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Incest as a Sexual Crime in Polish Criminal Law: A Relic of the Past or Still a Necessity in the Present?

In Article 201 of the Polish Penal Code of 1997, the legislator includes a criminal law regulation defining the crime of incest, according to which anyone who engages in sexual intercourse with an ascendant, descendant, adoptive person, adoptive parent, brother, or sister is subject to the penalty of deprivation of liberty for a term of between three months and five years. A legal provision of this type existed in each of the three Polish codes created in the twentieth century. The question arises whether in the contemporary criminal law of a democratic state governed by the rule of law, where in matters of human sexual behaviour the role of criminal law is primarily to safeguard sexual freedom and not decency in sexual matters, such a provision is actually needed, or perhaps whether its existence in criminal law is, in fact, unnecessary. To answer this question, it is necessary not only to analyse the statutory features of this act, but above all to examine the *ratio legis* of the criminal law norm related to it and the historical aspect of the whole issue.

In the Penal Code of 1997, in chapter XXV entitled "Crimes against sexual freedom and decency," the legislator includes a set of prohibited acts referred to in criminal law studies as "sexual offences"; this is also what these acts are called in judicial practice. It is worth considering for a moment what the term "sexual crime" actually means. It is not a legal term, which means it is not defined in any legal provision. The phrase "sexual crime" is not used anywhere in the code itself. Thus, it is a name created by legal doctrine; indeed, it is not an old name. It is also not a precise name. Marian Filar points out that the content and scope of the concept of "sexual crimes" may turn out to be both vague and controversial, *inter alia* because of its historical and territorial dynamism, as well as because the role and positioning of the sexual factor are decisive for the this term. Filar proposes that the term "sexual offences" should characterise only "sexually categorised" acts, that is, those in which sexual elements fall within the group of statutory features of the given offences.[1] According to M. Filar, sexual offences must objectively be of a sexual nature, not merely subjectively so; further the injured party must have been the actual possessor of the legal asset in question. There have

[1] M. Filar, *Przestępstwa seksualne w polskim prawie karnym*, Toruń 1985, pp. 10–11.

been opinions in Polish criminal law doctrine that only those acts can be considered sexual crimes that are directly related to the sexual drive of the perpetrator and that are committed in order to satisfy such a drive on the part of the offender; possibly, however, a sexual crime could involve satisfying the sexual drive of another person.[2] This understanding is not correct, because it does not at all take into account that a sexual crime could be committed by a perpetrator, not for the purpose of satisfying his or her (or another person's) sexual drive, but also for other reasons. For example, the perpetrator could commit rape in order to show the victim that he had power over her, or to humiliate her. It can be assumed that in the case of sexual crimes, the main, but by no means sole, motivation of the perpetrator is to satisfy a sexual drive (his or her own or that of another person). There are also views that prohibited acts related to human sexuality should be divided into sexual offences and crimes of a sexual nature. The former would include prohibited acts which, in the structure of the provision, contain circumstances of a sexual nature, such as the crime of rape and sexual abuse of a minor; however, the latter would include all other acts which contain sexual elements and which do not belong within the catalogue of sexual offences, such as violating the bodily integrity of another person (for example, beating, when inflicting pain is a factor that is sexually arousing for the perpetrator).[3] For Jarosław Warylewski the term "sexual crimes" is "the most understandable, meaningful, synthetic and at the same time adequate term for defining those acts that were, are or may be prohibited by criminal law and at the same time are directly related to human sexual life."[4] It is worth noting that some authors use different names interchangeably, for example, Andrzej Marek uses the terms sexual offences, offences in the field of sexual intercourse, offences against sexual freedom or decency, and offences against freedom and decency in the field of sexual intercourse.[5] Filar, in turn, uses the following names interchangeably: sexual offences, offences in the field of sexual intercourse, offences in the field of sexual intercourse.[6]

In other countries, in criminal law studies and practice, very similar names are used. In English, American, and Canadian criminal law, the names sex crimes, sex offences, or sexual offences are used, also often interchangeably; in Spanish-speaking countries in criminal law, these are: *los delitos sexuales* or *los delitos contra la libertad sexual*; in French-speaking countries, they are: *les crimes sexuels*; and in German-speaking countries, they are: *die Sexualdelikten*, *die Sexualstraftaten*, and *die Straftaten der Sexualsphäre*. It is worth noting that all these names connect the crime with sex. Therefore, to sum up, I consider for the purposes of this work that the name sexual

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[2] H. Rajzman, *Przestępstwa przeciwko wolności i godności człowieka (uwagi de lege ferenda)*, "Nowe Prawo" 1962, no. 3, p. 327; Z. Młynarczyk, *Sprawy o przestępstwa seksualne w aktualnej praktyce wymiaru sprawiedliwości*, "Nowe Prawo" 1969, no. 5, p. 797.

[3] T. Marcinkowski, *Medycyna sądowa dla prawników*, Szczytno 2010, p. 472.

[4] J. Warylewski, *Przestępstwa seksualne*, Gdańsk 2001, p. 16. All translations unless otherwise indicated are by me.

[5] A. Marek, *Prawo karne. Zagadnienia teorii i praktyki*, Warszawa 1997, p. 496.

[6] M. Filar, *Przestępstwa seksualne w polskim prawie karnym*…

crime refers to crimes related to sex and which are collected in chapter XXV of the Penal Code of 1997. The common denominator among all of them is "sex" and their perpetrators are referred to as sex offenders. This is a synthetic name that reflects the nature of the acts it concerns. I do not see the need to invent divisions of crimes into sexual and other, for example, those of sexual origin, of a sexual nature, etc. The name "sex crimes" is certainly not ideal, but so far no one has been able to propose a better one. The term is, thus, the best one and is commonly used in the world in the case of crimes directed against human sexual freedom and possibly so-called decency.

Sexual crimes, as indicated by the title of chapter XXV of the Penal Code, are directed against sexual freedom or decency. Some sexual crimes are directed against sexual freedom (for example, rape), some against decency (for example, incest), and some against both of these legal rights at the same time (for example, sexual intercourse with a minor under the age of fifteen). Since incest is a crime against decency and not against sexual freedom, below I only indicate briefly what the legal good in the form of sexual freedom is, and I focus rather on decency. As far as sexual freedom is concerned, it is a specific subject of protection in the case of the provisions of chapter XXV (but not all of them). It is certainly a significant merit of the creators of the 1997 Code that for the first time sexual freedom was formulated *expressis verbis* in the Polish Penal Code and immediately as a specific legal right in the institution of chapter XXV. This was not the case in either the Polish Penal Code of 1932 or the Penal Code of the Polish People's Republic of 1969. This state of affairs marks significant progress towards modernising Polish criminal law in the spirit of Western European law: sexual freedom has finally been recognised as an independent legal right and has been given an appropriate position. Some twenty-five years earlier, a similar situation occurred in the legal systems of countries located to the west of the Iron Curtain; for example in the Federal Republic of Germany, the chapter of the Criminal Code previously entitled "Crimes and misdemeanours against decency" (*Verbrechen und Vergehen gegen die Sittichkeit*) was replaced in 1973 by one entitled "Section Thirteen. Crimes against self-determination in the sexual field" (*Dreizehnter Abschnitt. Straftaten gegen die sexuelle Selbstbestimmung*).

