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## The Study of the Indonesian Ulama Council's (MUI) Fatwa Number 11 of 2012 Regarding the Status of Children Born out of Adultery and Their Treatment: Correlation with the Constitutional Court Decision Number 46/PUU-VIII/2010 (A Sociological-Historical Analysis)

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**ABSTRACT:** The status of children born out of wedlock and the treatment towards them: a study of the fatwa from the Indonesian Ulama Council (Majelis Ulama Indonesia or MUI) Number 11 of 2012 concerning the position of children born out of wedlock and its correlation with the Constitutional Court Decision Number 46/PUU-VIII/2010, a historical-sociological analysis. In reality, pregnancies outside of marriage are still prevalent in Indonesian society. Legal provisions also address marriage issues and the status of children, as stipulated in Law Number 1 of 1974 concerning Marriage, which, in Article 1, defines marriage as a spiritual and physical bond between a man and a woman. Regarding the status of children born out of wedlock and the treatment towards them, MUI issues a fatwa that emphasizes legal protection for the child. The government is obligated to protect children born out of wedlock and prevent abandonment, especially by imposing punishment on the man responsible for the birth to fulfill the child's needs. However, this does not establish paternity for the man causing the birth. The correlation with the Constitutional Court decision and the historical-sociological analysis addresses the societal need for fair rights and protection, particularly for women and children. Despite this, these considerations were not incorporated into the revision of Law Number 16 of 2019 concerning Marriage. This raises questions about the fulfillment of philosophical and sociological considerations in the formation of the Republic of Indonesia Law Number 16 of 2019 amending Law Number 1 of 1974 concerning Marriage.

**Keywords:** MUI, Child Protection, Historical-Sociological Analysis.



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### INTRODUCTION

When discussing marriage, the aspects of lineage and property cannot be overlooked. According to the viewpoint of Martiman Prodjohamijo, "Lineage here refers to the blood relationship between the father, mother, and their children. Thus, there is a biological connection between the

father and mother, and their children. Children born from this biological connection and nurtured throughout the marriage are considered legitimate children. (Prodjohamijo, 2007)"

Regarding marriage and its legal consequences, there has recently been a sensational news involving the Constitutional Court Decision Number 46/PUU-VIII/2010, which reviewed Law Number 1 of 1974 concerning Marriage. This decision sparked debates within society, particularly regarding the legal recognition of children born outside of marriage and their status, recognizing their legal relationship to their biological fathers. In its dictum, the court reviewed the provision of Article 43 paragraph (1) of the Marriage Law Number 1 of 1974 to state: "A child born out of wedlock has a civil relationship with its mother, the mother's family, and with the man identified as its father based on scientific and technological evidence and/or other legal proof of a blood relationship, including a civil relationship with the father's family." (Broadley & Goddard, 2014; Pandey & Gautam, 2015; Thørnblad & Holtan, 2013).

Based on the aforementioned Constitutional Court decision, Law Number 1 of 1974 concerning Marriage underwent a significant change, especially in Article 43 paragraph (1) as mentioned earlier. Since the law had not been amended, the Constitutional Court's decision caused concern and unrest within the community (Kirk & Duschinsky, 2017; Meiksans et al., 2021; Moonga & Green, 2016).

Rokhmadi expresses an opinion about the Constitutional Court decision, stating, "Although the Constitutional Court decision is a final decision related to the constitutional review of the Marriage Law, especially Article 43 paragraph (1), it functions as law in itself. Therefore, this Constitutional Court decision acts as legislation, and its substance is applicable universally, not individually or casuistically. This aligns with the provisions of Article 56 paragraph (3) and Article 57 paragraph (1) of the Constitutional Court Law. As a result, the Constitutional Court decision becomes a legal norm that applies to all Indonesian citizens regarding the legal relationship between a child and both parents, along with all its consequences. This applies whether the child is born within a valid marital union or outside a legally recognized marital bond. In other words, the child is born to a woman impregnated by a man within a marital union that lacks certainty and legal validity, as the marriage event does not comply with the applicable laws (secret or informal marriage). (Rokhmadi, 2015)"

Reflecting on the historical context of Indonesia's marriage laws and their legal consequences, the Marriage Law No. 1 of 1974 Article 2 paragraphs 1 and 2 explicitly state that a valid marriage is one conducted based on religion and registered with the competent authority. Thus, the Constitutional Court decision becomes an anomaly, particularly because the petitioner is a Muslim (Lacerna & Ancheta, 2020; Porter & Goyal, 2016). In such cases, the adoption of Islamic legal principles should be considered. However, society seems to use the decision as a justification for engaging in informal or unregistered marriages, referred to as "*Married by Accident-MbA*."

