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ARTICLE

Incest in French Law: A New Offence for an Old Prohibition

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Abstract
In France, the 2021 Act regarding sexual offences recognized incest as an autonomous offence. Previously, the French Penal Code traditionally prohibited incest as an aggravating circumstance based upon minority or the family relationship between the perpetrator and the victim. The problem was that, according to the strict construction principle, the judges had to determine the sexual offence, in turn supporting the aggravating circumstance of incest. To do so, they had to look for the evidence of the lack of consent determined by "violence, constraint, threaten or surprise". The 2021 Act is the conclusion of several controversial reforms considering this issue.

Keywords incest, sexual offences, rape, consent, criminal law, strict construction, minors

INTRODUCTION

Incest is one of the most traditional and oldest prohibitions in human history even if it was tolerated by some primitive societies, explained as being closer to the state of nature, stated as a political rule of government by Ancient Egypt, since the Old Testament.[1] Incest has been banned because it blurs the familial relationship as well as the natural order between the generations. Hence, social organization worldwide is based upon this general prohibition. However, it is noteworthy that the persistence of this social prohibition, consistently applied by civil law, has not always been considered in a special way by criminal law in France.

Until recently, French criminal law had not been punishing incest as an autonomous offence. Neither the Old Penal Code (1810; part of Napoleon's Codes), nor the New Penal Code (adopted in 1992 and which came into force in 1994), defined incest, but chose to punish it as an aggravated sexual offence. The Act of 21 April 2021 aiming to protect minors from sexual crimes and misdemeanours

[1]See Leviticus 18:6–18; Deuteronomy 27:20, 22–3.

and from incest[2] (2021 Act) was adopted in a very special context in France. After the Weinstein scandal, the "MeToo" movement publicized and widely spread sexual abuse allegations all over the world. In January 2021, Camille Kouchner, lawyer and academic lecturer, published the book *La Familia Grande* revealing that her stepfather, Olivier Duhamel, Director and Public Law Professor at the Institut des Sciences Politiques in Paris, a very famous and respected journalist, sexually abused and raped her twin brother when they were 14 years old. Most of their relatives and friends knew about it, but everyone chose silence. Their own mother wanted to protect her husband rather than her children. The very few persons who wanted to talk about it were persuaded to be silent, even their father[3] and very famous founder of Médecins sans frontières (an association well known all over the world as the "French doctors"). The book was published after the author's mother[4] died, more than 30 years after the rape. Even the victim, the twin brother, did not want to talk about the facts[5] at that time. The prescription of sexual crimes committed on minors is fixed at 30 years from their majority, meaning that it is not possible to charge the perpetrator with the crime after this term because the time limit bars the prosecution.[6]

The case caused a huge scandal in France, because the perpetrator was a prominent media figure, even if he was not charged with any offence.[7] The revelations gave rise to the "MeToo" incest movement in France and profoundly influenced the adoption of the legislation on incest and sexual offences against minors.

After several reforms on this same subject these last years, French penal law had to wait until 2021 in order to legally enshrine incest prohibition as an autonomous criminal offence. Before this time, French criminal law punished the conduct only as an aggravation of another sexual offence. The main issue was that incest depended on the initial characterization of this basic offence and could escape punishment without special evidence in addition to the common sexual offence. However, criminological and legal analysis shows that incest is not a sexual offence like the others and cannot be dissolved in this legal category. The consecration of the prohibition of incest in itself and by itself is therefore essential, illustrating the evolution of the social values protected by criminal law. The common sexual offences protect sexual freedom by setting consent as their core element, whereas incest especially protects a vulnerable victim because of the family relationship that totally blurs the context and interferes with their consent and discernment. The lack of consent, a traditional ingredient of a sexual offence, is not relevant anymore because of the incestuous situation. If the conclusion seems merely logical, it is interesting to study the obstacles to the French legal recognition of incest during recent years in order to

[2]Act no. 2021-478, 21 April 2021 Aiming to Protect Minors from Sexual Crimes, Misdemeanours and from Incest.

[3]Bernard Kouchner, Foreign Minister 2007–2010; Health Minister 2001–2002; founder of Médecins sans frontières in 1971.

[4]Evelyne Pisier, writer and public law professor.

[5]Finally, the victim complained. Olivier Duhamel was questioned by the police and admitted the facts, but he could not be charged with any criminal offence.

[6]Article 7 of the next Criminal Procedure Code, version since 21 April 2021.

[7]The investigation was closed without any charge because of prescription. More than 30 years since the majority of the victim had passed, barring the criminal trial.

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appreciate the importance of the 2021 reform. If the legal solution is the key determinant, from the criminological point of view, it is also implicitly interesting to determine how a behaviour prohibited since the beginning of mankind had to wait until 2021 to be defined and punished by criminal law.

INCEST TRADITIONALLY DISSOLVED IN OTHER SEXUAL OFFENCES

The 1810 French Penal Code was deeply reformed by several acts adopted in 1992 and is usually known as the New Penal Code. The sexual offences distinguished two separate categories, sexual aggressions and sexual abuses, based upon the consent of the victim. Minority and the family relationship, characteristics of incest, were taken into account in the penalties, as aggravating circumstances, but not necessarily as an ingredient of the offences.

Legal Distinction Between Sexual Aggressions and Sexual Abuses

The 1992 French Penal Code (FPC) categorized two classes of sexual offences – sexual aggressions[8] and sexual abuses.[9] Before exposing the distinction, it is very important to note that French criminal law is founded on an overall tripartite distinction according to the gravity of the offences and the penalties incurred.[10] Crimes are the most serious class of offences punished with criminal penalties.[11] FPC - Suppression misdemeanours are less important, incurring correctional penalties.[12] Both of them are determined by the statutory law (Suppression Art. 131-3 FPC),[13] as well as their ingredients.[14] Contraventions carry lighter penalties.[15] The regulatory law determines them, but this category is not relevant for sexual offences because there is no contravention in this matter.

The distinction between sexual abuses and sexual aggressions was based upon the consent as an ingredient of the offence. If sexual aggression necessarily required a lack of consent in order to be so characterized, sexual abuse relied merely upon the

[8]*Aggression sexuelle.*

[9]*Atteinte sexuelle.*

[10]Art. 111-1, FPC (official translation on the Legifrance Website): "Criminal offences are categorised as according to their seriousness as felonies, misdemeanors or petty offences." The names of the classes do not match with the legal definition; thus we will use the tripartite classification of "crimes, misdemeanors and contraventions".

