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THE CRIMINALIZATION OF VOLUNTARY INCESTUOUS INTERCOURSE BETWEEN MEMBERS OF THE NUCLEAR FAMILY IN THE BALKANS

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Abstract. The aim of this paper is to assess whether the legal definitions used by some European legislators to criminalize voluntary incestuous intercourse are in line with the results of the most recent studies. As we are about to show, incest has for centuries been a taboo topic and the subject of cautionary tales. Given that available studies clearly prove that incestuous relationships more often than not have negative effects on both the participants and their offspring, this paper does not call into question the necessity of having such norms, but rather the manner in which such a legislative policy is to be carried out. By comparing the criminal law norms used by Albania, Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Hungary, Romania, Serbia and Slovenia, this paper provides a comparative insight regarding the rationale behind the criminalization of such relationships in the Balkans and the surrounding area.

Keywords: incest, criminal law, Balkans, Europe.

Introduction

A study such as ours might begin by remembering that the legal sciences have often been portrayed as a mirror of the society which created them. Legal norms protect the most important values of a society and provide structure to an otherwise chaotic community. As a consequence, more often than not, the law is the resulting product of the unmitigated encounter between culture, religion, science, tradition and many more factors.

One of the most shocking discoveries of the twentieth century was that incest was much more widespread than some would have preferred to suppose. It was, in fact, proven that incest has been an ever-present phenomenon in European society at least since antiquity, through the Middle Ages (Archibald, 2001, p. 230) and up until the first half of the twentieth century. However, many more interdisciplinary studies are required before one could argue with certainty as to the exact nature and purpose of the taboos which surround this phenomenon. In the words of one author: “We may now conclude that although incest taboos vary widely, they are necessarily responsive to an evolutionarily driven, biologically based aversion for associates of the first few years of life, who are usually members of the nuclear family. At considerable human cost, the aversion may be over-ridden” (Gates, 2005, p. 155).

The aim of this paper is to assess whether the legal definitions used by some European legislators to criminalize voluntary incestuous intercourse are in line with the most recent studies concerning this phenomenon. As we are about to show, incest has for centuries been a taboo topic – a subject for the cautionary tales of various religious institutions. This means that the topic has been avoided by public and/or scientific discourse until just a few decades ago. Nevertheless, all data seems to point to the conclusion that the phenomenon was and still is very much present in these societies, as it is everywhere else in the world. Given that the available studies clearly prove that incestuous relationships more often than not have negative effects on both the participants and their offspring

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(Erickson, 2005, pp. 177–179), this paper does not call into question the necessity of the criminalization of voluntary incestuous intercourse, but rather the manner in which such a legislative policy is to be carried out.

We should also underline the fact that taboos have been defined differently by various authors. For the purposes of this paper, by a taboo we understand an unwritten rule which prohibits the members of a society from acknowledging, practicing, discussing, analysing or mentioning a specific practice, idea, phenomenon or ideology. In this sense, our definition is closer to that of Westermarck, who believes that a taboo is essentially a moral rule (Arnhart, 2005, p. 212).

As this should be a brief analysis, we chose to limit our study to one single part of Europe where the component states share important historical and cultural links, more specifically to the Balkans and some of the surrounding countries. Consequently, the conclusions of this paper are mainly relevant for this part of the European continent, but they should also prove to be a good starting point for any future research, regardless of the geographical and/or cultural setting.

The structure of this analysis is composed of three main sections. The first is meant to provide the reader with a brief state of the art concerning studies on incest. As there are hundreds, if not thousands, of studies conducted on this topic, we are not going to attempt to include and generally review all of them. Instead, we are going to try to highlight some of the main ideas which result from this body of research and which are relevant for any legal study of said criminal law norms. An emphasis will be placed on the history of these efforts, as one of our objectives is to find out when humanity started to better understand this phenomenon. The second section includes a general overview of the relevant criminal law norms used by these states for the criminalization of voluntary incestuous intercourse. In order gain a basic understanding of the emerging patterns, we have consulted the Criminal Codes of Albania, Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Hungary, Romania, Serbia and Slovenia. The last section includes some conclusions and remarks concerning the data offered in the first two sections. We would have certainly liked to include examples of court rulings from each and every country, however this proved to be impossible because of the linguistical and technical barriers encountered during our research. Nevertheless, a short review of the jurisprudential trends in existence in Romania should be enough to provide the reader and future studies with a general direction.

