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**Reform Forum Note**

# PROTECTING THE FUNDAMENTAL RIGHTS OF THE CHILD BY CRIMINALISING VOLUNTARY INCESTUOUS RELATIONS

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## ABSTRACT

***Background:*** The notion that incest is an extremely widespread problem in contemporary society has been rejected by most of the scientific community until the last couple of decades. Therefore, legal professionals and national legislators have only recently begun to understand the need to act in order to prevent the long-lasting, harmful effects that such relations might have upon the participants.

***Methods:*** In order to achieve the main objective of this paper, the authors have reviewed a selection of primary sources (mainly legal norms included in various national and international legal instruments). They have also consulted secondary sources, trying to obtain the relevant interdisciplinary data from legal, historical, and psychological studies. This paper does not intend to outline the complete state of the art concerning studies on the phenomenon of incest, therefore only the most relevant data regarding the prevention of incest by the enactment of the norms on the protection of the fundamental rights of the children have been collected.

The goal of this paper is to present a few considerations regarding the link between the implementation of the fundamental rights of the child and the criminalisation of incestuous relations between members of the same nuclear family.

***Results and Conclusion:*** The results of this brief study are worrisome, to say the least, as it appears that the states that are actively promoting the rights of the children also have a veritable tradition of denying the extent of the phenomenon of incest and actively and/or passively ignore its perils.

***Keywords:*** incest, criminal law, child, rights, direct relatives

## 1 INTRODUCTION

One could start this paper by celebrating the crucial role played by human rights culture in shaping the national and international legal instruments of the second half of the twentieth century. Particular attention should be paid to the fact that children are our future and that we are under a collective obligation to ensure the observance of their fundamental rights as a way to protect the future development of mankind. Unfortunately, a paper such as ours is still necessary, as one should remember a simple truth already synthesised in the literature: 'female children are regularly subjected to sexual assaults by adult males who are part of their intimate social world' and 'the aggressors are not outcasts and strangers; they are neighbours, family friends, uncles, cousins, stepfathers, and fathers'.[3]

This paper is about one of the internationally-recognised rights of the child and how national governments could do more to protect it by criminalising at least certain forms of incest. When this paper was written, there were 196 parties to the United Nations Convention on the Rights of the Child of 1990, which means that this is one of the most well-received international instruments in the history of mankind. However, one can easily see that there is still a long way to go before these rights are observed in every corner of the world.

The notion that direct relatives or siblings could willingly engage in intercourse might be one of the most rejected notions in the history of humankind. There are many reasons lurking behind this attitude, and it would not be a good strategy to attempt to formulate an explanation based solely on emotional blindness, cultural biases, lack of medical knowledge,

3 Judith Lewis Herman, *Father-Daughter Incest* (Harvard University Press 2003) 7.

a paternalistic culture reinforced by religious dogma, or moral taboos. The truth is that we need to have many more interdisciplinary studies before pronouncing a generally acceptable conclusion.

The idea that incest might be much more prevalent than one would expect, given the cultural and legal prohibitions present in most countries, has been known for more than a century. Nevertheless, as is the case with individuals, the fact that one society knows or intuits that it might have a problem does not mean that that society is willing to accept the truth about what causes that problem. As we are about to see in the next section of this paper, there are historians who argue that some of the most radical social movements from the modern and contemporary eras might have been linked to an attempt by the ruling classes to dissimulate the extent of this problem among their own ranks.[4]

The structure of this paper is meant to simplify our research by dividing the key points into different sections. The first section analyses the evolution of the main international instruments that are meant to protect the rights of the child. This is meant to highlight what we consider to be the most important three instruments adopted in the last century on this topic. If done correctly, it will become clear that the child has a right to a normal upbringing and to be safe from inappropriate sexual relations with the ones most close to him or her. The second section has the objective of presenting the reader with an overview of the key moments that marked the evolution of the perspective of Western societies on the phenomenon of incest. The third section includes a brief analysis of the social and cultural role played by the criminalisation of certain acts. The paper ends with a few conclusions, which represent the convergence point of the ideas presented in the previous three sections.

All this being said, we should mention that most of our arguments have been influenced by the results of the scientific studies conducted in the past half a century. Unfortunately, this means that our conclusions are based in great part on data collected while studying the most famous type of incest (father-daughter).

This does not mean that other types of incest are completely ignored, especially since there are obvious similarities between the dynamics of various incestuous relations. Nevertheless, differences should be taken into account when they appear. As an example, the data accumulated in the literature would seem to indicate that when a young boy is molested by one of his parents, it is as likely for the perpetrator to be the father or the mother.[5] However, one should remember that there have been far fewer recorded cases where a boy is involved in incestuous intercourse with one of his parents than there have been cases where a girl is used in such a way. Unfortunately, although 'the mother-son incest is probably the most involved, the least understood, and the most subtly traumatic of all forms of incest',[6] little data has been gathered on this subject.

