

The Law on Incest: A New Legal Realist Approach to Understanding the English and Welsh Prohibitions

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Abstract

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This thesis examines the prohibition of incest in England and Wales and is written within a New Legal Realist paradigm. The selection of the paradigm has freed the approach from a traditional black letter method and allowed for the use of multiple methodologies that are appropriate to the data being investigated.

The thesis begins by exploring the legislative action taken against incest in England and Wales from the Anglo-Saxon period through to the 2003 Sexual Offences Act. It finds that there has been little consistency in the regulation of incestuous activity across differing historical periods. The investigation identifies the reasons why action was taken against incest and what changes to the nature of the offence, including prohibited kin and sexual acts, were made over time.

Empirical analysis of the Report entitled *Setting the Boundaries*, which was the cornerstone of the incumbent legislation, was undertaken using Rhetorical Political Analysis. This allowed the discovery of stories and narratives which have supported the recommendations of the Report. These recommendations have ultimately become the incumbent legislation regulating incestuous sexual activity. The thesis also identifies a dissonance between the reasoning used when producing the recommendations, and that used to justify the recommendations during the parliamentary process.

Data concerning the sentencing of individuals prosecuted for commission of actions infringing the 2003 Act is analysed and compared to the previous legislation, and concerns over the compatibility of the 'incest' provisions in the 2003 Act with rules governing sentencing are raised. The compatibility of the provisions and the need to register on the Violent and Sex Offender Register is also investigated, as are previous legal challenges concerning registration and the impact of registration upon the offender and their position within society.

Finally, the position of the incumbent provisions is understood in light of current European Convention on Human Rights norms. Rather than using case precedent to argue for or against the compatibility of the domestic provisions, the cases are used as 'data' to investigate the provisions. An attempt to ascertain a European consensus on incest is also made. The investigation reveals that the reframed 'incest' provisions of the Sexual Offences Act 2003 may breach Articles 8 and, 8 + 14 of the European Convention on Human Rights.

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The legislation is correct as of August 2011.

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Table of Acronyms

| | |
|-----------|--|
| CAFSA | Consensual Adult Familial Sexual Activity |
| CDA | Critical Discourse Analysis |
| CJ | House of Commons Journal |
| CJA 2003 | Criminal Justice Act 2003 c.44 |
| CJA 2009 | Coroners and Justice Act 2009 c.25 |
| CLA 1977 | Criminal Law Act 1977 c.45 |
| CLAA 1885 | Criminal Law Amendment Act 1885 c.69 |
| CPS | Crown Prosecution Service |
| CRLC | Criminal Law Revision Committee |
| ECtHR | European Court of Human Rights |
| FSA | Familial Sexual Activity |
| HoL | House of Lords |
| MoA | Margin of Appreciation |
| NDS | Necessary in a democratic society |
| NSPCC | National Society for the Prevention of Cruelty to Children |
| NVA | National Vigilance Association |
| PAC | Policy Advisory Committee |
| RPA | Rhetorical Political Analysis |
| SCR | Stable Committed Relationships |
| SGC | Sentencing Guidelines Council |
| SLC | Scottish Law Commission |
| SOA 1956 | Sexual Offences Act 1956 c.69 |
| SOA 1997 | Sex Offenders Act 1997 c.51 |
| SORT | Sexual Offences Review Team |
| ViSOR | Violent and Sex Offender Register |

Chapter 1 - Introduction to Research

1.1 Purpose Statement

The purpose¹ of this New Legalist Realist study is to discover and understand the reasons for legal sanctions against incest in England and Wales and their continued existence today.

1.2 Research Question

How has the prohibition of incest been historically justified in England and Wales and how are the incumbent provisions justified today?

1.3 Introduction

The preliminary investigation into answering the research question involved a review of the literature on incest. As will be seen below, this is a broad and extensive literature and crosses a number of disciplines; there may be value in adopting an interdisciplinary approach that is aware of the complex nature of incest and its regulation.

However, before looking at the methodology used to provide an answer to the research question, the research paradigm will be discussed. It has been acknowledged that the paradigm sets the approach for the research. It situates and provides the background for the research and researcher, and Guba refers to the paradigm as 'a basic set of beliefs that guides action.'² I have attempted to use an approach that builds upon current experience and selected a paradigm appropriate to answering the research question in light of findings from the literature review.

This thesis was written in a New Legal Realist paradigm. This paradigm will be discussed after its precursor American Legal Realism is reviewed. This is followed by the methodologies that are used to help answer the research question and subsequently the literature review.

¹ Creswell J., *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (Sage Publications, London, 2007) 107-108.

² Guba E.G., 'The Alternative Paradigm Dialog' in *The Paradigm Dialog* Guba E.G., ed., (Sage, Newbury Park., CA, 1990) 17.

1.4 American Legal Realism and New Legal Realism

The term 'legal realists', generally refers to a group of American lawyers, judges and legal academics that advocated for a more 'realistic view of courts and law than the dominant formalist view.'³ The formalists thought that most legal decisions could or should be deduced simply and easily from general legal concepts or rules. They had little appreciation of the real-life consequences or outcomes of the decisions. Roscoe Pound termed this a 'mechanical jurisprudence.'⁴ It has been suggested that the original realists, were a 'loosely connected group' rather than being a coherent body of scholars, and were 'united more by their opposition to formalism than by their support for any particular theory of law.'⁵ Bix suggested that among realists 'there was little by way of agreed views, values, subject matter, or methodology.'⁶

The formalists were the original realists' target. These realists were concerned that the 'science' of law was not really science and that judges were free to decide cases in a number of ways and that the reasoning by judges was not as they portrayed it; law had become a façade for a multiplicity of agendas. In essence they saw a divergence between what was being said and what was happening on the ground. Judges had to exercise their 'judgment' and realists suggested that 'legal doctrine, at best, rationalized decisions based on bias or, in Llewellyn's terms, a judge's "situation sense".'⁷ Macaulay noted that original 'realist scholarship's' adherents sought to 'plug'⁸ social science into legal scholarship to better inform understandings of legal activity. It was this use of empirical social science that set the realists apart from other scholars of their time in informing their thinking about the law.

Llewellyn argued that realism was a method rather than a philosophy.⁹ This method, the use of empirical social science to inform the understanding of law, is the link shared with New Legal Realism (hereafter NLR). Nourse and Shaffer have suggested that NLR 'takes from the spirit of the old-legal-realist movement, builds from new methods and insights that have since been

³ George T.E., Gulati M., McGlinley A.C., 'The New Old Legal Realism' (2011) Vol.105(2) Northwestern University Law Review 689-736, 691.

⁴ Pound R., 'Mechanical Jurisprudence' (1908) Vol.8 Columbia Law Review 605-623.

⁵ Above n.3, 694.

⁶ Bix B., *Jurisprudence: Theory and Context*, 5th ed. (Sweet & Maxwell, London, 2009) 190.

⁷ Macaulay S., 'The New Versus the Old Legal Realism: "Things Ain't What They Used To Be"' (2005) Vol.2 Wisconsin Law Review 365-403, 371.

⁸ Ibid, 374.

⁹ Llewellyn K.N., *The Common Law Tradition: Deciding Appeals* (Brown Little, Boston, 1960) 509.

developed, and applies these methods and insights to the historic context that confronts us.¹⁰ The authors of the Nuffield Report on empirical research were expressing a widely held view when they suggested that the culture of legal scholarship may have ‘facilitated and reinforced a narrow doctrinal approach.’¹¹ Thus, paradigms such as NLR have been motivated by a desire to inject serious empirical inquiry into legal and policy debates.¹² As Erlanger suggested, ‘like the original Realists, who also sought to use social science in service of advancing legal knowledge, new legal realist scholars bring together legal theory and empirical research to build a stronger foundation for understanding law and formulating legal policy.’¹³

New Legal Realism has gone beyond mere interest in appellate judging; it has embraced an expansive view of law.¹⁴ Some NLR scholars are of course interested in ‘cases’ and what judges do on the ground,¹⁵ but an array of NLR scholarship has developed an interest outside of merely explaining the outcomes of legal cases. For example, Devah Pager sought to identify the combination of factors of race and incarceration to understand the causes of labour market inequalities and the effects of incarceration on differing racial groups.¹⁶ Luna sought to understand how interpretations of Spanish and Mexican law hindered original landowners’ ability to prove ownership by examining the procedural burdens imposed on them.¹⁷ Furthermore, Neilson and Nelson used analysis of federal employment discrimination cases to explain the divergent accounts given of the law. They claimed that there was a ‘dramatic amount of underclaiming’¹⁸ whilst statutory rights and remedies expanded, and argued that current scholarship was unable to explain this phenomenon because legal scholars were

¹⁰ Nourse V., Shaffer G., ‘Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?’ (2009) Vol.95 Cornell Law Review 61-137, 90.

¹¹ Glenn H., Partington M., Wheeler S., *The Nuffield Enquiry on Empirical Legal Research* ‘Law in the Real World: Improving Our Understanding of How Law Works’ November 2006 (Nuffield, London, 2006) [95].

¹² Schuman M.C., Mertz E., ‘Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism’ (2010) Annual Review of Law and Social Science Vol.6 557-579.

¹³ Mertz E.E., in Garth B., Erlanger H.S., Larson J.E., Mertz E.E., Nourse V.F., Wilkins D.B., ‘Is it Time for a New Legal Realism?’ (2005) Vol.2 Wisconsin Law Review 335-363, 337.

¹⁴ Handler J., in Handler J., et al., ‘A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences’ (2005) Vol.2 Wisconsin Law Review 479-518, 480 and Mertz E., in same, at 486.

¹⁵ For example Mertz E., ‘Afterword: Tapping the Promise of Relational Contract Theory--Real Legal Language and a New Legal Realism’ (1999-2000) Vol.94(3) Northwestern University Law Review 909-936. Miles T.J., Sunstein C.R., ‘The New Legal Realism’ (2008) Vol.75(2) University of Chicago Law Review 831-851.

¹⁶ Pager D., ‘Double Jeopardy: Race, Crime, and Getting a Job’ (2005) Vol.2 Wisconsin Law Review 617-662.

¹⁷ Luna G.T., ‘Legal Realism and the Treaty of Guadalupe Hidalgo: A Fractionalized Legal Template’ (2005) Vol.2 Wisconsin Law Review 519-556.

¹⁸ Nielson L.B., Nelson R., ‘Rights Realized - An Empirical Analysis of Employment Discrimination Litigation as a Claiming System’ (2005) Vol.2 Wisconsin Law Review 663-712.

unable to work with relevant social science. They also suggested that a lack of relevant social science resulted in misguided understandings by other scholars and ignorance of macro-level factors such as workplace power relationships. Thus the scholars claim that the divergence from a traditional doctrinal legal approach has facilitated a different understanding of the problems investigated.

Erlanger et al. have noted a number of divergences in activities and approaches taken by NLR scholars, though this does not mean that NLR has no common or central theme, nor that it has become what Dagan called 'incoherent eclecticism'.¹⁹ Probably the most important theme for all NLR actors is the desire to undertake a 'genuinely interdisciplinary approach to research on law'.²⁰ Instead of merely thinking about the scholarship as an incoherent eclecticism, NLR scholars recognised that a number of different pathways could be used to approach their research, and that NLR does not proscribe any single correct way to conduct research in an NLR paradigm.²¹ NLR scholars believe that research is enhanced through using methodologies drawn from fields outside the purely legal. Garth suggested that the key to the NLR approach was 'mutual respect and recognition of the theoretical and practical concerns of both law and social sciences'.²²

A number of similarities exist in scholarship that identifies as NLR; these similarities can be loosely termed the politics of the scholarship, and these go on to influence the approach and output. The beliefs and politics that underpin the 'dynamic'²³ new realism can be summarised as follows: individuals are recognised as being subjected to institutional influence and are vulnerable to the exertion of power. State institutions support collective resilience against problems and issues of the time, though all institutions are subject to malfunction. The scholarship of law requires empirical activity and recognises the recursive nature of law; law reform is dynamic and there is an ever-changing relationship between law and society. This relationship will be discussed further at section 1.6. A number of NLR scholars' key concepts, which occur within the scholarship, include public participation, mediating theory, recursivity of action and the simultaneity of law and politics.

¹⁹ Dagan H., 'The Realist Conception of Law' (2007) Vol.57(3) The University of Toronto Law Journal 607-660, 608.

²⁰ Garth B., Erlanger HS., Larson JE., Mertz E.E., Nourse V.F., Wilkins D.B., 'Is it Time for a New Legal Realism?' (2005) Vol.2 Wisconsin Law Review 335-363, 338.

²¹ Above n.12, Schuman and Mertz call this an 'eclectic openness to a wide range of social science methods.', 561.

²² Garth B.G., 'Introduction: Taking New Legal Realism to Transnational Issues and Institutions' (2006) Vol.31(4) Law and Social Inquiry 939-945, 941.

²³ Above n.10, 129.

Handler for example, viewed the NLR paradigm as '(1) empirically grounded at the bottom; (2) it is very cross-disciplinary; (3) it deals with a wide range of socioeconomic classes and interests; and (4) it has a very expansive view of the impact of law.'²⁴ Handler suggested a reduced focus on quantitative studies and a move towards a more ethnographical approach, with a focus on personal and group interactions. Handler also noted the movement away from the focus on groups as 'downtrodden' to a view that law builds, as well as oppresses, with the possibility of achieving social justice through law.²⁵ Mertz highlighted other points of convergence. She cited the "bottom-up" in addition to the "top-down" perspective - in multiple senses'²⁶ and the need to bring such perspectives together to gain a holistic picture of the law in operation. Mertz called for an approach within the legal sphere that used qualitative methods over the more 'readily' accessible quantitative methods. Mertz thought a second point of convergence was the scholarship seeking a "Middle-Range" theory that develops an interaction with empirical findings, policy applications, or local practices.'²⁷ She suggested that NLR scholarship has used fields outside of law, and economics including 'sociology, anthropology, psychology, history and political science,'²⁸ and suggested that NLR sought 'a truly interdisciplinary conversation: drawing on the full range of social science approaches.'

Therefore, six leading scholars have suggested a number of points of convergence for NLR scholarship. These included a) the importance of bottom-up as well as top-down empirical research, b) the importance of adequately translating social sciences within an interdisciplinary paradigm, c) a sound understanding of situated knowledge, both in terms of politics and scholarship, d) the ever increasing need for a global dimension and e) an emphasis on legal optimism.²⁹ Thus, whilst those operating within the NLR paradigm fail to agree on a single fixed definition of NLR, they are able to identify themes that hold this body of scholarship together.

²⁴ Handler J., in Handler J., et al., 'A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences' (2005) Vol.2 Wisconsin Law Review 479-518, 480.

²⁵ Ibid, 482.

²⁶ Mertz E., in Handler J., et al., 'A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences' (2005) Vol.2 Wisconsin Law Review 479-518, 484.

²⁷ Ibid.

²⁸ Ibid, 487.

²⁹ Above n.22.

1.5 New Legal Realism and this Thesis

As can be seen from the above, NLR is best described as an umbrella term. As Lobel put it, 'the new paradigm rejects the obsessive maintenance of traditional boundaries.'³⁰ However, even without this rigid structure Macaulay noted that it nonetheless might still be useful.³¹

The adoption of an NLR approach within this thesis is for a number of reasons. As already alluded to, and as will be shown in the literature below, the initial investigation suggested that incest has resisted rigid boundaries and has been extensively researched in a number of disciplines. However there has never been, to the author's knowledge, an investigation into the reasons behind the legislation against incest. The literature review highlighted a number of pieces on single events or regulation of incest in certain time periods, however there has been no known wide scale understanding of the reasons for regulating incestuous sexual activity.

As was suggested in the previous section, an NLR approach places considerable value on insights that are not purely legal in the doctrinal sense. Operating within an NLR paradigm, the lack of rigid boundaries meant that greater weight could be placed on historical, political and criminological data than would normally occur in a traditional black letter thesis. Not only is there a greater focus on 'other' data, the selection of the NLR paradigm means that the data can also be analysed using appropriate discipline-specific methods (detailed below from section 1.6.1-1.6.4).

As seen above, there was focus on judicial reasoning by the American realists and it has been seen that some NLR scholars have also chosen to look at judicial reasoning. Whilst the answer to the research question cannot be found in judicial reasoning (when this term is limited to court decisions) there is an emphasis in the research question of this thesis on understanding the reasoning process in creating the legislation and the factors influencing it. The fact that other scholars within the paradigm are concerned with analysis of reasoning processes suggests a compatibility of NLR with the aims of this thesis. As George et al. have suggested, 'we can better understand law by moving beyond our court-centric perspective.'³² As will be seen below, this has influenced the selection of data and greater emphasis is placed on the historical development of the offence, as well as the reasoning prior to the parliamentary

³⁰ Lobel O., in Handler J., et al., 'A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences' (2005) Vol.2 Wisconsin Law Review 479-518, 495.

³¹ Macaulay S., 'A New Legal Realism: Elegant Models and the Messy Law in Action' NLR Working Papers, Series 1 available online at [http:// www.newlegalrealism.org/readings/macaulay_wp.doc](http://www.newlegalrealism.org/readings/macaulay_wp.doc)

³² Above n.3, 691.

process and the consequences and repercussions of the criminalisation of incestuous sexual activities including the impact on offenders. The investigation obviously has a focus on the criminalisation of incest. As will be seen below at section 5.4.3.3, those engaging in incest can be classed as a sexual minority and have a right to sexual autonomy. The converse is that the actions of this group, whether genuinely consensual or not, may create victims. This thesis is researched with the recognition that the law on incest has the potential to build as well as oppress and as Handler suggests, is optimistic about the possibility of achieving social justice.

The acceptance of, and in fact the need for, methodological diversity was a further reason for the choice of an NLR paradigm. McCann suggested that academic insularity 'encourage[s] misplaced confidence in our limited ways of knowing, and reward[s] repetition of familiar research modes regardless of their merits.'³³ As seen above, not only does an NLR approach value interdisciplinarity, it is also cognisant of the need to use varying appropriate methods to generate the data and thus the findings. Schuman and Mertz accept and proudly use the term 'multimethod eclecticism',³⁴ in that the methods selected are chosen due to their compatibility with the data being analysed. The specific methods employed in the development of the answer are shown below (sections 1.6.1-1.6.4) and these include historiography, discourse analysis, traditional legal analysis and through selection and analysis of cases as 'data.'

McEvoy noted that NLR 'consists of an approach to legal problems that abandons none of the available tools but does use them in a different way.'³⁵ For example, the investigation into *Setting the Boundaries*³⁶ at Chapter 3 highlights the reference to European Convention of Human Rights norms when creating recommendations. The legislation created from these recommendations was analysed in light of these human rights norms in Chapter 5 of this thesis. Traditional legal reasoning and understating of ECtHR case precedent, *ratio decidendi* and obiter dictum are still used. However the 'data', that is the cases analysed, have not been picked to support any predetermined argument. Indeed, cases were taken across a time period (specific details are provided in the methodology below) and thus cases were selected and

³³ McCann M., 'Dr. Strangelove (Or: How I Learned to Stop Worrying and Love Methodology)' (2008) Vol.41 Studies in Law, Politics and Society 19-59, 24.

³⁴ Above n.12.

³⁵ McEvoy A.F., 'A New Realism for Legal Studies' (2005) Vol.2 Wisconsin Law Review 433-454.

³⁶ Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* Volume 1 & 2 (Home Office Communication Department, London, 2000). The Report was the foundation for the Sexual Offences Bill 2003 which became the Sexual Offences Act 2003. It is the reasoning of this report that is analysed in significant detail in chapter 3; hereafter 'the Report'.

used as data (in that reference period) rather than as case precedent for the value that the case is presumed to bring to the argument on incest or the topic at issue.

As seen above in section 1.4, NLR adherents believe the data used must be translated into language that makes it meaningful to the investigation. Mertz discussed the ‘problem of translation’³⁷ when using empirical work and engaging in legal scholarship. She suggested that ‘a legal reading of social science texts may often seek a “sound bite” – an abbreviated, functionally oriented conclusion – while missing the complexity or eliminating important information because it does not seem immediately relevant to the questions and categories dictated by legal frameworks.’³⁸ The task therefore is to ensure that the social science is used in an appropriate way that adds to the investigation, rather than allowing a predetermined legal argument to colour the conclusions drawn from the data.

It has already been seen that NLR scholars place heavy reliance on empirical work to inform their research. For the purposes of this thesis, empirical is defined as ‘relying on or derived from observation or assessment.’ There are a number of ways in which the research question could be answered in light of this need for empiricism. This thesis does not seek to observe or understand an individual or citizen’s perception of the law using questionnaires or interviews. Instead this thesis uses empirical methods to understand the reasoning within official discourse and the process of creating legislation against incest. Garth suggested that a benefit of empirical work is that it allows scholars to relate legal categories to the world around them and ‘prevents the observer from opining on that is “really happening,” [...] on the basis of convenient but off base assumptions.’³⁹ Nourse and Shaffer noted the dangers of scientism; they suggested that ‘empiricism is a word that covers a vast amount of territory, not only in terms of the methodologies it denotes but also the ideas it connotes. One of the ideas empiricism connotes is science.’⁴⁰ One of the concerns with this borrowing from the social sciences is the need to ensure that the insights gained are from ‘rigorous multimethod research.’⁴¹

³⁷ Above n.26, 488.

³⁸ Above n.26, 488.

³⁹ Above n.22, 942.

⁴⁰ Above n.10, 117.

⁴¹ See Schuman M.C., Mertz E., ‘Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism’ (2010) Vol.6 Annual Review of Law and Social Science 557-579.

Trubek and Esser suggested that to some, “critical empiricism” seems paradoxical... since empiricism has been identified with an objectivist discourse and an apolitical stance.⁴² As identified above, NLR is not an apolitical paradigm, but when engaging in the scholarship in an attempt to understand the legal processes, it seeks to do this with methodological rigor. This differs for each of the methodologies undertaken and will be addressed during the explanation of the methodologies (sections 1.6.1-1.6.4). For example, rather than giving a ‘sound bite’ of commentary on, or superficial analysis of, *Setting the Boundaries*, the Report is used as data and analysed using a methodology appropriate to the type of document (discussed in section 1.6.2). The Report is a document generated within a distinct political period, as part of a specific legislative process used to encourage public participation and to help form ideas on the law, as well as generate responses to the Report. The investigation (detailed below in Chapter 3) sought to analyse the reasoning of the Report, not using an external benchmark imposed on it by the researcher, but by the internal framework that the Report itself was seeking to adhere to (in this case the Terms of Reference). This selection of an appropriate methodology allows the investigation to understand the emergent themes from the research rather than imposition of the researcher’s pre-conceived ideas. An example of the thesis using ‘categories that develop out of qualitative empirical engagement,’⁴³ concerns the use of Rhetorical Political Analysis to identify classes and groups of words that form the basis of the reasoning process within the Report; these come from the Report as opposed to being imposed on it. Legal academics have been criticised for imposing their ideas and encouraged ‘to reveal far more about the process by which they generated and observed their data.’⁴⁴ Epstein and King’s call for transparency and accessibility is a request for the research to be replicable.⁴⁵ By setting out the paradigm, methodological approach and findings, this thesis goes some way to addressing these concerns.

There is an awareness of the limitations within the thesis. These limitations are not only of data and time, but also of starting point, perspective and of methodological approach. The NLR scholars have recognised that the ‘methodological eclecticism tends to yield rich but

⁴² Trubek D.M., Esser J., “Critical Empiricism” in *American Legal Studies: Paradox, Program, or Pandora’s Box?* (1989) Vol.14(1) *Law & Social Inquiry* 3-52.

⁴³ Above n.10, 119.

⁴⁴ Epstein L., King G., ‘The Rules of Inference’ (2002) Vol.69(1) *The University of Chicago Law Review* 1-133, 34.

⁴⁵ *Ibid*, 38.

ambiguous results.⁴⁶ By providing a transparent approach, others wishing to engage with the material can understand and if necessary, replicate the research.

Finally, the author is unaware of any example of legal research using an NLR approach in England and Wales towards this, or any other topic. The decision to undertake the research in an NLR paradigm was to free the answer from any rigid pre-conceived boundaries that a traditional doctrinal approach may have required. It allowed a freedom to answer the question beyond that of a traditional doctrinal approach and provided an opportunity to gain new insights into the legislation against incest as well as an original contribution to knowledge.

In sum, NLR is the paradigm in which the research is undertaken and where it can be grouped with other likeminded scholarship. The impact of NLR is on the path taken, not necessarily on the final outcome or findings of the research. It is not possible to say to what extent this thesis differs from a 'traditional legal analysis' because that research has not been undertaken. However it is possible to speculate that less emphasis would have been placed on the historical dimension of the offence and, as is seen in the literature review, incest might have been viewed as a merely a moral offence, without insight into the nuances across the differing historical periods. It is also possible to say that the reasoning in *Setting the Boundaries* might have been written off as poor, without understanding the way in which the reasoning was undertaken and the way the narratives of the report were presented. So too, the consequences and repercussions of the current law might have been given little place in any non-NLR investigation and finally the understanding of the reasoning on the European Convention on Human Rights might have been based on case precedent rather than using cases as 'data'.

1.6 The Development of an Incest Prohibition in Society and Law

What will become apparent from the literature review below, is that incest is not merely a legal concept. The removal of legislation prohibiting incest is unlikely to create a situation of mass intra-familial sexual activity. Thought of sexual acts with other family members would be likely to induce repugnance on mere suggestion,⁴⁷ and would continue to do so if the legal prohibition no longer existed. As will be seen in section 1.7.1, a number of anthropologists have sought to explain the prohibition in these terms and it appears that other, non-posit

⁴⁶ Above n.12, 573.

⁴⁷ See findings of Royzman E.B., Leeman R.F., Sabini J., "'You Make Me Sick': Moral Dyspepsia as a Reaction to Third-Party Sibling Incest' (2008) Vol.32 Motiv Emot 100-108.

norms have operated in the absence of the legal prohibition. Individuals' decisions to engage in or refrain from incest therefore appear to be not only regulated by the posited laws of England and Wales. As will be shown in Chapter 2, for a significant part of English and Welsh history there was no criminal prohibition against incest. Indeed, save for a period within the Civil War, incest was not criminalised until 1908, in response to heightened awareness of father-daughter rape. There was no suggestion that incest was widespread or regularly practiced during the intervening period, nor that the lack of a legal prohibition created an increase in incestuous activity before the legislation of 1908.

Cochrane argued that 'it is society that controls law and not the reverse.'⁴⁸ It is recognised that in England and Wales today 'the legal system stands in a relation of superior power to other systems of regulation as the ultimate source of coercive power.'⁴⁹ However other forces have worked to keep incestuous activity as a type of unwanted human interaction; for example, this may have been through a taboo or social rules, or godly and divine prohibitions. Moore has suggested that "'the law" is a short term for a very complex aggregation of principles, norms, ideas, rules, practices, and the activities of agencies... and enforcement.'⁵⁰ She argued that this 'law' is abstracted from the social context in which it exists, and is spoken of as if it were an entity capable of controlling that context. Unsurprisingly she then called for the 'law' and social context to be investigated together.

Other scholars, such as Fitzpatrick, have also contested Cochrane's view and believe there is a greater convergence between 'law and society' than the binary focus adopted by many scholars. Fitzpatrick suggested that 'custom supports law, but transforms the elements of custom that it appropriates into its own image and like-ness.'⁵¹ For Fitzpatrick the integral relations of mutual support between law and other social forms tend towards their convergence.⁵² Fitzpatrick has argued that law provides both identity and boundaries for

⁴⁸ Cochrane G., *Development Anthropology* (Oxford University Press, Oxford, 1971) 93-94 cited in Moore S.F., 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) Vol.7(4) *Law and Society Review* 719-746, 719.

⁴⁹ Engle-Merry S., 'Legal Pluralism' (1988) Vol.22(5) *Law and Society Review* 869-896, 874.

⁵⁰ Moore S.F., 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) Vol.7(4) *Law and Society Review* 719-746, 719.

⁵¹ Fitzpatrick P., 'Law and Societies' (1984) Vol.22(1) *Osgoode Hall Law Journal* 115-138, 122.

⁵² *Ibid.*

political society and, expresses and structures, social life. Thus it is law that makes society possible.⁵³

Luhmann suggested that law maintained its special identity as a system by being open to information from other systems, but reading such information in its own terms. The legal system is therefore open and at the same time closed. He saw the 'legal system [as] a differentiated functional system within society.'⁵⁴ He contested 'not only that the legal system fulfills a function for society – that it "serves society" – but also that the legal system participates in society's construction of reality.'⁵⁵ Luhmann saw the legal system as autopoietic; it produces by itself all the distinctions and concepts that it uses, and the boundaries of law are nothing outside of this self-production.⁵⁶ Rather than subsuming the contents of other systems, law can choose to respond to its environment or not.

As was seen in the previous section, this thesis seeks to understand the reasoning that led to the incumbent provisions. It does not seek to adopt an approach that views law as a wholly autonomous sphere. The approach is aware of the reflexive and recursive nature of the prohibition against incest, though it does not seek to measure this relationship. The thesis is written with an awareness of the inter-relationship between law and society but its endeavour is, as Schuman suggests, 'research that aspires not to advance a theoretical paradigm but to "provide solutions to [practical] problems that are presented to [it]'.⁵⁷ The paradigm is 'motivated less by systematic arguments about fundamental social processes than by casual curiosity, commonsense predications, and readily available data.'⁵⁸

Cotterrell has suggested that law both defines social relations and influences the shape of sociology studies. For Cotterrell, legal and other social ideas interpenetrate each other and it is no longer possible to draw a sharp line between law and society. Cotterrell's call for understanding law sociologically can be distilled into what he calls 'three postulates.'⁵⁹ This understanding has a strong resemblance to what NLR scholars see as integral to the

⁵³ Fitzpatrick P., 'Being Social in Socio-Legal Studies' (1995) Vol.22 *Journal of Law and Society* 105-112, cited in Cotterrell R., *Law, Culture and Society* (Ashgate, Hampshire, 2006) 49.

⁵⁴ Luhmann N., 'Law as a Social System' (1988-1989) Vol.83(1&2) *Northwestern University Law Review* 136-150, 138.

⁵⁵ *Ibid.*

⁵⁶ Luhmann N., *Law as a Social System*, tr by Ziegert K.A. (OUP, Oxford, 2004) Chapter 2, 'The Operative Closure of the Legal System.'

⁵⁷ Schuman M.C., Mertz E., 'Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism' (2010) Vol.6 *Annual Review of Law and Social Science* 557-579, 574.

⁵⁸ *Ibid.*

⁵⁹ As above n.53, 55.

investigation into law. For him, the understanding is 'transdisciplinary'. He sees law as an entirely social phenomenon that can be understood as an aspect of social relationships, and the coexistence of individuals in social groups. The second factor is that law must be understood empirically. Cotterrell suggests that this can be done 'through detailed examination of variation and continuity in actual historical patterns of social coexistence, rather than in relation to idealized or abstractly imagined social conditions.'⁶⁰ Lastly, legal ideas must be understood systematically as opposed to anecdotally or impressionistically. His suggestion is to broaden the understanding of law and this draws on an inclusive rather than an exclusive understanding. Like NLR, Cotterrell argues for insight to be drawn from many disciplinary fields. What he calls a 'sociological insight' he suggests should both 'inform and interpret legal ideas.'⁶¹ So the investigation of whether sociology is inside or outside law becomes redundant. For Cotterrell and NLR scholars the line between law and society, and thus between legal and sociological interpretation, becomes indistinct. He suggests that 'law constitutes society in certain respects, social understanding informs law in certain ways.'⁶²

As the forthcoming literature review suggests, over time there have been changes in the societal and legal basis and justifications for legislating on incest. For example Jónsson has suggested that by the eighteenth century there was a demise in the use of the 'word of God' in 'determining what incest "really" was' because 'by that time secular concerns had taken over.'⁶³ Cotterrell has argued that the vague definition and use of culture in legal literature has resulted in the misapprehension that law and culture were portrayed in seemingly incompatible ways. He has stated that law sometimes appears 'to be dependent on culture, sometimes dominating and controlling it; sometimes ignoring it, sometimes promoting or protecting it; sometimes expressing it, sometimes being expressed by it.'⁶⁴ Thus, this thesis is written with an awareness of the numerous competing claims on the position of law as being part of, and yet separately affected by, society. The thesis too, is written from a position of a wide understanding of what constitutes law, and is willing to draw on use of the multiple methodologies in order to interpret relevant data, as Cotterrell suggests, to 'inform and interpret legal ideas.' The methodologies that have been used to inform the analysis will be addressed in the following four sections.

⁶⁰ Ibid.

⁶¹ Ibid, 60.

⁶² Ibid, 60.

⁶³ Jónsson M., 'Incest and the Word of God: Early Sixteenth Century Protestant Disputes' (1994) Vol.85 *Archiv Fur Reformationsgeschichte* 96-119, 119.

⁶⁴ Cotterrell R., 'Law in Culture' (2004) Vol.17(1) *Ratio Juris* 1-14, 6.

1.6.1 Chapter 2: Method

Chapter 2 entitled 'The Historical Development of the Prohibition Against Incest' investigates the changes in legal provisions prohibiting incest in England and Wales from the Middle Ages through to the period before the enactment of the Sexual Offences Act 2003. This thesis presents a bricolage of historical facts and narratives in an attempt to produce a plausible historiographical explanation and understanding of the development of the prohibitions in England and Wales through an appreciation of the context within which they were made, which necessitated reliance on both primary and secondary sources. However, due to the passing of time and the failure to keep extensive records during some periods, there was not always a complete set of records to turn to in order to explore the variations in prohibitions on incest over the period investigated.

This thesis uses primary texts where they existed, and secondary materials supplemented those that were limited to delivering information in the specific form and for the distinct reason for which they were produced. As was seen above, the NLR paradigm places heavy emphasis on rigor. Ianziti has suggested that historiographical practices tend to vary across the profession. He suggested that 'they also tend to be controversial and remain to a large extent uncoded.'⁶⁵ However, he suggested that peer review is one such form of evaluation; therefore the ideas presented Chapter 2 have been published in a peer-reviewed journal, following presentation at two conferences to enable the ideas to be challenged. The data collected from the differing sources, were collated using tables (example given in Appendices) in order for the prohibition within the particular period to be understood in light of the social and cultural, political, governmental and religious contexts that helped form the response to incest at that time.

As noted in the literature review, much of the historical literature was not written with a specific focus on incest. Instead, the information on incest is often embedded in a larger narrative. For example, incest only formed a small part of Ingram's work on *Church Courts, Sex and Marriage in England 1570-1640*. Traditionalists would suggest that the data can exist independently of an understanding of context and period within which it was written. Although not a traditionalist himself, Burke noted that, according to the traditional paradigm, history is objective.⁶⁶ However, the lack of a single source of historical data on incest means

⁶⁵ Ianziti G., 'Historiography and its Discontents: The Windschuttle Gambit' (2005) *History Australia* Vol.2(2) 43-1 – 43-10, 43-2.

⁶⁶ Burke P., 'Overture: the New History, its Past and its Future' in Burke P., ed. *New Perspectives on Historical Writing* (Polity Press, Cambridge, 1991) 5.

that the data and thus information on incest used within the thesis needed to be extracted from but also understood within the narratives. Carr suggested that 'history consists of a corpus of ascertained facts.'⁶⁷ Yet for Carr, the historian is integral in deciding which facts make it into the final version of his or her literature. He suggested that there is never a pure form of history and that the historian needs to have some form of 'contact with the mind of those about whom he is writing.'⁶⁸ Finally, he suggested that the past could only be viewed through the eyes of the present. Carr expressed the view that the narrative and discourse used by the historian in a constant 'process of interaction between the historian and his facts, [and] an unending dialogue between the present and the past,' was what writing 'history' was about.

Similarly other historians including Echevarria have argued that history is 'the historian's *interpretation of what happened*'⁶⁹ and that, just like human memory, history is fallible and prone to selective recall. Historical methodology, like many social sciences, has seen a movement advocating acceptance of conceptual tools from outside the discipline to reject historical realism (that the past is real and objective) and instead accepting that differing agendas are implicit within traditional historical narrative.⁷⁰ Munslow too recognised history as 'a constituted narrative discourse written by the historian in the here and now.'⁷¹ Munslow advocated a deconstructionist approach that 'maintains that evidence signposts possible realities and possible interpretations because all contexts are inevitably textualised or narrativised.'⁷² Roberts suggested that what we call historical truth is likely to be partial, provisional and 'to some degree idiosyncratic.'⁷³

Operating within an NLR paradigm influenced the decision to seek a deeper understanding of the historical development and reasons for the offence, rather than a simple cursory understanding. The data was treated as signposting potential realities but was not indicative of one absolute truth. Primary and secondary texts, hard facts and narrative, were used together taken from multiple sources in order to highlight salient reasons for the legislation and

⁶⁷ Carr E.H., *What is History?* (Penguin, London, 1961).

⁶⁸ Ibid, 24.

⁶⁹ Echevarria A.J., 'The Trouble with History' (2005) Vol.35(2) *Parameters* 78-90, 79.

⁷⁰ Yilmaz K., 'Postmodernist Approach to the Discipline of History' (2007) Vol.14(2) *Kocaeli Üniversitesi Sosyal Bilimler Enstitüsü Dergisi* (Kocaeli University, School of Social Sciences Journal) 176-188.

⁷¹ Munslow A., *Deconstructing History* (Routledge, London, 1997) 35.

⁷² Ibid, 26.

⁷³ Roberts D.D., *Nothing But History: Reconstruction and Extremity after Metaphysics* (California University Press, Berkeley, 1995) 300 cited in Munslow A., 'Authority and Reality in the Representation of the Past' (1997) Vol.1(1) *Rethinking History* 75-87,83.

changes to it. This data was categorised within six different periods. The status of the prohibition of incest whether as civil, criminal or ecclesiastical was noted. Where possible, the rule was accessed as was any primary data concerning its passage through parliament, for example the Punishment of Incest Act 1908⁷⁴, former Bills and Hansard. The reasons given for changes in the rules were identified. This included reasons for changes in the status of the rule (for example, from criminal to civil law) as well as reasons for making other changes for example which kin were prohibited. The individuals within the prohibitions were identified, as were the specific prohibited acts and the penalty available. Finally, the social and cultural context, changes in government structures and any religious issues applicable to the period were also identified.

The data once collated⁷⁵ was then read together in order to provide a picture of the provisions within the historical period. Then, once the data was brought together for each discrete period, the bigger picture could be ascertained and an understanding gained of the prohibition across the differing periods.

1.6.2 Chapter 3: Method

Chapter 3 investigates the Report '*Setting the Boundaries.*' The Report was the foundation for the Sexual Offences Bill 2003 and most of the recommendations were accepted in Parliament without amendment to become the Sexual Offences Act 2003.⁷⁶

As seen above, Realists were motivated by a concern to uncover the formalist reasoning that masks political choices.⁷⁷ Danziger noted the danger of the invisibility of language: 'its capacity to conceal presuppositions and even political intentions... can have unexpected and dire consequences.'⁷⁸ In keeping with the paradigm, the methods and approach taken should be appropriate to the data being analysed. A number of techniques of discourse analysis have been commonly used in recent years. Discourse analysis is a widely accepted method of analysing text and or spoken language,⁷⁹ which 'requires systematic attention to the text and

⁷⁴ This Act was the legislative response to a persistent campaign to enact legislation prohibiting incest. Incest was criminalised only recently in 1908 in response to heightened awareness of father-daughter rape. This Act was subsumed into the consolidated Sexual Offences Act 1956 c.69 and was in force until mid-2004.

⁷⁵ See Appendix 1 for an example of tabulated data.

⁷⁶ See Appendix 2, the Government disagreed with only three of the 62 recommendations.

⁷⁷ Above n.10, 83.

⁷⁸ Danziger M., 'Policy Analysis Postmodernized: Some Political and Pedagogical Ramifications' (1995) Vol.23(3) Policy Studies Journal 435-450, 435.

⁷⁹ See generally Schiffrin D., Tannen D., Ehernberger-Hamilton H., *Handbook of Discourse Analysis* (Blackwell, Oxford, 2001).

content.⁸⁰ Discourse analysis can expose and critique ideologically motivated obfuscation,⁸¹ and can be undertaken using a number of different techniques.⁸² A prominent technique is Critical Discourse Analysis (hereafter CDA) which presumes the actor attempted to cover 'dubious interests and is fixated on exposing evasions and omissions rather than attending to argumentative content.'⁸³ Van Dijk noted that empirically adequate critical analysis of social problems was usually multidisciplinary and that CDA provided the possibility of discovering ways in which 'discourse structures enact, confirm, legitimate, reproduce or challenge relations of power and dominance in society.'⁸⁴ Cameron called for attention to be paid to texts' 'rhetorical properties, to notice their discursive and ideological preconceptions.'⁸⁵ She felt that there was 'something to be learned by considering not only what is said, but also how it is said.'⁸⁶

CDA seeks to deconstruct. It focuses on the 'abuse of such power, and especially dominance.'⁸⁷ As identified above, the New Legal Realist paradigm seeks to go beyond mere deconstruction with an emphasis on positive reconstruction and emphasis for social change.⁸⁸ Thus, CDA was only a partial fit within the NLR paradigm. Finlayson proposed a new form of discourse analysis called Rhetorical Political Analysis (hereafter RPA).⁸⁹ RPA takes into account the political task, which is the need to convince others to see things in the same light as the authors, by defining situations in particular ways to persuade readers to subsume that position or standpoint.⁹⁰ RPA identifies linguistic tools used by actors. It seeks to highlight the creation and formation of

⁸⁰ Gasper D., Aphorpe R., 'Introduction: Discourse Analysis and Policy Discourse' (1998) Vol.8(1) The European Journal of Development Research 1-15.

⁸¹ Finlayson A., Martin J., "'It Ain't What You Say...': British Political Studies and the Analysis of Speech and Rhetoric' (2008) Vol.3 British Politics 445-464, 446.

⁸² Alvesson M., Kärreman D., 'Varieties of Discourse: On the Study of Organizations through Discourse Analysis' (2000) Vol.53 Human Relations 1125-1149. Gasper D., Aphorpe R., 'Introduction: Discourse Analysis and Policy Discourse' (1998) Vol.8(1) The European Journal of Development Research 1-15.

⁸³ Finlayson A., 'From Beliefs to Arguments: Interpretive Methodology and Rhetorical Political Analysis' (2007) Vol.9 British Journal of Politics and International Relations 545-563, 553.

⁸⁴ Van Dijk T.A., 'Critical Discourse Analysis' in Schiffrin D., Tannen D., Ehnberger-Hamilton H., *Handbook of Discourse Analysis* (Blackwell, Oxford, 2001).

⁸⁵ Cameron D., 'When Worlds Collide: Expert and Popular Discourse on Language' (1997) Vol.19(1) Language Scientist 7-13, 7.

⁸⁶ Ibid.

⁸⁷ Above n.83.

⁸⁸ Erlanger HS., Garth B., Larson JE., Mertz E.E., Nourse V.F., and Wilkins D.B., 'Is it Time for a New Legal Realism?' (2005) Vol.2 Wisconsin Law Review 335-363, 345.

⁸⁹ Above n.83.

⁹⁰ Above n.83, 550.

a 'consensus'; after all, the task of the political actor is to convince others to agree with their proposals.⁹¹

Krebs and Jackson suggested that a successful application of rhetorical movement in political argument was not in persuading opponents but 'denying them the rhetorical materials out of which to craft a socially sustainable rebuttal.'⁹² Finlayson recognised that in the political sphere, deliberation, argumentation and persuasion involved use of rhetoric and linguistic technique.⁹³ He argued that some 'assessments of political speech and argument, used in, for example ... public administration are unable to fully recognize the legitimacy of rhetorical force in political argument and, unwilling to accept their necessarily strategic nature, tend to subsume rhetoric into the category of illegitimate coercion.'⁹⁴

Thus, RPA can be used to help identify where authors attempt to bind 'at least some of these different (multiple and varied political standpoints) positions together.'⁹⁵ The analysis thus sought to use RPA to identify the creation of a consensus within the Report on the issue of sexual offences, which was then used to develop recommendations for legislation.

The Report was read a number of times in order to identify its themes. These were the regularly occurring 'stories' within the Report, for example, seriousness of sexual acts, sex with children, coercion, consent and the existence of victims. In sum, these themes were part of the narrative and helped provide support for the reasoning that the Report sought to convey to the reader. Initially a number of 10-15 themes were highlighted. On further reading, these themes were grouped together where appropriate to produce fewer themes that encompassed the initial 10-15 themes. The findings formed the section below titled 'Stories and Narratives within *Setting the Boundaries*.'

A secondary analysis was conducted, investigating the sections relating specifically to 'incest' and sexual activity within the family. This secondary linguistic analysis used a form of coding to identify sentence structure, groups and classes of words, and the proximity of these 'key'

⁹¹ Above n.83, 551.

⁹² Krebs R.R., Jackson P.T., 'Twisting Tongues and Twisting Arms: The Power of Political Rhetoric' (2007) Vol.13(1) *European Journal of International Relations* 35-66, 42.

⁹³ See generally Finlayson A., 'Political Science, Political Ideas and Rhetoric' (2004) Vol.33(4) *Economy and Society* 528-549.

⁹⁴ *Ibid*, 538.

⁹⁵ Above n.83, 550.

words to the Report's recommendations.⁹⁶ The coding structure and explanation of the findings is provided at Chapter 3.4. The analysis investigated the consensus-building terms the Report used when engaging in the reasoning process and their use and proximity to the recommendations. It also highlighted a number of techniques the Report sought to employ in the reasoning process and allowed the findings to be set against the terms of reference.

The findings of the Chapter, and understanding of the reasoning in the pre-legislative and recommendation formation process once ascertained, could then be used to investigate and understand the Sexual Offences Act 2003.

1.6.3 Chapter 4: Method

This next chapter, Chapter 4, sought to investigate the action following *Setting the Boundaries*. The chapter used 'legal analysis.'⁹⁷ Information was gathered from a number of sources in order to shed light on the topic under investigation. The chapter, in light of the thesis' aims, was built from gathering material in order to understand the process that created the Sexual Offences Act 2003. Anderson et al. suggests this process of legal method involves understanding the facts and then developing a preliminary analysis of the problem. Appropriate statutory and constitutional (where applicable) materials relevant to the issues should then be examined alongside 'authoritative interpretations of the law.'⁹⁸ The Sexual Offences Bill 2003 and the debate in Parliament was detailed and explored using information on the reasoning process gained from the previous chapter. This traditional legal analysis involved use of Hansard and legal commentary on the passage of the Bill through the Houses of Parliament. Schrama suggests that legal analysis requires a search for the underlying principles (done in the previous chapter) before a comparison is made between the relative positions of the legal provisions and the categories involved.⁹⁹ The approach therefore sought to gather data relevant to the understanding of the legal provisions, their development and

⁹⁶ See generally de Beaugrande R., 'Critical Discourse Analysis: History, Ideology, Methodology' (2006) Vol.1 Studies in Language & Capitalism 29-56.

⁹⁷ Chynoweth P., 'Legal Research' Chapter 3 in Knight A., Ruddock L., *Advanced Research Methods in the Built Environment* (Blackwell, London, 2008).

⁹⁸ Anderson J.F., Reinsmith-Jones K., Mangels N.J., 'Need for Translated Methodologies in Criminal Justice and Criminological Research: Exploring Legal Techniques as an Additional Method' (2011) Vol.24(1) Criminal Justice Studies 83-103, 97.

⁹⁹ Schrama W., 'How to Carry Out Interdisciplinary Legal Research: Some Experiences with an Interdisciplinary Research Method' (2011) Vol.7(1) Utrecht Law Review 147-162, 156.

their actual and potential use. The techniques were therefore common to case analysis in order to give context to a legal problem.¹⁰⁰

The legal provisions, concerning sentencing, for example the Criminal Justice Act 2003, were then explored and investigated. The provisions concerning incest were interpreted in light of the sentencing framework for England and Wales, including guidelines from the Sentencing Guidelines Council. The need to understand the seriousness and harm within the incestuous act grew from this investigation, as these components were intrinsic to the sentencing goal. A number of fictional scenarios were used in order to highlight the potential impact of the law and the consequences flowing from charges, prosecution and conviction of a familial sexual offence.

Changes in sentencing maxima and previous research on the sentences imposed for incest and familial sexual activity were collected. A number of Freedom of Information Act 2000 requests were made to the Ministry of Justice in order to ascertain the sentencing disposals for s.64 and s.65 Sexual Offences Act 2003 offences. This data was then analysed in light of the sentencing guidelines and advice of the Sentencing Advisory Panel to the Sentencing Guidelines Council. The potential for automatic registration onto the Violent and Sex Offender Register (hereafter ViSOR), by virtue of conviction of a s.64/65 offence (on meeting registration criteria) was investigated. The purposes of registration were identified and the position regarding registration of those convicted of 'incest' offences was understood using the case scenarios from earlier within the chapter. Differences in requirements for registration were highlighted in light of the purposes of registration and, the seriousness and harm concepts, used from sentencing and the aims of the legislation gained from the previous chapter.

The collateral consequences of criminalisation, for example social stigmatisation, loss of relationships, employment and housing were then addressed. This section drew from external material and research conducted on sex offenders. A review of the literature identified little material that concerned familial sexual offenders and the impact on families. The literature found on consequences of incest often focused on the father-daughter abusive relationships. The investigation sought to broaden this to other incest offenders and address the offenders' views of registration and impact of this upon the individuals and families involved.

¹⁰⁰ Ibid.

Once seriousness, harm, registration and potential consequences had been addressed the position of ‘incest offenders’ as potential registrants on ViSOR was assessed. Legal challenges to entry onto ViSOR were investigated as were recent judgments questioning the nature of the registration scheme. The suitability of placing ‘incest offences’ within a group of sexual offences suitable for registration could then be examined and the position of the provisions understood in light of the regulatory framework surrounding sexual offences.

1.6.4 Chapter 5: Method

The investigation in Chapter 3 highlighted the centrality of human rights to the discourse concerning the modernisation of the law and creation and protection of the victim. The compatibility of the provisions with human rights norms as integral to these narratives and the reasoning underpinning them, was lauded as a key tenet of the ‘new approach.’ However, reference to human rights or explanation of what it meant in relation to sexual offences was fleeting, incomplete or occurred as a *non sequitur* in the reasoning process. There was no indication at domestic level that any in-depth scrutiny of human rights and the prohibition. No cases have reached the European Court of Human Rights (hereafter ECtHR) concerning incest, and the investigation failed to identify any cases at the domestic level citing European Convention of Human Rights (hereafter ECHR) norms, therefore it was not possible to analyse a case and its reasoning on incest.

Before looking at the method used to capture data and analyse the ECtHR reasoning, it is pertinent to look at the operation of the system of precedent for the Court. The ECtHR has held on a number of occasions that it is not bound by the doctrine of *stare decisis*. It is not obliged to follow precedent though the Court does cite previous cases within its decisions. The Court has said:

‘The Court considers that, while it is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases. Since the Convention is first and foremost a system for the protection of human rights, the Court must, however, have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved.’¹⁰¹

Thus, as a ‘living instrument’, the Court has declined to follow previous decisions on a number of occasions. One significant example is *Christine Goodwin v United Kingdom* which altered the

¹⁰¹ *Chapman v United Kingdom* (App no.27238/95) para.70.

approach the Court took towards transsexuals in *Sheffield and Horsham*.¹⁰² The Court held that:

‘It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement.’¹⁰³

The investigation to understand the criminalisation of incest therefore needs to be cognisant of the Court’s dynamic and evolutive approach. In addition, the approach taken should understand the role of ‘margin of appreciation’¹⁰⁴ (hereafter MoA) and ‘European consensus’¹⁰⁵ in the reasoning process.

In seeking to avoid a review of its criminalisation of incest and thus to avoid an investigation into its reasoning process, the State could argue that the action taken against incest was within its MoA and that there is no European consensus on incest. This would have the effect of nullifying any further investigation into the reasoning process without allowing for an understanding of the compatibility of the incest provisions with the human rights norms. The State realising the contentious nature of incest could use these tools to prevent the Court from engaging in a meaningful review. The approach did not seek to challenge the use of the MoA and European consensus, but sought to understand the norms before these political tools were imposed that would inevitably change the outcome in light of political will. The MoA varies from case to case. The availability of other research on the MoA made it possible to draw analogies with cases concerning sexual minorities. Ascertaining the level of consensus across 47 High Contracting Parties was hampered by the lack of any comprehensive database listing each countries criminal code or legal provisions. Hence, European consensus was investigated using data derived mainly from the Interpol website. National laws are written in a number of languages. Use of data from the Interpol website helped to mitigate this problem as it provided an almost complete set of data from the 47 High Contracting Parties, with the

¹⁰² *Sheffield and Horsham v United Kingdom* (App no.22985/93 and 23390/94).

¹⁰³ *Christine Goodwin v United Kingdom* (App no.28957/95) para.74.

¹⁰⁴ This term has been defined by Arai-Takahashi Y., in *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, Antwerp, 2002) to mean ‘the latitude a government enjoys in evaluating factual situations and in applying the provisions enumerated in international human rights treaties.’ 2.

¹⁰⁵ This term does not refer to any formal agreement between the High Contracting Parties to the ECHR on a particular issue. Instead it is used by the European Court of Human Rights to determine the proportionality of the matter under investigation. There is no specific method which is used by the Court for ascertaining the ‘consensus’ and a consensus may or may not be identified by the Court without any explanation as to how the Court came to its conclusion.

majority of the data in English.¹⁰⁶ The data was provided to Interpol in light of Countries' obligations under the Interpol Constitution,¹⁰⁷ though three states¹⁰⁸ had not transmitted data to Interpol. Secondary searches located missing data from sources identified in Appendix 4.

By operating within an NLR paradigm the author was able to step outside of the traditional method of selecting cases on the basis of case precedent. The answer to the research question did not require the predetermined decision that the prohibition was or was not in contradiction with ECHR rights and then the selection of random precedent (by the author) in order to argue that point using such cases, because the analysis sought to understand the prohibition in light of the most recent ECtHR jurisprudence. This jurisprudence was found from the cases, used because they were within the data set rather than because they were relevant to the author's predetermined decision to argue for or against the State's criminalisation of incest. The approach also responded to concerns with legal method raised by Epstein and King. They suggested that legal academics 'need to reveal far more about the process by which they generated and observed their data.'¹⁰⁹ The cases used are identified in Appendix 3A-C.

All case data came from the HUDOC website:¹¹⁰ the official European Court of Human Rights database of all judgments and decisions of the Court and the previous non-permanent European Court and European Commission of Human Rights. The Court gives judgment in either English or French, with both languages equally authoritative. However, some judgments are available in only one language. Judgments delivered in French were not analysed due to the unavailability of translation services.

To ascertain the cases to be used in the data set, firstly, the database was searched for the term 'Incest' within the entire text of the judgment. The search was limited to all judgments of the Grand Chamber and Chamber of the Court (not Committee) between 1st July 2009 and 1st July 2010 and produced a limited number of results. The search was widened to include all cases that were handed down from the date of the Courts existence to 1st July 2010. This resulted in 17 judgments all delivered in English. An analysis of the content and reasoning of these cases is found below at Chapter 5.4.1.

¹⁰⁶ Data is presented tabulated in Annex B. A small amount of data in French and Spanish required translation.

¹⁰⁷ The Constitution and General Regulations of the ICPO-INTERPOL adopted by the General Assembly, 25th session (Vienna, 1956); Article 9, Members shall do all within their power, in so far as is compatible with their own obligations, to carry out the decisions of the General Assembly.

¹⁰⁸ Macedonia, Montenegro and San Marino.

¹⁰⁹ Above n.34, 34.

¹¹⁰ ECtHR, *Search Portal* <http://www.echr.coe.int/ECHR/EN/hudoc> accessed 6 December 2010.

The database was then searched for Article 8 judgments, limited to the Grand Chamber and Chamber of the Court (not Committee) which were handed down between 1st July 2009 and 1st July 2010. This amounted to 56 results. Article 8 data was analysed through reading and identification of *ratio decidendi*. Other Articles (rights) raised in the cases were noted in the data table,¹¹¹ as were cases that involved Article 14.

Data on Article 12 was also collected from HUDOC. The search was limited to all judgments of the Grand Chamber and Chamber of the Court (not Committee) between 1st July 2009 and 1st July 2010. This returned a limited number of results. Thus, the search was widened to include all Article 12 cases handed down from the date of the Courts existence to 1st July 2010. Analysis of Article 12 cases identified material only tangentially relevant to answering the research question; therefore, this material does not form part of this thesis. Nonetheless, in keeping with the NLR paradigm's requirement of transparency, the results are listed in Appendix 3C. The case of *B & L v United Kingdom*,¹¹² is an exception. This case also appeared within the data set concerning the keyword 'incest' and was therefore analysed within that section.

The findings from the data were brought together in a traditional legal form. The cases were read using traditional legal skills in order to ascertain the *ratio decidendi*. The findings were then analysed in order to ascertain reasoning that may be relevant to the prohibition of incest. The information gleaned from the earlier chapters concerning the development of the provisions, the reasoning given to justify the form in which they were enacted and information concerning their potential effects was then used to understand the prohibition in light of the ECHR norms. Where relevant to the legal investigation and the Court's application of norms to the factual scenarios faced, the analysis draws upon the information from the previous chapters in order to explore the human rights compatibility of the provisions. These findings were then used to hypothesise about the compatibility of the consensual adult familial sexual abuse provisions in England and Wales and their compatibility with the European Convention norms.

1.7 Research into Incest

The aim of the following sections is to explore and review the literature on incest and they will highlight salient themes this raises. As was suggested in the introduction, the initial review of

¹¹¹ See Appendix 3A specifically the column titled 'Additional Article Raised'.

¹¹² *B & L v United Kingdom* (App no.36546/02).

the literature to enable an understanding of the prohibition highlighted that incest has been researched and written on by a multitude of different researchers from a wide array of disciplines. The literature also highlighted that incest is not purely a legal concept. What it reveals and as will be detailed below, are the varying meanings and definitions attributed to the term 'incest.' Incest is therefore not a static term. The term is no longer used within English and Welsh legislation and criminal law. However, it remains in use in a number of countries including Scotland.¹¹³ The literature on incest often provides a definition of what is meant by the author when the term is used. This suggests that authors in the multiple disciplines are aware of the lack of clarity caused by the use of the term.

La Fontaine identified definitions of incest from three potential sources: dictionary definitions that were heavily reliant on literary sources, the definitions deployed by the criminal law, and the common understandings of most people.¹¹⁴ To facilitate analysis and develop relevant themes from the literature reviewed for this thesis, the literature was grouped into four broad categories. These categories were a) anthropological and sociological literature, b) literature concerning a particular historical period or event c) legal literature and d) medical and scientific literature. Much of the literature contained information and data that could be categorised within one of the other disciplines, for example, some legal authors discussed anthropological issues. These four broad categories will be addressed below, before concluding with salient themes relevant for this thesis' investigation.

1.7.1 Anthropological and Sociological Literature on Incest

Much of this literature sought to identify incest as a universal phenomenon and to propose reasons for this. The earlier literature, for example detailing non-Western societies, involved the author visiting, observing and studying the culture, whereas later papers amalgamated data compiled by these early researchers.¹¹⁵ The interpretive nature of the investigations meant that there was often a failure to define the activity being researched. In his *Remarks and Inventions: Skeptical Essays about Kinship*, Needham claimed that incest theorists shared two general assumptions. Firstly, 'that we know what 'incest' really is, whatever form its regulation may take.'¹¹⁶ He cited Radcliffe-Brown who asserted that 'incest is *properly speaking*

¹¹³ Criminal Law (Consolidation) (Scotland) Act 1995 c.39 s.1 Incest.

¹¹⁴ La Fontaine J.S., 'Child Sexual Abuse and the Incest Taboo: Practical Problems and Theoretical Issues' (1988) Vol.23(1) *Man* 1-18, 4.

¹¹⁵ Evans-Pritchard E.E., '148. The Study of Kinship in Primitive Societies' (1929) 29 *Man* 190-194.

¹¹⁶ Needham R., *Remarks and Inventions: Skeptical Essays about Kinship* (Tavistock, London, 1974) 62

the sin or crime of sexual intimacy between immediate relatives within the family.¹¹⁷ This is probably an accurate summation of what the authors within this group felt about incest as a phenomenon.

Secondly Needham suggested the 'prohibition of incest is a universal.'¹¹⁸ He cited Levi-Strauss' comment, that incest was a rule which possesses universal character, to suggest uniformity in its definition. This is apt to obscure the true reality of the situation. Far from being a universal rule, this thesis finds (as it is already doing in this literature review) a substantial variation in definitions. In spite of such comments, Needham was cognisant that the 'classificatory concept of "incest" may itself actually have induced the confusion.'¹¹⁹ Sagarin noted that research into incest 'is hampered and confused as a result of lacking clear-cut definitions.'¹²⁰ Schneider contributed the 'Meaning of Incest' and noted some fundamental problems with the concept. Schneider positioned incest as an essentially cultural prohibition that has been inadequately defined. Schneider also suggested that anthropologists often interacted at cross-purposes with different goals concerning what they were trying to explain. He questioned whether they were attempting to explain a prohibition or merely attempting to explain a general behavioural trend.¹²¹

Recognising the cultural roots of the prohibition, White sought to define incest as a system of prohibitions that supported the survival of the 'group.' Yet this definition did not address the kin or acts prohibited and instead sought to explain the reasons for the prohibition rather than define incest. White suggested that 'Incest and exogamy are thus defined in terms of the mode of life of a people- by the mode of subsistence, the means and circumstances of offense and defense, the means of communication and transportation, customs of residence, knowledge, techniques of thought, etc.'¹²²

Renvoize devoted an entire chapter to the question 'What is incest?'¹²³ She noted the narrow legal definition was infrequently used outside the judicial sphere. 'The only useful definition of

¹¹⁷ Ibid. citing Radcliffe-Brown A.R., *African Systems of Kinship and Marriage* (OUP for International African Institute, London, 1950) 69.

¹¹⁸ Above n.116.

¹¹⁹ Ibid.

¹²⁰ Sagarin E., 'Incest: Problems of Definition and Frequency' (1977) Vol.13(2) *The Journal of Sex Research* 126-135.

¹²¹ Schneider D.M., 'The Meaning of Incest' (1976) Vol.85(2) *Journal of the Polynesian Society* 149-170, 154.

¹²² White L.A., 'The Definition and Prohibition of Incest' (1948) Vol.50(3) *American Anthropologist* 416-435, 434.

¹²³ Renvoize J., *Incest: A Family Pattern* (Routledge, London, 1982) Chapter 2.

incest for the purposes of this book therefore must be one which is broad enough to include a variety of sexual activity that would not in law be defined as incest but which is not so broad that there ceases to be any point in using the word “incest” at all.¹²⁴ Yet Renvoize recognised the problem with expanding the legal definition:

‘To sum up, then, for our purposes incest is a sexual relationship that may continue for years or be expressed overtly by nothing more than a single act, that takes place between a young person under the age of consent and an older person who has a close family tie, which is either a blood tie as with father/daughter/son, mother/daughter/son, brother/sister, or is a substitute for such relationships, as with step-parent or parent’s lover where the substitute has effectively taken over the role of the missing parent. The sexual act/acts can vary from exhibitionism to full intercourse: the only essential is that they shall be perceived either contemporaneously or later by the younger person to be of a sexual nature and of sufficient intensity to cause a disturbance in that younger person.’¹²⁵

Others, such as Gordon and O’Keefe used a specifically social definition. They categorised acts as incestuous where ‘two people were kin ... also if they occupied kinship roles – for example, stepfather and daughter.’¹²⁶ They were not concerned with the legal status of individuals hence they did not distinguish ‘mother’s lover’ from ‘stepfather.’

This body of anthropological and sociological literature often failed to link the purported protection of family structure provided by the taboo back to the prohibitions. Seligman, for example, did not examine in detail the kin who are subject to the prohibition and how this prohibition protected the family structure within societies she examined. Much of the literature failed to discuss any mechanisms of enforcement. Instead, there were often vague and unsubstantiated assertions including that, ‘the incest prohibitions are deeply rooted in the emotional experience of mankind. Transgression of them seldom needs to be punished by society, but brings its own punishment by means of supernatural intervention, usually in the form of severe illness or death.’¹²⁷ Thus, much of the literature failed to detail the specifics of the prohibitions. Others, when discussing the universality of the prohibition, for example Lévi-Strauss, failed to explain the structure of the prohibition or the differences and variations across differing societies. Whilst these theories often postulate an explanation for the original growth of the taboo, they do not go on to explain the how the structure of the prohibition has changed over time and how these taboos influence the current structure of legal prohibitions.

¹²⁴ Ibid 24.

¹²⁵ Ibid 31.

¹²⁶ Gordon L., O’Keefe P., ‘Incest as a Form of Family Violence: Evidence from Historical Case Records’ (1984) Vol.46(1) *Journal of Marriage and Family* 27-34, 28.

¹²⁷ Seligman B.Z., ‘The Problem of Incest and Exogamy: A Restatement’ (1952) Vol.52(3) *American Anthropologist* 305-316, 308.

Anthropologists and sociologists devoted much time to explaining the incest taboo during the 19th and 20th Centuries. They sought to understand the purpose of the taboo and to postulate reasons for its formation. Consequently, they generated much literature and a number of different theories behind the taboo. There are number of explanations of the taboo, which often cross-reference each other. These are, a) the prevention of role confusion and familial disruption, b) a taboo forming from intimate association, c) the creation of societal alliances, and d) the prevention of psychological gratification.

Role Confusion and Familial Disruption

Parker suggested Brenda Seligman and Bronislaw Malinowski belonged to the group of anthropologists responsible for the 'role confusion and family disruption theories.'¹²⁸ Seligman thought that 'the survival value of the incest prohibitions has been so important that it has become a universal law, the basis both of moral law and of social organisation.'¹²⁹ She suggested that the prohibitions acted to lessen friction resulting from sexual jealousies and competition over possession of females. The prohibition on incest was therefore to stabilise families and prevent damage to a social structure. Seligman believed that incest barriers protect the social structure that is founded on the basis of family.¹³⁰

Malinowski was criticised by White for dwelling upon the 'disruption and discord that the unrestricted exercise of sexual appetites would introduce into a small group of relatives or close associates.'¹³¹ Malinowski stated that 'a society which allows incest could not develop a stable family; it would therefore be deprived of the strongest foundations for kinship, and this in a primitive community would mean absence of social order.'¹³² He focused on the prohibition of incest as a component of social structure, finding that the sexual urge was disruptive and therefore not conducive to good order.

Intimate Association

The second explanation of the taboo is the 'intimate association' theory. Edward Westermarck, known for his *History of Human Marriage*, found that:

¹²⁸ Parker S., 'The Waning of the Incest Taboo' (1987) Vol.11 Legal Studies Forum 205-222, 207. Also Parker S., 'The Precultural Basis of the Incest Taboo: Toward A Biosocial Theory' (1976) Vol.78(2) 285-305, 288.

¹²⁹ Seligman B.Z., 'The Problem of Incest and Exogamy: A Restatement' (1952) Vol.52(3) American Anthropologist 305-316, 307.

¹³⁰ Ibid.

¹³¹ Above n.122, 431.

¹³² Malinowski B., 'Culture' in *Encyclopaedia of Social Sciences* Vol.4 (Macmillan, New York, 1930) 621-646, 630.

‘generally speaking, there is a remarkable absence of erotic feelings between persons living very closely together from childhood. Nay more, in this, as in many other cases, sexual indifference is combined with the positive feeling of aversion when the act is thought of. This I take to be the fundamental cause of the exogamous prohibitions. Persons who have been living closely together are as a rule near relatives. Hence their aversion to sexual relations with one another displays itself in custom and law as a prohibition of intercourse between near kin.’¹³³

He suggested that children reared together regardless of biological relationship, form a sentimental attachment that by nature is non-erotic and that taboos arise naturally, formed from innate attitudes. Westermarck’s work has been supported by Shepher’s oft-cited study in the Archives of Sexual Behaviour.¹³⁴ However it has been contradicted and disproven by Shor and Simchai, who offered an alternative explanation that incorporated socio-biological factors into their reasoning. Shor and Simchai challenged supporters of Westermarck on what they called a methodological fault.¹³⁵ They suggested supporters failed to evidence their findings, made evidential leaps to their conclusions and put a gloss on their proponent’s findings.¹³⁶ Instead, they proposed that the ‘significant nonbiological costs to incest ... should be seriously considered when trying to account for the common avoidance of this practice.’¹³⁷ Their explanation attempted to reposition socio-biological features; it did not rule out evolutionary or biological factors, rather it emphasised the importance of social cohesion and group unity.¹³⁸

Leavitt too challenged the Westermarck theory having suggested that ‘Westermarck, like current human socio-biologists, identified inbreeding harm as the reason natural selection would encourage outbreeding genotypes.’¹³⁹ Leavitt noted that if inbreeding is often harmless or even fitness enhancing, then the suggestion ‘that children raised together naturally trigger selection mechanisms for sexual avoidance is highly questionable.’¹⁴⁰ Leavitt therefore suggested that there was enough variation in breeding patterns to indicate that an incest avoidance mechanism through natural selection was unlikely.

¹³³ Westermarck E., *The History of Human Marriage* (Macmillan, London, 1921) 192.

¹³⁴ Shepher J., ‘Mate Selection Among Second Generation Kibbutz Adolescents and Adults: Incest Avoidance and Negative Imprinting’ (1971) Vol.1(4) Archives of Sexual Behaviour 293-307.

¹³⁵ Shor E., Simchai D., ‘Incest Avoidance, the Incest Taboo, and Social Cohesion: Revisiting Westermarck and the Case of the Israeli Kibbutzim’ (2009) Vol.114(6) American Journal of Sociology 1803-1842, 1832.

¹³⁶ Ibid.

¹³⁷ Ibid 1834.

¹³⁸ Ibid 1814.

¹³⁹ Leavitt G.C., ‘The Incest Taboo? A reconsideration of Westermarck’ (2007) Vol.7(4) Anthropological Today 393-419, 398 citing Westermarck E., *The History of Human Marriage* (Macmillan, London, 1921) 236.

¹⁴⁰ Ibid 393.

Creation of Societal Alliances

Claude Lévi-Strauss's study of non-European cultures¹⁴¹ resulted in his explanation of the universality of the incest taboo. His 'Alliance Theory' suggested the taboo was common to all human societies. He claimed that the prohibition against endogamy encouraged exogamy and thus created alliances between groups or family structures. He suggested that exogamy strengthened social solidarity through unrelated households forming relationships through marriage and through the exchange of women between social groups.

Similarly, according to the anthropologist Leslie White, 'the prohibition of incest has at bottom an economic motive.'¹⁴² White suggested that the need to create societal alliances in primitive cultures was greater than today, thus they enacted harsher penalties to prohibit incest as 'the very survival of the group depended to a considerable extent upon alliances formed by exogamy.'¹⁴³ He noted that the incest prohibition made 'families become units in the cooperative process.'¹⁴⁴

Preventing Psychological Gratification

Famously linked in popular culture to the study of incest, Sigmund Freud noted that even primitive societies had elaborate social organisations with the sole purpose to prevent incestuous sexual relations.¹⁴⁵ Freud analysed the exogamy of the totem system¹⁴⁶ that prohibited incest within not only the nuclear family but also extended families. The system acted to prevent incest among members of the same group unrelated by blood, and classified relations between some clan members unable to produce children as incestuous. Freud concluded that the unconscious mind repressed incestuous tendencies. He also believed that this occurred in civilised peoples as well as primitive societies. White called Freud's theory 'ingenious and appealing – in a dramatic sort of way at least.'¹⁴⁷ Controversy over the validity

¹⁴¹ See generally Lévi-Strauss C., *The Elementary Structures of Kinship*, Needham R., ed. Bell J.H, and Von Stormer J.R., trans. (Tavistock, London, 1970).

¹⁴² Above n.122, 426.

¹⁴³ Above n.122, 432.

¹⁴⁴ Above n.122, 425.

¹⁴⁵ Freud S., *Totem and Taboo*, Strachey J., trans. (Routledge, London, 1960).

¹⁴⁶ Totem has been defined by the Oxford English Dictionary online: 'By anthropologists the name has been extended to refer to other peoples and tribes, which (though they may not use totem marks) are similarly divided into groups or clans named after animals, etc.; such animals, animal-names, or animal-named groups, being spoken or written of as their totems, and their organization, their complex system of mutual and marriage relations and religious usages, being styled totemism.'

<http://www.oed.com/view/Entry/203813?rskey=DBdYzo&result=1&isAdvanced=false> accessed 01 December 2010.

¹⁴⁷ Above n.122, 419.

of his findings followed his changing opinion on the incest taboo.¹⁴⁸ Freud was acclaimed for explaining the Oedipus complex: that the father monopolised the females in the family group. The father expelled his sons once they were sexually mature. In the story of Oedipus, the sons joined forces to kill the father to access the women. However, after the father's death they 'determined to give him in death the submission and obedience that had refused in life.'¹⁴⁹ They therefore instituted a taboo preventing men from having sexual relations with their father's women and he thought that the need to look for an exogamous partner was the beginning of the incest taboo.

1.7.2 Literature on Incest in Defined Historical Periods

This grouping captured literature that detailed incest and its regulation during specific historical periods. A number of authors have sought to identify and understand the restrictions on sex and marriage as part of an understanding of the historical period as opposed to being motivated by a specific interest in the phenomenon of incest. Much of this group therefore comprises literature that mentions very little about incest.

As I have already commented, access to early historical sources data is limited. Much primary material has been destroyed. Other material was patchy in its discussion of incest; for example during the Victorian period incest was regarded as immoral and not openly discussed or written about. With regard to the Roman period, few (if any) specifically incest focused materials were produced. A number of generic texts on historical periods¹⁵⁰ referred to incest and often replicated material found in other literature. *The Institutes of Gaius*,¹⁵¹ as an authoritative starting point, were often referenced in much of the secondary material, for example in *Imperatoris Iustiniani Institutiones*.¹⁵²

Biblical teachings on incest have produced an extensive literature on incest and the Levitical prohibitions.¹⁵³ Both Christian and Jewish scholars claimed the correct interpretation of the

¹⁴⁸ For a brief but insightful review, see Renvoize J., *Incest: A Family Pattern* (Routledge, London, 1982) 35-36.

¹⁴⁹ Above n.122, 419.

¹⁵⁰ See generally Grubbs J.E., *Law and Family in Late Antiquity, The Emperor Constantine's Marriage Legislation* (Oxford University Press, Oxford, 1999). Watson A., *The Law of Persons in the Later Roman Republic* (Clarendon Press, Oxford, 1967). Strachan-Davidson J.L., *Problems of the Roman Criminal Law* (Clarendon Press, Oxford, 1912). Treggiari S., *Roman Marriage: Iusti Coniuges From the Time of Cicero to the Time of Ulpian* (Oxford University Press, Oxford, 1991).

¹⁵¹ De Zulueta F., *The Institutes of Gaius Book I* (Oxford, Clarendon Press, 1946).

¹⁵² Moyle J.B., *Imperatoris Iustiniani Institutiones* (Oxford, Clarendon Press, 1923).

¹⁵³ See generally Bigger S.F., 'The Family Laws of Leviticus 18 in Their Setting' (1979) Vol.98(2) *Journal of Biblical Literature* 187-203. Aggrawal A., 'References to Paraphilias and Sexual Crimes in the Bible' (2009) Vol.16 *Journal of Forensic and Legal Medicine* 109-114.

text.¹⁵⁴ Carmichael in *'Law, Legend, and Incest in the Bible'*¹⁵⁵ situated the text of Leviticus within the narrative of biblical legends in an attempt to explain the medley of individuals subjected to the prohibition. Mohrmann suggested that the numerous redactors were responsible for gaps in textual coverage of kin and the illogical order of the individuals concerned.¹⁵⁶ Epstein, who produced a number of hypothetical prohibitions with no textual basis in the bible, shared this view.¹⁵⁷ Jónsson suggested that England was an anomaly in being the only country to adopt a strict reading of Leviticus and that this was 'probably because such an approach served to justify the opinions and behaviour of the king.'¹⁵⁸

Herlihy investigated the position of women within marriage and incest rules during the early middle ages as part of a larger project on family and society.¹⁵⁹ Ingram's *Church Courts, Sex and Marriage in England 1570-1640* provided an explanation of the incidence and enforcement of sexual misdemeanour. Whilst not specifically devoted to researching incest, the offence played a central role in the text. Ingram's research used a great deal of data from local and parish records, yet his analysis avoided discussion of jurisdictional changes and abuse in ecclesiastical enforcement that resulted in the downfall of the church courts.¹⁶⁰ Thomas' article on the 1650 Act¹⁶¹ against incest 'The Puritans and Adultery'¹⁶² also did not give more than a passing reference to the abolition of ecclesiastical jurisdiction.¹⁶³ Other literature, much like that found in the medical and scientific group, used single case studies to examine approaches towards incestuous acts. Hole looked at a case in Herefordshire of 'a monstrous birth' as a result of an incestuous union in January 1600. She detailed the lack of clarity in the prohibited kin and suggested that in the 'sixteenth- and seventeenth-century debate on incest

¹⁵⁴ Levine B.A., 'Leviticus: Its Literary History and Location in Biblical Literature' in Rendtorff R., Kugler R.A., eds. *The Book of Leviticus: Composition and Reception* (Brill, 2006) 13-26.

¹⁵⁵ Carmichael C.M., *Law, Legend, and Incest in the Bible; Leviticus 18-20*, (Cornell University Press, London, 1997).

¹⁵⁶ Mohrmann D.C., 'Making sense of Sex: A Study of Leviticus 18' (2004) Vol.29 *Journal for the Study of the Old Testament* 57-79.

¹⁵⁷ Epstein L.M., *Marriage Laws of the Bible and Talmud* (Harvard University, Cambridge, 1942).

¹⁵⁸ Above n.63, 106.

¹⁵⁹ See generally Herlihy D., 'Making Sense of Incest: Women and the Marriage Rules of the Early Middle Ages' in Herlihy D., *Women, Family and Society in Medieval Europe, Historical Essays, 1978-1991* (Berghahn Books, Oxford, 1995) 96-109.

¹⁶⁰ See later at Chapter 2.4 Incest and the Civil War.

¹⁶¹ This Act, titled the 'Act for suppressing the detestable sins of Incest, Adultery and Fornication' was the first time that criminal legislation was enacted against incest. It has been previously prohibited through ecclesiastical jurisdiction. This legislation remained in force until the Restoration in 1660.

¹⁶² Thomas K., 'The Puritans and Adultery The Act of 1650 Reconsidered' in Pennington D, Thomas K., eds. *Puritans and Revolutionaries, Essays Presented to Christopher Hill* (Clarendon Press, Oxford, 1978) 257.

