



The Analysis of Sperm Donor Insemination Based on Perspective of Islamic Criminal Law

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Abstract

Keywords:
insemination,
sperm, donor

Insemination of donor sperm is an interesting subject to study. There is a chance that the child from the donor's sperm will not be recognized by the parents if it is different from expectations. Therefore, in terms of recognition, both in terms of positive law and Islamic law, it is an interesting problem to study. The aims of this study are: (1) to find out Islamic criminal law views on donor sperm insemination; (2) to find out the form of sanctions insemination of donor sperm according to Islamic criminal law. The design used in this study was normative legal research with a (statute approach) from the perspective of Islamic criminal law. In this study, documentation data collection techniques were used. Analysis technique normative legal research, used was descriptive-analysis with evaluation, interpretive, construction, and content analysis. Islamic criminal law views on donor sperm insemination is haram (forbidden) in Islamic perspective. The law is the same as adultery and children born from this kind of insemination have the same status as children born outside of a legal marriage. Perspective of Islamic criminal law on perpetrators. Artificial insemination with donor sperm cells is not restricted as is the law of fornication in adultery, however, artificial insemination with donor sperm is ta'zir on the grounds that the elements in the hadd of adultery are not fulfilled because there is no direct sexual intercourse.

Abstrak

Kata Kunci:
inseminasi,
sperma, donor

Inseminasi sperma donor merupakan hal yang menarik untuk dikaji. Ada kemungkinan anak dari sperma pendonor tidak akan dikenali oleh orang tua jika berbeda dengan harapan. Oleh karena itu, dalam hal pengakuan, baik dari segi hukum positif maupun hukum Islam, merupakan permasalahan yang menarik untuk dikaji. Tujuan penelitian ini adalah: (1) untuk mengetahui pandangan hukum pidana Islam tentang inseminasi

sperma donor; (2) Untuk mengetahui bentuk sanksi inseminasi sperma donor menurut hukum pidana Islam. Desain yang digunakan dalam penelitian ini adalah penelitian hukum normatif dengan pendekatan (*statute approach*) dari perspektif hukum pidana Islam. Dalam penelitian ini digunakan teknik pengumpulan data dokumentasi. Teknik analisis penelitian hukum normatif yang digunakan adalah deskriptif-analisis dengan evaluasi, interpretasi, konstruksi, dan analisis isi. Hukum pidana Islam memandang inseminasi sperma donor adalah haram (dilarang) dalam perspektif Islam. Hukumnya sama dengan zina dan anak yang lahir dari persilangan semacam ini memiliki status yang sama dengan anak yang lahir di luar perkawinan yang sah. Perspektif hukum pidana Islam terhadap pelaku. Inseminasi buatan dengan sel sperma donor tidak dilarang sebagaimana hukum zina dalam zina, namun inseminasi buatan dengan sperma donor adalah ta'zir dengan alasan tidak terpenuhinya unsur hadd zina karena tidak adanya hubungan seksual secara langsung.

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Introduction

Every human being, instinctively, needs a life partner who can complement and protect each other. When these feelings exist and find a suitable partner, then love grows between them. feelings of love and affection. After that they think to live together in a marriage bond in accordance with the rules that exist in Islamic law.¹

Someone who has been married for a long time but has no children feels that marriage is meaningless, because the marriage is not only to fulfill sexual satisfaction and it is lawful to have sex between a man and a woman, it is also to obtain offspring.²

However, it turns out that not all married couples are lucky in marriage. More specifically, not all of them are lucky in terms of having children. It turns out that there are cases where husband and wife cannot have children. Mikail in his article writes that there are at least 10 causes a woman is difficult to get pregnant. The first five (5) causes are related to reproductive system problems, while the rest are related to health problems such as certain postoperative body conditions, thyroid problems, causes due to cancer treatment, lifestyle, and age factors.³ Various efforts will be taken to have children. Starting from consulting with parties who are considered experts to solve the problem to looking for any

¹ Nasiri, *Kapita Selecta Marriage* (Cilacap: Ihya Media, 2016). 1

² MD Ali Al Hamidy, *Islam and Marriage* (Bandung: Third Edition, 1983).

