MARTOR

Title: *Parents, Children, Marriage: Bulgarian Courts' View on Romani Marriage-making*

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How to cite this article:
Nikolova, Maria G. 2020. "Parents, Children, Marriage: Bulgarian Courts' View on Romani Marriage-making." *Martor* 25: 153-164.

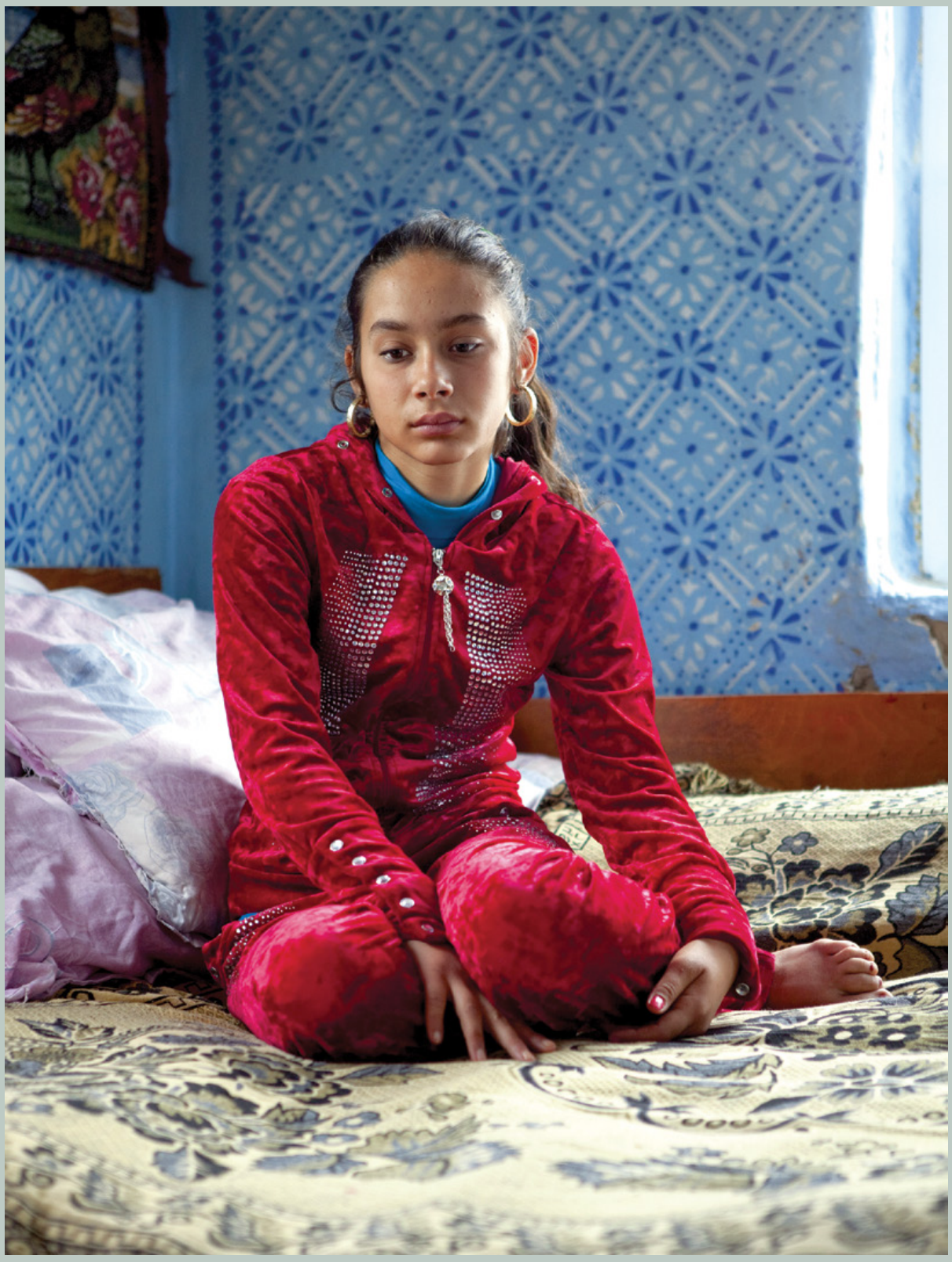
Published by: *Editura MARTOR* (MARTOR Publishing House), *Muzeul Național al Țăranului Român* (National Museum of the Romanian Peasant), Romania

