

***THE URGENCY OF PROTECTING CHILDREN BORN  
FROM WOMEN WHO HAD CEASED  
HER MARRIAGE DUE TO LI'AN \*)***

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**Abstract:** *A husband is given the right to deny the child born by his wife as his child, while his wife denies the accusation. If a husband accuses his wife of adultery, but does not complete the evidence by presenting 4 witnesses and his wife refutes the accusation, then they can take the oath of li'an. The child born of the oath of li'an is a child who called as mula'nah or an adulterous child or a child born out of marriage. As a result of the legal li'an child, this adulterous child does not have nasab, marriage guardian, inheritance and a living with the man who caused his birth. In order for the li'an child not to be abandoned by his biological father, a biological father should be appointed to take responsibility for fulfilling the life needs of the li'an child concerned. The government has the authority to determine the punishment of ta'zir to the adulterous man by obliging him to fulfill the life needs of the li'an child, even obliging him to give part of the assets after he dies through obligatory wasiat. This is done in order to fulfill the sense of justice and the interests of children and human rights of a child.*

**Keywords:** *li'an child; legal protection*

## **INTRODUCTION**

Marriage as a legal institution has important consequences in the lives of the parties who carry out the marriage.<sup>1</sup> The effect of

marriage also has implications for the legitimacy of the child who is born, so that it creates a familial relationship between the child and his parents, can be a legitimate child, a child outside of marriage, even adultery and a discordant child. In terms of law, the position of each child varies when associated with

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1. J. Satrio. 1993. *Marriage Property Law*. Bandung: Citra Aditya Bakti, p. 28.

marriage conducted by both parents.

The community views children as very important in household life (family). It is undeniable that one of the goals of marriage is to regenerate. Children from a marriage often make family relationships stronger and stronger, as well as the sense of responsibility of each partner becomes stronger. The existence of a marriage, will determine the legal position of a child born. A marriage that is held and declared validly will make the child being born as a legitimate child.

In The Act Number 1 of 1974 concerning Marriage (State Gazette of the Republic of Indonesia of 1974 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 3019; hereinafter referred to as The Act No. 1/1974) distinguishes children in marriage from legal children and illegitimate children. Both of which have different legal positions in family relationships. Article 42 of The Act No. 1/1974 stipulates that a legal child is a child born in or as a result of a legal marriage. Thus, an illegitimate child means that the child is not born in or as a result of a legal marriage. As a consequence, a legitimate child has a kinship (descent) with both parents, while the illegitimate child only has a relationship between his mother and his mother's family. This illegitimate child is called a child who is born out of marriage or an outside child marries.

According to Article 44 of The Act No. 1/1974, a husband can deny the legitimacy of the child born by his wife if the husband can prove that his wife has committed adultery and the child is the result of adultery, the court will give a decision about the legality of the child. If, it has been proven that the child is the result of adultery, then the child will become an illegitimate child or child born out

of marriage, who only has a civil relationship with his mother and mother's family.

In Islamic law, to prove that a woman has committed adultery, four male witnesses or two male witnesses plus four female witnesses must be put forward, because accusing people of committing adultery is a major sin. If it is then not proven, the accuser was sentenced to 40 years of punishment (Al-Quran Surah An-Nisa '(4): 254; Al-Quran Surah An-Nur (24): 4 and Al-Quran Surah Al-Baqarah (2): 282).<sup>2</sup> If a husband accuses his wife of committing adultery or denying a child in the womb or who has been born of his wife, but the husband does not have witnesses and the wife rejects the accusation or denial, then the settlement is carried out through the *li'an* process, which causes a marriage end between husband and wife forever and the child contained in his mother is given to his mother and the husband is free from the obligation to provide a living. The *li'an* procedure begins with the husband swearing four times with the accusation of adultery and/ or denial of the child, followed by a fifth oath with the words "Allah's curse on him if the accusation and/ or denial is a lie, then followed directly by the wife rejecting the accusation and/ or the denial by four oaths with the said accusation/ denial is incorrect, accompanied by the fifth oath with the words "the wrath of God on the accusation and/ or denial is true." By doing such procedure completely, then there is *li'an* (QS.24: 6-9).<sup>3</sup> If the oath of *li'an* has been pronounced, it will cause a break in marriage between the husband and the wife and the breakup of the relationship between the

2 Rachmadi Usman. 2006. *Legal Aspects of Individual and Family in Indonesia*. Jakarta: Sinar Grafika.. p. 349

3 *Ibid*.

child born to the mother's husband. The oath of *li'an* that the husband said brought changes to the status of the child who was born, because of the interruption of the relationship between his father and his mother. The effect of *li'an* is regulated in Article 162 of the Compilation of Islamic Law (KHI). According to this provision, if *li'an* occurs, the marriage is broken forever and the child conceived is given to his mother, while her husband is free from the obligation to provide a living. Unlike the case stated in the Constitutional Court Decision Number 46/ PUU-VIII/ 2010 dated February 17, 2012 which gives the possibility that a child born outside of marriage also has a civil relationship with his father and his father's family as long as it can be proven based on science and technology and/ or other evidence according to the law that can prove the blood relations of the man which causes his birth. *Li'an's* child is an adulterous child, including a child born outside of marriage, which can mean that the child of *li'an* can also have a civil relationship with his biological father. In the other hand, in Islam, a child is born in a holy condition and does not carry the sin of inheritance, even though the child is born as a result of adultery, it is also necessary to get legal protection. Likewise for children born from divorce because *li'an* needs to also be given legal protection, because children have the right to get justice and are protected from neglect since the birth is not due to the fault of the child and is still born in holy circumstances. For this reason, it is necessary to examine the position of children born as a result of the cease of marriage because of *li'an* and legal protection of children born from a wife who has been *li'an* by her husband. The results of this study are expected to find the principle of child protection that

is born as a result of the breakup of marriage because of *li'an*.

## METHOD

This research is a "normative legal research", which is a study of laws and regulations relating to family law, which is specifically related to the protection of children born to wives who are married to their husbands. This type of research is a legal vacuum, where there is a lack of clarity/ legal vacuum against the protection of children born to the wife in the husband. The nature of this research is prescriptive analytical, which is trying to solve the problems that exist in the community based on the research objectives to be achieved, which were originally compiled, explained then analyzed.

