

The legal framework of the freezing excess fertilized eggs contract under Algerian legislation



Received: 29/09/2025; Accepted: 03/12/2025

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Abstract

Freezing excess fertilized eggs in IVF is a major modern technique in the field of assisted reproduction technology as it offers the possibility for couples to preserve these eggs in optimal conditions for future use. The recourse to this technique led to the emergence of new legal relations between the freezing banks and the beneficiaries, and these relations are governed by special contracts, which are a mixture of medical, technical and contractual aspects. This study purports to define and describe the characteristics and legal nature of the fertilized-egg freezing contract, in addition to the resulting obligations for both parties. The results show a legislative vacuum in respect to this contract, which requires the intervention of the legislator to organize it in a special law frame as to achieve a balance between the financial rights of freezing centers and the respect of human dignity of the preserved eggs.

Keywords

In vitro fertilization;
Fertilized eggs;
Freezing contract;
Fertility centers;
Destruction of eggs.

الكلمات المفتاحية

تلقيح اصطناعي ؛
بويضات ملقحة ؛
عقد التجميد ؛
مراكز الخصوبة ؛
إتلاف البويضات.

النظام القانوني لعقد تجميد البويضات الملقحة الزائدة في التشريع الجزائري

ملخص

تعتبر تقنية تجميد البويضات الملقحة الزائدة في عملية التلقيح الاصطناعي الخارجي من أبرز التقنيات الحديثة في مجال المساعدة الطبية على الإنجاب، حيث تتيح للأزواج حفظ هذه البويضات في ظروف ملائمة لاستعمالها في محاولة الإنجاب مستقبلاً، وقد أفرز هذا الواقع ظهور علاقات قانونية جديدة بين بنوك التجميد والمستفيدين تحكمها عقود من نوع خاص تجمع بين الطابع الطبي والفني والتعاقد، ومن خلال هذه الدراسة تطرقنا إلى مفهوم عقد تجميد البويضات الملقحة وخصائصه وطبيعته القانونية إضافة إلى أهم الالتزامات المترتبة على عاتق طرفيه، وقد توصلنا إلى وجود فراغ تشريعي كبير بشأن هذا العقد، لهذا على المشرع التدخل لتنظيمه في قانون خاص لتحقيق التوازن بين الحقوق المالية لمراكز التجميد واحترام الكرامة الإنسانية لهذه البويضات.

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Doi:

I- Introduction :

Marriage is a consensual contract between a man and a woman respecting a set of Islamic laws, and it aims to form a family and preserve ancestry, this is why having children is essential to give marriage a real and concrete reason. However, certain spouses are deprived of this blessing and have difficulty conceiving, and this may affect them psychologically and even lead to family disintegration. Thus, modern medical techniques such as artificial insemination came to being to help couples treat their infertility or hypofertility.

Artificial insemination is of two types. The first type is the intrauterine insemination where the husband's sperms are placed inside the wife's uterus to meet the egg and continue growing as in normal sexual intercourse. In this case, excess fertilized eggs cannot be available. The second type is in vitro fertilization and it occurs outside the wife's reproductive apparatus, by removing eggs from the ovaries, combining them with sperm in a laboratory tube or dish to allow fertilization to occur, then returning the fertilized egg to the wife's uterus where it will continue to grow naturally. Fertilization is effectuated on many eggs, and the doctor will choose only two or three fertilized eggs to re-implant in the uterus, and cannot re-implant all the fertilized eggs to avoid the danger of multiple pregnancy. As such, the excess of fertilized eggs will be awaiting unknown destiny.

Thanks to microbiology excess fertilized eggs can be preserved for a long time without being affected or weakened through freezing, which is a modern developed technology, in cryopreservation banks or at the level of fertilization centers in charge of artificial insemination, in order to be reused in case of failure of first insemination or to bring about a new pregnancy. In this way, efforts and expenditure may be spared, and the haphazard of retrieving again eggs from ovaries can be avoided. In some western countries these extra eggs can be planted in the uterus of another woman suffering infertility, as a matter of donation or sale, as they can be donated for the sake of carrying scientific experiments on them.

Although the Algerian legislator explicitly permits the recourse to artificial insemination in the Family Code, pursuant to Article 45A added in 2005 by virtue of Ordinance 05-02¹, and fixes a number of regulations which align with the provisions of the Islamic law as specified in the same Article², considering this insemination a form of assisted reproductive technology in case of confirmed infertility pursuant to Article 370 of Health Law N° 18-11³. This operation being subject to some conditions stipulated by Article 371 of the same law, the legislator does not regulate the creation and the running of the egg-preservation banks, and contents to specify the prohibition of using more embryos than is stipulated, either for scientific research purposes or for sale or donation to a surrogate mother or to any other woman, pursuant to Article 374 of the Health Law. The legislator suggests, by virtue of Article 376 of the same law, for the conditions of the preservation and destruction of gametes, to refer to the upcoming regulation which has not been enacted yet.