[11]Art. 131-1, FPC: corresponding to felonies and punished with criminal imprisonment or criminal detention for a minimum term of 15 years.

[12]Art. 131-3, FPC: corresponding to misdeameanours and punished with an imprisonment of a maximum of 10 years and a fine of more than €3750.

[13]Art. 111-2, FPC: "Statute defines felonies and misdemeanours and determines the penalties applicable to their perpetrators."

[14]Article 111-3 of the FPC clearly limits the discretion of the judiciary imposing penalties: "No one may be punished for a felony or for a misdemeanour whose ingredients are not defined by statute, nor for a petty offence whose ingredients are not defined by a regulation.

No one may be punished by a penalty which is not provided for by the statute, if the offence is a felony or a misdemeanour, or by a regulation, if the offence is a petty offence."

[15]As stipulated in Article 131-12 of the FPC: penalties incurred for contraventions are a fine not exceeding €1500, forfeitures or restriction of rights.

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quality of the perpetrators and their victim. Therefore, incest could be taken into account as an automatic application of the latter. The French law considers majority, over 18 years, but there is no mandatory link between age and discernment, thus there is no threshold for consent. A minor is considered as being able to consent, irrespective of his age. The judge must appreciate the elements, allowing the court to deduce the capacity of consent based upon discernment. Consent is the determining parameter of sexual aggressions, considered more important than sexual abuse, which is why they carry severer penalties.

Sexual Abuses Before 2021

The FPC still punishes two kinds of sexual abuses, but their legal analysis has profoundly changed. Until 2021, the offence had an original structure. The legal definition relied upon the qualities and characteristics of the perpetrator and the victim and did not take into consideration consent, which was considered as being dubious in this matter. The "legal advantage" of sexual abuse was to punish the same conduct without considering the lack of consent, offering automatic protection to the victims and filling the gap of evidence.

Article 227-25 of the FPC punishes sexual abuse[16] committed "without violence, constraint, threat or surprise".[17] This means that consent was not considered to be an ingredient of the offence because the judges did not have to support their conviction on it. This is the reason why the scope of application of sexual abuse was very wide, but clear nevertheless, because the ingredients were precisely defined according to the protagonists' qualities. The perpetrator was an adult (more than 18 years old), while the victim was a minor under 15 years old. The article did not define precisely the material conduct forbidden, the *actus reus*. In this way, any sexual act, either sexual intercourse or only inappropriate sexual conduct, could be covered by the same legal definition of sexual abuse. Consent was not an ingredient of the *actus reus*, only sexual conduct was considered by criminal law.

The philosophy of the offence was straightforward – all sexual behaviours involving minors under 15 years and majors (over 18 years) were outlawed and punished with seven years' imprisonment and a fine of €100,000. This means that the article implicitly allowed sexual freedom between minors, whatever their age could be. According to Article 227-26 1° of the FPC, the penalties were aggravated to 10 years' imprisonment and a fine of €150,000[18] when the abuse was committed by a "legitimate, natural or adoptive ascendant or by any other person having authority over the victim", between other aggravating circumstances. In both cases, the offence was considered a misdemeanour. The incestuous relationship was considered only as an aggravating circumstance. It is most relevant to notice that sexual abuse strictly protected minors under 15 years old, but not all minors, those exceeding 15 years old being excluded.

[16]Even if some translations of Article 227-25 propose the word "offence", it is not relevant for French law because "offence" is the general word for any violation of criminal law.

[17]Article 227-25 of the FPC states: "The commission without violence, constraint, threat or surprise of a sexual offence by an adult on the person of a minor under fifteen years of age is punished by seven years' imprisonment and a fine of €100,000."

[18]Art. 227-26 1°, FPC.

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Article 227-27 also punished sexual abuses, defined as conducts committed "without violence, constraint, threat or surprise", but the scope of application was different because it did not aim at the same protagonists. The victim was a minor over 15 years, which is why the perpetrator was defined in a narrower sense by criminal law than by the precedent offence. The offender was necessarily a "legitimate, natural or adoptive ascendant or any other person having authority over the victim". The incestuous relationship was considered in itself as an ingredient of the offence. However, the penalties were lighter in this case than in the precedent case of sexual abuse on a minor under 15 years – three years' imprisonment and a fine of €45,000. It is noteworthy that the older the minor is, taking into account the threshold of 15 years old, the more the context of the offence must be construed as intrinsic moral constraint. For the minor under 15 years, the age of the perpetrator could be sufficient, but it is not the case for minors over 15 years where the *actus reus* must have been completed by an additional element – the special family relationship or the authority the perpetrator had over the victim. These two elements were alternative, meaning that each of them was sufficient for the criminal qualification. The family relationship equated to the authority over the victim, but this latter could be considered outside the family. This means that incest did not exist in French criminal law. On one hand, it was not a stand-alone crime. On the other hand, the conduct was not forbidden in itself, because of the family relationship, but especially because of the authority this situation gave to the perpetrator over the victim, taking into account a structural imbalance between the protagonists of the offence. For example, sexual abuse was characterized where it was committed by the father or the stepfather on a minor over 15 years because of their intrinsic qualities and family tie. However, it was also characterized where committed by the major son of the nanny because he had some authority over the victim. This shows that incest was not considered as a prohibition in itself, but as part of the general prohibition of sexual abuses on minors because of their inherent vulnerability due to their age and to the situation.

In both sexual abuses, the incestuous relationship is considered, either as an aggravating circumstance, either as an ingredient of the offence, but it is indifferent to consent. Nevertheless, if the sexual offence is committed with the lack of consent of the victim, the FPC requires the application of sexual aggressions.

Sexual Aggressions Before 2021

Sexual aggressions are defined in Article 222-22 and the next FPC. As well as before as after 2021, Article 222-22 punishes sexual aggression defined as any sexual abuse[19] committed with "violence, constraint, threat or surprise". This means that the material conduct may be the same as that for the sexual abuses, but that the lack of consent of the victim is the true key ingredient of the offence. Even more, if the

[19]Article 222-22, FPC states: "Sexual aggression is any sexual assault committed with violence, constraint, threat or surprise." If the Legifrance translation uses the expression of "sexual assault", it does not match with the original definition. The FPC defines sexual aggression as a "sexual abuse" committed with "violence, constraint, threat or surprise". The word "assault" already takes into account the lack of consent and could be considered as sufficient for the legal definition.

