

Family Secrets in the Liberal State

By Johan Tralau

In a controversial passage in Euripides's *Phoenician Women*, Oedipus's sons are called a "stain from the father" or "the father's stain" (*miasma patros*). Oedipus, the man who, unbeknownst to himself, kills his father and marries his own mother, pollutes not just himself to the degree that he feels forced to put out his own eyes – he has also produced children who, because of the inexpressible shame, themselves *are* a stain. Incest transgresses all boundaries; it is the greatest crime.

The history of humankind can blind us: all the strange, burlesque or cruel customs which have been practised in different cultures can give us the impression that nothing is constant, that nothing is set, that no morals transcend history and bind together all those naked small creatures called human beings. Yet perhaps we are mistaken. The American physician and philosopher Leon Kass has claimed that there are six phenomena which all sound individuals instinctively regard as repellent, namely: incest, bestiality, corpse desecration, cannibalism, rape and murder. Kass uses these acts as a starting point for a controversial argument about the wisdom of disgust, that is that our feelings of repugnance for certain actions in actual fact ought to serve as guidance in political and moral questions. Many liberals try to fend off such a conception; according to the most traditional version of liberalism the law should not prevent anyone from doing anything that does not directly harm another. One is allowed to injure or humiliate oneself, but not others, and if you have agreed to let someone injure you then you have only yourself to blame.

So what about Kass's examples – incest, bestiality, corpse desecration, cannibalism, rape and murder? Can one give these deeply felt taboos the force of law? Another American philosopher, Martha Nussbaum, has dismissed the entire problem by employing the eccentric argument that corpse desecration violates property rights – it is unclear whose – and that cannibalism presupposes that one must first kill the person who is to be eaten, which is murder and therefore involves obvious harm to others. Perhaps one should avoid being unduly sensationalist, but one can of course use as an example the German cannibal who a few years ago ate the genitalia of another consenting adult. The cannibal ended up in jail, but the question is if liberal legislation as

Nussbaum conceives it is actually capable of prohibiting the type of cannibalism where the victim has right from the outset already consented to the act.

The same point can be made about incest: can incest between consenting adults be prohibited within the horizon of liberalism? Nussbaum argues that incest can in fact be prohibited, since a daughter who is a minor cannot provide any actual informed consent for sexual intercourse with her father. Yet Nussbaum does not seem to have considered the obvious objection that the person in question – such as, according to rumour, Lucrezia Borgia – can be both legally above the age of consent and actually provide such consent. Swedish law, for instance, forbids sexual relations even between consenting adults who are close relations. Indeed, the incest taboo is humanity's most widespread and well-known moral taboo. Admittedly, there are certain differences between different cultures in their view of the phenomenon at its periphery, as in the question of the marriage of cousins, but at its core and in its most widespread conception the incest taboo is the universal human institution *par excellence*. The difficult question is, as shall be seen, if it can be maintained within the framework of liberal ideas to which western society to a large degree adheres.

The subject matter of the following is marriage and a certain type of liberal thinking which during recent decades has become ever more influential. "Liberal" can of course mean many different things. However, contemporary liberalism is associated by many with a preconception that the state should in some way remain "neutral" in questions of values. What that neutrality involves has not always been entirely clear. During the centre-right government in Sweden between 1991-94 there was, for instance, a debate about the new national school curriculum. The proposed curriculum included a statement about Western humanism, and certain people argued that it should be omitted because the state ought to be precisely "neutral". Moreover, not too long ago some MPs of the right-wing Swedish Moderate Party submitted a law proposal to parliament to the effect that the Swedish marriage law should be abolished, based on the argument that the state's provision of marriage for its citizens is not compatible with liberal neutrality. Instead, citizens should make their own civil law contracts with each other – not marriage. "The state ought not to favouritise or promote a particular form of living together", it was argued, and instead the "most reasonable thing would be if women, men, friends or siblings regulated their

relationships by means of free civil law contracts”. “Women, men, friends”, then – and “siblings”. The important thing about the law proposal is not that it is somewhat risqué that members of parliament (including a subsequent cabinet member, namely migration minister Tobias Billström) should promote the affairs of incestuous siblings; what is interesting in principle is the fact that the proposal specifically refers to a certain kind of neutrality in order to justify legislation.

