



# Criminal Law Study on Sperm Trading as a Part of Human Organ in Vitro Fertilization Process for Infertile Couple

Trini Handayani<sup>(✉)</sup> and Henny Nuraeny

Suryakencana University, Jawa Barat, Indonesia  
trinihandayani2012@gmail.com

**Abstract.** Reproduction is a process of continuing the lineage. This process involves a couple where the ovum owned by the wife is fertilized by the sperm of the husband, thus forming a zygote. In reality, not all couples have the privilege to produce zygote, thus called infertile, so that there are several means to achieve the goal of having a baby. One way is to undergo the in vitro fertilization (IVF) process that is considered as a pregnancy without natural means. If the IVF still fails, there is a chance to obtain the donor sperm. This situation however raises some issues. First, the biological and legal status seems to contradict each other since intuitively, that baby is the biological child of the sperm donor whereas based on Indonesia Marriage Law Number 1 Year 1974 states that the baby is the legal child of the couple since it is born out of the couple who are legally married. Second, will sperm donor trading be considered as a human organ trading where, as a human, it is a common sense that according to the norm and law, it is considered a prohibited act? It is already well known that internationally the sperm donor trading has been legalized in some countries. But what is exactly the long-term effect that happens when such a thing is legalized? The ambiguity emerging from these issues has to be explained descriptively to clarify the matters in the form of clear legal and biological definition. Therefore, research is performed using a normative juridical method. Using primary law resources like Indonesian laws, books, journals, and the previous research results, the validated qualitative summary can be drawn accurately without any need of quantitative data. The case studies regarding the long-term effects of the legalized sperm donor trading indicates that it is prone to causing an event where the biological father of the child born will leave untracked and worse, the trading will contribute to the significant increase of inbred fertilization. One case in America involves a man who tried to search for his true biological father. He found out that his biological father had donated more than 500 times of his sperm. This raised fear on the man as he is always haunted with the idea that he might date and even marry his sister of the same blood. To avoid the inbred fertilization caused by the sperm donor trading, there is a firm prohibition of human organs trading according to Indonesian Health Law Number 36 Year 2009 Article 192. The same law on Article 127 Paragraph 1 regulates the rules of unnatural means of giving birth, IVF is included in this category. It clearly states that any means of giving birth is considered unlawful if it uses sperm donors.

**Keywords:** sperm trading · in vitro fertilization · criminal law

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## 1 Introduction

The technological advancement in the medical field invented an unnatural means of giving birth called In-Vitro Fertilization in the year of 1970s to overcome the problems encountered by the infertile couple. Indonesian Law on Health Number 36 Year 2009 Article 127 does not define the term of in vitro fertilization, yet there is a statement that says the unnatural means of given birth as the substitute of the term of giving birth extraordinarily, that is through the sexual intercourse between the husband and the wife. The in vitro fertilization process generally is performed on a couple who is legally tied in a marriage. This process fertilizes the ovum by the sperm outside the body of the wife, that inside the fertilization tube. After the ovum has successfully been fertilized and produces embryo, the ovum will then be transferred to the womb so that the mother will have a normal pregnancy [1].

Referring to the Bahasa Indonesia Dictionary about the etymological definition, a child is a human that is still young or a human that is still not mature [2]. Generally, in Indonesian Civil Code Article 330, it is mentioned that a child is someone who is not mature yet or not reaching the age of 21 years and has not married yet [3]. However, the definition and the limit of a child in Indonesia, there is no similarity of what is stated in the Indonesian laws and the opinion of the experts. The reason is because of the background, intent, and purpose differences of each of the Indonesian laws or the experts.

According to WHO (2009), infertility is an illness of the reproductive system that is indicated by the inability to get pregnant after 12 months or more of the regular sexual intercourse without contraception. Infertility affects 20% of couples who desire a child and is considered as an illness. It is predicted that the infertility prevalence, regardless of the primary or secondary, reaches 15% or more of the couples within the reproductive range who desire a child. There are roughly less than a third of the infertile couple caused by the husband and another third is caused by the wife and the rest is because of the combination of both the husband and the wife. Infertility affects between 10% to 15% of the couple with 50% of the cases being caused by the husband [4].

