Regulations of Artificial Insemination Between Sharia rulings and National Legislation

ضوابط التلقيح الاصطناعي بين أحكام الشريعة والتشريع الوطني

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Received: 18-06-2025 *Accepted: 16-11-2025*

Abstract:

The objective of this study is to research the regulations governing artificial insemination by comparing Islamic Sharia rulings with Algerian national legislation. It analyzes the conditions stipulated in Algeria's Family Law and Health Law, such as the requirement of a legal marriage, spousal consent during their lifetime, and the prohibition of third-party gametes or surrogacy. The paper discusses varying scholarly Islamic opinions on the matter and concludes that while Algerian law permits the practice under strict conditions to protect lineage, it still lacks the detailed provisions necessary to address all modern complexities and prevent potential misuse.

Keywords: the regulations; insemination; Sharia; national legislation.

ملخص:

تسعى هذه الدراسة إلى البحث في الضوابط المنظمة لتقنية التلقيح الاصطناعي من خلال مقارنة أحكام الشريعة الإسلامية بالتشريع الوطني الجزائري .كما تحلل الشروط التي نص عليها قانون الأسرة الجزائري وقانون الصحة ،كاشتراط الزواج الشرعي، وموافقة الزوجين حال حياتهما، وحظر استخدام أمشاج طرف ثالث أو الأم البديلة .وتناقش أيضا اختلاف آراء الفقهاء المسلمين حول المسألة، وتخلص إلى أنه على الرغم من أن القانون الجزائري يجيز هذه الممارسة ضمن شروط صارمة لحماية النسب، إلا أنه يفتقر إلى التفصيلات الدقيقة اللازمة لمواجهة جميع التعقيدات الحديثة ومنع أي استغلال محتمل.

كلمات مفتاحية: الضوابط. المنظمة، التلقيح. الاصطناعي، الشريعة. الإسلامية، التشريع. الوطني.

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1. INTRODUCTION

Allah, the Creator of the universe, has established marriage for human being (man and woman) as a natural means for human reproduction. This process generally occurs through natural insemination. However, there are instances when pregnancy may not occur due to various factors or obstacles that prevent natural conception from taking place.

It is well known that infertility can lead to significant family problems; one of the most notable is the high rate of divorce, with couples separating from each other. In order to overcome and ease this obstacle, scholars have made considerable efforts, which eventually led to the discovery of the technique of artificial insemination.

The remarkable progress that science has achieved has made possible what was once impossible and difficult, including « artificial insemination » aimed at facilitating reproduction. This technology has attracted significant attention from many scientists and scholars. Among these scholars are Islamic jurists who have focused on studying the process of artificial insemination. They have agreed that resorting to this technique should only occur in cases of necessity and in accordance with specific legal Sharia guidelines, in order to preserve lineage from being mixed on one hand, and to prevent potential harms on the other. Necessity makes the forbidden permissible, and necessity should be measured by its extent. Therefore, most legal systems have kept up with biological medical advancements by regulating assisted reproductive processes. In this regard, the Algerian legislator, through an amendment to the Algerian Family Law in 2005 (Official Gazette, 2025, pp. Law No. 84-11) under Article 45 bis, has permitted the use of artificial insemination under specific conditions. It has emphasized the conditions and regulations for artificial insemination through the Health Law dated in 2018 (Official Gazette, 2020, pp. Law No. 18-11) in Article 371 of Chapter Seven: Ethics , literature and Bio, Section Four: medical ethics, Part Three: bioethics .

The Algerian legislator has stipulated criminal penalties in the Health Law for any act that violates the provisions related to assisted reproductive medicine mentioned in Chapter Seven.

Thus, the importance of the research titled Regulations of Artificial Insemination between Sharia Law and Algerian legislation lies in demonstrating the various frameworks established for it in both laws. The objective of studying the topic is to verify the adequacy of these established regulations, as well as the criminal penalties imposed for its violation, as outlined by the legislator in both the Algerian Family Law and the Health Law, in order to protect lineage.

Hence, the posed issue is as follows : To what extent are the regulations on artificial insemination, as stipulated by the Algerian legislator adequate in preserving lineage and preventing the harms resulting from their violation?