The motion in actual fact brings to the fore a very important issue. The doctrine that the state ought to be neutral in relation to the question of what constitutes a good life has become a popular one, and it is used to justify different ideas. To name but one example: in a recent one-person Swedish public inquiry into the question of same-sex marriage, there are admittedly no clearly stated principles which clarify the investigator’s position, but there are statements to do precisely with neutrality which give evidence of a certain degree of influence from such a notion. There is, however, reason to ask oneself what this neutrality of values actually involves, and if it might not have more far-reaching consequences than people are prepared to admit. For instance, some scholars have claimed that a ban on drugs cannot be sustained once the state and the law are subordinated to such a neutrality. Moreover, principles which are used to justify ethical and political positions must be thought through to their end, bitter or not. The issue which will be discussed here is what neutrality means for marriage – and for that universal human institution, the incest taboo.

The Neutral State

In order to establish what the state’s neutrality in questions of values actually means we must turn to political philosophy. A leading theorist, Ronald Dworkin – who admittedly on this point is contradictory – has stated that it means that legislation must be “independent of any particular conception of the good life, or of what gives value to life”. So what can first be seen is that the doctrine that the state should be neutral is not about being helpless and completely devoid of values; what liberal neutrality wishes to tie down and tame are values to do with *what constitutes a good life*. Liberal neutrality is not helpless in the face of violence or other severe abuses. In the case of certain values – to do with, for instance, basic rights – there is no problem at all. The

problem is with ideas about the good life, in other words that a certain way to live one's life is better than some other way.

The Swedish political scientist Ludvig Beckman has however demonstrated that three quite different doctrines are conflated in the discussion about liberal neutrality in the question of values. First of all, there is the case of some kind of neutral *consequences* of legislation, in other words that it will affect all parties concerned or all citizens in precisely the same way. However, this type of neutrality has to a large degree already been dismissed; no one actually believes that it is possible that this could ever occur. The second case is to do with neutral *aims*, in other words that the state or legislator's actual intent is not to promote or favouritise a certain group or a particular conception of the good life. This case is perhaps possible and possibly worth considering. However, the probably most interesting and theoretically robust conception of liberal neutrality in the question of values is to do with something else, namely how one *justifies* political decisions and legislation. The intent or consequences are in other words not the most important issue here, but rather the *reasons* which are put forward. Here the bridle that the philosophers wish to place on the political animals is precisely this, that not just any old reason can be cited to justify political positions. Reasons which are to do with fundamental rights are permissible, whereas conceptions about what is a good or excellent or perfect or dignified life cannot be considered when it comes to making political decisions.

There are divided opinions about the extent to which this halter should apply. One proponent of the idea, Bruce Ackerman, has argued that it should apply to all political decisions, whilst another, the leading light of Anglo-Saxon political philosophy, John Rawls, has claimed that conceptions of the good life can be referred to in matters which are not to do with society's "basic structure". In this context the difference is not that important. The family is to all intents and purposes a part of the basic structure of society, and consequently, Rawls argues that decisions about marriage and similar matters may not be based on a conception of what constitutes a good life. The fact that some proponents of same-sex marriage have chosen to base their arguments upon liberal neutrality of values is in other words not surprising; if the state cannot assume that one form of living one's life is – in any way – more worth protecting than any

other, then it would appear that there are no reasons why the right to marry should not be extended into entirely new spheres.