## ANALYSIS AND DISCUSSION

### The Position of Children Born to Wives that has been *Li'an* by Her husband

One reason for the divorce according to The Act No. 1/1974 is adultery, which is known as the reason for divorce based on adultery, like BW. But how does the meaning of zina in the perspective of the Act No. 1/1974 is an issue that is not easy to solve. Does the Act No. 1/1974 interpreted adultery as embraced by BW, it is clear that there still needs a depth study. It is indeed a thought debate, because the problem arises whether the meaning of adultery is entirely the same as what is meant by BW, especially if it is related to Article 284 of the Criminal Code (KUHP). In the other hand, the Act No. 1/1974 is strongly influenced by religious elements, of course the Islamic religion plays a very important role, so the notion of adultery can be drawn from its teachings. Broadly speaking, the notion of adultery in Islam is every sexual

relationship committed outside of marriage. Adultery which is categorized as *haram* is classified into two types, namely: adultery *muhson* and adultery *ghair muhson*. *Zina muhson* is a sexual relationship that is both, or one of them is still or has ever been married, and the punishment is stoned. For this type of *zina ghair muhson* is a sexual relationship outside marriage conducted between a virgin and a girl, whose punishment is flogged 100 times in front of public.<sup>4</sup>

Marriage with all the rules is stipulated by Allah SWT aims to regulate family life. This is very important because the family is the smallest unit of a society, whose alliance is intertwined with a very strong inner-born bond (*mitsaqan galizha*), namely with deep affection. But perhaps, due to certain factors, a household is faced with the reality that a housewife (wife) has begun to be unfaithful and betrayed by having an affair with another man, which then raises accusations against the wife that she has committed adultery. The accusation by the husband may be true and may be incorrect. But according to the Qur'anic rule when the accusation of adultery was committed by a husband against his wife, the husband must present four witnesses to prove his accusation. If not, the husband can prove the accusation by swearing *li'an*. If the husband has sworn *li'an*, the wife is threatened with adultery. However, the wife can avoid adultery if she is willing to swear that her husband's accusation is not true. If a husband and wife have sworn *li'an*, their marital relationship is declared as broken up (*fasakh*). If after that the wife gave birth to a child, then the child who was born was punished only having a nasal relationship with his mother and

his mother's family. Logically it is impossible for the oath of *li'an* to be carried out by both of them to be true. Surely the right one is only one, maybe the husband's oath or maybe the wife's oath. If the husband's oath is correct, then the wife in the wrong position has committed adultery, so the abolition of the child's sentence to the husband is correct. However, if the wife's oath is correct, then the abolition of the child's sentence against the husband is not appropriate. That is the law applied in the Qur'an.<sup>5</sup>

Adultery is an act which is forbidden by Allah SWT and His Messenger. The perpetrator will be subject to sanctions by binding or stoning. How to prove and determine the law of adultery is made so difficult by Islam. If there are only 2 witnesses for murder, the proof of adultery must be 4 witnesses who are just, truly witnessing the incident in detail. If only an accusation that the *fulan* and *fulanah* had committed adultery, or he had seen them both lying hugging naked in bed and under one blanket, it was not considered sufficient, meanwhile, if the 3 witnesses saw the incident in detail, but the 4th was not, all witnesses have to be beaten 80 times. Likewise, as with a person who accuses a man and a woman of adultery (without witnesses and evidence), he must be beaten 80 times. The goal is to protect the community, maintain their good name and nurture the family from wasting offspring and abandoning children.<sup>6</sup>

Islamic Law has a very strict attitude towards the issue of adultery. He determines a very narrow understanding as an act that is

4 Moch. Isnaeni. *Indonesian Marriage Law*. Surabaya: Revka Petra Media. p 208-209.

5 Abd. Rasyid As'ad. 22<sup>nd</sup> October 2013. *DNA tests to prevent the occurrence of Li'an*. <http://papurworejo.go.id/web/tes-dna-untuk-mertgah-terlian-lian/>. [Downloaded May 1<sup>st</sup>, 2017].

6 Mustofa Hasan. 2011. *Introduction to Family Law*. Bandung: Pustaka Setia. P.267.

carried out consciously and surely in a manner that does not allow the discovery of any doubt. Likewise, the method of proof is by determining the existence of 4 fair witnesses and witnessing the act in detail, which is usually difficult to do. Let's just say that someone does look at adultery as demanded, but the other 3 cannot see the same thing. Similarly, on the contrary, all of that shows an indisputable proof that Islam completely closes the door of such accusations as closely as possible so that a person's self-esteem does not fall by a very cruel slander.<sup>7</sup>

*Li'an* is lafaz in Arabic which comes from the root word laa-a-na which literally means "cursing each other". This method is called term *li'an*, because in the process the word "curse" is said. Among the representative definitions, which are easy to understand are "the oath of a husband who accuses his wife of adultery, while he is unable to bring 4 witnesses". In some key words that will explain the nature of the act of *li'an* is one form of oath or testimony to Allah which is 5 times. The first four testimonies that he is right with his words and the fifth that the curse of God is upon him when he lies. Second: the word "husband" is confronted with "wife". This implies that *li'an* applies between husband and wife and does not apply outside the environment. Third, the word "accusing adultery" means that the oath committed by the husband is that his wife commits adultery or believes that the baby conceived by his wife is not his child. If the accusation made by the husband has nothing to do with adultery or the child being conceived, it is not called *li'an*. Fourth, the word "husband is not able to bring 4 witnesses", which means that if with the accusation the husband is able to bring 4 witnesses

<sup>7</sup> *Ibid.*

as indicated when accused of adultery, not called as *li, an*; but report what happened to be resolved by the judge.<sup>8</sup>

The legal basis of the *li'an* is the Al-Quran Surah An-Nur verses 6 to 9, which states: "husbands who accuse their wives of committing adultery, even though they have no witnesses except themselves, let one of them declare testimony to God is four times that he belongs to the righteous and the fifth oath that the curse of Allah is upon him if he is among those who lie; the wife avoids the punishment of adultery if she proclaims a testimony to God four times, that her husband belongs to those who lie; the fifth stated that they were willing to accept the wrath of God, if their husbands were among the righteous."<sup>9</sup>

The Act No. 1/1974 and the implementing regulations do not regulate at all *li'an* issues as one of the causes of divorce. But The Act Number 7 of 1989 concerning Religious Courts (State Gazette of the Republic of Indonesia of 1989 Number 49, Supplement to the State Gazette of the Republic of Indonesia Number 3400) as amended first by the Act Number 3 of 2006 concerning Amendments to the Act Number 7 1989 concerning Religious Courts (State Gazette of the Republic of Indonesia Number 22 of 2006, Supplement to the State Gazette of the Republic of Indonesia Number 4611) and second time with the Act Number 50 of 2009 concerning Second Amendment to the Act Number 7 of 1989 concerning Religious Courts (Gazette State of the Republic of Indonesia Year 2009 Number 159, Supplement to the State Gazette of the

<sup>8</sup> Amir Syarifuddin. 2011. *Islamic Marriage Law in Indonesia Between Munakahic Fiqh and Marriage Law*. Jakarta: Kencana Prenada Group. p288- 289.

