Sexual intercourse among relatives and criminal law. Penalization of incest

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ABSTRACT

Introduction: Under Polish law there is a criminal offence, called incest, where close relatives perform an act of sexual intercourse with each other. Its penalization has a long tradition under Polish law. However, its criminalization remains controversial.
Purpose: To examine whether incest should still be penalized.
Materials and methods: The provisions of the Polish Penal Code and the relevant regulations of selected European states have been analysed. The judgement of the European Court for Human Rights and the criminal law literature have been examined as well.
Results: There are both reasons for the depenalization of incest and arguments in favour of its continued penalization.
Conclusions: The issue of incest may be seen both in the light of criminal law and from the point of view of morality. Looking at the problem solely from a legal perspective, the penalization of incest is not necessary and thus Article 201 of the Penal Code is redundant. Looking at the problem from a moral perspective, the opposite conclusion should be made.
Key words: incest, sexual intercourse, penalization of incest, eugenic reasons, decency, moral relativism

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INTRODUCTION

Under Polish law there is a criminal offence where members of close family engage in a sexual relationship with each other (with the obvious exception of sexual intercourse between a husband and a wife). Article 201 of the Polish Penal Code states: Whoever performs an act of sexual intercourse with his or her ascendant, descendant, adoptive child, adoptive parent, brother or sister shall be punished with imprisonment from three months to five years. This offence is called incest. Its penalization has a long tradition under Polish law. Incest was prohibited by the 1932 code and the 1969 code, and also by the currently applicable penal code of 1997. However, its penalization remains controversial. For many years opinions challenging the sense of its criminalization have been expressed. This study aims at discussing both reasons for the depenalization of incest and arguments in favour of its continued penalization.

At the beginning, some basic notions need to be explained. The potential perpetrator of the offence in question are the family members named in Article 201. These include relatives in the first line of blood relationship without any limit as to the degree of the blood relationship, i.e. ascendants (parents, grandparents and so on) and descendants (children, grandchildren, and so on), and relatives in the side line of blood relationship but only in the second degree, i.e. brothers and sisters. The later includes half-brothers and half-sisters [1]. Persons being in an adoption relationship, i.e. adoptive parents and adoptive children, can also be subjects of the offence. Persons do not commit a criminal offence when they are not aware of their consanguinity (as so-called Oedipus case, commonly known from the Greek mythology) or adoption relationship at the time of the act.

The criminal behaviour consists of performing sexual intercourse which includes either vaginal intercourse or anal or oral intercourse. The legal element of the offence describing the prohibited behaviour does not comprise other sexual activity, that is sexual activity other than sexual intercourse [2]. In other words, acts such as, for example, passionate kisses on the lips between a mother and a son or touching sexual organs of a relative in a sexual manner is not punishable. Force, threat or deception are not elements of incest; incest consists of consensual sexual intercourse.

Most European states have a criminal offence of incest [3]. However, the scope of the criminalized activity and the range of the punishment differ. In some states, such as, for instance, Iceland and Norway, not only sexual intercourse but also other sexual activities are punishable, however, in Norway consanguine siblings are liable of incest only if they have sexual intercourse [4]. Some states, for example Germany, Austria and Finland, criminalize only sexual intercourse [5]. There are legal orders, for instance in Germany, Austria and Finland, where sexual intercourse among the closest blood relatives is criminal but not among the persons being in an adoption relationship [6].

Under updated English law, incest is prohibited by sections 64 and 65 of the Sexual Offences Act 2003 [7]. These provisions penalize, according to their headings, ‘sex with an adult relative’; sexual relations with children are regulated by other provisions. A person is punishable for incest if he intentionally penetrates another person’s vagina or anus with a part of his body or anything else, or penetrates another person’s mouth with his penis. So, sexual acts other than sexual intercourse are not punishable. The penetration must be ‘sexual’, thus the penetration for some other purpose, for example where one sibling helps another to insert a pessary for medical reasons, is not covered by this offence [8]. The persons committing incest may be related to each other as parent (including an adoptive parent), grandparent, child (including an adopted person), grandchild, brother, sister, half-brother, half-sister, uncle, aunt, nephew or niece. Peripheral adoptive relatives are excluded from the offence of incest. So, for example, it would not be an offence for an adoptive brother and sister aged over 18 to have sexual intercourse [8]. It is worth noticing and, having in mind the Polish regulation, emphasising that the term ‘relative’ has been broadly defined. The above mentioned statute of 2003 continues to penalize sexual activity between adult brothers and sisters. This issue has been controversial among English authors. It has been argued, among other things, that ‘just because some people regard conduct as immoral is not a reason for rendering it illegal’ [9]. It has been stated in the latest English literature that offences of incest (described in sections 64 and 65 of the above-mentioned statute of 2003) are broad, gender-neutral offences that make both parties to sexual activity guilty. In conclusion, it has been asked, who is the law trying to protect? Finally, the following question has been put: ‘Will this be found to be compatible with Art 8 of the ECHR for consenting adults?’[10].

