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The Legal Protection of the Newborn Children Against the Crime of Murder in Algerian Legislation

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Abstract

The Algerian legislator, pursuant to Articles 259 and 261 of the Penal Code No. 24-06 of 28 of April 2024, criminalizes the killing of a newborn child and subjects it to the death penalty. As an exception to this, the mother benefits from a special mitigating provision under which the death penalty is replaced by a fixed-term imprisonment, in consideration of her biological and psychological circumstances. By contrast, the father or any other person who assists or participates in the commission of the offence is subject to the original penalty without mitigation, regardless of their motives.

Keywords: Child; Crime; Newborn; Mother.

Introduction

The protection of human life is regarded as one of the primary priorities of any State's legal system. The importance of this protection becomes even greater when the victim is a newborn child, given his\her extreme vulnerability and complete inability to defend himself\herself or seek assistance.

Consequently, various international and Arab legal systems, notably the Algerian legislation, seek to provide this vulnerable category with special criminal protection. This later includes criminalizing the killing of a newborn child and prescribing a severe penalty for such an act. Yet, a specific exception is considered for the cases where the perpetrator is the mother, regardless of whether she is the child's biological mother or not. These legal systems also differ in determining the age in which a child is legally considered a newborn. Some specify a period of two days from birth, while others set it at a few days or five days[1]. Whereas, the Algerian legislator has not specified a particular time limit, but has opted to merely use the term newborn.

Accordingly, this research paper examines the legal protection afforded to newborn children against the crime of murder under Algerian legislation by addressing the following research question:

To what extent does Algerian legislation provide legal protection for newborn children against the crime of murder? In other words, what does the penal policy for protecting newborn infants from homicide entail under Algerian legislation?

To address this research question, this paper is divided into two chapters:

- Chapter One: Protection of Newborn Children against Murder.
- Chapter Two: Penalties for the Crime of Killing a Newborn Child.

Chapter One: Protection of Newborn Children Against Murder

Murder is a serious offence that violates the sanctity of human life and results in the death of a person, which is prohibited by both Islamic law and statutory law. This act may take one of two forms: intentional killing or unintentional killing (involuntary). However, the case under consideration excludes unintentional killing, as this offence is, in most cases, the result of the perpetrator's deliberate intent.

Given that newborn children are incapable of defending themselves or seeking help from others, Algerian law protects them against potential threats to their lives and imposes severe penalties on perpetrators, regardless of their status. This is in accordance with Article 259 of Law No. 24-06 which includes the Algerian Penal Code.

Based on this, the present section examines the protection of newborn children against murder: first, when committed by the mother (**Subsection One**), and second when committed by other parties (**Subsection Two**).

Section One: Protection of Newborn Children Against Murder Committed by the Mother

This subsection examines the protection afforded by the Algerian legislator to newborn children against murder committed by their mothers. It therefore addresses the conditions required for the crime of a mother killing her newborn child (**Subsection One**), as well as the specific conditions relating to the motive for committing this crime (**Subsection Two**).

Subsection One: Conditions for the Crime of a Mother Killing Her Newborn Child

The offence of killing a newborn child is not distinct from other homicide offences, as it may be subject to severe penalties or fall under the category of ordinary homicide. Nevertheless, this crime is frequently committed by the infant's own mother, in which case certain specific conditions must be met for the offence to be established. These conditions include the following:

First: Conditions Relating to the Perpetrator

Unlike other legal systems and pursuant to Article 261, paragraph 2, the Algerian legislator did not require that the killing of a newborn child be committed by an illegitimate mother[2]. Instead, it only mentions that this crime is committed by the mother; either the biological or otherwise, with the condition that her status as the mother is established even in the absence of a marriage contract. To this end, adoptive mothers and wet nurses are excluded from this provision[3]. This condition is found in most of the compared legal systems, which require that the mother have conceived the child through an illicit sexual intercourse, irrespective of the circumstances, including rape, adultery, or incest. [4]