³ Bramirus Mikail, "10 Causes of Difficulty Pregnant Women," *Kompas*, 2012.

alternatives such as adoption, treatment, reproductive health therapy and using medical technology that can bring children as children, if so many efforts have been passed without success, not infrequently domestic life will be fragile. which in turn leads to polygamy or can lead to divorce.

Now, various technological discoveries have emerged in the field of genetic engineering that can be used to overcome obstacles and help husbands and wives who cannot produce children, this engineering is marked by the emergence of artificial insemination such as donor sperm, sperm banks, or magic boxes that are able to store sperm and ovum like a real uterus.⁴

Naturally, a new method of fertilization outside the uterus has been discovered, known as In Vitro Fertilization (IVF). In Vitro Fertilization (IVF) is the union/fertilization of male seeds against female seeds in a petri dish (in the laboratory), which after the union (*zygote*), will be implanted or replanted in the uterus of the woman who has the seeds.

If artificial insemination is carried out with the husband's own sperm and ovum cells and the embryos are not transferred to another woman's womb, including another wife (for a polygamous husband), Islam justifies either by taking the husband's sperm, then injecting it into the wife's vagina or uterus, or by means of fertilization

⁴ Said Agil Husain al -Munawar, *Islamic Law and Social Pluralism* (Jakarta: Tapestry, 2004). 104

outside the uterus, then the fruit (*vertilized ovum*) is implanted in the wife's womb, provided that the condition of the husband and wife concerned really requires artificial insemination to have children, because with natural fertilization, husband and wife are unable to have children.

In accordance with its development, the artificial insemination program is not only a solution for married couples to bring a baby, but because they want to get a super and genius baby. To fulfill this desire, in the implementation of artificial insemination, the husband no longer uses the husband's sperm but uses the sperm of another person or a donor that can be obtained at a sperm bank. This has been practiced by Afton Blake, a psychologist from the United States who has succeeded in giving birth to Dorrion with the help of a sperm bank.⁵

In its development, this artificial insemination program has also been practiced using sperm and ovum donors who are not husband and wife then the embryo is transplanted into the wife's uterus. husband's sperm is very lacking. This type of artificial insemination is also known as donor conception.⁶

One of the biggest risks caused by donor sperm is infection in the person using the sperm. This usually occurs if the bank does not

⁵ Ali Gufron Mukti and Adi Heru Sutomo, *Abortion, IVF, Euthanasia, Kidney Transplant and Genital Surgery: In Medical Review, Law, and Islam* (Yogyakarta: Aditya Media, 2007). 15

⁶ Salim, *IVF Legal Aspects Review* (Jakarta: Sinar Graphic, 2007). 67

follow protocols or is very negligent in its sperm collection and handling policies. Moreover, the sperm center cannot guarantee that the cells are 100% free of genetic diseases. Because certain hereditary conditions do not have standardized testing.

Complications that occur are not only about health, but also legal and ethical aspects. So sperm donors are required to sign a legal agreement, often with the recipient especially regarding the rights of the child in the future.

الَّذِي جَعَلَ لَكُمُ الْأَرْضَ مَهْدًا
وَسَلَكَ لَكُمُ فِيهَا سُبُلًا وَأَنْزَلَ مِنَ
السَّمَاءِ مَاءً فَأَخْرَجْنَا بِهِ أَزْوَاجًا مِنْ
نَبَاتٍ شَتَّىٰ.

"Who has made for you the earth a stretch and Who has made for you on the earth a path, and sends down rain from the sky. So We grow with rain water of various kinds of plants" (thaha: 7)

This means that the child from the donor's sperm will not be recognized by his parents if it is different from expectations.