The decisive issue here is not to say that all other political thought, which does not belong to this specific type of liberalism, is concerned with the state always trying to encourage everything that is good, and ban everything that is bad. Plato, who can hardly be accused of having any specifically modern prejudices, says for instance in the *Laws* that it would be “inappropriate” (*aprepes*) if the law did precisely that; in every just state there must be some kind of leeway for action. However, the liberal idea that is to do with neutrality of values has a very specific conception about what should be excluded, namely precisely ideas about the good life, as opposed to the most fundamental rights and goods. There is reason to specify how particular and unusual this idea is in a historical perspective. From the beginnings of political philosophy and up until quite recently it was something else which was regarded as desirable. Consequently, in Aristotle’s *Politics* it is stated that the state “emerged for life’s [basic existence’s] sake, but is there for the good life’s sake” (*ginomenē men tou zēn heneken, ousa de tou eu zēn*). However, some things change and even peculiar matters can come to be considered as justified over time. Whatever the case may be, there is reason to follow this chain of thought to see where it leads.

Hence: in its most promising version the idea that the state should be neutral means that political decisions about marriage, for instance, may not be based upon what is valuable or what can be regarded as a good life. Conversely, political decisions and laws must relate to, and be justified by a small core of values which are to do with fundamental rights, such as freedom of speech, or the protection of life and property, or “primary goods” such as preconditions for life and the most basic capacity for moral choice. This excludes all ideas about human perfection or self-realisation; it is a dispassionate, objective way of doing away with what the literature calls “comprehensive doctrines” about the good life. Moreover, maybe, just maybe it is actually also a way of excluding even the most fundamental taboo about that which is not the good life.

Breaking Taboos and Causing Harm

Why is incest such pollution, such a crime? Once again: the discussion here does not concern incest towards minors, but that of consenting adults who are close relations. There are of course intellectuals and others who have denied that incest is something reprehensible. The great eccentric theoretist of egoism, the strange nineteenth century character Max Stirner wrote that all morality is repressive (“fanatisch”), and that this included the incest taboo. Also, the theme of incest has often been used in the history of political thought as a provocation. For instance, Diderot in the philosophical dialogue *Supplément au voyage de Bougainville* lets a cheerful savage appear who does not realise the reprehensibility of incest, and who is also impolite enough to point out certain consequences of the Old Testament’s account of the early history of humanity – whereupon the pious Christian hypocrite can only reply helplessly that “*l’inceste est un crime abominable, et parlons d’autre chose*”. However, in all certainty most people’s spontaneous answer would be that the incest taboo should be upheld, as incest can lead to inbreeding – or, as expressed in the liberal idiom: that incest can result in harm to others, namely those children who are produced, or deprive them of “primary goods” such as health.

The question is, however, if the risk of genetic defects and inbreeding can be regarded as causing harm “to others” or to destroy “primary goods” in the sense that is relevant if the state is to remain neutral in relation to people’s conception of the good life. In the first case, there is a problem which concerns the possibility to cause harm to people who do not yet exist. Can one be regarded as having caused “harm” to someone who has not yet been conceived – and who would not be conceived unless the action which caused the injury were performed? Most people are in agreement that we have a duty towards future generations. Yet exactly who these future generations are remains unclear and controversial. For instance, the German-American philosopher Hans Jonas has put forward the important argument against cloning that it denies the clone an open future: the individual who has been cloned can always be confronted with his own genetic original; see how it lived; how its face has become lined; how its choices in life have been made; how it has developed – and thereby the clone is denied, according to Jonas, the openness which a human being needs to experience when confronting the future. There are reasons to point out that this argument does not hinge on genetic determinism; the clone does not

have to *be* exactly like his original. However, the clone will *experience* himself as restrained and unfree, a state of affairs which is rooted in human nature and in people's unavoidable interest in their own origins. For these reasons cloning must be regarded as reprehensible – and this is irrespective of the fact that it is part of a decisive and further step in the development toward turning the human being into a thing, a material for other people's manipulation. However, the question is if the argument against cloning is sufficient to justify a ban on cloning; in any event it cannot without difficulties become a factor in a state which has adopted the doctrine of liberal neutrality in questions concerning the good life.

