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Third-party artificial insemination and the problem of donating sperm and eggs - A comparative study between the Algerian law, Islamic law, French law and European laws in general

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Abstract. The progress of science in the medical field and the legal framing of artificial insemination have engendered the problem of third-party insemination in accordance with a legal framework that is provided by some countries. This mainly aims to guarantee the right to every person unable to procreate to have children. This situation led to the creation of sperm and egg banks which began to receive donations, free of charge, while protecting the confidentiality of donor-related information. The importance of the topic pushed us to carry out a comparative study in order to clarify the stance of the Algerian legislator on this issue, with respect to Islamic Law or Sharia, and then to discuss the legal framing of the sperm and egg donation process in the French and European laws. We also try to examine the way these countries address the most significant pressures they are exposed to from the children born by this method considering their right to know their lineage.

Keywords. Artificial insemination; Donor; Egg; Sperm; Law; Lineage

1. Introduction

The family is the basic social institution of society. It is the source for the formation and perpetuation of societies (Blagojche Anastasov, 2020, p. 643) through reproduction. However, sometimes humans may not be able to reproduce naturally. The expansion of human knowledge and the new discoveries in the field of medicine have led to the emergence of artificial insemination which is a technique used in treating infertility that prevents a married couple from having children of their own. A new phenomenon, associated with artificial insemination, which consists in freezing the sperm and eggs whether for personal use or to be donated, has recently emerged in France, Belgium and several other European and American countries.

The spread and dissemination of this phenomenon required the development of a legal framework at the comparative level. Then, some regulations were established and implemented for that purpose. The most prominent one concerned the free of charge and confidential donation of sperm and eggs, without requiring the donor's information.

With regard to the Algerian legislator, he regulated artificial insemination in the amendment to the Family Code of 2005, and in the Health Law No 18-11, and then defined a

legal framework for it. In addition, he did not allow artificial insemination to be carried out with the help of others or through donation. He also prohibited insemination using the surrogate mother. It is worth emphasizing that all these principles are in line with those of the Islamic Law (Sharia) which sanctifies the principle of non-mixing kinships.

The present study aims primarily to explore the third-party artificial insemination issue through the donation of sperm and eggs. It also seeks to investigate its rule in the Algerian legislation and in the Islamic law, and also tries to discuss the position of the European countries that organized it while guaranteeing the right of a person to know one's lineage.

This study was based on analytical and comparative approaches through the analysis of legal texts. It was realized by conducting a comparison between the Algerian law, the Islamic law and the law in European countries.

2: Donating sperm and eggs for third-party artificial insemination in the Algerian law and Islamic law or Sharia

2-1 The Algerian law perspective

Doctors in artificial insemination technology rely on male sperm, female eggs, or both, from those seeking treatment, or from donors in the case of third-party artificial insemination.

Sperm in its broadest sense refers to the semen (Suleiman, 217, p. 12). In this respect, God Almighty said: "We created him from an amniotic sperm, and We will test him" (Surat Al-Insan, Verse 20).

It is important to mention that sperms must be collected on the same day in the case of internal insemination. However, this can be done once the eggs are ready in the case of external insemination. Then, the sperm meets the egg in the same way as it occurs in a normal situation in internal insemination through what is commonly known as an intrauterine injection. This can also be done with medical assistance using a tube in the case of external insemination.

It should be noted that the sperm can be either fresh or frozen. With the spreading of sperm banks, both members of the couple can, in a number of countries, use a third party to provide them with his sperm in case they are unable to give birth to children.

Regarding oocytes, i.e. eggs of the female, doctors define them as the female reproductive cells that emerge from the ovary. Then, once the oocyte is fertilized with the male reproductive cell, it grows by division (Al-Sha'i, 2018, p. 131).

It should be mentioned that the egg, in turn, can be fertilized in two ways:

- *Intrauterine insemination*

- *External insemination* which takes place outside the uterus. The egg is frozen by immersing it in liquid nitrogen, with a temperature equal to -196 degrees.

Recently, the phenomenon of egg and sperm donation for external insemination has become widely popular in several European countries.