In reality, pregnancies outside of marriage remain prevalent in Indonesian society. Indonesia, as a legal state, also addresses marriage issues and the status of children through Law No. 1 of 1974 concerning Marriage. In Article 1 of this law, it is stated that marriage is a spiritual and physical

bond between a man and a woman. This underscores that marriage, in addition to being based on love, should also be substantiated by tangible evidence (Ramulyo, 2000). Meanwhile, the status of a child is regulated in Article 43 paragraph (1) of Law No. 1 of 1974 concerning Marriage, which specifies that a child born out of wedlock only has a family relationship with its mother and the mother's family (Soemiyati, 1999).

Chairman of the Indonesian Ulama Council (MUI), KH Ma'ruf Amin, responded to the Constitutional Court's decision on the status of children born out of wedlock, sparking debates. The MUI considers the decision of the Constitutional Court to have exceeded its limits. He stated, "The Constitutional Court decision has gone beyond the initial petition, which merely sought civil recognition for children born within the bounds of marriage but not registered with the Religious Affairs Office (KUA) (Berrick et al., 2020; Hartill & Lang, 2018; Kasim et al., 2022; Nietz, 2019). It has now extended to the civil relationship of children born out of wedlock, resulting from illicit relationships with men, broadening their legal status." This, according to Islamic teachings, is not justified. "As a result of the Constitutional Court decision, the legal status of children born out of wedlock is equated with those born within a valid marriage, encompassing obligations, financial entitlements, especially inheritance rights. (detiknews, 2012)"

Given the background, the author intends to delve deeper and analyze the Indonesian Ulama Council (MUI) Fatwa No. 11 of 2012 regarding the status of children born out of wedlock and their treatment, along with examining the historical-sociological correlation with Constitutional Court Decision No. 46/PUU-VIII/2010.

## **METHOD**

This research is of a descriptive analytical nature. It is a normative juridical study conducted through the examination and analysis of secondary data sources, including regulations related to marriage, MUI (Indonesian Ulama Council) fatwas, and Constitutional Court decisions pertaining to this theme. The data analysis employed is qualitative descriptive analysis, which involves examining and presenting materials descriptively to obtain an overview of data that aligns with the research focus (Sugiyono, 2016).

## **RESULT AND DISCUSSION**

### **1. The Concept of Children Born Out of Wedlock According to Marriage Law and Islamic Law.**

A child born outside of marriage, according to the terminology used in Civil Law, is referred to as "*natuurlijk kind*" (natural child). The approach to the term 'illegitimate child' as 'a child born outside of a valid marriage' differs from the understanding of an 'illegitimate child' in Civil Law. In Civil Law, the term "illegitimate child" refers to a child born from the relationship between two individuals, a man and a woman who are not husband and wife, where one or both of them are

bound by marriage to other people. Therefore, the concept of an "out-of-wedlock child" in Civil Law pertains to a child conceived and born outside of marriage, and it is a term distinct from the term "*illegitimate child*." (Prawirohamidjojo, 2008)

Law Number 1 of 1974 concerning Marriage regulates the origin of children in Articles 42, 43, and 44. Article 42 states that a legitimate child is one born within or as a result of a valid marriage. Article 43 paragraph (1) specifies that a child born outside of marriage only has a civil relationship with its mother and the mother's family, while paragraph (2) states that the status of such a child as mentioned in paragraph (1) will be further regulated by Government Regulation. Article 44 paragraph (1) allows a husband to contest the legitimacy of a child born to his wife if he can prove that his wife committed adultery, resulting in the child. Paragraph (2) adds that the court will decide on the legitimacy of the child upon the request of the concerned party.