This lack of knowledge directly impacts any sort of legal effort meant to prevent and/or punish the mothers who take advantage of the innocence of their sons for their own sexual gratification, especially since it makes it a lot harder for the judicial authorities to understand the fundamental differences between the dynamics of a mother-son incestuous affair and those of a father-daughter incestuous affair.

If anything, we believe that the legal community cannot afford to wait a few more decades in order to have more data about the intrinsic link between the fundamental rights of the child and the (largely) unchecked phenomenon of incest. This is why this paper represents

4 Lynn Sacco, *Unspeakable: Father-Daughter Incest in American History* (The Johns Hopkins University Press 2009) 50-51.

5 Herman (n 3) 20.

6 Susan Forward and Craig Buck, *Betrayal of Innocence. Incest and Its Devastation* (Penguin 1984) 73.

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an intermediate point, providing future legal studies with an interdisciplinary footing for an amelioration of the national and international instruments which seek to protect our children.

As we have already said, in the next section, we will realise a short overview of the international norms which have improved the chance of the children to better legal protection.

## 2 THE MAIN INTERNATIONAL INSTRUMENTS MEANT TO PROTECT THE RIGHTS OF THE CHILD

On 2 September 1990, the United Nations Convention on the Rights of the Child (hereinafter – the CRC) entered into force, marking a fundamental shift in the attitude of the international community with respect to the relation between an adult-oriented society and the children. The Convention was adopted and opened for signature, ratification, and accession by General Assembly Resolution 44/25 of 20 November 1989, and it entered into force the following September. One of the main goals of this document was to strengthen a legal framework which was meant to enforce a simple enough idea, 'that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding'.

The principles that govern the 1990 UN Convention were not new when it was adopted. One could say that they were built on existing principles. In fact, these ideas were stated for the first time at an international level in 1924, when the League of Nations adopted the Declaration of the Rights of the Child (hereinafter – 24.D) in Geneva on 26 September. This document, which is extremely succinct and political in nature, affirmed five basic rights of the child, 'beyond and above all considerations of race, nationality or creed'.

We have elected to begin this part of our exposition by citing these norms precisely because they all share an unfortunate historical coordinate. None of these provisions is directly linked to the notion of incest prevention, and that is quite normal, as we are about to argue in the following section. Most of the members of the European or North American societies would have plainly refused the idea that incestuous relationships between the members of the same nuclear family were a problem in that era. It was believed that Western civilisation could not indulge such savage urges. Therefore, barring the possibility of discovering new contrary evidence, it is safer to assume that the authors and signatories of the 24.D were not thinking about this issue when they drafted and signed it. However, at least one of these provisions, the very first point of the 1924 Declaration, is meant to promote the obligation of parents in particular but also of society in general to ensure the normal development of the child. In fact, the first point of the 24.D states that 'The child must be given the means requisite for its normal development, both materially and spiritually'.

As we mentioned before, this document was not legally binding for anyone, not even for the members of the League of Nations. Nevertheless, the same rules of interpretation may be applied when studying the meaning of its wording. Thus, we believe that the idea of allowing a child to develop normally implies that no generally-accepted and known taboos are to be breached, including the one prohibiting incestuous intercourse between members of the same nuclear family. As we are about to see, the incest taboo was extremely strong in Western society at the beginning of the twentieth century, which justifies the plausibility of this theory. It was almost a given truth.

Another world war had to pass before another important initiative for the history of the fundamental rights of the child appeared. On 20 November 1959, the General Assembly of the United Nations proclaimed a second Declaration of the Rights of the Child (hereinafter –

59.D). This new international document was supposed to reflect the more cautious and invested attitude of this body in solving the problems and injustices suffered by children from all over the world. However, one should also note that, like its ancestor from 1924, the 1959 Declaration was also a non-binding manifestation of the will of the international community. Consequently, even though it would have been able to provide a stronger footing for claims based on international customary law, the 59.D did not provide any viable instruments that one could have used in order to force a community to treat its children better.

One should also remember that 1959 was not the best of times from a global perspective. The decolonisation process was underway, and many former colonies were struggling to survive as democratic states in a very unfavourable economic, political, and cultural context. The Cold War was also more present than ever, hindering any kind of humanitarian efforts that would have been able to improve the standard of living on a global scale. It was a time marked by military and political conflicts and by a general lack of resources in several parts of the world. In this context, one can easily see how the adoption of a convention on the rights of the child was a beacon of light, even if a dim one, as it lacked any legal effect.