One should also remember that this study is not about involuntary or coerced incestuous intercourse. As we have previously stated, the aim of this paper is to offer another perspective on the actuality of the legal definitions used by the national legislator in order to criminalize voluntary incestuous relationships. Therefore, we are going to review the corresponding offense for the latter type of conduct, which is usually named “incest”. We are aware that “true” incestuous relations are rare in the jurisprudence, as such acts more often than not involve some form of coercion. In another author’s words, “because children are normally reared by their parents and siblings with one another, nuclear family incest is rare except as child abuse” (Wolf, 2014, p. 134). Nevertheless, this is exactly why more legal studies are needed on this subject, while rape or sexual abuse between the members of the nuclear family has been extensively researched. This paper should provide a good stepping stone for any such future research on this topic.

Having said all that, we can move on to the first section of this study, where we offer a brief overview of the ideas which, in our opinion, should be taken into consideration before formulating any *de lege ferenda* proposition on the subject of incest.

1. **A few ideas concerning the state of research on the topic of incest**

For a very long time, the phenomenon of incest was shrouded in a veil of taboos and stereotypes. In fact, at the end of the nineteenth century, most scientists believed that incestuous relations were common in nature and uncommon in human society, as the latter, being the more evolved species, developed cultural mechanisms to prevent it. This idea was false, and was proven as such by studies conducted in the first half of the next century. In fact, we now know that it is the other way around. The reality, it would seem, is that incest is now more common than ever in human communities and uncommon in nature (Erickson, 2005, pp. 177–180).

Unfortunately, historians lack the data required to be able to create exact statistics for each era and for every society. However, what one could certainly argue is that incestuous relations, both inside and outside the nuclear family, have always played a role in European society. As we are about to see, these practices have gone from being perfectly acceptable or even the rule to being the subject of countless taboos.

In Ancient Rome, given the latest demographic-oriented studies, it would seem that marriages between siblings were a common occurrence. We now know this because the Roman administration organized a census of the population every fourteen years, and some scrolls recording these results have survived to this day (Scheidel, 2005, p. 93). However, one could hardly argue that these marriages were the norm in Roman society and we still do not know what motivated them, as the determining factors might have varied substantially. Religion, finances, culture, family history and many more factors could have led a family to decide to marry the siblings or the half-siblings.

Ancient Egypt was somewhat different, in the sense that marriages between siblings were the norm in that society even after the Roman conquest (Scheidel, 2005, p. 105). However, researchers are still not in agreement regarding the factors which favoured these sorts of matrimonial arrangements. It could be argued that there was not just one single determining driver, but multiple such elements of different natures.

We should point out that all these studies show is that incest between indirect relatives, even between members of the same nuclear family (e.g., between siblings), existed as a practice in the Mediterranean space during antiquity. It should not be understood that incest between direct (primary) relatives was common or that the existence of any kind of incestuous relations in this historical era serves as definitive proof that incestuous intercourse is less problematic from a medical point of view. In fact, more data is needed before jumping to any sort of conclusion.

During the Medieval Era, such forbidden practices were considered useful for moral and religious propaganda in the Christian kingdoms and principalities, as well as (more often than not) of great interest as chivalric adventures (Archibald, 2001, p. 229). However, it would be an error to believe that the conceptualization of such a prohibition was a random occurrence. Like most taboos, this rule played an important social role in a society which lacked other practical means of preventing it. In a time when general education and mass-media did not exist, cautionary tales passed from hearth to hearth would have been among the best means of communicating an important lesson for the public health of the general population. Moreover, instituting an incest taboo was viewed as useful by writers such as Thomas Aquinas, who believed that this would help people restrain their sexual urges when living in close and communal quarters, as most common-folk would have done in those times (Archibald, 2001, p. 230).

All this being said, it is easy to notice that these cautionary tales were mostly concerned with incestuous relations between members of the same nuclear family. In contrast to antiquity, marriages between siblings were no longer tolerated by the religious authorities and became the subject of very strict prohibitions. However, incestuous relations outside of the nuclear family were not only tolerated, but even encouraged. Marriage between first cousins became one of the most efficient ways of strengthening family bonds and preserving the wealth accumulated by previous generations.

The idea that certain incestuous relations were not only acceptable, but also normal, survived the end of the Medieval Era and was adopted by modern societies. In the modern era, when the wealth and good reputation of the family play an important social role, marriages between cousins were common both for high society and for the middle class (the bourgeoisie) in the most civilized nations of the era (Kuper, 2009, pp. 243–245).

All this being said, it would seem that incest was not a significant issue for European States at the beginning of the twentieth century; the phenomenon was widespread enough, but it was not of major concern. As we have previously said, intercourse between cousins was normal and encouraged, as long as it took place after marriage. Intercourse between direct relatives and/or between siblings was unacceptable, however unstoppable and impossible to research, as shame, the spectre of social stigma, and centuries of old taboos sealed the lips of most of the people involved. In addition, as we have previously indicated, most scientists, like most western societies,

embraced a stereotype and claimed that incest was a constant only in nature, where ethics, culture and religion did not exist.