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lack of consent can be realized by different means, criminal law provides an exhaustive list of four means. Violence (1) is generally physical, as constraint (2) is rather moral. Threat (3) is a moral pressure for themselves or for others. In these cases, the consent of the victim was forced and cannot be considered as available. In the last case, the victim may have consented to the sexual act, but surprise (4) spoils the quality of the consent because they did not have the necessary elements of information to validly consent.

Article 222-23 punishes rape which is a particular species of sexual aggression, because it is committed with "violence, constraint, threat or surprise", but is necessarily characterized by "any act of sexual penetration, whatever its nature" defined by case law as any penetration "by or in the sex".[20] If penetration is rape's distinctive element inside the sexual aggressions' class,[21] the core element of all sexual aggressions is the lack of consent. Considered a crime, rape is punished with a 15-year criminal imprisonment, while the other sexual aggressions are considered misdemeanours and are punished with five-year imprisonment.

A very controversial case[22] decided that rape requires "a voluntary introduction beyond the edge of the vagina, deep enough to characterize a penetration" and cannot be established by the introduction of the tongue "without any precision of intensity, depth, duration or movement". The victim, 13 years old at the time of the action, was still a virgin and complained that the perpetrator, her mother's companion, penetrated her once with his tongue, even if other sexual conducts lasted several months. The Criminal Chamber of the Court of Cassation approved the charges based upon the sexual aggression aggravated by the authority the perpetrator exerted over the victim, the offence being a misdemeanour, but refused the criminal qualification of rape because of the insufficient characterization of the penetration. However, the lack of consent of the victim was considered by the judges as an ingredient of the offence, irrespective of the age of the victim, and could be legally used for both offences. Moreover, both rape and other sexual aggressions can see their penalties aggravated by several circumstances, including the case where the offence is committed against a minor under 15 years old[23] or by a "legitimate, natural or adoptive ascendant or by any other person having authority over the victim".[24]

Before the 2021 Act, these common provisions concerned all the sexual aggressions. According to the previous provisions, incest was not considered as a special offence but was indirectly considered among the aggravating circumstances,[25] i.e. the victim under the age of 15 years,[26] the vulnerable

[20]Criminal Chamber of the Court of Cassation (C. Cass. Crim.) 5 September 1990 (Bull. Crim. no. 313, *RSC* 1991, p. 348, Levasseur).

[21]C. Cass. Crim. 28 March 1990, no. 90-80.285 (*Dr. pén.* 1990, 294).

[22]C. Cas. Crim. 14 October 2020, no. 20-83.273 (*AJ Pénal* 2020, p. 590, Darsonville).

[23]Art. 222-24 2°, FPC, previous version, before 2021, states: "where it is committed against a minor under the age of fifteen years".

[24]Art. 222-24 4°, FPC, previous version, before 2021.

[25]Art. 222-24 4°, FPC, previous version, before 2021: "where it is committed by a legitimate, natural or adoptive ascendant, or by any other person having authority over the victim".

[26]Art. 222-24 2°, FPC, previous version, before 2021: "where it is committed against a minor under the age of fifteen years".

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victim,[27] by persons abusing their authority,[28] committed by several perpetrators,[29] a *modus operandi* with use of a weapon,[30] using a communications network to contact the victim,[31] etc.

The main legal issue was to determine if the family relationship could be sufficient to consider incest as a sexual aggression, and thus a stand-alone offence, or if it was just an aggravating circumstance that had to be added and rely upon the initial offence. Undoubtedly, the positive answer makes it possible to punish incest as an autonomous offence, although the judges must establish both the sexual offence and the incestuous dimension as an aggravating factor. But French case law was very strict in the construction of the "incestuous" elements and refused to consider them as legal ingredients of sexual aggressions.

THE IMPASSE OF INCEST IN FRENCH CRIMINAL CASE LAW

As incest was not taken into account in the definition of sexual aggressions, the judges tried to use other legal elements to fill the gap of criminal law. In this direction, the minority of the victim and the family relationship between the perpetrator and their victim, giving him an inherent authority over the latter, were proposed to the Court of Cassation as ingredients of sexual aggressions, but this was unsuccessful. It is noteworthy that the incestuous dimension especially covers minors in France. Criminal law does not punish incest between adults aged over 18 years. The common provisions of the sexual offences apply in this case without any aggravation. Before 2021, incest on minors did not exist as a stand-alone offence in the FPC.

Endeavours to Establish Specific Incestuous Elements

As incest was not recognized as an offence by the FPC, case law tried to base its punishment on characteristic elements that the common sexual offences used, such as the minority of the victim and the family relationship.

A minor is generally considered to be a vulnerable person and is better served by criminal than by civil law. Minors intrinsically have a lack or imperfect discernment and so need legal protection. The Criminal Chamber of the Court of Cassation

[27]Art. 222-24 3°, FPC, previous version, before 2021: "where it is committed against a person whose particular vulnerability, due to age, sickness, an infirmity, a physical or psychological disability or to pregnancy, is apparent or known to the perpetrator".

[28]Art. 222-24 5°, FPC, previous version, before 2021: "where it is committed by a person misusing the authority conferred by his position".

[29]Art. 222-24 6°, FPC, previous version, before 2021: "where it is committed by two or more acting as perpetrators or accomplices".

[30]Art. 222-24 7°, FPC, previous version, before 2021: "where it is committed with the use or threatened use of a weapon".

[31]Art. 222-24 7°, FPC, previous version, before 2021: "where the victim has been brought into contact with the perpetrator of these acts through the use of a communications network, for the distribution of messages to a non-specified audience".

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defined discernment as the capacity to understand and to control their acts.[32] If this definition concerns the perpetrator, it can also apply to the victim. French law does not define an objective threshold for discernment, nor for consent. Nevertheless, a recent reform of minors' criminal liability makes a presumption of discernment for minors over 13 years old.[33] Any contrary evidence can be taken into consideration by the judge who can decide the opposite. Suppose the "age of reason" can be discussed. In that case, the general rule is that the perpetrator acting without discernment, either because he is too young or suffers from a mental disorder, cannot be liable because he did not consent to violate criminal law given a lack of capacity of discernment. Thus, the culpability, the *mens rea* dimension, cannot be characterized. In the same sense, when the ingredients of the offence embody the victim's consent, their discernment should be examined in order to determine if they could validly consent with "intelligence and will".

