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Does the Prohibition of Incest Excessively Restrict Human Sexual Freedom?***

1. PURPOSE OF THE STUDY

This paper aims at answering a question if the criminal law prohibition of incest excessively restricts human sexual freedom.

Considerations of this research will refer to the Polish legislation and, in more precise terms, to Article 201 of the Polish Penal Code¹, pursuant to which: ‘Whoever commits the act of sexual intercourse with ascendants, descendants, adopted persons, adopters, brothers or sisters, shall be subject to a penalty of imprisonment of 3 months up to 5 years’ (and views presented in the Polish doctrine of criminal law and decisions taken by Polish courts, which are examined in light of this provision). As stipulated in the said regulation, the prohibition of incest will be analysed with reference to requirements set forth in Article 31(3) of the Constitution of the Republic of Poland², in which a rational action of public authorities is stipulated³.

It is clear that the analysis of Article 201 of PC (concerning the prohibition of incest) carried out with reference to Article 31(3) of the Constitution of RP will not make it possible to unambiguously determine whether the criminalisation of incest is a fully rational solution or not. After all, it should be underlined that the principle of proportionality (*sensu largo*) stipulated in Article 31 of the

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¹ The Act of 6 June 1997 – the Penal Code (consolidated text Polish journal of laws Dz.U. 2018, item 1600, as amended, ‘PC’).

² The Constitution of the Republic of Poland of 2 April 1997 (Dz.U. No. 78, item 483, as amended, ‘Constitution of RP’).

³ Obviously, this kind of an operation should not be performed *in abstracto*, but with respect to a given factual situation, or rather to a certain kind of factual situations, to which the norm of Article 201 PC applies (see K. Wojtyczek, *Zasada proporcjonalności jako granica prawa karnania*, *Czasopismo Prawa Karnego i Nauk Penalnych* 2(1999), 42). However, the author of this study has taken an attempt to carry out the set task. It should be noted though that considered will be only an issue of punishability of voluntary incestuous relationships between adults. There are two reasons why this type of a limitation seems to be justified. Firstly, it is only in this scope that Article 201 of PC is not a repetition of other provisions (see K. Banasik, *Karalność kazirodztwa jako naruszenie wolności seksualnej* [in:] *Konteksty prawa i praw człowieka*, Z.M. Dymińska (ed.), Kraków, 2012, 42; J. Waryłewski, *Zakaz kazirodztwa w kodeksie karnym oraz w ujęciu prawnoporównawczym*, *Przeгляд Sądowy* 5(2001), 96). Secondly, it is the criminalisation of these exact types of behaviour that arouses most controversy in the subject literature.

Constitution of RP allows one to question those legal regulations which trespass a certain degree of non-rationality (which excessively constrain human rights and freedoms)⁴. The mentioned analysis will hence form an essential argument in the discussion on the need (or its lack) for the forthcoming decriminalisation of the unlawful act concerned.

2. INTRODUCTION

Let it be reminded that pursuant to Article 201 of PC those shall be punished who commit the act of sexual intercourse with ascendants, descendants, adopted persons, adopters, brothers or sisters.

Already a superficial analysis of the said provision allows one to state that the legislator used it to restrict a possibility to freely choose a sexual partner and, what follows, has interfered with human sexual freedom. It is clear that this freedom forms one of the elements of the individual's private life and is not protected as such (in Poland it unequivocally results from Article 47 of the Constitution of RP⁵). Notwithstanding the above, it does not mean it is of an absolute character⁶. Quite contrary, exercising this freedom may be restricted, but two conditions have to be met in this regard in Poland, which are set forth in Article 31(1) of the Constitution of RP.

3. FORMAL PREMISE

Pursuant to Article 31(3) of the Constitution of RP, a basic requirement for introducing restrictions on people with regard to exercising rights and freedoms they are entitled to is to establish their statutory force in a legal act (a formal premise)⁷. This gives rise to two obligations: first, to construct a restriction in a statutory law; secondly, to introduce the restriction in such a way as to meet a demand for completeness of a statutory provision⁸. The prohibition of incest stipulated in Article

⁴ See K. Wojtyczek, *ibid.*, 45.

⁵ Article 47 of the Constitution of RP provides that every person is entitled to the protection of a private life, family life, honour and a good name as well as to decide about their personal life. This provision hence acknowledges the human right to privacy. It is extremely difficult to define 'privacy'. It is almost impossible to list all its elements separately and precisely. Therefore, the definitions created so far focus on indicating those areas that should be protected by establishing the right to privacy or actions which infringe on this right (see M. Safjan, *Prawo do ochrony życia prywatnego* [in:] *Podstawowe prawa jednostki i ich ochrona sądowa*, L. Wiśniewski (ed.), Warszawa, 1997, 127–128; D. Ostrowska, *Prawo do prywatności* [in:] J. Hołda, Z. Hołda, D. Ostrowska, J.A. Rybczyńska, *Prawa człowieka. Zarys wykładu*, Kraków, 2004, 136). 'The right to privacy is a right to living in a manner consistent with one's wish. It is connected with the freedom to act and direct one's conduct in a manner an individual deems to be right with regard to own capabilities. Such wide presentation of privacy leaves space for us taking decisions concerning ourselves, without engagement of any third parties. Privacy understood in this way encompasses: the freedom of speech and religion; intimacy of a personal life; making choices regarding own life and health; information concerning an individual; freedoms which, in order to be exercised, require free decision making' (A. Breczko, *Podmiotowość prawna człowieka w warunkach postępu biotechnomedycznego*, Białystok, 2011, 172).

