

The Legal Certainty Surrounding the Status of Children Born Through in-Vitro Fertilization With a Deceased Biological Father is A Subject of Discussion

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Received : December 14, 2023

Accepted : January 5, 2024

Published : February 28, 2024

Citation: Dermawan, I, M. (2024). The Legal Certainty Surrounding the Status of Children Born Through in-Vitro Fertilization With a Deceased Biological Father is A Subject of Discussion. Sinergi International Journal of Law, 2(1), 27-37.

ABSTRACT: The purpose of marriage includes the desire to have offspring; however, not all married couples achieve this, often due to primary health issues. Expert doctors, armed with knowledge and technology, have discovered a method in the process of reproduction known as in-vitro fertilization (IVF). This discovery serves as a solution for married couples facing health problems. IVF is a process where egg fertilization by sperm occurs outside the female body, utilizing a fertilization tube. The resulting valid fertilization is then implanted in the wife's womb, from where the egg originated. The legal regulations for IVF are based on Law Number 36 of 2009 concerning health. Assisted pregnancy efforts can only be undertaken by legally married couples, meeting specific criteria such as fertilization materials originating from the husband and wife, with the implantation performed by authorized healthcare professionals at designated facilities. If these conditions are met, the offspring resulting from IVF is considered the biological child of the married couple. However, new challenges arise when the IVF process is conducted after the husband's demise, particularly in determining the lineage and civil rights status of the child or baby born through this process. To address these new challenges, this research aims to understand the legal status of posthumous IVF implementation and the lineage and civil rights status of children born through this process. The research is conducted through a literature review, utilizing a normative approach, with data collection from primary and secondary sources. The research findings indicate that the lineage and civil rights of a child born through posthumous IVF can be established with evidence from the biological father, demonstrated through scientific and technological means or other legal evidence establishing a blood relationship, as highlighted in Constitutional Court Decision No. 46/PUU VIII/2010. **Keywords:** In-Vitro Fertilization (Bayi Tabung), Legal Certainty, Civil Rights. **Keywords:** Status of Children, in-Vitro Fertilization, Biological Father



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INTRODUCTION

Marriage is a spiritual and physical bond between a man and a woman with the aim of establishing a lasting and happy family based on the belief in the Almighty (Law Number 1 of 1974 concerning

Marriage, Article 1). Each individual is born with diverse forms and characteristics to complement one another (Ha et al., 2023; Mainguy et al., 2022; Widayati & Pangestu, 2020). Living in matrimony is a natural demand for humans as social beings. The smallest unit of society, known as a family, consists of a household head and several individuals who gather and reside together under one roof, interdependently fulfilling each other's needs.

A family feels more complete with the birth of a child. The presence of a child is a cherished desire for every married couple, as children are considered to have unique value for the family. Many perceive a family as incomplete without children, and children are believed to enhance the harmony of the household (Hirth et al., 2023; Tesfaye et al., 2004). The presence of a child can bring solace in solitude and serve as a primary support for the creation of a peaceful life, manifesting the essence of love and affection. However, not all married couples can easily have offspring, and many couples may struggle for years without success in having children.

The inability of a married couple to conceive, despite being married for an extended period, is often attributed to health issues. Health disruptions can affect not only the wife but also the husband. Several health issues may affect women, including damage to the fallopian tubes, endometriosis, early menopause, polycystic ovary syndrome (PCOS) (Farland et al., 2022; Lee et al., 2023; Ryu et al., 2023), ovarian scarring, thyroid problems, cancer treatments, pelvic adhesions, certain medications, lifestyle factors, and age (Mikail). On the male side, issues may arise with weak or insufficient sperm that cannot reach the wife's uterus to meet the egg. Strengthening the sperm or facilitating their journey to the wife's uterus may not always resolve this issue. This situation can lead to infertility, hindering the couple from having children (Armini et al., 2020; Kim et al., 2020; Purba et al., 2021).

Difficulty in conceiving is often attributed to health disruptions in the reproductive organs or fertility issues. Even when a couple is declared fertile, some may still face challenges in getting pregnant. Contributing factors to difficulty in conceiving, despite being declared fertile, include obesity, reproductive organ diseases, frequency of sexual intercourse, history of delaying pregnancy, hormonal imbalances, and other related factors.

Millions of married couples worldwide strive in various ways to have children, prompting scientists to compete in creating the latest innovations using technology and scientific knowledge. The result of their efforts is the discovery of a new method in human reproduction, known in medical terms as In Vitro Fertilization (IVF), more commonly referred to as test-tube baby technology (Ishaq et al., 2023). "In Vitro" is derived from Latin, meaning "in the glass" or "in a test tube," while "Fertilization" is an English term denoting the process of conception (Shidiq, 2016). This discovery has become a significant solution for married couples facing difficulties in conceiving, and even those experiencing infertility.

