

redefinition_of_child_of_adultery _ijsr.pdf

by

Submission date: 01-Jun-2019 08:53AM (UTC+0700)

Submission ID: 1138592538

File name: redefinition_of_child_of_adultery_ijsr.pdf (1.46M)

Word count: 7104

Character count: 34588

The Redefinition of Child of Adultery

Dr. Iffatin Nur, M.Ag.

Lecturer, Faculty of Sharia of the IAIN Tulung Agung, Jl. Moyor Sujadi No. 46 Tulungagung East Java, Indonesia

Abstract: Having a status of being a child born out of a legal marriage will put him/her facing various problems; stereotypes, sanctions, discriminations, violence, even an abortion and a disposal. So, by being equipped with the humanization consciousness and human nature, let us redefine the labelling of "a child of adultery" with a more humane and a more friendly call such as "a mother's child" which is proposed and established by the Indonesian Child Protection Agency (Lembaga Perlindungan Anak, abbreviated as LPA, Ind.). That there is no single man born into this world bearing the original sins of their parents and that biologically there is no child born without a father. Furthermore, let us give to such children their rights appropriately; must be guaranteed, protected, and fulfilled by the parents, families, communities, the government, and the state according to Implementation of child protection is based on Pancasila (the Five Principles) and the Constitution of the Republic of Indonesia of the Year 1945 as well as the basic principles of the Convention on the Rights of the Children which include (a) non-discrimination; (b) best interests for the children; (c) the rights for life, survival and development; (d) a respect towards the children's opinions. It is To be improper and unfair when the law stipulates that a child who is born from a sexual relation outside of a legal marriage (either of informal marriage or adultery) only has civil relationships with the mother. It is not right and also unfair if the law frees man who impregnated the child's mother so that he can get away from his responsibilities as a father. Even more so, the injustice is due to the fact that the law negates the rights of the child towards his/her biological father, where as, existing technological developments allow proving that a baby is a biological child of a particular man through a DNA test as an example. "The event of childbirth due to sexual intercourse is a legal relationship containing reciprocal rights and obligations between the child, the mother, and the father."

Keyword: Redefinition, Child of Adultery, Islamic Concept

1. Introduction

Having a status of being a child born out of a legal marriage will put him/her facing various problems, stereotypes, sanctions, discriminations, violence and even an abortion and a disposal. As soon as this child was born, he/she will immediately face some stereotypes or negative labellings such as a child of adultery (anak zina, Ind.), an illegitimate child (anak haram, Ind.), and so forth. As a result, in his/her struggle within a condition of being helpless, he/she will find any rejection in getting the rights and position as any other legitimate children in general. This is so because by law such child only has a civil relationship with his/her mother and the mother's family. The misery becomes more serious/complicated due to the existence of the rule that any child born out of a legal marriage will not acquire the rights that become the fathers' obligations, namely: to be recognized as the father's child, to have his/her necessities of life fulfilled, to be legally protected and supported until he/she has come (comes) to their legal age, and to have the right of custodianship let alone to get inheritance.

Such stereotypes and legal burdens as just mentioned are totally contrary to some verses of the Quran, the sayings of the Prophet Muhammad and the *atsar* (legacy/tradition) of the Prophet's Companions as mentioned in the following:

وهو الذي خلق من الماء بشرا فجعله نسبا وصهرا وكان ربك قديرا
"And it is He Who has created man from water, then has He established relationships of lineage and marriage; for thy Lord has power (over all things)." (Surah al-Furqan: 54).

The second qur'anic verses, I argue, assert that someone does not bear the sin of others and neither does a child of adultery bear the sins of adulterers as mentioned in His sayings:

ولا تكسب كل نفس إلا عليها ولا تزر وازرة وزر أخرى ثم إلى ربكم مرجعكم فينبئكم بما كنتم فيه تختلفون

"Every soul draws the meed of its acts on none but itself, no bearer of burdens can bear the burdens of another. Your goal in the end is towards Allah, He will tell you the truth of the things wherein ye disputed." (Surah al-An'am: 164)

ولا تزر وازرة وزر أخرى ثم إلى ربكم مرجعكم فينبئكم بما كنتم تعملون إنه عليم بذات الصدور

"And no bearer of burdens can bear the burden of another. In the end, to your Lord is your return when He will tell you the truth of all that ye did (in this life) for He knoweth well all that is in (men's) hearts." (Surah al-Zumar: 7)

In addition, among the hadiths explaining that children born into the world are in a state of *fitrah* (nature) without any sin are for example:

عن أبي هريرة رضي الله عنه قال: قال النبي صلى الله عليه وسلم: كل مولود يولد على الفطرة فابواه يهودانه أو ينصرانه أو يمجسانه (رواه البخاري ومسلم)

From Abu Hurairah he said that the Prophet of Allah said: "Every child is born in a state of nature, it is both parents that make them to become a Jew, a Christian, or a Zoroastrian." (narrated by al-Bukhari and Muslim) (foot note)

Imam al-San'ani quotes the hadiths in his book "Al-Mushannaf" in the chapter "Itq walad al-zina" quoted a hadith number 13.871 (sebaiknya dihapus karena confusing) discusses *atsar* of the Companions that explaining that the Caliph Umar ibn al-Khattab (may Allah be pleased with him) instructed/intestate Muslim to always treat children of adultery well.