This problem has been raised before the European Court for Human Rights in Strasbourg. The case concerned an alleged violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The applicant complained that his criminal conviction of incest with his adult sister (conviction by a German court) had violated his right to respect for his private and family life as provided in Article 8. In the judgement of 2012, the Court observed that there is no consensus between the member states of the Council of Europe as to whether the consensual commitment of sexual acts between adult siblings

should be criminally sanctioned. Still, altogether a majority of twenty-four out of the forty-four states reviewed provide for criminal liability. Consensual sexual acts between siblings are not subject to criminal liability in, for example, France, the Netherlands, the Russian Federation, Spain and Turkey. In recent years, incest between adult siblings has been decriminalised in a few countries, for instance in Portugal (in 1983) and in Serbia (in 2006). The Court further noted that all the legal systems, including those which do not impose criminal liability, prohibit siblings from getting married and thus, a broad consensus transpired that sexual relationships between siblings are neither accepted by the legal order nor by society as a whole. The Court further considered that the instant case concerned a question about the requirements of morals and that the domestic authorities enjoy a wide margin of appreciation in determining how to confront incestuous relationships between consenting adults, notwithstanding the fact that this decision concerns an intimate aspect of an individual's private life. The Court concluded that the domestic courts stayed within their margin of appreciation when convicting the applicant of incest, thus there has accordingly been no violation of Article 8 of the Convention [11].

DISCUSSION

Criminal law plays a few functions in a state and a society. The protective function is the most important of them [12]. The set of rules that make up criminal law is supposed to be a means for the protection of legal interests. To put it clearly, criminal law protects values recognized in a society. These values include, for instance, peace, health, property, freedom, and morality. Penalization of a human activity has to be justified. Every criminal offence has to have a rationale, i.e. a sense of existence. In other words, each type of criminal offence has to aim at the protection of a value recognized by the majority of the members of a society.

The values protected by the criminal offence of incest have been heavily controversial among the representatives of the Polish doctrine of criminal law. At the time of the creation of this type of criminal offence, i.e. when it was introduced to the first Polish Penal Code of 1932, eugenic reasons were given as an argument [13]. It was believed that children born as a result of incestuous sexual intercourse were more susceptible to genetic defects, so a protected value was the health of any future children. Under the Penal Code of 1969, morality was considered the main protected value [14]. In the currently applying penal code, that is the code of 1997, the criminal offence of incest is located in the chapter entitled 'Offences against sexual freedom and decency'. It is widely recognized that, generally, the title of the chapter indicates the protected interests. As to the offence in question, it is clear that the penalization of incest does not protect sexual freedom since force, threat or deception do not belong to the constitutive elements of incest, i.e. consensual sexual intercourse is criminal. Therefore decency is commonly recognized as the main value protected by Article 201 of the Penal Code [15]. In addition, the following interests are usually mentioned: family, the correct functioning of a family, and the children born out of such a relationship who could be subject to social discrimination [16]. The justification of the penalization of incest is no more based on eugenic reasons because, as it is stated in the forensic genetic literature and in the criminal law literature, contemporary genetics has not proven that children of parents being in a close blood relationship are more in danger of having genetic faults [17]. Moreover, it is also criminal to have sexual intercourse which cannot lead to the conception of child that is heterosexual anal or oral intercourse or homosexual intercourse. Additionally, sexual intercourse in an adoption relationship are prohibited as well. So, the argument of the protection of possible future children, either from genetic faults or social discrimination, can be dismissed. The argument that the penalization of incest protects the correct functioning of a family is not convincing. Firstly, sexual acts other than the penetration of vagina, anus or mouth are not prohibited (and those acts can also deeply influence the mental state of a child, so the mental health of children in a family is not protected). Secondly, it has to be noticed that sexual intercourse within a family is rather a consequence of than a reason for dysfunction within a family. It is supposed that sexual intercourse between close members of a family is performed by people with a mental disorder or by those already living in a dysfunctional family. A criminal conviction will not help this family. Such a perpetrator needs psychological-sexological assistance [18].