One should consider not only the psychological damage produced by the abuse of the more powerful participant (the parent, the older sibling, etc.), but also the psychological issues that arise from the stigma that the more fragile participant, the one convinced to indulge the pleasures of the former, has to bear in society when the truth about the incestuous relationships becomes common knowledge inside that community (Hadreas, 2002, p. 219).

At the same time, the modern sciences of sociology and anthropology were in their earliest days, and even the most open-minded researchers of the time would have probably refused to be involved in any such investigation. One should remember that, in the first half of the twentieth century, academics of the social sciences viewed any interdisciplinary study which involved recognizing the methodology of natural sciences as dangerous for the autonomous status of their respective fields (Shepher, 1983, pp. 176–177).

This perspective slowly changed and, in the second half of the last century, academic discourse reached a point where collaboration might be possible. The number of scientists who still argue in favour of a purely unique determining cause is reducing each day. In fact, one could hardly argue, for example, that genetic and/or environmental determinism are still popular theories (Bateson, 2005, pp. 35–36). In fact, interdisciplinary discourse has shown the limitations of the knowledge accumulated by each field on this topic. In the opinion of one author, this is problematic, as the lack of scientific interest which exists in one field of study also limits the potential findings of the people who are studying the same topic in another field of study (Bittles, 2005, p. 54).

The latter idea can be easily illustrated by mentioning two apparently completely separate lines of inquiry. Firstly, one could remember that it was posited that the study of primates might prove useful for the understanding of the avoidance of inbreeding as a naturally selected behaviour. It is certainly true that this kind of research is still in its early stages and its findings should be treated cautiously for the moment, but one should also consider the impact of its basic assertions. If most primates seem to have a naturally selected behaviour which helps them to avoid the dangers of inbreeding (Pusey, 2005, pp. 71–72), it is certainly worth considering that the prohibition of incest has a much more solid footing than it would appear. Does this mean that the cultural (or religious) taboo is also driven by a natural instinct of the human being? The general answer is yes; however, at the turn of the century, the extent to which the latter shaped the former was still unclear.

In a study conducted in the last years of the twentieth century, it was shown that there were a lot fewer cases of biological fathers who initiated incestuous intercourse with their offspring than there were step-fathers, or fathers who initiated such relations with members of their extended families (Seto, Lalumiere & Kuban, 1999, p. 271). The authors believe that close childhood association between members of the nuclear family was the explanation, thus validating, at least partially, a theory formulated in 1889 by Westermarck. However, the general conclusion of the study is that more research is needed before drawing a more categorical conclusion. Ten years later, another study, sociological this time, draw the conclusion that close childhood connections are not enough to prevent incestuous intercourse if a strong prohibition is not already in place (Shor & Simchai, 2009, p. 1836). We have mentioned these two studies as examples for a much more heterogeneous reality of the state of the art on this topic.

Secondly, by switching to the social sciences, one might observe that, although these sciences have been somewhat more interested in the subject, the ideas that they may provide are general at best. As an example, from a sociological point of view, it has been said that marriages between siblings:

> …occur almost exclusively in societies where ranking is sufficiently developed to exempt high-status people from most manual labour, as in chiefdoms, or to give them class rights over society's basic means of production, as in states. And they are unlikely to occur where state-building had created sufficient mundane power to relieve the ruling class of most of its supernatural aura. Under conditions not fully mapped out, but surely recurrent in human history, our innate alertness to the emotional complexity of incest can be turned to precise political ends, until something more dependable comes along (Gates, 2005, p. 156).

This kind of perspective, which puts the accent on the social nature of prohibition, even if it completely ignores the biological and/or psychological drive, provides an important insight by adding another complex layer to a possible explanation of the phenomenon of incest.

Consequently, another way of looking at this problem is to take into consideration the two main products of the phenomenon in collective culture. On one hand there is incest avoidance: the ability, regardless of its disputed nature, of the human being to avoid endangering the future of its species by not getting involved in incestuous intercourse. On the other hand, one has incest taboos, which, regardless of their disputed nature, are social constructs which are passed between the members of a society in order to prevent the same thing: incestuous relations. Unfortunately, the literature shows that most researchers who conducted studies on this topic during the twentieth century, regardless of their specialization, favoured one aspect and completely ignored the other (Wolf, 2014, pp. 133–134).

We are of the opinion that the prolonged reluctance of European and North American scholars to tackle the issues of causality and the legal regulation of incestuous sexual relations between members of the nuclear family led to immature and incomplete legislation concerning this topic. As we are about to see, the Balkan states have embraced different approaches to the subject, but none of them are based upon extended multidisciplinary research.