URL: http://martor.muzeultaranuluiroman.ro/archive/martor-25-2020/

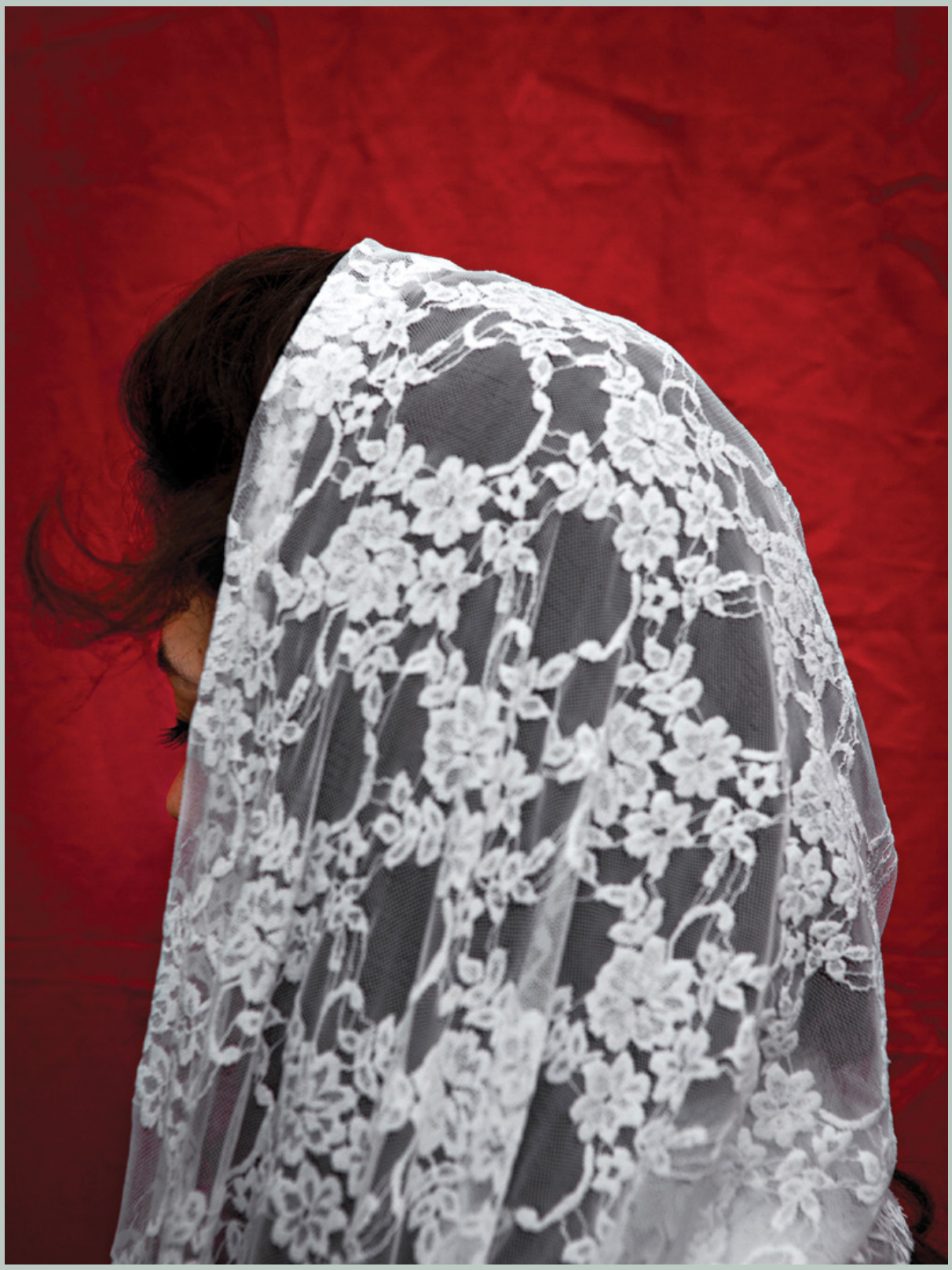
Martor is indexed by:

CEEOL, EBSCO, Index Copernicus, Anthropological Index Online (AIO), MLA International Bibliography.

This issue of Martor has been published with the financial support of the National Cultural Fund Administration (AFCN Romania).



III. Law and Activism in the Case of Early Age and/or Arranged Marriages



Parents, Children, Marriage: Bulgarian Courts' View on Romani Marriage-making

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ABSTRACT

This commentary deals with customary early marriages as practiced by some Romani communities in Bulgaria, and the ways in which they are represented in judgments issued by the criminal courts. It traces the legal routes by which this practice is prosecuted, explores who typically faces charges under the relevant criminal texts, and provides examples from case law. The main aims of the text are to demonstrate the value of court records as sources for ethnographic enquiry, to offer examples of the application of these sources to projects of interest to (legal) anthropology, and to encourage their use by both social scientists and lawyers.

KEYWORDS

Roma, customary marriages, early marriages, Bulgaria, criminal justice system, court records, ethnographic sources, legal anthropology.

The jurisprudence of statutory rape: an overview

In summer 2015 I started working on a case of "statutory rape," representing a thirteen-year-old victim.[1] I was a practicing lawyer in Bulgaria at the time, focusing on women's rights and sexual violence. My work on this particular case, with its factual simplicity and procedural complexity (a paradoxical difficulty that most sexual violence cases seem to share) led me to discover anthropology as an invaluable lens through which I could better grasp the details of my case. It also helped me view judicial practice—case law—as a profoundly rich source of ethnographic material, recording the worldviews, choices, customs, and disputes of people whose practices the law may happen to both prohibit and accommodate, sometimes without formally intending to do so. I am referring in particular to the case law that handles customary Romani marriages, which are commonly known in the international legal discourse as "early marriages" or "child marriages." While the case from which my interest in this topic stemmed did not concern a Roma family, what follows below is an account of how my work led me to explore in more detail this particular type of case law, of my subsequent interest in the parental responsibility engaged in a great number of these cases, and some insights from my current research into the matter.

My client and her family were EU nationals living in Bulgaria. The man who was charged with the crime was a local Bulgarian man, ten years the victim's senior. The incident had occurred in a small town in rural Bulgaria and was an acquaintance rape, notoriously hard to prove. Besides, it also contained the typical feature of a "lost cause" rape case, which prosecutors and courts in any European country still

1) Article 151 (1) of the Bulgarian Criminal Code (1968) defines the crime of statutory rape (or underage intercourse, as it is known in Anglo-Saxon jurisdictions) as follows: "A person who has sexual intercourse with a person below fourteen years of age, insofar as the act does not constitute a crime under Article 152 [*rape*], shall be sentenced to imprisonment from two to six years."

find very difficult to convict: there was no evidence of physical struggle—although this is the predominant form in which rape occurs.

