



Lucjan Świto

University of Warmia and Mazury in Olsztyn

Department of Philosophy and Canon Law

<https://orcid.org/0000-0002-6392-4599>

“New Human Rights” and the Ban on Sexual Intercourse between Relatives Legal Contemplation

Abstract: The classic conception of human rights, expressed in the Universal Declaration of Human Rights signed in Paris on December 10, 1948, has been receiving attempts at reinterpretation in the recent 50 years. The appearance of the concept of “new human rights” in the public sphere serves as an example here. However, the scope of the term “new rights” and the precise meaning of “reproductive and sexual rights” are not entirely known. The change in perception of human sexuality, the affirmation of sexual liberation, and the acceptance of violating social taboo in the name of the “new human rights” invites reflection on how the concept of sexual rights relates to the ban on sexual contacts between relatives. Does a ban on incest lose its rationale in modern times, and does the penalisation of such acts constitute merely anachronistic oppression? Are the currently enforced normative solutions clear and free of questions and controversy in this matter? Lastly, one is compelled to inquire whether sexual contacts between relatives are perhaps already among the “new human rights.” The present article endeavours to answer these questions.

Keywords: human rights, incest, sexual decency, feminism

Introduction

Human rights are a group of individual rights to which all humans are entitled by virtue of the unique value of the human person. Every human being is vested with them because he “is a person, that is, his nature is endowed with intel-

ligence and free will. Indeed, precisely because he is a person he has rights and obligations flowing directly and simultaneously from his very nature.”¹ These rights rest on a certain consensus which overarches ideologies, as well as on foundational, common values belonging to the universal heritage of humankind. They are inalienable, inviolable, and independent of any lawgiving power, since they are primary and superior to such a power. The direct source of these rights is the dignity of the human person.²

The classic conception of human rights presented above, expressed in the Universal Declaration of Human Rights signed in Paris on December 10, 1948,³ has received attempts at reinterpretation in the last 50 years, exemplified in the appearance of “new human rights.” The term is derived from “sexual and reproductive rights,” which appeared in the late 1960s driven by women’s liberation movement and sexual revolution. Although the term itself was officially introduced to the international discourse only at the International Conference on Population and Development held in Cairo in 1994,⁴ the concept of reproductive and sexual rights appeared for the first time in the Proclamation of Teheran, which was a resolution passed at the conclusion of the first International Conference on Human Rights held by the United Nations in Teheran in 1986.⁵ Currently, the concept of these rights functions not only in the forum of the United Nations, but has also been implemented in the language used by other international organisations, including the European Union, which—as is worth noting—in the first half of 2015 alone passed four resolutions referring to the mentioned rights.⁶

¹ John XXIII (1963), *Pacem in Terris*, Diocese of Davenport. Archived from the original on 12 May 2008, accessed April 30, 2019, § 9.

² For more see i.a. Henryk Skorowski, *Problematyka praw człowieka* (Warszawa: Wydawnictwo UKSW, 2005), 10–26.

³ Among the universal human rights, the Declaration names the right to life, liberty, and personal safety, the right to property, the right to freedom of thought, conscience, and religion. The Declaration does not grant these rights, but recognizes their existence as inherent in the nature of the human person, see Franciszek Greniuk, *Od Powszechnej Deklaracji Praw Człowieka do Karty Praw Podstawowych*, in *Prawa człowieka. Przesłanie moralne Kościoła*, ed. K. Jeżyna and T. Zadykiewicz (Lublin: Wydawnictwo KUL, 2010), 16–17.

⁴ International Conference on Population and Development Programme of Action adopted at the International Conference on Population and Development Cairo, 5–13 September 1994, 20th Anniversary Edition, <http://www.unfpa.org/publications/international-conference-population-and-development-programme-action#sthash.DrDJT1pf.dpuf>, 58–74, accessed June 20, 2015.

⁵ Point 16 of the Proclamation of Teheran, a document adopted on 2 April 1968 during the United Nations International Conference on Human Rights in Teheran, U.N. Doc. A/CONF.32/41 at 3, <https://www1.umn.edu/humanrts/instree/12ptichr.htm>, accessed June 20, 2015.