Having said that, we can now proceed to the second section of our paper, where we will briefly present the manner in which the national legislators from the Balkans elected to criminalize some forms of incestuous relations, while searching for emerging patterns.

2. The criminalization of incest in South-Eastern Europe

In the light of the information provided in the previous section, we can argue that, despite the fact that research on the subject of incest is still in its earlier stages, there are a few ideas with regard to which consensus may have already been achieved. Firstly, there is a strong medical argument against sexual intercourse between direct relatives, when and if such an intercourse leads to a pregnancy, as there is strong evidence that the child has a higher chance of having a severe medical condition as a result. Secondly, there is also a general consensus that most societies developed a taboo against incestuous relationships in one form or another, although there are notorious exceptions to this rule and the nature of those taboos is still very much disputed. Thirdly, the first two ideas are only applicable to incestuous relationships between members of the nuclear family.

If we are to accept that most of the countries which form the international community accept at least the validity of those three ideas, the fact that France, Spain, Russia, the Netherlands and some of the South American countries do not criminalize any kind of incestuous intercourse will certainly come as a surprise (O'Reilly, 2015, pp. 18–19). We are of the opinion that this kind of legislative policy is hardly the result of one single main driver, such as conservatism (Russia may be a conservative country, but France is not) or radical progressiveness (France and Spain may be more progressive, but Russia is certainly not). Consequently, we would suggest that an individual explanation has to sort through extensive future research on each country, or at least each geographical and/or cultural area.

Therefore, we will try to contribute to any such future efforts by providing a brief insight into the similarities and differences which mark the provisions used by some of the national legislators from, or historically linked to, a relatively conservative region: the Balkans.

In relation to the Albanian Criminal Code, henceforth the A.C.C., we mention the fact that we have consulted the most recent official translation of the Albanian Criminal Code; however, one should take note that it was marked as a provisional translation.

Very much like the other normative acts cited in this paper, the A.C.C. stipulates the conditions under which incestuous relationships are to be criminalized; however, it does so under a more peculiar name: sexual or homosexual activity with consanguine persons and persons in a position of trust. Thus, according to Art. 106 of

this act, "engagement in the act of sexual or homosexual intercourse between parents and children, brother and sister, between brothers, sisters, between consanguine relatives in an ascending line or with persons in the position of trust or adoption" is considered an offence and may be punished by imprisonment up to seven years.

Art. 106 of the A.C.C. is an excellent example to start with, as it shows how a national legislator might prefer to criminalize different forms of incestuous intercourse for different reasons. As we have previously stated in the first section of this paper, there is a general consensus that sexual intercourse between direct relatives is dangerous as it raises the risk of serious health issues for the offspring. Actually, in the case of inbreeding between direct relatives (some authors also call them primary relatives, but for the purposes of this paper, we will keep utilizing the term "direct relatives", as it is also commonly used in the English translations of the national Criminal Codes), the excess death-plus-major-defect rate is raised by 20 to 40 percent (Wolf, 2014, p. 134). However, this fact would not explain neither the criminalization of homosexual intercourse between direct or indirect relatives, nor the criminalization of sexual intercourse between the person who adopts (or one of their direct or indirect relatives) and the person who is adopted. Neither of these latter cases justify any kind of physiological health issues. However, as we are about to see, similar kinds of provisions have been adopted by most of the countries included in our brief study. Moreover, this kind of reasoning should not be surprising, as the very idea of justice is far from being extremely clear (Constantinescu-Mărunțel, 2020, pp. 70–71). At the end of this section, we will try to explain this one constant in light of the information provided in the first section.

In relation to the Austrian Criminal Code, henceforth the O.C.C., we should mention that we have consulted the Romanian translation of the Austrian Criminal Code, as we were unable to find a trustworthy source for an English or French translation. We took into consideration the fact that the Romanian translation is the result of an official project of the Romanian Ministry of Justice, in the context of which authorized translators were employed to translate into Romanian the Criminal Codes of all the members of the European Union.

The O.C.C. also provides for a definition of the offence of incest in Art. 211, which has four distinct paragraphs. According to dispositions set out by the first paragraph, a person may be prosecuted for incest if they engage in sexual intercourse with a direct relative, whether with an ascendant or with a descendant. If they are found guilty, then the court may sentence them to imprisonment up to one year or to pay a fine up to 720 daily penalties.