Method

The research approach used is a qualitative approach. Quality methods are research methods used to examine the natural condition of objects, (as opposed to experiments) where the researcher is a key instrument. Quality researchers are also defined by studies whose data is expressed in verbal form and analyzed without the use of

statistical technicalities Mudir explained that quality research is research whose data is expressed in its naturalistic state or what it is (naturalistic, natural setting), not changed in the form of symbols or numbers with a view to finding the truth behind objective and sufficient data

While the type of research in this study uses this type of literature research or library research. Literature research is research undertaken to solve a problem that relies on critical study of library materials and related research results presented in new ways

To get the data and information needed, the builder searches and collects through documentation, namely the use of documents in the form of references in the form of books, journals, or blogs, especially related to the study of this problem.

Result and Discussion

Artificial insemination from donor sperm

The fertilization process using the artificial insemination method between the husband's sperm cell and the wife's egg cell is actually a medical effort to allow the husband's sperm cell to reach the wife's egg cell. The sperm cell will then fertilize the egg not in its natural place.⁷

There are several artificial insemination techniques that have been developed in the medical world, including:⁸

⁷ Ibid. 43

⁸ Masfuk Zuhdi, *Masail Fiqhiyah* (Jakarta: Gunung Agung Store, 1997). 20

Gamete Intra Fallopian Transfer (GIFT)

Gamete Intra Fallopian Transfer (GIFT) is a pregnancy-creating technique in which an egg that has been removed from the woman's ovary will be mated with a cleanly washed sperm cell of the man and then the egg and sperm are placed in the fallopian tube through a small hole in the woman's abdomen. In a nutshell, *Gamete Intra Fallopian Transfer* (GIFT) is an attempt to bring together germ cells (gametes) between the ovum and sperm by pouring or spraying the mixture of germ cells using a tubal cannula into the ampulla.⁹

This system is more natural because fertilization occurs in the body, this is done right at the time the woman ovulates (approximately 10-16 days) before the next menstruation. Because there is no exact method to determine the ovulation period, this system is carried out 2-3 times between 2 periods within the time limit at which ovulation is suspected to have occurred. Then, the semen (sperm) will be taken and placed into the uterus. Regarding the placement of semen, there are several possibilities, namely at the top of the pubic canal (intra vaginal), around the cervix (para cervical), in the cervical canal (inter cervical). and in the uterine cavity (intrauterine). The last two methods are carried out when there is an abnormality in the cervix that

blocks the entry of sperm cells into the uterine cavity.

The Gamete Intra Fallopian Transfer (GIFT) method is actually not artificial insemination in the true sense, because fertilization occurs in the oviduct of the prospective mother herself. So this GIFT technique is more natural because fertilization is in the fallopian tube in the mother's body, not tube.

Fertilization in Vitro (FIV)

Fertilization In Vitro namely the insemination process by taking the husband's sperm and wife's ovum then processed in the Vitro (tube), and after fertilization occurs then transferred to the uterus.¹⁰ The technique is fertilization carried out outside the body in a culture dish (Petri disk), with conditions that are close to natural (in the uterus). with the real name IVF, because fertilization occurs outside the body.

The procedure for the In Vitro Fertilization (FIV) technique consists of several stages, those are follows :
The first stage: Treatment stimulates (stimulation) the ovaries.

At this stage the wife is given a drug that stimulates the ovaries, so that it can release many eggs and this method is different from the usual way, only one ovum develops in the menstrual cycle. Doctors will provide useful treatment to create appropriate levels of sex or reproductive hormones for the creation of the ovulation process for mature eggs in married couples. The medicine given by the doctor to the wife can be in the form of food or

⁹ Abd. Salam Arief, *Renewal of Islamic Legal Thought Between Facts and Reality* (Yogyakarta: Lesti, 2003). 159

¹⁰ Ibid.

injectable medicine which is given every day since the onset of menstruation and only stopped after it turns out that the eggs are mature. The average time of giving this hormone is about 7 days.

