

## ISTINBATH ON THE PRACTICE OF SPERM DONATION AND ITS CONSEQUENCES BASED ON ISLAMIC LAW IN INDONESIA

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### Abstract

The rapid advancement of medical technology has introduced artificial insemination as an alternative method for procreation, raising significant legal and ethical questions in Islamic law and Indonesian legal systems. This study explores the legal status of artificial insemination involving sperm donors and the nasab (lineage) implications for children born through this practice. Utilizing normative legal research methods, the analysis incorporates primary sources, including the Qur'an, Hadith, and Indonesian legal frameworks, as well as secondary materials such as legal opinions and scholarly interpretations. The findings reveal that Islamic law strictly prohibits artificial insemination using donor sperm from a party other than the legal husband, equating the act to adultery. The resulting lineage of children is contested, aligning only with the mother per Islamic jurisprudence, while Indonesian law offers a nuanced view following the Constitutional Court's rulings number 46/PUU-VIII/2010. This study underscores the necessity of legal clarity to reconcile traditional Islamic principles with contemporary legal practices, ensuring ethical compliance and societal harmony.

**Keywords:** Artificial Insemination; Nasab; Sperm Donors.

### 1. INTRODUCTION

Allah SWT created everything in this world in pairs. Article 28B paragraph (1) of the 1945 Constitution of the Republic of Indonesia states that, "Every person has the right to form a family and continue offspring through legal marriage". In Islam, marriage is a physical and mental bond between a man and a woman to fulfill the needs of household life as husband and wife who fulfill the conditions and pillars determined by Islamic law.

But a happy family life often depends on other factors, one of which is the presence of children. Children are the fruit of the heart and soul mates. In general, children can be classified into two types, namely legal children and illegitimate children. Based on Article 42 of Law Number 1 of 1974 concerning Marriage states that, "A child is a legitimate child if born in or as a result of a legal marriage, and has a nasab with his father".

Humans are fortunate living beings as they are also endowed with strength, initiative, and creativity from God. With this gift, mankind has science. In its development, science also plays a role in various inventions and technologies. For example, technology in the medical field, currently technology in the medical field is progressing and the impact is very rapidly, and this has a positive impact on humans. One of the discoveries in this field is the discovery of new ways to have children called artificial insemination.

In Indonesia and other predominantly Muslim countries, advances in artificial insemination technology have emerged. It is important to note that the Qur'an does not specifically address

this topic. There are specific regulations governing the status of children conceived through artificial insemination programs. Artificial insemination is not specifically discussed in the Qur'an and As-Sunnah, so it is imperative that it be studied and confirmed. When a consensus of scholars cannot be reached, a process of ijtihad involving the use of Qiyas or analogy is used to derive legal provisions.

Islam is a religion that is rahmatan lil 'alamin. In Islam, the Qur'an and the Hadith of the Prophet Muhammad PBUH are guidelines in order to achieve the mercy of God, who blesses nature. As a guideline, the Quran contains norms, both Aqidah, Shari'ah, Akhlak, and so on, which descended 14 centuries ago. In Islam, there are also two sources for gaining knowledge and guidance on the truth. The first is revelation, and the second is reason. Knowledge and truth based on revelation are absolute (certain), while knowledge derived from reason is uncertain. Islam strongly encourages the use of reason to think and reflect on all His creations. The difference between humans and other living things is in their minds; using human reason can know good and bad things, unlike plants that are not given reason, and animals are also like that, but only given instincts.

Intellect in Islam is a gift from Allah SWT, which must be guarded, maintained, and protected. The role of reason is the main factor in Islamic law to determine a person as a mukallaf (person who is burdened with something). Even if someone has reached the age of puberty but is not of sound mind, the taklifi law (assignment) is not imposed on him. This is in line with positive law, which recognizes the term *personae miserabile*, which is a human being who is considered incapable of acting or performing legal acts.

