(1992) 37 JLSS 216
June 1992
Incest and the Forbidden Degrees of Marriage in Scots Law

Kenneth McK Norrie, University of Strathclyde

The helpful comments of Jenifer Ross, Department of Law, University of Strathclyde, are gratefully acknowledged, but any opinion expressed herein is, of course, the sole responsibility of the author -- K McK N.

Sexual intercourse between a person and certain close relatives will, in some circumstances, constitute the crime of incest in Scots law (The Sexual Offences (Scotland) Act 1976, s 2A, as inserted by the Incest and Related Offences (Scotland) Act 1986); a purported marriage between a person and certain other close relatives will have no effect and will be void (The Marriage (Scotland) Act 1977, s 2, Sched 1, as amended by the Marriage (Prohibited Degrees of Relationship) Act 1986). This article aims to examine the rules of law contained in these two provisions and, in particular, to analyse the justification for these rules. It is not to be questioned that all rules of law demand justification, and it is submitted that if a statutory rule has no justification it demands repeal. This article will argue that there is no justification for criminalising incest, and no justification for prohibiting marriage between parties within certain degrees of relationship.

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

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

The rules of incest

The prohibition on incestuous relationships is one of the oldest prohibitions in law. Incest has been a taboo in most societies from the earliest days of civilisation (Curiously, although the act was considered abominable, it was not criminal in England until the passing of the Prohibition of Incest Act 1908). In the Bible, the eighteenth chapter of the Book of Leviticus laid down the categories of relationship that were so abominable to the Judaic deity that terrible punishment could be inflicted by mortals; and this source was directly incorporated into the Scottish statute book by the Incest Act 1567, which punished with life imprisonment anyone who had sexual intercourse within the degrees of relationship forbidden by verses 6 to 17 of that part of the Bible. This Act, and that part of Leviticus (In the Geneva translation, James VI and I not having yet authorised his version: see HM Advocate v RM 1969 JC 52), remained part of Scottish statutory law until 1986, when the law was greatly simplified and brought up to date by the Incest and Related Offences (Scotland) Act 1986, which amended the Sexual Offences (Scotland) Act 1976 ('the 1976 Act').

Section 2A(1) of the 1976 Act lays down the list of categories of relatives between whom sexual intercourse will be a crime. It is expressly provided that sexual intercourse between persons outwith any of the listed categories cannot amount to incest. (Section 2A(3). This avoids any argument that there may still exist some wider common law crime of incest that could be charged if the conditions for the statutory crime of incest are not satisfied.) This table is in two parts.

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

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

Within these degrees, the act that is prohibited is heterosexual sexual intercourse. The physical nature of the act that is prohibited is the same as for rape: sexual intercourse constituted by the insertion of the male penis into the female vagina. Any other form of sexual act, such as homosexual acts, or penetration into any part of the female body other than her vagina, does not amount to sexual intercourse and cannot therefore be incest. (Though it may amount to some other offence such as shameless indecency: see R v HM Advocate 1988 SCCR 254; 1988 SLT 623 in which a father was convicted of this common law crime having committed a sexual act that fell short of sexual intercourse with his sixteen-year-old daughter. The court held that the relationship between the parties rendered the father's conduct sufficiently 'shameless' to constitute the offence.) Lord Justice-General Inglis described the form of penetration for incest as being 'precisely on a par' with that required for rape: '[It] is not necessary that the penetration be complete, or that emission be proved to have followed. It is not even necessary that the hymen be ruptured.' (In Jas Simpson (1870) 1 Coup 437 at pp 439/440. Cf, the nature of penetration required to consummate a marriage, which has to be 'ordinary and complete', and 'not partial and imperfect', at least in English law, where the matter is significant: see Dr Lushington in D-e v A-q (1845) 1 Rob Eccl 279 at p 298.) If incest is committed, then both parties to the act are guilty of the crime, though it is certainly not the practice to prosecute a child who is the subject of sexual abuse by a parent or relative. Undoubtedly the court would take the view, if such a prosecution were brought, that the child was too young to consent to the act, and therefore lacked the required mens rea. (The accused in Wallace v Tudhope 1981 SCCR 295; 1982 SLT 218 had previously been convicted of incest when seventeen years of age (and placed on probation therefor).) A person who is outwith the degrees forbidden under the 1976 Act may be guilty art and part of the crime of incest (Vaughan v HM Advocate 1979 SLT 49).

It is a defence if the accused can prove (1) that he or she did not know and had no reason to suspect that the other party was related in one of the degrees (1976 Act, S 2A(1)(a)), (2) that he or she did not consent to the sexual intercourse (ie, that she (It would be difficult to prove that a man had had sexual intercourse without consent (though this would not be impossible: cf, Vaughan v HM Advocate 1979 SLT 49, though that case involved a young boy).) was raped) or did not consent to sexual intercourse with that person (ie, had made a mistake as to identity) (1976 Act, s 2A(1)(b)), or (3) that he or she was married to the other person at the time the act took place, the marriage having taken place outwith Scotland and being recognised as valid by Scots law (1976 Act, s 2A(1)(c)).