⁶ See L. Garlicki, *Przesłanki ograniczania konstytucyjnych praw i wolności (na tle orzecznictwa Trybunału Konstytucyjnego)*, Państwo i Prawo 10(2001), 6–8.

⁷ It seems that the meaning of this requirement is obvious. It suffices to demonstrate that it guarantees the parliament is engaged in the shaping of an individual's legal situation and, what follows, ensures that the decision-making process is open, no hasty and unwise decisions are made, and, what is more, makes it possible to control the government in terms of its law-shaping activity. L. Garlicki, *ibid.*, 10).

⁸ See J. Zakolska, *Zasada proporcjonalności w orzecznictwie Trybunału Konstytucyjnego*, Warszawa, 2008, 118.

201 of PC undoubtedly fulfils both these obligations; indeed, the Penal Code is a statutory law (and of major importance to the Polish criminal law) and one can explain by interpreting Article 201 of PC all key elements of the prohibition of incest (a party to the unlawful act, objective side of the unlawful act, subjective side of the unlawful act, subject of protection). There can, therefore, be a smooth shift now to the analysis of the prohibition in question when considering subsequent premises resulting from Article 31 of the Constitution of RP.

4. THE SUBJECT OF PROTECTION

The Constitution of RP allows the restriction of human rights and freedoms only when it is necessary for the state security, public order, environmental conservation, public health and morality, or rights and freedom of other persons. In other words, interference with an individual's rights and freedoms is only possible when it is based on a paramount public interest. It is hence essential to identify objectives which the legislator considered upon establishing the prohibition of incest between members of immediate family.

The foundations of a draft Penal Code of 1997 do not mention any *ratio legis* of Article 201 of PC⁹; whereas the doctrine has seen the bipolarisation of stances in this matter. On the one hand, some authors point that Article 201 of PC does not protect anything in reality, and even if it were to safeguard anything, then nothing else than morals understood as the compatibility of human behaviour with socially accepted moral values¹⁰. On the other hand, there are those who find arguments for the criminalisation of incest in other aspects, in particular, related to its eugenic character or the protection of families.

Adopting the first mentioned stance, i.e. in line with which Article 201 of PC safeguards morals at most, which is understood as the compatibility of human behaviour with socially accepted values, it could be stated that the prohibition of incest in the criminal law interferes with human freedom too intensively. To exemplify, K. Banasik indicates that: 'Sexual freedom is closer to humans than morals, even more than morals being a set of norms which an individual identifies with. It seems justifiable to conclude that sexual freedom as a legal good which is more individualised and personalised comes first before abstract morality. The above analysis corroborates (...) a thesis that the punishability of incest is a sign of unfair infringement on human freedom by public authorities'¹¹. Therefore, M. Budyn-Kulik is right in pinpointing that this sort of view would be justified only in a society in which moral principles are clearly set and reprehensibility of incest does not raise any doubt. Only then would it be guaranteed that the criminal law would not have to safeguard against breaking

⁹ See *Kodeks karny, kodeks postępowania karnego, kodeks karny wykonawczy. Nowe kodeksy karne – z 1997 r. z uzasadnieniami*, Warszawa, 1997, 196–197.

¹⁰ See K. Banasik, *Karalność kazirodztwa...*, 40–41; K. Banasik, *W kwestii penalizacji kazirodztwa*, *Prokuratura i Prawo* 4(2011), 68; M. Filar, *Przestępstwa seksualne w nowym kodeksie karnym* [in:] *Nowa kodyfikacja karna. Kodeks karny. Krótkie komentarze*, Warszawa, 1997, No. 2, 45; L. Gardocki, *Prawo karne*, Warszawa, 2013, 276–277; O. Górniok, *Sporne problemy przestępstwa gwałtu zbiorowego*, *Nowe Prawo* 10(1972), 181; M. Surkont, *Prawo karne. Podręcznik dla studentów administracji*, Sopot, 1998, 173; J. Warylewski, *Zakaz kazirodztwa...*, 80.

¹¹ K. Banasik, *Karalność kazirodztwa...*, 41–42.

such a moral norm¹². ‘However, (these days – KB’s note) we witness a situation when private morality is stratifying more and more (norms and values considered by an individual as important and thus observed) against common morality (“officially” accepted values and norms). (...) Due to this reason, the criminal law is starting to aim at “ordering”. The legislator clearly and explicitly informs that a given type of behaviour should be condemned and punished. That is why one cannot agree with a viewpoint that “we can surely discard ‘morals’ from the criminal law”¹³.

Notwithstanding the above, it is worth considering whether there are other reasons than those founded on morals for introducing Article 201 to the Penal Code.

Potential grounds for the criminalisation of incest should obviously encompass an increased risk of health abnormalities in offspring born out of incestuous relationships¹⁴. While it is true that a number of authors undermine this concept, citing – to substantiate their thesis – results of relevant studies¹⁵, as much research, also contemporary genetic engineers, make this concept probable to a significant degree¹⁶. Therefore, as I think, a statement of J. Giza still holds true that at a current phase of research it should be deemed premature to refuse a view that the protection of a good in a form of freedom against eugenic threats is one of the reasons for prohibiting incest¹⁷.

Antagonists of the eugenic argument try also to depreciate it by contending that should the legislator want to safeguard the society against any health irregularities, it would also forbid other relationships which could lead to offspring of a higher risk of disability, for instance, relationships of mentally disabled people or those affected by genetic defects. This argument cannot be considered valid whatsoever. Irrespective of the legislator’s will, it would be certainly inadmissible to introduce the mentioned prohibition. And a reason for this is the fact that we would then speak about the said persons being completely deprived of their sexual freedom and not only about a narrow restriction of this freedom as it happens in the case of the prohibition of incest. Undoubtedly, this kind of a solution would be unconstitutional (since it would be too far-reaching)¹⁸.