Based on the qur'anic verses of the Quranic, hadiths and *atsar* we can conclude that any child born from either a legal marriage or illegal relation remains in pristine and pure condition without any sin at all, let alone they bear and carry the burden of sins of their parents. However, the legal and

social community has already given them sanctions that seem very unfair and discriminatory onto the weak and tiny creatures that actually need very much protection and helping hands.

Realizing that there is no single man born into this world bearing the original sins of their parents and that biologically there is no child born without a father as well as the presence of the diversity of mentioning the status of children, such as *own child, foster child, nursing child, stepchild, and child of adultery*, the issue should, therefore, be addressed and redefined wisely so as not to make any child born out of adultery feel alienated, excluded and humiliated.

2. Methode

This study used a qualitative approach. This was carried out with the consideration that the study related to the philosophical writings and thoughts. The possible method used in this study such as the study of literatures, namely that all associated resources with the study, organized as a texts (books, result of research, magazines and so on). Once all the information collected and considered enough, the next step was to conduct the depth and thorough study. This was carried out in order to the data and information that has obtained to be accurate. After the analysis or this depth study, then the results of this study was presented by descriptive analysis to describe the procession of the searching of God in Islamic theology.

3. Discussion

3.1. The Redefinition of Child of Adultery

Almost in various literatures of both Islamic and conventional laws, a child of adultery is defined as a child born of *fornication* which is the sexual intercourse between a man and a woman who are not tied up in a legal marriage. Or in the Indonesian Act No. 1 of the year 1974 on Marriage, a child of adultery is defined as a child born outside a valid or legal marriage; while the valid or legal marriage recognized in Indonesia is one which is carried out according to the law of each bride's religion and belief. The registration of a marriage is performed by the registrar at the Indonesian Subdistrict Office of Religious Affairs (Kantor Urusan Agama, abbreviated as KUA, *Ind.*) for the brides who marry according to Islam. Meanwhile for those who hold a marriage according to religious laws and beliefs other than Islam, then they record it in the Civil Registry Office (Kantor Catatan Sipil, *Ind.*). So, if any marriage is not recorded in the KUA and Civil Registry Office then it is deemed to be not valid or illegal under the state law's perspective. As a legal consequence, any child born outside of a legal marriage only has a civil relationship with their mothers and the mothers' family.

Such stereotypes and legal burdens are actually contrary to some verses of the Quran, the sayings of the Prophet Muhammad and the *atsar* (tradition) of the Prophet's Companions as had been mentioned previously. The connotation of meaning and legal content of the transcendental sources that have been mentioned is that every baby that is born from either a legal marriage or illegal

relation remains in pristine and pure condition without any sin at all, let alone they bear and carry the burden of sins of their parents. However, unfortunately, the legal and social community has already given them the punishment that seems very unfair and discriminatory onto the weak and tiny creatures that actually need very much protection and helping hands.

So, let us, by being equipped with the humanization consciousness and human nature, redefine the labelling of "a child of adultery" with a more humane and a more friendly call such as "a mother's child" which is proposed and established by the Indonesian Child Protection Agency (Lembaga Perlindungan Anak, abbreviated as LPA, *Ind.*). Furthermore, let us give to such children their rights appropriately.

3.2. Illegitimate Children in the Perspective of Fiqh

There is an *ijma' 'ulama*, -an agreement by acclamation (a consensus) of the Islamic scholars that if there is a man commits adultery with a married woman and she gives birth to a child, then the child's lineage is not tied to the man with whom she committed adultery but to the husband of the mother provided he (i.e. the woman's husband) does not deny the child.

وأجمعت الأمة على ذلك نقلاً عن نبيها صلى الله عليه وسلم وجعل رسول الله صلى الله عليه وسلم كل ولد يولد على فراش لرجل لاحقاً به على كل حال. إلا أن ينفيه بلعان على حكم اللعان

The Muslim people have had an ijma' (consensus) about it on the basis of the hadith of the Prophet (pbuh) and the Prophet of Allah assigns that each child born from a mother and there present her husband, the child's lineage is tied to his/her father (i.e. the mother's husband) unless he denies the child with li'an, then the law regarding li'an applies.