Sexual freedom as a concept must be defined both in a positive sense, as "freedom to" and in a negative sense, as "freedom from."[7] Sexual freedom is the right of every person to choose a sexual partner, to choose a type of sexual contact, its place and time, as well as the type of sexual activities in which he or she participates. The scope of sexual freedom in a positive sense has not been defined in any legal act, but it can be assumed that it is very broad and refers to everything related to sex. Sexual freedom is also freedom from all types of coercion, and above all from physical, mental, or economic coercion. Sexual freedom is granted to every person and only a specific individual can make a decision about his/her sexual life; of course, a certain limitation here is an appropriate age, which in Polish law has been set at the age of fifteen, and the possession of a sound mind, because for a decision regarding sexual

[7] J. Warylewski, *Problematyka przedmiotu ochrony tzw. przestępstw seksualnych*, "Państwo i Prawo" 2001, no. 9, p. 77.

life to be legally relevant, it must be taken by a person who recognizes the significance of his or her act and can direct his or her own behaviour. Taking into account the level of intimacy of sexual relations and the importance of sexual life for human well-being, sexual freedom should be considered one of the fundamental human freedoms. Sexual freedom, therefore, also means freedom from sexual assault; it is part of a broader concept of freedom that comes in various forms.

Lech Gardocki claims that sexual freedom is not linked to morality, which is a certain system of social norms (mainly moral) regulating people's behaviour in the sexual sphere.[8] In the case of certain sexual offences, decency as sexual morality is an independent and equal subject of protection as compared to sexual freedom. It is not, in any way, the case that morality has a superior position over sexual freedom; moreover, such freedom is not, in any way, a derivative of morality. The fact that moral norms limit, but also guarantee, certain manifestations of sexual freedom does not mean that there is any special relationship between sexual freedom (that is, the generic subject of protection for some sexual crimes) and (sexual) morality (that is, the system of moral norms existing in a specific society).[9] Sexual freedom is not absolute; it is not limitless, because its limits are marked by law. The limits of sexual freedom are the freedoms and rights of other people, for example, the proper psychophysical development of a child in the case of the crime of sexual intercourse with a minor under fifteen years of age (Article 200 of the Penal Code of 1997); these limits also include, among other factors, decency, public health, and public order.

Until the second half of the twentieth century, decency was considered the subject of sexual crimes. It was a matter of morality in the sphere of human sexual life. Morality means a set of moral principles relating to human behaviour in the sexual sphere. It should be emphasised that morality is not unchanging and permanent, but is subject to change along with society. In the 1980s and 1990s, Polish criminal law theory was still dominated by views according to which morality played a dominant role in the area of sexual relations. For example, Kazimierz Buchała writes that if someone wants to formulate a generic object of protection common to these crimes, this would be morality in the sphere of sexual life rather than sexual freedom.[10] Similarly Witold Świda claims that sexual freedom is a specific derivative of morality in the sexual sphere, concluding that it is merely a manifestation of morality in the sexual sphere and, thus, concerns the moral norms accepted in society in this area.[11] Filar held the same opinion for a long time, stating that sexual freedom "does not seem to be an independent and autonomous value, but a derivative of another value, which is sexual customs established on the basis of current social relations."[12]

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[8] L. Gardocki, *Prawo karne*, Warszawa 2015, p. 271.

[9] J. Warylewski, *Rozdział XXV. Przestępstwa przeciwko wolności seksualnej i obyczajności* [in:] *idem*, *Kodeks karny. Komentarz*, Warszawa 2001, p. 13.

[10] K. Buchała, *Prawo karne materialne*, Warszawa 1980, p. 669.

[11] W. Świda, *Prawo karne*, Warszawa 1986, pp. 497–498.

[12] M. Filar, *Przestępstwa w dziedzinie stosunków seksualnych* [in:] *System prawa karnego. O przestępstwach w szczególności. Tom IV. Część 2*, eds. I. Andrejew, L. Kubicki, J. Waszczyński, Wrocław–Warszawa–Kraków 1989, p. 152.

It is no exaggeration to say that decency as the subject of sexual crimes has been closely connected with morality. It was, therefore, a legal good of a general and abstract nature. Decency was identified with morality; it was simply morality in matters of human sexual life. This situation lasted for hundreds of years and was usually combined with rigour in matters of sex, as in medieval Europe. This, in turn, often involved excessive criminalization of sexual behaviour. It took a very long time to gradually move away from this type of penalization towards liberalization and towards limiting the role of the state and criminal law in matters related to human sexuality. Finally, it was recognized that criminal law serves as an *ultima ratio*, not a *prima ratio*, and that what is unethical, immoral, or even indecent does not necessarily require criminalization. The state's primary task is to protect sexual freedom, not to act as a guardian of morality in sexual matters. This libertarian approach identified sexual freedom as the primary good protected by criminal law provisions for sexual offences. In fact, it was not until 1964, at the Ninth Congress of the International Association of Criminal Law in The Hague, that strong positions emerged calling for the need to abandon the model in which criminal law protects decency in sexual crimes. These positions proclaimed the need for decriminalisation (for example, with regard to homosexual sex and prostitution) and for depenalisation (mitigating criminal penalties) of a large portion of sexual crimes. A directive on the criminalisation of crimes against the family and sexual morality (decency) was proposed. This emphasised the rationalisation of a libertarian and victim-oriented nature, replacing the previous rationalisation of a moralistic nature.[13]

The evolution of criminal law in this area did not only refer to doctrine, but also covered the courts; for example, in Poland from the 1970s (that is, after the entry into force of the Penal Code of 1969), references to decency as a subject of protection in sexual crimes were extremely rare[14]. The findings of the Congress were very important for the process of creating new law, both in Western Europe and in the Eastern bloc countries. This influence began to be visible, for example, in the titles of chapters in adopted or amended penal codes, including the Polish Code of 1969, where some of the offences contained in the Penal Code of 1932 in the chapter entitled "Prostitution" were moved to chapter XXII entitled "Crimes against Freedom." Crimes that were traditionally considered crimes against indecency and in which sexual freedom could not be the subject of the attack, such as incest, remained in the chapters protecting against indecency or were also included in new chapters on sexual freedom. This was because a solution was adopted, according to which the concept of sexual freedom was extended to include what is called "sexual shame" (sexual shyness), which may affect the injured party when he or she comes into contact with a sexual behaviour

[13] A. Wądołowska, *Wolność seksualna jako przedmiot ochrony prawnokarnej*, "Prokuratura i Prawo" 2007, no. 4, p. 139.

[14] Judgment of the Court of Appeal in Kraków of 4 April 1991, II AKz 28/91, "Krakowskie Zeszyty Sądowe" 1991, no. 4, pos. 16; Supreme Court judgment of 3 July 1975, II KR 66/75, "Orzecznictwo Sądu Najwyższego: Izba Karna i Wojskowa" 1975, no. 10–11, pos. 141; Supreme Court judgment of 14 March 1972, V KRN 33/72, "Orzecznictwo Sądu Najwyższego: Izba Karna i Wojskowa" 1972, no. 9, pos. 136.

or object, for example, pornography. Sexual shame is a feeling of embarrassment and unpleasantness that a person feels when he/she comes into contact with a perpetrator who seeks to sexually abuse him/her, but also when he/she comes into contact with a specific psychosexual stimulator against his/her will. Ultimately, it was assumed that the concept of sexual crimes should be constructed on this basis, that is, that sexual freedom and sexual shame are combined and therefore, for example, rape and the public display of pornographic content are not substantively different.[15] Similarly, incest is a sexual crime because, while violating decency, it also violates sexual shame. Over time, decency began to lose its importance as a protected legal interest in sexual crimes and was moved to the background, remaining a generic subject of protection only in the case of only a few sexual crimes, including the crime of incest under Article 201 Penal Code from 1997. Decency, as a set of moral rules relating to human sexual life and functioning in society, may be considered a legal good and, therefore, the subject of protection in the case of sexual crimes only to the extent that it does not limit human sexual freedom guaranteed by national and international law. The question arises whether such a violation of sexual freedom does not occur with the criminalisation of incest. This point is developed further at the end of this article.