<sup>9</sup> Ahmad Azhar Basyir. 2004. *Islamic Marriage Law*. Yogyakarta: UII Press. P.88

Republic of Indonesia Number 5078) refers to discussing divorce for reasons of adultery as stated in Article 87 and Article 88, which states as follows:

**Divorced With the Reasons of Adultery**

**Article 87**

1. If an application or claim for divorce is filed on the grounds that one of the parties commits adultery, the applicant or plaintiff cannot complete the evidence and the respondent or the defendant refutes the reason, and the Judge believes that the request or claim is not proven at all and the effort affirmation of evidence that it is no longer possible to obtain evidence from the applicant or plaintiff or from the respondent or defendant, then the Judge because of his position can instruct the applicant or plaintiff to swear.
2. The respondent or defendant is given the opportunity to confirm his objection in the same way.

**Article 88**

- a. If the oath as referred to in Article 87 paragraph (1) is carried out by the husband, the settlement can be carried out by means of the *li'an*.
- b. If the oath as referred to in Article 87 paragraph (1) is carried out by the wife, the settlement shall be carried out with the applicable procedural law.

Regarding the guidelines for proceedings with the Religious Courts in relation to the legal process for divorce proceedings on the reasons for the husband's adultery and the legal process for divorce for the reason that the adulterous wife (*li'an*) is further regulated in the Book II Guidelines for the Implementation of Duties and Administration of the 2013 Religious Courts based on the Decree of the Chief Justice of the Supreme Court Number

KMA/ 032/ SK/ IV/ 2006 concerning the Enactment of Book II Guidelines for Implementation of Duties and Administration of Religious Courts on April 4, 2006 as follows:

- a. Examination and settlement of the claim for divorce on the grounds of the husband's adultery, is carried out based on the procedural law that applies to the ordinary divorce claim, which is carried out with a witness or oath of breaker, or on the basis of a criminal decision that has permanent legal force that her husband commits adultery.
- b. Examination and settlement of divorce over the reasons for the wife's adultery, is carried out based on the procedural law as in letter (a) or by way of *li'an* (Ex Article 87 and 88 the Act Number 7 of 1989 jo the Act Number 3 of 2006 jo Act Number 50 of 2009).
- c. Formal requirements for *li'an* oath:
  1. Allegations of a wife committing adultery are listed or made chronologically in a claim or petition.
  2. The wife denied the husband's accusation that he had committed adultery with another man.
  3. *Li'an* oath is carried out at by the order of the Judge who examined the case.
- d. Material Terms of *Li'an* Oath:
  1. The husband cannot complete the evidence on the accusation of adultery with his wife.
  2. The husband's oath was pronounced in the Panel of Judges (Court) which was attended by the applicant's wife.
  3. The husband's oath is also answered by the oath of the wife delivered at the court hearing as well.
  4. First oath (cursing each other) ac-

ording to the prescribed oath text.

e. The *li'an* oath procedure is regulated in Article 127 of the Compilation of Islamic Law as follows:

1. Husband swears four times with the accusation of adultery and/ or denial of the child followed by a fifth oath with the words "Allah's curse upon him if the accusation or denial is a lie".
2. The wife rejects the accusation or denial with four oaths of the word "the accusation or denial is incorrect", followed by the fifth oath with the words "God's wrath on him if the accusation or denial is true".
3. The procedure for numbers (1) and (2) is an inseparable entity.

f. *Li'an* is only valid if it is carried out in front of the trial of the Religious Court/ Syari'ah Court, whose legal consequences resulted in the termination of marriage between the husband and wife forever. The judge must drop the interim decision.

g. The examination process for divorce with *li'an* is:

1. After the Applicant and the Respondent have answered the answer, proceed with proof.
2. If there is no evidence found in Article 164 HIR/ Article 284 of the RBg other than proof of oath, the Religious Court/ Mahkamah Syari'ah asks the husband whether to take the oath of *li'an* or not.
3. If the husband wants to take the oath of *li'an*, the Religious Court / Mahkamah Syari'ah orders the husband to take an oath of liability four times which reads: "By Allah I swear that my wife has committed adultery",

and after that proceed with the words: "I am ready to accept the curse of Allah if I lie".

4. After the husband takes the oath, the Religious Court/ Mahkamah Syari'ah asks the wife if she is willing to take an oath of oath.
5. If the wife is willing to take an oath of oath, the Religious Court/ Mahkamah Syari'ah instructs the wife to take an oath four times which reads: "By Allah I swear that I am not committing adultery", and after that is followed by a statement: "I am ready to accept the wrath of God when I lie."
6. The verdict of divorce by the reason of adultery will state: "Decide a divorce against the Defendant (name ... bin. ...) against the Plaintiff (name ... binti .....)".
- h. The verdict of divorced by the reason of *li'an* will state: "Decide a the divorce for the Petitioner (name ..... bin .....) against the Respondent (name ... binti .....)"<sup>10</sup>

Then in Articles 125 through 128 KHI is perfectly regulated regarding the procedures for *li'an* and its legal consequences, by taking all the provisions contained in *fiqh* with the following formula:

#### **Article 125**

*Li'an* caused a marriage break between husband and wife forever.

#### **Article 126**

*Li'an* happened because the husband accused the wife of committing adultery and or denied

<sup>10</sup> Directorate General of the Religious Courts of the Supreme Court. 2013. *Revised Book II Edition of the 2013 Guidelines for the Implementation of Duties and Administration of Religious Courts*. Jakarta: Directorate General of the Religious Courts of the Supreme Court.p. 135-136.

the child in the womb or who had been born to his wife, while the wife refused the accusation and/ or denial.