¹⁶³ The importance of the abolition of ecclesiastical jurisdiction is analysed at Chapter 2.5 Incest and the Civil War.

centred mainly on the relationships involved and the degrees of kinship which should be prohibited.¹⁶⁴

In their separate works, both Wohl¹⁶⁵ and Kuper¹⁶⁶ concluded that the 1908 Act¹⁶⁷ was a response to child abuse and neither explained the campaign by social reformers to extend the law. Both articles failed to detail concern with the existing legal provisions and their inadequacy when used to tackle child abuse. The focus of these works was not on the legal provisions which had implications for the conclusions drawn; for example Wohl erroneously suggested that only males could be prosecuted under the 1908 Act and that this was an indication of the limits of Victorian and Edwardian conceptions of female sexuality.¹⁶⁸

This discussion of the historical literature has shown that it was both comprehensive and selective when assessing incest and its prohibition. Due to the focus of the literature being on a specific period and concern with that individual event or era, it did not address the prohibition of incest across different periods. Whilst this has resulted in some comprehensive coverage, for example of the 1650 Act, the attention to detail on the specific period meant that the articles have not placed the treatment of incest within the bigger picture of the historical development of the offence. The literature constrained the assessment to finite periods. There has not been a comprehensive assessment of regulation across all periods: gaps in material exist as some periods have had less research done on them or have been deemed unimportant, for example little was written on incest between the late 16th through to 19th centuries. This is unsurprising as there were no changes in legislation to precipitate discussion.

1.7.3 Legal Literature on Incest

This group encompasses literature that focuses on the legal concept of incest. Incest as a legal concept has had its definition altered throughout history. As expected, much of this literature adopted the definitions set out in the relevant legislation under discussion. Whilst contemporary legal definitions avoid reference to marriage, commentators have remained

¹⁶⁴ Hole R., 'Incest, Consanguinity and A Monstrous Birth in Rural England, January 1600' (2000) Vol.25(2) Social History 183-199.

¹⁶⁵ Wohl A.S., 'Sex and the Single Room: Incest Among the Victorian Working Classes' in Wohl A.S., ed., *The Victorian Family: Structure and Stresses* (Croom Helm, London, 1978) 199.

¹⁶⁶ Kuper A., 'Incest, Cousin Marriage, and the Origin of the Human Sciences in Nineteenth-Century England' (2002) Vol.174(1) Past and Present 158-183.

¹⁶⁷ The Punishment of Incest Act 1908 was the first time since 1660 that incest was a criminal offence in England and Wales, This Act is investigated below at Chapter 2.6. The investigation identified a problem with another act that failed to allow successful prosecutions for rape when used against fathers. The remedy to this problem became an all-encompassing familial-sex prohibition that was the 1908 Act and focus turned to morality of sexual relations as opposed to abhorrence at child sexual abuse.

¹⁶⁸ Above n.165, 210.

happy to merge both the sexual and marriage prohibition. Ho recognised that ‘the parameters for incest vary by culture, but its general definition is a sexual act committed between people too closely related to marry legally.’¹⁶⁹ Gilgun also linked incest to marriage and stated ‘for this research, incest is defined as sexual behaviours between family members who are legally prohibited to marry.’¹⁷⁰ However, the sexual offence provisions regarding incest vary considerably from the marriage prohibitions, shown below in Chapter 2. The legal definition, as opposed to the other groupings, is not only interested in the relationship but also age of the individuals. Kirkwood and Mihaila used the term incest as a synonym for ‘in-family child abuse.’¹⁷¹ However, as shown below, many inter-generational acts were prohibited in addition to intra-generational sexual activity. Kelly suggested that incest was an ‘institutional concept which has often been obscured by long-lived taboos and cultural determinations, and which has resisted fully rational analysis.’¹⁷²

A full assessment of the changes in the legal definition of incest in England and Wales appears in Chapter 2. The numerous Acts and their preparatory works are not reproduced here. A diagrammatical depiction of the proposed Bills and Acts can be found in Annex A1-14.

From biblical times through to the Civil War, the legal definition of incest was a sexual act of intercourse between persons within the ‘prohibited degrees’ of marriage.¹⁷³ The concept of incest was allied to marriage, and sex was an act that could only legitimately occur after a marriage. During the 19th century, marriage was no longer treated as necessary precursor for sexual relations. Consequently the legislation on prohibited kin in marriage and sexual relations gradually altered. The law required precision in definition because of the consequences that attached to prosecution of an infringement. The result is that the definition of ‘incest’ in legal literature is often the most narrowly and precisely defined. However, McLaughlin noted that ‘written law codes were often silent on father-daughter incest ‘because

¹⁶⁹ Ho J., ‘Incest and Sex Offender Registration: Who Is Registration Helping and Who Is It Hurting?’ (2007-2008) Vol.14 *Cardozo Journal of Law & Gender* 429-457, 429.

¹⁷⁰ Gilgun J.F ‘We Shared Something Special: The Moral Discourse of Incest Perpetrators’ (1995) Vol.57(2) *Journal of Marriage and Family* 265-281, 268.

¹⁷¹ Kirkwood L.J., Mihaila M.E., ‘Incest and the Legal System: Inadequacies and Alternatives’ (1979) Vol.12 *University of California Davis Law Review* 673-699, 673.

¹⁷² Kelly H.A., ‘Kinship, Incest and the Dictates of Law’ (1969) Vol.14 *American Journal of Jurisprudence* 69-78, 78.

¹⁷³ Prohibited degrees is often used to refer to those individuals falling within the Table of Kindred and Affinity now found in Marriage Act 1949 Sch.1. Marriages within prohibited degrees are declared void by s.1 of the Act.

it did not need to be addressed.¹⁷⁴ The definition has been limited to sexual intercourse only,¹⁷⁵ but in recent years has extended to other penetrative acts.¹⁷⁶ When looking at the differing legal definitions Ho suggested that ‘an explanation for the fluidity of the definition of incest could be that sanguinity is not the only factor that can be deemed incestuous, depending on the culture.’¹⁷⁷

Concerning England and Wales, much of the recent literature has advocated a different legal response to incest. One such article is Bailey and McCabe’s ‘Reforming the Law of Incest.’¹⁷⁸ This called for consensual incest between adults over 18 to be legalised and the removal of incest from the statute book. The authors relied heavily upon the work of the Wolfenden Committee¹⁷⁹ and argued that law ought to be separate from morals, and that incest is but one example of moral legislation. Others, including Temkin, have called for an extension of the offence of incest.¹⁸⁰ Bell’s assessment¹⁸¹ addressed the issue of incest and engaged with the discourse of the legal process from a feminist perspective.¹⁸² The legal position of incest has also been discussed in the popular press with a number of articles in leading newspapers.¹⁸³

Some authors, including Royce and Waits, acknowledge that no ‘universally accepted definition of incest’¹⁸⁴ exists. Recent commentary has recognised that ‘incest’ can comprise different types of behaviour,¹⁸⁵ including consensual and non-consensual, and has suggested that the law should focus on issues of consent.¹⁸⁶ Gilgun recognised that a ‘comprehensive

¹⁷⁴ McLaughlin M., ‘“Abominable Mingling”: Father-Daughter Incest and the Law’ (1997) Vol.24(1) *Medieval Feminist Forum* 26-30, 29.

¹⁷⁵ Punishment of Incest Act 1908 c.45, and Sexual Offences Act 1956 c.69 criminalising familial vaginal penetration only.

¹⁷⁶ Sexual Offences Act 2003 c.42 criminalising anal, oral and vaginal familial penetration.

¹⁷⁷ Above n.169, 430.

¹⁷⁸ Bailey V., McCabe S., ‘Reforming the Law of Incest’ (1979) *Criminal Law Review* 749-764.

¹⁷⁹ Home Office, *Report of the Committee on Homosexual Offences and Prostitution* Cmnd 247 (*Wolfenden Report*) (HMSO, London, 1957).

¹⁸⁰ Temkin J., ‘Do We Need A Crime of Incest?’ (1991) Vol.44 *Current Legal Problems* 185-216.

¹⁸¹ Bell V., *Interrogating Incest: Feminism, Foucault and the Law* (Routledge, London, 1993).

¹⁸² Ibid, Chapter 5 – What’s the problem? The constriction and criminalisation of incest.

¹⁸³ Wynn Davies P., ‘Family Groups Attack Moves to Liberalise Incest Law’ *The Independent* (London, 26 May 1989) 2. Johnston P., ‘How Incest Slipped From the Statute Book’ *The Daily Telegraph* (London, 21 November 2002) 10. Ford R., ‘Tougher Rape Laws Come into Force’ *The Times* (London, 1 May 2004) 5. Cragg S., ‘The Sexual Offences Act is Good in Parts, But It May Be Too Strict or Confused on Some Crimes’ *The Times* (London, 11 May 2004) 7. Spencer J., ‘Why the Act is Indecent’ *The Independent* (London, 3 May 2004) 7.

¹⁸⁴ Royce D., Waits A.A., ‘The Crime of Incest’ (1978) Vol.5 *Northern Kentucky Law Review* 191-206.

¹⁸⁵ Note, ‘Inbred Obscurity: Improving Incest laws in the Shadow of the “Sexual Family”’ (2006) Vol.119(8) *Harvard Law Review* 2464-2485, 2465.

¹⁸⁶ Roffee J.A., ‘Incest in Scots Law: Missed Opportunities in the Scottish Law Commission Review’ (2010) Vol.10(2) *Contemporary Issues in Law* 168-180, 174.

definition' includes non-touch activity such as looks and talk.¹⁸⁷ Hughes sought to answer the question whether 'the existing prohibitions regarding incest can be defended on utilitarian grounds?'¹⁸⁸ Hughes did not define the offence and proceeded to discuss both abusive and non-abusive conduct. Like many authors, Hughes did not investigate what the incumbent law sought to achieve. He did however propose a change in legislation having noted that, 'this suggestion admittedly ignores the harm that may be done to the family unit and hence to society generally.'¹⁸⁹

A number of authors have attempted to situate the offences within, for example, time or place or to rationalise the prohibition of incest within wider criminal law or legal principles. Bailey and Blackburn in 'The Punishment of Incest Act 1908: A Case Study of Law Creation'¹⁹⁰ used the historical and cultural background to understand the development of the Act. This article drew criticism from Wolfram who suggested:

'biological considerations were not used to further the 1908 Act clearly not because they were unknown, as Bailey and Blackburn suggest, but because they were not wholly favourable to the proposed legislation and did not fit with the old system, which was still widely supported and in which affinity was classed with consanguinity.'¹⁹¹

Such criticism appears misdirected, as the 1908 Act did not concern itself with affinal relations.¹⁹²

Social anthropologists, including Fellow of the British Academy Adam Kuper,¹⁹³ have assessed the law and have provided a number of interesting, but at times legally erroneous, accounts of its creation. Numerous other articles including Zellick's 'Incest' have questioned the basis for the criminal law and suggested the 'most compelling argument is eugenic.'¹⁹⁴ Others, including Morton's 'The Incest Act 1908'¹⁹⁵ have described the legal provisions and their oppressive effects on individuals. Anthropologists, including Simpson in his article 'Scrambling

¹⁸⁷ Above n.170, 268.

¹⁸⁸ Hughes G., 'The Crime of Incest' (1964) Vol.55 Journal of Criminal Law and Criminology and Police Science 322-331, 322. By using the term 'utilitarian grounds', which is not explained, one is led to believe that Hughes is making reference to high numbers of child sexual abuse cases.

¹⁸⁹ Ibid 330.

¹⁹⁰ Bailey V., Blackburn S., 'The Punishment of Incest Act 1908: A Case Study of Law Creation' (1979) Criminal Law Review 708-718, 710.

¹⁹¹ Wolfram S., 'Eugenics and the Punishment of Incest Act 1908' (1983) Criminal Law Review 308-316, 313-314.

¹⁹² See Annex A9.

¹⁹³ See Kuper A., *Incest and Influence: The Private Life of Bourgeois England* (Harvard University Press, Massachusetts, 2009) Chapter 2 The Law of Incest.

¹⁹⁴ Zellick G., 'Incest' (1971) Vol.12, New Law Journal 715-716.

¹⁹⁵ Morton J., 'The Incest Act 1908: Was it Ever Relevant' (1988) Vol.138 New Law Journal 59-61.

Parenthood', have sought to assess the legislative reform as a 'glimpse [of] a novel engagement between conceptual constraints and inter-personal possibilities which ought to be of particular interest to ethnographers.'¹⁹⁶

A number of articles have generally been descriptive when detailing the prohibitions and penalties attaching and whilst some discussions have used anthropological or sociological data, many have made what has become a pervasive error. The judiciary, including the Court of Appeal, have found that the gravamen of the offence is the effect on the potential offspring.¹⁹⁷ Some academics have erred in suggesting the basis of the 1908 offence was genetic.¹⁹⁸ Sufficient data exists to ascertain that this was not the case. As recently as 2003, Jeffrey Lamb stated:

'it has been argued in the past that the offence reflects the horror and disgust that society feels towards such behaviour, but the better view, especially when one considers that it is only blood relations that are affected by the offence, is that the basis of the law is eugenic.'¹⁹⁹

Other literature has included reports and government publications such as the 1984 Criminal Law Revision Committee's *Working Paper of Sexual Offences*²⁰⁰ and the 1999 Sexual Offences Review Team's *Setting the Boundaries*²⁰¹, which also make such inaccuracies. Legal texts including *Rook & Ward on Sexual Offences* have detailed the elements of the offences, including requirements for the indictment, sentencing, consent, the mental element, and corroboration.²⁰² Similar texts have detailed cases and judgments relevant to the prosecution of the offences.²⁰³

Some of the legal literature has been written with motives that include highlighting the anomalies in the law, as well as contextualising and understanding the aims of the provisions and detailing its discriminatory protection.²⁰⁴ The pitfalls of such an approach are addressed in

¹⁹⁶ Simpson B., 'Scrambling Parenthood: English Kinship and the Prohibited Degrees of Affinity' (2006) Vol.22(3) *Anthropology Today* 3-6, 3.

¹⁹⁷ *R v Winch* (1974) *Criminal Law Review* 487.

¹⁹⁸ Manchester A.H., 'The Law of Incest in England and Wales' (1979) Vol.3 *Child Abuse and Neglect* 679-682, 682.

¹⁹⁹ Lamb J., *Sexual Offences* (Tottel Publishing, London, 2003) 101.

²⁰⁰ Home Office Criminal Law Revision Committee, *Working Paper on Sexual Offences* (Home Office, London, 1980).

²⁰¹ Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* Volume 1 & 2 (Home Office Communication Department, London, 2000).

²⁰² Rook P.F.G., Ward R., *Sexual Offences* (Waterlow Publishers, London, 1990) Chapter 3 Incest.

²⁰³ Hill J.B., Fletcher-Rogers K.E., *Sexually Related Offences (Criminal Practice Series)* (Sweet & Maxwell, London, 1997).

²⁰⁴ Above n.188, 330.

'Incest in Scots Law: Missed Opportunities in the Scottish Law Commission Review.'²⁰⁵ Other literature from campaigners and academics has included reasoned arguments for changes to the law, as has some literature developed as part of a governmental reform process. Researchers in this grouping have at times attempted to provide a historical background to the legislation. However, their approaches have led them to making suggestions that were factually incomplete; for example, the suggestion that incest was a crime of recent origin, failed to acknowledge the previous criminal states in which the law existed.²⁰⁶

1.7.4 Incest in Medical and Scientific Literature

This broad category encompasses literature from both medical and other scientific sources including practitioners, counsellors, psychotherapists as well as eugenic specialists and geneticists.

As will be seen below, the medical and scientific definitions of incest are some of the broadest. Incest has been defined as 'abuses of power and trust.'²⁰⁷ It has been suggested that the wide definition of incest used by the medical community, and the mingling of psychiatric and legal concepts has caused difficulties in using data on incest.²⁰⁸ La Fontaine noted that incest has been conflated into 'child sexual abuse' and although the two concepts overlap,²⁰⁹ their use interchangeably has the potential to cause great confusion.²¹⁰ Much of the literature recognised the difficulties of the definition of 'incest'. Meiselman recognised this and devoted a whole section to 'Problems with the Research Definition of Incest.'²¹¹ He suggested that the degree of relationship, and kind and amount of sexual activity, was the problem. Cooper suggested that the 'legal definition of incest creates artificial categories of behaviour which do not reflect the total clinical reality,'²¹² and noted differences between 'legal' and 'clinical' incest. This was mirrored by West's findings. He noted that 'from the standpoint of assessing

²⁰⁵ Roffee J.A., 'Incest in Scots Law: Missed Opportunities in the Scottish Law Commission Review' (2010) Vol.10(2) Contemporary Issues in Law 168-180, 174.

²⁰⁶ For example, see Andrews J.S., 'Incest – Who Needs It?' (1977) Vol.10(1) Australian Journal of Forensic Sciences 30-42, 31.

²⁰⁷ Lew M., *Victims No Longer* (Quill, New York, 2004) 10.

²⁰⁸ Rosenfeld A.A., Nadelson C.C., Krieger M., Backman J.H., 'Incest and Sexual Abuse of Children' (1977) Vol.16(2) Journal of the American Academy of Child Psychiatry 327-339, 329.

²⁰⁹ See particularly deliberate use of the term to cause ambiguity at 3.6 Labelling and Use of a Synthetic Necessary Truth.

²¹⁰ La Fontaine J., *Child Sexual Abuse* (Polity Press, Cambridge, 1990) 24.

²¹¹ Meiselman K.C., *Incest: A Psychological Study of Causes and Effects with Treatment Recommendations* (Jossey-Bass, London, 1979) 41.

²¹² Cooper I.K., 'Decriminalization of Incest – New Legal-Clinical Responses' in Eekelaar J.M, Katz S.N., eds. *Family Violence: An International and Interdisciplinary Study* (Butterworths, Toronto, 1980) 518-528.

the consequences or the treatment for young people it is unrealistic to keep formal legal labels.’²¹³

Rosenfeld et al. believed that confusion and difference between psychiatric and legal definitions made ‘objective psychiatric assessment of material difficult.’²¹⁴ They concluded that ‘mingling’ psychiatric and legal concepts complicated the clinicians’ work: the victim sees the over-seductiveness or overstimulation of a family member as incestuous but this is not in line with the legal definition. Phillips-Green adopted a wide definition and described (sibling-incest) as ‘*inappropriate fondling, touching, or sexual contact: indecent exposure; masturbation; exposure to pornography; oral sex; anal sex; digital penetration; and actual intercourse between brother and sister or same-gender siblings.*’²¹⁵ Thus, therapeutic definitions are more expansive when compared to legal definitions of incestuous conduct. Hanson et al. adopted a wide definition of incest that included all familial sexual contact identified by the study.²¹⁶ This included, but was not limited to, ‘touching of the ‘victims’ genitalia or breasts, exposing oneself and sexual intercourse.’²¹⁷ Browning and Boatman used ‘sexual intercourse or acts of deviant sexual behaviour, including sexual molestation, between persons who are related, including stepchildren.’²¹⁸ Goodwin et al. noted that in psychiatric literature the definition of incest ranged ‘from the narrow requirements of consanguinity and sexual intercourse to the more inclusive definition of child sexual abuse by an adult or older child in a parental role.’²¹⁹

Lew suggested that ‘Incest is a violation of trust, power and protection.’²²⁰ A number of therapists, psychologists and doctors have used a definition that identified and highlighted the wrong by the family member ‘presumed to stand in a protective role to the victim.’²²¹ Canepa and Bandini’s *Incest and Family Dynamics*²²² was a clinical study interested in only father-

²¹³ West D.J., ‘Incest in Childhood and Adolescence: Long-Term Effects and Therapy’ (1988) Vol.40(5) British Journal of Hospital Medicine 352-360, 352.

²¹⁴ Above n.208.

²¹⁵ Phillips-Green M.J., ‘Sibling Incest’ (2002) Vol.10 The Family Journal 195-202, 196 (emphasis added).

²¹⁶ Hanson R.K., Gizzarelli R., Scott H., ‘The Attitudes of Incest Offenders: Sexual Entitlement and Acceptance of Sex with Children’ (1994) Vol.21 Criminal Justice and Behavior 187-202.

²¹⁷ Ibid 192.

²¹⁸ Browning D.H., Boatman B., ‘Incest: Children at Risk’ (1977) Vol.134(1) American Journal of Psychiatry 69-72, 69.

²¹⁹ Goodwin J., Sahd D., and Rada R.T., ‘False Accusations and False Denials of Incest: Clinical Myths and Clinical Realities’ in Goodwin J., *Sexual Abuse: Incest Victims and Their Families* (Wright PSG, London, 1982) 17.

²²⁰ Above n.107, 10.

²²¹ Ibid 11.

²²² Canepa G., Bandini T., ‘Incest and Family Dynamics: A Clinical Study’ (1980) Vol.3 International Journal of Law and Psychiatry 453-460.

daughter sexual relations. All daughters were minors when the sexual activity began, thus for Canepa and Bandini the 'incest' they investigated was wholly abusive. Consensual and non-consensual action falls within this definition depending upon the interpretation of a person's ability to consent. In addition to the quality and nature of the act, the definitions had focused on the kin engaging in the activity. Recourse to statutory legal definitions often prevented authors from discussing activity between kin outside of the legal provisions. In 'The Incest Taboo: Loosened Sexual Boundaries in Remarried Families', Perlmutter et al. suggested that incest required a blood tie, thus they did not include relationships between stepparent and stepchild and instead called this 'household sexual abuse.'²²³ Courtois used the definition of 'sexual contact or behavior occurring between related and quasi-related individuals' and said 'incest is considered a form of child abuse when the perpetrator is older, physically bigger and stronger, and/or holds a position of power or authority over the victim.'²²⁴ Emphasis was on the power differential exercised within the sexual relationship and was something discussed in the pre-legislative discourse, as will be seen in Chapter 3.

Medical and scientific definitions of incest were thus some of the broadest within the literature. Clearly, the motive for generating the definition thus influenced what was included. Motives included identification of 'incestuous' conduct to provide medico-therapeutic treatment. Investigations that sought to ascertain effects of incest on 'survivors' adopted expansive definitions in order to establish symptoms for further study.

Much of the literature focused upon treatment of the after-effects of abusive incestuous activity. Grand and Alpert found 'the effects of sexual abuse are often multiple, serious and enduring.'²²⁵ Cole suggested that 'virtually every psychological symptom and many medical symptoms have been associated with incest, including some reported cases of no symptomatology.'²²⁶ Effects of incestuous activity have included physical conditions such as chronic pelvic pain.²²⁷ Practitioners have found numerous mental health concerns including, post-traumatic stress disorder, anxiety, major depressive disorders, dysthymia, dissociative

²²³ Perlmutter L.H., Engel T., Sager C.J., 'The Incest Taboo: Loosened Sexual Boundaries in Remarried Families' (1982) Vol.8(2) *Journal of Sex & Marital Therapy* 83-96, 84.

²²⁴ Courtois C.A., 'Healing the Incest Wound: A Treatment Update with Attention to Recovered-Memory Issues' (1997) Vol.51(4) *American Journal of Psychotherapy* 464-496, 467.

²²⁵ Grand S., Alpert J.L., 'The Core Trauma of Incest: An Object Relations View' (1993) Vol.24(3) *Professional Psychology: Research and Practice* 330-334.

²²⁶ Cole P.M., Putnam F.W., 'Effect of Incest on Self and Social Functioning: A Developmental Psychopathology Perspective' (1992) Vol.60(2) *Journal of Consulting and Clinical Psychology* 174-184, 175.

²²⁷ Walker E.A., Katon W.J., Hansom J., et al 'Medical and Psychiatric Symptoms in Women with Childhood Sexual Abuse' (1992) Vol.54 *Psychosomatic Medicine* 658-664.

disorders and conduct disorders.²²⁸ Other major psychiatric disorders linked to incest have included self-mutilation, suicide attempts, panic attacks, and instability.²²⁹ Studies have found that incest victims were 'significantly more likely to binge, vomit, experience loss of control over eating and report dissatisfaction than other control subjects.'²³⁰ In addition to such symptoms, incest victims have been found to have marital instability,²³¹ high utilisation of medical care²³² and repeated involuntary childbearing.²³³ Rudd and Herzberger have found effects of incest to include both promiscuity and frigidity.²³⁴ West noted in the case of male victims that late effects of incest could lead to aggressive sex crime and homosexual prostitution.²³⁵ Incest survivors are overrepresented in a number of at-risk populations including, the homeless, and women in prison, prostitutes and addicts.²³⁶

The literature has also demonstrated a link between medical symptoms of incest and 'severe family disorganisation.'²³⁷ Nakashima found that 'incest arises as a symptom of severely disoriented family relationships.'²³⁸ Older studies found that incest occurred between 'members of large working-class families living in cramped quarters.'²³⁹ Lustig suggested that the fathers in these families were 'habitually unemployed ... from broken homes and had usually left home after little schooling to work sporadically as labourers.'²⁴⁰ However, research that is more recent indicated that incest also occurred in suburban middle to upper class families where both parents lived in the home.²⁴¹

²²⁸ Above n.215, 199.

²²⁹ Above n.226, 176.

²³⁰ Wonderlich S., Donaldson M.A., Carson D.K., et al 'Eating Disturbance and Incest' (1996) Vol.11(2) Journal of Interpersonal Violence 195-207.

²³¹ Felitti V.J., 'Long-term Medical Consequences of Incest, Rape and Molestation'(1991) Vol.84(3) Southern Medical Journal 328-331.

²³² Ibid.

²³³ Herman J., Hirschman L., 'Families at Risk for Father-Daughter Incest' (1981) Vol.138 American Journal of Psychiatry 967-970.

²³⁴ Rudd J.M., Herzberger S.D., 'Brother-Sister Incest – Father-Daughter Incest: A Comparison of Characteristics and Consequences' Child Abuse and Neglect (1999) Vol.23(9) 915-918.

²³⁵ West D.J., 'Incest in Childhood and Adolescence: Long-Term Effects and Therapy' (1988) Vol.40(5) British Journal of Hospital Medicine 352-360.

²³⁶ Russell D.E.H., *The Secret Trauma: Incest in the Lives of Girls and Women* (Basic Books, New York, 1986) cited in Courtois C.A., 'Healing the Incest Wound: A Treatment Update with Attention to Recovered-Memory Issues' (1997) Vol.51(4) American Journal of Psychotherapy 464-496.

²³⁷ Emslie G.J., Rosenfeld A., 'Incest Reported by Children and Adolescents Hospitalized for Severe Psychiatric Problems' (1983) Vol.140 American Journal of Psychiatry 708-711.

²³⁸ Nakashima I.I., Zakus G.E., 'Incest: Review and Clinical Experience' (1977) Vol.60(5) Paediatrics 696-701.

²³⁹ Lustig N., 'Research Article: Incest and Family Disorder' (1972) Vol.2 British Medical Journal 364.

²⁴⁰ Ibid.

²⁴¹ Adler N.A., Schutz J., 'Sibling Incest Offenders' (1995) Vol.19(7) Child Abuse & Neglect 811-819, 817.

Children of Incest

The 1967 paper by Adams and Neel²⁴² has become an oft-cited source for the belief in the high likelihood of birth defects and eugenic concerns. They found that the 'offspring of incestuous unions have a greater morbidity and mortality than the average.'²⁴³ Their study 'described a small series of 18 children resulting from [incestuous] unions.' Whilst the study employed a control group of mothers, Adams and Neel noted problems when attempting to match intelligence and that a 'higher proportion of women involved in incest were probably in the "dull" category.' They found a lesser chance of premature birth from the incestuous mothers and that there was no difference in length of neither baby nor head circumference. The study found that seven of the 18 children of incest were normal with an above average IQ of 110. Sadly, two children died neonatally, two were 'severely mentally retarded', one had a cleft lip and three children had a low IQ of 70, on repeated testing. The babies in the control group were not repeatedly tested.

Other studies have reported effects that included a higher incidence than expected of abnormal neuropsychiatric findings.²⁴⁴ Low IQ²⁴⁵ and seizures have also been reported.²⁴⁶ Carter found early death in children of incest from cystic fibrosis, progressive cerebral degeneration and congenital heart defects.²⁴⁷ Roberts' study suggested that major recessive genes reduced mental capabilities in incestuous offspring; however, he also noted an alternative explanation that 'those of poor mental capacity tend to breed more closely if the opportunity arises.'²⁴⁸ Farrelly briefly looked at the implications of selective criminalisation based on genetic risk, and the consequences for families with known genetic defects and their choices to have children.²⁴⁹

Treatment of Incest

Phillips-Green noted that 'many professionals still do not recognize the seriousness of the problem'²⁵⁰ of incest. There is a wealth of literature concerning treatment of incestuous activity. Unsurprisingly, the literature focused on abusive or coercive incestuous relationships,

²⁴² Adams M.S., Neel J.V., 'Children of Incest' (1967) Vol.40(1) *Pediatrics* 55-62.

²⁴³ Above n.239, citing Adams M.S., Neel J.V., 'Children of Incest' (1967) Vol.40(1) *Pediatrics* 55-62.

²⁴⁴ Davies R.K., 'Incest: Some Neuropsychiatric Findings' (1978-9) Vol.9(2) *The International Journal of Psychiatry in Medicine* 117-121.

²⁴⁵ Jancar J., Johnston S.J., 'Incest and Mental Handicap' (1990) Vol.34 *Journal of Mental Deficiency Research* 483-490.

²⁴⁶ Above n.244.

²⁴⁷ Carter C.O., 'Risk to Offspring of Incest' (1967) Vol.1 *Lancet* 436.

²⁴⁸ Roberts D.F., 'Incest, Inbreeding and Mental Abilities' (1967) Vol.4 *British Medical Journal* 336-337.

²⁴⁹ Farrelly C., 'The Case for Rethinking Incest Laws' (2008) Vol.34(11) *Journal of Medical Ethics* 1-2.

²⁵⁰ Above n.215, 195.

thus, the literature was written from the perspective that incestuous conduct was wholly abusive.

Donaldson and Cordes-Green discussed the benefits of group treatment of adult incestuous survivors.²⁵¹ This text was written for professionals who were engaging survivors when attempting to build relationships and facilitate counselling. Other texts were written specifically for individuals affected by childhood sexual abuse and incest.²⁵² *Conspiracy of Silence* was written to inform the public and practitioners about the existence of incest and its cross-cultural nature, destroying the myth that it was confined to one particular social, demographic group.²⁵³ Jean Renvoize's book entitled *Incest: A Family Pattern* comprehensively discussed the topic, the state, individuals, families and opportunities for treatment.²⁵⁴ Academics and practitioners have used case studies to highlight familial dynamics observed in incest cases.²⁵⁵ These have included distant or inaccessible parents, parental stimulation and creation of a sexual climate in the home, and family secrets, for example extramarital affairs.²⁵⁶

Other literature has detailed the continued failure to support victims effectively: Frenken and van Stolk noted that assistance to victims was hampered by institutional distrust and professionals' inability to stop on going incest.²⁵⁷ They also found professionals had shortcomings in knowledge, skills and emotional resistance towards incest.²⁵⁸ There was often a deficiency in the data used, as the foci of the studies were often individuals who required medical treatment. Cyr's study used victims who were brought to the attention of youth authorities in cases of confirmed childhood sexual abuse.²⁵⁹ Other open studies recruited through newspaper and public service announcements on radio and television: one particular

²⁵¹ Donaldson M.A., Cordes-Green S., *Group Treatment of Adult Incest Survivors* (Sage, London, 1994).

²⁵² Hunter M., *Abused Boys* (Macmillan, New York, 1990).

²⁵³ Butler S., *Conspiracy of Silence* (Volcano Press, California, 1985).

²⁵⁴ Above n.123.

²⁵⁵ Vander Mey B.J., Neff R.L., 'Adult-Child Incest: A Sample of Substantiated Cases' (1984) Vol.33(4) 549-557.

²⁵⁶ Smith H., Israel E., 'Sibling Incest: A Study of the Dynamics of 25 Cases' (1987) Vol.11(1) Child Abuse and Neglect 101-108.

²⁵⁷ Frenken J., van Stolk B., 'Incest Victims: Inadequate Help by Professionals' (1990) Vol.14(2) Child Abuse and Neglect 253-263.

²⁵⁸ Ibid.

²⁵⁹ Cyr M., Wright J., McDuff P., Perron A., 'Intrafamilial Sexual Abuse: Brother-Sister Incest Does Not Differ From Father-Daughter and Stepfather-Stepdaughter Incest' (2002) Vol.26 Child Abuse and Neglect 957-973.

study left incest to be 'self defined and blood ties were not critical rather the closeness of authority was a key factor' even though this research has been titled *Making Sense of Incest*.²⁶⁰

Meiselman was concerned with a psychological study of causes and effects of incest. He used parent-child case studies, thus the 'problem' he was attempting to solve was child abuse. Meiselman did not have access to an entire spectrum of patients including those who engaged in consensual sexual activity. He argued that 'prevention of incest would be furthered by education of authorities, such as family physicians, religious advisors and marriage and family counsellors, who are often consulted by the family members.'²⁶¹

Wilson suggested that 'until the law connects with the social sciences in more than a haphazard way, courts will continue to fail children.'²⁶² The focus of much of the literature has been on the children within the family. They are often the victim in the abusive relationship. The literature has also focused on the children of the relationship if offspring result from an incestuous union. However, there is little literature concerning the identification and occurrence of consensual adult familial sexual activity. Individuals in such relationships were unlikely to receive medical care. Consensual sexual activity between kin within s.64/65 Sexual Offences Act 2003 is illegal. Thus, such individuals were unlikely to identify themselves voluntarily due to the social stigma that attaches, thus acting as a deterrent to disclosure.²⁶³

1.8 The Literature and This Thesis Researching 'Incest'

As the discussion of the literature has revealed, the term 'incest' has a multiplicity of different meanings, which vary across, as well as within, disciplines. It has also shown that often this literature has added to a lack of clarity by failing to define the specifics of the topic under review. Because this thesis is starting its investigation to understand and discover the prohibitions, it is not proposed that any concrete definition is adopted.

It can be distilled from the literature that any definition of 'incest' incorporates at least the following variables, a) sexual activity. Incest often refers to penetrative sexual activity, which is

²⁶⁰ Silver R.L., Boon C., Stones M.H., 'Searching for Meaning in Misfortune: Making Sense of Incest' (1983) Vol.39(2) Journal of Social Issues 81-101, 84.

²⁶¹ Meiselman K.C., *Incest: A Psychological Study of Causes and Effects with Treatment Recommendations* (Jossey-Bass, London, 1979) 332.

²⁶² Wilson R.F., 'Recognizing the Threat posed by an Incestuous Parent to the Victim's Siblings. Part II: Improving Legal Responses' (2004) Vol.13(3) Journal of Child and Family Studies 263-276, 264.

²⁶³ Stigma and associated concerns are addressed below at 4.5.3. See also Green D., 'Resisting the Stigma of Incest: An Experiment in Personal Construct Psychotherapy' (1988) Vol.11 Journal of Adolescence 299-308.

generally limited to intercourse unless otherwise stated. However, it is recognised that serious damage can be caused by non-penetrative interaction.²⁶⁴ This sexual activity has to be between the second variable, b) kin. The existence of kinship ties is integral to the sexual activity being incestuous. Each piece of literature subsumes or adopts a definition of who is or is not kin for the purpose of the article or book. Therefore, the thesis appreciates the varying kin subsumed within the term 'incest' and that the term refers to the kin integral to the definition adopted by the author, paper, legislation or the period being analysed, critiqued or described. The third variable is c) age. The literature and legislation often makes a distinction between adults and minors. Both groups have the potential to be 'incest victims' or 'incest perpetrators' and this thesis will note the sometimes important differences where the adult and child distinction is relevant. Often linked to age is the fourth variable, d) consent. Much of the literature deemed incest to be non-consensual and thus abusive conduct. However, it is recognised that 'incest' also incorporates a body of conduct that is not non-consensual but is actually wanted and consented to by both parties. Therefore the presence or absence of consent will be indicated using the terms 'abusive' and 'consensual' and synonyms. Finally, the last variable noted within the literature is e) marriage. As noted from the first and second variables, 'incest' references two related individuals engaging in sexual activity. It does not presuppose the existence or otherwise of marriage. A number of definitions, particularly legal provisions, provide exceptions to the incest rules between kin who are married. Therefore, for the purposes of this investigation into the regulation of incestuous activity, incest is loosely understood as 'sexual activity which may be consensual or not between kin.'

The literature has indicated that whilst much has been written on incest, there is little that seeks to understand the reasoning and development of the offence in England and Wales across different historical periods. There are isolated pockets of research on specific periods of

The review of the literature also indicated that there are multiple approaches that can be taken to understanding incest. It has shown that 'incest' is not merely a phenomenon known to the legal world. Therefore, the literature indicated that the approach to the thesis should be capable of understanding incest as a phenomenon that is of interest to a number of disciplines. Consideration of the literature therefore impacted the decision to conduct the research in a paradigm that values cross-disciplinary research. The following chapter will therefore begin by investigating the reasoning behind the historical English and Welsh provisions, dating from the

²⁶⁴ For examples, see above n.123, Renvoize, 24 'any number of acts may be committed which frequently are at least as traumatic to the victim as full intercourse.'

Anglo-Saxon period through to the predecessor of the incumbent Act, which was in force until its repeal in 2004.

Chapter 2 - The Historical Development of the Prohibition Against Incest¹

2.1 Introduction

Records of social disapproval of incest within England and Wales, including both church-based² and criminal law³ exist from as early as Roman Britain.

The Chapter details six historical periods of change in the regulation of incest, providing the reasoning behind the English and Welsh provisions. The use of a methodology compatible with the New Legal Realist paradigm, incorporating socio-historical context, has led to the discovery of a subset of reasons for legislating against incest. This subset of reasons exists behind a veil of reasons given within the public justification process. For example, it is seen below that the Act of 1908 came about due to the fact that provisions of another Act failed to protect daughters from rape and not because of an overriding concern with other unpalatable behaviour between family members.⁴ The regulation of incest will be first addressed in the Middle Ages as this is the period in which the first specific English and Welsh prohibitions were detailed. However as will be seen below, there was significant influence of the Christian Bible both on this period and those following.

2.2 Incest in the Middle Ages

In England and Wales, the Christian Bible, for a long period of time, was identifiable as the source of the prohibition on incestuous sexual relations. Leviticus, known as the 'rule' book of

¹ This Chapter has formed the basis of the publication, Roffee J.A., 'Lifting the Veil on Incest: The Historical Development of the Offence' (2011) Vol.5(10) International Journal of Interdisciplinary Social Sciences 297-312.

² Church-based refers to ecclesiastical law enforced through ecclesiastical courts, For further details see Manchester A.H., 'The Reform of the Ecclesiastical Courts' (1966) Vol.10(1) American Journal of Legal History 51-75, 52, who noted 'Separate ecclesiastical courts had existed in England since the time of William the Conqueror, who provided that they should have care of "pleas affecting episcopal jurisdiction" and "any cause concerning the government of souls."' See also Atkinson T.E., 'Brief History of English Testamentary Jurisdiction' (1943) Vol.8 Missouri Law Review 107-128.

³ Criminal law here refers to law that is enforced outside of the ecclesiastical realm through temporal or secular jurisdiction of the King.

⁴ Findings detailed below in section 2.6.

the Bible, is home to the rules concerning incest;⁵ the main provisions are located within Chapter 18 v.6-16. The book appears to be a muddle of provisions, hastily thrown together and with little coherence. Mohrmann called it 'a hodge-podge of laws loosely related to matters of sex.'⁶ The purpose of Leviticus was to direct the Israelites away from imitating practices of the heretics and to inform them of the correct way to live.⁷ The code was not written in an easily accessible form and the list of kin with whom sexual relations were prohibited was not exhaustive: it failed to include the father-daughter relationship – the one expected to be at the core of any incest offence.⁸ In addition to omitting daughters, the list omitted mother's brother's wife, all nieces and first cousins.⁹ Mohrmann noted the omission of prohibiting relations with a daughter was 'especially problematic'¹⁰ but suggested a simple remedy by implying into the text non-explicit relationships. The rules addressed a male audience and prohibited only incestuous activity with four generations of female kin.

Some commentators believed that redactors of the Bible brought together sources of different origins 'without any real attempt at editing or correlation.'¹¹ Whilst not free from criticism,¹² Carmichael's approach appears plausible. He suggested that the rules were written in response to fictional biblical stories, which explained their chaotic and rather slipshod nature.¹³ Punishment for breach of these complex rules was severe. The book of Leviticus was intended to delineate the boundaries of a holy Israelite society, a society distinct from its neighbours.

⁵ Kellogg S.H., *The Book of Leviticus*, 3rd ed., (Klock & Klock, Minnesota, 1978) 20-24.

⁶ Mohrmann D.C., 'Making sense of Sex: A Study of Leviticus 18' (2004) Vol.29 *Journal for the Study of the Old Testament*, 57-79, 57.

⁷ Carmichael C.M., *Law, Legend, and Incest in the Bible: Leviticus 18-20*, (Cornell University Press, London, 1997) 5. Kellogg S.H., *The Book of Leviticus*, 3rd ed., (Klock & Klock, Minnesota, 1978) 21.

⁸ See Annex A1.

⁹ Jonsson differs in his reading of the enumerated kin, see Jonsson M., 'Incest and the Word of God: Early Sixteenth Century Protestant Disputes,' (1994) Vol.85 *Archiv Fur Rechtformationsgeschichte* 96-119, 100.

¹⁰ Above n.6, 70.

¹¹ Snaith N.A., *Leviticus and Numbers* (Thomas Nelson, London, 1967) 137.

¹² Klingbeil has suggested that Carmichael's interpretations lack hermeneutical validity and his method of interpretation borders on allegorical, leaving the reader with the uneasy feeling of the interpretation having paid little attention to the context. Klingbeil G.A., 'Review: Carmichael, Calum M. *Law, Legend and Incest in the Bible: Leviticus 18-20*' *Review of Biblical Literature* 05/24/2000 (Society of Biblical Literature, <http://www.bookreviews.org>). Ellens suggested that 'his argument does not develop primarily as a solution to exegetical problems that exist in the text. Rather, it develops as a coherent theory supporting the premise with which he begins. Ellens D., 'Review: Carmichael, Calum M. *Law, Legend and Incest in the Bible: Leviticus 18-20*' *Review of Biblical Literature* 05/24/2000 (Society of Biblical Literature, <http://www.bookreviews.org>). However Wyatt felt Carmichael's work contained 'cogent and eloquent argument' with his case being 'persuasively made'. Wyatt N. 'Review: Carmichael, Calum M. *Law, Legend and Incest in the Bible: Leviticus 18-20*' (1998) Vol.79 *Journal for the Study of the Old Testament* 143.

¹³ Above n.7, 1.

Citizens of neighbouring states were permitted into Israelite society; however, failure to abide by its rules resulted in an end to their activities and cultures through personal death of the rule breaker.¹⁴ As Carmichael stated, 'from the world of the Near East, the incest rules of the Bible – in particular those found in the two chapters of Leviticus 18 and 20 – have had greater effect on Western law than any comparable body of biblical rules.'

After the Romans left, England saw a period of hybridity within its legal system. Anglo-Saxon law was that of a number of different peoples, Angles, Saxons, Jutes, Frisians, Danes and Scandinavians. The joining of a number of differing peoples, all with their own laws, meant there was no codified set of Anglo-Saxon laws. Keeton noted that 'while all these peoples had a common, but remote Teutonic ancestry, they differed widely in their civilisation and customs,'¹⁵ and thus 'one of the most striking features of English law [...] is the abundance of local customs.'¹⁶

One common denominator was the Anglo-Saxon church: Helmholz noted that 'attempts to ferret out and correct sexual offences committed by men and women were to play a large part in the juridical life of the English Church.'¹⁷ Enforcement of religious rules occurred through the Church. Incest was mentioned in a number of statutes and authoritative letters including a letter from Pope John VIII to Burgred, King of the Mercians in 873.¹⁸ These religious prohibitions formed the basis of the 'Constitutions' of Archbishop of Canterbury,¹⁹ dated between 942 and 946, which also prohibited incest. Later, laws including part 4 of the Laws of Edward and Guthrum declared incest a crime 'where bishops were given a say in fixing the proper form of its punishment.'²⁰ The lack of official records resulted in debate over the official version of King Æthelred's Laws; one thing that is clear from both was their biblical origin. Version V stated 'every Christian man is zealously to avoid illicit intercourse and duly to keep the laws of the church,'²¹ and a more thorough version VI provided that:

'it is never to happen that a Christian man marries in his own kin within six degrees of relationship, that is within the fourth "knee", now with the widow of anyone who was so near

¹⁴ Above n.6, 62.

¹⁵ Keeton G.W., *English Law; The Judicial Contribution*, (David & Charles, Newton Abbot, 1974) 10.

¹⁶ Ibid.

¹⁷ Helmholz R.H., *The Oxford History of the Laws of England*, Vol. 1, (OUP, Oxford, 2004) 49.

¹⁸ Whitelock D., Brett M., and Brooke C.N.L., eds., *Council & Synods with Other Documents Relating to the English Church, Vol I, AD 871–1204*, pt.I, 871–1066, (Clarendon Press, Oxford, 1981) 1.

¹⁹ Ibid 67.

²⁰ Above n.17, 50.

²¹ Above n.18, 350 para 10.

to him in natural relationship, nor with a near relative of the wife to whom he was previously married.’²²

In a letter from King Cnut to the people of England dated between 1019-1020, Cnut decreed that bishops should ‘shun all evildoing, namely slayers of their kin and murders, and perjurers and wizards and sorceresses and adulterers and (committees of) incest.’ The severity of the penalty varied with whom the act was committed: ‘if anyone commits incest, he is to pay compensation according to the degree of the relationship, whether by wergild or by a fine or by all his possessions,’²³ also intimating that a heavier penalty is applicable the closer the relationship.²⁴

The biblical provisions remained enforceable through ecclesiastical jurisdiction after the separation of ecclesiastical and temporal courts by William I in 1072. The Statute of Circumspecte Agatis²⁵ of 1285 Edward I confined the jurisdiction of the church courts to purely ecclesiastical matters. Helmholz suggests that the busy ecclesiastical courts enjoyed the support of the monarchs and most of the bishops, with the problems that they faced not sufficient to overwhelm them.²⁶

2.3 Confusion following Henry VIII

There is no evidence that the law concerning incest changed dramatically during the 14th and 15th Centuries. Henry VIII’s pursuit of a son instigated the next shift affecting marriage laws and incest.²⁷ Marriage and sexual relations remained necessarily connected, with sexual relations being prohibited outside of a marital relationship. Henry set about the Reformation, which for the King, in the opening stage, ‘was dominated less by desire for reformation of Church and state than by a determination to succeed in his marriage project.’²⁸ The passing of the Act of Supremacy and Submission of Clergy and Restraint of Appeals,²⁹ created a huge governance shift, and Henry became Supreme Head of the Church of England in order to allow dissolution of his marriage to Catherine of Aragon and marriage to Anne Boleyn. Incest

²² Above n.18, 350.

²³ Above n.18, 497 citing section 51.

²⁴ Above n.18, 498 citing section 51.1.

²⁵ ‘The Statute of Circumspecte Agatis’ see *Statutes of the Realm*, (Pall Mall, London, Dawsons, MDCCCXVII) Reprinted 1963, Vol.I. 13 Edw.I. 101.

²⁶ Above n.17, 283.

²⁷ For a detailed examination of the effect of Henry VIII’s changes during the Reformation see Scarisbrick J.J., *Henry VIII* (Yale English Monarchs Series), (Yale University Press, Maine, 1997).

²⁸ Williamson J.A., *The Tudor Age*, 3rd ed., (Longmans, London, 1964) 121.

²⁹ ‘The Act for the Submission of the Clergy and the Restraint of Appeals of 1534’ see *Statutes of the Realm*, (Pall Mall, London, Dawsons, MDCCCXVII) Reprinted 1963, Vol.III., 25 Hen.VIII c.19 460.

remained an ecclesiastical offence and Henry permitted all canon law not repugnant to the laws of England to remain in force. The Reformation altered the punishment available for incest and 'corporal punishment [for sexual offences] was abandoned and the normal censures became public penance and excommunication.'³⁰

Henry's immediate successors had little if any impact on the punishment of incest despite the major shifts in the church. The law that applied in England and Wales was the same as that of the Western Church. It was enforced with zeal here as it was elsewhere. To help settle confusion created by Henry and his successors changing the laws on marriage and the prohibited degrees,³¹ in 1563 Archbishop Parker produced a table of Kindred and Affinity, which was mandatorily placed in all parish churches and prayer books.³² The table was subsumed into the 1604 Canons. Helmholz notes that these adjustments by Parker to the traditional rules had been made a) to clarify the existing law, b) update the canons into contemporary thought, and c) make more definite legal conclusions.³³ The Canons of 1604 contained two provisions relating to incestuous activity; Canon 99 entitled 'None to marry within the Degrees prohibited,' and Canon 109 entitled 'Notorious Crimes and Scandals to be certified into Ecclesiastical Courts by Presentment,' the wording showing their distinctly theological basis.³⁴

Compliance with religious standards remained the goal. Through Tudor times, the ecclesiastical courts maintained a position of power over the conduct of daily life that was being supervised and moulded by the clergy.³⁵ The ecclesiastical courts inflicted penalties for sins as distinguished from crimes: 'in town and country the man of normal conduct was much more likely to be fined or flogged by the court Christian than by the justice of the King.'³⁶

³⁰ Thomas K., 'The Puritans and Adultery, The Act of 1650 Reconsidered' in Pennington D., Thomas K., eds. *Puritans and Revolutionaries; Essays Presented to Christopher Hill* (Clarendon Press, Oxford, 1978) 263.

³¹ Definition provided at Chapter 1 n.173.

³² Coster W., *Family and Kinship in England 1450-1800, Seminar Studies in History*, (London, Longman, 2001) replicating Church of England, Province of Canterbury, Archbishop Parker, *Table of Kindred and Affinity* (Printed for Thomas Adams, London c.1600) available at http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&res_id=xri:eebo&rft_id=xri:eebo:image:150720 accessed 20 November 2008.

³³ Above n.17, 267.

³⁴ Church of England, *Constitutions and Canons Ecclesiastical* (Robert Barker, printer to the Kings most excellent Maestie, London, 1604) available at http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&res_id=xri:eebo&rft_id=xri:eebo:image:150720 accessed 10 December 2008. Canon 99 begins "No person shall marry within the degrees prohibited by the laws of God, and expressed in a Table set forth by authority in the year of our Lord God 1563."

³⁵ Williamson J.A., *The Tudor Age*, 3rd ed., (Longmans, London, 1964) 73.

³⁶ Ibid.

Ingram noted that penalties 'were quite sufficient to reinforce the principle that incest was a grave offence, and they may well have had considerable deterrent effect.'³⁷ However, presumably enticed by the possibility of high returns achieved by strict enforcement, those tasked with enforcement began to show signs of corruption:³⁸ false allegations of incest and the need to obtain dispensations for marriage to kin resulted in payments by those seeking ecclesiastical judicial assistance.

2.4 Incest and the Civil War

Archbishop Parker's table included more kin³⁹ than did Leviticus, which was achieved through the interpretative technique known as 'Parity of Reason.'⁴⁰ This technique expanded the prohibited groups by including those thought to be equivalent to those enumerated within Leviticus. Of the 30 relations in the table with whom sexual activity and marriage was prohibited, 20 were affinal, including a single step-relation and only ten blood relations. The prohibited degrees spread across five generations and no mention was made of same-sex incestuous activity: male same-sex activity was criminalised elsewhere. The penalties for those breaching the law were 'strict but not draconian.'⁴¹ Imprisonment was not an option for the ecclesiastical courts; instead, sanctions consisted of penance and excommunication.⁴² Penance was often public and highly stigmatising for the offender. Excommunication was the most severe sanction, largely incomprehensible to a modern secular population. The rich were able to commute penance and excommunication through a money payment to the enforcing body. As the ecclesiastical courts penetrated all parts of daily life, an amalgam of belligerent subjects were unsatisfied by their conduct; this ranged from those who felt the courts did not punish enough moral misconduct to those who felt the courts interfered too much. It is against this background that this next period should be viewed.

Governance shifts though King Charles's personal rule, known as the Rule of Thorough, saw the King assisted by Archbishop William Laud. Laud, after being elevated to the Archbishopric of Canterbury in 1633, instigated the Laudian policy of conformity with church laws. These

³⁷ Ingram M., *Church Courts, Sex, and Marriage in England 1570-1640*, (CUP, Cambridge, 1987) 249.

³⁸ See Douglas Price F., 'The Abuses of Excommunication and the Decline of Ecclesiastical Discipline Under Queen Elizabeth' (1942) Vol.57(225) *English Historical Review* 106-115. May G., 'Experiments in the Legal Control of Sex Expression' (1929) Vol.39(2) *Yale Law Journal* 219-244, 228.

³⁹ See Annex A2.

⁴⁰ Wolfram S., *In-Laws and Outlaws; Kinship and Marriage in England* (Croom Helm, London 1987) 26.

⁴¹ Above n.37, 248.

⁴² For further detail, consult Veall D., *The Popular Movement for Law Reform 1640-1660* (Clarendon Press, Oxford, 1967) 11.

laws were rigorously applied and severe punishments followed. Laud controlled the Court of High Commission, which became the target of abolition along with the King's illegal levying of taxes.⁴³ Opponents of corruption and thus of the ecclesiastical courts solicited Parliamentary action. The situation was not one of Charles' making: he 'tried to uphold ecclesiastical justice. But...[his] efforts came too late to restore the church courts' moral authority.'⁴⁴ The church courts' downfall was not inevitable nor the result of the longstanding weaknesses and grievances against them; rather their end was due to the 'personalities and policies of the years immediately preceding the calling of the Long Parliament, and in the play of events and opinion at Westminster and in the localities in the period 1640-2.'⁴⁵ There was no shortage of complaints that those operating the ecclesiastical courts were acting arbitrarily and for self-gain.⁴⁶ This resulted in the removal of jurisdiction from ecclesiastical courts. With no venue to hear cases concerning incest, this rendered the provisions against incest unenforceable.

Neither ecclesiastical law nor the incest prohibitions were abolished. Similar to the previous period, the purported reason for prohibiting incest was still biblically rooted. Nevertheless, the end of ecclesiastical jurisdiction meant that 'in 1641 the Englishman became free from the persecutions for sexual offences that the ecclesiastical courts had pursued for centuries.'⁴⁷ There was, however, no intention to set men free to commit incest. The Puritans, whose numbers had been growing since the latter years of Elizabeth's reign following their return from exile,⁴⁸ were interested in stringent enforcement of morals, ridding the church of excesses and moving 'back-to-basics.' The removal of jurisdiction sparked a barrage of complaints including the *Remonstrance of the Commons of England to the House of Commons* of 1643. There was concern that removal of spiritual jurisdiction meant there was 'no longer any means of punishing "heinous crimes . . . as adultery, incest."'⁴⁹ Those leading the country and Commons concluded it would be more expedient to deal with incest through the temporal

⁴³ Setaro F.C., 'A History of English Ecclesiastical Law (Part II)' (1938) Vol.18 Boston University Law Review 342-399, 360.

⁴⁴ Above n.37, 12.

⁴⁵ Above n.37, 369.

⁴⁶ See Helmholz R.H., *The Oxford History of the Laws of England*, Vol. 1 (OUP, Oxford, 2004) 239 and Hill C., *Society and Puritanism in Pre-Revolutionary England* (Secker & Warburg, London, 1964) 316.

⁴⁷ Above n.42, 139.

⁴⁸ Above n.35, 329.

⁴⁹ Above n.42, citing Walker H., *The Remonstrance of the Commons of England to the House of Commons* (7 March 1643) 4.

courts rather than resurrecting ecclesiastical court jurisdiction or an alternative form of parochial discipline.⁵⁰

The removal of King Charles I, and consolidation in the numbers of members attending Parliament, did not lead to a more radical approach to governance. Religious reform was at the top of the agenda⁵¹ and the Rump Parliament was not inactive.⁵² Worden has suggested that the Rump's principal concern was to dissociate itself from growing and alarming manifestations of religious extremism.⁵³ It attempted to establish Presbyterianism as the national religion. However, in the face of significant hostility it instead 'enacted measures likely to appeal to a wide range of opinion.'⁵⁴ Legislating against incest was therefore a good fit. With grave concern over government stability, potential civil war and public safety, few Parliamentarians appeared willing to risk opposing legislation on issues with a basic moral consensus. The effort spent prohibiting incest turned on the symbolic value of the Bill. Who would want to be seen blocking legislation prohibiting morally repugnant behaviour such as incest?

Within this period, criminalisation of incest was one of a number of symbolic Acts by the new government that indicated the seriousness with which they took the people's concerns. Acts were passed 'for the better Observation of the Lords-Day, Days of Thanks-giving and Humiliation'⁵⁵ and 'for the better preventing of prophane Swearing and Cursing'(sic).⁵⁶ Considering pressing issues of national stability, control, unrest and Civil War, incest and these moral Acts were given much parliamentary time. The first documented legislative attempts to enact provisions criminalising incest appeared in late 1644. During the period 1644-1650, Parliament debated incest no less than 19 times;⁵⁷ unfortunately few records remain to

⁵⁰ Hill C., *The Century of Revolution 1603-1714* (Nelson, London, 1961) 79.

⁵¹ For further detail see Worden B., *The Rump Parliament 1648-1653* (CUP, Cambridge, 1974).

⁵² Ibid, 232.

⁵³ Ibid, 232.

⁵⁴ Hutton R., *The British Republic 1649-1660* 2nd ed. (Macmillan, London, 2000) 19.

⁵⁵ 'An Act for the better Observation of the Lords-Day, Days of Thanks-giving and Humiliation' 16th April 1650, see Firth C.H., Rait R.S., eds. *Acts and Ordinances of the Interregnum 1642-1660*, Vol. II (HMSO, London, 1911) 383.

⁵⁶ 'An Act for the better preventing of prophane Swearing and Cursing' 26th June 1650, see Firth C.H., Rait R.S., eds. *Acts and Ordinances of the Interregnum 1642-1660*, Vol. II (HMSO, London, 1911) 393.

⁵⁷ House of Commons Journal, (hereafter CJ) Vol. III 721 (11 December 1644), CJ Vol. III 724 (16 December 1644), CJ Vol. IV 35 (29 January 1645), CJ Vol. V 184 (26 May 1647), CJ Vol. V 188 (27 May 1647), CJ Vol. V 189 (28 May 1647), CJ Vol. V 478 (3 March 1648), CJ Vol. V 523 (31 March 1648), CJ Vol. V 648 (26 July 1648), CJ Vol. VI 171 (23 March 1649), CJ Vol. VI 354 (1 February 1650), CJ Vol. VI 359 (8 February 1650), CJ Vol. VI 366 (15 February 1650), CJ Vol. VI 385 (22 March 1650), CJ Vol. VI 389 (29 March 1650), CJ Vol. VI 396 (12 April 1650), CJ Vol. VI 404 (26 April 1650), CJ Vol. VI 408 (3 May 1650), CJ Vol. VI 410 (10 May 1650).

provide details of the Bills' contents and reasoning. On the 17th March 1649, 'An Act for abolishing the Kingly Office in England and Irlenad and the Dominions thereunto belonging'(sic)⁵⁸ was passed. Within a week of the abolition of the monarchy, it was ordered that 'Mr Salloway do give this House an Account of the Bill touching Incest and Adultery, on Wednesday next.'⁵⁹ Thus, the Rump was prompt in taking action against incest in the immediate aftermath of the huge national changes. There was a failure to enact Bills in 1644, 1645, 1647, 1648 and 1649 before success in 1650.

During the legislative process, the Committee (debating the Bill) made a number of amendments; it had stiffened the penalty with the removal of the benefit of clergy,⁶⁰ and added safeguards including a short limitation period⁶¹ and provision of witnesses for the accused.⁶² On 10th May 1650, the 'Act for suppressing the detestable sins of Incest, Adultery and Fornication'⁶³ was finally passed with the penalty of death attaching to its infringement. The Act applied to a significantly reduced number of kin as compared to Archbishop Parker's Table of Kindred and Affinity.⁶⁴ To say incest was not sinful became criminal and anyone in breach would 'suffer six months imprisonment without bail.'⁶⁵ Worden noted 'these were harsh measures, although they had been even harsher before the House had amended them.'⁶⁶

The extent to which the Act was enforced is questionable; the new legislation against incest was considered too savage to be employed upon any large scale and was rarely invoked, as

⁵⁸ 'An Act for abolishing the Kingly Office in England and Irlenad and the Dominions thereunto belonging' 17th March 1649, see Firth C.H., Rait R.S., eds. *Acts and Ordinances of the Interregnum 1642-1660*, Vol. II (HMSO, London, 1911) 18.

⁵⁹ CJ Vol. VI 171 (23 March 1649)

⁶⁰ CJ Vol. VI 365 (15 February 1650) For discussion of Benefit of Clergy see Hall J., *Theft, Law and Society* 2nd ed. (Bobbs-Merill, New York, 1952) specifically Chapter 4. It was originally a privilege mitigating the severity of the law that exempted clergy from criminal liability under secular law and placed them under the jurisdiction of ecclesiastical courts. This was later extended to the literate and then more generally. See Hall L., 'Strict or Liberal Construction of Penal Statutes' (1935) Vol.48(5) *Harvard Law Review* 748-774, 750 for a detailed list of offences exempting benefit of clergy.

⁶¹ CJ Vol. VI 408 (3 May 1650). The Act (n.85) states 'Provided also, That no person or persons shall incur any of the penalties in this Act mentioned, unless the said person or persons be thereof indicted within twelve Moneths after the offence committed.'

⁶² CJ Vol. VI 408 (3 May 1650).

⁶³ 'An Act for suppressing the detestable sins of Incest, Adultery and Fornication' 10th May 1650, see Firth C.H., Rait R.S., eds. *Acts and Ordinances of the Interregnum 1642-1660*, Vol. II (HMSO, London, 1911) 387.

⁶⁴ Compare Annex A2 with Annex A3.

⁶⁵ 'An Act against several Atheistical, Blasphemous and Excrable Opinions, derogatory to the honour of God, and destructive to humane society' 9th August 1650, see Firth C.H., Rait R.S., eds. *Acts and Ordinances of the Interregnum 1642-1660*, Vol. II (HMSO, London, 1911) 409.

⁶⁶ Above n.51, 233.

few cared to report their neighbours for such crimes.⁶⁷ That the Act's contemporaries knew the law to be 'draconic'⁶⁸ further supports suggestions that the Act was symbolic; that its focus and impact was to quell disquiet and show that the Rump Parliament was taking complaints seriously. A cursory review of the reasons behind the legislation suggested that the law's creation was merely reiterating religious mores. However, underlying reasons for the Act were the symbolic reaction to the people's complaints and the measure being one of many attempts by the government to secure its unstable position.

2.5 Restoration and Stability - 1660-1899

The next period was one of relative stability for the incest provisions. No sooner had the Civil War ended when another change in the incest provisions occurred. The 1650 Act was abolished, though concern was not with the specific measure. Focus was instead on its status as a piece of illegitimate Interregnum legislation. Like the previous periods, governance shifts and jurisdictional changes had a direct impact upon the incest prohibition.

'Widespread feeling about its absurdity'⁶⁹ and even the appointment of a committee to consolidate and revise the legislation did not affect the Act of 1650. Unsympathetically Davies called it a 'draconic law,' and 'definitely a step in the wrong direction, and, like most statutes with exorbitant penalties, was nullified by the refusal of juries to convict.'⁷⁰ However, it was not the unwillingness of juries to convict, nor the barbarity of the penalty that had any effect on changing the status back to an ecclesiastical wrong.

⁶⁷ For further explanation see Hutton R., *The British Republic 1649-1660*, 2nd ed. (Macmillan, London, 2000) 41. Hendrick H., *Child Welfare: Historical Dimensions, Contemporary Debate*, (Policy Press, Bristol, 2003) 37. Ingram M., *Church Courts, Sex, and Marriage in England, 1570-1640* (CUP, Cambridge, 1987) 335. Thomas K., 'The Puritans and Adultery, The Act of 1650 Reconsidered' in Pennington D., Thomas K., eds. *Puritans and Revolutionaries; Essays Presented to Christopher Hill* (Clarendon Press, Oxford, 1978) 281. See also Inderwick F.A., *The Interregnum AD 1648-1660* (Searle & Rivington, London, 1891) for analysis of Middlesex and the Western Assize Court 33-39.

⁶⁸ Davies G., *The Early Stuarts 1603-1660* in Clark G., ed. *The Oxford History of England Series* (Clarendon Press, Oxford, 1959) 172.

⁶⁹ Veall D., *The Popular Movement for Law Reform 1640-1660*, (Clarendon Press, Oxford, 1967) 141. See also Thomas K., 'The Puritans and Adultery, The Act of 1650 Reconsidered' in Pennington D., Thomas K., eds. *Puritans and Revolutionaries; Essays Presented to Christopher Hill* (Clarendon Press, Oxford, 1978) 281. It is not possible to locate information on the failure of the committee as no records have survived. CJ Vol. VII 443 (4 October 1656).

⁷⁰ Above n.68, 172.

Instead the operative reason for change was the invalidity of the Interregnum's legislation.⁷¹ The Convention Parliament⁷² nullified the Interregnum's Acts and Ordinances by implication.⁷³ Interregnum legislation that King Charles II and Parliament wanted to remain in force necessarily required re-enactment.⁷⁴ None of the Acts following the Restoration referred to incest; thus, it did not retain its elevated status as a criminal felony. Shortly after Charles II's restoration, ecclesiastical courts were 'effectively re-established, with their pre-civil war powers virtually intact.'⁷⁵ Incest was once again an ecclesiastical offence with church courts regaining jurisdiction over spiritual matters.

During the late 17th and 18th centuries, the innocuous ecclesiastical enforcement of incest provisions unsurprisingly failed to attract parliamentary attention. A resurgence of interest came in 1830 when a Special Commission was appointed to inquire into the practice and jurisdiction of the ecclesiastical courts.⁷⁶ As in previous eras, the primary concern was not incest; it was once again the structure of the courts. Incest continued to be a spiritual offence punished by 'monition, penance, excommunication, *suspension ab ingress Ecclesiae*, suspension from office and deprivation.'⁷⁷ The Commission concluded that jurisdiction exercised by ecclesiastical courts over laymen for other offences⁷⁸ should be abolished, leaving incest alone for ecclesiastical courts to adjudicate upon.⁷⁹

Even though it suggested the offence was of 'aggravated character' recommending punishment through 'fine and limited imprisonment',⁸⁰ the Commission proposed that incest be made a misdemeanour and transferred to the temporal courts.⁸¹ No reference was made to

⁷¹ For further details consult Firth C.H., Rait R.S., eds. *Acts and Ordinances of the Interregnum 1642-1660*, Vol. II (London, HMSO, 1911) xxxiii.

⁷² A Convention Parliament (the 1660 Parliament known as the Restoration Convention) is a Parliament that has assembled without formal summons of the sovereign.

⁷³ An Act declaring their formal assertion of invalidity was passed by the Cavalier Parliament in 1661: 'An Act for the Safety and Preservation of His Majesties Person and Government' see *Statutes of the Realm*, (Pall Mall, London, Dawsons, MDCCCXVII) Reprinted 1963, Vol.V 13 Car.II c.1 304.

⁷⁴ Firth C.H., Rait R.S., eds., *Acts and Ordinances of the Interregnum 1642-1660*, Vol. II, (London, HMSO, 1911) xxxiii.

⁷⁵ Above n.37, 372 citing Green I.M., *The Reestablishment of the Church of England 1660-1663* (OUP, Oxford, 1978) Chapter 6.

⁷⁶ House of Commons '*The Special and General Reports Made to His Majesty by the Commissioners Appointed to Inquire into the Practice and Jurisdiction of the Ecclesiastical Courts in England and Wales*' 1831-32 (199) xxiv 1.

⁷⁷ Ibid 13.

⁷⁸ Ibid brawling, 61 and defamation, 63.

⁷⁹ Ibid 62.

⁸⁰ Ibid 64.

⁸¹ Ibid 'It is competent to institute Criminal Proceedings for Incest, Adultery and Fornication; but in the Arches Court and the Consistory of London, no such suit has been brought for a long series of years; in

the biblical prohibitions against incest; instead, public decency and morality were cited as reasons for keeping the offence alongside jurisdictional consistency for its move to the temporal courts. The operative reason was thus the little contentious jurisdiction left for ecclesiastical courts to adjudicate, and secondly that it would be impossible to administer satisfactorily offences within the ecclesiastical courts. The implicit acceptance of the necessity of an incest law no longer appeared to be based solely on religious mores. Although in *Mourdant v Moncreiffe*,⁸² and *Martin v Mackonochie*⁸³ the judiciary reasoned their decisions upon the continued existence of ecclesiastical jurisdiction in cases of adultery and incest. Such negligible numbers of ecclesiastical cases reached the courts that in *Phillimore v Machon*⁸⁴ Lord Penzance held:

‘it cannot, I think be doubted that a recurrence to the punishment of the laity for the good of their souls by the ecclesiastical courts would not be in harmony with modern ideas, or the position which ecclesiastical authority now occupies in this country. Nor do I think that the enforcement of such powers where they still exist, if they do exist, is likely to benefit the community.’

The prohibitions of earlier periods, based on biblical text, appear to have been transformed into a public morality.⁸⁵ Roberts has suggested the attempt to legislate morals became a ‘Victorian pastime.’⁸⁶ The law was not altered following the publication of the Special Commission Report in 1831-82 and incest remained an ecclesiastical offence.

some of the country Courts they have been very rare. It may be greatly doubted whether any beneficial effects have resulted from these proceedings, or at least so beneficial as to counterbalance the odium they have excited, and the oppression which, in some few instances, has been exercised. We think that the cognizance of such offences cannot be advantageously conferred on the Provincial Courts; and, on the whole we are of the opinion, that these prosecutions should be abolished. Incest is, however, a species of offence of so aggravated a character, that some remedy ought to be substituted; and it appears to us, that the correction of this grosser violation of morality and public decency might be, with propriety, transferred to the Courts of Common Law, the offence being made indictable as a Misdemeanor, to be punished by fine and limited imprisonment. The Court will have authority to take security for future good behaviour.

Should these measures be carried into execution, the Criminal Jurisdiction of the Ecclesiastical Courts may be entirely abolished.’ (*sic*).

⁸² *Mourdant v Moncreiffe* (1874) 2 Sc.&Div at 381.

⁸³ *Martin v Mackonochie* (1878-79) L.R. 4 QBD at 770.

⁸⁴ *Phillimore v Machon* (1876) 1 P.D. 480.

⁸⁵ For a discussion of public morality and its impact in moral reform of Victorian Britain see Searle G.R., *Morality and the Market in Victorian Britain* (Oxford University Press, Oxford, 1998) specifically Chapter 10.

⁸⁶ Roberts M.J.D., *Morals, Art and the Law: The Passing of the Obscene Publications Act, 1857* (1985) Vol.28(4) *Victorian Studies* 609-629, 611.

2.6 Protecting Daughters - Success in 1908

As seen above, at the end of the previous period, support for the offence of incest had shifted away from its religious basis. Instead, Special Commission arguments focused on the offence being against morality and public decency. Undoubtedly, centuries of religious enforcement had helped create a society that had a collective dislike for incest.⁸⁷

Interest in incestuous activity resulted in the legislature being presented with a Bill in 1899. Similar to the situation in 1650, a number of attempts were made before the Bill was passed into statute in 1908.⁸⁸ Hendrick suggested that the successful Act of 1908 ‘was the result of a campaign dating back to the early 1890s.’⁸⁹ A number of pressure groups seeking legislative action led this campaign. The attempt in 1899 was the first to that sought criminalise incestuous sexual activity separately from incestuous marriage. The original Bill of 1899 contained a drastically reduced number of kin as compared to Archbishop Parker’s Table.⁹⁰ This Bill failed to receive sufficient parliamentary time and there are no parliamentary records or Hansard available to help determine reasons for a renewed interest in the offence. A similar Bill⁹¹ was presented to the House of Commons on March 20th 1900 and although a second reading was scheduled for the 9th May, this never occurred and the Bill lapsed.

The third attempt occurred in 1903 when on February 24th Colonel Lockwood introduced the Incest Bill into the Commons.⁹² The Bill went to a Standing Committee and lapsed; however, unlike with previous attempts Hansard recorded the debate.⁹³ The Bill’s proponents failed to provide coherent reasons for the offence. Instead, it was based on common understandings, beliefs and prejudices against incest. Reasons supporting criminalisation can be distilled into four broad categories: prevalence of the offence;⁹⁴ deterrence;⁹⁵ unwillingness to discuss

⁸⁷ See 1.7.1 Anthropological and Sociological Literature on Incest, Frazer observed ‘moral antipathy is rather the fruit than the seed of the prohibition of incest. It is the slowly accumulated effect of a prohibition which has been transmitted through successive generations from time immemorial.’ Frazer J.G., *Totemism and Exogamy*, Vol.1 (Cosimo, New York, 2009) (Originally published 1910) 164.

⁸⁸ Attempts were made to change the law in 1899, 1900, 1903, 1907 and finally in 1908.

⁸⁹ Hendrick H., *Child Welfare: Historical Dimensions, Contemporary Debate*, (Policy Press, Bristol, 2003) 39.

⁹⁰ See Annex A4 as compared to Annex A2.

⁹¹ See Annex A4 A Bill to Provide for the Punishment of the Crime of Incest 1900, Bill 136. Hansard HC vol.80 col.1325 (20 March 1900).

⁹² Incest Bill 1903, Bill 51.

⁹³ Committee Reports at that time were not archived. Parliamentary Archives has confirmed that these were destroyed.

⁹⁴ Hansard HC vol.118 col.1683 (5 March 1903).

⁹⁵ Hansard HL vol.125 col.821 (16 July 1903).

incest and implicit necessity to criminalise;⁹⁶ and appeal to comparative law.⁹⁷ The Earl of Donoughmore suggested England and Wales ought to follow Scotland and the United States of America in criminalising incest.⁹⁸ This was the first (recorded) occurrence that issues of comparative law were raised in debates on incest.

Amongst those sceptical of the need for legislation against incest was the Lord Chancellor, the Earl of Halsbury, who was less confident about the Bill's impact. He did not doubt the Earl of Donoughmore's 'research' but believed this should not be the 'mode by which a complete alteration of the criminal law is to be justified'.⁹⁹ Arguments against incest fell within three categories: criminalisation would cause more harm than good;¹⁰⁰ failure by the Bill's proponents to provide evidence that the current law was inadequate¹⁰¹; and inappropriate use of comparative law.

The original Bill of 1903 proposed criminalising males of any age for having intercourse with females over 13 who were their grand-daughters, daughters or sisters.¹⁰² It proposed to limit criminalisation of incestuous activity by females to those above 16 who had sexual relations with their grandfathers, fathers, or brothers.¹⁰³ An amendment was moved to criminalise acts with those under thirteen,¹⁰⁴ which was rejected on the basis that thirteen met various recommendations on both sides of the House and sex with any person under thirteen could be charged under another Act.¹⁰⁵ The Bill went to Standing Committee¹⁰⁶ where son was added to the prohibited kin for females;¹⁰⁷ this anomalous amendment added to the inconsistent protection provided by the Bill.¹⁰⁸ Another amendment, to include 'step-daughter'¹⁰⁹, was proposed, as it was claimed this was the most serious class of victims.¹¹⁰ The Solicitor-General, questioned 'whether it was within the purview of the Bill to make 'incest' that which was not

⁹⁶ Hansard HC vol.118 col.1683 (5 March 1903). Hansard HC vol.124 col.699 (26 June 1903). Hansard HL vol.125 col.820 (16 July 1903). Hansard HL vol.125 col.822 (16 July 1903).

⁹⁷ Hansard HL vol.125 col.821 (16 July 1903).

⁹⁸ Hansard HL vol.125 col.820 (16 July 1903).

⁹⁹ Hansard HL vol.125 col.822 (16 July 1903).

¹⁰⁰ Hansard HL vol.125 col.824 (16 July 1903). Hansard HC vol.118 col.1684 (5 March 1903).

¹⁰¹ Hansard HL vol.125 col.824 (16 July 1903).

¹⁰² Incest Bill 1903, Bill 51 s.1 See Annex A4.

¹⁰³ Incest Bill 1903, Bill 51 s.2.

¹⁰⁴ Hansard HC vol.124 col.698 (26 June 1903).

¹⁰⁵ Ibid.

¹⁰⁶ A Bill to Provide for the Punishment of Incest 1903, Bill 134.

¹⁰⁷ See Annex A5.

¹⁰⁸ See Annex A5 showing the unequal coverage if generations for kin of males as compared to females.

¹⁰⁹ Hansard HC vol.124 col.698 (26 June 1903).

¹¹⁰ Ibid.

incest at present.¹¹¹ This amendment was agreed to, though whilst in the Lords leave in Committee was requested to delete the amendment and ‘thereby confine the operation of the act to blood relations,’¹¹² thus suggesting the offence was based on eugenic considerations that were not elaborated. Therefore, step-daughter was not added to the Bill.

The Bill proposed punishment by penal servitude of between three and seven years or imprisonment for a period not exceeding two years, with or without hard labour.¹¹³ During debate in the Commons, Mr Talbot MP moved to exclude the limit on punishment that could be imposed by judges.¹¹⁴ However, the House opted for the seven-year maximum. The Bill failed to receive a third reading and again lapsed.

Four years later, in 1907, another Bill was introduced, which mirrored the unaltered original 1899 Bill.¹¹⁵ This is somewhat intriguing, as it can be seen from the above, amendments to include additional kin had been made in the previous reading.¹¹⁶ Unsurprisingly when the 1907 Bill returned from Standing Committee, it had been altered to include previous amendments, though the Bill had insufficient Parliamentary time for enactment.¹¹⁷

Shortly thereafter, the Incest Bill 1908¹¹⁸ received its first reading in Parliament on the 27th February 1908. It was sent to Standing Committee and returned to Parliament on the 1st April 1908. The arguments in support of the Bill closely mirrored those of the failed 1903 attempt. The Bill was restricted to blood relations and there was no discussion or cognisance of the centuries of ecclesiastical regulation. Unlike in 1903, the Bill in 1908 was enacted and made incest a criminal offence. When the Punishment of Incest Act 1908¹¹⁹ came into force on January 1st 1909, this was the first time since 1661 that incest had been punishable outside the ecclesiastical sphere.