In what began as the investigation of a rape, unsurprisingly, the investigating police officer was soon experiencing evidentiary challenges. The prosecutor on the case was finding it difficult to ensure that the charges of rape would stand up in court. He decided to charge the defendant with the "lesser" crime of statutory rape, because of the victim's young age: the defendant did not deny having had intercourse with the victim, he denied only her lack of consent, which constituted evidence enough for the charges of statutory rape to be brought against him, since the victim's consent is irrelevant under this text. Losing the chance to have the case prosecuted as rape was devastating, but not entirely unexpected, in my experience, and I began to explore my options in getting as much remedy as possible for the victim and her family from the trial that was going to unfold under the new charges.

At the time, I was working primarily on "classical" sexual violence cases, i.e., simply put, cases defined by their non-consensual nature, such as rape. In contrast, the young victim's consent, which may as well be present (in a non-legal sense) in a given situation, is not relevant for the crime of statutory rape. The law prohibits her from agreeing to sexual intercourse,[2] and the presence of her consent would not affect in any way the criminal nature of the act. Therefore, trying to ensure a successful prosecution and a guilty verdict for a rape complaint through the "neutral" and limited scope of underage intercourse, as far as the prosecution service was concerned, was the best route to take, legally. However, in terms of ensuring effective sentencing, which would correspond to the actual harm caused, the likelihood was altogether not very high.

As I prepared for this case, I researched approximately forty judgments issued by different courts in Bulgaria on cases prosecuted for the crime of statutory rape in order to make an assessment, based on the current case law, about our chances of securing a conviction, as well as about the sentencing formula—the amount and type of penalty we were to expect.[3] I was mainly concerned to prevent the trial from ending with a mere slap on the wrist for the defendant, which was not completely out of the question. One could expect that the majority of cases reported under this article of the Bulgarian Criminal Code (henceforth CC) would be initiated by the concerned parents of a young girl who had sexual intercourse with her boyfriend, and that the two partners would be very close in age; or, alternatively, the scenario could involve a couple with a greater age difference, where although coercion *per se* may not have been present, nevertheless, under the law, and on the initiative of the girl's parents or guardians, the man (the perpetrator) would be prosecuted for underage intercourse. I expected the sentencing practices employed by the courts to reflect both their level of disapproval of this type of conduct and their attitude that since coercion was, allegedly, not involved, then it would be disproportionate to penalize the defendant harsher than necessary, depending on the circumstances.

My supposition was correct. The sentences issued by the courts in the case law I examined rarely contained effective imprisonment,[4] and were instead limited to suspended sentences of imprisonment or fines.[5] My presumed scenario about the victim and the perpetrator, however, was correct only in a very small share of the cases. In contrast, the majority of the cases revealed a recurring feature that I did not expect at the time. With a few exceptions, in all of the judgments I found,[6] both the perpetrator and the victim were Roma ethnics, and all of the cases contained claims of either customary engagement or elopement, as a form of *cultural defense*.[7]

2)The age of sexual consent is fourteen under the Bulgarian legislation. However, intercourse with a person over fourteen would also constitute a crime if that person could not or did not correctly understand the purpose or meaning of the act in which he or she participated (Art. 151 (4) of the Criminal Code).

3) Although the Criminal Code prescribes a specific punishment for each crime, in practice, it frequently happens that the formal prescriptions are derogated by a procedural exemption or reduction, which can result in a different type or amount/duration of punishment. Therefore, current case law is the best indicator of what to expect from a conviction.

4) The penalty prescribed by the CC for the crime of statutory rape is two to six years of imprisonment (Art. 151 (1) of the CC).

5) Unsurprisingly, the case that I was working on ended with a conviction and a suspended sentence for the defendant, in line with the established case law.

6) Through a search by article of the CC using the Ciela electronic legal database. Bulgarian courts typically publish their judgments in an electronic format after the personal data of the participants is redacted. This makes online access to case law in Bulgaria very easy—through a free public website, or through subscription-based legal data banks.

Judicial records as sources of ethnographic material

Before I continue with presenting examples of such judgments, it is worth discussing judicial records as sources of ethnographic material. The cases I examined were found in individual judgments published in an electronic form by the Bulgarian courts, and so the collection of judgments contained cases from different regions of the country. All of the judgments were issued by first-instance courts—the district courts, where the cases were heard for the first time. The actual record I could access through a legal database was just the text of the judgment, containing the number of the case and the date of the judgment, but with the personal details of the parties redacted. No other documents, which would be part of a case file, are accessible via legal database banks in Bulgaria. Therefore, what the judgments reveal to us is the end result of a situation, a conflict, which began and developed "behind the scenes" and reached its conclusion in the judgment. All information relating to how and by whom the case was reported; how it was initiated; what the witnesses relayed in their testimonies; and any data about the motivation of the parties and of the authorities to come together in each trial are mostly invisible to us, when examining only the judgments. The case file is archived in the court where the trial took place, and it is available for examination only in person, only by a lawyer or the parties to the case, and usually after receiving permission from the court administration. Consequently, the electronic banks of published judgments are a rare and valuable point of access to court records as ethnographic sources, which are otherwise not so easy to reach.