Naturally the freezing of the fertilized eggs does not occur without a contractual relation between the fertilization bank and the beneficiary. The widespread of this contract generated many legal, social and ethical issues. To cover this topic, the following research problems are advanced:

Are legal texts on excess fertilized-egg freezing in Algeria sufficient to regulate the fertilized-egg freezing contract? Is it necessary to establish a special legal system for this type of contracts as to achieve balance between financial rights of the freezing centers and human dignity of the fertilized eggs?

To answer these questions, we decided to opt for a descriptive approach to define the concept of fertilized eggs and their freezing techniques, and an analytical approach to grasp the legal adaptation of the freezing contract and its ensuing effects. The study is, thus, divided in two parts, the first part deals with the definition and nature of fertilized-egg freezing contracts, and the second part deals with obligations emanating from such contracts.

II- Definition and legal nature of the fertilized egg freezing contract:

The fertilized-egg freezing bank carries out its work by concluding contracts with individuals dealing with it, in order to preserve their samples under specific conditions agreed upon between the two parties. To grasp the concept of this contract, we need first to define it, and then determine its legal nature.

II.1- The concept of the fertilized-egg freezing contract:

The fertilized-egg freezing contract is one of the legal actions generated by modern technologies. In regard to the novelty of this contract and its accelerated expanded use in medical centers, in addition to the specific nature of these samples they take in charge of their freezing, it is deemed important to define this contract and describe its characteristics.

II.1.1- Defining the fertilized-egg freezing contract:

Legislation everywhere approves the freezing of fertilized eggs especially with the advance in the codification of medically assisted procreation such as artificial insemination. Furthermore, artificial insemination centers require the reliance on the freezing techniques and the advantages it offers. This process is catered for by the Algerian legislator. The widespread of insemination centers and the ambiguity surrounding the use of such contract in terms of its legal regulation, motivated this study which is interested in the legal aspect of this contract. To reach a definition of the fertilized-egg freezing contract, we need first to define the fertilized eggs and see if they can be considered embryos deserving to be

treated as such. At a second stage, we need to define the freezing technique and explain the attitudes of the Islamic law on its use.

II.1.1.1- The meaning of fertilized eggs:

The fertilized egg is the cell resulting from the union of 23 chromosomes in the male sexual cell (the sperm) with 23 chromosomes in the female sexual cell (the egg) during the insemination process, to form a mature germ cell called a genome. This latter would form the basic unit of all members of the human species⁴. Thus, the fertilized egg is considered the first cell in the formation of the fetus and contains a full range of the genetic material (AND) from father and mother. The female egg may be inseminated naturally or artificially through a medical assistance. The question to ask here is when does the fertilized egg constitute a fetus?

In the Arabic language, a fetus is what is hidden in the woman's uterus⁵. Conventionally, a fetus means that human creature which is formed when an egg is fertilized by a sperm, and as far as this creature remains unseen inside the uterus, it is called a fetus. However, there is a disagreement among Islamic scholars over the meaning of a fetus. Some would require for a fetus to be called so, to show certain features such as fingers or nails, otherwise it is called a leech. Others consider a fetus to be whatever is formed in the uterus of a woman, even if it is just a leech not yet showing any human detail. Thus, for them a fetus is formed at the mere union of a sperm with an egg and by the implantation of the fertilized egg in the uterus⁶.

Thus, there is no problem re-planting the frozen fertilized eggs in the uterus. The problem is when these frozen eggs remain longer outside the uterus without being planted. Are these eggs to be treated the same as fetuses in the woman's uterus?

Considering the frozen eggs waiting outside the uterus, fetuses or not, brings about important effects in the light of Islamic and positive laws. If they are to be considered full fetuses, this means they enjoy certain rights such as their parts in the inheritance and in the will until their destiny is known, and they have their rights in blood money in case of the destruction of the fertilized eggs placed in a tube⁷. Jurists are divided in their opinion on whether to consider fertilized eggs outside the uterus full fetuses or not. The majority, constituting the first group, believe that these eggs are not full fetuses because linguistically speaking the word fetus means that it is unseen inside the uterus, yet the exceeded number of fertilized egg exists outside the uterus⁸. According to this last opinion, the fertilized egg does not constitute a fetus unless it has been implanted on the wall of the uterus and hence called a pregnancy. Being placed in an experimental tube does not give the fertilized egg the name of a fetus until it is planted in the uterus of the woman desiring to give birth to children. Thus, the sacredness of the egg depends on the place of its existence. If placed outside the uterus, the egg does not enjoy the Islamic legal provisions devoted to the fetus. The second group believes that since the sacredness of the fertilized eggs starts from the moment of its fertilization, the fertilized egg outside the uterus must enjoy the same sacredness because scientifically and biologically speaking it is the same and has all the necessary vital elements. As such, it must be entitled to have the same Islamic and legal rights, and there is no difference between a fertilized egg inside or outside the uterus to be considered a fetus⁹; In the light of this last opinion, even if the linguistic and conventional definition of a fetus focuses on it being situated inside the uterus, does not exclude the fetus placed outside the uterus as this modern technique was not known before to be taken into account at that time.