The *prima facie* reason for a change in status to a criminal offence appeared to be concern over child abuse.¹²⁰ In the House of Commons debate, no thought was given to re-enacting an ecclesiastical rather than a criminal offence. Sir James Fitzjames Stephen suggested the

¹¹¹ Hansard HC vol.124 col.699 (26 June 1903).

¹¹² Hansard HL vol.125 col.820 (16 July 1903).

¹¹³ Incest Bill 1903, Bill 51 s.1.

¹¹⁴ Hansard HC vol.124 col.701 (26 June 1903).

¹¹⁵ See Annex A6.

¹¹⁶ See Annex A5 and compare to the new Bill 134 at Annex A6.

¹¹⁷ See Annex A7 Bill 257.

¹¹⁸ See Annex A8 A Bill to provide for the Punishment of Incest 1908, Bill 127.

¹¹⁹ Punishment of Incest Act 1908 c.45 See Annex A9.

¹²⁰ Bailey V., Blackburn S., ‘The Punishment of Incest Act 1908: A Case Study of Law Creation’ (1979) Criminal Law Review 708-718.

ecclesiastical nature of the offence delayed making incest a temporal crime.¹²¹ Bailey and Blackburn have suggested that 'official reluctance' to enact criminal provisions was the product of three Victorian influences:¹²² the taboo nature of the subject; that public acknowledgement of an 'unnatural vice' would tarnish the reputation of the family home; and the failure to provide 'statistical proof of the incidence of incest.'

Bailey and Blackburn note: 'in short, specialist societies, focusing on the frequency of incest and the domestic victimisation of children, and on the difficulties of prosecuting all cases of incest under existing criminal statutes, laid the foundations for legislative action.'¹²³ They suggest that the Act was a 'demonstration in English criminal law of the theory of lawmaking which stresses the role of the crusading reformer or "moral entrepreneur."'¹²⁴

The 'social-purity movement' including pressure groups such as the National Vigilance Association (NVA) used the opportunity to protect daughters and were supported by the National Society for the Prevention of Cruelty to Children (NSPCC) in extending the provisions to cover other family members. This campaign was closely linked with the Victorian urge to 'repress all criminal vice and public immorality.'¹²⁵ Local branches of both organisations sent details to the Home Office upon discovering cases. Yet the movement's primary concern could be seen from them informing the Home Office of the difficulties of dealing with cases of father-daughter rape using existing laws.¹²⁶ The prosecution of intra-familial abuse, particularly between fathers and daughters, was exacerbated by the short limitation period of 3 months and requirement of parental consent to a medical examination contained within the Criminal Law Amendment Act 1885 c.69 (hereafter CLAA 1885).

No overarching reason was given in support of the offence. Support was gathered from a number of singularly weak arguments. These were loosely constructed around widespread disgust of incestuous activity; proponents of criminalisation openly admitted their unwillingness to speak in depth about the issue.¹²⁷ The eugenic argument (that the offence should exist due to the deleterious effect of familial sexual relations on offspring and thus any

¹²¹ Stephen J.F., *A History of the Criminal Law of England* (Macmilland & Co, London, 1883).

¹²² Wohl A.S., 'Sex in the Single Room: Incest Among the Victorian Working Classes' in Wohl A.S., ed. *The Victorian Family* (Croom Helm, London, 1978) 197-216.

¹²³ Above n.120, 712.

¹²⁴ Above n.120, 710.

¹²⁵ Above n.120, 711.

¹²⁶ Ibid.

¹²⁷ Hansard HC vol.191 col.278 (26 June 1908). Hansard HL vol.197 col.1408 (2 December 1908).

future gene pool)¹²⁸ did not appear to be the rationale for the offence as it was rarely cited.¹²⁹ Reliance on any eugenic basis without sound scientific knowledge is problematic; there appears to have been no attempt to confirm the validity of such evidence. Abhorrence at father-daughter rape¹³⁰ was not channelled into efforts to amend the CLAA 1885.¹³¹ Instead, interested parties provided unverified statistics of father-daughter rape and induced Home Office support, for a Bill that only tangentially dealt with the issue prompting action.¹³² Arguments of comparative law¹³³ made in support of the Bill suggested England's backwardness. No evidence of the perceived deterrent effect of the legislation was ever provided, nor was any thought given to less drastic measures. Thus a number of weak arguments were combined together. General disgust of incest amplified support for a seemingly sensible and necessary Bill. Members of Parliament openly noted their precarious positions and did not want to appear in opposition to the Bill, thus they qualified all comments they made. Mr Rawlinson MP stated: 'it was a grossly immoral offence, and though he [Mr Rawlinson] felt it was unpopular to oppose a Bill of this kind in the House, he ventured to submit that before this offence was made a crime the House should see to it that they did not take any step that might do more harm than good.'¹³⁴ Concern over repercussions through public reaction at election time may have further stifled debate.

The arguments provided in support of the Bill in 1908 were no different to those of 1903. However in 1908 the Home Office's backing, absent in 1903, ensured success. Parliamentarians' unwillingness to enter into a detailed discussion of incest left the arguments provided in support of the Bill often unsatisfactorily reasoned. Legislative scrutiny by the Liberal led Parliament was limited. The Bill's proponents failed to provide supporting evidence

¹²⁸ Many scholars believe that one of the reasons for the criminalisation of incest is the protection of the gene pool and prevention of birth of children with genetic malformations caused by inbreeding between family members. See generally Wolfram S., 'Eugenics and the Punishment of Incest Act 1908' (1983) *Criminal Law Review* 308-316.

¹²⁹ Hansard HC vol.191 col.283 (26 June 1908) Mr Rawlinson stating that his professional experience had 'known instances producing no less than three or four children of weak intellect, idiots and imbeciles.' Hansard HC vol.191 col.284 (26 June 1908) Mr Samuel (The Under-Secretary of State for the Home Department) notes incest 'might entail consequences of a disastrous kind on the offspring which sometimes followed such intercourse.' Hansard HL vol.197 col.1410 (2 December 1908) Earl Russell states it is the 'offspring on whom the punishment (of allowing incest) chiefly falls.' Hansard HL vol.197 col.1411 (2 December 1908) Lord Loreburn (The Lord Chancellor) suggesting 'the community should stigmatise as a crime that which is a crime in substance, seeing that it produces not only moral depravity but also physical deterioration.' See also Above n.120, 716.

¹³⁰ Hansard HC vol.191 col.283 (26 June 1908).

¹³¹ Hansard HL vol.197 col.1412 (2 December 1908).

¹³² Hansard HC vol.191 col.284 (26 June 1908).

¹³³ Hansard HC vol.191 col.288 (26 June 1908). Hansard HL vol.197 col.1408 (2 December 1908).

¹³⁴ Hansard HC vol.191 col.280 (26 June 1908).

for, or acknowledge the inherent weaknesses in, their arguments. The protection of daughters from abusive fathers veiled weak and morally based arguments against incest. A pictorial explanation of the 1908 Act is located at Annex A9. It can be seen that the protection available was imbalanced and differed depending on the sex of the offender; extended sentences were available to offenders having intercourse with girls under thirteen but not with young boys.

2.7 Failed Attempts at Change: Post-1956

The latter half of the twentieth century saw a number of proposed changes to the provisions criminalising incestuous sexual activity. The first of these, the Sexual Offences Act 1956, was a response to the increasing number of single-issue statutes and sought to consolidate the legislation concerning sexual offences into a single Act. This Act did not alter the provisions of the Punishment of Incest Act 1908 nor did evidence suggest any thought was given to altering the offence in 1956. Separate male and female offences remained and those with whom sexual relations were forbidden were enumerated. The offence mirrored the 1908 statute and the anomalies remained.¹³⁵ The offence of Incest by a man¹³⁶ had a maximum penalty of life imprisonment 'if with a girl under thirteen, and so charged in the indictment.'¹³⁷ Commission of the offence by a male or female was punishable by seven years imprisonment, and attempt had a maximum of two years.¹³⁸ The severity of the punishment was reduced with the removal of the hard labour.

Homosexual incestuous activity was not specifically criminalised, though homosexual male sexual acts were prohibited in the Sexual Offences Act 1956.¹³⁹ However, general decriminalisation of homosexual male sexual relations resulted in homosexual incestuous relationships being permitted following the Sexual Offences Act 1967¹⁴⁰ if both parties were above the age of 21.

In 1977, a new incitement offence was added. This offence was only of tangential relevance to this investigation as it concerned 'Inciting a girl under sixteen to have incestuous sexual intercourse.'¹⁴¹ It was an offence for a 'man to incite to have sexual intercourse with him a girl

¹³⁵ See Annex A10 showing the difference in generational coverage depending on the sex of the offender.

¹³⁶ Sexual Offences Act 1956 c.69 s.10.

¹³⁷ Sexual Offences Act 1956 c.69 Sch. 2 para. 14(a).

¹³⁸ Sexual Offences Act 1956 c.69 Sch. 2 para. 14(b), para. 15(a) and (b).

¹³⁹ Sexual Offences Act 1956 c.69 s.12 Buggery, s.13 Indecency between men.

¹⁴⁰ Sexual Offences Act 1967 c.60 s.1(1).

¹⁴¹ Criminal Law Act 1977 c.45 s.54.

under the age of sixteen whom he knows to be his grand-daughter, daughter or sister.¹⁴² 'Man' included 'boys' and 'sister' was deemed to include 'half-sister'.¹⁴³

In the 1980s, there were numerous recommendations for legal change in the regulation of incest. Ultimately, these were not successful; however, a number of innovative changes were proposed. The Criminal Law Revision Committee (hereafter CRLC) was part of the Home Office, and published a Working Paper on Sexual Offences in 1980.¹⁴⁴ The Working Paper reviewed the law and recognised calls for extending it to cover adopted children. However, it rejected suggestions to afford protection to adopted kin and others vulnerable to abuse, for example where young people may be exploited by a school teacher. This was on the basis that 'our legislative tradition...requires statutes to state explicitly what the law prohibits...on the other hand, a long detailed list, would be bound to prove incomplete.'¹⁴⁵ The CRLC did not believe that relaxing the law on incest would result in incest becoming an acceptable practice.¹⁴⁶ It found that by 1980 most convictions under the incest statutes were for sexual acts with a minor.¹⁴⁷ The Working Paper was progressive and distinguished between different sexual acts that the general term 'incest' encompassed.¹⁴⁸ The question whether it was appropriate to introduce a prosecution policy, where brother-sister incest would only be punished if a child were produced, was raised and put out for consultation.¹⁴⁹ It was also recognised that the intervention of the criminal law should be as limited as possible.¹⁵⁰ The Working Paper noted the name 'incest' was undesirably emotive¹⁵¹ and found no evidence to suggest that the offence should be widened to include other groups including uncles, aunts, nephews and nieces.¹⁵² It also found a lack of evidence of a serious problem concerning activity with step-relations, leaving them hesitant to extend the offence further.¹⁵³ Nor did the Working Paper propose to extend the offence to acts other than intercourse.¹⁵⁴ The Working Paper noted that incest was unlike other sexual offences, particularly relating to sentencing and consequent

¹⁴² Criminal Law Act 1977 c.45 s.54(1).

¹⁴³ Criminal Law Act 1977 c.45 s.54(2).

¹⁴⁴ Home Office Criminal Law Revision Committee, *Working Paper on Sexual Offences* (Home Office, London, 1980).

¹⁴⁵ Above n.144, [122] citing [14].

¹⁴⁶ Above n.144, [108].

¹⁴⁷ Above n.144, [111].

¹⁴⁸ Often legal documents fail to recognise the multiple definitions of incest and consequently ignore actions which others including readers may view as incest. See above Chapter 1.3 and 1.4.

¹⁴⁹ Above n.144, [115].

¹⁵⁰ Above n.144, [126].

¹⁵¹ Above n.144, [129].

¹⁵² Above n.144, [120].

¹⁵³ Above n.144, [123].

¹⁵⁴ Above n.144, [129].

distress and damage caused to the family unit. These issues including sentencing will be addressed below in Chapter 4 of this thesis.

The Working Paper led to the *Report to the Law Commission on Codification of the Criminal Law*.¹⁵⁵ This Report was written by a team of academic lawyers and, led by Professor J.C. Smith, contained a draft criminal code which was submitted to the Law Commission in November 1984 and laid before Parliament on 28th March 1985. The Report concerned itself with the 'general principles of liability' and did not provide its own specific assessment of the sexual offences including incest. Rather, it referred the reader to the CRLC's 15th Report,¹⁵⁶ implicitly endorsing its findings.¹⁵⁷ There was no suggestion in the 15th Report to change the status of the law, though there was a recommendation to decriminalise sibling sexual activity where both parties were over 21.¹⁵⁸ The CRLC did not propose to alter the mismatch in protection found between the male/female ascending/descending generations introduced by the 1908 Act (see previous section).¹⁵⁹ Recommendation 8.44(3) proposed extending criminalisation to individuals not previously covered: 'the offence of incest between father and daughter and mother and son should include adoptive as well as blood relations.' This was reasoned on vulnerability to sexual exploitation. The 15th Report also noted that it did not believe the public would regard the extension as anomalous nor would it lessen the seriousness with which incest was viewed.¹⁶⁰

The Working Group of the Law Commission and the Policy Advisory Committee (hereafter PAC)¹⁶¹ recognised the law's breadth: 'A majority of us agree with the majority of the PAC that incest between a brother and sister both aged 21 and over should cease to be an offence. Once they are adult they no longer need the protection of the criminal law... these Members

¹⁵⁵ Law Commission, 'Codification of the Criminal Law: A Report to the Law Commission' (Law Com, No 143, 1985) (House of Commons Papers, 1985, 270) (HMSO, London, 1985).

¹⁵⁶ Home Office, Criminal Law Revision Committee 'Fifteenth Report: Sexual Offences' April 1984 Cmnd 9213 (HMSO, London, 1984).

¹⁵⁷ Law Commission, 'Codification of the Criminal Law: A Report to the Law Commission' (Law Com, No 143, 1985) (House of Commons Papers, 1985, 270) (HMSO, London, 1985) Appendix A, at 162 fn 9 citing Home Office, Criminal Law Revision Committee 'Fifteenth Report: Sexual Offences' April 1984 Cmnd 9213 (HMSO, London, 1984).

¹⁵⁸ Above n.156, [8.22] Recommendation 8.44(5).

¹⁵⁹ Above n.156, Recommendation 8.44(1) and 8.44(2) repeating the uneven application found in the PIA 1908.

¹⁶⁰ Above n.156, [8.28].

¹⁶¹ The Policy Advisory Committee was appointed by the Home Secretary in 1975 with terms of reference to 'look into and advise on such issues arising during the CRLCs review of sexual offences as may be referred to them by the Home Secretary or that Committee.' Home Office, Criminal Law Revision Committee 'Fifteenth Report: Sexual Offences' April 1984 Cmnd 9213 (HMSO, London, 1984) Appendix A.

consider that the law is unnecessarily cruel in this respect.’ Therefore, recommendation 8.44(5) suggested ‘it should remain the offence of incest for brother and sister to have sexual intercourse with each other but it should cease to be an offence where they have both reached the age of 21.’ There was also the recommendation that a ‘separate offence should be created of unlawful sexual intercourse with a step-child under 21.’¹⁶²

The Report noted that ‘our society regards incest with abhorrence’,¹⁶³ although it stated that there were two reasons for intervention in incestuous sexual relationships: genetic risk and social and psychological consequences.¹⁶⁴ The Report looked at both of the justifications for legal action. The evidence of genetic risk dated from a 1967 Study¹⁶⁵ that put the risk of serious defect 28% higher than offspring born of individuals not related in the first degree. The PAC recognised ‘that the risk may be overestimated, it is on any judgement substantial,’¹⁶⁶ and ‘the precise degree of genetic risk is not very important to a consideration of the justification for an offence of incest.’ If genetic risk, even if substantial, should not be used for justification,¹⁶⁷ this would leave only social and psychological consequences, supporting legal intervention against incest.

The PAC accepted ‘as a basis for all our considerations that incestuous relationships are wholly undesirable for the individuals and for our society and potentially harmful with possible long-term psychological consequences.’¹⁶⁸ The Law Commission’s Report on Sexual Offences endorsed the view of the PAC ‘who suggested...the primary aim of the law against incest is the protection of the young and vulnerable against sexual exploitation within the family.’¹⁶⁹ The Working Group on the Law Commission’s fifteenth report appeared to see the issue as one that ‘may impair a child’s development and his or her capacity to form normal emotional and social relationships.’¹⁷⁰ The ‘special dimension of the family, which adds to the harmful consequences of incest’ was noted distinguishing incest from other sexual abuse. The law was

¹⁶² Above n.156, Recommendation 8.44 (6).

¹⁶³ Above n.156, 63.

¹⁶⁴ Above n.156, 65.

¹⁶⁵ Adams M.S., Neel J.V., ‘Children of Incest’ (1967) Vol.40(1) Pediatrics 55-62. This is discussed in the literature review above.

¹⁶⁶ Above n.156, 65.

¹⁶⁷ Above n.156, 65-66 stating at [8.10] ‘We would, however, maintain that the precise degree of genetic risk is not very important to a consideration of the justification for an offence of incest. Society does not yet prohibit sexual intercourse in other circumstances in which there is a high genetic risk of abnormality in the offspring of a relationship, for example with hereditary diseases such as Huntington’s chorea ; and we are very anxious about the implications of any proposal that it should.’

¹⁶⁸ Above n.156, 64.

¹⁶⁹ Above n.156, 66.

¹⁷⁰ Above n.156, 66.

believed to have a protective role and ability to prevent harm to the 'victim' and members of the family. It was also suggested that the 'threat of the law' was a last resort to attempt to break up an unwanted relationship. They proposed keeping the name 'incest,' existing penalties, and not widening the offence to include other sexual acts. This was very different to the recommendations following *Setting the Boundaries*, as will be seen below in Chapter 3 which proposed changes in all these areas.

The Draft Criminal Code of 1989¹⁷¹ was 'the culmination of many years' work by the [Law] Commission in the field of criminal law,'¹⁷² and subsumed the contents of the 1985 Report (No 143) (detailed above). The (1989 Draft Code) Bill was said to take 'account of the many comments received on the earlier draft Bill and [new] conclusions, as well as considerably expanding the scope of offences covered in Part II.'¹⁷³ The Committee recommended modifications to the law, though these did not include a complete decriminalisation.

The Draft Criminal Code of 1989 took a new and divergent approach to the pre-2003 incest law. For the first time, there was a legal acknowledgement of consensual adult familial relationships existing outside a sphere of illegal actions.¹⁷⁴ Although there remained a disparity between the male/female coverage of generations,¹⁷⁵ the Code proposed decriminalising incest between a brother and sister over the age of 21. It proposed extending the offence to include adoptive as well as blood relationships between father and daughter, and mother and son, and that daughters, granddaughters and sons under the age of 21 be exempted from liability.¹⁷⁶ It was not proposed to extend the offence to same-sex relationships.

Schedule 1 of the Draft Code detailed prosecution and punishment: s.103(1) (Incest by an man) and s.104(1) (Incest by a woman) offences would only be triable on indictment, with the consent of the Director of Public Prosecutions and proposed a maximum punishment of 7 years imprisonment. Proposed alternative verdicts of Intercourse with a girl under thirteen or sixteen were available. Aggravated incest (s.103(2)), again triable on indictment with the consent of the Director of Public Prosecutions would have a maximum of life imprisonment.

¹⁷¹ Law Commission, 'A Criminal Code for England and Wales, Volume 1, Report and Draft Criminal Code Bill' (Law Com, No 177, 1989) (House of Commons Papers, 1989, 299) (HMSO, London, 1989).

¹⁷² *Ibid*, 1.

¹⁷³ *Ibid*.

¹⁷⁴ See Annex A11 Sec 103(1)(b) and 104(1)(b).

¹⁷⁵ See Annex 11 male – one generation above, two below the offender, female – two generations above, one below the offender.

¹⁷⁶ Law Commission, 'A Criminal Code for England and Wales, Volume 2, Commentary on Draft Criminal Code Bill' (Law Com, No 177, 1989) (House of Commons Papers, 1989, 299) (HMSO, London, 1989) [15.34] 263.

Inciting incestuous intercourse (s.103(3)), would have been triable either way, leading to a maximum of 2 years imprisonment when tried on indictment. For women, no alternative verdicts were possible for the s.104 offence. The maximum punishments were no lighter for consenting adult relationships which fell outside the male, s.103(1)(b) and female, s.104(1)(b) exceptions. The Draft Criminal Code thus maintained disparities in protection and punishments available; however it was never enacted 'not for want of confidence in its objects on its contents, but for lack of parliamentary time.'¹⁷⁷

2.8 Marriage and Anomalous Adoption

Whilst the focus of this thesis is not on the provisions concerning marriage, it is necessary to address some issues raised by a lack of coherence between those prohibited from marrying and those prohibited from having sexual relations both because of kinship. Modern conceptions of the 'family' have altered with adoption becoming commonplace, which has ramifications for the laws concerning both marriage and sexual relations.

Regulation of marriage in England and Wales occurred through the Marriage Act 1949 c.76, which set out in Schedule 1 those within the Prohibited Degrees of Relationship. When enacted in 1949 there were 23 people listed as prohibited for each sex in the table of Kindred and Affinity. Twelve of these were affinal relations and the remaining 11 were consanguinal relations. Thus, when the Marriage Act was enacted, it created serious anomalies in law:¹⁷⁸ the 1908 Act prohibited a man from having sexual intercourse with his half-sister,¹⁷⁹ however half-sister was not listed within Schedule 1 of the Marriage Act 1949. Thus whilst a man could not have sex with his half-sister, he could marry her. Equally perversely, a man was not prohibited from having sexual intercourse with his grandmother,¹⁸⁰ but could not marry his mother's mother or father's mother; both listed in Schedule 1. Females were able to have sexual relations with a grandson¹⁸¹ though were not permitted to marry him: son's son and daughter's son were listed in Schedule 1. The Punishment of Incest Act 1908 prohibited

¹⁷⁷ Lord Bingham of Cornhill, Lord Chief Justice of England, Speech at Dinner for HM Judges, The Mansion House, London 22 July 1998, available at http://www.judiciary.gov.uk/publications_media/speeches/pre_2004/mnsion98.htm accessed 05 June 2009.

¹⁷⁸ See and compare Annex A14 Marriage Act 1949 with Annex A9 Punishment of Incest Act 1908.

¹⁷⁹ Punishment of Incest Act 1908 c.45 s.1 and 3.

¹⁸⁰ Omitted from Punishment of Incest Act 1908 c.45 s.2.

¹⁸¹ Omitted from Punishment of Incest Act 1908 c.45 s.3.

women from having sexual intercourse with half-brothers, though they would be able to marry them.¹⁸²

Individuals were unable to marry the 12 proscribed affinal relations, though they legally could have had sexual intercourse with them. This situation persisted until 1986 when the Marriage (Prohibited Degrees of Relationship) Act 1986¹⁸³ removed the 12 affinal relations from the Prohibited Degrees. This did not affect the four remaining consanguinal relations with whom it was possible to have sexual intercourse but not to marry.

The Children Act 1975 mandated that an adopted child should be treated in law as if he had been born as a child of the marriage and an adopted child should be treated in law as if he were not the child of any person other than the adopters or adopter.¹⁸⁴ Yet an amendment in Schedule 1¹⁸⁵ caused another anomaly to appear in the law. The Act added 'Adoptive mother or former adoptive mother, Adoptive daughter or former adoptive daughter, Adoptive father or former adoptive father, Adoptive son or former adoptive son,'¹⁸⁶ to the Marriage Act's table of Kindred and Affinity. However, there was an exception that excluded from the general rule of equal treatment the provisions of s.10/11 of the Sexual Offences Act 1956. This led to the anomalous position whereby adoptees were unable to marry their adoptive parents yet could have had sexual intercourse with them: adopted parents were excluded from being prohibited kin within the Sexual Offences Act 1956.¹⁸⁷

The Adoption and Children Act 2002 c.38 mirrored the position of an adopted child found above. The Explanatory Notes¹⁸⁸ to the Act stated:

'203. *Section 74* provides that the general principle of *section 67* (that an adopted person is to be treated as if he had been born as the child of the adopter or adopters) is not to apply for the purposes of marriages within prohibited degrees of relationship or to incest, and for these purposes an adopted person remains part of his natural family. The only exception is that an adopted person cannot marry his adoptive parent, as this falls within the restrictions set out in the table of kindred and affinity in Schedule 1 to the Marriage Act 1949. Otherwise there are no restrictions on marriage within an adoptive family.'

¹⁸² Half-brother not listed in Marriage Act 1949 c.76 Sch. 1.

¹⁸³ Marriage (Prohibited Degrees of Relationship) Act 1986 c.16.

¹⁸⁴ Children Act 1975 c.72 s.8(9), Sch. 1 Part II para. 3(1) and 3(2).

¹⁸⁵ Children Act 1975 c.72 s.8(9), Sch. 1 Part II para. 7(1).

¹⁸⁶ Children Act 1975 c.72 s.108(1)(a), Sch. 3 para. 8.

¹⁸⁷ See Annex A10.

¹⁸⁸ *Explanatory Notes to Adoption and Children Act 2002 c.38*

http://www.opsi.gov.uk/acts/acts2002/en/ukpgaen_20020038_en_1 accessed 30 June 2009.

Thus, if protection of children and the vulnerable and preventing abuse of positions of trust were aims of the law (as found in *Setting the Boundaries* below in Chapter 3), it appeared counter-intuitive to remove protection afforded to an adopted child who, for all other purposes, was assimilated into the family and treated like a child born of the parents. This situation was remedied in 2008.¹⁸⁹

2.9 Conclusion

The investigation has shown that the laws against incest in England and Wales have undergone significant changes throughout their history. The investigation has grouped these into six broad historical periods.

The offence has existed as both an ecclesiastical offence, and, today, a criminal offence. In addition to the changes in status of the offence, the kin covered by the prohibitions have also changed, as have the individuals prohibited from having sexual relations. The kin have been based on biblical prohibitions, consanguinity and positions of vulnerability within the family, for example step and adoptive relations. The prohibited act has been male-female penile vaginal intercourse though there have been calls to extend this. The punishment for infringement has ranged from the death penalty through to calls for consensual activity to be legalised.

The reasoning provided for the prohibitions has also differed through time. The reasons have included biblical compliance, living a moral and sin free life, and upholding moral virtues of society. Most recently, the legislation has been reasoned on the basis of the protection of children from abuse and protection of the vulnerable. These reasons have often not been clearly communicated to the public. The investigation identified what appears to be two sets of reasoning occurring in the legislative process. These are the reasons to act, and the reasons that are outwardly given to justify the legislation to the population at large. For example, resurgence in interest in the late 19th century followed the failure of the CLAA 1885 to protect daughters from parental sexual abuse. Social reformers seized the opportunity to expand the legislation far beyond that necessary to remedy the issue with the CLAA 1885, and in so doing supported their other puritanical aims. Criminalisation in 1650 followed concern within the Rump Parliament to visibly disassociate itself from religious extremism, rather than Parliamentary concern with incest per se.

¹⁸⁹ See Chapter 4 at n.41.

One apparent consistency appears to be the infrequency of use of the law across all periods. It has been called draconic and at times the law was used so infrequently that the judiciary questioned where jurisdiction for adjudicating incestuous acts actually lay.¹⁹⁰ More recently, focus has returned to the Acts prohibiting incest in an attempt to prosecute and prohibit familial and child sexual abuse. However, it has been suggested that with the development of other laws to combat these ills, the incest statute has been sporadically used in recent decades.¹⁹¹ The issues concerning use of the legislation will be picked up in Chapter 4 below.

Thus, the laws against incest in England and Wales cannot be said to have any overarching theme. Similar to the findings in Chapter 1 regarding the literature review, the definition of ‘incest’ and ‘incestuous acts’, particularly within the legislation has meant a number of things. Quite simply, what is meant by ‘incest’ (i.e. its definition) in law in England and Wales is dependent on the period under investigation. This historical assessment has provided an understanding of the development of the offence. Quite often the law has been altered in response to activities that were unrelated to familial sexual activity. The reasoning identified within this chapter, particularly that relating to the 1908 and thus 1956 Acts, can be drawn upon where necessary to analyse the claims made and justifications proffered, regarding legislation regulating incest during this investigation into the reasoning process that produced the Sexual Offences Act 2003.

The next chapter investigates the reasoning process producing the recommendations within *Setting the Boundaries*, which became the basis of the Sexual Offences Bill 2003 and thus, the latest legislation regulating incestuous activity.

¹⁹⁰ *Phillimore v Machon* 1876 1 P.D. 480 as per Lord Penzance .

¹⁹¹ Francis B., Soothill K., ‘Moral Panics and the Aftermath: A Study of Incest’ (2002) Vol.24(1) *The Journal of Social Welfare & Family Law* 1-17, 10.

Chapter 3 - *Setting the Boundaries* and Recommendations Relating to Incest

3.1 Introduction

As was seen in the previous chapter, the Law Commission and various governmental working groups had proposed a number of reforms to the law on incest. These did not result in any change. The most recent response to incest was found within the Sexual Offences Act 2003; however, a number of preparatory steps led to its creation. This chapter seeks to identify and understand the reasoning process within the recommendation formation stage. The chapter begins by situating the initial government action on sexual offences and the report entitled *Setting the Boundaries*.¹ This Report effectively became the cornerstone of legislative action in the sexual offences sphere.

As discussed in Chapter 1 at 1.6.2, Rhetorical Political Analysis, a form of discourse analysis, was the method used to assess the Report. The analysis identifies a number of stories and narratives within the reasoning process, and linguistic techniques and tropes, used to produce seemingly unobjectionable recommendations. A flawed reasoning process that is internally inconsistent in its approach to reforming sexual offences is also discovered. The Chapter will outline the review into sexual offences, before identifying the stories and narratives of the Report and providing an explanation of the findings of the micro-linguistic assessment undertaken. The Chapter will then look at the labelling and linguistic techniques that were used and that made the reasoning appear objective and supportive of the recommendations proposed.

3.2 The Review into Sexual Offences

The Minister of State for the Home Office, Mr Alun Michael informed Parliament of the Government's intention to review sexual offences on the 15th June 1998.² On the 25th January 1999, the Home Secretary announced the terms of reference of the Sexual Offences Review

¹ See Chapter 1 at n.36 for details.

² Hansard HC vol.314 col.10 (15 June 1998).

which was to be conducted by a Steering Group of officials and advisors complemented by an External Reference Group.³ In July 2000, the Home Office published the findings of the Review in the report entitled '*Setting the Boundaries*.' It had a dual purpose: to provide recommendations to Ministers and to stimulate public response.⁴

As will be seen in Chapter 4, the Report became the basis for the Labour government's response to the issue of sex crime and informed much of the Sexual Offences Bill.⁵ Whilst both the legislative chambers debated the 2003 Bill, many of the changes made to the Sexual Offences Act 1956 c.69 (SOA 1956) originated from the Report.

It will be argued below that the recommendations relating to the law on incest result from a failure to apply sufficient rigour to their analysis and resulted in the formation of recommendations that breach the Review's terms of reference and 'guiding principles.'

3.2.1 Why Review Sexual Offences?

As identified in the previous chapter, although there had been a number of Reviews of, and Working Groups on, sexual offences in the 1980s, little legislative action followed.⁶

The Report stated:

'Why did the law need reviewing? It is a patchwork quilt of provisions ancient and modern that works because people make it do so, not because there is a coherence and structure. Some is quite new – the definition of rape for example was last changed in 1994. But much is old, dating from nineteenth century laws that codified the common law of the time, and reflected the social attitudes and roles of men and women of the time. With the advent of a new century and the incorporation of the European Convention of Human Rights into our law, the time was right to take a fresh look at the law to see that it meets the need of the country today.'⁷

Integral to the 1997 Labour Party manifesto was the commitment to being 'tough on crime and tough on the causes of crime.'⁸ The Party 'proposed a new approach to law and order'

³ Hansard HC vol.324 col.80-81 (25 January 1999).

⁴ Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* Volume 1 (Home Office Communication Department, London, 2000) [Foreword].

⁵ Sexual Offences Bill 2003 HL Bill 026 (28 January 2003).

⁶ See above at Chapter 2.7.

⁷ Above n.4 [0.2]

⁸ Labour Party (Great Britain), *New Labour: Because Britain Deserves Better* (1997 Party Manifesto) (Labour Party, London, 1997) 4, 5, 22.

focusing on 'individual responsibility for crime'⁹ and committed to providing greater protection for victims in rape and sexual offence trials.¹⁰

Much disquiet originated from a number of differing lobby groups concerning the need to overhaul the multiplicity of sexual offences. Integral to the New Labour project was the commitment to modernisation.¹¹ Blair stated that 'we (Labour) are determined to deliver our programme of modernisation and reform – applying our values to improve Britain.'¹²

At the same time, there was an increasing concern with the number of rape cases that rightly or wrongly resulted in failed prosecutions.¹³ Lobbyists were increasing pressure on the government to tackle the systemic lack of protection provided to individuals with mental disabilities, resulting in unfair treatment.¹⁴ Mencap cited one successful prosecution out of 1400 suspected cases of sexual abuse against people with learning disabilities.¹⁵ They also noted the inadequate maximum sentences provided against offenders.¹⁶ Other groups seeking fair treatment raised similar issues, including questions of the compatibility of existing provisions, particularly homosexual offences, with human rights law. There had been an attempt to reduce the age of consent for homosexual sexual activity to 16 in the 1994 Criminal Justice and Public Order Bill.¹⁷ This was unsuccessful; however, the age of consent was reduced to 18,¹⁸ with cross party support.¹⁹

The Labour Party was committed to promoting and securing human rights: in opposition, on 18 December 1996, the Shadow Home Secretary published *Bringing Rights Home*, a consultation paper on incorporation of the ECHR. Shortly after the 1997 General Election the White Paper

⁹ Ibid 22.

¹⁰ Ibid 23.

¹¹ Kelly G., ed. 'Is New Labour Working?' Fabian Pamphlet 590 (Fabian Society, London, 1999).

¹² Blair T., in Kelly G., ed. 'Is New Labour Working?' Fabian Pamphlet 590 (Fabian Society, London, 1999) 2.

¹³ Hansard HC vol.279 col.356 (12 June 1996) Ms Jowell 'With the conviction rate for rape at less than 9 per cent - unchanged since 1985' See particularly, issues raised in Temkin J., *Rape and the Legal Process* (Sweet & Maxwell, London, 1987).

¹⁴ Mencap, *Barriers to Justice: A Mencap Study into How the Criminal Justice System Treats People With Learning Disabilities* (Mencap, London, 1997) 12.

¹⁵ Ibid 6.

¹⁶ Ibid 11.

¹⁷ Hansard HC vol.238 col.74 (21 February 1994).

¹⁸ Criminal Justice and Public Order Act 1994 c.33 s.145(1).

¹⁹ Wynn-Davies P., 'Gay Age of Consent' *The Independent* (London, 23 February 1994) 15.

*Rights Brought Home: The Human Rights Bill*²⁰ was published. As will be seen in the analysis below, compliance with human rights became crucial to the reasoning process employed during the formative stage of the recommendations. When the Report was published, the Human Rights Act 1998 had received Royal Assent. The Act imposed a legal duty on public authorities to act in a manner compatible with Convention rights:²¹ for the first time the legislature was obliged to consider issues of human rights compatibility.²² New Labour envisaged the public as integral stakeholders in this modernisation of Britain.²³ A review of sexual offences was not only compatible with this commitment but was also required. In opposition, the Labour Party was critical of the Conservative Party's approach to crime.²⁴ It was therefore unsurprising that the new government sought to take control of the situation and act to remedy a number of the failings it had vocalised whilst in opposition.

3.2.2 Framing the Review's Parameters

The Sexual Offences Review Team²⁵ (hereafter SORT) was provided with a concrete 'terms of reference'²⁶ against which the team should undertake the review:

"To review the sex offences in the common and statute law of England and Wales, and make recommendations that will:

provide coherent and clear sex offences which protect individuals, especially children and the more vulnerable, from abuse and exploitation;

enable abusers to be appropriately punished; and

be fair and non-discriminatory in accordance with the ECHR and Human Rights Act."

These terms of reference were presented in Parliament. Their linguistic construction and articulation of outcome as mandatory - i.e. 'will', suggests a limitation on the Review's

²⁰ Home Office, *Rights Brought Home: The Human Rights Bill* Cm 3782 (TSO, London, 1997).

²¹ Human Rights Act 1998 c.42 s.6.

²² Feldman D., *Civil Liberties and Human Rights in England and Wales*, 2nd ed., (Oxford, OUP, 2002) 93

²³ Richards P., 'Is the Party Over? New Labour and the Politics of Participation' Fabian Pamphlet 594 (Fabian Society, London, 2000). Johnstone G., 'Penal Policy Making: Elitist, Populist or Participatory?' (2000) Vol.2(2) *Punishment and Society* 161-180.

²⁴ Ryan M., 'Penal Policy Making Towards the Millennium: Elites and Populists; New Labour and the New Criminology' (1999) Vol.27 *International Journal of the Sociology of Law* 1-22, 11.

²⁵ The membership of the Sex Offences Review was set out in Annex One of Volume 1 of the Report. There are too many individuals to mention here, however it comprised a Chair (Betty Moxon), a secretary and an administrative support assistant. There was a steering group of 29 individuals and an external reference group of 26 individuals. Papers were sent to 12 different organisations and government bodies.

²⁶ Above n.3.

freedom of action and provided a framework to guide what the recommendations should include and omit.

For a review of 'sex offences' to occur it is necessary understand what is meant by a 'sexual offence'. An understanding would thus provide parameters for review, and it was accepted that the Review should address both judicially produced common law and the legislature's statute. Naturally, a similar review²⁷ by the Scottish Law Commission (hereafter SLC) into sexual offences entailed a definition of 'sexual offences' in order to determine their remit. The SLC identified three sources to provide possible answers, including the 'existing law', 'general classifications of sexual offences' and 'legal writings'. The SLC found 'incest' as formulated in Scotland to be a 'sexual offence' using all three tests propounded.²⁸ Unsurprisingly, SORT likewise included incest within the term 'sexual offences.' As was identified in Chapter 2, the offence of Incest had been criminalised in England and Wales since 1908.²⁹ An application of the SLC tests to England and Wales would produce the same results: in addition to the 'existing law'³⁰, 'general classifications of sexual offences' classed incest as a sexual offence³¹ as did 'legal writings' on the issue.³²

The SORT operated with the preconception that it was tasked with an assessment of the entire contents, matters of evidence and procedure of the Sexual Offences Act 1956 (and associated Acts) and to bring the offences and defences into the new century.³³ Sexual offences encompass a huge area of contentious behaviour.³⁴ It does not appear that there was any exercise like that conducted by the SLC to determine from first principles what a sexual offence was.

²⁷ Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences, Discussion Paper No 131* (Edinburgh, TSO, 2006) 5.

²⁸ Ibid 6-7 and 10.

²⁹ Punishment of Incest Act 1908 c.45 see Annex A 9.

³⁰ Sexual Offences Act 1956 c.69 s.10 and s.11 see Annex A 10.

³¹ Karpman B., *The Sex Offender and His Offences: Etiology, Pathology, Psychodynamics and Treatment* (Julian Press, New York, 1954). Thomas T., *Sex Crime: Sex Offending and Society, Crime and Society Series*, (Devon, Willan Publishing, 2000) Honore T., *Sex Law* (Duckworth, London 1978).

³² Temkin J., *Rape and the Legal Process* (Sweet & Maxwell, London, 1987). Zellick G., 'Incest' (1971) Vol.12, *New Law Journal* 715-716. Kuper A., *Incest and Influence: The Private Life of Bourgeois England* (Harvard University Press, Massachusetts, 2009) Chapter 2 'The Law of Incest.' Bailey V., Blackburn S., 'The Punishment of Incest Act 1908: A Case Study of Law Creation' (1979) *Criminal Law Review* 708-718. Wolfram S., 'Eugenics and the Punishment of Incest Act 1908' (1983) *Criminal Law Review* 308-316.

³³ Above n.4 [1.1.2].

Secondary to this, the SORT appeared to have accepted the correctness of criminalisation of all offences already enacted as 'sexual offences'. The passive acceptance of the correct and appropriate criminalisation of offences within the Sexual Offences Act 1956 positioned the *status quo* as the foundation upon which to build, rather than it being an opportunity to start from scratch. Thus, rather than providing a set of 'coherent and clear sex offences' from first principles the Review approached the task as one to identify and recommend remedies to any omissions in protection that it found.

3.2.3 The Report's Stylistic Features

Many governments use a pre-set structure of communication to satisfy certain conventions reflecting institutional norms.³⁵ Finlayson suggested that the more formal and unemotional a form of discourse, the more we may think it objective and the more factual statements and normative claims become blurred.³⁶ Iedema and Wodak noted that 'organizational power is constituted and reproduced through structures of organizational communication, interaction and symbolism.'³⁷ The stylistic features employed by the Report are common to other government documents and consultation papers, and disclose an appearance of authority. In addition to the 'terms of reference', 'guiding principles' are enumerated and presented as limits imposed on the SORT, giving the suggestion that recommendations are constrained by them. Although the Report was to deliver recommendations *to* Ministers, it also sought to influence development of the law. Its style and format (as with all reports) were designed to convince readers of the content's quality and aimed to secure their agreement with its recommendations. The stylistic features are thus a tool: the authoritative appearance designed to convince the reader of the quality of the recommendations presented. Stylistic features are insufficient to achieve this alone and thus complement the contents. The analysis of style must therefore supplement the analysis of content.

The Home Office Communications Directorate published the Report. It is split into two volumes and within Volume 1; there is a 'Foreword' by the Home Secretary, which is an

³⁴ In addition to 'Rape and Sexual Assault', acts with 'Children', 'Vulnerable People' and 'Abuse within the Family' 'Issues of Gender and Discrimination' and 'Trafficking and Sexual Exploitation' are prostitution, assault and sexual activity including sado-masochism.

³⁵ Finlayson A., 'From Beliefs to Arguments: Interpretive Methodology and Rhetorical Political Analysis' (2007) Vol.9 British Journal of Politics and International Relations 545-563, 556, citing Fairclough N., *Language and Power* 2nd ed. (Pearson, Essex, 2001) 175-84 'Discourse technologies and bureaucracy'.

³⁶ Ibid, 556.

important feature to demonstrate the Report's (and thus the recommendation's) authority. The Home Secretary as a lead cabinet minister is an important figure in government: leading the department responsible for policing, that has as its aim 'to help people feel secure in their homes and communities.'³⁸ The Home Secretary and thus Home Office are stakeholders in the formulation of sexual offences; their endorsement of the Report is therefore an important though possibly inevitable feature. The Report has nine Chapters and two Annexes. Volume 2 contains supporting evidence split into 22 Appendices.

The first Chapter details the reasons and themes for the Review, which it calls the 'Purpose and Principles'. The terms of reference were structured to allow the SORT to derive themes for assessment. The remaining chapters were split into areas of particular interest, including Rape, Children, Vulnerable People, Abuse within the Family, Gender and Discrimination, Trafficking, Other Offences and Further Issues. Annex 1 detailed the membership of the Review and costs incurred, and Annex 2 listed the offences proposed accompanied by suggested penalties.

Finally, the Report stated that it was 'evidence based.'³⁹ There was no detailed explanation as to what was meant by this statement, whether this was supporting argument or empirical data. Volume 2 was entitled '*Setting the Boundaries: Reforming the Law on Sex Offences* Volume 2: Supporting Evidence.' The Concise Oxford Dictionary defines evidence as 'information indicating whether a belief or proposition is true or valid'.⁴⁰ Collins defines it as 'ground for belief or disbelief; data on which to base proof or to establish truth or falsehood.'⁴¹ The Report goes some way to implicitly providing the parameters of its definition of evidence, when it explains that:

'The process we used was open, inclusive and evidence based:

- a review structure that included key stakeholders on both the Steering Group and the advisory External Reference Group;
- a public consultation exercise with over 160 responses telling us what was wrong with the law and how it should be reformed;

³⁷ Iedema R., Wodak R., 'Introduction: Organizational Discourses and Practices' (1999) Vol.10(1) Discourse and Society 5-19, 11.

³⁸ Home Office, *Our Objectives and Values* <http://www.homeoffice.gov.uk/about-us/purpose-and-aims/index.html> accessed 25 February 2010.

³⁹ Above n.4, [0.4].

⁴⁰ Pearsall J., *Concise Oxford Dictionary*, 10th ed. (OUP, Oxford, 2001).

⁴¹ Anderson S., et al., *Collins English Dictionary* (HarperCollins, Glasgow, 2006).

- consultation conferences with criminal justice practitioners, academics, those who work with victims/survivors, children and vulnerable people, parliamentarians, faith groups and many other organisations and individuals including men's and women's groups;
- looking at evidence from research and from the experiences of other countries in reforming their law.⁴²

The evidence that the Report relied upon therefore appears to be the sources listed in the quotation above. The word 'evidence' is commonly used, indeed, 112 times within volume 1. Its use within the Report, suggests that the authors were using it to legitimise the Report and its Recommendations, for example the Report states:

'Our work has been strongly evidence based and drew not only on earlier work, such as that of the Criminal Law Revision Committee, but also on the considerable amount of subsequent research and experience of law reform in other jurisdictions since then.'⁴³

In sum, the inclusion of stakeholders, public responses, and the consultation seminars as well as a selection of research, both domestic and international, provides the 'evidential basis' for the Report and recommendations. As noted above, a number of these were found within Volume 2 of the Report. The nature and quality of this evidence generated from the deliberative process is addressed below at section 3.3.5. Before looking at the narratives of the Report, attention will be paid to the guiding principles of the review.

3.2.4 Guiding Principles

In addition to the terms of reference,⁴⁴ the Review team elucidated two principles that it labelled 'guiding principles', located within the Executive Summary. The first was that the SORT agreed to judge between right and wrong based on an 'assessment of the harm done to the individual (and through the individual, to society as a whole).'⁴⁵ As will be seen below, the Review did not identify this harm and instead often merely asserted a non-explicit assessment of 'harm done to the individual'; a statement suggesting 'the abusive nature of all incestuous conduct.'⁴⁶

⁴² Above n.4, [0.4].

⁴³ Above n.4, [1.1.2].

⁴⁴ Identified above at 3.2.2

⁴⁵ Above n.4, [0.6].

⁴⁶ See 3.5.4 Under-description.

The SORT's other guiding principle was that 'the criminal law should not intrude unnecessarily into the private life of adults.'⁴⁷ The Report explained that 'applying the principle of harm means that most consensual activity between adults in private should be their own affair, and not that of the criminal law.'⁴⁸ This is an often-quoted passage attributed to the *Report of the Committee on Homosexual Offences and Prostitution* chaired by Lord Wolfenden.⁴⁹

In addition to these two explicitly identified 'guiding principles' another set of 'principles' appeared both within the 'terms of reference' and in the main body of the Report, though these were not identified by the review as 'guiding principles'. The Report does not explain these 'additional principles,' nor does the Report note that these 'additional principles' are not complementary; indeed they are mutually exclusive.

3.2.4.1 Additional Principles *Within* the 'Terms of Reference'

The 'terms of reference' are broken down into four sub-components. The inclusion of these sub-components suggested that the recommendations were aligned and compatible with these. The first sub-component was 'clarity and coherence': lack of clarity and coherence in the SOA 1956 and associated provisions was a reason to review the entire area of law.⁵⁰

The second additional principle, the 'protection of individuals,' supported action to prevent harm, which was a 'guiding principle.' It provided the opportunity for a paternalistic approach: 'children and the more vulnerable'⁵¹ were highlighted as of particular concern. However, the words 'abuse and exploitation' were located after 'children and vulnerable' suggesting a limited paternalistic principle.⁵² Rather than appearing to be directed at shaping the content of individuals' lives, this limited paternalistic principle appeared to permit formative sexual activity only upon reaching the age of consent or where genuine consent was capable of being given.

The third principle, to ensure the recommendations would 'enable abusers to be appropriately punished,' suggested treatment in light of damage caused and culpability of the individuals involved. This required clearly defined offences and compliance with the principle of fair

⁴⁷ Above n.4, [0.7].

⁴⁸ Above n.4, [0.7].

⁴⁹ Home Office, *Report of the Committee on Homosexual Offences and Prostitution* Cmnd 247 (*Wolfenden Report*) (HMSO, London, 1957) Chapter 2 para 14.

⁵⁰ See above at 3.2.1.

⁵¹ Also identified in [2.5.4][2.20.1] and specifically Chapter 3 of the Report entitled 'Children.'

⁵² The terms of reference are located above at 3.2.2.

labelling;⁵³ that is, the label (the title or name of the offence) applied by the criminal law should 'represent fairly the nature and magnitude of the law-breaking.'⁵⁴ Finally, the Review was required to act fairly and conduct itself in a non-discriminatory fashion in accordance with the ECHR and the Human Rights Act. This would support the above reading of 'appropriate punishment' in light of harm, damage and culpability.

3.2.4.2 Additional Principles *Without* the 'Terms of Reference'

The investigation identified two additional principles outside the 'terms of reference' and guiding principles. These were 'social acceptability' and 'sexual autonomy.'

The concept of 'social acceptability'⁵⁵ found within Chapter 1 'Purposes and Principles,' though not within the terms of reference, appears to have been elevated in status to a 'guiding principle.' No definition of 'social acceptability' was given nor was there any explanation of how the Review intended to use it. The Report stated 'Sex offences reach deeper into society than almost any other part of the criminal law. They set out the parameters not just for what society considers to be acceptable and unacceptable behaviour, but designate behaviour that is so unacceptable as to be criminal.'⁵⁶ It appears the Report was aware of the precarious position that it faced and noted that 'although the criminal law plays an important declaratory role in society, it is not the arbiter of morals,'⁵⁷ indeed these issues were touched on only very briefly and often were linked to the use of moral axioms.⁵⁸ The contested nature of sexual relations was implied with the use of statements such as 'there is no Highway Code for sexual relations to give a clear indication of what society expects or will tolerate.'⁵⁹ The Report did not explain or detail its identification or measurement of 'social acceptability.' The lack of explanation could mean that social acceptability could disguise reasoning based on morality and not provide a set of 'clear and coherent sex offences.' Particular problems with the use of societal morality and its incorporation into the incumbent law were alluded to with the Report noting that 'much of the law dates from a hundred years ago and more, when society and the

⁵³ 'Representative labelling' was first used by Ashworth in 1981, Ashworth A., 'The Elasticity of Mens Rea' in Tapper C.H.F., ed. *Crime, Proof and Punishment; Essays in Memory of Sir Rupert Cross* (Butterworth, London, 1981). Glanville Williams termed this 'fair labelling' in Williams G., 'Convictions and Fair Labelling' (1983) Vol.42 Cambridge Law Journal 85. Chalmers J., and Leverick F., undertook an insightful analysis in 'Fair Labelling in Criminal Law' (2008) Vol.71(2) Modern Law Review 217-246 .

⁵⁴ Ashworth A., *Principles of Criminal Law*, 5th ed. (OUP, Oxford, 2006) 88.

⁵⁵ Above n.4, [1.1.3].

⁵⁶ Above n.4, [1.1.3].

⁵⁷ Above n.4, [1.5.1].

⁵⁸ Moral axioms are discussed below at 3.5.3.

roles of men and women were perceived very differently.⁶⁰ As will be shown below, whilst the Review did not overtly rely on assimilation of societal morality during its reasoning process, it is clear that morality did in fact feature. For example, the Report noted that ‘The CLRC concluded in this instance that it is one of the functions of the law to uphold certain basic moral standards.’⁶¹ Failure to either adopt or oppose such position leaves the reader unsure of the reason why the statement was made. The moral position taken by the CRLC was stated though the Report omitted any discussion of it. Thus, it silently endorsed this moral position. The Report stated ‘the approach of the review in developing proposals was to consider that in a diverse and tolerant society, the law should be based on a public morality that protects the individual from danger, harm, fear or distress, with additional safeguards for the younger and more vulnerable members of the community.’⁶² These axiomatic statements, that merge societal morality and protection against harm, fit with the narratives of the Report and help support the seriousness and modernisation narratives that will be discussed below at section 3.3.

The Report stated that ‘society may properly apply standards through the criminal law which are intended to protect the family as an institution as well as individuals from abuse.’⁶³ These standards were not identified. Protection of the family as an institution is an inherently contentious subject with particular relevance to incestuous conduct. Incestuous relationships are often regarded as highly disruptive to traditional family structures⁶⁴, however, so too are relationships that experience break-up and divorce. Families with stepparents also pose problems for traditional family structures. The rights of gays and lesbians to found families is also at odds with the traditional male-female family structure, as is the position of transgendered persons. Thus, resort to reasoning such as ‘protection of the family as an institution’ is rooted in a socio-historical construct of what constitutes a ‘family’. Thus, as identified in Chapter 2, incest had traditionally not been criminal in England and Wales, but its criminalisation since 1908, may have begun to create a societal belief in the need for its

⁵⁹ Above n.4, [0.8].

⁶⁰ Above n.4, [1.1.2]

⁶¹ Above n.4, [5.8.1].

⁶² Above n.4, [1.3.3].

⁶³ Above n.4, [0.7].

⁶⁴ See the ‘role confusion and familial disruption theory’ behind the incest prohibition as detailed in Chapter 1 at n.128-132.

criminalisation. Without the Report investigating this possibility, it may simply continue to assert the need for a legislative *status quo*.

The other principle identified as guiding the preparation of the recommendations was ‘Sexual autonomy.’ This concept was found within the Executive Summary⁶⁵, but not within Chapter 1 ‘Purposes and Principles’, and was used in the chapters concerning rape and sexual assault,⁶⁶ and protecting vulnerable people.⁶⁷ There is no explanation of the meaning of sexual autonomy. Yet, there are a number of different types and conceptions of autonomy⁶⁸ from utilitarian⁶⁹ to libertarian.⁷⁰ The recognition and use of paternalism and constant reiteration of freedom and choice in sexual activity suggests the Report intended a middle version of autonomy, accepting both utilitarian/paternalistic and libertarian aims, much like the Kantian approach.⁷¹ The libertarian approach featured heavily within Chapter 6 which was devoted to overhauling the homosexual offences of Buggery and Gross Indecency (SOA 1956 s.12, s.13). In relation to incest, the Report noted that ‘in a tolerant and diverse society, the law should be based on a public morality that protects the individual from danger, harm, fear or distress, with additional safeguards for the younger and frailer members of the community.’⁷² The analysis below shows a single use of sexual autonomy in relation to incest, to bolster the Report’s reasoning process. Following discussion of grooming, the Report stated ‘it is quite proper to argue that, in such situation, an adult’s right to exercise sexual autonomy in their private life is not absolute.’⁷³ Such a statement is uncontroversial and hence likely to be accepted. Again, as shown below at section 3.4, the existence of sexually autonomous consensual adult familial sexual activity (hereafter CAFSA) is not explored by the Report.

⁶⁵ Above n.4, [0.7].

⁶⁶ Above n.4, [2.1.1][2.7.2][2.13.7][2.20.1][2.20.3].

⁶⁷ Above n.4, [4.5.7][4.5.9].

⁶⁸ The literature on autonomy is extensive and is too large to review here, see generally Dworkin G., *The Theory and Practice of Autonomy*, Cambridge Studies in Philosophy, (CUP, Cambridge, 1988). McLean S.A.M., *Autonomy, Consent and the Law* (Routledge, Oxford, 2010).

⁶⁹ See unpublished thesis by Weimer S., *Autonomy and the Utilitarian State*, Doctor of Philosophy, Graduate College of Bowling Green State University, December 2009.

⁷⁰ See generally Mill J.S., *On Liberty* (Filiquarian Publishing, Minnesota, 2006), Arneson R.J., ‘Mill versus Paternalism’ *Ethics* (1980) Vol.90(4) 470-489.

⁷¹ See generally Kant I., *Groundwork for the Metaphysics of Morals* tr. by Zweig A., Hill-Jr T.E., Zweig A., eds. (OUP, Oxford, 2002).

⁷² Above n.4, [6.2.4].

⁷³ Above n.4, [5.8.2].

3.2.5 The Report's Recommendations

The Review produced 62 recommendations detailed in Appendix 2. Within Chapter 5, addressing familial sexual activity, it made nine specific recommendations numbered 35-43. Recommendation 43 concerned the criminalisation of incest:

‘Sexual penetration between adult close family members (defined as certain blood and adoptive relationships) should continue to be forbidden by law. In the light of evidence about the early onset and abusive nature of incestuous relationships started in childhood, the responsibility for any offence should sit with the person who was adult at onset.’

The following section details the findings of the investigation into incest and *Setting the Boundaries*.

3.2.6 Incest and *Setting the Boundaries*: Chapter 5

As identified in the literature review, the concept of incest, due to its multiple definitions necessarily requires explanation before it is used. *Setting the Boundaries* as a document, which was to prompt public response and propose recommendations to Ministers, should have ensured clarity at all stages. The ‘terms of reference’ required clarity; however the Report did not define the term.

The discussion of incest is found within Chapter 5 entitled ‘Sexual Abuse within the Family’ with adult incest examined at section 5.8 of the Report. The Report adopted an aphoristic tone and embarked upon an assessment containing significant amounts of conjecture.⁷⁴ Within the chapter protection of children and the vulnerable are granted high priority⁷⁵ and morals and the taboo nature of incestuous relationships feature heavily.⁷⁶ As identified above, Chapter 3 concerned sexual offences against children and Chapter 4 against vulnerable people, thus much of Chapter 5 could have been addressed in previous chapters. The NSPCC, original proponents of the incest law (identified above in Chapter 2.6), suggested that the harm that the criminal law ought to eradicate is the abuse of a position of trust. They suggested that ‘it is the protection of children within the family rather than the incestuous nature of the relationship, which is important. That fact should be recognised by the criminal law. There

⁷⁴ Above n.4, [5.2.2][5.3.6][5.5.6][5.8.1].

⁷⁵ Above n.4, [5.1.1][5.1.2][5.1.4][5.1.5][5.1.9][5.2.2][5.3.1][5.3.5][5.5.3][5.5.4][5.5.5][5.5.6][5.5.7][5.5.8][5.5.9][5.5.10][5.5.11][5.5.12][5.5.13][5.5.14][5.6.6][5.6.7][5.6.8][5.6.9][5.6.12][5.7.1][5.8.1][5.8.3][5.8.7].

⁷⁶ Above n.4, [5.1.4][5.3.2][5.5.2][5.8.1][5.8.2][5.8.3].

should be an offence which punishes the illegal sexual behaviour within the family and adds an extra penalty for the abuse of trust.’⁷⁷

The Report noted that ‘the offence of incest sets out in law a fundamental social taboo about sexual relations within the family, reflecting widely held abhorrence. We regard the offence as one of a fundamental breach of trust by one family member against another.’⁷⁸ As noted above, reference to an incest taboo is virtually meaningless as anthropologists have diverging views as to the existence and content of the taboo.⁷⁹ The Report does not look at the historical development of the offence, which as seen in the preceding chapter, has impacted the decision to criminalise what was originally an ecclesiastical wrong. Also the Report did not investigate the ‘taboo’ and what this means in the context of criminalisation of incest, indeed there is no evidence that the body of anthropological literature, identified in the literature review above, was ever used in the Report. The medical concerns with incestuous sexual relationships were also not used within the reasoning process. This differential treatment of incest and the need to highlight the ‘taboo’ and ‘abhorrence’ within the chapter, implicitly suggests that there is some difference in the quality of the incestuous act versus any non-incestuous sexual offences. The narratives of the Report will be addressed in the following section, and then a micro-linguistic assessment of the sections concerning the offence of incest will be addressed in section 3.4 below.

3.3 Stories and Narratives within *Setting the Boundaries*

The analysis identified five themes within the Report. These themes are generalised inter-linked narratives that help the development of the Report’s recommendations. The first obvious, but significant theme is the seriousness of sexual crimes. The theme concerning the solemn nature of the task facilitates a narrative that underlies much of the Report: the protection of a victim. With the ‘victim’ identified, this facilitates a narrative of action: something must be done to rectify the problem that allows these serious crimes against victims to go unpunished. This narrative of ‘action’ can be split into two other narratives: of modernisation and the deliberative nature of the process. The modernisation narrative highlights that the task being undertaken is surmountable. This action narrative dictates that

⁷⁷ Above n.4, [5.1.4].

⁷⁸ Above n.4, [5.1.4].

⁷⁹ See above 1.7.1. Anthropological and Sociological Literature on Incest.

the action to modernise protection of victims from these serious crimes, can and will be achieved through a deliberative process. As will be shown below, the lack of contemporary relevance of the law is highlighted as a resolvable issue. Thus a simple narrative, which portrays the Review's task as a mere update of the law, is born.

3.3.1 Seriousness of the Task

Throughout the Report the solemn nature of the task being undertaken is emphasised. The Review team must get this right; failure to do so may lead to unnecessary intrusion into the private lives of adults.⁸⁰ The Report's task was to review the law surrounding the 'dreadful crimes which deeply affect the lives of victims and their families.'⁸¹ The narrative is used to highlight the seriousness of the Reviews' subject and its aim to stop exploitation, abuse, harm, and relationships resulting from persuasion and grooming.⁸² Dangers of leaving the situation unresolved are reiterated by discussion of the effects of sexual offences on victims.⁸³ Action to prevent such damage to individuals and wider society therefore follows as necessary. Victims are identified as women, children and vulnerable people.⁸⁴ Implicit within the narrative is the need to act to protect victims of crime: failure to provide protection would place the country in breach of its commitment to human rights.⁸⁵ Discussion of public protection⁸⁶ complements the constant reference to harm caused by unwanted sexual contact/conduct.⁸⁷ This recognition of damage and danger, and thus the seriousness of the task, underpins the Report's other stories and narratives. This action, tied to a narrative of modernisation, thus reinforces the need to act against serious problems and ensure that both timely and modern solutions are provided.

3.3.2 Creation and Protection of the 'Victim'

The creation, situation and use of the 'victim' is another significant story/narrative relied upon by the Report. As Quinney noted, 'A "victimless" crime can only be one that is defined after the fact by an outside observer.'⁸⁸ He also argued that the 'rhetoric of victimization is one

⁸⁰ Above n.4, [0.1][0.6][0.23].

⁸¹ Above n.4, [Foreword].

⁸² Above n.4, [0.8].

⁸³ Above n.4, [0.10][2.15.2][2.84] Including amongst others, psychological damage and disease transmission.

⁸⁴ Above n.4, [0.6] and see below at 3.3.5 Creation and Protection of the 'Victim'.

⁸⁵ Above n.4, [0.7].

⁸⁶ Above n.4, [1.2.2].

⁸⁷ Above n.4, [0.10][2.8.5][2.16.1][2.17.1][2.18.1].

⁸⁸ Quinney R., 'Who is the Victim?' (1972-73) Vol.10 Criminology 314-323.

more weapon the ruling class uses to justify and perpetuate its own existence.⁸⁹ This 'victim' and *her*⁹⁰ creation and use within the Report provided a beneficiary upon whom the narrative of action and modernisation was framed to protect. *She* is the beneficiary of legislative action taken on her behalf.⁹¹ For McShane and Williams the conception of victim 'provides emotional credibility to the prosecution.'⁹² *She* is used by the Report to assimilate the widely held moral abhorrence to incest. Use of the victim turned moral abhorrence from illegitimate primary reasoning for criminalisation (the stance the Review took)⁹³ into legitimate secondary reasoning with the recommendations having been devised to protect the 'victim'.⁹⁴ Use of the 'victim' 'ignores actual harm and focuses on the offender, exacting the price for transgressing the legal codes.'⁹⁵ The identification of a 'victim' is therefore central to the reasoning process. Building a consensus and using this to protect the 'victim' creates a 'public interest' thus supporting recommendations with respect to incest. Real harm is subordinated to 'conceptions of legal harm.'⁹⁶ In other words the 'victim' became a functional tool within the Report; the recommendations in *Setting the Boundaries* were framed as an attempt to secure the 'victim's' personal and sexual autonomy. Ignorance (deliberate or not) of the consensual nature of some incestuous acts automatically created a 'victim' in need of protection (i.e. the person to whom the non-consensual acts occurred).

The argument that the 'victim' is an implicit construction that appears throughout the Report, is supported by Sebba's observation that there is now a 'constant rhetoric on victims' rights.'⁹⁷ Existing narratives (outside the Report) were used to link the internal narratives to 'achieve authority because they resonate with prevailing cultural constructions.'⁹⁸ These external narratives concern the use of engrained social stereotypes when creating the personification

⁸⁹ Ibid 315.

⁹⁰ Deliberate use of 'her', explained below.

⁹¹ Above n.4, [0.6].

⁹² McShane M.D., Williams F.P., 'Radical Victimology: A Critique of the Concept of Victim in Traditional Victimology' (1992) Vol.38 Crime & Delinquency 258-271, 260.

⁹³ See above 3.2.4.2.

⁹⁴ See Conclusions.

⁹⁵ Above n.92, 260.

⁹⁶ Ibid.

⁹⁷ Sebba L., "'Victim-Driven' Criminalisation? Some Recent Trends in the Expansion of the Criminal Law in McSherry B., Norrie A., Bronitt S., eds. *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart, Oxford, 2009) 61.

⁹⁸ Cavender G., Bond-Maupin L., Jurik N.C., 'The Construction of Gender in Reality Crime TV' (1999) Vol.13(5) Gender & Society 643-663, 644.

of the 'victim'.⁹⁹ This 'victim' is a person endowed with a number of attributes: a vulnerable person,¹⁰⁰ a person needing of protection, possibly a child,¹⁰¹ or a woman.¹⁰² This 'perceived vulnerability'¹⁰³ that women are more likely to be unable to escape from or resist an assailant results in an increased quotient of fear by women.¹⁰⁴ Common tropes of male power and control¹⁰⁵ were pitched against a depiction of a 'victim', who needed legal assistance and required help against compulsion.¹⁰⁶ The narrative embeds the view that the 'victim' is unable to function properly without the law's protection and that the incumbent (pre-2003) law failed to do this adequately.

The Report exacerbated such stereotypes using the 'victim' to bolster the recommendations: 'such imagery reinforces gender stereotypes, including women's subjugation to men.'¹⁰⁷ The analysis of the Report also supports Sebba's contention that 'victims play a larger rhetorical and conceptual role today in the criminalisation process than previously.'¹⁰⁸ The 'offender cannot be viewed as victim, nor can the victim be viewed as offender',¹⁰⁹ there is thus a dichotomous position. However, in relation to instances of consensual adult incest the offender occupies both positions.

Identifying the existence of vulnerable individuals/victims facilitated maintenance of the legislative *status quo*. It is trite to say that victims required protection. The keystone of government action on sexual offences was protection of the vulnerable. However, allied to this

⁹⁹ Ibid, see Cavender et al. who suggest that television programmes reproduce gender stereotypes and facilitate discussion of women's victimization.

¹⁰⁰ Killias M., Clerici C., 'Different Measures of Vulnerability in their Relation to Different Dimension of Fear of Crime' (2000) Vol.40 British Journal of Criminology 437-450, 449 suggest that sex remains an important factor in explaining the feelings of fear of crime.

¹⁰¹ Above n.4, [1.1.5][1.1.9] and separate chapter devoted to Children: Chapter 3.

¹⁰² Above n.4, [0.6][1.1.1].

¹⁰³ Yodanis C.L., 'Gender Inequality, Violence Against Women, and Fear: A Cross-National Test of the Feminist Theory of Violence Against Women' (2004) Vol.19 Journal of Interpersonal Violence 655-674, 657.

¹⁰⁴ Above n.100.

¹⁰⁵ Mackinnon C., *Toward a Feminist Theory of the State*, (Harvard University Press, Boston, 1989). Lips H.M., *Women, Men, and Power*, (Mayfield Publishing Co. Mountain View CA. USA, 1991). O'Neil J.M., 'Male Sex Role Conflicts, Sexism, and Masculinity: Psychological Implications for Men, Women, and the Counseling Psychologist' (1989) Vol.9(2) The Counseling Psychologist 61-80. Howard J.A., Blumstein P., Schwartz P., 'Sex, Power, and Influence Tactics in Intimate Relationships' (1986) Vol.51(1) Journal of Personality and Social Psychology 102-109.

¹⁰⁶ Above n.4, [2.20.3][1.1.3].

¹⁰⁷ Above n.98, 645.

¹⁰⁸ Above n.97, 81.

¹⁰⁹ Above n.92, 261.

and as shown in the micro-level assessment that follows the explanation of these narratives, the vulnerable category is extended to include participants of consensual acts, which become ‘abusive’ through this labelling.¹¹⁰ Chronologically, once a ‘victim’ is identified, the law must be available to support the creation of a ‘safe, just and tolerant society,’¹¹¹ and failure to do so would breach the ECHR. Recommendations inappropriate and/or irrelevant to consensual acts suddenly become relevant when the victim is found. Re-labelling the consensual incestuous acts thus becomes key to the Reports’ promotion of the position to keep the incest provision. The Report’s reiteration of the need to act fairly, implicitly suggests that the recommendations produced are compatible with the requirement to be fair and non-discriminatory.¹¹²

3.3.3 Action

The Report presents itself as part of an active and simple process: to review and update the law on sexual offences. There was no overt intention for the update of sexual offences to end once the Report had been produced.

The need to tackle the contemporary issues (in the mid-1990s) of sexual offences has been identified above.¹¹³ The identification of a number of concerns, including low rape-charge convictions, high profile offences, inequality in treatment, and need for additional protection, were presented as issues to be addressed within the Report and Recommendations.¹¹⁴ The Report did not accept the *status quo* as an option and did not discuss leaving the law unchanged, thus it provided an implicit call for action. The task to tackle these serious crimes was achievable and it was proposed that an update of the law would allow for ‘increas[ed] protection and provid[e] appropriate remedies’¹¹⁵ to victims. The Report did not address the complexity or length of time needed to complete the task.

The Report recognised that sexual offences touch ‘the most personal and contentious area of the criminal law.’¹¹⁶ Potentially contentious issues concerning conflicting beliefs or foundational principles upon which to base the criminal law were avoided by using a unifying set of ‘terms of reference’ to enable the discussion to be framed on seemingly neutral

¹¹⁰ See below at 3.4.1.

¹¹¹ Above n.4, [Foreword].

¹¹² Above n.4, [Foreword][Introduction][0.3][0.5][0.7][0.24][1.1.1][1.1.6][1.1.8][1.1.9][1.1.10][1.1.11][1.2.6][1.3.1][1.3.2][1.3.5][1.5.3].

¹¹³ See above 3.2.1 Why Review Sexual Offences?

¹¹⁴ Above n.4, [0.1][0.2][2.5.2].

¹¹⁵ Above n.4, [5.5.5].

territory. The ‘terms of reference’ did not mention or overtly indicate any guiding principles for criminalisation. Consensus building terms such as ‘coherency’, ‘clarity’ and the ‘protection of the vulnerable’ were used to engage rational actors to subscribe to and support the action (the solutions proposed).

The Report avoided repeated mention of morality and did not explicitly address what was meant by ‘appropriate punishments’ and ‘fairness and non-discrimination.’ The focus was on ‘action’ instead of the presentation of problems. The Report did not explicitly highlight any one particular failing prompting interest in sexual offences or incest. Instead, the treatment of sexual offences was presented as a gauge of treatment of victims within a civilised society. Similarly, although Chapter 5¹¹⁷ highlighted a number of problems with the incumbent law on incest, the story is one of achieving modernisation of protection through necessary action.

3.3.4 Modernisation of Law

The narrative of modernisation forms one part of, and feeds into and supports, the narrative of action. The framing of the Review necessitates the action, an action of modernisation. Whilst recognising the existence of grave problems in society that the law does not tackle well,¹¹⁸ Moxon suggested that the Review provided an excellent opportunity to remedy such problems through ‘modernising and strengthening the law.’¹¹⁹

As identified above, the contemporary issues concern the modernisation of protection required to prevent application and reliance upon a law that is out of date.¹²⁰ This update to the protection offered can be loosely split into three interlinked sub-categories, which include the people protected, the offences committed and the punishments available.

The focus on increasing protection is a narrative that is linked with the creation and protection of the victim discussed above. The Report noted the requirement to ‘increase the protection the law gives to vulnerable people, and we regard this as a vitally important task.’¹²¹ In particular, children and individuals with mental impairment had been highlighted as particularly vulnerable sections of society. A whole chapter of the Report was dedicated to

¹¹⁶ Above n.4, [0.1].

¹¹⁷ Above n.4, [5.2].

¹¹⁸ Above n.4, [Foreword].

¹¹⁹ Above n.4, [Foreword].

¹²⁰ See above n.4, [Foreword][Introduction][0.2][0.6][0.12][0.18][0.24][1.1.1][1.1.2][2.13.6][2.18.5][3.3.5][5.1.1][5.6.8][7.7.1][8.2.1][8.4.3].

children (ch.3) and to vulnerable people (ch.4). It was not only children and mentally impaired individuals that were singled out as beneficiaries of this increase in protection, the Report explicitly noted the need for protection of 'male victims/survivors'¹²² as well as those within the 'looser family structures' of contemporary Britain.¹²³

This action encompassed a modernisation and update of the offences that could be committed. The Report noted the problem with the existing law reflecting the social attitudes and roles of men and women of the time (it was produced).¹²⁴ Chapter 6 of the Report was titled 'Issues of Gender and Discrimination'. The chapter primarily dealt with homosexual offences.¹²⁵ The Report stated that 'making same sex behaviour criminal is cruel and unnecessary.'¹²⁶ The offences against homosexual activity were modernised through the widening of other non-consensual offences on the explicit basis to produce a law that was ECHR compliant.¹²⁷ This directly fed into the terms of reference.¹²⁸

A modernisation of the punishments available when sentencing an offender was the final subcategory of this update of protection that the Review sought to achieve. The Report noted that the maximum penalty for commission of 'Burglary with intent to rape'¹²⁹ was 14 years. This is an example of where the Report proposed extending an offence to cover other 'acts' (sexual assault by penetration) and increasing the maximum penalty, in this case, to life. Similarly it was proposed that the offence of 'indecent assault',¹³⁰ that carried a maximum penalty of 10 years imprisonment, was 'not serious enough to deal with the worst cases.'¹³¹ The Report therefore suggested the replacement of the offence with 'sexual assault by penetration' to reflect the seriousness of the offence and allow for appropriate punishment.¹³² This modernisation and update of the protection offered by the law was facilitated by the use of the ECHR. The Report explicitly noted the need to produce recommendations that were in

¹²¹ Above n.4, [4.1.1].

¹²² Above n.4, [0.6].

¹²³ These looser structures' were not defined within the Report. Above n.4, [0.7][5.1.1][5.2.4]5.5.11] [5.6.7][5.6.10].

¹²⁴ Above n.4, [0.2].

¹²⁵ Above n.4, [6.6.1]-[6.6.17].

¹²⁶ Above n.4, [6.6.1].

¹²⁷ Above n.4, [6.2.2.].

¹²⁸ See above n.4, [1.2] including [1.2.1]-[1.2.6].

¹²⁹ Theft Act 1968 c.60, s.9.

¹³⁰ Sexual Offences Act 1956 s.14 indecent assault on a woman, s.15 indecent assault on a man.

¹³¹ Above n.4, [2.3.1]

¹³² Above n.4, [2.3.1][2.9].

accordance with the 'terms of reference' and thus be compliant with ECHR and Human Rights Act requirements. This deployment of ECHR principles of 'fairness and non-discrimination' as benchmarks indicate compliance and convey legitimacy. Mere acknowledgement of the duty to comply with higher human rights norms suggested the recommendations were produced to such standard. There was frequent reference to the ECHR throughout the Report as well as the explicit acknowledgement that 'the ECHR provided us with a dynamic policy making framework that enabled us to look at the role of the state in protecting its citizens.'¹³³

A modernisation discourse reiterates and enhances the credibility of the governmental actors. The government had shown its intention to update the law on sexual offences pre-election and *Setting the Boundaries* appeared consistent with the 'New Labour' approach and aim to promote fairer societies, modernising Britain and supporting equality.¹³⁴ The Report does not make explicit reference to the pre-election pledges¹³⁵ and political statements.¹³⁶

This narrative of modernisation goes hand-in-hand with the Report being promoted as the product of a deliberative consultation. It is noted as the beginning of the journey; that the government required public input in the reform process.¹³⁷ The content of the Review and many of the recommendations are an explicit example of an update of the law with the provisions being reformulated to remove overt discrimination¹³⁸ and promote fairness. The importance of this should not be underestimated. By complying with and following their stated aims, this in and of itself enhances the credibility of the Report and the actors within the process. This modernisation becomes credible. The actors have identified the reasons behind and supporting the modernisation: all that is then left is the doing; it is thus implied that the product that is produced by them, is compliant with what has already been presented. The secondary component of the narrative of action, the deliberative process, facilitates and guides this modernisation process and will be addressed below.

¹³³ Above n.4, quote at [0.5] and [0.3][0.5][0.7][1.1.8][1.2.1][1.2.2][1.2.4][4.1.3][4.2.3][5.8.2][6.2.2][6.3.4][6.6.3][7.2.2][7.3.1][7.6.8][8.4.10].

¹³⁴ See above 3.2.1.

¹³⁵ Labour Party (Great Britain), *Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into United Kingdom Law* (Labour Party, London, 1996).

¹³⁶ Hansard HC vol.279 col.356 and col.359 (12 June 1996) Ms Jowell.

¹³⁷ Above n.4, [Foreword][Introduction].

¹³⁸ Above n.4, [6.2.1].

3.3.5 A Deliberative Process

The second narrative of action concerns the approach taken to tackle the serious problem identified and increase protection for victims. This action taken to modernise the law was presented as deliberative in nature. The Home Secretary reaffirmed and emphasised the Report as a set of recommendations to Ministers.¹³⁹ The Foreword appealed to the public to respond to the proposals and thus encouraged public participation in the reform process. The Report as a deliberative tool aimed to enhance participation and democratic will formation, and was at the same time endowing the resulting recommendations with gravitas: not only were they formulated under the leadership of the expert Sex Offences Review Team but also through participation of other stakeholders. This stakeholder participation included use of the thoughts, feelings and comments of practitioners, academics, children and vulnerable people.¹⁴⁰

The Report was presented as an inclusive document, the product of an 'open, consultative process which involved many people and drew in many strands of opinion.'¹⁴¹ This framing of the Report helps to secure the empathy of the reader towards the recommendations. Appendix H9 of Volume 2 detailed the 147 delegates who contributed through attending the review conferences and seminars. The Report acknowledged the importance of a high level of understanding by the public of both the aims of the review and consequent recommendations for legal change. This is not only because the law on sexual offences regulates the most private and intimate part of life,¹⁴² but because of the extreme and significant consequences following a breach of the law.¹⁴³ The SORT employed linguistic techniques to permit the discussion to occur at levels accessible to the public, which were particularly notable within the Executive Summary. Techniques including the use of metaphors¹⁴⁴ helped facilitate a multi-level understanding of the remit of the review and recommendations for reform by permitting multi-level input into the process of creating recommendations for legislative change.