⁶ See: European Parliament Resolution of 10 March 2015 on progress on equality between women and men in the European Union, 2014/2217(INI); European Parliament Resolution of 20 February 2015 on the Annual Report on Human Rights and Democracy in the World 2013 and the European Union’s policy on the matter, 2014/2216(INI); European Parliament Reso-

The scope of the term “new rights” and the precise meaning of “reproductive and sexual rights” are not entirely known.⁷ However, the indefiniteness of the term is not accidental, as these rights undergo constant changes, depending on emerging possibilities connected with, for example, the development of so-called assisted reproductive technology, or artificial reproduction. Whether the analysed term includes the “right to abortion”⁸ is still a controversial issue. Nevertheless, it is commonly accepted that reproductive and sexual rights mean the right of “couples and individuals”⁹ to make decisions concerning the creation of offspring and its number, the right to choose sexual orientation and sexual partners, the right to choose the form of protection against unwanted pregnancy and sexually transmitted infections, unrestricted access to information, contraception, sterilisation, and above all the free choice of sexual behaviour, that is, the right to make unrestricted use of one’s sexuality.

The change in perception of human sexuality, the affirmation of sexual liberation, and the acceptance of violating social taboo in the name of the “new human rights” invites reflection on how the concept of sexual rights relates to the ban on sexual contacts between relatives, which until recently was firmly and quite ubiquitously established in public awareness. Does a ban on incest lose its rationale in modern times, and does the penalisation of such acts constitute merely anachronistic oppression? Are the currently enforced normative solutions clear and free of questions and controversy in this matter? Lastly, one is compelled to inquire whether sexual contact between relatives is perhaps already among the “new human rights.”

lution of 9 June 2015 on the EU Strategy for equality between women and men post 2015, 2014/2152(INI).

⁷ For more, see i.a. Karolina Dobrowolska, “Prawa reprodukcyjne i seksualne w ONZ i ich doktrynalne uwarunkowania,” *Zeszyty Prawnicze*, vol. 16 (2) (2016): 163–181.

⁸ Jane Adolphe, “‘Gender’ Wars at the United Nations,” *Ave Maria Law Review* vol. 11 (2012): 1. In the literature it is remarked that the current concept of reproductive rights formed on the basis of the provisions of the Cairo Conference did not include the “right to abortion,” however, the question is constantly brought up—calls for revision of the international consensus in this matter are regularly repeated in the forum of the United Nations, see Dobrowolska, “Prawa,” 175–176.

⁹ World Population Plan of Action, August 1976, Adopted by the World Population Conference Bucharest, 1974, Agency for International Development Washington, D.C. 20523, pt. B(f), <http://www.population-security.org/27-APP1.html#C.1.f>, accessed September 25, 2018.

Ban on Incest¹⁰ in Public Discourse

Lifting the ban on incest is not a purely abstract and hypothetical topic, but a question undergoing lively debate in the public sphere, and even undertaken by widely publicized films.¹¹ Catchy titles in the press and on the Internet almost jump out at the reader: “Kazirodztwo – co w tym złego?” [Incest – What Is Wrong about It?],¹² “Z siostrą to nie grzech” [It’s Not a Sin If She’s Your Sister],¹³ “Karać czy nie karać za kazirodztwo w XXI wieku?” [Should We Punish Incest in the 21st Century?],¹⁴ “W Niemczech chcą zalegalizować kazirodztwo” [Germany Wants to Legalise Incest].¹⁵

The last title refers to the opinion of the German Ethics Council associated with the Bundestag that “criminal law is not the appropriate means to preserve a social taboo.” In its lengthy report on incest, the Council recommended a partial amendment to article 173 of the criminal code (which existed in German law since 1871, the early times of Bismarck), which stipulates three years’ imprisonment for intercourse with a family member, even if it was mutually consensual. Fourteen council members were in favor of the indicated change, nine were opposed, and two abstained. It should be added that the discussion was not purely academic, but precipitated by the specific case of Patrick Stübing and his sister Susan Karolewski, who at that time had four children together. The siblings were separated as children, found each other after the years, and became romantically involved. Their story precipitated a country-wide discussion on incest. Jerzy Montag, legal expert for the Green Party parliamentary faction, said in defence of the siblings that article 173 was contrary to the spirit of the 21st century. We must not establish social mores with the criminal code.

