Media Hukum Indonesia (MHI)
Published by Yayasan Daarul Huda Krueng Mane
https://ojs.daarulhuda.or.id/index.php/MHI/index

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e-ISSN: 3032-6591
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Implications of Constitutional Court Decision No. 46/PUU-VIII/2010 for Inheritance Rights of Children Born of Incest

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Abstract: This study examines whether, and to what extent, Constitutional Court Decision No. 46/PUU-VIII/2010 can be used to determine the inheritance rights of children born of incestuous relationships. The decision extended the civil relationship of children born out of wedlock to the biological father once paternity is proven by science and technology or other legal evidence, yet it said nothing about children whose parents' relationship is absolutely prohibited. Using normative legal research with statutory and conceptual approaches, the study analyses the Marriage Law, the Civil Code, the Compilation of Islamic Law, the 2023 Criminal Code, the Child Protection Law and MUI Fatwa No. 11 of 2012. The findings show that a child born of incest remains a full legal subject entitled to identity, knowledge of origin, maintenance and protection against discrimination, and that proof of biological paternity under the decision faces no legal obstacle. The decision cannot, however, serve as a basis for heir status: the Civil Code (Articles 283 and 867), the Compilation of Islamic Law (Articles 100 and 186) and customary law consistently deny such a child succession to the biological father. The decision therefore operates only as a limited civil relationship, while the child's economic protection should be secured through court-enforced maintenance and a mandatory bequest (*wasiat wajibah*), pending explicit legislation.

Abstrak: *Penelitian ini menguji apakah dan sejauh mana Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 dapat digunakan untuk menentukan hak waris anak yang lahir dari hubungan inses. Putusan tersebut memperluas hubungan perdata anak luar kawin dengan ayah biologisnya sepanjang dapat dibuktikan berdasarkan ilmu pengetahuan dan teknologi dan/atau alat bukti lain menurut hukum, tetapi tidak mengatur anak yang hubungan orang tuanya dilarang secara absolut. Dengan metode penelitian hukum normatif melalui pendekatan perundang-undangan dan konseptual, penelitian ini menganalisis UU Perkawinan, KUHPerdata, Kompilasi Hukum Islam, KUHP 2023, UU Perlindungan Anak, dan Fatwa MUI Nomor 11 Tahun 2012. Hasil penelitian menunjukkan bahwa anak inses tetap merupakan subjek hukum penuh yang berhak atas identitas, pengetahuan asal-usul, nafkah, dan perlindungan dari diskriminasi, serta pembuktian biologis berdasarkan putusan tersebut tidak menghadapi hambatan yuridis. Namun, putusan tersebut tidak dapat menjadi dasar kedudukan ahli waris karena KUHPerdata (Pasal 283 dan 867), KHI (Pasal 100 dan 186), dan hukum adat secara konsisten menolak pewarisan anak inses dari ayah biologisnya. Dengan demikian, putusan tersebut hanya berlaku sebagai hubungan keperdataan terbatas, sedangkan perlindungan ekonomi anak dijamin melalui nafkah yang ditetapkan pengadilan dan wasiat wajibah, sampai tersedia pengaturan undang-undang yang eksplisit.*

Article History
Received: 25 October 2026
Revised: 15 November 2026
Published: 25 November 2026

Keywords:
Constitutional Court Decision 46/PUU-VIII/2010; children of incest; inheritance rights; child protection; public order.

https://doi.org/10.5281/zenodo.24549705

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INTRODUCTION

The legal relationship between a child and his or her parents is a fundamental issue in Indonesian family law. Indonesian law broadly classifies children as legitimate children and children born out of wedlock, and that classification determines the scope of the civil relationship that follows, including rights to identity, maintenance, recognition of origin and inheritance. Before Constitutional Court Decision No. 46/PUU-VIII/2010 (hereinafter the Decision), Article 43(1) of Law No. 1 of 1974 on Marriage provided that a child born out of wedlock had a civil relationship only with the mother and

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the mother's family. A biological father had no legal relationship with the child unless a recognition (*erkenning*) was made under the Civil Code, a rule increasingly criticised for ignoring biological fact and the principle of child protection (Lestari et al., 2023; Marilang, 2016).