To address this issue, an inductive approach has been adopted by examining the provisions and criminal penalties outlined in both the Family Law and the Health Law, as well as an analytical approach by studying the legal rules governing these regulations and criminal penalties.

2. Chapter One: The Concept of Artificial Insemination

Explaining the concept of artificial insemination requires defining it and identifying similar terms.

2.1 The First Section: Definition of Artificial Insemination

It can be said that artificial insemination is a form of reproduction assisted by modern technology, which doctors and specialists have resorted in order to treat cases of infertility in couples.

The scholars have provided several definitions of artificial insemination, including the following: “Artificial insemination is the process of combining a male gamete with a female gamete without natural sexual intercourse, under the care of a specialized doctor for the purpose of

reproduction" (Zoubeida, p. 15).

It has also been defined as: «The process through which the wife's ovum is fertilized by being combined with her husband's sperm, whether this combination took place inside the uterus or initially in a tube, and then the fertilized ovum is transferred to the wife's uterus without any intervention from others at all. This occurs during the husband's life and within the framework of a marital relationship between the couple» (Heikal, 2007, pp. 118-119).

It has also been defined as: «A process conducted either to introduce sperm into the vagina for the purpose of fertilizing the ovum inside the uterus, or to implant the fertilized ovum into a test tube and then into the woman's uterus who desires to become pregnant. This is done for a therapeutic reasons to treat the effects of infertility, enabling the spouses (or friends in non-Islamic countries) to have children» (Taha, p. 82).

It has also been defined as: «a complex medical process in which the wife's ovum is fertilized by her husband's sperm within an existing marital relationship, whether the fertilization occurs inside the wife's uterus or outside, and then the fertilized ovum is returned to the uterus with the aim of reproducing a child that they were unable to reproduce through natural means» (Heikal, 2007, p. 119) .

These definitions attempted to define artificial insemination by specifying its types, while other definitions focused on explaining its process, purpose, and outcome.

When referring to Algerian law, we find that the legislator did not define artificial insemination in the Algerian Family law but addressed the matter in the Health Law, using the term "medical assistance for reproduction" instead of the term "artificial insemination." Article 370 states: "Medical assistance for reproduction is a medical activity that allows reproduction outside the natural process in the case of medically confirmed infertility. It consists of clinical, biological, and therapeutic practices that allow for the stimulation of ovulation, in vitro fertilization, embryo transfer, and artificial insemination.

2. The second section: Distinguishing Artificial Insemination from Similar Procedures

Artificial insemination is distinct from the term cloning. Cloning has been defined as: "The process of producing a living organism by transferring a living cell containing all the genetic information into an empty ovum, resulting in an embryo identical to the original in terms of genetic, physiological, and morphological characteristics (Fahmy, 2014, p. 182) .

Cloning is the production of offspring from somatic cells taken from adult individuals. The offspring is born carrying all the traits of the individual who donated the somatic cell, and only those traits. In other words, the offspring is an identical copy of that individual, as if it were a carbon copy of a page of writing or a photocopy of it. The reason the offspring appears as an exact replica of the donor of the somatic cell is that this cell contains the duplicated chromosomal number, meaning it contains the entire structure , form or genetic composition.

As a reminder, the Algerian legislator used the term "artificial insemination" rather than "industrial" according to Article 45 bis of the Algerian Family law (Official Gazette, 2005, pp. No. 05-02), because the correct literal translation of the word from the foreign language "Artificial" means human intervention in a mechanical, manual way, which is different from the natural process that occurs without human intervention. On the other hand, the term "El sinaa'i" , in the foreign language corresponds to the word "Industrial," which means "industry," and there is a clear and significant difference between the two terms (Saida, 2016, p. 72).

3. The Second Chapter: Legislative Treatment of Artificial Insemination and Its Conditions

The legislative treatment of artificial insemination as a modern method requires a review of various legislations that have addressed it, starting with family law.