Therefore, it is important to determine if the lack of discernment or its imperfection could automatically rely upon minority and the family relationship. In this case, the objective elements concerning the perpetrator, the victim and their links should be sufficient and incest itself could be considered as a type of sexual aggression. Otherwise, if criminal law initially asks for evidence of the lack of consent based upon violence, constraint, threat or surprise, incest is dissolved in sexual aggressions as an aggravating circumstance. If criminal courts wanted to favour the punishment and widely construed the ingredients of sexual aggressions taking into account incest as an ingredient, the Court of Cassation opposed it by refusing this interpretation and imposing a strict construction of sexual aggression.[34]

The Court of Cassation refused to consider that the victim's age or the special relationship between the protagonists could establish the lack of consent required by the legal definition.[35] A 14-year-old young boy, encouraged by his father, had sexual intercourse with his stepmother for several years and decided to stop this situation at the moment of his majority. The Criminal Chamber held there was no rape or sexual aggression because there was no lack of consent, but only sexual abuse. In this latter offence, the perpetrator's and victim's ages and links are considered in the ingredients,[36] contrarily to sexual aggressions. This showed that the Court of Cassation considered that the judges must first and foremost characterize violence, constraint, threat or surprise, realizing the lack of consent. At the same

[32]C. Cass. Crim. 13 December 1956 (Bull. Crim. no. 840): any perpetrator, regardless of how old he is, must act with "intelligence and will". In this case, a six-year-child was charged with an involuntary offence; that is, he could not realize what he was doing.

[33]Art. L 11-1, § 2, the Minors' Criminal Justice Code: "Minors under 13 are presumed not to be able of discernment. Minors over 13 are presumed to be able of discernment."

[34]C. Cass. Crim. 18 June 2003, no. 02-87.216: the mother's cohabitee was sentenced for sexual abuse on his stepdaughter of nine to 11 years old because he had authority over the victim, but not for sexual aggression because there was no evidence of violence, constraint, threat, or surprise.

[35]Cour de Cassation, Assemblée plénière 8 July 2005 (Bull. Crim. no. 8): "an act of sexual penetration constitutes a rape only if it committed with violence, constraint or surprise".

[36]C. Cass. Crim. 21 October 1998 (Bull. Crim. no. 274, *D.* 1999, 75, Mayaud; *JCP* 1998, II, 10215, Mayer): the decision of the trial judges had no legal basis where characterizing "the violence, constraint or surprise, on the age of the victim and the status of the ascendant or person having authority of the perpetrators, whereas these elements make it possible to identify the aggravated sexual abuse of a minor, but cannot form rape or sexual aggression, because they constitute only aggravating circumstances for the latter offences".

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time the victim's young age or the special family relationship between the protagonists cannot substitute the *actus reus* provided by the Penal Code. This meant that if parents or a relative sexually abused a 10-year-old child by using force or a threat to harm a younger brother, the judges could charge the perpetrator with sexual aggression or rape, depending on if there was sexual penetration or not. But, in the opposite case, if the father just took advantage of the situation and abused the affective context, it can only be considered sexual abuse, even if there was a sexual penetration, because there was no evidence of lack of consent.

The Court of Cassation, hiding behind the strict construction of criminal law, was strongly criticized because young children are intrinsically unable to appreciate a sexual situation correctly and, thus, to give their valid consent, being too young to foresee its significance and consequences. Criminal law was powerless to punish these severe conducts harming severely vulnerable young victims for the rest of their lives.

Obstacles to the Application of Incestuous-Specific Elements

The Court of Cassation used two main arguments to justify its refusal to consider incest as an ingredient of sexual offences, irrespective of the perpetrators' impunity.

Firstly, the principle of the strict construction of criminal law is the foundation of the French legal system. In a strict sense, the latter is legalist, meaning that all offences derive from written law and that case law cannot create any offence, or penalty, and cannot complete or contradict the statute. In the case of sexual offences, the legislator chose to consider minority and the special family relationship between the perpetrator and the victim as an ingredient of the offence only for sexual abuses. Sexual aggressions definitively require the victim's lack of consent necessarily based upon the evidence of the "violence, constraint, threat or surprise". Neither minority nor family ties can substitute for the lack of consent.

Secondly, for sexual aggressions, the judges cannot use minority or the ascendant's quality to characterize the ingredient of the offence – the violence, constraint, threat or surprise – and the aggravating circumstance, according to the "*ne bis in idem*" principle. The latter requires that each element of evidence should be used just once in the criminal procedure. Hence, as the legislator expressly used these elements for the aggravating circumstance, the judges must favour the legal interpretation and use it to aggravate the penalty instead of as an ingredient of the offence. Each time the judge characterized these elements as an aggravating circumstance, he could not use them anymore for the legal definition of the offence. This means that the objective elements – minority, authority, family relationship – are not considered as the ingredients of any expression of the lack of consent and prevent the sentence of sexual aggression. The Court of Cassation's demonstration led to an impasse for criminal law because it was impossible to aggravate an inexistant offence's punishment.

This issue of the lack of consent based upon the very young age of the victim of the family relationship between the protagonists was a very important legal debate in France for several years. The criminal doctrine (Koering-Joulin 2006) severely criticized case law, mostly the Court of Cassation legal reasoning, but also the legal

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deficiencies. Incest was totally dissolved in the common sexual offences class and lost its unique special philosophy.

Because of this passionate legal debate, the Court of Cassation consented to a change of the ingredients' definition in some cases and accepted that the very young age of the victims could be considered as a form of moral constraint for some sexual aggressions.[37] For instance, a grandfather committed sexual aggressions on his three grandchildren, 18 months to five years old. In this 2005 case, the judges considered that the very young children could not perceive the sexual character of the behaviour and that they should be presumed as being constrained to accept and suffer it, even if there was no evidence of "violence, constraint, threat or surprise". If the Court agreed to overturn its interpretation of sexual aggression, it was not the same for rape. Still, rape belongs to the class of sexual aggression and should meet the same conditions and regime. Case law was criticized as insufficient, but it also became inconsistent. Moreover, the judges mainly built the offence on the minority under 15 years and not on the specific family relationship. The impasse of criminal law became a failure and the legislator had to change the rules to address incest.