One should not believe that the penalty chosen by the Austrian federal legislator for this offence is a mild one just because it allows the courts to make a choice between imprisonment and a criminal fine. It is true that this would be the obvious conclusion if we were to compare the upper limit of the imprisonment term provided for by Art. 211 par. (1) of the O.C.C. with the upper limit of the imprisonment term provided for by Art. 106 of the A.C.C. However, we should point out that the Austrian legislator elected to set the same system of penalties for the basic version of manslaughter, pursuant to Art. 80 par. (1) of the O.C.C. At the same time, one should also notice that the court is allowed to impose a great number of daily penalties. In Austria, the amount of a daily penalties, pursuant to Art. 19 par. (2) of the O.C.C., ranges between 4 and 5000 euros, and is to be determined by the court in accordance with the circumstances of the case. Under those circumstances, we believe that the Austrian system of penalties for the offence of incest may also be considered harsh.

The second paragraph of Art. 211 criminalizes the act of the person who instigates one of their descendants to engage in sexual intercourse with the perpetrator. As this is, in fact, an act of inciting incestuous relations, one could expect that the Austrian legislator would have set out a more forgiving system of penalties. However, this is not the case. In fact, the penalty for this specific form of instigation is imprisonment up to three years. If we are to consider that imprisonment is regarded in general as a more severe form of punishment than a criminal fine, we could argue that Art. 80 par. (2) of the O.C.C. provides for an aggravated form of incest.

Art. 80 par. (3) of the O.C.C. provides for an attenuated form of incest. In this case, the Austrian legislator elected to criminalize the act of the person who engages in sexual intercourse with their sister. Taking into account that such conduct may be punished by imprisonment up to 6 months or by up to 360 daily penalties, we would suggest this means that, in the eyes of this legislator, incestuous intercourse between indirect relatives is less serious than incestuous intercourse between direct relatives.

In any case, pursuant to the fourth paragraph of the same article, a person who was under 19 years old when the offence was committed shall not be punished if they were instigated to do so. This means that, under these specific circumstances, a person otherwise criminally accountable will not be prosecuted and convicted, even if it has been proven that they committed the offence.

Given the fact that Bosnia and Herzegovina are a federation, similar norms may be found in normative acts adopted by the states which form the federation. We are not going to conduct an in-depth analysis of the all the relevant Bosnian legal provisions, as that would mean that this paper would have to become much too long. Therefore, for the moment, we are going to limit ourselves to presenting the federal criminal dispositions. One should also take note that we were unable to find any official translation of this code into English or French, therefore we have used an unofficial consolidated version, but from the most reputable source we could find.

The Criminal Code of the Federation of Bosnia and Herzegovina, hereinafter the B.H.C.C., also includes several provisions dedicated to the criminalization of incestuous relations. Specifically, Art. 213 of this normative act includes one basic form and two aggravated forms of this offence. In its basic form, the offence of incest may have been committed by "whosoever has sexual intercourse, or commits sex acts tantamount to sexual intercourse, with a lineal relative or a sibling". A person convicted pursuant to Art. 213 par. (1) may be punished by a fine or by imprisonment for a term of no less than 6 months and no more than two years. By a lineal relative, one understands a direct (primary) relative, either a descendant or an ascendant. Therefore, one could notice that Art. 213 par. (1) of the B.H.C.C. criminalizes a larger sphere of conducts than, for example, Art. 211 par. (1) of the O.C.C.

Prior to the presentation of the two aggravated forms of this particular offence, one should know that the B.H.C.C distinguishes between the notions of juvenile and child. Pursuant to the dispositions of Art. 2 par. (13), a juvenile is a person who has not reached the age of eighteen years. A child, pursuant to the dispositions of par. (12) of the same article, is a person who has not reached fourteen years of age. Therefore, in Bosnia and Herzegovina, according to the criminal law, a person is to be considered a child from the moment of their birth and up to the last moment until they turn fourteen. From the moment a person reaches fourteen years of age and up to the last moment before they turn eighteen years of age, they are considered a juvenile.

If the national legislator creates such thresholds, more often than not, an offence committed against a juvenile is considered more serious than the same offence committed under the same circumstances against an adult. Likewise, an offence committed against a child would be considered more serious than the same offence committed against a juvenile.

On that matter, it should be noted that we do have some reservations in relation to this manner of distinguishing between the severity of one offence in comparison with another. Although we do agree that an offence committed against a minor should be considered more serious than the same offence committed against an adult, we think that one should create differences between minors based on their age. We see no clear advantage in creating such differences in a general manner, for the entire Criminal Code. If there is a need to differentiate between victims based on their age in a very specific circumstance, we believe it would be better to simply introduce a set of special norms for that case.