The story from Germany is not an exception. In 2012, a similar discussion erupted in Denmark, sparked by Niklas and Sofie, siblings from Aarhus, who

¹⁰ It must be noted that the Polish word “kazirodztwo,” translated here as “incest,” is used colloquially, even by lawyers, but is not part of legislative language. “Incest” itself is borrowed from Latin *incestum*, meaning “impurity,” “obscenity,” or “blemish,” and was used in a broader sense than just intercourse between relatives. The term is found in Western terminology (Fr. *inceste*, Sp. *incesto*, Ger. *Inzest*). See: Andrzej Sakowicz, *Prawnokarne gwarancje prywatności* (Kraków: Zakamycze, 2006). See also Małgorzata Szwejkowska and Bronisław Sitek, “Karnoprawny zakaz stosunków kazirodczych,” *Studia Prawnoustrojowe*, vol. 23 (2014): 31–47.

¹¹ In Poland, one of the films with this theme was Filip Marczewski’s *Shameless* of 2012.

¹² <https://www.wiatrak.nl/57127/kazirodztwo-co-w-tym-zlego>, accessed September 25, 2018.

¹³ <https://www.wprost.pl/tylko-u-nas/334836/Z-siostra-to-nie-grzech.html>, accessed September 25, 2018.

¹⁴ http://wyborcza.pl/1,76842,12858518,Karac_czy_nie_karac_za_kazirodztwo_w_XXI_wieku__W.html, accessed September 25, 2018.

¹⁵ <https://wiadomosci.wp.pl/w-niemczech-chca-zalegalizowac-kazirodztwo-6027652193174145a>, accessed September 25, 2018.

had a daughter together. That time as well, the rationale of penalizing intercourse between two consenting adults was put into question. “The government should not be overseeing who has children with whom,” as a Member of Parliament Pernille Skipper said to the daily “Politiken.” She called penalizing sexual relations between relatives “an old-fashioned and grotesque approach to sex and family.”

Analogous arguments were made in a debate which took place in Switzerland. In 2010, the Minister of Justice from the Social Democratic Party, Simonetta Sommaruga, declared that the ban on incest “infringes on people’s autonomy” and proposed a change in the law.

A discussion in a similar “European” spirit takes place in Poland as well. In 2014, in his blog hosted by the weekly *Polityka*, professor Jan Hartman—then a member of the Ethics Committee for the Ministry of Health—wrote that if the motherly, or brotherly-sisterly love could be harmoniously melded with erotic love, a new, higher quality of love and relationship was achieved.¹⁶ Hartman continued that in the age of effective contraception, it was time to ask ourselves the question of what could be the justification of a ban on incest today. He noted that the doctrine behind the strict treatment of incest is completely inconsistent with the modern jurisprudence, since one set of the arguments levelled is religious, and another—“eugenic” which is not employed elsewhere. He wrote that the point was that children from such relationships could be born disabled and other couples at risk of such a problem were not met with this argument.

Ban on Incest in Criminal Law

Staying with national discourse, it is worth noting that the matter is raised not only in the media, but in the domain of criminal law. This is due to the fact that the *ratio legis* of the ban on incest is not clearly defined and has been interpreted in various ways for years. Whereas eugenic considerations and the proper functioning of the family, as well as decency in sexual matters, have been the standard justification for penalizing incest until the second half of the 20th century, they have since diminished in significance, although not disappeared entirely.¹⁷ As an example, such a stance is represented by Juliusz Leszczyński,

¹⁶ This particular statement was deleted from the blog. <https://hartman.blog.polityka.pl/2014/09/29/palenie-meskiej-czarownicy>.

¹⁷ For more, see Małgorzata Tomkiewicz “Kazirodztwo a prawnokarna ochrona rodziny w Polsce,” *Polityka Społeczna i Resocjalizacyjna*, vol. 21 (2013): 32. The author points out that the sexual bond in an incestuous relationship creates an arrangement which is opposed to other family members and sets itself apart as a subsystem in the family structure which, in turn,

according to whom a ban on incest is still justified by eugenic concerns and the necessity to protect public decency.¹⁸ Marek Bojarski also opines that the ban on incest aims to protect decency shaped by years of tradition, while taking into account arguments of eugenic nature.¹⁹

Legal doctrine also includes the view proposed by Andrzej Zoll,²⁰ Mateusz Rodzynkiewicz,²¹ Jan Baranowski,²² and Małgorzata Tomkiewicz²³ that incest disrupts the functioning of a particular family as a social subsystem.