However, even if one dispenses with the problem of the unborn individual's moral status there remains another and perhaps more difficult problem. If incest is to be regarded as so reprehensible that it ought to be forbidden by law, based on the possibility of genetic defects in the resultant progeny, then the presumptive parents must be regarded as being responsible for such defects. That such defects are the probable result of incest between close relatives must be regarded as established beyond doubt. The problem can be later destructive consequences for those children who are produced, or for humanity as a whole. Given this, the evolutionary rationale for the incest taboo is not hard to understand. Certain scientists have however argued that incest can be evolutionarily advantageous for certain populations; if individuals who in some sense have "bad" genes reproduce with close relatives, then they may produce offspring who themselves may not be sufficiently successful at being able to reproduce – resulting in the genes being deleted from the population. Other scientists have dismissed this theory, however. In this context it is of no great importance; the decisive factor here is that one can assume that incest really does have great disadvantages for the offspring, something that is apparent in those parts of the world where marriages between cousins are common.

Can therefore these negative effects – directly for the progeny or indirectly for mankind – justify the incest taboo and the related ban on such marriages? In the case of humanity as a whole it is not immediately clear. If genetic variation were reduced then this would be negative for humankind. However, the incest taboo is not just a "construction", to use an already tired academic phrase, it is a psychological reality amongst all children who grow up together. So strong is the psychological resistance to desire towards one's own siblings that even other

children with whom a person has shared his or her childhood are encompassed by it. It is, in other words, well established that children who grow up in a close-knit environment are not as a rule erotically attracted to one another later in life. This means therefore that the incest taboo strengthens something which in almost all cases is already the strongest form of internalised taboo. It is, in other words, not possible that a lifting of the incest taboo would result in genetic depletion for humanity as a whole, as incest in any possible scenario would remain extremely rare. Neither would the problem of marriage within one's own local village or family play a part in modern societies where mobility – both geographical and many other kinds – is remarkably great. The thought of possible consequences for the survival of humankind as a whole can therefore not justify the incest taboo within the framework of a liberalism which wishes to justify laws without basing them on what can be considered a good life.

Harm, Illness and Loneliness

Concern about the offspring's health and psychological situation seems perhaps therefore to be more promising in this context. An incestuous couple – siblings or other – can be presumed to have children who are defective in some way, and for this they can be regarded as being responsible. Liberal neutrality would then be able to uphold the ban on incest and on incestuous marriage, by referring to the fact that the progeny are denied that which John Rawls calls “primary goods” – in this case, health.

However, normative principles regarding what is good and what is reprehensible must be possible to generalise; they must be able to be applied to all similar cases, or explain in which way a different case really is different. Here, once again, there arises a problem.

Firstly, there is namely general unease about the idea that parents are responsible for their children's inherited defects, or other defects. Indeed, this unease is quite justified: in a time when parents through preimplantation diagnosis, amniotic fluid tests and other means can find out a child's sex, risks of inherited or other diseases, eye-colour and, possibly, in the future, sexual orientation, there is also the risk that they may, by means of abortion or other means, choose to “correct” the problem. In China and India, incidentally, the lack of girls is already a demographic problem; one which may have exceptionally destructive consequences when large numbers of

young men are not bound into the institution of marriage, as a result of there quite simply not being enough women. What is relevant in this context is the risk of defects of some sort in the child. Representatives of organisations which support the physically and mentally impaired have expressed concerns that those parents who in such a situation do not choose to terminate their child's life will therefore come to be seen as being responsible for the illness in question. In particular, when it comes to Down's syndrome it has been claimed that there is the pressure of expectation to choose such a "solution". So far parents are not regarded in any deeper sense as being responsible for birth defects, and the state's role in caring for the physically impaired has therefore not yet come to be questioned. In this context, however, one must ask oneself what it is that is in principle different between an incestuous couple, and a normal couple which know that their possible progeny may suffer from a genetic defect.