The crime of incest (Latin, *incestus*) and the crime of rape are probably the two oldest types of sexual crimes. The prohibition of incest appears to have roots in many civilizations and legal systems around the world from ancient times. Of course, the limits of prohibited sexual relations between family members were defined in different ways, and incestuous relations between mother and son were usually punished most severely. At the same time, it should be recalled that there were also cultures in which incest was not marked pejoratively and was not subject to criminal sanctions, for example, in ancient Egypt, Persia, the lands of the Incas, and among some Germanic tribes. Only under the influence of Christianity did some societies begin to punish incestuous relationships.[16] In most civilizations, however, incest was punishable by law. The Code of Hammurabi provided the death penalty for sexual intercourse between a mother and her son, and sexual intercourse between father and daughter was punishable by exile.[17] Incest was also punishable by death in Hebrew law; prohibitions relating to incestuous sexual relations are found in the Third Book of Moses (the Book of Leviticus), according to which all incestuous relations were punishable by death by stoning, burning, or hanging.[18] In the ancient Greek polis, incest was often punishable by death or exile. In Roman law, incest was punished only in the event of an incestuous

[15] M. Filar, *Przestępstwa seksualne w polskim prawie karnym*…, p. 26.

[16] *Encyklopedia podręczna prawa karnego*, ed. W. Makowski, Warszawa, p. 709, https://polona.pl/item-view/53c4ba94-e9da-47fc-9233-70c08c18c276?page=0 [accessed: 2025.08.1], p. 709. (The Encyclopaedia was published in the form of notebooks. Twenty-six issues were published in volumes 1–4 in the 1930s, with no specific year of publication indicated.)

[17] M. Stępień, *Kodeks Hammurabiego*, 2003, pp. 46–47, https://web.archive.org/web/20140116200939/http://www.pistis.pl/biblioteka/Hammurabiego%20kodeks.pdf [accessed: 2025.08.1].

[18] W. Bojarski, *Kara śmierci w prawach państw antycznych* [in:] *Kara śmierci w starożytnym Rzymie*, eds. H. Kowalski, M. Kuryłowicz, Lublin 1996, pp. 15–16.

marriage (based on the law *lex Iulia de adulteriis*). Over time, when Christianity became the dominant religion in the Roman state at the end of the period of antiquity, canon law gained an increasingly stronger position and defined incest as a very serious crime, partly based on Jewish law and to some extent on *lex Iulia de adulteriis*. Interestingly, church law expanded the scope of prohibited incestuous relations by increasing the number of persons with whom sexual relations were considered incestuous, and at one point all relations up to the seventh degree of canonical kinship were considered incestuous. Pope Innocent had to introduce a reform in this respect and limit the list of relatives and affinities to the fourth degree of kinship of canonical commutation.

Canon law also gave rise to new problems related to incest, previously unknown in the Graeco-Roman world, because sexual intercourse between people connected by "spiritual kinship" (*cognatio spiritualis*) also began to be considered incestuous, which applied, for example, to godparents and their godson or goddaughter.[19] The law of the Lombards, who occupied a large area of Italy, also adopted many of the norms of Roman law and canon law; and sexual intercourse between the closest of relatives was punishable by death, while in the case of more distant relations the penalty was exile and confiscation of property.[20] Similar provisions were also in force in the law of the Franks, who conquered Gaul and then northern Italy and most likely also followed the norms of Roman law and canon law to some extent. In the Middle Ages, the *Constitutio Criminalis Carolina* criminalised incest by defining it broadly and insisting that sexual relations with a stepdaughter, stepson, and stepmother together with her stepchildren were also of such a nature. Later, the prohibition of incest was extended to siblings. The *Carolina* provisions became the foundation for the provisions contained in the *Theresiana*,[21] the *Leopoldina*,[22] and the *Josephine* Code.[23] In medieval English law, the penalty for incest was a wergild-type fine (that is, a monetary penalty, as in the case of murder) and the confiscation of property; the penalty depended on the degree of kinship.[24]

In Poland from the sixteenth through to the eighteenth centuries, land law did not contain penalties for incest, which does not mean that it was not punished, because it was and severely so, since in this case the Saxon municipal law common in

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19 I. Grabowski, *Prawo kanoniczne według nowego kodeksu*, Lwów 1927, p. 415.

20 K. Koranyi, *Powszechna historia państwa i prawa*, vol. 2, Warszawa 1966, p. 219.

21 *Constitutio Criminalis Theresiana* (commonly known as the *Theresiana* and *Terezjana*) is a criminal code, covering substantive and procedural law, which was granted to the Austrian states by Empress Maria Theresa in 1768.

22 The *Leopoldina* is the common name for the penal code of 1786 issued by the Grand Duke of Tuscany, Leopold of Habsburg. The code was in the spirit of the Enlightenment and was the first European code to take into account the suggestions of Cesare Beccaria and the humanitarian school. In the *Leopoldina*, among other things, the death penalty, corporal punishment and shameful punishments were abolished, and universally applicable penalties involving solitary confinement were introduced.

23 The *Josephine* Code (German, *Josephina*) is the common name for the General Penal Code on Crimes and Punishments (German, *Allgemeines Gesetz über Verbrechen und derselben Bestrafung*). It was the penal code of Emperor Joseph II, from whom the common name is derived. It was in force from 1787 in the countries of the Habsburg Monarchy.

24 K. Koranyi, *Powszechna historia państwa i prawa*…, vol. 2, p. 260 and vol. 3, p. 296.

the Poland was applied. According to it, if incest was committed by members of the noble class who were related to each other in the direct line, they faced the penalty of death by beheading; similarly, the death penalty, this time by hanging (which was the standard for imposing the death penalty on the lower classes at that time), was imposed for incest among peasants. In practice, however, these punishments were imposed very rarely, and in addition, in the case of the peasantry, instead of hanging, the punishment was flogging combined with church penance.[25] This was most likely due to the fact that peasants were the property of their lord; so punishing them with death resulted in a reduction in the number of the lord's possessions. Incest itself was defined at that time in accordance with the relaxed provisions of canon law, that is, as sexual relations between relatives in the direct line or in the collateral line, as well as sexual relations between relatives by marriage up to the fourth degree. The Saxon law current in Poland made the type of punishment dependent on the degree of kinship, providing for *poena capita* for incest between forebears and descendants, flogging and permanent (perpetual) banishment for incest between collateral relatives, and finally, banishment and flogging for men and six months of imprisonment for women in the case of relatives by marriage.[26]

At the end of the eighteenth century and at the same time at the end of the existence of the First Polish Republic, as a result of the increasing importance of Enlightenment philosophy, penal regulations were also relaxed in relation to incest. There was "Mitigation of penalties applied in courts having jurisdiction in criminal cases. The very fact of shifting the centre of gravity to the penalty of imprisonment and not, as it had been so far, to the death penalty testifies to this tendency to mitigate penalties, and in addition, facts from court practice speak of this mitigation, when towards the end of Poland's existence we encounter cases of the application of imprisonment and corporal punishment where previously the qualified death penalty had been applied (that is, in 1792 for incest a sentence of half a year in prison and twenty-five lashes was given, when previously it would have been burning or another death penalty)."[27]

The first Polish penal code was created after the fall of the First Polish Republic,[28] that is, in the Kingdom of Poland in 1818.[29] In the Penal Code, in Article 445, section XIII,

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[25] K. Kaczmarczyk, B. Leśnodorski, *Historia państwa i prawa Polski*, Warszawa 1966, p. 336 and 369.