According to Mieczysław Surkont, incest is a crime against decency, whereas the concern for the health of potential offspring, even though it does have some significance, is an entirely secondary justification for the ban.²⁴ For Oktawia Górniok,²⁵ Marek Mozgawa,²⁶ and Andrzej Marek,²⁷ the protected object of the crime of incest is solely decency, while for Igor Andrejew incest “offends public morality.”²⁸

For Lech Gardocki “the reasons to punish incest have an emotional character, and the reason for this emotion is not entirely clear.”²⁹ For Marian Filar, the

leads to unclear family roles, blurring their boundaries, conflicts, stress and social isolation of the family.

¹⁸ See Juliusz Leszczyński “O projektach reformy przepisów dotyczących przestępstw seksualnych,” *Państwo i Prawo*, vol. 2 (1992): 83–84.

¹⁹ See Marek Bojarski, *Prawo karne materialne. Część ogólna i szczególna* (Warszawa: Wolters Kluwer, 2004), 452.

²⁰ See Andrzej Zoll “Ochrona prywatności w prawie karnym,” *Czasopismo Prawa Karnego i Nauk Penalnych*, vol. 4, no. 1 (2000): 225.

²¹ See Mateusz Rodzynkiewicz, *Przestępstwa przeciwko wolności seksualnej*, in *Kodeks karny. Część szczególna. Komentarz do art. 117–277*, vol. 2, ed. Andrzej Zoll (Kraków: Kantor Wydawniczy Zakamczycze. Oddział Polskich Wydawnictw Profesjonalnych, 2006), 659.

²² According to Jan Baranowski, three meanings of the term “family” as a good protected by law should be differentiated: (1) family in the specific sense—as the particular functioning unit, a social subsystem, whose functioning may become disrupted by incestuous relations; (2) family in the abstract sense—as a symbol and value, in which case what is protected is not a particular family, but rather the social family structure—it is permissible to disrupt or even destroy a given family through criminal law intervention if there exist incestuous relations, in order to bolster family as an abstract symbol or value; (3) the true protected good is not family itself, but certain elements of moral doctrines as part of various ideologies, see Jan Baranowski, “Ratio legis prawnokarnego zakazu kazirodztwa,” *Przegląd Prawa Karnego* vol. 3, (1990), 67.

²³ Tomkiewicz, “Kazirodztwo,” 32.

²⁴ Mirosław Surkont, *Prawo karne. Podręcznik dla studentów administracji* (Sopot: Wydawnictwo Praw. Lex, 1998), 173.

²⁵ Oktawia Górniok, Stanisław Hoc, and Stanisław Przyjemski, *Kodeks karny: komentarz*, vol. 3. (Gdańsk: Wydawnictwo Arche, 1999), 171.

²⁶ See Marek Mozgawa, *Przestępstwa przeciwko wolności seksualnej i obyczajności*, in *Kodeks karny. Komentarz*, ed. Marek Mozgawa (Warszawa: Wolters Kluwer, 2014), 516.

²⁷ See Andrzej Marek, *Kodeks karny. Komentarz* (Warszawa: Wolters Kluwer, 2010).

²⁸ Igor Andrejew, *Polskie prawo karne w zarysie* (Warszawa: PWN, 1989), 421.

²⁹ Lech Gardocki, *Prawo karne* (Warszawa: PWN, 1998), 243.

protected object in the case of incest is "sexual decency understood in moralistic terms."³⁰

On the other hand, according to Jarosław Warylewski, the concern for moral and physical health of society only reinforces legislative paternalism, and does not serve the members of society, who often know best how to take care of themselves. The need to protect the family also does not support keeping the ban on incest, since, as the author claims, family dysfunction is almost never caused by incestuous relations, which appear only as a consequence of other pathologizing factors. Because of these doubts as to the eugenic and family-oriented reasons for the incest ban, and the untenability of protection for decency alone, the author postulates lifting the ban on incest, considering it a completely superfluous criminal law regulation of consensual sexual relations between adult relatives. Only that—he claims—would put criminal law on a more rational footing.

Warylewski also postulates that the ban on incest is a violation of the right to privacy as defined, i.a. in Article 8 of the European Convention on Human Rights. Therefore, the mentioned author is convinced that requesting the legislature to decriminalize incest is a voice in defence of both sexual freedom and all those human freedoms being curtailed and usurped by the government.³¹

A similar position is taken by Katarzyna Banasik,³² who views the ban on incest as a violation of sexual freedom, and by Andrzej Sakowicz, according to whom criminalizing incestuous relations is an example of criminal law overreach into the private sphere, and of granting primacy to the phenomenon of legal paternalism. He opines that the Polish legislature has not presented any arguments which would justify maintaining the ban on consensual incestuous relations between adults, which might prompt a discussion of legal grounds for decriminalizing sexual intercourse between relatives.