If the incest taboo is to be justified by referring to the fact that one can predict genetic defects in the child, the natural question will be how the law is to deal with persons who are carriers of problematic genetic disorders. There are inherited diseases, for instance Huntington's, which without doubt can be said to give a poorer quality of life than a life that is free of the disease: it always leads to death far earlier than the average mortality rate. The question is therefore if it is how serious the potentially inherited disease or defect is, that should decide the right to marry and produce children. Should a liberalism which is based on neutral justifications, in other words one which in no cases whatsoever takes a stand on what is a good or perfect life, forbid marriage even for people who are carriers of diseases such as Huntington's? In that case it must be justified by an argument to the effect that people who produce children which will probably be subject to serious diseases thereby deny these children a "primary good" such as health. However, it does not seem likely that many liberals – or others – would like to see such an application of the principle of neutral justification, as it would involve a considerably larger group of people being excluded from the right to marry and procreate than those who are in incestuous partnerships, and who are excluded today.

Such things can change however. In Tommaso Campanella's renaissance utopia *La città del sole* (1602) the sun city's inhabitants find it amusing that the narrator and other Europeans spend time breeding "[la] razza de cani e cavalli, e trascuramo la nostra" ("the race of dogs and horses and

neglect our own”). In any case it will be necessary to explain what difference there is *in principle* between the two cases. If it is just the risk of future harm which is decisive then the argument for the ban on incest must either be generalised to other cases where inherited genetic defects can be expected – or one must find another argument; one which has to do with something other than the physical health of the offspring being at risk.

A possible objection could be that the ban on incest should instead be justified by referring to the fact that the children of such a couple would be socially stigmatised. This is plausible and seems perhaps intuitively to be a decisive argument. However, the question is once again if it can be justified within a specific liberal doctrine, in other words how it can be conjoined with the idea that the state cannot prohibit anything by referring to what is or can be said to be a good life. Social disapproval and norms admittedly play a considerable role in every society’s life, and perhaps it could be claimed that the burden of existing as a result of the transgression of the greatest taboo would perhaps be so hard to bear that the legal ban can be justified. John Rawls writes that the “primary goods” which every citizen must have acknowledged and guaranteed includes “the social bases of self-respect”. What this can be considered to mean is not immediately apparent, particularly not when it comes to distinguishing it in a principled manner from all conceptions that moral independence is something that is conducive to a good life for the individual. However, feelings of shame concerning one’s own origins and identity can of course be destructive for an individual’s self-respect and feelings of self-worth.

Simultaneously, societal norms should be employed with a certain degree of caution in legislative questions: not every kind of norm can be relevant. The fact that society dislikes, is suspicious of or is hostile towards certain ways of life cannot immediately be the decisive factor. In many societies there is of course the formal right to marry an individual from another ethnic group; a right which, however, can be almost impossible to practise because of social pressure – or at least cannot come into question for many because of strong social norms. Even in countries which do not have a formal system of apartheid, the price for breaking societal norms with regard to marriage can perhaps be just as high as for an incestuous couple. Here the question is how a liberal way of thinking is to position itself when attempting to be neutral in relation to people’s conceptions of what constitutes a good life. On the one hand, breaking norms regarding marriage

can really deprive the offspring of precisely “the social bases of self-respect”. On the other hand, it would be strange to codify a societal norm which did not fit in with a freedom-oriented constitution and state. Once again: the question is what in principle is the difference between dislike of a union between close relations and that of a union between individuals from different groups in a deeply divided society. If the concern is for the children, then the type of liberalism which we are discussing here must be able to show that the social stigmatisation in the previous case is of a completely different character. This means that, firstly, whether there should or should not be a ban on incest becomes an empirical question; a question of how strong the incest taboo in a given society actually is as a norm. Secondly, the choice stands between making illiberal norms law on the one hand and abandoning even the prohibition of incest on the other hand. Or, once again, to seek a new and different argument.