Therefore, the existence of legal provisions through this endeavor can be used as a guideline or handle so that the community, especially Muslims, before starting the artificial insemination process, it is very important to understand the Islamic law surrounding artificial insemination. It is imperative for the Muslim community to be well informed and guided in this journey. By abiding by religious customs, one begins to perform certain actions. The inseparability of law and religion in the Islamic faith is increasingly evident. Islamic law embodies a system of order.

## 2. TABLES / ILLUSTRATIONS

This research employs a normative legal approach (legal research) aimed at solving legal problems by analyzing existing laws and doctrines. The study focuses on the practice of artificial insemination systems with donor sperm within the framework of Islamic jurisprudence and Indonesian legal systems.

The research utilizes two approaches: the statutory approach and the conceptual approach. The statute approach examines relevant legal provisions, including the Qur'an, Hadith, Indonesian laws, and regulations such as the 1974 Marriage Law and the Compilation of Islamic Law (KHI). Meanwhile, the conceptual approach explores doctrines, scholarly interpretations, and fatwas, particularly those issued by the Indonesian Council of Ulama (MUI), to analyze the ethical and legal aspects of artificial insemination.

Primary legal sources include the Qur'an, Hadith, legislation, and fatwas, while secondary sources encompass legal commentaries, books, journals, and articles discussing artificial insemination and its implications. Data collection involves a comprehensive literature review to ensure the inclusion of all relevant materials.

The analysis is conducted qualitatively, synthesizing Islamic and Indonesian legal perspectives to address the status of children born through artificial insemination and provide practical recommendations for harmonizing religious and legal frameworks.

## **Sperm Donation and Its Practices in Indonesia**

In the Indonesian dictionary, artificial insemination is a translation of the English term artificial insemination. In Arabic it is called al-taqih ash-shind'i. While in Indonesia it is also called artificial insemination, artificial fertilization or artificial insemination.

According to various opinions, one of them is Dr. Djamalin Djanah, artificial insemination is a job using a special tool to inject semen (sperm or semen) into the uterus for the purpose of fertilization. Ir. Suryo defines artificial insemination as a method of using a tool to place sperm in or near the cervical canal with the aim of causing pregnancy. Dr. Nukman Moeloek defines it more specifically as a way or technique of artificially inserting the husband's semen into the wife's uterus.

The reasons for artificial insemination may vary. One of them is the desire to have children. This is especially done for married couples who have been married for a long time but have not been blessed with children. Another factor for artificial insemination is to prevent the extinction of humanity due to war.

### **There are two methods of artificial insemination, namely:**

#### 1. In Vitro Fertilization or *Fertilisasi in Vitro* (FIV)

In Vitro Fertilization is fertilization that is done outside the body, in a Petri dish, in an atmosphere that is close to scientific. If successful, the fertilization results will be transferred to the endometrium of the uterine cavity when it reaches the morula stage. This technique is often called test tube babies (in vitro fertilization) or fertilization outside the body (in vitro fertilization).

#### 2. Garnet Intra Tubal Transplant or *Tandur Alih Garnet Intra Tuba* (TAGIT)

Garnet Intra Tubal Transplant is an attempt to bring together egg and sperm cells by using a fallopian tube cannula to spray a mixture of germ cells into the ampulla. Artificial insemination can be divided into the following categories to collect seeds (sperm and eggs).

As explained in Article 1 and Article 40, it is prohibited to place egg cells or sperm in the uterus of someone who is not a legal wife or does not have a bond, the bond can be said to be outside the family line. Test tube babies or artificial insemination are permitted as long as they are carried out for married couples who are married or have a legal relationship in the eyes of religion, and are legally registered. Article 40 paragraph (3) states that Assisted Reproduction or pregnancy outside of natural means, as referred to in paragraph (1), is carried out by the development of science and technology and does not conflict with religious norms.