¹² See M. Budyn-Kulik, *Prawnokarna problematyka kazirodztwa w ujęciu paternalistycznym*, *Wojskowy Przegląd Prawniczy* 1–2(2012), 70.

¹³ *Ibid.*

¹⁴ See P. Daniluk, C. Nowak, *Kazirodztwo jako problem karnoprawny (dwugłos)*, *Archiwum Kryminologii* 2007–2008, Vol. XXIX–XXX, 478; J. Giza, *Zagadnienie kazirodztwa w nowym kodeksie karnym*, *Problemy Rodziny* 4(1970), 45; J. Leszczyński, *O projektach reformy przepisów dotyczących przestępstw seksualnych*, *Państwo i Prawo* 2(1992), 83–84.

¹⁵ In literature most often cited is the research of B. Ślusarczyk, who examined 310 cases of incest which were the subject of criminal proceedings between 1970–1975 (see B. Ślusarczyk, *Z problematyki kazirodztwa (charakterystyka rodzin, w których ujawniono fakty współżycia kazirodczego*, *Studia Kryminologiczne, Kryminalistyczne i Penitencjarne* 1977, Vol. 6, 136 et seq.). It should be hence emphasised that many authors questioning the concept saying that freedom from eugenic threats forms the subject of protection under Article 201 PC limits itself solely to a statement that the ‘thesis about deficient offspring born out of incestuous relationships has not been corroborated’ (see K. Banasik, *Karalność kazirodztwa...*, 40; L. Gardocki, *Prawo...*, 264; N. Kłaczyńska, *Komentarz do art. 201 Kodeksu karnego* [in:] J. Giezek (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warszawa, 2014, 550–551; A. Marek, *Komentarz do art. 201 Kodeksu karnego* [in:] A. Marek, *Kodeks karny. Komentarz*, Warszawa, 2005, 460; M. Rodzyńkiewicz [in:] A. Zoll (ed.), *Kodeks karny. Część szczególna. Tom II. Komentarz do art. 117–277 k.k.*, Kraków, 2006, 659; A. Sakowicz, *Prawokarne gwarancje prywatności*, Kraków, 2006, 207).

¹⁶ See P. Daniluk, C. Nowak, *Kazirodztwo jako problem...*, 477–478; J. Baranowski, *Ratio legis prawokarnego zakazu kazirodztwa*, *Przegląd Prawa Karnego* 3(1990), 64–65. See also E. Raczek, *Kazirodztwo – ujęcie sądowo-genetyczne*, *Archiwum Medycyny Sądowej i Kryminologii* 1(2012), Vol. LXII, 57.

¹⁷ See J. Giza, *Zagadnienie kazirodztwa...*, 45.

¹⁸ See P. Daniluk, C. Nowak, *Kazirodztwo jako problem...*, 478–479.

The argument in question will not cease to be pertinent even if a circumstance is considered that the norm warranted under Article 201 of PC does not only prohibit heterosexual relationships between persons related by biological kinship, but also, for example, homosexual relationships between adopted persons and adopters. This circumstance becomes hence completely irrelevant if one takes account of a potential subsequent reason for the criminalisation of incest, which is intended to safeguard the family as a fundamental unit of society¹⁹.

Obviously, the argument that the family forms the subject of protection under Article 201 of PC is virtually disregarded in literature with a statement that it is not sexual intercourse between members of an immediate family that results in problems, but rather difficulties that already exist in the family lead to incest²⁰. Nonetheless, it should be noted that, although one must agree with this kind of thesis, it is beyond any doubt that the phenomenon of incest only deepens the breakdown of the family that has already begun, leading to weakening or even cutting fundamental family bonds and should be opposed as such²¹.

Another view is also expressed against the argument being discussed that (Article 201 of PC – KB's note) does not safeguard (...) the correct, whatever is meant by that, functioning of families as it does not forbid sexual drive in family arrangements to be stimulated or satisfied, let it suffice that partners refrain from sexual intercourses.²² At first glance, this objection seems to be valid. After all, Article 201 of PC prohibits ordinary heterosexual copulation (sexual intercourse), as well as an oral and anal intercourse (hetero- and homosexual), yet it does not forbid 'other sexual acts'²³. However, this circumstance could be justified – which was duly noted by V. Konarska-Wrżosek – by the legislator's attempting to classify solely the most harmful part of incestuous behaviours as the offence specified in Article 201 of PC²⁴.

¹⁹ A question can be asked: what family is it about? Is it about a family understood as a specific functional unit whose functioning has been disturbed by the phenomenon of incest? Or is it about a family treated as an abstract symbol and value (family-based structure of society)? Or perhaps what is meant here is connected with the concept of family elements of moral doctrines which form part of various ideologies? (see J. Baranowski, *Ratio legis...*, 67). Well, one can risk a statement that each above interpretation is appropriate. Not only does Article 201 of PC safeguard (or attempt to safeguard) a specific social sub-system against incest occurring within its framework, it also sanctions the approved structure of society.

²⁰ See K. Banasik, *Karalność kazirodztwa...*, 42; J. Warylewski, *Zakaz kazirodztwa...*, 82.