Taboos, Norms and the Horizon of Liberalism

It is beyond all doubt that the incest taboo plays an exceptionally important role in human culture. The German sociologist and philosopher Arnold Gehlen claims that the inception of the incest taboo was the decisive turning point in the history of early humankind. When totemism was introduced and human groups united in worship of a holy animal there arose, according to Gehlen, two completely revolutionary institutions: on the one hand, a ban on cannibalism within the individual’s own group, and, on the other hand, the incest taboo. This means that early humans were forced to control their urges and subdue them. Indeed, this becomes for Gehlen the great achievement in humanity’s history – that humans cease to be creatures of the moment who are slaves to their own desires and instead begin to build institutions, such as the political community and the family, which liberate them from their own arbitrary desires. However, irrespective of how much this speculative prehistory can explain the inception of the incest taboo, there remains the question of its legitimacy today. As Hegel points out in *Grundlinien der Philosophie des Rechts* (1821) the existence of institutions such as monasteries today cannot be justified by their role as bearers and preservers of culture during the Middle Ages.

Indeed, perhaps Hegel can actually help us. In the same book he rejects mere emotion, the “dunkele Gefühle” that people have previously cited as the reason for the incest taboo. He states

that clearly, the thought of incest goes against the healthy sense of humanity, but the incest taboo demands another and better argument. For Hegel this has to do with the nature of marriage. In marriage men and women are united and reconciled with each other. This difference between them, the fact that they are two individuals of different sexes, then becomes a unity, an elective union which corresponds to man's status as a free being with intellectual capacity and independence. This excludes polygamy, for in such an enterprise the two sexes cannot attain unity and be reconciled with each other. However, it also excludes incest, for marriage is "eine sittliche Handlung der Freiheit", ("a moral action of freedom") which of necessity must concern someone who is not already encompassed by what is the "immediate natural", in other words, the original family's emotions. For marriage is the family, and the family's purpose is at first glance paradoxical: its goal is its own dissolution. The family is not closed in on itself; its purpose is to raise the children "zur Selbständigkeit und freien Persönlichkeit und damit zur Fähigkeit, aus der natürlichen Einheit der Familie zu treten". This purpose is to make it possible for the children to leave the original family at one point and form their own, new family; to have children of their own and to raise these to the same moral independence. However, an incestuous "marriage" would mean that the family *is not* open towards that which is different from itself. It would be a solidarity that was closed in on itself; which from the very beginning actually had not left the first "immediate" natural unit which the mother, father and child constitute. Therefore the incest taboo is based on the human being's status as the animal which knows that it is an animal and thereby becomes something other and more than an animal – a being with spirit, with intellect and with moral independence.

One is once again forced to ask the question if this view of marriage and the family is compatible with the liberal idea that renounces all the more comprehensive doctrines of the good life. Admittedly, even this sort of liberalism must acknowledge the need and value for all citizens to be given some form of fundamental moral liberty. However, Hegel's argument seems to fall outside of its scope: it is founded on a conception about what constitutes a good and fulfilled human life.

What does this mean in this context? There are two ways out of the dilemma. In the first place, one can abandon the principle of state neutrality in the matter of values. There is every reason to

consider this dispassionately. The fact that neutrality in the question of values is embraced by some, but not all liberals, means that it is not liberalism as such that must be regarded as a thing of the past, but rather a certain relatively extreme variant of it. However, a principle must be able to be applied to all cases that are similar in principle, and if this then has absurd consequences then it is the principle itself that must be surrendered. On the other hand, one can hold on to the idea that the state should be neutral in relation to conceptions about what constitutes a good life, and in such cases the incest taboo and the ban on marriage between close relatives can no longer be upheld. In such cases marriage between siblings must also be allowed. There are in all probability people who can adapt their moral intuitions even to a doctrine such as this. Simultaneously, there is something rather eccentric about a political doctrine which claims to be universally applicable, but which cannot justify the most universal human institution. To allow a conception of the good life to influence the basic structure of the state and the law would, according to John Rawls, give the state a “sectarian character”. However, the question is if it is not instead another doctrine which becomes sectarian and peculiar, namely the political and moral principle which cannot accommodate the universally accepted norm of the incest taboo. Regarded in that light, liberal neutrality is a sowing of dragon’s teeth whose real powers have yet to be fully realised.