#### Article 127

The *li'an* procedure is arranged as follows:

- a. The husband swears four times with the accusation of adultery and/ or denial of the child followed by a fifth oath with the words "Allah's curse upon him if the accusation and or denial is a lie";
- b. The wife rejects the accusation and or denial with four oaths of the word "the accusation and or denial is incorrect", followed by the fifth oath with the words "God's wrath on him: the accusation and or denial is true";
- c. the procedure in letters a and b is an inseparable unity;
- d. if the procedure for letter a is not followed by the procedure for letter b, then *li'an* does not occur.

#### Article 128

*Li'an* is only valid if done before a Religious Court hearing.

The legal consequences of *li'an* are the occurrence of divorce between husband and wife. For a husband, his wife becomes unclean for him forever, his wife must not reconcile or remarry with her ex-husband with a new marriage. If his wife gives birth to the child he has conceived, the child is punished not including her husband's offspring. Another legal consequence caused by legal *li'an* is that *zina* has fallen and passed, the husband and wife divorced forever, applied based on the husband's confession that he did not interfere with his wife and if there is a child after the *li'an* statement cannot be recognized by the husband as his child. On the contrary, the wife can abort the law against her by defending her husband's *li'an* with his *li'an* over her

husband.<sup>11</sup>

Regarding to the legal consequences of *li'an* according to *fiqh*, this is also regulated in Article 162 of KHI which stipulates that if *li'an* occurs, the marriage will be terminated forever and the child conceived is given to his mother, while her husband is free from the obligation to provide a living. With the fact that the relationship between men which caused his birth with a denied child became interrupted, then the *li'an* child was born to his mother and his mother's family. Furthermore, his *li'an* father was freed from the obligation to provide for the *li'an* child.

Bearing in mind the legal consequences of the oath of *li'an* by a husband against a wife on the allegation of adultery, especially the wife who is pregnant or denied the child born of marriage does not only result in the breakup of marriage between husband and wife forever but other legal consequences for the child born from a wife who is *li'an* by her husband, the child born will have the status of *mula'nah*. *Mula'nah* is a child born to a woman who is *li'an* by her husband. Because of the *li'an*, the child changes his status to an illegitimate child (preaching) and his position in the eyes of the law is the same as an adulterous child, where he only has a civil relationship with his mother and his mother's family, while those who deny it with *li'an* does not have any relationship, *mula'nah* is a special terminology in Islamic law whose essence is the same as the child of adultery in BW. Although children born outside the marriage in the view of Islamic law and BW are different, especially differences in adultery terminology. According to Islamic law, all intercourse

11 H.M.A. Tihami dan Sohari Sahrani. 2009. *Munakaha Fiqh: A Complete Marriage Law Study*. Jakarta: Rajawali, p. 318-319.

committed outside of marriage is a form of adultery, while based on the provisions of Article 284 of the Penal Code that is meant by adultery is “a man who has married does *mukah (overspel)* while he knows Article 27 BW applies to him and a woman who does *mukah (overspel)* even though it is found that Article 27 BW applies to him “, so according to western law a new child can be categorized as an adulterous child if the child is born of a husband and wife relationship committed by a man with a woman where one or both are married to other people. Adulterous children are children in the lowest group compared to other groups of children based on the BW provisions that adultery and discordant children cannot be recognized by their biological parents, so that juridically an adulterous child will not have a father or mother and therefore an adulterous child will not have any civil rights from his biological parents, except as stipulated in Article 867 paragraph (2) BW, which is limited to the right to earn a living according to the ability of his biological parents after taking into account the number and circumstances of lawful heirs based on regulations.<sup>12</sup>

In view of the legal consequences of divorce because the *li'an* has a consequence on the status of the child in the womb, the wife becomes a child who only has a civil relationship with his mother who is the same as the child with adultery. So, it is better if divorce with this swearing-in oath should not be done emotionally and in a hurry, it should be carried out after a DNA test is carried out on the child who is born, and even if divorce is un-

avoidable the divorce should not be done for reasons of adultery which is later due to the absence of witnesses must take the oath of *li'an* towards the pregnant wife who may be the child being conceived is the child of the husband who *li'an* his wife.

For husbands who are sure or heavy in their expectations of the truth, the accusation is altered or permissible. But if the husband is not strongly suspected the truth of his accusation, then the *li'an* law for him is *haram*. Whereas the purpose of allowing the *li'an* is to provide convenience to husbands who are convinced of the truth of their adultery accusations, whereas in formal law they cannot do anything to prove the truth. The lesson is to release the threat from the husband who is convinced of the truth, the formal law cannot help him.<sup>13</sup>

Sheikh Hasan Ayyub explained that Allah revealed the verses of *li'an* as a mercy to His servants, a cure for the diseases in their hearts, and to stop the very painful social tragedy. The essence of this tragedy is that if a man ensures his wife is adulterous in his condition as a wife, then he can file a complaint with the judge or his deputy. Then the judge sent a letter to the woman to be present, then the judge sent a letter to the woman to attend, then the judge advised them with appropriate advice to encourage repentance and return to Allah. If each person insists on his attitude, the man continues to accuse his wife of adultery, and the wife continues to deny having committed adultery, then the judge can order them to carry out the *li'an*.<sup>14</sup>

The accusation regarding the *li'an* is in

12 D.Y.Witanto. 2012. *Family Law Rights and Position of Children Outside Marriage After the Constitutional Court's Decision concerning the Material Test of the Marriage law*. Jakarta: Library Achievement. p. 40.