[26] J. Warylewski, *Przestępstwa seksualne*…, p. 230.

[27] J. Rafacz, *Dawne polskie prawo karne. Część ogólna*, Warszawa 1932, p. 28, https://kpbc.umk.pl/dlibra/publication/71100/edition/77950/content [accessed: 2025.08.1].

[28] The Partitions of Poland were three partitions of the Polish–Lithuanian state that took place between 1772 and 1795. They meant the end of the existence of Poland for 123 years. The partitions were conducted by Russia, Prussia, and Austria, which divided Polish territory among themselves progressively in the process of territorial seizures and annexations. In the nineteenth century, Poland's lands were held by these three powers. Therefore, the criminal law of the three partitioning powers remained in force in Poland throughout the nineteenth century. This state of affairs lasted until the end of the First World War, the fall of imperial Russia, Germany, and Austria, and the rebirth of the Polish state.

[29] *Prawo Kodeksu Karzącego dla Królestwa Polskiego z 20 lipca 1818 r.*, "Dziennik Praw Królestwa Polskiego", vol. 5, no. 20, https://iura.uj.edu.pl/Content/3676/HTML/uwsp%C3%B3%C5%82cze%C5%9Bniony%20Kodeks%20karz%C4%85cy%201818.html [accessed: 2025.08.1].

which is entitled "On Offences Against Good Morals," there is a provision penalizing the crime of incest, according to which "Incest, that is, carnal intercourse between relatives in the ascending and descending line, that is, their relationship comes from the legitimate or illegitimate bed, shall be punishable by confinement in a public detention centre for a term of between one and three years." Additionally, Article 446 specifies that "Fornication between brothers and sisters, whether full or half, or fornication with the spouse of one of the parents, children or siblings, shall be punishable by imprisonment in a public detention facility for a period of three months to one year. In addition, the one of the guilty perpetrators may be prohibited from staying in a place."

The next legal act in force in the Polish lands under Russian occupation was the Russian Code of Capital and Corrective Penalties of 1845, which had been in force in the Kingdom of Poland since 1847. Incest was defined there as a conscious physical intercourse between two people, relatives or affinities to the extent that marriage is prohibited. The *ratio legis* of incest was indicated at the time; the justification for its criminality resulted from concerns about the health of future generations, as incestuous relations could negatively affect them. In addition, incest was said to undermine the morality of the family and society "by replacing pure affection and respect for elders with disorder and unbridled debauchery."[30] In the doctrine of criminal law of that time, it was stated that: "[…] it should be noted: that an incestuous relationship rarely occurs, similarly to the higher organized animals, as it is contrary to the physiological conditions of human nature, which seeks contrasts; that it is shrouded in secrecy; that bringing this act to light, and usually through human malice, causes even greater scandal. These considerations led Romanesque legislations, with the exception of Italian and Spanish, to remain silent about such acts. The Spanish Code took a middle path, punishing incest only when a man has carnal intercourse with his sister or a descendant, and inflicting only a punishment on the man, and a mild one at that, because it was equal to the punishment for the seduction of a minor by a guardian, teacher, etc."[31] It should be noted that the crime of incest was regulated in Article 1088 of the third chapter ("On crimes against family union") of the Code of 1845, in an extremely casuistic manner., According to this regulation, for incest between relatives in the direct, ascending, or descending line, regardless of the degree, the guilty were punished by deprivation of all rights and by exile to more distant places in Siberia, where, instead of being allowed to settle, they were to be imprisoned alone in a tower for ten years, and after that time, they were to be sent to a monastery for life in order to perform hard physical labour there. If the convicted persons belonged to one of the Christian denominations, then in addition to the above, they were also to be subjected to church penance in accordance with the law of their denomination. In turn, Article 1089 states that "for incest between collateral relatives, but also between close relatives up to the second

[30] S. Budziński, *O przestępstwach w szczególności. Wykład porównawczy*, Warszawa 1883, p. 247, https://books.google.pl/books?id=ThKup-xzcQ8C&printsec=frontcover&hl=pl&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false [accessed: 2025.08.1].

[31] *Ibid*.

degree, those guilty of Orthodox religion will be punished, according to the closeness of the degree of kinship or affinity, according to the following rules: For incest between second-degree relatives, deprivation of all rights and exile to Siberia to be imprisoned there in a tower for five years, after which they will be sent to a monastery for life to perform hard labour there. For incest between relatives of the third degree or between relatives of the first degree, that is, with a father-in-law or mother-in-law, with a son-in-law or daughter-in-law committed: exile to a flat in the Tomsk or Tobolsk province, with confinement from one to three years, and if they are not exempted from corporal punishment by law, sending to correctional prison groups for a period of from two to six years, depending on the circumstances that increase or decrease their guilt. For incest between relatives of the fourth degree, that is, with a cousin or first cousin, with a cousin or first cousin, or between relatives of the second degree, that is, with the husband's brother or sister-in-law, with the wife's brother-in-law or sister, committed by imprisonment in a monastery for a period of six months to one year. In addition to this, all those guilty, in each case, will undergo ecclesiastical penance according to the decree of the spiritual superior. Those belonging to the Roman Catholic or other Christian denominations, for incest between relatives of the second degree or relatives of the first degree, will undergo: the same punishment as persons of the Orthodox denomination. For incest committed with relatives or affines of such degrees in which, according to the rules of their church, marriage may be permitted, they shall be subject to punishment only when the crime was connected with adultery, or when for some reason marriage between the guilty cannot be permitted. And in each case they shall also be subject to ecclesiastical penance according to the decree of their spiritual superiors."[32]

The last Russian legal act in force on Polish soil was the Penal Code of 1903, in which part twenty-seven, entitled "On Prostitution," defined the crime of incest. According to Article 518, the perpetrator of incest with a descendant or ascendant relative was punished with a hard prison sentence of one to four years (the ascendant) and with imprisonment of one to six years (the descendant). If the descendant was under fourteen years old, he was exempt from punishment. Moreover, in accordance with Article 519, the perpetrator of incest with a collateral relative of the second degree or with a descendant or ascendant of the spouse, or with the spouse of a descendant or ascendant relative, was punished with imprisonment from one to three years. As before, the *ratio legis* of punishability of incest was reduced to a primarily eugenic argument and the penalization of incest was explained by the fact that "The factual circumstances of incest were based on the principles of protecting the public interest and maintaining the proper fitness of the species, hence the issue of mutual consent is irrelevant here."[33]

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[32] *Kodeks kar głównych i poprawczych*, Warszawa 1847, pp. 791–795, https://pbc.biaman.pl/dlibra/publication/4601/edition/4524/content [accessed: 2025.08.1].

[33] W. Makowski, *Prawo karne. O przestępstwach w szczególności. Wykład porównawczy prawa karnego austrjackiego, niemieckiego i rosyjskiego obowiązującego w Polsce*, Warszawa 1924, p. 344.