The practice of artificial insemination using sperm donors is prohibited in Indonesia. The prohibition is contained in the general regulations regarding test tube babies contained in Article 16 of Law No. 23 of 1992 concerning Health and regulated in Article 127 paragraph (1) letter a of Law 36 of 2009 concerning Health. In these regulations it can be stated that the practice of artificial insemination can only be carried out between a husband and wife who are legally married, and is emphasized in Article 82 paragraph (2) letter a of Law No. 23 of 1992 concerning Health which.

Saysreads "Intentionally engaging in pregnancy efforts outside of natural methods that do not align with the provisions referred to in Article 16, paragraph (2) shall be punished by a maximum imprisonment of five years and/or a maximum fine of 100,000,000 Indonesian rupiah. Bahwasannya dengan sengaja melakukan upaya kehamilan diluar cara alami yang tidak sesuai dengan ketentuan sebagaimana dimaksud dalam Pasal 16 ayat (2), dipidana dengan pidana penjara paling lama 5 (lima) tahun dan atau pidana denda paling banyak Rp.100.000.000,00 (seratus juta rupiah)".

## The Law Of Artificial Insemination According To The Fatwa

On June 13, 1979, the leadership council of the Indonesian Ulema Council (MUI) decided to issue a fatwa prohibiting the practice of in vitro fertilization, the contents of which were as follows:

1. Artificial insemination using sperm and eggs from a legally married couple is permitted. This is in accordance with the Word of Allah SWT in Surah an-Nahl (16), paragraph 72:

*It means : "Allah created spouses of your own kind for you, and from your spouses, he gave you children and grandchildren and a good provision. So why do they believe in falsehoods but deny Allah's blessings? Allah menjadikan bagimu pasangan (suami atau isteri) dari jenis kamu sendiri, menjadikan bagimu dari pasanganmu anak-anak dan cucu-cucu, serta menganugerahi kamu rezeki yang baik-baik. Mengapa terhadap yang batil mereka beriman, sedangkan terhadap nikmat Allah mereka ingkar?"*

Artificial insemination of a husband and wife with the implantation of another wife's uterus is forbidden. This is based on the rule of Sadd adz-dzari'ah;

Artificial insemination from frozen sperm from a deceased husband is haram. Because it will cause relationship problems with determining inheritance. As the words of Rasulullah PBUH in the authentic hadith of Bukhari and Muslim:

*It means: "Nu'man bin Bashir said: "I heard the Messenger of Allah (PBUH) say: "What is lawful is clear, and what is forbidden is also clear, and between the two, there is the vague." Most people do not know this, so whoever avoids the shubhat has protected his religion and honor. Whoever is involved in the shubhat is likely to commit haram."...Nu'man bin Basyir berkata: aku mendengar Rasulullah SAWPBUH bersabda; Yang halal itu adalah jelas, dan yang haram itu juga jelas dan antara keduanya terdapat yang samar-samar. Sebagian besar manusia tidak mengetahuinya maka siapa saja yang takut (terpelihara dari) pada yang syubhat, maka ia telah menyelamatkan agamanya dan kehormatannya dan siapa saja yang terlibat dalam perkara subhat maka ia dikhawatirkan terjun pada yang haram..."*

To protect lineage or lineage, Islamic teachings regulate that marriage is considered an effective way to protect and maintain the sanctity of lineage. Islam believes that the sanctity of blood is very important, because Islamic law is closely related to family structure, be it marriage law, inheritance law, and its various derivatives, including civil rights in Islamic law, including lineage rights, guardianship rights, and inheritance rights. Even the concept of "mahram" or "muhriman" in Islam is the result of a marital relationship. In addition to the command to marry, Islamic law also prohibits adultery because it makes a legitimate lineage untenable.

With the enactment of Islamic law, which functions as a legal system that regulates human life and lifestyle. So everyone should always pay attention to the things around them. This is very

important and must be considered at all times, one of which is how to maintain and care for offspring (hifzh al irdl/al nasl). Islam highly values human honor, both individuals and their descendants. For Muslims in particular and non-Muslims in general, this is a recognition and protection of biological human rights created by Allah SWT. Protection of this respect is seen in the prohibition of adultery, slander, gossiping about others (ghibah), fighting each other, cursing, and insulting someone or their lineage.