¹³⁹ Above n.4, [Foreword].

¹⁴⁰ Above n.4, [Introduction].

¹⁴¹ Ibid.

¹⁴² Above n.4, [0.6].

¹⁴³ For example the maximum punishment for breach of SOA 2003 s.1(4) (Rape) is imprisonment for life.

¹⁴⁴ Above n.4, [0.2][0.8]. See Unpublished thesis by Aksberg Bjerkmo Johansen T., *What's in a Metaphor?: The Use of Political Metaphors in the Conservative and Labour Parties*, Master in Language - English Study, Faculty of Humanities, University of Tromsø, Autumn 2007.

The multi-level input occurred through public responses as well as attendance and participation in the seminar processes. However, contributors made statements without reference to any supporting data or information. These arguments then reappear in support of the recommendations,¹⁴⁵ for example, ‘many contributors felt that such relationships tend to begin in childhood.’¹⁴⁶ Mere assimilation of participants’ prejudice and stakeholder conjecture does not lend itself to modernising the law. Contributors noted the law needed to express societal disapproval,¹⁴⁷ yet this was at odds with the aims of the Report and the statement that it sought not to be the arbiter of private morality.¹⁴⁸ Personal belief delivered through unsubstantiated assertions became part of the basis for recommendations by the simple fact that such beliefs were aired in consultation seminars.

The SORT used public participation in a selective manner to support recommendations, including those on incest, that appear difficult to justify based on the guiding principles of the Review. The Report is structured through narratives and key words, to allow the public to feel engaged in a meaningful deliberative dialogue with Government in this reform process. Yet this uncritical inclusion of public participation has diluted the ability of the SORT to uphold the terms of reference resulting in questionable recommendations. The ‘evidence base’ must therefore be understood: this assessment will take place in the following section.

3.3.5.1 Quality of Deliberative Consultation and Supporting Evidence

The second volume of the Report detailed the ‘evidence’ upon which the Review sought to rely in producing its recommendations. The volume detailed eight consultation meetings: three conferences and five seminars. These took place in multiple locations across the country including London, Newbury, York, Leeds, Cheltenham and Leicester. There were four literature reviews conducted on behalf of the Review; these included research into rape and sexual assault; offences against children and vulnerable people; offences of sexual exploitation; and research into homosexual offences. Information concerning international approaches was provided from Australia, New Zealand and South Africa. The Review looked at a Law Commission policy paper on Consent in Sexual Offences and made two visits to a single school.

¹⁴⁵ Within [5.8.1][5.8.2][5.8.3] analysed below at 3.4 Micro-Linguistic Assessment of Chapter 5.8.

¹⁴⁶ Above n.4, [5.3.6].

¹⁴⁷ Above n.4, [5.3.2].

¹⁴⁸ Above n.4, [6.2.4].

The presentation of information reiterates the ‘evidence based approach’¹⁴⁹ the Review claims to have undertaken. It is stated that ‘this volume of the Report sets out the external research commissioned on behalf of the review, some of the research undertaken by the review, summaries of the consultation conferences held by the review and a list of written contributions made to the review.’¹⁵⁰ The Review goes on to state that it cannot include all the extra investigations and analyses that have been undertaken. The list of origin of the written contributions is, in and of itself, almost meaningless to anyone seeking to assess the reasoning process and reasons relied upon in support of the positions taken. There is a duty incumbent upon the SORT to detail the evidence upon which it relied. Failure to evidence statements renders them no more than unsubstantiated assertions.

A number of issues concerning the reasoning process and evidence presented are noted below. These are not presented as exhaustive list, merely illustrative of the anomalies that exist, with a particular regard to incest.

Appendix D1 is a ‘Literature Review of Research into Rape and Sexual Assault’ by Professor Jennifer Temkin, completed in March 1999. Incest was one of the areas examined within this Literature Review. Of the four pages presented on incest, 10 different publications were referenced.¹⁵¹ Of these 10, three were Reports including those of the Criminal Law Revision Committee and the Scottish Law Commission. The remaining seven came from five different authors. Temkin cited her own pro-criminalisation article on no less than five occasions. As can be seen from the literature review of this thesis above in Chapter 1, there is a wealth of literature available on incest, much of which would have been relevant to the investigation being undertaken by the Review. Temkin conducts the analysis: ‘On the assumption that the Review will seek to retain it (the incest offence),’¹⁵² which suggests an approach not in accordance with the remit of the review, which required starting from first principles.¹⁵³ Equally, her approach was not in accordance with academic opinion on the offence; she stated: ‘At present only sexual intercourse is covered by the offence reflecting eugenic

¹⁴⁹ Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* Volume 2: Supporting Evidence (Home Office Communication Department, London, 2000) [i].

¹⁵⁰ Ibid.

¹⁵¹ This figure does not include the Acts cited nor does it include criminal statistics or supplementary tables.

¹⁵² Above n.149, 110.

¹⁵³ Above n.4, [Foreword].

considerations.¹⁵⁴ As was seen in Chapter 2.6 of this thesis, action to create the offence of incest was prompted by concern over father-daughter rape.

Incest also arose in Appendix D2 'Literature Review of Research into the Law on Sexual Offences Against Children and Vulnerable People' conducted by Dr Caroline Keenan and Lee Maitland in May 1999. Six pages were devoted to the issue of incest and children and vulnerable people. As with Temkin, this literature review did not start from first principles. It used 15 sources from multiple authors. It placed significant weight on the 1984 CRLC Report that was never adopted into legislation. Temkin's article *Do we need a crime of incest?*¹⁵⁵ featured heavily in the analysis¹⁵⁶ as did the discriminatory impact of the law and failure to protect boys.¹⁵⁷

In Appendix F, the proposed changes to South African law following the 'Review of the South African Law Commission Proposals' were detailed. This Review appeared to be neutral in its approach to the offence. Interestingly, no authors were cited by the Review except for Temkin's finding that 'incest in all its forms is frequently harmful or extremely harmful to victims and that the notion of consent is problematic.'¹⁵⁸ The proposals presented three 'groups' that advocated the abolition of the offence. The first included those who sought to rely on existing offences to cover the unwanted action; the second group advocated decriminalisation of sibling incest even where this occurred under the age of consent; and the third group wanted 'to see the introduction of a new offence of sexual abuse of authority.'¹⁵⁹ The South African Law Commission proposed to leave the crime of incest to the common law. However, they advocated making the crime gender neutral and use of the statutory definition of 'sexual penetration' to be applied to the common law offence.¹⁶⁰

Appendix H1, the Seminar for Legal Practitioners, detailed the support for the continued existence of an incest offence. It was reported that the legal practitioners found that 'society still found the activity repellent.'¹⁶¹ No evidence was provided to substantiate such

¹⁵⁴ Above n.149, at 110 and contrast Chapter 2.6.

¹⁵⁵ Temkin J., 'Do We Need A Crime of Incest?' (1991) Vol.44 Current Legal Problems 185-216.

¹⁵⁶ Above n.149, 149,151,152,153.

¹⁵⁷ Above n.149, 169-171 at [10.2]

¹⁵⁸ Above n.149, 254 citing Temkin above n.116.

¹⁵⁹ Above n.149, 254.

¹⁶⁰ Above n.149, 255.

¹⁶¹ Above n.149, 271.

statements.¹⁶² In the Conference on the European Convention on Human Rights found at Appendix H2, John Wadham raised the position of incest in his speech. He suggested that the law should be reformed to be 'clear and straightforward in order to comply with Article 7.'¹⁶³ The General Discussion¹⁶⁴ that followed suggested that incest was prohibited for a number of reasons including eugenics and moral repugnance. It also noted that 'the role of the criminal law is not just about mischief but about sending signals, but moral disapproval is not sufficient justification.'¹⁶⁵

The Seminar for Parliamentarians detailed in Appendix H3 saw the issue of Protection of Children discussed. The sorts of "loaded" questions posed to the group included: '1.What are the problems with the current law—does the present law on incest protect children adequately?'¹⁶⁶ The feelings of the group were that the incumbent law failed to protect children adequately and that incest was an emotive term. The group was uncertain as to whether the criminal law should extend to behaviour between consenting adults and suggested scientific evidence might be required to identify and highlight genetic risks. The parliamentarians supported its continued criminalisation based on incest's links with abuse; it was described as 'power relationships such as that of a father over his child.'¹⁶⁷

The Consultation Seminar on Abuse within the Family (Appendix H7) was held at the NSPCC Training Centre in Beaumont Leys in Leicester.¹⁶⁸ When introducing the seminar, Betty Moxon noted that the 'law on incest and abuse forms part of a larger set of offences that protect children from sexual abuse, and everyone from unwanted, non-consensual sexual acts.'¹⁶⁹ She failed to note that the law criminalised consensual sexual activity and that the 'act' that was

¹⁶² Ibid.

¹⁶³ Above n.149, 283.

¹⁶⁴ 'General Discussion' is the term used by the Report to distinguish the discussion of the participants in the seminars and conferences of the Review from the discussion of the keynote speakers and other discussion leaders, chairs and rapporteurs.

¹⁶⁵ Above n.149, 284.

¹⁶⁶ Above n.149, 291.

¹⁶⁷ Ibid.

¹⁶⁸ The Report noted in Appendix B (of Vol.2) those individuals who gave written submissions or those who had meetings with the SORT to discuss sexual offences. The Report did not detail the participants of the seminars and conferences that it undertook. It is therefore not possible to identify who participated in this seminar, though the individuals who chaired sessions and acted as rapporteurs were listed at the end of Appendix H7. The Appendix detailed that participants included 'police, prosecutors, judiciary, social work, faith groups, voluntary organisations and colleagues from other government departments.'

¹⁶⁹ Above n.149, 340.

criminalised was limited to penile-vaginal penetration. Thus whilst the original idea behind the offence may have been to solve problems associated with the CLAA 1885, by the time it was passed a number of other considerations had influenced its development.¹⁷⁰

Moxon noted that the seminar would inform the thinking of the review and thus the content of the final Report. As I have already pointed out, the Report sought to start from first principles, yet material was presented to the participants with the implicit preconception of an outcome. Moxon suggested to the participants that ‘the review was charged with increasing the protection that the law could offer,’ before the review ascertained any consensus on the topic of familial sexual activity. Moxon suggested that the questions posed:

‘should be **considered** in light of:

- Increasing protection: the family environment was where a child should be safest, not at risk;
- Gender neutrality: no assumptions should be made about the role of men and women, or differential impacts of abuse on boys and girls.’¹⁷¹ (Emphasis in original).

There was no evidence of any explanation to the participants that the Review’s task was to start from first principles. This resulted in statements made within the discussion groups that would be used to inform the Review’s thinking, but that were formed without the evidence that the Report placed such great emphasis on. Group D felt there was a need for the offence of incest ‘on the grounds that it was needed to express society’s disapproval of certain sexual relationships within a family.’¹⁷² Similarly statements came from Group B, where it was ‘felt that many incestuous relationships had started in childhood and represented an abuse of power and should be criminal. The conclusion was that incest should be kept for consenting adults who were blood relatives, and who knew they were closely related.’¹⁷³ Group D felt that ‘it would be politically unacceptable to repeal this aspect of the offence of incest’¹⁷⁴ (specific reference to adult consensual incest). Group C referred to the ‘potential consequences to any resulting offspring’¹⁷⁵ without pointing to any clinical data to support their claims.

¹⁷⁰ See Chapter 2.6 Protecting Daughters–Success in 1908.

¹⁷¹ Above n.149, 340.

¹⁷² Above n.149, 341.

¹⁷³ Ibid.

¹⁷⁴ Above n.149, 342.

¹⁷⁵ Ibid.

The consultation processes incorporated and consequently legitimised what appear to be positional standpoints against both non-consensual and consensual incest. The quality of the supporting evidence has been shown to be questionable and the literature reviews to have drawn on a small number of authors. There also appears to have been a failure in the consultation seminars to communicate the terms of reference clearly to the participants to allow their discussion to be guided by these. There does not appear to have been any process in place to remedy these failings in the review process. Thus, the recommendations in the Report were formed using these seminars, consultations and literature reviews, which did not start from first principles and where there is no evidence of any challenge to factually incorrect statements and unsubstantiated assertions aired within these.

3.4 Micro-Linguistic Assessment of Chapter 5.8 – ‘Adult’ Incest

Chapter 5 is the basis of the recommendations relating to ‘Sexual Abuse within the Family.’ Offences concerning child sexual abuse and non-consensual activity were assessed elsewhere within the Report. The analysis that follows therefore concerned the identification of the reasoning around the presentation of adult familial sexual activity. The central issue in the section entitled ‘Should there be a familial sexual abuse offence between adults?’ is consent. The presence or absence of thereof has been identified in each sentence/phrase.

Each sentence/phrase within this section of the report has been given an identifier to pinpoint its position within the chapter. The letter refers to the position of the sentence within the paragraphs and these appear alphabetically. The number that follows the letter identifies the paragraph to which the sentence belongs, for example sentences in para. 5.8.1 were identified with the number 1, for example (A1), (B1), (C1). Sentences within para. 5.8.2 were identified with the number 2, (A2), (B2), (C2) etc. The identifiers appear after the sentence/phrase to which they refer.

Once the sentences and phrases had been given an identifier, the sentences were coded for the type of consent to which they referred. For example, a sentence/phrase referring to rape would be coded as being non-consensual (rape occurs only in the absence of consent). Where the activity in question was consensual, the sentence was coded as consensual. The coding was applied each time a reference was made to consensual or non-consensual types of conduct.

The codes used were as follows: S for consensual adult incest; T for a generic usage of the term incest, which could include both consensual and non-consensual; and V for non-consensual incest or incest with a child. Sentences that referred to both consensual and non-consensual acts or were ambiguous were labelled T.

3.4.1 Assessment of Paragraph 5.8.1

'5.8.1 It has been argued that the offence of incest should not apply to sexual activity between consenting adults, (A1) on the grounds that it is not harmful to society as a whole, (B1) and that adults have a right to make decisions about their own sexual behaviour in private. (C1) In 1984, the CLRC considered whether incest should cease to be an offence once both parties reached a specified age. (D1) A large body of research indicated that most of these relationships (E1) began when one of the partners was a child, (F1) and that often it represented a long-term abuse of power. (G1) It seems unjust to deny someone redress through the criminal law who later in life realises that the relationship they have been involved in has not been appropriate, (H1) or where they were unable to make a complaint until older, (I1) especially when they themselves might have been groomed or coerced into consenting to the act. (J1) The CLRC concluded in this instance that it is one of the functions of the law to uphold certain basic moral standards. (K1)'

The Review immediately began by conflating consensual relationships with non-consensual ones. (A1)(B1)(C1) all relate to consensual adult incest (S). The Report intersperses its analysis with superfluous statements that are tangential to the reasoning process. (D1) was such a statement; the fact the CLRC assessed the issue of incest is of only minor importance; (D1) was diversionary as it is a T statement. Discussion has moved from S to T.

The Review then referred to an unacknowledged large body of research (E1) into 'these relationships'; this is an attempt to attest the recommendation's credibility, though the evidentiary base is not cited. Additionally, the reader is positioned into believing that the Report is concerned with (A1) consensual relationships (S), whereas the construction of the text suggests reference to 'these relationships', is reference to generic 'incestuous relationships' (T). (E1) contains reference to the T class of words; generic incest. By moving from consensual (S) in (A1)(B1)(C1) to generic (T) in (D1)+(E1), this paved the way for discussion of the abusive.¹⁷⁶ It would appear illogical to discuss consensual acts and then make

¹⁷⁶ See below at affinity of consensual S to T and T to V.

recommendations based on non-consensual acts; however, as will be seen below this is what the Review did.

The reasoning is not deductive; it does not logically follow from the existence of consensual familial adult sexual relationships that such relationships began when one of the parties was a child (F1) or that the relationship represented a long-term abuse of power (G1). It is quite possible that after analysis, apparent consensual sexual relationships are non-consensual relationships. However, the Report is advocating engagement of criminal law on the basis that some (unidentified) research (E1) suggested that ‘most’ (E1) of these relationships (reference to (A1) consensual relationships) are not genuinely consensual. This is an unsubstantiated assertion and not evidenced based.

(H1) was an appeal to basic humanity and the concept of justice. The Report argues that the instigator of inappropriate relationships (H1); those which occur out of pressure, abuse, threats or coercion, should face criminal sanction for breach of the victim’s personal and sexual autonomy. However, contrary to the suggestion implied at (H1)(I1), it is possible that a victim is able to make a complaint ‘later in life’ as no limitation clause applies to the criminal law. Hence (H1)(I1)(J1) were diversionary statements logically relevant to only non-consensual activity (V). There is no suggestion that the criminal law should deny protection to someone in an inappropriate relationship (V). Sentence construction suggested that the recommendation is securing justice and protection.

(K1) was a position bolstering superfluous statement. The Report was not tasked with reviewing what the CRLC decided almost two decades previously. Nor did the Report note that the recommendations in *Setting the Boundaries*, for example recommendation 44 on the abolition of the offence of buggery, were at odds with the 1984 CRLC Report.¹⁷⁷ The CRLC’s unwillingness to recommend changes to the law on incest in 1984 was used to bolster the reasoning process. (K1) was an implicit acknowledgement of the use of morality to inform the recommendations. However (K1) was incompatible with statements made earlier within the Report.¹⁷⁸ This statement is an example of the ‘additional principles without the terms of reference’ being used to influence the recommendations. (K1) suggested to the reader that ‘general morality’ is against abusive relationships, something that no rational actor could

¹⁷⁷ Home Office, Criminal Law Revision Committee ‘Fifteenth Report: Sexual Offences’ April 1984 Cmnd 9213 (HMSO, London, 1984) Recommendation 3.8 keeping a distinct offence of buggery.

disagree with. (K1) was bolstering the point that grooming should not to occur and that moral standards supported this position. (K1) ends a paragraph, which began by discussing consensual activity, then moved onto generic activity and ends having discussed non-consensual activity, suggesting that the law's function is to tackle abusive conduct (V) found in the preceding sentence (J1). This links to the next paragraph that goes on to further investigate the issue.

3.4.2 Assessment of Paragraph 5.8.2

5.8.2 'The review also considered this point. (A2) One of our guiding principles was to uphold the rights of adults to consensual sexual relationships in private, reflecting the ECHR respect for private life. (B2) Siblings or half-siblings may meet as adults, not even knowing that they are related. (C2) They are attracted and a sexual relationship develops. (D2) It is important to recognise that that relationship would only be criminal if they knew they were related. (E2) This has even formed plots in soap operas. (F2) Such cases very rarely come to the attention of the law (G2) or are prosecuted. (H2) This may be an innocuous scenario, but evidence to us, and the CLRC, pointed to the fact that many adult incestuous relationships are based on long term grooming (I2) and pressure from childhood, (J2) and are not genuinely consensual. (K2) It is quite proper to argue that, in such situations, an adult's right to exercise sexual autonomy in their private life is not absolute, (L2) and that society may properly apply standards through the criminal law (M2) that are intended to protect the family as an institution (N2) as well as individuals from abuse. (O2) In addition to this, the ECHR ensures that the state must uphold its responsibility to provide a remedy in law so that a complainant can seek justice. (P2)'

The next paragraph began by suggesting to the reader that the Review 'considered' (A2) criminalising abusive (V) behaviour (J1). This self-evident truth, that the law must uphold standards criminalising abuse, thus reiterated to the reader what they already knew. The disjunction between (S) at the top of paragraph 5.8.1 and the conclusion at the bottom is not apparent to the reader on a cursory reading. (K1) is an ambiguous generic statement, referring to both consensual and non-consensual conduct. The linguistic construction having included the words 'in this instance' (K1) indicated that it was only relevant to (J1) i.e. abusive conduct.

The Report acknowledged the requirement to provide recommendations consistent with the ECHR (B2). As discussed above, this suggested to the reader that it was implicitly human rights compliant. Acknowledgment of the necessity of human rights compatibility was both position

¹⁷⁸ Above n.4, [1.5.1].

bolstering and diversionary, and made at both the beginning (B2) and end (P2) of the paragraph. The SORT restated this general principle in the middle of the reasoning process; they did not restate other principles from the terms of reference. This suggests that the SORT was aware that their morally based recommendations have the capacity to breach the ECHR¹⁷⁹ and therefore they sought to pre-empt any such allegation by having made a statement acknowledging the need for compatibility.

The Report began the scene-setting again. It moved from potentially correct though ambiguous statements (K1), logically deduced from abusive relationships (V) at the end of the first paragraph, to a discussion of consensual relationships (C2)+(D2) thus beginning another S-T-V pattern. (E2) was a factually correct descriptive statement. It did nothing to explain reasons behind criminalisation yet did add weight to criminalisation of the *status quo* (i.e. based on morality). (F2) was superfluous to the argument. It simply acted to distract the reader from the argument's flow. Statement (G2) was an assertion not backed by evidence or statistics, though could be true. However, (H2) was another statement not backed by evidence and added to distract the reader from the flow of argument related to consensual activity. There would be no need to prosecute related persons who meet as adults ((C2)+(D2)) if the parties were unaware of the relationship (i.e. if (E2) did not exist.) It is unlikely that the Police or CPS would be aware of cases where siblings meet as adults ((C2)+(D2)) unless the parties become aware of their relationship, in which case (E2) would occur and prosecution would be expected. The basic question as to the reason behind the criminal prohibition occurs here. Criminalising the sexual activity turns on the knowledge of the relationship. Lack of knowledge would prevent prosecution.

The previous paragraph suggested that incestuous relationships were not genuinely consensual (G1)(H1) and were therefore abusive, and should be criminalised on this basis. It is not criminal to have intercourse with someone related, when one is unaware of the relationship, but it is when one *is* aware of the relationship. Lack of knowledge would prevent criminalisation: the law is therefore seeking to stop those who know of the activity. The paragraph continued with other distracting statements, (H2)(I2)(J2). (H2)(I2)(J2) were unsubstantiated but not unreasonable assertions. The positions in (I2)(J2)(K2) were logically impossible to flow from the positions at the beginning of the paragraph (C2) and (D2). Though

¹⁷⁹ See Chapter 5.5.3 Justifying State Action Interfering with Article 8 Rights.

non-genuinely consensual relationships (K2) may occur when two familial partners meet in adulthood, discussion of such relationships as abusive did not logically follow the earlier sentences. The sentence structure again moved in an S-T-V pattern. (C2)+(D2) were consensual acts (S). (I2)+(J2) were non-consensual acts (V). Therefore (C2)+(D2) and (I2)+(J2) were mutually exclusive; relationships based on long term grooming and pressure from childhood cannot occur when individuals meet as adults. It is possible for (C2)+(D2) to occur and at the same time be a non-consensual relationship (K2), however this would be similar to any non-familial non-consensual relationship where, for example, force, threats or coercion exist. If the State were inactive in providing legal remedies for victims in the circumstance of (I2)(J2)(K2) this would likely be a breach of the positive obligation imposed by Article 8 ECHR and thus be incompatible with (B2).

Statement (L2) was diversionary, and made with insufficient clarity as to the type of relationships at issue. It added nothing to the reasoning process and was tangential in relevance to consensual adult relationships. However, it set up a scenario where action infringing rights could be acknowledged as legitimate. There was no explanation that any infringement must be justified through a strict necessity and proportionality test. Statement (L2) was correct with respect to statement (I2)(J2)(K2); an individual cannot claim infringement of personal autonomy if the State restricted them from grooming, pressuring or causing another person to be in a not-genuinely-consensual-relationship. The conclusion, referring to 'such situations', (L2) referenced non-consensual (V) relationships including 'long term grooming,' (I2) 'pressure' (J2) and 'non-consensual,' (K2). However, (L2) was not corrected with respect to (S) consensual activity which appeared earlier in the paragraph,¹⁸⁰ and (L2)'s proximity to different and unrelated statements concerning both (S) and in other cases, (T) relationships suggested some relevance of the conclusion to the latter.

The statement that society 'may properly apply standards through the criminal law' (M2) appears to be ambiguous. This may have implied that society may properly apply a set of objective standards (M2X) or it may properly apply standards, a synonym for subjective 'value-laden standards' (M2Y), through the criminal law. If the latter (M2Y) is the case, the 'values' were not ascertained and made apparent. Therefore, contrary to statements within the Report, the danger existed that moralism would be used as the basis of the criminal law.

¹⁸⁰ Legislation infringing Article 8 ECHR must pass strict tests. See below 5.4.3.

(M2) may or may not be compatible with the statement (N2). (M2) appeared to reiterate the statement (K1) and confirmed the acceptability of the criminal law to stand as the arbiter of morals, suggesting that (M2Y) is the correct interpretation of the ambiguous statement (M2). Protection of the family (N2) and protection of the individual (O2) could be secured by an application of the criminal law based on an objective basis rather than the subjective basis.

Thus criminalisation of (C2)+(D2) was not justified in the Report. As above, (I2)(J2) were mutually exclusive of a (C2)(D2) scenario. There was no need to recommend deploying the criminal law to protect individuals from abuse (O2) unless (I2), (J2) or (K2) were present. (O2) necessarily required the existence of (I2), (J2) or (K2) and thus as the latter were mutually exclusive of (C2)+(D2), (O2) was therefore incompatible with (C2)+(D2) providing there was no abusive relationship. (C2)+(D2), a consensual relationship cannot lead to the engagement of the criminal law on the basis of tackling abusive conduct without justification. Failure to provide justification by the Report suggests morals are the main rationale for criminalising incestuous conduct. Thus, this breaches the terms of reference and is contrary to statements made by SORT. The statement (P2) has little relevance to the preceding argument. (P2) was a diversionary statement which acted to affirm the need for action and bolster the position that the state must take action against abusive conduct (I2), (J2) and (K2) and that society may properly apply standards through the criminal law to uphold these individuals rights (O2) as directed by the ECHR obligation (P2). Taking action against 'incest' therefore appears well reasoned, yet to take action against (I2), (J2) and (K2) does not require criminalisation of (C2) and (D2). (P2) was employed to affirm the conclusion within the next paragraph that supports the criminalisation of consensual adult incest. (P2) is not immediately relevant to (M2) and (O2) but is most relevant to (L2) and the statements (I2), (J2) and (K2). In any event, the remedy provided by the law in the event of a breach of the ECHR is a declaration of incompatibility under the HRA 1998 and does not require criminalisation of neither (C2)(D2) nor (E2).

3.5 Labelling and Use of a Synthetic Necessary Truth

The Report, similar to others of the same type when making proposals, intended to set the rules for inclusion and exclusion in society through later enactment of its recommendations

and endorsement of its findings.¹⁸¹ The process of labelling affects the individuals, objects or issues being labelled.¹⁸² The Report sought to identify the conduct deemed worthy of restriction and prohibition using the criminal law. As will be explained in the next sections, the coding above identified the conflation of consensual and non-consensual incestuous sexual relations: labelling consensual activity as abusive. Few rational actors would disagree with the criminalisation of *abusive* relationships. There is no widespread or visible pro-incest lobby.¹⁸³ Indeed, there is widespread disgust at incestuous activity.¹⁸⁴ Wood noted some labels are more easily imposed on people than others are.¹⁸⁵ Imposition of a label onto those engaging in incest is therefore unlikely to attract much dissent and can occur with relative ease.

The keystone to the production of the Report's recommendations occurs using a 'synthetic necessary truth'.¹⁸⁶ The recommendations require the acceptance of a necessary truth before they appear acceptable and legitimate. This synthetic necessary truth is labelling *all* incestuous liaisons as odious. The title of this chapter of the Report, '*Sexual Abuse within the Family*' labels all that which is contained within it. Incest's place within the realm of sexual offences was taken for granted rather than established.¹⁸⁷ The suitability of reviewing all forms of incestuous activity within this chapter is dubious as such title *prima facie* suggests the exclusion of discussion surrounding consensual relationships, and that all familial relationships are abusive. There was no explicit identification of reasons for this chapter title; it may

¹⁸¹ Wood G., 'The Politics of Development Policy Labelling' (1985) Vol.16(3) Development and Change 347-373, 352.

¹⁸² Ibid 347.

¹⁸³ See Renvoize J., *Incest: A Family Pattern* (Routledge, London, 1982) Chapter 7 The Pro-incest Lobby.

¹⁸⁴ Ellis T.B., 'Disgusting Bodies, Disgusting Religion: The Biology of Tantra' (2011) Vol.79(4) Journal of the American Academy of Religion 879-927, 922. Pogge T., 'Timeless Wisdom or Moral Arrogance?' (2005) Vol.7(1) Australian Journal of Professional and Applied Ethics 60-65, 63. Clinical studies have shown a difference in the level of disgust according to the individuals engaging in incestuous sexual activity, see Antfolk J., Karlsson M., Backstrom A., et al., 'Disgust Elicited by Third-Party Incest: The Roles of Biological Relatedness, Co-Residence, and Family Relationship' (2012) Vol.33 Evolution and Human Behavior 217-233. Royzman E.B., Leeman R.F., Sabini J., "'You Make Me Sick": Moral Dyspepsia as a Reaction to Third-Party Sibling Incest' (2008) Vol.32 *Motiv Emot* 100-108, this paper identifies disgust manifesting as a physical reaction. Young L., Saxe R., 'When Ignorance is No Excuse: Different Roles for Intent Across Moral Domains' (2011) Vol.120 Cognition 202-214, where the authors note differing (higher) levels of disgust for purity violations (incest) and deliberate harm violations (knowingly feeding peanuts to a person who is allergic to nuts).

¹⁸⁵ Above n.181, 347.

¹⁸⁶ Warnock G.J., 'Every Event Has a Cause' in Flew A., ed. *Logic and Language* (Oxford, Blackwell, 1955).

¹⁸⁷ See above, 3.2.2.

originate from personal beliefs and feelings of the SORT or may be an assimilation of the views expressed by those participating in the review process.¹⁸⁸

The construction of this synthetic necessary truth was achieved through a number of techniques and tropes. The use of words suggesting the absence of consent reinforced the negative connotations of the activity, which the Report was seeking to regulate. There was little point in investigating non-abusive consensual relationships within a chapter dedicated to abuse. As shown above at 3.4.2 (Assessment of Paragraph 5.8.2) consensual familial relationships were rapidly dismissed as having germinated from a power imbalance or the exercise of undue pressure.¹⁸⁹ Chapter 5 of the Report concerned itself with a number of offences classed as sexual abuse, where there was an abusive element or the absence of genuine consent. Yet discussion of consensual relationships within such a chapter is inherently problematic. The labelling prevented discussion of consensual incest from first principles as the Report claimed. The Report did not consider the necessity of criminalisation of consensual activity on any basis other than social abhorrence. Before the reader was even permitted to assess the Chapter's contents, the title manoeuvred the reader into a *prima facie* acceptance of the suitability of reviewing incestuous consensual relationships within a framework dedicated to reviewing abusive conduct.

This synthetic necessary truth was reinforced by the use of the stigmatic term 'incest.' This repeated use of the stigmatic term is addressed below at 3.5.1. Words suggesting the absence of consent fed this synthetic necessary truth, as did the use of moral axioms/self-evident truths. The failure to draw attention to the recommendations' intended use against consensual sexual activity avoids challenge by emphasising their ability to protect vulnerable people. Statements conflate consensual relationships into non-consensual.¹⁹⁰

The 'synthetic necessary truth' thus became a vessel to deliver the recommendations. The self-reiterating techniques supporting the 'necessary truth' and facilitating the labelling process are identified in the following sections 3.5.1-3.5.5.

¹⁸⁸ For example, statements in Volume 2 above at n.171, n.172 are consistent with this.

¹⁸⁹ (C2) and (D2) dismissed through (I2), (J2) and (K2).

¹⁹⁰ See 3.5.4 Under-description.

3.5.1 Repeated Use of Stigmatic Term

The Report recognised the stigma attached to the use of the term incest.¹⁹¹ However, the SORT continued to use the term ‘incest’ after it noted the inappropriateness of its use.¹⁹² Consensual adult familial sexual activity (hereafter CAFSA) is necessarily under-reported. There is nothing motivating consensual actors to report their incestuous liaisons; indeed, there is great reason not to.¹⁹³ The under-reporting of CAFSA causes a skewing of the discussion due to the affinity of the term ‘incest’ with non-consensual activity, discussed further at section 3.5.4 below.

The Report noted that:

‘the offence of incest sets out in law a fundamental social taboo about sexual relations within the family, reflecting widely held abhorrence. We regard the offence as one of a fundamental breach of trust by one family member against another.’¹⁹⁴

It is clear that a forty-year-old father engaging in incestuous activity with his fifteen-year-old daughter is a fundamental breach of trust. The same cannot be assumed where the parties are two seventeen-year-old twins. Whilst many incestuous relationships are abusive, including those with children and where there is grooming, pressure, or coercion; this does not mean that consensual activities fit within preceding categories.

In light of earlier conclusions, the term T (generic incest) was used as a diversionary label to avoid drawing the reader’s attention to the inclusion of S (consensual acts). The repeated use of the term incest (and its affinity with non-consensual acts (V)) facilitated the recommendations to combat abusive conduct. The term ‘incest’ was noted as being unable to deliver protection to the family,¹⁹⁵ and ‘as inappropriate for the informal and temporary family arrangements that can be the cause of particular concern.’¹⁹⁶ Thus, even though it was recognised that the term should be abandoned, the continued use of the stigmatic and unhelpful term ‘incest’ facilitated the argument in support of the unreasoned recommendations. Use of ‘incest’ allowed readers to engage and draw upon any prejudicial or

¹⁹¹ Above n.4, [5.2.4].

¹⁹² Incest has also been recognised as a very loaded, damaging and stigmatic term by a number of authors, see for example Green D., ‘Resisting the Stigma of Incest: An Experiment in Personal Construct Psychotherapy’ (1988) Vol.11 Journal of Adolescence 299-308. Stigma and incest (and other sexual offences) is addressed at 4.5.3.

¹⁹³ If the relationship was truly consensual and no grooming or other abusive activity had occurred, then the reporting of the case would cause a detriment to both parties. This comes from the legal intervention used to end the relationship with the possibility of prosecution under the existing law.

¹⁹⁴ Above n.4, [5.1.4].

¹⁹⁵ Above n.4, [5.5.5].

engrained beliefs that would support criminalisation of consensual ‘incest.’ The discussion of consensual incest was not delivered as category (S) but merely as T, allowing the issue of criminalising consensual acts to be avoided. Use of words suggesting the absence of consent reinforced by the repeated use of the stigmatic term (with negative connotations of abuse) thus reiterated the call for action.

3.5.2 Words Suggesting the Absence of Consent

Much of the debate as to whether familial sexual activity (hereafter FSA) should be criminalised often bears on the consent or otherwise of the parties. Therefore, the words suggesting the existence or absence of consent are noteworthy. The term ‘Incest’ has a high affinity with the absence of consent due to its close linkage to child abuse.¹⁹⁷ This thesis identified a group of words attributed suggesting the absence of consent. Examples of these words include, ‘long-term abuse’, ‘groomed’, ‘coerced’, ‘pressure’ and ‘not genuinely consensual’. Prima facie, one would expect the complete absence of words indicating the ‘absence of consent’ when reviewing an offence which does not require consent nor the absence of it. There may be situations within such a chapter, which call for expression of instances where there was no consent, for example ‘where the position of sibling incest was induced through coercion, this would be an offence.’ It is therefore conceivable that words suggesting the absence of consent would be present in such a chapter. However, an assessment of the chapter shows that none of this class of words is used in this way. This class of words was found in all but one of the paragraphs analysed,¹⁹⁸ the sheer volume and frequency of such words suggesting the absence of consent requires explanation.

The proximity of words suggesting the ‘absence of consent’ to ‘family unit’ words was noted. These ‘family unit’ words included for example any references to ‘child/-ren’ and ‘famil/-y/-ial’. These ‘family unit’ words appeared in all the paragraphs concerning the reasoning relevant to consensual adult activity except paragraph 5.8.5. Protection of the family as an institution, appeared have been elevated akin to a guiding principle in Chapter 5. It was used as a moral axiom to support the reasoning process. It was used in the reasoning (N2) to assert that an adult does not have a complete right to private sexual autonomy (L2) in cases of abuse (I2),

¹⁹⁶ Above n.4, [5.5.5].

¹⁹⁷ See above 3.5.1, and below 3.5.4. Note discussion at Chapter 2.6 where the Punishment of Incest Act 1908 was legislated to combat the issue of father-daughter rape. Incest statutes have been used to target child abuse as seen through the increased usage following the Cleveland Affair. See 4.4.5, n.96.

¹⁹⁸ Not 5.8.5 the smallest of the paragraphs.

(J2) and (K2). The Report failed to link deductively the issues of consensual sexual activity and non-consensual activity and the 'family unit.' By repeatedly using non-consensual terms in close proximity to family unit words, the Report was implicitly reiterating to the reader the high affinity between incest and children/family.

3.5.3 Moral Axioms / Self-evident Truths

Another linguistic tool employed by the Report to aid the argument was the use of moral axioms. Sporadic positioning of the axioms acted as an affirmation of the purpose of the task. The wrongfulness of 'sex with children,' is generally accepted. Sexual relations that are 'abusive,' or flow from 'pressured' or 'groomed' relationships are widely regarded as inappropriate. The need to criminalise non-consensual activity is another axiom and was used by the Report. The absence of consent is the backbone of arguably the most serious of all sexual offences: rape.¹⁹⁹ Use of such axioms allowed reinforcement of the view that the 'acts under review' (i.e. incest) were inherently serious and thus worthy of criminal sanction. The avoidance of consistent and rational argument was facilitated using moral axioms

Widespread criticism of the pre-2003 legislation, because of overt discrimination and endorsement of certain favoured sexual behaviour, was in part responsible for the entire legislative review.²⁰⁰ It is difficult to criticise the Report if it avoids stating what it deems to be acceptable. Clearly, abusive relationships are unacceptable. The relabeling of activities that the Report finds unattractive, as abusive activities, not only supported criminalisation based on public protection but also allowed the Report to avoid charges of discrimination. The wrongfulness associated with the absence of consent is self-evident. Axioms are used to allow reasoning to follow the statements. The benefit to the Report was the avoidance of overtly identifying or drawing attention to the recommendations as value laden. The Report steered away from prescribing 'normal' sexual relations. This was unsurprising; as found above, one of the main reasons to update the Sexual Offences Act 1956 was the removal of discriminatory prohibitions. However, the use of moral axioms silently prescribed a set of sexual norms. The use of the axioms, concerning the special nature of sexual relationships and which were consent based, help persuade the reader into agreement with the recommendations.

¹⁹⁹ Above n.4, 9 'Of all sexual offences, rape is the most serious.'

²⁰⁰ See 3.2.1 Why Review Sexual Offences?

The use of the axioms facilitated masking the Report's failures in deductive reasoning, for example 'the dynamics and balance of power with a family require special recognition and we were concerned to ensure that patterns of abuse established in childhood were not allowed to continue into adulthood.'²⁰¹ This completely avoided acknowledgment of consensual adult activity. The axioms were presented as strong persuasive and diversionary statements. They thus aided under-description of the topic being discussed.

3.5.4 Under-description

The Report used a technique that the author of this thesis will call 'under-description'. This under-description enabled the reasoning to move from discussion of the consensual to the non-consensual and is a form of labelling which was used to delineate and identify certain behaviour worthy of criminalisation. There was an imbedded valuation and judgement in the act of labelling which combines prejudices and stereotyping.²⁰² The choice of the labels, both implicit and explicit, used by the SORT, affects how the reader aligns their position to the recommendations for or against incestuous activity.

It is possible that an anti-incest view is the incumbent view held by the reader,²⁰³ which may be strengthened by the Report's use of the term incest in close proximity to other abusive terms. The Report was primarily concerned with rape and homosexual offences and thus other offences such as incest received less attention. Had the SORT wanted to alter the law through recommending decriminalisation of incest, the Report would have had to identify problems with the incumbent law and justify any change from the *status quo*. Although the *status quo* did not align with the terms of reference, it was easier to leave the law untouched rather than attempt to convince the reader of the technical (though very real) problems with the incumbent position.

3.5.4.1 Polarity

This under-description was necessary because two of the coded groups, S and V are polar.²⁰⁴ That is, consent (S) is the antithesis of non-consent (V); they are by definition at the opposite ends of the spectrum. This polarity undoubtedly posed a problem for the SORT when trying to convey messages concerning acceptable behaviour. The public would receive mixed messages

²⁰¹ Above n.4, [5.8.3].

²⁰² Above n.181, 348.

²⁰³ See generally Chapter 1.7.1 and the existence of an incest taboo.

if the rules were inconsistent. For example, theft is criminalised. The message 'do not steal, thieves will be punished' is conveyed to the public. The antithesis, not stealing, is thus promoted.

The Review placed specific emphasis on promoting consent.²⁰⁵ The government had already commissioned another Report specifically on consent in sexual offences.²⁰⁶ Actions that violate consent or are non-consensual are discouraged and punished. The recommendations promoted a criminal law that focused on consent to sexual acts: engaging in such acts without genuine consent is illegal. The absence of consent was the basis for the most serious sexual crime.²⁰⁷ The Review wanted to criminalise acts falling in the categorised grouping (V).²⁰⁸ Recommendation 43²⁰⁹ proposing the continued criminalisation of both consensual and non-consensual adult FSA did not follow this pattern and instead advocated criminalisation of conduct falling within consensual (S) and non-consensual (V) categories, i.e. generic (T).

Thus, two problems appeared in the reasoning. Firstly, the conflation within the reasoning of the two polar groups S and V into T, resulting in the criminalisation of all 'incestuous' activity (i.e. both is consensual and non-consensual). Secondly the inconsistency between the recommendations made with respect to 'incest' including criminalisation of 'S' and the remainder of the Review advocating criminalising only 'V' and thus the inherent inconsistency between the provisions in this section of the Report and the other provisions, and the message the public receives.

Manipulation of the text and careful manoeuvring in reasoning was used to overcome the dissonance between the two positions, causing the polarity of positions to appear non-existent. This results in the recommendations appearing consistent with the reasoning applied and compatible with the other recommendations within the Report. One such way the polarity was overcome was through the manipulation of the argumentation to simply ignore the consensual nature of some incestuous acts. This issue is explored in the following section.

²⁰⁴ Arnold T., *The Folklore of Capitalism* (Yale University Press, New Haven MT, 1937), Chapter VII 'The Traps Which Lie in Definitions and Polar Words.'

²⁰⁵ See generally, above n.4, Chapter 2.

²⁰⁶ Law Commission, 'Consent in Sex Offences - A Report to the Home Office Sex Offences Review' (27 July 2000) Unnumbered series, available at <http://www.lawcom.gov.uk/docs/consent.pdf>

²⁰⁷ Home Office 'Setting the Boundaries: Reforming the Law on Sex Offences' Volume 1 (Home Office Communication Department, London, 2000) 9 "Of all sexual offences, rape is the most serious."

²⁰⁸ Hansard HL vol.644 col.772 (13 February 2003).

²⁰⁹ Detailed at Appendix 2.

3.5.4.2 Ignoring Consent (S)

With respect to incest, S (consent) fell from being the focus of the investigation and it instead turned to the generic (T). Recommendations were delivered after discussion of activity within T and/or V categories. By formulating recommendations that supported criminalisation of generic incest (T), (that is consensual and non-consensual), the SORT implicitly included the subcategory S. The recommendations gained a hallmark of non-refutability as they were presented to combat V and associated problems, (remembering T's high affinity with V); something with which no rational person could disagree.

Consent was used to delineate that which should be criminalised from that which should not, and the majority of the recommendations required lack of consent for the criminal offence to be committed.²¹⁰ The Report was actively seeking, promoting and implicitly condoning consensual relationships.²¹¹ However with respect to incest, the Report displayed an inability to deal with individuals in the S group in a fair and non-discriminatory fashion. Only by ignoring the consent group (S), and instead referencing the generic (T), could the Report make the recommendations appear rational. The recommendations failed to treat those within the category S with 'care' as required by the terms of reference.

Under-description through use of the term, generic incest, T, avoided drawing the reader's attention to its two sub-categories. The under-description has resulted in an ignorance of the category (S). There can be nothing closer to the desired conduct than S itself: S = consent. For some (unidentified) reason, the Report ignored the inherent consent in S: this is akin to completely ignoring S (as a category). Instead, the focus was deflected elsewhere on to the participants. The rare nature of incestuous acts and the identity of the participants (as family members/related kin) was used to orientate the argument from the consensual nature onto

²¹⁰ Compare the criminalisation of rape and non-criminal sexual penetration:
Rape- SOA 2003 s.1

- (1) A person (A) commits an offence if—
 - (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
 - (b) B does not consent to the penetration, and
 - (c) A does not reasonably believe that B consents.
- (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

Thus the offence turns on the absence of consent by B and A's lack of reasonable belief as to the existence of consent.

the level of normative deviation. The consensual nature of the activity remained irrelevant. S became lost having been subsumed within T, and the discussion focused on the participants' identity; at the same time, it allowed the recommendations to be made with respect to T instead of to S and V, separately. This facilitated the recommendations in favour of the continued criminalisation; the focus moved away from the actus reus (i.e. consensual sexual penetration) and on to the identity of the participants engaging in the sexual activity. Ignoring S maintained the recommendations' validity. An appreciation of the consensual nature of S at the recommendation stage would have required a more thoughtful analysis and thorough explanation and justification of the recommendations. However, by the time the recommendations were made, the reader had been manoeuvred away from thinking about the issue of consensual FSA, indeed consensual activity (S) had been ignored.

3.5.5 Movement and Deductive Reasoning

In keeping with its transparent, deliberative and democratic aims, the Report presented itself as the product of syllogistic reasoning. Those with only a fleeting interest in reform are unlikely to challenge the output of an open and transparent review apparently starting from first principles. Only once a discursive study of the arguments is undertaken does the inconsistent reasoning become apparent.

The logic used is flawed. A pattern of 'statement \rightarrow conjecture \rightarrow conclusion' appears. The arguments are not deductive, nor do they clearly state the evidence they rely upon, rather they are disjunctive. Imagine the scenario of a Report wanting to make recommendations relating to car transportation. The discussion centres on general/generic forms of transport, and conclusions are drawn relating to boats. Whilst there is common theme, this being transport, the quality of these conclusions and their use relating to car transportation ought to be questioned. The Report conditioned readers into an identifiable thought process. Unfortunately, 'family relationship' and 'abuse' became synonyms. The paragraphs dedicated to framing the discussion²¹² around the adult offence showed a discernible structure, following a specific $S \rightarrow T \rightarrow V$ pattern. The discussion began with an instance or example of consensual incest; it then moved into a discussion concerning generic incest, before ending having discussed non-consensual incest. Conclusions and recommendations followed passages

²¹¹ This is in line with the other report presented to the government by the Law Commission: Law Commission, 'Consent in Sex Offences - A Report to the Home Office Sex Offences Review' (27 July 2000) Unnumbered series, available at <http://www.lawcom.gov.uk/docs/consent.pdf>

discussing category V. The structuring of the sections neither invited nor accepted refutation.²¹³ The recommendations, distanced from consensual adult familial sexual activity appear to be responses to abusive non-consensual FSA. The conclusions are not based on S but are instead based on V and/or T.

The potential for CAFSA was paid lip-service. The construction of the text through inclusion of diversionary statements, removed the reader's attention from the subject under review. Then the movement from the specific to the generic occurred. Generally acceptable rational statements followed the move from the general to the different-specific: car → transport → boat; or here: consensual relationship → generic relationship → non-consensual relationship. The generally understood nature of incest as abusive was exploited: no explanation was given when the recommendations were made that they were only relevant and correctly reasoned with respect to non-consensual activities.

Chapter 5 of the Report did not explicitly cite morals as that main basis supporting the continued existence of the new CAFSA offence. The Report posed the question 'whether there is any justification for specific laws against incest or abuse within the family'²¹⁴ before it began its assessment. The SORT noted that much of the prohibited activity might well be criminal in terms of other offences.²¹⁵ No explanation was given as to why there should be a second set of offences or what the law was seeking to achieve in light of the fact the conduct was criminalised elsewhere.

The Report stated that the 'primary aim of the law in this area should be to protect against sexual exploitation within the family, especially, young and vulnerable people.'²¹⁶ Recommendation 35 proposed the offence of familial sexual abuse to replace and extend the existing offence of incest.²¹⁷ It followed very brief reasoning that noted the particular nature of close family relationships and the importance of family in society.²¹⁸ The Report reiterated 'the rationale for the offence is the need to protect children and more vulnerable people within the

²¹² Above n.4, [5.8.1] and [5.82].

²¹³ Gasper D., Apthorpe R., 'Introduction: Discourse Analysis and Policy Discourse' (1998) Vol.8(1) The European Journal of Development Research 1-15, 6.

²¹⁴ Above n.4, [5.5.1].

²¹⁵ Above n.4, [5.5.1].

²¹⁶ Above n.4, [5.5.3].

²¹⁷ Sexual Offences Act 1956 c.69 ss.10, 11, Criminal Law Act 1977 c.45 s.54.

²¹⁸ Above n.4, [5.5.4].

family, however that is defined.²¹⁹ However, it does not appear that the offence was formulated solely with the interests of the children and vulnerable taking centre stage.

Immediately before presenting recommendation 35, the Report concluded with the *non sequitur*: ‘the sexual relationships in the family that we propose should be prohibited can never be freely agreed.’²²⁰ This statement was not substantiated with reference to data. The statement is factually incorrect: CAFSA can and does occur. They can be freely agreed and are subject to punishment. Consent or lack thereof, does not feature as part of the offence’s requirements. Since protection of children and the vulnerable is achieved through other provisions, it does not follow that either require an incest statute capable of criminalising CAFSA.

It is therefore difficult to understand why the Review concerned itself with issues raised in the following statement: ‘it would not be right to seem to legitimise sexual relationships between adult family members.’²²¹ Far from not wanting to be the arbiter of morals, the Review appears to have concerned itself with the need to uphold basic moral standards.²²² The Review identified that incest raises complex issues including widespread unease and repugnance. The Report highlighted, though failed to substantiate, other statements designed to bolster its reasoning including the ‘clear justification in terms of protection of the family unit.’²²³

It was suggested that the law should increase protection and provide appropriate remedies.²²⁴ If protection of children and the vulnerable were the central aim then restricting criminalisation to penile-penetration only, is unjustifiably narrow. The old offence included merely penile-vaginal penetration; the recommendation for new offence widened this to include anal and oral penetration. The Report suggested that the restrictive (new) formulation does not condone other types of inappropriate behaviour but reflects the traditionally limited nature of the offence.²²⁵ Should tradition continue to prevent appropriate remedies for victims? The consultation seminar noted the widespread feeling that the law did not offer the

²¹⁹ Above n.4, [5.5.5].

²²⁰ Above n.4, [5.5.6].

²²¹ Above n.4, [5.8.3].

²²² Above n.4, [5.8.1].

²²³ Above n.4, [5.8.3].

²²⁴ Above n.4, [5.5.5].

²²⁵ Above n.4, [5.5.9].

protection that it should.²²⁶ The Report legitimised and endorsed other aspects raised in the public consultation. The Report does not reason why it did not do so with this statement, using it as justification to widen the ambit of the offence even further. The extension of the offence to contain only penetrative acts is insufficient. There is much activity, both penetrative and not, which can be deeply devastating to the individuals involved.²²⁷ Much of the penetrative abuse starts with intimate touching and grooming, leading to oral or anal activity before penile-penetration.²²⁸ It is therefore difficult to understand how extending protection could be equated to broadening the offence to an unacceptably wide and uncertain range of behaviour.²²⁹ The behaviour is clearly certain enough to proscribe sexual conduct with a child²³⁰ and equally the case with proscribing sexual conduct with a child family member.²³¹ If it is the 'family nature' of the offence that makes it necessary to keep an offence of family penetration (i.e. incest); why elevate penetrative acts over non-penetrative familial sexual acts? It therefore remains difficult to understand the Review's reasoning process, apparently evidenced based, yet presented without the evidence upon which its conclusions are based.

3.6 Conclusions

Operating within an NLR paradigm meant that a defined method of textual analysis was undertaken, rather than a simple 'reading' and identification of the reasoning as being outwardly sound but actually poor, as might be done by a doctrinal approach. The method, RPA, accepted the need for rhetoric in the reasoning process, and sought to identify the stories and narratives used in the creation of a consensus. In this case, narratives of seriousness, victims, and action through modernisation and deliberation, were key to the consensus formation. The recommendations were created after a failure to define the term 'incest' (T, generic) and its two sub-categories. The repeated use of the stigmatic term allowed under-

²²⁶ Above n.149, 340 [Introduction].

²²⁷ See evidence on effects including Schizophrenia: Glueck B.C., Early Sexual Experience in Schizophrenia, in Beigel H.G., ed. *Advances in Sex Research* (New York, Harper Row, 1963). Lidz T., et al. *Schizophrenia and the Family* (International University Press, New York, 1965); Other psychosis: Cavenar J.O., et al. 'A Clinical Note on Hysterical Psychosis' (1974) Vol.136 American Journal of Psychiatry 830-832.

²²⁸ See Finkelhor D., *Sexually Victimized Children* (Free Press, New York, 1979). Renvoize J., *Incest: A Family Pattern* (Routledge, London, 1982). La Fontaine J.S., 'Child Sexual Abuse and the Incest Taboo: Practical Problems and Theoretical Issues' (1988) Vol.23(1) *Man* 1-18, 4.

²²⁹ Above n.4, [5.5.9].

²³⁰ An offence under the Sexual Offences Act 2003 c.42 ss.5-8 including Rape and other offences against children under 13 and ss.9-15 Child sex offences.

²³¹ An offence under the Sexual Offences Act 2003 c.42 ss.25-29 Familial child sex offences.

description in the reasoning process. Labelling exacerbated the misrepresentation of information and facilitated the use of flawed deductive reasoning. A number of discursive techniques/tropes permitted the Report to give the appearance of addressing the issue of 'incest' objectively. The Review noted and then, assimilated and affirmed the 'taboo.' It did not assess familial sexual activity in light of the terms of reference. Support for the recommendations was gained through the reiteration of sensible moral axioms, and the proximity of the discussion of 'incest' to words suggesting the absence of consent.

Detailed analysis of the reasoning identified the use of the under-descriptive label T (generic incest) which allowed conflation of abusive familial sexual abuse (V) with consensual FSA (S). This is both a clever and interesting movement: T became a synonym for S and V. The recommendations were not worded with respect to CAFSA; instead, they appeared to target abusive (V) or generic (T) activity. T is therefore an incorrect synonym for S. By subsuming the consensual (S) into the generic (T) the SORT made plausible recommendations relevant to both generic and abusive; by virtue of targeting the generic, it also targeted the consensual (S).

This investigation has discovered the moral basis of the Report's recommendations concerning incest despite significant protestations to the contrary. What appeared to be *prima facie* common sense responses to the issue of generic 'incest' (T) followed flawed deductive reasoning, constant reiteration and emphasis on credibility and use of sophisticated framing techniques/tropes. There was no visible illogical argumentation. The recommendations outwardly appeared to be well reasoned and not the product of an irrational process. However, they were theoretically illogical, unsubstantiated, and failed to withstand scrutiny. Therefore, they provided a very questionable basis for government policy.

The following chapter will look at the action taken after the Report was delivered to the government. It will also discuss the provisions in light of sentencing guidelines and consequences and repercussions of a prosecution for an incest and/or familial sexual offence.

Chapter 4 - Sexual Offences Act 2003: Repercussions, Sentencing and Registration

4.1 Introduction

This Chapter investigates action following the Report *Setting the Boundaries*.¹ The previous chapter highlighted concerns with the reasoning process and recommendations of the Report. This chapter discusses the transformation of these recommendations into legislative provisions. The impact of these legislative provisions is then investigated in light of the policy decisions on incest.

The profound and serious implications following the use of criminal provisions against incest are investigated below. Potential consequences arise as soon as an accusation of sexual activity is made. Not all reported sexual activity would reach trial and eventually conviction stage, however, the approach to and effects of, sentencing and registration following case disposal by the court will be reviewed.

What becomes apparent within this chapter is the dissonance between the willingness to criminalise CAFSA and the state's aversion to imposing meaningful sentences. This aversion could stem from a number of reasons, though the lack of identifiable harm to a victim and the unease and unwillingness of sentencers to use morality are identified as contributing factors. There is a divergence between the reasoning behind the law² and behind the sentences imposed. Registration of sex offenders is automatic in certain circumstances, and some consensual familial sex offenders are required to register.³ Registration is shown to be inappropriate for CAFSA and it is reasoned that the significant implications and consequences of registration are sufficient to trigger 'victim status' within the Convention framework.⁴

¹ See Chapter 1 at n.36 for details.

² As identified above, Chapter 3 *Setting the Boundaries*.

³ Outlined at 4.5 Automatic Registration Upon Sentencing and 4.5.2.1 Scenarios Requiring Registration.

⁴ The ECtHR 'may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.' (Article 34 ECHR) To deter spurious litigants 'victim' has been interpreted by the Court as requiring an individual to be a victim of a breach. The Court has held that 'Such a "breach" results from the mere existence of a law which introduces, directs or authorises measures incompatible with the rights and freedoms safeguarded; this is confirmed

Both the unwillingness to impose a meaningful sentence and haphazard registration requirements indicate a systemic unease within the criminal justice system about dealing with the issue of 'incest', leading to discriminatory and inconsistent treatment. Bodies responsible for oversight of sentencing have taken fundamentally different approaches to the use of the law compared to the Home Office. This chapter highlights the failings and the inconsistencies, bringing to the fore the deficiencies in preparation for the ECHR analysis in the following chapter.

4.2 Protecting the Public - Sexual Offences Bill 2003

As seen in the previous chapter, *Setting the Boundaries* was open for public consultation. The public responses as well as the government response formed the document titled 'Responses to *Setting the Boundaries*: Reforming the law on Sex Offences.'⁵ Analysis of this document shows that of the 62 recommendations proposed by the Review, the government only disagreed with three.

The government agreed in part to Recommendation 43 (proposing continued sanctions against sexual penetration between adult close family members). The response noted that 'the fundamental motivation for this offence is the breach of trust, which underpins the rest of the proposals relating to familial sexual abuse.'⁶ This explanation conflicts with the previously stated reasons: 'the proposed lifelong prohibition is consistent with the existing offence of incest, which is well understood and is already accepted not only for genetic reasons, but also as a means by which moral standards are upheld.'⁷ This latter sentence suggested that the 'fundamental motivation' was therefore not a breach of trust but instead the moral and eugenic considerations. Non-inclusion of adoptive relationships on the basis that 'it would be an unnecessary intrusion for the law to criminalise sexual relationships between consenting adults who are not related by blood,'⁸ further supports this finding.

Recommendation 44 recognised that the criminal law should not treat people differently on basis of their sexual orientation. The government stated:

unequivocally by the travaux préparatoires' as held in *Ireland v the United Kingdom* Judgment of 18 January 1978, Series A no. 25, pp. 90-91, paras.239-240.

⁵ HL Deposited Papers, DEP 2002/2348, *Responses to Setting the Boundaries: Reforming the Law on Sex Offences* Deposited in the House of Lords Library, 19th November 2002.

⁶ Ibid 49.

⁷ Ibid 49.

⁸ Ibid 49.

‘the criminal law should not be used as an arbiter of private morality but an expression of what is needed to protect society as a whole. There is no good justification for it to be used to regulate consensual sexual behaviour between competent consenting adults where there is no harm to either of them.’⁹

Such statement justified the removal of criminal sanctions against homosexual relations. There is no indication that this reasoning does not apply to CAFSA situations. However, the government failed to apply it to the latter. There is an unexplained dissonance in the discourse justifying the governmental position. It is possible the government failed to appreciate that such divergent recommendations and reasoning would be delivered consecutively.

*Protecting the Public*¹⁰ was the government White Paper setting out their proposals for reforming sexual offences. The White Paper noted¹¹ that the proposals contained within it were based on the Sex Offenders¹², and the Sex Offences Reviews¹³ and relied upon the reasoning above. In the Foreword, the, then Home Secretary, David Blunkett, began by reiterating that ‘public protection, particularly of children and the most vulnerable, is this Government’s priority.’¹⁴ Mr Blunkett recognised that the government should not ‘intervene in the personal, private relationships of consenting adults.’¹⁵ The proposals concerning familial sexual activity (FSA) were placed within Chapter 4 of the White Paper titled ‘Special protection for children and the most vulnerable.’ It proposed the creation of two new offences relating to familial sexual activity replacing the existing s.10/11 Sexual Offences Act 1956 c.69 (SOA 1956) offences of Incest by a man and Incest by a woman.¹⁶ The Paper explained that the first of these new offences was the ‘familial sexual abuse of a child provision’ designed to protect children within loser family structures. It proposed an offence with a maximum penalty of 14 years imprisonment to reflect the seriousness of the offence and the abuse of a position of trust within a vulnerable environment.¹⁷ The second offence was entitled ‘prohibited adult sexual relationships’.¹⁸ The Paper stated that ‘despite involving consensual adults it is generally

⁹ Ibid 50.

¹⁰ Home Office, *Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences* Cm 5668 (TSO, London, 2002).

¹¹ Ibid 6.

¹² A review of the effectiveness of the Sex Offenders Act 1997 was announced by Charles Clarke, Minister of State for the Home Office in June 2000. Hansard HC vol.352 col.395-396 W (26 June 2000). The report produced was *Home Office/Scottish Executive, Consultation Paper on the Review of Part 1 of the Sex Offenders Act 1997* (Home Office Communications Directorate, London, 2001).

¹³ Reference to above n.1, *Setting the Boundaries*.

¹⁴ Above n.10, 5 [Foreword].

¹⁵ Above n.10, 5 [Foreword].

¹⁶ Above n.10, 26 [58].

¹⁷ Above n.10, 26 [58].

¹⁸ Above n.10, 26 [59].

believed that all such behaviour is wrong and should be covered by the criminal law.¹⁹ This mirrors the conclusions in *Setting the Boundaries*.²⁰ No in-depth explanation or reasoning was given. It appears that reasoning from *Setting the Boundaries* was used to justify the proposals, for example ‘there is evidence to suggest that some adult familial relationships are the result of long-term grooming by an older family member and the criminal law needs to protect adults from abuse in such circumstances.’ Such a reduced maximum penalty of only 2 years imprisonment appears out of line with other abusive or coercive offences. This suggests that there may be other silent reasons acting within the reasoning process.

The Sexual Offences Bill²¹ was introduced into the House of Lords on 28th January 2003. James Morton stated that ‘sadly the opportunity to reform the incest laws has not been taken.’²² This statement is probably too strong as a number of substantive changes were introduced and will be detailed below. It was immediately declared a ‘deeply flawed Bill’ that was ‘fuelled by public hysteria.’²³ The Bill set out (clause 68) Sex with an adult relative: penetration and (clause 69) Sex with an adult relative: consenting to penetration.²⁴ The explanatory notes explained that clauses 68/69 (later enacted as s.64/65 Sexual Offences Act 2003) did not apply to adoptive relatives.²⁵ At the second reading in the Lords, the Minister of State for the Home Office, Lord Falconer presented the Bill on behalf of the government.²⁶ He presented, though only in brief outline, most of the offences proposed within the Bill, with clauses 68 and 69 being notable exceptions.²⁷ Lord Falconer stated:

‘the sexual offences that I have outlined today are sensible, consistent and balanced. We have dragged the law on sexual offences into the 21st century, in a way which will treat everyone in society equally.’²⁸ Clauses 68 and 69 were agreed without amendment on 19th May 2003.²⁹

¹⁹ Above n.10, 26 [59].

²⁰ Above n.1, Vol.1, [5.8.1][5.8.2][5.8.3].

²¹ Sexual Offences Bill 2003 HL Bill 026 (28 January 2003).

²² Morton J., ‘Opinion – The Sexual Offences Bill’ (2003) Vol.67 *Journal of Criminal Law* 183.

²³ Bennion F., *Sexual Ethics and Criminal Law: A Critique of Sexual Offences Bill 2003* (Lester Publishing, Oxford, 2003) 6.

²⁴ See Annex 11.

²⁵ *Explanatory Notes for Sexual Offences Bill 2003 HL Bill 026* (28 January 2003)

<http://www.publications.parliament.uk/pa/ld200203/ldbills/026/en/03026x--.htm> accessed 29 March 2011.

²⁶ Hansard HL vol.644 col.771 (13 February 2003).

²⁷ Hansard HL vol.644 col.774-5 (13 February 2003).

²⁸ Hansard HL vol.644 col.775 (13 February 2003).

²⁹ Hansard HL vol.648 col.555 (19 May 2003).

Clause numbering was altered at the Report Stage and during the Bill's third reading in the Lords, Lord Lucas moved an amendment, to alter those capable of committing the offence outlined in Clause 65 (now remunbered) [Sex with an adult relative: penetration]:

‘as far as I can see, is a collection of relatives who may be expected to share or will share consanguinity of 25 per cent or more. The relative missing from the list is a blood uncle or blood aunt.

They are likely to have a fair degree of contact with their nephews and nieces, and one might expect sexual relationships to develop in some circumstances. If the objection to incest is the closeness of blood, rather than something more emotional, why are uncles and aunts not included?’³⁰

Baroness Scotland of Asthal responded, stating:

‘Our general policy on the offences in Part 1 has been that the criminal law should intervene only if sexual behaviour is non-consensual, exploitative or abusive and that it has no role to play in consensual activity that does not cause harm. With regard to consensual sexual activity between adults who are closely related by blood, we continue to feel that the criminal law has a role to play in upholding morals and making a statement about behaviour that is not acceptable.

Although the familial child sex offences have been drawn more widely than the old incest offences in order to reflect the opportunities for the abuse of children that exist in the family unit, we are content that the primary motivation for the "sex with an adult relative" offences should be concerned with morality and eugenics—gene mutation in children born of same-blood unions.’

There is disunity in the arguments propounded. *Setting the Boundaries* noted the weakness of the genetic argument and did not seek to rely upon it.³¹ It did not rely on the moral argument, which it noted in a pluralistic society was inherently weak. Instead, it relied on the protection of vulnerable children argument. Chapter 3 identified that the reasoning process within the Report appeared to veil a moral offence, even though the Review expressly excluded reliance on morals: reliance on the protection of children argument was clearly not applicable to consensual adult relationships.³²

Baroness Scotland continued:

‘I appreciate that aunts and uncles are prohibited by law from marrying their nephews and nieces, but that is also true of other categories of relative for example, adoptive parents and their adoptive children. Uncles and aunts have never been included in the incest offences, and

³⁰ Hansard HL vol.649 col.741 (17 June 2003).

³¹ Above n.1, Vol.1, [5.1.8][5.1.9].

³² See above 3.5, these two issues have been brought together through illogical reasoning and the assimilation of the ‘consensual’ into the larger ‘generic’ group which has high affinity and is seen as synonymous with the ‘abusive’.

we can see no reason to make sexual activity between such relatives a criminal offence now. I regret to say that, for those reasons, I cannot accept the amendment.’³³

Lord Lucas responded:

‘My Lords, I am content not to pursue the question of morality. I am happy to leave the noble Baroness and the Government to theirs... [...]...

I am surprised to see that, if we criminalise the relationship between a young girl and her half-brother, which is likely to be perfectly ordinary and innocent and less likely to be abusive than a relationship between an uncle and a niece, the Government will not, on the basis of eugenics, also include the uncle-niece relationship.

I shall not press the amendment and beg leave to withdraw it.’³⁴

The Bill passed in the Lords the same day and went to the Commons. During the review of the proposed legislation in Standing Committee B, Mr Humfrey Malins, MP for Woking, proposed the same addition of ‘uncle, aunt, nephew or niece.’³⁵ The Solicitor-General, Harriet Harman responded:

‘the original incest offences in the Sexual Offences Act 1956, on which the offences are based, were founded equally on fears of genetic abnormalities in children born of a close blood union and on the public distaste for sexual relationships between such close blood relatives.’³⁶

What the Solicitor-General said is in direct conflict with earlier findings of this thesis.³⁷ When the Act returned to the Lords on 13th November 2003 the Commons had amended Clause 65 (renumbered) and inserted ‘uncle, aunt, nephew or niece.’³⁸ Without further debate or comment, Baroness Scotland who, five months earlier was against the amendments, proposed that the House ‘do agree with the Commons in their amendments.’ The House then agreed to this. Baroness Scotland, in her own words had ‘no reason’ to support the amendment in June 2003, yet in November 2003 she supported the additional kin without comment. Baroness Scotland’s actions are discrepant; she noted the need to intervene only when behaviour is non-consensual yet she supported inclusion of consensual activities.

The law was reasoned on child protection and protection of the vulnerable, yet when the finite detail was challenged, the reasoning changed to upholding morality and eugenic concerns.

³³ Hansard HL vol.649 col.742 (17 June 2003).

³⁴ Ibid.

³⁵ Hansard HC Standing Committee B ‘Sexual Offences Bill 2003 [Lords]’ col.229 (16 September 2003).

³⁶ Ibid col.230.

³⁷ See above 2.6 Protecting Daughters, identifying the reasoning behind the original pre-codified (SOA 1956) law as protection of daughters from their fathers and concern with inadequate legal protection through the Criminal Law Amendment Act 1885.

³⁸ Hansard HL vol.654 col.1639 (13 November 2003).

4.3 Sexual Offences Act 2003

The Sexual Offences Act 2003 c.42 (hereafter SOA 2003), which received Royal Assent on 20th November 2003, prohibited a significant array of non-consensual conduct. Rape is prohibited in section 1 of the Act; Sexual Assault and Assault by Penetration covers other non-consensual activity. Sections 5-8 concern Rape and other offences against children under 13. Causing or inciting sexual assault with a child has a maximum penalty of 14 years; Rape and Assault by Penetration of a child has a maximum of life imprisonment. Sections 9-15 detail Child Sex Offences including Sexual Activity with a Child (s.9) and Causing a Child to Watch a Sex Act (s.12). Sections 16-24 detail the Abuse of Position of Trust provisions. These comprehensive provisions detail a number of 'positions of trust' that make sexual activity illegal. These positions are analogous to any familial relationship. Sections 25-29 are the provisions proscribing sexual activity with child family member. This includes penetrative activity (s.25(6)) with a maximum penalty of 14 years' imprisonment. A comprehensive set of provisions exist covering all non-consensual sexual activity with a family member, and all consensual sexual activity with a child family member. The only sexual activity not covered by other provisions within the SOA 2003, and criminalised by s.64/65, is consensual familial penetrative activity.

The SOA 2003 substantially overhauled criminalisation of incestuous sexual activity. It repealed the 1908 offences of Incest by a Man and Incest by a Woman. New offences entitled Sex with an Adult Relative removed anomalies created by the gender specific offences.³⁹ The Act extended the law to cover other previously non-prohibited persons including uncles, aunts, nieces and nephews. It now includes sexual activity with a family member of the same sex. The offence became gender neutral to avoid discrimination.

Section 64 criminalises sexual penetration with an adult relative. 'A', must be over 16, and who can be of either sex, is prohibited from having penetrative sexual relations with 'B', who is over 18, if 'A' is 'B's' parent, grandparent, child, grandchild, brother or sister, including half-brothers and sisters, uncle⁴⁰ or aunt⁴¹, niece or nephew.⁴² Thus, the offence concerns only blood relationships: uncle, aunt, niece and nephew initially excluded from the prohibition were added after debate.

³⁹ See Annex A13 for visual comparison of the kin covered by the prohibition.

⁴⁰ SOA 2003 s.64(3)(a) Defined as the brother of a person's parent.

⁴¹ SOA 2003 s.64(3)(a) Defined as the sister of a person's parent.

⁴² SOA 2003 c.42 s.64(3)(b) Defined as the child of a person's brother or sister.

The open-ended terms 'grandparent' and 'grandchild' catch all ascending and descending relatives in the maternal and paternal lines. Adopted relatives were omitted from the prohibition.⁴³ Thus, the individuals covered by the prohibition appear to reflect a eugenic concern. It appears such basis influenced the Lords amendment.⁴⁴ A man could still have sexual relations with his wife's daughter or son and face no consequences for this. Similarly, he could have relations with his wife's mother or sister, or father's wife. The prohibited kin enumerated in the Act increased to 14 individuals spanning at least five generations, including an unlimited number of ascending and descending generations.⁴⁵ The SOA 2003 widened the prohibited acts from merely penile-vaginal penetration to sexual anal, oral and vaginal penetration. The Act therefore substantially widened the number of individuals who could be caught engaging in consensual sexual activity and the range of acts that could lead to prosecution. At the same time, it substantially reduced the maximum penalties available. A further discussion of these penalties occurs below, after issues of sentencing and disposal of CAFSA are first addressed.

4.4 Case Disposal - Sentencing

The following section investigates the sentencing provisions used by the courts. Particular to the familial penetration/consent to penetration offences is the difficulty in identifying and applying the concepts of seriousness and harm. Seriousness is the key concept, comprising culpability and harm, which is used to determine the sentence. Harm is a component, which must be identified at the sentencing stage,⁴⁶ yet is not present in CAFSA cases.⁴⁷ The framework for sentencing will be reviewed below, as will the maximum sentences and those that the courts have imposed to date.

The Sentencing Council for England and Wales provided guidelines on sentencing. The Coroners and Justice Act 2009 created this Council, which was intended to promote greater transparency and consistency in sentencing and to maintain judicial independence.⁴⁸ The

⁴³ This anomaly was remedied by the Criminal Justice and Immigration Act 2008 c.4 Sch.15 ss.5, and 6, inserting adoptive parent within the term 'parent'; and 'child' includes an adopted person within the meaning of Chapter 4 of Part I of the Adoption and Children Act 2002. Criminal Justice and Immigration Act 2008 s.7 provides for the disapplication of provisions altering the status conferred by adoption. This means that adoptive parents and children are now covered by s.64/65 SOA 2003.

⁴⁴ See above 4.2 Protecting the Public—Sexual Offences Bill 2003.

⁴⁵ See Annex A13.

⁴⁶ Criminal Justice Act 2003 c.44 s.143(1), hereafter CJA 2003.

⁴⁷ See 4.4.1 Scenarios for Case Disposal.

⁴⁸ Coroners and Justice Act 2009 c.25 s.118(1), hereafter CJA 2009.

Sentencing Council, like its predecessors operates as an independent, non-departmental public body of the Ministry of Justice. It replaced the Sentencing Guidelines Council⁴⁹ (hereafter SGC) and the Sentencing Advisory Panel.⁵⁰ The SGC's definitive guidelines remain relevant until they are replaced by new or updated guidelines. The purposes of sentencing are not found within Guidelines and instead have a primary legislative footing. The following section details a number of scenarios that will be used to understand and analyse the purposes of sentencing.

4.4.1 Scenarios for Case Disposal

A number of CAFSA scenarios may be of use to highlight the impact of sentencing on the individuals:

Relevant provision, s.64, 2003 Act: H – 37-year-old male and I – 35-year-old female. H and I are brother and sister. Both were placed into care after I's birth following their mother's breakdown. Both knew of the existence of the other sibling but had no idea as to the sibling's identity. H met I through work colleagues. They meet on a number of occasions and a relationship developed. They decided to marry, and only at this point did they discover their family tie. They decided to continue their relationship.

Relevant provision, s.64/65, 2003 Act: J – 20-year-old male and K – 20-year-old male. J and K are identical twins. Following a period of horseplay J and K engage in regular fallatio and anal penetration with each other.

Relevant provision, s.64, 2003 Act: L – 17-year-old male and M – 20-year-old female. L and M are brother and sister. Over a prolonged period, L and M have been engaging in consensual oral and vaginal intercourse.

Relevant provision, s.65, 2003 Act: P – 18-year-old female and Q – 17-year-and 364 days old male. P and Q are half-brother and half-sister. P consented to oral sexual activity with Q.

4.4.2 Purposes of Sentencing

The Criminal Justice Act 2003 s.142 mandates that each court have regard to the five purposes of sentencing when disposing of a case:

⁴⁹ Created by virtue of the CJA 2003 s.167. The Council was tasked with issuing definitive guidelines (CJA 2003 s.170(9)) which every court is obliged to have regard to when sentencing an offender (CJA 2003 s.172(1)).

⁵⁰ The Sentencing Guidelines Council was assisted by the Sentencing Advisory Panel (SAP) which produced advice, after consultation, for the Council to deliberate upon. CJA 2009 s.135 abolished both bodies.

‘Section 142 - Purposes of sentencing

(1) Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing—

- (a) the punishment of offenders,
- (b) the reduction of crime (including its reduction by deterrence),
- (c) the reform and rehabilitation of offenders,
- (d) the protection of the public, and
- (e) the making of reparation by offenders to persons affected by their offences.’

It is pertinent to assess each of the purposes of sentencing as applied to the group of individuals H-Q above, whose actions are not criminalised elsewhere in the SOA 2003. The Criminal Justice Act 2003 was the first attempt to overhaul sentencing policy since the Criminal Justice Act 1991. The 1991 Act placed desert as the central plank of all sentencing decisions.⁵¹ Though the 2003 Act ‘provides a list [it] does not provide a hierarchy between the justifications,’⁵² and Dingwall has suggested that in practice desert is likely to remain the primary determinant of the sentence.⁵³ Whilst the Act provided a menu of purposes for the judge to choose from, it could be argued that as long as at least one of the purposes is satisfied then the sentence is justified.

Obviously, individuals being sentenced have been pronounced guilty of the offence and are *prima facie* candidates for punishment. As seen above, the legislative process created ‘victims’ through the labelling process.⁵⁴ Once this externally imposed label is removed from the consenting adults for example, with H and I, and, J and K, it is necessary to identify what they are being punished for (other than breaking the rule). By removing the imposed label of a ‘victim’ the application of (a) the *[correct]* punishment of offenders becomes difficult. The offender has clearly broken a legal rule. The correct punishment builds upon the purposes of

⁵¹ Robinson P.H., ‘Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical’ (2008) Vol.67(1) Cambridge Law Journal 145-175.

⁵² Dingwall G., ‘Deserving Desert? Locating the Present Role of Retributivism in the Sentencing of Adult Offenders’ (2008) Vol.47(4) The Howard Journal 400-410, 402.

⁵³ Ibid.

