



THE ABORTION OF DEFORMED FETUS BETWEEN CRIMINALIZATION AND THE LEGITIMACY OF THERAPEUTIC PREGNANCY TERMINATION IN ALGERIAN LAW

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ARTICLE INFO

Article History:

Received 23.12.2024
Accepted 31.01.2025
Published 31.03.2025

Keywords:

Abortion, Crime, Deformed fetus, Therapeutic pregnancy termination, Necessit

ABSTRACT

This article examines a critical and highly debated issue concerning the abortion of a deformed fetus, a topic that continues to provoke significant legal and ethical discussions. Abortion, as addressed by statutory legislation, balances two competing rights: the fetus's right to life and the woman's right to bodily autonomy. Algerian law, however, gives precedence to the fetus's right to life, whether the fetus is healthy or deformed, and criminalizes intentional abortion, whether performed by the mother or a third party. The crime is deemed complete when its legal elements are fulfilled, except in cases of necessity. The Penal Code explicitly exempts cases where the mother's life is at risk, recognizing therapeutic abortion as a lawful exception. Additionally, Health Law No. 18-11 allows for therapeutic termination of pregnancy when the mother's life or psychological and mental well-being is threatened, provided that the procedure is conducted in a public healthcare institution. However, the law does not explicitly address the issue of deformed fetuses, leaving this matter without a clear legal directive.

INTRODUCTION

The right to life is protected by international and national laws and is considered the most fundamental right associated with human beings. Violation of this right is a punishable offence. In addition, the fetus in the mother's womb is granted certain rights by law, the most important of which is the right to life, which manifests itself in its stability in the mother's womb. This protection is intended to protect it from actions that might prevent it from being born alive, referred to in positive legislation as abortion. Abortion is generally criminalized, with exceptions allowing it in certain cases.

This applies to a healthy fetus; however, medical advances may reveal the existence of a fetus with congenital malformations, resulting in the birth of a child with severe conditions that make life either impossible or difficult, requiring constant assistance from others. As a result, many couples consider terminating such pregnancies, especially in the face of women's rights advocates who consider it a right to be exercised at will, thus placing abortion in a delicate balance between two rights: the mother's right to decide whether to keep her fetus, and the fetus's right to life.

Although abortion is an affront to humanity at its most vulnerable developmental stage, the 1948¹ Universal Declaration of Human Rights, while affirming the right to life after birth, overlooks the prenatal stage, as the fetus is not considered a human being at that point. Interest in the rights of the unborn began to grow with the adoption of the American Convention on Human Rights in 1969, which in Article 4 explicitly recognized the right of every human being to a dignified life from the moment of conception.² Before this, the preamble to the 1959 Declaration of the Rights of the Child stated that "the child, in view of his or her physical and mental immaturity, needs special protection and care, in particular appropriate legal protection, both before and after birth".³

Legislation generally criminalizes abortion, but allows it in certain cases. Advances in medical technology have made early detection of fetal conditions easier, and there has been a noticeable increase in cases of fetal malformation due to various factors, including genetic problems or medication use. This has led to increased research and conferences addressing the issue from medical, ethical, legal and religious perspectives, amidst legislative silence.

The importance of this research lies in the severity of the conditions faced by a deformed fetus and the difficulties it causes to its family, as well as the desire of some individuals to terminate such pregnancies before birth. However, these actions should not be governed by personal whims, but by religious, legal and ethical provisions. The legislator has not explicitly addressed the issue of deformed fetuses in the newly introduced texts on abortion, which criminalize it as a general rule but allow it in certain therapeutic cases.

Despite the enactment of Health Law No. 18-11, which establishes the legality of therapeutic abortion and expands its conditions, the law's position on fetal malformation remains ambiguous. Thus, when is the termination of a deformed fetus considered a criminal offence, and in what cases does the law permit therapeutic abortion?