³⁰ Marian Filar, "Przestępstwa seksualne w nowym kodeksie karnym," in *Nowa kodyfikacja karna. Krótkie komentarze*, vol. 2, ed. A. Leciak (Warszawa: Ministerstwo Sprawiedliwości. Departament Kadr i Szkolenia, 1997), 45.

³¹ *Ibid.*, 96–97.

³² Katarzyna Banasik, "W kwestii penalizacji kazirodztwa," *Prokuratura i Prawo*, vol. 4 (2011): 65–72; Katarzyna Banasik, "Karalność kazirodztwa jako naruszenie wolności seksualnej," in *Konteksty prawa i praw człowieka*, ed. Zyta Maria Dymińska (Kraków: Oficyna Wydawnicza AFM, 2012), 37–46.

Ban on Incest in Canon Law, Polish Law, and European Law

Liaisons between closely-related persons have been a point of concern for church legislators for centuries, and the care for purity of family relations and of sexual life has been and still is prominent in the teaching of Church fathers.³³ This care found its expression, i.a. in defining the degree of consanguinity as an impediment to marriage. Initially, consanguinity was calculated drawing from the principles of Roman law, but since the 8th century, the German computation was canonically adopted, de facto resulting in a extension of the impediment to marriage to more distant relatives. The culmination in restrictive definitions of incest and marriage impediments came with the changes introduced by synods in the 10th century. Prohibition of consanguineous marriage was then extended to and including the 7th degree of consanguinity in the collateral line, and it was only Innocent III at the Second Council of the Lateran in 1215 who reduced the consanguinity impediment back to the fourth degree. This regulation endured till the 21st century.³⁴

The ban on incest also has a long tradition in Polish law. These kinds of sexual behaviors are penalized in Art. 206 of the Criminal Code of 1932,³⁵ as well as Art. 175 of the Criminal Code of 1969,³⁶ and in Art. 201 of the Criminal Code of 1997.³⁷

In the current Polish criminal law, the ban on incest is found in Art. 201 of the Criminal Code. The law reads as follows: Whoever has sexual intercourse with an ascendant, descendant, or a person being an adopted, adopting relation or brother or sister shall be subject to the penalty of the deprivation of liberty for a term of between three months and five years—which would seem to be clear and understandable. The problem, however—as rightly pointed out by Małgorzata Tomkiewicz, among others—is that such a penalization of incest has clear limitations of both objective and subjective character.³⁸

³³ Elizabeth Archibald, *Incest and the Medieval Imagination* (Oxford: Oxford University Press, 2001), 20.

³⁴ Wojciech Góralski, *Kanoniczne prawo małżeńskie* (Warszawa: Polskie Wydawnictwo Prawnicze Iuris, 2000), 69–76.

³⁵ Decree of the President of Poland of 11 July 1932, Criminal Code (Dz.U.1932.60.571, Art. 206): “Whoever has intercourse with a direct relative, brother, or sister, shall be subject to the penalty of the deprivation of liberty for up to 5 years.”

³⁶ Act of 19 April 1969, Criminal Code (Dz.U.1969.13.94, Art. 175): “Whoever has sexual intercourse with a direct relative, brother, or sister, or a person adopting or being adopted, shall be subject to the penalty of the deprivation of liberty from 6 months to 5 years.”

³⁷ Act of 6 June 1997, Criminal Code (Dz.U.1997.88.553; consolidated text: Dz.U.2018.1600).

³⁸ Tomkiewicz, “Kazirodztwo,” 32.

First of all, as the mentioned author also stresses, the prohibition present in the adduced Art. 201 pertains only to "sexual intercourse." The article does not criminalize "other sexual acts," whose term denotes behaviors beyond the meaning of sexual intercourse which are involved in the broadly understood human sexual life, consisting in bodily contact of the offender with the victim, or at least in bodily and sexual involvement of the victim. The term covers situations in which the offender, with the purpose of arousing or satisfying their own drive, not only touches the victim's sexual organs (even through clothes), but also undertakes other acts in contact with their body.³⁹

On this point alone, it must be admitted that the Polish legislature does not prohibit all forms of sexual activity between the persons specified in Art. 201, but only sexual intercourse. This means that arousing and satisfying the sexual drive between closest relatives, unless it crosses the boundary of sexual intercourse, is legally irrelevant.