Attempting to reconstruct the original situation from which the trial originated requires carefully working back in time from the text of the judgment, trying to locate among the factual information and the judges' comments any mention of events that would help piece together the circumstances that led to the criminal investigation. In the majority of cases this is impossible, since the reporting of the case is rarely included in the facts considered relevant to the prosecution, the charges, and the verdict.

In certain cases, the mention of who reported the case and why would be included, if such information was directly linked to establishing the sequence of events, and therefore relevant for the court. For example, in one case of elopement, the judgment's factual part contained a mention of the young victim's grandfather being the one who reported the case to the police, after he learned of her elopement, of which none of her family knew. In contrast, where the cases concerned "proper" customary marriages, i.e., approved by the families of both the bride and the groom, there would be no mention of who reported the case and why, and how it came to be prosecuted as a criminal offence.

The celebration of the customary engagement would, usually, constitute a relevant fact in the proceedings, and therefore it would be included in the text of the judgment. This fact's relevance to the examination of the case gives the judgment its ethnographic value; alternatively, if the prosecutor did not deem it necessary to include such data in their submission, and if the issue was not raised in court, this background information would not appear in the text of the judgment. However, the reporting of the crime and the reasons for doing so are in fact the ones that provide some of the most valuable ethnographic data since, if the customary marriage were approved of by both sets of parents and celebrated openly, then there would be no reason to report it as a crime. So, why was it reported?

Ethnographic literature on Romani customary marriages can answer these questions. However, the link between the customary marriage practices of Bulgarian Roma and their arrival in criminal

7) The wording of the judgments varied, but usually contained references to "engagement," "Romani traditions," "customs," and also, occasionally, the judges' comments relating to marriage at a very early age, or marriage between children. The expression "cultural defense" is not found in any of the case law I reviewed.

court has not benefited from detailed interdisciplinary research so far, and the data that exists is informative but brief. One of the sources that came to my attention points to disputes or disagreements arising between the two in-law families after the fact of the customary wedding, possibly related to the (failed) fulfillment of spousal duties or material arrangements related to the union.[8] My research shows that examining the reporting of statutory rape cases by Roma would provide, undoubtedly, valuable ethnographic data to help understand the nature and internal dynamics of the human rights issue of "early marriages," and it presents court records as highly important sources of anthropological material. As I clarify below, in comparison, the cases in which the parents are on trial, and not the groom, predominantly start with the reporting of a pregnancy or birth by the medical personnel or the social services, who become aware of the fact in the course of their work.

8) A very brief remark on this topic is included in the Report on early marriages prepared by Amalipe Center for Interethnic Dialogue and Tolerance – V. Tarnovo (2011), a Bulgarian Roma rights NGO. Titled *Preventing Early Marriages*, the Report covers Bulgaria, Romania, and Greece.

Statutory rape vs. underage cohabitation

The example of a statutory rape case below (Case 1) shows a typical scenario found in the case law prosecuting grooms for underage intercourse.

Case 1[*]

In December 2009, M., a fifteen-year-old young man, and his girlfriend D., who was thirteen at the time, both Roma, decided they wanted to live together, after dating for several months. They announced their decision to their parents who, having assured themselves that the young couple were resolved to start their life together, agreed to their decision. A customary engagement was celebrated, after which the couple consummated their union.

The two youngsters started living as a family at the home of the boy's parents. D. became pregnant and gave birth in August 2010. Sometime later, M. and D. had a formal (legal) civil marriage.

In early 2013, M. was charged with the crime of statutory rape under Article 151 (1) of the Criminal Code.

The prosecution service recommended as punishment probationary measures for a period of six months on the grounds that the defendant had been a minor at the time of the commission of the offence.

The defense claimed that M. did not possess an awareness of the unlawfulness of his actions because he had acted in accordance with the Romani traditions.

The court found the defendant not guilty.

* The case descriptions are my own summaries of individual judgments issued by Bulgarian courts.

Some of the statutory rape judgments examined included the judge's reasoning on the choice of charges that could be brought against the defendant who claimed to be a groom (and examples of what can be described as a cultural defense). The circumstances of these cases revealed very similar scenarios, and all included the element of underage intercourse[9] in the alleged context of a customary marriage. This way the groom could, alternatively, be prosecuted for another crime, i.e., "underage cohabitation," if he was not a minor himself, and, especially, if the bride was older than

9) To reiterate, what is commonly known as "statutory rape" within the common law jurisdictions is defined under Bulgarian law as the crime of intercourse with a person under the age of fourteen. Children below the age of fourteen are legally not able to consent to sexual intercourse, and therefore the crime is prosecutable irrespective of any evidence as to the victim's voluntary participation in intercourse.

thirteen.[10] Cohabitation with a girl under the age of sixteen constitutes a crime under the CC, as illustrated by the example in Case 2 below.

The issue of the close connection which exists in practice between the two crimes—statutory rape and underage cohabitation—in the context of Romani customary marriages was made very clear from a number of judgments I examined. This prompted me to explore next judgments issued in trials of underage cohabitation, a crime under Article 191 of the CC.

A search for judgments issued on cases of underage cohabitation presented the customary engagements/ marriages case law in a new light—a large share of these judgments concerned trials *against the parents* of young Roma who had entered into a customary marriage. The parents were charged with the crime of *facilitating* underage cohabitation, under Article 191 (2) of the CC.

10) If the bride is over the age of thirteen, charges of underage intercourse cannot be brought. Cohabiting with a girl under the age of sixteen constitutes a crime for which only adults can be prosecuted, i.e., the groom must be at least eighteen (Article 191 (1) of the CC). Therefore, depending on the specific circumstances of each case, the prosecution service will have to assess which of the two crimes would fit the case best.