In Polish territory under Prussian (later German) occupation, the German penal law of 1871 obtained. It contained a criminal law regulation on incest in § 173, according to which "For carnal intercourse between relatives in the ascending and descending line, the first shall be subject to a hard labour penalty of up to five years, the last to a prison sentence of up to two years. Carnal intercourse between relatives in the ascending and descending line, as well as between siblings, will be punished by imprisonment for up to two years. In addition to the prison sentence, the loss of civic rights may be imposed. Relatives and relatives in the descending line will not be punished if they have not yet reached the age of eighteen."[34]

In the Austrian penal law of 1852 (Austria was the third partitioning power), the provision of § 131 specified that incest between relatives in the ascending and descending line, regardless of whether the relationship was "legitimate or illegitimate," was punishable by imprisonment from six months to one year. In Austrian law, incest meant fornication (as the translations of the time defined it), which was considered to be sexual intercourse between two people related in the direct line, regardless of whether their relationship was based on legal status, and regardless of whether it was of a closer or more distant degree. Incest was considered a crime in the Austrian Code. In turn, the provision of § 501 of the Code criminalized prostitution between siblings or closest relatives by affinity. Such a crime was considered prostitution between: 1) siblings (both full and half; 2) stepson/stepdaughter and stepmother/stepfather; 3) son-in-law/daughter-in-law and mother-in-law/father-in-law; and 4) relatives by affinity in the degree of siblings. This type of prostitution was not a crime, but an offence punishable by strict detention from one to three months. In addition, the task of the competent authority was also to ensure that the separation of the perpetrators guilty of incest continued after the sentence had been served and that such separation constituted an obstacle for them to continue to maintain sexual relations with each other prohibited by law.[35]

In more recent times, the first Polish Penal Code after regaining independence, that of 1932, also regulated the crime of incest.[36] This code is generally a very interesting legal act, because on the one hand it combines modern (for those times) solutions, and at the same time, which is rarely emphasised in Polish scholarship, it

[34] *Kodeks karny Rzeszy Niemieckiej z dnia 15 maja 1871 r. z późniejszymi zmianami i uzupełnieniami po rok 1918 wraz z ustawą wprowadczą do Kodeksu karnego dla Związku Północno-Niemieckiego (Rzeczy Niemieckiej) z dnia 31 maja 1870 r. Przekład urzędowy Departamentu Sprawiedliwości Ministerstwa b. Dzielnicy Pruskiej*, Poznań 1920, https://iura.uj.edu.pl/Content/131/PDF/Kodeks%20karny%20Rzeszy%20NIemieckiej%2015%2005%201871z%20poz%20zm%20do%201918.pdf [accessed: 2025.08.1].

[35] E. Krzymuski, *Wykład prawa karnego ze stanowiska nauki i prawa austryackiego. Tom 2*, Kraków 1902, pp. 508–509, https://bibliotekacyfrowa.pl/dlibra/publication/27744/edition/34529/wyklad-prawa-karnego-ze-stanowiska-nauki-i-prawa-austryackiego-t-2-krzymuski-edmund-1851-1928 [accessed: 2025.08.1].

[36] Rozporządzenie Prezydenta Rzeczypospolitej z dnia 11 lipca 1932 r. – Kodeks karny (Dz. U. z 1932 r. Nr 60, poz. 571; Decree of the President of the Republic of Poland of 11 July 1932 – Penal Code, Journal of Laws 1932, No. 60, item 571).

is also in a sense a descendant of the three codes in force in the Polish lands during the partitions, that is, the Russian, German, and Austrian codes, from which various solutions were drawn when creating it. According to Article 206, anyone who has sexual intercourse with a relative in the direct line, a brother or sister, is subject to a prison sentence of six months to five years. The subject of the crime, as defined in the doctrine of the time, was the "proper development" of the human species. This is indicated by Juliusz Makarewicz, one of the creators of the Code, who wrote: "the basic idea of this provision is not so much the protection of the so-called sexual morality, but the protection of the species against endogamy leading to racial degeneration. The requirement of obligatory exogamy is not difficult to implement, since incest is limited to the ascending and descending lines (father with daughter, mother with son), or to sexual intercourse between brother and sister. Since it concerns racial purity, the issue of legitimate or illegitimate descent does not play any role." Makarewicz further writes that "the starting point for the criminality of incest is the protection of the species from degeneration."[37] Wacław Wincenty Makowski also writes in the same spirit. For him "the subject of legal protection in this case is the eugenic consideration, therefore the issue of kinship is not taken into account. Kinship is a relationship resulting from the fact of birth, therefore the provisions regarding incest cannot cover sexual relations between persons related on the basis of civil law (adoption)."[38] The focus here is on copulation with relatives in the direct line or with a brother or a sister; this is characteristic because this provision, unlike the one contained in the same Code, for example, under Articles 203 or 204, clearly places emphasis on copulation and not on an indecent act. At that time, vaginal intercourse is considered sexual intercourse, which correlates with the subject of the crime, because only as a result of such intercourse could fertilization occur. Makarewicz notes that "copulation is completed at the moment of joining the reproductive parts of persons of different sexes."[39] Makowski emphasises that incest is "a natural sexual intercourse, therefore any other lewd act will not be incestuous."[40] For the existence of the crime, it is irrelevant whether the copulation had ended. This is a result of the fact that incest is classified as a crime "causing danger."[41] Criminalized incest concerned ascendants, descendants, and siblings; it belonged to the group of so-called formal crimes.

During the communist dictatorship in Poland, in the new Penal Code of 1969[42] incest is described in Article 175, according to which anyone who engaged in sexual intercourse with a relative in the direct line, a brother or sister, or with a person in an adopted relationship, was subject to the penalty of imprisonment from six months to five years. In the case of this act, the protected good was primarily considered to be

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37 J. Makarewicz, *Kodeks karny z komentarzem*, Lwów 1932, p. 303.

38 W. Makowski, *Kodeks karny. Komentarz*, Warszawa 1937, p. 598.

39 J. Makarewicz, *Kodeks karny*…, p. 303.

40 W. Makowski, *Kodeks karny*…, p. 598.

41 This is the same in Articles 215–222 of the Penal Code 1932.

42 Ustawa z dnia 19 kwietnia 1969 r. – Kodeks karny (Dz. U. z 1969 r. Nr 13, poz. 94; Act of 19 April 1969 – Penal Code, Journal of Laws 1969, No. 13, item 94).

decency in the sphere of sexual relations.[43] This time, in contrast to the Code of 1932, the *ratio legis* is based on the qualification of incest as a highly immoral act, clearly contrary to applicable social norms in this matter, and not on the eugenic argument referring to the possible harmfulness to the potential offspring of the perpetrators of incestuous relations.[44] The fact that the 1969 Penal Code also prohibits sexual intercourse between an adoptive parent and an adopted child (persons who are not biologically related) was indicative of a change in the justification for the criminalisation of incest compared to the period when the 1932 Code was in force. An additional premise for the allegedly new rationalisation of the law is the introduction of a new term instead of the term "copulates" from Article 206 of the Penal Code of 1932. The Penal Code of 1969 mentions "sexual intercourse" in Article 175. This constitutes a broader term, going beyond just vaginal intercourse. However, it should be noted here that, contrary to official claims regarding the abandonment of eugenic rationalization for penalizing incest, in reality many scholars of doctrine still refer to this argument when describing incest. For example, they explicitly state "the premise for penalization is not only eugenic, but also moral considerations."[45] In addition to decency, the subject of this crime is considered to be the proper functioning of the family and the development of minors; Filar points out that "Undoubtedly, an additional subject of protection here is also the social interest in the proper functioning and implementation of family tasks and the proper social and moral development of young people."[46]