Imam Ibn Qudamah also expressed his opinion as follows:

وأجمعوا على أنه إذا ولد على فراش رجل فادعاه آخر أنه لا يلحقه

The scholars have an agreement (ijma') on the child born by a mother and there present her husband, then another man confesses to be the child's father, the child's lineage is not tied to him (i.e. the man making a confession).

The majority (*jumhur*) opinions of the Hanafiyyah, Malikiyyah, Shafi'yyah, and Hanabillah schools of thought state that the principle of lineage establishment is due to a legal marriage relationship. Apart from a legal marriage, there is no legal consequences of lineage relationships, and thus the lineage of a child of adultery is tied to his/her mother and not to the man who has committed adultery to her as written down in the following citations:

a. Ibn Hajar al-'Asqalani said:

نقل عن الشافعي أنه قال: لقوله "الولد للفراش" معنيان: أحدهما هو له مالم ينفيه، فإذا نفاه بما شرع له كاللعان انتفى عنه، والثاني: إذا تنازع رب الفراش والعاشر فالولد لرب الفراش "ثم قال: "وقوله: "وللعاهر الحجر"، أي: للزاني الخيبة والحرمان. والعهر يفتحتين: الزنا، وقيل: يختص بالليل، ومعنى الخيبة هنا: حرمان الولد الذي يدعيه. وجرت عادة العرب أن تقول لمن خاب: له الحجر وينفيه الحجر والتراب، ونحو ذلك، وقيل: المراد بالحجر هنا أنه يرحم قال النووي: وهو ضعيف، لأن الرجم مختص بالمحصن، ولأنه لا يلزم من رجمه نفي الولد، والخبر إنما سيق لنفي الولد، وقال السبكي: والأول أشبه بمساق الحديث، لتعم الخيبة كل زان

It was cited from Imam Shafi'i about the two definitions of the meaning of the hadith "The child becomes a right of the mattress owner (i.e. the husband)". First: The child becomes

a right of the owner of the mattress (i.e. the husband) as long as he does not deny him/her. If the owner of the mattress (the husband) denies or does not acknowledge the child through a procedure that is deemed legal according to the shariah such as conducting a li'an, then the child is determined to be not the husband's child. Second: If there is a dispute (relating to possession of the child) between the mattress owner (the husband) and a man who committed adultery with the husband's wife/slave woman, then the child becomes a right of the owner of the mattress (the husband). Meanwhile the meaning of the sentence "For the male adulterer is stoned" is that the male adulterer is barred and is in despair. The meaning of the word al-'ahar using two fathahs (on the letters 'ain and ha') is adultery. Some say that the word is used for adultery done at night. Therefore, the meaning of "in despair" in the sentence is that the male adulterer will not get a right of lineage (nasab) over the child born as a result of his adultery conduct. The selection of the word "in despair" here is in accordance with the traditions of the Arab people who usually state: "For him is a stone" or "In his mouth there is a stone" for those who despair of hope.

There are some people who argue that the meaning of the word "stone" here is punishing by rajam (stoning). Imam Nawawi stated that this opinion is weak, because stoning is only meant for adulterers who are mukhsan (already married). On the other hand, this hadith is not intended to explain the law of stoning, but merely intended to deny the right of the child to the adulterer. Therefore, Imam Subki stated that the first opinion is more in line with the wording of the hadith because it can express in general that desperation (of getting the right over the child) covers the entire group of adulterers either they are mukhsan or not.

b. Imam al-Sayyid al-Bakry stated that:

ولد الزنا لا ينسب لأب وإنما ينسب لأمه

A child of adultery's lineage is not tied to the father, his/her lineage is only tied to the mother.

c. Imam Ibn Hazm has an opinion as follows:

والولد يلحق بالمرأة إذا زنت وحملت به ولا يلحق بالرجل

A child's lineage is tied to the mother when she committed adultery and conceived him/her, and it is not tied to the man (with whom the mother committed adultery).

d. The opinion of Imam Ibn Nujaim in his book *al-Bahr al-Raiq Syarh Kanz ad-Daqa'iq*:

ويرث ولد الزنا واللعان من جهة الأم فقط؛ لأن نسبه من جهة الأب منقطع فلا يرث به ومن جهة الأم ثابت فيرث به أمه وأخته من الأم بالفرض لا غير وكذا ترثه أمه وأخته من أمه فرضاً لا غير

A child of adultery or li'an only gets the inheritance rights from the mother alone, because his/her lineage to the father is cut off so he/she will not get any inheritance right from the father. Meanwhile the clarity of his/her lineage is only through the mother's side, so he/she have an inheritance right from the mother's side and from the sister(s) of the same mother by fardh (i.e. certain parts) only. Likewise, the mother and the sister(s) of the same mother can inherit from the child by fardh (i.e. certain parts) only and not by any other way.