Case 2

The defendant F., aged eighteen, and his girlfriend A., fifteen years of age, were in a relationship. On August 6, 2018, they decided to get engaged and start living together. Initially their parents objected, but soon accepted their decision. A. moved into F.'s home.

In September 2018, their parents organized a Romani customary engagement celebration for the young couple.

On August 14, 2018, the social services in the town of B. were informed by a local gynecologist that A. was four months pregnant. The social services visited A.'s home, and it was established that she was residing not with her parents, but with F., as his wife.

Consequently, the defendant F. was charged with underage cohabitation under Article 191 (1) of the Criminal Code and found guilty.

As the case law examples show, customary early marriages, as encountered currently among Bulgarian Roma (and irrespective of how they are prosecuted), typically take place according to the following scenario: the two young people, both (or one) of them below the age of eighteen, and sometimes below the age of sixteen, decide to become a family—this does not appear to be always solely the parents' decision, but, as the judgments show, in many cases the boy and the girl start going out together and take the decision themselves. They always have to receive the permission or approval of the parents, because otherwise this would be a case of elopement, which is not approved of, and may cost the couple the support of their families.

The marriage is consummated as a form of officiating the union, and this is where criminal law first becomes relevant. When the girl is under the age of fourteen, intercourse constitutes statutory rape, which is a crime under Article 151 of the CC. After the consummation of the union, sometimes the sheet carrying evidence of the girl's virginity is displayed during the celebration.[11] It is primarily during the monitoring of a pregnancy of the underage bride that the authorities are alerted by the medical staff or the social services, and charges against the parents for facilitating an early-age marriage are brought under Article 191 (2) CC.

What does underage cohabitation look like according to the judicial records of Bulgarian courts? Underage cohabitation is

11) From the case law examined we learn that the sheet with the evidence of the bride's virginity is collected as evidentiary material by the prosecution. That is how ethnographic data on this particular practice becomes secured in case law.

a crime under Article 191 of the CC, which forbids "living together as husband and wife" with a girl under the age of sixteen. An example typically found in the case law would be the customary marriage between a boy under or close to the age of eighteen and a girl under the age of sixteen. In many cases both are minors, while in some the groom is an adult, and the bride is underage. It appears that in the majority of the cases processed by the Bulgarian courts the age difference between the two is never significant. In the cases that attract more attention and end up on the desks of the municipal authorities or in criminal courts, both the boy and the girl are under the age of sixteen, which is not uncommon. For the first six months of 2020 alone, ninety-three judgments on underage cohabitation were issued by courts across the country.[12] Another nineteen judgments concerned the crime of facilitating underage cohabitation—trials against parents.[13] The majority of the cases appear to be, again, customary Romani marriages.

Although the legislative texts that criminalize underage cohabitation contain no reference to custom or culture, judicial practice shows that an overwhelming majority of all the prosecutions for the crime of underage cohabitation, including parental prosecutions, involve what appears to be Romani customary marriages. This is not to say that non-Roma cases are exempt in practice from prosecution. Rather, the reason for this demographic discrepancy may be found, on the one hand, in the absence of the practice among Bulgarian non-Roma youth to cohabit as spouses at an early age, at this point in time. On the other hand, however, the reasons may also lie in the specific ways in which underage cohabitation is approached, formed, negotiated, carried out, and settled among the groups or families who practice it, and in the internal reasons for which it ends up in criminal court.

Criminalizing underage cohabitation: a historical overview

The crime of underage cohabitation[14] entered Bulgarian legislation in 1968, when the new Criminal Code (currently in force) was passed by the Parliament. Before that, the Criminal Code of 1951 did not contain any provisions criminalizing this conduct. This is relevant to the questions of when and how familial patterns involving minors as spouses became a matter of concern for the then government, what justified their conceptualization as harmful and led to their subsequent criminalization.[15] The initial assumption is that the number of occurrences of this pattern on the territory of the country came to justify its formal regulation, and that the conduct in question was frowned upon. Apart from the internal reasons for legislative reform, the political motivation to criminalize certain practices or modes of conduct also, typically, develops in collaboration with the international community in the context of supranational projects, such as the participation in international agreements and membership in international organizations. Global allegiances, such as membership in the UN,[16] could have been one of the external contributing factors to the introduction of this law reform.

In 1954 the UN issued a General Assembly Resolution titled *Status of women in private law: customs, ancient laws and practices affecting the human dignity of women*. In this resolution, the General Assembly "*[u]rges* all States, […] to take all appropriate measures […] with a view to […] abolishing such customs, ancient laws and practices by ensuring complete freedom in the choice of a spouse; […] eliminating completely child marriages and the betrothal of young girls before the age of puberty and establishing appropriate penalties where necessary."[17] At the time, the United Nations Declaration of Human Rights (1948) had already provided in

12) The electronic legal database used to access Bulgarian legislation and case law is Ciela.

13) Art. 191 of the Criminal Code (1968): (2) Any adult who persuades an underage male and female who have not reached the age of sixteen to start living as spouses or facilitates their living as spouses without entering into a marriage, shall be punished by imprisonment for up to two years or by probation.

14) Art. 191 of the Criminal Code (1968): (1) Any adult who, without having entered into a marriage, starts living as husband and wife with a female who has not reached the age of sixteen, shall be punished by imprisonment for up to two years or by probation, as well as by public reprimand.