A scientist R.G. Edwards conducted research on a couple named John Brown and Leslie, who had been experiencing infertility for nine years. This research led to a groundbreaking discovery, and on July 25, 1978, Louise Joy Brown was born as the world's first test-tube baby in the United Kingdom (Kompas). The concept of test-tube babies was introduced in Indonesia in 1983, and on May 2, 1988, a child born through the IVF process was safely delivered at Harapan Kita Hospital

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in Jakarta, named Nugroho Karyanto (Perfitri.org). This success became a new hope for couples desiring to have children. However, the introduction of this new technology inevitably sparked debates among politicians, religious leaders, and medical professionals regarding the legality and biomedical ethics of such research.

The In Vitro Fertilization (IVF) technology allows the fertilization of an egg by sperm outside the wife's body, presenting a novel breakthrough to assist married couples yearning for the presence of a child in their family (Prawirohardjo, 2006). Since then, the IVF technique has progressed over the years, gaining popularity not only among ordinary people but also within the celebrity community. Examples include celebrity couples like Zaskia Sungkar & Irwansyah, Surya Saputra & Cyntia Lamusu, and others who have undergone IVF programs based on their respective reasons.

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However, not all segments of society can afford this, primarily due to the substantial costs associated with the IVF process. In Indonesia, the cost of IVF procedures starts at Rp. 40,000,000 per cycle. Meanwhile, in Malaysia, it begins at Rp. 53,000,000 per cycle, in Singapore at Rp. 78,000,000 per cycle, and in Thailand at Rp. 180,000,000 per cycle (Alodok).

The implementation of Artificial Insemination in Indonesia involves obtaining male sperm and female eggs, then combining them outside the womb in a prepared tube. The sperm and eggs are taken from a legally married couple. After fertilization occurs, the resulting mixture is then placed into a woman's womb. The sperm and eggs are stored at a temperature adapted to their original environment, allowing them to remain viable for months or even years.

In the implementation of IVF programs, there is a risk that humans cannot predict, namely death. Because the timing and location of a person's death are never known. An incident in 2021 in the Gujarat State of India illustrates this, where a woman underwent IVF treatment after her husband had passed away. At that time, according to the doctors, the chances of her critically ill husband surviving Covid-19 were very slim. However, the woman was determined to have a child from her husband as a tangible representation of his final legacy. The extraction of her husband's sperm was done when he was in critical condition, and the process of combining the sperm and egg was carried out after his passing (Suara.com).

When viewed from the regulations in place in Indonesia, Islamic law states that when a married couple passes away, their marital relationship is automatically terminated, a concept often referred to as "cerai mati" or death divorce. According to Article 2 of the Civil Code, which states, "A child conceived is considered to be born whenever its interests require it. If the child dies during delivery, it is considered as if it never existed. (Civil Code Article 2)" However, the observed fact contradicts

this legal stance, as the sperm from a deceased husband can still function to produce offspring through In Vitro Fertilization (IVF).

In the future, this will give rise to issues, particularly concerning the child's lineage and civil rights. From the perspective of Islamic law, regarding the clarity of the legitimacy of the sperm source used after the married couple has separated due to the death of one party, the status of a child born through IVF is considered invalid. Scholars generally agree that a child born in such circumstances only inherits from the mother. However, from a positive law perspective, a child born through IVF is considered the biological child of the father. This becomes complex because the baby is in the mother's womb when the biological father has already passed away. This view contradicts Article 2 of the Civil Code, which states that a child is considered legitimate and has a lineage relationship with both parents if the mother is pregnant when the father passes away, and the child is born safely.

Given the issues outlined, it is intriguing to conduct an in-depth study to understand how the lineage and civil rights of children are affected based on the prevailing legal regulations in Indonesia. In this context, the author can explore the topic to be discussed and presented in the thesis titled: "Legal Certainty of the Status of Children Resulting from In-Vitro Fertilization with a Deceased Biological Father."

METHOD

The method used in this research is based on literature research, where literature serves as the primary source of data. This type of research falls under the category of normative juridical legal research. Normative juridical legal research is a deductive analysis of articles in legislation that regulate the issues mentioned above. The juridical research approach means that this study refers to existing literature studies and/or examines literary materials. Meanwhile, being normative in nature, it aims to obtain normative knowledge about the relationship between one regulation and another. (1) How is the legal certainty of children resulting from in-vitro fertilization with a deceased father viewed from the perspective of positive law in Indonesia? (2) What are the civil rights of children resulting from in-vitro fertilization with a deceased father, especially after the Constitutional Court Decision No. 46/PUU VIII/2010?

RESULT AND DISCUSSION

1. Analysis of Positive Law Regarding the Legal Certainty of the Status of Children Resulting from In-Vitro Fertilization with a Deceased Biological Father Based on Constitutional Court Decision No. 46/PUU VIII/2010.