A mother may be held liable for the murder of her newborn through various acts, such as refusing to breastfeed him\her, preventing the umbilical cord from being tied, or engaging in acts that cause the child's death. These may include strangulation, feeding the child a poisonous substance, burning, neglecting, beating the child or other acts through which this crime is established[5]. In addition to this it is required for these acts to be intentional and carried out with the mother's deliberate will; however, there are cases in which the mother may be held liable for unintentional killing, such as cases involving negligence.[6]

Second: Conditions Relating to the Victim

In this type of crime, the child, regardless of sex, must be a newborn. Some compared legislations refer to such a child as a "neonate", i.e., a living being that has been born and is no longer a fetus, having passed beyond the fetal stage but not yet entered childhood.[7]

The victim must also have been born alive, since an individual possesses legal personality from the moment of being born alive. Yet, if the child is stillborn, the burden of proving the death rests with the Public Prosecutor's Office, which relies on medical expertise to prove the death of the newborn through a

report submitted to the Public Prosecution. The report provides a comprehensive account of the circumstances, including the child's cries and breathing manner, etc[8]. Furthermore, the crime must be committed against the child during or after the birth; if it occurs before birth, it falls under a different offence named abortion.[9]

Subsection Two: Conditions Relating to the Motive for Committing the Crime

In addition to the above-mentioned conditions for the commission of the crime of killing a newborn, there are specific conditions relating to the motive that may lead the mother to deliberately commit this offence. Criminal legislation has identified two approaches concerning the requirement of such a motive, namely:

First approach: It involves concealing a scandal and fearing the reaction of society. In most Arab societies, an illegitimate child is often rejected and despised as he\she is the result of a relationship not formalised by a marriage contract, which is contrary to the prevailing customs, traditions, and Islamic religious teachings[10]. Under this approach, the motive is regarded as a fundamental element of the criminal intent required for this offence, as it is driven by the mother's desire to secure social acceptance by shielding herself from public disgrace and improving her family's image and honor in the eyes of society. This is particularly relevant when the pregnancy is resulted from a relationship to which she did not consent. To achieve this, the mother may attempt to eliminate the perceived source of disgrace by killing the child.[11]

It should be noted that certain criminal legal systems do not allow a mother who has killed her newborn to benefit from the mitigating excuse that would reduce the applicable penalty. Instead, the offence is regarded as an ordinary homicide if the judge concludes that the mother committed the crime for reasons other than the previously mentioned motive. Such reasons may include seeking revenge against the child's father for refusing to acknowledge the child, abandoning the mother, or even forcing her into the relationship. Other possible motives may include the burden of raising the child amidst difficult economic circumstances.[12]

Second Approach: Proponents of this doctrinal and legislative approach argue that the existence of a specific motive is not a prerequisite for establishing the crime of killing a newborn. Accordingly, the legal classification of this crime and the establishment of its constituent elements remain the same, whether it is committed to conceal the disgrace associated with the birth of an illegitimate child or for any other deliberate reason. In this regard, the Algerian legislator, under the second paragraph of Article 261 of the Algerian Penal Code No 24-06 of 2024, has stipulated only the existence of a general criminal intent, without requiring a specific motive for the commission of this crime[13]. Consequently, the scope of application of this penal provision extends to encompass all cases, regardless of the motive behind the crime; whether the mother commits it to preserve her honour, for economic reasons, or because of congenital deformities or illnesses that the newborn suffers from.[14]

Section Two: Protection of Newborns Against Homicide Committed by Third Parties

In the crime of killing a newborn, the perpetrator's punishment varies according to their status and relationship to the child. Since a third party does not enjoy the same position as the mother, the applicable penalties and circumstances differ; hence, third parties do not benefit from the mitigating provisions applicable to the mother.

Accordingly, it is necessary under Algerian law to distinguish between the crime of a father killing his newborn child (Subsection One) and the crime of killing a newborn committed by a third party (Subsection Two).