To address this issue, the analytical method was primarily used by analyzing legal texts to derive the legislator's position on the termination of deformed fetuses and the cases of criminalization and permissibility. In addition, the descriptive method was used when necessary to provide definitions or outline legal conditions and to present the opinions of scholars on the subject.

The topic is therefore divided into two main sections: the first section deals with the criminalization of the abortion of deformed fetuses, while the second section is dedicated to the legality of therapeutic abortion in cases of deformed fetuses.

1 United Nations. (10.12.1948). Universal Declaration Of Human Rights (Resolution No. 217 A). <<https://www.un.org/ar/universal-declaration-human-rights>> [Last seen: 03.11.2024].

2 American Convention on Human Rights. (12.11.1966). Office of Human Rights. <<http://hrlibrary.umn.edu/arab/am2.html>> [Last seen: 05.11.2024].

3 United Nations. (20.11.1959). Declaration of the Rights of

the Child (Resolution 1386 (D-14)). Human Rights Library <<http://hrlibrary.umn.edu/arab/b025.html>> [Last seen: 13.11.2024].

1. CRIMINALIZATION OF THE ABORTION OF DEFORMED FETUSES

A deformed fetus is a living fetus that has certain congenital malformations, whether these malformations are externally visible or internally hidden. These malformations may be incompatible with intrauterine life, resulting in spontaneous abortion, or they may be compatible, resulting in the birth of a child with physical defects or organ dysfunction.⁴ Despite the suffering of a child born with congenital defects, the law protects such fetuses both before and after birth, just as it protects any normal fetus. Abortion is considered a crime in principle whenever its elements are present (section one), and penalties are imposed once these elements are collectively established (section two).

1.1. Elements of the crime and applicable penalties

The Penal Code criminalizes abortion in articles 304, 306, 309, and 310,⁵ considering it a violation of the right to life of the fetus, regardless of the means used. Article 304 of the Penal Code states that anyone who aborts a pregnant woman or a person presumed to be pregnant, with or without her consent, by giving her food, drink or medicine, or by using force or any other means, shall be punished by imprisonment for one to five years and a fine of DZD 100,000 to DZD 500,000. If the abortion results in death, the penalty is temporary imprisonment for ten to twenty years.⁶

1.1.1. Presumed element of the offence

The object of the offence is the existence of pregnancy, i.e. the fetus in the mother's womb or

the presumption of its existence. The crime is not committed if the act is committed on a non-pregnant woman, as the law requires a woman who is pregnant or presumed to be pregnant, as stated in Article 304 of the Criminal Code.

The protection of the fetus against abortion begins with the fertilization of the ovum in a normal pregnancy and continues until birth. It should be noted that the act must be committed on a pregnant woman or a woman presumed to be pregnant. The presumption of pregnancy is a very short period, not exceeding ten to fifteen days from the date of the missed menstrual cycle.⁷

In the case of artificial insemination, the text does not apply to embryos fertilized outside the human body, even if they are kept for some time. The application of abortion laws only begins once they are implanted in the uterus and become an established pregnancy. This is because the article criminalizes the abortion of a pregnant woman, and a fertilized ovum does not constitute a pregnancy as long as it remains outside the human body, becoming one only after implantation in the uterus.

1.1.2. The material element of the offence

In general, the material element of the offence consists of an act performed by the offender that results in the termination of a pregnancy.⁸ This element consists of three components: a physical act, a criminal result, and a causal link between them. The physical act is the intentional criminal behavior of the offender to achieve the intended result and includes any act that results in the termination of the pregnancy.⁹ Its classification varies from a misdemeanor if the abortion is caused by the administration of drugs or other means that lead to abortion, to a felony if the abortion results in death.¹⁰

The penal legislator has mentioned the means of abortion as an example in Article 304 of the

4 Zaria, F., Fashar, A.A. (2022). The Deformed Fetus and the Ruling on its Abortion. *Al-Wahat Research Studies Journal*, 15(2), p. 489.