The existence of children in a family is desirable and expected by all married couples, yet in reality not all couples afford such luxury and, in terms of health, can get a child naturally. A child exists to complement the happiness of a family. Lonely days will go away merely with their existence. A child is a blessing of God. Therefore, instinctively all humans have a strong desire to have a child and consider life is not perfect without them. For the parents who have a kid, happiness comes in many forms of what their kids do. They will be proud of what their children achieve, be it having the best grade at school, winning a competition, achieving a high academic title, working for an important position, and etc. This is the most important point of having a child for a family [5].

Nevertheless, having a kid in reality is not always what is hoped and imagined. God grants some who have been married within a year, the others after 2–4 years, or even some have it after more than 10 years. There are many ways that the couples have done to continue their lineage, from getting herbal medication to medication using a tube–test baby. The main issue on how difficult it is to get a child for a couple is infertility. There are times where the couples are considered fertile yet they still have not been able to get pregnant, thus the solution of this issue is to perform a in vitro fertilization where the

ovum and the sperm from the married couple is first extracted, fertilized inside the tube, and then transported back to the womb as stated on Indonesian Law on Health regarding the nascencies in an unnatural ways, one of it is tube-test baby.

## 2 Research Method

This research utilizes the normative juridical method, that is by elaborating the results of the previously related researches descriptively and by analyzing it quantitatively based on the Indonesian laws, and experts' opinions. The theoretical basis, in the form of Indonesian laws and experts' opinions, is used as the main reference of this research that will be adjusted according to the observed fact to validate the data and to gain an accurate summary. Besides that, this basis will also be beneficial to depict the general idea of the background of the research and the resources for the research's results discussion.

## 3 Findings and Discussion

### a. Long-term effects of sperm donor trading.

Sperm donors are prone to causing unexpected inbred fertilization. This is due to the sperm origin being hardly traceable whenever someone tries to undergo the IVF process using that sperm. This fact will definitely lead to huge possibilities that one man might be the biological father of many children since it is possible for him to give his sperm to as many mothers as possible. Besides the possibility of inbred fertilization, there is a chance of paralyzing the relationship of the child with their civil parents when the child finds out that their parents are not biologically tied with him. To summarize, a confusion will definitely arise that will lead to many complicated situations for the fact that the child has different DNA test results than what their parents have.

There are several cases where sperm donor leads to many confusing situations. A case in the UK tells a story about a man named Barry Stevens who finds out that he has 600 half-siblings conceived from the sperm of one single man. His father who was legally married to his biological mother was infertile. So his mother had to receive a sperm donor to continue her lineage. He had to learn this hard truth after his civil father had passed away when his mother bravely told him. At that time, DNA tests were so expensive that he could not afford to prove who his biological father was on paper. As the technology advances and the DNA test is getting cheaper and more accessible, he tested his own DNA and met a man named David that turned out to be his half-brother. He said that he felt a strong bond with the man he met and in many ways were similar to him. He also mentioned that he felt a strong sense of betrayal when he found out that his civil father was not his biological father, thus endangering the relationship with his family [6].

There is also an infamous criminal case in South Korea that shocks the world for its complex nature. The case is infamously named the Abandoned Gumi Baby as it involved a 22-years-old woman named Kim who abandoned her alleged child. She was sentenced to 20 years in prison for abandoning the baby to death. The cause of death is not official yet but it is probably due to starvation and dehydration. Kim was

generally considered as her mother. However, the DNA test revealed that the baby was in fact Kim's biological sister. It was actually the child of Kim's 48-year-old mother named Seok who lived on a different floor of the same multi unit house. That means each of them had given birth around the same time and Kim's mother had switched Kim's biological baby with hers. Seok however refused to reveal the details regarding the complicated situation but there is a chance that Seok might have a baby from the sperm donor [7].

Based on these cases, it can be summarized that sperm donor legalization might lead to lesser DNA variation. Lesser DNA variation will lead to the increase of cases of rare genetic diseases, or worse, new unknown genetic disorders might emerge. This will also cause the child's immune system to weaken. When the immune system is forming, there is a necessary component called Major Histocompatibility Complex (MHC). MHC consists of groups of genes that act as the prevention of illness. For MHC to function properly, genetic variety has to be as high as possible, better known as allele. The allele exists in a human body, the more the body functions properly to prevent illness. This is the reason why in Islam, inbred fertilization is unlawful. Thus, considering the summary obtained from these study cases, it can be inferred that sperm donors will cause chaos among the society that will hinder the achievement of becoming a prosperous society.