Subsection One: The Crime of a Father Killing His Newborn Child

With reference to the provisions of Islamic law concerning this crime, the killing of a newborn by the father as the perpetrator, may be attributed to ignorance and backwardness, as was prevalent during the pre-Islamic era of ignorance (Jahiliyah). This is supported by the words of Allah the Almighty: “Indeed, those who killed their children foolishly, without knowledge, and prohibited what Allah had provided for them, fabricating lies against Allah, have certainly gone astray and were not guided.”[15]

The reasons that may lead fathers to kill their newborn children are numerous, the most important of which include the following:

1. Fear of poverty: Many fathers fear the inability to meet their children's basic needs, including food, clothing, recreation, and shelter. That said, many fathers worry about their lack of the sufficient financial means to take care of their children, particularly if they are unemployed. In addition to the present circumstances, these fathers may find it difficult to meet all the needs of their kids. While if the father is employed, balancing work with the time required for raising, supervising, and caring for his children may prove challenging. Accordingly, poverty is considered one of the reasons leading a father to take the life of his newborn child.

However, Allah the Almighty says in his book: “And do not kill your children for fear of poverty. We provide for them and for you. Indeed, killing them is a grave sin.” [16]He also says: “And do not kill your children out of poverty. We provide for you and for them.”[17] The father's conduct in this context contradicts the principles and values of Islamic law and reflects his failure to recognize the blessings bestowed by Allah upon His servants, particularly the blessing of procreation. Children and wealth are among the adornments of worldly life and the father, in this case, overlooks the fact that every child is born with a provision (rizq) ordained by God from His vast bounty. The offending father's thinking, in this case, is confined to the circumstances prevailing at the time of birth, as he fails to believe in Allah's divine decree neglecting that sustenance may come afterwards, which is the result of his distance from the teachings of Islam.

2. The sex of the newborn: The killing of newborn children by some fathers may also be linked to the sex of the child. Some fathers, most of whom prefer male children, may be disappointed when a girl is born instead. During the pre-Islamic era of ignorance, fathers could murder their newborn daughters by burying them alive, believing that the birth of a girl would bring misfortune, disgrace, and bad luck to the father. Even worse was their belief that their deities would be angered by the birth of a female child, which could be negatively affecting the father's social standing within the tribe. Consequently, they considered it necessary to dispose of their daughters by killing or burying them alive. In this regard, Allah the Almighty says: “When one of them is given the news of the birth of a female, his face darkens, and he suppresses his grief. He hides himself from the people because of the bad news he has received, wondering whether he should keep her in disgrace or bury her in the ground. How evil is their judgement.”[18]

Subsection Two: The Crime of Killing a Newborn Child by a Third Party

The term “third party” refers to any person involved in the crime of killing a newborn child, whether as an accomplice, a participant, or someone who conceals the crime. Under Islamic law, the life of a newborn child is equivalent to that of an adult as the Islamic religion does not distinguish between them merely on the basis of age. It, rather, recognizes that a child possesses a soul and therefore their life must be protected. Accordingly, any harm or danger inflicted upon the child constitutes a crime whose constituent elements are fulfilled. Not only that, but in circumstances like war and situations of danger, the child’s life is prioritized over that of an adult.[19]

Consequently, the crime of killing a newborn child is a complete criminal offence, just like an ordinary crime committed against an adult, and is therefore subject to the same penalties. However,

pursuant to Article 272 of the Algerian Penal Code No. 24-06, the Algerian legislature has prescribed the death penalty for perpetrators, regardless of their status, including the father or any other legitimate ascendant.[20]

Chapter Two: Penalties for the Crime of Killing a Newborn Child

This chapter distinguishes between the penalty imposed on a mother who kills her newborn child (Section One) and the penalty imposed on a third party who kills a newborn child (Section Two).

Section One: The Penalty for a Mother Who Kills Her Newborn Child

Among the penal provisions established by Algerian legislation is a mitigating circumstance specifically applicable to the mother who kills her newborn child. This circumstance is classified as a mitigating excuse that the judge is required to apply and take into consideration whenever the statutory conditions are met. Accordingly, exploring the penalty for the crime of a mother killing her newborn child requires an analysis of two essential elements: first, the mitigating circumstance applicable to the mother (Subsection One), and second, the justifications for granting the mother the benefit of this circumstance (Subsection Two).