As in the case of the 1924 League of Nations Declaration, barring any new evidence that was previously unavailable to us, the 59.D. was not drafted or signed as a means to prevent the abuse of children or the endangering of their development through involvement in voluntary incestuous relations. However, as we are about to see in the next section, the second half of the twentieth century was a time in history when the scientific community was beginning to realise two things. Firstly, incest among members of the same nuclear family is a much more common problem than one would have expected. Secondly, such relations may have lasting harmful effects on the minors who participate, willingly or unwillingly. This actually provided a scientific explanation for the incest taboos which have been present in Western society since the Middle Ages.

All this being said, one notices that the authors of the 1959 Declaration elected to use a much more detailed manner of promoting the right of the child to develop normally (to use the terminology of the 1924 Declaration). In this sense, the sixth principle of the 59.D. states that

> the child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security (…).

One should also notice that the ninth principle affirms that

> the child shall be protected against all forms of neglect, cruelty and exploitation.

However, in our opinion, it would be a bit of an exaggeration to consider that this norm was meant to promote the prohibition of incestuous relations between adults and minors when all of them are members of the same nuclear family. It is certainly true that such forms of intercourse or similar acts may represent a form of cruelty and/or exploitation. Nevertheless, the goal of the ninth principle is to remember that children should not be used as a labour force and that their physical, mental, and moral development should not be endangered by employing or engaging them in any kind of activities as means to gain profit.

In light of these, we would argue that at the moment of the adoption of the CRC in 1990, the international community had already been affirming the rights of the child in an increasingly exhaustive manner. At the same time, in 1990, as we are about to see, both the scientific community and the general public (in Europe and North America at least) already understood not only the perilous nature of the incestuous relations between members of the same nuclear family but also the alarming presence of this problem in the contemporary society.

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The CRC is most certainly a major step forward, if one is to compare its provisions with those of the 24.D or even with those of 59.D. The ever-growing nature of the protection granted by the international community for the rights of the child is extremely visible. We have already seen that the five principles put forward as a declaration in 1924 have been reshaped, annotated, and enriched in 1959 when five more principles were added. In 1990, the General Assembly of the United Nations took the opportunity and added many more provisions, and it included all of them in a legally binding instrument for the signatory states, thus imposing the observance of specific obligations upon the public authorities of the latter.

Even if this document does not address the issue of incest in a direct manner either, it is very clear that the international community was less than shy in limiting the rights of the parents and/or legal guardians of the child in relation to the upbringing of the latter. Pursuant to the provisions of Art. 19 par. (1) of the CRC

> states parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

It could be argued that this is just a rephrasing of the sixth principle of the 1959 Declaration on the Rights of the Child, and the thesis most certainly has its merits. Still, it should be noted that the 1959 text was a simple statement, an idea which was not enhanced by any kind of procedural mechanism which would allow the public authorities to intervene in order to prevent or put an end to the various forms of abuses that a parent or a legal guardian could easily inflict upon a child. If the state was a part of the United Nations and if the said state voluntarily introduced in its national legislation such a mechanism, then the sixth principle could become an effective legal argument. If the state was unwilling to 'burden' its public authorities with such a task, then no legal obligation existed in order to impose the application of the sixth principle. The CRC remedied that loophole and introduced the obligation of the public authorities to act in such cases. The para. 2 of Art. 19 identifies practical means that should be used by the state in order to exercise due diligence in such cases:

> such protective measures should, as appropriate, include effective procedures for the establishment of social programs to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

However, given the subject of our paper and the positioning of these provisions in the economy of this particular international instrument, para. 1 of Art. 19 of the CRC represents the set of general norms. For us to be able to discover the importance of the criminalisation of voluntary incestuous intercourse between an adult and a minor, we would also have to mention the provisions of Art. 34 a) of the 1990 Convention. These are explicitly meant to create an obligation for the signatory parties to protect any child from all forms of sexual exploitation and sexual abuse. In fact, states are required to take all the necessary steps, legislative, logistical, or otherwise, for the prevention of 'the inducement or coercion of a child to engage in any unlawful sexual activity'. Moreover, these measures must be regulated and implemented at a national, bilateral, or multilateral level, depending on the nature of the risk.

As we are about to see, the scientific community agrees that, within certain limits, the involvement of a minor (of a child) in incestuous relations with members from the same nuclear family more often than not endangers normal development. However, at the same time, not all states agree with that thesis, and some refuse to criminalise voluntary incestuous relations, even when such forms of intercourse occur between an adult and a minor.

All these being said, we can now proceed to analyse the sinuous path of Western societies to acknowledging and preventing incestuous relations between members of the same nuclear family. Many of the hurdles encountered during the process were generated by the very incapability of the scientific community to accept that their quotidian reality included civilised men and women who were utilising their own children in a sexual manner.