²¹ See P. Daniluk, C. Nowak, *Kazirodztwo jako problem...*, 479. It is worth quoting J. Baranowski's view which, in my opinion, is correct here: 'According to a new thesis, which gathers more and more supporters, incest is not a cause but consequence of other factors that disturb a family life. However, this statement seems to be (...) not fully compelling as it is based on empirical research of families in which incest was prosecuted under criminal law. It means that the choice of population under examination was determined by selective mechanisms of the system of justice. As found in the latest research, incestuous relationships not only take place in pathological families of a lower social status, but also in middle-class families which function normally only on the surface. In his new study on this subject, M. Hirsh, for instance, defines incest as an act of which essence does not lie only in satisfying sexual drive, but far more as a perpetrator's attempt to seek compensation for cold and frustrating relationships in the family they come from. The above doubt does not aim at undermining the thesis about the destructive influence incest has on a given family. Nonetheless, constructing simple models of causes and consequences seems to be unjustified' (J. Baranowski, *Ratio legis...*, 67–68).

²² J. Warylewski, *Zakaz kazirodztwa...*, 80.

²³ See A. Marek, *Komentarz...* [in:] *Kodeks karny...*, 460.

²⁴ As V. Konarska-Wrżosek points: 'Every incestuous act breaches moral norms which a modern society observes. Despite the foregoing, not all sexual acts taken in incestuous arrangements are equally immoral and harmful to intra-family relationships and when taking account of possibilities of a family continuing to function in a way allowing the performance of its primary functions. From this point of view, not of any importance is a fact in what personal arrangement between closest members of family and at what age relationships of sexual character occur. That is why not all sexual acts but only their most harmful part has fallen within the

Apart from the above points, there are other arguments raised in literature, which could justify the criminalisation of incest. Among other things, they refer to: (1) the need to develop relationships from outside families, to eradicate families' tendencies to isolate themselves, to broaden families' socialising opportunities, to strengthen parental authority through counteracting the establishment of links of sexual character²⁵; (2) the protection of the society against types of behaviour viewed by its vast majority as unwanted²⁶; (3) the protection of underage siblings and offspring of partners living in an incestuous relationship against possible registration of such relationships, which could negatively affect the shaping of models of inter-human relationships²⁷; and (4) the prevention of offspring being born to partners living in incestuous relationships due to a fact that such children are stigmatised from the beginning of their life, they do not live in normal family environments, they are often socially isolated, which may result in socially and psychologically abnormal development, lack of a normal and happy life and difficulties in forming own successful relationships and families²⁸.

It is beyond any doubt that all the aforementioned goods (freedom from eugenic threats, correct functioning of the family, morals, etc.) are included in a set of values listed in Article 31(3) of the Constitution of RP. And so, the freedom from eugenic threats could be classified under the category of the protection of public health, the protection of family under the protection of public order, and morals, obviously and first of all, under public morality. After all and as K. Wojtyczek reasonably argues 'A very general and vague way of defining these premises (in Article 31(3) of the Constitution of RP – KB's note) does not constrain (...) in any significant way the legislator's freedom to act and, in practice, allows the protection of almost all constitutional values in the criminal law'²⁹. Therefore, a further analysis of incest can be now taken, based on Article 31(3) of the Constitution of RP. It should be emphasised though that establishing a link between the restriction of human freedom (or right) and the protection of one of values specified in the Constitution of RP is a crucial condition for recognising such a restriction as

scope of criminalisation as a type of the offence of incest' (V. Konarska-Wrzošek, *Przedmiot ochrony przy typie przestępstwa kazirodztwa* [in:] Ł. Pohl (ed.), *Aktualne problemy prawa karnego. Księga pamiątkowa z okazji Jubileuszu 70. urodzin Profesora Andrzeja J. Szwarca*, Poznań, 2009, 291).

²⁵ See M. Demczuk, *Kazirodztwo – zarys problematyki* [in:] G. Iniewicz, M. Mijas (eds.), *Seksualność człowieka. Wybrane zagadnienia*, Kraków, 2011, 146; J. Giza, *Zagadnienie kazirodztwa...*, 47; A. Podgórecki, *Patologia życia społecznego*, Warszawa, 1969, 253–254.

²⁶ See N. Kłaczyńska, *Komentarz...* [in:] *Kodeks karny...*, 551.

²⁷ N. Kłaczyńska, *ibid.*

²⁸ See V. Konarska-Wrzošek, *Przedmiot ochrony...*, 290; M. Rodzynkiewicz [in:] *Kodeks karny...*, 659. In addition, the protection of minors could form *ratio legis* of the criminalisation of incest. Such a belief follows from the fact that, in my opinion, Article 201 of PC could play, insofar as it does not already play a considerable role in detecting and eradicating sexual abuse in family structures (see P. Nalewajko, *Konstytucyjność prawno Karnego zakazu kazirodztwa – uwagi na gruncie postanowienia niemieckiego Trybunału Konstytucyjnego z dnia 26 lutego 2008 r.* [in:] N. Buchowska (et al.), *Prawo wobec wyzwań współczesności. T. 6. Materiały sesji naukowej (Poznań, 15.06.2009 r.)*, Poznań, 2010, 52). See also P. Kozłowska-Kalisz, *Racjonalizacja penalizacji kazirodztwa* [in:] *Kazirodztwo* [online], Warszawa, 2018–11–20, <https://sip.lex.pl/#/monograph/369392048/311775> (accessed on 11 December 2018); M. Piatek, *Kodeksowe ujęcie kazirodztwa – pozorny zakaz i pozorna ochrona* [in:] *Kazirodztwo* [online], Warszawa, 2018–11–20, <https://sip.lex.pl/#/monograph/369392048/311779> (accessed on 11 December 2018); J. Sobczak, *Bioetyka a kazirodztwo. W kwestii dobra chronionego w odniesieniu do przestępstwa kazirodztwa* [in:] *Kazirodztwo* [online], Warszawa, 2018–11–20, <https://sip.lex.pl/#/monograph/369392048/311802> (accessed on 11 December 2018).