⁵⁴ See above at Chapter 3.3.2 Creation and Protection of the ‘Victim’. See also Mankoff M., ‘Social Reaction and Career Deviance: A Critical Analysis’ (1971) Vol.12 Sociological Quarterly 204-218 stating ‘rule-breakers become entrenched in deviant roles because they are labelled “deviant” by others and are consequently excluded from resuming normal roles in the community.’

the law found during the legislative process: the court may have regard to the purposes of the law, using preparatory works.⁵⁵ Protection of children and the vulnerable is the explicitly stated purpose of the law.⁵⁶ Yet in the scenarios concerning H and I, and, J and K there is no vulnerable person for the law to protect. As seen throughout the legislative decision making process, there is some sympathy towards individuals in H and I, and, J and K's position. For the punishment to be meaningful to H and I, and, J and K, the reasons for punishment need to be clearly outlined. They need an explanation which is more comprehensive than 'their conduct is worthy of punishment' in addition to the acknowledgement that they have 'broken a legal rule.' As found in Chapter 3, these reasons have not been provided within the recommendation formation process.

The objective to reduce crime (b) is achieved through sentencing individuals to terms of imprisonment, which temporarily incapacitates them.⁵⁷ However, this is likely to lead to a return to the ambient level (therefore increase to pre-incapacitation levels) on release, if the offender has not been offered an alternative path. In addition, the offender may have learnt new criminal techniques whilst incarcerated, and an otherwise law-abiding citizen may assimilate into criminal circles.

In recent years, theories of deterrence have fallen out of criminological favour.⁵⁸ Positive, natural and social norms work to influence individual's behaviour in a multiplicity of ways. Whilst the law is able to provide a social-educative function, this becomes especially difficult when the reasons behind the law are unclear and not communicated.⁵⁹ As was seen in the previous chapters, there is a strong social taboo surrounding incest and FSA:⁶⁰ it is unlikely that the criminal law is going to deter individuals not already deterred by the strong social taboo, natural law norms or moral repugnance. In light of the personal and private nature of sexual acts, the individuals involved are unlikely to believe that they are going to be apprehended/caught engaging in the crime. Once investigatory attrition, for example, lack of evidence and prosecutorial attrition, and the public interest test are factored in, it becomes highly unlikely individuals would be deterred by a criminal sanctions against CAFSA. However,

⁵⁵ As derived from *Pepper (Her Majesty's Inspector of Taxes) v Hart* [1992] UKHL 3 (26 November 1992), [1993] AC 593.

⁵⁶ See above at Chapter 3.6 and 4.2 Protecting the Public–Sexual Offences Bill.

⁵⁷ Von Hirsch A., in Doob A.M., Webster C.M., *Offenders' Thought Processes* in Von Hirsch A., Ashworth A., Roberts J., eds. *Principled Sentencing; Readings on Theory and Policy* (Hart, Oxford 2009) 75.

⁵⁸ Von Hirsch A., Ashworth A., Roberts J., *Principled Sentencing; Readings on Theory and Policy* (Hart, Oxford 2009) 40.

⁵⁹ Above n.55.

⁶⁰ See above 1.7.1 Anthropological and Sociological Literature on Incest.

when imposing a sentence, these hurdles have been overcome; an individual being sentenced has been convicted of the offence.

Data is not provided to the court to allow it to make an informed assessment of the effectiveness of sentencing on the reform and rehabilitation (c) of individuals engaging in CAFSA. Sentences imposed to reform and rehabilitate are unlikely to be successful unless these concepts form an integral part of the sentence.⁶¹ Evidence of sentences handed down to date suggest Community Orders play a significant role: if reform and rehabilitation is to form a meaningful part of the sentence, the specific nature of the stigma attaching to sex offenders and the sex with an adult relative offence, also needs to be taken into account.⁶²

Sentencing an individual for committing an offence of familial penetration has only a tangential relevance to the protection of the public (d). No evidence has been provided suggesting that the public is receiving a tangible benefit by prohibiting CAFSA.⁶³ Whilst offences involving an abuse of a position of trust, grooming or coercion may be good indicators of future risk to the public, these are excluded in cases of CAFSA. Thus, such offences are not relevant to scenarios involving H and I, and, J and K. Protection of the public is unlikely to be a relevant factor when sentencing an individual for familial penetration or consent to penetration.

The making of reparation by offenders to persons affected by their offences (e) is unlikely to be relevant to the penetratee or the penetrator. Neither family member in a CASFA scenario is a 'victim'⁶⁴ and as such both are likely to be charged with the respective offence for example, J charged with s.64, K with s.65 or J charged with s.65, K with s.64. Reparation may be to the community, for 'offence caused' by CAFSA. However, it is difficult to ascertain and identify particular individuals who would be recipients of the reparation, or if the claim is the community requires reparation, that which ought to be repaired.

As can be seen, the purposes of sentencing are not easy to apply to a CAFSA scenario. Sentencing requires determination of the seriousness of the crime; therefore, the following section will investigate this.

⁶¹ See below 4.4.4 Sentences Available.

⁶² See below 4.5.3 Collateral Consequences.

⁶³ See 4.5.2.2 Familial Offenders Propensity to Commit Offences.

⁶⁴ See above 3.3.2 Creation and Protection of the 'Victim'.

4.4.3 Seriousness: Culpability and Harm

It has been suggested that the emphasis on culpability and harm should be the uppermost considerations for the court when sentencing, and these relate most closely to proportionality and desert.⁶⁵ The concept of seriousness is defined in the Criminal Justice Act 2003 s.143(1) which provides: 'In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.' Thus, to allow sentencing to occur the court must assess both culpability and harm when identifying the seriousness of the offence.

Culpability of individuals has been divided into four categories: intention, recklessness, knowledge and negligence.⁶⁶ A requirement of both s.64 and s.65 offences is knowledge (or reasonable expectation of knowledge) of the relationship with the other individual involved; intention to have penetrative sex or to consent to penetrative sex is thus required. A person therefore cannot be guilty of reckless 'penetration' or 'consent to' penetration. However, a person may be guilty through negligence, if it is charged that they could have reasonably been expected to know of the relationship between the parties.

The offence does not require intention to cause harm through the familial penetration or consent to penetration. However, for sentencing it is necessary to identify the harm caused by the penetration or consent to penetration. The *Definitive Guideline on Seriousness* identifies three subsets of harm: to individual victims; to the Community; and other types of harm.⁶⁷

The reasoning employed in the Report stage failed to identify any harm in consensual adult activity.⁶⁸ Instead, the Report reasoned using the protection of children and the vulnerable.⁶⁹ Although the Report discredited and sought not to rely upon eugenic reasons, these were raised within the legislative debate. There is possibility of harm to a community member (presumably one that brought the acts to the State's attention) who has knowledge of the

⁶⁵ Above n.52, 402.

⁶⁶ Sentencing Guidelines Council, *Guideline: Overarching Principles: Seriousness* (2004) http://sentencing-guidelines.gov.uk/docs/seriousness_guideline.pdf accessed 3 May 2010 [1.7].

⁶⁷ Ibid [1.9][1.12][1.13].

⁶⁸ The author is cognisant of the important Hart-Devlin debate on prohibition and criminalisation based on harm to public morals. It is accepted that 'state punishment is a practice that claims to be structured by certain definite aims and values' (Duff R.A., Garland D., 'Introduction: Thinking About Punishment' in Duff R.A., Garland D., eds. *A Reader on Punishment* (OUP, Oxford 1995) 1. The identification of these aims and values is of interest to answering the research question. Harm to public morals was never raised within debates, nor has it been used within *Setting the Boundaries*, see particularly [6.4.2] and the statement that the criminal law is not the arbiter of private morality. See also 4.2 Protecting the Public—Sexual Offences Bill 2003.

⁶⁹ See above at Chapter 3 Conclusion.

intercourse.⁷⁰ As noted above, truly consensual acts do not have ‘victims’ requiring protection from harm.⁷¹ The guideline noted that ‘in some cases no actual harm may have resulted and the court will be concerned with assessing the relative dangerousness of the offender’s conduct.’⁷² There is no evidence to suggest that consensual FSA is more dangerous than sexual activity between non-family members.⁷³ Inherent within the act is the absence of dangerousness: there is no identifiable harm resulting to an individual who participates in penetration or consent to penetration by a family member.

The guidelines give examples of harm to the community including economic loss, harm to public health and interference with the administration of justice.⁷⁴ Penetration or consent to penetration by a family member does not appear to fit these types of community harm. Within the category of ‘other types of harm’ the SGC noted that ‘some conduct is criminalised purely by reference to public feeling or social mores.’ They did not expand on this nor explain the ‘harm’ caused. It appears that the harm caused by familial penetration or consent to penetration would fall within this amorphous category. As seen in the previous chapter, the Report discounted reference to morality.⁷⁵ The lack of explanation of any damage caused by ‘harm-to-social-mores’ makes the sentencing exercise difficult. From the scenarios above, if H and I continue their relationship and it becomes public knowledge there may be some ‘harm-to-social-mores.’ However, the law has been predicated on protection of children and the vulnerable. It therefore appears illegitimate at the sentencing stage to bring in the ‘harm-to-social-mores’ concept that was explicitly excluded during the legislative formation and reasoning process.

The SGC explained that harm must be assessed in light of culpability. Individuals in the scenarios have engaged in consensual adult penetration or consent to penetration, knowingly consented to, or penetrated a family member, yet no harm resulted. There is an imbalance between culpability and harm. The offenders, with intention and knowledge of the relationship of the person being penetrated and/or by whom they have consented to be penetrated, have

⁷⁰ However if the penetration or consent to penetration is done openly and in view of others, the offender could be charged with an offence which accurately criminalises the harm caused by such which may be a s.5 offence of causing harassment, alarm or distress or s.4A causing such intentionally. Public Order Act 1986 c.64 s.5 and s.4A.

⁷¹ See above 3.3.2 Creation and Protection of the ‘Victim’.

⁷² Above n.66, [1.11].

⁷³ Excludes potential risk to offspring.

⁷⁴ Above n.66, [1.12].

⁷⁵ Above n.1, Vol.1 [1.5.1].

a high level of culpability. However, the harm that resulted is unidentifiable, resulting in the sentence being based upon culpability alone.

The SGC guideline stated that ‘the culpability of the offender in the particular circumstances of an individual case should be the initial factor in determining the seriousness of an offence.’⁷⁶ There are a number of aggravating factors likely to indicate higher culpability. Abuse of power and abuse of position of trust are relevant factors which may apply to an offence of penetration or consent by a family member; though are necessarily excluded by the presence of a consensual relationship. In the scenarios, H and I met through mutual friends and J and K started their activity through horseplay. They engage in consensual activity. The Criminal Justice Act 2003 s.166(1) makes provision for the court to take account of any matters which ‘in the opinion of the court, are relevant in mitigation of sentence’: clearly lack of knowledge is not available (as an integral part of the offence). The consensual nature of the offence and its non-abusive beginnings may thus act to mitigate the sentence.

Thus, a circular argument is seen in relation to sentencing. Sentencing is based upon the seriousness of the offence: it must involve an appreciation of the culpability and of the harm, that is or may be caused by, the offender’s actions. Decisions on culpability are made in light of harm, and decisions on harm, made in light of culpability. The SOA 2003 seeks to target the most serious of offences. However, the most serious harm resulting from CAFSA is shown to be mere offence to the community.

4.4.4 Sentences Available

Previous maxima⁷⁷ for the 1956 offences of ‘Incest by a man’ or ‘Incest by a woman’ were seven years’ imprisonment. Parliament legislated the new punishment available under s.64/65 SOA 2003, ‘Sex with an Adult Relative: Penetration’ and ‘Sex with an Adult Relative: Consent,’ to provide:

‘(5) A person guilty of an offence under this section is liable—

on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

on conviction on indictment, to imprisonment for a term not exceeding 2 years.’⁷⁸

⁷⁶ Above n.66, 5.

⁷⁷ SOA 1956 Sch.2 Pt II, Maximum for s.10 Incest by a Man with a girl under thirteen and so charged in the indictment was life.

⁷⁸ SOA 2003 s.64(5) and s.65(5).

A family member within the prohibited degrees can be found guilty, if he/she knowingly penetrated or consented to penetration with a listed family member. The removal of the high maximum penalty of seven years reflected a modernisation of the law, which implicitly noted the existence of CAFSA, and that other incestuous activity (coercive and that undertaken with children) is criminalised with higher maximum penalties elsewhere in the new Act.⁷⁹ The SGC produced a *Definitive Sentencing Guideline on the Sexual Offences Act 2003*⁸⁰ in April 2007 that noted a number of factors to take into consideration when sentencing individuals for the new s.64/65 offences. Sentences for public protection must be considered in all cases.⁸¹ This is a mandatory requirement, however as considered below, the need to protect the public does not feature in CAFSA cases.⁸²

The SGC Guideline provided the following table:⁸³

Prohibited adult sexual relationships: sex with an adult relative.

Maximum penalty for both offences: 2 years

| Type/nature of activity | Starting points | Sentencing ranges |
|--|--|---|
| Where there is evidence of long-term grooming that took place at a time when the person being groomed was under 18 | 12 months custody if offender is 18 or over | 26 weeks–2 years custody |
| Where there is evidence of grooming of one party by the other at a time when both parties were over the age of 18 | Community order | An appropriate non-custodial sentence* |
| Sexual penetration with no aggravating factors | Community order | An appropriate non-custodial sentence* |

* ‘Non-custodial sentence’ in this context suggests a community order or a fine. In most instances, an offence will have crossed the threshold for a community order. However, in accordance with normal sentencing practice, a court is not precluded from imposing a financial penalty where that is determined to be the appropriate sentence.

The SAP’s advice to the Council highlighted ‘The relatively low maximum penalty for these offences [which] reflects the fact that they involve sexual relationships between consenting

⁷⁹ Examples include SOA 2003 s.6 assault of a child under 13 by penetration, maximum sentence – life, s.9 sexual activity with a child, maximum sentence – 14 years.

⁸⁰ Sentencing Guidelines Council, *Definitive Guideline-Sexual Offences Act 2003* (30 April 2007, London) http://www.sentencing-guidelines.gov.uk/docs/0000_SexualOffencesAct1.pdf accessed 1 June 2009.

⁸¹ Ibid part 5, 92 [1].

⁸² See 4.5.2.2 Familial Offenders Propensity to Commit Offences.

⁸³ Above n.80, 93.

adults.’⁸⁴ It also suggested that the redefinition of the offences and the new low maximum penalty should feature in the Council’s guidance. The SGC reiterated the provision was an example of the criminal law being used against consenting adults. It noted that a defence to both offences exists if the blood relationship is not known and the defendant could not reasonably have been aware of it. The stance of the SAP and the SGC is fundamentally at odds with the law based on the Report for the Home Office (*Setting the Boundaries*). Recommendations 35 and 43, which proposed the new familial sexual abuse (s.64/65) offences, are reasoned on the erroneous statement the ‘the sexual relationships in the family that we propose should be prohibited can never be freely agreed.’⁸⁵ They are presented as tackling coercive (i.e. non-consensual) conduct.⁸⁶ The SAP and SGC based their low starting point for sentences on the fact that the relationships are entered into by consenting adults with the sentencing range being an ‘appropriate non-custodial sentence.’⁸⁷ The Council’s Guidance stated ‘where an offence involves no harm to a victim (other than the offensiveness of the conduct to society at large), the starting point for sentencing should normally be a community order.’⁸⁸ The SGC appears to have read into the Report’s reasoning and uncovered the true meaning in statements such as ‘the particular nature of close family relationships, and the importance of the family in society, justify special provision in the criminal law.’⁸⁹ The SGC were aware that they were providing guidelines for sentencing an offence based on protection of morals: such low sentencing point is out of line with guidelines given for coercive offences.

The sentence of a Community Order and consequent criminal record remains a significant imposition on a person wishing to have a consensual relationship. The imposition of a Community Order means the imposition of a ‘requirement.’⁹⁰ The requirements ‘must be

⁸⁴ Sentencing Advisory Panel, *Advice to SGC on Sexual Offences*, <http://www.sentencing-guidelines.gov.uk/docs/advice-sexual-offences.pdf> accessed 1 June 2009.

⁸⁵ Above n.1, [5.5.6].

⁸⁶ See 3.6.

⁸⁷ Above n.80, 93.

⁸⁸ Above n.80, 92.

⁸⁹ Above n.1, [5.5.4].

⁹⁰ Criminal Justice Act 2003 s.177

‘(1) Where a person aged 16 or over is convicted of an offence, the court by or before which he is convicted may make an order (in this Part referred to as a “community order”) imposing on him any one or more of the following requirements—

- (a) an unpaid work requirement (as defined by section 199),
- (b) an activity requirement (as defined by section 201),
- (c) a programme requirement (as defined by section 202),
- (d) a prohibited activity requirement (as defined by section 203),

selected by reference to the seriousness of the offence, the purpose(s) of sentencing that the court wishes to achieve, the risk of reoffending, the ability of the offender to comply and the availability of requirements in the local area.⁹¹ An SGC study found that 50% of all orders made have a single requirement and of those 65% were for unpaid work.⁹² The unpaid work requirement cannot be administered for less than 40 hours⁹³ and the average length of orders increased from 12.3 months (April 2005) to 14.3 months by December 2005.⁹⁴ Evidence detailed in the following section suggests that individuals who engage in s.64/65 offences are therefore likely to receive a Community Order.

4.4.5 Sentences Imposed for s.64/s.65 (2004-2008)

Following a Freedom of Information Act 2000 request (for this thesis) the Ministry of Justice produced the sentencing dispositions for the period 2004-2008 (see Table 2 below).⁹⁵ Only 25 sentences were handed down for s.64 offences over the reporting period. This is a drastic reduction when compared to the previous s.10/11 SOA 1956 provisions reported in the official statistics in Table 1 below. The number of offenders found guilty of the SOA 1956 offences reduced by 73% over the reporting period. Francis and Soothill investigated the use of the SOA 1956 provisions and hypothesised that their use was sparked by a moral panic concerning widespread child abuse.⁹⁶

-
- (e) a curfew requirement (as defined by section 204),
 - (f) an exclusion requirement (as defined by section 205),
 - (g) a residence requirement (as defined by section 206),
 - (h) a mental health treatment requirement (as defined by section 207),
 - (i) a drug rehabilitation requirement (as defined by section 209),
 - (j) an alcohol treatment requirement (as defined by section 212),
 - (k) a supervision requirement (as defined by section 213), and
 - (l) in a case where the offender is aged under 25, an attendance centre requirement (as defined by section 214).'

⁹¹ Sentencing Guidelines Council, 'Sentencing Advisory Panel "The Use of Community Orders"' in *The Sentence: The Sentencing Guidelines Council Newsletter*, Issue 05 (SGC/SAP, London, 2006).

⁹² Ibid.

⁹³ CJA 2003 s.199(2)(a).

⁹⁴ Above n.91.

⁹⁵ Personal email Communication, Graeme Fairnie providing Justice Statistics–Analytical Services, Ministry of Justice (Ref SENT(JSAS)121-10 (28/04/2010)).

⁹⁶ Francis B., Soothill K., 'Moral Panics and the Aftermath: A Study of Incest' (2002) Vol.24(1) *The Journal of Social Welfare & Family Law* 1-17. Soothill et al detail the number of cautions or convictions given for SOA 1956 incest offences through 1980-1998. The numbers peak at 243 convictions in 1988 falling to 79 in 1996. They conclude a 'remarkable' moral panic surrounded the widespread media coverage of the Cleveland Affair causing this surge in convictions.⁹⁶ Their research details the changing pattern of the victims with 26.8% under 13 in 1973. However, between 1988-96 approximately 51% of the victims

Table 1. Offenders found guilty at all courts or cautioned for indictable sexual offences: Incest (SOA 1956 s.10/11 and CLA 1977 s.54) (1991-2004).⁹⁷

| | | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 |
|--------|----------------------------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|
| Incest | <i>Guilty or cautioned</i> | 157 | 127 | 127 | 96 | 62 | 62 | 64 | 72 | 42 | 50 | 45 | 54 | 43 | 43 |
| | <i>Cautioned</i> | | | | | | | | | | | 7 | 4 | 5 | 8 |
| | <i>Cautioned as %</i> | | | | | | | | | | | 16 | 7 | 12 | 19 |

Table 2. Breakdown of sentencing disposals for s.64/65 SOA 2003, (2004-2008).⁹⁸

| | | 2004 | 2005 | 2006 | 2007 | 2008 ⁽¹⁾ |
|------|-----------------------------|------|------|------|------|---------------------|
| s.64 | <i>Discharge</i> | 0 | 2 | 2 | 0 | 1 |
| | <i>Fine</i> | 0 | 0 | 0 | 0 | 0 |
| | <i>Community sentence</i> | 0 | 1 | 3 | 5 | 3 |
| | <i>Suspended sentence</i> | 0 | 0 | 0 | 1 | 1 |
| | <i>Immediate custody</i> | 0 | 1 | 1 | 2 | 2 |
| | <i>Otherwise dealt with</i> | 0 | 0 | 0 | 0 | 0 |
| | <i>Total sentenced</i> | 0 | 4 | 6 | 8 | 7 |
| | | | | | | |
| | | | | | | |
| s.65 | <i>Discharge</i> | 0 | 0 | 0 | 0 | 2 |
| | <i>Fine</i> | 0 | 0 | 0 | 0 | 0 |
| | <i>Community sentence</i> | 1 | 0 | 1 | 0 | 1 |
| | <i>Suspended sentence</i> | 0 | 0 | 0 | 0 | 0 |
| | <i>Immediate custody</i> | 0 | 0 | 0 | 0 | 0 |
| | <i>Otherwise dealt with</i> | 0 | 0 | 0 | 0 | 0 |
| | <i>Total sentenced</i> | 1 | 0 | 1 | 0 | 3 |

(1) Excludes Cardiff Magistrates' Court for April, July and August 2008.

Table 2 displays a higher number sentences imposed, hence convictions, for s.64 offence (penetration) as compared to the s.65 (consent to penetration). There may be a number of factors for this, including that charges against s.64 offenders may include cases of non-consensual intercourse. However, s.65's construction necessarily requires consent as a component. There may also be a greater willingness to charge males with the penetration

were under 13. Thus, the previous incest offences were clearly targeted/used against child sex offenders instead of charging these offenders with one of the specific child sex offences.

⁹⁷ Data compiled from:

Home Office, *Criminal Statistics England and Wales 2001* Cm 5696 (National Statistics, London, December 2002) Table 5.12, 50.

Home Office, *Criminal Statistics England and Wales 2002* Cm 6054 (National Statistics, London, December 2003) Table 2.12, 45.

Home Office, *Criminal Statistics England and Wales 2003* Cm 6361 (National Statistics, London, November 2004) Table 2.12, 43.

Home Office, Home Office Statistical Bulletin RDS 19/05 2nd ed. *Criminal Statistics 2004 England and Wales* (National Statistics/Office for Criminal Justice Reform, London, November 2005) Table 3.12.

⁹⁸ Above n.95.

offence,⁹⁹ (although both males and females could be charged with sexual penetration: in stereotypical sex-roles, it is males who predominately and anatomically penetrate females).¹⁰⁰ This may be because s.64 is used as an alternative to other coercive penetration offences, for example s.1 rape. Stereotypical sex roles also suggest that the majority of offenders likely to be charged with a s.65 offence are females (females not having a penis to penetrate, and having a vagina to be penetrated and men being less likely to consent to sexual penetration.)¹⁰¹ There were only five sentences within the reporting period for s.65 offences: community sentences were imposed in three instances with the remainder being discharged. The sentences given reflect an unwillingness to use custodial punishment.

Of these 25 sentences imposed for s.64, the most numerous were community sentences with 12 imposed. Immediate custody occurred in only six cases. Only 24% of the sentences resulted in imprisonment. Unfortunately, data on duration of sentences or types of order is not yet available. In the last two reporting years (2007-2008) the number of sentences for s.64 exceeded the number of cases proceeded against.¹⁰² This suggests the new familial sexual offence provisions are used to secure conviction of individuals where the evidential burden is insufficient to convict of another offence, for example rape, where the lack of consent cannot be proved.

It can be hypothesised from the statistics that in disposing of s.64/65 offences, the criminal justice system treats these as relatively minor offences. There is a significant discretion to be exercised before the sentencing stage. The Report flippantly reasoned that this discretion would be sufficient to protect individuals from arbitrary prosecution. This discretion includes that of the police in deciding to investigate the alleged activity and their decision to refer to the Crown Prosecution Service (hereafter CPS) to bring charges. The CPS is required to satisfy

⁹⁹ Personal email Communication, Graeme Fairnie providing Justice Statistics–Analytical Services, Ministry of Justice (Ref SENT(JSAS)121-10 (22/07/2010)) 18 males proceeded against and 3 females for the s.64 familial penetration offence.

¹⁰⁰ SOA 2003 s.64(1)(a) a vagina or anus may be penetrated with a part of his body or anything else, or penetrates another person's mouth with his penis.

¹⁰¹ Above n.99, 7 females proceeded against and 1 males for the s.65 consent to familial penetration offence.

¹⁰² This is possible because of Criminal Law Act 1967 c.58 s.6(3) which provides that where a person is tried on indictment for any offence except treason or murder and the jury find him not guilty of the offence specifically charged in the indictment, the jury may find him guilty of an alternative offence, if the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial.

itself that the Full Code¹⁰³ test is met when exercising its discretion to prosecute. Firstly, the Crown Prosecutor must be satisfied that sufficient evidence exists for a 'realistic prospect of conviction' against the defendant, which is known as the evidential stage. Secondly, the Prosecutor has to be sure that it is *in the public interest for the CPS to bring the case to court*. Attorneys-General have endorsed the position echoed by Sir Hartley Shawcross, on public interest that 'it has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution.'¹⁰⁴ Cases reaching the sentencing stage have passed these two tests and both the police and CPS have exercised their discretion against the defendants.

Whilst evidence has shown that very few of the s.64/65 cases result in sentences other than a Community Order, there may be a number of situations where an individual may be required to register as a sex offender. The next section therefore looks at the imposition of automatic registration requirements contingent upon sentencing.

4.5 Automatic Registration Upon Sentencing

If prosecuted for consensual adult familial sexual penetration, individuals may face automatic registration requirements. The following section will outline the registration requirements and reasons for their imposition. It will assess the background to the notification provisions and investigate a number of scenarios where s.64/65 offenders may be required to register. Consequences of registration will be identified and potential human rights implications will be investigated for individuals affected by the familial penetration and or consent to penetration legislation.

Registration and notification requirements for persons convicted of a notifiable sexual offence have existed since the 1st September 1997 under the Sex Offenders Act 1997.¹⁰⁵ Part 2 of the Sexual Offences Act 2003, which came into force on 1st May 2004, replaced these provisions and apply retrospectively to persons subject to notification requirements under the 1997 Act.¹⁰⁶ Since 2007, registration is on the Violent and Sex Offender Register (ViSOR) which is 'designed to facilitate the work of Multi Agency Public Protection Arrangements (MAPPA)

¹⁰³ CPS, *The Code for Crown Prosecutors*, February 2010 (CPS Policy Directorate, London, 2010) [4.10]-[4.20].

¹⁰⁴ Hansard HC vol.483 col.681 (29 January 1951).

¹⁰⁵ Sex Offenders Act 1997 c.51 Part 1, hereafter SOA 1997.

¹⁰⁶ SOA 2003 Part 2.

by assisting co-operative working¹⁰⁷ between the police, probation and prison services. ViSOR's aim is to facilitate control of the risk of serious harm, which individuals placed on the register are thought to pose: the National Policing Improvement Agency suggested the register is 'designed to enhance protection of the public and reduce risk of serious harm.'¹⁰⁸ McAlinden noted the 1997 and thus 2003 Acts were 'designed with a key supervisory role in mind.'¹⁰⁹ ViSOR is no longer a simple catalogue of names and addresses: it has been transformed through successive legislative amendments into a huge database accessed by numerous actors including:

- '43 forces in England and Wales
- Police Service of Northern Ireland
- 8 Scottish forces
- Serious Crime Analysis Section (SCAS)
- Child Exploitation and Online Protection (CEOP) Centre
- Joint Border Operations Centre (JBOC)
- British Transport Police (BTP)
- HM Forces Service Police Crime Bureau
- Scottish Criminal Justice Social Work Organisations
- All Probation Service areas in England and Wales
- All Private and Public Sector Prisons in England and Wales
- Scottish Prison Service (SPS) Intelligence Bureau.'¹¹⁰

4.5.1 Origins of Registration

British media coverage of sexual offences has grown incrementally since the mid-1990s in large part reflecting events outside the United Kingdom, including offences by Marc Dutroux,¹¹¹ and interest in the United States concerning the location of sex offenders in response to the abduction of Jacob Wetterling. The *Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program*¹¹² was part of the *Violent Crime Control and Law Enforcement Act 1994*, and was the first initiative to introduce a state run system of registration. Thomas noted that 'in truth there ha[s] been no pilot schemes or indeed any research to suggest that a sex offender register could make a community safer.'¹¹³

¹⁰⁷ National Policing Improvement Agency, *Dangerous Persons Database ViSOR*, <http://www.npia.police.uk/en/10510.htm> accessed 22 April 2010.

¹⁰⁸ Ibid.

¹⁰⁹ McAlinden A., *The Shaming of Sexual Offenders: Risk, Retribution and Reintegration*, (Oxford, Hart, 2007) 100.

¹¹⁰ Above n.107.

¹¹¹ Critcher C., 'Media, Government and Moral Panic: The Politics of Paedophilia in Britain 2000-1' (2002) Vol.3(4) *Journalism Studies* 521-535, 522.

¹¹² 42 USC 14071

¹¹³ Thomas T., 'When Public Protection becomes Punishment? The UK Use of Civil Measures to Contain Sex Offender' (2006) Vol.1(1) *Sex Offender Treatment* 2.

Thomas suggested that since its inception the register has been continually strengthened and tightened, with little resistance to such measures in light of the prevailing 'popular punitive' attitude.¹¹⁴ The National Probation Service noted that 'ViSOR allows substantial information to be recorded on each nominal [registered individual],'¹¹⁵ and that 'making our communities safer and reducing re-offending is our highest priority.'¹¹⁶ The Home Office produced a consultation paper¹¹⁷ on sentencing and post-release supervision of sex offenders after two private members' Bills to introduce legislation failed.¹¹⁸ The Paper cited three reasons in support of notification: the ability of the register to help police identify possible suspects after a crime; the possibility it could help prevent crimes; and that it could act as a deterrent.¹¹⁹ Public outrage at the presence of paedophiles within the community gave the impetus for legislating,¹²⁰ with eighty-seven per cent of consultation respondents supporting placing an obligation on convicted sex offenders to register their address with the police.¹²¹

Each police force is required to keep a register of sex offenders who present for registration. The system had a number of problems with information not being shared between different protection agencies. During July 2000, the News of the World launched a high profile 'name-and-shame' campaign following the abduction and murder of Sarah Payne.¹²² On the 23rd and 30th July it published photographs and information on sex offenders, promising not to stop until it had done so for each one in the country and pressed for 'community notification.'¹²³ There are significant arguments for high-risk offenders' whereabouts to be easily ascertainable, for example through a register. However, the entry of other individuals subject to notification requirements including those convicted of CAFSA offences, may serve all parties, the individual, police and public, more harm than good.¹²⁴ The National Probation Service suggested the 'joint use of ViSOR increases the ability to share intelligence and enable

¹¹⁴ Thomas T., 'The Sex Offender "Register": A Case Study in Function Creep' (2008) Vol.47(3) The Howard Journal 227-237.

¹¹⁵ National Probation Service, Probation Circular 40/2006, *ViSOR Implementation*, 7th December 2006 [6.4].

¹¹⁶ Ibid [2.2].

¹¹⁷ Home Office, *Sentencing and Supervision of Sex Offenders—A Consultation Document*, Cm 3304 (HMSO, London 1996).

¹¹⁸ Sexual Offences Against Children (Register of Offenders) Bill (27 February 1996), Paedophiles (Registration and Miscellaneous Provisions) Bill (12 June 1996).

¹¹⁹ Above n.117, [43].

¹²⁰ Above n.109, 103.

¹²¹ Hansard HC vol.284 col.14 WA (25 October 1996).

¹²² Chas Critcher provides an excellent and detailed assessment of the campaign, see above n.111.

¹²³ See Thomas T., 'Sex Offenders, the Home Office and the Sunday Papers' (2001) Vol.23(1) Journal of Social Welfare and Family Law 103-8.

¹²⁴ This is expanded upon at 4.5.3.

the safe transfer of key information when these offenders move, in turn enhancing public protection measures.¹²⁵ However, there is no indication, that in 1997 or in 2003, an informed assessment of the appropriateness of including CAFSA offenders on the register was ever made. As will be shown below, this type of registration is unlikely to improve public protection and safety when applied to offenders charged with CAFSA offences.

4.5.2 Registering As a Familial Sexual Offender

Notification requirements apply to offences listed within Schedule 3, SOA 2003. The requirements apply where a person is convicted of an offence listed in Schedule 3¹²⁶; found not guilty of such an offence by reason of insanity¹²⁷; found to be under a disability and to have done the act charged against them in respect of such an offence¹²⁸; or is cautioned in respect of such an offence.¹²⁹ The type of offence, age of the victim and age of the offender all affect the requirement to register. The sentencing disposal affects the length of registration: custodial sentences result in a registration period, matching the period for a conviction to become spent within the Rehabilitation of Offenders Act 1974 c.53.

Under the 2003 Act, notification requirements regarding s.64/65 exist where, (a) the offender was under 18, he is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months; (b) in any other case, the offender, in respect of the offence or finding, is or has been -(i) sentenced to a term of imprisonment, or (ii) detained in a hospital.¹³⁰ Any man who committed an offence under s.10, SOA 1956 remains subject to the notification requirements if the victim or other party was under 18.¹³¹ Additionally anyone who committed an offence under s.54, Criminal Law Act 1977 c.45 (CLA 1977) (inciting girl under 16 to have incestuous sexual intercourse) is also subject to the registration requirements.¹³²

Under the original 1997 Act, only Incest by a man (s.10 SOA 1956) required registration.¹³³ This requirement did not apply where the victim was 18 or over. Cobley noted that ‘concern had also been expressed that the list of offenders should not include ‘unnecessary’ names where, for example, there were adult consensual acts or sexual offences of a comparatively minor

¹²⁵ Above n.115, [2.4].

¹²⁶ SOA 2003 s.80(1)(a).

¹²⁷ SOA 2003 s.80(1)(b).

¹²⁸ SOA 2003 s.80(1)(c).

¹²⁹ SOA 2003 s.80(1)(d).

¹³⁰ SOA 2003 Sch.3 s.32.

¹³¹ SOA 2003 Sch.3 s.4.

¹³² SOA 2003 Sch.3 s.12.

¹³³ Other than the CLA 1977 s.54 incitement offence.

nature.¹³⁴ Public protection was the impetus for the registration system. Therefore, the omission of notification requirements for those prosecuted under the ‘Incest by a woman’ s.11 SOA 1956, offence is an anomaly. Sex offenders are both male and female. As noted above, the register was designed to enhance public protection and reduce risk of serious harm.¹³⁵ Unless evidence to the contrary is adduced, a male incest offender within the s.10 offence has the same propensity to reoffend as a female offender within the analogous s.11 offence. The non-registration of women who engage in intra-familial sexual activity with children is a dangerous omission (if it is actually necessary for public protection to register incest offenders). Equally, if public protection was the guiding force behind the Act, it appears unnecessary to limit registration to cases where the victim was under 18. Limiting registration to those ‘committing an offence with individuals (family members) who were under the age of 18’¹³⁶ suggests underlying motives were used to delineate the offence including the recognition of the need to restrict registration to the most serious of offenders. This delineates the remainder that do not require registration as non-serious sex offences. As will be shown below, individuals may be subject to registration requirements where there is no risk to the public and where there is no need for public protection. Indeed, as there is no (or very limited) risk to the public in such cases, registration acts to punish the individual: something contrary to the guiding principles of registration proposed at the outset.¹³⁷ If punishment is an inherent yet silent reason for registration, this raises the question whether offenders guilty of s.64/65 offences deserve the same punishment as offenders guilty of rape and child sex offences.

4.5.2.1 Scenarios Requiring Registration

The following scenarios are examples of individuals engaging in non-coercive sexual acts which if prosecuted may result in the requirement to register on ViSOR:

Relevant provision, s.10, 1956 Act: X – 16-year-old male and Y – 17-years and 364 day-old female. X and Y are half-brother and sister. The notification requirements would apply if X was prosecuted where X and Y engaged in consensual (penile-vaginal) intercourse, either in or outside a relationship. This would be the case if X were: found guilty;¹³⁸ he is found not guilty of such an offence by reason of insanity, or is found to be under a disability and to have done

¹³⁴ Cobley C., ‘Keeping Track of Sex Offenders: Part I of the Sex Offenders Act 1997’ (1997) Vol.60(5) 690-699, 693.

¹³⁵ Above n.107.

¹³⁶ SOA 2003 Sch.3 s.4.

¹³⁷ Hansard HC Standing Committee D, col.8. (4 February 1997).

¹³⁸ SOA 1997 s.1(1)(a).

the act charged against him in respect of such an offence;¹³⁹ or, cautioned in respect of the offence.¹⁴⁰

Relevant provision, s.54, 1977 Act:¹⁴¹ C – 14-year-old male and D – 15-year-old female. C and D are half-brother and half-sister. They have estranged parents but are aware they share the same father. Their families lead separate lives and they meet at a party. While drunken C incites D to have sexual intercourse with him, is overheard and reported to the police. No sexual intercourse occurs. Should the police issue a simple caution to C, he will still be required to register.

Relevant provision, s.64/65 2003 Act: H – 37-year-old male and I – 35-year-old female. H and I are brother and sister.¹⁴² If either party is sentenced to imprisonment for a term of at least 12 months, they must register.

Relevant provision, s.64/65, 2003 Act: J – 20-year-old male and K – 20-year-old male. J and K are identical twins. Following a period of horseplay J and K engage in regular fellatio and anal penetration with each other. If J or K is sentenced to a term of imprisonment of at least 12 months; or detained in a hospital, then he shall be required to register.

The individuals in such cases present little risk to the public. It is questionable whether anyone convicted of a s.65 offence would *ever* be deemed to be a risk to the public. It would be interesting to determine the level of risk posed by an individual who merely consents to penetration by a family member. No known data is available on this. A person convicted of the s.65 offence may have been subjected to grooming but unable to prove this. Rather than the victim being prosecuted for a s.65 offence, such grooming of the s.65 victim (and then offender) should find the perpetrator/initiator facing the appropriate criminal sanction for familial sexual abuse.

¹³⁹ SOA 1997 s.1(1)(b).

¹⁴⁰ SOA 1997 s.1(1)(c).

¹⁴¹ CLA 1977 s.54 Inciting girl under sixteen to have incestuous sexual intercourse.

‘(1)It is an offence for a man to incite to have sexual intercourse with him a girl under the age of sixteen whom he knows to be his grand-daughter, daughter or sister.

(2)In the preceding subsection “man” includes boy, “sister” includes half-sister, and for the purposes of that subsection any expression importing a relationship between two people shall be taken to apply notwithstanding that the relationship is not traced through lawful wedlock.

(4)A person guilty of an offence under this section shall be liable—

(a)on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding £1,000, or both;

(b)on conviction on indictment, to imprisonment for a term not exceeding two years.’

¹⁴² Scenario details above at 4.4.1.

The above scenarios involve individuals with knowledge of the relationship. All acts (or attempts) are consensual. Even though there is no 'victim', registration requirements apply. The registration requirements are an attempt to protect the public by requiring registration of those committing serious offences. Serious offences are equated with risk to the public. The registration requirements are discriminatory, for example, non-registration of female s.11 offenders is an anomaly. At the same time, it appears the registration framework has the potential to capture individuals with no propensity to commit offences and who pose little risk to the public and are thus over-inclusive. The following section will look at offender's propensity to commit further offences.

4.5.2.2 Familial Offenders Propensity to Commit Offences

Soothill and Francis assessed previous criminal histories of convicted incest offenders in the period 1988-96.¹⁴³ They identified a pattern of 'remarkably constant... criminal histories of the males convicted over the years, 1988-96.'¹⁴⁴ Fifty per cent of males convicted of incest between the years 1988-96 had no previous convictions. Of those with convictions, 7.2% had multiple convictions including both sexual and nonsexual convictions. An average of 3.4% of those convicted of incest between the years 1988-96 had solely previous sexual convictions. Whilst approximately 50% of those convicted of incest therefore had previous convictions, this does not automatically lead to the presumption that individuals committing incest form part of a dangerous group. Indeed only 10.6% of those convicted had received previous convictions for a sexual offence.

In a separate study in the USA, information presented before a Subcommittee of the Judiciary House of Representatives noted that 'offenders who were related to victim were the least likely to reoffend.'¹⁴⁵ Winick stated that 'those who commit acts of sexual abuse against their child or spouse may pose no risk or only a minimal risk of victimizing others sexually.'¹⁴⁶ Registration therefore appears unnecessary to protect the public. The modus operandi of

¹⁴³ Francis B., Soothill K., 'Moral Panics and the Aftermath: A Study of Incest' (2002) Vol.24(1) The Journal of Social Welfare & Family Law 1-17. Note the study related to the s.10/11 SOA 1956 provisions which were widely used against those committing child sexual abuse within the family.

¹⁴⁴ Ibid 9.

¹⁴⁵ Taft B., Wilkinson R.A., *Ten-year Recidivism Follow-up of 1989 Sex Offender Releases* (Dept of Rehabilitation and Correction, Ohio, 2001) reproduced in Appendix of material for the *Hearing of 'Protection Against Sexual Exploitation of Children Act of 2005, and the Prevention and Deterrence of Crimes Against Children Act of 2005*, Hearing on H.R 2318 and H.R 2388, June 7th 2005, Serial No. 109-33

¹⁴⁶ Winick B., 'A Therapeutic Jurisprudence Analysis of Sex Offender Registration and Community Notification Laws' 213, 218 in Winnick B.J., and La Fond J.Q., (eds.) *Protecting Society from Sexually Dangerous Offenders: Law, Justice and Therapy* (American Psychological Association, Washington DC, 2003).

incest offenders is an interest in sexual relations with a family member rather than with the wider community. Thus, registration of an incest offender is unlikely to further public protection and registration requirements remain over inclusive when applied to s.64/65 offences.

4.5.3 Collateral Consequences

Very often, the criminal law has been deployed to provide stigmatisation as an end rather than a means.¹⁴⁷ Stigma is seen as a deterrent and is thought to be useful in helping reduce the level of offending. Deterrence has generally fallen out of favour¹⁴⁸ and it is interesting that stigmatisation has not followed. There are numerous consequences following the imposition of a criminal sentence, including the existence of a criminal record¹⁴⁹ and stigma¹⁵⁰ being often cited components helping distinguish criminal law from the private sphere.¹⁵¹ However, additional stigma attaches to individuals convicted of a registrable sex offence. McCaghy noted that 'it is obvious that many deviants must adjust their self-concepts and life styles to cope with actual or potential societal reaction.'¹⁵²

Tewksbury noted that data from his study¹⁵³ suggested that there was a social stigmatisation,¹⁵⁴ loss of relationships, employment and housing following entry upon a register.¹⁵⁵ If the period of imprisonment has not already deprived the family of financial resources, the strain will likely be increased when the offender's employer learns of the offence with the potential of dismissal and withdrawal of employment.¹⁵⁶ A significant

¹⁴⁷ See Chapter 7 'Stigmatising' in Walker N., *Punishment, Danger & Stigma: The Morality of Criminal Justice* (Blackwell, Oxford, 1980).

¹⁴⁸ See generally 4.4.2 Purposes of Sentencing, and above n.58.

¹⁴⁹ On criminal records, see Thomas T., *Criminal Records: A Database for the Criminal Justice System and Beyond* (Palgrave Macmillan, Hampshire, 2007).

¹⁵⁰ See generally Goffman E., *Stigma* (Pelican, Middlesex, 1968).

¹⁵¹ Schwartz R.D., Skolnick J.H., 'Two Studies of Legal Stigma' (1962) Vol.10(2) *Social Problems* 133. Rasmusen E.B., 'Stigma and Self-Fulfilling Expectations of Criminality' (1996) Vol.39 *Journal of Law and Economics* 519-544.

¹⁵² McCaghy C., *Deviant Behaviour* (Collier Macmillan, London, 1976) 87.

¹⁵³ Tewksbury, R. 'Collateral Consequences of Sex Offender Registration' (2005) Vol.21(1) *Journal of Contemporary Criminal Justice* 67-81, 68.

¹⁵⁴ Also affirmed by Massaro T.M., 'Shame Culture and American Criminal law' (1991) Vol.89 *Michigan Law Review* 1880-944. Bedarf A.R., 'Examining Sex Offender Community Notification Laws' (1995) Vol.83 *California Law Review* 885-939.

¹⁵⁵ Tewksbury R., Lees M., 'Perceptions of Sex Offender Registration: Collateral Consequences and Community Experiences' (2006) Vol.26 *Sociological Spectrum* 309-334.

¹⁵⁶ Becker G., *Human Capital* (Columbia University Press, New York, 1975). Hagan J., 'The Social Embeddedness of Crime and Unemployment' (1993) Vol.31 *Criminology* 465-491.

minority of registered sex offenders also experienced both verbal and physical assaults.¹⁵⁷ Shajnfeld and Krueger also noted the ability of registration and notification requirements to create public hysteria,¹⁵⁸ and Winick has suggested that 'the continued shaming and stigmatization... may produce anger in the discharged sex offender, further norm deviance, and, in extreme cases, even physical violence.'¹⁵⁹ Other problems noted include the fact that increasing or drawing the offender's attention to his perceived position of isolation may cause a return to delinquent behaviour as a coping mechanism.¹⁶⁰ Tewksbury has also suggested that on a wider scale such consequences and lack of reintegration might cause offenders to 'become increasingly isolated and frustrated, which could in turn lead to recidivism.'¹⁶¹

In her piece entitled *The Use of 'Shame' With Sexual Offenders*, McAlinden noted two types of shaming. The first was that associated with the traditional retributive approach consistent with state-led and popular responses. She called this 'disintegrative shaming' and suggested that 'far from ensuring offender reintegration, the net result is often labelling, stigmatization, ostracism and a return to offending behaviour.'¹⁶² The second type, 'reintegrative' shaming, affirms the offender's membership within law-abiding society. The latter is process-based where state and voluntary sector support and treatment networks, work together, to secure a return to non-criminal behaviour once the offender returns to society. Goffman noted the concept of 'courtesy stigma' that attaches to the offender's family,¹⁶³ and Ho suggested that the victim is implicated with shame forced upon them due to the fact they often share the 'same information, the same home, the same name' as the offender.¹⁶⁴ This is true of both consensual and non-consensual FSA. Labelling as a sex-offender means the offender is potentially forced to associate with other offenders with whom they would not otherwise associate, therefore exposing them to individuals who accept deviant behaviour as the norm.

¹⁵⁷ Shajnfeld A., Krueger R.B., 'Reforming (Purportedly) Non-Punitive Responses to Sexual Offending' (2006) Vol.25 *Developments in Mental Health Law* 81-99, 82.

¹⁵⁸ Ibid.

¹⁵⁹ Above n.146.

¹⁶⁰ Edwards W., Hensley C., 'Contextualising Sex Offender Management Legislation and Policy: Evaluating the Problem of Latent Consequences in Community Notification' (2001) Vol.45 *International Journal of Offender Therapy and Comparative Criminology* 83-101.

¹⁶¹ Above n.153.

¹⁶² McAlinden A., 'The Use of 'Shame' with Sexual Offenders' (2005) Vol.45 *British Journal of Criminology* 373-394, 373.

¹⁶³ See Goffman E., *Stigma: Notes on the Management of a Spoilt Identity* (Touchstone Books, New York, 1962).

¹⁶⁴ Ho J., 'Incest and Sex Offender Registration: Who Is Registration Helping and Who Is It Hurting?' (2007-2008) Vol.14 *Cardozo Journal of Law & Gender* 429-457, 429.

Thus in Braithwaite's words the 'stigmatization therefore increases the attractiveness of criminal subcultures.'¹⁶⁵

Pager identified the concept of 'credentialing'¹⁶⁶ where the state brands individuals, which qualifies them for discrimination or social exclusion. This can be seen to occur in the legal process on first contact with investigatory bodies. Arguably, more serious credentialing occurs following sentencing and registration. The register's purpose was for the police to keep track of the most dangerous offenders that posed a risk to the public. Placing an individual on a register stands the individual out as a more odious, more dangerous individual who poses a greater risk to society. This official labelling and stereotyping/stigmatisation therefore 'leads to an altered identity in the actor, necessitating a reconstitution of the self.'¹⁶⁷ There was never any attempt to review the s.64/65 offences against the impacts that flow from the registration on ViSOR. This is particularly important with such serious impacts potentially affecting non-dangerous consensual offenders.

4.5.3.1 Offenders Views of Registration

Offenders' perceptions of registration may affect their prospect of reoffending. As seen in the previous section when an offender feels the sanction is 'too severe, it may be too hard to overcome'¹⁶⁸ and this may ultimately lead to recidivism.

Tewksbury found that registered sex offenders 'universally'¹⁶⁹ perceive the registration as a 'good and valuable entity' that 'does make [a] positive contribution[s] to society'. However, registrants had split feelings concerning the system's ability to reduce recidivism. Tewksbury cited a registrant who believed the 'one size fits all'¹⁷⁰ policy was a problem. Along with others, the registrant believed that registration should take account of dangerousness, the completion of treatment and those whose victims were children. The registered sex offenders advocated for a greater distinction between types of sex offenders. They were supportive of an objective assessment to determine dangerousness and consequently registration status. Unsurprisingly

¹⁶⁵ Braithwaite J., 'Shame and Criminal Justice' (2000) Vol.42(3) Canadian Journal of Criminology 281-298, 287.

¹⁶⁶ Pager D., 'The Mark of a Criminal Record' (2003) Vol.108(5) The American Journal of Sociology 937-975, 942.

¹⁶⁷ Davis N., 'Labelling Theory in Deviance Research: A Critique and Reconsideration' (1972) Vol.13 Sociological Quarterly 447-474, 460.

¹⁶⁸ Tewksbury R., Lees M.B., 'Perceptions of Punishment: How Registered Sex Offenders View Registries' (2007) Vol.53(3) Crime & Delinquency 380-407, 386 citing Sherman L.W., Berk R.A., 'The Specific Deterrent Effects of Arrest for Domestic Assault' (1984) Vol.49(1) American Sociological Review 261-272.

¹⁶⁹ Ibid Tewksbury, 391.

¹⁷⁰ Ibid 394.

they ‘believe[d] that completing a risk evaluation during the time that a registrant is on the registry would be productive’.¹⁷¹ The next section will go on to address the legal challenges to the registration requirements, however it will first address the issue of the need to conduct an individual assessment by a MAPPA authority.

4.5.4 Legal Challenges to Registration Requirements

The Criminal Justice Act 2003 s.325 imposes a duty on a responsible MAPPA authority to undertake a risk assessment of all individuals on the sex offenders register. Therefore, if it is possible to undertake a review once the offender is on the register, it is possible and thus clearly appropriate to conduct a similar exercise to determine the initial suitability for registration. As the system currently stands, registration is tied to the sentence and the length of registration is correlated with the severity of the sentence¹⁷² and is based on the period proscribed in the Rehabilitation of Offenders Act 1974. The sentence imposed is not a good indicator or determinant of risk. Therefore, currently, potentially dangerous individuals may not be required to register or vice versa. Implementing a MAPPA style assessment may well be an appropriate and effective solution to determine suitability for registration.

Thomas reported that responses to the Government consultation were “‘largely against” any discretionary element to allow de-registration before the allotted time period was completed.’¹⁷³ Soothill and Francis noted a lack of rationale and suggested that ‘varying periods under different conditions seems more akin to continuing the punishment of sex offenders rather than representing appropriate measures to protect the public.’¹⁷⁴

When advising against any mechanism to allow a review of the registration period, the Home Office noted that the ‘provisions are tough’ and that additional advice beyond that of the police would be required to allow an assessment to be made. Therefore ‘a significant amount of bureaucracy would have to be created.’¹⁷⁵ The Parliamentary Under-Secretary of State for the Home Department suggested the ‘periods [of registration] are also proportionate to the seriousness of the offence, as it is established at the time of sentencing.’¹⁷⁶ However, he

¹⁷¹ Ibid 400.

¹⁷² A table detailing registration periods is found in the SOA 2003 s.82.

¹⁷³ Thomas T., ‘The Sex Offender Register: Some Observations on the Time Periods for Registration’ (2009) Vol.48(3) The Howard Journal 257-266 citing Hansard HC Standing Committee D, col.23. (4 February 1997).

¹⁷⁴ Soothill K., Francis B., ‘Sexual Reconvictions and the Sex Offenders Act 1997’ (1997) Vol.147 New Law Journal 1324-1325, 1325.

¹⁷⁵ Hansard HC Standing Committee D, col.8. (4 February 1997) Timothy Kirkhope.

¹⁷⁶ Ibid col.24.

ignored the issue of risk, which was supposedly the central concern of the registration scheme. He equated the registration periods with the sentencing requirement: 'it [registration] is linked to the sentence that the judge has passed when he has determined all the facts of the case and reached a conclusion on the gravity of the case and on the individual before him.' However, this reasoning is flawed. The judge does not make an independent assessment of risk when determining the seriousness of the crime, which in turn is the basis of the sentence. Whilst protection of the public must feature within the judge's reasoning process as mandated by CJA 2003 s.142(1)(d), the sentence length alone does not signify risk.

A particularly high-risk individual may receive a lenient sentence, as the gravity of the offence may have been low with equally low culpability. Such sentence does not determine risk. When the original Bill was debated in 1997, Alun Michael engaged in vigorous debate with Timothy Kirkhope. Michael noted the Bill did not incorporate risk. Kirkhope responded that:

'it is difficult to determine precisely the appropriate length of the registration period. It is essential to link the length of registration with that of conviction, because, on conviction, the court determine the guilt of the accused and the seriousness of the offence, which is reflected in the length of the sentence.'¹⁷⁷

The sentence is reflective of harm and culpability, and is not based on future risk. Protection of the public is an aim of sentencing. However, the Under-Secretary equated risk with sentence length. He felt that a review system was unnecessary because anyone sentenced to two-and-a-half years or more imprisonment is subjected to the lifetime notification requirement and being sentenced for such period equated to the individual posing a risk to society. Only individuals sentenced to less than two-and-a-half years see their registration requirements expire. He noted that 'the provisions are tough.' It is difficult to understand why anything need be tough if it is not a punishment and instead is a device to assist policing. The Under-Secretary's responses to questions and conduct in the Standing Committee suggested that rather than being a risk management system, registration was intended to be integral to the punishment imposed. In 2001, the Home Office noted that 'were the registration requirement to become more onerous, there could come a point at which the Act could no longer be seen as an administrative requirement.'¹⁷⁸

¹⁷⁷ Ibid col. 23.

¹⁷⁸ Home Office/Scottish Executive, *Consultation Paper on the Review of Part 1 of the Sex Offenders Act 1997* (Home Office/Scottish Executive, London/Edinburgh, 2001) ch.3 para.7.

In *Re Kevin Gallagher*, Mr. Justice Kerr noted that:

‘The proportionality of the measures is not to be judged by their impact on a particular individual, however. The scheme as a whole must be examined to see whether it goes beyond what is necessary to achieve the aim of protecting the public and deterring sex offenders from engaging in further criminal behaviour.’¹⁷⁹

He noted that ‘the gravity of sex offences and the serious harm that is caused to those who suffer sexual abuse must weigh heavily in favour of a scheme designed to protect potential victims of such crimes.’¹⁸⁰ Section 64/65 offences can be committed without a ‘victim’ and there is no evidenced potential of risk of serious harm to the public.¹⁸¹

Imperative to the justification of the interference is the ability of registration to achieve its stated aim and not simply be an additional penalty.¹⁸² Kerr J. held ‘the automatic nature of the notification requirements is ... a necessary and reasonable element of the scheme. Its purpose is to ensure that the police are aware of the whereabouts of all serious sex offenders.’¹⁸³ *Forbes v SSHD* endorsed this reasoning and justification of the notification requirements.¹⁸⁴

In April 2010, the Supreme Court gave judgment in *R (on the application of F) and Thompson v Secretary of State for the Home Department*.¹⁸⁵ The Supreme Court found the indefinite notification requirements of Sexual Offences Act 2003 s.82(1) incompatible with Article 8 ECHR and followed the Divisional Court in making a declaration of incompatibility. A Remedial Order¹⁸⁶ has been drafted and is to be laid before Parliament. The Order concerned the indefinite notification periods and provided for a review after 15 years where the offender was over 18 at the relevant notification date, and after 8 years where then offender was under 18.¹⁸⁷ Lord Phillip’s concern was with notification scheme’s proportionality.¹⁸⁸ Lord Hope noted that the requirements ‘do not contain any mechanism for the review of the justification for continuing the requirements in individual cases.’¹⁸⁹ The periods of registration within the

¹⁷⁹ *Re Kevin Gallagher* [2003] NIQB 26, para.19.

¹⁸⁰ *Ibid* para.24.

¹⁸¹ Above 4.5.2.2 Familial Offenders Propensity to Commit Offences.

¹⁸² Above n.179, para.24.

¹⁸³ Above n.179, para.25.

¹⁸⁴ *Forbes v Secretary of State for the Home Department* [2006] EWCA Civ 962.

¹⁸⁵ *R (on the application of F (by his litigation friend F)) and Thompson (FC) v Secretary of State for the Home Department* [2010] UKSC 17.

¹⁸⁶ The Sexual Offences Act 2003 (Remedial) Order 2011

http://www.legislation.gov.uk/ukdsi/2011/9780111512357/pdfs/ukdsi_9780111512357_en.pdf

accessed 25 August 2011.

¹⁸⁷ Proposing a new SOA 2003 s.91B(2)(a) and (b).

¹⁸⁸ Above n.185, per Lord Phillips [41].

¹⁸⁹ Above n.185, per Lord Hope [59].

Remedial Order still impose a significant burden on an individual convicted of a registrable offence.

The 'automatic nature of the scheme' may well be a necessary and reasonable element. However, it has not been evidenced that s.64/65 offences are appropriate for inclusion within the registration system. The case of *A v Scottish Ministers*¹⁹⁰ again raised the question of proportionality of the notification requirements and the legitimacy of the aim of registration. The Lord Ordinary made the following observation: 'the rigid and indeterminate nature of the scheme under discussion does not result in this petitioner having to bear an individual and excessive burden,'¹⁹¹ but noted that this may vary with different case facts. No challenge to the registration requirements has so far raised the argument that the requirements should not apply to a specific offence listed in Schedule 3 (in this case s.64/65).¹⁹² This is a potential avenue of challenge available to an individual found guilty of a notifiable offence. This argument may be particularly strong with respect to s.64/65. Serious questions as to the compatibility of registering s.64/65 offenders can be raised in light of the analysis in Chapter 3, showing the erroneous reasoning used to formulate the recommendations and guide legislative debate. The aim of the register was to protect children.¹⁹³ The overt aim of the provisions was to protect children and the vulnerable. However, once an analysis of the reasoning behind s.64/65 was made, it became clear that the current provisions are morally based.

As seen in the previous section, Cobley suggested that registration of incest was restricted to the s.10, SOA 1956 male offence with a victim under the age of 18 to prevent unnecessary names entering onto the register. 'Concern had also been expressed that the list of offenders should not include 'unnecessary' names where, for example, there were adult consensual acts or sexual offences of a comparatively minor nature.'¹⁹⁴ As suggested above, no evidence has been found to suggest that placing consensual sexual activity on the register protects the public, nor was there evidence that re-offending is reduced by placing individuals guilty of consensual acts within s.64/65 onto ViSOR.

¹⁹⁰ *A v Scottish Ministers* [2007] CSOH 189.

¹⁹¹ *Ibid* [52].

¹⁹² Statistics were not available as to numbers of registered s.64/65 offenders nor was there any indication that any case concerning registration had been brought by a s.64/65 offender.

¹⁹³ Hansard HC Standing Committee D, Third Sitting, col.90 (6 February 1997).

¹⁹⁴ Above n.134, 693.

Like the 1997 Act, legislative scrutiny concerning the inclusion of s.64/65 within the ambits of the 2003 registration system was insufficient. There was no evidence adduced regarding propensity to commit offences or risk to the wider society. The initial registration requirements were based on stereotypical beliefs that old men were committing offences (s.11, SOA 1956 women were exempt) against victims under 18 and posed the most serious threat to society. It was stated in Standing Committee that the law 'seek[s] to ensure that those who are intended to be targeted - that is, those who are a danger to children – are caught, but that those who are no danger to children are not included needlessly within the ambit of the Bill.'¹⁹⁵ It appears that the new system replicated the problems of the old law.

The notification requirements could be challenged on the basis that s.64/65 offenders are inappropriate for inclusion onto ViSOR. Research has not indicated any challenges to the registration requirements by s.64/65 offenders. Collateral consequences attaching to registration have been found to be numerous and severe. The scenarios explored above indicate the possibility of an individual being found guilty of notifiable offence within the 2003 Act but the conduct was not worthy of registration. Lack of proportionality between the legitimate aims pursued and criminalisation, sentencing and registration of CAFSA will undoubtedly leave open the possibility of challenge. The ill-conceived catchall registration provisions are not tailored to the aim pursued. The scenarios above detail a number of situations where individuals were involved in non-coercive CAFSA. There was neither a victim to protect nor any risk to society to be reduced by registration. Registration therefore appears to be a punishment.

4.6 Conclusion

This Chapter has shown the Sexual Offences Bill 2003 subsumed the reasoning within *Setting the Boundaries* to become the Sexual Offences Act 2003. Parliamentary debate in both chambers failed to remedy the deficient reasoning from the recommendation formation stage. The purposes of sentencing were investigated and the CAFSA offence was found to be difficult understand in light of these and the concepts of seriousness, culpability and harm were found difficult to apply to the new offence. The Sexual Offences Act sought to criminalise the most serious of offences and increase protection for victims. However, if the most serious harm resulting from CAFSA was mere offence to the community, then the inclusion of such activity within the Act remains questionable.

¹⁹⁵ Above n.193.

Only 30 sentences were imposed for incest-related offences in the period 2004-2008. This is a vast reduction compared to the old law which had 43 sentencing decisions its final year of operation. The evidence suggested a reorientation of the offence towards primarily consensual acts. However, Justice Statistics indicated that the new offences are being used as alternative verdicts presumably (but unconfirmed) for the penetrative offence of rape. This raises further questions beyond the scope of this thesis on the appropriate use of the criminal law. The data indicated that s.64 is being used as a catchall for crimes where there is insufficient evidence to secure conviction on other charges. It has been seen that other provisions more adequately reflect the gravity of a range of differing coercive, abusive and child sex offences with greater sentencing maxima.

The investigation found the potential for the sentences imposed for incest to have a devastating impact upon the individual(s) involved including where automatic registration requirements are triggered. It also found the aims of registration to be public protection from offenders posing a serious risk. The analysis has suggested that registration is unlikely to improve public protection and safety when used against s.64/65 CA/SA offences. As recent judgments have appreciated, the registration requirements have been significantly strengthened. The consequences of registration were shown to be significant and numerous with the registration requirements potentially having a greater impact than a custodial sentence. The 'one-size-fits-all' approach deemed unacceptable for sentencing has been shown to be equally unacceptable when concerning registration having potentially serious impacts for s.64/65 offenders.

Section 64/65 offences target consensual activity, there are no victims and there is no risk to the public, they are therefore inappropriate for inclusion onto ViSOR. The scenarios illustrate the law's failure to appreciate its aim (both the 2003 Act and registration (1997 as amended)): public protection. Requiring individuals in the scenarios to register is as questionable as their propensity to commit other sexual offences.

The following chapter seeks to understand the compatibility of the s.64/65 offences in light of the European Human Rights framework, which has been shown to be a central reason justifying their enactment.

Chapter 5 - Incest and European Human Rights

5.1 Introduction

As was seen in Chapter 3 above, European Convention on Human Rights¹ (hereafter ECHR) norms were integral to the discourse supporting the modernisation and recommendation formation process. The analysis identified that a discourse of modernisation fed into the recommendations both highlighting their creditability and gravitas, and reinforcing their quality and production in a deliberative process. As the investigation above found, the entire review of sexual offences was predicated upon the basis of a commitment to human rights and non-discrimination.² It was also seen that there were serious problems with the recommendations' reasoning and that their use in policy/law making purposes is thus problematic.

Cases concerning both consensual adult familial sexual activity (hereafter CAFSA) and human rights have not featured before the British Courts or the European Court of Human Rights (hereafter ECtHR). Issues of incest have arisen as secondary points of concern,³ but the ECtHR has never addressed the prohibition of CAFSA. This chapter seeks to understand the s.64/65 provisions in light of the relevant human rights norms and Court jurisprudence. Chapters 3 and 4 identified state failures in constitutional duties⁴ of legislative oversight concerning s.64/65 Sexual Offences Act 2003. This failure extended to the registration requirements imposed upon this sub-class of 'sexual offenders': it has been the argument in this thesis that there is little evidence to indicate that these individuals pose a threat to public safety and little propensity to reoffend.

The previous chapter highlighted that significant consequences and repercussions may result from the existence and use of the s.64/65 provisions. It also noted the difficulty in sentencing s.64/65 cases and the data suggested the provisions were used to sentence offenders where

¹ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5; 213 U.N.T.S. 221.

² Found within the terms of reference of the review, Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* Volume 1 (Home Office Communication Department, London, 2000) [0.3].

³ These cases have been identified and are listed in Appendix 3B.

⁴ Dawood Y., 'The Antidomination Model and the Judicial Oversight of Democracy' (2008) Vol.96 *Georgetown Law Journal* 1411-1485, Pt II Domination and Democracy. See Chapter 3.6 concerning *Setting the Boundaries*.

there was insufficient evidence for other offences, for example rape. The chapter then investigated the registration requirements justified on the basis of public protection and noted a number of human rights challenges in relation to these.

This Chapter uses ECtHR jurisprudence in order to understand the position of the s.64/65 provisions with human rights norms. The methodology is detailed above at section 1.6.4. As this section explained, the decision to operate in an NLR paradigm meant that whilst a legal analysis was undertaken, the cases used for analysis came from the section of 'data' rather than selecting cases on the basis of precedent. The data sets are provided in Appendices 3A-C.

This chapter will begin by reviewing the function of the ECHR before going on to detail the analysis of the research concerning the compatibility of s.64/65 and the Convention.

5.2 The European Convention on Human Rights

The Council of Europe produced the Convention for the Protection of Human Rights and Fundamental Freedoms, commonly known as the European Convention on Human Rights. The United Kingdom signed the Convention in November 1950 and was one of the first countries to do so. The European Court of Human Rights, an international court, was set up in 1959 and individuals are able to apply directly to the Court though they must have first sought a domestic remedy.⁵

Currently 47 countries have signed and ratified the Convention including a large number of former communist countries once part of the Soviet Union, and are obliged to respect the rights, not only of citizens but of all individuals within their jurisdiction. The status in domestic law of this international treaty varies greatly; from a status higher than that enjoyed by many Constitutions, to not even achieving the status afforded to domestic law. The latter situation existed in the United Kingdom until 2000 when the Human Rights Act 1998 c.42 entered into force. Whilst the Convention was not previously judicially enforceable in the domestic courts of the United Kingdom, the Government was obliged to comply with the Treaty effective since 3rd September 1953. As detailed above in section 3.2.1 the Labour Government elected in 1997 noted their commitment to domestic incorporation in their election Manifesto.⁶ The preamble of the Act stated that the Act is 'to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights.' One scholar stated 'incorporation was intended

⁵ ECHR Article 35(1).

⁶ Labour Party (Great Britain), *New Labour: Because Britain Deserves Better* (1997 Party Manifesto) (Labour Party, London, 1997).

to modernise society and refresh democracy.⁷ It was thought this would stem the flow of cases to the European Court in Strasbourg that had previously been the only source of remedy for individuals unable to cite ECHR obligations before domestic courts. Whilst the quality of the applications changed, the volume did not decline, possibly because of the greater awareness of Convention rights and the duty of national courts to consider Convention rights of their own motion. The Court has been experiencing an exponential growth in its caseload, with 152,000 pending applications as of the 30th April 2011.⁸

5.2.1 Incest and the ECHR

The English and Welsh legislation governing familial sexual conduct, more specifically incest, was enacted after the Human Rights Act 1998 was incorporated into domestic legislation. Thus, s.19 of that Act mandated a statement of compliance with the human rights obligations under that Act. The Minister presenting the Sexual Offences Bill made a statement of compliance when the Bill was presented to Parliament. The Joint Committee on Human Rights examined the Sexual Offences Bill in its 12th Report. In relation to the Sexual Offences Bill, the only concern raised was with:

‘clause 6, imposing liability on children under 13 for all sexual touching whether or not there is consent and whether or not it can properly be regarded as indecent, would not be proportionate to a legitimate aim so as to be justifiable under ECHR Article 8.2; and that in other respects, the Bill is unlikely to give rise to a significant risk of a threat to human rights.’⁹

There is no indication, other than scrutiny by the Joint Committee, that the government undertook a comprehensive review to understand the provisions in light of the human rights norms. Therefore this chapter uses ECtHR cases to investigate the position of domestic legislation and its compatibility with ECHR norms. The reasoning in *Setting the Boundaries*¹⁰ has already been shown to be problematic, however the author has not yet investigated the quality of the statements of compliance with ECHR norms made when recommending and enacting the legislation.

⁷ Fairclough A., ‘Human Rights: the Constitution in the Balance’ (June 2000) Context Issue 66.

⁸ European Court of Human Rights, *Pending Applications Allocated to a Judicial Formation* http://www.echr.coe.int/NR/ronlyres/92D2D024-6F05-495E-A714-4729DEE6462C/0/Pending_applications_chart.pdf accessed 8 June 2011.

⁹ Joint Committee on Human Rights, *Scrutiny of Bills: Further Progress; Sexual Offences Bill* (2002-03, HL 119, HC 765) [2.20].

¹⁰ See Chapter 3.6.

Setting the Boundaries explicitly mentioned Article 6, the right to a fair trial,¹¹ Article 7, freedom from retroactive penalties,¹² Article 8, the right to private and family life¹³ and Article 14, the right to non-discrimination in enjoyment of ECHR rights.¹⁴ Specifically within the sections discussing adult familial sexual activity, reference was made to *X and Y v The Netherlands* noting that the ‘ECHR ensures that the state must uphold its responsibility to provide a remedy in law so that a complainant can seek justice.’¹⁵ The case concerned Y who was unable to pursue a criminal case of rape due to her mental incapacity, and the requirement on the state to provide ‘practical and effective protection.’

5.2.1.1 Jurisdiction

The Court has jurisdiction¹⁶ to hear cases which are both inter-States and from individual applicants. Individual applications must come from individuals who claim to be a ‘victim’ of a violation of one of the rights within the Convention.¹⁷ This requirement prevents the Court from looking at legislation in *abstracto*. Admissibility criteria are set out in Article 35: this provides that individual applications under Article 34 shall be declared inadmissible if ‘(a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or (b) the applicant has not suffered a significant disadvantage.’

The ECtHR ‘may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.’¹⁸ So as to ensure that there are not spurious litigants, ‘victim’ has been interpreted by the Court to mean the individual must be a victim of a breach. The Court has held in *Ireland v the United Kingdom* that ‘Such a “breach” results from the mere existence of a law which introduces, directs or authorises measures incompatible with the rights and freedoms safeguarded; this is confirmed unequivocally by the travaux préparatoires.’¹⁹ The following section will address a number of uses of the ECHR.

¹¹ Above n.2, [0.5][1.2.6].

¹² Ibid [1.2.6].

¹³ Ibid [0.5][1.2.3][1.2.5].

¹⁴ Ibid [0.5][1.2.3][1.2.5].

¹⁵ Above n.2, [0.7][5.8.2] citing *X and Y v The Netherlands* (App no.8978/80).

¹⁶ ECHR Article 32.

¹⁷ ECHR Article 34.

¹⁸ Ibid.

¹⁹ *Ireland v the United Kingdom* (App no.5310/71) para.239-240.

5.2.2 Uses of ECHR

The core role of the ECtHR as a judicial body, designed to adjudicate between parties wishing to settle their legal disputes, is to provide a forum for legal exertion of power. The ECtHR is linked intrinsically to the movement of the power dynamic between the individual and the state, and sometimes between states.²⁰ As will be shown below; individuals, lobbyists, groups and governments use both the Convention and the ECtHR as a tool for numerous purposes including norm convergence, and commonly rights and liberty protection.

Academics have drawn on the ECHR and associated principles in their arguments; for example, Walsh used Articles 3 and 8 to advance her claim regarding criminalisation of drug possession.²¹ Stalford analogised ECHR doctrine and aims with that of the EU in furtherance of an inclusive family law having noted that ‘provisions of the [ECHR] inform and influence’ the application of EU law.²² Malik posited the use of the ECHR to ensure that discrimination law moved beyond a ‘minimalist standard,’ and thus to enhance domestic protection.²³

The ECHR was used by the Labour government to create a ‘sense of urgency and reform to the second chamber (in which the highest judicial court sat) [and] provided the opportunity to instigate a clearer separation of powers.’²⁴ The Convention was a tool used to support New Labour’s agenda and added weight to the argument supporting governmental reform for the abolition of the judicial branch of the House of Lords (hereafter HoL), leading to the creation of a new Supreme Court.

Lobbyists including the gay-rights movement have also used the ECHR: Cornides cited the attempt by ‘a homosexual couple to impose an obligation to legislate for “same-sex marriage” on all 47 Member States.’²⁵ Jackson noted that the ‘ECHR and the council continue to be seen as important external instruments for supporting domestic actors committed to promoting,

²⁰ Interstate cases include *Cyprus v Turkey* (App no.25781/94) and *Ireland v UK* (App no.5310/71).

²¹ Walsh C., ‘Drugs and Human Rights: Private Palliatives, Sacramental Freedoms and Cognitive Liberty’ (2010) Vol.14(3) *International Journal of Human Rights*, 425-441.

²² Stalford H., ‘Concepts of Family Under EU Law—Lessons from the ECHR’ (2002) Vol.16 *International Journal of Law, Policy and the Family* 410-434, 412.

²³ Malik M., ‘Modernising Discrimination Law’: Proposals for a Single Equality Act for Great Britain’ (2007) Vol.9 *International Journal of Discrimination and the Law* 73-94, 76.

²⁴ Flinders M., ‘Majoritarian Democracy in Britain: New Labour and the Constitution’ (2005) Vol.28(1) *West European Politics* 61-93, 82.

²⁵ Cornides J., *The ‘Right to Marriage’ According to the ECHR and the European Fundamental Rights Charter* http://works.bepress.com/cgi/viewcontent.cgi?article=1031&context=jakob_cornides accessed 01 October 2010.

defending, or consolidating liberal democratic governance.²⁶ He suggested that the ECHR can be used to 'push Russia toward adapting its legal and political culture to European norms.'²⁷

There have even been politically expedient uses of the ECHR by domestic courts: Krisch suggested that the HoL showed particular loyalty to the judgments of the ECtHR fashioned to support its continued existence. By applying the Strasbourg law, Krisch suggested that the HoL could claim that it was merely applying the law and exercising the parliamentary mandate given to it. This in turn positions the court as a necessary tool in legal protection and cements its existence: abolition of an organ protecting human rights being unthinkable. Krisch suggested that it was 'an attempt to defend its authority against challenge.'²⁸ The HoL has developed into a quasi-constitutional court with powers over executive and legislative action which is in strong tension with the previous role of courts under the British constitutional system.

Despite these strategic uses, the Convention's primary role has been human rights protection. O'Donnell noted that when a State intervenes within the private arena 'the organs of the Convention will act to moderate the consequences of such interference.'²⁹ Individuals litigating claims seek to overturn interference by the state or require the state to act where it has so far refrained from doing so. The impact of the ECHR is not always immediate. In *Poitrinol* it was argued that a doctrine of French criminal law, the forfeiture of the right of appeal for an accused who fails to appear in person, was a violation of the right to a fair trial. The French Courts remained resolute and unwilling to set aside their procedural rules even in light of an ECtHR judgment to the contrary. Thus the French Courts were unwilling to accede to the claims that they were not superior in deciding the correct rule to apply. It has been suggested that this was France 'drawing autonomous limits to protect a constitutional core from European interference.'³⁰ However a number of years later the legislature followed the ECtHR judgment and altered the law to prevent a conflict with human rights. The impact of the ECHR was felt in France though this did not benefit the applicant in the instant case; it was of benefit

²⁶ Jackson W.D., 'Russia and the Council of Europe: The Perils of Premature Admission' (2004) Vol.51(5) Problems of Post-Communism 23-33, 24.

²⁷ Ibid 31.

²⁸ Krisch N., *The Open Architecture of European Human Rights Law*, LSE Law, Society and Economy Working Papers 11/2007, 24.

²⁹ O'Donnell K., 'Protection of Family Life: Positive Approaches and the ECHR' (1995) Vol.17(3) Journal of Social Welfare and Family Law 261-279, 278.

³⁰ Above n.28, 12.

to all following the Convention induced legislative change.³¹ The following section will look at pervasive issues in the operation of the Court: the concepts of the margin of appreciation and European consensus.

5.3 Pervasive Issues

In seeking to understand the position of English and Welsh CAJSA provisions and relevant human rights norms, the investigation required an understanding of applicable concepts used by the Court. Three issues are particularly relevant when investigating the European Court of Human Rights. As noted above, the Court as an international Court is aware of its semi-precious position, and that High Contracting Parties have agreed to its exercise of jurisdiction: it has stated that 'its supervisory role [is] subject to the principle of subsidiarity.'³² The High Contracting Parties remain sovereign to the extent that they have acceded to the Court's jurisdiction and are, as sovereign nations able to exercise their autonomy and exit the Convention after giving necessary notice.³³ Abdullahi An-Na'im subscribed to the view that distinct cultural norms and the values they embody are manipulated by the powerful elite to further their own interests.³⁴ Academics have spent much time debating the universality of human rights.³⁵ Universalism and cultural relativism have often been portrayed as opposites on the rights spectrum.³⁶ Cultural relativism has been held to reflect the claim that 'international human rights should not apply or should apply only with a special interpretation to certain groups because the provisions in their normal form of application are alien to the groups in question.'³⁷ Cultural relativists highlighted the historical and conceptually reflective

³¹ The Committee of Ministers is tasked with supervision of the execution of judgments of the Court.

³² *Z and Others v United Kingdom* (App no.29392/95)

³³ ECHR Article 58 *Denunciation*:

1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.

³⁴ An-Na'im A.A., *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights in Human Rights in Cross-Cultural Perspectives: Quest for Consensus* (University of Pennsylvania Press, Philadelphia, 1992) 28.