15) It is also noteworthy that some present-day European domestic criminal legislations (such as that of Belgium, for example) apparently do not contain a text formally criminalising such practices. I received this information from a Belgian judge during a discussion at a conference.

16) Bulgaria has been a member state of the United Nations since December 14, 1955.

17) A/RES/843(IX), December 17, 1954.

Article 16 (2) that "[m]arriage shall be entered into only with the free and full consent of the intending spouses."[18] These instruments were followed and built upon by the UN Convention on consent to marriage, minimum age for marriage, and registration of marriages of 1964, which in its preamble made a specific reference to the above resolution. Article 2 of the Convention stated that "States Parties to the present Convention shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses." The new Bulgarian CC entered into force, criminalizing underage cohabitation only several years later, in 1968.

The explicit criminalization of existing practices, such as customary marriages, which a government is attempting to eradicate, is a method of regulation that is complementary to the formal introduction of age limitations for the purpose of defining a "legally binding" marriage. This is necessary because *de facto* living as husband and wife with an underage girl is practiced by groups or individuals who may not require, or routinely do not resort to, a formal registration of marriages. In this way, the provision of a minimum age requirement for entering into a legal marriage is, in itself, not sufficient to prevent the practice of cohabitation with a minor.

In 1979 the Convention on the elimination of all forms of discrimination against women employed the language of the resolution to condemn directly and explicitly "the betrothal and the marriage of a child," and did not limit itself to the setting up of boundaries to entering into a marriage. Article 16 (2) stated that "[t]he betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory."

In the following decades the attention of the international communities to the issue of child or early marriages progressively intensified, generating a substantial number of initiatives, research and instruments to explore, define and regulate early marriages with the means of international law. A 2014 UN recommendation issued jointly by the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child[19] provided the following definition:

> Child marriage, also referred to as early marriage, is any marriage where at least one of the parties is under eighteen years of age. The overwhelming majority of child marriages, both formal and informal, involve girls, although at times their spouses are also under eighteen years of age. A child marriage is considered to be a form of forced marriage, given that one and/or both parties have not expressed full, free and informed consent. As a matter of respecting the child's evolving capacities and autonomy in making decisions that affect her or his life, a marriage of a mature, capable child below eighteen years of age may be allowed in exceptional circumstances, provided that the child is at least sixteen years of age and that such decisions are made by a judge based on legitimate exceptional grounds defined by law and on the evidence of maturity, without deference to culture and tradition.[20]

As noted above, underage cohabitation, as defined in the Bulgarian CC, is a culturally neutral text. It could include both an "informal marriage" (according to the meaning in the recommendation above, as a customary practice that may be marked by a ceremony) and any instance of an adult living with a girl under the age of sixteen in any form of quasi-spousal scenario.

In 1982 the CC was amended to include also the facilitation of entering into cohabitation with a minor (Article 191 (2)

18) The UN Declaration of Human Rights can be accessed at: https://www.un.org/en/universal-declaration-human-rights/.

19) Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/ General comment No. 18 of the Committee on the Rights of the Child on harmful practices, November 14, 2014.

20) Ibid., para. 20, section B.

of the CC). The wording is, again, basic and neutral, and although it does not specify the persons who may bear liability for this crime, the established case law shows that these are almost exclusively the parents of a bride or groom cohabiting according to the Romani marriage tradition.

Charges of facilitating underage cohabitation are at the core of the case law dealing with the issue of parental liability for enabling early marriages. In practice, when the groom and the bride are both underage, the authorities who have been alerted to the situation have a choice of what charges to bring against whom. Charges could be brought against the parents of the two children for facilitating underage cohabitation, if the parents had approved of the marriage and provided a home for the new couple. Usually the parents who are housing and supporting the couple financially and otherwise are the ones who are charged and prosecuted. Both parents stand trial for this crime as co-conspirators.

21) The term "cultural defense" is never used in the judgments that I examined. The explanations given by the defendants about the context in which the criminal offence for which they were charged was committed, when obviously ethnographic or related to customs or difference, can be considered a tacit cultural defense from the perspective of the multiculturalist vocabulary and discourse, but this is not so obvious a conclusion from the court's perspective. Formally and overtly, the defense under Article 9 (2) of the CC, which is frequently attempted, is purely legal in nature—the claim being that their actions did not endanger anyone and therefore they should not be seen as criminal.

Parental liability for underage cohabitation

The following case study illustrates the prosecution and conviction of a parent who enabled an underage couple to begin living as spouses.

In early 2014, S. (a fifteen-year-old boy) and A. (a fourteen-year-old girl), both Bulgarian citizens of Romani origin, decided to enter into a customary marriage after a two-year relationship. They informed their parents of their intentions. The parents agreed, and a customary engagement in the community was celebrated on the March 8, 2014. On that date the couple started living together as a family at the groom's mother's house. Sometime later the couple had a child.

In late 2016 or early 2017, the mother of the groom was charged with facilitating underage cohabitation under Article 191 (2) of the CC. The father of the groom was also charged, but his case was heard separately because he had a criminal record, and different proceedings applied to him.