## 3 THE PROBLEM OF VOLUNTARY INCESTUOUS INTERCOURSE BETWEEN ADULTS AND MINORS

When this paper was written, the vast majority of the researchers who have dedicated time and resources for the study of the effects of incestuous relations between an adult and a minor belonging to the same nuclear family have accepted that more often not, these relations produce harmful lasting effects upon the latter. However, one should remember that this conclusion was not a given fifty years ago, and it was very much neglected or even dismissed one hundred years ago. Even Sigmund Freud, the famous psychoanalyst who started his career by researching the effects of unresolved sexual issues from childhood, abandoned the study of incestuous relations later in life.[7] He had discovered that the sexual traumas underlining and generating mental health problems for countless adults were sexual abuses, including incest, which occurred when they were children or adolescents. Unfortunately, he was not comfortable with his discovery, as it actually proved that his society, the highly praised and civilised European society of the beginning of the twentieth century, had an endemic problem that was tolerated, if not generated, by the otherwise extremely respectable and certainly prosperous paterfamiliases.[8]

In a letter from 1897, Sigmund Freud admits that he could not believe his patients with regard to their accounts of being sexually abused as children by their fathers: 'then there was the astonishing thing that in every case blame was laid on perverse acts by the father, and realisation of the unexpected frequency of hysteria, in every case of which the same thing applied, though it was hardly credible that perverted acts against children were so general'. Then, the great psychoanalyst had a moment of weakness and tried to calm his conscience by doing the unspeakable. He shifted the blame towards the victim and concluded that the daughters were lying in order to dissimulate their own incestuous desires towards their fathers.[9] In other words, feeling conflicted, Freud ended up repudiating his own original theory. However, 'this conclusion was based not on any new evidence from patients, but rather on Freud's own growing unwillingness to believe that licentious behaviour on the part of fathers could be so widespread'.

Accepting that incest was a rather widespread practice was also hindered by otherwise well-intentioned norms. As an example, the *in-camera* rule included in the 1908 United Kingdom`s Punishment of Incest Act ensured that

> cases were heard in closed court not only restricted the publication of information about such trials but reinforced the incest "taboo" prolonging public ignorance that it was a crime, allowing some offenders to claim lack of knowledge and preventing, or at least limiting, informed public discourse.[10]

7 Arnold W Rachman and Susan A Klett, *Analysis of the Incest Trauma. Retrieval, Recovery, Renewal* (Karnac Books 2015) 17-18.

8 Herman (n 3) 9.

9 Herman (n 3) 10.

10 Kim Stevenson, '"These Are Cases Which It Is Inadvisable to Drag into the Light of Day": Disinterring the Crime of Incest in Early Twentieth-Century England' 20 Crime, History and Societies' <https://journals.openedition.org/chs/1669?lang=en> accessed 4 January 2022.

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In the United States of America from the end of the nineteenth century and the first half of the twentieth century, a gonorrhoea epidemic among young girls from reputable families with no history of sexual activity baffled the doctors at first, but it quickly became obvious that this was a clear sign of incestuous intercourse between fathers and underage daughters in many white privileged homes.[11] These suspicions were left unspoken, as it would have exposed an extremely serious inherent problem of what society perceived at the time as the ideal form of the nuclear family. An 'elegant' solution was quickly discovered, and the myth that gonorrhoea passed through toilet seats and doorknobs was created instead. It would take almost one hundred years to refute this myth and train the medical community to accept that the presence of sexually transmitted diseases in young girls with no record of sexual activity is a sign of possible child abuse.[12]

At the same time, one should consider that at the beginning of the twentieth century, the public space was not ready for a debate about incest for reasons apparently not connected to the phenomenon. As most of the minor participants in voluntary incestuous intercourse are women, society also needed to overcome some of its other issues for the former to start speaking as young adults. In this sense, the rise of feminism in the past century had the indirect effect of forcing media institutions, politicians, and public authorities to allow more space and time to discuss this problem, while it also proved that the idealised nuclear family has its own limitations and dangers:

> until the resurgence of the women's liberation movement, even the most courageous explorers of sexual mores simply refused to deal with the fact that many men, including fathers, feel entitled to use children for their sexual enjoyment.[13]

According to one author, this does not mean that feminism should only speak about the traumas of young girls and women, as the feminist position is not just about highlighting the sexual damage suffered by girls and women but simultaneously forms a fundamental critique of the family, of the construction of gendered sexualities, of the 'normality' of incestuous abuse.[14] In other words, feminism has facilitated a partially open-minded discussion about incest as a form of child abuse but, unfortunately, at the same time, directed the entire attention of the public towards one single form of incest – that which occurs between adult males and their underage female offspring.