At the beginning of the year 2000, an opinion poll revealed that 90% of French people thought incest was an offence, and they wanted a strict prohibition of it in the FPC and severe penalties to punish it. The legislator adopted new rules, but, despite the consensus, their application was very complex and much more complicated than it seemed at the time.

INCEST AS A SEMI-AUTONOMOUS SEXUAL OFFENCE

The public and legal opinions widely required the introduction of an autonomous offence punishing incest in itself. Its legal definition and coordination with other sexual offences required a global reform of the entire legal category. The issue was energetically debated since the beginning of 2000, and the final form was adopted on 21 April 2021.[38] The importance of the reform cannot be appreciated without studying the different legal unsuccessful solutions that French criminal law proposed.

The Symbolic Prohibition

In order to neutralize and reverse case law requiring the compulsory elements of "violence, constraint, threat or surprise" that could not be based upon young age or special family relationship, the Act of 8 February 2010[39] introduced new articles in the Penal Code. Especially, Article 222-31-1 provided that "rapes and sexual aggressions must be considered as being incestuous when committed inside the family by an ascendant, a brother, a sister or any other person, including a legal partner (concubine, cohabitee . . .) of a member of the family having authority over

[37]C. Cass. Crim. 7 December 2005 (Bull. Crim. no. 326).

[38]Act no. 2021-478, 21 April 2021 Aiming to Protect Minors from Sexual Crimes, Misdemeanours and from Incest.

[39]Act no. 2010-121, 8 February 2010 Aiming to Include Incest Committed on Minors in the French Penal Code and to Improve the Detection and Care of Victims of Incestuous Acts.

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the victim".[40] It was noteworthy that incest was not considered as a stand-alone offence and that no legal qualification could apply directly to this behaviour; it was still a qualification based upon another sexual offence, either sexual aggressions, or sexual abuses.

The 2010 Act[41] had mainly a symbolical dimension because the aggravation of the penalties was already provided by the circumstances of minority or the special relationship between the protagonists. The incestuous qualification did not add anything, neither concerning the ingredients, nor concerning the penalties. For that reason, the French doctrine proposed the word "overqualification" to identify this new and unique legal technique used by the 2010 Act. But incest's definition did not meet the constitutional standards.

The Constitutional Council decided to ban Article 222-31-1.[42] According to the criminal legality principle, requiring that law be clear and precise when determining each ingredient of the offence, the Council held that the legal provisions, more precisely, the word "family", were not clear. This condition covers the exact quality requirements for criminal legality as defined by the European Court of Human Rights, the accessibility, and the foreseeability. In the 2011 Constitutional Council decision, the incestuous overqualification was considered unconstitutional because it did not allow people to identify the conducts forbidden and punished by the law because neither civil law nor the other legal subjects do not determine the "family" in a precise way. The unconstitutionality was decided with immediate effect, which means that all the pending procedures based upon this article had been deprived of legal basis.[43] The same decision of unconstitutionality was also applied to sexual abuses, which were also concerned with the incestuous overqualification.[44] Considered a major case in criminal constitutional control, the 2011 decision was bitterly debated and showed again the legal failure considering incest.

The legislator's reaction was to adopt another statute on 14 March 2016.[45] If the main aim of this 2016 Act is related to civil law, there is a significant criminal provision related to incest. The 2016 Act introduced a new article in the FPC, Article 222-31-1, the same article number as the one introduced by the 2010 Act and banned by the Constitutional Council. The 2016 provision considered that "rapes and sexual aggressions are considered incestuous not only when committed on a minor by an ascendant, a brother, a sister, an uncle, an aunt, a nephew or a niece" but also by "their spouse, cohabitee, partner bound by a civil union if they have

[40]Art. 222-31-1, 8 February 2010 version of the Act.

[41]Act no. 2010-121, see note 39.

[42]Constitutional Council, 16 September 2011, no. 2011-163 QPC: the legislator could choose to punish incest as a specific offence, but he could not abstain from defining precisely the individuals, who must be considered, within the meaning of this qualification, as members of the family. In this case, there is a breach of the criminal legality principle with immediate effect, equating to the repeal of the statute.

[43]C. Cass. Crim. 12 October 2011, three decisions on the same legal basis, no. 10-88.885, no. 10-82842 and no. 10-84.992: the provisions used for the charges were declared unconstitutional with immediate effect and, according to this decision, from this date, no sentence can be based upon the incestuous qualification provided by the repealed statute.

[44]Constitutional Council, 17 February 2012, no. 2011-222 QPC, about Article 227-27-2 of the FPC: the Constitutional Council applies to sexual abuses the same legal analysis as for sexual aggressions. It repeals the statute for breach of the criminal legality principle.

[45]Act no. 2016-297, 14 March 2016 Regarding the Protection of the Child.

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authority over the minor". It is interesting to note that the wording of the legal provision was the same as the provision proposed in 2010, regarding the exhaustive list of perpetrators in the case of incest, but the family standard was not used anymore.

The constitutionality of the 2016 legal definition was never contested because it obviously meets constitutional principles. The 2016 Act introduced incest in the FPC, but the most important issue was still to determine its legal nature. The 2016 Act did not consider incest as an autonomous offence but as the overqualification of other sexual offences. Incest still depended on sexual aggressions or abuses, and if the judges did not characterize the basic offences, the incestuous dimension could not be supported by any offence and was deprived of all legal existence and effects.

Trying to continually enlarge the criminal consideration of incest, the Act of 3 August 2018[46] deeply changed the scope of application of incest, but did not reverse the legal method of qualification. Incest was still considered an overqualification based on common sexual offences. Nevertheless, the scope of application was extended because it applied to minor victims and adults suffering an incestuous offence. For that reason, the word "minor" was removed and replaced by "the victim", as well as in the title of the paragraph of the FPC,[47] and in the wording of the articles.[48] Since 2018, incest has been applied to every victim, regardless of their age, until the 2021 Act.

This modification had a high symbolic value but very few legal effects. Criminal law still did not punish incest as a stand-alone offence but backed on another sexual offence. The social and moral culpability of the perpetrator was obviously superior because of the timeless social prohibition of incestuous relationships, but the legal consequences were the same because incest was just an overqualification and could not be punished if there was no evidence for the basic sexual offence. The judges still faced the same difficulties to prove "violence, constraint, threat or surprise" in order to establish criminal law infringement.