3.1 The first section: Legislative Treatment of Artificial Insemination

The legislative definition of artificial insemination, according to the Algerian law, does not provide a specific definition but permits it according to Article 45 Bis mentioned above. It is subject to three conditions for it to be performed. The first condition is that the marriage must be legitimate. The second condition is that the insemination must be with the consent of both spouses and during their lifetime. The third and final condition is that it must be done using the husband's sperm and the wife's ovum, and no other. Therefore, according to Algerian legislation, artificial insemination refers to the process of combining the wife's ovum with her husband's sperm, under the supervision of a qualified doctor, with the purpose of conception. This process is carried out in hospitals and specialized medical centers, and it must be done according to legal and religious regulations as required by medical practice (Jilali, 2013-2014, p. 07).

The process of artificial insemination according to Algerian legislation varies depending on the source of the insemination and the place of fertilization using semen. It can be divided into two types. The first type is internal artificial insemination, which refers to the medical process of introducing the man's semen into the designated area in the woman for therapeutic purposes (Yasser Mohamed Abdullah, 2020). The semen can be either fresh or frozen during this process. The second type is external artificial insemination**,** also known as in vitro fertilization (IVF). This type differs from the previous one, as it involves the fertilization of the man's sperm with the woman's ovum outside the uterus, in a test tube. After the appropriate division occurs following the meeting of the sperm and ovum, the fertilized embryo is then returned to the woman's uterus (Omarani, Protection of the Human Body in Light of Medical Practices and Modern Procedures in Positive Law and Sharia, 2009-2010, p. 23) .

The article 45 Bis of the Algerian Family Law stipulates that artificial insemination is permissible, but under certain conditions: the marriage must be legitimate, with the consent of both spouses, and during their lifetime. It

must be performed using the husband's sperm and the wife's ovum, with the use of her uterus. These conditions are also mentioned in Article 371 of the Health Law, which adds another condition: that the couple must be medically diagnosed with confirmed infertility, and they must submit a written request for medical assistance with conception.

The article 371 of the Health Law states that medical assistance with conception is exclusively available to respond to a request made by a man and a woman of childbearing age, both of them are alive, legally married, and suffering from confirmed infertility. They must agree to either embryo transfer or artificial fertilization. The procedure can only involve the husband's sperm and the wife's ovum, excluding any, with no other individuals involved. The couple must submit a written request for medical assistance with conception while both are alive, and they must confirm the request within one month from the date of its receipt by the relevant institution or authority.

The article 372 of the Health Law states that: "The clinical and biological therapeutic procedures related to medical assistance with conception must be carried out by certified practitioners for this purpose, in institutions, centers, or laboratories licensed by the minister in charge of health to carry out such activities."

Therefore, according to Articles 45 Bis of the Algerian Family Law, and Articles 371 and 372 of the Health Law, we find that artificial insemination is subject to the following regulations:

1- The marriage must be legitimate:
It is required that the marriage be legitimate for artificial insemination to take place, for many reasons, including ensuring the protection of the child's rights to care, protection, and proper upbringing. This cannot be ensured in an unlawful relationship. Additionally, the insemination must be with the consent of both spouses and during their lifetime.

Additionally, artificial insemination must be performed using the husband's sperm and the wife's ovum. Doctors are required to verify the

existence of a legitimate marriage contract between them. Therefore, the marriage is considered both legitimate and legal if it fulfills the elements and regulations outlined in Articles 9 and 9 Bis of the Family Law. Article 9 states the following: "Marriage is contracted through the mutual consent of the spouses."

The article 9 Bis states that: "The marriage contract must fulfill the following conditions: the capacity to marry, — the dowry, — the guardian, — the two witnesses, — the absence of any legal impediments to marriage." Therefore, marriage is established according to Article 22 of the Algerian Family Law with an extract from the civil status records. In the case of non-registration, marriage is established by a court ruling.

2- the artificial insemination must be performed with the consent of both spouses:

This matter appears clearly and self – evidently , considering that paternity is an optional matter. In this case, the child's interest must be given priority. It is not acceptable to refuse the arrival of the child, only for it to be neglected and left without care afterward. Furthermore, if the insemination process takes place without the consent of the spouses, it is considered a blatant violation of bodily sanctity and falls under the legal provisions of Articles 264 and the subsequent ones.