13 Muhammad Syaifuddin, Sri Turatmiyah dan Annalisa Yahanan. 2012. *Divorce Law*. Jakarta: SinarGrafika., p. 158.

14 *Ibid.*, p. 159.

two forms. First, because he saw the act of adultery committed by his wife and second, denying the child conceived by his wife. The conditions that apply to the allegation are if the allegations are explained in detail as witnesses of adultery give an explanation because the words of the *li'an* committed by the husband occupy the position of the testimony. If the accusation is in the form of denying the child being conceived, the husband's explanation is required to occupy the position of the witness. If the allegation is in the form of denying the child being conceived, the husband's explanation requires that his wife beforehand be clean and never get married after the cleanup. About the boundaries and signs that clean is different from the understanding of scholars. According to Imam Malik, in one other history it was said that 3 times of menstruation and in other narrations it was said that one menstruation period. Likewise in denying the child absolutely, some scholars say it is not valid for *li'an*, while other scholars say it is valid even though the accusation is valid without explanation.<sup>15</sup>

With the oath of rejection the wife is free from adultery sanctions. The husband's oath and refusal of oath from the wife were made before a judge in court. With the occurrence of mutual oath and cursing, the marriage breaks between the two and cannot return to marriage forever. In addition, the child born from the marriage is not given to the husband who *li'an* his wife, because the *li'an* is besides accusing adultery, as well as denying the child conceived by his wife.<sup>16</sup>

The Act No. 1/1974 has distinguished children in marriage from legal children and illegitimate children, both of whom have dif-

ferent legal positions in the family. Article 42 of the Act No. 1/1974 stipulates that a legal child is a child born in or as a result of a legal marriage. This means that children born outside legal marriage are not legitimate children. An illegitimate child means that the child is not born in or as a result of a legal marriage. Consequently a legitimate child has a civil relationship with his parents, while an illegitimate child only has a civil relationship with his mother and his mother's family. This illegitimate child is called a child born outside of marriage. In Islamic law, a child born out of marriage is called a child of adultery (adultery child), namely a child born as a result of a relationship outside the marriage that is legitimate according to religious provisions. The *li'an* child means that the child is *li'an* in the sense of adultery. This child is a child born of a legitimate wife but her husband denies/denies him as a child, so that the child is not the husband's child to his wife who is *li'an* by her husband.

Thus, in the Act No. 1/1974, a child born to a wife who has been *li'an* by her husband, the child will occupy a position as an illegitimate child or a child born out of marriage as stipulated in Article 43 paragraph (1) of the Act No. 1/1974, was stated to only have civil relations with his mother and family. This means that the child has a familial relationship with the consequences, especially the right to inherit, so it is almost the same as the family status with a legitimate child, only the difference between the child outside the marriage has nothing to do with his father, as the one who raised it. On the contrary, a legitimate child has a civil relationship besides with his mother and family, his mother also has a civil relationship with his father and his

15 Amir Syarifuddin. *Op.Cit.*, p. 295.

16 *Ibid.*

father's family.<sup>17</sup> The position of the child in marriage, according to Islamic law as contained in the KHI in principle has the same view as the Act No. 1/1974, because Article 100 KHI contains a formula that is not different from Article 43 paragraph (1) of the Act No. 1/1974, where an unmarried child only has a *nasab* relationship with his mother and his mother's family, so that the child outside of marriage or child born out of marriage or adulterous child, including the *li'an* child is not entitled to inheritance, livelihood, marriage guardianship from his father.

### The Principle of Child Protection for Li'an Children

The child of adultery was not only cut off from *nasab* from his father, but also he was not entitled to the inheritance left by his father. The school scholars agreed, if adultery was proven with a true understanding and in the manner prescribed, no inheritance rights between children who had been born through adultery and those born from their father's sperm, because in Islamic law that child do not have a legitimate *nasab* connection with him.<sup>18</sup> This also applies to the *li'an* child who only has a civil relationship with his mother, where the *li'an* child relationship is disconnected from his mother's husband and the man who impregnates his mother if he is not the child of his mother's husband.

Many narrow minded people who see children born from unclean relationships will still be "illegitimate children" even though in the terminology of Islam the term "illegitimate child" has never been known and this

is clearly contrary to what Allah SWT said in Al-Quran Surat Al- Hujarat verse 13, which means: "the truth is that the most noble man beside Allah is the one who is afraid of Allah". From this verse we can understand that the Creator himself never grouped humans based on his birth status. The position of man in the presence of Allah SWT is only distinguished based on the value of his piety. Islam never teaches that parents' sins can be passed on to their children or borne by their offspring.<sup>19</sup> Therefore, even if the child is adultery child, He does not bear the sin of adultery committed by the person who causes his birth.

Considering the position of a child born to a wife who has been *li'an* by her husband only has a civil or *nasab* relationship to his mother, which is the same as the position of adultery child according to the concept of Islamic law, then clearly the position of the *li'an* child is including children born outside legal marriage as regulated in Article 43 paragraph (1) of the Act No. 1/1974 which reads: "Children born out of marriage have a civil relationship with their mother and family." The same provision was found in Article 100 of KHI that children born outside of marriage only have a *nasab* relationship with their mother and family and Article 162 KHI which reads: "When *li'an* happens the marriage breaks forever and the child conceived is given to his mother, while the husband is free from the obligation to provide."

Thus, in line with the Article 43 paragraph (1) of the Act No. 1/1974, the formula is the same as Article 100 KHI, so children born outside of marriage only have *nasab* relationship with their mother and family. In this sense, including children born outside marriage are:

17 Soedharyo Soimin. 2004. *People and Family Civil Law/ BW Legal Perspective, Islamic Law, and Customary Law*. Jakarta: Sinar Grafika. P.41.

18 Mustofa Hasan. *Op.Cit.*, p. 267.

19 *Ibid.*, p. 87.

1. A child born to a woman who does not have a legal marriage with the man who impregnates her;
2. Children born to women due to rape victims by one or more men;
3. Children born to women who are *li'an* (denied) by their husbands;
4. Children born to women whose pregnancies are due to wrong people (mistaken), suspected that the husband turns out not;
5. Children born to women whose pregnancies are due to forbidden marriages, such as marrying siblings.

The numbers 4 and 5 above in Islamic law are called *syubhat* children, which if admitted by the father of *syubhat* his *nasab* can be connected to him, while the numbers 1, 2 and 3 are included as a group of adulterous children.<sup>20</sup>

Children born outside of marriage by Article 43 paragraph (1) of the Act No. 1/1974 do not occupy a position as a legal child. As a result the child born outside of marriage only has a civil relationship with his mother and mother's family. Then how is the legal position of the child concerned based on Article 43 paragraph (2) of the Act No. 1/1974 promised to be further regulated by Government Regulation. But it is really dilemma to address the existence of children born outside of this marriage, and the matter proved that the government itself until several decades passed even more than half a century, never issued the promised regulation because of giddiness. It must be admitted that it is complicated to determine the legal position of the child outside the marriage in question explic-

itly, this is because the religious element surrounds the Act No. 1/1974. Many interests must be considered so that the relevant parties are not harmed by the presence of unmarried children, most of whom are not desired either by moral values or religious teachings. Even though the birth of a child is outside marriage, the mistake could not be inflicted on him, because all the mistakes were in a couple who had had a legal sexual relationship outside of marriage or as a result of an illegal marriage. It feels indeed unfair to merely defame the bitterness only on the part of the child who does not know why he must be born. It is also very inhumane if a fertilizing father is released from his responsibility for the survival of an outside marriage child as the results of his actions. Really this is a problem that is stuck at the intersection without necessity to be completely overcome.<sup>21</sup>