Through the administration of this drug, the doctor expects the maturation of the egg follicle to occur. When the egg follicle is considered mature, the release process is ready to be stimulated. The maturation of the egg cells is monitored every day with the wife's blood test, and *ultrasonography* test examination. However, sometimes the ovaries fail to react to the drug.¹¹

Second stage: Egg retrieval.

If the wife's egg cells are many, then the egg is taken which will be done by injection through the vagina under the guidance of the image produced by the ultrasound device. At the time of this retrieval, the wife will of course be under general anaesthesia, which aims to create calm for the wife, so that the retrieval of eggs or ova can run smoothly.¹²

Third phase: Fertilization or fertilization of the egg.

After successfully removing some eggs, the doctor will ask for sperm from the husband either to be removed by himself (masturbation) or by a special procedure by a doctor in the operating room. However, the safest way is of course by masturbation.

Furthermore, the spermatozoa contained in the sperm will be

separated from the content of other sperm ingredients. After the purification process is complete, the spermatozoa with good quality will be brought together with mature eggs for fertilization in a glass tube in the laboratory. This is the stage that the spermatozoa and the egg are waiting for to meet. In a special place that ensures nutrition, as well as sterility, the spermatozoa and the egg are brought together.

A total of approximately 20,000 male spermatozoa are placed together with 1 female mature egg in a special dish. By doing this, medical experts expect the process of fertilization of the egg by the spermatozoa within 17-20 hours after the retrieval of the egg from the ovary.¹³

Fourth stage: Embryo transfer.

After fertilization occurs, the embryologist and fertility specialist will carry out special monitoring of the development of the embryo. Embryos that are considered well developed will be implanted in the uterus. Usually, a good embryo will see a number of 8-10 cells at the time it will be implanted in the uterus. These embryos will be transferred through the vagina into the uterine cavity of the mother 2-3 days later.

Fifth stage: Observation of the occurrence of pregnancy.

After implantation of the embryo, it remains to wait whether pregnancy will occur. If 14 days after embryo transfer there is no menstruation, then a urine test is performed to determine the presence of pregnancy. New pregnancy will

¹¹ Salim, *IVF Legal Aspects Review*. 34

¹² Wiryawan Permadi, *Only 7 Days Understanding In Vitro Fertilization* (Bandung: Refika Aditama, 2008). 31

¹³ Ibid. 33

be confirmed by ultrasound examination a week later. If all the stages have been carried out by the wife and it turns out that pregnancy occurs, then we are just waiting for the birth process, which takes 9 months and 10 days. At the time of pregnancy, the wife was not allowed to work hard for fear of miscarriage.¹⁴

Technically, the two terms between Gamete Intra Fallopian Transfer (GIFT) and Fertilization in Vitro (FIV) have quite significant differences, although they have almost the same goal, namely to treat infertility or infertility problems.¹⁵

Artificial insemination children obtained from husband and wife can occur from a fertilization of seeds and ova with various possibilities as follows:

The seeds of the husband and wife are then implanted in the womb of the wife. The seeds of a husband and wife are then implanted in another woman's womb. Seed from the husband and fertilized with the ovum of another woman and implanted in the womb of the wife. Seed from the husband and fertilized with another woman's ovum and implanted in another woman's womb. The seed from another male (donor) is fertilized with the wife's ovum and implanted in the wife's womb. The seed from another male (donor) is fertilized with the wife's ovum and implanted in another woman's womb. The seed from another male (donor) is fertilized

with another woman's ovum and implanted in the wife's womb. The seed from another man (donor) is fertilized with the ovum of a different wife from the husband and implanted in the womb of the wife.¹⁶

Islamic criminal law perspective on donor sperm insemination

This insemination is carried out if the husband cannot produce sperm or azoospermia or the husband has a congenital disease that can be passed on to his offspring. Sperm donors must do medical tests first, such as blood type, blood type, background psychology status, IQ test, hereditary disease, and free from infectious diseases. The success rate of AID insemination is 60-70%.¹⁷ Artificial insemination with sperm from a donor is also known as Artificial Insemination Donor.