It is also not permissible to perform artificial insemination after the dissolution of the marriage by divorce or death (Barzouq, Rules of Descent Between Algerian Law and French Law: A Comparative Study, 2014-2015) . It is a condition that the wife be inseminated with the semen of her deceased husband, which has been frozen in a sperm bank, as long as the marriage is in place and ongoing. The Algerian legislator should have added the phrase "during their lifetime" to extend the prohibition of insemination in cases of divorce and death.

3. It must be with the husband's sperm and the wife's ovum, and no one else:

The process of artificial insemination is carried out using the wife's uterus, as per Article 45 bis of the Algerian Family Law, between the spouses, using only the husband's sperm and the wife's uterus, not that of another woman. Therefore, it is understood from the wording of the aforementioned article that a third party cannot be involved in the insemination process, such as using a ready-made embryo from the sperm of a foreign man, or an ovum from another woman, or implanting the fertilized ovum in the uterus of a surrogate. Hence, the use of any third party in reproductive methods is considered invalid and unlawful.

4. The spouses must submit a written request related to medical assistance for reproduction:

Article 371, Paragraph 2, of the Health Law mentions the requirement for the spouses to submit a written request related to medical assistance for reproduction. The spouses must confirm this request one month after its receipt by the concerned institution.

5. The artificial insemination must take place in licensed institutions, centers, or laboratories:

This is addressed in Article 372 of the Health Law, which specifies that the artificial insemination process must occur in licensed institutions, centers, or laboratories.

Contemporary scholars have agreed on the prohibition of taking sperm from someone else than the husband and placing it in the wife's vagina, as well as prohibiting the husband's sperm from being injected into the vagina of someone other than the wife. But what if this process is carried out between the husband and wife while the marriage is still intact, What is the stance of the scholars on this?

In fact, scholars differ on this issue, with two main sayings:

The first saying: Permissibility
This saying is supported by the majority of contemporary scholars, including

Sheikh Mahmoud Shaltout, Sheikh Jad al-Haq Ali Jad al-Haq, Sheikh Muhammad Hasanin Makhlouf, Sheikh Mustafa Ahmad al-Zarqa, Sheikh Ibrahim al-Qattan, Sheikh Zakariya al-Bari, Sheikh Ahmad al-Sharbasi, Sheikh Abdulaziz al-Khayat, Sheikh Wahba al-Zuhayli, Muhammad Salam Madkour, and Omar Farouq al-Fahl. Sheikh Muhammad Shaltout said: "If it is the man's semen for his wife, then it is an action that falls within the boundaries of the law and the principles that societies are governed by, and it is a lawful act with no sin or hardship involved."

Sheikh Jad al-Haq further clarified the matter by saying: "If this process involves the insemination of the wife with the semen of her husband, without the substitution or mixing with the semen of another man or even an animal, then this insemination is permitted by Islamic law."

The Islamic Fiqh Academy adopted this view in its fifth decision during the seventh session held from 11 -16 Rai' Al –Akhir , 1404 AH (Islamic calendar), stating: "The method of obtaining male sperm from a married man, which is then injected into the uterus of his own wife, is a method that is legally permissible."

The second saying: Those who deem it impermissible
This view is held by some scholars, including Ahmad al-Haji, who states: "There is no absolute evidence in the Qur'an, the Sunnah, or the schools of jurisprudence to permit this artificial insemination, and therefore, it is considered impermissible. Their evidence includes:

The first evidence: Allah has prescribed sexual intercourse between the spouses for a fundamental purpose, which is to ensure psychological comfort resulting from both physical and emotional enjoyment. Allah says in verse 189 of Surah Al-A'raf:« He is the One Who created you from a single soul, then from it made its spouse so he may find comfort in her. After he had been united with her, she carried a light burden that developed gradually. When it grew heavy, they prayed to Allah, their Lord, "If you grant us good offspring, we will certainly be grateful.» (quran, pp. Surah Al-A'raf - 189).

Since artificial insemination does not achieve psychological

satisfaction, it is considered impermissible according to the legal maxim, "The default ruling for sexual relations is prohibition unless there is evidence to permit it."

The second evidence: Artificial insemination violates human dignity and degrades it. For this reason, Allah prohibited adultery due to the harm it causes to the dignity of the offspring. The same applies to artificial insemination (Al-Akna, 2016, p. 1273).