The first aggravated form of the offence of incest, according to the second paragraph of Art. 213 of the B.H.C.C, is the perpetration of the same acts between the same categories of persons, with one major difference. This time, the perpetrator commits the offence with a juvenile. The same applies for the second aggravated form of the offence, pursuant to Art. 213 par. (3), but, in this instance, the perpetrator commits the acts with a child. As expected, the first aggravated form is sanctioned less severely than the second: imprisonment for a term of between one and five years, pursuant to Art. 213 par. (2), and imprisonment for a term of between two and ten years, pursuant to the third paragraph, respectively.

Bulgaria is one of the most northern states in the Balkans, and its legislator has also elected to include the offence of incest in its Criminal Code. According to Art. 154 of the Bulgarian Criminal Code of 1968 (with amendments up until 2017) henceforth the B.C.C., incest is defined as "sexual intercourse between relatives in ascending and

descending line, between brothers and sisters, and between adopters and adopted persons”. The penalty for committing any one of these acts is imprisonment for up to three years for both participants.

One can easily see that Art. 154 of the B.C.C. and Art. 106 of the A.C.C. have been drafted in a very similar manner, in the sense that both are an expression not only of the medical concerns regarding the effects of incestuous intercourse on potential offspring, but also of the taboos and stereotypes which forbid any kind of sexual activity between members of the same nuclear family, regardless of whether they are blood relatives or not. As we are about to see, the same may be said about the relevant provisions adopted by the Croatian legislator.

The Croatian Criminal Code of 2011, henceforth the C.C.C., has one of the most lenient attitudes towards the offence of incest, which is defined by the provisions of Art. 179 par. (1). The Croatian legislator decided that such acts may be punished with imprisonment not exceeding 1 year. Accordingly, the offence may be committed by “whoever engages in sexual intercourse or an equivalent sexual act with a relative by blood in direct line, a brother, sister, half-brother or half-sister, by blood or by adoption”. The second paragraph of the same article establishes that a participant to the commission of the act who was a child at that moment, that is to say that the child was under 18 years old, is not to be punished.

However, one could also consider the option of differentiating between the versions of incest by qualifying each of them in a different manner. Pursuant to Art. 199 par. (1) of the Hungarian Criminal Code of 2012 henceforth the H.C.C., “any person who engages in sexual activities with their relative in direct line is guilty of a felony”, and they may be punished by imprisonment not exceeding three years. It may be noted that the Hungarian legislator opted to expressly stipulate that, under these circumstances, the acts of the perpetrator(s) constitute a felony. At the same time, pursuant to the second paragraph of the same article, “any person who has sexual intercourse with his or her sibling shall be punishable for a misdemeanour”. Consequently, the punishment for the latter conduct is less severe, the judge having the right to impose imprisonment not exceeding two years.

Given what we have seen so far, it is certainly interesting that a national legislator from this geographical area would elect to differentiate between the forms of incest based on how closely related the perpetrators are. However, if we are to consider the information provided in the first section of this paper, it is to be expected for a European country to establish that sexual intercourse between siblings is a less severe breach of the law than sexual intercourse between relatives in a direct line. After all, countries such as Hungary and Austria are simply transposing within their legislation the various degrees of severity which have characterized incest taboos for centuries.

Even more so, pursuant to Art. 199 par. (3), if one of the perpetrators is under the age of 18 years and if said person is a descendant of the other perpetrator(s), the former will not be punished. This is not instituting a ground for exemption from criminal responsibility, but it allows the authorities to adopt a much more lenient attitude towards minors in a circumstance which is extremely sensible for all the parties which have been involved. If the descendant is a minor, this means that at least one of their ascendants has convinced them that they should engage in sexual intercourse. In such a situation, even if the minor is old enough to understand the implications of such an act, they might have been easily convinced otherwise, given the already intimate relationship existing between them as members of the same nuclear family.

The Romanian Criminal Code, henceforth the R.C.C., adopts a “classical” attitude in relation to the offense of incest. According to the provisions of Art. 377, the act is defined as “sexual intercourse with consent, between persons related in direct line or between siblings”. However, if we are to compare the system of penalties adopted by the Romanian legislator with what we have discovered from consulting the criminal legislation of other countries from the same region, we would be inclined to believe that the former is rather severe. Pursuant to the same norm, the offense of incest is punishable in Romania by no less than 1 and no more than 5 years of imprisonment.

However, it should be noted that Romania, unlike Albania, for example, does not criminalize incestuous relations between members of the same nuclear family if the nature of those relations is homosexual (Udroiu, 2019, p. 742). This would reflect a shy and self-conscious attempt on the part of the Romanian legislator in 2014 to break away

from the stereotypes and taboos of the old world, while not upsetting the more conservative part of Romanian society. As a result, even if it is not explicitly mentioned by the text of the law, and even if most Romanian literature criticizes this option, Art. 377 of the R.C.C. also covers homosexual incestuous relations between members of the same nuclear family (Trandafir, 2019, p. 473).