The results of research and discussion that the results of the artificial insemination process using the husband's sperm are legally permissible based on the results of the ijthad of the scholars and the distribution of inheritance is the same as for children born naturally. The process of artificial insemination using donor sperm is haram and the inheritance is only obtained from the mother. Artificial insemination using a surrogate mother is also illegal and can only be inherited from biological parents. The existence of the process

¹⁴ Salim, *IVF Legal Aspects Review*. 35

¹⁵ Setiawan, *Midwifery Ethics and Health Law* (Jakarta: Trans Info Media, 2010). 125

¹⁶ Arief, *Renewal of Islamic Legal Thought Between Facts and Reality*. 160

¹⁷ Evi Puspita, "Artificial Insemination," 2017, http://ferrykarwur.i8com/Materi_Bio/Materi.Html.

and results of artificial insemination, the authors suggest to the general public,

In Indonesia, attempts at pregnancy outside the natural way can only be carried out by married couples who are indeed difficult to produce offspring due to infertility or problems with the reproductive organs. In the MUI fatwa, it is unlawful for artificial insemination in which the sperm and ovum are taken from other than a legal husband and wife pair. The status is considered the same as having sex between the opposite sex outside of a legal marriage. In addition, artificial insemination of frozen sperm from a husband who has died is also unlawful. Indonesia also prohibits the rental of wombs, in which embryos from the sperm and eggs of a married couple are implanted in another woman's womb. In Article 127 of Law Number 36 concerning Health, the result of fertilization of sperm and ovum from the husband and wife concerned must be implanted in the womb of the wife where the ovum came from.

Artificial insemination carried out with the help of sperm and/or ovum donors is prohibited, and the law is the same as adultery (*prostitution*). And as a result of the law, the child resulting from insemination is illegitimate and his lineage is only related to the mother who gave birth to him.¹⁸

According to Al-Munawar. S, (2004) on the problem of artificial insemination, if the sperm and ovum

that are brought together come from a legal husband and wife, then it is permissible. However, if the sperm and ovum that are brought together are not from a legal husband and wife, then it is not justified and even considered as adultery in disguise.

As for the arguments *syar'i* which can be a legal basis for prohibiting artificial insemination with a donor, are as follows.

Al-Qur'an Surah Al-Isra verse 70:

وَلَقَدْ كَرَّمْنَا بَنِي آدَمَ وَحَمَلْنَاهُمْ فِي
الْبَرِّ وَالْبَحْرِ وَرَزَقْنَاهُمْ مِنَ الطَّيِّبَاتِ
وَفَضَّلْنَاهُمْ عَلَى كَثِيرٍ مِمَّنْ خَلَقْنَا
تَفْضِيلًا

"And verily We have honored the children of Adam, We transported them to land and sea, We provided sustenance from the good things and We gave them a perfect advantage over most of the creatures we have created." (Surat al-Israa: 70).

And the letter At-Tin verse 4:

لَقَدْ خَلَقْنَا الْإِنْسَانَ فِي أَحْسَنِ تَقْوِيمٍ

"Indeed, We have created man in the best of forms." (Surat At Tin: 4).

These two verses show that humans were created by God as creatures who have advantages / privileges so that they exceed other God's creatures. And God Himself is pleased to glorify humans, then humans should be able to respect their own dignity and also respect the dignity of fellow human beings on the contrary artificial insemination with donors. it is essentially degrading human dignity

¹⁸ Mahmud Shaltut, *Al-Fatwa* (Cairo: Darul Qolam, 2007). 326

on the same level as inseminated animals.

