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Sexual intercourse between a person and certain close relatives will, in some circumstances, constitute the crime of incest in Scots law (The Sexual Offences (Scotland) Act 1960, ss 24A, as inserted by the Prohibited Degrees of Relationship Act 1986); a purported marriage between a person and certain other close relatives will have no effect and will be void (The Marriage (Scotland) Act 1977, s 2, Sch 1, as amended by the Marriage (Prohibited Degrees of Relationship) Act 1986). This article aims to examine the rules of law contained in these two provisions and, in particular, to analyse the justification for these rules. It is not to be questioned that all rules of law demand justification, and it is submitted that if a statutory rule has no justification it demands repeal. This article will argue that there is no justification for criminalising incest, and no justification for prohibiting marriage between parties within certain degrees of relationship.

In order to avoid misunderstanding, it should be pointed out immediately that the present writer is not advocating 'free sex', particularly not with children, nor is he advocating unlimited rights to marry. Sexual intercourse with a child, or with someone who does not or cannot consent, or with someone who is being exploited, are heinous crimes and should remain so. But they are all today punishable irrespective of the existence of the crime of incest. In relation to marriage, there cannot be unlimited rights to marry so long as the law regards that relationship as one of legal significance — the conferring of legal consequences on the relationship gives the law the right (always within reason) to state who may enter into that relationship.

Rather, what the present writer is advocating is the view that the current rules on incest and the forbidden degrees of marriage are unnecessary and distasteful nonsense, which do not stand up to rational analysis, which are not needed to achieve the proper policies of the law, and which deal with situations that, in the criminal law, are dealt with by other means and, in matrimonial law, do not need to be dealt with at all.

The rules of incest

The prohibition on incestuous relationships is one of the oldest prohibitions in law. Incest has been a taboo in most societies from the earliest days of civilisation (Cunningham, though the act was considered abominable, it was not criminal in England). The criminal law on incest is to be found in the eighteenth chapter of the Book of Leviticus laid down the categories of relationships that were so abominable to the Judaic deity that terror punishment could be inflicted by mortals; and this source was directly incorporated into the Scottish statute book by the Incest Act 1567, which punished with life imprisonment anyone who had sexual relationships by the degrees of relationship forbidden by verse 6 to 17 of that part of the law in the Genevan translation, James VI and I and not having yet authorised his version: see HM Advocate v RM 1969 JC 52). This avoids any argument that there may still exist some wider common law crime of incest that could be charged if the conditions for the statutory crime of incest are not satisfied.) This table is in two parts.

The first part concerns relationships by consanguinity, that is what in lay terms are described as blood relationships and which may more accurately be described as genetic relationships. A male person who has sexual intercourse with any of the following females, or a female person who has sexual intercourse with any of the equivalent males, will be guilty of an offence: mother, daughter, grand mother, granddaughter, great grandmother, great granddaughter, sister, aunt or niece. The relationships mentioned are all natural, in the medical sense of being genetic rather than social, and, altering the previous law, do include illegitimate relationships and do not include step-relationships. (So it is not incest, though it may in some circumstances be some other crime, to have sexual intercourse with one's wife's daughter, legitimate or illegitimate (not being one's own daughter). This was previously the law in any case with illegitimate relationships: see HM Advocate v JMR 1985 SCCR 330, following HM Advocate v RM 1969 JC 52.) Following the previous law, the relationships caught may be of the full blood or the half blood consanguinean (through the male line) or uterine (through the female line) (Section 2A(1)).

The second part of the table deals with relationships by adoption. A male person who has sexual intercourse with any of the following females, or a female person who has sexual intercourse with any of the equivalent males, will be guilty of an offence: adoptive mother, former adoptive mother, adoptive daughter and former adoptive daughter. The position concerning adoptive relationships is now, for before the 1976 Act was amended in 1986, sexual intercourse between adoptive parents and children was not incest (Though it could in some circumstances have amounted to some other crime: see HM Advocate v RM 1969 JC 52). However, even yet, the adopted child is not in an identical position to the natural legitimate child: adoption only brings the adopted child within the prohibited degrees in relation to her or his adoptive parents and not the other relatives acquired through adoption (These other relationships are legally recognised for the purposes of, for example, succession: see the Succession (Scotland) Act 1964, ss 23, 24). An adopted child remains within the forbidden degrees in relation to his natural parents and other natural (genetic) relatives (Adoption (Scotland) Act 1978, s 41(1)).