e. The opinion of Imam Ibn 'Abidin in the book *Radd al-Muhtar 'ala al-Durr al-Mukhtar* (Hasyiyah Ibn 'Abidin) is as follows:

ويرث ولد الزنا واللعان بجهة الأم فقط لما قد مناه في العصابات أنه لا أب لهما

A child of adultery or li'an only gets the inheritance rights from the mother alone, as we have explained in the chapter that describes the ashabah (residuary), as the child of adultery does not have a father.

f. The opinion of Ibn Taymiyya in his book *al-Fataawa al-Kubra*:

واختلف العلماء في استحقاق ولد الزنا إذا لم يكن فراشاً؟ على قولين. إكماً ثبت عن النبي صلى الله عليه وسلم أنه ألحق ابن وليدة زمعة بن الأسود بن زمعة بن الأسود، وكان قد أحبلها عتية بن أبي وقاص، فاختصم فيه سعد وعبد بن زمعة، فقال سعد: ابن أخي. عهد إلى أن ابن وليدة زمعة هذا ابني. فقال عبد: أخي وابن وليدة أبي؛ ولد على فراش أبي. فقال النبي صلى الله عليه وسلم: هو لك يا عبد بن زمعة الولد للفراش، وللعاشر الحجر؛ احتجبي منه يا سودة؛ لما رأى من شبهه البين بعتية، فجعله أخاه في الميراث دون الحرمة

The scholars differed regarding to istilkhaf (attribution) for the child of adultery if the mother does not have the owner of the mattress (i.e. the husband) or a sayyid/owner (for slave women). It was narrated in a hadith that the Prophet attributed a child of a woman slave of Zam'ah ibn Aswad to him (Zam'ah), whereas the one that impregnated her was Uthbah ibn Abi Waqqash. Meanwhile, Sa'ad stated: The child born by the woman slave was the son of my brother (Uthbah), and I (Sa'ad said) was assigned to take care of him like my own son. "Abd ibn Zam'ah denied it by saying: "The boy is my brother and a son of my father's woman slave, he was born on the bed of my father". The Prophet of Allah (pbuh) said: "The child is yours, O Abd ibn Zam'ah, the child becomes a right of the mattress owner and for the adulterer is a stone", then the Prophet said: "Wear a veil towards him, O Sauda! (Sauda bint Zam'ah – a wife of the Prophet Muhammad)" because he saw the child's resemblance to Uthbah. So he made the boy a brother to Sauda bint Zam'ah in terms of inheritance rights but did not make him as a mahram (to her).

g. The opinion of Dr. Wahbah al-Zuhaili which basically stated that, if there is a man who fornicates with a woman who has a husband and then the woman gives birth to a child, there is a consensus of scholars, as stated by Imam Ibn Abd al-Barr in "al-Tamhid" which confirms that the child's lineage is not tied to the man committed adultery but to the husband of the woman provided he does not deny the child through li'an. Meanwhile, if he fornicates with a woman who is not married and then the woman gives birth to a child, then according to majority (jumhur) of scholars of eight madzhab (schools of thought), the child's lineage is only tied to the mother despite of any confession by the man who has committed adultery with the mother. This is because the lineage linkage from the child to the man who commits adultery will open up the door for doing such bad conduct whereas we are ordered to close the door that leads to (conducting) any prohibition (sadd al-dzari'ah) in order to maintain the sanctity of lineage from any bad conduct.

3.3. The Decision of The Indonesian Constitutional Court

The assembly of the Indonesian Constitutional Court (Mahkamah Konstitusi, abbreviated as MK, Ind.) declared

that article 43 paragraph (1) of the Indonesian Act No. 1 of 1974 on Marriage is *conditionally unconstitutional*. In its verdict, the Court declared ³ at the article 43 paragraph (1) of the Act on Marriage is *contrary to the Indonesian Constitution of the year 1945* as long as it is interpreted to eliminate relationship (of the child ³ of adultery) with the man, which can be proved through science and technology and or other evidences, turns out to have a blood relationship as the father to the child.

"The article 43 paragraph (1) of the Indonesian Act No. 1 of 1974 on Marriage has no binding legal force, so that article should read: *"Any child born outside a marriage has a civil relationship with the mother and the mother's family and with the father that can be proved by science and technology and or other means of evidence in which by law the child has a blood relationship to the father including a civil relationship with the father's family."*

In its consideration, the Court held it to be improper and unfair when the law stipulates that a child who is born from a sexual relation outside of a legal marriage (either of informal marriage or adultery) only has civil relationships with the mother. "It is not right and also unfair if the law frees man who impregnated the child's mother so that he can get away from his responsibilities as a father," said Ahmad Fadlil Sumadi, a judge of the Constitutional Court.