As for us, we tend to support the opinion of the first group. We believe that the fertilized eggs in the experimental tube do not constitute fetuses before they are planted in the uterus. The uterus is the unique appropriate place for these eggs to grow and develop. The experimental tube offers only vital conditions for them to survive at the beginning, but if they are not planted in the uterus they will die. This opinion is clearly revealed in the title of our paper. The inseminated eggs in the freezing banks are known as frozen fertilized eggs and not frozen fetuses. To call them fetuses gives the impression that they are treated as such and benefit from the same legal provisions stipulated for fetuses, while in reality it is not possible to acknowledge them the right in inheritance and testament and impose abortion penalty on them. However, this does not mean to treat them as things and deny them the right to grow and develop and enjoy human dignity and benefit from moral values prevailing in society.

The Algerian legislator opted for the phrase "excess fetuses" in Article 374 of Health law to speak of fertilized eggs when he prohibited the use of these fetuses in a number superior to what is actually stipulated, and applied the same law on sperms and eggs.

However, the issue raised about the legislative acknowledgment of freezing the fertilized eggs is due to the Algerian legislator using in Article 376 of Health Law, the term "gametes" when referring to the regulations on the conditions of preservation and destruction of these gametes, while not using the term "fertilized eggs", which incites us to ask about the reason behind the use of the term "gametes"

The singular of gametes in gamete and in Arabic it means the mixture of two colors or two things. Gametes represent a mixture of the man's semen and the woman's squirting, in addition to blood and clot. It is also referred to as mixed drops, semen or mingled sperm to describe the mixture of male and female gametes¹⁰. The term "gametes" also applies to male cells and female cells before they are mixed to form a fertilized egg¹¹. As such, the term used does not cover the fertilized eggs. Consequently, the legislator, when issuing the regulatory texts stipulated by Article 376 mentioned above, has to remove this ambiguity and unify between the terms he uses and clarify whether the conditions

of preservation concerns eggs and sperms alone or include excess fertilized eggs, because this use of the term “gametes” in the meaning above specified, excludes eggs.

II.1.1.2- The meaning of the freezing technique and the position of Islamic jurisprudence on it:

The freezing technique consists of cooling fertilized eggs at low temperatures to preserve their quality and procreation ability in the future. This is done by placing the fertilized eggs in fridges and small chemical chambers using liquid nitrogen to freeze them at -196° in order to stop their growth and any chemical interactions in them. They are then planted in the uterus under a medical supervision¹². There are two major methods used for freezing fertilized eggs: slow freezing whereby embryos are gradually frozen under control, which takes longer, and rapid freezing, the method currently used known also as “vitrification”, which prevents the formation of ice crystals in the fertilized egg cells and preserve their viability for future use¹³.

The Algerian legislator, through Article 376 of the Health Law, made use of the term “preservation” to denote the freezing technique. It is noteworthy to mention the idea of fertilized-egg freezing banks (or frozen embryos banks) which emerged by the 1980’s whereby the first test-tube baby was born in Australia in 1984¹⁴.

According to what has preceded, “Frozen fertilized eggs” are defined as fertilized eggs in their early or first stages of life which are being preserved in specific fridges at a certain degree of temperature, in specific liquids liable to preserve their viability and prevent them from growing until they are needed, where they are taken out from the fridges and allowed to grow¹⁵. They are also defined as being the result of the fusion between a sperm cell and an ovum (egg) under certain conditions, stored in specific banks to be reactivated in the future¹⁶.

In regards to the ethical and legal problems raised by the freezing of fertilized eggs, the Islamic jurisprudence does not agree on the authorization or the prohibition of the use of such technique. On one hand, there are those who believe in the forbiddance of this technique as expressed in the decision taken by the Academy of the Islamic Jurisprudence on March 20th, 1990, which prevented doctors from carrying out the insemination of any extra number of eggs beyond what is needed, and in case of a surplus, they are left without a medical care to die naturally¹⁷. This is the opinion espoused by many Islamic scholars who considered the freezing of fertilized eggs forbidden because it would be mixed with other fertilized eggs, mistakenly or intentionally for commercial purposes, and the consequential damage caused by the freezing of these eggs is more severe than the damage resulting from not freezing them. This is why they should be destroyed. Thus, if implantation in the uterus fails, the fertilization process is repeated from beginning without recourse to freezing extra fertilized eggs in a way to block the means to evil as we say in Islamic jurisprudence¹⁸.

On the other hand, other scholars authorize the freezing of fertilized eggs but under some conditions among which to be done under medical supervision of trusted Muslim doctors, and to offer guarantees by the storing banks against any mixing of lineages or egg manipulation, and to have an absolute necessity to resort to this process, and to have an ongoing marriage bond, and the fertilization should be done with the husband’s sperm, and the freezing period should not be long¹⁹.