In comparison with the other national legislators presented in this paper, the Serbian legislator in its criminal legislation includes the narrowest definition of incest. According to Art. 197 of the Serbian Criminal Code of 2005 (with amendments until 2013) henceforth the Sr.C.C., the offense may have been committed when it is proven that an adult engaged "in sexual intercourse or an act of equal magnitude with an underage relative by blood, or an underage sibling". If the perpetrator is convicted, then the court may apply a punishment with imprisonment of six months to five years. Regarding this point, one should also remember that in many cases of incestuous sexual intercourse between direct relatives, the non-participating spouse of the ascendant plays an important role by ignoring the relation or by tolerating it (Ricker, 2006, pp. 37–40).

As we have already seen, this is easily one of the most severe punishments stipulated by a national legislator from this geographical area for this offense, at least if we are to compare it with the penalties imposed for the basic forms of this offense in other states.

It might be useful to note at this point that the Slovenian authorities have defined incest in the same manner, whilst electing to impose a much more lenient punishment. Pursuant to Art. 195 of the Slovenian Criminal Code of 2008, henceforth the Sl.C.C., "an adult who has sexual intercourse with an underage lineal relative or underage brother or sister shall be sentenced to imprisonment for not more than two years".

While we have presented the relevant norms and their corresponding formal expressions in the normative acts, it should be stressed out that the definitions of incest used by the national legislators previously mentioned are the product of various theories, taboos, social practices and stereotypes which were relevant at the beginning of the twentieth century. One should also consider that sometimes the incest taboo functions inversely. If the social ties of a family are important for the very survival of the entire community, the taboo incest appears in order to force families to enter into marriage unions, even if the community does not have a problem with what an incestuous relationship actually entails (Hadreas, 2002, p. 219).

The legal traditions and philosophies of these states, which are mostly conservative, prevented any kind of update. This in an era in which sociology and anthropology discovered that all of the theories which were posited during the first sixty or seventy years of the twentieth century were unable to provide a sufficiently coherent explanation for the various types of voluntary incestuous relations (Schepher, 1983, pp. 177–178).

Having said all of this, we may proceed to conducting a short review of Romanian jurisprudence on the matter, which should allow us to assess whether the norms presented above are a simple archaic remnant or are actually applied by public authorities with the (at least tacit) support of the public.

3. Incest in Romanian jurisprudence

As we have previously indicated, the criminalization of certain voluntary incestuous relationships was preserved by the Romanian legislator in 2014, when a new Criminal Code was adopted in this country. Pursuant to the dispositions of Art. 377, if direct relatives (e.g., mother and son) or siblings engage in sexual relations, this is an offence punishable by one to five years of imprisonment.

On the 4th of November 2021, the Oradea Court of Appeal decided that a man who engaged in sexual intercourse with his daughter several times between the 26th of January 2018 and the 4th of February 2018 had committed the offence of incest, pursuant to the dispositions of Art. 377 of the Romanian Criminal Code, and sentenced him to 1 year and 6 months of imprisonment. Through the same decision, the daughter was sentenced for the same offence to 8 months of imprisonment, but the court elected to postpone the execution of the punishment, pursuant to the dispositions of Art. 83 par. (1) of the Criminal Code.

In the same vein, the Ploiești Court of Appeal ruled that a man who engaged in voluntary sexual intercourse with his daughter (sixteen years old at the time) committed both the offence of sexual intercourse with a minor (Art. 220 of the Criminal Code) and the offence of incest (Art. 377 of the Criminal Code). It should be mentioned that the daughter became pregnant as a result of repeatedly engaging in sexual intercourse with her father, and she gave birth to a healthy child which she then abandoned to the care of the public authorities. The father was sentenced to a total of 24 months of imprisonment, of which 20 months was for the offence of sexual intercourse with a minor and 12 months was for the offence of incest (reduced to 4 months pursuant to the dispositions of Art. 38 par. 2 of the Criminal Code).

We could, of course, continue to provide the reader with several examples of similar court rulings from each year prior to 2021, but the building of such an extensive archive within the limits of this paper is hardly necessary. The simple fact is that Romanian courts judge dozens of incest-related cases each year, many of those resulting in convictions of months, if not years, of imprisonment, especially when minors are involved. Therefore, one could argue that the dispositions of Art. 377 are being consistently applied in Romania.