Even more so, the injustice is due to the fact that the law negates the rights of the child towards his/her biological father, whereas, existing technological developments allow proving that a baby is a biological child of a particular man through a DNA test as an example. "The event of childbirth due to sexual intercourse is a legal relationship containing reciprocal rights and obligations between the child, the mother, and the father."

⁶ According to the Court, the child's relationship with a man as his/her father is not solely because of the presence of a marriage bond, but can also be based on proving the existence of a blood relationship between the child with his/her father. Apart from the matter of procedures or administration of marriage, a child born should get legal protection. Otherwise, it is the child born outside a legal marriage that becomes the victim.

"A child remains innocent because his/her birth is not of his/her will. The children who are born without a clarity status of their fathers often get unfair treatment and stigma from the communities they live. Therefore, the law must provide protection and fair legal certainty on the status of children ³ and their rights, although the validity of (their parents') marriage is still disputed."

Meanwhile, the Constitutional Judge Maria Farida Indrati had different reasons (a concurring opinion). She said that the Article 43 paragraph (1) of the Indonesian Act No. 1 of 1974 on Marriage precludes the child from having a civil relationship with his/her biological father. It is the risk of an unrecorded marriage. However, it is not proper that in such condition the child must bear the bad impacts caused by the parent's conduct. According to her, if it is regarded as a sanction, then both the state law or the Islamic law do not

recognize the concept of a child must bear the sanctions due to the conducts of the parents which is known by the term of *original sin*. "The potency of bad impacts due to any marriage that do not fit to the Act on Marriage is a risk for men and women who perform the marriages, but not a risk that should be borne by the children who are born from such marriage." Thus, the fulfillment of the rights of children born, regardless of whether the marriage is lawful or not according to the state law, remains to become the obligation of either the legal parents or the biological parents of the children."

⁴ The decision of the Constitutional Court which stipulates that a child born outside a legal marriage also has a legal relationship with his biological father, in addition to the biological mother, still becomes a controversy. The Indonesian Assembly of Ulama (Majelis Ulama Indonesia, abbreviated as MUI, Ind.) Rushed to perform an *ijtihad* in determining clauses of *fatwa* (religious advices) on this issue.

The thing that should be underlined here is that in the decision of the Court as mentioned, the *object* discussed is the illegitimate children (the children of adultery and the children from religious marriages of the parents which are not recorded formally in the state). Meanwhile, the MUI discussed specifically about the child of adultery in their *fatwa*. The MUI worried that the Court's decision would be misunderstood by the public as a legitimation that adultery may be justified. In their *fatwa*, the MUI pertained to declare that adultery is forbidden. The *Fatwa* (Advisory) Commission of MUI submitted five recommendations to the Indonesian Parliament and Government related to adultery behaviors that lead to the issue of the existence of illegitimate children.

3.4. The MUI's Fatwa No.11/2012 about the Status of and Treatments Towards Children of Adultery

For further information, the MUI's *fatwa* No. 11/2012 about the Status of and Treatments Towards Children of Adultery. By considering about main concept of Islam (Al-Qur'an dan Hadiths), Islamic scientist opinion so that the Indonesian Assembly of Ulama' decides the following:

First: General Provisions

Within this *fatwa* what ⁶ meant by:

1. A child of adultery is a child born as a result of sexual intercourse outside a marriage which is deemed legal under the religious provisions and such conduct is a *jarimah* (a felony).
2. *Hadd* is a kind of punishment for a criminal act of which its form and degree are set by *nash* (religious texts).
3. *Ta'zir* is a kind of punishment for a criminal act of which its form and degree are delegated to the *ulil amri* (the authority holding the right to establish a punishment).
4. *Wasiat wajibah* is a policy of the *ulil amr* (ruler) that requires the man who caused the birth of a child of adultery to intestate his property to his child of adultery concerned after his death.

Second: The Legal Provisions

1. A child of adultery has no relationship of lineage, custodian of marriage ⁴ inheritance, and *nafaqah* (maintainance for life) with the man who caused his/her birth.

2. A child of adultery only has relationship of lineage, custodian of marriage, inheritance, and *nafaqah* (maintenance for life) with the mother and the mother's family.
3. A child of adultery does not bear the sins of adultery committed by the persons causing his/her birth.
4. Onto adulterers shall be imposed the *hadd* sanctions by the authorities for the sake of perserving the legitimate offspring (*hifzh al-nasl*).
5. The government has authority to impose the *ta'zir* sanctions to adulterer man who caused the birth of a child by requiring him to:
 - a. Fulfill the needs for living of the child;
 - b. Provide property for the child after his death through *wasiat wajibah*.
6. Such punishment as referred by number 5 aims to protect the child and not by any means to endorse lineage relationship between the child with a man that caused his/her birth.