With regard to the Algerian Family Code, it turns out that it actually adopted artificial insemination in 2005 (Law 84/11 amended and supplemented by Law 05/02 of February 27, 1984). Then, regulations relating to this phenomenon were set in the text of Article 45 bis thereof, to avoid and exclude any misinterpretation or anything that could lead to the mixing of lineages. This Article states that:

"The couple may resort to artificial insemination.

Artificial insemination must abide by the following terms and conditions:

- The marriage ought to be legal,

- The insemination shall be performed with the consent of both spouses and while they are still alive,

- The insemination shall be achieved solely with the husband's sperm, the wife's egg and wife's uterus.

- The artificial insemination with a surrogate mother is not permitted."

With reference to Article 371, the first paragraph of Law No. 18-11 relating to Health (Law 18-11 of July 2) states that:

"Medical assistance to procreation is exclusively dedicated to satisfying the request expressed by a man and a woman of reproductive age and who are still alive. They must constitute a legally binding marriage and suffer from medically confirmed infertility. They both ought to agree to transfusion or artificial insemination. Only the husband's sperm and the wife's egg can be used, and only theirs. Anyone else must be excluded."

Moreover, Article 374 in Health Law explicitly prohibits any circulation as a means to scientific research, donation or sale and any other form of transactions dealing with sperm, eggs, even between mixed wives, fetuses exceeding the appointed number or not, by a surrogate mother, or any other woman be it a sister, a mother, or a daughter, and even the cytoplasm.

Extrapolation of the provisions of the aforementioned articles allows observing that the legislator in the Health Law is assertive and insistent to prohibit the artificial insemination through the assistance of others. Indeed, the legislator requires that this insemination be done with the husband's sperm, and with the egg and uterus of the wife. In addition, the marriage must be legitimate; both parties must be alive and agree to this operation. Any transaction relating to sperm or eggs through sale, donation or any other form, is expressly prohibited.

The position of the legislator is hopefully in line with the principles of Islamic law which prohibits the mixing of lineages.

2-2 The Islamic law (Sharia) perspective

The disclosure made by the Islamic law on artificial insemination requires distinguishing the following two issues:

- Artificial insemination from the husband and wife, whether internal or external, is permitted by Islamic law provided that it agrees with its objectives and principles in preserving kinship and facilitating life, in accordance with the Almighty God's saying: "He has chosen you and has placed no hardship on you in practicing your religion" (Al-Hajj), and also: "God wants ease for you, and He does not want hardship for you." (Al-Baqarah)

In this context, it is permitted to freeze sperm or eggs when this is really necessary, like in the case of illness, while part of jurisprudence refuses that if it is for no reason. The main reason for this is to block any pretext, and to prevent committing anything that is prohibited (Radwan, 2014, p. 36).

- Third-party artificial insemination done through the use of sperm and eggs that are donated to private banks in specialized laboratories, as this would be considered as Al-Istibda' in the pre-Islamic era, which is a reaction to sexual intercourse where a woman requests intercourse with a man in order to obtain from him a child only. In this case, the husband would say to his wife: "Go to that person for sexual intercourse with him". He will stay away from her and does not touch her until it becomes clear that she is pregnant from that man and is it is prohibited (al-Atheer, p. 133).

The prohibition of donating eggs and sperm unquestionably stems from the fact that:

- It is contrary to what has been agreed upon, since establishing marriage is the basis for permissibility of fertilization, which is not the case here.

- It is one form of fornication; it is an encouragement for mixing lineages.

- It opens the way for human trafficking. The person loses his sanctity and humanity that were guaranteed to him by all the heavenly laws.

- It is contrary to common sense, morals and human standards.
- It allows manipulating sperm and eggs for personal purposes in order to improve the human race and produce them as they desire.
- It destroys the family's principles and structure, and deviates from its objectives and its real goal of stability and affection between spouses and of building bridges of communication between their families, and giving birth to good offspring.
- It is also a loss of the true and essential meaning of parenting (Al-Safadi, 2007, p. 69).

3: Third-party artificial insemination via gamete donation in France and European countries

3-1 Legal framework for gamete donation in France and in European countries

It is widely acknowledged that assisted reproduction using donor sperm and oocytes has existed for several decades, in different member states of the Council of Europe. In addition, it should be noted that there are different types of legislation regarding the donation of human gametes for the treatment of infertility of one or both members of the couple, depending on the medically assisted procreation technique used (Sutter, 2018, p. 01). This assisted reproduction became possible for female couples and single women (Lenouvel, 2022) in the year 2021 (Law 2021-1017 of August 2).