However, if incest was not considered an autonomous element of sexual offences, its natural components were embodied by the law in the lack of consent, particularly in the definition of moral constraint.

Moral Constraint Based Upon Incestuous Elements

Before the 2021 Act, sexual aggressions were exclusively characterized by the lack of consent, exhaustively constituted by the means of "violence, constraint, threat or surprise". If criminal law did not take into account incest as a stand-alone offence, its main ingredients could be considered as supporting constraint and be embodied in the lack of consent.

The 2010 Act introduced in the FPC Article 222-22-1 stating that constraint could be both physical and moral. The definition of moral constraint could be based upon two elements: the age difference between the perpetrator and their victim and

[46]Act no. 2018-703, 3 August 2018 Strengthening the Fight Against Sexual and Gender-Based Violence.

[47]FPC, Book II, Chapter II "Offences Against the Physical or Psychological Integrity of the Person", Section III "Sexual Aggressions – Common Provisions", § III, called "Incest Committed on a Minor", Act 14 April 2016, changed to "Incest", 3 August 2018.

[48]Art. 222-31-1 and following, FPC, 3 August 2018 version in force from 6 August 2016 to 21 April 2021.

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the authority that the perpetrator exerted over the victim. The Constitutional Council, in a very important decision,[49] considered that these provisions met constitutional principles, mainly criminal legality, because they had only an interpretative scope and were conceived as a guideline for the judges and not as an imperative constitutive rule. This decision had two main consequences. Firstly, it allowed the retrospective application of the 2010 provisions to previous conducts[50] committed before the law had come into force. Secondly, it opened widely the scope of application of moral constraint. Despite the wording of the legal provisions defining it as the addition of two elements – the age difference between the perpetrator and their victim **and** the authority that the perpetrator exerted over the victim – because of the conjunction "and", the Court of Cassation held that the interpretative nature of the provisions made it possible to use only one of these elements[51] or any other element.

In this way, the definition was not compulsory for the judge, but just an inspiration, which is a very rare case for the French criminal system provided with a Code and submitted to strict criminal legality on the civil law pattern.

The Constitutional Council repealed the direct incestuous overqualification, but the main incestuous ingredients – the context of the offence and the perpetrators' and victims' ages – building moral constraint, were implicitly introduced in the statute and case law.

The Act of 3 August 2018 continued the same legal analysis and criminal philosophy by adding surprise to moral constraint and rewrote Article 222-22-1. However, this statute decided to distinguish two separate conducts inside the same legal provision and added more complexity to an issue which was already very difficult.[52] Where sexual acts were committed on a minor, moral constraint or surprise could result from the age difference or the perpetrator's authority over the victim, and, especially, the *de facto* authority could result from a "significant age difference" (§2). The legislator's intention was laudable to ease the characterization of the offence, but its application was very hard and obscure. What does "significant" mean? Is it 10 years, 20 years, even more? Was it an objective standard – the number – applying to all cases or did the judges have to consider the contextual elements to identify what "significant" was in the particular case?

In §3 it was provided that, when sexual acts were committed on a minor under 15 years, moral constraint or surprise were characterized by the abuse of vulnerability

[49]Constitutional Council, 6 February 2015, no. 2014-448 QPC (*RSC* 2015, p. 86, Mayaud), stated that the 2010 Act has the sole purpose of determining certain factual circumstances that the judges can consider appreciating if the conduct was committed under duress, but does not, in any way, intend to define the ingredients of the offence.

[50]C. Cass. Crim. 15 April 2015, no. 14-82.172 (Bull. Crim. no. 93, *AJ Pénal* 2015, 421, Darsonville): "the interpretative provisions of Article 222-22-1 of the FPC allow, without infringing the non-retroactivity principle of criminal law, to infer the moral constraint suffered by the victim, nine years old at the time of the facts, because of her age difference with the defendant", her stepfather.

[51]C. Cass. Crim. 18 February 2015, no. 14-80.772: the victims did not complain of any violence, or threats but the perpetrator "by virtue of his status and aura as a famous karate teacher, conferring on him a certain authority, was able to create a close affectionate relationship with young boys, placing them into a debt situation by offering them different gifts; this behaviour is the moral constraint of Article 222-22-1 of the FPC" resulting from the *de facto* authority he exerted over the victims.

[52]Art. 222-22-1, FPC, 3 August 2018 version, in force from 6 August 2018 to 23 April 2021.

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of the victim who did not have the necessary discernment for the sexual acts. The legal provisions' wording was significantly different, producing important legal effects. Where the victim was a minor under 15 years, there was a presumption of moral constraint or surprise, facilitating the characterization of the sexual offence. Where the victim was a minor over 15 years, the judges could deduce moral constraint or surprise from all the relevant evidence, especially the age difference and the authority the perpetrator exerted over the victim, but without the facilitation of the presumption.

Either way, this legal definition surely made it easier to establish the criminal offence, but incest was still a symbolic qualification supported by another sexual offence and strictly depending on the lack of consent determined by the use of "violence, constraint, threats or surprise". French criminal law only considered some components of incest, as minority of the victim or the family context or authority, in the definition of moral constraint. Criticized as a "denial of justice" in a general sense, as well as by lawyers, judges, associations and public opinion, French criminal law on incest had to reverse and was reformed very recently. Even if the large definition of moral constraint and surprise is still the same in Article 222-22-1, statutory law enshrines incest prohibition as a stand-alone offence with an autonomous legal definition inside the class of sexual offences.

INCEST AS A STAND-ALONE OFFENCE

The 2021 Act aiming to protect minors from sexual crimes and misdemeanours and from incest[53] finally provided an autonomous legal status for the incest offence. From the very beginning, the statutory proposal declared that consent was very complex and difficult when the victim was an adult, both for legal definition and evidence, but did not even have a place in the legal debate when the victim was a minor or a child. The statute was considerably enriched during the parliamentary debates. If the reform keeps the traditional legal distinctions between sexual abuse and aggression, it deeply changes the nature and the ingredients of sexual offences.

Incest in the New Legal Classification of Sexual Offences

French criminal law still considers two main classes of sexual offences.