Under the current Polish Penal Code of 1997, incest is regulated in Article 201, according to which: "Anyone who engages in sexual intercourse with an ascendant, descendant, adoptive person, adoptive parent, brother or sister shall be subject to the penalty of deprivation of liberty for a term of between three months and five years."[47] It is interesting to note that this provision has not undergone a single amendment since the adoption of the criminal law twenty-seven years ago. In terms of content, this provision does not differ substantially from the regulations previously adopted in the Codes of 1932 and 1969. Incest is, therefore, still seen as a so-called victimless crime, because there is no necessary and direct victim of an act of incest. In fact, Article 201 criminalizes consensual sexual intercourse between people. The provision uses the phrase "sexual intercourse" and not "sexual activity." This is very important because it means that Article 201 only penalizes vaginal, anal, and oral intercourse, as well as substitutes for these relationships, between the persons indicated in the content of the provision. Therefore, "other sexual activities" are not subject to criminalization, which

[43] M. Siewierski, *Rozdział XXIII. Przestępstwa przeciwko obyczajności* [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz*, Warszawa 1977, p. 444.

[44] I. Andrejew, *Rozdział XXIII. Przestępstwa przeciwko obyczajności* [in:] *idem*, W. Świda, W. Wolter, *Kodeks karny z komentarzem*, Warszawa 1973, p. 515; *Projekt kodeksu karnego oraz przepisów wprowadzających kodeks karny (uzasadnienie)*, Warszawa 1968, p. 141.

[45] M. Siewierski, *Rozdział XXIII. Przestępstwa przeciwko obyczajności* [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny...*, p. 444; K. Buchała, *Prawo karne materialne*, Warszawa 1980, p. 703.

[46] M. Filar, *Przestępstwa seksualne w polskim prawie karnym*…, p. 84.

[47] Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny (tekst jedn.: Dz. U. z 2025 r., poz. 383 ze zm.; Act of 6 June 1997 – Penal Code, consolidated text: Journal of Laws 2025, item 383, as amended).

means that they are legal under Polish criminal law. This is precisely where a serious objection to this provision comes from. What does the provision of Article 201 of the Penal Code actually protect?

Almost a hundred years ago, it was pointed out that "Eugenic, ethical and social considerations speak in favor of punishing incest, but in addition to physical repulsion (*horror sanguinis*), eugenic moments seem to be fundamental. Statistics show that almost 80% of children born from such marriages are physically and morally crippled. In addition, the fact that from the point of view of the purity of family life, such a factual situation cannot go unpunished if society wants to protect itself from its disastrous effects speaks in favour of punishing incest."[48] According to another group of authors who conducted a broad review of published research results, the risk of negative health consequences for offspring from incestuous relationships is probably 7% to 31% higher than such a risk in the general population.[49] But nowadays, eugenic arguments are rejected, and rightly so. Or perhaps they are not rejected at all? After all, while work was still underway on the new Code, published works directly pointed to eugenic rationalization alongside that of the protection of sexual morality[50] and emphasised the alleged danger of producing "physically and mentally inferior offspring."[51] Let us acknowledge, however, that these are the private views of specific authors (although publicly expressed) and let us assume that the eugenic rationalization of Article 201 of the Penal Code does not exist. Besides, if we were to accept eugenic rationalization, then why criminalize sexual intercourse (and probably only vaginal intercourse) between people of the same sex? What would be the point? None. Similarly, there would be no sense in criminalizing incest between an adoptee and an adoptive parent, that is, people who are not biologically related to each other, and whose potential offspring, therefore, would not be at risk of alleged potential genetic defects.

So what speaks in favour of this provision, and what does it protect? All that remains is decency, the proper functioning of the family, and the development of the minor, when incest involves a minor. It is, therefore, necessary to consider the decency indicated in the area of sexual relations in the social sense and in the sphere of family relations. It is commonly accepted that incest is an act that violates morality. And in fact, it is. Moreover, incest significantly violates the norms in force in the area of sexual life relating to members of one family. This is precisely what results in the possibility of

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[48] J. Macko, *Prostytucja. Nierząd – handel żywym towarem – pornografia ze stanowiska historji, etyki, higjeny i prawa*, Warszawa 1927, p. 160.

[49] L. Bennett, A.G. Motulsky, A. Bittles, L. Hudgins, S. Uhrich, D.L. Doyle, K. Silvey, C.R. Scott, E. Cheng, B. McGillivray, R.D. Steiner, D. Olson, *Genetic counseling and screening of consanguineous couples and their offspring: Recommendations of the National Society of Genetic Counselors*, "Journal of Genetic Counseling" 2002, vol. 11, no. 2, pp. 97–119; see also: M. Ciesielka, *Kazirodztwo w ujęciu genetycznym* [in:] *Kazirodztwo*, ed. M. Mozgawa, Warszawa 2016, pp. 271–280; A. Michalska-Warias, *Kazirodztwo a pokrewieństwo prawne i biologiczne* [in:] *Kazirodztwo*…, pp. 92–109.

[50] J. Baranowski, *Ratio legis prawnokarnego zakazu kazirodztwa*, "Przegląd Prawa Karnego" 1990, no. 3, p. 62.

[51] J. Leszczyński, *Przestępstwa tzw. seksualne w projekcie polskiego kodeksu karnego (wersja z grudnia 1991 r.)*, "Palestra" 1992, vol. 39, no. 9–10, p. 34.

qualifying the family[52] and its proper functioning as the subject of the crime of incest under Article 201. The provision penalizing incest, therefore, protects decency, and protects the proper functioning of the family. It also protects the proper psychophysical development of a minor. It is true that after the age of fifteen, a sane person can make any legally relevant decision regarding his or her own sexuality, and, thus, exercise the sexual freedom to which he or she is entitled. But this freedom is not unlimited, and in this case the law narrows the group of people with whom sexual intercourse can be engaged in in order to protect a minor from a negative transformation of his or her family relations, because the prevailing moral rules in this matter boil down to the fact that sexual intercourse is excluded within the family apart from between husband and wife. The penal provision of Article 201, therefore, criminalizes sexual intercourse between mother and daughter, as well as between brother and sister. This does not seem to arouse any social resistance; it is most likely accepted by the majority of society as a rightful reaction to breaking a taboo concerning sex between some family members.

But is it really? One should look closely at the statutory features of Article 201 of the Penal Code: the provision penalizes sexual intercourse, but why not other sexual acts, why not all sexual acts? After all, such a construction of the provision, and this construction is basically repeated from the Criminal Act of 1969, means that while the law responds to oral intercourse between a seventeen-year-old daughter and her forty-six-year-old father, it cannot respond when the daughter masturbates her father with her hand. Why is this so? It is because masturbating another person does not constitute sexual intercourse, because it is neither vaginal, anal, nor oral intercourse, nor does it belong to the category of substitutes for these types of intercourse. It is included in the concept of "other sexual activity." This means that either the legislator has missed something and forgot (and this has been the case since 1969) also to criminalise other sexual activities, or it must mean that in Polish society such behaviour as masturbating a parent (or grandfather, grandmother, etc.) does not constitute an act violating decency, nor does it affect the proper functioning of the family, and the proper psychophysical development of a minor. However, such behaviour certainly violates the morals prevailing in Poland and undermines the proper functioning of the family and the proper development of the child.