Moreover, we should not automatically assume that the data provided by the studies conducted in Europe or in North America is enough to understand a phenomenon that has proved to be much more complex than expected. A study conducted in South Africa and relied heavily on the testimonies of thirteen survivors showed that a society characterised by a strong paternalistic culture of the white man over the public and private life has a strong potential to favour the occurrence and hiding of severe cases of incest.[15] In the case of this country, this type of culture was the result of a centuries-old juxtaposition of political, cultural, racial, and religious elements. This does not mean that paternalistic societies may only appear in former European colonies. Nevertheless, the effect is that 'as long as fathers dominate their families, they will have the power to make sexual use of their children'.[16] The simple fact that most men have chosen not to exercise this power for their sexual pleasure does not mean that some do not. Moreover, if incestuous relations, even voluntary ones, are

11 Sacco (n 4) 210.
12 Sacco (n 4) 212.
13 Herman (n 3) 21.
14 Vikki Bell, *Interrogating Incest. Feminism, Foucault and the Law* (Routledge 1993) 174-175.
15 Diane EH Russell, *Behind Closed Doors in White South Africa. Incest Survivors Tell Their Stories* (Macmillan Press Ltd 1997) 156-157.
16 Russell (n 15) 158.

not criminalised, one could hardly argue that adults will restrain themselves because of the mere existence of a taboo or of any other type of social prohibition that is not matched with the threat of proportionate punishment. In fact, there are researchers that doubt the efficacy of such taboos, especially when they are not reinforced by more pressing and immediate medical, biological, or economic needs.[17]

All this being said, there are a few studies that can give us a general idea about how widespread the problem of incestuous relations might be. We insist that the results might vary considerably if such research were to be conducted nowadays, as the original data was collected in the United States of America between 1953 and 1978, conducted by Alfred Kinsey in 1953, by Judson Landis in 1956, by John Gagnon in 1965, and by David Finkelhor in 1978.[18] We have already shown that cultural, religious, moral, and economic differences may play a determining factor in inhibiting or favouring the incest phenomenon. At the same time, we must mention that we are not going to reanalyse the methodology of these studies or their findings. We simply do not have the space for such an endeavour, and it would not significantly improve our own research. Consequently, we will limit ourselves to presenting the general quantitative conclusion derived from the combined results of these four studies:

> - one-fifth to one-third of all women reported that they had had some sort of childhood sexual encounter with an adult male;
> - between four and twelve per cent of all women reported a sexual experience with a relative;
> - one woman in one hundred reported a sexual experience with her father or stepfather.[19]

As we mentioned in the first part of our paper, one should also remember that the dynamics of father-daughter incestuous affairs are substantially different from what we encounter in other types of incest. These differences should be taken into account not only when one attempts to extrapolate the results of studies like the ones previously presented but also when assessing the effects that such an affair has on the other members of the same nuclear family. As an example, in the case of father-daughter incest, the mother is usually a silent partner, ignoring and/or denying what is happening.[20] In the case of mother-son incest, the father is usually an absent partner, and his lack of involvement in the family life prevents him from understanding what is happening. In both cases, the non-offending partner might act in good faith, or they might actively and knowingly facilitate the abusive relationship, thus intentionally contributing to the harming of the minor.

If father-daughter incest is a phenomenon different enough from mother-son incest, one should remember that both are usually radically different from sibling incest. If one of the siblings is much older than the other, then the dynamics of the incestuous relationships can become similar in certain ways, but not completely. This is because 'siblings are generally so inclined to experiment sexually that some experts estimate that at least casual sibling sexual contact occurs in nine out of ten families with more than one child'.[21] Despite it being the most widespread and unreported form of incest, it usually remains in a benign form, especially when the siblings are of similar age and very young (the 'show-me-yours-I'll-show-you-mine' game serves the purpose of allowing children to discover their own sexualities in

17 Eran Shor and Dalit Simchai, 'Incest Avoidance, the Incest Taboo, and Social Cohesion: Revisiting Westermarck and the Case of the Israeli Kibbutzim' (2009) 114 American Journal of Sociology 1836.

18 Herman (n 3) 12.

19 Ibid.

20 Forward and Buck (n 6) 74.

21 Forward and Buck (n 6) 85.

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a playful, naïve, and reciprocal manner). Nevertheless, one should keep in mind that sibling incest can easily cross the boundaries of fraternal games and become extremely violent and traumatic, especially when the age difference between the participants is substantial.[22]

Consequently, we are of the opinion that the data that has been collected so far during various studies justifies the conclusion that any form of incestuous relationship between an adult and a child has the potential to irreversibly harm the development of the latter, thus endangering his or her capacity to lead a healthy and well-balanced adult life.

In the following section, we will analyse the possibility of utilising the norms of the criminal law to prevent incestuous relations.

## 4 THE PURPOSE OF CRIMINALISING INCESTUOUS INTERCOURSE BETWEEN DIRECT RELATIVES AND SIBLINGS

The criminalisation of incest may be explained in at least two ways. Firstly, it can be viewed as an expression of the strong cultural and religious prohibitions (taboos) instituted in most of the world's societies since the Middle Ages. Secondly, it may be perceived as the result of the latest scientific discoveries regarding the lasting harmful effects that incestuous relations may have upon the participants. Unfortunately, we do not have the space to explore the nature of these criminal norms for each and every contemporary country, therefore the object of this section of our study has an alternative, much more precisely aimed objective. We will attempt to see what the purpose of criminal norms is and how they could prevent incestuous relations between an adult and a minor in a national system of law. However, such an exercise has its own clear limitations, and the results may vary considerably from one legal system to another. Therefore, we would suggest that our findings represent a good starting point for future research, but we do not claim they are applicable in all countries.