- b. Legal point of view regarding the sperm trading on overcoming the problems encountered by the infertile couple who desires a child.

Linguistically, trading is exchanging one thing for another. Trading a good in exchange for another good is considered as selling. However, technological advancement proves to raise new issues, among them are tube-test baby service and sperm injection. These two matters are one of the driving factors of how a medical institution is formed for the purpose of managing the sperm collection, better known as sperm bank. This collected sperm is then traded. Generally the sperm is sold to someone who desires a child, or worse, to a fertile couple who wants to have a better quality child. From this case, writers will elaborate the law that governs the sperm trading, as well as trading goods with money.

The word purchase or buy is a process of adding a matter in exchange of something, or the possession of assets. Nevertheless, this term is always linguistically paired with sales, thus forming the compound word sales and purchase in Bahasa Indonesia or better known as trading in English. The compound word means exchanging goods with the other goods or money with the other goods where one party gets something from another party as an exchange of the goods that have been given. Based on this definition, the summary of the definition of trading is an agreement to exchange goods with the other goods or money in a way of letting go of the rights to possess their goods or money from one party to another with the tacit understanding of the willingness to let go for all parties involved in the activity according to the rules governed by *syara'* or the law of Islam [7].

The use of in vitro fertilization technology to obtain a child is a breakthrough in the medical field that is known commonly used by couples who are infertile. This gives a glimpse of hope for them who have not been granted a child caused by infertility from one of the pair. There are three types of in vitro fertilization usage, those are using the husband's sperm, the sperm donor, and surrogate mother [7].

Couples who are eligible to undergo the tube-test baby procedure are the ones who are infertile, caused by (1) the wife whose two oviducts are damaged, (2) the wife's cervical mucus that is not normal, (3) the immune disorder where there is substance that is anti against the sperm inside the body, (4) no pregnancy even after the oviduct surgery, (5) no pregnancy after having been going through endometriosis medication, (6) the husband who has bad sperm quality (*oligospermia*), (7) unexplained cause of the infertility, [7] (8) immune disorders where the cause is still unknown [8].

There are 4 stages of the in vitro fertilization procedure. First, the ovum is stimulated using specific medication. Second, the best ovum is taken and the sperm is extracted from the husband personally. Third, the best ovum is then fertilized with the best sperm inside the tube. Lastly, the embryo that has been fertilized is transferred to the womb after having been waited for 18-20 hours [8].

The sperm is categorized as a human organ that is diminutive as it can only be seen by the microscope. There is a prohibition to trade sperm according to Indonesian Law Number 36 Year 2009 on Health Article 192 which states criminal punishments of 10 years imprisonment and Rp. 1,000,000,000,- (one billion rupiahs) are given for those who commit such acts. The double punishments are there for the purpose of giving heavy sanction against the criminal action of trading the human organ.

- c. Legal status of the child obtained from in vitro fertilization process who uses the sperm taken not from the legally married couple.

The technological advancement in the medical field that enables infertile couples to have babies is a major breakthrough. However, this phenomena raises ethical and legal issues that have not previously emerged. The main topic here is about the issues of the in vitro fertilization process [9].

The Indonesian Civil Code and Law Number 1 Year 1974 on Marriage don't regulate the firm definition and status of the children born out of the in vitro fertilization process. As an effect of no clear regulation, the legal status regarding the performers—in this case the doctors, researchers, and scientists—, husband, wife, sperm donor, ovum donor, surrogate mother, and baby are ambiguous. During the course of the process advancement, the question will always arise and there will always be opinion differences about the artificial insemination [9].

In vitro fertilization is a procedure that should be an important consideration for meeting humans' personal needs so that it needs protection. The legal protection pertaining to the in vitro fertilization procedure should govern matters within the scope of family ties and how society should best react to that procedure. One of the family ties' matters is juridical and hereditary status of the child. In Indonesia, the laws that rule the artificial reproduction technique is regulated on Indonesian Law Number 36 Year 2009 on Health Article 127 Paragraph 1 which states that any efforts of unnatural nascency can only be performed by the legally married couple with the conditions that (a) the sperm and ovum fertilization result from the legally married couple has to be transported to the womb where the ovum originates, (b) the procedure is performed by the medical staffs who have the capacity and rights to perform such procedure, and (c) the procedure is performed at the registered medical facilities. The next article then mentions that the conditions of unnatural nascency are regulated by Indonesia Government Regulation [10].