As far as the subjective applicability of the ban is concerned, it must be noted that the crime of incest has been reduced by the legislator to a very narrow set of family members, the principle of which is not entirely understandable. The subjects named in the regulation do not include direct affinity, while it strictly limits the list of included persons. It is, therefore, not penalized, for example, if a parent-in-law has intercourse with a child-in-law, or if an adult stepchild has intercourse with a stepparent, or a person has intercourse with a person adopted⁴⁰ by their spouse. The analyzed scope of incest also does not include intercourse between unrelated persons adopted by the same person, or between a natural child of the person adopting and the person being adopted.

In European countries, there are various standards regarding incest. In France, the penalty for such relations was lifted back in 1810 by Napoleon Bonaparte. Incestuous liaisons are also not prosecuted in Spain, Portugal, Luxembourg, the Netherlands, and Belgium.

The diversity in European state laws towards the phenomenon of incest has been noted by the European Court of Human Rights, which analysed the ban on incest between siblings in its reasoning of the judgment of 12 April 2012, case

³⁹ See Supreme Court decision of 21 May 2008 in the case VKK 139/08, *Prokuratura i Prawo*, no. 12 (2008): 8.

⁴⁰ An attempt to extend the ban on incest to relations between the adopted and natural child of the same person analogous to the ban existing between siblings is not a sound move because Polish family law, beside *adoptio plena* includes also *adoptio minus plena*, which stipulates precisely that the adopted person is not fully included (in legal terms) in the family of the adopting person, and does not become a brother or sister for the natural children of the adopting person. *Adoptio plena*, on the other hand, does create a legal relationship of parent and child, and the adopted person does acquire rights and duties resulting from consanguinity towards the relatives of the adopting person, but even that kind of adoption does not create a relation of consanguinity, see Kazimierz Piasecki (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz* (Warszawa: LexisNexis, 2009), 101.

number 43547/08 *Stübing v. Germany*.⁴¹ In the ruling, ECHR explicitly states that there is no consensus among the Council of Europe Member States regarding penalization of consensual intercourse between adult siblings. In its conclusion, ECHR does admit that national courts sentencing for incest are within their margin of discretion, which does not violate Art. 8 of the Convention, but focuses, in its opinion, not on circumstances which could justify penalizing incest, as such, but on psychological and motivational determinants of Stübing's partner at the moment of deciding to enter into sexual relations with her half-brother.

The problem of incest has not been the subject matter of other ECHR decisions, but announcements of the Court in other cases regarding sexual matters clearly point to an interpretative direction. As an example, in the *A.D.T. vs. Great Britain* decision of 31 July 2000, ECHR rested its argumentation on the statement in the *Dudgeon* case, where it remarked: "Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved."⁴² In *E.B. vs. France* of 22 January 2008⁴³ the Court stated that the autonomy of persons participating in emotional relationships should be given special protection, recognizing the special importance of sexual life to the full realization of human personality, tied to the person's identity.⁹⁰⁰

Based on Art. 8.2 of the European Convention on Human Rights, the court indicated many times that public interest expressed in moral norms must give way to rights to privacy and autonomy in the sexual sphere. Particularly, it is consistently considered a violation of the Convention to criminalize, based on moral grounds, homosexual intercourse in conditions of full privacy between adults acting in full knowledge.⁴⁴

Conclusions

Fifty years ago, in 1968, as Pope Paul VI published his encyclical *Humanae Vitae* on moral principles guiding the transmission of human life, in which he restated the teachings of Second Vatican Council on spousal love and responsible reproduction, indissolubility of marriage, and the unifying and reproductive

⁴¹ See LEX No. 1130518.

⁴² See § 60.

⁴³ Complaint No. 43546/02.

⁴⁴ Marek Nowicki, *Europejska Konwencja Praw Człowieka* (Warszawa: Oficyna Wolters Kluwer, 2007), 31.

importance of the conjugal act,⁴⁵ at the United Nations conference in Teheran, a debate was held on the dangers of world overpopulation and the necessity of controlling the birth rate. This debate, as evidenced in the following years, resulted in the consolidation of anthropological changes, leading to the formation of a new cultural model of the human being. This new human is characterized by a radical individualism and subjectivism, for whom the only value is that which brings him benefit or pleasure, and who considers it his fundamental right to satisfy his individual desires, demanding they be authorized by positive law.⁴⁶ An expression of these are the "new human rights" analyzed here.