5 Algerian Penal Code. (11.06.1966). Official Gazette, No. 49, amending and supplementing <https://wipolex-res.wipo.int/edocs/lexdocs/laws/ar/dz/dz027ar.pdf> [Last seen: 20.11.2024].

6 Amended by Law No. 24-06 (2024) which includes amendments to the Penal Code, Official Gazette dated 30.04.2024, No. 30. <https://www.joradp.dz/FTP/jo-ara-be/2024/A2024030.pdf> [Last seen: 15.09.2024].

7 Ben Zita, A. (2013). The Beginning of Human Life and its Legal Implications between French Law and Algerian Law. *Journal of Truth*, 12(1), p. 83.

8 Kamel, A.S. (2011). *Explanation of the Penal Code, Crimes Against Humanity, Comparative Study*. 5th Edition, Dar Al-Thaqafa for Publishing and Distribution, Jordan, p. 358.

9 Yakhlef, A. (2023). A Study on the Crime of Abortion Between the Penal Code and Health Law 18-11. *Journal of Legal and Economic Research*, 6 (2), p. 842.

10 Yakhlef, A., Op.cit, p. 842.

Penal Code, which states that anyone who aborts a pregnant woman or a person presumed to be pregnant by giving her food, drink or medicine, or by using methods or acts of violence or any other means, whether she has consented or not, or by attempting to do so, shall be punished. The legislator has broadened the means of abortion to include any physical activity, the use of drugs or food, intimidation of the pregnant woman, threats and other means, all of which constitute a physical act if they lead to abortion.

Regardless of the means used for abortion, it is necessary to prove that the means used caused the abortion. This is a matter for the judge in the case, who will be guided by expert opinion.¹¹ According to Article 304 of the Penal Code, the mere attempt to perform an abortion is punishable.

The criminal result is the termination of the pregnancy or the expulsion of the fetus from the womb before the natural time. For the crime to be established, the fetus may be expelled alive or dead. The criminal result can take two forms: the death of the fetus in the womb while it remains in the womb, or the expulsion of the fetus from the womb, alive or dead.¹²

In addition to the above-mentioned aspects of the offence, a causal link must be established between the offender's conduct, i.e. the act leading to the abortion, and the death of the fetus or its expulsion from the mother's womb before birth. It must be proven that the means used were the cause of the abortion, and it is the responsibility of the judge to resolve this issue, with the assistance of medical experts.

1.1.3. The mental element

The mental element refers to criminal intent, as abortion is considered a premeditated crime, which requires the offender to be aware that he is committing a crime and to have the intention to achieve the result, which is abortion. Therefore, there must be a general criminal intent, which can be established simply by providing the means that lead to the result or by performing acts that lead to the criminal result. Criminal intent consists of

two elements: knowledge and intent, meaning that the perpetrator knows that his act is aimed at a pregnant woman and that the means he uses can lead to an abortion.¹³

If the perpetrator does not know that the woman is pregnant, the offence is not committed. Similarly, if they do not know that the means used will cause an abortion, they cannot be punished. Thus, if an abortion is performed by mistake, whether by a doctor or someone else, there is no criminal intent.

1.2. Penalties for the crime of abortion

The law provides for primary and supplementary penalties for those who commit the act of abortion, whether as the principal actor or as an accomplice.

1.2.1. Primary penalties

Article 304 of the amended Criminal Code provides for a prison sentence of between one and five years and a fine of between DZD 100,000 and DZD 500,000 for anyone who performs an abortion on a pregnant woman. This misdemeanor becomes a felony with a prison sentence of 10 to 20 years if the abortion results in death.

According to Article 305 of the amended Criminal Code, if it is proven that the offender habitually performs abortions as referred to in Article 304, the prison sentence shall be doubled in the case referred to in the first paragraph of the same Article and increased to the maximum in the case referred to in the second paragraph.