³⁵ For a leading proponent see Slone R.D., 'Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights' (2001) Vol.34 *Vanderbilt Journal of Transnational Law* 527-596. Mullender R., 'Human Rights: Universalism and Cultural Relativism' (2003) Vol.6(3) *Critical Review of International Social and Political Philosophy* 70-103.

³⁶ See generally Lau H., *Sexual Orientation: Testing the Universality of International Human Rights Law* (2004) Vol.71(4) *The University of Chicago Law Review* 1689-1720.

³⁷ Singer M., 'Relativism, Culture, Religion and Identity' in Howland C.W., ed. *Religious Fundamentalism and the Human Rights of Women* (Palgrave, New York, 1999) 45-55, 46.

nature of Western values in the rights protected.³⁸ Teson defined relativism as ‘the position according to which local cultural traditions (including religious, political, and legal practices) properly determine the existence and scope of civil and political rights enjoyed by individuals in a given society.’³⁹ Both the ECHR’s scope and its geographical application has widened since its inception. Some sovereign nations are not in agreement as to the extent of protection afforded via human rights norms, whilst other nations feel that imposition of certain rights within their jurisdictions would be inappropriate. The Court recognises there are situations where it is necessary to provide deference in review, leaving some areas outside the scope of protection provided by the Court. The ECtHR has engaged two concepts to determine this level of deference: the margin of appreciation and European consensus. These will be discussed below.

5.3.1 The Margin of Appreciation

The doctrine of the margin of appreciation (hereafter MoA) is ‘based on the notion that each society is entitled to certain latitude in balancing individual rights and national interests, as well as resolving conflicts that emerge as a result of diverse moral convictions.’⁴⁰ Lestas suggested the MoA amounts to the claim that the ECtHR should ‘often *defer* to the judgment of national authorities on the basis that the ECHR is an *international* convention not a national bill of rights.’⁴¹ It has been described by academics as ‘analogous to the concept of judicial discretion,’⁴² and critically as having a ‘Trojan Horse-like character.’⁴³ Its history has been charted from the application of derogation clauses when it was first called a ‘discretion’⁴⁴ and it’s first explicit use in *Lawless v Ireland*.⁴⁵ It is now used by the Court to ‘reassure the State that its own interest in protecting itself would not be compromised by international policies.’⁴⁶

³⁸ Cobbah J.A.M., ‘African Values and the Human Rights Debate: An African Perspective’ (1987) Vol.9 Human Rights Quarterly 309-331.

³⁹ Teson F., ‘International Human Rights and Cultural Relativism’ (1984-1985) Vol.25 Virginia Journal of International Law 869-900, 870.

⁴⁰ Bakircioglu O., ‘The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases’ (2007) Vol.8(7) German Law Journal 711-734, 711.

⁴¹ Lestas G., *A Theory of Interpretation of the European Convention on Human Rights* (OUP, Oxford, 2007) 81.

⁴² Above n.40.

⁴³ De la Rasilla del Moral I., ‘The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine’ (2006) Vol.7(6) German Law Journal 611-624, 611.

⁴⁴ Above n.40 citing *Greece v United Kingdom* (App no.176/56).

⁴⁵ *Lawless v Ireland* (App no.332/57).

⁴⁶ Ostrovsky A.A., ‘What’s so Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals’ (2005) Vol.1(1) Hanse Law Review 47-64, 48.

The Court's use of the MoA without a principled theory concerns academics and draws criticism: it is in essence unprincipled⁴⁷ (or politely referred to as 'loosely principled'⁴⁸). Lord Lester was scathing in his assessment of the doctrine: 'the concept of the "margin of appreciation" has become as slippery and elusive as an eel. Again and again the Court now appears to use the margin of appreciation as a substitute for coherent legal analysis of the issues at stake.'⁴⁹ Letsas suggested that the deficiency is attributable to the failure to draw upon substantive rights theory to justify the conclusion reached in the particular case.⁵⁰ The MoA appears to have an inverse relationship to the identification of a European consensus. When the Court identifies a large Consensus on an issue it permits a very narrow MoA on the matter at issue: that is, the Contracting Party may act within a very tight set of constraints and the Court's assessment of State action will be strict.⁵¹ Where no Consensus on an issue is identified, the Court takes a hands-off approach and allows the Contracting Party a wide MoA within which it can act.⁵² The Court has held that the MoA varies according to a number of factors that have included 'the circumstances, the subject matter and its background.'⁵³ General measures of economic or social strategy⁵⁴ often permit the State to have a wide MoA although when 'the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of.'⁵⁵ A dual standard used by the Court to undertake its review is noted: there are 'suspect categories' and other cases. Suspect categories include race, sex or illegitimacy and the Court applies the strict standard of proportionality.⁵⁶

The failure of the Court to identify a coherent framework for when and how to use the MoA suggests there is little structure preventing its application from being entirely arbitrary. It is

⁴⁷ Bakircioglu O., 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases' (2007) Vol.8(7) German Law Journal 711-734, 731. Arai-Takahashi Y., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, Antwerp, 2002) 18.

⁴⁸ Above n.43, 614.

⁴⁹ Lord Lester of Herne Hill, General Rapporteur *The European Convention on Human Rights in the New Architecture of Europe*, in: Proceedings of the 8th International Colloquy on the European Convention on Human Rights (Strasbourg, Council of Europe, 1996) 227.

⁵⁰ Letsas G., 'Two Concepts of the Margin of Appreciation' (2006) Vol.26(4) Oxford Journal of Legal Studies 705-732, 705.

⁵¹ See the often cited case of *Dudgeon v United Kingdom* (App no.7525/76).

⁵² See *Dahlab v Switzerland* (App no.42393/98). *Sahin v Turkey* (App no.44774/98).

⁵³ *S.H. and Others v Austria* (App no.57813/00) para.65. *Schalk and Kopf v Austria* (App no.30141/04) para.96.

⁵⁴ *Schalk and Kopf v Austria* (App no.30141/04) para.97.

⁵⁵ *Kozak v Poland* (App no.13102/02) para.92.

⁵⁶ Arai-Takahashi Y., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, Antwerp, 2002) 169.

therefore open to the Court to cite the MoA in any case where it wishes to avoid a confrontation with a High Contracting Party. The position of the Court as an institution upholding 'Universal Rights' has therefore been placed into doubt; its ability to protect rights against egregious power abuses has also been brought into question. The Court's application of the MoA has supported critics of human rights and permitted opponents to engage in rights destruction: cultural relativism can be legitimately claimed in light of the Court's decisions. Cultural relativists have noted that human rights are not innate and are instead capable of being overridden depending upon the society in question. It was not intended that the Court would defer to all national sensitivities: indeed, its position and legitimacy could understandably be questioned if the Court were to permit High Contracting Parties to flagrantly abuse rights. However, on the same spectrum the Court is unlikely to want to get involved with minor issues and trivial breaches of rights. The Court therefore often seeks to ascertain a European consensus, which is another tool used to moderate its decision to review or not. This consensus is discussed below.

5.3.2 European Consensus

The ECtHR, tasked to adjudicate human rights cases against High Contracting Parties within its jurisdiction, is therefore in part responsible for helping to remedy a democratic deficit or the failure on the part of the state that permitted the breach to occur. Mere capitulation to the national sensitivities and interests would fail to deliver meaningful human rights protection. The Court's mantra that 'rights must be practical and effective not theoretical and illusory'⁵⁷ would be vacuous if it simply deferred to national governments.

Similar to the MoA, the 'European consensus' has no textual basis. As noted above⁵⁸ the level of scrutiny of State action is intimately related to the Consensus on an issue. The Consensus is used by the Court to decide whether to 'apply' a wide or narrow MoA, thus permitting the Court to avoid making a decision in politically difficult case. The inconsistent application of this 'Consensus' has already led to claims of judicial double standards.⁵⁹ Brauch suggested that this is a breach of the rule of law⁶⁰ and Benvenisti suggested it is a 'convenient subterfuge for

⁵⁷ *Airey v Ireland* (App no.6289/73).

⁵⁸ See above at Chapter 5.3.1 Margin of Appreciation.

⁵⁹ Benvenisti E., 'Margin of Appreciation, Consensus and Universal Standards' (1999) Vol.31 International Law and Politics 843-854, 844.

⁶⁰ Brauch J.A., 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2004) Vol.11 Columbia Journal of European Law 113-150, 146.

implementing the court's hidden principled decisions.⁶¹ Though Benvenisti noted that the 'consensus doctrine has been portrayed as a sophisticated mechanism to prod nations to update their policies,'⁶² instead it has been suggested that its use absolves the Court from responsibility for the decision it is about to deliver.⁶³

It has been stated that the Court should 'not invoke vague general concepts without actual fact-finding.'⁶⁴ Helfer suggested that the failure to define the method of ascertaining this consensus risks its legitimacy.⁶⁵ Ostrovsky was correct in noting that as ECHR membership grows, the Consensus shrinks.⁶⁶ A Consensus level of 62% was insufficient to engage the Court to act in *Sheffield and Horsham*.⁶⁷ In this case the Court found there was a wide MoA which allowed the Contracting Party to continue violating transsexuals' rights. Commentators including Brauch and Radacic argued that the level of Consensus should not be a relevant question for the Court.⁶⁸ The Court is specially placed as a guarantor of rights, Contracting Parties have agreed to its jurisdiction and it occupies a supra-national position. Therefore, whilst the Court should not be on the offensive, taking-on States over every small issue, the Court is tasked with remedying abuses of rights. Much of the justification and support for the MoA and Consensus lies within the supra-national nature of the Court and the rationale to ensure national sovereignty. Macdonald's often cited argument appears wide of the mark. He stated:

'The margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and Contracting States over their respective spheres of authority and enables the Court to balance the sovereignty of Contracting Parties with their obligations under the Convention.'⁶⁹

⁶¹ Above n.59, 852. See also Brauch J.A., 'The Dangerous Search for an Elusive Consensus: What the Supreme Court Should Learn from the European Court of Human Rights' (2009) Vol.52(2) Howard Law Journal 277-318, 292.

⁶² Above n.59, 851.

⁶³ MacDonald R.S.J., Matscher F., Petzold H., *The European System for the Protection of Human Rights* (Nijhoff, Leiden, 1993) 124.

⁶⁴ O'Donnell T.A., 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights' (1982) Vol.4(4) Human Rights Quarterly 474-496, 482.

⁶⁵ Helfer L.R., 'Consensus, Coherence, and the European Convention on Human Rights' (1993) Vol.26 Cornell International Law Journal 133-165, 135.

⁶⁶ Above n.46, 51.

⁶⁷ Brauch J.A., 'The Dangerous Search for an Elusive Consensus: What the Supreme Court Should Learn from the European Court of Human Rights' (2009) Vol.52(2) Howard Law Journal 277-318, 287 citing *Sheffield and Horsham v United Kingdom* (App no.22985/93 and 23390/94).

⁶⁸ Above n.61, Brauch, 78. Radacic I., 'Gender Equality Jurisprudence of the European Court of Human Rights' (2008) Vol.19(4) European Journal of International Law 841-857, 850.

⁶⁹ MacDonald R.S.J., Matscher F., Petzold H., *The European System for the Protection of Human Rights* (Nijhoff, Leiden, 1993) 123.

However respecting national sovereignty does not require the Court to accede to State action that breaches rights, given that each State has willingly acceded to the Convention. Damaging confrontations are only likely to occur where the Court steps beyond its role as a protector of rights and enters into prescribing state action. In this regard, extensive use of positive rights becomes questionable.⁷⁰ In difficult cases the Court appears to defer to the European consensus. This has the effect of making the Court react to trends, rather than proactive in its endeavour to temper rights abuses.

The following section is an attempt by the author to ascertain information on the existence of any consensus on the issues of incest and familial sexual activity.

5.3.2.1 European Consensus on Familial Sexual Activity

Analysis of the data on familial sexual offences within the High Contracting Parties showed a number of approaches varying widely.⁷¹ Data suggested that 15 countries had an offence entitled 'Incest'. A further nine countries' provisions criminalised familial sexual activity within the category 'rape or sexual abuse.' Four countries, including the United Kingdom and Germany, defined the activity as sexual intercourse between relatives. Ten countries had no provision concerning familial sexual relations. The provisions detailed great variations in kin with whom sexual relations were prohibited. Rudimentary analysis identified that 35 countries prohibited some form of parent-descendant relationship. Some countries, for example Romania used the term 'legal representative' to include parent. Bulgaria proscribed the adopter and the adopted, as did Denmark. Estonia prohibited sexual intercourse between a 'parent with the rights of a parent or grandparent.' Presumably, this did not prohibit sex between biological kin who did not have these rights. Twenty-seven states prohibited sexual relations between siblings, though a number of these including Iceland, Norway and Germany would not punish activity if the parties were under 18 and Greece would not punish if the

⁷⁰ The debate on the positive or negative nature of rights is beyond the scope of this thesis. See generally arguments for and against positive rights and their method of inception: Fredman S., *Human Rights Transformed: Positive Duties and Positive Rights*, (2006) Public Law 498-560. Hofstotter B., 'European Court of Human Rights: Positive Obligations in *E. And Others v. United Kingdom*' (2004) Vol.2(3) *International Journal of Constitutional Law* 525-56., Mowbray A., *The Creativity of the European Court of Human Rights* (2005) Vol.5(1) *Human Rights Law Review* 57-79. Forder C.J., 'Legal Protection Under Article 8 ECHR: *Marckx* and Beyond' (1990) Vol.37 *Netherlands International Law Review* 162-181. Fennell P., 'The Third Way in Mental Health Policy: Negative Rights, Positive Rights, and the Convention' (1999) Vol.26(1) *Journal of Law and Society* 103-127. de Than C., 'Positive Obligations Under the European Convention on Human Rights: Towards the Human Rights of Victims and Vulnerable Witnesses?' (2003) Vol.67 *Journal of Criminal Law* 165-182. Mowbray A., *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, Oxford, 2004).

⁷¹ Data is located within Annex B. The method of data capture is detailed above at section 1.6.4.

individuals were under 17. The lack of consensus on treatment of incestuous sexual activity was confirmed by the large variation in sentences available. France had one of the more severe punishments with a maximum of 20 years imprisonment if the activity constituted rape. Poland had one of the most lenient sentences of imprisonment, with a minimum tariff of three months. Punishment through pecuniary fine existed in France, Macedonia and the Netherlands.

There is a great deal of difference between the countries. As seen from this brief review, some classify the incestuous activity together with the most serious sexual offences including rape, and other countries view it as a minor matter. It is therefore exceptionally difficult to ascertain any consensus on the issue of familial sexual relations. There are of course a number of limitations to this very brief assessment; these are detailed in Chapter 6. Despite the problems ascertaining any consensus, it has been shown that it is possible to identify some common themes between the countries, though it is unlikely that these would be sufficient for a consensus to be found in ECtHR terms.

5.3.3 Overarching Concepts

The issues of universality of norms, MoA and European consensus are all likely to feature heavily in any ECtHR decision concerning CAFSA. The need for any Consensus on an issue suggests the Court does not want to be too much in the vanguard in its approach to human rights protection. Thus, potentially ground-breaking decisions of the ECtHR are tempered by existing action of High Contracting Parties. Brems suggested that ‘the concept of a “margin” of appreciation fits into a weak relativist position, in which the role of national cultures is merely corrective, a limited counterbalance to the general universalist rule.’⁷² Others believed that the MoA has not resulted in a relativistic Court or lowering of Convention standards, but instead shows a recognition and acceptance of the limited local variations within the range of rights the High Contracting Parties have agreed to secure.⁷³

The dangers of accepting relativism were all too apparent to Endsjo who rejected the relativistic reasoning:

‘if human rights are understood in a way that makes it possible to exclude the basic rights of certain groups only because of religious and cultural prejudices traditionally found in the

⁷² Brems E., *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, (1996) Vol.56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Heidelberg Journal of International Law) 240-315.

⁷³ Sweeney J.A., ‘Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era’ (2005) Vol.54(2) *International and Comparative Law Quarterly* 459-474.

Christian West, we find that the principle of universality is taken right out of the human rights, and human rights are transformed to a set of rules only reflecting historically Western values.’⁷⁴

Endsjo cited Radhika Coomaraswamy, United Nations Special Rapporteur on Violence against Women who suggested ‘the greatest challenge to international rights comes from cultural relativism and religious extremism.’⁷⁵ Evanoff also took issue with the relativist position and thought that ‘in cross-cultural dialogue the relativist would ask us to simply adopt a tolerant attitude towards whatever differences exist between different cultures without further debate.’⁷⁶ The problem with the relativist position is thus its failure to accept the possibility of the fallibility of its approach. This is of great concern to individuals wishing to engage in CAFSA or activities in the s.64/65 offence. As the literature review identified, prohibitions against incest have existed across a number of cultures and for centuries. However, despite claims to the contrary they have not been universal.⁷⁷ In Chapter 2, it was seen that in England and Wales, the only universal is the inconsistency in approach taken towards incestuous activity.⁷⁸

A contextually void application of the ECHR would be as absurd as complete deference to relativistic positions. Therefore, a position that appreciates the needs of the competing interests groups is required. As Evanoff suggested, there is no reason why the socially constructed claims of one culture or another must simply be accepted.⁷⁹ His concern was that ‘by regarding the norms a culture already accepts as “valid” denies the possibility that something better can be hoped for or worked towards.’⁸⁰ Evanoff’s analysis revealed the power basis of the relativistic position. Distilled, Evanoff argued that the cultural positions marginalise those who fail to accept them through stifling debate and by being implicitly accepted as valid. This legitimises existing forms of power and absolves individuals from having to act in solidarity with victims of oppression in other cultures.⁸¹ As seen in Chapter 3 the creation of a consensus on incest and failure to recognise the consensual nature of some incestuous relationships occurred at national level using sophisticated linguistic techniques.

⁷⁴ Endsjo D.O., ‘Lesbian, Gay, Bisexual, and Transgender Rights and the Religious Relativism of Human Rights’ (2005) Vol.6(2) Human Rights Review 102-110, 109.

⁷⁵ Coomaraswamy R., ‘Different but Free: Cultural Relativism and Women’s Rights as Human Rights’ in Howland C.W., *Religious Fundamentalisms and the Human Rights of Women* (Palgrave, New York, 2001) 79-90.

⁷⁶ Evanoff R.J., ‘Universalist, Relativist, and Constructivist Approaches to Intercultural Ethics’ (2004) Vol.28 International Journal of Intercultural Relations 439-458., 445.

⁷⁷ See 1.7.1. Anthropological and Sociological Literature on Incest.

⁷⁸ See 2.9.

⁷⁹ Above n.76, 446.

⁸⁰ Ibid.

⁸¹ Ibid.

This created recommendations that were not in keeping with the terms of reference and these were translated into the Sexual Offences Act 2003. The remainder of this chapter will investigate this legislation (s.64/65) in light of the human rights framework used to support its creation, whilst being cognisant of the power dynamic implicit within the international human rights machinery.

5.4 ECtHR Norms Derived From Case Law

Three data sets were interrogated to distil and assess the ECtHR case law relevant to an examination of the s.64/65 provisions. The methodology is detailed in section 1.6.4 above. These three data sets are explored below and begin with cases that used the word ‘incest’ within the judgment. Following this is assessment of Article 8 data, and the final section addresses Article 8 when used in conjunction with Article 14.

The formulaic process the ECtHR deploys when adjudicating a case helped the analysis of the data (cases). Within the judgment there is a stage known as ‘Courts Assessment’ in which the Court follows a number of non-explicit stages. Firstly, the Court finds whether the right in question is applicable (i.e. has it been engaged?), and does this by assessing if there was an interference with the claimed right. Some Articles (Rights) provide the State with the opportunity to justify their interference, (for example Article 8). However, other breaches are impossible to justify once a breach has been found, (for example Article 3). Where justification is possible, justificatory reasons are provided in a closed list within the second paragraph of the applicable Article. If a justificatory reason is found, the Court goes on to test this to ascertain any violation. The further tests include assessing the necessity of the interference ‘in accordance with the law’, the existence of a legitimate aim for the interference and its necessity in a democratic society.

5.4.1 Cases Referring to Incest

The investigation revealed 17 cases with the term ‘incest’ in the judgment.⁸² Substantive articles were engaged 24 times.⁸³ These included cases under Articles 3 (Prohibition of torture and inhumane and degrading treatment), 5 (Right to Liberty and Security), 6 (Right to a Fair Trial), 7 (No Punishment without Law), 8 (Right to Respect for Private and Family Life), 10 (Freedom of Expression), 12 (Right to Marriage) and 14 (Prohibition of Discrimination).

⁸² These cases can be found at Appendix 3B.

⁸³ Ibid. Issues were tabulated for analysis.

Article 8 was the most frequently cited Article: the majority of the cases citing this article concerned care proceedings involving children.⁸⁴ Cases also involved positive duties incumbent upon the state to ensure sufficient action was taken to prevent individuals suffering breaches of Article 3, due to child sexual abuse (that the Court termed incest).⁸⁵ Such cases are not applicable to reasoning regarding CAFSA. Cases involving removal of children into care raised issues concerning fair trial and its component parts such as expeditious proceedings and a right to challenge witnesses.⁸⁶ Whilst many of these cases raise interesting points they were only tangentially related to the current investigation.

‘Incest’ was cited in a number of Freedom of Expression cases. Article 10 ‘incest’ issues concerned patterns of statements made by individuals often accusing others of engaging in incest,⁸⁷ questioning by lawyers of experts’ competency in cases concerning accusations of incest⁸⁸ or, issues with domestic court decisions concerning cases of incest.⁸⁹ These cases did not highlight any issues relevant to s.64/65 and/or CAFSA.

An analysis of the ECHR case law showed that no case had raised issues of CAFSA or its prosecution. The case of *S.B.C v The United Kingdom*⁹⁰ concerned bail, Article 5 and an individual who was incidentally accused of rape and incest. English and Welsh law required the automatic granting of bail unless the charge was listed under Sch.1 Bail Act 1976 c.63. The applicant was arrested on suspicion of incest but was charged with rape. The arbitrary nature of the automatic decision against bail (the charge was listed) and lack of judicial oversight were important factors in the outcome of the decision. The case of *B & L v United Kingdom*,⁹¹ concerned parties within the Prohibited Degrees who were prohibited from marrying. The Court found that the bar on marriage did not prevent this type of relationship from occurring, although it pursued a legitimate aim in protecting the integrity of the family. It added that since no incest or criminal law prevented this type of extra-marital relationship it could not be said that the ban on the applicant’s marriage prevented the L’s son from being exposed to any alleged confusion or emotional insecurity. In addition the Court noted that Parliament had found no useful purpose of public policy in prohibiting such marriage. The Court held that the

⁸⁴ *K.A. v Finland* (App no.27751/95). *R. v Finland* (App no.34141/96). *H.K. v Finland* (App no.36065/97).

⁸⁵ *E and others v United Kingdom* (App no.33218/96).

⁸⁶ *F. and M. v Finland* (App no.22508/02).

⁸⁷ For example, accusation of incest against an Archbishop: *Klein v Slovakia* (App no.72208/01).

⁸⁸ *Veraat v Netherlands* (App no.10807/04).

⁸⁹ *De Haes and Gijssels v Belgium* (App no.19983/92).

⁹⁰ *S.B.C v United Kingdom* (App no.39360/98).

⁹¹ *B & L v United Kingdom* (App no.36546/02).

inconsistency between the stated aims of the provisions and the possibility of a waiver undermined the rationality and logic of the law.

5.4.2 Article 8 - Right to Respect for Private and Family Life

The methods for data collection and analysis have been explored above at section 1.6.4.

Article 8 ECHR provides: '1. Everyone has the right to respect for his private and family life, his home and his correspondence.' Analysis of the data suggests that the Court has sought to distinguish between the four elements in paragraph one: immediately 'home' and 'correspondence' can be set aside as CAFSA does not engage these components. The Court has noted on a number of occasions that the concept of 'private life' is broad⁹² and is not susceptible to exhaustive definition.⁹³ Article 8 also protects the right to an identity and personal development.⁹⁴ More specifically, Article 8 has been held to protect self-determination⁹⁵ and sexual life.⁹⁶ The right to establish relationships is expressly protected⁹⁷ as is the right to develop relationships.⁹⁸ It can be hypothesised that the CAFSA provisions (s.64/65) are thus likely to engage Article 8 within the sphere of private life. Individuals in CAFSA relationships may argue that they are developing and establishing a relationship that has a sexual element and is integral to their personal development and self-determination.

In addition to 'private life' individuals engaging in CAFSA may arguably find their actions fall within 'family life.' The Court has held that the 'mutual enjoyment by a parent and child of each other's company constitutes a fundamental element of family life.'⁹⁹ This may be particularly relevant to the parent-offspring sexual relationships. The Court held in *A.W. Khan v United Kingdom* (an immigration case) that there were no ties sufficient for family life unless there were additional elements of dependence¹⁰⁰ and 'family under this provision (Article 8) is

⁹² *S.H. and Others v Austria* (App no.57813/00) para.58.

⁹³ *Gillan and Quinton v United Kingdom* (App no.4158/05) para.61. *Ciubotaru v Moldova* (App no.27138/04) para.49. *Dolenec v Croatia* (App no.25282/06) para.165.

⁹⁴ *Gillan* n.93, para.61.

⁹⁵ *S.H.* n.92, para.58.

⁹⁶ *Ibid.* *Ciubotaru v Moldova* (App no.27138/04) para.49 citing *Laskey, Jaggard and Brown v United Kingdom* (App no. 21627/93, 21826/93 and 21974/93).

⁹⁷ *Gillan* n.93, para.61.

⁹⁸ *A.W. Khan v United Kingdom* (App no.47486/06) para.31.

⁹⁹ *Zaunegger v Germany* (App no.22028/04) para.38. *Eberhard and M. v Slovenia* (App no.9733/05) para.125. *Kurochkin v Ukraine* (App no.42276/08) para.37. *Dolhamre v Sweden* (App no.67/04) para.108 citing *Johansen v Norway* (App no.17383/90) para.52.

¹⁰⁰ *A.W. Khan* n.98, para.32.

not confined to marriage-based relationships and may encompass other *de facto* “family ties” where the parties are living together out of wedlock.¹⁰¹ The Court has held:

‘92. In contrast, the Court’s case-law has only accepted that the emotional and sexual relationship of a same-sex couple constitutes “private life” but has not found that it constitutes “family life”, even where a long-term relationship of cohabiting partners was at stake. In coming to that conclusion, the Court observed that despite the growing tendency in a number of European States towards the legal and judicial recognition of stable *de facto* partnerships between homosexuals, given the existence of little common ground between the Contracting States, this was an area in which they still enjoyed a wide margin of appreciation (see *Mata Estevez v. Spain* (dec.), no. 56501/00, ECHR 2001-VI, with further references). In the case of *Karner* (...), concerning the succession of a same-sex couples’ surviving partner to the deceased’s tenancy rights, which fell under the notion of “home”, the Court explicitly left open the question whether the case also concerned the applicant’s “private and family life”.

93. The Court notes that since 2001, when the decision in *Mata Estevez* was given, a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then a considerable number of member States have afforded legal recognition to same-sex couples (see above, paragraphs 27-30). Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of “family” (see paragraph 26 above).

94. In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would.

95. The Court therefore concludes that the facts of the present case fall within the notion of “private life” as well as “family life” within the meaning of Article 8. Consequently, Article 14 taken in conjunction with Article 8 applies.¹⁰²

As seen in the above excerpt, enjoyment of ‘family life’ is provided for different-sex couples (this has never been an issue) and the Court recently extended this to same-sex couples. It appears artificial to protect these types of relationships but to deny it to couples (different or same-sex) who have consanguinal familial ties (for example, are brother and sister). The above excerpt suggests the Court sought a consensus on the issue to engage the right. Insufficient data is available to investigate ‘family life’ fully and the existence of ‘family life’ is uncertain. However, consistent application of the Court’s case law would suggest the applicability of Article 8 and ‘private life’.

As was found in the previous chapter, the mere existence of the legislation (s.64/65 SOA 2003), the potential for investigation by the police, and ability of the CPS to bring charges, is

¹⁰¹ *Zaunegger* n.99, para.37. *Schalk* n.54, para.91.

¹⁰² *Schalk* n.54.

therefore sufficient to constitute victim status. Thus Article 8 ECHR is engaged under ‘private’ and potentially ‘family’ life requiring the state to justify its action.

Positive or Negative Obligation?

The Court has held on numerous occasions that ‘the essential object of Article 8 is to protect the individual against arbitrary action by public authorities.’¹⁰³ Case law also highlights that positive obligations are incumbent upon a state.¹⁰⁴ In this regard, the Court has refused to give a precise definition claiming that no such definition exists. It has said that a ‘positive obligation may be to provide services, facilities or any other steps to ensure effective protection of the rights guaranteed in this provision.’¹⁰⁵ The SOA 2003 criminalises individuals engaging in CAFSA. Any claim by them against the provisions is likely to involve a negative obligation and the persons would be asking the state to stop the application of, and to remove, the legislative provisions in the absence of objective justification. Thus, it is necessary to identify possible justifications by the state; these will be addressed in the next section.

5.4.3 Justifying State Action Interfering With Article 8 Rights

As was explained above, actions by a state will breach Article 8 if they cause an unjustified interference with the individual’s rights. Article 8(2) permits an interference with the protected right if the interference is ‘in accordance with the law, pursues one or more of the legitimate aims to which paragraph 2 of Article 8 refers and is necessary in a democratic society in order to achieve any such aim.’¹⁰⁶ The following section uses the principles derived from the data set concerning Article 8 to understand the compatibility of the reasons justifying s.64/65 with the obligation under Article 8.

5.4.3.1 ‘In Accordance With the Law’

This Convention mandated requirement has been expanded upon in the case of *Kennedy*. The Court held that this requirement comprised three conditions: the impugned measure must have some basis in domestic law; the domestic law must be compatible with the rule of law and accessible to the individual concerned; and the person affected must be able to foresee

¹⁰³ *Dabrowska v Poland* (App no.34568/08) para.44.

¹⁰⁴ *Eberhard and M. v Slovenia* (App no.9733/05) para.126. *Dabrowska v Poland* (App no.34568/08) para.44. Above n.70.

¹⁰⁵ Above n.56, 85.

¹⁰⁶ *Kennedy v United Kingdom* (App no.26839/05) para.130.

the consequences of the domestic law for him.¹⁰⁷ The compatibility of the provisions with these requirements will be addressed below:

Basis in Domestic Law

There is unlikely to be any problem for the State to meet this requirement. As seen in the previous chapter, the Sexual Offences Act 2003 is a piece of criminal legislation which entered Parliament, was read in both Houses, received Royal Assent on 18th November 2003 and entered into force on 1st May 2004. Prosecution of CAFSA therefore has a basis in domestic law.

Compatible with the Rule of Law, Quality of Law, Accessible and Foreseeable

That the law should be adequately accessible and foreseeable has been expanded upon in *Gillan*¹⁰⁸ to mean that the law be ‘formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct.’¹⁰⁹ This case, though concerning authorization of stop and search powers by the police under anti-terrorism legislation, is the only case within the data set that it is possible to reason from.

It appears that individuals engaging in CAFSA have a strong case to argue that the law was not accessible and foreseeable. Whilst the law in *strictu sensu* was available to individuals, the implementation and use of the s.64/65 was not. The Court has held that ‘for the domestic law to meet these requirements it must afford a measure of legal protection against arbitrary interferences by public authorities.’¹¹⁰ It was seen in the previous chapter that such individuals will be unable to ascertain the level of discretion to be exercised by the police and Crown Prosecution Service (CPS) when handling their case. The CPS has produced legal guidance that is publicly available relating to sexual offences in the Sexual Offences Act 2003.¹¹¹ However, it was found that this guidance failed to indicate how the CPS would exercise its discretion with regard to s.64/65. The CPS has indicated (following a Freedom of Information Act 2000 request) that ‘there are no CPS guidelines on prosecutorial discretion and decision making with

¹⁰⁷ Ibid citing *Rataru v Romania* (App no.28341/95) para.52, *Liberty and Others v United Kingdom* (App no.58243/00) para.59, *Iordachi and Others v Moldova* (App no.25198/02) para.37. See also *Gillan and Quinton v United Kingdom* (App no.4158/05) para.76. *Mikhaylyuk and Petrov v Ukraine* (App no.11932/02) para.25.

¹⁰⁸ *Gillan* n.93, para.76 and *Shalimov v Ukraine* (App no.20808/02) para.85

¹⁰⁹ *Gillan* n.93, citing *S. and Marper v United Kingdom* (App nos.30562/04 and 30566/04) paras.95 and 96

¹¹⁰ *Gillan* n.93, para.77.

¹¹¹ Crown Prosecution Service, *Legal Guidance – Sexual Offences*
http://www.cps.gov.uk/legal/s_to_u/sexual_offences_act/ accessed 29 August 2010.

regard to Section 64 and 65 of the Sexual Offences Act 2003. Nor is there any information on any alternative offences that may be charged and the reasons behind this.’¹¹²

The Court held in *Gillan* that within a democratic society the executive cannot be granted an unfettered power. The law is required to indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.¹¹³ It is recognised that this may not be in the statute but is often found in ancillary measures, for example Codes of Practice or Guidelines.¹¹⁴

The Court impugned the measure in *Shalimov* as it found that there was no clarity in the scope of the discretion and in particular in that case, there was no requirement to give reasons for the discretionary decision and therefore there were no safeguards against arbitrariness or abuse.¹¹⁵ The state should not place the individual in the position that it is likely if not impossible to prove that the power was improperly exercised.¹¹⁶ In light of the legislative debate and the constant reference to abusive, groomed or coerced relationships within *Setting the Boundaries*, as seen above, it is within the realms of possibility that individuals engaging in CAFSA could reasonably expect not to be prosecuted. The failure during the pre-legislative process to identify and delineate the different types of ‘incestuous sexual activity’ is thus inherently problematic.¹¹⁷

Setting the Boundaries noted that ‘it must be for the police as investigators and the CPS as prosecutor to determine who was the instigator, and who should therefore be regarded as culpable.’¹¹⁸ Such statements appear to reference abusive situations. There is no discussion of the situation of individuals in CAFSA relationships and relevant police or prosecutorial action. Thus, it would not be unreasonable to conclude that the reasoning process was no longer relevant to those in CAFSA relationships. This appears to be a failure in compatibility with the rule of law; that the law is not sufficiently accessible and foreseeable for an individual to accurately regulate their conduct. Whilst the law is broad enough to prohibit CAFSA situations,

¹¹² Personal email Communication, FOIUnit@cps.gsi.gov.uk response to email dated 7 October 2010 (Ref 2482 (25/10/2010)).

¹¹³ *Gillan* n.93, para.77 citing *Hasan and Chaush v Bulgaria* (App no 30985/96) para.4, *Maestri v Italy* (App no.39748/98) para.30, *Silver and Others v United Kingdom* (App nos .5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75) paras.88-90, *Vlasov v Russia* (App no.78146/01) para.125.

¹¹⁴ *Gillan* n.93, para.78.

¹¹⁵ *Shalimov v Ukraine* (App no.20808/02) para.88.

¹¹⁶ *Gillan* n.93, para.86.

¹¹⁷ Note confusion over the definition of incest: 1.8 The Literature and this Thesis Researching ‘Incest’ and the issues concerning reasoning found in Chapter 3.

¹¹⁸ Above n.2, [5.8.7].

the reasoning process focuses on abusive action and preventing victimisation of vulnerable and weak individuals.¹¹⁹ Individuals are faced with a situation that essentially puts them at the mercy of the police investigating the complaint and the CPS when deciding to prosecute.¹²⁰ This is clearly at odds with the Courts' finding that 'the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.'¹²¹ It is arguable that combined, these factors cast significant doubt upon the compatibility of s.64/65 and the rule of law. Should the Court decide that the law had a sufficient basis; it would then continue to ascertain the legality of the state action through an assessment of the legitimate aim.

5.4.3.2 'Legitimate Aim'

Article 8(2) reads 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.' The Court held in *Rachwalski and Frenec* that the exceptions within Article 8(2) are to be interpreted narrowly¹²² and in *Mastepan* that the need for them in a given case must be convincingly established.¹²³

Justifications are proffered by the State when it is called upon to justify the measure at issue. However, because no such claim has been heard by the Court, the reasons justifying enacting the recommendations found within *Setting the Boundaries* (identified in Chapter 3), and legislative debates as recorded in Hansard (identified in Chapter 4) will be assessed below.

As found from the analysis within Chapter 3, the stated aim of the familial sexual abuse provisions was to protect 'individuals from abuse'.¹²⁴ As noted above, there is an ECHR requirement to provide a 'remedy' in law to a victim.¹²⁵ Protecting individuals from abuse is undoubtedly a state function.¹²⁶ Police forces across High Contracting Parties have as one of their primary functions the proper functioning of society: one component of this is to allow

¹¹⁹ See 3.6.

¹²⁰ As identified in Chapter 4 there is little evidence that the decision to prosecute could be taken following the application of the Full Code test.

¹²¹ *Gillan* n.93, para.77.

¹²² *Rachwalski and Frenec v Poland* (App no.47709/99) para.69.

¹²³ *Mastepan v Russia* (App no.3708/03) para.40.

¹²⁴ Above n.2, [5.8.2]. See above 3.6.

¹²⁵ Above n.2, [5.8.2].

¹²⁶ *Osman v United Kingdom* (App no.32452/94).

individuals to conduct their daily lives without fear of abuse from others. This includes the fear of sexual abuse encompassing that from a family member. Legislation against sexual violation including activities contained in s.64/65 could therefore easily be justified by reference to categories of public safety, protection of health and the protection of rights and freedoms of others. Legislation acting to combat, and protect individuals from sexual abuse has a legitimate aim. It was seen above that the Report also places reliance on the fact that evidence (not cited) ‘pointed to the fact that many adult incestuous relationships are based on long term grooming and pressure from childhood, and are not genuinely consensual.’¹²⁷ This latter argument on the nature of the relationships is tied to protection of the individual. Relationships that have their origins in grooming, coercion or pressure are not genuinely consensual relationships and are therefore abusive. Such activity falls within an array of provisions¹²⁸ and possibly s.64 (if within stipulated relationships), but not s.65 (consent to penetration).

With regard to the justification of protection of the family, the Court has been willing to take an expansive reading ‘family’. For a number of years it operated on the basis that homosexual-relations did not fall within the scope of family.¹²⁹ In *Karner* the Court accepted that the surviving partner of a gay relationship seeking to accede to the tenancy rights did have a claim under the Article 8 concept of ‘home’.¹³⁰ In the same case the Court left open the question of whether the relationship engaged ‘private’ and or ‘family’ life. In *Schalk and Kopf* the Court went further in holding that cohabiting same-sex couples living in stable *de facto* partnerships were within the notion of ‘family-life’.¹³¹ In light of such reasoning, and as was shown in the applicability of Article 8¹³² there is little to distinguish the CAFSA relationships from any other heterosexual/homosexual stable relationships. Consequently, they would be distinguished only on the basis of consanguinity. Protection of the family could be said to fall within a number of justifications listed in Article 8(2) including protection of the rights and freedoms of others, for example, those who wish to enjoy their family life. The structure and support networks surrounding the family could be said to ensure and stabilise public safety

¹²⁷ Above n.2, [5.8.2].

¹²⁸ See above 4.3 Sexual Offences Act 2003.

¹²⁹ *Mata Estevez v Spain* (App no.56501/00) paras.27-30.

¹³⁰ *Karner v Austria* (App no.40016/98) para.33.

¹³¹ *Schalk* n.54, para.94.

¹³² Above at Chapter 5.4.2 Article 8 – Right to Respect for Private and Family Life.

and security including for the prevention of disorder or crime and consequently the economic well-being of the country.¹³³

There has been no evidence adduced that permitting individuals to have CAFSA relations would affect the family as an institution. Similar arguments were made regarding the decriminalisation of homosexual sexual activity and these have not proven true, nor has evidence been gathered of any adverse effect to the family as an institution following the removal of such provisions. This lack of evidence therefore suggests that the protection of the family as an institution is not an independent legitimate aim.

It was seen above that both the Report and the Executive in Parliament make reference to the fact 'it would not be right to seem to legitimise sexual relationships between adult family members.'¹³⁴ Whilst the state did not seek reliance on this as a primary justification during the legislative process, and indeed made statements to the contrary,¹³⁵ the state may use it in attempting to justify its action to the Court. This statement that criminalisation of CAFSA is to uphold societal morality, thus to prevent the public from forming the opinion that the legislature was endorsing incestuous activity, was not found within Chapter 3 or 4 to be a main or significant reason supporting criminalisation. This finding is further supported when looking at the parliamentary discussion surrounding the passage of the Bill: Lord Falconer noted that the legislation presented was designed to treat everyone equally.¹³⁶ The contradictory statements from Baroness Scotland suggested that government 'continue to feel that the criminal law has a role to play in upholding morals,'¹³⁷ and were noted above. These would likely be used by the State if called upon to justify its position. However, the Report noted 'we have always borne in mind that although the criminal law plays an important declaratory role

¹³³ Extensive research in the area of child adoption points to numerous tangible benefits affiliated to the existence of families as opposed to clusters of individuals not in family settings. 'Adoption has been viewed as a highly successful societal solution' as opposed to leaving children outside a family setting: see Brodzinsky D.M., 'Long-term outcomes in Adoption' (1993) Vol.3(1) *The Future of Children* 153-166, 153.

Data has also suggested that being in long-term foster care is less beneficial than adoption, underscoring the benefits of families: see Triseliotis J., 'Long-term Foster Care or Adoption? The Evidence Examined' (2002) Vol.7 *Child and Family Social Work* 23-33 and see generally the meta-analysis of Juffer F., van Ijzendoorn M.H., 'Behaviour Problems and Mental Health Referrals of International Adoptees' (2005) Vol.293(20) *Journal of the American Medical Association* 2501-2515.

¹³⁴ Above n.2, [5.8.3], Hansard HL vol.649 col.743 (17 June 2003).

¹³⁵ Hansard HL vol.649 col.741 (17 June 2003) Baroness Scotland 'Our general policy on the offences in Part 1 has been that the criminal law should intervene only if sexual behaviour is non-consensual, exploitative or abusive and that it has no role to play in consensual activity that does not cause harm.'

¹³⁶ Above 4.2 Protecting the Public—Sexual Offences Bill 2003.

¹³⁷ Hansard HL vol.649 col.742 (17 June 2003).

in society, it is not the arbiter of morals.’¹³⁸ The discourse analysis above at Chapter 3 highlighted the problematic reasoning upon which the recommendations for the Sexual Offences Bill were made.

It has been shown that the Contracting Party sought in pre-legislative discourse and in legislative debate, to avoid reliance upon moralistic reasoning. Updating the law with the intention of removing outdated, biased and discriminatory offences based on morals was one of the factors instigating the review. So too was the recognition of diversity in life choices, along with individual’s right to live their life as they decide in the absence of harm to others.¹³⁹ The ECtHR is thus placed in a difficult position: it is hypothesised that the Court must recognise that the Contracting Party has itself ruled out reliance on moralistic reasoning. It appears perverse for the Court to accept an argument based on morals when seeking to identify a legitimate aim on the part of the state.

Whilst concluding, the Review relied on the fact that there were very few prosecutions under the impugned provisions. The low number of potential violations of human rights cannot be used to support the continued existence of the provisions. Allied to this, reliance was placed on the discretion of the ‘police as investigators and CPS as prosecutor to determine who was the instigator, and who should therefore be regarded as culpable.’¹⁴⁰ The argument is that prosecutorial discretion is sufficient to protect human rights. Such justification is no different to the argument of protection of rights due to the infrequent use of the law. Therefore, this cannot be regarded as an independent justification.

Protecting individuals from abuse and protection of the family, appear to be legitimate aims of s.64/65. These can be justified with reference to the protection of ‘public safety, for the prevention of disorder or crime, for the protection of health, or for the protection of the rights and freedoms of others.’ Sufficient evidence suggests these provisions were taken to ensure public safety and protection of the rights and freedoms of others. It is hypothesised that the provisions were not used to ensure ‘the economic well-being of the country or for the protection of morals,’ as these have not been adequately reasoned for the former, and in light of government statements to the contrary on the latter, thus are likely to be discounted by the Court.

¹³⁸ Above n.2, [1.5].

¹³⁹ Above n.2, [Executive Summary][Foreword].

¹⁴⁰ Above n.2, [5.8.7].

Once a legitimate aim has been identified the provisions taken in pursuance of such aim must conform to the requirement to be 'necessary in a democratic society.'

5.4.3.3 'Necessary in a Democratic Society'

The requirement of 'necessary in a democratic society' (hereafter NDS) is mandated by Article 8(2). Once a state has provided the legitimate aim it is seeking to achieve, the Court will seek to address the issue of how it went about achieving such aim. For an international Court this stage is potentially highly contentious as the Court essentially renders judgment on the quality of the state's actions. This is also the stage where the MoA is extensively used by the Court along with the concept of European consensus.¹⁴¹

Arai-Takahashi has investigated the Court's requirements of 'necessary in a democratic society' and found two criteria for applying the NDS test.¹⁴² The Court requires: 'relevant and sufficient reasons' to be proffered by the State. 'Necessity' is the requirement of a 'pressing social need. *Kurochkin* reiterated these criteria.¹⁴³ The Court has laid down general principles for applying the 'necessary in a democratic society' test.¹⁴⁴

'1. General principles

97. On a number of occasions, the Court has stated its understanding of the phrase "necessary in a democratic society", the nature of its functions in the examination of issues turning on that phrase and the manner in which it will perform those functions. It suffices here to summarise certain principles:

(a) the adjective "necessary" is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable" (see the *Handyside* judgment of 7 December 1976, Series A no. 24, p. 22, § 48);

(b) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention (*ibid.*, p. 23, § 49);

(c) the phrase "necessary in a democratic society" means that, to be compatible with the Convention, the interference must, *inter alia*, correspond to a "pressing social need" and be "proportionate to the legitimate aim pursued" (*ibid.*, pp. 22-23, §§ 48-49);

(d) those paragraphs of Articles of the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted (see the above-mentioned *Klass* and others judgment, Series A no. 28, p. 21, § 42).'

¹⁴¹ Both concepts are addressed above at 5.3.1 and 5.3.2.

¹⁴² Above n.56, 11.

¹⁴³ *Kurochkin v Ukraine* (App no.42276/08) para.43 citing *Kutzner v Germany* (App no.46544/99) para.60. *Saviny v Ukraine* (App no.39948/06) para.47.

¹⁴⁴ *Silver and Others v United Kingdom* (App no.5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75) para.97.

Academic categorisation

Some academics have suggested that the Court does not apply the same level of scrutiny for each case when seeking to apply the NDS test. Academic categorisation through empirical analysis of ECtHR case-law has resulted in the finding that the case law on minorities can be grouped into three categories '(a) sexual minorities (homosexual and transsexuals) (b) historical ethnic and religious minorities and (c) aliens, immigrants and asylum seekers.'¹⁴⁵

Arai-Takahashi investigated the Court's application of law and policy. His study identified that the Court usually applied strict scrutiny when assessing national legislation regarding homosexuals. 'Evolutive interpretation' was deployed to gradually reduce national discretion although there has been an element of deference within a number of Court decisions. The Court held that varying moral standards and the supranational character of the Court make the national authorities best placed to assess public and private morality (MoA). However, Arai-Takahashi questioned the duration of this continued deference in light of the 'common-ground' that has formed regarding the treatment of homosexuals. He noted that the Court engaged with the issues raised through an implicit and 'intense' proportionality test.

When addressing homosexuals' rights, the Court replaced 'sufficient' reasons with the requirement of 'particularly convincing and weighty reasons.' It also required the state to impose the least restrictive alternative when a choice of options was available. Arai-Takahashi noted that the Court resorted to a 'comparative and evolutive interpretation' and in a number of progressive cases governments failed to provide 'convincing and weighty reasons.' In sum, what appeared to be the Court's boldness was actually masking its passive and wait-and-see attitude. This finding suggested that the Court failed to instigate protection of rights in the absence of a significant number states also providing protection. This deference to European consensus and refusal to act until a common ground existed, showed that the Court lagged behind Contracting States who increased their protection independently of the Court. The NDS test thus became a judicial tool to mask the essentially political nature of their decisions.

The second group that saw an initially deferential view by the Court were transsexuals,¹⁴⁶ (another of Aganostou's sexual-minority groups.) Similar to the plight of homosexuals, the Commission initially relied upon an emerging consensus in the Contracting Parties to increase

¹⁴⁵ Aganostou D., 'Does European Human Rights Law Matter? Implementation and Domestic Impact of Strasbourg Court Judgments on minority-related policies' (2010) Vol.14(5) *International Journal of Human Rights* 721-743, 724.

¹⁴⁶ Above n.56, 72.

the intensity of review through the concept of ‘proportionality’. This differed from the Court¹⁴⁷ which held (at the time of Arai-Takahashi’s assessment) that there was little common ground. Critically, Arai-Takahashi suggested that ‘the Strasbourg organs have missed the appropriate time for their policy shift, and rather than lead the formation of public opinion, they are merely taking passive part in addressing fundamental aspects of privacy.’¹⁴⁸ However, since Arai-Takahashi’s assessment, the Court’s jurisprudence has shifted to follow the growing Consensus concerning transsexualism. Failure to act in the absence of Consensus suggested the ECtHR positioned itself as a slow reactionary force to interregional trends. The following section will therefore apply the NDS test to the s.64/65 CAFSA provisions.

Application to CAFSA

Anagnostou omitted detailing the reasons for categorising homosexual and transgender individuals as sexual minorities for the purpose of the 2010 article. However, the term sexual minority has received numerous definitions.¹⁴⁹ Individuals engaging in CAFSA are a sexual minority using Nichols and Shernoff’s definition, comprising ‘groups of people who affiliate, self-label, and seek human rights and acceptance for sexual lifestyles that are often considered psychologically and/or morally deficient by mainstream citizens.’¹⁵⁰ Individuals engaging in CAFSA are likely to be considered morally deviant as well as psychologically deficient. Whilst they are rare, there are groups that affiliate, self-label and seek acceptance for engaging in CAFSA activities.¹⁵¹ Similar to homosexuals and transsexuals there has been an extensive history of differential treatment against those engaging in CAFSA and like other sexual minorities, there is an intimate link between the CAFSA group and sexual identity often through expressive actions. This expressive action, (sex with a family member) could be said to

¹⁴⁷ The full time permanent European Court of Human Rights began sitting in 1998 and replaced the European Commission of Human Right created in 1954 and the part-time non-permanent European Court of Human Rights created in 1959.

¹⁴⁸ Above n.56, 74. The MoA is explained above at 5.3.1.

¹⁴⁹ Sexual minorities have been defined in numerous ways including simply ‘nonheterosexual’ by Diamond L.M., ‘New Paradigms for Research on Heterosexual and Sexual-Minority Development’ (2003) Vol.32(4) *Journal of Clinical Child and Adolescent Psychology* 490-498. Others such as Rivers use it as a synonym for homosexuality: see Rivers I., ‘Social Exclusion, Absenteeism and Sexual Minority Youth’ (2000) Vol.15(1) *Support for Learning* 13-18. It has been used to describe those who ‘identify as other than monogamous heterosexuals’ including, transgender, multiple-sexual-partners, sex workers, and S/M practitioners by Moser C., ‘Addressing the healthcare Needs of Sexual Minority Patients’ (1999) Vol.2 *Electronic Journal of Human Sexuality* www.ejhs.org/volume2/Moser/moser1.htm

¹⁵⁰ Nichols M., Shernoff M., ‘Therapy with Sexual Minorities: Queering Practice’ Chapter 13 in Leiblum S.R., ed. *Principles and Practice of Sexual Therapy* 4th ed. (Guilford, New York, 2007).

¹⁵¹ Some websites include <http://www.geneticsexualattraction.com>, <http://www.cousincouples.com>, <http://www.incestnews.blogspot.com.au>, last accessed 26th February 2012. These sights provide information and resources to individuals who wish to engage in consensual adult familial sexual activity.

go to the core of the individual's self-identity and thus be intimately related to personal and self-determination. Therefore, they fit within the definition of Nichols and Shernoff's sexual minority groups.

This investigation sought to use analogous situations to reason through the human rights norms due to the lack of cases directly dealing with CAFSA. Thus, the information gained through Aganostou's analysis is particularly useful, including categorisation of the case law on the protection of sexual minorities, in understanding future consistent treatment by the Court of any CAFSA claim.

Whilst applying the criteria of 'pressing social need' to these groups, the Court permits Contracting Parties a MoA.¹⁵² This can be seen in the case of *Kurochkin*¹⁵³ where the Court stated 'it is not the Court's task to substitute itself for the domestic authorities in the exercise of their responsibilities ... [omitted] ... but rather to review under the Convention the decisions that those authorities have taken in their exercise of their power of assessment.'¹⁵⁴ The Court applies a varying standard of scrutiny depending on the interference: 'authorities have a wide margin of appreciation in particular when assessing the necessity of taking a child into care, a stricter scrutiny is called for in respect of any further limitations.'¹⁵⁵

Arai-Takahashi suggested that the criterion of 'relevance' is easily related and compared to the test for legitimate aim.¹⁵⁶ He suggested that only exceptionally are Contracting Parties found in violation of this standard. Such situation is the result of the Court wishing to be politically mindful of 'expressly or implicitly incorporating arbitrary purposes into its legislation.'¹⁵⁷ If faced with the question, the Court is most likely to find the Sexual Offences Act 2003 pursues a legitimate aim. The legislation (s.64/65) is broadly relevant to achieving the stated aim; it criminalises any sexual penetration, consensual or not, with a family member. This removes any questions concerning the validity of consent and/or determining whether the penetration is the result of grooming or coercion.

In light of the legitimate aim, it is not beyond the realms of possibility that the s.65 (consent to penetration) provision is relevant and capable of advancing the stated aim. However, it seems counter-intuitive that the penetrated individual may be prosecuted (s.65) as it is usually the

¹⁵² Above n.56, 12.

¹⁵³ *Kurochkin v Ukraine* (App no.42276/08) paras.51-52.

¹⁵⁴ *Kurochkin* n.153, paras.51.

¹⁵⁵ *Dolhamre v Sweden* (App no.67/04) para.110 citing *Kutzner v Germany* (App no.46544/99) para.67.

¹⁵⁶ Above n.56, 63.

¹⁵⁷ Above n.56, 11.

case that the penetrated victim is not the instigator. Admittedly, questions of quality of consent are not engaged and thus make for an easier application of the law. The government may proffer the justification that the law sends a signal: that consenting to penetration by family members is illegal and that this provides support (to those who do not want to consent but feel they have to, due to grooming or pressure) to prevent individuals from engaging in such conduct. The law warns individuals that consenting (in coercive relationships) is wrong, and therefore these individuals have the law's support in resisting such relationships. Such construction seems extremely tenuous. However, if this is the correct interpretation, s.65 is not directly relevant to achieving the aim: it appears to attempt to achieve its goal in a roundabout manner achievable through less restrictive legislation. Therefore, s.65 does not pass the relevance tests.

With regard to the requirement or condition of 'sufficient reasons', Arai-Takahashi suggested the Court required a 'more careful analysis,' with the substitution of the sufficient reasons test for 'particularly convincing and weighty reasons.' Factors including the nature, severity and effects of the obstructing measures, in addition to the harm caused to the citizen, are all part of the proportionality test.¹⁵⁸

Section 64 criminalises penetration of a family member: as noted above it necessarily includes CAFSA. It therefore precludes individuals from the free choice of engaging in consensual sexual penetrative activity: an integral part of a relationship. The proportionality test is intertwined with the necessity of the action taken by the state. Protecting individuals from unwanted sexual attention is necessary state action: there is a legitimate aim and the potential severity of the infringement suggests use of criminal laws prohibiting such actions would be proportionate (depending on the severity of the sanction). However, this law not only protects individuals from unwanted action: it additionally prevents individuals from engaging in certain categories of wanted action (genuine CAFSA penetration.) As seen in chapter 4, the severities of the restrictions for individuals who want to engage in non-harmful CAFSA penetrative activity, are therefore, immense. A choice to engage in intercourse could result in criminal prosecution and may lead to inclusion on ViSOR.¹⁵⁹ Numerous detrimental consequences as identified in Chapter 4 thus occur, including impact upon employment, education and social exclusion.¹⁶⁰ Other legislative provisions criminalise non-consensual penetrative acts

¹⁵⁸ Above n.56, 63.

¹⁵⁹ Discussed at 4.5.2.

¹⁶⁰ Above 4.5.3.

prohibited within s.64.¹⁶¹ It is therefore hypothesised that s.64, is a superfluous legislative provision. It is overbroad in catching CAFSA conduct: other provisions exist to achieve the legitimate aim of protecting individuals from abuse. The only additional purpose served by s.64 is the discriminatory treatment of individuals in a sexual relationship because of consanguinity. In light of this, the state has not proffered sufficient reasons for its existence.

A number of problems in addition to those found with s.64 also arise with s.65 consent to penetration, when reviewed against the ‘necessary in a democratic society test.’ If consent is understood as fully informed and genuine consent, then ‘pressure, coercion and grooming’ have been excluded from the provision. If ‘consent’ were to receive a wide reading not excluding those who have been pressured, coerced or groomed, this would also criminalise victims of the intercourse. These victims (individuals) ought not to have their actions criminalised: if anything, they are in need of the laws’ protection rather than being its target. Within the pre-legislative reports and debates concerning the offence, no evidence has been proffered to support the contention that criminalisation of consent to penetration with adult family members is necessary to protect individuals from harm or abuse. No evidence has been proffered to show that adults engaged in such activity have a propensity to abuse or harm other family members, or the public, thus making the case for such criminalisation. Nor have any ‘particularly convincing or weighty reasons’ been proffered as to how the provisions sought to protect the family.

The Court held in *Oluic* that there must be a fair balance between competing interests of the individual and the community as a whole.¹⁶² As seen in the previous chapter, there has been no identified harm to the individual or community from permitting CAFSA. Legislative debate excluded morals as a basis for the offence.¹⁶³ The same detrimental consequences to the individual (as identified with s.64 above at n.159) are likely to occur when s.65 is used against individuals consenting to penetration. Remembering that the ‘essential object of Article 8 is to protect the individual against arbitrary action by public authorities’¹⁶⁴ and in light of the state discourse, it is therefore hypothesised that the state will fail to proffer a ‘pressing social need’ for the criminalisation of acts within s.65 and thus breach Article 8.

¹⁶¹ As seen above at Chapter 4.3 Sexual Offences Act 2003.

¹⁶² *Oluic v Croatia* (App no.61260/08) para.46.

¹⁶³ See above 4.3.

¹⁶⁴ *Dabrowska* n.103, para.44.

5.4.4 Article 14 - Prohibition of Discrimination

The analysis of Article 8 data above, highlighted a number of cases where Articles 8 and 14 were raised together. Article 14 states ‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’ It has no independent existence¹⁶⁵ and only complements other substantive provisions;¹⁶⁶ therefore it cannot be raised independently as a cause of action.

The Court begins by assessing whether the issue falls within another substantive provision, though it does not presuppose a violation of such. It is necessary for the facts to ‘fall within the ambit’ of one or more Articles of the Convention for Article 14 to apply.¹⁶⁷ As was found in the previous section, the provisions against CAFSA suggest the applicability of Article 8; therefore it follows that Article 14 may be applicable. The Court then seeks to determine if the alleged reason for the discrimination is one of the grounds listed in Article 14. The basis of discrimination concerning CAFSA could be categorised under ‘other status.’ The Court goes on to ascertain that the applicants can properly compare themselves with another class of persons who are treated more favourably. Finally, the Court determines if the difference in treatment is capable of objective and reasonable justification. The ‘difference in treatment’ constitutes discrimination ‘unless a) it has a legitimate aim and b) unless there exists a reasonable relationship of proportionality between the means employed and the aim pursued.’¹⁶⁸ The legitimate aims of the legislation are identified above,¹⁶⁹ thus the analysis of Article 14 will begin with the reasonable relationship of proportionality.

Reasonable Relationship of Proportionality

Individuals wishing to engage in CAFSA may argue they are victims of a difference in treatment that lacks objective and reasonable justification.¹⁷⁰ There must be a difference in treatment of persons in relevantly similar situations.¹⁷¹ The Court goes on to explain that ‘Contracting States

¹⁶⁵ *Zaunegger* n.99, para.35. *Kozak v Poland* (App no.13102/02) para.82.

¹⁶⁶ *Schalk* n.54, para.89. *S.H.* n.92, para.61 citing *Sahin v Germany* (App no.30943/96) para.85.

¹⁶⁷ *S.H.* n.92, para.61 citing *Petrovic v Austria* (App no.20458/92) para.22 and *Burden v United Kingdom* (App no.13378/05) para.58. *Kozak v Poland* (App no.13102/02) para.82 citing *Odievre v France* (App no.42326/98) para.54.

¹⁶⁸ *Schalk* n.54, para.97. See above n.56, 167.

¹⁶⁹ As above at 5.4.3.2 ‘Legitimate Aim’.

¹⁷⁰ Analogous position to the applicants in *S.H.* n.92, para.62

¹⁷¹ *Schalk* n.54, para.96.

enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment.¹⁷²

In *S.H* the Court recognised that ‘just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification.’¹⁷³ It has been argued in the previous section that individuals engaging in CAFSA are part of a sexual minority group. Thus the Court’s distinctions and treatment applicable to other sexual minority groups can be analogised here. The Court has noted on a number of occasions when dealing with the suspect category of ‘sexual orientation’ that the MoA afforded to the state is narrow.¹⁷⁴

In *Schalk*, the Court was forced to determine what amounted to a ‘relevantly similar situation.’ The Court held that same-sex couples were just as capable of entering into stable committed relationships (SCR) as different-sex couples. The focus was not on the identity of the parties. Instead, it was on the quality of the relationship. There was therefore a relevantly similar situation between same-sex and different-sex couples. The difference in treatment is between couples in an unrelated SCR (non-consanguinal ties) and those in a related SCR (consanguinal ties). Any ‘sexual minority’ couple in a stable committed relationship is in a relevantly similar situation. The only difference between *Schalk* and individuals in CAFSA relationships was the existence of consanguinity. Extending protection to the ‘sexual minority’ group of individuals engaging in CAFSA is likely to be extremely controversial, thus the Court is likely to state that they are not in a relevantly similar situation. However, it is open to individuals to argue, if focus is on blood, that the comparator chosen is incorrect. They would be free to argue that the correct comparator is not the identity of the party (kin), but the quality of the relationship, focusing on the consensual nature of the acts within the SCR (treating similarly all consensual, different-sex, same-sex and kin-relationships). Abusive relationships would not be a relevantly similar situation. Selection of the wrong comparator is a tool that can be easily used by the Court to avoid review.¹⁷⁵ Should the Court find a relevantly similar situation, it would then be required to assess if there was an objective and reasonable justification for the difference in treatment.

¹⁷² *S.H.* n.92, para.65 citing *Van Raalte v Netherlands* (App no.20060/92) para.39. *Schalk* n.54, para.96 citing *Burden v United Kingdom* (App no.13378/05) para.60.

¹⁷³ *S.H.* n.92, para.97.

¹⁷⁴ *Kozak v Poland* (App no.13102/02) para.92.

¹⁷⁵ See Wintemute R., ‘Sex Discrimination In *Macdonald And Pearce*: Why The Law Lords Chose The Wrong Comparators’ (2003) Vol.14(2) *King’s Law Journal* 267-282. See also Koppelman A., ‘Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination’ (1994) Vol.69 *New York University Law Review* 197-281.

There must also be a reasonable relationship of proportionality between the legitimate aim and the means employed. The legitimate aims of s.64/65 have been identified above as protection of individuals from abuse and protection of the family. As identified above in section 4.3 a number of other provisions could be engaged to protect individuals against sexual violence without the need for s.64/65.

The range of action (limited to sexual penetration) and combination of individuals (enumerated family members) able to breach s.64 means that it is a relatively narrow provision. All unwanted penetrative acts of sexual nature are prohibited by the rape provision, if the penetration is by a penis¹⁷⁶ or by the assault by penetration provision, if the penetration is sexual and is using part of a body or anything else.¹⁷⁷ Unwanted sexual conduct outside of penetration has been shown to be equally if not more damaging to individuals involved¹⁷⁸ and s.64 fails to prohibit this.

It thus appears that there is no reasonable relationship of proportionality between the means employed and the aim pursued. Criminalising only penetration within the family group, and ignoring non-consensual abusive non-penetrative activity, does not best achieve the aim of securing the rights of violated individuals. If an individual is penetrating a person who is giving full and true informed consent to the act of penetration, the consent negates any violation of the individuals' person. The provisions are insufficiently tailored to the aim to be achieved and thus are not necessary in a democratic society. Section 64 accordingly appears to breach Article 14 in conjunction with Article 8.

Section 65 criminalises consent to penetration. The protection of individuals from abuse, and protection of the family, does not require the criminalisation of individuals consenting to penetration. No convincing evidence has been adduced to suggest that there was a need to criminalise all familial penetration to protect the rights of the victims. The legislation was not sufficiently tailored to the aims that it sought to achieve. Individuals wanting to have a CAFSA relationship are prevented by s.65. Arai-Takahashi noted that the aim of the test was to 'ascertain whether the 'disadvantage suffered by the applicant is excessive in relation to the legitimate aim pursued.'¹⁷⁹ It has been shown that the implications of the criminalising CAFSA

¹⁷⁶ Sexual Offences Act 2003 s.1.

¹⁷⁷ Ibid s.2.

¹⁷⁸ Renvoize J., *Incest: A Family Pattern* (Routledge, London, 1982) 24.

¹⁷⁹ Above n.56, 172 citing *National Union of Belgian Police* (App no.4464/70) para.49.

are extreme¹⁸⁰ in relation to protecting individuals and the family; suggesting a breach of Article 14 when in conjunction with Article 8.

Prohibition of CAFSA is therefore collateral to the aim of protecting individuals from abuse. Such sexual relations were prohibited for unclear reasons. Separation of s.64/65 from the scheme of other sexual offences would not leave any gap in protection for victims of abusive conduct. Both s.64/65 are superfluous and unnecessary to protect individuals from abuse.

5.5 Conclusion

The Court has noted on numerous occasions that the Convention is a living instrument to be interpreted in light of present-day conditions.¹⁸¹ The investigation identified that the Court has never heard a case where arguments of CAFSA were raised and where 'incest' has been mentioned, this has always been a purely incidental issue.

The pervasive issues and doctrines of MoA and European consensus are likely to be at the heart of any Court decision concerning CAFSA. It has been identified that there is no European consensus on incestuous sexual activity. It is hypothesised that the Court, when faced with a sexual minority and applying its case law consistently, would apply a wide MoA on the basis of Arai-Takahashi's findings.

With regard to Article 8, the Court has extended the component rights to sexual minority groups including transsexuals and homosexuals. Analysis of the case law has shown that issues concerning familial sexual activity engage 'private' and arguably 'family' life. The English and Welsh provisions (s.64/65) prohibiting CAFSA have an identifiable basis in domestic law. However, questions of accessibility and foreseeability concerning individuals engaging in CAFSA, where there is no dominant partner and no victim, were raised. The extent of the discretion left to the police and Crown Prosecution Service using the legislation against individuals where no victim exists is questionable. No guidelines that are applicable to legislation prohibiting CAFSA have been identified or located.

The provisions must be intended for use to achieve a legitimate aim. The legitimate aims of protecting individuals from abuse and the protection of the family were identified in Chapters 3 and 4 of this thesis. The Court used a nuanced necessary in a democratic society test when addressing issues of sexual minorities. An emerging common ground acts to reduce state

¹⁸⁰ See Chapter 4 and discussion above.

¹⁸¹ *S.H.* n.92, para.64.

discretion, as does the concept of 'evolutive interpretation.' The Court replaced the 'sufficient' reasons part of the test with 'particularly convincing and weighty reasons' when addressing sexual minorities. The investigation found that sexual activity other than consensual familial penetrative sexual activity was criminalised elsewhere in the Sexual Offences Act 2003. Indeed s.65 does not protect another at all; it simply criminalises consensual sexual activity. The Court maintained its mantra in *Oluic* that there must be a fair balance between the competing interests of the individual and the community as a whole. It thus appears that the real concern with the law and its compatibility with European Convention norms occurs through the 'necessary in a democratic society' standard. A disjunction exists between criminalising consensual sexual activity (the most intimate spheres of an individual's private life) and the method of protecting individuals from abuse. It is hypothesised that no particularly convincing and weighty reasons can be proffered by the state to explain how s.65 protects individuals from abuse. Nor does any explanation exist concerning how s.64/65 is necessary to protect the family beyond other existing provisions. It is therefore hypothesised that the Court's jurisprudence points to a breach of Article 8 'private life' with regard to s.64/65.

It is also hypothesised that there is significant potential for Article 14 jurisprudence to influence the contemporary prohibition of CAFSA. Discrimination is prohibited and is defined as a difference in treatment in relevantly similar situations. The analysis analogised committed stable consanguinal relationships with other protected stable committed relationships. Article 14 requires a legitimate aim for the provisions that the alleged offending state is seeking to justify. There must be a reasonable relationship of proportionality between the means employed and the aim pursued. In cases dealing with sexual minorities the Court has looked for particularly serious reasons being proffered. The Contracting Party used the criminal law to provide a remedy to victims. This law has a potentially serious impact on individuals wishing to engage in CAFSA. The provisions do not cover other sexual acts, which are capable of causing significantly more damage, nor do other provisions cover such consensual acts between non-related adults. There is thus no reasonable relationship of proportionality in attempting to secure rights through the broad measures prohibiting all (including consensual) penetrative activity within the family group and ignoring non-penetrative familial sexual activity. The analysis suggests the hypothesis that the provisions at issue breach Article 14 in conjunction with Article 8.

The inquiry has not sought to prove any right to incest. It has shown that the justifications identified within chapters 3 and 4 and used to support the current provisions, indicate that

such provisions are insufficiently tailored to the legitimate aim to prevent breaches of Article 8, and Article 14 in conjunction with Article 8. There appears to be a lack of 'necessity in a democratic society' regarding Article 8 and a lack of 'reasonable relationship of proportionality' regarding Article 14.

Individuals engaging in CAFSA have the rights provided under the European Convention to be treated with the same dignity and respect as those who do not engage in such activities. In seeking to enact provisions that are fair and non-discriminatory it has been shown that England and Wales has failed to do so. The State must justify its action much more carefully in order to avoid breaches of human rights when legislating on the issues of incest and consensual adult familial sexual activity.

Chapter 6 - Thesis Reflections, Conclusions, Limitations and Future Research

6.1 Reflections

A significant and enlightening discovery occurred through my personal journey as a researcher: having had a traditional legal education at King's College London, K.U. Leuven and then at the University of Oxford, interdisciplinary investigations were somewhat alien to me. I soon discovered that any attempt to understand the regulation of incest required a broader, more encompassing approach. Data from multiple disciplines and multiple methods were all used in the creation of an inherently legal answer: interdisciplinary, transdisciplinary or multi-sited approaches (whatever the researcher decides to call it) are of great value, aiding legal analysis and ensuring it is responsive to real problems.

6.1.1 Methodological Approach

The thesis adopted an original methodological approach. As seen in chapter 1, the situation of the research within an NLR paradigm provided the opportunity to break free of a black letter approach and allowed for the selection of research methodologies appropriate to the data being analysed. This framework can be applied to investigate other offences and is seen in Annex C. The framework allows for investigation and understanding of the incumbent legal response to incest using relevant historical discourse and responses, pre-legislative discourse, and the consequences and repercussions of the criminalisation of incest. The initial investigation into the historical development of the offence gave an understanding of the changing responses to incest. The discovery of a dual set of reasons, that is the given justification to the population at large and the reasons that created the change in the legislation, highlighted the need for a thorough and systematic approach when analysing the reasoning behind the incumbent provisions.

The investigation sought to understand the incumbent response in light of the framework used to create the provisions. Thus rather than imposing an external framework of analysis or supporting a predetermined outcome using traditional legal analysis and reasoning, the task was approached constructively, by interpreting the data in a critical manner, using methods appropriate to the data.

Thus the adoption of a New Legal Realist paradigm provided the opportunity for greater depth and understanding of the reasoning behind the offence of incest, and uses, background and impact of legislative provisions. It did so in a transparent way that was able to use this 'multimethod eclecticism'¹, whilst at the same time 'revealing how the data was generated and observed'² and allowed these extra-legal methods to, as Cotterrell suggested, 'inform and interpret legal ideas.'³

6.2 Conclusions

The prohibition of incest within England and Wales has not shown any consistent pattern. The ad-hoc legislative provisions are lacking regularity in reasoning, prohibited-kin, and penalties, and were created at each period for politically expedient reasons.

The Government has referenced human rights as a normative tool to support positions on CAFSA that are antithetical to generally accepted human rights norms. The analysis has shown reference to human rights in order to gain advantage in the legislative reasoning process and to negate further investigation into the recommendations proposed. Thus, human rights have been shown to have the potential to be dangerous tools in a democratic state's reasoning process.

The investigation has shown that legislative tinkering with incest only ever occurred when politically expedient. Investigation of both primary and secondary historical sources allowed the development of the following hypothesis. For the majority of the last millennia, incest was prohibited only through church measures based on provisions that were found within the Christian Bible. These norms were sufficient to deter the majority of the population from committing incest. Those breaching the ecclesiastical rules received a penalty of penance or excommunication. A small window during a period of national instability in 1650-1660 saw incest criminalised, making the new government appear responsive to public unrest. Monarchical restoration saw the abolition of those draconian measures. Interest in incest was reignited by social puritans and moral-reform-organisations following concern over child abuse in the late 19th century. Rather than amending existing provisions, the liberal government enacted illiberal, moralistic and discriminatory provisions. There has never been a clear understanding of what role the incest prohibition sought to play and the investigation uncovered a dichotomy in reasons for the prohibition.

¹ Schuman M.C., Mertz E., 'Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism' (2010) *Annual Review of Law and Social Science* Vol.6 557-579.

² Epstein L., King G., 'The Rules of Inference' (2002) Vol.69(1) *The University of Chicago Law Review* 1-133, 34.

³ Cotterrell R., *Law, Culture and Society* (Ashgate, Hampshire, 2006) 60.

The 2003 legislative endeavour was studied in significant depth and the governmental report fundamental to changing legislative provisions was analysed. The analysis showed that a number of sophisticated discursive techniques were used to disguise a reasoning process recommending criminalisation of CAFSA. Deliberative democratic ideals of public engagement turned into governmental reliance on unsubstantiated assertions of small sample groups.

Significant failures within the Report included the failure to define incest: this problem, highlighted in the literature review, played a significant part in the formation of the discriminatory legislative provisions. The reasoning process failed to identify the core concern with CAFSA that the recommendations were seeking to tackle. Consensual and non-consensual activities were grouped together and labelled 'incest.' The labelling of consensual activity as abusive was intimately connected with the power dynamics used to ostracise unwanted behaviour. The creation of a 'victim' was significant in providing a situation that required legal intervention to prevent such abuse. The failure to apply a consistent set of arguments produced recommendations that breached the terms of reference: rather than being clear, coherent, fair and non-discriminatory and in accordance with human rights, these recommendations were based on illogical, erroneous and fallacious reasoning. Assimilation of participants' prejudices and poor expert evidence marred the Report's findings.

This law-making process, which ultimately led to the formation of the Sexual Offences Act 2003, had no rigorous external quality check. This thesis has highlighted significant failings in recommendations produced to inform the legislative process. Whilst Parliament could have remedied the errors, they did not. Some Members of Parliament took seriously their task to scrutinise legislation. They asked sufficiently rigorous questions of the contents. Yet the Ministers responsible for the Bill suggested the issues raised could be remedied in Standing Committee. This did not occur. The law was widened to include more acts, more individuals and all sexualities. Use of the s.64/65 provisions was minimal, with only 30 sentences imposed in the period 2004-2008. The vast reduction in use of the new provisions as compared to the previous law, highlighted in Chapter 4, suggested a reorientation of the offence to target purely consensual acts.

Sentencing CAFSA offences was shown to be difficult in light of the legislative requirements. Government agents were cognisant of the consensual nature of the acts and the severe consequences flowing from the engagement of the criminal law, particularly registrable sex offences, when proposing sentencing guidelines. Chapter 4 investigated the suitability of s.64/65 for registration. The inclusion of CAFSA offenders onto the list of those requiring registration was

investigated and found to be ill thought out. The need to register offenders prosecuted for their consent to be penetrated (s.65) also appeared unnecessary.

Inherent in both pre- legislative and legislative reasoning processes was reliance on European Human Rights norms. The thesis sought to understand the provisions in light of these norms. Rudimentary analysis has revealed a lack of European consensus concerning provisions prohibiting incestuous sexual activity. Investigation of these human rights norms and provisions enacted for the fundamental aim of public protection suggested s.64/65 were insufficiently tailored to the legitimate aim and thus breached Article 8. The provisions were found to be unnecessary in a democratic society. The provisions were also looked at in light of Article 14 jurisprudence. It was hypothesised that there is an arguable case for CAFSA relationships to be treated comparatively to other relevantly similar stable committed relationships. It was therefore hypothesised that the provisions are also discriminatory in light of protection offered by Article 14 in conjunction with Article 8.

6.3 Limitations

Restricted linguistic and translation resources limited the collection and analysis of the European consensus data found within Chapter 5. This also influenced the ECHR case law data selection.

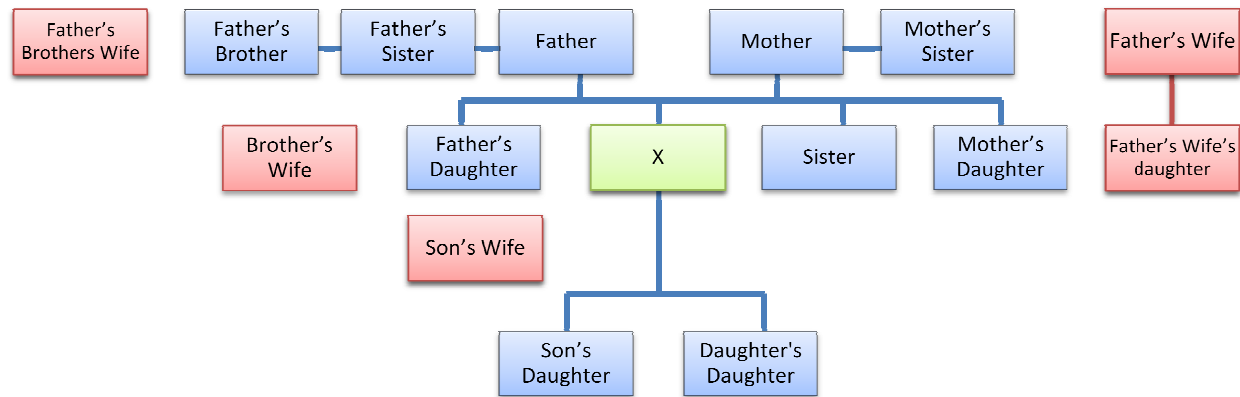
The lack of data available from the Ministry of Justice in providing offender profiles for those who committed familial adult sexual offences, resulted in an inability to analyse patterns of offences, and to understand in greater detail, information about the offences and those who commit them.