As for our personal opinion on this issue, we approve the decision taken by the Academy of the Islamic Jurisprudence, forbidding the freezing of fertilized eggs whatever the conditions imposed on this freezing, because there is no guarantee for the trustworthiness of the people taking in charge this operation, who may fall trap of their own weaknesses and give way to the manipulation or the commercialization of these eggs. Human faults exist always even if at lower levels. Thus, whatever the necessity to resort to freezing justified by the desire to bring children, the particularity of these eggs is more important to preserve as a matter of preserving lineages. Moreover, modern medicine has not yet discovered the possible future side effects on babies born from frozen fertilized eggs.

II.1.1.3- Meaning of the frozen fertilized egg contract:

To carry out the fertilized-egg freezing operation, the freezing banks or fertility centers conclude contracts with clients. Thus, the freezing of fertilized eggs contract is a contract concluded between the beneficiary and the fertility center in order to preserve extra fertilized eggs under certain conditions and for a specific period and for a fixed price, to be returned to the beneficiary when needed²⁰.

Thus, the freezing fertilized egg contract is drafted between two parties, the natural person representing the beneficiary- that is the two spouses-who seek the preservation of fertilized eggs in the freezing center to use them later, contrary to the fertilization of non-fertilized eggs or sperms, and the second party representing the legal entity, that is the fertilizing banks or the public or private health facilities in charge of freezing the fertilize eggs for the beneficiary for a given fee.

Consequently, the fertilized egg banks are institutions whose basic task is to store these eggs in special equipment until they are requested for carrying experiments or for an assisted medical procedure²¹. It is worth mentioning that besides the existence of fertilized egg storing banks (embryo banks) that interest the present study, there exist storing banks for the preservation of tissues and organs, and others to preserve stem cells and blood, etc. Despite the similarities between these banks pertaining to storage, the fertilized -egg banks has some particularity regarding their religious, ethical, and legal aspects.

In Algeria there are no banks for preserving embryos, but clinics in artificial insemination technique are devoted to freezing the extra fertilized eggs remaining from IVF.

II.1.2- Characteristics of fertilized-egg freezing contract:

According to the previous definitions of fertilized-egg freezing contracts, it is noticed that this contract has a number of characteristics:

- **It is consensual:** this contract is created through the consent of the beneficiary (the spouses) and the bank to preserve the fertilized eggs for a certain period, and for a specific fee without the need to draft it in a specific legal form. This consensual aspect is not related to public order because the two parties can agree to not conclude a freezing contract between them in a form other than what has been consented by them. In reference to ministerial instruction N° 300 issued on May 12th, 2000 by the ministry of health, fixing the good clinical practices in the field of assisted reproductive technology, freezing cannot occur unless there a written approval of husband and wife. Fertilization center in Algeria strives to establish specific samples of contracts specific to each type of freezing whether it is of eggs, or of sperms.
- **It is binding for both parties:** it yields obligations for both parties. On one part, the freezing bank commits itself to receive the sample and provide fridges and freezing equipment, and takes necessary procedures to store these samples and return the fertilized eggs to their owner. On the hand, the beneficiary commits themselves to hand over the samples and pay the fees to the bank.
- **It is continuous (time-contract):** Its objective being to preserve fertilized eggs for a specific period of time to be reused in artificial insemination if the first insemination turns to be unsuccessful. This period may be fixed by the law or agreed upon in the convention.
- **It is intuit personae:** this is due to the particularity of the relation between the contracting parties which is principally based on trust. On one hand, the beneficiary, when desiring to preserve fertilized eggs, chooses a freezing bank that possesses developed equipment and high competencies and has a prestigious reputation to be able to securely store the fertilized eggs. The bank is thus personally committed to implement the contract and cannot assign the contract to another person, without the consent of the beneficiary. Moreover, this contract is important for the beneficiary for being tied to the future of their offspring. The beneficiary's status may change like in cases of divorce or death and this would lead to the termination of the contract or would bring about complicated legal issues²².

II.2-The Legal Nature of the fertilized egg freezing contract:

In regard to the newness of the fertilized-egg freezing contract and the specificity of the sample to be frozen which makes it different from ordinary money, a debate is raised concerning the nature of the agreement concluded between the freezing bank and the beneficiary especially in relation to the absence of a framing regulation of this contract and how it should be adapted. Thus, there are those who consider it to be a leasing contract, or deposit contract or a contract of a special nature. We will discuss these opinions in the following section:

II.2.1- Fertilized-egg freezing contract as a lease contract:

The Algerian legislator defined the lease contract in Article 467 of the Civil Code²³ as a contract through which a leaser grants the lessee the right to benefit from something for a specific period of time and for a given fee. The rent allowance is paid cash or against the accomplishment of another task.