Within these degrees, the act that is prohibited is heterosexual sexual intercourse. The physical nature of the act that is prohibited is the same as for rape: sexual intercourse constituted by the insertion of the male penis into the female vagina. Any other form of sexual act, such as homosexual acts, or penetration into any part of the female body other than her vagina, does not amount to sexual intercourse and cannot therefore be incest. (Though it may amount to some other other offence such as shameless indecency: see R v HM Advocate 1988 SCCR 254; 1988 SLT 623 in which a father was convicted of this common law crime having committed a sexual act that fell short of sexual intercourse with his sixteen-year-old daughter. The court held that the relationship between the parties rendered the father's conduct sufficiently 'shameless' to constitute the offence.) Lord Justice-General Inglis described the form of penetration for incest as being 'precisely part of the female body other than her vagina, does not amount to sexual intercourse and cannot therefore be incest. (Though it may amount to some other common law crime of incest.) This avoids any argument that there may still exist other common law crimes that could be charged if the conditions for the statutory crime of incest are not satisfied.)

The forbiddeed degrees of marriage

The degrees of relationship within which people cannot contract a valid marriage are, in relation to consanguinity and adoption, the same as those described above for the purposes of the crime of incest. This is laid down by the Marriage (Scotland) Act 1977 (Section 2, Sch 1), as amended by the Marriage (Prohibited Degrees of Relationship) Act 1986. In addition, that statute also provides that those in a relationship of affinity may not marry (though sexual intercourse between affines is no crime).

A relationship of affinity is one created through marriage, and curiously the law assumes that affinity survives the marriage which created it, whether that marriage ends by death or by divorce. Affinity was originally brought into the forbidden degrees, for the purposes of both incest and marriage, on the theory
the other affinitive relationships, that is the step-relationships, marriage is permitted provided (1) that both parties are over twenty-one years of age, and (2) that the younger party has not at any time before the age of eighteen been treated by the other party as a child of the family, both having lived in the same household. The design of this provision is to ensure that marriage between affines can take place only when the parties have never previously assumed the role of parent or child in the same household. The design of this provision is to ensure that marriage between affines can take place only when the parties have never previously assumed the role of parent or child in the same household.

Justifying the rules

Though the aims of the respective legislation are different and the rules concerning incest and the forbidden degrees of marriage are different too, the justification for each tends to be the same. As we shall see, however, the justification is also equally weak in relation to both sets of rules.

There is no doubt that incest is a taboo, and that marriage between relatives creates a certain negative response, even a repugnance. Yet general repugnance is nowhere near sufficient to justify a criminal prohibition, as was recognised with the decriminalisation of (some) homosexual acts. Something more is required than a mere gut reaction.

The most common argument raised in favour of both criminalising incest and prohibiting marriage -- though it is in fact seldom mentioned in the cases -- is the fear that such relationships, if confucian, could result in offspring who suffer from genetically transmitted disabilities. The scientific evidence in support of this claim suggests, at most, that there is an increase in risk. (See Morton, 'Empirical Risks in Consanguineous Marriages' (1958) 10 Am J Hum Gen 344; Adams and Neel, 'Childhood of Incest' (1967) 74 Pediatrics 151.) The Act of Prohibiting Marriage in the 1976 Act, ¶32(1), makes it a defence to the crime of incest that 'babies born from IVF have sometimes been found to have a lower birth weight rate, five times the spina bifida rate, and four times the perinatal death rate'. (HCL, Vol. 1, col. 106.) If this is true then the risk to a child of incest is very much less: see authorities cited above.

The basis of the fear is by no means clear. Is the prohibition designed to protect the genetic purity of the race (ie, is the policy one of protecting society)? If so, the fear is unrealistic, for it would take many generations of inbreeding (which are highly unlikely to occur) before any significant effect on the population was noticed. And in any case there is strong authority in other areas of the law to suggest that personal liberties are not to be interfered with merely for 'eugenic' reasons. (See Re B (A Minor) (Warship: Sterilisation) [1987] 2 WLR 1213 in which it was held by a unanimous House of Lords that eugenics did not justify the non-consensual sterilisation of a congenitally mentally disabled woman, and that the justification for such an act could be found only in the woman's own interests.) If the fear is not for the genetic harm to society, might it be based on the genetic harm to the individual or the family (ie, is the policy one of protecting individuals)? So the fear may well be anachronistic but the prohibition hardly addresses it. The crime of incest prohibits the act of penile penetration, not the act of fecundation. It is neither incest nor any other crime for a woman to inseminate herself artificially with the semen of her brother or her father or her son. (Artificial insemination does not amount to adultery, because adultery requires penile penetration: Maclean v Maclean 1958 SC 195; and since incest requires penile penetration, too artificial insemination cannot be incest.) If incest and the laws of marriage were truly designed to prevent the birth of genetically inbred children it would achieve that purpose far better by prohibiting genetic inbreeding rather than the other means of marriage and incest and the laws of marriage and incest.