Thus, one asks why this type of behaviour was not covered by criminal prohibition. Further, if it is a matter of a mistake on the part of the legislator, then it is a mistake that has lasted for over half a century, if one considers both recent codes. Is it possible that the legislator has not been able to correct this type of legal defect for over fifty years? It seems doubtful, although not impossible. The current state of affairs means that the law does not fully protect either morality, the proper functioning of the family, or the proper psycho-physical development of a minor. An urgent change is necessary here,

[52] R. Krajewski, *Uzasadnienia kryminalizacji kazirodztwa*, "Prokuratura i Prawo" 2016, no. 6, pp. 5–28; M. Tomkiewicz, *Kazirodztwo a prawnokarna ochrona rodziny w Polsce*, "Profilaktyka Społeczna i Resocjalizacja" 2013, no. 21, p. 25.

one that I discuss at the end of this text. At this point, however, it is worth recalling Warylewski's words. He considers that "The prohibition of Article 201 of the Penal Code covers, in addition to heterosexual intercourse, also sexual intercourse between persons of the same sex. The concept of 'sexual intercourse' […] is broader in scope than the term 'copulation' and, unlike the latter – limited exclusively to normal heterosexual intercourse – it applies to both homosexual contacts between men and lesbian incest between women. However, it does not cover other sexual activities referred to in Article 197 § 2, Articles 198, 199 and 200 § 1 of the Penal Code. This fact confirms the thesis that Article 201 of the Penal Code does not really protect anyone or anything – it is only a mock-up […]. It does not protect minors from sexual abuse, unless it goes beyond the broad formula of 'other sexual activities'. It does not protect the health of offspring […]. It also does not protect the proper, whatever that means, functioning of the family, because it does not prohibit the stimulation and satisfaction of sexual drive in family arrangements, as long as the partners refrain from intercourse. As a result, contemporary Polish doctrine tries with some difficulty to indicate the proper subject of protection for this provision. It cannot be ruled out that the legislator also had some problems with this. The justification for the draft of the new Penal Code completely omits the issue of *ratio legis* of the prohibition of incest. Thus, it can probably be assumed – after all, there must be some justification for every criminalisation – that the legislator was guided by the same premises that accompanied the adoption of the Penal Code on 19 April 1969."[53]

Among Polish scholars of criminal law Violetta Konarska-Wrzosek considers that the provision protects morality in the sphere of sexual life applicable in our society and the proper functioning of the family. Every incestuous act violates the applicable moral norms and not all sexual activities undertaken in incestuous arrangements are equally immoral and dangerous to family relations or to the further functioning of the family in a way that allows a realization of its basic functions.[54] Mirosław Surkont believes that in the case of incest, the subject of the crime is morality, and that the concern for the health of any offspring, if it was taken into account by the authors of the Code, was only a secondary element[55]; this is also how Patrycja Kozłowska-Kalisz interprets this issue.[56] Joanna Piórkowska-Flieger writes that the subject of protection is socially established sexual morality, according to which sexual intercourse between persons who are closely related or who are connected by a legal relationship modelled

[53] J. Warylewski, *Rozdział IV. Przestępstwa przeciwko wolności seksualnej i obyczajności* [in:] *Przestępstwa przeciwko dobrom indywidualnym*, ed. J. Warylewski, series: System Prawa Karnego, vol. 10, Warszawa 2016, pp. 855–856; *idem*, *Glosa do uchwały Sądu Najwyższego z dnia 19 maja 1999 r., I KZP 17/99*, "Orzecznictwo Sądów Polskich" 1999, no. 12, p. 633; *idem*, *Karalność praktyk sadomasochistycznych a prawo do prywatności*, "Gdańskie Studia Prawnicze" 1999, vol. 4, p. 68.

[54] V. Konarska-Wrzosek, *Rozdział XXV. Przestępstwa przeciwko wolności seksualnej i obyczajności* [in:] *Kodeks karny. Komentarz*, ed. V. Konarska-Wrzosek, 6th ed., Warszawa 2023, LEX, commentary on Article 201 of the Polish Penal Code, point 1.

[55] M. Surkont, *Prawo karne. Podręcznik dla studentów administracji*, Sopot 1998, p. 173.

[56] P. Kozłowska-Kalisz, *Racjonalizacja penalizacji kazirodztwa* [in:] *Kazirodztwo…*

on a relationship of kinship (adoption) is immoral and therefore inadmissible.[57] For Gardocki, the reason for criminalizing incest is not clear. He writes that "It is known that in almost all known cultures incest was considered a terrifying act, as breaking a certain taboo. […] attempts were made to justify the criminality of incest by the harmfulness of incestuous relations to the health of potential offspring. […] the reasons for punishing incest are of an emotional nature, and the reason for this emotion is not yet entirely clear."[58] In Filar's opinion, the subject of protection with regard to incest is sexual custom understood in a moralistic manner,[59] and not sexual freedom and the health of potential offspring resulting from incestuous sexual intercourse.[60] Paweł Daniluk writes that the criminalisation of incest is strongly connected with the protection of moral norms.[61] The problem of defining the protected interest in the case of the crime of incest has existed since the development of contemporary Polish criminal law. The justification for the criminalization of incest has undergone changes over the years, which is reflected in the statutory definition of its characteristics.[62]

How then can one answer the question posed in the title of this article: is the notion of incest a relic of the past or is it a necessity of the present? Should it be removed from the catalogue of prohibited acts, or is its existence there necessary to protect the legal interests indicated above? In my opinion, the answer goes beyond binary thinking, because such thinking leads to oversimplification, going to extremes, and thus missing what lies in the middle. Therefore, the response should not be limited solely to a vote in favour of completely removing the provision on incest from the Penal Code, as Warylewski and Katarzyna Banasik[63] propose, but it also cannot mean recognising that the current wording of the provision is optimal (because it definitely is not) and not subjecting it to any change.

I am of the opinion that criminal law, like almost everything in the world around us, is subject to change, and it is good when these changes constitute an evolution

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57 J. Piórkowska-Flieger, *Rozdział XXV. Przestępstwa przeciwko wolności seksualnej i obyczajności* [in:] *Kodeks karny. Komentarz*, ed. T. Bojarski, Warszawa 2016, p. 583.

58 L. Gardocki, *Prawo karne*…, pp. 276–277.

59 M. Filar, *Przestępstwa seksualne w nowym kodeksie karnym* [in:] *Nowa kodyfikacja karna. Krótkie komentarze*. *Zeszyt 2*, ed. L. Bogunia, Warszawa 1997, p. 45.

60 M. Filar, *Rozdział XXV. Przestępstwa przeciwko wolności seksualnej i obyczajności* [in:] *Kodeks karny. Komentarz*, ed. M. Filar, Warszawa 2012, p. 1014.

61 P. Daniluk, C. Nowak, *Kazirodztwo jako problem karnoprawny (dwugłos)*, "Archiwum Kryminologii" 2007–2008, vol. 29–30, p. 475; see also: L. Falandysz, *O koncepcji tzw. "przestępstw bez ofiar"*, "Państwo i Prawo" 1978, issue 8–9, p. 107.

62 K. Nazaruk, *Kazirodztwo. Aspekty prawnokarne i kryminologiczne*, "Ius Novum" 2022, vol. 16, no. 2, p. 22; M. Płatek, *Kodeksowe ujęcie kazirodztwa – pozorny zakaz i pozorna ochrona* [in:] *Kazirodztwo*…, pp. 133–136; K. Banasik, *Karalność kazirodztwa jako naruszenie wolności seksualnej* [in:] *Konteksty prawa i praw człowieka*, ed. Z. Dymińska, Kraków 2012, p. 37 ff.; V. Konarska-Wrzosek, *Przedmiot ochrony przy typie przestępstwa kazirodztwa* [in:] *Aktualne problemy prawa karnego. Księga pamiątkowa z okazji Jubileuszu 70. urodzin Profesora Andrzeja J. Szwarca*, ed. Ł. Pohl, Poznań 2009, pp. 290–292.