Some common points between fertilized-egg freezing contract and lease contract emerge clearly as both are consensual, compensational, continuous and grant importance to time, and they are management contracts not of disposition. This resemblance finds its support in jurisprudence²⁴ whereby some scholars consider this freezing contract as a lease contract because the beneficiary in the freezing contract is the lessee in the lease contract who benefits from storage places and fridges in freezing banks for storing extra fertilized eggs, and the freezing bank is the lessor, However, enjoyment in the lease contract is the egg preservation in the freezing contract.

However, there are some differences between these two types of contracts. On one hand, the lessor's purpose in a lease contract is the reception of a fee in exchange for the use of the rented property without any specification, whereas the purpose of the freezing bank is not only preserving the beneficiary's fertilized eggs, but also to follow certain procedures to ensure the preservation of these samples and guarantee their security, by providing adequate freezing temperatures, monitoring regularly the situation of the frozen eggs, and carrying different tests whenever necessary.

On the other hand, provisions related to handing over the rented property to the tenant to benefit from it do not apply for the freezing contract (Article 476 of the Algerian Civil Code) as the freezing centers are not obliged to hand over preservation equipment and machinery to clients, on the contrary it is clients who are obliged to hand over the sample to the bank to store it. Thus the benefit from freezing is assured by the bank without the intervention of the beneficiary. The manner to preserve the fertilized eggs is medically regulated. Consequently the provisions related to the lessee returning the rented property do not apply here (Article 502 of the civil law), and this is why we cannot consider the freezing contract as a leasing one.

II.2.2- Freezing contract as a deposit contract:

Based on the definition stipulated in Article 590 of the Algeria Civil Code, through a deposit contract, a depositor hands over a moveable property to a depositary to preserve it and return it later on. The freezing contract can be considered a deposit in regard to its aim which is preservation. Both are in rem contracts and require the application of provisions having to do with returning the deposited item upon request or after expiration of the time limit.

Despite the apparent resemblance between the deposit contract and the fertilized-egg freezing contract, there are some differences between them which have to do with the specific nature of the freezing contract. By referring to Article 590 of the Algerian civil code, the item deposited is described as a thing, and considering the freezing contract as a deposit contract implies considering the fertilized eggs as material things that should be treated as such. However, the fertilized eggs cannot be equated to material items because they have a biological nature.

Another difference between the two contracts is that a deposit contract can be concluded without a fee, contrary to the freezing contract, which is a commutative contract and is basically concluded for a fee. Furthermore, it is difficult to apply the legal provisions of a deposit contract on freezing contracts especially after the depositor's death, because in this last case, the deposited item in a deposit contract is returned to their inheritors and is divided between them according to their respective parts, but in a freezing contract, the issue raises a number of Islamic and positive legal principles. The beneficiary in a freezing contract are the two spouses, so when the husband dies for examples, there is a problem of whether the fertilized eggs shall be destroyed or planted in the wife's uterus before the expiry of her widowhood waiting period. In case both husband and wife die, these eggs cannot pass to their inheritors, but should rather be destroyed²⁵.

II.2.3- The freezing contract as a special contract:

On the basis of what has preceded and despite the resemblance between the fertilized- egg freezing contract, the lease contract, and the deposit contract, there appear to be a number of different points differentiating them. Hence, the prevailing opinion in Jurisprudence²⁶ is that the fertilized-egg freezing contract is a contract of a special kind uniting between medical, legal and technical aspects. Thus, it is distinguished from other kinds of contracts known in legislation, and is considered an innominate contract that does not enter under any category of other contracts defined by the law. It is governed by the provisions of the general theory of contracts. The specificity of this contract has to do with sensitivity of the item to be frozen which is a biological matter related to the first stages of human life (fertilized eggs), and also from the obligations imposed upon its parties especially for the freezing bank. Thus, it is important that the Algerian legislator intervenes here to regulate its rules according to the Islamic law precepts.

III- The effects of the fertilized egg freezing contract:

The fertilize egg freezing contract is considered a novel type of contract imposed by the scientific development in relation to assisted reproductive technology. One of its characteristics is that it is binding for both parties and yields obligations for both of them. In what follows is a presentation of the obligations of the freezing bank and of the beneficiary.

III.1- Obligations of the fertilized egg freezing bank:

The fertilized egg freezing contract purports to preserve the sample of eggs as to ensure their availability in case the first insemination process fails. To achieve this, the freezing bank is bound to inform the beneficiary about the specificity of the freezing process and the risks it faces, and is bound to preserve these eggs. What follows is an explanation of these two obligations:

III.1.1- Obligation to inform:

The obligation to inform is an important means to achieve the contractual balance, and it precedes the contract itself. Hence, one party commits themselves to provide the other party with the necessary information to reach a valid insightful consent whereby the second party is well informed of all details and information concerning the contract. This is due to some considerations having to do with the nature of the contract or the nature of one of its parties. This obligation offers protection to the vulnerable party and permits to the contractual party to have clear ideas to give their consent and take the right decision of concluding or not the contract.²⁷

This obligation is stated in Article 23 of the Algerian Health Law N° 18-11 as follows: "Anyone must be informed about their health state, required treatment and the risks they face." In contrast, the Emirati legislator states clearly in Article 08 of the Federal Law N° 07 of the year 2019 concerning assisted reproductive technology²⁸, artificial insemination centers have to give the spouses detailed explanation of the technique chosen by them, and the steps of carrying out this operation, and any secondary effects or complications that may arise, in addition to the material costs and the expected percentage of pregnancy on the basis of similar cases in their center.