The first-instance court found the defendant guilty as charged. On appeal before the Regional Court, the defendant, through her lawyer, claimed that her conduct posed an "insignificant threat to society," a defense under Article 9 (2) of the CC. She maintained that her conduct did not possess enough of the element of a "threat to society" to pass the threshold of a criminal offence; that she was only helping the young couple; that she was unemployed; and she also raised in her defense the customary practices of the Romani communities in Bulgaria.[21]

The appeals court confirmed the lower court's guilty verdict. The court did not credit the defendant's claim that, while her conduct may fall under the terms of the criminal offence she was charged with, it did not pass the threshold of posing a significant threat to society, and that the customary practices of her ethnic community could justify her behavior. The court stated that under the domestic legislation, as well as according to the UN Convention on the Rights of the Child (1989), every person under the age of eighteen should be treated as a child, unless the relevant laws prescribed that majority is reached at an earlier age. Therefore, the court concluded that the two minors (her son and his bride), whose cohabitation had been facilitated by the defendant, were children in the meaning of the law, and as such they required specialized care as they are presumed mentally and physically immature, unable to make independent decisions, and cannot be held responsible for their actions. The court pointed out that according to Article 27 of the Convention every child has the right to a standard of living in accordance with the child's needs, and that the State and especially the parents of the child hold the obligation to

A clarifying note that may be useful for non-lawyers or lawyers unfamiliar with Continental legal systems. Article 9 of the Bulgarian CC reads: "(1) A criminal offence is an act that is dangerous to society (action or inaction), which has been culpably committed, and which has been declared punishable under the law. (2) An act is not a criminal offence when, although it formally contains the elements of a criminal offence as set out in the law, because of its insignificance is not dangerous to society or its danger to society is obviously insignificant". The element of being a threat—the quality of endangerment, or gravity—is an inherent feature of what is considered by positivist legal doctrine "a crime" or a "criminal offence." A crime is an act (or an omission to act) which is included in the Criminal Code (or other criminal legislation), i.e., it is criminalized, because it is considered too serious, too dangerous for society not to be penalized by criminal law. However, if the act committed formally fulfills the scenario described in a criminal text, but does not possess in itself, in its context, the level of danger which justifies its treatment as a crime proper, then such an act is not a crime, because in fact it lacks the quality of being a threat (the exception under Article 9 (2) of the CC), and therefore should not be prosecuted and punished as a crime but as a lesser offence, or not at all. This exemption can be used as a form of defense. It is particularly appropriate in the context of cultural diversity where a cultural defense can be introduced to allege that because the act committed has an emic meaning, different from the one attributed to it by the legislature, therefore it is not dangerous, it does not pose a threat to society, and it should not be penalized. The case study discussed gives an example of such a defense.

provide that. The court went on to conclude that, for that reason, the defendant's conduct was not only of nature to pose a threat to society, but that it was unlawful and punishable under the law.

The degree to which a criminal conduct poses a threat to society is an integral feature of any criminal offence under the law. Under Article 9 (2) of the CC, a conduct cannot be considered criminal under the law if it does

Another example of this stance taken by the courts in line with the established legal practice of drawing a firm line between childhood and adulthood is found in a judgment of the following year, 2018, on a case of underage cohabitation against the groom, where the court stated: "Bulgaria is a member state of the European Union and a signatory to a number of international instruments protecting the interests of the child. It is of paramount importance therefore to prioritize the protection of the personal inviolability of children. It is unacceptable to create conditions allowing for the discrimination of children on the grounds of ethnic, cultural, or social background and gender, with the excuse that an ethnic group in the country has certain traditions. Under Article 6 of the Constitution all people are born free and equal in dignity and rights, and all citizens are equal in the eyes of the law. No exceptions to the full enjoyment of rights and privileges are permissible on the grounds of nationality, ethnicity, gender, background."

not pass the threshold of posing a threat to society, or if this threat is insignificant. Because the quality of posing a threat to society—both by the perpetrator and his or her conduct—must be considered by the courts when deciding on the type, length, or amount of the punishment in each case, if the "insignificant threat" defense is successful, then the defendant would be acquitted, or at least given a lower penalty if found guilty. In the majority of cases of underage cohabitation the courts do not tend to grant an acquittal under Article 9 (2) CC, but typically grant the administrative sanction exemption (see below), if the requirements of the law are met.

In the majority of the judgements on customary early marriages, the courts appear to place the existence of a custom to enter early marriages into the group of mitigating circumstances,[22] which are directly linked to decisions of lower penalties. Moreover, in most of this repetitive case law the initial punishment recommendation made by the prosecution service is an exemption from criminal punishment with substitution for administrative sanctions.

22) An illustration of how this consideration features in the judicial narrative can be seen in a judgment on a case of underage cohabitation against the groom, in 2018, where the court noted: "In its assessment of the specifics of the case this court took into consideration also the particular norms of the ethnicity to which the defendant belongs."

Following the recommendation of the prosecutor in the first-instance proceedings, the court decided to apply a legal exemption allowing for a criminal penalty to be substituted for an administrative sanction (a fine), applicable to cases where the punishment prescribed by the law is less than three years of imprisonment, the defendant has no criminal record, and no damage to property has resulted from the crime. The minimum amount under the law was meted out (BGN 1000, approx. EUR 500). The appeals court found that the application of the criminal punishment exemption and its substitution for an administrative sanction in the minimum amount was appointed correctly by the lower court and confirmed the verdict.

The court refused the request of the defense to apply Article 9 (2) of the CC and to acquit on grounds of "insufficient threat to society," and decided to confirm the guilty verdict. The court, however, readily accepted that the criminal penalty exemption rule was appropriate in this case, and that the application of harsher criminal measures was not justified under the circumstances.

By accepting the prosecution's recommendation to apply the administrative penalty exemption the court not only followed the established judicial practice in sentencing on cases of underage cohabitation, but also made a point that while early marriages should not be tolerated in principle, harsh punishments for these customary practices would not produce a favorable result or resolve the issue. Effective or suspended sentence of imprisonment is typically not meted out. The penalty formula in this case belongs to a consistent judicial practice on similar cases, in which the defendant is found guilty.