In addition, Article 306 of the amended Penal Code states that persons who instruct others on how to perform or facilitate an abortion, such as doctors, midwives, dental surgeons, medical students, pharmacy students, pharmacy employees, drug preparers, manufacturers of medical instruments, dealers in surgical instruments, nurses and masseurs, shall be liable to the penalties specified in Articles 304 and 305, respectively. For a woman who performs an abortion on herself, Article 308 of the Penal Code provides for a prison sentence

11 Bousqi'a, A. (2022). The Brief on Special Penal Law, Part One. New University Publishing, Algeria, p. 44.

12 Said Namour, M. S. (2011). Explanation of the Penal Code, Special Section on Crimes Against Persons. Vol. 1, 4th Edition, Dar Al-Thaqafa, Jordan, p.185.

13 Braf, D. (2007). Abortion in Light of Islamic Law and the Algerian Penal Code. Journal of Scientific Research and Islamic Studies, 3(1), p. 313.

of six months to two years and a fine of DZD 20,000 to 100,000.

As for incitement, Article 310 of the Penal Code provides for a prison sentence of two months to three years and a fine of DZD 20,000 to 100,000 or one of the two penalties. The offence of incitement to abortion is committed even if the criminal result is not realized, regardless of whether the inciter is the main actor or merely directs someone to the means leading to abortion, as specified in Article 310. If the incitement is directed against a person, Article 42, which provides for the punishment of accomplices, applies.¹⁴

1.2.2. Additional penalties

– Ban on residence

In addition to the main penalties provided for in article 304 of the Criminal Code, the last paragraph of the same article states that a ban on residence may be imposed in all cases. Article 306 also provides for this prohibition in accordance with the provisions of the Penal Code. This additional penalty for the offence of abortion, even if the fetus is deformed, consists of a prohibition of residence for a period of up to five years in cases of misdemeanor, in accordance with article 12 of the Penal Code, to be applied from the day on which the primary penalty is fulfilled or the offender is released. The imposition of this penalty is at the discretion of the judge, i.e. it may be imposed or not.

– Disbarment

According to the amended Article 306/2 of the Criminal Code, perpetrators of the crime of abortion may be disqualified from exercising their profession if the judge finds a direct link between the crime committed and the exercise of the profession. The amendment of the above article by Law 24-06 requires proof of a direct link between the crime of abortion and the exercise of the profession to deprive the perpetrator of his or her professional rights. In the absence of such a link, the perpetrator is not disqualified from practicing his profession.

In addition, article 311 of the Penal Code stipulates that any conviction for the crime of abortion,

whether by conviction, attempt or complicity, automatically leads to a ban on exercising any profession or working in clinics or maternity wards, or in any public or private institution that normally receives women in a state of actual or presumed pregnancy, whether for pay or not.

2. LEGALITY OF THERAPEUTIC ABORTION FOR MALFORMED FETUSES

As previously mentioned, the default position is the criminalization of abortion, penalizing it regardless of whether the fetus is healthy or malformed. The law also protects the latter and prevents any assault on it, as the legal texts broadly criminalize anyone who aborts a pregnant woman or even one presumed to be pregnant. The law provides exceptional cases in which abortion is permitted under specific conditions, which include situations where the termination of pregnancy is justified by medical ethics for various reasons, such as tuberculosis, breast cancer, or severe psychological disorders, including hypertension and others.¹⁵

Before considering the conditions under which abortion is permitted, it is important to distinguish between the terms “abortion” and “therapeutic termination of pregnancy”, and then to examine the conditions under which therapeutic termination of a malformed fetus is permitted.