Ministerial Decree of Indonesia Ministry of Health Number 72/Menkes/Per/II/1999 on Organizing the Artificial Reproduction Technology defines the general regulations, permissions, guidance and monitoring, transition regulation, and closing regulation for any means of unnatural nascency. Furthermore, based on the decree of Indonesia Health Ministry, the Special and Private Hospital Directorate of the Indonesia Health Ministry creates the guidance for serving tube-test baby at the hospital which states that (1) Artificial technology service can only be performed using the husband's sperm of the legally married couple, (2) Artificial reproduction service is a part of the infertility service holistically, (3) Embryo can be transported to the womb not more than three embryos simultaneously; four embryos can only be transported in conditions that (a) the hospital has three levels of newborn baby care unit, (b) the legally married couple has previously undergone at least artificial reproduction technology procedure twice that failed, (c) the wife's age is more than 35 years old [11].

Juridical status of the child born out of the in vitro fertilization process using sperm donor and ovum of the wife where the embryo is transplanted into the womb of the wife can be classified into two types of child, (1) The child is legal through the confession if the sperm donor is obtained with the permission from the husband, (2) The child is considered as illegitimate if the sperm donor is obtained without the permission from the husband. According to Indonesia Civil Code, Article 280 mentions that the effect of the confession of that child is the civil ties between the child and their parents who have acknowledged that child is formed. In another word, the child's acknowledgement causes the status of that child to be legal so that it forms the rights and obligations just like the rights to use their parents' name [9].

d. A criminal law policy against buying up spermatozoa.

Terminologically, the term policy can be defined as the general principle that acts as the guidance for government, including the law enforcer, in managing, controlling, or overcoming public matters, societal issues, or sections for forming the laws, and allocating laws or rules to achieve one general goal towards realizing the prosperous society [12]. Soedarto said that criminal politics holds the election to achieve the results of criminal laws that are the best for the sake of fulfilling justice and efficiency [13]. Furthermore, Mahmud Mulyadi stated that criminal politics is an endeavor to define the direction of the Indonesia criminal law enforcement in the future using the projection of the current enforcement [14]. The definition is more clearly defined on the definition of penal policy coined by Marc Ancel, that is a knowledge and art at the same time that has a purpose of enabling the positive law to be formed better [15]. Based on those definitions, the criminal law policy is an effort to enforce the criminal law against criminal action that is generally necessary for law amendments. One of criminal law policies that is currently needed is sperm trading where there are cases that happen in the society.

In the regulation of legal studies in Indonesia, sperm trading has no legality either juristically or sociologically. Yet, in reality there are always cases that happen without publication and media coverage. The reason is that every person has their own motives and interests, be it economy, or privilege. Sperm trading is assumed to happen because one of the pairs in a marriage cannot meet the standard of good quality sperm, so that it causes the couple to have difficulty in having a child.

Generally, every family expects to continue their lineage legally from the legally married couple, yet there are always cases where a couple is infertile. *in vitro fertilization* (IVF) is a pregnancy that happens initially by the ovum that is fertilized by the sperm outside the body. The fertilization is performed inside the tube. This procedure is performed if any efforts of pregnancy, like consuming medicines and undergoing artificial insemination or surgery, does not yield any results. IVF is an effective method from the category of reproduction technology to get pregnant. The procedure can be done by using the wife's own ovum assisted by the sperm of the husband. On another hand, this procedure might involve ovum, sperm, or embryo from the donors. In some instances, a surrogate mother might also be involved to transplant the embryo inside her womb if the wife has a pregnancy problem.

Tube-test baby process phenomena raises legal issues if the sperm does not come from the legally married couple, or in another word obtained from the other person outside the marriage, either obtained from purchasing or obtaining the donor from the sperm bank. The practice of trading sperm through the sperm bank according to sharia law is unlawful since the buyer, that is the woman, inserts the sperm obtained from the sperm bank to her genitalia to get pregnant using artificial insemination means, that is the technique to get pregnant without sexual intercourse.

The law that regulates the sperm trading prohibition is clearly stated in the Indonesian Bill on Family Endurance, where the bill regulates the prohibition for every person to trade, to donate, or even to receive sperm or ovum. This is written on Article 31 that states (1) every person is prohibited from trading sperm or ovum, donating voluntarily, receiving sperm or ovum donor performed personally or through the institution for any means of having a child, (2) every person is prohibited from persuading, facilitating, forcing, and/or threatening others to trade sperm or ovum, to donate, or to receive sperm or ovum donor performed personally or through the institution for any means of having a child [16].