This goal is a religious obligation towards humans; therefore, ignoring this obligation is a serious deviation from Sharia law. The needs of Maqashid Hifzh al irdl/al nasl can be divided into three categories, including:

- a. Hifzh al irdl/al nasl daruriyyat, preserving descendants and honor means requiring marriage and prohibiting adultery. Because if marriage is neglected and adultery is rampant, then the existence and purity of future generations are threatened.
- b. Hifzh al irdl/al nasl hajjiyat, In this category, preserving descendants and honor means avoiding things that can lead to adultery, and if family harmony cannot be maintained, then divorce through talaq is necessary.
- c. Hifzh al irdl/al nasl, This means protecting your lineage and honor by trying to control your views, words, and actions as an initial effort to cause harm.

To maintain the sanctity of bloodlines, Islam not only forbids adultery but also the entire concept of absolute adoption, namely the adoption of a child which removes a child's bloodline from his biological father. This can be seen in the asbab an-nuzul of the letter Al-Ahzab (33), paragraphs 4-5.

*It means: "Allah does not make for a man two hearts in his heart, nor does He make your wives whom you have fornicated your mothers, nor does He make your adopted sons your own. These are but the words of your mouth. Allah says what is right and He shows the way. Allah tidak menjadikan bagi seseorang dua hati dalam rongganya, Dia tidak menjadikan isteri-isterimu yang kamu zihar itu sebagai ibumu, dan Dia pun tidak menjadikan anak angkatmu sebagai anak kandungmu (sendiri). Yang demikian itu hanyalah perkataan di mulutmu saja. Allah mengatakan sesuatu yang hak dan Dia menunjukkan jalan (yang benar)." "Call them by their father's name. That is just in the sight of Allah. If you don't know their fathers, call them your brothers in religion and your forefathers. If you do not know their fathers, call them your brothers in religion and your forefathers. You will not be sinful if you are mistaken about that, only if you intend to do wrong. Allah is Forgiving and Merciful. Panggillah mereka (anak angkat itu) dengan (memakai) nama bapak mereka. Itulah yang adil di sisi Allah. Jika kamu tidak mengetahui bapak mereka, (panggillah mereka sebagai) saudara-saudaramu seagama dan maula-maulamu. Tidak ada dosa atasmu jika kamu khilaf tentang itu, tetapi (yang ada dosanya) apa yang disengaja oleh hatimu. Allah Maha Pengampun lagi Maha Penyayang."*

Commentators agree that the revelation of this paragraph is related to the appointment of Zaid bin Haritsah by the Prophet, when Zaid was called Zaid, son of Muhammad, not Putra Haritsah, this paragraph was revealed.

From the explanation above, it can be concluded that lineage is one of the adh-dharuriyyat al-khamsah, or al-kulliyah al-khamsah, or pancajiwa that must be maintained properly at all times. The issue of lineage is very important in building and maintaining the integrity of

humanity and is one of the main factors that must be kept pure through marriage and avoiding all forms of adultery.

A person's honor is often related to his/her lineage. And if a child is called an "orphan", then he/she will almost certainly encounter major obstacles in the development of his/her personality in the future because of his/her unclear genetic status. To maintain this, Islam forbids someone from erasing the lineage/name of his/her biological father. In addition to psychological problems and the development of a child's personality, the issue of lineage or genetics is also related to *muharramat*, which is a rule that prohibits women who are forbidden to marry (considered incest/marrying in the same lineage).

In the Islamic legal system (*Fiqh*), the problem of blood relations or kinship is a wide-ranging problem because blood relations or kinship not only have an impact on intergenerational problems but also legal and social problems. A stern warning is given to people who deliberately hide who their father is and know their genealogy, but they deliberately hide or deny it, because this act (hiding their genealogy) can result in mixing *mahrams*, breaking inheritance rights, breaking kinship ties, and others.