Considering mitigating and aggravating circumstances for the purposes of sentencing is the court's obligation under the law, and therefore the inclusion of the defendant's cultural views among the mitigating factors leads to the conclusion that the acknowledgement of such perceptions did contribute to—or supported—the decision of the court to prescribe an exemption from criminal punishment, and a financial sanction in the minimum amount.

The judgment described above is an example of a very specific and narrowly uniform group of cases within the larger case law on underage cohabitation—the prosecution of a parent. In the present case, the prosecution of the young groom was not a legal option, because he was a minor, aged fifteen at the time of the ceremony. Consequently, the charges were brought against the parents of the boy, with whom the couple lived as husband and wife. The appeals court justified its decision to confirm the guilty verdict of the lower court with the argument that the protection of the child's interests takes priority before

customary practices, and that legal norms take priority before religious or customary norms, if the latter contradict them.

The court considered that the obligation to ensure the well-being of minors lies with their parents and that this obligation is of paramount importance under domestic and international law. In the words of the court:

> The existence of specific customs of the Romani ethnic communities, characteristic of which is the cohabitation of children as spouses, cannot in itself negate the element of a "threat to society," because in contemporary societies priority is given not to religion or custom as regulators of social conduct but to legal norms, the compliance with which is the responsibility of everyone in the interest of the protection of each individual. Moreover, assuming that Romani customs should exclude criminal liability in respect of the members of that community would mean that only non-members of that community should bear liability [*for that crime*], which would lead to unequal treatment under the same law. In addition, every child, irrespective of the child's ethnic origin, until they reach the age of eighteen, have a right to protection that can guarantee the child's normal intellectual, spiritual, and social development.

It is clear that the rift between the logic and nature of the practice of early marriages among Bulgarian Roma, on the one hand, and the courts' reasoning and justification of their verdicts (especially the verdicts against the parents) on the other, hinges on the conflicting perceptions about maturity and adulthood, but even more so on their (ir)relevance to *being* or *becoming* married. While, for a judge, the state of being a spouse is a state which may endanger or damage, psychologically and/or physically, a person who has not yet reached legal adulthood, i.e., a child, irrespective of their gender, for the communities who practice early marriages, according to some accounts, being married is a form of protection of the young people from psychological and/or physical harm, and of other social and cultural values, at a time when they are at their most vulnerable.[23] The more pertinent, although less visible, question however is whether the current judicial practice of prosecuting and punishing conduct falling within the scope of customary early marriages among the Roma is striking the "right" balance between accommodating cultural diversity and upholding the competing values promoted by formal justice.

23) The absence of a prominent division between adulthood and childhood is being addressed in ethnographic detail by Stewart (2018). The issues with assigning moral value by the standards of formal Western legislative reform on sexual violence to cultural normativities inherent at the time to Papua New Guinea have been discussed by Strathern (1997).

Conclusion

My review of judgments from Bulgarian courts in which ethnographic evidence of customary Romani marriages is found indicates two main trends in the prosecution of these cases: they are either prosecuted as "underage intercourse" or as "underage cohabitation." The number of cases in both groups involving Roma ethnics (both parties to the case are Roma) is considerably greater than that involving Bulgarian ethnics. This observation points to a stable practice, which, as it happens, is very narrowly culturally specific, although it is processed by the courts under culturally neutral legislative texts.

Furthermore, the research suggests that these neutrally worded criminal texts appear to be frequently utilized by a community in Bulgaria whose members, of their own free will, initiate proceedings under these articles. The number and similarity of these cases and their frequent occurrence in criminal courts beg the question of whether this voluntary litigious behavior is well-informed as to the processes and consequences and strategically planned. In other words, is resorting to criminal law a consciously selected mechanism of handling interpersonal tension, possibly

related to failed marital attempts such as elopements, bride kidnapping, failure to fulfil customary expectations that were impossible to settle within the community, as opposed to these cases being simply instances of spontaneous reporting of one's grievances to the authorities? Research of Romani use of the police and the courts in Romania,[24] which bears certain contextual similarities to the data found in Bulgarian courts, suggests that low standing within the community and the lack of access to (or influence with) internal conflict resolution mechanisms might prompt the disappointed party to decide to take the case to the formal courts.

24) Ana Chirițoiu, personal communication.

One of the aims of this text was to emphasize the value of court records and case law in general as a primary source of rich ethnographic material, specifically related to the topic of early marriages as practiced by local communities. Another aim was to comment on the legal diversity of this practice's representation within domestic case law, which could result in the prosecution of either the groom or the parents, as well as on the complexities and the peculiarities of the decision making related to the prosecution and sentencing of this practice.

The particular question of the shared contribution to the creation of this case law—both by Romani litigants and the justice system itself—if thoroughly researched, could provide data on topics such as litigation-related decision making, agency and adulthood, the relative and combined value of the formal judicial system and informal customary dispute resolution techniques, and could provide insight into the phenomenon of the fluctuating stages in the life of legal norms that are maintained by repeated conduct external to mainstream society.

Because this text is intended only as an introductory commentary on the appearance of ethnographic evidence within Bulgarian court records, its ultimate goal is to draw (again) the attention of anthropologists to a subject that is familiar but remains, in many ways, remote, and to a source of data, which is still, to a large extent, underutilized for the purposes of interdisciplinary inquiry.

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