In conclusion, sexual morality is the only value protected by Article 201 of the Penal Code. Here 'morality' means 'morality' or 'decency' of a society (i.e. of most members of a society), that is a 'public' morality related to the behaviour from the sexual sphere. Penalization of incest with respect to public morality may be challenged by another interest also under the protection of law, that is sexual freedom (Article 47 of the Polish Constitution; Article 8 § 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms). There can be a conflict between public decency and the sexual autonomy of an individual [19]. Even in a democratic society, individual freedoms may be subject to limitations for the purpose of the protection of, for instance, public

morality, if the admissibility of such limitation is provided for by the law (Article 31 § 3 of the Constitution). Thus, the law maker has to decide which protected interest takes precedence.

In the Polish doctrine of criminal law, difficulties with sufficient justification of the penalization of incest have been noticed for many years. Some authors have demanded the depenalization of incest between adult siblings or at least expressed their doubts as to the criminalization of incest [20]. For instance, a view has been expressed that the reasons for the penalization of incest have an emotional character [21]. An opinion has been expressed that Article 201 does not protect anybody or anything but 'a good frame of mind of the legislator' and thus it is a dummy [22].

In the public opinion, incest is commonly associated with sexual abuse of children and thus the criminal ban of incest is seen as a means for the protection of children. Most of the members of society do not know the extent of the law regarding which sexual activities are prohibited and who are the potential perpetrators as provided for by Article 201 of the Penal Code. In particular, it is not generally known that adult persons, for example, half-brother and half-sister performing consensual sexual intercourse are liable to imprisonment. This is also the case when they do it at home, when no minors are watching. Penalization of incest is commonly connected with a punishment for sexual relations between adults and children. The idea of depenalization of incest in terms of repealing Article 201 from the penal code causes public outrage mainly because it is immediately associated with a father being able to abuse his thirteen-year-old daughter with impunity (and it can be supposed that this is how the problem would be presented in the media). As a matter of fact, Article 201, criminalizing incest, is not necessary to convict such a father. Sexual relationships with a minor under the age of 15 is criminalized by Article 200 § 1 of the Penal Code. This provision provides for a longer imprisonment than Article 201. In a criminal proceedings, the basis for sentencing would therefore be Article 200 § 1 of the Penal Code. Article 201 would be given only at the description of the offence committed by the accused. Article 201 has an autonomous significance only in the case of consensual sexual intercourse between persons aged 15 or more, for example, if a 15-year-old daughter consents to sexual intercourse with her father and not force, threat or deception has been used to influence her attitude to the sexual intercourse [23]. It has to be emphasized that criminal law recognizes that a person aged 15 is able to give a relevant consent in the sexual sphere. In other words, the law maker considers 15-year-old people mature enough to decide about their sexual activity. It should also be stressed that the offence of sexual abuse of a minor (Article 200 § 1) penalizes both sexual intercourse and other sexual activity with a minor under the age of 15, whereas the offence of incest (Article 201) penalizes only sexual intercourse. All of this clearly shows that the penalization of incest is not necessary to bring to justice those who abuse vulnerable children.