The forbidden degrees of marriage

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

A relationship of affinity is one created through marriage, and curiously the law assumes that affinity survives the marriage which created it, whether that marriage ends by death or by divorce. Affinity was originally brought into the forbidden degrees, for the purposes of both incest and marriage, on the theory

(now long dead) that parties in a married state are held to be identified, with the result that anyone related to one party is automatically related to the other in the same degree: my wife's niece is my niece, etc (Purves, Trs v Purves (1895) 22R 513. Even when this theory held sway it was not taken to its logical conclusion: my wife's sister may have been my sister, but she was not my brother's sister and could lawfully marry him. And the theory never had any effect in the law of succession.) Affinity is a purely legal concept and arises from marriage and no other form of relationship. So the cohabitation of a man and a woman does not create any affinity between the man and the woman's blood relations, nor between the woman and the man's blood relations. It follows that, for example, a man may not marry his son's ex-wife, but he may marry his son's ex-mistress. (In Hamilton v Wylie (1827) 5S 716 the old idea that sexual intercourse alone created a relationship of affinity (rather as sexual intercourse following a promise of marriage created an irregular marriage under certain conditions at common law) was diapproved.)

The effect of the rules forbidding affines to marry is as follows. A man may not (subject to exceptions shortly to be discussed) marry any of the following (and a woman may not marry any of the male equivalents): his son's or his father's or his grandfather's former wife; or his own former wife's former mother or daughter or granddaughter.

Until recently, the prohibition on all affines within these classes (And in other classes: the Marriage (Scotland) Act 1977 as originally passed prohibited marriage between a man and the grandmother of his former wife or the former wife of his grandson (and between a woman and the male equivalent) marrying was as absolute as that prohibiting consanguine or adoptive relations marrying. However, with the Marriage (Prohibited Degrees of Relationship) Act 1986, certain exceptions were made concerning the affinitive relationships, though they deal with only very particular situations. If the relationship is between a man and his son's former wife or his own former wife's mother (or between a woman and the equivalent males), that is the relationships-in-law, then marriage is permitted provided (1) that both parties are over twenty-one years of age and (2) that the marriage is solemnised (The use of the word 'solemnised' in the statute suggests that these rules cannot apply to irregular marriages, which, of their nature, are not 'solemnised'.) after the death of both the son and the son's mother (if he wishes to marry the son's former wife) or after the death of the former wife and her father (if he wishes to marry his own wife's mother) [see p 237, below]. With the other affinitive relationships, that is the step-relationships, marriage is permitted provided (1) that both parties are over twenty-one years of age, and (2) that the younger party has not at any time before the age of eighteen been treated by the other party as a child of the family, both having lived in the same household. The design of this provision is to ensure that marriage between affines can take place only when the parties have never previously assumed the roles of parent and child in relation to each other. (For an examination of the difficulties of interpreting the phrases 'lived in the same household' and 'treated . . . as a child of his family', see Nichols, 'Step-daughters and Mothers-in-law', 1986 SLT (News) 229 at 231.)

Justifying the rules

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

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

The most common argument raised in favour of both criminalising incest and prohibiting marriage -- though it is in fact seldom mentioned in the cases -- is the fear that such relationships, if fecund, could result in offspring who suffer from genetically transmitted disabilities. The scientific evidence in support of this claim suggests, at most, that there is an increase in risk, (See Morton, 'Empirical Risks in Consanguineous Marriages' (1958) 10 Am J Hum Gen 344; Adams and Neel, 'Children of Incest' (1967) 40 Pediatrics 55; Farrow and Juberg, 'Genetics and Laws Prohibiting Marriage in the US' (1969) 209 JAMA 534; Wolfram, 'Eugenics and the Prohibition of Incest Act 1908' [1983] Crim LR 308.) which is of course very different from suggesting that a disabled child will be born. That increase in risk appears to be no greater than the risk to children born by means of IVF, which is not prohibited, and arguably is encouraged, by the law. (Human Fertilisation and Embryology Act 1990. During the parliamentary debates it was reported that 'babies born from IVF have three times the low birth weight rate, five times the spina bifida rate, and four times the perinatal death rate': HC, Vol 171, col 106. If this is true then the risk to a child of incest is very much less: see authorities cited above.)