The Constitutional Court corrected this position. In the Decision, pronounced on 17 February 2012 in the petition of Aisyah Mochtar (Machica Mochtar) and her son, the Court held that Article 43(1) must be read to include a civil relationship with the man who is proven, by science and technology and/or other evidence recognised by law, to be the child's father, including a civil relationship with the father's family (Constitutional Court Decision No. 46/PUU-VIII/2010; Figgar & Saidi, 2022). The Decision shifted the basis of the civil relationship from the formal status of the parents' marriage to proven biological descent, and it has been read as an expression of the principles of non-discrimination and the best interests of the child (Amalia et al., 2026; Setyawan et al., 2024).

The Decision, however, created a new problem when applied to a particular category of children: those born of incest. Incest is sexual intercourse between persons related by blood in the direct line or in certain degrees of the collateral line. Indonesian law treats such a relationship as absolutely prohibited. Article 8(a) and (b) of the Marriage Law and Article 39 of the Compilation of Islamic Law (KHI) bar marriage between blood relatives, and Law No. 1 of 2023 on the Criminal Code, in force since 2 January 2026, criminalises intercourse within the nuclear family (Farina et al., 2026). The position of a child born of incest is therefore more complex than that of an ordinary child born out of wedlock. For an ordinary child, the parents' relationship is merely unregistered or not recognised as a marriage; for a child of incest, the relationship is not only invalid but absolutely prohibited and potentially punishable. The normative question is whether the extension of the civil relationship granted by the Decision also reaches the child of incest. On the one hand, a child cannot be blamed for the conduct of the parents. On the other, applying the Decision in full could appear to make an incestuous relationship the source of positive legal effects, including inheritance.

The dilemma sharpens in the law of succession. The Civil Code, the KHI and customary law in principle do not grant a child born of a prohibited relationship the status of heir to the biological father. Under the Civil Code, a child conceived in incest (*bloedschande*) cannot be recognised and receives only necessary maintenance (Articles 283 and 867); under the KHI, a child born out of wedlock has a lineage (*nasab*) and inheritance relationship only with the mother and her family (Articles 100 and 186); and customary law generally places such a child in the mother's line (Haryati & Satriawan, 2024; Lestari et al., 2023). There is thus an unresolved tension between two strong norms: the child-protection principle championed by the Decision and the public-order principle embedded in the prohibition of incest.

Existing research has approached the Decision mainly through the lens of ordinary children born out of wedlock, particularly children of unregistered marriages, and has focused on recognition, notarial practice and inheritance (Figgar & Saidi, 2022; Judiasih et al., 2024; Lestari et al., 2023; Paparang, 2026; Wiliyandari et al., 2026; Yohanes & Djaja, 2024). Studies that address children of incest have done so from the perspective of Islamic jurisprudence (Djawas et al., 2022), the annulment of incestuous marriages and the best interests of the child (Maharani et al., 2023), lineage status (Farina et al., 2026), general child protection (Haryati & Satriawan, 2024) or criminal law (Abdullah et al., 2023). Haryati and Satriawan (2024) and Farina et al. (2026) argue that the Decision should extend to children of incest when paternity is proven by DNA, but neither separates the civil relationship from heir status across the three inheritance regimes, and neither accounts for the criminalisation of intra-family intercourse in the 2023 Criminal Code.

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This article fills that gap. Its novelty lies in three points: it distinguishes three layers of the child's position, namely status as a legal subject, the civil relationship with the biological father and heir status; it tests the Decision against each layer under the Civil Code, the KHI and customary law simultaneously; and it situates the analysis within the 2023 Criminal Code, which now criminalises the very conduct from which the child is born. On that basis the article proposes a model of a limited civil relationship. The article addresses two questions: (1) what is the legal status of a child born of incest in the Indonesian legal system; and (2) what are the implications of Constitutional Court Decision No. 46/PUU-VIII/2010 for the inheritance rights of such a child?

RESEARCH METHOD

This article uses normative (doctrinal) legal research to assess the compatibility and the limits of applying Constitutional Court Decision No. 46/PUU-VIII/2010 to the civil status and inheritance rights of children born of incest. Two approaches are used. The statutory approach examines the 1945 Constitution, the Marriage Law as amended by Law No. 16 of 2019, the Civil Code, the KHI, the Child Protection Law, Law No. 1 of 2023 on the Criminal Code and the Decision itself. The conceptual approach examines doctrines and principles on children born out of wedlock, the civil relationship, succession, public order and child protection.