This technique is legally framed in France by the law n 94-654, of July 29, 1994, relating to the donation and use of elements and products of the human body. This law was subsequently revised in 2004, 2011, 2019, 2020 and 2021.

In Belgium, gamete donation has also benefited from a legislative framework in medical practice, by the Royal Decree of 15 February 1999 (Derby, 2009, p. 20).

Among the principles to be respected in this case, mention should be made of anonymity, gratuity, as well as free and informed consent. Note also that in order to obtain informed consent from both parties, the given information has to be complete.

The donor is informed by the doctor about the method and technique used in the treatment, particularly concerning the risks and constraints related to hormonal treatment and collection of oocytes from the donor (roux, 2020, p. 03).

According to the provisions of the Bioethics Law in France, donors must be under the age of 45 and ought to already have at least one child. They donate their sperm voluntarily, and their sperm can only be used to conceive a maximum number of 10 children.

Donors come several times to the centers to collect their sperm and undergo medical examinations.

Afterwards, their donation is validated if, on the one hand, the spermatozoa characteristics are sufficient and satisfactory and, on the other hand, if there is no risk of transmission of any infectious disease or a known or suspected pathology for its genetic character (J. M. Kunstmann, 2010, p. 54).

It should also be noted that the principle of anonymity is enshrined in both the public health code (Article L1211-5) and the civil code (Article 16-8 chapter 2).

Donors and recipients cannot know their respective identities so that no kinship can be possible between the child resulting from the donation and the donor.

In addition, the child belongs to the couple who wanted him; his family is the one in which he was born.

It is worth emphasizing that this absolute right to anonymity was established for the purpose of protecting the legal parents by excluding any link with the donor and avoiding any payment of the donor by the couple receiving the sperm donation (roux, 2020, p. 03).

In Europe, most countries have restricted the right of a person born from third-party artificial insemination to know their origins. This restriction can come from the legislation, but also from the lack of a system that collects the identities of sperm donors. Therefore, just like the parallel disputes that could arise over adoption and human assisted reproduction, the conflict between the child's right to information and the adult's right to anonymity has typically been resolved in favor of the adult.

The principle of anonymity of gamete donors has been introduced into the legislation of several countries in order to ensure the altruistic and voluntary character of a donation but also to respect the donor's private life and preserve the interests of the legal family of the conceived child (Sutter, 2018, p. 01).

3 -2 Anonymity as a specificity of gamete donation and the right to have access to one's origins

The donation of gametes, unlike other donations of human body products, does not save a life; it creates one. The problem with anonymity of gamete donation, as it was adopted in 1994 in France, is that it establishes a rivalry between biological and social parents. It makes the sterile husband pass for the child's progenitor.

The anonymity of gamete donation not only erases names, it erases people and actions. It makes a story untellable (roux, 2020, p. 25).

It should also be emphasized that the anonymity of gamete donors is no longer a unanimous principle in Europe. Indeed, an international trend, aiming at recognizing the right of the conceived person to have access to his genetic origins, has been developing over the last few decades.

In 1984, Sweden was the first country to lift the principle of anonymity for gamete donations. Some years later, this Swedish model was then adopted by several other European countries such as Germany, Switzerland, the Netherlands and the United Kingdom.

Later on, in 2018 in Portugal, the Constitutional Court decided that the anonymous donation of gametes was incompatible with the Portuguese Constitution, thus changing the legal framework for gamete donations in Portugal and enshrining the right of access to one's genetic origins (Decision of the Portuguese Constitutional Court).

In France, in 2021, the revision of the law relating to bioethics marked a turning point in the history of the French model of medically assisted procreation. Children conceived by donation earned the right to identify the man or woman who contributed to their conception.

The government opened access to non-identifying donor data (age, physical characteristics, family situation, country of birth, motivation for donation, etc.) (Art. L. 1244-6: A doctor may have access to non-identifying medical information).

The majority of individuals resulting from the donation of gametes or embryos may request access to the identity of the donor(s) who gave them birth and also to accede to non-identifying information.