Furthermore, Article 32 states that (1) every person is prohibited from surrogating for any means of having a child, (2) every person is prohibited from persuading, facilitating, forcing, and/or threatening others to surrogate for any means of having a child [16].

Whereas Article 139 regulates the criminal punishment for any parties involved in Article 31 Paragraph 1. For those who do it will be punished criminally by 5 years of imprisonment and/or the fine of at most Rp. 500,000,000 (five hundred millions rupiah). As for those who do the criminal act stated in Article 32 Paragraph 2 will be punished with more severe punishment as regulated in Article 140. Article 140 states that those who do it intentionally will be imprisoned for 7 years with the fine of at most Rp. 500,000,000 (five hundred millions rupiah).

Based on the articles above, it can be summarized that the act of surrogating to have a child is clearly prohibited. The prohibition also includes the acts of persuading, facilitating, forcing, and/or threatening others to surrogate to have a child. The regulation that gives sanction for those actions as stated in Article 31 and 32 is written on Section XIII Article 139, 140, 141, 142, and 143. The sanction can be given for a person or a corporation [17]. The regulation of that bill can be considered

as *ius constituendum*, the law that is expected or the law that will be enforced in the future, from the criminal law standpoint.

Referring to the criminal law policy concept, that bill is still on the stage of formulation. Nonetheless, it is considered as the effort to realize a prosperous society based on the penal policy defined by Marc Angel [18]. Based on the definition from Marc Ancel, Sudarto defines penal policy quoted by Barda Nawawi Arief as:

- a. The effort to materialize laws that are well tailored to the current situation and condition;
- b. Policies from the country through the institutions that have the rights to define the laws that are predicted to be useful for expressing something that exists within the society and to achieve what is dreamed of [19].

Another opinion comes from A. Mulder, where he defines *Strafrecht Politiek* or penal policy as the boundary of policy to define (1) how far the enforced criminal policies have to be amended or renewed, (2) what can be done to prevent the criminal action, and (3) how to investigate, prosecute, justify, and execute criminal policies [18].

According to the above opinions and theories, the summary is that criminal law policies or penal policy is a regulation that is formulated and set by the authorized institutions as a guideline for society or law enforcers for the purpose of preventing and overcoming criminal actions. The effort of overcoming criminal action is a part of law enforcement. Therefore, it is often said that criminal law policy is a part of law enforcement policy [18]. Besides being a part of law enforcement policy, it is also an integral part of protecting social welfare and of social policy as well. Social policy can be interpreted as a rational effort to achieve a prosperous society including society protection. Thus, the definition of social policy includes social welfare policy and social defense policy [18].

Referring to the opinion of the experts regarding the criminal law policy theory, the criminal law in Indonesia prohibits sperm or ovum trading as well as ovum surrogate. Besides being prohibited, this matter is also considered unlawful according to religious standpoint since the means of having a child is obtained not from the legally married couple. This will affect the legal status of the newborn child. The child born out of this means will not always be and automatically considered as the legal child and the heir because it has to be observed from the marriage status tree, fertilization, and, specifically for tube-test baby, where the sperm is obtained from. The IVF process using the sperm obtained from the donor outside the legally married couple will face great consequences and difficult situations from the legal standpoint. To avoid this situation, a criminal law regulation is strongly necessary that regulates the sperm or ovum used in the IVF process so that the legal and justice certainty can be achieved.



## 4 Conclusion

Based on the above elaboration, it can be summarized that:

1. The status of the child born out of the in vitro fertilization process according to the Indonesia Civil Code is a legal child if the process uses the husband's sperm based on the legal marriage conditions regulated on Indonesian Law Number 1 Year 1971. The child will also have civil ties and the rights to receive inheritance;
2. Sperm is considered as a diminutive human organ as it can only be seen using microscope, thus making it strongly prohibited for trading as human organs trading prohibition is regulated on Indonesian Law Number 36 Year 2009 on Health with criminal sanction of 10 years of imprisonment and fine of Rp. 1,000,000,000,- (one billion rupiah). The double criminal sanctions are intended to give severe punishments for those who commit human organs trading

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