The legal materials comprise primary materials (legislation, the Decision and MUI Fatwa No. 11 of 2012 as a source of Islamic legal opinion followed by religious courts) and secondary materials (peer-reviewed journal articles). The materials were collected through library research, inventoried and classified by legal regime, and then analysed prescriptively using deductive reasoning, drawing conclusions from general norms in order to construct legal arguments and normative solutions to the problem of the inheritance rights of children born of incest.

RESULT AND DISCUSSION

Legal Status of Children Born of Incest in the Indonesian Legal System

The legal status of a child born of incest touches on public order, morality, child protection and non-discrimination at the same time. The analysis must therefore begin with the classification of children born out of wedlock in the Civil Code, proceed through the prohibition of incest in marriage law, criminal law and customary law, and end with the constitutional position of the child as a legal subject.

The Civil Code distinguishes children born out of wedlock who may be recognised from those who may not. Article 272 provides that a child born out of wedlock becomes legitimate upon the subsequent marriage of the parents, except a child conceived in adultery or incest. Article 283 adds that a child conceived in adultery or incest may not be recognised, subject only to Article 273, which permits legitimation of a child of incest where the parents obtain a dispensation to marry and recognise the child in the marriage certificate. Because recognition under Article 280 is the gateway to a civil relationship with the father, the classical civil law places the child of incest outside any civil relationship with the biological father, even where the biological link can be proven; the law grants such a child only necessary maintenance (Haryati & Satriawan, 2024; Aguelline & Erliyani, 2026).

The Marriage Law prohibits marriage between persons related by blood in the direct line, ascending or descending (Article 8(a)), and in the collateral line between siblings, between a person and a parent's sibling, and between a person and a grandparent's sibling (Article 8(b)). The KHI contains a parallel prohibition based on lineage (Article 39), and a marriage concluded in breach of it may be annulled (Marriage Law, Article 22; KHI, Article 70(d)). A distinction must be drawn here. Where an

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incestuous marriage was in fact concluded and later annulled, Article 28(2)(a) of the Marriage Law provides that the annulment does not operate retroactively against children born of that marriage, and Maharani et al. (2023) conclude that such children retain the status of children born within the marriage. Islamic jurisprudence reaches a similar result through the minority doctrine of intercourse under mistaken belief (*wath'i syubhat*), under which a child born of a marriage that was invalid through mistake or ignorance is attributed to both parents (Djawas et al., 2022). This article concerns the more common and more difficult case: a child born of an incestuous relationship outside any marriage, or of a relationship the parties knew to be prohibited.

Criminal law confirms the gravity of the prohibition. The colonial-era Criminal Code addressed incest only indirectly: Article 294(1) punishes indecent acts with one's own child, stepchild, adopted child or a minor under one's supervision, and did not reach consensual incest between adults (Abdullah et al., 2023). Law No. 1 of 2023 on the Criminal Code, in force since 2 January 2026, changes this. Article 413 punishes any person who has intercourse with someone known to be a member of his or her nuclear family (*keluarga batih*), meaning father, mother and biological child, with imprisonment of up to ten years. The state therefore no longer merely prohibits incestuous marriage; it criminalises the core forms of incestuous intercourse itself. The criminal norm sends a clear signal that the law will not attach advantageous legal consequences to the perpetrators of incest.

Customary law reaches a similar conclusion through different reasoning. Incest, known as *sumbang* in many communities, is regarded as a grave breach of the community's moral and religious order. In customary systems the child of a prohibited relationship generally remains in the mother's line and is not admitted to the father's lineage, and Lestari et al. (2023) observe that customary law broadly shares the position of Islamic law in denying such a child inheritance from the father. In Bali, for example, a child born out of wedlock is traditionally not regarded as a legitimate member of the father's family (Dewi et al., 2025).