Observing Article 42 of Law Number 1 of 1974, it provides legal tolerance for a child born within a valid marriage, even if the time gap between the marriage and the child's birth is less than the minimum limit for gestational age. As long as the baby is born while the mother is in a valid marital union, the child is considered legitimate. The law does not specify a minimum gestational age, neither in its articles nor in its explanations. The Compilation of Islamic Law emphasizes and details what is regulated in the Marriage Law. Meanwhile, in the Compilation of Islamic Law (Kompilasi Hukum Islam or KHI), an out-of-wedlock child is also referred to as a child born out of adultery. Ibn Rushd defines adultery as sexual relations that occur outside of a valid marriage, not during lawful matrimony and not belonging to someone.

While in the Quran, Allah emphasizes the importance of clarity in lineage and the origin of kinship, among other things:

مَا جَعَلَ اللَّهُ لِرَجُلٍ مِنْ قَلْبَيْنِ فِي جَوْفِهِ وَمَا جَعَلَ أَزْوَاجَكُمْ اللَّائِي تَظَاهَرُونَ مِنْهُنَّ أُمَّهَاتِكُمْ وَمَا جَعَلَ أَدْعِيَاءَكُمْ أَبْنَاءَكُمْ ذَلِكَ قَوْلُكُمْ بِأَفْوَاهِكُمْ وَاللَّهُ يَعُولُ الْحَقَّ وَهُوَ يَهْدِي السَّبِيلَ (4) ادْعُوهُمْ لِأَبَائِهِمْ هُوَ أَقْسَطُ عِنْدَ اللَّهِ فَإِنْ لَمْ تَعْلَمُوا آبَاءَهُمْ فَإِخْوَانُكُمْ فِي الدِّينِ وَمَوَالِيكُمْ وَلَيْسَ عَلَيْكُمْ جُنَاحٌ فِيمَا أَخْطَأْتُمْ بِهِ وَلَكِنْ مَا تَعَمَّدَتْ قُلُوبُكُمْ وَكَانَ اللَّهُ غَفُورًا رَحِيمًا (5)

"And He Has not made your adopted sons your [true] sons. That is [merely] your saying by your mouths, but Allah says the truth, and He guides to the [right] way. Call them by [the names of] their fathers; it is more just in the sight of Allah. But if you do not know their fathers - then they are [still] your brothers in religion and those entrusted to you. And there is no blame upon you for that in which you have erred but [only for] what your hearts intended. And ever is Allah Forgiving and Merciful." (Quran, Al-Aḥzāb 33:4-5)

Emphasized further by:

وَالْمُحْصَنَاتُ مِنَ النِّسَاءِ إِلَّا مَا مَلَكَتْ أَيْمَانُكُمْ ۚ كِتَابَ اللَّهِ عَلَيْكُمْ ۚ وَأُحِلَّ لَكُمْ مَا وَرَاءَ ذَلِكَ أَنْ تَبْتَغُوا بِأَمْوَالِكُمْ مُحْصِنِينَ غَيْرَ مُسَافِحِينَ ۚ فَمَا اسْتَمْتَعْتُمْ بِهِ مِنْهُنَّ فَآتُوهُنَّ أُجُورَهُنَّ فَرِيضَةً ۚ وَلَا جُنَاحَ عَلَيْكُمْ فِيمَا تَرَاضَيْتُمْ بِهِ مِنْ بَعْدِ الْفَرِيضَةِ ۚ إِنَّ اللَّهَ كَانَ عَلِيمًا حَكِيمًا.

"And [also prohibited to you are all] married women except those your right hands possess. [This is] the decree of Allah upon you. And lawful to you are [all others] beyond these, [provided] that you seek them [in marriage] with [gifts from] your property, desiring chastity, not unlawful sexual intercourse. So for whatever you enjoy [of marriage] from them, give them their due compensation as an obligation. And there is no blame upon you for what you mutually agree to beyond the obligation. Indeed, Allah is ever Knowing and Wise." (Quran, Al-Nisā' 4:24)

Then, with the Hadith that explains that lineage is attributed to the owner of the bed or the husband of the woman who gave birth (*firasyy*).