Third: The Recommendations

- 1) The Indonesian Parliament and the Government are urged to immediately formulate legislation that governs:
 - a) Heavy sanctions against perpetrators of adultery that can serve as *zawajir* and *mawani* (making the perpetrators deterrent and those who have not done such conduct be afraid to do so);
 - b) Adultery to be included as a general offense not a complaint because adultery is a crime that disgraces the sublime dignity of human beings.
- 2) The government is obliged to prevent the occurrence of adultery as well as to provide harsh and assertive law enforcement.
- 3) The government must protect the children of adultery (illegitimate children) and prevent them from being abandoned especially by giving punishment to the men who caused their birth in the form of fulfilling their life needs.
- 4) The government is required to provide the convenience of services for possessing birth certificates to the children of adultery but their lineage are not tied to the men who have caused their birth.
- 5) The government is obliged to educate people not to discriminate the children of adultery by treating them normally as other children. The determination of the lineage of the children of adultery to their mothers is intended to protect their lineage and other related religious provisions and not as a form of discrimination to them.

Fourth: The Closing Provisions

1. This *fatwa* is valid on the date of enactment, with a provision that if at a later day it needs refinement, it will be improved and refined as appropriate.
2. In order for every Muslim and those who need may beware of it, all stakeholders are urged to disseminate this *fatwa*.

3.5. The Preventive Fiqh: Redefinition, Rehabilitation and Fighting for the Rights of "Mother's Children" as Humanitarian Relief Measures

In the Act of the Republic of Indonesia No.23 of the year 2002 on The Protection of Children there explained some

important provisions as (1) A child is a person who is not yet 18 (eighteen) years old including the babies who are still in the wombs; (2) A child protection is all activities to ensure and protect children and their rights in order they can live, grow, develop, and participate optimally in accordance with human dignity and prestige and attain protection from violence and discrimination; (3) A family is the smallest unit of society consisting of a husband and a wife, or a husband a wife and their child/children, or a father and his child/children, or a mother and her child/children, or blood relatives in a straight line up or down until the third degree; (4) Parents are a father and/or mother, or a father and/or a step mother, or a father and/or a foster mother.

In Article 2 there stated that the rights of a child is a part of human rights that must be guaranteed, protected, and fulfilled by the parents, families, communities, the government, and the state. Implementation of child protection is based on *Pancasila* (the Five Principles) and the Constitution of the Republic of Indonesia of the Year 1945 as well as the basic principles of the Convention on the Rights of the Children which include: (a) Non-discrimination; (b). Best interests for the children; (c). The rights for life, survival and development, and (d). A respect towards the children's opinions.

In Article 3 there mentioned that the protection of children aims to ensure the fulfillment of children's rights in order they can live, grow, develop, and participate optimally in accordance with the dignity and prestige of humanity, as well as attain protection from violence and discrimination for the sake of bringing the qualified, noble-mannered, and prosperous Indonesian children into reality.

In Article 4 there stated that every child has the right to live, grow, develop, and participate fairly in accordance with humanity's dignity and prestige as well as to obtain protection from violence and discrimination. The article 5 reads: Every child has the right to a name as their self-identity and citizenship status. In Article 6 there mentioned that every child has the right to worship according to his/her religion, to think, and to express themselves in accordance with their level of intelligence and age under their parental guidance.

In Article 7 paragraph (1) there mentioned that every child has the right to know their parents, to be bred and raised by his/her own parents. Then, Article 13 paragraph (1) reads: Every child while in the care of the parent, a custodian, or any other party responsible for their care, are entitled to obtain protection from any conduct of: (a). Discrimination; (b). Exploitation, both economic and sexual exploitations; (c). A abandonment; (d). Cruelty, violence, and persecution; (e). Injustice, and (f). Other misconducts.

In Article 14 there stated that every child has the right to be raised by their own parents, unless there is a reason and/or a valid legal rule which indicates that a separation towards them is for the best interests of the child and is the last consideration. Meanwhile, in Article 21 there stated that the State and the government are obliged and responsible to respect and guarantee the rights of every child regardless of their ethnic group, religion, race, class, gender, ethnicity,

2. Culture and language, the legal status of the child, the child's birth order, and their physical and/or mental condition.

Furthermore, in Article 22 there mentioned that the State and the government are obliged and responsible to provide facilities and infrastructure supports in the implementation of child protection. Then, in Article 26 (1) there stated that parents are obliged and responsible for: (a). Caring, nurturing, educating, and protecting their children; (b). Fostering their children according to their ability, talents, and interests; and (c). Preventing any marriage at the children age.

Regarding to the child's identity, it is described in Article 27 that: (1) The personal identity of every child must be given since birth; (2) The identity referred to the paragraph (1) shall be recorded in a birth certificate; (3) The making of a birth certificate is based on a statement letter from the persons who witness and/or assist in the birth of the child. (4) In the event that no one knows the birth process of the child and his/her parents' whereabouts is not known either, the making of a birth certificate for such child is based on the testimony of people who found the child.

