INCEST AND ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

PATRICK STUBING was removed from his natural family at the age of three and his foster parents later adopted him. As an adult he renewed contact with his natural family and found he had a grown-up sister. The two of them began to live together (in the fullest sense of the expression) and over the next four years, until he underwent a vasectomy, she regularly bore him children. For his ongoing sexual relationship with his sister he was prosecuted and convicted no less than three times for the offence of incest contrary to §173 of the German Criminal Code. On the third occasion he was sentenced to 16 months' imprisonment; his sister, who this time was also prosecuted, was convicted too, but because of her mental state excused from punishment. Stubing then complained to the German Constitutional Court, arguing that his conviction was unconstitutional. When, by a majority, this Court turned him down he applied to the European Court of Human Rights in Strasbourg, arguing that his conviction violated his right to "respect for his private and family life" as protected by Article 8 of the European Convention.

In *Stubing v Germany* (2012) 55 E.H.R.R. 24 a Division of the Strasbourg Court declared his application admissible, but rejected it. In so doing, the judges accepted that a legal ban on sexual intercourse with his willing sister was an interference with his right to respect for his private life, and hence that Article 8 was properly engaged. But Article 8(2), they pointed out, permits the state to interfere with private lives where this is "necessary in a democratic society … for the protection of health or morals, or for the protection of the rights and freedoms of others". In the context of restrictions on people's sexual freedom, they said, such interferences are only "necessary" where there is a "pressing social need" for them. But, said the court, in deciding whether such a pressing social need exists, contracting States enjoy a wide "margin of appreciation". As to whether incest between consenting adults should constitute a criminal offence the legal systems of the Contracting States, the judges pointed out, are currently divided. Furthermore, though some countries that once punished it have decriminalised it in recent years, others have retained the offence, or even widened it. In the light of this division of national opinion the Court concluded that the punishment of Stubing for consensual sexual intercourse with his adult sister fell within the German "margin of appreciation", and his application therefore failed.

In principle, the issue in this case is the same as the one that arose some decades back in relation to the criminalisation of homosexual acts between consenting adult males. When, if ever, should the criminal law punish sexual acts between consenting adults carried out

in privacy? Once upon a time, a sufficient answer would have been "When those acts are contrary to the moral values generally accepted by society". Whether such an answer was sufficient was, of course, the central point of the celebrated debate between Hart and Devlin in the 1960s, Devlin claiming that it was, and Hart arguing that it was not. And as far as homosexual acts are concerned, it was of course the Hart view that eventually prevailed. For England and Wales, Parliament changed the law to legalise homosexual acts between consenting adult males in 1967, and 13 years later it did the same for Scotland too.

A move to change the law in Northern Ireland too, however, was temporarily abandoned in the face of furious opposition. The Reverend Ian Paisley's "save Ulster from sodomy" campaign – in which, unusually, he stood shoulder to shoulder with the Catholic bishops – quickly attracted 70,000 signatures to its petition demanding that, in this part of the United Kingdom, the existing law should be maintained. And so it was until in *Dudgeon v UK* (1982) 4 EHRR 149 a majority of the Strasbourg Court, also accepting the Hart view of the matter, condemned the UK over this for violation of Article 8 of the Convention. A few years later, in *Norris v Ireland* (1991) 13 EHRR 186, the Strasbourg Court similarly dispatched the identical ban which still lingered on in the Republic.

In reaching the opposite conclusion in the *Stubing* case the Strasbourg Court sought to apply its reasoning in these two earlier cases, rather than to reject it. So it was not prepared to say that the punishment of adult incest fell within the German national margin of appreciation simply because German morality was outraged by it. Instead, taking the lead from the majority of the German Constitutional Court and the arguments of the German government, it looked for utilitarian reasons by which to distinguish the criminalisation of incest from the criminalisation of homosexual acts.

The arguments it found were two. One was the risk of genetic abnormalities in any children that might result from the union, and other was the risk that sexual relations between siblings could "seriously damage family structures". Whether taken on their own or in conjunction, these risks do not make much of a case for imposing criminal liability. The enhanced risk of genetic abnormality, though it exists, is relatively small – and very much smaller than the risk when lawful sexual intercourse takes place with someone who is the carrier of a genetically transmissible disease, like Huntington's chorea or haemophilia. (And even this small genetic risk, of course, only arises where both of the incestuous parties are fertile, unlike the Stubings after Mr Stubing's vasectomy.) And the risk of the behaviour breaking up the happy home – or making an unhappy one yet more dysfunctional – is even less convincing as a reason. If it were generally accepted

as sufficient ground for criminalising sexual acts, the prisons of the Western world would be even more overcrowded than they are.

With utilitarian arguments as weak as these, it is unsurprising that the German government and the Strasbourg Court also sought to justify the criminalisation of adult incest by invoking other arguments as well: in particular, "the background of a common conviction that incest should be subject to criminal liability" (at [63]) and the need "to maintain the taboo against incest" (at [50]). But these, surely, are the same sort of arguments which were deployed, in previous decades, in support of maintaining the criminalisation of homosexual acts between consenting males; as indeed they were at one time also used to support the criminalisation of sexual relations between those of different races. As against this, it could be said that the taboo against incest appears to be more general in time and space than the taboos against other forms of sexual practice which different societies have frowned upon at different times and different places. But if the criminalisation of a type of sexual behaviour cannot properly be justified by the fact that many people are disgusted by the thought of it, can it be justified by the fact that nearly everybody is? And if the incest taboo is so strong that nearly everybody deeply disapproves of it, is it really necessary to imprison those who break it in order to ensure it is maintained?

In truth it is hard to resist the conclusion that it was really the "yuck factor", rather than the utilitarian reasons, which ultimately led the Strasbourg Court to decide this case as it did. And the same can be said of the legislative decision to retain and extend the criminalisation of adult incest in sections 63 and 64 of the Sexual Offences Act 2003. Fuelled by a mixture of political correctitude and moral panic, Parliament replaced the previous offence of incest, defined as vaginal intercourse between a limited range of blood relatives, with a new offence of "sex with an adult relative", covering any act of penetrative sex between any of an extended range of adult relatives, and extending to "homosexual incest" between related adult males. Even a weak utilitarian argument for this new offence would be difficult to find.

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THE DEMISE OF THE PRIVATE PROSECUTION?

SECTION 6 of the Prosecution of Offences Act 1985 (the "1985 Act") allows a person who complains that she has been the victim of crime to instigate a private prosecution against the alleged perpetrator. The Director of Public Prosecutions ("DPP") is, in certain cases, required to take over this prosecution. Where he is not so bound, the DPP