As previously discussed, a child conceived through In-Vitro Fertilization after the death of the husband is categorized as illegitimate and is not entitled to civil rights from the father, especially inheritance rights. The provision in Article 43 paragraph (1) of Law No. 1 of 1974, in addition to

aligning with fiqh theory, also aligns or at least does not contradict the 1945 Constitution, particularly Article 28B paragraph (1) and paragraph (2), as well as Article 28D paragraph (1). However, this conclusion appears to differ from the opinion of the Constitutional Court, which states that Article 43 paragraph (1) of Law No. 1 of 1974 is in contradiction with the 1945 Constitution because it denies civil rights to children born out of wedlock from their biological father.

The purpose of Constitutional Court Decision No. 46/PUU VIII/2010 is to:

- (1) Legitimize the legal blood relationship between a child and their biological father, transforming what was initially a reality into a legal relationship with legal consequences.
- (2) Ensure fair treatment for every child born, even if their parents' marriage is not (yet) legally certain.
- (3) Provide legal protection for the basic rights of children concerning both their father and their father's family and environment.
- (4) Affirm the legal obligation (legal custody) of a father to support every child born from his blood.
- (5) Reinforce the legal obligation (legal custody) of a father to support every child born from his blood.

In this context, as long as the child's biological parentage can be scientifically proven through knowledge and technology, given that the sperm used is clearly from the biological father, the conception process is, however, not natural but rather scientific. Despite the non-natural conception technique, a child born in this manner still deserves protection and rights as a human being. The goal of the Constitutional Court in issuing Decision No. 46/PUU VIII/2010 is to ensure that the child is not disadvantaged psychologically, does not become a target of social stigma, public ridicule, and similar issues.

It is not possible for a woman to become pregnant without the union of sperm and egg, either scientifically or through other means, based on the advancements in science and technology. Therefore, it is not accurate if the child is only granted civil status to the mother and her family because the baby is within the mother's womb after the biological father's death. The law should provide fair protection to the child's status and rights, including those born even if the validity of their parents' marriage is still contested.

In Law Number 23 of 2002 concerning Child Protection, various aspects of child protection, including religious, health, educational, and special protection aspects, are regulated in a mutually supportive manner. The implementation of child protection involves these various aspects. Additionally, the child's civil rights are part of efforts to fulfill the child's rights, regulated under the Child Protection Law, specifically in the section on the Child's Status. Article 27 specifically addresses the following:

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- (1) The personal identity of every child must be provided from birth.
- (2) The identity, as referred to in paragraph (1), is recorded in the birth certificate.
- (3) The creation of a birth certificate is based on a statement from individuals who witnessed and/or assisted in the birth process.
- (4) In cases where the birth process of a child is unknown, and the parents' whereabouts are unknown, the creation of a birth certificate for that child is based on information from the person who found them.

Another related provision is the right of a child to know their parents, as stipulated in Article 7 of the Child Protection Law, which states:

- (1) Every child has the right to know their parents, to be raised, and nurtured by their own parents.
- (2) In cases where, for some reason, the parents cannot ensure the child's growth and development, or the child is in a neglected condition, the child has the right to be fostered or adopted by someone else, following the provisions of the applicable laws and regulations.

The determination of a child's lineage outside of marriage to the mother is intended to protect the child's lineage and other related religious provisions, not as a form of discrimination. Even in the case of adopted children, the child must be informed of their origins and is prohibited from concealing their origins, as stipulated in Article 40 of the Adoption Law (UUPA), which emphasizes that "Adoptive parents are obliged to inform the adopted child about their origins and biological parents."

The status of the civil rights of a child resulting from In Vitro Fertilization after the death of the husband following the Constitutional Court Decision No. 46/PUU VIII/2010 is that the child is entitled to civil rights from both the mother and the father. The relationship between the child and a man as the father is not solely based on the marital bond but can also be established through proof of a blood relationship between the child and the man as the father. Therefore, regardless of the marital status, a child born should receive legal protection. Failing to do so would harm the innocent child. However, it should be noted that the Constitutional Court Decision No. 46/PUU VIII/2010 does not automatically serve as legal cover for children resulting from in vitro fertilization after the biological father's death; their civil rights must still go through the judicial process.

2. Analysis of Islamic Law on Legal Certainty of the Status of Tube Baby Offspring Whose Biological Father Has Passed Away Based on Constitutional Court Decision No. 46/PUU VIII/2010

In examining the issue of In Vitro Fertilization (IVF) after the death of the husband according to Islamic law, the method of *ijtihad* commonly employed by *mujtahids* is utilized to determine a

ruling in line with the principles and spirit of the Qur'an and Sunnah, which are the primary sources of Islamic law. However, it would be more beneficial for the matter of IVF to be scrutinized through a multidisciplinary approach involving scholars and Muslim intellectuals from various relevant disciplines such as medicine, biology, law, religion, and ethics. This approach aims to reach a legal conclusion that is truly proportional and foundational.