On one hand, sexual abuses keep their legal qualification and ingredients and continue to punish sexual conducts committed without "violence, constraint, threat or surprise", either on a minor under 15 years by an adult, or on a minor over 15 years by an ascendant or a person having authority. This shows that the offence is still based upon the main characteristics of the protagonists, mainly their age, irrespective of their behaviour.

On the other hand, sexual aggressions still distinguish rape, defined by sexual penetration,[54] and the other sexual aggressions, but their ingredients changed. The lack of consent is no more a *sine qua non* condition of the legal offence.

[53]Act no. 2021-478, 21 April 2021 Aimed at Protecting Minors From Sexual Crimes and Misdemeanours and Incest, *Journal officiel* 22 April 2021.

[54]The 2021 Act added "oral-sexual contact" for the definition of all kinds of rape.

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Since the 2021 Act, the FPC defines three types of rapes, the classification also applied to "the other sexual aggressions" (the legal expression used by the law).

The first type can be called "classical rape" and is based upon the lack of consent of the victim being materialized by the use of "violence, constraint, threat or surprise"; in this way, criminal law remains unchanged.

The second type is rape based on illegal intercourse imposed by an adult on a minor under 15 years, conduct necessarily completed by an additional element – either an age difference between the protagonists superior to five years, or a material advantage when the perpetrator offers or promises a compensation or a payment.[55] The protagonists are the same as for sexual abuse, but there is a supplementary ingredient consisting of a moral (the age difference) or a material (counterparty) pressure. However, the first condition based upon the five-year difference between the protagonists, romantically called the "Romeo and Juliet" clause, was introduced in order to make it possible that young adults can continue a love affair they engaged in when they were minor, when one of the partners is not yet major. The sexual freedom between minors is totally guaranteed and is extended to young adults.

The third type is incest and is considered as being the most important evolution of criminal law in this field. The 2021 Act introduced Article 222-23-2 punishing any act of sexual penetration committed by an adult on a minor where the perpetrator is an ascendant or any other person mentioned in Article 222-22-3 having authority over the victim. Even if the latter article seems to be a creation of the 2021 Act, it is only a formal modification. As a matter of fact, this list was formerly provided by Article 222-31-1 and is quite stable. Additionally to ascendants,[56] criminal law punishes sexual intercourse between a minor and a brother, a sister, an uncle, an aunt, a nephew or a niece, the list completed in 2021 with "great uncles and great aunts",[57] and also the spouse, the cohabitee, the partner bound by a civil union[58] of these persons, if they have a legal or *de facto* authority over the victim.

The most important change, in a symbolic and legal way, is the autonomous definition of incest. Henceforth, incest is no more based upon another sexual offence, itself based upon the ingredients of "violence, constraint, threat or surprise". From now on, incest is totally indifferent to the lack of consent. Minority and the family relationship between the perpetrator and the victim are sufficient to ban incest. If the offence has a large legal definition, taking into account individuals related by blood – ascendant, brother, uncle, etc. – as well as by social ties – individuals legally bound to blood relatives by marriage, civil union or cohabitation – its legal regime is not identical. The blood ties are sufficient to characterize incest, whereas the social bounds must be completed by an additional condition of the authority that the perpetrator has over the victim. Moreover, incest is possible only for minors, but it is noteworthy that the reform concerns all minors and not only minors under 15 years.

[55]Art. 222-23-1, FPC, 21 April 2021 version.

[56]Art. 222-22-3, 1°, FPC, 21 April 2021 version.

[57]Art. 222-22-3, 2°, FPC, 21 April 2021 version.

[58]Art. 222-22-3, 3°, FPC, 21 April 2021 version: "the spouse, the cohabitee of one of the persons mentioned in § 1° and 2° or the partner bound by a civil pact of solidarity to one of the persons mentioned in the same § 1° and 2°, if he has a legal or *de facto* authority over the victim".

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The New Legal Regime

Incestuous rape incurs severer penalties than classical rape, but equal to illegal rapes committed on minors under 15 years, penalties protecting all minors in the case of incest. The penalties are elevated from 15 years of criminal detention[59] to 20 years.[60] Even if the term of the penalty provided for incestuous rape is heavier, both penalties are criminal, showing that these conducts are considered as being part of the most serious offences in French criminal law. The FPC determines two aggravating circumstances for incestuous rape. If the latter caused the death of the victim, the penalty is elevated to 30 years' detention,[61] and if it was preceded, committed with or followed by torture and acts of barbarism, it is punished with criminal detention for life.[62]

The prescription is also subject to special conditions. Since 2017,[63] the criminal prescription of 20 years applied to all crimes, thereby cancelling the special 30 years' prescription of the sexual offences committed on minors. This legal system was less favourable for the victims; this is the reason why the 2018 Act[64] reformed it and extended it to a term of 30 years. The starting point is the majority of the victim because they do not have the legal capacity to complain and go to court before. However, the 2021 Act introduced a unique mechanism of a starting point considering that the 30 years' term starts again if the perpetrator commits the same type of offence on another minor victim.[65] In this special case, the renewal of the prescription is based more upon the subjective dangerousness of the perpetrator than on the objective consideration of the conduct. This unique mechanism, called a slipping starting point, more precisely a flowing starting point, is justified by the horror of incest and the vulnerability of the victim. Criminal law involves several legal solutions in order to punish severely this particular offences.

This same tripartite classification between classical, illegal and incestuous offences also applies to other sexual aggressions. Henceforth, sexual abuses, determined at Article 227-25, as before, punish the conduct committed by a major on a minor under 15 years, excepting cases of rape and sexual aggression. The balance between sexual abuses and aggressions has been inverted in favour of the second one by the reform. Before the 2021 Act, judges characterized sexual abuse each time sexual aggression could not be proved, in most cases because of there being no evidence of the lack of consent. Since the reform, as the lack of consent is no more required for incestuous sexual aggression, the judges can punish rape and sexual aggression committed inside the family, in a large sense, even when there is no evidence of "violence, constraint, threat or surprise", because of the consideration of the protagonists' qualities. The balance changed in favour of the victims and the

[59]Art. 222-23, FPC, 21 April 2021 version.

[60]Art. 222-23-3, FPC, 21 April 2021 version.

[61]Art. 222-25, FPC, 21 April 2021 version.

[62]Art. 222-26, FPC, 21 April 2021 version.