This new measure is expected to be applied on September 1, 2022 after the creation of a commission that will respond to requests, and a register which will collect data relating to:

- Former donors who spontaneously contacted the commission or the donation center to consent to access to their non-identifying data and their identity,
- All donors making a donation as of September 1, 2022.

At the international level, several international instruments bear witness to this development. First of all, the United Nations International Convention on the Rights of the

Child of 1989, in its Article 7 Paragraph 1, guarantees to the child the right to know his parents to the best extent possible.

In addition, Article 8 of the International Convention on the Rights of the Child sets out the right of the child to preserve his identity, including his family relations, without unlawful interference. This international treaty goes on to provide that countries must provide appropriate assistance and protection so that the identity of the child is restored as quickly as possible.

However, it should be noted that the International Convention on the Rights of the Child only concerns children. Its field of application therefore does not extend to an adult person conceived from a donation of gametes and wishing to know his genetic origins.

In the previous case, the European Convention on Human Rights of the Council of Europe can be useful, because it applies to all people, whether minors or adults.

Indeed, the European Court of Human Rights in Strasbourg has, since the early 2000s, made a constructive interpretation of Article 8 of the Convention which ensures the right to privacy of individuals. For example, it considers that Article 8 protects the right to identity and personal development, which includes the right of access to information allowing establishing some roots of one's history.

Moreover, it also considers that Article 8 allows the person to know the origins and circumstances of his birth and provides him with the right to have access to the certainty of paternal filiation (Sutter, 2018, p. 02).

Anonymity is today at the heart of social evolutions. Children resulting from the donation of gametes can testify, and the genetic tests can reveal the identity of the donor. A balance must be found between respect for privacy and the right to know one's ascendancy.

4. Conclusion

The scientific advancement in the medical field has led to the development of solutions to uncontrollable situations. However, this issue should be adequately framed with appropriate controls in order to avoid getting into severe situations that could engender very bad consequences.

The Islamic law (Sharia) tried to keep pace with scientific developments as much as possible by framing and permitting artificial insemination between spouses because of its good purpose, provided that both abide by the prescribed principles.

Nevertheless, some laws instituted in other countries, such as European and American countries, have exaggerated the framing of third-party artificial insemination. They opened the domain of donating sperm and eggs, allowed establishing sperm and egg banks in laboratories, and provided the legal framework to control that.

Probably, the most significant problem in these countries, particularly the European countries, is that the children born from sperm or egg donation always want to know their lineage, on the one hand and, on the other, the legal penalty imposed by the French Penal Code in Article 511-10, which is a fine of 30 000 Euros, for anyone who intends to reveal the identity of the egg or sperm's donor.

The most effective solution for them was probably the medical technology which took into consideration the distance separating the patient from the health institution (Adriana Pakendek, 2022, p. 301). For this, most French people resort to DNA testing using electronic methods, including even their saliva. They then send them to American laboratories in order to get results showing them the people who share the closest DNA ratio and are likely to have a parental relationship with them.

Furthermore, the latest amendment by the French law of 2021 is apparently the best evidence of the uproar caused by children born by this method and who want to know their origin. This amendment stipulates regulations, starting in September 2022, that make every sperm and egg donor agree to give all needed information to the children born of him later as a prerequisite for donation.

Accordingly, this study allows making the following recommendations:

- The Algerian legislator did the right thing by prohibiting the third-party artificial insemination method, in accordance with the principles dictated by the Islamic Sharia, which is the primary source of the Algerian Family Code. However, to prevent any loopholes that may emerge, the legislator must frame the issue of freezing eggs and sperm of both spouses or of one of them, if this is prescribed by a medical necessity when fearing a disease, while providing controls and regulations for keeping those eggs and sperm so they can be donated later on.

- The fact that the French law allows single mothers and lesbians to undergo third-party artificial insemination is contrary to the main goal of the permissibility of assisted insemination, because the purpose of this method is to make the nurturing father replace the biological father in order to keep the child's upbringing in a balanced environment.

- The right of children resulting from assisted artificial insemination to know the origin of their lineage is fully legitimate. For this, the judicial systems of several European countries have begun to put implement it. Obviously, legislators in France and the rest of the European countries must guarantee this right to those children.

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