2.1. Distinction between abortion and therapeutic termination of pregnancy

The terms “abortion” and “therapeutic termination of pregnancy” overlap in several respects, as both terminate the life of the fetus. Abortion is the voluntary termination of pregnancy, known as criminal abortion, which involves the evacuation of the uterus by any means, such as the use of drugs, physical force or surgery, and is not intend-

14 Belaro, K. (2024). The Crime of Abortion in Algerian Legislation, *Journal of Human Sciences*. 34(4), p. 357.

15 Jean-Marie, V. A. U. (2023). Crime Against Life: The Case of Abortion. Legal, Biblical-Quranic, and Magisterial Considerations of Human Life. *IOSR Journal of Business and Management*, 25(10), p. 64.

ed to protect the life of the mother, as there is no medical need for a woman to abort herself or for someone else to assist her in doing so

Conversely, therapeutic abortion is a medical intervention to terminate a pregnancy based on the medical necessity of the mother when the pregnancy poses a risk to her health or life, such as in cases of chronic illness or ectopic pregnancy. Here, the necessity of abortion moves the act from the realm of criminality to that of permissibility. It is noteworthy that medical advances have reduced the need for abortion to save the life of the mother, as doctors can resort to inducing labor or performing a caesarean section to save both the fetus and the mother.¹⁶

It should also be noted that the legislator used the term “therapeutic abortion” in Article 72 of the repealed Health Protection and Promotion Act to refer to the need to save the life of the mother from danger or to preserve her physiological and mental balance, which is in serious danger.

Thus, the act moves out of the realm of criminalization when it is committed in circumstances that limit the application of its specific penal text, because the interest of society in permitting the act outweighs the interest in criminal behavior, losing it. This is known as the justification of permissibility, i.e. the permissibility of a criminalized act. It is therefore essential to establish a state of necessity, where harm can only be avoided by committing a crime. In legal terminology, necessity refers to a situation in which a person is exposed to danger or severe hardship, which causes fear of harm or injury to oneself, a part of one’s body, one’s reputation, one’s mental state or one’s property and its consequences.¹⁷ In such cases, it becomes necessary or permissible to perform a prohibited act or to neglect or delay a duty to avert harm, according to the prevailing assumptions within the framework of the Sharia.

The Algerian legislator has defined necessity as a cause of permissibility in Article 48 of the Penal Code, which states: “There is no punishment for anyone who is forced to commit a crime by a

force he is unable to resist”. This remains a general rule regarding the prohibition of criminal liability and includes the permissibility of abortion when a state of necessity is established. However, the details of the conditions for the permissibility of abortion have been specifically regulated by the legislator.

Following the repeal of the Health Protection and Promotion Act and the enactment of Health Act No. 18-11,¹⁸ Article 77 introduces the concept of “therapeutic abortion”, which states that “Therapeutic abortion aims to protect the health of the mother when her life or mental and psychological balance is threatened by pregnancy”.

It is noteworthy that the legislator’s intention has maintained the removal of therapeutic abortion from the realm of criminalization to that of permissibility, with the only innovation being a change in terminology to distinguish between the crime of abortion and the permissibility of therapeutic termination of pregnancy. Moreover, the term “therapeutic” suggests that it is carried out by a doctor who, after a series of examinations and analyses, is forced to terminate the pregnancy for the sake of the mother’s health and life.

2.2. Conditions for the permissibility of therapeutic abortion for malformed fetuses

Algerian law does not specifically address malformed fetuses in specific texts, but uses broad terms interpreted by jurists to include cases of carrying a malformed fetus. In reality, these texts favor the life and health of the mother over that of the fetus, or in other words, protect the mother and her health. Therefore, the protected interest is that of the mother, and the legal texts apply equally to both healthy and malformed fetuses. In general terms, Health Law No. 18-11 establishes a series of conditions for the termination of pregnancy, some of which relate to the protection of the mother’s life (section 1), while others relate to threats to the mother’s mental and psycholog-

16 Belaidi, F. (2021). Algerian Responsibility for the Crime of Abortion in Algerian Law. *Mediterranean Journal of Law and Economics*, University of Tlemcen, 6 (2), p. 121.

17 Al-Zuhaili, W. (1985). *Theory of Legal Necessity Compared to Positive Law*. 4th Edition, Al-Risalah Foundation, Beirut, p. 68.

18 Algerian Health Law. (29.07.2018). Official Gazette, No. 46, amended and supplemented <<https://www.jo-radp.dz/FTP/jo-arabe/2018/A2018046.pdf>> [Last seen: 09.10.2024].

ical balance (section 2), and require that the procedure be carried out in a public health facility (section 3).