حَدَّثَنَا يَحْيَى بْنُ قَزَعَةَ حَدَّثَنَا مَالِكٌ عَنْ ابْنِ شَهَابٍ عَنْ عُرْوَةَ بْنِ الرُّبَيْرِ عَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا قَالَتْ كَانَ عْتَبَةُ بْنُ أَبِي وَقَّاصٍ عَهْدَ إِلَى أَخِيهِ سَعْدِ بْنِ أَبِي وَقَّاصٍ أَنَّ ابْنَ وَلِيدَةَ زَمْعَةَ مِثِّي فَأَقْبَضَهُ قَالَتْ فَلَمَّا كَانَ عَامَ الْفَتْحِ أَخَذَهُ سَعْدُ بْنُ أَبِي وَقَّاصٍ وَقَالَ ابْنُ أَخِي قَدْ عَهَدَ إِلَيَّ فِيهِ فَقَامَ عَبْدُ بْنُ زَمْعَةَ فَقَالَ أَخِي وَابْنُ وَلِيدَةَ أَبِي أُوْلِدَ عَلَى فِرَاشِهِ فَتَسَاوَقَا إِلَى النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَقَالَ سَعْدُ يَا رَسُولَ اللَّهِ ابْنُ أَخِي كَانَ قَدْ عَهَدَ إِلَيَّ فِيهِ فَقَالَ عَبْدُ بْنُ زَمْعَةَ أَخِي وَابْنُ وَلِيدَةَ أَبِي أُوْلِدَ عَلَى فِرَاشِهِ فَقَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ هُوَ لَكَ يَا عَبْدُ بْنُ زَمْعَةَ ثُمَّ قَالَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ الْوَلَدُ لِلْفِرَاشِ وَلِلْعَاهِرِ الْحَجَرُ ثُمَّ قَالَ لِسُؤْدَةَ بِنْتِ زَمْعَةَ زَوْجِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ اخْتَجِي مِنْهُ لِمَا رَأَى مِنْ شَبَهِهِ بِعْتَبَةَ فَمَا رَأَاهَا حَتَّى لَقِيَ اللَّهَ.

"From Aisha (may Allah be pleased with her), she said: Sa'd bin Abi Waqqāṣ and Abd bin Zam'ah disputed over a child. Sa'd said, 'O Messenger of Allah, this child is my brother Utbah bin Abi Waqqāṣ 's son. He told me that he is his son. Look at the resemblance.' Abd bin Zum'ah also said, 'This child is my brother's, O Messenger of Allah. He was born to the owner of the bed (Firasyy), my father from his mother.' Then the Messenger of Allah looked at the child's face and saw a clear resemblance to Utbah. So the Prophet said, 'This child is your brother's, O Abd bin Zum'ah. For the owner of the bed or the husband of the woman who gives birth (Firasyy) has the right. As for the child of an adulterer, stones are for him, and avoid him, O Saudah bint Zum'ah.' Aisha said, 'She never saw Saudah after that.' (Al-Bukhārī and Muslim)"

عَنْ عَمْرُو بْنِ شُعَيْبٍ عَنْ أَبِيهِ عَنْ جَدِّهِ قَالَ: قَامَ رَجُلٌ فَقَالَ: يَا رَسُولَ اللَّهِ، إِنَّ فُلَانًا ابْنِي، عَاهَرْتُ بِأُمِّهِ فِي الْجَاهِلِيَّةِ، فَقَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: لَا دَعْوَةَ فِي الْإِسْلَامِ، ذَهَبَ أَمْرُ الْجَاهِلِيَّةِ، الْوَلَدُ لِلْفِرَاشِ، وَالْعَاهِرِ الْحَجَرُ (رواه أبو داود)

"From Amr bin Shu'aib, from his father, from his grandfather, he said: Someone said, 'O Messenger of Allah, this person is my child; I committed adultery with his mother during the era of ignorance.' The Prophet then said, 'There is no acknowledgment of lineage in Islam for what happened in the era of ignorance. The child belongs to the owner of the bed or the husband of the woman who gives birth (*firasyy*), and for the adulterer, there is the punishment of stones.' (Abu Dawood)"

In matters of lineage and legal status, there is also a Hadith that explains that the child born out of wedlock is attributed to its mother, including:

قَالَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فِي وَوَلَدِ الزَّيْنَةَ " لِأَهْلِ أُمِّهِ مَنْ كَانُوا " (رواه أبو داود)

The Prophet (peace be upon him) said regarding a child born out of wedlock: 'He belongs to his mother's family.' (Abu Dawood)"

In the Compilation of Islamic Law (Kompilasi Hukum Islam or KHI), it is emphasized and detailed in Article 99 that a legitimate child is: a) A child born within or as a result of a valid marriage. b) The result of fertilization between a lawful husband and wife outside the womb and born by the wife. Article 100 states that a child born out of wedlock only has a lineage relationship with its mother and the mother's family. Article 101 mentions that a husband who denies the legitimacy of a child, while the wife does not deny it, can confirm his denial through "*li'an*" (mutual cursing).

Based on Article 99 of the Compilation of Islamic Law, there is a legal innovation to anticipate the possibility of in vitro fertilization, a process in which ovulation is engineered outside the womb using a tube prepared for that purpose. The fertilized egg is then inserted back into the wife's womb and delivered by the wife. This legal update maintains the restriction between a lawful husband and wife bound by a valid marriage. Article 102 also does not specify the minimum and maximum age limits for the unborn baby as the basis for a husband to contest the legitimacy of a child born to his wife.

Meanwhile, Article 102, paragraph (1), stipulates that a husband who intends to contest a child born to his wife must file a lawsuit with the Religious Court within 180 days after the child's birth or 360 days after the dissolution of the marriage, or after the husband becomes aware that his wife has given birth and is in a location where he can file his case.

According to civil law in Indonesia, a legitimate child is one born after their parents undergo a valid marriage. A marriage is considered valid when it is conducted according to the laws of their respective religions and beliefs. In terms of the definition of an illegitimate child, there are at least two interpretations: first, a child conceived and born outside of a valid marriage, and second, a child conceived outside of marriage but born after their parents have entered into a valid marriage.

In Article 50 of Law No. 23 of 2006 on Population Administration, as amended by Law No. 24 of 2013, it stipulates that the acknowledgment of a child must be reported to the relevant authority within 30 days from the date of the parents' marriage and the issuance of the marriage certificate. This provision is exempted for parents whose religion does not permit the acknowledgment of a child born outside of a valid marriage.

Regarding civil matters, inheritance for children born out of wedlock is regulated in Article 862 to Article 866 of the Civil Code:

- a) If the deceased leaves legitimate descendants or a spouse, then children born out of wedlock inherit 1/3 of the portion they would have received if they were legitimate children (Article 863 of the Civil Code);
- b) If the deceased does not leave legitimate descendants or a spouse but leaves collateral relatives, in the ascending line (mother, father, grandmother, etc.) or siblings, both male

and female, or their descendants, the acknowledged children inherit 1/2 of the inheritance. However, if only distant relatives exist, the acknowledged children receive 3/4 (Article 863 of the Civil Code);

- c) The portion for children born out of wedlock must be given first. Then the remainder is divided among legitimate heirs (Article 864 of the Civil Code);
- d) If the deceased does not leave legitimate heirs, then they inherit the entire estate (Article 865 of the Civil Code);
- e) If the child born out of wedlock dies first, they can be replaced by their (legitimate) children (Article 866 of the Civil Code).

Therefore, according to the provisions of the Civil Code, inheritance applies only to children born out of wedlock who are acknowledged by their father and/or mother. Without acknowledgment from the father and/or mother, children born out of wedlock do not have inheritance rights. This differs from Islamic inheritance law applicable in Indonesia. Children born out of wedlock only have a civil relationship with their mother and her family (Article 43 paragraph (1) UUP refer to Article 100 KHI). Therefore, these children can only inherit from the biological mother's family.

## **2. The perspective of MUI Fatwa No. 11 of 2012 on the Status of Children Resulting from Zina and Treatment Towards Them emphasizes the importance of legal protection for children born out of wedlock.**

Regarding children born out of wedlock, the perspective of the MUI Fatwa is more focused on the protection of children born out of adultery and the treatment towards them, as stated in the legal provisions. The Fatwa emphasizes that the government is obligated to protect children born out of adultery and prevent abandonment, especially by imposing punishment on the men responsible for their birth to fulfill their living needs.