Subsection One: Mitigation of the Penalty Imposed on the Mother

In Article 261 of the Penal Code, the Algerian legislature sought to strike a balance between the heinousness of taking the life of a child who is incapable of defending himself \herself and the consideration of the psychological and biological condition of the mother who commits this crime. As a result, it prescribed mitigated penalties that do not extend to the death penalty. In this context, it states: “A mother who kills her newborn child shall be punished by temporary term of imprisonment ranging from ten to twenty years.”[21]

An example of this would be a mother who kills her newborn child as a result of severe financial hardship that leaves her unable to feed the child and ensure his\her essential needs, or because the child suffers from a chronic illness due to which she fears the social stigma, ridicule, and suffering that both of them may face in the future. [22]

Accordingly, the Algerian legislature grants the mother a mitigating excuse solely on the basis of her status as the child’s mother. However, she cannot benefit from this mitigating circumstance if her motive is not to avoid disgrace.

In contrast, Egyptian criminal legislation has adopted a different approach, whereby motherhood alone is not recognized as an automatic reason for granting a mitigating circumstance in this offence. Instead, the mother is treated as a woman unrelated to the victim as it is subject to the aggravated penalties prescribed for intentional homicide, which may extend to the death penalty if the condition relating to the motive of avoiding disgrace is not present. This distinction can be illustrated through two cases as follows:

Case One: A mother kills her illegitimate child in order to conceal the matter from her family, her social environment, and the society that shows no mercy. In this case, Egyptian legislation rules for a penalty of temporary imprisonment instead of the death penalty or life imprisonment.

Case Two: A mother kills her child who was born within a lawful and officially registered marriage under the excuse of postpartum depression or another economic reason. In this case, Egyptian legislation does not recognize motherhood as a mitigating excuse. It rather considers her unrelated to the newborn and rules for her be sentenced to death or life imprisonment. By contrast, Algerian legislation grants the mother the benefit of the mitigating circumstance in both cases.[23]

It appears that the only beneficiary of the mitigating circumstance in the crime of killing a newborn child is the mother herself. That is to say no other participant or person involved in the offence, regardless of their status, can benefit from this legal mitigating circumstance. Pursuant to Article 261 of Law No.

24-06 containing the Algerian Penal Code, the Algerian legislature has reserved this mitigating excuse exclusively for the mother, provided that the statutory conditions governing its application are fulfilled. This reflects the legislature's consideration of the mother's particular biological and psychological circumstances.[24]

In this context, Dr Hussein Ali Shahrour argues that the killing of a newborn child is most often committed by a young, unmarried woman, implying that the child is frequently born out of wedlock. However, this does not exclude the possibility of the offence being committed by married women as the mothers who wish to dispose of their newborn children after delivery, whether they accept or reject them, often tend to do so before breastfeeding[25]. Once the mother breastfeeds the child, however, she develops affection for the newborn and becomes emotionally and spiritually attached to him\her.[26]

Subsection Two: Justifications for Mitigating the Penalty

The mitigating circumstance granted for the mother's penalty in the case discussed above is justified by the psychological and social conditions she experiences at the time of committing the offence. Given her inherently affectionate and compassionate nature, a mother would not resort to killing her newborn child unless she were subjected to exceptionally harsh circumstances.

In other Arab legal systems, the mitigating circumstance is justified by the mother's situation, in which she seeks to avert disgrace from herself and from the family and social environment in which she lives, resulting in the killing of an illegitimate child. Hence, the concealment of the resulting scandal serves as the primary justification for granting her a reduction in the original penalty prescribed for the offence.[27]

In the same vein, the rationale for this mitigation lies in the view that killing a child under such circumstances is less serious than other forms of intentional homicide. It is known that the victim is a vulnerable human being who has not yet acquired legal personality, which a child obtains upon being born alive. Furthermore, the child's health condition may be disturbing for his life, in addition, to his\her illegitimate status which may expose him\her to social obstacles in the future because of the circumstances of his\her birth. Consequently, the legislature considers the harm caused to society by killing such a child to be less significant than the harm resulting from the killing of a child who was born under ordinary circumstances.[28]

Section Two: The Extent to Which Third Parties May Benefit from the Mitigating Excuse

This section examines the extent to which third parties may benefit from the mitigating excuse in the crime of killing a newborn child. It addresses the exclusion of third parties from benefiting from this excuse (Subsection One), followed by the penalty prescribed by the Algerian legislature for third parties (Subsection Two).