The "new rights" are established without reference to objective norms, solely based on subjective convictions of the persons establishing them. These individual choices become a reference point for a "new" legal system. The postmodern principle of free choice leads to a climate which permits thought, speech, and action outside of the framework of logic, morality, and tradition. Man, in order to avail himself of this right to choose, must liberate himself from all limitations, be they normative, ontological, ethical, cultural or religious. In this "liberation," his liberty is expressed. He can even choose sexual orientation and the form of his family, as well as change those in response to his latest needs.⁴⁷

The implementation of these rights happens through cultural transformation, underpinned by a change of laws and policies of the state regarding healthcare, education, and above all, the social mentality. The social taboo surrounding incest is ever bolder entering public debate, and the rationale behind its prohibition is questioned with increasing vigour and radicality, all under the banners of human autonomy and freedom. This phenomenon is fully in line with the view of Gerald Dworkin, who "proclaimed that the individual was morally autonomous if, and only if, their moral principles were exclusively their own. The individual must not be relieved, replaced or limited in their moral choice by the state. Actions by the legislator which remove individual moral autonomy in the name of the competing value of public morality expressing public interest are a manifestation of moralizing, paternalism, and a violation of the right to privacy."⁴⁸ A violation of sexual autonomy is, in the light of this theory, the most egregious form of privacy violation.

⁴⁵ The document states decisively that "it is necessary that each and every marriage act remain ordered *per se* to the procreation of human life" (No. 11), although it does allow regulation of conceptions (No. 16), while it forbids any contraceptive or interceptive methods (therefore, any artificial methods for preventing pregnancy – No. 14).

⁴⁶ Cf. Michael Schooyans, *Ukryte oblicze ONZ* (Toruń: Wydawnictwo Wyższej Szkoły Kultury Społecznej i Medialnej, 2001), 53–54.

⁴⁷ Bożena Bassa, "Prawa reprodukcyjne i seksualne jako 'nowe prawa' człowieka," *Studia nad Rodziną*, vol. 30–31, n. 1–2 (2012): 368.

⁴⁸ See Tom Gerety, "Redefining Privacy," *Harvard Civil Rights – Civil Liberties Law Review* vol. 12, no. 2, (1977): 1–23; Joanna Braciak, *Prawo do prywatności* (Warszawa: Wydawnictwo Sejmowe, 2004), 317.

In the context of the above, it is impossible not to note that the “new rights” are in fact a deformed version of human rights,⁴⁹ as they stand in opposition to natural law, and are at their core expressions of mere hedonism. What should be the reason for most concern is the fact that reproductive and sexual rights penetrate ever deeper into the structure of societies and lead to changes in behavior, set new priorities, lead to school program reforms, new policies of governments and various organizations, as well as new laws.

Coming back to legislation, it should be noted that although the law of the Catholic Church still unequivocally considers incest a moral evil, which corrupts a person, the legal systems of individual European states are undergoing distinct liberalization, and the jurisprudence of the ECHR seems to support that trend. In the Polish criminal law, the ban on incest is still present, but its objective and subjective limitations make it less than robust. Eliminating direct affinity from qualification, and limiting it only to the adopting and adopted person, threatens both the proper family relations and their decency, and also blurs the basic family structures. Limiting the ban on incest to sexual intercourse alone legitimizes all other forms of sexual involvement among family members, which is hard to reconcile either with the axiology of family functions or with decency. It seems—and it should be stated clearly—that the “softening” of both doctrine and the law, indicated above, which is expressed not only as tolerance but indeed as increasing approval for incestuous behaviors, is an action directed and intended towards weakening the family. It is hard not to perceive it as an echo of the agenda of the second and third wave feminist movements.⁵⁰

Are contacts between related persons, then, able to be viewed as “new human rights”? In attempting to answer this question, one must admit—however improbable this might have seemed only a decade or two ago—that nowadays the affirmative answer is not out of the question. This conclusion is supported primarily by the fact that it is currently the cultural trend to demand as many rights as there are possible choices.⁵¹ It is also supported by the ever bolder proposals raised in the media and in academic discussions to entirely de-penalize incest, and views which explicitly regard these kinds of sexual behaviors as the expression of human rights.