Furthermore, an adulterer is subject to hadd punishment by the authorities to ensure the preservation of legitimate offspring (hafizh al-nasl). The government has the authority to impose discretionary punishment on the male adulterer responsible for the birth, obliging him to provide for the child's needs and allocate assets through a mandatory will after his death. The protection outlined in the MUI Fatwa aims to safeguard the rights of these children to receive what is rightfully theirs. Even though these children cannot be attributed to someone who caused their birth.

In this context, the legal protection specified in the MUI Fatwa No. 11 of 2012 on the status of children born out of adultery and their treatment is outlined in the recommendations section, which includes:

- a) The government must prevent adultery by enforcing strict and firm legal measures;

- b) The government is obliged to protect children born out of adultery and prevent abandonment, particularly by penalizing the men responsible for their birth to support their living needs;
- c) The government is urged to facilitate birth certificate services for children born out of adultery without attributing them to the man who caused their birth;
- d) The government must educate society not to discriminate against children born out of adultery and treat them equally. Assigning these children to their mothers is intended to protect their lineage and religious regulations, not as a form of discrimination.

Moreover, the government has the authority to impose discretionary punishment on the male adulterer responsible for the birth, obliging him to:

- a) Provide for the child's living needs;
- b) Allocate assets through a mandatory will after his death. The distribution of assets through a mandatory will does not imply the attribution of the child to the man who caused the birth but is a responsibility towards the man who caused the child to be born.

Analyzing the MUI Fatwa reveals its correlation with Wahbah Az-Zuhaili's opinion titled "Ahkam Al-Aulad An-Natijin'an Az\_Zina," presented during the 20th Daurah of the Majma' Fiqh Islami in Mecca on December 25-29, 2010. The essence of the opinion is that if a man commits adultery with a married woman resulting in the birth of a child, there is consensus among scholars, as stated by Imam Ibn Abdil Barr in "At-Tamhid" (8/183), that the child is not attributed to the adulterer but to the woman's husband, provided he does not disown the child through *li'an* (mutual imprecation). Conversely, if the man commits adultery with an unmarried woman, and she gives birth, according to the majority of scholars from the eight schools of thought, the child is attributed only to the mother, even if there is acknowledgment from the male adulterer. This is because attributing the child to the male adulterer would open the door to adultery, violating the command to close paths leading to sin (*sadd adz-dzari'ah*) to preserve the sanctity of lineage from immoral behavior.

Thus, it is essential to note that:

- a) A child born out of adultery is the result of an extramarital relationship, considered a criminal offense;
- b) *Hadd* is a punishment type with form and degree determined by scriptural sources;
- c) *Ta'zir* is a punishment type with form and degree left to the discretion of authorities;
- d) Mandatory will is a policy of authorities requiring the man responsible for the birth of a child through adultery to bequeath assets to the child.

Regarding the applicable laws:

- a) A child born out of adultery has no lineage, marriage guardian, inheritance, or financial responsibility with the man causing the birth;
- b) A child born out of adultery only has lineage, inheritance, and financial responsibility with the mother and her family;
- c) A child born out of adultery does not bear the sin of adultery committed by the person causing their birth. d) An adulterer is subject to *hadd* punishment by the authorities to ensure the preservation of legitimate offspring (*hifz al-nasl*);



- d) The government has the authority to impose discretionary punishment on the male adulterer responsible for the birth, obliging him to provide for the child's needs and allocate assets through a mandatory will after his death;
- e) The punishment mentioned in point e aims to protect the child, not to establish a lineage between the child and the man who caused their birth.