Before proceeding to this brief analysis, one should remember that nowadays, incest is criminalised in most countries, even if there are a few notorious exceptions: France, Spain, Russia, the Netherlands, and some of the South American countries.[23] In our opinion, this option cannot be explained by one single theory for all the indicated states. They are much too different, and what seems to be a plausible explanation in the case of one of them would inevitably fail in the case of another. As an example, we believe that the notorious secularism embraced by the French Government must have played an important role in repealing the provisions that incriminated some forms of incestuous relations, not only because they were considered unnecessary in French society, but also because they represented the influence exercised by religious institutions over the public authorities. In this sense, one could verify the norms included in the 1804 Civil Code in relation to matrimony and blood relations.[24]

The idea that various factors influence national legislators in different ways is important because it can also explain why the offence of incest has different definitions in different countries. The Albanian Criminal Code includes the offence of sexual or homosexual activity with consanguine persons and persons in the position of trust, pursuant to the provisions of Art. 106, which is defined as the

22 Ibid.

23 Martin O'Reilly, 'Is Adult Incest Wrong?' (2015) Humanism Ireland 18.

24 1804 French Code < https://revolution.chnm.org/items/show/358 > accessed 4 January 2022.

> 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.[25]

One can easily see that this is a norm with a very large scope, as it creates a legal fiction by stating that sexual intercourse between a person who has been adopted and one of their legal relatives is also considered incest, and it is punished accordingly. As we are about to see, such norms may have even larger scopes.

Section 155 of the Canadian Criminal Code also introduces a very specific definition of the offence of incest, as it stipulates that

> everyone commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person.[26]

In this case, the national legislator has opted for the incrimination of sexual intercourse between members of the same nuclear family (child-parent or sibling-sibling), but also of such relations when they occur between children and grandparents. Still, it is easier to justify the need for incrimination in the case of section 155 of the Canadian Criminal Code than it is in the case of Art. 106 of the Albanian Criminal Code. There are both medical arguments and strong taboos surrounding the relations prohibited by the former, while part of the latter is justified only by the cultural and religious taboos already existing in Albanian society. It is a matter of opinion whether taboos and other forms of moral, cultural, or religious prohibitions may be accepted as a basis for a severe limitation of the fundamental rights of a person.

Serbia, another European country with a strong conservative majority, has elected to incriminate incestuous relations, but its norms have a far narrower scope. Pursuant to Art. 197 of the Serbian Criminal Code,[27] the offence of incest may have been committed when 'an adult engages in sexual intercourse or an act of equal magnitude with an underage relative by blood, or an underage sibling'. Essentially, Serbia did not criminalise any kind of incestuous relations between adults, thus providing our study with an example of a moderate criminal policy, found somewhere in the middle between Russia or France, on the one hand, and Iceland, on the other hand.

A fourth and last example is the Icelandic Criminal Code,[28] which adopts one of the severest attitudes towards incestuous relations. One could even say that if we are to consider a spectrum of the attitudes that countries adopt regarding the phenomenon of incest, France would be at one end, while Iceland would be on the other end. Art. 200 paras. (1) and (2) of this document incriminate any kind of sexual intercourse, sexual relations, or sexual harassment when committed against the perpetrator's own child or another type of descendant (ex. nephew). The punishment imposed by the Icelandic legislator is imprisonment for up to eight years under normal circumstances and up to 12 years if the child is 15, 16, or 17 years of age. If the participants are aged 15 years or older, then sibling incest is also incriminated under the provisions of Art. 200 par. (3) of the Icelandic Criminal Code, but the punishment is less severe: up to four years of imprisonment. However, if both siblings were under the

25 Albanian Criminal Code, Law No. 7895, dated 27 Jan 1995. < https://adsdatabase.ohchr.org/IssueLibrary/ALBANIA_Criminal%20Code.pdf > accessed 4 January 2022.

26 Canadian Criminal Code, last amended on 27 August 2021. <https://laws-lois.justice.gc.ca/eng/acts/c-46/ > accessed 4 January 2022.

27 Serbian Criminal Code, last amended on 24 December 2012. <https://www.legislationline.org/download/id/5480/file/Serbia_CC_am2012_en.pdf > accessed 4 January 2022.

28 Icelandic Criminal Code (General Penal Code) No. 19, dated on 12 February 1940 < https://www.legislationline.org/download/id/6159/file/General%20Penal%20Code%20of%20Iceland%201940,%20amended%202015.pdf accessed 4 January 2022.