²⁹ See K. Wojtyczek, *Zasada proporcjonalności...*, 41.

admissible, but not the only one. This restriction has to also compensate for the principle of proportionality (Article 31(3) sentence 1 of the Constitution of RP) and, what is more, it cannot infringe on the core of individual rights or freedoms (Article 31(3) sentence 1 of the Constitution of RP)³⁰.

5. PRINCIPLE OF USEFULNESS AND PRINCIPLE OF NECESSITY

The principle of proportionality boils down to – in a simplified way, obviously – a statement that the legislator is forbidden from excessive interference with an individual's freedoms and rights. To establish whether in a given case such excessive interference does not take place, it is essential to answer three questions: (1) can the implemented regulation bring about the results it was designed to produce (the principle of usefulness); (2) is the regulation necessary to safeguard public interest which it is connected with (the principle of necessity); (3) are effects of the implemented regulation proportional to the burden it imposes on citizens (the principle of proportionality *sensu stricto*)³¹. A requisite for examining whether the content of Article 201 of PC is consistent with the aforementioned principles is to consider the whole content of norms expressed within the framework of this provision. It is hence necessary to analyse the correctness of introducing punishability, the accuracy of formulating the description of this kind of an unlawful act and the severity of a penal sanction that has been provided for³².

Considerations should be started from reminding that the protection of legal goods has to consist in, on the one hand, deterring potential offenders from infringing on these goods (general prevention) as well as strengthening a feeling in the society that social norms which do not permit these goods to be violated are binding (general prevention) and, on the other, securing the society against a given offender re-violating a given good (individual prevention)³³. So, when it comes to general prevention, then in the case of incest, criminalisation seems to be the only useful and effective at the same time solution. A reason behind this conclusion is that literature has not demonstrated any other methods yet which could, in a comparable way, secure the goods specified in Article 201 of PC against violation and confirm that social norms forbidding such violation are binding. The latter aspect becomes of considerable importance now since, as it has been already mentioned, there is no contemporary message as to the moral assessment of behaviour such as incest.

As far as individual prevention is concerned, it seems not to be completely proven that criminalisation is justifiable. There are valid arguments put forward that support given to perpetrators by psychologists or sex therapists can be of equal

³⁰ L. Garlicki, *Przesłanki ograniczania...*, 18.

³¹ See the judgment of the Constitutional Tribunal of 26 April 1995, K 11/94, LEX No. 25538. Let's add that in Article 3(3) of the Constitution of RP the issue of 'necessity to restrict' is referred to the concept of 'democratic state'. What follows, if a question is raised whether a given restriction is necessary, useful and proportional, then a requisite for answering it is to take account of legal consequences of standards of democracy (see J. Zakolska, *Zasada proporcjonalności...*, 125; L. Garlicki, *Przesłanki ograniczenia...*, 21).

³² See M. Królikowski, *Dwa paradygmaty zasady proporcjonalności w prawie karnym* [in:] T. Dukiet-Nagórska (ed.), *Zasada proporcjonalności w prawie karnym*, Warszawa, 2010, 41.

³³ See Ł. Pohl, *Prawo karne. Wykład części ogólnej*, Warszawa, 2012, 472–474. See also K. Wojtyczek, *Zasada proporcjonalności...*, 35.

effectiveness. It is conceivable that this type of counselling could contribute even more to the perpetrator's understanding of family relationships in an appropriate way³⁴. A problem is that the case of incest in the family has to be detected in the first place and it seems that in this scope Article 201 of PC plays a significant role.

As has been already stated, the assessment of the way the unlawful act is described when taking account of the declared subject of protection is also of vital importance. 'A situation may occur though when the very "intent" (purpose) of the legislator was legitimate constitutionally but certain solutions fell outside the scope of such legitimacy³⁵'. It seems that with regard to Article 201 of PC we do not deal with this sort of a situation as this provision defines a punishable behaviour so as to allow the effective realisation of set objectives and in the most narrow manner at the same time³⁶. Another thing is that due to its synthetic nature, Article 201 of PC loses a considerable portion of its precision, which is reflected in the earlier doubts whether it is the legislator's intent to protect the family and freedom against eugenic threats or not.

What raises serious doubts though is answering the question if the penalty set out in Article 201 of PC is not too harsh. In other words, there is uncertainty if less severe penalties would not lead to achieving the same (or even better) results³⁷. A remark should be made that sexual intercourse with members of the family is subject to a penalty which is, *in abstracto*, the most severe out of all types of punishment provided for in the Penal Code, i.e. imprisonment of which period can be as long as from 3 months to up to 5 years. And so what we deal here with is the same punitive sanction as for the unintentional cause of human death.

Therefore, in the author's opinion, what needs to be thought over is the lowering of the upper threshold of the statutory penalty to a period of 3 years' imprisonment (which was once proposed by J. Warylewski). Most importantly, Article 201 of PC does not significantly strengthen the protection of the society against rape offenders or those guilty of sexual intercourse with a minor under 15 years of age; there are other provisions that adequately safeguard against this type of offences, that is Article 197 of PC³⁸ and Article 200 § 1 of PC³⁹. When it comes to voluntary

³⁴ See K. Banasik, *W kwestii...*, 69.

³⁵ The judgment of the Constitutional Tribunal of 30 October 2006, P 10/06, LEX No. 210825.

³⁶ After all, the norm sanctioned in Article 201 of PC prohibits its addressees exclusively from sexual intercourse with certain persons; it does not encompass other sexual acts. In addition, it should be noted that possible sexual partners of an individual have been limited in this provision to merely a few explicitly specified persons.