Thus, the obligation in the fertilized egg freezing contract resides in providing the beneficiary with detailed information about the technological aspect of this process, the preservation technique, and all the procedures carried out to avoid their destruction or mixing with other eggs, freezing duration, material costs of the operation, advantages offered, risks endured during storage and transport of the eggs, eventual complications of their implantation in the uterus after defrosting, percentage of success of the frozen eggs and other information that may help the beneficiary to take sound decisions about

freezing or not freezing their fertilized eggs. All this is important because the aim behind the freezing is not preservation itself, but rather a preliminary step towards a future reproduction project for the egg holders.

III.1.2- Obligation to preserve the samples:

The purpose of concluding a fertilized-egg freezing contract is the preservation of these eggs and prevention against their destruction. Thus, the preserving obligation of the freezing banks is very fundamental. From a practical point of view, freezing is carried out by specialists in biological and medical sciences and according to scientific and delicate medical bases that prevent the destruction and mixing of frozen samples²⁹. On one hand, preserving these samples from destruction requires the adoption of specific freezing techniques to conserve their cellular structure. Moreover, it requires the strict monitoring of storing conditions by controlling the levels of liquid nitrogen and of temperature. At the same time, the eggs should be prevented from being affected by external factors, and provided with the necessary sanitary precautions to ensure sterile freezing and thawing environment. They should also be protected against pollution when transferred.

On the other hand, to prevent mixing the fertilized eggs and the risks this engenders in terms of mixing lineages, it is necessary to take great care when recording the fertilized samples on the specific registers, showing the number of samples, name of holders and their number on the medical file open for them, date of taking out the sample, date of fertilization and of freezing, and whatever new information it may emerge³⁰.

The question to be raised here is the following: is the obligation of the bank to preserve the fertilized eggs intact an obligation of due diligence, as is generally the case in medical care, or an obligation of achieving result in regard to the specificity of these eggs?

In the context of medical liability in general, it is unanimously agreed upon that the doctor's obligation is one of due diligence as dictated by the principles of the medical profession without guaranteeing the recovering of the diseased because this operation requires the interference of many external variables that escape their control. The doctor's obligation becomes then one of achieving result when using modern techniques and equipment liable to bring certainly the desired result, such as in the case of laboratory tests, blood transfer, etc.³¹.

By analogy, we can say that basically the obligation of the freezing bank is that of due diligence, as the bank is committed to use adequate equipment and technical tools, to adhere to required scientific protocols and medical norms, to ensure continuous control of the validity of the used equipment and the freezing conditions such as temperature and humidity, to provide absolute security systems such as backup electricity generators and permanent electronic control. The freezing bank is also bound to inform the beneficiary of any emergency liable to affect the storing conditions, and take all decisions and scientific and technical procedures to ensure the security of the eggs against any damage. In case the bank is justifiably seen to have been negligent, it will be held responsible because the freezing of eggs is affected by a complicated set of scientific and technical factors. However, despite the scientific advance, failure of the freezing operation is always probable for reasons beyond the bank's control, and may be attributed to sudden technical failures, vital changes, biological developments that escape complete control.

Despite this, there are still those who would believe that the bank's obligation is an obligation to achieve a result³² in due regard to the pure technical nature of the freezing process and the level of the technology used in it. All variables of this process are controllable and fixable thanks to modern techniques. This is why the probability of failure is little in comparison to cases involving a medical treatment contract. This is also an obligation to achieve a result because of the beneficiaries' legitimate expectations as the spouses naturally want to secure their fertilized eggs to be able to use them later on. Thus, it is not enough for the bank to make efforts to achieve this aim, but it is rather obliged to guarantee the preservation of these eggs all along the period of the contract. Thus, if the result is not obtained, the bank will be held responsible. It will suffice for the beneficiary, in this case, to prove the non-achievement of the result unless the bank has a reason justifying this failure.

In addition to what has preceded, the freezing process should be temporary and ends with the end of the reasons having necessitated its implementation. Because of the absence of a legal text fixing the duration of egg-preservation in the light of the Algerian health law 11-18, we refer to the ministerial instruction N° 300 cited above which authorizes the freezing of some extra fertilized eggs with the consent of the two spouses in order to re-use them in the future in case of the failure of first attempts to pregnancy. The freezing duration has been limited to three years after which the eggs are returned by virtue of a report in this regard. Yet in comparative legislatures, in the Emirati law of 2019, this duration is of five years, according to Article 10 on assisted medical procreation, and this duration can be extended for an equal period on the basis of a written request by the spouses.