2.2.1. Termination of pregnancy to protect the health of the mother

In certain cases, a pregnancy may endanger the life of the mother. The doctor has no choice but to terminate the pregnancy, which is in principle a criminal offence. However, the law justifies this criminalization if the pregnancy endangers the life of the mother.

Article 308 of the Penal Code states: “There is no penalty for abortion if it is necessary to save the mother’s life from danger, provided it is performed by a doctor or surgeon in a non-secret manner and after notifying the administrative authority”. The article requires that the act be performed by a doctor or surgeon and that the administrative authority be informed for the act to be deemed permissible.

In addition, Article 77 of the Health Code refers to therapeutic abortion when the pregnancy threatens the mother’s life, thus removing the act from the realm of crime and placing it in the realm of medical treatment. If the fetus is severely deformed and threatens the mother’s life, the law allows therapeutic abortion to protect the mother’s life.

Islamic jurisprudence has also dealt extensively with the issue of intentional abortion. Some scholars have forbidden it outright, while others have allowed it only after the soul has been implanted in the fetus, except in cases of necessity to save the life of the mother. It is believed that the soul is implanted after one hundred and twenty days, and there is no disagreement among scholars as to the prohibition of abortion after this point.

Scholars generally agree that it is forbidden to abort a fetus without a valid reason after the soul has been implanted, which is after four months (120 days). However, there is controversy over the permissibility of aborting a fetus after the soul has been implanted if its continued existence poses a danger to the mother. Some argue against the permissibility of aborting the fetus to save another life, while others maintain that it is permissible if it is the only way to save the mother from

certain death, which could lead to her death as well as that of the fetus. Some scholars have allowed abortion unconditionally before the soul is breathed into the fetus, while others allow it only within the first forty days. There are also those who allow abortion before the breath of life only for valid reasons, while others maintain that abortion before the breath of life is not permissible at all.¹⁹

Scholars did not exclude deformed fetuses from these rulings, since the means of determining the condition of the fetus in the womb were not advanced. Whether the abortion is performed by a doctor, the mother or any other person, it is considered the killing of a soul, which God has forbidden. The deformed fetus is a human being with the right to life, and therefore its killing is forbidden, as stated in the Qur’an: “And kill not the soul which Allah has forbidden, except by right. That is what He has commanded you, that you may use reason”.²⁰

As far as contemporary jurisprudence is concerned, the issue of deformed fetuses is often discussed in legal forums. From the collective reasoning of prominent scholars of this era, we find the decision of the Islamic Fiqh Academy No. 04 in its twelfth session in Mecca, which states: “When the pregnancy has reached one hundred and twenty (120) days, it is not permissible to terminate it, even if the medical diagnosis indicates that it is deformed, unless a report from a reliable medical committee of qualified doctors confirms that the continuation of the pregnancy poses a definite danger to the mother’s life. In this case, abortion is permitted, whether or not the fetus is deformed, to avert the greater of the two harms”.

If, before the end of one hundred and twenty days of pregnancy, it is confirmed by a report from a trustworthy committee of specialized doctors – based on technical examinations using equipment and laboratory methods – that the fetus is seriously deformed and incurable, and that if it remains and is born at the expected time, its life will be filled with suffering for both the child and its family, then it is permissible to terminate the pregnancy at the request of the parents. In making

19 Al-Qahatani, M.B.M. (2003). Abortion of the Deformed Fetus and Its Ruling in Islamic Law. *Journal of Sharia and Islamic Studies*, Kuwait University, 18 (54), p. 181.

20 Koran, Surah Al-An’am. Verse No. 151.

this decision, the Council recommends that doctors and parents fear God and consider this matter carefully.²¹

In summary, modern Islamic jurisprudence has moved towards prohibiting the abortion of both healthy and deformed fetuses after the soul has been implanted, that is, after the 120th day of gestation. Regardless of the severity of the deformity, abortion is prohibited. However, if it is established that the fetus has serious, incurable deformities and will suffer greatly, it is permissible to terminate the pregnancy at the request of the parents before the 120th day, after careful examination of the situation.