[63]Act no. 2017-242, 27 February 2017, Reforming the Prescription in Criminal Matters.

[64]Act no. 2018-703, see note 46.

[65]Article 7 of the Criminal Procedure Code, version since 21 April 2021: "however, in the case of rape, where there is the commission of a new rape, sexual aggression or sexual assault on another minor victim by the same perpetrator before the end of this period, the prescription is extended until the end of the new term".

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stand-alone crime of incest makes it possible to punish behaviours that previously escaped criminal law.

CONCLUSION

To conclude, it is very important to note that incest has existed as an autonomous offence in the FPC only since April 2021. Its creation was very hard and complex in France, although it has been recognized for a very long time by common law in England (Roman 2005). An explanation of this impasse of criminal law should consist in the construction methods. Instead of waiting for a change in statutory rules, judges should interpret the wording of the legal provisions and look for the "*ratio legis*". In the same vein, it is also noteworthy that the Constitutional Council held that the word "family" did not have a clear legal sense. Therefore, it seemed impossible to criminal judges to try to construe the word "*enfant*" (child) in French and, especially, its Latin root, "*infans*", meaning "speechless". The literal interpretation could lead the judges to consider that the child cannot speak and validly consent to sexual intercourse and that, following the same inspiration, the "family" is the social structure built in order to protect them, not to expose their vulnerability to sexual offences. However, the literal analysis was not considered as being relevant by the Criminal Chamber of the Court of Cassation waiting for the 2021 Act to punish incest as an autonomous offence. The legislation changed several times during this last 10 years, being a very confusing situation for French criminal law based upon a Code and quite opposed to case law as a source of offence and penalty. Incest may be a key element to appreciate the civil law pattern because it shows that codification is not always synonymous with permanence and stability.

The new legal definition of incest only applies to minors, irrespective of their age, and not only to minors under 15 years, better protected for some sexual offences. The stand-alone crime of incest does not take into account the lack of consent because of minors' imperfect discernment. However, there is no special consideration of incest committed on majors, being considered as an expression of sexual freedom between consenting adults. This means that the family relationship is not the main characteristic of incest; the protagonists' ages prevail. If the 2021 Act is an important achievement, the statute also limited incest to minors, where the former legal definition applied also to majors, even if there was no particular legal consideration, neither on the definition, nor on the penalty. Only the symbolical dimension was provided by the law. This means that the reform is not perfectly achieved and that French criminal law can still progress by considering incest committed on major victims. It is the only way to totally consider incest in an autonomous way, separate from the victim's minority. The sexual prohibition would be based solely on family relationship, by blood, by legal or social ties. If the political will seems to go further in the general prohibition of any incestuous conduct,[66] the study of the tormented evolution of incest in French criminal law raises the fear of a slow reform. This shows the gap between the consensual statement of society and the

[66]Adrien Taquet, Secretary of State for Children, declared on 5 January 2022 that incest should be a general prohibition and that the threshold of 18 years old should be reformed: "Regardless of age, nobody can have sexual intercourse with their father, son or daughter." (Senechal 2022)

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controversial legal appreciation and explains how the old prohibition of incest, as old as mankind, can be a new offence in the FPC.

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TRANSLATED ABSTRACTS

Abstracto

En Francia, la Ley de 2021 sobre los delitos sexuales consagró el incesto como delito autónomo. Considerando que, el Código Penal francés tradicionalmente prohibía el incesto como circunstancia agravante, con base en la minoría de edad o la relación familiar entre el perpetrador y su víctima. El problema era que, según el principio de construcción estricta, los jueces debían determinar el delito sexual que sustentaba la agravante del incesto. Para ello, debían buscar la prueba de la falta de consentimiento determinada por la "violencia, coacción, amenaza o sorpresa". La Ley 2021 es la conclusión de varias reformas controvertidas que consideran este tema.

Palabras clave incesto, ofensas sexuales, violación, consentimiento, derecho penal, construccion estricta, menores

Abstrait

En France, la loi de 2021 sur les infractions sexuelles a consacré l'inceste comme une infraction. Auparavant, le Code pénal français interdisait traditionnellement l'inceste comme circonstance aggravante fondée sur la minorité ou le lien familial entre l'auteur et la victime. Le problème était que, selon le principe d'interprétation stricte, les juges devaient déterminer l'infraction sexuelle à son tour supportant la circonstance aggravante de l'inceste. Pour ce faire, ils devaient rechercher la preuve du défaut de consentement déterminé par « la violence, la contrainte, la menace ou la surprise ». La loi 2021 est l'aboutissement de plusieurs réformes controversées portant sur cette question.

Mots clés inceste, infractions sexuelles, viol, consentement, loi criminelle, construction stricte, mineurs

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خلاصة

في فرنسا ، اعتبر قانون 2021 المتعلق بالجرائم الجنسية سفاح القربى جريمة قائمة بذاتها. في السابق ، كان قانون العقوبات الفرنسي يحظر تقليديًا سفاح القربى كظرف مشدد ، بناءً على كون الضحية قاصرًا أو العلاقة الأسرية بين الجاني والضحية. كانت المشكلة أنه ، وفقًا لمبدأ البناء الصارم ، كان على القضاة تحديد الجريمة الجنسية أولاً التي تدعم الظروف المشددة لسفاح القربى. للقيام بذلك ، كان عليهم البحث عن دليل على عدم الموافقة الذي يحدده "العنف أو الإكراه أو التهديد أو المفاجأة". قانون 2021 هو نتيجة العديد من الإصلاحات المثيرة للجدل بالنظر في هذه المسألة.

الكلمات المفتاحية: سفاح القربى؛ جريمة جنسية اغتصاب موافقة ؛ قانون جنائي ؛ البناء الصارم قاصر من العمر

抽象的

在法国，关于性犯罪的 2021 年法案承认乱伦是一种自主犯罪。 以前，法国刑法传统上禁止乱伦作为加重情节，基于受害者是未成年人或肇事者与受害者之间的家庭关系。 问题在于，根据严格的建构原则，法官必须确定支持乱伦加重情节的性犯罪。 为此，他们必须寻找由“暴力、约束、威胁或意外”确定的缺乏同意的证据。 2021 年法案是考虑到这个问题的几项有争议的改革的结论。

关键词：乱伦； 性犯罪； 强奸； 同意 ；刑法； 严格施工； 未成年人

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