In Islamic law, lineage plays a very important role. By clarifying a person's blood status, the laws surrounding it are also clarified, for example, regarding marriage. If a man is known to have a blood relationship and is still a *mahram*, namely a woman, then it is forbidden for both of them to marry. In determining whether someone has the right to inherit the deceased's estate. Certainty of lineage plays a very important role because, in Islamic law inheritance is strictly regulated. However, the high level of social mobility can make two siblings who are still blood relatives not know each other. Maybe they don't know each other because of distance or other reasons.

It is very important that this lineage is upheld and recognized in Islam, both in relation to guardianship, inheritance, and even marriage. When deciding to get married, lineage is an important factor that must be considered so that the marriage can be harmonious. This is in accordance with the words of the Prophet Muhammad SAWPBUH: Meaning: "Women are married for four reasons: religion, wealth, beauty, and lineage. Therefore, choose a woman based on her religion, as this will benefit you. *Wanita dinikahi karena empat hal, karena agama, harta, kecantikan, dan nasab (keturunannya). Maka pilihlah agamanya maka akan menguntungkan kamu*". (HR Abu Dawud).

From Abu Dzar al-Ghifari, Rasulullah SAWPBUH said: "A person who claims to be related to someone who is not his father is not a disbeliever if he knows it. However, whoever claims to be related to people who are not his people should be prepared to take his seat in Hell. *Tidaklah seorang yang mengaku bernasab kepada lelaki yang bukan ayahnya, sedangkan ia mengetahuinya maka ia adalah seorang kafir. Dan siapa yang mengaku bernasab kepada suatu kaum yang bukan kaumnya, maka bersiaplah untuk mengambil tempat duduknya di neraka*". It can be seen from the description above that, in Islamic teachings, it is very important to maintain and preserve the sanctity of blood. Because Islamic law is always related to family structure, be it the law related to marriage or the law related to inheritance. In marriage law, blood relations are one of the reasons for prohibiting marriage between one and another, while in inheritance law, blood relations are one of the reasons someone obtains the right to inherit the property of their heirs. This is, among other things, what is meant by civil relations in Islamic law.

## **Development Of Children's Civil Status After The MK Decision**

The Constitutional Court (MK) issued a decision regarding the legal status of illegitimate children in February 2012, namely MK Decision Number 46/PUU-VIII/2010. This decision granted the demands of Hj. Aisyah Mochtar alias Machica Mochtar, who filed a judicial review of Law of the Republic of Indonesia Number 1 of 1974 concerning Marriage (Law of the Republic of Indonesia/1/1974), in particular Article 34 paragraph (1).

The chronology of the case until the judicial review was filed as follows: Hj. Aisyah Mochtar alias Machica Mochtar binti H. Mochtar Ibrahim, on December 20, 1993, was married by Moerdiono (Minister of State Secretary) in Jakarta with the guardian of the late H. Mochtar Ibrahim, witnessed by 2 witnesses, each named the late KH. M. Yusuf Usman and Risman, with a dowry in the form of a set of prayer equipment, 2,000 Riyals (Arabic currency), a package of gold and diamond jewelry paid in cash. Moerdiono is a married man who remarried his second wife, Machica Mokhtar, based on an Islamic marriage contract, but it was not recorded in the marriage certificate book because it had not been submitted to the relevant sub-district PPN/KUA, and an excerpt of the marriage certificate was also not available. This marriage produced a son named Muhammad Iqbal Ramadhan bin Moerdiono.

## **Maternity Status Of Children Resulting From Sperm Donor Artificial Insemination**

Based on verses, Hadith, fiqh rules, ulama opinions, and MUI Fatwa, children born as a result of artificial insemination and IVF whose sperm is taken from their parents are the same as biological children. However, if the sperm is not obtained from the sperm of the parents (legal husband) or another person (donor), then the status of the child born is the same as a child born as a result of adultery. Likewise, if the womb used is not the wife's womb, then the child she is carrying will also have the same status as a child resulting from adultery. Who is born is the same as a child of adultery.