³⁷ It should be stressed here that: 'The assessment of how severe a penalty is cannot be narrowed down to its types and borders but it should also take account of principles of the infliction and execution of the penalty. When considering possibilities of setting less strict penalties, not only consequences of deliberated statutory solutions for the prevention of a given harm should be taken into account, but also further repercussions of a criminal law regulation, the stabilisation of a given social norm in particular' (K. Wojtyczek, *Zasada proporcjonalności...*, 38).

³⁸ Pursuant to Article 197 of PC: '§ 1 Whoever induces another person to sexual intercourse by violence, unlawful threat or deceit shall be subject to a penalty of imprisonment of 2 to 12 years. § 2 If the perpetrator, in a manner specified in § 1, induces another person to submit to another sexual act or perform the same, they shall be subject to a penalty of imprisonment of 6 months to 8 years. § 3 If the perpetrator commits the offence of rape: (1) with another person; (2) on a minor of under 15 years of age; (3) on an ascendant, a descendant, an adopted person, an adopter, a brother or sister, they shall be subject to a penalty of imprisonment for a period of at least 3 years. § 4 If the perpetrator of the act specified in § 1–3 acts with extreme cruelty, they shall be subject to a penalty of imprisonment for a period of at least 5 years'.

³⁹ Pursuant to Article 200 § 1 of PC: 'Whoever engages in sexual intercourse with a minor of under 15 years of age or commits another sexual act on the said person or induces the said person to submit to the said acts or to perform the same, they shall be subject to a penalty of imprisonment of 2 to 12 years'.

intercourse between adult partners, this penalty would be sufficient in terms of criminal and political aspects (which could not be said about a fine and penalty of restricting one's liberty; stipulating that incest offenders would be subject to the specified penalties would not secure adequately, as it seems, protected goods, nor would it ensure the stabilisation of the social norm in question)⁴⁰.

It is worth stressing here that due to a fact that the punishment has this and not the other shape Article 201 of PC may provide for: (1) ruling – instead of imprisonment as stipulated in this provision – fine or restriction of liberty (Article 37a of PC); (2) ruling – instead of imprisonment as stipulated in this provision – simultaneous imprisonment for not longer than 3 months and restriction of liberty for up to 2 years fine (Article 37b of PC); (3) conditional discontinuation of proceedings (Article 66 of PC); and 4) conditional suspension of the execution of the adjudicated penalty (Article 69 of PC). Ultimately, one may risk stating (in the context of the last option) that in the case of voluntary sexual intercourse of adults the penalties inflicted will not exceed, and if they do, then not too often, one year of imprisonment⁴¹.

It can be argued of course that 'Punishing sexual partners under Article 201 of PC (by imprisonment, in particular – KB's note) will not only fail to defend the family unit, but it will cause its ultimate breakdown. Such partners need expert advice'⁴². A problem is that the main purpose of criminal law is not to punish perpetrators but counteracting the violation of certain goods (in the case of offence referred to in Article 201 of PC, it is, *inter alia*, preventing the infringement of the family well-being) and in this context the criminalisation of incest appears to be essential. In addition, where it is truly possible to 'defend the family unit', the court will be able to – as has been already mentioned – exercise the competences conferred in the Penal Code under Articles 37a, 37b, 66 or 69.

Having regard to the above, it should be stated that Article 201 of PC does not contradict the principle of usefulness and principle of necessity. Nevertheless, it should be examined if the restriction of human liberty specified under this provision does not breach the principle of proportionality *sensu stricto*.

6. THE PRINCIPLE OF PROPORTIONALITY *SENSU STRICTO*

Behind the principle of proportionality *sensu stricto* is the observance of a proportion between all goods which a given interference refers to and those which it safeguards.

⁴⁰ See J. Warylewski, *Kazirodztwo (art. 201 KK)* [in:] J. Warylewski (ed.), *System prawa karnego. Vol. 10. Przepęstwa przeciwko dobrom indywidualnym*, Warszawa, 2012, 806.

⁴¹ M. Rodzyńkiewicz is right in indicating that: 'When imposing punishment for the offence of incest, the court should assess, in particular, criminological distinctiveness and degree of culpability which occurs between various cases of assigning liability for this crime – for instance, voluntary sexual intercourse between adult siblings and sexual intercourse between a father and teenage daughter. The correct adoption of directives of imposing punishment under Article 53 of PC (...) should lead here to significant diversification of penalties' (M. Rodzyńkiewicz [in:] *Kodeks karny...*, 663).

⁴² See K. Banasik, *W kwestii...*, 69. J. Baranowski contends that: 'interference (of the system of justice – KB's note) does not keep the family affected by incest safe but it destroys it. According to G. Strantenwerth, it entails adverse economic repercussions, the poisoning of personal relationships by family members testifying against one another, separation or divorce as well as discrimination of the environment' (J. Baranowski, *Ratio legis...*, 68). Unfortunately, such scenario cannot be excluded.

As regards the goods which the criminalisation of incest affects, they can surely include sexual freedom of an individual and its personal freedom due to the stipulated sanction of imprisonment. Whereas the protected ones are first and foremost freedom from eugenic threat, correct functioning of the family and morals. As K. Wojtyczek points: ‘The adoption of the principle of proportionality in the strict sense requires at all times “weighing goods” (...). Generally speaking, two elements should be reflected upon – the weight of colliding values and the degree of their realisation. The more important the value which the interference effects and the higher the degree of violation, the more precious the value which this interference is to safeguard must be and the higher the degree at which the second one is achieved. A fact that a given value is placed higher in an abstract hierarchy of values than the other one means that in some situations it cannot be sacrificed – to a certain degree – to realise a value which is ranked lower in the hierarchy’⁴³.