The prohibition of the parents' conduct, however, does not extinguish the child's standing as a legal subject. A child is protected by law from birth and even from conception whenever the child's interests so require (Civil Code, Article 2). Article 28B(2) of the 1945 Constitution guarantees every child the right to survival, growth and development and to protection from violence and discrimination. The Child Protection Law adopts non-discrimination and the best interests of the child as guiding principles (Article 2), guarantees the child's right to know his or her parents (Article 7(1)) and the right to an identity (Article 27). Indonesia has also ratified the Convention on the Rights of the Child through Presidential Decree No. 36 of 1990. In the Decision itself, Justice Maria Farida Indrati, in her concurring opinion, stressed that it is not appropriate for a child to bear the loss caused by the conduct of the parents (Setyawan et al., 2024). Religious courts have applied the same reasoning when determining the origin of children born out of wedlock (Ma'arif & Nurani, 2026).

It is therefore essential to separate the status of the child from the conduct of the parents. The incestuous act is prohibited by marriage law, customary law and criminal law, but that prohibition is addressed to the perpetrators, not to the child. This separation reflects the principle that criminal liability is personal (*nemo punitur pro alieno delicto*): no one may be punished for the wrong of another. Denying the child basic rights because of the circumstances of birth would amount to exactly such punishment. The analysis must therefore always distinguish incest as a prohibited act from the child as a full legal subject.

Constructed in this way, the child of incest is a child born out of wedlock, because the parents' relationship cannot produce a valid marriage. Following the Decision, Article 43(1) of the Marriage Law opens a civil relationship with the biological father where paternity is proven by science and

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technology or other lawful evidence. Haryati and Satriawan (2024) and Farina et al. (2026) accept that this reading extends to children of incest when DNA evidence is available, while noting that it does not alter lineage-based rights under Islamic law, such as guardianship in marriage (*wali nikah*). The civil relationship, however, is not the same as heir status. It encompasses the right to know one's origin, maintenance, care and other civil responsibilities of the father. Inheritance requires further analysis, because the Civil Code, the KHI and customary law follow different logics. This is the point at which the position of the child of incest becomes complex: biological descent can be proven, but lineage and succession do not necessarily follow.

Under the Civil Code, the child of incest falls within the category of children who cannot be recognised or legitimated (Articles 272, 273 and 283). Article 867 states that the provisions on the inheritance of natural children do not apply to children born of adultery or incest and that the law grants them only necessary maintenance (*nafkah seperlunya*). That maintenance is fixed according to the means of the father or mother and the number and position of the lawful heirs (Article 868), and if the parent provided such maintenance during his or her lifetime, the child has no further claim against the estate (Article 869). Aguelline and Erliyani (2026) read *seperlunya* as covering basic subsistence, namely food, clothing, housing and essential health care, and note that the right cannot be excluded by agreement because Article 867 is mandatory.

Under Islamic law as codified in the KHI, a child born out of wedlock has a lineage relationship only with the mother and her family (Article 100) and a reciprocal inheritance relationship only with the mother and her family (Article 186). Classical scholarship of the Maliki and Shafi'i schools holds that intercourse outside marriage produces no lineage with the man, so the child has no inheritance relationship with him; Indonesian inheritance practice generally follows this view (Djawas et al., 2022). Because incest is a prohibition of a graver degree than ordinary *zina*, the child of incest falls in the same category, with the heavier moral consequences resting on the perpetrators, not on the child.

Implications of Constitutional Court Decision No. 46/PUU-VIII/2010 for the Inheritance Rights of Children Born of Incest

The Decision is a landmark in Indonesian family law because it changed the normative construction of the status of children born out of wedlock. The Court declared Article 43(1) of the Marriage Law conditionally unconstitutional, so that the provision must now read: a child born out of wedlock has a civil relationship with the mother and the mother's family and with the man as the father who can be proven by science and technology and/or other evidence recognised by law to have a blood relationship, including a civil relationship with the father's family (Constitutional Court Decision No. 46/PUU-VIII/2010; Figgar & Saidi, 2022).

Before the Decision, a child born out of wedlock could obtain a civil relationship with the father only through recognition or legitimation. The Decision moved the key from formal procedure to provable biological fact, a form of progressive judicial law-making oriented to the best interests of the child. Its wording does not distinguish between children of unregistered marriages, children of consensual relationships and children of relationships that are morally or legally prohibited. On a textual reading, the legitimacy of the parents' relationship is no longer what determines the child's civil relationship; biological descent is.