In Vitro Fertilization (IVF) conducted using the sperm of a deceased husband on the eggs of a woman who is no longer his (legal) wife, despite the aim to address difficulties in conceiving through conventional means, is not sanctioned by Islamic Sharia. This is because it gives rise to a more significant issue – the offspring's lineage status cannot be connected to both parents. As per the jurisprudential principle: "Preventing harm takes precedence over securing benefits, and when there is a conflict between harm and benefit, the priority is given to preventing harm."

Since the 1980s, the issue of artificial insemination has been widely discussed among the Islamic community, both at the national and international levels. Islam permits this practice when it involves the use of the husband's sperm and the wife's egg, and the resulting embryo is not transferred to the womb of another woman, including another wife in the case of polygamous marriages. This approval extends to various methods, such as injecting the husband's sperm into the wife's vagina or uterus or utilizing In Vitro Fertilization, where the fertilized egg is then implanted into the wife's womb. It is important to note that this is permissible only when the husband and wife genuinely require artificial insemination to conceive, as natural conception has proven unsuccessful for them (Zuhdi, 1994).

On the contrary, if artificial insemination involves the use of donated sperm and/or eggs, it is considered forbidden, and its legal consequences are akin to adultery (prostitution). Consequently, the child resulting from such insemination is considered illegitimate, with lineage only linked to the mother who gave birth (Syaltut, t.th.). Regarding the issue of test-tube babies, the Indonesian Council of Ulama has issued four fatwas (Agama, 2003):

- (1) In the case of test-tube babies using the sperm and eggs of a legitimate husband and wife, it is deemed permissible (allowed) as it falls under individual choice based on religious principles.
- (2) Test-tube babies from a legitimate husband-wife pair with the surrogate womb of another wife (for example, from the second wife entrusted to the first wife) are deemed forbidden based on the principle of *Sadd Al-Zari'ah*. This is because it could lead to complex issues related to inheritance, especially concerning the children born to the mother providing the eggs and the mother carrying and delivering the child, and vice versa.
- (3) Test-tube babies using frozen sperm from a deceased husband are considered forbidden as it can lead to complicated issues, both in terms of determining lineage and inheritance.
- (4) Test-tube babies using sperm and eggs taken from individuals other than a legitimate husband and wife are deemed forbidden. This is because their status is equated with

extramarital relations between individuals of different sexes (adultery), based on the principle of *Sadd az-zari'ah*, which aims to prevent the occurrence of actual adultery.

A conclusion can be drawn that, according to Islamic law, in the case of in vitro fertilization post the death of the husband, the child is considered illegitimate because the process of conceiving the child occurs after the marriage of the parents has ended due to the husband's death. The status of legal rights for a child resulting from in vitro fertilization post the death of the husband after the decision of the Constitutional Court No. 46/PUU VIII/2010 cannot be justified as it contradicts Islamic Sharia, and it is considered forbidden. Thus, according to Islamic law, the legal rights status of a child resulting from in vitro fertilization can only be attributed to the mother.

CONCLUSION

Regarding the discussion on the Legal Status Assurance of Children Resulting from In Vitro Fertilization After the Death of the Biological Father post the Constitutional Court Decision No. 46/PUU VIII/2010:

- (1) According to Civil Law and Islamic Law, the lineage/*nasab* status of a child resulting from in vitro fertilization processed after the death of the father can only be attributed to the mother and her family.
- (2) According to Civil Law and Islamic Law, a child resulting from artificial insemination from a deceased father inherits only from the mother based on Article 836 of the Civil Code and in accordance with the inheritance laws in Islam.

Based on the decision of the Constitutional Court No. 46/PUU VIII/2010, a child resulting from in vitro fertilization after the death of the biological father can obtain legal rights from the biological father as long as it can be proven with scientific and technological evidence or other legal evidence that, according to the law, has a blood relationship. Another reason is that the child obtains legal rights from both the father and the mother because the relationship between the child and the parents is not solely based on the marital bond but also on the proof of a blood relationship between the born baby and the biological father. Thus, regardless of marital status, a child born should receive legal protection. If not, the child will suffer unjustly. The Constitutional Court Decision No. 46/PUU VIII/2010 serves as legal precedent, and, of course, the legal rights must still go through the judicial process.

Based on the above conclusion, the author's suggestion is that in the development of science and technology, the medical and health sciences sector should operate within the existing norms, not just from a medical perspective. This is necessary to anticipate the disruption of social order in society. The government should consider prohibiting the establishment of sperm and egg banks to prevent the accumulation of frozen sperm and eggs, which may lead to new issues, especially regarding lineage and descendants.

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