The basis of the fear is by no means clear. Is the prohibition designed to protect the genetic purity of the race (ie, is the policy one of protecting society)? If so, the fear is unrealistic, for it would take many generations of inbreeding (which are highly unlikely to occur) before any significant effect on the population was noticed. And in any case there is strong authority in other areas of the law to suggest that personal liberties are not to be interfered with merely for 'eugenic' reasons. (See Re B (A Minor) (Wardship: Sterilisation) [1987] 2 WLR 1213 in which it was held by a unanimous House of Lords that eugenics could not justify the non-consensual sterilisation of a congenitally mentally disabled woman, and that the justification for such an act could be found only in the woman's best interests.) If the fear is not for the genetic harm to society, might it be based on the genetic harm to the individual or the family (ie, is the policy one of protecting individuals)? If so, the fear may well be more realistic but the prohibition hardly addresses it. The crime of incest prohibits the act of penile penetration, not the act of fecundation. It is neither incest nor any other crime for a woman to inseminate herself artificially with the semen of her brother or her father or her son. (Artificial insemination does not amount to adultery, because adultery requires penile penetration: Maclennan v Maclennan 1958 SC 105; and since incest requires penile penetration, so too artificial insemination cannot be incest.) If incest and the laws of marriage were truly designed to prevent the birth of genetically inbred children it would achieve that purpose far better by prohibiting genetic inbreeding rather than penetrative sexual intercourse and forbidding marriages irrespective of the fecundity of the parties. In other areas of the law, nothing is done to prevent the birth of disabled children. An incestuous union produces a mere risk of disablement (but would always attract punishment); yet when there is a certainty of disablement, the law does not punish those who allow this to eventuate. Abortion on the ground of foetal disability is permitted (Abortion Act 1967, s 1(1)) but not demanded or even encouraged by the law. Nor is it any crime for two unrelated people who have the same deleterious gene to have sex, or even deliberately to procreate.

The clinching argument against genetic risk being a sound basis for the prohibition of incest is that various statutes permit (or do not prohibit) sexual relations between blood relations. Under the (now repealed) Incest Act 1567 there could be no incest between parties related illegitimately, except by a mother and her illegitimate son, because there was no legal relationship between the parties so related (Erskine VI 4.56; Hume, i, 452; Macdonald's Criminal Law of Scotland (5th edn) at p 148.) (with only the stated exception) (HM Advocate v RM 1969 JC 52). The blood link was irrelevant to the commission of the crime. And today, under the Human Fertilisation and Embryology Act 1990, where the mother of a child is defined as the woman who carried it, irrespective of a genetic link with the carrying mother (Section 27(1)), no exception is made (as there is with, for example, the adoption legislation) for the crime of incest. (Notwithstanding a plea from the Chief Rabbi during the Act's Second Reading in the House of Lords that such an exception be made: HL Deb, 7th December 1989, col 1074.) So a male born to one woman can legally have sexual intercourse, as fecund as he pleases, with his genetic mother. Furthermore, under the 1976 Act, it is a defence to the charge if the accused can prove that he or she was unaware of the relationship (1976 Act, s 2A(1)(a)). This provision shows that mens rea is required, that is a guilty mind: the law is therefore trying to punish the inherent badness, rather than trying to prevent the genetic deterioration of the human race or to prevent the birth of biologically 'inferior' human beings. It is clear that the genetic argument simply does not work.

A quite different type of argument in favour of criminalising incest and prohibiting certain marriages is that to allow such things would disturb the stability of families and, because families are the basis upon which society rests, would therefore disturb the stability of society itself. Society, it may be argued, is entitled to protect itself from such a risk. Again, one is obliged to ask how serious that risk actually is, and whether the prohibition properly addresses the risk.

It is submitted that the prohibition on incest does not address the risk of destabilising families. It must be remembered that incest is constituted only by penetrative heterosexual intercourse. Sexual behaviour falling short of that act cannot amount to incest, yet that behaviour may surely be as disruptive of the family relationship as any other. Possibly more disruptive of a family relationship would be homosexual activity within it, which can never be incest. The law does not prohibit disruption of families, it prohibits heterosexual penetration. The family is protected in other ways if there are members within it that need protection. So, for example, if one party is under sixteen, there are other offences that can and will be charged, which properly draw penalties strict enough to constitute the necessary deterrence to the potential offender and the protection of the young that the law rightly aims for. If the law were serious about protecting families and the weaker members therein it could do so much more efficaciously by prohibiting sexual relations (of whatever nature) between the two people when one stands in some position of authority over the other, or in circumstances in which the risk is great that one party did not give totally free consent, but rather was influenced by the authority that the other had over him or her. The law does this already under the Incest and Related Offences (Scotland) Act 1986, for one of the newly created related offences is that of a person in a position of trust over a child under sixteen having intercourse with that child (This new offence was inserted into the 1976 Act as s 2C) (this of course is already a statutory offence in any case in relation to girls (1976 Act, ss 3, 4), though not boys, under sixteen). A similar idea is found in the legislation concerning the forbidden degrees of marriage, because the prohibition on marriage between those related by

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

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

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

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

Conclusion

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

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