The question raised here is the following: After the expiration of the period, can the preservation banks destroy the frozen fertilized eggs?

From a legal perspective, most legislation regulating the issue of fertilized egg freezing tend towards egg destruction cases, which may be the result of the death of either spouses, end of the marriage bond, expiry of the preservation period without prolongation, request of destruction by the spouses. This is the opinion of the Emirati legislator in the Federal law of 2019. As in Algeria, and because of the lack of texts regulating the Health Law N° 18-11, the tendency is towards

the adoption of the Ministerial Instruction of the year 2000, which stipulates the destruction of the fertilized eggs at the expiry of the preservation period, and at the death or divorce of (either) of the spouses.

In the presence of the legal text permitting the destruction or elimination of the fertilized eggs, the issue may appear easy for doctors at first sight especially in the absence of conscientious and religious principle framing the operation. However, this issue is difficult to settle especially from a religious and legal perspective questioning the specificity of these frozen samples.

First, Islamic scholars diverge on their opinions on abortion according to stages of fetal development³³. Thus, at the pre-germinal phase, the majority of scholars from the Shafi'i, Hanafi and from most schools of Hanbali agree on the authorization of abortion, but consider it to be disfavored as a matter of recommendation (not of prohibition). Thus, according to this point of view, the destruction of fertilized eggs before this stage is permissible, while the Maliki scholars prohibit such abortion even at the pre-germinal phase because they consider the fetus has the right to life from the very beginning. Hence, the destruction of the frozen fertilized egg is like abortion in natural insemination as both put an end to the life of a fetus, which is prohibited in Islam. The Algerian legislator adopts the same attitude and incriminates this act through Article 304 of Penal Code, which considers that in abortion, the fetus is being assaulted even in the very first days of formation. The question to be raised here is the following: Is the frozen fertilized egg destruction considered an abortion from the religious and legal perspectives?

The Crime of Abortion, in both law and Shari'a, presumes the existence of pregnancy so that the fetus can be said to have been taken out or evicted from the uterus. Pregnancy is the fertilized egg implanted in the uterus until normal delivery³⁴. For pregnancy to occur, the fertilized egg must be implanted in the uterus tissues as literally stipulated by the above said Article 304, "whoever abort a pregnant woman...". Thus in addition to the mens rea and the actus reus, the crime of abortion requires a presumed element which is the existence of a pregnancy, that is a fetus in the mother's uterus before abortion. Thus, the egg destruction is not considered an abortion in the view of law and Shari'a because the fertilized egg is situated outside the uterus and is not implanted yet.³⁵

If it is permissible to give up the implantation of the fertilized eggs or their destruction, scholars diverge on their views on the method of executing these fetuses. On one hand, some would prefer to suggest to not resort to an extra number of fertilized eggs, but in case extra eggs happen to exist, they have no sanctity because these eggs are not implanted in the uterus. On the other hand, there are those who believe that the fertilized eggs represent the first stages of human formation, and as such they have their sanctity and should not be destroyed, but rather should be left to die naturally, which is less infringing on the sanctity of these eggs as there is no real assault on their life³⁶.

III.2- Obligations of the beneficiary:

As said before, the main obligation of the freezing bank is the preservation of the frozen fertilized eggs, and naturally, it cannot fulfill its duty and execute its obligation unless the beneficiary hands over these eggs and pay the corresponding fees.

III.2.1- The obligation of handing over:

The beneficiary's obligation of handing over the fertilized eggs is key one in the freezing contract for the bank to fulfill its obligation in terms of preservation and freezing. Thus, the eggs must be present when concluding the contract and they must be scientifically and medically suitable for freezing, that is free of defects that hinder their preservation. These eggs must also be obtained from an existing marital relationship³⁷. The beneficiary's handing over of the fertilized eggs is proven by issuing a document specifying the number of fertilized eggs and their biological condition at the time of delivery.

III.2.2 - Obligation of payment:

The fertilized-egg freezing contract is an exchange contract which means that the beneficiary is committed to pay a fee to the fertility center in exchange of the service received from it, which is of a scientific and technical nature consisting of the preservation of the frozen samples to guarantee their security for a period of time agreed upon between the contracting parties. The fee represents the payment of the preservation and storage service in itself and does not concern any subsequent medical result such as ensuring pregnancy and giving birth to children by using the frozen fertilized eggs³⁸.

It is noticed that the payment of the fee in the fertilized-egg freezing contract is a pure financial obligation to ensure the continuity and the quality of the service related to the preservation of the fertilized eggs. This fee is fixed and explicitly evaluated in the contract and is often paid regularly (monthly or annually) along the freezing period. If the beneficiary fails to pay any of the installments, they will receive a notice upon his failure of which the freezing bank has the right to request the termination of the contract and a compensation for the resulting damage. Upon the termination of the contract, a very important issue is brought to the fore, which is that of destroying the fertilized eggs. It is noteworthy that embryos are not instantly destroyed as soon as the beneficiary fails to pay the fee, all attempts should be made to remedy to the situation and incite the beneficiary to payment because we are not dealing with mere goods or material items, but we are rather dealing with special entities which have human and ethical dimensions. The destruction of the egg is a delicate

decision subject not only to contract rules, but also linked to public order and medical deontology, which require stricter procedures in addition to administrative and medical supervision.