The provisions of those regulations and the facts in the form of rampant acts of physical violence, sexual violence, abortion and disposal as well as murder of innocent babies become one of the most important reasons to perform rescue actions and legal protection towards children of adultery, children of *li'an* (i.e. those denied by the fathers), children born out of *mut'ah* (contract) marriages and children born out of *sirri* (officially unrecorded) marriages which are categorized as illegitimate children by law.

According to the Indonesian highest constitutional foundation which is the State Constitution of the year 1945, in Article 32 there stated that "The poor people and abandoned children are maintained by the state." Therefore, it is appropriate that those children also become a responsibility and in the protection of the state law and the state is obliged to struggle for and give their rights as it should be.

In the corridor of Islamic jurisprudence, the guidelines about the treatment towards such issue which must be put forward are the words of Allah in Surahs al-Furqan: 54, al-An'am: 164, and al-Zumar: 7 and a hadith of the Prophet (pbuh) as narrated by Abu Hurairah along with an *atsar* of Umar by employing some of the following principles;

تصرف الإمام على الرعية منوط بالمصلحة

"A policy taken by a leader (government) is based on the benefit to the people."

جلب المصالح مقدم على مفاسد

"... bringing maslahat (benefits) takes precedence over Avoiding mafsadat (harms)"

With the methods and approaches of *maqashid sharia* (objectives of the Islamic teachings) which is *hifdz al-nafs* (preservation of one's soul) in this context must take precedence over other *hifdz* (preservations), it will give birth a preventive jurisprudence in conducting intact protection to "the mother's children".

4. Conclusion

From the discussion above, can be concluded;

1. In various literatures of both Islamic and conventional laws, a child of adultery is defined as a child born of *fornication* which is the sexual intercourse between a man and a woman who are not tied up in a legal marriage. Or in the Indonesian Act No. 1 of the year 1974 on Marriage, a child of adultery is defined as a child born outside a valid or legal marriage. Any child born outside of a legal marriage only has a civil relationship with their mothers and the mothers' family.
2. Such stereotypes and legal burdens are actually contrary to some verses of the Quran, the sayings of the Prophet Muhammad and the *atsar* (tradition) of the Prophet's Companion that every baby that is born from either a legal marriage or illegal relation remains in pristine and pure condition without any sin at all, let alone they bear and carry the burden of sins of their parents. So, let us, by being equipped with the humanization consciousness and human nature, redefine the labelling of "a child of adultery" with a more humane and a more friendly call such as "a mother's child" which is proposed and established by the Indonesian Child Protection Agency (Lembaga Perlindungan Anak, abbreviated as LPA, Ind.).
3. The majority (*jumhur*) opinions of the Hanafiyyah, Malikiyyah, Shafi'iyah, and Hanabilah schools of thought state that the principle of lineage establishment is due to a legal marriage relationship. Apart from a legal marriage, there is no legal consequences of lineage relationships, and thus the lineage of a child of adultery is tied to his/her mother and not to the man who has committed adultery to her.
4. The assembly of the Indonesian Constitutional Court (Mahkamah Konstitusi, abbreviated as MK, Ind.) declared that "The article 43 paragraph (1) of the Indonesian Act No. 1 of 1974 on Marriage has no binding legal force, so that article should read: "Any child born outside a marriage has a civil relationship with the mother and the mother's family and with the father that can be proved by science and technology and or other means of evidence in which by law the child has a blood relation to the father including a civil relationship with the father's family".
5. The MUI's *fatwa* No. 11 / 2012 about the Status of and Treatments Towards Children of Adultery decides the following: (a) A child of adultery has no relationship of lineage, custodian of marriage, inheritance, and *nafaqah* (maintenance for life) with the man who caused his/her birth. (b) A child of adultery only has relationship of lineage, custodian of marriage, inheritance, and *nafaqah* (maintenance for life) with the mother and the mother's family. (c) A child of adultery does not bear the sins of adultery committed by the persons causing his/her birth. (d) Onto adulterers shall be imposed the *hadd* sanctions by the authorities for the sake of preserving the legitimate offspring (*hifzh al-nasl*). (e) The government has authority to impose the *ta'zir* sanctions to adulterer man who caused the birth of a child by requiring him to: fulfill the needs for living of the child, provide property for the child after his death through *wasiat wajibah*. Such punishment as referred by number 5 aims to protect the child and not by any means to endorse lineage

relationship between the child with a man that caused his/her birth.

[mui-tentang-kedudukan-anak-zina-dan-perlakuan-terhadapnya/#sthash.K055EnK9.dpbs](#)(Accessed 2013-12-30).