63 See: J. Warylewski, *Rozdział IV. Przestępstwa przeciwko wolności seksualnej i obyczajności* [in:] *Przestępstwa przeciwko dobrom indywidualnym*…, p. 859; K. Banasik, *W kwestii penalizacji kazirodztwa*, "Prokuratura i Prawo" 2011, no. 4, pp. 65–72.

and not a degradation. Over the last hundred years, criminal law in the field of sexual offences has undergone a major evolution, including in the field of sexual offences, where the main generic subject of acts so defined has become sexual freedom, which in most cases has replaced decency in relation to these crimes. However, there are still a few acts where morality is the main legal good threatened by the perpetrator, and the crime of incest is certainly one of them. I believe that, although incest is a socially harmful act that affects morality and the family, when it concerns only adults, it should no longer be criminalized. Why? I argue this because it is not the role of the state to guard morality, either religious morality, or ideological morality, or morality of habits, and even less so to guard morality in matters related to sex. An ancient Roman legal maxim is: *volenti non fit iniuria* (to a willing person, injury is not done). If sane adults, that is, those over eighteen years of age, make a joint decision regarding their sexual life, despite their kinship, then although it may violate social mores, and however indecent or even repulsive it may seem, that decision should not be subject to penalisation. An adult has every right, arising from his or her sexual freedom, to make whatever decisions he or she wants in this regard, even if they seem wrong to others. It is high time for the state to withdraw in this area, to apply in practice the principle of criminal law as the *ultima ratio* and to stop punishing sexual intercourse (since this is the only thing that is currently of interest to the law) in cases of this type of incest.

However, I am not in favour of complete decriminalisation of incestuous relationships. I also believe it is high time to move toward decriminalising incest under Article 201 of the Penal Code, though not completely. I believe that although incest is a socially harmful act that harms both morality and the family, as well as the proper psychophysical development of a minor (if he or she is a participant in the act), if it only affects adults, it should no longer be a subject of criminal law. Certainly, such behaviour is not consistent with the moral norms prevailing in Poland, and in most cases, incestuous behavior violates the foundations of a properly functioning family, but with the evolution of criminal law and its ultimate reduction to *ultima ratio*, that is, the last resort used by the state to solve specific social problems, I am of the opinion that it is time following the example of a large number of countries to move away from penalizing this type of behaviour between adults. For example, in 2025, incest between adults was legal in Argentina, Belgium, Brazil, France, Spain, Japan, South Korea, Latvia, the Netherlands, Portugal, Russia, and Turkey, among others. However, I agree with Konarska-Wrzosek regarding the issue of so-called potential incestuous offspring. People should be able to do whatever they want, as long as they do not violate the rights and freedoms of others. If, as a result of their behaviour, they bring a new human being into being, their actions go beyond this libertarian approach, because they actually influence the entire life of that child, and in an incestuous relationship it is difficult to consider this influence positive or even neutral.

In the case of offspring from an incestuous relationship, the child born as a result of this act may essentially be deprived of the chance to lead what can be called a normal life and, through no fault of his or her own, may suffer the consequences of the pathological sexual relationship through which he or she came into this world.

These are arguments that should be reflected in criminal laws, which could have a preventive effect on individuals engaging in incestuous intercourse and prevent the creation of offspring from such sexual relationships. Therefore, Article 201 of the Penal Code should be amended to include a § 2, the content of which would essentially be identical to that currently contained in § 1, with the difference that it would include the phrase "if pregnancy results from the act." Thus, incest in this case would practically boil down to sexual intercourse between close relatives of the opposite (biological) sex and in the form of vaginal intercourse, as this can lead to conception. Based on the modified proposal put forward by Konarska-Wrzosek (cited earlier), this crime would include pregnancy as a consequence of the perpetrators' conduct. This would be a consequential crime. However, the result of incestuous sexual intercourse could be both intentional and unintentional, as it is not the intention that is important here, but the effect, which is pregnancy. Issues related to whether the incestuous conception of a child was intentional or not would be taken into account when determining the penalty. The *sine qua non* premise for criminalizing such incest would be a participant's pregnancy, not the child's birth, which would prevent a possible illegal termination of pregnancy or the birth of a live child. Contrary to Konarska-Wrzosek's proposal, this would not constitute a qualified form of incest punishable by a harsher penalty than the act currently described in Article 201.

I am in favour of modifying the regulations in this direction, so as to criminalize incest when at least one of the participants in such sexual activity is a minor, that is, a person under eighteen years of age. I believe that this would be sufficient to guarantee proper criminal protection of a minor against indecent sexual acts within family relations, which should protect both the proper functioning of the family and the proper development of the minor in question.

As part of my *de lege ferenda* recommendation, I propose amending the provision of Article 201 and giving it the following wording:

> Article 201. § 1. Whoever engages in sexual intercourse with a descendant, adoptee, brother, or sister, if such person is a minor, shall be subject to the penalty of imprisonment for a term of between three months and five years.
> § 2. Whoever engages in sexual intercourse with a descendant, adoptee, adoptive parent, brother, or sister shall be subject to the penalty specified in § 1 if the act results in pregnancy.

The proposed provision, designated § 1, narrows the scope of entities participating in criminalised incest. The ascendant and adoptive parent are omitted, as it is impossible for an ascendant to be a minor at the same time, just as it is impossible under Polish law for an adoptive parent to be a minor. In the case of the proposed amendment, incest constitutes a crime when even one of the participants is a minor. The generic subject of the offence under Article 201 § 1 remains decency, while the individual subject is the proper psychophysical development of the minor and the proper functioning of the family. Should incest, as penalized in Article 201 of the Penal Code, cover, as it currently does, only sexual intercourse, that is, vaginal, anal, and oral intercourse and their substitutes, or should it also encompass other sexual acts? Given that other

sexual acts constitute less of an intrusion into a person's intimate sphere, and above all, that incest occurs with the consent of the participants, I do not believe it would be appropriate to expand the sphere of sexual life to include a prohibition on engaging in other sexual acts between designated individuals in the case of incest. Of course, from a moral perspective, the behaviour will still seem extremely inappropriate, yet it should not be subject to criminal liability.

Finally, it is worth emphasising that human freedoms and rights, including sexual freedom, are universal in nature, and the task of the state applying criminal law is to protect these freedoms and rights. In the case of sexual crimes, such a good is primarily sexual freedom, while decency has nowadays, as a result of the evolution of both society and law, faded into the background. The state should not be allowed to excessively restrict sexual freedom, except in necessary cases, in order to guarantee general and abstract moral norms relating to human sexuality. I believe that incestuous relationships between sane adult people do not fall into this category.

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Summary

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Incest as a Sexual Crime in Polish Criminal Law: A Relic of the Past or Still a Necessity in the Present?

The article deals with the crime of incest in Polish criminal law. The author analyzes the justification for the existence of the legal prohibition of incest. He examines this issue based on a historical outline and the views of scholars of the doctrine of criminal law. The author proposes the creation of a draft provision *de lege ferenda*.

Keywords: incest, sexual crime, sexual freedom, decency.