According to Mahmut Syaltut, artificial insemination originating from sperm donors (other people) is actually classified as Jarimah or a criminal act, and a greater disobedience than tabanni (adopting a child), which has been annulled by the Koran and hadith because he ordained the child to someone other than the father.

Agreeing with Mahmut Syaltut, Al-Qardlawi said that if artificial insemination does not come from the sperm of a man (husband), then the act is a very heinous crime, and more wrong than the act of adopting a child (tabanni). This is because a child born through artificial insemination is mixed or mixed with the wrong act of adultery, even though the Law actually contradicts the Law on adoption, namely inserting foreign elements into the bloodline. With this act, it will actually lead humans to the level of animals, that are inhumane for people who have been bound by noble social ties.

Children born through artificial insemination and test tube babies taken from sperm other than the husband's sperm are attempts to disguise offspring. On the one hand, it is the same as adultery, which is condemned by the Sharia and law, lowering the high dignity of humans to the level of lowly animals who are not worthy of living amid a noble society.

According to Ali Hasan, he said that a child was an adulterer not because of the methods used by the husband and wife, but because the child's origin (lineage) was unclear, and his father was completely unknown; moreover, the sperm came from a sperm bank that had been mixed up. If examined further, the lineage (parents) of the child is more obscure than the of a child of

adultery, whose father can be known at least by the mother. While children from artificial insemination and IVF are only doctors who know where the sperm was obtained from, or no one knows at all when the sperm was taken from a sperm bank that has been mixed up.

Thus, the status of the child is reviewed from the perspective of Islamic law is the same as the child of adultery including in resolving inheritance and marriage problems for girls. According to Prof. Dr. Hj. Huzaimah T. Yanggo, the child of adultery has 2 consequences, namely:

1. Loss of the dignity of the mahram so that sisters, daughters and mothers can marry fathers who commit adultery. This is the opinion of Imam Malik and Syafi'i. This also applies to babies born through artificial insemination and test tube babies whose sperm is taken from another person.
2. Loss of inheritance rights from the adulterous father and the child only has an inheritance relationship with the mother.

Likewise, according to Wahbah Zuhaili, a child's lineage to his mother is fixed even though it is the result of adultery, let alone the result of artificial insemination, but a child's lineage to his father is not sick (fixed) except by means of a valid marriage or fasid marriage or wati' syubhat and Islam cancels the custom of ignorant people who commit children to their fathers through adultery, based on the Hadith of the Prophet SAWPBUH which means: The child is the result of relations with a legitimate wife (al-waladuli all firasy), and those who commit adultery are stoned. "anak itu hasil hubungan dengan isteri yang sah (al-waladuli all firasy) dan orang-orang yang berzina dirajam". (HR. Jama'ah except at-Tirmidhi).

### 3. CONCLUSION OR SUMMARY

In the Constitutional Court Decision No. 46/2010, it is stated that an illegitimate child has a civil relationship with his father as proven by science and technology. However, based on the Qur'an, as-Sunnah (al-Hadith) of the Prophet Muhammad SAW, the Law, the Compilation of Islamic Law, and the MUI Fatwa that have been stated above, it can be concluded that placing sperm into the uterus of a woman who is not halal (not a wife) is classified as Jarimah or is a criminal act. Thus, the status of a child born from an artificial insemination program with donor sperm is the same as a child of adultery, where the child is equated with an illegitimate child, so that the child only has a civil relationship with his mother.

In the Constitutional Court Decision No. 46/2010. The Assembly should limit the scope of the permission to assign an illegitimate child to its father only to an illegitimate child born in a secret marriage. Then for married couples who have not been blessed with a child, it would be better for the couple to adopt a child rather than carry out artificial insemination with donor sperm (not the husband).

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