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age of 18 years at the time of the offence, then the court is allowed to waive the punishment application.

Art. 201 of the Icelandic Criminal Code proves that two societies with very different historical backgrounds can produce very similar norms, as it is formulated with an even bigger scope in mind than it was the case for Art. 106 of the Albanian Criminal Code. Pursuant to the provisions of the first paragraph of the former, a punishment of up to 12 years of imprisonment may be applied to

> any person who has sexual intercourse or other sexual relations with a child aged 15, 16 or 17 year who is his or her adopted child, step-child, foster-child or the child of his or her cohabiting partner, or is bound to him or her by similar family relationships in direct line of descent, or is a child who has been committed to his or her authority for education or upbringing.[29]

Except for the last thesis, one may easily notice that the Icelandic legislator went to great lengths to promote in the society a very clear message: the relations established between the members of the nuclear family, regardless of whether they are blood relatives or not, must not be of a sexual nature.

Regardless of the factors which influenced the national legislators and determined them to criminalise or not some of the incestuous forms of intercourse, the effect is representative for these societies at a given time. In other words, 'criminal justice systems symbolise states' national identity and culture'.[30]

However, one should note that the notion of justice is not as clear as it might appear at first glance, both from a philosophical and a legal standpoint.[31] When a person breaches a criminal law provision, that is a form of a violation of the law, which has different names in different national systems: crime, offence, felony, misdemeanour, etc. As this paper does not attempt to analyse the subtleties of comparative criminal law, there is no need to present at this time the various differences and similarities established by different states between these notions. Consequently, for the purposes of this study, we are going to use the notion of offence to indicate a violation of the criminal law, irrespective of the terminology used by each specific domestic legal system.

The literature offers multiple explanations for the nature of offences. According to one opinion, they are both wrongs and public wrongs.[32] Firstly, they are wrongs because there is a need for the public authorities to forbid one from committing them. Secondly, they are public wrongs because they cannot be settled by private individuals among themselves, neither within the framework of a judicial trial nor in private. When an offence is committed, the public authorities must intervene in order to rectify the situation and in order to punish the perpetrator. This intervention is justifiable according to the theories formulated during the modern era, as the perpetrator is a free agent and morally (and legally) accountable for his or her actions. However, the general goal of the criminal law and of the authorities in charge of implementing the criminal policy of the state should not be limited to harsh retribution against the perpetrator, but it should also envisage healing the collective traumas inflicted by the commission of the offence.[33]

29 Albanian Criminal Code, Law No. 7895, dated 27 Jan 1995. < https://adsdatabase.ohchr.org/IssueLibrary/ALBANIA_Criminal%20Code.pdf > accessed 4 January 2022.

30 Merita Kettunen, *Legitimizing European Criminal Law. Justification and Restrictions* (Springer 2020) 47.

31 Cătălin Constantinescu-Mărunțel, 'The Rather Ambiguous Notion of Justice Utilised by the European States' (2020) 10 Union of Jurists of Romania. Law Review 74-75.

32 Kettunen (n 24) 51.

33 Sergio Dellavalle, 'Reconciliation v. Retribution, and Co-Operation v. Substitution: Hegel's Suggestions for a Philosophy of International Criminal Law' in Morten Bergsmo and Emiliano J Buis (eds), *Philosophical Foundations of International Criminal Law: Correlating Thinkers* (Torkel Opsahl Academic EPublisher 2018) 501.

At the same time, one has to remember that one of the most important functions of the criminal law is to prevent the very conducts which are being criminalised by the effect of its own norms.[34] In the European literature that analyses the role of the criminal law in the continental legal systems, several authors have argued that this preventive function can be accomplished if the national legislator formulates the norms so that they can serve not only as a form of immaterial protection but also as an educational tool that is disseminated to the general public with the help of the educational system.[35]

However, little has changed during the last one hundred years, even if a researcher were pointing out the inadequacies of the criminal law even during the 1960s.[36] Legislative inertia causes an undetermined number of dramas every year.

In light of all the information provided in this section, we can now conclude that the criminalisation of incest could be an invaluable tool for a national legislator who wanted to promote the fact that incestuous relations between an adult and a minor are dangerous, especially for the latter. As we have seen in the second section, there is an incredibly fine line in such cases between voluntary intercourse and child abuse, even when the minor is almost an adult and might have already reached the age of consent.

## 5 CONCLUSIONS

While it is certainly understandable that most people experience a form of emotional blindness to the phenomenon of incest, it is extremely dangerous for an entire society to knowingly embrace such a handicap.[37] We must accept that incestuous relations are a constant in our society and promote the idea that they are intrinsically linked to the phenomenon of domestic child abuse. Consequently, not criminalising them presents undeniable risks, at least by hindering the efforts of the public authorities to investigate possible cases of child endangerment.