### **3. Analysis of Constitutional Court Decision No. 46/PUU-VIII/2010 on Children Born out of Wedlock**

Constitutional Court Decision No. 46/PUU-VIII/2010 originated from a petition submitted by Hj. Aisyah Mochtar or Machica binti H. Mochtar Ibrahim and Muhammad Iqbal Ramadhan bin Moerdiono, represented by their legal representatives Rusdianto Matulatuwa, Oktryan Makta, and Miftachul, as stated in the Power of Attorney No. 58/KH.M&M/KVIII2010 dated August 5, 2010. The essence of the petition was a judicial review of Article 2 paragraph (2) of Law No. 1 of 1974, which states, "Every marriage is recorded according to prevailing laws and regulations," and Article 3 paragraph (1), which states, "A child born out of wedlock only has a civil relationship with its mother and her family." (Fadil SJ, 2013)

Referring to the Constitutional norm in Article 28B paragraph (1) of the 1945 Constitution, the petitioner's marriage, conducted according to the principles of a valid marriage, is hindered by Article 2 paragraph (2) of Law No. 1 of 1974. The legal norm mandating the registration of marriages according to prevailing laws and regulations has rendered a marriage valid and in line with Islamic legal norms invalid according to legal norms. Consequently, this affects the status of the children born to the petitioner, making their status invalid according to the legal norms in Law No. 1 of 1974 concerning the petitioner's marriage (religious norms).

The enactment of Law No. 1 of 1974, related to the registration of marriages and children born from unregistered marriages considered as children born out of wedlock with only a civil relationship with their mother, has caused legal uncertainty. It disturbs and violates the sense of justice prevailing in society, causing harm to the petitioner due to the birth that occurred without a valid reason. Although born as a result of the affectionate relationship between the petitioner and her husband, due to the provisions of Article 43 paragraph (1) of Law No. 1 of 1974, it creates legal uncertainty between the child and its father. This violates the constitutional right of the child to know its origins and imposes a psychological burden on the child due to the lack of acknowledgment by the father.

Amri & Khalidi argue, "Philosophical considerations are considerations arising from the perspective of life, consciousness, and the life goals derived from Pancasila and the 1945 Constitution. However, Article 43 of Law No. 1 of 1974 on Marriage has been declared in conflict with the 1945 Constitution by the Constitutional Court. Sociological considerations are considerations for the formation of regulations to meet legal needs for various aspects of life in

society. Meanwhile, societal needs demand the removal of Article 43 through a judicial review to the Constitutional Court." (Khalidi, 2021)

Moch. Muhibbin similarly states, "The relationship between a child and a man as a father is not solely based on marital ties but can also be based on proof of a blood relationship between the child and the man as the father. Regardless of the procedural/administrative aspects of their marriage, a child born must receive legal protection." The Constitutional Court's decision is based on the consideration that naturally, a child is born from the union of ovum and sperm, whether through sexual intercourse or technological developments leading to fertilization. Therefore, according to the Constitutional Court, it is inappropriate and unjust for a child born out of wedlock to have a relationship only with its mother. It is also unfair to absolve the biological father of his responsibilities as a father and, simultaneously, deprive the child of its rights to its father. The connection between a child and a man as a father is not solely due to marital ties but can also be based on a blood relationship. Thus, regardless of the administrative marriage procedure, a child born must receive legal protection. Without such protection, the child will be adversely affected, even though the child is innocent, and its birth is beyond its control (Muhibbin, 2022).

## **CONCLUSION**

Based on the previous discussion, it can be concluded that the fatwa regarding the position of children born out of wedlock and the treatment towards them emphasizes legal protection for such children. The government is obliged to protect children born out of wedlock, prevent abandonment, and impose penalties on the men responsible for their birth to ensure they fulfill the children's living needs. Additionally, the government is urged to facilitate the issuance of birth certificates for children born out of wedlock without attributing paternity to the men involved in their birth. As for the correlation with the Constitutional Court decision No. 46/PUU-VIII/2010, a historical and sociological analysis indicates that it addresses societal needs for adequate rights and protection, especially for women and children. However, it raises questions about the fulfillment of philosophical and sociological considerations in the formation of Law No. 16 of 2019 concerning Amendments to Law No. 1 of 1974 concerning Marriage, as these aspects were not incorporated into the revision.

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**The Study of the Indonesian Ulama Council's (MUI) Fatwa Number 11 of 2012 Regarding the Status of Children Born out of Adultery and Their Treatment: Correlation with the Constitutional Court Decision Number 46/PUU-VIII/2010 (A Sociological-Historical Analysis)**

Susilowati

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