The mother and family of an unmarried child who claims to have a civil relationship based on Article 43 paragraph (1) of the Act No. 1/1974, sometimes submitting an application to the court to get clarity on their rights, but many businesses failed. The climax was when a petition was filed with the Constitutional Court on the grounds that the existence of Article 43 of the Act No. 1/1974 does not guarantee the constitution of extramarital children and through a Constitutional Court Decision Number 46/ PUU-VIII/ 2010 dated 17 February 2012 which is essentially in order to protect the rights of child outside marriages, the person concerned has a civil relationship with his father's party. The Amendment of the Constitutional Court Decision which revised Article 43 paragraph (1) of the Act No. 1/1974 is "a child born out of marriage has a civil relationship with his mother and his mother's

20 Bahruddin Muhammad. 2014. *Inheritance Rights of Children Outside Marriage: Study of Results of Constitutional Court Decision Number 46 / PUU-VIII / 2010*. Semarang: Fatawa Publishing. P.303.

21 Moch. Isnaeni. *Op.Cit.*, p. 237.

family and with a man as his father which can be proven based on science and technology and/ or other evidence according to the law having blood relations including civil relations with his father's family".

The Constitutional Court Decision was motivated by the application of a judicial review submitted by Hj. Aisyah Mochtar aka Machicha binti H. Mochtar Ibrahim and Muhammad Iqbal Ramadhan bin Moerdiono who have brought a new paradigm in the system of civil law and family law applicable in Indonesia. Various opinions of pros and cons accompany the birth of the decision. Some opinions state that the ruling will provide a better legal change in efforts to protect children based on the law and society, while others argue that the decision will bring a lot of complexity and new issues regarding inheritance law in Indonesia. In fact, some extremist state that the Constitutional Court Decision has legalized adultery in Indonesia.<sup>22</sup>

The Indonesian Ulama Council (MUI) considered the Constitutional Court Decision Number 46/ PUU-VIII/ 2010 was very excessive, exceeded the limit, and was "over dose" and contrary to the teachings of Islam and Article 29 of the 1945 Constitution. Constitutional Court Decision Number 46/ PUU-VIII/ 2010 this has gone beyond the request for just recognizing civil relations over children with fathers, but not registered at the KUA, becoming widespread about civil relations over children resulting from adultery with men which resulted in their birth. The MUI views that the Constitutional Court Decision has very broad consequences, including legalizing the relationship between *nasab*, inheritance, guardian, and the living between the child of adultery and the man

who caused his birth, which is not justified in Islamic teachings. As a result of the reckless decision of the Constitutional Court, now the position of the child of adultery is made the same as the position of the child born of a legitimate marital relationship, both in terms of the obligation to earn a living and especially inheritance rights. It is clear that this Constitutional Court Decision has made the marriage institution less relevant, let alone just recording it, given the equalization of rights between the children of adultery with the child of the legal marriage. This, we value greatly decreases the degree of purity and nobility of marriage institutions. Even at an extreme level, there can be an opinion that there is no need for a marriage institution, because people do not need to be legally married if it is associated with the child legal protection, "Ichwan Sam added."<sup>23</sup>

In addition, the MUI considered that the Constitutional Court's decision had opened the "Pandora's box" which we have been guarding, namely the opening of great opportunities for the development of thoughts and behavior of some people to engage in extramarital relations (adultery) without worrying about the child's future (especially concerns from the female partner of adultery). Because even though not in a marriage bond (adultery), after all the child of the adultery relationship still has the same inheritance rights as the child born from a legal marriage. Obviously, the Constitutional Court's decision has disturbed, changed, and even damaged the Islamic inheritance law which comes

22 Bachrudin Muhammad. *Op.Cit.*, p.124.

23 MUI: *Constitutional Court Decisions, Over Dose and Contrary to Islamic Teachings*. <http://www.voa-islam.com/read/indonesiana/2012/03/14/18167/mui-putus-mk-sembrono-over-dosis-bertolak-dengan-ajaran-islam/#sthash.417oThrR.dpuf>. [Downloaded May 7<sup>th</sup> 2017].

from the Qur'an and Sunnah. Moreover, the Constitutional Court Decision states that children born from the result of adultery will receive inheritance from men which results in their birth. "Even though Islamic inheritance law originating from the Qur'an and Sunnah explicitly and clearly states the category of children who receive inheritance, and children born from the result of adultery are clearly not getting inheritance rights from men which resulted in their birth," said KH. Ma'ruf Amin. The MUI considered that the Constitutional Court had been wrong, as if the child resulting from adultery had no legal protection. The truth is, according to the MUI, children from the results of adultery have legal protection, but legal protection is not the same as children in marriage, where one only has a civil relationship with his mother and his mother's family, while the other has a father and mother. . That's the point of marriage institutions. Eliminating the difference in legal protection for both conditions will make the marriage institution something irrelevant, this cannot be accepted by Islam. In the MUI Fatwa Number 11 of 2012 concerning the Position of Children of Adultery and Treatment Against It, stated: "Children resulting from adultery do not have *nasab*, marriage guardian, inheritance, and *nafaqah* with the man who caused his birth."<sup>24</sup>

The Constitutional Court considered that the legislation should not abolish the responsibility of a man and a woman who led to the birth of a child. The responsibility is attached to both of them as father and mother, not only to one of the parties. During this time the prevailing rules seemed to deliberately negate the responsibilities of men and impose everything on women as mothers. Therefore, in the interests and legal protection, the Consti-

tutional Court changed Article 43 of the Act No. 1/1974.<sup>25</sup>

Regarding the issue of the status of children outside of marriage from a legal perspective, it must be seen from two aspects, among others, from the aspect of his parents' marriage and from the aspects of the child's interests. If we look at the first aspect in seeing the contents of the Constitutional Court's decision, then it is clear that the conclusion of the Constitutional Court's decision is against the noble values in a marriage, especially if the argument is then used as a measure to justify the problem of children outside of marriage, because it cannot be denied that birth a child is a result of a relationship between a man and a woman who should be legally bound in a marriage relationship. An act of adultery will give birth to a child from adultery, so that legalizing the child's legal status resulting from adultery will have an impact on the effort to legalize the act of adultery.<sup>26</sup>