6.4 Future Research

The thesis has shown an example of use of public engagement in recommendation formation. The use of participant's prejudices fed directly into the legislative decision making process. Future research could ascertain possibilities for minimising or removing erroneous or contaminated data.

Greater research is needed on those who engage in CAFSA. As was seen from the literature review, studies on 'incest' often focus on the abusive nature of the conduct, ignoring the CAFSA category. There is only limited data concerning occurrence rates and likelihood of reoffending of those convicted of CAFSA offences: this too is needed, to better inform government recommendations and legislation.

Annex A1: Diagrammatical form of Leviticus c.18 v.6-16



6 None of you shall approach to any that is near of kin to him, to uncover *their* nakedness: I *am* the LORD.

7 The nakedness of thy father, or the nakedness of thy mother, shalt thou not uncover: she *is* thy mother; thou shalt not uncover her nakedness.

8 The nakedness of thy father's wife shalt thou not uncover: it *is* thy father's nakedness.

9 The nakedness of thy sister, the daughter of thy father, or daughter of thy mother, *whether she be* born at home, or born abroad, *even* their nakedness thou shalt not uncover.

10 The nakedness of thy son's daughter, or of thy daughter's daughter, *even* their nakedness thou shalt not uncover: for theirs *is* thine own nakedness.

11 The nakedness of thy father's wife's daughter, begotten of thy father, she *is* thy sister, thou shalt not uncover her nakedness.

12 Thou shalt not uncover the nakedness of thy father's sister: she *is* thy father's near kinswoman.

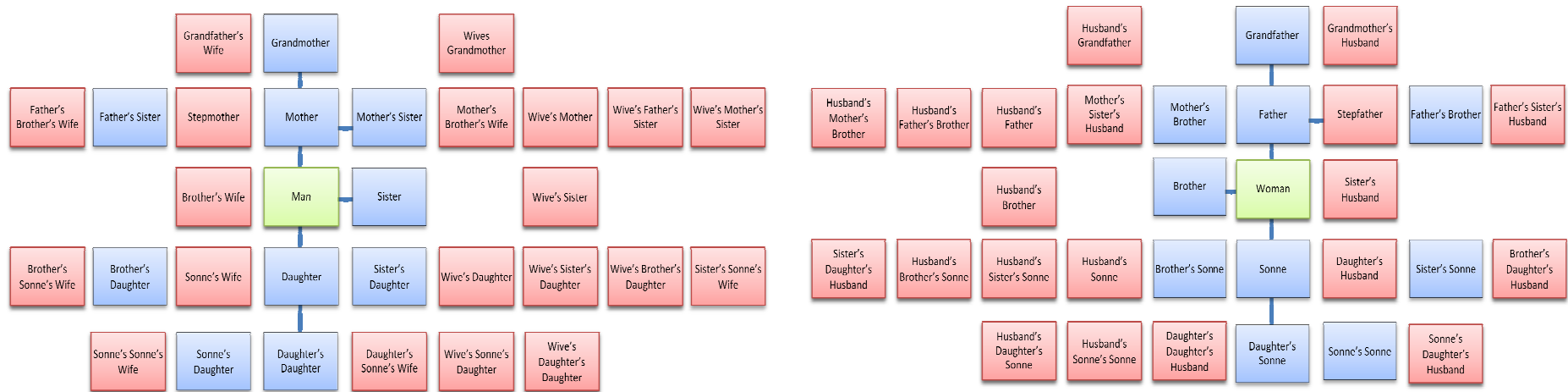
13 Thou shalt not uncover the nakedness of thy mother's sister: for she *is* thy mother's near kinswoman.

14 Thou shalt not uncover the nakedness of thy father's brother, thou shalt not approach to his wife: she *is* thine aunt.

15 Thou shalt not uncover the nakedness of thy daughter-in-law: she *is* thy son's wife; thou shalt not uncover her nakedness.

16 Thou shalt not uncover the nakedness of thy brother's wife: it *is* thy brother's nakedness.

Annex A2: Diagrammatical form of Archbishop Parker's Table of Kindred and Affinity 1563



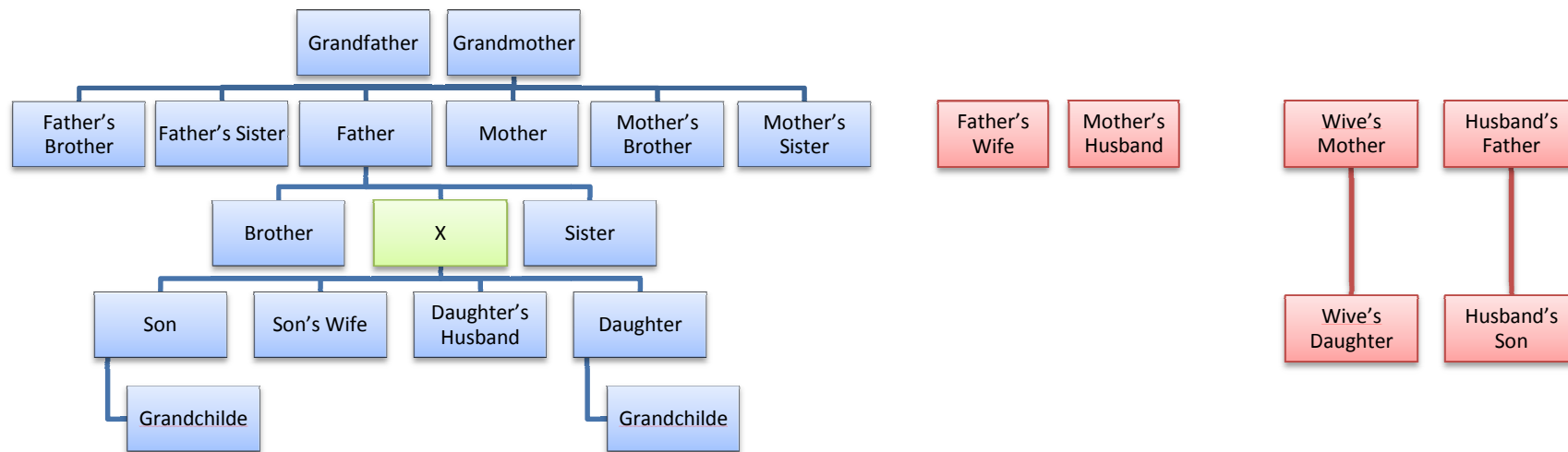
Grandmother
 Grandfather's Wife
 Wive's Grandmother
 Father's Sister
 Mother's Sister
 Father's Brother's Wife
 Mother's Brothers Wife
 Wive's Father's Sister
 Wive's Mother's Sister
 Mother
 Stepmother
 Wive's Mother
 Daughter
 Wive's Daughter
 Sonne's Wife

Sister
 Wive's Sister
 Brother's Wife
 Sonne's Daughter
 Daughter's Daughter
 Sonne's Sonne's Wife
 Daughter's Sonne's Wife
 Wive's Sonne's Daughter
 Wive's Daughter's Daughter
 Brother's Daughter
 Sister's Daughter
 Brother's Sonne's Wife
 Sister's Sonne's Wife
 Wive's Brother's Daughter
 Wive's Sister's Daughter

Grandfather
 Grandmother's Husband
 Husband's Grandfather
 Father's Brother
 Mother's Brother
 Father's Sister's Husband
 Mother's Sister's Husband
 Husband's Father's Brother
 Husband's Mother's Brother
 Father
 Stepfather
 Husband's Father
 Sonne
 Husband's Sonne
 Daughter's Husband

Brother
 Husband's Brother
 Sister's Husband
 Sonne's Sonne
 Daughter's Sonne
 Sonne's Daughter's Husband
 Daughter's Daughter's Husband
 Husband's Sonne's Sonne
 Husband's Daughter's Sonne
 Brother's Sonne
 Sister's Sonne
 Brother's Daughter's Husband
 Sister's Daughter's Husband
 Husband's Brother's Sonne
 Husband's Sister's Sonne

Annex A3: Diagrammatical form of An Act for suppressing the detestable sins of Incest, Adultery and Fornication 10th May 1650



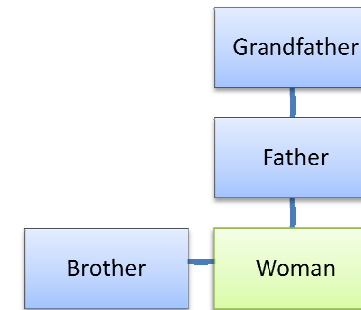
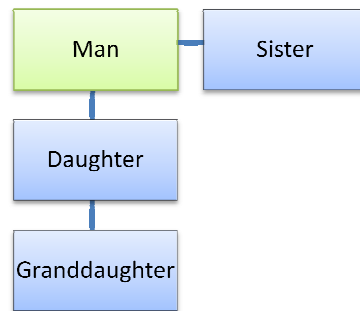
What shall be adjudged Incest; Such offence shall be Felony; Such marriages void, and children illegitimate.

For the suppressing of the abominable and crying sins of Incest, Adultery and Fornication, wherewith this Land is much defiled, and Almighty God highly displeased; Be it Enacted by the Authority of this present Parliament, That if any person or persons whatsoever, shall from and after the Four and twentieth day of June, in the year of our Lord One thousand six hundred and fifty, Marry, or have the carnal knowledge of the Body of his or her Grandfather or Grandmother, Father or Mother, Brother or Sister, Son or Daughter, or Grandchilde, Fathers Brother or Sister, Mothers Brother or Sister, Fathers Wife, Mothers Husband, Sons Wife, Daughters Husband, Wives Mother or Daughter, Husbands Father or Son; all and every such Offences are hereby adjudged and declared Incest:

And every such Offence shall be, and is hereby adjudged Felony; and every person offending therein, and confessing the same, or being thereof convicted by verdict upon Indictment or Presentment, before any Judge or Justices at the Assize or Sessions of the Peace, shall suffer death as in case of Felony, without benefit of Clergy: And all and every such Marriage and Marriages are hereby declared and adjudged to be void in Law, to all intents and purposes; and the Children begotten between such persons, notwithstanding any contract or solemnization of Marriage, to be illegitimate, and altogether disabled to claim or inherit any Lands or Inheritance whatsoever, by way of descent from, or to receive or challenge any Childes Portion in any Goods or Chattels of their said Parents, or any other Ancestor of such Parents.

Annex A4: Diagrammatical form of Incest (Punishment) Bill 127 1889; Incest A Bill to Provide for the Punishment of the Crime of Incest Bill 136 1900; Incest Bill 51 1903

These three bills contained the same substantive provisions and so have been shown together.



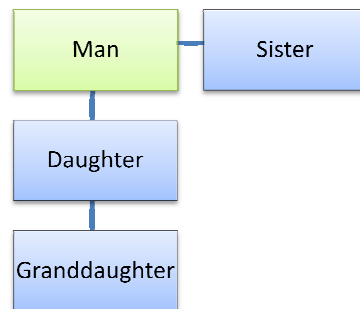
1 Incest by males

(1) Any male person who has carnal knowledge of a female person, of or above the age of thirteen years, knowing such female person to be his grand-daughter, daughter or sister, shall be guilty of a misdemeanour, and upon conviction thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not less than three years, and not exceeding seven years, or to be imprisoned for any time not exceeding two years with or without hard labour.

2 Incest by females of or over sixteen

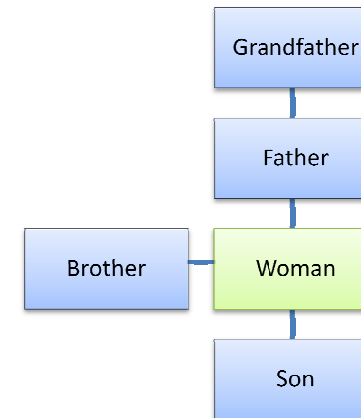
If any female person of or above the age of sixteen years shall consent to her grandfather, father, or brother having carnal knowledge of her, and permit him (knowing him to be her grandfather, father, or brother) to have carnal knowledge of her, she shall be guilty of a misdemeanour, and upon conviction thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not less than three years and not exceeding seven years, or to be imprisoned with or without hard labour for any time not exceeding two years.

Annex A5: Diagrammatical form of Incest Bill 134 1903 (Amended by Committee)



1 Incest by males

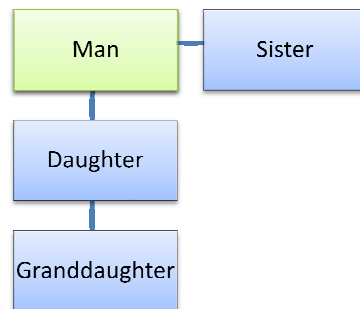
(1) Any male person who has carnal knowledge of a female person of or above the age of thirteen years, knowing such female person to be his grand-daughter, daughter, or sister, shall be guilty of a misdemeanour, and upon conviction thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not less than three years, and not exceeding seven years, or to be imprisoned for any time not exceeding two years with or without hard labour.



2 Incest by females of or over sixteen

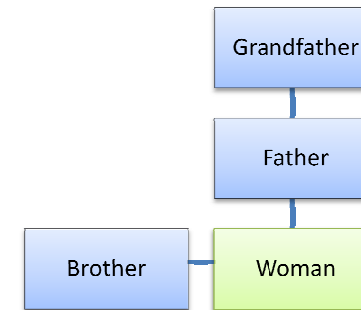
If any female person of or above the age of sixteen years shall consent to her grandfather, father, son, or brother having carnal knowledge of her, and permit him (knowing him to be her grandfather, father, son, or brother) to have carnal knowledge of her, she shall be guilty of a misdemeanour, and upon conviction thereof shall be liable, at the discretion of the court, to be kept in in penal servitude for any term not less than three years and not exceeding seven years, or to be imprisoned with or without hard labour for any time not exceeding two years.

Annex A6: Diagrammatical form of Incest Bill 173 1907 (7.Edw.7)



1 Incest by males

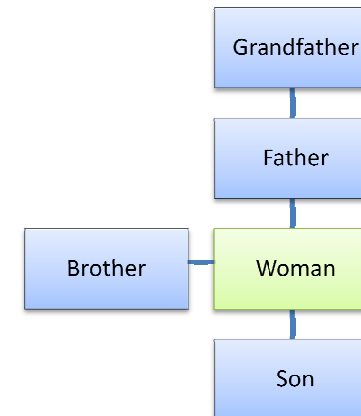
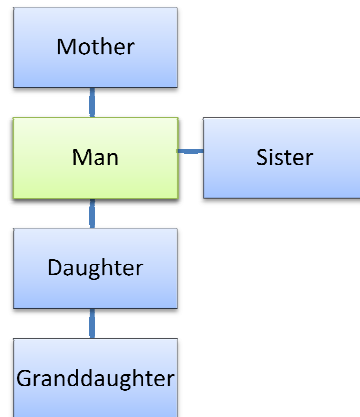
(1) Any male person who has carnal knowledge of a female person of or above the age of thirteen years, who is to his knowledge his grand-daughter, daughter, or sister, shall be guilty of a misdemeanour, and upon conviction thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not less than three years, and not exceeding seven years, or to be imprisoned for any time not exceeding two years with or without hard labour.



2 Incest by females of or over sixteen

Any female person of or above the age of sixteen years who permits her grandfather, father, or brother, to have carnal knowledge of her (knowing him to be her grandfather, father, or brother, as the case may be) shall be guilty of a misdemeanour, and upon conviction thereof shall be liable, at the discretion of the Court, to be kept in in penal servitude for any term not less than three years, and not exceeding seven years, or to be imprisoned with or without hard labour for any time not exceeding two years: Provided that in all proceedings against any female for an offence against this section, it shall be a sufficient defence to prove that such female, at the time she consented to her grandfather, father, or brother having carnal knowledge of her, or permitted him so to do, was acting under this coercion.

Annex A7: Diagrammatical form of Incest Bill 257 1907 (Amended by Committee) (7.Edw.7)



1 Incest by males

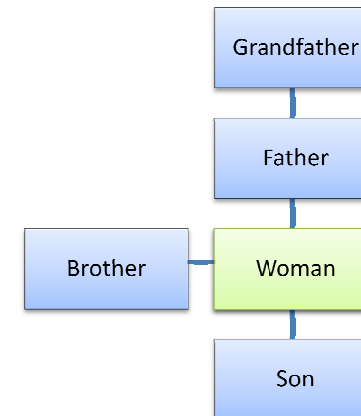
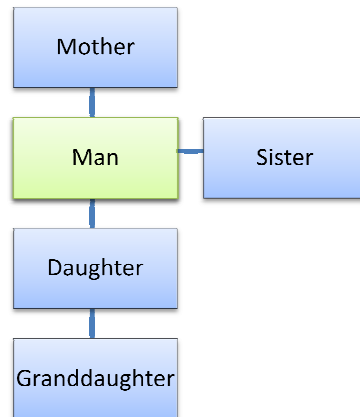
(1) Any male person who has carnal knowledge of a female person, who is to his knowledge his grand-daughter, daughter, sister, or mother, shall be guilty of a misdemeanour, and upon conviction thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not less than three years, and not exceeding seven years, or to be imprisoned for any time not exceeding two years with or without hard labour.

Provided that if on an indictment for any such offence it is proved that the female person is under the age of thirteen years the same punishment may be imposed as may be imposed under section four of the Criminal Law Amendment Act, 1885 (which deals with the defilement of girls under thirteen years of age).

2 Incest by females of or over sixteen

Any female person of or above the age of sixteen years shall consent to her grandfather, father, brother, or son to have carnal knowledge of her (knowing him to be her grandfather, father, brother, or son, as the case may be) shall be guilty of a misdemeanour, and upon conviction thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not less than three years, and not exceeding seven years, or to be imprisoned with or without hard labour for any time not exceeding two years.

Annex A8: Diagrammatical form of Incest Bill 127 1908 (8.Edw.7)



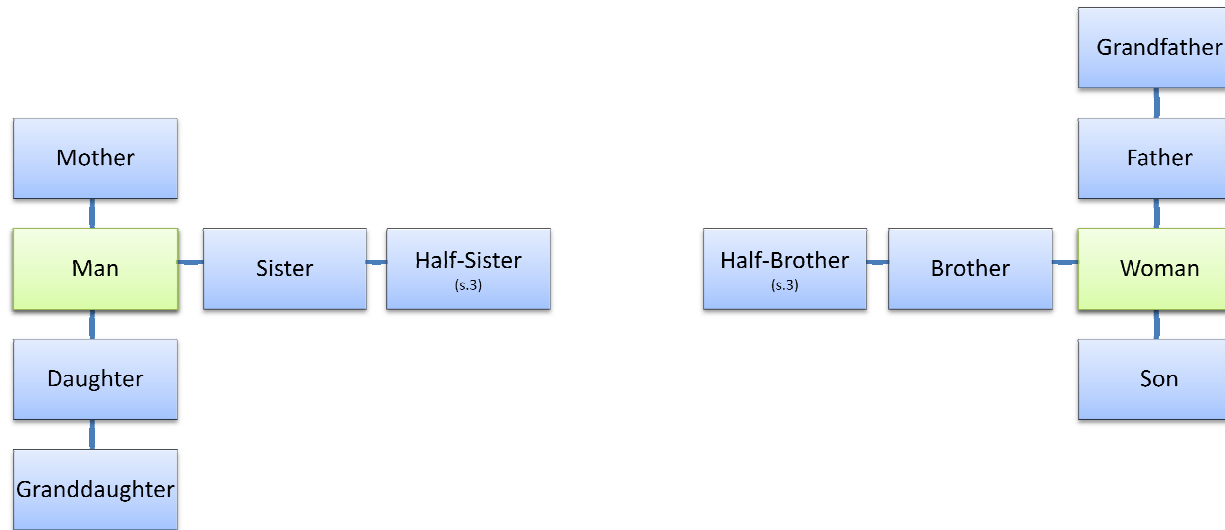
1 Incest by males

(1) Any male person who has carnal knowledge of a female person, who is to his knowledge his grand-daughter, daughter, sister, or mother, shall be guilty of a misdemeanour, and upon conviction thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not less than three years, and not exceeding seven years, or to be imprisoned for any time not exceeding two years with or without hard labour: Provided that if on an indictment for any such offence it is proved that the female person is under the age of thirteen years the same punishment may be imposed as may be imposed under section four of the Criminal Law Amendment Act, 1885 (which deals with the defilement of girls under thirteen years of age).

2 Incest by females of or over sixteen

Any female person of or above the age of sixteen years shall consent to her grandfather, father, brother, or son, to have carnal knowledge of her (knowing him to be her grandfather, father, brother, or son, as the case may be) shall be guilty of a misdemeanour, and upon conviction thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not less than three years, and not exceeding seven years, or to be imprisoned with or without hard labour for any time not exceeding two years.

Annex A9: Diagrammatical form of Punishment of Incest Act 1908 c.45



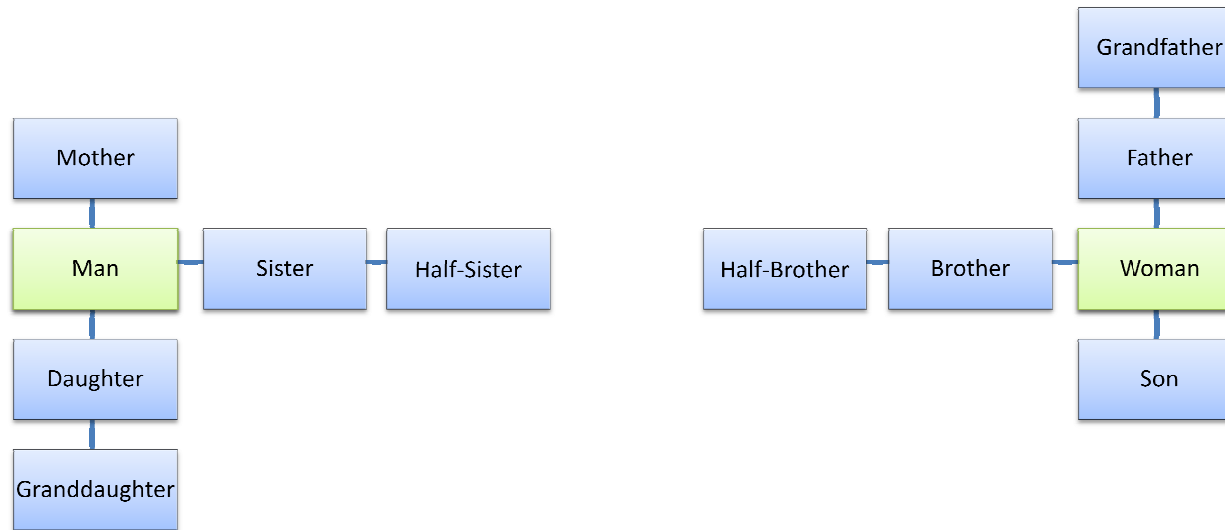
1 Incest by males

(1) Any male person who has carnal knowledge of a female person, who is to his knowledge his grand-daughter, daughter, sister or mother shall be guilty of a misdemeanour, and upon conviction thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not less than three years, and not exceeding seven years, or to be imprisoned for any time not exceeding two years with or without hard labour: Provided that if, on an indictment and proved that the female person is under the age of thirteen years, the same punishment may be imposed under section four of the Criminal Law Amendment Act, 1885 (which deals with the defilement of girls under thirteen years of age).

2 Incest by females of or over sixteen

Any female person of or above the age of sixteen years who with consent permits her grandfather, father, brother, or son to have carnal knowledge of her (knowing him to be her grandfather, father, brother, or son, as the case may be) shall be guilty of a misdemeanour, and upon conviction thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not less than three years, and not exceeding seven years, or to be imprisoned with or without hard labour for any time not exceeding two years.

Annex A10: Diagrammatical form of Sexual Offences Act 1956 c.69



10 Incest by a man

(1) It is an offence for a man to have sexual intercourse with a woman whom he knows to be his grand-daughter, daughter, sister or mother.

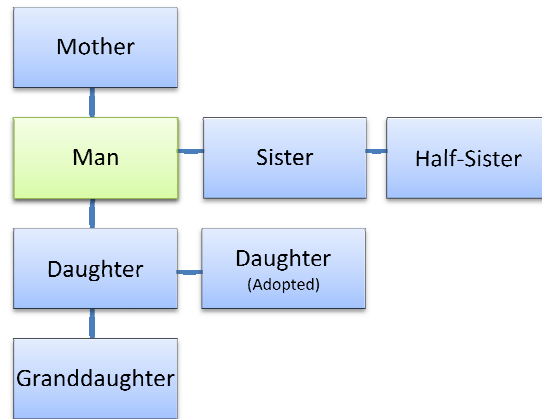
(2) In the foregoing subsection "sister" includes half-sister, and for the purposes of that subsection any expression importing a relationship between two people shall be taken to apply notwithstanding that the relationship is not traced through lawful wedlock.

11 Incest by a woman

(1) It is an offence for a woman of the age of sixteen or over to permit a man whom she knows to be her grandfather, father, brother or son to have sexual intercourse with her by her consent.

(2) In the foregoing subsection "brother" includes half-brother, and for the purposes of that subsection any expression importing a relationship between two people shall be taken to apply notwithstanding that the relationship is not traced through lawful wedlock.

Annex A11: Diagrammatical form of Draft Criminal Code 1989

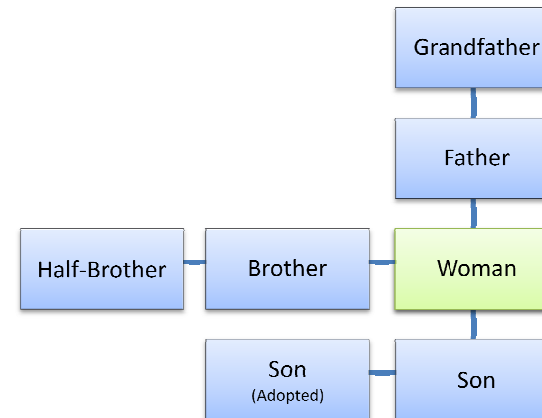


103 Incest by a man

(1) A man is guilty of incest if he has sexual intercourse with a woman whom he knows to be-

- (a) his grand-daughter or daughter; or
- (b) his sister unless –
 - (i) both he and his sister are aged twenty-one or above; or
 - (ii) he is aged twenty-one or above and he believes her to be aged twenty-one or above;
- (c) his mother (unless he is under the age of twenty-one).

(4) For the purposes of this section, “daughter” includes adopted daughter and “sister” includes half-sister.



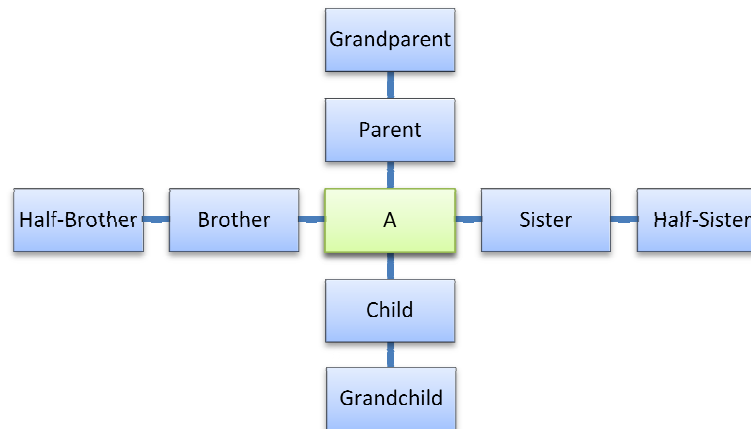
104 Incest by a woman

(1) A woman is guilty of incest if she has sexual intercourse with a man whom she knows to be-

- (a) her son; or
- (b) his brother unless –
 - (i) both she and her brother are aged twenty-one or above; or
 - (ii) she is aged twenty-one or above and she believes him to be aged twenty-one or above; or
- (c) her father or grandfather mother (unless she is under the age of twenty-one)

(2) For the purposes of this section, “son” includes adopted son and “brother” includes half-brother.

Annex A12: Diagrammatical form of Sexual Offences [HL] Bill 26 (2003)



68 Sex with an adult relative: penetration

(1) A person aged 16 or over (A) commits an offence if—

- (a) he intentionally penetrates another person's vagina or anus with a part of his body or anything else, or penetrates another person's mouth with his penis,
- (b) the penetration is sexual, and
- (c) the other person is a relative of A aged 18 or over.

(2) In this section, "relative" means a parent, grandparent, child, grandchild, brother, sister, half-brother or half-sister.

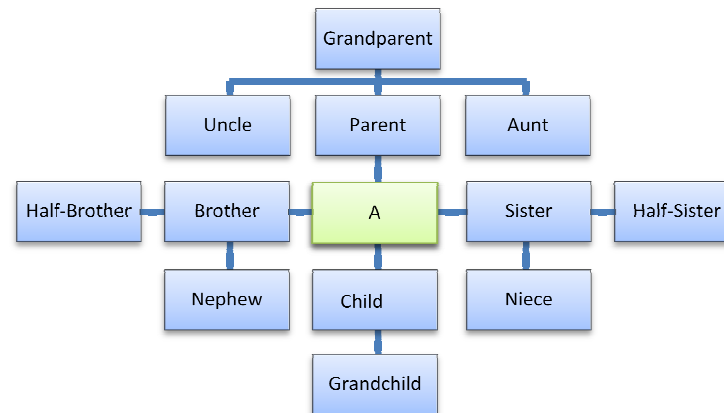
69 Sex with an adult relative: consenting to penetration

(1) A person aged 16 or over (A) commits an offence if—

- (a) another person (B) penetrates A's vagina or anus with a part of B's body or anything else, or penetrates A's mouth with B's penis,
- (b) A consents to the penetration,
- (c) the penetration is sexual, and
- (d) B is a relative of A aged 18 or over.

(2) In this section, "relative" means a parent, grandparent, child, grandchild, brother, sister, half-brother or half-sister.

Annex A13: Diagrammatical form of Sexual Offences Act 2003c.42 (as enacted)



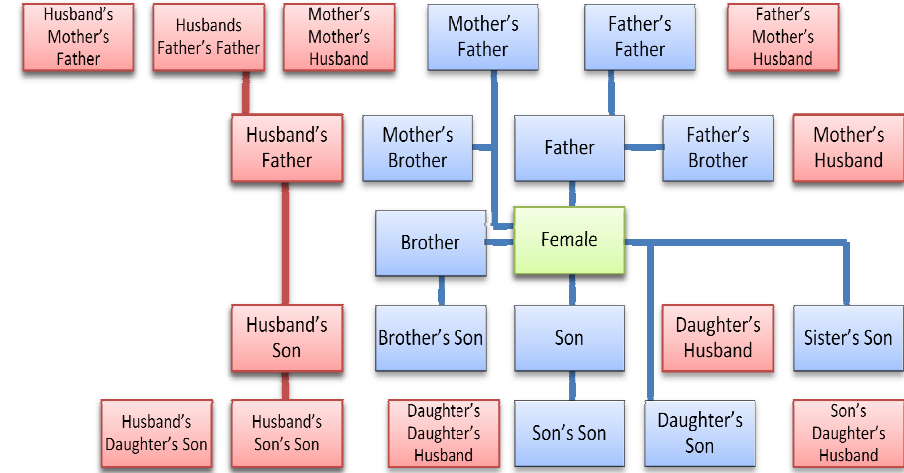
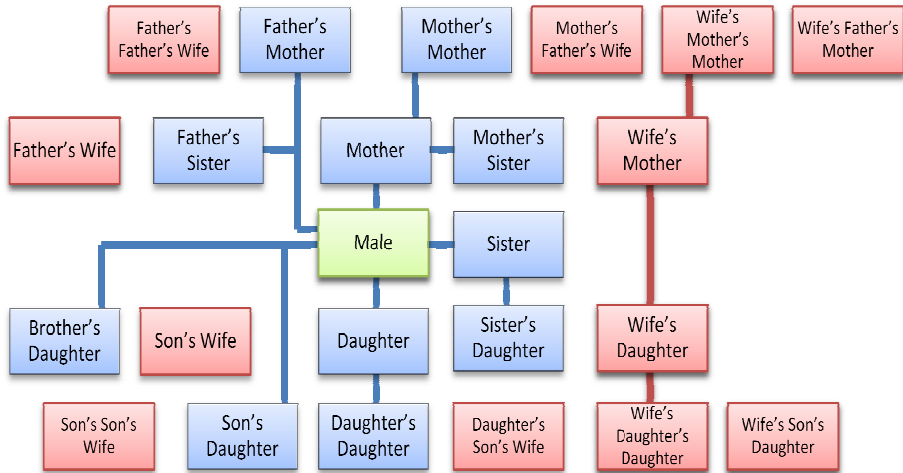
64 Sex with an adult relative: penetration

- (1) A person aged 16 or over (A) commits an offence if—
- (a) he intentionally penetrates another person's vagina or anus with a part of his body or anything else, or penetrates another person's mouth with his penis,
 - (b) the penetration is sexual,
 - (c) the other person (B) is aged 18 or over,
 - (d) A is related to B in a way mentioned in subsection (2), and
 - (e) A knows or could reasonably be expected to know that he is related to B in that way.

65 Sex with an adult relative: consenting to penetration

- (1) A person aged 16 or over (A) commits an offence if—
- (a) another person (B) penetrates A's vagina or anus with a part of B's body or anything else, or penetrates A's mouth with B's penis,
 - (b) A consents to the penetration,
 - (c) the penetration is sexual,
 - (d) B is aged 18 or over,
 - (e) A is related to B in a way mentioned in subsection (2), and
 - (f) A knows or could reasonably be expected to know that he is related to B in that way.

Annex A14: Diagrammatical form of Marriage Act 1949 c.76 (as enacted)



Schedule 1 Part 1

Mother
Daughter
Father's mother
Mother's mother
Son's daughter
Daughter's daughter
Sister
Wife's mother
Wife's daughter
Father's wife
Son's wife
Father's father's wife

Mother's father's wife
Wife's father's mother
Wife's mother's mother
Wife's son's daughter
Wife's daughter's daughter
Son's son's wife
Daughter's son's wife
Father's sister
Mother's sister
Brother's daughter
Sister's daughter

Schedule 1 Part 1

Father
Son
Father's father
Mother's father
Son's son
Daughter's son
Brother
Husband's father
Husband's son
Mother's husband
Daughter's husband
Father's mother's husband

Mother's mother's husband
Husband's father's father
Husband's mother's father
Husband's son's son
Husband's daughter's son
Son's daughter's husband
Daughter's daughter's
husband
Father's brother
Mother's brother
Brother's son
Sister's son

Annex B High Contracting Parties and National Legislation Concerning Incest

| No. | Country | Title of Offence | Parents/Children | Siblings | Aggravating factor of another offence | Sentence |
|-----|------------|--------------------------------------|---|---------------------|---------------------------------------|---|
| 1. | Albania | Incest Art 106 Penal Code | ✓ | ✓ | ✗ | Up to 5 years |
| 2. | Andorra | Intercourse with children | ✓ Art 208 - child between 4-18 (Art 205: under 4 any penetration is considered as a rape, without consideration of the parents/children relationship) | ✗ | ✗ | Up to 7 years imprisonment |
| 3. | Armenia | ✗ | ✗ | ✗ | ✗ | ✗ |
| 4. | Austria | Incest s.211 Incest of Penal Code | ✓ | ✓ Up to 6 months | ✗ | Up to 1 year if person with consanguine descendant Up to 3 years if in ascending line |
| 5. | Azerbaijan | ✗ | ✗ | ✗ | ✗ | ✗ |
| 6. | Belgium | Rape | ✓ Art 377 | ✓ | ✓ | Hard labour = min. 7 years if victim is an adult; 12 years if between 16-18; 17 years if less than 14 |

| No. | Country | Title of Offence | Parents/Children | Siblings | Aggravating factor of another offence | Sentence |
|-----|------------------------|--|------------------------|----------|---------------------------------------|----------------------------------|
| 7. | Bosnia and Herzegovina | Incest Article 213 Criminal Code of the Federation of Bosnia and Herzegovina | No data | No data | No data | No data |
| 8. | Bulgaria | No Data | ✓ Adopter and adopted | ✓ | ✗ | Up to 3 years |
| 9. | Croatia | Incest Art 198 of Penal Code 'Intercourse or equivalent act' | ✓ | ✓ | ✗ | Not exceeding 1 year |
| | | | | | | With minor - 6 months to 5 years |
| | | | | | | With child - 1 to 8 years |
| 10. | Cyprus | Incest Section 147 of the Criminal Code CAP 154 | ✓ 'Any male person' | ✓ | ✗ | For 7 years |
| 11. | Czech Republic | Sexual intercourse between relatives Art 188 of Criminal Code | ✓ Proximate generation | ✓ | ✗ | At most 3 years |

| No. | Country | Title of Offence | Parents/Children | Siblings | Aggravating factor of another offence | Sentence |
|-----|---------|---|--|---|---------------------------------------|---|
| 12. | Denmark | s223 of the Danish Penal Code | Only adopted child step dad as foster child. | ✗ | ✗ | Not exceeding 4 years |
| 13. | Estonia | Estonian Penal Code s144 Sexual intercourse with descendent | A parent with the rights of a parent or a grand parent. | ✗ | ✗ | Up to 3 years. |
| 14. | Finland | Chapter 17 Finnish Penal Code s22 Incest | ✓ Parent & ascendant Child & descendent No punishment if person is coerced and under 18. | ✓ | ✗ | Fine and imprisonment for at most 2 years |
| 15. | France | Rape | ✓ Even if not recognised at law or adopted | ✓ | ✓ Art 222-24 | Up to 20 years |
| | | Other sexual assaults | | | ✓ Art 222-29 al.2 | Up to 10 years/15,000€ |
| | | Other sexual abuses | | | ✓ Art 227-26 al.1 | Up to 10 years/150,000€ |
| | | | | | ✓ Art 227-27 | 2 years, 30,000€ |
| 16. | Georgia | ✗ None | ✗ | ✗ | ✗ | ✗ |
| 17. | Germany | Sexual intercourse between relatives s173 of the German Penal Code | ✓ | ✓ Descendants & siblings not 18 shall not be punished | ✗ | 173(1) sex with consanguine descendant not exceeding 3 years or a fine. Same for siblings |

| No. | Country | Title of Offence | Parents/Children | Siblings | Aggravating factor of another offence | Sentence |
|-----|---------|---|--|--|---------------------------------------|--|
| | | | | | | 173(2) sex with consanguine ascendant not exceeding 2 years or fine. Same for siblings |
| 18. | Greece | Art 345 Greek Penal Code Incest | ✓ No offence if under 17 | ✓ | ✗ | Relatives of ascendant up to 10 years Blood relative of descendant up to 2 years |
| | | Art 346 Greek Penal Code Indecency between relatives up to 1 year | ✓ No offence if under 17 | ✓ | ✗ | Brothers, sisters and half b/s up to 2 years |
| 19. | Hungary | Incest s203 | ✓ Relative in direct line No punishment if under 18 | ✓ | ✗ | 1-5 years |
| | | ‘Intercourse or fornicates’ | | Intercourse with sibling (misdemeanour) s203 (3) | ✗ | Up to 2 years See 203(3) |
| 20. | Iceland | s.200 Icelandic Penal Code | ✓ Intercourse other sexual relations | | | Up to 6 years or up to 10 if child is under 16. |
| | | | | ✓ Intercourse other sexual relations | | Up to 4 years imprisonment Or waive if under 18 |

| No. | Country | Title of Offence | Parents/Children | Siblings | Aggravating factor of another offence | Sentence |
|-----|---------|---|---|---|---------------------------------------|--|
| | | | | | | |
| | | | ✓ Sexual harassment | | | Up to 2 years or up to 4 if child is under 16. |
| 21. | Ireland | Incest Punishment of Incest Act 1908 | Male with female who is mother, sister, daughter or granddaughter | ✗ | ✗ | No data |
| 22. | Italy | Child Prostitution | ✓ Art 600-16 | ✗ | ✓ | 6 to 12 years + ½ or 2/3 of the normal sentence |
| | | Sexual violence ✓ Collective | ✓ Art 609 Bis ✓ Art 608 = father, father of the adopted child, legal representative | | | 6 to 12 years 6 to 12 years + ½ or 2/3 of the normal sentence |
| | | Sexual abuse | ✓ Art 609 Quarter = father, father of the adopted child, legal representative | Scope greater compared to the others. Not explicitly mentioning incest. However, it includes persons with whom the child is living/ who is the carer. Only if between the sex | | |

| No. | Country | Title of Offence | Parents/Children | Siblings | Aggravating factor of another offence | Sentence |
|-----|---------------|---|------------------|---|---------------------------------------|--|
| | | | | offender and the victim no more than 3 years (al.2) | | |
| 23. | Latvia | ✖ None | ✖ | ✖ | ✖ | ✖ |
| 24. | Liechtenstein | Incest 211 Penal Code | No data | No data | No data | No data |
| 25. | Lithuania | ✖ None | ✖ | ✖ | ✖ | ✖ |
| 26. | Luxembourg | Rape | ✓ Art 377 | ✖ | ✓ | See Art 266 |
| | | Prostitution | ✓ Art 380 | ✖ | ✓ | Not mentioned but additionally, no rights over the child |
| 27. | Macedonia | Incest Art 194 Criminal Code Crimes against sexual freedom & sexual morality | ✓ First line | ✓ | ✖ | Up to 1 year or fine If it is statutory rape or act on a child at least 3 years |
| 28. | Malta | Rape Act 198 Criminal Code 'Carnal knowledge with violence' No Incest provision per se | ✓ | ✓ | ✓ Aggravating circumstance of rape | 3-9 years aggravating circumstance increases punishment by one degree |

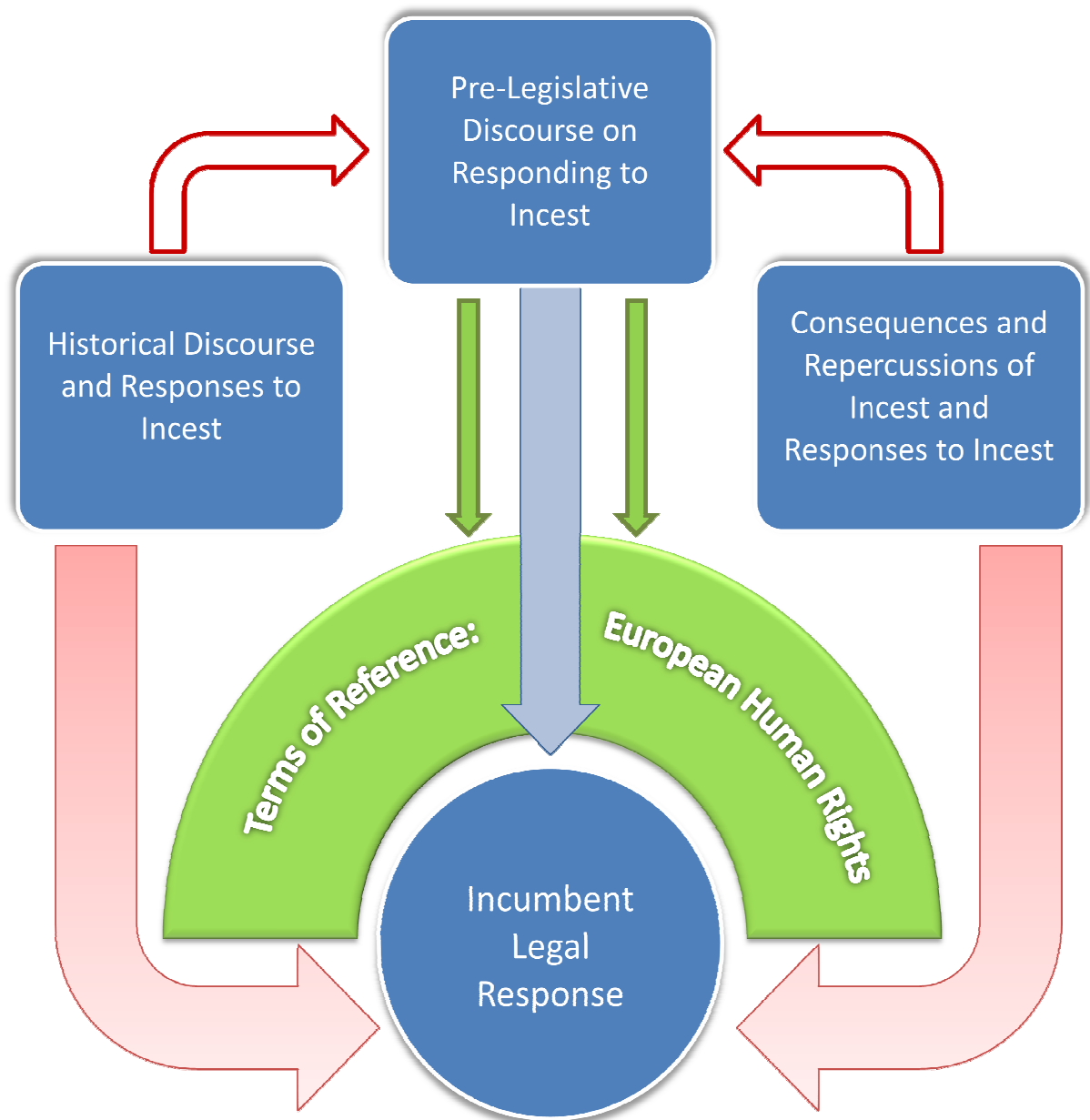
| No. | Country | Title of Offence | Parents/Children | Siblings | Aggravating factor of another offence | Sentence |
|-----|-------------|---|---|--|---------------------------------------|---|
| 29. | Moldova | Incest Article 201 Chapter VII Crimes against families and juveniles | ✓ Direct relatives up to 3 rd degree (not if up to 18 years of age and age differential not more than 2 years.) | ✓ | ✗ | Up to 5 years |
| 30. | Monaco | Rape and other sexual abuses | ✓ | ✓ | ✓ | Rape and indecent assault = against 15 years old and younger: the maximal national imprisonment; Other abuses = 10 to 20 years |
| | | Prostitution against children | ✓ | ✓ | ✓ | If offence committed, incited or attempted by a parent, 5 to 10 years and a fine according to Article 26(4) |
| 31. | Montenegro | Art 223 Incest Chapter 19 Criminal Code Criminal acts against marriage & family | ✓ Direct line intercourse | ✓ Adult with minor, brother or sister. | ✗ | Not exceeding 3 years |
| 32. | Netherlands | Child Abuse Art 249 Penal Code No Incest provision per se | Minor child Step child Foster child Ward | ✗ | ✗ | Not more than 6 years imprisonment or fine in 4 th category |

| No. | Country | Title of Offence | Parents/Children | Siblings | Aggravating factor of another offence | Sentence |
|-----|------------|---|---|----------------------------------|---------------------------------------|---|
| | | | Minor Minor servant | | | |
| 33. | Norway | Norwegian Penal Code Section 19 Sexual Offences Ss.197 | ✓ Person with descending line biological & adopted | | ✗ | Not exceeding 5 years |
| | | Ss.198 | | ✓ | ✗ | Not exceeding 1 year No penalty if under 18 |
| 34. | Poland | Article 201 | ✓ Ascendant Descendent Adopted | ✓ | ✗ | Between 3 months & 5 years |
| 35. | Portugal | ✗ None | ✗ | ✗ | ✗ | ✗ |
| 36. | Romania | Child sexual abuse (against girls) | 'Legal representative' – though incest not expressly mentioned. | ✗ | ✓ | 1 to 15 years imprisonment |
| 37. | Russia | ✗ None | ✗ | ✗ | ✗ | ✗ |
| 38. | San Marino | Incest | Ascending, Descending – joins carnally. | ✓ | ✗ | Imprisonment by one third degree and lifetime ban of being a parental guardian |
| 39. | Serbia | Incest Article 197 Chapter 19 Offences relating to marriage & family | ✓ Adult with underage relative by blood | ✓ Adult with underage sibling | ✗ | Up to 3 years imprisonment |

| No. | Country | Title of Offence | Parents/Children | Siblings | Aggravating factor of another offence | Sentence |
|-----|-------------|--|--|---|---------------------------------------|--|
| 40. | Slovakia | ✖ None | ✖ | ✖ | ✖ | ✖ |
| 41. | Slovenia | Article 183 Sexual Assault on person below 15 years. | Intercourse or lewd act. Parent, educator, guardian, adoptive parent. | | ✖ | Not less than 1 and not more than 8 years |
| | | Article 204 Incest | Adult with underage linear relative. | Adults with underage brother or sister. | ✖ | Not more than 2 years |
| 42. | Spain | ✖ None | ✖ | ✖ | ✖ | ✖ |
| 43. | Sweden | Sexual intercourse Section 4 of Swedish Penal Code | ✓ | ✓ | ✖ | Offspring at most 2 years Siblings at most 1 year |
| 44. | Switzerland | Intercourse | ✓ | ✓ (only if same blood) | ✓ Art 213 | Imprisonment |
| 45. | Turkey | New Turkish Penal Code Art 103 (3) Sexual abuse of children | Ascendant or second or third degree blood relative | ✖ | ✖ | From 8 to 15 years |
| | | | Step father or adopted person coerced | | | Sentence increased by half |
| | | New Turkish Penal Code Art 102 Violate sexual immunity | Third degree blood relation or kinship | | | 2 to 7 years |

| No. | Country | Title of Offence | Parents/Children | Siblings | Aggravating factor of another offence | Sentence |
|-----|----------------|--|------------------|----------|---------------------------------------|---|
| 46. | Ukraine | ✕ None | ✕ | ✕ | ✕ | ✕ |
| 47. | United Kingdom | England and Wales: Sexual Offences Act 2003 s.64 Sex with an adult relative: penetration s.65 Sex with an adult relative: consenting to penetration | ✓ | ✓ | ✕ | A person guilty of an offence under this section is liable— (a)on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both; (b)on conviction on indictment, to imprisonment for a term not exceeding 2 years |

Annex C Diagrammatical Representation of Thesis



Appendix 1 Example of Table Containing Historical Data – Period ‘1660 Restoration’

| | |
|--|--|
| Is the offence criminalised or civilly punishable? | Return to ecclesiastical sphere from criminal. |
| Source of Rule? | <p>Both Houses concluded, without discussion that the legislation enacted since 1642 was invalid.</p> <p>‘By implication this asserted the invalidity of all the Acts passed by the Long Parliament after the revolution of 1649.’¹</p> <p>Any legislation it wished to keep should be done through new bills.</p> <p>‘with these exceptions [enumerated] the existence of the legislative enactments passed during the Interregnum came to an end in 1660. The Convention Parliament contented itself with nullifying them indirectly by implication, and passed no resolutions expressly declaring their validity. The formal nullification of the Acts and Ordinances was effected by a declaratory Act passed in 1661.’²</p> <p>In the first parliamentary session of 1661, the Commons in the ‘Act for explanation of a clause contained in an Act of Parliament made in the seventeenth year of the late King Charles, intituled An act for repeal of a branch of a statute primo Elizabeth concerning commissioners for causes ecclesiastical,’³ ‘agreed to repeal those parts of the act of 1641 which might be said to impugn the bishops’ powers to hold their ordinary ecclesiastical courts.’⁴ The Act also refused ‘to confirm canons made in the year 1640 nor any of them, nor any other ecclesiastical laws or canons not formerly</p> |

¹ Firth C.H., Rait R.S., eds., Acts and Ordinances of the Interregnum 1642-1660, Vol. II, (London, HMSO, 1911) xxxii

² Ibid xxxiii.

³ ‘An Act for explanation of a clause contained in an Act of Parliament made in the seventeenth year of the late King Charles, intituled An act for repeal of a branch of a statute primo Elizabeth concerning commissioners for causes ecclesiastical.’ 1661, Anno decimo tertio, Caroli II. C.12., in Statutes at Large, 13 Cha. II to 1 Jam II., Vol. VIII (Cambridge, Joseph Bentham, 1763) 20.

⁴ Kenyon J.P., The Stuart Constitution, 1603-1688, (Cambridge, Cambridge University Press, 1986) 338.

| | |
|---|---|
| | confirmed, allowed or enacted by parliament for by the established laws of the land as they stood in the year...1639. ⁵ Act 'for repeal of an act of parliament, intituled, An act for disabling all persons in holy orders to exercise any temporal jurisdiction or authority.' ⁶ This Act removed the bar on clergy exercising legal authority and helped to restore ecclesiastical court jurisdiction. |
| Reason for criminalisation or civil punishment? | Acts of Interregnum Parliament never received Royal Assent: the Acts and Ordinances of the period could be viewed as being illegal. As soon as the Monarchy was restored the status would have fallen from a criminal to a permitted. A change in status, which is a by-product of national change. |
| Reason for the change from the previous regime – e.g. reason for going from civil to criminal | Firth and Rait 'from [the moment the monarchy was restored, on May 1, 1660] the fate of the legislation of the Interregnum was practically determined. The question at issue ceased to be the validity of the Acts passed since 1649, and became that of validity of all the Acts and ordinances passed since the summer of 1642. Legally, the legislation of both periods was equally invalid, since none of these enactments had received the King's assent. Nevertheless, Parliament at first approached the subject with some timidity, and seemed inclined to nullify part only of this legislation.' ⁷ |
| Prohibited Kin | Pre-1640 prohibitions – 1604 Canons. |
| Acts prohibited | Canon 99/109 1604 Canons |
| Penalty attaching to breach | Use of the 1650 Act was questionable, 'the new legislation on sexual misdemeanours, was apparently considered too savage to be employed upon any large scale.' ⁸ Hendrick suggests the law was 'rarely invoked.' ⁹ |

⁵ Statutes of the Realm, (Pall Mall, London, Dawsons, MDCCCXVII) Reprinted 1963, Vol.V. 316 .

⁶ 'An act for repeal of an act of parliament, intituled, An act for disabling all persons in holy orders to exercise any temporal jurisdiction or authority,' 1661, Anno decimo tertio, Caroli II. C.2, in Statutes at Large, 13 Cha. II to 1 Jam II., Vol. VIII (Cambridge, Joseph Bentham, 1763) 5.

⁷ Firth C.H., Rait R.S., eds., Acts and Ordinances of the Interregnum 1642-1660, Vol. II, (London, HMSO, 1911) xxxi

⁸ Hutton R., The British Republic 1649-1660, 2nd ed., (London, Macmillan, 2000) 41.

| | |
|----------------------------------|--|
| | <p>Ingram supports this view, that 'the introduction of the death penalty for incest and adultery during the Commonwealth was to prove largely a dead letter, partly because of intractable problem of proof, but more fundamentally because few cared to hand their neighbours for such crimes.'¹⁰ It was thought that it would have a deterrent effect sufficient to prevent the behaviour it proscribed. Ingram 'such an extreme penalty was neither necessary nor desirable in seventeenth-century England.'¹¹</p> <p>Davies - unsympathetic to the law, calling it a 'draconic law, which made adultery punishable by death (10 May 1650), was definitely a step in the wrong direction, and, like most statutes with exorbitant penalties, was nullified by the refusal of juries to convict.'¹²</p> <p>Veall 'in 1656 a committee was appointed to consolidate and revise the Act because of the widespread feeling about its absurdity, but no action followed.'¹³</p> <p>Telephone - Parliamentary Archives - no records survived.</p> <p>Penalty reverted to penance and excommunication.</p> <p>No records are found for the intervening period; however it appears that incest remained punishable as an ecclesiastical offence carrying the same penalties as other ecclesiastical offences, penance and excommunication.</p> |
| Socio Cultural Context, Religion | Post Puritan – See previous period for downfall. |

⁹ Hendrick H., *Child Welfare: Historical Dimensions, Contemporary Debate*, (Bristol, Policy Press, 2003) 37.

¹⁰ Ingram M., *Church Courts, Sex, and Marriage in England, 1570-1640*, (Cambridge, CUP, 1987), 335.

¹¹ Ingram, 248.

¹² Davies G., *The Early Stuarts 1603 – 1660 in The Oxford History of England Series*, ed. by Clark G., (Oxford Clarendon Press, 1959) 172.

¹³ Veall D., *The Popular Movement for Law Reform 1640-1660*, (Oxford, Clarendon Press, 1967) 141.

| | |
|-----------------------|---|
| Governance structures | <p>Acts following the Restoration - No reference to incest.</p> <p>If King Charles II wanted to keep the invalid Acts and Ordinances of the Interregnum any legislation must be passed in the correct legal manner.</p> <p>Firth and Rait list a number of statutes that were 'based on enactments of the revolutionary period'¹⁴ and 'some later statutes [...] also closely related to enactments of the Interregnum period.'¹⁵</p> |
|-----------------------|---|

¹⁴ Firth C.H., Rait R.S., eds., Acts and Ordinances of the Interregnum 1642-1660, Vol. II, (London, HMSO, 1911) xxxiii

¹⁵ Ibid.

Appendix 2 Recommendations from *Setting the Boundaries* and Government Responses

| | Recommendation in Brief | Government Response | Total Responses | Agree | Disagree / Proposed alternative | No view |
|----|--|---------------------|-----------------|-------|---------------------------------|---------|
| 1. | Offence of rape to be retained as penile penetration without consent and extended to include oral penetration. | Agree | 65 | 42 | 8 | 15 |
| 2. | Rape should not be subdivided into lesser or more serious offences. | Agree | 46 | 20 | 23 | 3 |
| 3. | A new offence of sexual assault by penetration to be used for all other penetration without consent. | Agree | 47 | 42 | 4 | 1 |
| 4. | Consent should be defined in law as “free agreement”. | Agree in part | 59 | 46 | 7 | 6 |
| 5. | Law should set out a non-exhaustive list of circumstances where consent was not present. | Agree in part | 42 | 34 | 5 | 3 |
| 6. | Law should include non-exhaustive list of examples of where consent is not present. | Agree in part | 42 | 27 | 11 | 4 |
| 7. | There should be standard direction on meaning of consent & consideration should be given as to whether this should be placed in statute. | Agree in part | 44 | 24 | 10 | 10 |
| 8. | Rape/sexual assault by penetration may be committed intentionally or recklessly & definition of recklessness in sex offences should include lack of any thought as to consent. | Agree | 38 | 30 | 3 | 5 |
| 9. | Defence of honest belief in free agreement should not be available where there was self induced intoxication, recklessness as to consent, or if accused did not take all reasonable steps to ascertain free agreement. | Agree in part | 86 | 38 | 48 | 0 |

| | Recommendation in Brief | Government Response | Total Responses | Agree | Disagree / Proposed alternative | No view |
|-----|--|----------------------------|------------------------|--------------|--|----------------|
| 10. | Should be new offence of sexual assault to cover sexual touching that is done without consent of victim. | Agree | 36 | 27 | 5 | 4 |
| 11. | Should be new offence of assault to commit rape or sexual assault by penetration. | Agree in part | 33 | 28 | 2 | 3 |
| 12. | New offence of trespass with intent to commit a serious sex offence should replace burglary with intent to rape. | Agree in part | 32 | 25 | 2 | 5 |
| 13. | Should be a new offence of abduction with intent to commit a serious sex offence. | Agree in part | 31 | 24 | 2 | 5 |
| 14. | Should be an offence of obtaining sexual penetration by threats or deception in any part of the world. | Agree in part | 35 | 26 | 6 | 3 |
| 15. | Offence of administering drugs (etc.) with intent to stupefy victim in order that they are sexually penetrated should be retained. | Agree in part | 30 | 28 | 0 | 2 |
| 16. | Should be new offences of compelling another to perform sexual acts, with several levels of seriousness depending on nature of compelled acts. | Agree in part | 29 | 24 | 1 | 4 |
| 17. | As matter of public policy, the age of legal consent should remain at sixteen. | Agree | 43 | 28 | 15 | 0 |
| 18. | Law setting out specific offences against children should state that below age of 13 a child cannot effectively consent to sexual activity. | Agree in part | 45 | 32 | 13 | 0 |
| 19. | There should be an offence of adult (over 18) sexual abuse of a child (under 16). | Agree in part | 52 | 36 | 16 | 0 |
| 20. | There should be no time limit on prosecution for new offence of adult sexual activity with a child. | Agree | 50 | 36 | 14 | 0 |

| | Recommendation in Brief | Government Response | Total Responses | Agree | Disagree / Proposed alternative | No view |
|-----|--|----------------------------|------------------------|--------------|--|----------------|
| 21. | A mistake of fact in age should be available as a defence but it should be limited to honest & reasonable belief & defendant has taken all reasonable steps to ascertain age. | Agree in part | 50 | 34 | 16 | 0 |
| 22. | The use of defence of mistake of fact in age should be limited to raising defence in court on one occasion only. | Disagree | 48 | 22 | 26 | 0 |
| 23. | In principle, defence of mistake of fact in age should remain limited by age of defendant. | Disagree | 74 | 46 | 28 | 0 |
| 24. | Belief in marriage should remain a defence to offences involving sex with a child, but should not apply where child is below age of 13. | Agree | 35 | 18 | 17 | 0 |
| 25. | An offence persistent sexual abuse of a child reflecting a course of conduct should be introduced. | Disagree | 70 | 57 | 13 | 0 |
| 26. | Those recognised as giving help, advice, treatment & support to children & young people in matters of sexual health should not be regarded as aiding & abetting a criminal offence. | Agree | 80 | 72 | 8 | 0 |
| 27. | There should be offence of sexual activity between minors to replace existing offences of unlawful sexual intercourse, buggery, indecency with children & sexual activity prohibited for children. | Agree | 47 | 28 | 19 | 0 |
| 28. | We recommend further consideration be given to appropriate, non-criminal interventions for young people under 16 engaging in mutually agreed under-age sex. | Agree | 46 | 38 | 8 | 0 |
| 29. | Criminal law needs to have measures in place which can be used to deal with children who sexually abuse other children. | Agree | 28 | 25 | 3 | 0 |

| | Recommendation in Brief | Government Response | Total Responses | Agree | Disagree / Proposed alternative | No view |
|-----|---|----------------------------|------------------------|--------------|--|----------------|
| 30. | There should be a statutory definition of capacity to consent which reflects both knowledge & understanding of sex. | Agree | 74 | 45 | 8 | 0 |
| 31. | There should be a specific offence relating to sexual activity with a person with severe mental disability who would not have capacity to consent to sexual relations. | Agree | 45 | 21 | 24 | 0 |
| 32. | There should be offences of a breach of a relationship of care to prohibit sex between a patient with a mental disorder, person in residential care and sex between doctors and patients. | Agree in part | 94 | 72 | 15 | 0 |
| 33. | There should be a defence of a pre-existing sexual relationship for the offence of breach of a relationship of care where there is some degree of capacity to consent. | Agree | 32 | 28 | 4 | 0 |
| 34. | There should be a specific offence of obtaining sex with a mentally impaired person by threat or deception. | Agree in part | 35 | 30 | 5 | 0 |
| 35. | There should be an offence of familial sexual abuse to reflect looser structure of modern families which will replace & extend existing offences of incest. | Agree | 66 | 53 | 13 | 0 |
| 36. | For purpose of offence of familial sexual abuse, prohibition on sexual relations with a child should apply until the child is 18. | Agree | 41 | 31 | 10 | 0 |
| 37. | Offence of familial sexual abuse should apply to sexual penetration of a child by all of those relations included in existing offence of incest with addition of uncles & aunts related by blood. | Agree in part | 64 | 38 | 26 | 0 |
| 38. | Adoptive parents should be treated on same basis as natural parents for purposes of offence of familial sexual abuse. | Agree | 42 | 40 | 1 | 0 |

| | Recommendation in Brief | Government Response | Total Responses | Agree | Disagree / Proposed alternative | No view |
|-----|---|----------------------------|------------------------|--------------|--|----------------|
| 39. | Sexual relations between adoptive siblings should be prohibited until age of 18. | Agree | 44 | 28 | 16 | 0 |
| 40. | There should be a defence of marriage for adoptive siblings over the age of 16. | Agree | 36 | 19 | 15 | 0 |
| 41. | Offence of familial sexual abuse should apply to stepparents & foster-parents. If relationship has ended, prohibition should still apply until a child is 18. | Agree | 60 | 48 | 9 | 0 |
| 42. | Offence of familial sexual abuse should apply to sexual penetration with or of a child by any other person living in household & in position of trust or authority over that child. | Agree in part | 42 | 32 | 4/6 | 0 |
| 43. | Sexual penetration between adult close family members should continue to be forbidden by law. | Agree in part | 52 | 27 | 6/19 | 0 |
| 44. | Criminal law should not treat people differently on basis of their sexual orientation. | Agree | 45 | 39 | 4 | 2 |
| 45. | Present offences of buggery & gross indecency should be repealed, with separate provision made for protection of children & animals. | Agree | 39 | 33 | 6 | 0 |
| 46. | Section 16 of Sexual offences Act 1956 & Section 4 of Sexual Offences Act 1967 will no longer be necessary & should be repealed. | Agree | 33 | 30 | 3 | 0 |
| 47. | Section 32 of the Sexual Offences Act 1956 should be repealed. | Agree | 36 | 36 | 8 | 0 |
| 48. | Consideration should be given to regulation of soliciting by men for purposes of prostitution under section 1 of Street Offences Act 1959 on same basis as soliciting by women. | Agree | 37 | 32 | 5 | 0 |

| | Recommendation in Brief | Government Response | Total Responses | Agree | Disagree / Proposed alternative | No view |
|-----|---|----------------------------|------------------------|--------------|--|----------------|
| 49. | There should be a specific trafficking offence. This offence could involve bringing a person to move from one place to another for purposes of commercial sexual exploitation or prostitution. | Agree | 43 | 35 | 8 | 0 |
| 50. | Review considers that commercial sexual exploitation of children should be dealt with by specific offences in which 'child' should refer to any person up to age of 18. | Agree | 36 | 31 | 5 | 0 |
| 51. | It should be an offence to buy sexual services of a child, recruit into commercial sexual exploitation, participate in or allow the exploitation or receive money for exploitation. | Agree in part | 36 | 34 | 0 | 0 |
| 52. | There should be offences of exploiting others by receiving money from prostitutes, managing or controlling prostitutes and recruiting people into prostitution whether or not for gain. | Agree in part | 39 | 29 | 10 | 0 |
| 53. | There should be a further review of the law on prostitution | Agree in part | 43 | 41 | 2 | 0 |
| 54. | There should be a new offence of indecent exposure relating to exposing the penis when he knew that he might cause fear, alarm or distress to another person. | Agree in part | 452 | 23 | 21 (408 agreed in part) | 0 |
| 55. | There should be an offence of voyeurism where a person in interior of building or other structure has reasonable expectation of privacy. There should be exception for authorised surveillance. | Agree | 94 | 20 | 5 (69 agreed in part) | 0 |
| 56. | A new public order offence should be created to deal with sexual behaviour that person knew or should have known was likely to cause distress, alarm or offence to others in a public place. | Agree | 71 | 24 | 3 (44 agreed in part) | 0 |

| | Recommendation in Brief | Government Response | Total Responses | Agree | Disagree / Proposed alternative | No view |
|-----|--|----------------------------|------------------------|--------------|--|----------------|
| 57. | A specific offence of bestiality should be retained. | Agree | 38 | 27 | 11 | 0 |
| 58. | Sexual interference with human remains should be an offence. | Agree | 31 | 30 | 1 | 0 |
| 59. | Sex offender treatment should continue to develop & be made available to those convicted of relevant offences. | Agree | 22 | 21 | 1 | 0 |
| 60. | All of the offences recommended, except for those which we recommend as public order/public nuisance offences, carry some degree of risk that would justify their consideration as part of a review of Schedule 1 of the Sex Offenders Act 1997. | Agree | 22 | 22 | 0 | 0 |
| 61. | The issue of the requirement for children to register under Sex Offenders Act should be separately considered in a review of the Act. | | 20 | 20 | 0 | 0 |
| 62. | Provision of alternative verdicts should be considered in preparation of new legislation and for avoidance of doubt that they should be set out in statute. | Agree | 20 | 20 | 0 | 0 |

Appendix 3A Data Table of Cases, Hudoc Search 'Article 8'

| Case Name | Case No. | Judgment Date | Article 14 Issue | Additional Article Involved | Language |
|--------------------------------|------------------|---------------|------------------|---------------------------------|----------|
| Zehentner v Austria | 20082/02 | 16/07/2009 | N | Article 1 of Prot.1,6, 8 | English |
| Nikitenko v Latvia | 62609/00 | 16/07/2009 | N | | French |
| Rachwalski and Ferenc v Poland | 47709/99 | 28/07/2009 | N | Article 3, 5, 8 | English |
| E S and Others v Slovakia | 8227/04 | 15/09/2009 | N | Article 3, 5, 8 | English |
| Enea v Italy | 74912/01 | 17/09/2009 | N | Article 8, 9 | English |
| Stochlak v Poland | 38273/02 | 22/09/2009 | N | | French |
| Tsonyo Tsonov v Bulgaria | 33726/03 | 01/10/2009 | N | | French |
| C C v Spain | 1425/06 | 06/10/2009 | N | | French |
| Salonaji-Drobnjak v Serbia | 36500/05 | 13/10/2009 | N | Article 6, 8 | English |
| Ovus v Turkey | 42981/04 | 13/10/2009 | N | | French |
| Costreie v Romania | 31703/05 | 13/10/2009 | N | | French |
| Tsourlakis v Greece | 50796/07 | 15/10/2009 | N | | French |
| Stoyan Dimitrov v Bulgaria | 36275/02 | 22/10/2009 | N | | French |
| Paulic v Croatia | 3572/06 | 22/10/2009 | N | Article 6(1)+14, 8, 1 of Prot.1 | English |
| Haralambie v Romania | 21737/03 | 27/10/2009 | N | | French |
| R R v Romania (No. 1) | 1188/05 | 10/11/2009 | N | | French |
| Vautier v France | 28499/05 | 26/11/2009 | N | | French |
| Dolenec v Croatia | 25282/06 | 26/11/2009 | N | Article 3, 5, 6, 8 | English |
| Velcea and Mazare v Romania | 64301/01 | 01/12/2009 | N | | French |
| Eberhard and M v Slovenia | 9733/05; 8673/05 | 01/12/2009 | N | Article 6, 8 | English |

| Case Name | Case No. | Judgment Date | Article 14 Issue | Additional Article Involved | Language |
|---|------------------------------|---------------|------------------|---|----------|
| Zaunegger v Germany | 22028/04 | 03/12/2009 | Y | Article 8+14 | English |
| Mikhaylyuk and Petrov v Ukraine | 11932/02 | 10/12/2009 | N | Article 8 | English |
| Gardel v France | 16428/05 | 17/12/2009 | N | | French |
| Bouchacourt v France | 5335/06 | 17/12/2009 | N | | French |
| M B v France | 22115/06 | 17/12/2009 | N | | French |
| Tapia Gasca and D v Spain | 20272/06 | 22/12/2009 | N | | French |
| Gillan and Quinton v The United Kingdom | 4158/05 | 12/01/2010 | N | Article 8, 10, 11 | English |
| Khan A W v The United Kingdom | 47486/06 | 12/01/2010 | N | Article 8 | English |
| Mastepan v Russia | 3708/03 | 14/01/2010 | N | Article 8 | English |
| Wegera v Poland | 141/07 | 19/01/2010 | N | | French |
| Xavier Da Silveira v France | 43757/05 | 21/01/2010 | N | Article 8 | French |
| Kemal Taskin and Others v Turkey | 30206/04; 37038/04; 43681/04 | 02/02/2010 | Y | | French |
| Dabrowska v Poland | 34568/08 | 02/02/2010 | N | Article 8 | English |
| Raza v Bulgaria | 31465/08 | 11/02/2010 | N | Article 5, 6, 8 | English |
| Anatoliy Tarasov v Russia | 3950/02 | 18/02/2010 | N | Article 2, 3, 4, 5, 6, 7, 8, 1 of Prot.1, 4 of Prot.7 | English |
| Kozak v Poland | 13102/02 | 02/03/2010 | Y | Article 6, 8+14 | English |
| Shalimov v Ukraine | 20808/02 | 04/03/2010 | N | Article 5, 6, 8 | English |
| A D and O D v The United Kingdom | 28680/06 | 16/03/2010 | N | Article 8 | English |
| M A K and R K v The United Kingdom | 45901/05; 40146/06 | 23/03/2010 | N | Article 3, 6, 8 | English |
| Mutlag v Germany | 40601/05 | 25/03/2010 | N | | French |
| Petrenco v Moldova | 20928/05 | 30/03/2010 | N | Article 6, 8 | English |

| Case Name | Case No. | Judgment Date | Article 14 Issue | Additional Article Involved | Language |
|-----------------------------------|--------------------|---------------|------------------|-----------------------------------|----------|
| S H and Others, v Austria | 57813/00 | 01/04/2010 | Y | Article 8+14 | English |
| Mustafa and Armagan Akin v Turkey | 4694/03 | 06/04/2010 | N | Article 6+14, 8, 5 of Prot.7 | English |
| MacReady v The Czech Republic | 4824/06; 15512/08 | 22/04/2010 | N | Article 6, 8 | English |
| Moretti and Benedetti v Italy | 16318/07 | 27/04/2010 | N | | French |
| Ciubotaru v Moldova | 27138/04 | 27/04/2010 | N | Article 6, 8 | English |
| Kennedy v The United Kingdom | 26839/05 | 18/05/2010 | N | Article 6, 8 | English |
| Visloguzov v Ukraine | 32362/02 | 20/05/2010 | N | Article 3, 8 | English |
| Kurochkin v Ukraine | 42276/08 | 20/05/2010 | N | Article 8 | English |
| Oluic v Croatia | 61260/08 | 20/05/2010 | N | Article 8 | English |
| Saghinadze and Others v Georgia | 18768/05 | 27/05/2010 | N | Article 5, 8, 1 of Prot.1 | English |
| Mawaka v The Netherlands | 29031/04 | 01/06/2010 | N | Article 3, 8 | English |
| Dolhamre v Sweden | 67/04 | 08/06/2010 | N | Article 6, 8 | English |
| Schwizgebel v Switzerland | 25762/07 | 10/06/2010 | Y | | French |
| Schalk and Kopf v Austria | 30141/04 | 24/06/2010 | Y | Article 8+14, 12+14, 1 of Prot.1, | English |
| Davydov and Others v Ukraine | 17674/02; 39081/02 | 1/07/2010 | N | Article 3, 8 | English |

Appendix 3B Data Table of Cases, Hudoc Search 'Incest' with Issues Arising

| Case Name | Case No. | Judgment Date | Main Articles | Language | Issue |
|-----------------------------------|----------|---------------|--------------------|----------|---|
| Dudgeon v The United Kingdom | 7525/76 | 22/10/1981 | Article 8 | English | Homosexuality criminalisation. Incest referred to in dissent – example of moral consensus law. |
| Ozturk v Germany | 8544/79 | 21/02/1984 | Article 6 | English | Discussion of what is criminal. Here road traffic type incident. Question was is it criminal or is it regulatory? Suggestion incest is not usually criminal. |
| De Haes and Gijssels v Belgium | 19983/92 | 24/02/1997 | Article 10 | English | Journalists prosecuted for writing articles that criticised judges (incest was basis for court judgment). |
| S B C v The United Kingdom | 39360/98 | 19/06/2001 | Article 5 | English | Person accused of rape/incest. English law did not permit bail in such circumstances. Claimed breach of Article 5(3) & 5(5). Judicial control of pre-trial detention is an essential feature of guarantees of convention. |
| Mouisel v France | 67263/01 | 14/11/2002 | Article 3 | English | Applicant detained claiming serious health issues. Inhumane and degrading treatment. Stated incest arises as a reason behind upsurge of older persons in prison system. |
| E and Others v The United Kingdom | 33218/96 | 26/11/2002 | Article 3 & 8 | English | Applicant's abuse by stepfather. Claimed breach of Article 3 inhumane and degrading treatment. I.e. State did not do sufficient to protect them. |
| K A v Finland | 27751/95 | 14/01/2003 | Article 8 | English | Accusation against applicant and wife of incest – onus on family reunification. |
| Odievre v France | 42326/98 | 13/02/2003 | Article 14 + 8 & 8 | English | Abandoned child sought to get details of mother who expressly declined release of information. |

| Case Name | Case No. | Judgment Date | Main Articles | Language | Issue |
|--|----------|---------------|----------------|----------|---|
| B and L v The United Kingdom | 36536/02 | 13/09/2005 | Article 12 | English | B and L were prevented from marrying as they were within the Prohibited Degrees laid down by primary statute the Marriage Act 1949 as amended by the Marriage (Prohibited Degrees of Relationship) Act 1986. They were able to get a personal exemption from Parliament. Impediment placed on the marriage served no useful purpose of public policy. |
| T and Others v Finland | 27744/95 | 13/12/2005 | Article 6 | English | Care proceedings-suggestion of incest Length of proceedings. |
| R v Finland | 34141/96 | 30/05/2006 | Article 8 | English | Suggestion of incest with child-positive duty on State to facilitate family reunification. |
| H K v Finland | 36065/97 | 26/09/2006 | Article 8 | English | Suspected child abuse by applicant against child. Child taken into care. |
| Klein v Slovakia | 72208/01 | 31/10/2006 | Article 10 | English | Accusation of incest against Archbishop-Complained of Article 10 expression after conviction for defamation. |
| Veraart v The Netherlands | 10807/04 | 30/11/2006 | Article 10 | English | Applicant is lawyer to family K. Family member alleged incest against another family member. Lawyer questioned an expert's qualification. State disciplinary tribunal found against lawyer. Claimed freedom of expression. |
| Tysiac v Poland | 5410/03 | 20/03/2007 | Article 3 & 8 | English | Applicant wanted termination of pregnancy on medical grounds. Not permitted to terminate. Incest was given as one of the possible reasons for termination. |
| F and M v Finland | 22508/02 | 17/07/2007 | Article 6 | English | Applicant was father of his daughter who social workers claim was sexually abused. Father's inability to question girl amounted to breach of fair trial and reasonable time-6 years. |
| Case of Flinkkila and Others v Finland | 25576/04 | 06/04/2010 | Article 10 & 7 | English | Journalists reporting on incest prosecuted. |

Appendix 3C Data Table of Cases, Hudoc Search 'Article 12' with Issues Arising

| Case Name | Case No. | Judgment Date | Articles involved | Language | Issue |
|--|-----------------------|---------------|--------------------------------------|----------|---|
| Sheffield and Horsham v The United Kingdom | 22985/93; 23390/94 | 30/07/1998 | Article 8, 12, 14 | English | Transsexuals - Names - Marriage & Definition of Gender and Birth Certificates. |
| I v The United Kingdom | 25680/94 | 11/07/2002 | Article 8, 12, 14 Breach of 12 | English | Post operative MTF transsexual as above and Social Security Employment & Pensions. Rape & imprisonment. |
| Christine Goodwin v The United Kingdom | 28957/95 | 11/07/2002 | Article 8, 12, 14, 13 | English | MTF Post operative as above. |
| Dickson v The United Kingdom | 44362/04 | 04/12/2007 | Article 8, 12 | English | Applicant requested artificial insemination was in prison requesting it with wife. |
| B and L v The United Kingdom | 36536/02 | 13/09/2005 | Article 12, 14 | English | Father-in-law & daughter-in-law unable to marry. Prohibited by Marriage Act 1949. |
| Munoz Diaz v Spain | 49151/07 | 08/12/2009 | Article 12, 1 of Prot.1, 14 | English | Roma requested survivors pension Roma marriage not recognised in Spain. |
| F v Switzerland | 11329/85 | 18/12/1987 | Article 12 | English | Applicant has entered into numerous marriages and divorced Civil code allowed court to prohibit re-marriage and require reflection time. |
| Johnston and Others v Ireland | 9697/82 | 18/12/1986 | Article 8, 9, 12, 13, 8+14, 12+14 | English | Unable to obtain divorce by laws of Ireland. |
| Marckx v Belgium | 6833/74 | 13/06/1979 | Article 12, 8+14, 1 of Prot.1+14 | English | Marckx unmarried had daughter. Law did not recognise legal bond b/w unmarried mother and child. M had to recognise maternity in specific |

| Case Name | Case No. | Judgment Date | Articles involved | Language | Issue |
|---------------------------------|----------|---------------|------------------------------|----------|--|
| | | | | | proceedings or adopt. Inheritance rights remained less than to child born in marriage. |
| Rees v The United Kingdom | 9532/81 | 17/10/1986 | Article 8, 12 | English | FTM Transsexual Name, Identity Documents, Register of Births & Marriage |
| Cossey v The United Kingdom | 10843/84 | 27/09/1990 | Article 8, 12 | English | MTF transsexual as above. |
| Beldjoudi v France | 12083/86 | 26/03/1992 | Article 8, 8+14, 3, 9, 12 | English | Non-national deported following conviction |
| P, C and S v The United Kingdom | 56547/00 | 16/07/2002 | Article 8, 6, 12 | English | Applicant & husband had child, P. P has Munchausen syndrome by Proxy. Child taken into care. |
| Selim v Cyprus | 47293/99 | 16/07/2002 | Article 8, 12, 13, 14 | English | Cyprus has no law permitting Muslims to marry. Applicant went to Romania to marry. |
| Dickson v The United Kingdom | 44362/04 | 18/04/2006 | Article 8, 12 | English | Case facts as noted above. |
| Lizanets v Ukraine | 6725/03 | 31/05/2007 | Article 5(1), 595), 6(1), 12 | English | Application charged with corruption. Case dropped. Case reopened. Had nervous breakdown due to detention. Compensation awarded by dom. ct then reduced on appeal. |
| Aresti Charalambous v Cyprus | 43151/04 | 19/07/2007 | Article 6, 8, 12 | English | Applicant married Romanian woman. Requested divorce. Deportation proceedings. Q if state impinged right to marry as was unable to remarry and found a family while still married. |
| Emonet and Others v Switzerland | 39051/03 | 13/12/2007 | Article 8, 12 | English | Second and third applicants never married. First applicant became paraplegic (is second applicant's daughter). Third applicant adopted first applicant to help out with care. This had effect of terminating |

| Case Name | Case No. | Judgment Date | Articles involved | Language | Issue |
|---------------------------------------|----------|---------------|------------------------|----------|--|
| | | | | | second applicant's rights. |
| Buchholz v Germany | 7759/77 | 06/05/1981 | Article 6(1), 8, 3, 12 | English | Applicant dismissed from employment due to rationalisation. |
| Frasik v Poland | 22933/02 | 05/01/2010 | Article 12, 13, 5(4) | English | Applicant wanted to marry IK whom he was accused of raping (evidential exception of spouse and to testify). |
| Jaremowicz v Poland | 24023/03 | 05/01/2010 | Article 12, 12+14, 13 | English | Applicant wants to marry another detainee met whilst in prison. |
| Schalk and Kopf v Austria | 30141/04 | 24/06/2010 | Article 12, 14+8 | English | Same-sex couple requested right to marry. |
| Singh and Others v The United Kingdom | 60148/00 | 08/06/2006 | Article 8, 12, 13, 14 | English | British citizen born in India and Indian national are married and living in UK. Adopted baby of cousin living in India. Adoptions from India are not recognised for purposes of entry clearance. |
| L v Lithuania | 27527/03 | 11/09/2007 | Article 3, 8, 12, 14 | English | FTM transsexual's inability to complete gender reassignment prevents him from marrying and founding a family. |

Appendix 4 Annex B Sources - High Contracting Parties and National Legislation Concerning Incest

Albania

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaAlbania.pdf>

Andorra

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaAndorra.pdf>

Armenia

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaArmenia.pdf>

Austria

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaAustria.pdf>

Azerbaijan

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaAzerbaijan.pdf>

Belgium

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaBelgium.pdf>

Bosnia and Herzegovina

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaBosniaHerzegovina.pdf>

Bulgaria

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaBulgaria.pdf>

Croatia

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaCroatia.pdf>

Cyprus

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaCyprus.pdf>

Czech Republic

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaCzechRepublic.pdf>

Denmark

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaDenmark.pdf>

Estonia

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaEstonia.pdf>

Finland

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaFinland.pdf>

France

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaFrance.pdf>

Georgia

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaGeorgia.pdf>

Germany

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaGermany.pdf>

Greece

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaGreece.pdf>

Hungary

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaHungary.pdf>

Iceland

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaIceland.pdf>

Ireland

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaIreland.pdf>

Italy

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaItaly.pdf>

Latvia

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaLatvia.pdf>

Liechtenstein

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaLiechtenstein.pdf>

Lithuania

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaLithuania.pdf>

Luxembourg

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaLuxembourg.pdf>

Macedonia

<http://www.mlrc.org.mk/law/CriminalCode.htm>

Malta

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaMalta.pdf>

Moldova

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaMoldova.pdf>

Monaco

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaMonaco.pdf>

Montenegro

<http://www.gov.me/files/1230044662.doc>

<http://www.legislationline.org/documents/action/popup/id/4168/preview>

Netherlands

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaNetherlands.pdf>

Norway

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaNorway.pdf>

Poland

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaPoland.pdf>

Portugal

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaPortug.pdf>

Romania

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaRomania.pdf>

Russia

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaRussia.pdf>

San Marino

<http://www.consigliograndeegenerale.sm/on-line/Home/ArchivioLeggiDecretieRegolamenti/scheda17011720.html>

Serbia

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaSerbiaMontenegro.pdf>

Slovakia

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaSlovakia.pdf>

Slovenia

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaSlovenia.pdf>

http://www2.policija.si/portal_en/zakonodaja/pdf/PenalCode2007.pdf

Spain

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaSpain.pdf>

Sweden

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaSweden.pdf>

Switzerland

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaSwitzerland.pdf>

Turkey

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaTurkey.pdf>

http://www.justice.gov.tr/basiclaws/Criminal_Code.pdf

Ukraine

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaUkraine.pdf>

United Kingdom

<http://www.legislation.gov.uk/ukpga/2003/42/contents>

All links correct 01 May 2011.