The scope of the Decision nevertheless remains contested. Marilang (2016) argues that "children born out of wedlock" in the Decision essentially refers to children born of *zina*, and that the "civil relationship" covers only a limited set of ties between child and father. Figgar and Saidi (2022) see the Decision as a middle way that does not legalise adultery. Yohanes and Djaja (2024) conclude that the Decision cannot be applied directly as a basis for kinship and requires a court determination of

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paternity. Wiliyandari et al. (2026) document inconsistent judicial interpretation and the absence of implementing regulations, which has led some registries and notaries to refuse to issue certificates of inheritance. Most importantly, Lestari et al. (2023) observe that the Decision does not address inheritance at all, leaving the question to the existing inheritance regimes.

As regards proof, the Decision requires evidence of a blood relationship by science and technology and/or other lawful evidence. In incest cases, biological proof faces no legal obstacle: the child shares a genetic link with the biological father, and the requirement can be met through DNA testing in the same way as for any other child born out of wedlock. Proof of descent is a matter of establishing fact, not of moral evaluation. A distinctive feature of incest cases must, however, be noted: the very proceedings that establish paternity also establish facts that may constitute an offence under Article 413 of the 2023 Criminal Code. This is the authors' observation rather than settled doctrine, but it suggests that courts must design such proceedings to protect the child from becoming an instrument of, or a casualty of, the criminal process.

Although the evidential requirement can be satisfied, the application of the Decision to children of incest faces important legal limits. First, the parents' relationship is absolutely prohibited under Article 8(a) and (b) of the Marriage Law and Article 39 of the KHI, and the core of it is now a criminal offence. This distinguishes it from an ordinary relationship outside marriage, which is not always unlawful. Second, the Decision does not abolish or soften the prohibition of incest. It extends the child's relationship with the father; it does not legalise or normalise the parents' relationship. The incestuous act remains unlawful and its perpetrators may still be prosecuted, but the child's rights cannot be cancelled because of the parents' offence.

Third, the Decision interpreted the Marriage Law, not the law of succession. Article 66 of the Marriage Law repeals provisions of the Civil Code only to the extent that the matter has been regulated by the Marriage Law. Inheritance is not regulated by the Marriage Law, so, in the authors' view, Articles 867 to 869 of the Civil Code continue to govern the succession rights of a child of incest for persons subject to the Civil Code, even after the civil relationship has been extended. The same logic applies to the KHI, whose Articles 100 and 186 the Decision did not change (Farina et al., 2026).

Accordingly, the Decision opens the way for a child of incest, once paternity has been proven, to be recognised as a legal subject with a basic civil relationship with the biological father: the right to maintenance, legal protection, recognition of origin and the right to bring civil claims against the father. That recognition does not, however, automatically produce inheritance rights. All three inheritance regimes impose clear limits. Under the Civil Code, the child of incest has the same position as other children who cannot be recognised: no place among the heirs and only a claim to necessary maintenance. Under the KHI, the child has lineage and inheritance rights only with respect to the mother and her family, and a child born of a relationship graver than *zina* plainly has no inheritance relationship with the biological father. Under customary law, the child generally follows the mother's line. The three regimes are consistent: an incestuous relationship cannot be the basis for full inheritance rights.

Islamic legal opinion, however, offers a protective mechanism that does not rely on lineage. MUI Fatwa No. 11 of 2012, issued in response to the Decision, maintains that a child of *zina* has no lineage, guardianship, inheritance or maintenance relationship with the man who caused the birth, but it recommends that the competent authority impose a discretionary sanction (*ta'zir*) obliging that man to meet the child's needs and to give the child part of his estate after death through a mandatory bequest (*wasiat wajibah*), expressly to protect the child rather than to legitimise lineage (Ilhami, 2018). Judiasih et al. (2024) note that this bequest is capped at one third of the estate so as to protect the lawful heirs. In practice, religious courts are not consistent. In Case No. 0257/Pdt.G/2012/PA.Jbg, the court granted

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a mandatory bequest to a child born out of wedlock by extensive interpretation of Article 209 of the KHI, which provides for such a bequest only to adopted children, but other judges decline to do so (Daud & Azahari, 2020). Some authors go further and argue that a child who proves biological descent should receive a fair share of the estate (Amalia et al., 2026), a position that, if applied to incest, would collide with the three inheritance regimes described above.