Sheikh Muhammad Shaltout has considered that artificial insemination as a legitimate act within the framework of law and Sharia when it involves the husband's sperm for his wife. In this case, it is a lawful act with no sin or hardship involved. Allah has commanded us to seek medical treatment, and He made every difficulty easier. Thus, He does not prevent those who are deprived of childbearing from searching for the safe and correct means that enable them to have children. However, this practice must be in line with the well-being of the individual and not for the sake of fame like searching for a scoop. It must not violate Sharia principles, such as through cloning or other practices forbidden by Sharia, nor should it lead to actions that conflict with Islamic rulings and beliefs, and the medical practice should not violate religious and doctrinal rulings, and deviating toward the satisfaction of desires in a way that contradicts Sharia, such as creating a marriage outside the bounds of lawful wedlock (Fahmy, 2014, p. 130).

3.2 Section Two: Penalties for Violating the Rules of Artificial Insemination

The Algerian legislator has established penalties for violations of the rules regarding artificial insemination in Chapter Eight of the Health Law. It outlines penal provisions that punish any act that constitutes a violation of the artificial insemination regulations mentioned in Article 371 of the Health Law, whether the offender is an individual or a legal person. These penalties include both primary and supplementary sanctions.

According to Article 434 of the Health Law, an individual who violates the artificial insemination rules, as outlined in Article 371 of the same law, is

subject to imprisonment for a term of five (5) years to ten (10) years, and a fine ranging from 500,000 DZD to 1,000,000 DZD.

For a legal person, the primary penalty, according to Article 441, Section 1 of the same law, involves a fine no less than five times the maximum fine imposed on an individual, which is 1,000,000 DZD.

Article 372 of the Health Law stipulates that artificial insemination procedures must be performed by authorized practitioners for this purpose, in institutions, centers, or laboratories licensed by the minister responsible for health. However, it is noted that the law does not specify any penalties for violations of this article when it addresses criminal provisions. Therefore, there is a need to reconsider how actions that violate the rules of artificial insemination, as criminalized by Algerian law, are classified and to impose appropriate penalties for each violation in proportion to the severity of the act.

For instance, the Algerian legislator has required that insemination must take place during the lifetime of the couple. A violation of this condition could occur, such as ; if an insemination happens during the widow's waiting period. While this process would be considered as a violation, its consequences would be much less severe than if an ovum were fertilized with the sperm of a foreign man (not the husband) or with the ovum of a foreign woman (not the wife). The most serious violation would be the case where artificial insemination is carried out using sperm and ovum from two individuals who are not married to each other, or the use of a surrogate mother. In these last cases, the crime should be classified as a felony due to the resulting confusion of lineage and the associated harms.

4. CONCLUSION

Artificial insemination is a set of medical procedures aimed at fertilizing the ovum outside the uterus in a test tube or laboratory container. It is one of the most recent scientific methods contributing to reproduction.

It is considered a biological revolution in this modern age we live in. Furthermore, it is an exceptional method that should only be used when there is a strong medical justification to support it. This artificial method of conception has had a profound impact on many fundamental concepts, one of the most important being lineage. It is also considered a modern technique that requires most comparative legal systems to regulate it with clear and precise legal provisions that leave no ambiguity.

The Algerian legislator, through Article 45 bis, has authorized the resorting to artificial insemination within the framework of Islamic and legal rules. These rules include that the marriage must be legal, that the insemination must be done with the consent of both spouses, during their lifetime, using the husband's sperm and the wife's ovum, and that the use of a surrogate mother is not permitted. Additionally, the Health Law issued on 2-6-2018 introduced other conditions through Articles 371 and 372 that were not addressed in the Algerian Family Law. These include proving infertility through a medical certificate, submitting a written request for medical assistance with reproduction, and conducting the artificial insemination in licensed institutions, centers, or laboratories. All the above-mentioned provisions serve as safeguards to protect the lineage and prevent harm.

The Algerian Family Law lacks many details regarding this technique, which requires attention and review. Moreover, the legislation embodied in the Health Law has not given it the necessary care and precise details that would protect it from any uncalculated manipulations or from human trafficking, which has become a characteristic of this era.

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