References

Books and Chapters in Books

Anderson S., et al., *Collins English Dictionary* (HarperCollins, Glasgow, 2006).

An-Na'im A.A., *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights in Human Rights in Cross-Cultural Perspectives: Quest for Consensus* (University of Pennsylvania Press, Philadelphia, 1992) 28.

Arai-Takahashi Y., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, Antwerp, 2002).

Arnold T., *The Folklore of Capitalism* (Yale University Press, New Haven MT, 1937).

Ashworth A., 'The Elasticity of Mens Rea' in Tapper C.H.F., ed. *Crime, Proof and Punishment; Essays in Memory of Sir Rupert Cross* (Butterworth, London, 1981).

Ashworth A., *Principles of Criminal Law*, 5th ed. (OUP, Oxford, 2006).

Bankas E., 'The Contribution of Comparative Law to the Harmonisation of European Private Law' in Harding A., Orucu E., eds. *Comparative Law in the 21st Century* (Kluwer, London, 2002).

Becker G., *Human Capital* (Columbia University Press, New York, 1975).

Bell V., *Interrogating Incest: Feminism, Foucault and the Law* (Routledge, London, 1993).

Bennion F., *Sexual Ethics and Criminal Law: A Critique of Sexual Offences Bill 2003* (Lester Publishing, Oxford, 2003).

Bix B., *Jurisprudence: Theory and Context*, 5th ed. (Sweet & Maxwell, London, 2009).

Burke P., 'Overture: the New History, its Past and its Future' in Burke P., ed. *New Perspectives on Historical Writing* (Polity Press, Cambridge, 1991).

Butler S., *Conspiracy of Silence* (Volcano Press, California, 1985).

Carmichael C.M., *Law, Legend, and Incest in the Bible; Leviticus 18-20*, (Cornell University Press, London, 1997).

Carr E.H., *What is History?* (Penguin, London, 1961).

Chynoweth P., 'Legal Research' Chapter 3 in Knight A., Ruddock L., *Advanced Research Methods in the Built Environment* (Blackwell, London, 2008).

Cochrane G., *Development Anthropology* (Oxford University Press, Oxford, 1971).

Coomaraswamy R., 'Different but Free: Cultural Relativism and Women's Rights as Human Rights' in Howland C.W., *Religious Fundamentalisms and the Human Rights of Women* (Palgrave, New York, 2001).

Cooper I.K., 'Decriminalization of Incest – New Legal-Clinical Responses' in Eekelaar J.M, Katz S.N., eds. *Family Violence: An International and Interdisciplinary Study* (Butterworths, Toronto, 1980) 518-528.

Coster W., *Family and Kinship in England 1450-1800, Seminar Studies in History*, (London, Longman, 2001).

- Creswell J., *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (Sage Publications, London, 2007).
- Davies G., *The Early Stuarts 1603-1660* in Clark G., ed. *The Oxford History of England Series* (Clarendon Press, Oxford, 1959).
- De Zulueta F., *The Institutes of Gaius Book I* (Oxford, Clarendon Press, 1946).
- Donaldson M.A., Cordes-Green S., *Group Treatment of Adult Incest Survivors* (Sage, London, 1994).
- Duff R.A., Garland D., 'Introduction: Thinking About Punishment' in Duff R.A., Garland D., eds. *A Reader on Punishment* (OUP, Oxford 1995).
- Dworkin G., *The Theory and Practice of Autonomy*, Cambridge Studies in Philosophy, (CUP, Cambridge, 1988).
- Epstien L.M., *Marriage Laws of the Bible and Talmud* (Harvard University, Cambridge, 1942).
- Fairclough N., 'Discursive transition in Central and Eastern Europe' in Shi-xu ed. *Discourse as Cultural Struggle* (Hong Kong University Press, Hong Kong, 2007) 49-72.
- Fairclough N., *Language and Power* 2nd ed. (Pearson, Essex, 2001).
- Feldman D., *Civil Liberties and Human Rights in England and Wales*, 2nd ed., (Oxford, OUP, 2002).
- Finkelhor D., *Sexually Victimized Children* (Free Press, New York, 1979).
- Firth C.H., Rait R.S., eds., *Acts and Ordinances of the Interregnum 1642-1660* (London, HMSO, 1911).
- Forester J., 'Learning from Practice Stories – The Priority of Practical Judgement' in Fischer F., Forester eds. *The Argumentative Turn in Policy Analysis and Planning* (Duke University Press, Durham NC, 1993) 186-209.
- Frazer J.G., *Totemism and Exogamy*, Vol.1 (Cosimo, New York, 2009) (Originally published 1910).
- Freud S., *Totem and Taboo*, Strachey J., trans. (Routledge, London, 1960).
- Glueck B.C., Early Sexual Experience in Schizophrenia, in Beigel H.G., ed. *Advances in Sex Research* (New York, Harper Row, 1963).
- Goffman E., *Stigma* (Pelican, Middlesex, 1968).
- Goffman E., *Stigma: Notes on the Management of a Spoilt Identity* (Touchstone Books, New York, 1962).
- Goodwin J., Sahd D., and Rada R.T., 'False Accusations and False Denials of Incest: Clinical Myths and Clinical Realities' in Goodwin J., *Sexual Abuse: Incest Victims and Their Families* (Wright PSG, London, 1982).
- Green I.M., *The Reestablishment of the Church of England 1660-1663* (OUP, Oxford, 1978).
- Grubbs J.E., *Law and Family in Late Antiquity, The Emperor Constantine's Marriage Legislation* (Oxford University Press, Oxford, 1999).
- Guba E.G., 'The Alternative Paradigm Dialog' in *The Paradigm Dialog* Guba E.G., ed., (Sage, Newbury Park., CA, 1990).
- Guba E.G., Lincoln Y.S., 'Paradigmatic Controversies, Contradictions, and Emerging Confluences' in Denzin N.K., Lincoln Y.S., *The Sage Handbook of Qualitative Research* 3rd ed. (Sage, California, 2005).

Habermas J., *The Structural Transformation of the Public Sphere* tr. Burger T., (MIT Press, Massachusetts, 1991).

Hall J., *Theft, Law and Society* 2nd ed. (Bobbs-Merill, New York, 1952).

Hart H.L.A., *The Concept of Law* 2nd ed. (Clarendon Press, Oxford, 1994).

Helmholz R.H., *The Oxford History of the Laws of England*, Vol. 1 (OUP, Oxford, 2004).

Hendrick H., *Child Welfare: Historical Dimensions, Contemporary Debate*, (Policy Press, Bristol, 2003) 37.

Herlihy D., 'Making Sense of Incest: Women and the Marriage Rules of the Early Middle Ages' in Herlihy D., *Women, Family and Society in Medieval Europe, Historical Essays, 1978-1991* (Berghahn Books, Oxford, 1995) 96-109.

Hill C., *Society and Puritanism in Pre-Revolutionary England* (Secker & Warburg, London, 1964).

Hill C., *The Century of Revolution 1603-1714* (Nelson, London, 1961).

Hill J.B., Fletcher-Rogers K.E., *Sexually Related Offences (Criminal Practice Series)* (Sweet & Maxwell, London, 1997).

Honore T., *Sex Law* (Duckworth, London 1978).

Hunter M., *Abused Boys* (Macmillan, New York, 1990).

Hutchinson L., *The Politics of Postmodernism* (Routledge, London, 1989).

Hutton R., *The British Republic 1649-1660* 2nd ed. (Macmillan, London, 2000).

Inderwick F.A., *The Interregnum AD 1648-1660* (Searle & Rivington, London, 1891).

Ingram M., *Church Courts, Sex, and Marriage in England 1570-1640*, (CUP, Cambridge, 1987).

Kant I., *Groundwork for the Metaphysics of Morals* tr. by Zweig A., Hill-Jr T.E., Zweig A., eds. (OUP, Oxford, 2002).

Karpman B., *The Sex Offender and His Offences: Etiology, Pathology, Psychodynamics and Treatment* (Julian Press, New York, 1954).

Keeton G.W., *English Law; The Judicial Contribution*, (David & Charles, Newton Abbot, 1974).

Kellogg S.H., *The Book of Leviticus*, 3rd ed., (Klock & Klock, Minnesota, 1978)

Kuper A., *Incest and Influence: The Private Life of Bourgeois England* (Harvard University Press, Massachusetts, 2009).

La Fontaine J., *Child Sexual Abuse* (Polity Press, Cambridge, 1990)

Lamb J., *Sexual Offences* (Tottel Publishing, London, 2003).

Lestas G., *A Theory of Interpretation of the European Convention on Human Rights* (OUP, Oxford, 2007).

Levine B.A., 'Leviticus: Its Literary History and Location in Biblical Literature' in Rendtorff R., Kugler R.A., eds. *The Book of Leviticus: Composition and Reception* (Brill, 2006) 13-26.

Lévi-Strauss C., *The Elementary Structures of Kinship*, Needham R., ed. Bell J.H, and Von Störmer J.R., trans. (Tavistock, London, 1970).

Lew M., *Victims No Longer* (Quill, New York, 2004) 10.

Lidz T., et al. *Schizophrenia and the Family* (International University Press, New York, 1965).

Lips H.M., *Women, Men, and Power*, (Mayfield Publishing Co. Mountain View CA. USA, 1991).

Lord Lester of Herne Hill, General Rapporteur *The European Convention on Human Rights in the New Architecture of Europe*, in: Proceedings of the 8th International Colloquy on the European Convention on Human Rights (Strasbourg, Council of Europe, 1996) 227.

Llewellyn K.N., *The Common Law Tradition: Deciding Appeals* (Brown Little, Boston, 1960).

Luhmann N., *Law as a Social System*, tr by Ziegert K.A. (OUP, Oxford, 2004).

MacDonald R.S.J., Matscher F., Petzold H., *The European System for the Protection of Human Rights* (Nijhoff, Leiden, 1993).

Mackinnon C., *Toward a Feminist Theory of the State*, (Harvard University Press, Boston, 1989).

Malinowski B., 'Culture' in *Encyclopaedia of Social Sciences* Vol.4 (Macmillan, New York, 1930) 621-646.

McAlinden A., *The Shaming of Sexual Offenders: Risk, Retribution and Reintegration*, (Oxford, Hart, 2007).

McCaghy C., *Deviant Behaviour* (Collier Macmillan, London, 1976).

McLean S.A.M., *Autonomy, Consent and the Law* (Routledge, Oxford, 2010).

Meiselman K.C., *Incest: A Psychological Study of Causes and Effects with Treatment Recommendations* (Jossey-Bass, London, 1979).

Menski W., *Comparative Law in a Global Context* 2nd ed. (Cambridge University Press, Cambridge, 2006).

Mill J.S., *On Liberty* (Filiquarian Publishing, Minnesota, 2006).

Moore S.F., *Law As A Process: An Anthropological Approach* (Routledge, London, 1978).

Mowbray A., *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, Oxford, 2004).

Moyle J.B., *Imperatoris Iustiniani Institutiones* (Oxford, Clarendon Press, 1923).

Munslow A., *Deconstructing History* (Routledge, London, 1997).

Needham R., *Remarks and Inventions: Skeptical Essays about Kinship* (Tavistock, London, 1974).

Nichols M., Shernoff M., 'Therapy with Sexual Minorities: Queering Practice' Chapter 13 in Leiblum S.R., ed. *Principles and Practice of Sexual Therapy* 4th ed. (Guilford, New York, 2007).

Packer H.L., *The Limits of the Criminal Sanction* (Stanford University Press, California, 1968).

Pearsall J., *Concise Oxford Dictionary*, 10th ed. (OUP, Oxford, 2001).

- Radcliffe-Brown A.R., *African Systems of Kinship and Marriage* (OUP for International African Institute, London, 1950).
- Renvoize J., *Incest: A Family Pattern* (Routledge, London, 1982).
- Resnick L.B., 'Introduction' in Resnick L.B., ed., *Knowing, Learning and Instruction: Essays in Honor of Robert Glaser* (Erlbaum, Hillsdale, NJ., 1989).
- Roberts D.D., *Nothing But History: Reconstruction and Extremity after Metaphysics* (California University Press, Berkeley, 1995).
- Rook P.F.G., Ward R., *Sexual Offences* (Waterlow Publishers, London, 1990).
- Russell D.E.H., *The Secret Trauma: Incest in the Lives of Girls and Women* (Basic Books, New York, 1986).
- Scarlsbrick J.J., *Henry VIII* (Yale English Monarchs Series), (Yale University Press, Maine, 1997).
- Schiffrin D., Tannen D., Ehernberger-Hamilton H., *Handbook of Discourse Analysis* (Blackwell, Oxford, 2001).
- Searle G.R., *Morality and the Market in Victorian Britain* (Oxford University Press, Oxford, 1998).
- Sebba L., "Victim-Driven" Criminalisation? Some Recent Trends in the Expansion of the Criminal Law in McSherry B., Norrie A., Bronitt S., eds. *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart, Oxford, 2009).
- Singer M., 'Relativism, Culture, Religion and Identity' in Howland C.W., ed. *Religious Fundamentalism and the Human Rights of Women* (Palgrave, New York, 1999) 45-55.
- Snaith N.A., *Leviticus and Numbers* (Thomas Nelson, London, 1967).
- Stephen J.F., *A History of the Criminal Law of England* (Macmilland & Co, London, 1883).
- Strachan-Davidson J.L., *Problems of the Roman Criminal Law* (Clarendon Press, Oxford, 1912).
- Temkin J., *Rape and the Legal Process* (Sweet & Maxwell, London, 1987).
- Thomas K., 'The Puritans and Adultery The Act of 1650 Reconsidered' in Pennington D, Thomas K., eds. *Puritans and Revolutionaries, Essays Presented to Christopher Hill* (Clarendon Press, Oxford, 1978).
- Thomas T., *Criminal Records: A Database for the Criminal Justice System and Beyond* (Palgrave Macmillan, Hampshire, 2007).
- Thomas T., *Sex Crime: Sex Offending and Society, Crime and Society Series*, (Devon, Willan Publishing, 2000)
- Treggiari S., *Roman Marriage: Iusti Coniuges From the Time of Cicero to the Time of Ulpian* (Oxford University Press, Oxford, 1991).
- Van Dijk T.A., 'Critical Discourse Analysis' in Schiffrin D., Tannen D., Ehernberger-Hamilton H., *Handbook of Discourse Analysis* (Blackwell, Oxford, 2001).
- Veall D., *The Popular Movement for Law Reform 1640-1660* (Clarendon Press, Oxford, 1967).
- Von Hirsch A., Ashworth A., Roberts J., *Principled Sentencing; Readings on Theory and Policy* (Hart, Oxford 2009).

Von Hirsch A., in Doob A.M., Webster C.M., Offenders' Thought Processes in Von Hirsch A., Ashworth A., Roberts J., eds. *Principled Sentencing; Readings on Theory and Policy* (Hart, Oxford 2009).

Walker N., *Punishment, Danger & Stigma: The Morality of Criminal Justice* (Blackwell, Oxford, 1980).

Walsham G., *Interpreting Information Systems in Organizations* (Wiley, London, 1993).

Warnock G.J., 'Every Event Has a Cause' in Flew A., ed. *Logic and Language* (Oxford, Blackwell, 1955).

Watson A., *The Law of Persons in the Later Roman Republic* (Clarendon Press, Oxford, 1967).

Westermarck E., *The History of Human Marriage* (Macmillan, London, 1921) 236.

Whitelock D., Brett M., and Brooke C.N.L., eds., *Council & Synods with Other Documents Relating to the English Church, Vol I, AD 871–1204*, pt.I, 871-1066, (Clarendon Press, Oxford, 1981).

Williamson J.A., *The Tudor Age*, 3rd ed., (Longmans, London, 1964)

Winick B., 'A Therapeutic Jurisprudence Analysis of Sex offender Registration and Community Notification Laws' 213, 218 in Winnick B.J., and La Fond J.Q., (eds.) *Protecting Society from Sexually Dangerous Offenders: Law, Justice and Therapy* (American Psychological Association, Washington DC, 2003).

Wohl A.S., 'Sex in the Single Room: Incest Among the Victorian Working Classes' in Wohl A.S., ed. *The Victorian Family* (Croom Helm, London, 1978) 197-216.

Wolfram S., *In-Laws and Outlaws; Kinship and Marriage in England* (Croom Helm, London 1987).

Worden B., *The Rump Parliament 1648-1653* (CUP, Cambridge, 1974).

Journal Articles

Adams M.S., Neel J.V., 'Children of Incest' (1967) Vol.40(1) Pediatrics 55-62.

Adler N.A., Schutz J., 'Sibling Incest Offenders' (1995) Vol.19(7) Child Abuse & Neglect 811-819.

Aggrawal A., 'References to Paraphilias and Sexual Crimes in the Bible' (2009) Vol.16 Journal of Forensic and Legal Medicine 109-114.

Alvesson M., Karreman D., 'Varieties of Discourse: On the Study of Organizations through Discourse Analysis' (2000) Vol.53 Human Relations 1125-1149.

Anagnostou D., 'Does European Human Rights Law Matter? Implementation and Domestic Impact of Strasbourg Court Judgments on minority-related policies' (2010) Vol.14(5) International Journal of Human Rights 721-743.

Anderson J.F., Reinsmith-Jones K., Mangels N.J., 'Need for Translated Methodologies in Criminal Justice and Criminological Research: Exploring Legal Techniques as an Additional Method' (2011) Vol.24(1) Criminal Justice Studies 83-103.

Andrews J.S., 'Incest – Who Needs It?' (1977) Vol.10(1) Australian Journal of Forensic Sciences 30-42.

Antfolk. J., Karlsson M., Backstrom A., et al., 'Disgust Elicited by Third-Party Incest: The Roles of Biological Relatedness, Co-Residence, and Family Relationship' (2012) Vol.33 Evolution and Human Behavior 217-233.

- Arneson R.J., 'Mill versus Paternalism' Ethics (1980) Vol.90(4) 470-489.
- Atkinson T.E., 'Brief History of English Testamentary Jurisdiction' (1943) Vol.8 Missouri Law Review 107-128.
- Bailey V., Blackburn S., 'The Punishment of Incest Act 1908: A Case Study of Law Creation' (1979) Criminal Law Review 708-718.
- Bailey V., McCabe S., 'Reforming the Law of Incest' (1979) Criminal Law Review 749-764.
- Bakircioglu O., 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases' (2007) Vol.8(7) German Law Journal 711-734.
- Bedarf A.R., 'Examining Sex Offender Community Notification Laws' (1995) Vol.83 California Law Review 885-939.
- Benvenisti E., 'Margin of Appreciation, Consensus and Universal Standards' (1999) Vol.31 International Law and Politics 843-854.
- Bigger S.F., 'The Family Laws of Leviticus 18 in Their Setting' (1979) Vol.98(2) Journal of Biblical Literature 187-203.
- Bohman J., 'Survey Article: The Coming of Age of Deliberative Democracy' (1998) Vol.6(4) The Journal of Political Philosophy 400-425.
- Braithwaite J., 'Shame and Criminal Justice' (2000) Vol.42(3) Canadian Journal of Criminology 281-298.
- Brauch J.A., 'The Dangerous Search for an Elusive Consensus: What the Supreme Court Should Learn from the European Court of Human Rights' (2009) Vol.52(2) Howard Law Journal 277-318.
- Brauch J.A., 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2004) Vol.11 Columbia Journal of European Law 113-150.
- Brems E., 'Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse' (1997) Vol.19(1) Human Rights Quarterly 136-164.
- Brems E., 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (1996) Vol.56 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Heidelberg Journal of International Law) 240-315.
- Brodzinsky D.M., 'Long-term outcomes in Adoption' (1993) Vol.3(1) The Future of Children 153-166.
- Browning D.H., Boatman B., 'Incest: Children at Risk' (1977) Vol.134(1) American Journal of Psychiatry 69-72.
- Buckler S., 'Theory, Ideology, Rhetoric: Ideas in Politics and the Case of "Community" in Recent Political Discourse' (2007) Vol.9 British Journal of Politics and International Relations 34-54
- Cameron D., 'When Worlds Collide: Expert and Popular Discourse on Language' (1997) Vol.19(1) Language Scientist 7-13.
- Canepa G., Bandini T., 'Incest and Family Dynamics: A Clinical Study' (1980) Vol.3 International Journal of Law and Psychiatry 453-460.
- Carter C.O., 'Risk to Offspring of Incest' (1967) Vol.1 Lancet 436.

Cavenar J.O., et al. 'A Clinical Note on Hysterical Psychosis' (1974) Vol.136 American Journal of Psychiatry 830-832.

Cavender G., Bond-Maupin L., Jurik N.C., 'The Construction of Gender in Reality Crime TV' (1999) Vol.13(5) Gender & Society 643-663.

Chalmers J., Leverick F., 'Fair Labelling in Criminal Law' (2008) Vol.71(2) Modern Law Review 217-246 .

Cobbah J.A.M., 'African Values and the Human Rights Debate: An African Perspective' (1987) Vol.9 Human Rights Quarterly 309-331.

Cobley C., 'Keeping Track of Sex Offenders: Part I of the Sex Offenders Act 1997' (1997) Vol.60(5) 690-699.

Cole P.M., Putnam F.W., 'Effect of Incest on Self and Social Functioning: A Developmental Psychopathology Perspective' (1992) Vol.60(2) Journal of Consulting and Clinical Psychology 174-184.

Cooke M., 'Five Arguments for Deliberative Democracy' (2000) Vol.48 Political Studies 947-969.

Cotterrell R., 'Law in Culture' (2004) Vol.17(1) Ratio Juris 1-14.

Courtois C.A., 'Healing the Incest Wound: A Treatment Update with Attention to Recovered-Memory Issues' (1997) Vol.51(4) American Journal of Psychotherapy 464-496.

Critcher C., 'Media, Government and Moral Panic: The Politics of Paedophilia in Britain 2000-1' (2002) Vol.3(4) Journalism Studies 521-535.

Cyr M., Wright J., McDuff P., Perron A., 'Intrafamilial Sexual Abuse: Brother-Sister Incest Does Not Differ From Father-Daughter and Stepfather-Stepdaughter Incest' (2002) Vol.26 Child Abuse and Neglect 957-973.

Dagan H., 'The Realist Conception of Law' (2007) Vol.57(3) The University of Toronto Law Journal 607-660.

Danziger M., 'Policy Analysis Postmodernized: Some Political and Pedagogical Ramifications' (1995) Vol.23(3) Policy Studies Journal 435-450.

Davies R.K., 'Incest: Some Neuropsychiatric Findings' (1978-9) Vol.9(2) The International Journal of Psychiatry in Medicine 117-121.

Davis N., 'Labelling Theory in Deviance Research: A Critique and Reconsideration' (1972) Vol.13 Sociological Quarterly 447-474.

Dawood Y., 'The Antidomination Model and the Judicial Oversight of Democracy' (2008) Vol.96 Georgetown Law Journal 1411-1485.

de Beaugrande R., 'Critical Discourse Analysis: History, Ideology, Methodology' (2006) Vol.1 Studies in Language & Capitalism 29-56.

De la Rasilla del Moral I., 'The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine' (2006) Vol.7(6) German Law Journal 611-624.

de Than C., 'Positive Obligations Under the European Convention on Human Rights: Towards the Human Rights of Victims and Vulnerable Witnesses?' (2003) Vol.67 Journal of Criminal Law 165-182.

Diamond L.M., 'New Paradigms for Research on Heterosexual and Sexual-Minority Development' (2003) Vol.32(4) Journal of Clinical Child and Adolescent Psychology 490-498.

Dingwall G., 'Deserting Desert? Locating the Present Role of Retributivism in the Sentencing of Adult Offenders' (2008) Vol.47(4) *The Howard Journal* 400-410.

Douglas Price F., 'The Abuses of Excommunication and the Decline of Ecclesiastical Discipline Under Queen Elizabeth' (1942) Vol.57(225) *English Historical Review* 106-115.

Echevarria A.J., 'The Trouble with History' (2005) Vol.35(2) *Parameters* 78-90.

Edwards W., Hensley C., 'Contextualising Sex Offender Management Legislation and Policy: Evaluating the Problem of Latent Consequences in Community Notification' (2001) Vol.45 *International Journal of Offender Therapy and Comparative Criminology* 83-101.

Ellens D., 'Review: Carmichael, Calum M. *Law, Legend and Incest in the Bible: Leviticus 18-20*' Review of Biblical Literature 05/24/2000 (Society of Biblical Literature, <http://www.bookreviews.org>).

Ellis T.B., 'Disgusting Bodies, Disgusting Religion: The Biology of Tantra' (2011) Vol.79(4) *Journal of the American Academy of Religion* 879-927.

Emslie G.J., Rosenfeld A., 'Incest Reported by Children and Adolescents Hospitalized for Severe Psychiatric Problems' (1983) Vol.140 *American Journal of Psychiatry* 708-711.

Endsjo D.O., 'Lesbian, Gay, Bisexual, and Transgender Rights and the Religious Relativism of Human Rights' (2005) Vol.6(2) *Human Rights Review* 102-110.

Engle-Merry S., 'Legal Pluralism' (1988) Vol.22(5) *Law and Society Review* 869-896.

Epstein L., King G., 'The Rules of Inference' (2002) Vol.69(1) *University of Chicago Law Review* 1-133.

Erlanger HS., Garth B., Larson JE., Mertz E.E., Nourse V.F., and Wilkins D.B., 'Is it Time for a New Legal Realism?' (2005) Vol.2 *Wisconsin Law Review* 335-363.

Evanoff R.J., 'Universalist, Relativist, and Constructivist Approaches to Intercultural Ethics' (2004) Vol.28 *International Journal of Intercultural Relations* 439-458.

Evans-Pritchard E.E., '148. The Study of Kinship in Primitive Societies' (1929) 29 *Man* 190-194.

Fairclough A., 'Human Rights: the Constitution in the Balance' (June 2000) *Context Issue* 66.

Fairclough N., 'Critical Discourse Analysis' (1995) Vol.9 *Marges Linguistiques* 76-94.

Farrelly C., 'The Case for Rethinking Incest Laws' (2008) Vol.34(11) *Journal of Medical Ethics* 1-2.

Felitti V.J., 'Long-term Medical Consequences of Incest, Rape and Molestation' (1991) Vol.84(3) *Southern Medical Journal* 328-331.

Fennell P., 'The Third Way in Mental Health Policy: Negative Rights, Positive Rights, and the Convention' (1999) Vol.26(1) *Journal of Law and Society* 103-127.

Finlayson A., 'From Beliefs to Arguments: Interpretive Methodology and Rhetorical Political Analysis' (2007) Vol.9 *British Journal of Politics and International Relations* 545-563.

Finlayson A., 'Political Science, Political Ideas and Rhetoric' (2004) Vol.33(4) *Economy and Society* 528-549, 538.

Finlayson A., Martin J., "'It Ain't What You Say...': British Political Studies and the Analysis of Speech and Rhetoric' (2008) Vol.3 British Politics 445-464.

Finney P., 'Still "marking time?" Text, Discourse, and Truth in International History' (2001) Vol.27 Review of International Studies 291-308.

Fitzpatrick P., 'Being Social in Socio-Legal Studies' (1995) Vol.22 Journal of Law and Society 105-112.

Fitzpatrick P., 'Law and Societies' (1984) Vol.22(1) Osgoode Hall Law Journal 115-138.

Flinders M., 'Majoritarian Democracy in Britain: New Labour and the Constitution' (2005) Vol.28(1) West European Politics 61-93.

Forder C.J., 'Legal Protection Under Article 8 ECHR: *Marckx* and Beyond' (1990) Vol.37 Netherlands International Law Review 162-181.

Francis B., Soothill K., 'Moral Panics and the Aftermath: A Study of Incest' (2002) Vol.24(1) The Journal of Social Welfare & Family Law 1-17.

Fredman S., Human Rights Transformed: Positive Duties and Positive Rights, (2006) Public Law 498-560.

Frenken J., van Stolk B., 'Incest Victims: Inadequate Help by Professionals' (1990) Vol.14(2) Child Abuse and Neglect 253-263.

Garth B.G., 'Introduction: Taking New Legal Realism to Transnational Issues and Institutions' (2006) Vol.31(4) Law and Social Inquiry 939-394.

Gasper D., Aphorpe R., 'Introduction: Discourse Analysis and Policy Discourse' (1998) Vol.8(1) The European Journal of Development Research 1-15.

George T.E., Gulati M., McGlinley A.C., 'The New Old Legal Realism' (2011) Vol.105(2) Northwestern University Law Review 689-736.

Gilgun J.F 'We Shared Something Special: The Moral Discourse of Incest Perpetrators' (1995) Vol.57(2) Journal of Marriage and Family 265-281.

Gordon L., O'Keefe P., 'Incest as a Form of Family Violence: Evidence from Historical Case Records' (1984) Vol.46(1) Journal of Marriage and Family 27-34.

Grand S., Alpert J.L., 'The Core Trauma of Incest: An Object Relations View' (1993) Vol.24(3) Professional Psychology: Research and Practice 330-334.

Green D., 'Resisting the Stigma of Incest: An Experiment in Personal Construct Psychotherapy' (1988) Vol.11 Journal of Adolescence 299-308.

Habermas J., 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) Vol.29(6) Political Theory 766-781.

Habermas J., 'On the Internal Relation between the Rule of Law and Democracy' (1995) Vol.3(1) European Journal of Philosophy 12-20.

Habermas J., 'Three Normative Models of Democracy' (1994) Vol.1(1) Constellations 1-10.

Hagan J., 'The Social Embeddedness of Crime and Unemployment' (1993) Vol.31 Criminology 465-491.

- Hall L., 'Strict or Liberal Construction of Penal Statutes' (1935) Vol.48(5) Harvard Law Review 748-774.
- Hanson R.K., Gizzarelli R., Scott H., 'The Attitudes of Incest Offenders: Sexual Entitlement and Acceptance of Sex with Children' (1994) Vol.21 Criminal Justice and Behavior 187-202.
- Helfer L.R., 'Consensus, Coherence, and the European Convention on Human Rights' (1993) Vol.26 Cornell International Law Journal 133-165.
- Herman J., Hirschman L., 'Families at Risk for Father-Daughter Incest' (1981) Vol.138 American Journal of Psychiatry 967-970.
- Ho J., 'Incest and Sex Offender Registration: Who Is Registration Helping and Who Is It Hurting?' (2007-2008) Vol.14 Cardozo Journal of Law & Gender 429-457.
- Hofstotter B., 'European Court of Human Rights: Positive Obligations in E. And Others v. United Kingdom' (2004) Vol.2(3) International Journal of Constitutional Law 525-56.
- Hole R., 'Incest, Consanguinity and A Monstrous Birth in Rural England, January 1600' (2000) Vol.25(2) Social History 183-199.
- Howard J.A., Blumstein P., Schwartz P., 'Sex, Power, and Influence Tactics in Intimate Relationships' (1986) Vol.51(1) Journal of Personality and Social Psychology 102-109.
- Hughes G., 'The Crime of Incest' (1964) Vol.55 Journal of Criminal Law and Criminology and Police Science 322-331.
- Husak D., 'The Criminal Law as Last Resort' (2004) Vol.24(2) Oxford Journal of Legal Studies 207-235.
- Iedema R., Wodak R., 'Introduction: Organizational Discourses and Practices' (1999) Vol.10(1) Discourse and Society 5-19.
- Ianziti G., 'Historiography and its Discontents: The Windschuttle Gambit' (2005) History Australia Vol.2(2) 43-1-43-10.
- Jackson W.D., 'Russia and the Council of Europe: The Perils of Premature Admission' (2004) Vol.51(5) Problems of Post-Communism 23-33.
- Jancar J., Johnston S.J., 'Incest and Mental Handicap' (1990) Vol.34 Journal of Mental Deficiency Research 483-490.
- Johnstone G., 'Penal Policy Making: Elitist, Populist or Participatory?' (2000) Vol.2(2) Punishment and Society 161-180.
- Jónsson M., 'Incest and the Word of God: Early Sixteenth Century Protestant Disputes' (1994) Vol.85 Archiv Fur Reformationsgeschichte 96-119.
- Juffer F., van Ijzendoorn M.H., 'Behaviour Problems and Mental Health Referrals of International Adoptees' (2005) Vol.293(20) Journal of the American Medical Association 2501-2515.
- Kelly H.A., 'Kinship, Incest and the Dictates of Law' (1969) Vol.14 American Journal of Jurisprudence 69-78.
- Killias M., Clerici C., 'Different Measures of Vulnerability in their Relation to Different Dimension of Fear of Crime' (2000) Vol.40 British Journal of Criminology 437-450.

Kirkwood L.J., Mihaila M.E., 'Incest and the Legal System: Inadequacies and Alternatives' (1979) Vol.12 University of California Davis Law Review 673-699.

Klingbeil G.A., 'Review: Carmichael, Calum M. *Law, Legend and Incest in the Bible: Leviticus 18-20*' Review of Biblical Literature 05/24/2000 (Society of Biblical Literature, <http://www.bookreviews.org>).

Koppelman A., 'Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination' (1994) Vol.69 New York University Law Review 197-281.

Krebs R.R., Jackson P.T., 'Twisting Tongues and Twisting Arms: The Power of Political Rhetoric' (2007) Vol.13(1) European Journal of International Relations 35-66.

Kuper A., 'Incest, Cousin Marriage, and the Origin of the Human Sciences in Nineteenth-Century England' (2002) Vol.174(1) Past and Present 158-183.

La Fontaine J.S., 'Child Sexual Abuse and the Incest Taboo: Practical Problems and Theoretical Issues' (1988) Vol.23(1) Man 1-18.

Lau H., Sexual Orientation: Testing the Universality of International Human Rights Law (2004) Vol.71(4) The University of Chicago Law Review 1689-1720.

Leavitt G.C., 'The Incest Taboo? A reconsideration of Westermarck' (2007) Vol.7(4) Anthropological Today 393-419.

Letsas G., 'Two Concepts of the Margin of Appreciation' (2006) Vol.26(4) Oxford Journal of Legal Studies 705-732.

Luhmann N., Law as a Social System' (1988-1989) Vol.83(1&2) Northwestern University Law Review 136-150.

Luna G.T., 'Legal Realism and the Treaty of Guadalupe Hidalgo – A Fractionalized Legal Template' (2005) Wisconsin Law Review 519.

Lustig N., 'Research Article: Incest and Family Disorder' (1972) Vol.2 British Medical Journal 364.

Macaulay S., 'Contracts, New Legal Realism, and Improving the Navigation of The Yellow Submarine' (2005-2006) Vol.80 Tulane Law Review 1161-1195.

Malik M., 'Modernising Discrimination Law': Proposals for a Single Equality Act for Great Britain' (2007) Vol.9 International Journal of Discrimination and the Law 73-94.

Manchester A.H., 'The Law of Incest in England and Wales' (1979) Vol.3 Child Abuse and Neglect 679-682.

Manchester A.H., 'The Reform of the Ecclesiastical Courts' (1966) Vol.10(1) American Journal of Legal History 51-75.

Mankoff M., 'Social Reaction and Career Deviance: A Critical Analysis' (1971) Vol.12 Sociological Quarterly 204-218.

Massaro T.M., 'Shame Culture and American Criminal law' (1991) Vol.89 Michigan Law Review 1880-944.

May G., 'Experiments in the Legal Control of Sex Expression' (1929) Vol.39(2) Yale Law Journal 219-244.

McAlinden A., 'The Use of 'Shame' with Sexual Offenders' (2005) Vol.45 British Journal of Criminology 373-394.

McCann M., 'Dr. Strangelove (Or: How I Learned to Stop Worrying and Love Methodology)' (2008) Vol.41 *Studies in Law, Politics and Society* 19-59.

McEvoy A.F., 'A New Realism for Legal Studies' (2005) Vol.2 *Wisconsin Law Review* 433-454.

McLaughlin M., "'Abominable Mingling": Father-Daughter Incest and the Law' (1997) Vol.24(1) *Medieval Feminist Forum* 26-30.

McShane M.D., Williams F.P., 'Radical Victimology: A Critique of the Concept of Victim in Traditional Victimology' (1992) Vol.38 *Crime & Delinquency* 258-271.

Mertz E., 'Afterword: Tapping the Promise of Relational Contract Theory--Real Legal Language and a New Legal Realism' (1999-2000) Vol.94(3) *Northwestern University Law Review* 909-936.

Miles T.J., Sunstein C.R., 'The New Legal Realism' (2008) Vol.75(2) *University of Chicago Law Review* 831-851.

Minkinen P., "'If Taken in Earnest": Criminal Law Doctrine and the Last Resort' (2006) Vol.45(5) *Howard Journal of Criminal Justice* 521-536.

Mitchell T.W., 'Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism' (2005) Vol.2 *Wisconsin Law Review* 557.

Mohrmann D.C., 'Making sense of Sex: A Study of Leviticus 18' (2004) Vol.29 *Journal for the Study of the Old Testament* 57-79.

Moore S.F., 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) Vol.7(4) *Law and Society Review* 719-746.

Morton J., 'Opinion – The Sexual Offences Bill' (2003) Vol.67 *Journal of Criminal Law* 183.

Morton J., 'The Incest Act 1908: Was it Ever Relevant' (1988) Vol.138 *New Law Journal* 59-61.

Moser C., 'Addressing the healthcare Needs of Sexual Minority Patients' (1999) Vol.2 *Electronic Journal of Human Sexuality* www.ejhs.org/volume2/Moser/moser1.htm

Mowbray A., 'The Creativity of the European Court of Human Rights' (2005) Vol.5(1) *Human Rights Law Review* 57-79.

Mullender R., 'Human Rights: Universalism and Cultural Relativism' (2003) Vol.6(3) *Critical Review of International Social and Political Philosophy* 70-103.

Munslow A., 'Authority and Reality in the Representation of the Past' (1997) Vol.1(1) *Rethinking History* 75-87.

Nakashima I.I., Zakus G.E., 'Incest: Review and Clinical Experience' (1977) Vol.60(5) *Paediatrics* 696-701.

Neilson L.B., Nelson R.L., 'Rights Realized? An Empirical Analysis of Employment Discrimination Litigation As A Claiming System' (2005) Vol.2 *Wisconsin Law Review* 663-711.

Note, 'Inbred Obscurity: Improving Incest laws in the Shadow of the "Sexual Family"' (2006) Vol.119(8) *Harvard Law Review* 2464-2485.

Nourse V.F., Shaffer G.C., 'Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?' (2009) Vol.95 *Cornell Law Review* 61.

O'Donnell K., 'Protection of Family Life: Positive Approaches and the ECHR' (1995) Vol.17(3) *Journal of Social Welfare and Family Law* 261-279.

O'Donnell T.A., 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights' (1982) Vol.4(4) *Human Rights Quarterly* 474-496.

O'Neil J.M., 'Male Sex Role Conflicts, Sexism, and Masculinity: Psychological Implications for Men, Women, and the Counseling Psychologist' (1989) Vol.9(2) *The Counseling Psychologist* 61-80.

O'Neill J., 'The Rhetoric of Deliberation: Some Problems in Kantian Theories of Deliberative Democracy' (2002) Vol.8 *Res Publica* 249-268.

Ostrovsky A.A., 'What's so Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals' (2005) Vol.1(1) *Hanse Law Review* 47-64.

Pager D., 'Double Jeopardy: Race, Crime, And Getting A Job' (2005) Vol.2 *Wisconsin Law Review* 617-662.

Pager D., 'The Mark of a Criminal Record' (2003) Vol.108(5) *The American Journal of Sociology* 937-975.

Parker S., 'The Precultural Basis of the Incest Taboo: Toward A Biosocial Theory' (1976) Vol.78(2) 285-305.

Parker S., 'The Waning of the Incest Taboo' (1987) Vol.11 *Legal Studies Forum* 205-222.

Perlmutter L.H., Engel T., Sager C.J., 'The Incest Taboo: Loosened Sexual Boundaries in Remarried Families' (1982) Vol.8(2) *Journal of Sex & Marital Therapy* 83-96.

Phillips-Green M.J., 'Sibling Incest' (2002) Vol.10 *The Family Journal* 195-202.

Pogge T., 'Timeless Wisdom or Moral Arrogance?' (2005) Vol.7(1) *Australian Journal of Professional and Applied Ethics* 60-65.

Posner R.A., 'Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution' (1986-1987) Vol.37(2) *Case Western Reserve Law Review* 179-217.

Pound R., 'Mechanical Jurisprudence' (1908) Vol.8 *Columbia Law Review* 605-623.

Quinney R., 'Who is the Victim?' (1972-73) Vol.10 *Criminology* 314-323.

Radacic I., 'Gender Equality Jurisprudence of the European Court of Human Rights' (2008) Vol.19(4) *European Journal of International Law* 841-857.

Rasmusen E.B., 'Stigma and Self-Fulfilling Expectations of Criminality' (1996) Vol.39 *Journal of Law and Economics* 519-544.

Rivers I., 'Social Exclusion, Absenteeism and Sexual Minority Youth' (2000) Vol.15(1) *Support for Learning* 13-18.

Roberts D.F., 'Incest, Inbreeding and Mental Abilities' (1967) Vol.4 *British Medical Journal* 336-337.

Roberts M.J.D., 'Morals, Art and the Law: The Passing of the Obscene Publications Act, 1857' (1985) Vol.28(4) *Victorian Studies* 609-629.

Robinson P.H., 'Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical' (2008) Vol.67(1) *Cambridge Law Journal* 145-175.

Roffee J.A., 'Incest in Scots Law: Missed Opportunities in the Scottish Law Commission Review' (2010) Vol.10(2) *Contemporary Issues in Law* 168-180.

Roffee J.A., 'Lifting the Veil on Incest: The Historical Development of the Offence' (2011) Vol.5(10) *International Journal of Interdisciplinary Social Sciences* 297-312.

Rosenfeld A.A., Nadelson C.C., Krieger M., Backman J.H., 'Incest and Sexual Abuse of Children' (1977) Vol.16(2) *Journal of the American Academy of Child Psychiatry* 327-339.

Royce D., Waits A.A., 'The Crime of Incest' (1978) Vol.5 *Northern Kentucky Law Review* 191-206.

Royzman E.B., Leeman R.F., Sabini J., "'You Make Me Sick': Moral Dyspepsia as a Reaction to Third-Party Sibling Incest' (2008) Vol.32 *Motiv Emot* 100-108.

Rudd J.M., Herzberger S.D., 'Brother-Sister Incest – Father-Daughter Incest: A Comparison of Characteristics and Consequences' *Child Abuse and Neglect* (1999) Vol.23(9) 915-918.

Ryan M., 'Penal Policy Making Towards the Millennium: Elites and Populists; New Labour and the New Criminology' (1999) Vol.27 *International Journal of the Sociology of Law* 1-22.

Sagarin E., 'Incest: Problems of Definition and Frequency' (1977) Vol.13(2) *The Journal of Sex Research* 126-135.

Schneider D.M., 'The Meaning of Incest' (1976) Vol.85(2) *Journal of the Polynesian Society* 149-170.

Schrama W., 'How to Carry Out Interdisciplinary Legal Research: Some Experiences with an Interdisciplinary Research Method' (2011) Vol.7(1) *Utrecht Law Review* 147-162.

Schuman M.C., Mertz E., 'Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism' (2010) Vol.6 *Annual Review of Law and Social Science* 557-579.

Schwartz R.D., Skolnick J.H., 'Two Studies of Legal Stigma' (1962) Vol.10(2) *Social Problems* 133.

Seligman B.Z., 'The Problem of Incest and Exogamy: A Restatement' (1952) Vol.52(3) *American Anthropologist* 305-316.

Setaro F.C., 'A History of English Ecclesiastical Law (Part II)' (1938) Vol.18 *Boston University Law Review* 342-399.

Shajnfeld A., Krueger R.B., 'Reforming (Purportedly) Non-Punitive Responses to Sexual Offending' (2006) Vol.25 *Developments in Mental Health Law* 81-99.

Shepher J., 'Mate Selection Among Second Generation Kibbutz Adolescents and Adults: Incest Avoidance and Negative Imprinting' (1971) Vol.1(4) *Archives of Sexual Behaviour* 293-307.

Sherman L.W., Berk R.A., 'The Specific Deterrent Effects of Arrest for Domestic Assault' (1984) Vol.49(1) *American Sociological Review* 261-272.

Shor E., Simchai D., 'Incest Avoidance, the Incest Taboo, and Social Cohesion: Revisiting Westermarck and the Case of the Israeli Kibbutzim' (2009) Vol.114(6) *American Journal of Sociology* 1803-1842.

Simpson B., 'Scrambling Parenthood: English Kinship and the Prohibited Degrees of Affinity' (2006) Vol.22(3) *Anthropology Today* 3-6.

Silver R.L., Boon C., Stones M.H., 'Searching for Meaning in Misfortune: Making Sense of Incest' (1983) Vol.39(2) *Journal of Social Issues* 81-101.

Slone R.D., 'Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights' (2001) Vol.34 *Vanderbilt Journal of Transnational Law* 527-596.

Smith H., Israel E., 'Sibling Incest: A Study of the Dynamics of 25 Cases' (1987) Vol.11(1) *Child Abuse and Neglect* 101-108.

Soothill K., Francis B., 'Sexual Reconvictions and the Sex Offenders Act 1997' (1997) Vol.147 *New Law Journal* 1324-1325.

Stalford H., 'Concepts of Family Under EU Law—Lessons from the ECHR' (2002) Vol.16 *International Journal of Law, Policy and the Family* 410-434.

Steiner Z., 'On Writing International History: Chaps, Maps and Much More' (1997) Vol.73 *International Affairs* 531-546.

Sweeney J.A., 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era' (2005) Vol.54(2) *International and Comparative Law Quarterly* 459-474.

Temkin J., 'Do We Need A Crime of Incest?' (1991) Vol.44 *Current Legal Problems* 185-216.

Teson F., 'International Human Rights and Cultural Relativism' (1984-1985) Vol.25 *Virginia Journal of International Law* 869-900.

Tewksbury R., Lees M., 'Perceptions of Sex Offender Registration: Collateral Consequences and Community Experiences' (2006) Vol.26 *Sociological Spectrum* 309-334.

Tewksbury R., Lees M.B., 'Perceptions of Punishment: How Registered Sex Offenders View Registries' (2007) Vol.53(3) *Crime & Delinquency* 380-407.

Tewksbury, R. 'Collateral Consequences of Sex Offender Registration' (2005) Vol.21(1) *Journal of Contemporary Criminal Justice* 67-81.

Thomas T., 'The Sex Offender "Register": A Case Study in Function Creep' (2008) Vol.47(3) *The Howard Journal* 227-237.

Thomas T., 'Sex Offenders, the Home Office and the Sunday Papers' (2001) Vol.23(1) *Journal of Social Welfare and Family Law* 103-8.

Thomas T., 'The Sex Offender Register: Some Observations on the Time Periods for Registration' (2009) Vol.48(3) *The Howard Journal* 257-266.

Thomas T., 'When Public Protection becomes Punishment? The UK Use of Civil Measures to Contain Sex Offender' (2006) Vol.1(1) *Sex Offender Treatment* 2.

Triseliotis J., 'Long-term Foster Care or Adoption? The Evidence Examined' (2002) Vol.7 *Child and Family Social Work* 23-33.

Unger R.M., 'The Critical Legal Studies Movement' (1983) Vol.96(3) *Harvard Law Review* 561-675.

Vander Mey B.J., Neff R.L., 'Adult-Child Incest: A Sample of Substantiated Cases' (1984) Vol.33(4) 549-557.

Walker E.A., Katon W.J., Hansom J., et al 'Medical and Psychiatric Symptoms in Women with Childhood Sexual Abuse' (1992) Vol.54 Psychosomatic Medicine 658-664.

Walsh C., 'Drugs and Human Rights: Private Palliatives, Sacramental Freedoms and Cognitive Liberty' (2010) Vol.14(3) International Journal of Human Rights, 425-441.

West D.J., 'Incest in Childhood and Adolescence: Long-Term Effects and Therapy' (1988) Vol.40(5) British Journal of Hospital Medicine 352-360.

White L.A., 'The Definition and Prohibition of Incest' (1948) Vol.50(3) American Anthropologist 416-435.

Williams G., 'Convictions and Fair Labelling' (1983) Vol.42 Cambridge Law Journal 85.

Wilson R.F., 'Recognizing the Threat posed by an Incestuous Parent to the Victim's Siblings. Part II: Improving Legal Responses' (2004) Vol.13(3) Journal of Child and Family Studies 263-276.

Wintemute R., 'Sex Discrimination In *Macdonald And Pearce*: Why The Law Lords Chose The Wrong Comparators' (2003) Vol.14(2) King's Law Journal 267-282.

Wolfram S., 'Eugenics and the Punishment of Incest Act 1908' (1983) Criminal Law Review 308-316.

Wonderlich S., Donaldson M.A., Carson D.K., et al 'Eating Disturbance and Incest' (1996) Vol.11(2) Journal of Interpersonal Violence 195-207.

Wood G., 'The Politics of Development Policy Labelling' (1985) Vol.16(3) Development and Change 347-373.

Wyatt N. 'Review: Carmichael, Calum M. *Law, Legend and Incest in the Bible: Leviticus 18-20*' (1998) Vol.79 Journal for the Study of the Old Testament 143.

Yilmaz K., 'Postmodernist Approach to the Discipline of History' (2007) Vol.14(2) Kocaeli Üniversitesi Sosyal Bilimler Enstitüsü Dergisi (Kocaeli University, School of Social Sciences Journal) 176-188.

Yodanis C.L., 'Gender Inequality, Violence Against Women, and Fear: A Cross-National Test of the Feminist Theory of Violence Against Women' (2004) Vol.19 Journal of Interpersonal Violence 655-674.

Young L., Saxe R., 'When Ignorance is No Excuse: Different Roles for Intent Across Moral Domains' (2011) Vol.120 Cognition 202-214.

Zellick G., 'Incest' (1971) Vol.12, New Law Journal 715-716.

Government Publications

CPS, *The Code for Crown Prosecutors*, February 2010 (CPS Policy Directorate, London, 2010).

HL Deposited Papers, DEP 2002/2348, *Responses to Setting the Boundaries: Reforming the Law on Sex Offences* Deposited in the House of Lords Library, 19th November 2002.

Home Office Criminal Law Revision Committee, *Working Paper on Sexual Offences* (Home Office, London, 1980).

Home Office, Criminal Law Revision Committee, 'Fifteenth Report: Sexual Offences' April 1984 Cmnd 9213 (HMSO, London, 1984).

Home Office, *Criminal Statistics England and Wales 2001* Cm 5696 (National Statistics, London, December 2002).

Home Office, *Criminal Statistics England and Wales 2002* Cm 6054 (National Statistics, London, December 2003).

Home Office, *Criminal Statistics England and Wales 2003* Cm 6361 (National Statistics, London, November 2004).

Home Office, Home Office Statistical Bulletin RDS 19/05 2nd ed. *Criminal Statistics 2004 England and Wales* (National Statistics/Office for Criminal Justice Reform, London, November 2005).

Home Office, *Our Objectives and Values* <http://www.homeoffice.gov.uk/about-us/purpose-and-aims/index.html> accessed 25 February 2010.

Home Office, *Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences* Cm 5668 (TSO, London, 2002).

Home Office, *Report of the Committee on Homosexual Offences and Prostitution* Cmnd 247 (*Wolfenden Report*) (HMSO, London, 1957).

Home Office, *Rights Brought Home: The Human Rights Bill* Cm 3782 (TSO, London, 1997).

Home Office, *Sentencing and Supervision of Sex Offenders—A Consultation Document*, Cm 3304 (HMSO, London 1996).

Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* Volume 1 & 2 (Home Office Communication Department, London, 2000).

Home Office/Scottish Executive, *Consultation Paper on the Review of Part 1 of the Sex Offenders Act 1997* (Home Office/Scottish Executive, London/Edinburgh, 2001).

House of Commons 'The Special and General Reports Made to His Majesty by the Commissioners Appointed to Inquire into the Practice and Jurisdiction of the Ecclesiastical Courts in England and Wales' 1831-32 (199).

Joint Committee on Human Rights, *Scrutiny of Bills: Further Progress; Sexual Offences Bill* (2002-03, HL 119, HC 765).

Law Commission, 'A Criminal Code for England and Wales, Volume 1, Report and Draft Criminal Code Bill' (Law Com, No 177, 1989) (House of Commons Papers, 1989, 299) (HMSO, London, 1989).

Law Commission, 'Codification of the Criminal Law: A Report to the Law Commission' (Law Com, No 143, 1985) (House of Commons Papers, 1985, 270) (HMSO, London, 1985).

Law Commission, 'Consent in Sex Offences - A Report to the Home Office Sex Offences Review' (27 July 2000) Unnumbered series, available at <http://www.lawcom.gov.uk/docs/consent.pdf>

National Probation Service, Probation Circular 40/2006, *ViSOR Implementation*, 7th December 2006 [6.4].

Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences, Discussion Paper No 131* (Edinburgh, TSO, 2006).

Sentencing Advisory Panel, *Advice to SGC on Sexual Offences*, <http://www.sentencing-guidelines.gov.uk/docs/advice-sexual-offences.pdf> accessed 1 June 2009.

Sentencing Guidelines Council, 'Sentencing Advisory Panel "The Use of Community Orders"' in *The Sentence: The Sentencing Guidelines Council Newsletter*, Issue 05 (SGC/SAP, London, 2006).

Sentencing Guidelines Council, *Definitive Guideline-Sexual Offences Act 2003* (30 April 2007, London) http://www.sentencing-guidelines.gov.uk/docs/0000_SexualOffencesAct1.pdf accessed 1 June 2009.

Sentencing Guidelines Council, *Guideline: Overarching Principles: Seriousness* (2004) http://sentencing-guidelines.gov.uk/docs/seriousness_guideline.pdf accessed 3 May 2010.

Crown Prosecution Service, *Legal Guidance – Sexual Offences* http://www.cps.gov.uk/legal/s_to_u/sexual_offences_act/ accessed 29 August 2010.

Legislation

Bills

A Bill to Provide for the Punishment of Incest 1903, Bill 134.

A Bill to provide for the Punishment of Incest 1908, Bill 127.

A Bill to Provide for the Punishment of the Crime of Incest 1900, Bill 136.

Incest Bill 1903, Bill 51.

Incest Bill 1907, Bill 257.

Paedophiles (Registration and Miscellaneous Provisions) Bill (12 June 1996).

Sexual Offences Against Children (Register of Offenders) Bill (27 February 1996)

Sexual Offences Bill 2003 HL Bill 026 (28 January 2003).

The Sexual Offences Act 2003 (Remedial) Order 2011 (Draft)
http://www.legislation.gov.uk/ukdsi/2011/9780111512357/pdfs/ukdsi_9780111512357_en.pdf accessed 25 August 2011.

Acts

'An Act against several Atheistical, Blasphemous and Excrable Opinions, derogatory to the honour of God, and destructive to humane society' 9th August 1650, see Firth C.H., Rait R.S., eds. *Acts and Ordinances of the Interregnum 1642-1660*, Vol. II (HMSO, London, 1911) 409.

'An Act for explanation of a clause contained in an Act of Parliament made in the seventeenth year of the late King Charles, intituled An act for repeal of a branch of a statute primo Elizabeth concerning commissioners for causes ecclesiastical.' 1661, Anno decimo tertio, Caroli II. C.12., in *Statutes at Large*, 13 Cha. II to 1 Jam II., Vol. VIII (Cambridge, Joseph Bentham, 1763) 20.

'An Act for suppressing the detestable sins of Incest, Adultery and Fornication' 10th May 1650, see Firth C.H., Rait R.S., eds. *Acts and Ordinances of the Interregnum 1642-1660*, Vol. II (HMSO, London, 1911) 387.

'An act for repeal of an act of parliament, intituled, An act for disabling all persons in holy orders to exercise any temporal jurisdiction or authority,' 1661, Anno decimo tertio, Caroli II. C.2, in *Statutes at Large*, 13 Cha. II to 1 Jam II., Vol. VIII (Cambridge, Joseph Bentham, 1763) 5.

‘An Act for the Safety and Preservation of His Majesties Person and Government’ see *Statutes of the Realm*, (Pall Mall, London, Dawsons, MDCCCXVII) Reprinted 1963, Vol.V 13 Car.II c.1 304.

‘The Act for the Submission of the Clergy and the Restraint of Appeals of 1534’ see *Statutes of the Realm*, (Pall Mall, London, Dawsons, MDCCCXVII) Reprinted 1963, Vol.III., 25 Hen.VIII c.19 460.

‘The Statute of Circumspecte Agatis’ see *Statutes of the Realm*, (Pall Mall, London, Dawsons, MDCCCXVII) Reprinted 1963, Vol.I. 13 Edw.I. 101.

Adoption and Children Act 2002 c.38.

Bail Act 1976 c.63.

Children Act 1975 c.72

Coroners and Justice Act 2009 c.25.

Criminal Justice Act 1991 c.53.

Criminal Justice Act 2003 c.44

Criminal Justice and Immigration Act 2008 c.4

Criminal Justice and Public Order Act 1994 c.33

Criminal Law (Consolidation) (Scotland) Act 1995 c.39.

Criminal Law Act 1967 c.58.

Criminal Law Act 1977 c.45.

Criminal Law Amendment Act 1885 c.69.

Freedom of Information Act 2000 c.36.

Human Rights Act 1998 c.42.

Marriage (Prohibited Degrees of Relationship) Act 1986 c.16.

Marriage Act 1949 c.76.

Public Order Act 1986 c.64.

Punishment of Incest Act 1908 c.45.

Rehabilitation of Offenders Act 1974 c.53.

Sex Offenders Act 1997 c.51.

Sexual Offences Act 1956 c.69

Sexual Offences Act 1967 c.60.

Sexual Offences Act 2003 c.42.

Theft Act 1968 c.60.

Non-domestic Instruments

Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program 42 USC 14071 part of the Violent Crime Control and Law Enforcement Act 1994

Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5; 213 U.N.T.S. 221.

Constitution and General Regulations of the ICPO-INTERPOL adopted by the General Assembly, 25th session (Vienna, 1956).

Explanatory Notes

Explanatory Notes for Sexual Offences Bill 2003 HL Bill 026 (28 January 2003)

<http://www.publications.parliament.uk/pa/ld200203/ldbills/026/en/03026x--.htm> accessed 29 March 2011.

Explanatory Notes to Adoption and Children Act 2002 c.38

http://www.opsi.gov.uk/acts/acts2002/en/ukpgaen_20020038_en_1 accessed 30 June 2009.

House of Commons Journal

CJ Vol. III 721 (11 December 1644)

CJ Vol. III 724 (16 December 1644)

CJ Vol. IV 35 (29 January 1645).

CJ Vol. V 184 (26 May 1647).

CJ Vol. V 188 (27 May 1647).

CJ Vol. V 189 (28 May 1647).

CJ Vol. V 478 (3 March 1648).

CJ Vol. V 523 (31 March 1648).

CJ Vol. V 648 (26 July 1648).

CJ Vol. VI 171 (23 March 1649).

CJ Vol. VI 354 (1 February 1650).

CJ Vol. VI 359 (8 February 1650).

CJ Vol. VI 365 (15 February 1650)

CJ Vol. VI 366 (15 February 1650).

CJ Vol. VI 385 (22 March 1650)

CJ Vol. VI 389 (29 March 1650)

CJ Vol. VI 396 (12 April 1650)

CJ Vol. VI 404 (26 April 1650)

CJ Vol. VI 408 (3 May 1650)

CJ Vol. VI 410 (10 May 1650).

CJ Vol. VII 443 (4 October 1656).

Hansard

Hansard HC vol.80 col.1325 (20 March 1900).

Hansard HC vol.118 col.1683 (5 March 1903).

Hansard HC vol.118 col.1684 (5 March 1903).

Hansard HC vol.124 col.698 (26 June 1903).

Hansard HC vol.124 col.699 (26 June 1903).

Hansard HC vol.124 col.701 (26 June 1903).

Hansard HL vol.125 col.820 (16 July 1903).

Hansard HL vol.125 col.821 (16 July 1903).

Hansard HL vol.125 col.822 (16 July 1903).

Hansard HL vol.125 col.824 (16 July 1903).

Hansard HC vol.191 col.278 (26 June 1908).

Hansard HC vol.191 col.280 (26 June 1908).

Hansard HC vol.191 col.283 (26 June 1908)

Hansard HC vol.191 col.284 (26 June 1908)

Hansard HC vol.191 col.288 (26 June 1908).

Hansard HL vol.197 col.1408 (2 December 1908)

Hansard HL vol.197 col.1410 (2 December 1908)

Hansard HL vol.197 col.1411 (2 December 1908).

Hansard HL vol.197 col.1412 (2 December 1908).

Hansard HC vol.483 col.681 (29 January 1951).

Hansard HC vol.238 col.74 (21 February 1994).

Hansard HC vol.279 col.356 and col.359 (12 June 1996).

Hansard HC vol.284 col.14 WA (25 October 1996).

Hansard HC vol.314 col.10 (15 June 1998).

Hansard HC vol.324 col.80-81 (25 January 1999).

Hansard HC vol.352 col.395-396 W (26 June 2000).

Hansard HL vol.644 col.772 (13 February 2003).

Hansard HL vol.644 col.771 (13 February 2003).

Hansard HL vol.644 col.774-5 (13 February 2003).

Hansard HL vol.644 col.775 (13 February 2003).

Hansard HL vol.648 col.555 (19 May 2003).

Hansard HL vol.649 col.741 (17 June 2003).

Hansard HL vol.649 col.742 (17 June 2003).

Hansard HL vol.654 col.1639 (13 November 2003).

Hansard HC Standing Committee B 'Sexual Offences Bill 2003 [Lords]' col.229 (16 September 2003).

Hansard HC Standing Committee D, col.23. (4 February 1997).

Hansard HC Standing Committee D, col.24. (4 February 1997).

Hansard HC Standing Committee D, col.8. (4 February 1997).

Hansard HC Standing Committee D, Third Sitting, col.90 (6 February 1997).

Miscellaneous

Cases

A v Scottish Ministers [2007] CSOH 189.

Forbes v Secretary of State for the Home Department [2006] EWCA Civ 962.

Martin v Mackonochie (1878-79) L.R. 4 QBD.

Mourdant v Moncreiffe (1874) 2 Sc.&Div at 381.

Pepper (Her Majesty's Inspector of Taxes) v Hart [1992] UKHL 3 (26 November 1992), [1993] AC 593.

Phillimore v Machon (1876) 1 P.D. 480.

R (on the application of F (by his litigation friend F)) and Thompson (FC) v Secretary of State for the Home Department [2010] UKSC 17.

R v Winch (1974) Criminal Law Review 487.

Re Kevin Gallagher [2003] NIQB 26.

Pamphlets

Blair T., in Kelly G., ed. 'Is New Labour Working?' Fabian Pamphlet 590 (Fabian Society, London, 1999).

Church of England, *Constitutions and Canons Ecclesiasticall* (Robert Barker, printer to the Kings most excellent Maiestie, London, 1604) available at http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&res_id=xri:eebo&rft_id=xri:eebo:image:150720 accessed 10 December 2008.

Church of England, Province of Canterbury, Archbishop Parker, *Table of Kindred and Affinity* (Printed for Thomas Adams, London c.1600) available at http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&res_id=xri:eebo&rft_id=xri:eebo:image:150720 accessed 20 November 2008.

Cragg S., 'The Sexual Offences Act is Good in Parts, But It May Be Too Strict or Confused on Some Crimes' *The Times* (London, 11 May 2004) 7.

Ford R., 'Tougher Rape Laws Come into Force' *The Times* (London, 1 May 2004) 5.

Glenn H., Partington M., Wheeler S., *The Nuffield Enquiry on Empirical Legal Research* 'Law in the Real World: Improving Our Understanding of How Law Works' November 2006 (Nuffield, London, 2006).

Johnston P., 'How Incest Slipped From the Statute Book' *The Daily Telegraph* (London, 21 November 2002) 10.

Kelly G., ed. 'Is New Labour Working?' Fabian Pamphlet 590 (Fabian Society, London, 1999).

Krisch N., *The Open Architecture of European Human Rights Law*, LSE Law, Society and Economy Working Papers 11/2007.

Labour Party (Great Britain), *Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into United Kingdom Law* (Labour Party, London, 1996).

Labour Party (Great Britain), *New Labour: Because Britain Deserves Better* (1997 Party Manifesto) (Labour Party, London, 1997).

Mencap, *Barriers to Justice: A Mencap Study into How the Criminal Justice System Treats People With Learning Disabilities* (Mencap, London, 1997).

Richards P., 'Is the Party Over? New Labour and the Politics of Participation' Fabian Pamphlet 594 (Fabian Society, London, 2000).

Spencer J., 'Why the Act is Indecent' *The Independent* (London, 3 May 2004) 7.

Taft B., Wilkinson R.A., *Ten-year Recidivism Follow-up of 1989 Sex Offender Releases* (Dept of Rehabilitation and Correction, Ohio, 2001) reproduced in Appendix of material for the *Hearing of 'Protection Against Sexual Exploitation of Children Act of 2005, and the Prevention and Deterrence of Crimes Against Children Act of 2005*, Hearing on H.R 2318 and H.R 2388, June 7th 2005, Serial No. 109-33.

Walker H., *The Remonstrance of the Commons of England to the House of Commons* (7 March 1643).

Wynn-Davies P., 'Family Groups Attack Moves to Liberalise Incest Law' *The Independent* (London, 26 May 1989) 2.

Wynn-Davies P., 'Gay Age of Consent' *The Independent* (London, 23 February 1994) 15.

Unpublished Works

Personal email Communication, FOIUnit@cps.gsi.gov.uk response to email dated 7 October 2010 (Ref 2482 (25/10/2010))

Personal email Communication, Graeme Fairnie providing Justice Statistics–Analytical Services, Ministry of Justice (Ref SENT(JSAS)121-10 (28/04/2010)).

Personal email Communication, Graeme Fairnie providing Justice Statistics–Analytical Services, Ministry of Justice (Ref SENT(JSAS)121-10 (22/07/2010)).

Unpublished thesis by Aksberg Bjerkmo Johansen T., *What's in a Metaphor?: The Use of Political Metaphors in the Conservative and Labour Parties*, Master in Language - English Study, Faculty of Humanities, University of Tromsø, Autumn 2007.

Unpublished thesis by Weimer S., *Autonomy and the Utilitarian State*, Doctor of Philosophy, Graduate College of Bowling Green State University, December 2009.

Web-based Sources

Amnesty International, *Uganda: Anti-Homosexuality Bill is Inherently Discriminatory and Threatens Broader Human Rights* (Amnesty International Publications, London, 2010) available at http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/201/201101/20110124_409aianti_homo_en.pdf accessed 04 March 2011.

Cornides J., *The 'Right to Marriage' According to the ECHR and the European Fundamental Rights Charter* http://works.bepress.com/cgi/viewcontent.cgi?article=1031&context=jakob_cornides accessed 01 October 2010.

Cousin Couples, *Cousin Marriage Resources*, <http://www.cousincouples.com> accessed 26 February 2012.

European Court of Human Rights, *Search Portal* <http://www.echr.coe.int/ECHR/EN/hudoc> accessed 6 December 2010.

European Court of Human Rights, *Pending Applications Allocated to a Judicial Formation* http://www.echr.coe.int/NR/rdonlyres/92D2D024-6F05-495E-A714-4729DEE6462C/0/Pending_applications_chart.pdf accessed 8 June 2011

Genetic Sexual Attraction, <http://www.geneticsexualattraction.com> accessed 26 February 2012.

Incest News Blog, *Incest News*, <http://incestnews.blogspot.com.au> accessed 26 February 2012.

Lord Bingham of Cornhill, Lord Chief Justice of England, Speech at Dinner for HM Judges, The Mansion House, London 22 July 1998, available at http://www.judiciary.gov.uk/publications_media/speeches/pre_2004/mnsion98.htm accessed 05 June 2009.

National Policing Improvement Agency, *Dangerous Persons Database ViSOR*, <http://www.npia.police.uk/en/10510.htm> accessed 22 April 2010.

Oxford English Dictionary Online, *Totem* <http://www.oed.com/view/Entry/203813?rskey=DBdYzo&result=1&isAdvanced=false> accessed 01 December 2010.

Cases of the European Court of Human Rights

A.W. Khan v United Kingdom (App no.47486/06).

Airey v Ireland (App no.6289/73).

B & L v United Kingdom (App no.36546/02).

Burden v United Kingdom (App no.13378/05).

Chapman v United Kingdom (App no.27238/95).

Christine Goodwin v United Kingdom (App no.28957/95).

Ciubotaru v Moldova (App no.27138/04) para.49.

Cyprus v Turkey (App no.25781/94).

Dabrowska v Poland (App no.34568/08).

Dahlab v Switzerland (App no.42393/98).

De Haes and Gijssels v Belgium (App no.19983/92).

Dolenec v Croatia (App no.25282/06) para.165.

Dolhamre v Sweden (App no.67/04).

Dudgeon v United Kingdom (App no.7525/76).

E and others v United Kingdom (App no.33218/96).

Eberhard and M. v Slovenia (App no.9733/05).

F. and M. v Finland (App no.22508/02).

Gillan and Quinton v United Kingdom (App no.4158/05).

Greece v United Kingdom (App no.176/56).

H.K. v Finland (App no.36065/97).

Hasan and Chaush v Bulgaria (App no 30985/96).

Iordachi and Others v Moldova (App no.25198/02).

Ireland v UK (App no.5310/71).

Johansen v Norway (App no.17383/90).

K.A. v Finland (App no.27751/95).

Karner v Austria (App no.40016/98).

Kennedy v United Kingdom (App no 26839/05).

Klein v Slovakia (App no.72208/01).

Kozak v Poland (App no.13102/02).

Kurochkin v Ukraine (App no.42276/08).

Kutzner v Germany (App no.46544/99).

Laskey, Jaggard and Brown v United Kingdom (App no.21627/93, 21826/93 and 21974/93).

Lawless v Ireland (App no.332/57).

Liberty and Others v United Kingdom (App no.58243/00).

Maestri v Italy (App no.39748/98).

Mastepan v Russia (App no.3708/03).

Mata Estevez v Spain (App no.56501/00).

Mikhaylyuk and Petrov v Ukraine (App no 11932/02).

National Union of Belgian Police (App no.4464/70).

Odievre v France (App no.42326/98).

Oluic v Croatia (App no.61260/08).

Osman v United Kingdom (App no.32452/94).

Petrovic v Austria (App no.20458/92).

R. v Finland (App no.34141/96).

Rachwalski and Frenec v Poland (App no.47709/99).

Rataru v Romania (App no.28341/95).

S. and Marper v United Kingdom (App nos. 30562/04 and 30566/04).

S.B.C v United Kingdom (App no.39360/98).

S.H. and Others v Austria (App no.57813/00).

Sahin v Germany (App no.30943/96).

Sahin v Turkey (App no.44774/98).

Saviny v Ukraine (App no.39948/06).

Schalk and Kopf v Austria (App no.30141/04).

Shalimov v Ukraine (App no.20808/02).

Sheffield and Horsham v United Kingdom (App no.22985/93 and 23390/94).

Silver and Others v United Kingdom (App no.5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75).

Van Raalte v Netherlands (App no.20060/92).

Veraat v Netherlands (App no.10807/04).

Vlasov v Russia (App no 78146/01).

X and Y v The Netherlands (App no.8978/80).

Z and Others v United Kingdom (App no.29392/95).

Zaunegger v Germany (App no.22028/04).