In the first section of our paper, we showed that a society that denies vehemently even the possibility of having a problem is prone to be blind to even the most obvious evidence of having this problem. One of the consequences of this collective choice is the apparition of a strong bias among the members of the scientific community. As an example, in the twentieth-century United States, the fact that medical professionals were formally trained to identify the least pathological cause of disease meant that a doctor would be inclined to think that father-daughter incest was a rather rare occurrence and was less likely to consider it a distinct possibility unless there was an external factor that raised it directly.[38] The same principle applies to the judicial authorities and law enforcement agencies.

Criminalising incestuous relations between the members of a nuclear family sends a strong message that cannot be denied: children might be preyed upon by their parents or elder siblings. In turn, this creates the space and the tools for the public opinion to discuss the problem, prevent it, and intervene when the act has already been committed. The fundamental right of a child to normal development cannot be truly implemented in the absence of such criminalisation.

34 Constantin Mitrache and Cristian Mitrache, *Drept Penal Român. Partea Generală* (Third edition, Universul Juridic 2019) 31-32.

35 Florin Streteanu and Daniel Nițu, *Drept Penal. Partea Generală* (Universul Juridic 2014) 12-13.

36 Graham Hughes, 'The Crime of Incest' 55 Journal of Criminal Law and Criminology 329-330.

37 Rachman and Klett (n 7) 1-2.

38 Sacco (n 4) 212.

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However, we would also like to revert to the international legal norms cited at the beginning of our analysis. If the experience of the twentieth century has shown anything, it is that the protection of the most fundamental rights of a person should not be trusted solely to a state and its public authorities, as political factions with infamous agendas can easily take absolute control over those. Therefore, we are of the opinion that the international community should consider amending the international provisions regarding the relevant rights of the children to put pressure on the national legislators to acknowledge and directly tackle the phenomenon of incest.

## REFERENCES

1. Bell V, *Interrogating Incest. Feminism, Foucault and the Law* (Routledge 1993).
2. Constantinescu-Mărunțel C, 'The Rather Ambiguous Notion of Justice Utilised by the European States' (2020) 10 Union of Jurists of Romania. Law Review 53.
3. Dellavalle S, 'Reconciliation v. Retribution, and Co-Operation v. Substitution: Hegel's Suggestions for a Philosophy of International Criminal Law' in Morten Bergsmo and Emiliano J Buis (eds), *Philosophical Foundations of International Criminal Law: Correlating Thinkers* (Torkel Opsahl Academic EPublisher 2018).
4. Forward S and Buck C, *Betrayal of Innocence. Incest and Its Devastation* (Penguin 1984).
5. Herman JL, *Father-Daughter Incest* (Harvard University Press 2003).
6. Graham Hughes, 'The Crime of Incest' 55 Journal of Criminal Law and Criminology 322.
7. Kettunen M, *Legitimizing European Criminal Law. Justification and Restrictions* (Springer 2020).
8. Mitrache C and Mitrache C, *Drept Penal Român. Partea Generală* (Third edition, Universul Juridic 2019).
9. O'Reilly M, 'Is Adult Incest Wrong?' [2015] Humanism Ireland 18.
10. Rachman AW and Klett SA, *Analysis of the Incest Trauma. Retrieval, Recovery, Renewal* (Karnac Books 2015).
11. Russell DEH, *Behind Closed Doors in White South Africa. Incest Survivors Tell Their Stories* (Macmillan Press Ltd 1997).
12. Sacco L, *Unspeakable: Father-Daughter Incest in American History* (The Johns Hopkins University Press 2009).
13. Shor E and Simchai D, 'Incest Avoidance, the Incest Taboo, and Social Cohesion: Revisiting Westermarck and the Case of the Israeli Kibbutzim' (2009) 114 American Journal of Sociology 1803.
14. Stevenson K '"These Are Cases Which It Is Inadvisable to Drag into the Light of Day": Disinterring the Crime of Incest in Early Twentieth-Century England' 20 Crime, History and Societies <https://journals.openedition.org/chs/1669?lang=en> accessed 4 January 2022.
15. Streteanu F and Nițu D, *Drept Penal. Partea Generală* (Universul Juridic 2014).
16. Criminal codes of OSCE participating states <https://www.legislationline.org/documents/section/criminal-codes> accessed June 2021.
17. League of Nations, Geneva Declaration of the Rights of the Child <http://www.un-documents.net/gdrc1924.htm> accessed 23 June 2021.

18. United Nations, General Assembly, Convention on the Rights of the Child <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> accessed 23 June 2021

19. United Nations, General Assembly, Resolution 1386(XIV). Declaration of the Rights of the Child <https://www.refworld.org/docid/3ae6b38e3.html> accessed 23 June 2021.

20. United Nations, Status of the Convention on the Rights of the Child <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en> accessed 24 June 2021.