Prophetic Hadith

لَا يَحِلُّ لِأَمْرِيٍّ يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ أَنْ
يَسْقِي مَاءَهُ زَرْعَ غَيْرِهِ (الحديث)

"It is not lawful for a person who believes in Allah and the Last Day to pour his water (sperm) on other people's plants (other people's wife's vagina). (Narrated by Abu Daud At-Tirmidhi, and this Hadith is considered authentic by Ibn Hibban)¹⁹

At the time of the priests of the madhhab the problem of artificial insemination with sperm and/or ovum donors, because the word ma' (ماء) in Arabic as well as in the Qur'an it can be used to mean rain water or water in general, as mentioned in Surah Thaha verse 53; and it can also be used for the meaning of liquid or sperm as in Surah Al-Nur verse 45 and At-Thariq verse 6.

The legal rules of Islamic Fiqh which read:

دَرَأُ الْمَفَاسِدِ مُقَدَّمٌ عَلَى جَلْبِ الْمَصَالِحِ

"Avoiding harm (danger) must take precedence over seeking/attracting maslahah/goodness".²⁰

We can understand that artificial insemination with donor sperm and/or ovum brings more harm than harm. The problem is that it can help married couples who are both infertile or one of them is infertile or there is a natural obstacle

in the husband or wife that prevents the sperm cell from meeting the egg cell. For example, because the oviduct (*tuba paluppi*) is too narrow or the ejaculation (sperm emission) is too weak. However, the benefits of artificial insemination are much larger, including the following:

Mixing lineage, even though Islam really maintains the sanctity/honor of sex and purity of lineage, because it has something to do with mahraman (who is lawful and who is forbidden to be married) and inheritance. Contrary to sunnatullah or natural law. Insemination is essentially the same as prostitution/adultery, because there is mixing of sperm with ovum without legal marriage. The presence of artificially inseminated children can be a source of conflict in the household, especially donor-assisted insemination is a very unique child who has very different forms and physical characteristics and character/mental characteristics of the child and his/her parents. Artificially inseminated children whose bloodlines are very hidden and whose donors are kept secret are worse off than adopted children whose origins are generally known. Babies resulting from insemination are born without a natural affection process, especially for insemination through a caretaker mother who must deliver her baby to a married couple whose seeds, according to the contract, there is no natural maternal relationship between the child and his mother (note Al- Qur'an letter

¹⁹ Al-Shun'ani, *Subul Al-Salam* (Bandung: Maktabah Dahlan, 1967). 207

²⁰ Abu Bakar Al-Ahdal, *Faraidhul Bahiyah* (Pasuruan: Sidogiri Library, 2009). 29

Luqman verse 14 and al-Ahqhaf verse 15).²¹

Regarding the status of children who are inseminated with sperm or ovum donors according to Islamic law, they are illegal and have the same status as prostitution children. The Minister of Health assumes that Indonesian people, including religious circles, will be able to receive artificial insemination as well as family planning. However, it must be remembered that religious circles can accept family planning because the government does not impose family planning tools/methods that are contrary to religion, such as sterilization, menstrual regulation and abortion. Therefore, it is hoped that the government will only allow the practice of artificial insemination that does not conflict with the principles of religion, in this case Islam completely prohibits the mixing of nasab with the intercession of donor sperm or ovum.²²

Conclusion

Insemination of donor sperm is an interesting subject to study. There is a chance that the child from the donor's sperm will not be recognized by the parents if it is different from expectations. Therefore, in terms of recognition, both in terms of positive law and Islamic law, it is an interesting problem to study. Islamic criminal law perspective on donor sperm insemination is haram (forbidden) in Islam. The law is the same as adultery and children born

from this kind of insemination have the same status as children born outside of a legal marriage. The view of Islamic criminal law on perpetrators Artificial insemination with donor sperm cells is not restricted as is the law of fornication in adultery, however, artificial insemination with donor sperm is ta'zir on the grounds that the elements in the had of adultery are not fulfilled because there is no direct sexual intercourse

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²¹ Zuhdi, *Masail Fiqhiyah*. 25-26

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