References

- [1] Abidin, Imam Ibn. 1966 AD/1386 AH. *Radd al-Muhtar' ala al-Durr al-Mukhtar, Hasyiyah Ibn 'Abidin*. Egypt: Mushthafa al-Baby al-Halaby.
- [2] al-Andalusiy, Abu Muhammad Ali ibnu Muhammad ibnu Sa'id Ibnu Hazm. [n.d.]. *Al-Muhalla*. Beirut: Dar al-Ihya.
- [3] al-Asqalani, Syihabuddin Abul Fadhl Ahmad ibn Ali ibn Muhammad ibn Muhammad ibn Ali bin Mahmud Ibn Hajar. 2008. *Fathul Barri*. Chp. 23. Amiruddin (Trans. and ed.). Jakarta: Pustaka Azzam.
- [4] al-Barr, Abu 'Umar Yusuf ibn 'Abd Allah ibn Muhammad Ibn 'Abd. 1407 AH. *al-Tamhid*. Morocco: Wizarat al-Awqaf wa al-Syu'un al-Islamiyyah.
- [5] al-Dimyati, Sayyid Abu Bakar. [n.d.]. *I' anatut Tholibin*. Beirut: Dar al- Kutub al-Ilmiyah.
- [6] al-Dimasyqi, Abu Muhammad 'Abd Allah ibn Ahmad ibn Muhammad Ibn Qudamah. 1986. *al-Mughni*. Beirut: Hajar.
- [7] al-Hanafi, Imam Ibnu Nujaim. 2002. *al-Bahr ar-Raiq Syarh Kanzu al-Daqaiq*. Beirut: Dar al-Ihya al-Tsuras al-Arabi.
- [8] Ali, Abdullah Yusuf. 1995. *The Meaning of the Holy Quran*. 5thed. Maryland-USA: Amana Corporation.
- [9] al-Maqdisi, Ibnu Qudamah. 1981. *Al-Mughni Syarh Mukhtasar Al-Khiraqi*. Riyadh: Maktabah ar-Riyadh al-Haditsah.
- [10] al-San'ani, Imam Abdul Razzaq. 1972AD / 1392 AH. *Al-Mushannaf*. 1st ed. Verified by Habiburrahman al-A'zhami. Beirut: al-Maktab al-Islami.
- [11] al-Zuhaili, Wahbah. 2010. *Al-Ahkam al-Natijin Aulad 'an al-Zina*. a seminar paper. Mecca: the 20th Daurah Majma' Fiqh Islami. 25 – 29 December.
- [12] Indonesia, The Government of the Republic of. 1974. *Undang – Undang Nomor 1/1974 tentang Perkawinan*. Jakarta: Sekretariat Negara RI. <http://www.dikti.go.id/files/atur/UU1-1974Perkawinan.pdf> (Accessed 2013-12-30)
- [13] Indonesia, The Government of the Republic of. 1975. *Peraturan Pemerintah Nomor 9/1975 tentang Pelaksanaan UU No. 1/1974 tentang Perkawinan*. Jakarta: Sekretariat Negara RI.
- [14] http://hukum.unsrat.ac.id/pp/pp_9_75.htm (Accessed 2013-12-30)
- [15] Indonesia, The Government of the Republic of. 2011. *Undang – Undang Dasar Negara Republik Indonesia Tahun 1945*. 10th ed. Jakarta: Sekretariat Jenderal MPR RI.
- [16] Sahbani, Agus. 2012. *Anak Luar Nikah Juga Urusan Bapak Biologis*. <http://www.hukumonline.com/berita/baca/lt4f3e0363f2148/anak-luar-nikah-juga-urusan-bapak-biologis>. (Accessed 2013-12-30).
- [17] Taymiyya, Ibn. 2010. *al-Fataawa al-Kubra*. 4th ed. Beirut: Dar al- Kutub al-Ilmiyah.
- [18] Voa-Islam.com. 2012. *Fatwa MUI Tentang Kedudukan Anak Hasil Zina dan Perlakuan Terhadapnya*.
- [19] <http://www.voa-islam.com/read/indonesiana/2012/03/22/18307/fatwa->

ORIGINALITY REPORT

11%

SIMILARITY INDEX

8%

INTERNET SOURCES

2%

PUBLICATIONS

11%

STUDENT PAPERS

PRIMARY SOURCES

1

Submitted to RK University

Student Paper

4%

2

bubuhanbanjar-belajarmehalabiu.blogspot.com

Internet Source

2%

3

Submitted to UIN Syarif Hidayatullah Jakarta

Student Paper

2%

4

Submitted to Lambung Mangkurat University

Student Paper

1%

5

www.yurisdiksi.org

Internet Source

1%

6

Submitted to International Islamic University
Malaysia

Student Paper

1%

Exclude quotes On

Exclude matches < 1%

Exclude bibliography On