The Redefinition of Child of Adultery

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Abstract: Having a status of being a child born out of an illegal 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 his 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 unjust when the law stipulates that a child who is born from 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 an illegal 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 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 comes (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:

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’ani verses, i argue is assert that someone does not bear the sin of others and neither does a child of adultery bear the sins of adulterers mentioned in His sayings:

لولا نسي كل نفس إلا عليها ولتتر وزرة وزر أخرى ثم إلى ريم مرجم.“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)

و لولا تتر وزرة وزر أخرى ثم إلى ريم مرجم فيلبس بما كتب فيه خلفه.“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 edition, among the hadiths explaining that children born into the world are in a state of fitrah (nature) are any sin are for example:

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).

Produced all that is in (men’s) hearts.” (Surah al-Zumar: 7)

Imam al-San’ani quotes the hadits in his book “Al-Mushannad” in the chapter “Iq walad al-zina” quoted a hadith number 13.871 (sebaiknya dihapus karena confusing) discussing atsar of the Companions that explaining that the Caliph ‘Umar ibn al-Khattab (may Allah be pleased with him) instructed/intestate Muslimo always treat children of adultery well.

Based on the quranic verses of the Quranic, hadits and atsr we can conclude that any child born from either a legal marriage or illegal relation remains in pristine 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 "ownchild, fosterchild, 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, 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 not tied to him (i.e. the man making a confession).

Such stereotypes and legal burdens are actually contrary to the law of each marriage recognized in Indonesia. Such stereotypes and legal burdens are actually contrary to the perspective. As a legal consequence, any child born outside a legal marriage only has a civil relationship with their parents and the mothers and the mothers’ family.

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 scholar 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.

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.

The scholars have an agreement (ijma') on the child born bya 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’iyyah, 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 as written down in the following citations:

a. Ibn Hajar al-Asqalani said:

"And in the hadith of the Prophet (pbuh) and the Prophet of Allah assigns that each child born from 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)."

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 l'ī'ān, 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 stone” is that the male adulterer is barred and is in despair. The meaning of the word al-ī'ān using two fathahs (on the letters ‘ain and ha’) is adultery. Some say that 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 rajm 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:

وَلَدُ الْعِدْلُ لَا يُقَسِّمُ إِلَّا أَبِي وَأُمِّي نِسْبَةً إِلَيْهِ

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:

وَلَدُ الْعِدْلُ يَقِلُ بِالْمَرَأَةِ أَنْ يُزَدَّ نَهَيْتُهُ وَلَا يَقِلُ بِالجِرْجَلِ

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-Ra'iyy Syarh Kan'ad-Daqiqi:

وَيَرِدْ وَلَدُ الْزَنَّةِ وَالْعِدْلُ من جُمُهْرَةِ الأَمَّةِ إِنْ كَانَ نَسِيَةً مِّنِّ جَهَّةِ الْأَبِ إِنْ تُفْتَرَى بهُ إِنْ خَلَقَهَا فَلَا يُقَلَّ بَلْ هْوَاءُ أَمَّةِ فَرْعَاءٌ إِنْ قَرَأَ خَلَقَهَا

A child of adultery or l'ī'ān 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-Muhtā’ ala al-Durr al-Mukhtar (Hasyiyah Ibn ‘Abidin) as follows:

وَيَرِدْ وَلَدُ الْزَنَّةِ وَالْعِدْلُ يَقِلُ بِالْمَرَأَةِ أَنْ يُزَدَّ نَهَيْتُهُ وَلَا يَقِلُ بِالجِرْجَلِ

A child of adultery or l’ī’ān 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:

وَيَرِدْ وَلَدُ الْزَنَّةِ وَالْعِدْلُ يَقِلُ بِالْمَرَأَةِ أَنْ يُزَدَّ نَهَيْتُهُ وَلَا يَقِلُ بِالجِرْجَلِ

The scholars differed regarding to istilkhaq (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 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 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 l’ī’ān. 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 madzhabbs (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 that 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 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 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 Fadil 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."

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 born 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 otorignal 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."

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 ijithad in determining clauses of fatwa (religious advice) on this issue.

The thing that should be underlined here is that in the decision of the Court as mentioned, the fatwa 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 legitimization 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 is 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 jairimah (a felony).
2. Hadd is a kind of punishment for a criminal act of which its form and degreare set by nash (religious texts).
3. Ta’zir is a kind of punishment for a criminal act of which its form and degreare delegated to the ulil amri (the authority holding the right to establish a punishment).
4. Wasiat wajibah is a policy of theulil amri (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, inheritance, and nafaqah (maintenance 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 nafagalt (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. Fulfilthe 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.

1. This fatwa is valid on the date of enactment, with a provision that if at a later day it needs a refinement, it will be improved and refined as appropriate.
2. In order for every Muslim and those who need maybeware 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 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 bandonment; (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, religious provisions and not as a form of discrimination to them.
culture and language, the legal status of the child, the child’s birth order, and their physical and/or mental condition.

Furthermore, 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 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 fact that 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:

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

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

With the methods and approaches of maqashidsharia (objectives of the Islamic teachings) which is hifž; al-nafs(preservation of one’s soul) in this context must take precedence over other hifž(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 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 Companions 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’iyyah, 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 nafqah(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 nafqah(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 (hifž al-nasl). (e) The government has authority to impose the wasiat wajibah 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.

References