Subsection One: Exclusion of Third Parties from the Mitigating Excuse

An examination of the second paragraph of Article 261 of the Algerian Penal Code No. 24-06, reveals that the Algerian legislature has not established any special penal provisions in favor of a father who intentionally takes the life of his child on account of his relationship with the victim. Instead, it places him in the same position as any other person unrelated to the newborn.[29]

In general, the victim's father cannot benefit from any mitigating circumstances like those specifically provided for the mother under the Penal Code, which were subject to the justifications and conditions previously discussed. This is regardless of his role in committing the crime, whether as the principal perpetrator, a participant, or an accomplice.[30]

However, there is an approach that opposes this view and calls for mitigating the penalty imposed on a father who kills his newborn child, relying on the Prophetic Sunnah and hadiths that prohibit the application of retaliatory punishment (Qisas) when the perpetrator is the victim's father. Instead, the father

is subject to a discretionary punishment[31] out of concern about the disciplinary correction a father might administer to his child. Proponents of this view cite the saying of the Prophet Muhammad (peace be upon him): "A father is not subject to retaliation for killing his child."[32]

Subsection Two: Penalties Prescribed for Third Parties

When criminalizing the intentional killing of newborn children, the Algerian legislature did not consider the perpetrator's motives as a criterion for individualizing or mitigating the penalty. It, rather, adopted the principle of uniformity of punishment, imposing the same penalty in different cases regardless of the motive behind the commission of the offence against the child. Accordingly, Article 261 expressly and implicitly mandates the death penalty for perpetrators, equating this offence with the crime of assassination.[33]

This ruling remains applicable even when the motives or purposes behind the offence appear to be humanitarian or social in nature. This may be the case, for instance, when a newborn suffers from severe congenital abnormalities that prevent normal development, or when the child is born outside a legally recognized marital relationship. In both cases, the Algerian legislature maintains the same penalty without distinction, which was clearly apparent when the legislature has excluded the psychological and social motives behind the commission of this crime. It adhered instead to the principle that this offence remains a serious act regardless of the motives behind it and that third parties are subject to severe penalties, unlike cases in which the perpetrator is the mother, as discussed above.

From the perspective of Islamic law, Allah Almighty states in the Quran: "And whoever kills a believer intentionally, his recompense is Hell, wherein he will abide eternally and the wrath of Allah shall be upon him and he has prepared for him a great punishment."[34] Allah Almighty also states: "Whoever kills a soul unless for a soul or for corruption [done] in the land—it is as if he had slain mankind entirely."[35]

Conclusion

Under Article 259 of Law No. 24-06 of the Algerian Penal Code, the Algerian legislature defines infanticide as the taking of the life of a child shortly after birth and prescribes in Article 261 the death penalty for aggravated intentional homicide in general. However, it exempts the mother alone from this original penalty, whether she acts as the principal perpetrator or as an accomplice, reducing her punishment to temporary imprisonment for a term of ten to twenty years. This is in recognition of the biological and psychological circumstances she experiences following childbirth, as well as the social considerations relating to the avoidance of disgrace and scandal.

Nevertheless, this mitigating provision does not extend to any other person. A father who kills his newborn child, or any other participant or accomplice who assists the mother in committing the offence, remains subject to the original penalty prescribed for intentional homicide, namely the death penalty. The legislature has not made the perpetrator's motives a criterion for mitigating the penalty when the offender is someone other than the mother. The death penalty therefore remains applicable regardless of the nature of those motives. This demonstrates the legislature's adherence to the principle of individualization of punishment, according to which only the mother benefits from the mitigating excuse due to the particularity of her situation. While, all other perpetrators, including the father, remain subject to the severest criminal penalties, given that the killing of a newborn child constitutes a serious offence that cannot be justified by any type of motives.

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