Undoubtedly, sexual freedom belongs to a catalogue of fundamental rights and freedoms. In Poland, it is safeguarded by the so-called non-derogable rights, i.e. which must not be restricted even at times of martial law and emergency (Article 233(1) of the Constitution of RP)⁴⁴. Of major importance is also, quite obviously, personal freedom referred to in Article 41 of the Constitution of RP. What follows, interference with freedoms at issue should be always duly justified and not too intensive. As regards the prohibition of incest, the above premises have been fulfilled, as it seems though. Admittedly, interference with the human sexual freedom provided for in Article 201 of PC is not very intensive; the list of possible sexual partners of the individual has been limited by a mere few persons specified in the said provision. We can talk only about gross interference in the case of individual personal freedom since the sanction stipulated in Article 201 of PC is imprisonment of 3 months to 5 years. Nevertheless, it should be emphasised that a direct reason for this interference is a fact of committing the offence and sentencing. After all, it seems that when it comes to the voluntary sexual intercourse of adults, penalties inflicted by depriving liberty will not considerably reach the upper threshold of statutory punishment, and they will be sometimes conditionally suspended or replaced with a fine or penalty restricting liberty.

Furthermore, of utmost importance are goods for whose protection it was decided to introduce the prohibition of incest. As it seems, the weight of the good being the freedom from eugenic threat does not necessitate more substantial justification. And when it comes to the good in the form of the family functioning correctly, in the context of the Polish system of law attention should be drawn to Article 18 of the Constitution of RP, pursuant to which: ‘Marriage as the relationship between a woman and a man, family, maternity and parenthood shall be protected and safeguarded by the Republic of Poland’. The inclusion of this provision in Chapter 1 of the Constitution of RP (entitled ‘The Republic’) seems to demonstrate that the protection of family is treated as ‘one of the fundamental

⁴³ K. Wojtyczek, *Zasada proporcjonalności...*, 42.

⁴⁴ See the judgment of the Constitutional Tribunal of 30 October 2006, P 10/06.

principles constructing the state system by defining it as one of the central pillars on which the structure of the state law and system, as well as state apparatus, has been built⁴⁵.

It is also the good being morals that matter crucially. Particularly at times when – as has already been shown – we face the deepening stratification of private morality, that is norms and values considered by the individual as important and observed by it, from common morality understood as officially accepted norms and values. There is no clear message as to the moral evaluation of such behaviours, for instance, incest, which may turn out exceptionally dangerous to individuals with an undeveloped hierarchy of values (though not only for them)⁴⁶. By all means, the author of this study agrees that it is inadmissible to ‘force morality’, meaning the interference of law with the field of perfectionistic moral principles or morally controversial cases. However, it can be presumed that imposing legal sanctions for failure to observe the prohibition of sexual intercourse with immediate family members does not constitute such ‘forcing of morality’. It seems that this prohibition belongs to norms of fundamental nature and does not result only from emotions and prejudice, but also from potential negative consequences which incest may bring to the society (family in particular) and given individuals⁴⁷.

Even though we refuse the concept behind which the prohibition of incest falls within the so-called ethical minimum and assume that incest is a morally controversial case, then the legal prohibition of such behaviour will be still admissible. The reason behind this is that Poles seemingly have not formed a society yet whose members show a high degree of moral development and feeling of moral responsibility for own acts, and still to relatively wide extent expect the law to serve also an educational function⁴⁸. There are, therefore, ‘substantiated doubts concerning results (...) (of adopting in the practice of the Polish law – KB’s note) the concept of moral neutrality of law, which is reflected in specific statutory acts liberalising ethically and legally controversial cases’⁴⁹.

7. CONCLUSIONS

Having regard to the above, one can risk stating that by introducing the prohibition of incest the legislator has realised all colliding values in the highest possibly degree. On the one hand, the adequate protection of human rights and freedoms has been provided and, on the other hand, common goods of the society have been sufficiently safeguarded. In other words, there is the right proportion between the effect exerted by Article 201 of PC and burden imposed on the individual, which means the said provision is in line with the principle of proportionality *sensu*

⁴⁵ See the judgment of the Constitutional Tribunal of 30 October 2006, P 10/06. It is also Article 47 of the Constitution of RP that safeguards the family life and, as has been already indicated, the goods referred to in this provision are protected by non-derogable rights. Furthermore, it should be noted that pursuant to Article 71 of the Constitution of RP the state has to take account of the family well-being when constructing its social and economic policies.

⁴⁶ See M. Budyn-Kulik, *Prawnokarna problematyka...*, p. 70.

⁴⁷ See D. Bunikowski, *Porządek prawny a neutralność moralna prawa*, http://usfiles.us.szc.pl/pliki/plik_1160575750.doc (accessed on 1 September 2014), 28.

⁴⁸ See D. Bunikowski, *ibid.*, 35.

⁴⁹ *Ibid.*

stricto, and what follows, it fulfils all requirements stipulated in Article 31.3 of the Constitution of RP. In addition, the prohibition under Article 201 of PC does not breach the essence of rights and freedoms which it interferes with.

It can be argued as well that there is no absolute certainty as to the social harm of incest, the effectiveness of the prohibition specified in Article 201 of PC and the positive final balance. This argument will be probably accompanied by a demand to act in accordance with the principle of *in dubio pro libertate*, which says that ‘the burden of proof in respect of criminalisation falls on the legislator, and in case of any doubt, criminalisation should be abandoned’⁵⁰. It appears though that there are no reasons why the criminalisation of incest should be excluded only because not all doubts connected with Article 201 of PC can be resolved unambiguously. After all, the criminalisation of a given behaviour does not require its culpability but only (or perhaps as much as) demonstrating its probability, and such probability, in the author’s opinion, is what we deal with in the offence of incest⁵¹.