By way of conclusion, it should be noted that even in the national literature on this subject, there is no shortage of voices saying that there is nothing standing in the way of including incest undertaken by adults capable of recognizing

⁴⁹ Schooyans, *Ukryte*, 49.

⁵⁰ The development of feminist thought is commonly divided into three phases: the so-called first wave, shaped in the 19th century, which fought for formal equality between women and men, including suffrage; the second wave, beginning approximately in the 1960s; and the third wave (postmodernist), which flourished in the 1990s, see Dobrowolska, *Prawa*, 164.

⁵¹ Bassa, “Prawa,” 368.

the significance of their actions and of directing their behaviour *in the list of human rights*.⁵²

If one were to assume that the sole criteria legitimizing sexual contacts are age of majority and consent, and everything that man is capable of inventing to satisfy his desires is his right, then—to stay within this narrative frame—one must only signal that human rights thus understood in principle have no bounds. Apart from incest, another avenue for discussing human sexual freedom and human rights may soon (provided that the consenting person leaves such disposition regarding their body) also include necrophilia, but that is a topic for another article.

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⁵² Sakowicz, *Prawnokarne*, 32. The author views *incest* as an element of the right to privacy.

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Lucjan Świto

«Nouveaux droits» de l’homme et interdiction des contacts sexuels
entre les personnes qui ont des liens de consanguinité
Réflexion juridique

Résumé

Le concept classique des droits de l’homme, exprimé dans la Déclaration universelle des droits de l’homme signée à Paris le 10 décembre 1948, a fait l’objet de plusieurs tentatives de réinterprétation au cours des cinquante dernières années. L’apparition du concept de «nouveaux droits de l’homme» dans l’espace public en est une preuve éclatante. Cependant, les réponses aux questions, à savoir quelle est la portée du sens du terme «nouveaux droits», et surtout ce que signifie exactement «droits reproductifs et sexuels», ne sont pas entièrement connues. Le changement de perception de la sexualité humaine, l’affirmation de la libération sexuelle et le consentement à briser les tabous sociaux au nom des «nouveaux droits» humains provoquent une réflexion aux questions suivantes : comment le concept de droits sexuels se rapporte-t-il à l’interdiction des contacts sexuels entre les personnes qui ont des liens de consanguinité?; l’interdiction de l’inceste dans la réalité contemporaine perd-elle sa raison d’être et sa pénalisation n’est-il pas en train d’être réduit au symptôme d’un anachronisme oppressif?; les solutions normatives actuellement contraignantes en la matière sont-elles claires et exemptes de questions et de controverses? Enfin, il est impossible de ne pas se demander si les contacts sexuels entre les personnes qui ont des liens de consanguinité ne font pas partie des «nouveaux droits» de l’homme? Le présent article tente de répondre aux questions posées.

Mots-clés : droits de l’homme, inceste, moralité sexuelle, féminisme

Lucjan Świto

«Nuovi diritti» dell’uomo e divieto di contatti sessuali tra parenti
Una riflessione legale

Sommario

Il concetto di diritti umani classico, espresso nella Dichiarazione universale dei diritti dell’uomo firmata a Parigi il 10 dicembre 1948, è stato oggetto di molte reinterpretazioni negli ultimi cinquant’anni. L’apparizione del concetto di «nuovi diritti umani» nello spazio pubblico ne è una prova lampante. Tuttavia, non è completamente esplicitato qual sia la portata del significato del termine «nuovi diritti», e in particolare che cosa significhi esattamente «diritti riproduttivi e sessuali». Il cambiamento nella percezione della sessualità umana, l’affermazione della liberazione sessuale e il consenso a infrangere i tabù sociali in nome dei «nuovi diritti» umani provocano una riflessione basata sulle domande seguenti: come capire il concetto di diritti sessuali in riferimento al divieto di contatti sessuali tra parenti? Il divieto dell’incesto nella realtà contemporanea perde la sua ragion d’essere e la sua penalizzazione diventa solo sintomo di un anacronismo oppressivo? Le soluzioni normative attualmente vincolanti in questa materia sono chiare e libere da domande e controversie? Infine, è impossibile non chiedersi se i rapporti sessuali tra parenti non appartengano ai «nuovi diritti» dell’uomo? Il presente articolo è un tentativo di rispondere alle domande poste.

Parole chiave: diritti umani, incesto, moralità sessuale, femminismo