But if we use the second aspect where we try to let go for a moment about the issue of marital validity carried out by the parent of the child or maybe that there is absolutely no marriage, then we will be able to see several things including:

1. The occurrence of birth is not the will of the child;
2. The child is never given the right to choose he will be born from whose womb;
3. The child has no interest in the legitimacy of the parents' marriage, because he is not involved in the actions and mistakes committed by his parents;
4. There is no single sin that can be passed on to its offspring, so that the child cannot bear the consequences of the sin made by

24 *Ibid.*

25 Bachrudin Muhammad .*Op.Cit.*, p. 125.

26 *Ibid.*, p.129.

his parents;

5. The issue of birth is a destiny that cannot be avoided by the child, so in principle there will be no child who wants to be born in an illegal relationship;
6. Every child born outside of marriage has the same interests and needs as children in general, so that it is unfair if the child is limited to his civil rights, only because of an error that is not committed by him;
7. The Constitution protects the basic rights of every child to get a proper status before the law, including children born out of marriage;
8. Releasing the father's responsibility for his child only because there is no marriage or illegal marriage is a form of injustice, because he has a large role in the birth of the child.<sup>27</sup>

Linking between marital status with the status of a child that is born is a common thing, it is intended to give an important meaning to a marriage, so that the views of secularism and hedonism which consider marriage to be only ceremonial procession, do not grow and develop in Indonesian society. But on the other hand the law also cannot place children in a vulnerable position when problems occur with the validity of their parents' marriage. Because this will create new problems for the future of the nation. In principle, it is not permissible to change the view that every sexual relationship must be preceded by a marriage that is legitimate according to religion and fulfill the command of state law, but against cases already born of children from illegitimate relationships, the law must not be blind to reality. It is not an appropriate solution if the children become objects of neglect with status and legal recognition. The provi-

<sup>27</sup> *Ibid.*, p.130-131.

sion of civil rights for the child will not make the relationship made by his parents become legal according to law.<sup>28</sup>

It turned out that the Constitutional Court Decision Number 46/ PUU-VIII/ 2010, then the question arose from the public regarding the position of the child of adultery, especially related to *nasab*, inheritance, and marriage guardianship of a child from adultery with men which caused his birth according to Islamic law. Responding to this question, the MUI deems it necessary to establish a fatwa concerning the position of the child from adultery and treatment of it in order to be used as a guideline as set out in Fatwa Number 11 of 2012 concerning the Position of Children of Adultery and Treatment of It (Fatwa No. 11/2012). Regarding legal provisions, MUI in Fatwa No. 11/2012) states as follows:

1. Children of adultery do not have *nasab*, marriage guardian, inheritance, and *nafaqah* with the man who caused his birth;
2. Children of adultery only have *nasab*, inheritance, and *nafaqah* relationships with their mother and mother's family;
3. The child of adultery does not bear the sin of adultery committed by a person who causes his birth;
4. Adulterers are subject to *hadd* punishment by the authorities, for the benefit of guarding legitimate offspring (*hifzh al-nasl*);
5. The government has the authority to impose the punishment of *ta'zir* male adulterers which results in the birth of a child by obliging them to:
  - a. fulfill the child's living needs;
  - b. giving property after he died through obligatory wasiat.
6. Punishment as referred to in number 5

<sup>28</sup> *Ibid.*, p. 130.

aims to protect children, not to legitimize the relationship between the child and the man resulting in his birth.

Therefore, considering the position of the *li'anchild* who also includes children born out of marriage, whose position is the same as adultery, then based on the MUI fatwa No. 11/2012 can be a basic form of legal protection against children born from divorce because of *li'an*, even though the *li'anchild* does not have *nasab*, marriage guardian, inheritance and *nafaqah* with the man who caused his birth and husband of his mother. The government has the authority to impose the punishment of *ta'zir* male adulterers which results in the birth of a child by obliging to fulfill the necessities of life, and giving property after he dies through obligatory *wasiat*. Of course, to determine the man who was the cause of his birth must be proven based on the provisions of Article 43 paragraph (2) of the Act No. 1/1974 which was revised by the Constitutional Court. Therefore, here the obligation to provide protection for children born out of marriage is left to the government by putting it into law as mandated by Article 43 paragraph (2) of the Act No. 1/1974 which will further regulate the position of children born out of marriage.

One of the goals of marriage according to Islamic law is to maintain the sanctity of *nasab* relations. It is from the *nasab* relationship that the right of a father or family of a male lineage father to become a marriage guardian for a daughter will arise. Likewise in inheritance law, the right to inherit arises due to marriage and *nasab* relations arising from a legal marriage. If it is associated with the child of adultery, then the addition of Article 43 paragraph (1) of the Act No. 1/974 by the Constitutional Court, according to Islamic

law it should only be limited to dealing with maintenance and education rights.<sup>29</sup>

The addition of phrases in Article 43 paragraph (1) of the Act No. 1/1974 is intended to protect children outside of marriage, including adultery, so as not to be abandoned by their biological father, so it is not intended to legitimize *nasab* between the children outside of marriage to the biological father that caused his birth. His biological father was punished to take responsibility for fulfilling the living needs of the child outside of marriage. Not only that, even the government also has the authority to impose the *ta'zir* sentence on adulterous men which results in the birth of a child out of marriage by requiring him to give property after he dies through obligatory *wasiat*. The point is that the government is obliged to protect children from adultery and prevent neglect of them, therefore the government has the authority to give punishment to men which causes their birth to fulfill their needs. In line with the legal provisions and recommendations of the MUI as above, the Supreme Court in a National Working Meeting with the Court of Justice of the entire Indonesian Judiciary in Jakarta on October 31, 2012 through the Commission II in the Field of Religious Courts formulated that children born of adultery should fulfill the sense of justice and the interests of children and children's rights, applying the opinion of the Hanafiah school, in which the child of adultery has the right to earn a living from his biological father and his biological father's family. This is

29 Achmad Irwan Hamzani. March 2015. *Nasab of Foreign Children Married After the Decision of the Constitutional Court Number 46 / PUU-VIII / 2010*. Constitutional Journal, Volume 12, Number 1. Jakarta: Secretariat General and Registrar of the Constitutional Court of the Republic of Indonesia, p. 73.

because in reality in the community, the child from adultery is often neglected because the man who caused his birth is not responsible for meeting his basic needs.