As mentioned above, Algerian law prioritizes the life of the mother and constantly seeks to protect her health and that of her fetus. One of the most important mechanisms put in place to ensure a healthy family is the requirement for a medical certificate at the time of marriage, dated no more than three months previously, as provided for in Article 07 bis of the Family Code and Article 72 of the Health Code, which requires medical examinations before marriage. This was recently reinforced by the issuance of Executive Decree No. 24-366,²² which repealed Executive Decree No. 06-154 and introduced numerous provisions aimed at protecting offspring from congenital malformations and serious diseases by informing those intending to marry of the risks of such diseases before entering into marriage.

Article 05 of Decree No. 24-366 specifies the mandatory examinations to be included in the medical certificate, namely:

- A thorough family or personal history of chronic diseases, hereditary diseases or malformations, in particular chromosomal abnormalities and genetic diseases and congenital heart disease, as well as the measurement of arterial blood pressure, weight, height and a comprehensive clinical examination.

21 Islamic Fiqh Council. (1990). Regarding the Issue of Abortion of the Congenitally Deformed Fetus. Mecca <<https://ketabonline.com/ar/books/24407/read?page=72&part=1#p-24407-72-4>> [Last seen: 10.08.2024].

22 Executive Decree. (07.11.2024). Concerning Medical Certificates and Examinations Before Marriage. Official Gazette, dated 13.11.2024, No76 <<https://www.jo-radp.dz/FTP/jo-arabe/2024/A2024076.pdf>> [Last seen: 24.11.2024].

Concerning laboratory tests, the law distinguishes between mandatory biological tests that must be included in the medical certificate for marriage, which are:

- Blood grouping (ABO Rh);
- Serological tests for toxoplasmosis, rubella, syphilis and other diseases, all of which can cause significant fetal malformations;
- Recommended biological tests, including serological tests for viral hepatitis B (VHB) and C (VHC) and tests for human immunodeficiency virus (HIV). The physician has the discretion to order additional necessary biological tests if there are signs or symptoms that could lead to sexually transmitted diseases.

Compliance with the law on medical certificates, following the principle that prevention is better than cure, will reduce future cases of fetal malformations, especially with regard to compulsory tests and family history inquiries for certain diseases that may be hereditary, especially in consanguineous marriages.

It should be noted that a significant percentage of spontaneously aborted fetuses are severely malformed with major chromosomal defects, with rates ranging from 80% to 90%.²³ Other fetuses with severe malformations die shortly after birth or within a short time.

2.2.2. Therapeutic abortion when the woman's mental and psychological balance is at risk

Article 77 of the Health Code states that maintaining the mental and psychological balance of the mother is a condition that allows a doctor to intervene to terminate the pregnancy for therapeutic purposes. The broad interpretation of mental and psychological balance opens the door to justifying abortion, which could lead to unlimited moral offences. The legal texts are vague and unclear, failing to specify the cases in which the mother's mental and psychological balance is threatened, the means of proof, and the responsibilities of both the mother and the doctor. The legislator promised in article 77/2 to issue regulations

23 Al-Bar, M. A. (1985). The Abortion Problem: A Medical and Jurisprudential Study. 1st Edition, Saudi Publishing and Distribution House, Riyadh, p. 12.

explaining the application of this article, but such regulations have not yet been issued. Until then, many questions remain about mental and psychological equilibrium, how to prove it and when it is established.

In practice, a doctor will not accept a mother's or couple's request for a therapeutic abortion on the grounds of fetal malformation under Article 77 of the Public Health Code unless a medical certificate from a specialist doctor is presented, confirming either the threat to the mother's life or her mental or psychological equilibrium.