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affinity contains exceptions where both parties are over twenty-one, unless (an exception to the exception) the younger was treated as a child of the family by the elder. A statute that prohibited sexual activity between a person who is treated as a parent in that family would achieve the purpose of avoiding disruption of the family circle, and would not suffer the disadvantage of also prohibiting relationships where no real danger of disruption exists (e.g., the forty-year-old bachelor having sexual intercourse with, or even wishing to marry, his forty-five-year-old spinster sister).

Nor is the risk of disruption of families really that great. Family roles will of course be altered by developing and changing sexual relations and marital desires. But to this fear there are two counterpoints. First, if the fear is realistic, it is surprising that the law does not protect the individual from all the other risks that sex and marriage give rise to. Freedom to marry is freedom to make one’s own mistakes. It is freedom to individuals to weigh up the risks themselves and to decide themselves whether to take the risks (as indeed is recognised by the law itself in permitting exceptions to the prohibitions). Secondly, if the law really does want to prevent family roles being altered, it certainly does not do so in a watertight fashion. It allows divorce, which alters roles. More particularly it allows adoptive brothers and sisters to marry and have sexual relations, as well as persons and their ex-spouse’s siblings or aunts or uncles, or nieces or nephews. And it has always allowed cousins to marry and have sex.

A different but related argument is that the prohibition on marriage between affines protects a marriage from sexual competition between the spouse and his or her relatives. In today’s society, when extended families seldom live in the proximity they did in the past, this argument has lost much of its force. And indeed one wonders if it ever had much force. A prohibition on marriage may well inhibit thoughts of marriage, but, given that marriage is by no means a prerequisite for sexual intercourse for the vast majority of the population in Scotland today, it is unlikely to inhibit the development of sexual desire. The present writer is highly doubtful as to the efficacy of a prohibition on marriage in dampering sexual ardour.

Is there any threat to society in allowing affinitive marriages? The religious argument based on the sanctity of the two families being united lost its validity in law when the affinitive relationships were taken out of the scope of the law of incest. (The legislative history of the Marriage (Prohibited Degrees of Relationship) Act 1986 makes it plain that there was strong support for abolishing the prohibition on affinitive marriages completely, but that this was prevented by the (English, of necessity) Lords Spiritual in the House of Lords: see Nichols, op cit, n 24.) The idea that a marriage brings together two families is of course very sweet, but it is a social idea to which the law pays no heed and confers no consequence. (Affines have no entitlement, for example, to claim rights in succession or to claim damages for negligently caused death.) It might be pointed out that the number of individual wishing to marry relatives or ex-relatives is likely to be tiny. Society will continue to exact on individuals a view of what ‘families’ are all about, and incidences of affinitive marriages are unlikely to disrupt that view. Divorce is permitted even though it is highly disruptive of families, yet the family survives, as does society. Indeed the family, and society, have survived the vast increase since the Second World War in relationships of cohabitation. If there were any threat to society from affinitive marriages, would there not also be a threat from affinitive cohabitation? But the law is completely indifferent to that possibility. A man may live with and have sex with his father’s ex-wife (not being his own mother), even if he is only sixteen. As a means of social engineering, therefore, a mere prohibition on marriage is unlikely to be effective. For persons choosing to spend their lives together, it is almost punitive without any crime.

Conclusion

Article 12 of the European Convention on Human Rights guarantees men and women of marriageable age the right to marry and to found a family, according to the national laws governing the exercise of that right. Article 8 contains an unqualified recognition of the right to respect for private and family life, which includes consensual sexual relations. (See Dudgeon v UK (1981) 4 EHRR 149, which decided that a law criminalising homosexual acts between consenting adults in private was an unjustified interference with the applicant’s right to respect for his private life.) The law in Scotland relating to incest and the forbidden degrees of marriage does not consist with these fundamental freedoms, because the reasons given for criminalising a particular sexual act between persons closely related to each other, and for prohibiting marriage within certain degrees of pre-existing or former relationships, do not stand up to rational analysis. The rules that are applied are not applied consistently, and any stated policies are undermined by other legal provisions.

Freedom is about being free to make one’s own mistakes and take one’s own risks. Freedom to marry and to enter into sexual relationships gives one the freedom to take these risks. These freedoms, ostensibly guaranteed by the European Convention on Human Rights, do not exist in Scotland so long as Scots law contains prohibitions that cannot be justified by any realistic policy. It is submitted that the laws prohibiting incest and forbidding relatives from marrying serve no useful purpose in a modern society, and that the rules ought to be scrapped forthwith