The child is a mandate as well as a gift from the Almighty God, which we must always maintain because in him the inherent dignity, dignity, and rights must be upheld. Children's rights are part of human rights which are also contained in and guaranteed by the 1945 Constitution of the Republic of Indonesia (UUD 1945). Article 28B paragraph (2) of the 1945 Constitution stipulates that "Every child has the right to survive, growth and developed and is entitled protection from violence and discrimination". In order to be able to be responsible for the survival of the nation and state, every child needs to have the widest possible opportunity to grow and develop optimally, both physically, mentally and socially. For this reason, protection measures are needed to bring about the welfare of children by providing guarantees for the fulfillment of their rights without discriminatory treatment. Legal provisions for child protection are further stipulated in the Act Number 23 of 2002 concerning Child Protection (State Gazette of the Republic of Indonesia Number 109 of 2002, Supplement to the State Gazette of the Republic of Indonesia Number 4235; hereinafter referred to as the Act No. 23/2002) as amended, first time with the Act Number 35 of 2014 concerning Amendments to the Act Number 23 of 2002 concerning Child Protection (State Gazette of the Republic of Indonesia Number 297 of 2014, Supplement to the State Gazette of the Republic of Indonesia Number 5606) and second time with the Act Number 17 In 2016 concerning the Stipulation of Government Regulation in Lieu of the Act Number 1 of 2016 concerning

the Second Amendment to the Act Number 23 of 2002 concerning Child Protection Becomes Law (State Gazette of the Republic of Indonesia Number 237 of 2016, Supplement to the State Gazette of the Republic of Indonesia Number 5946; hereinafter referred to as the Act No. 17/2016).

Legal protection for children can be interpreted as an effort to protect the law on various rights and freedoms of children and various interests related to child welfare. Therefore, the issue of legal protection for children covers a very broad scope. Therefore, the scope of legal protection for children includes: (1) protection of children's freedom; (2) protection of children's rights; and (3) legal protection for all children's interests related to welfare. Meanwhile, the definition of child protection in Article 1 paragraph 2 of the Act No. 23/2002 as amended the latest by the Act No. 17/2016 means that all activities to guarantee and protect children and their rights can live, grow, develop, and participate optimally in accordance with human dignity, and be protected from violence and discrimination. Thus, in the context of child protection, a child has the right to be protected from violence and discriminatory treatment against him. Such child protection is regulated in Article 13 paragraph (1) of the Act No. 23/2002 as amended the latest by the Act No. 17/2016 which confirms the following:

Every child in the care of parents, guardians, or any other party responsible for care, is entitled to protect from treatment:

- a. discrimination;
- b. exploitation, both economic and sexual;
- c. neglecting;
- d. cruelty, violence and persecution;
- e. injustice; and
- f. other wrong treatment.

When linked to adultery, adultery is not permitted to receive discriminatory treatment and neglect from their parents, especially the biological father who caused his birth. The treatment of discrimination, for example treatment that discriminates the legal status of children. Adultery is often regarded as an illegitimate and discriminated child, because the birth certificate is only attributed to the mother. Plus the treatment of neglect of adultery, for example acts of deliberately ignoring the obligation to maintain, care for, or take care of adultery as it should. Whereas in terms of marital law as stipulated in Article 45 paragraph (1) and paragraph (2) the Act No. 1/1974, both parents, including their biological fathers have the obligation to care for and educate their children as well as possible, which is valid until the child is married or independent, which obligation applies even if the marriage between the two parents is broken. Clearly, that based on Article 13 paragraph (1) of the Act No. 23/2002 as amended the latest by the Act No. 17/2016, a child, including an adulterous child, should have the right to be protected from discrimination and neglect. It also remembers that the child is born in a holy condition and does not carry the inherited sin, even though he is born as a result of adultery, the guilty are both parents. The right to care and education for the child remains attached even though the child was born as a result of adultery, and that is also the duty of the man who caused his birth.

## CONCLUSION

1. The position of a child born to a pregnant wife who has been *li'an* by her husband is a *mula'nah* child. Because of the oath of *li'an*, the child changes his status to an illegitimate child (prejudice) and his position in the law is the same as an adulterous child, both seen from the Act No. 1/1974 or KHI and Fatwa MUI No. 11/2012. Children born to a wife who has been *li'an* by her husband, the child will occupy the position of an illegitimate child or a child born out of marriage as stipulated in Article 43 paragraph (1) of the Act No. 1/1974 which stated that the child will only have civil relations with his mother and family. This is in line with Article 100 of KHI, where out-of-marriage children only have a *nasab* relationship with their mother and family, so that the child of *Li'an* who belongs to adultery is not entitled to inheritance, marriage trust, and income from his father.
2. Considering the position of the *li'an* child who also includes children born out of marriage, whose position is the same as adultery child, both based on the Act No. 1/1974 or KHI. MUI Fatwa No. 11/2012 can be the basis for providing a form of legal protection for the *li'an* child. The government has the authority to impose *ta'zir* punishment on male adulterers which results in the birth of a child by obliging to fulfill the child's living needs and at the same time providing property after he dies through obligatory *wasiat*. The punishment is intended to protect the *li'an* child, not to validate the *nasab* relationship between the *li'an* child and the man who caused his birth. This is because in reality in the community, the child of adultery is often neglected, remembering that the man who caused his birth is not responsible for fulfilling his basic needs, considering that each child is born in a holy condition and does not carry the sin of inheritance, including the *li'an* child,

the guilty is his parents. The right to care and education of *li'an* children remains attached even though the child is born as a result of adultery, and that is the duty of the man who causes his birth. Of course, to determine the man who was the cause of his birth must be proven based on the provisions of Article 43 paragraph (2) of the Act No. 1/1974 which has been revised by the Constitutional Court.

3. Therefore, the obligation to provide protection for *li'an* children including children born out of marriage is surrendered to the government by putting it in legislation as mandated by Article 43 paragraph (2) of the Act No. 1/1974 which will further regulate the position of children born out of marriage.

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