The above presented deliberations show that there are both reasons to criminalize incest and arguments to depenalize it. One thing is certain: the legislator has to undertake action and to change the current state of the law. It has to choose one of the two different directions, upon deciding on some moral questions, for instance, whether the value of decency should take precedence over the value of sexual freedom. These two directions are: either to repeal Article 201 and, if considering it appropriate to emphasize the social condemnation of behaviour of this kind, create an aggravated type of the offence of sexual abuse of a minor under the age of 15 (that is to establish in Article 200 § 2 an offence of sexual abuse within a family [24]; however, this would not be necessary since the court may take into account the circumstance of incest at sentencing) or to amend Article 201 by the extension of the prohibited acts, i.e. by the inclusion of sexual activities other than only sexual intercourse. The first way would prevail if the legislator considers, among other things, that a criminal law sanction is not an appropriate reaction to consensual sexual intercourse between mature siblings. The second option would be implemented if the legislator decides to emphasize the significance of a moral ban on sexual relationships between close relatives.

It has to be asked how broad the extent of criminalization ought to be. How far should the criminal law reach in the sphere of consensual sexual behaviour? What level of interference of criminal law is justified, bearing in mind that criminal law is *ultima ratio* (a last resort)? Do we not have an overcriminalization in this area? It is clear that a proposal of depenalization of incest is controversial and would invoke many negative emotions in our society. However, this ought not to prevent the attempts to make criminal law rational. On the other hand, one could argue that we currently have more important socio-economic problems to resolve than this criminal law issue. Moreover, the current state of the law disturbs almost nobody. In other words, it violates the sexual freedom of only a very few people, i.e. those involved in sexual intercourse within their family and possibly having a mental disturbance, and only when the case is revealed and prosecuted. It has to be noted here that, taking into account the number of cases appearing in courts, the practical significance of Article 201 of the Penal Code is minimal [25].

Incest has been a taboo since time immemorial. Sexual relationships between members of close family (with the exception, of course, of a sexual relationship between a man and a woman being partners, e.g. husband and wife) have been considered immoral and prohibited in most societies and groups of people for many centuries [26]. The ban on incest is deeply rooted in the culture of many different societies, not only European ones. And so it is in the Polish nation. An illustration of the moral and social condemnation of such sexual relationships is the ban on marriage between relatives in the direct line (ascendants and descendants) and between siblings (Article 14 § 1 of the Polish Family and Guardianship Code). An adoptive parent and their adoptive child may not marry each other either (Article 15 § 1 of the Family and Guardianship Code). A basic question is whether condemnation ought also to be expressed in the area of criminal law. Undoubtedly, Article 201 of the Penal Code stresses significance of values such as decency in the sphere of sexual life. It is, however, disputable whether the threat of imprisonment is an effective means to deter potential perpetrator. To put it another way, the effectiveness of the deterrent function of the punishment in the sphere of sexual behaviour is debatable.

CONCLUSIONS

The issue of incest may be seen both in the light of criminal law and from the perspective of morality. Bearing in mind all the deliberations presented above, the inference can be made that, looking at the problem solely from a legal perspective, the penalization of incest is not necessary and thus Article 201 of the Penal Code is redundant. Looking at the problem from a moral perspective, the opposite conclusion should be made. Furthermore, to fully reflect the moral disapproval, sexual activities other than sexual intercourse should be included in Article 201 of the Penal Code.

When considering the criminalization of incest, an issue of the relationship between the criminal law norms and the moral norms arises. A detailed discussion of this issue exceeds the scope of this paper. However, a few remarks can be made. The norms of criminal law and the moral norms do not coincide but they overlap to a large extent [27]. The activity of an individual may be legally irrelevant but it may contradict the moral norms accepted by society (i.e. the overwhelming majority of the members of a society). However, the law maker may not ignore the moral norms since the law is not a value in itself but it ought to serve society. Moreover, the law maker should react to social changes and put or maintain under the protection of criminal law those moral values that are still appreciated by the overwhelming majority of society but at the same time are under threat. The fact is that over the years some changes in the perception of certain moral values and aspects of sexual behaviour occurred in European societies and Polish society is not an exception. Not all of these changes are to be praised. Some traditional values have been endangered [28] and there have been attempts to redefine some traditional social institutions, for instance, the institution of marriage as a relationship between a man and a woman. The possibility that some people will change their moral evaluation of sexual intercourse between close relatives seems not to be entirely abstract and unrealistic. In recent years, moral relativism has been more and more apparent. In this situation, an assertive statement made by the criminal law maker is needed. This statement should be a clear indication of what is wrong and immoral and therefore criminal in the sphere of sexual behaviour.

Conflicts of interest

None to declare.

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