The fact that the Romanian public authorities have a constant policy of reporting, prosecuting and condemning the perpetrators of the offence of incest is also visible in the jurisprudence of the Romanian Supreme Court. The latter decided in 2021 that these specific trials could be optimized if the corroborated interpretations of certain norms from the Romanian Criminal and Civil codes were changed. Therefore, the Romanian High Court of Cassation and Justice, hereinafter the Romanian Supreme Court or ICCJ, ruled that the criminal courts are competent to judge if there is a direct biological link between the alleged perpetrators of the offence of incest, even if, pursuant to the dispositions of the Civil Code, this preliminary problem should have been sent to a civil court. The intent of the Supreme Court was to interpret the legal dispositions in such a manner as to, in effect, optimize the criminal trials where such deeds are judged.

That being the case, we should highlight that, at least in Romania (but we would not be surprised if this were true for the countries that were mentioned in the previous sections), the following three aspects of the phenomenon have to be accepted:

1) The national legislator recently considered that the criminalization of incest is still necessary, and that such a criminal policy adequately reflects the moral and/or religious values of the majority of its citizens; therefore, it included/retained the definition of the offence of incest in the newest version of the Criminal Code;

2) The public authorities are constantly reporting, prosecuting, judging and even convicting people who committed the acts criminalized under the legal definition of incest;

3) The public does not interfere with this process and there is no significant public pressure to decriminalize these voluntary incestuous relations.

However, none of the three points mentioned above are the result of an acknowledged, informed and coordinated public debate on the subject. In our opinion, the validity of the Romanian criminal norms on the subject has to be seriously questioned, as this validity is not the result of a scientific, methodologically sound exercise, nor is it the result of a democratically tested public debate. The Romanian criminal norms regarding the prohibition of incestuous relations are, in our opinion, the result of a socially accepted inertia. In 2014, the Romanian Parliament simply elected to push aside a much-delayed subject. From a political point of view, the subject was too dangerous for MPs, so they voted for a “safe” option: to continue to implement a criminal policy which was dictated by the *socially, religiously and culturally acceptable perceived reality* of the beginning of the twentieth century.

Having said all that, we can proceed to the next and last section of our paper, where we will present the results of the analysis conducted up to this point.

Conclusions

In the modern world, one would expect national legislators to adopt a more cautious attitude when criminalizing conduct such as that which is broadly termed incest. As we said at the beginning of this paper, we do believe that some forms of incestuous intercourse have to be criminalized: when and if strong scientific data shows that such conduits have negative effects for the entire society, or at least for an innocent third party. However, this is not the case in the Balkans or in the surrounding states. All of the states included in this study have criminalized some forms of incest; however, most ignored the clearly defined limits of what is dangerous from a scientific perspective, and elected to maintain to this day a set of provisions which is at least in part the expression of medieval cautionary tales.

In our opinion, when considering the validity of these norms as legal means aimed at the prevention of a harmful social phenomenon, i.e., incest, one should also check if they are the expression of the most recent findings with respect to that phenomenon.

Consequently, we going to end this paper with a division of the countries mentioned above according to four different criteria. We hope that this data will help other researchers in their future studies, as more research is clearly needed. As we have seen, the rationale currently used by the different national legislators is incomplete at best.

Firstly, it is interesting to note that all of the nine states included in this study have criminalized voluntary incestuous relations between direct relatives. However, one should take note of the fact that Serbia and Slovenia have criminalized such conduct only when one of the participants is a minor, probably in reference to the high probability of the presence of some form of child abuse in such cases. It should also be mentioned that Bosnia and Herzegovina elected to impose a much more severe punishment for those perpetrators who participate in incestuous intercourse with a minor.

Secondly, all of the states included in this study have criminalized voluntary incestuous relations between siblings. Albania, Bosnia and Herzegovina, Bulgaria, Croatia and Romania utilize the same system of penalties as they do for voluntary incestuous relations between direct relatives. Austria and Hungary have criminalized these relations; however, they included them in an attenuated form of the offense. Serbia and Slovenia have also criminalized these relations; however, only if such an act has been committed by one or more adults with a minor.

Thirdly, there are three states which criminalize voluntary incestuous relations between members of the same nuclear family even if they are not blood relatives: Albania, Bulgaria and Croatia.

Lastly, there is one country which criminalizes voluntary homosexual incestuous relations between members of the same nuclear family: Albania.

As a final remark, we are of the opinion that, irrespective of the medical arguments which may or may not support the idea that the criminalization of incest is or is not necessary in a contemporary and democratic society, this issue cannot and should not be analysed whilst ignoring the moral and/or religious views of the majority of the citizens of these countries. Therefore, if these norms exist and are being applied with the democratic support of citizens, in a context where no fundamental right of the perpetrators is suppressed, it is not our place to judge their validity solely on the basis of the existence or non-existence of otherwise neutral scientific arguments.

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