The situation reveals a conflict of norms between public order and child protection. Public order requires the state to maintain the prohibition of incest, protect morality and ensure that the lawful family structure is not disturbed by legitimating prohibited relationships. Child protection requires the state to guarantee the child's dignity, identity, knowledge of origin and right to care without discrimination. Applying the Decision in full to inheritance would create three risks. It would treat an incestuous relationship as a source of positive legal effects; it would make the succession relationship reciprocal, so that the perpetrator of incest could in turn become an heir of the child; and it would weaken the norms of decency and public order. The maxim *nemo auditur propriam turpitudinem allegans* (no one may be heard to rely on his own wrong) is apt here: the father may not derive rights from the very conduct the law prohibits. The maxim limits the father's position, not the child's.

A balanced construction is therefore needed. The Decision should not be read as granting full inheritance rights to every category of children born out of wedlock regardless of the parents' relationship. For a child of incest, a clear limitation is required: a basic civil relationship is permitted as a means of protecting the child, while heir status is withheld to preserve public order and the prohibition of incest. This limited civil relationship can be implemented through three mechanisms: (1) court-ordered maintenance and care costs against the biological father, grounded in the Decision and, for persons subject to the Civil Code, in Articles 867 to 869; (2) for Muslims, a court-ordered mandatory bequest of up to one third of the estate following MUI Fatwa No. 11 of 2012, which provides economic security without recognising lineage; and (3) recognition of the child's origin for purposes of identity, without conferring on the father rights that depend on lineage. Because these mechanisms currently rest on judicial interpretation and a non-binding fatwa, explicit legislation on the treatment of children born of prohibited relationships is needed to avoid a normative vacuum and inconsistent interpretation (Wiliyandari et al., 2026).

In sum, the Decision may be applied to a child of incest in matters of biological proof and the recognition of a basic civil relationship. Its application to succession must be limited, because full application would conflict with public order, would be inconsistent with the national inheritance regimes and would risk indirectly legitimising incest. The most appropriate middle way is to give the child civil protection without making the child a full heir, through mandatory maintenance, a mandatory bequest and a specific form of limited civil relationship that does not undermine the prohibition of incest.

CONCLUSION

A child born of incest remains a legal subject who cannot be blamed for the parents' relationship. All Indonesian legal regimes, namely the Marriage Law, the KHI, customary law and, since 2 January 2026, the 2023 Criminal Code, treat incest as an absolutely prohibited relationship, but the prohibition is addressed to the perpetrators, not to the child. The child of incest is entitled to legal protection, identity, knowledge of origin and care, and Indonesian law clearly separates incest as a breach of public order from the position of the child, which must be protected under the principle of non-discrimination. The child of incest is therefore a child born out of wedlock with the same basic legal standing as other children born out of wedlock.

Constitutional Court Decision No. 46/PUU-VIII/2010 extended the civil relationship of children born out of wedlock to the biological father, but it cannot be applied in full to a child of incest. It allows a limited civil relationship based on scientific proof of paternity, yet it cannot ground heir status, because heir status would conflict with public order and the prohibition of incest and because the Decision did not amend the law of succession. The Civil Code, the KHI and customary law consistently deny the child of incest inheritance from the biological father. The civil relationship arising after the Decision must therefore be confined to basic rights such as maintenance and recognition of origin, while economic protection is secured through court-ordered maintenance and a mandatory bequest, without inheritance consequences that would weaken the prohibition of incest.

RECOMMENDATION

The legislature should regulate explicitly the status of children born of prohibited relationships, either by amending the Marriage Law or by enacting the implementing regulation that the Decision has lacked since 2012, and should distinguish between the civil relationship and heir status. The Supreme Court should issue guidance to the courts on maintenance orders and mandatory bequests for children born of incest so that their protection does not depend on the inclinations of individual judges. This study is limited to normative analysis and did not examine court decisions involving children of incest; future research should study such decisions empirically and assess how the 2023 Criminal Code affects paternity and maintenance proceedings.

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