The Algerian legislature has never stated that abortion of a malformed foetus is permissible, but has created vague provisions that are open to interpretation. By including cases of threat to the mother's mental and psychological balance, a range of situations could be covered, such as pregnancies resulting from adultery or rape, or cases of malformed fetuses. Many women may find it difficult to accept carrying a malformed fetus, leading to a psychological conflict between the options of either terminating the pregnancy or keeping it.

A careful reading of the law makes it clear that the decision to abort a deformed foetus does not belong to the mother or the father, but to the doctor alone. The law describes the procedure as "therapeutic", meaning that the abortion is intended to treat the mother, whether to save her life or to maintain her mental and psychological balance. If the therapeutic condition is not met, the doctor is prohibited from terminating the pregnancy, even if the fetus is deformed. Should the doctor proceed, he would be committing the crime of abortion, subject to the penalties set out in Article 304 of the Criminal Code, as specified in Article 409 of the Health Code.

2.2.3. Therapeutic abortion must take place in a public health facility

Article 78 of Health Law No. 18-11 states: "Therapeutic abortion can only be performed in public health facilities". Article 308 of the Penal Code also states: "Abortion is not punishable if it is necessary to save the life of the mother, provided that it is performed by a doctor or surgeon in a transparent manner and after the administrative authority has been informed."

According to the above texts, therapeutic abortion must take place in a specialized facility, specifically in a hospital, in the maternity ward. The procedure must be preceded by an examination requiring the presence of a specialist doctor.

If a doctor performs a therapeutic abortion outside a public health facility, he or she can be sentenced to between six months and a year in prison and a fine of between DZD 200,000 and DZD 400,000, according to Article 410 of the Health Code.

CONCLUSION

Despite the numerous studies on the issue of malformed fetuses, the law has not clearly stated its position on the permissibility of their abortion. It has not defined cases of severe malformation, nor has it relied on jurisprudence to determine the stage at which a malformed fetus can be aborted without constituting an assault on life. Overall, research on this issue has led to several conclusions:

- **General rule:** Abortion is a punishable offence, with no distinction made between malformed and healthy fetuses for criminalization. However, the act may be exempt from criminal liability if the abortion is necessary to save the life of the mother, according to the Penal Code.
- **Health Law No. 18-11:** This law uses the term "therapeutic abortion", which has a broader scope than therapeutic abortion and allows the doctor to intervene in cases where the mother's life is threatened or her mental and psychological equilibrium is at risk.
- **Doctor's duty:** A doctor is obliged to perform a therapeutic abortion if the conditions set out in Article 77 of the Health Code are met. Although the law does not explicitly mention the case of a malformed fetus, if the pregnancy threatens the mother's life or her mental and psychological balance, it is up to the doctor to intervene.
- **Vagueness of legal texts:** The use of vague terms may increase the doctor's liability, as he could be held responsible for not carrying out a therapeutic abortion if a woman proves that carrying a malformed fetus

threatens her mental and psychological balance.

Based on these findings, the following proposals are made, which differ from the conclusions of other researchers regarding the need to explicitly permit the abortion of malformed fetuses under strict conditions. My proposals are based on the principle of prevention and tackling the causes of the phenomenon. There should be no rush to judgment, because the malformed fetus in the womb has rights, including the right to stability and survival until birth. Any attack on this vulnerable being, unable to defend itself, is an attack on life. The scientific debate on abortion remains controversial and requires further research. It is worth noting that severely malformed fetuses may spontaneously abort, and some may die shortly after birth.

- The main recommendation is to investigate the causes of fetal malformations to prevent severe cases. This can be achieved by strengthening the role of the doctor in the medical certificate required for marriage, particularly as required by the new Executive Decree No. 24-366, which obliges those intending to marry to undergo examinations and tests, especially in cases of hereditary diseases or congenital malformations. The doctor should play a role in recommending additional tests.
- It is also essential to speed up the adoption of the regulations promised in Article 77, which will clarify the procedures for therapeutic abortion.

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