Thus, the destruction of the fertilized eggs must require issuing a report proving the destruction, pursuant to instruction 300 of the Algerian Ministry of Health. However, this instruction does not precise the nature of this report, whether it is official or not and what institution is responsible for its drafting. To prove the effective destruction of these eggs and to ensure the respect of lineages, the report should be drafted in the official form in the presence of an official institution, a judicial one preferably.

IV- Conclusion:

The present study shows that the fertilized egg freezing contracts emerged as the result of scientific development in the domain of reproductive medicine whereby egg fertilization has become an inevitable scientific and medical reality. Couples are now able to preserve the extra number of fertilized eggs resulting from artificial insemination to be reused if the first attempt to insemination fails, or if there is a desire for a future pregnancy. It saves the troubles of extracting new eggs and fertilizing them again and all ensuing costs. Despite the advantages of such a contract, it proves to raise complex legal problems due to the specific contractual relationship between the freezing banks and beneficiaries, as it is not a mere classical civil contract, and touches upon ethical, social, and human dimensions of utmost sensitivity.

The major results of the present study are the following:

- Scholars diverge in their opinions on the permissibility or not of fertilized egg freezing. The prevailing opinion tends towards the non-permissibility of such a process whatever the constraints imposed on the freezing process. No matter the justification given for such freezing especially as regards the pressing desire for procreation, the necessity of the preservation of lineage is deemed more important. .
- Most scholars diverge in their opinions on whether to consider the fertilized eggs outside the uterus as fetuses or not, but the prevailing opinion tends towards not considering them fetuses before being implanted inside the uterus, and hence they are not legally treated like fetuses, and their destruction is not considered abortion from the Islamic and legal perspectives.
- The fertilized egg- freezing contract is characterized as being consensual, binding for both parties, compensational, in rem, timely and intuit personae.
- The fertilized egg-freezing contract is a contract of a special nature uniting between medical, legal and technical elements. Its specificity is explained in relation to the thing to be frozen (the fertilized eggs) and the nature of the obligations resulting for its parties, particularly for the freezing bank.
- This contract brings about obligations for both parties, the freezing banks commit themselves to inform and to preserve the fertilized eggs, and the beneficiary commits themselves to hand over the samples and pay the fees.
- Scholars diverge in their opinions on the nature of the freezing bank's obligations to preserve the eggs during freezing. Some consider this obligation to be an obligation of making the necessary efforts because the freezing process is affected by complex technical and scientific factors beyond the bank's control. Other consider this obligation to be an obligation to achieve the desired outcome. Because of the pure technical aspect of the freezing process and the level of the technological instruments used which put all intervening variables under control.
- The legislator decided to destroy the fertilized eggs at the end of the agreed preservation period, and in case of the death or divorce of either of the spouses. Their destruction has no sanctity as these eggs have not been transplanted yet inside the uterus, but they are considered to represent the first stages of human life and therefore, the best destruction way is to let them die naturally as being less infringing upon their sanctity and having no direct assault to life.

In the light of the above, we can make the following recommendations:

- The Algerian legislator should, upon issuing regulatory texts set forth in the Article 376 of Health Law, clarify the meanings of gametes and indicate whether the aforementioned preservation conditions pertain only to eggs and sperms, or encompass the extra number of fertilized eggs, because the use of the term gametes may exclude the fertilized eggs.
- Because of the widespread use of fertilized eggs in Algeria, the legislator shall set an exhaustive legal framework to regulate all assisted reproductive technology, especially the fertilized egg freezing technique, to determine the conditions for the use of such techniques, specify the medical and ethical guarantees and their legal effect on the contractual relationship between medical centers and beneficiaries. The legislator shall not leave such a legal regulation scattered between Family Code, Health Law and Ministerial Order.

- Fertilization centers shall fertilize only the required number of eggs expected to be transplanted, so as to avoid having a surplus number. In case of an extra number of fertilized eggs, these eggs shall be left without any medical care until they die naturally.
- Enhancing administrative and health control of the fertilized egg freezing centers by imposing periodic and strict control of freezing and destruction registers, making sure of the respect of the approved ethical, legal and medical criteria by these centers, to avoid any mixing or manipulation of the fertilized eggs.
- Specifying the entity entrusted with issuing the report of fertilized egg destruction. In order to confirm the effective destruction of these eggs, and to prevent the manipulation of the eggs and the subsequent mixing of lineages, the destruction process shall be established by an official document and in presence of an official entity which should be preferably a judicial authority.
- The need to raise people's medical and legal awareness of fertilized egg freezing techniques, to know their rights and legal obligations, and to understand future consequences of such procedures on both legal and ethical aspects.

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