Nonetheless, we emphasise that the above conclusion does not imply yet that Article 201 of PC needs to be maintained in its present form.

Abstract

Konrad Burdziak, *Does the Prohibition of Incest Excessively Restrict Human Sexual Freedom?*

Pursuant to Article 201 of the Polish Penal Code (‘PC’) those shall be punished who commit the act of sexual intercourse with ascendants, descendants, adopted persons, adopters, brothers or sisters. As a result, by introducing the said provision, the Polish legislator has restrained individual sexual freedom, which is safeguarded in Article 47 of the Constitution of the Republic of Poland. Under the Polish Constitution, every human freedom can be obviously subject to restrictions; however, if this is the case, conditions laid down in Article 31(3) of the Constitution of RP have to be always observed. These requirements include: (1) the inclusion of a restriction in a statutory act; (2) possibility of establishing a constraint only if it is necessary for state security, public order, environmental conservation, public health and morality or rights and freedoms of other persons; (3) forbidding excessive interference with the individual freedom being limited (principle of proportionality); (4) prohibition of infringing the essence of this freedom.

*The in-depth analysis of the prohibition of incest carried out by the author of this study has shown that it was (and still is) public interest that is the premise for introducing Article 201 of the Penal Code. What is more, the said provision can bring about results which the legislator aimed at (principle of usefulness) and is essential to safeguard public interest it is connected with (principle of necessity). By introducing the prohibition of incest, the legislator also maintained the right proportion between the effect exerted by Article 201 of PC and burden imposed on the individual, which means the said provision is in line with the principle of proportionality *sensu stricto*, and what follows, it fulfils all requirements stipulated in Article 31(3) of the Constitution of RP. Furthermore, the prohibition under Article 201 of PC does not breach the essence of rights and freedoms which it interferes with. It can be argued as well that there is no absolute certainty as to the social harm of incest, effectiveness of the prohibition referred to in Article 201 of PC and positive final balance.*

⁵⁰ L. Gardocki, *Subsydiarność prawa karnego oraz in dubio pro libertate jako zasady kryminalizacji*, Państwo i Prawo 12(1989), 65.

⁵¹ See L. Gardocki, *ibid.*, 69.

This argument will probably entail a demand to act in accordance with the principle of in dubio pro libertate, i.e. to relinquish criminalisation. It appears though that there are no reasons why the criminalisation of incest should be excluded only because not all doubts connected with Article 201 of PC can be resolved unambiguously.

Keywords: incest, sexual freedom, Article 201 of the Polish Penal Code, Article 31(3) of the Constitution of the Republic of Poland

Streszczenie

Konrad Burdziak, Czy zakaz kazirodztwa w sposób nadmierny ogranicza wolność seksualną człowieka?

Zgodnie z art. 201 polskiego Kodeksu karnego (k.k.), podlega karze ten, kto dopuszcza się obcowania płciowego w stosunku do wstęp nego, zstęp nego, przysposobionego, przysposabiającego, brata lub siostry. Za pośrednictwem rzeczono go przepisu ustawodawca polski ograniczył zatem wolność seksualną jednostki chronioną przez art. 47 Konstytucji RP. Oczywiście w myśl polskiej konstytucji każda wolność człowieka może podlegać ograniczeniom; w takim przypadku zawsze jednak muszą zostać spełnione warunki określone w art. 31 ust. 3 Konstytucji RP. Do warunków tych zaliczamy: 1) wymóg ustanowienia ograniczenia w akcie prawnym rangi ustawowej; 2) możliwość ustanowienia ograniczenia tylko wówczas, gdy jest to konieczne dla bezpieczeństwa państwa, porządku publicznego, ochrony środowiska, zdrowia i moralności publicznej, albo wolności i praw innych osób; 3) zakaz nadmiernej ingerencji w ograniczaną wolność jednostki (zasada proporcjonalności); 4) zakaz naruszenia istoty tejże wolności.

Przeprowadzona przez autora niniejszej publikacji dogłębna analiza zakazu kazirodztwa wykazała przy tym, że za wprowadzeniem art. 201 do Kodeksu karnego przemawiał (i wciąż przemawia) istotny interes publiczny. Co więcej, przywołany przepis jest w stanie doprowadzić do zamierzonych przez ustawodawcę skutków (zasada przydatności) oraz jest niezbędny dla ochrony interesu publicznego, z którym jest powiązany (zasada konieczności). Wprowadzając zakaz kazirodztwa, ustawodawca zachował także odpowiednią proporcję pomiędzy efektem regulacji art. 201 k.k. a ciężarem nałożonym na jednostkę, co oznacza że dyskutowany przepis jest zgodny z zasadą proporcjonalności sensu stricto, a w konsekwencji – iż spełnia wszystkie wymogi przewidziane w art. 31 ust. 3 Konstytucji RP. Zakaz z art. 201 k.k. nie narusza bowiem również istoty wolności i praw, w które ingeruje. Może się oczywiście pojawić zarzut, że brak jest stuprocentowej pewności co do społecznej szkodliwości kazirodztwa, skuteczności zakazu określonego w art. 201 k.k. oraz pozytywnego bilansu zysków i strat. Z zarzutem tym zaś pojawi się zapewne postulat postąpienia zgodnie z regułą in dubio pro libertate, tzn. postulat odstąpienia od kryminalizacji. Wydaje się jednak, że nie ma powodów, by wykluczać kryminalizację kazirodztwa tylko dlatego, iż nie wszystkie wątpliwości związane z art. 201 k.k. można rozstrzygnąć w sposób jednoznaczny.

Słowa kluczowe: kazirodztwo, wolność seksualna, art. 201 Kodeksu karnego, art. 31 ust. 3 Konstytucji RP

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