

Classical Liberalism versus Equity

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1. INTRODUCTION

Within the Canadian legal academy, classical liberalism is heresy. Canadian law schools invariably claim to value academic freedom and diversity of views, but in fact have become predominantly progressive and conformist institutions captured by the ideology of social justice and critical race theory. Law professors who openly criticize the legal academy's political commitment to wokeness and its attendant positions can be tallied on one hand—and that is rounding up.

At my law school at Queen's University in Kingston, Ontario, for a brief time I enjoyed the camaraderie of Wanjiru Njoya, an dynamic colleague and fellow heretic. Njoya and I shared a penchant for the values of the Western legal tradition including individual liberty, free speech, private property, and equal treatment under the law. Sadly, Njoya left Queen's in 2017 to take up a senior lectureship at the University of Exeter, where she teaches European Union law and corporate law. In her delicious and courageous new book, *Economic Freedom and Social Justice: The Classical Ideal of Equality in Contexts of Racial Diversity*, Njoya takes on sacred cows of legal progressivism and social justice, and in particular its obsession with racial equity and identitarianism. It is a carefully reasoned exposé of the flaws, short-cuts, and wishful thinking that underlie the concepts of substantive equality and redistribution, whatever their forms or stated justifications.

2. RAWLS

Western culture and Enlightenment values are now eroding so quickly that one might conclude that the revolution is already complete. One need only look to the ethos now dominant in major public institutions—governments, universities, public education, big business, big tech, legacy media, and so on—to conclude that the new order is now established as the ascendant status quo. Who was the intellectual leader of this revolution? Some might point to Marx, or perhaps Foucault, Gramsci, or Marcuse. But in the halls of the law schools, its champion must surely be John Rawls. To the hordes of progressive legal scholars occupying the legal academy in common law countries, who are busy purging what remains of traditional Anglo-American legal principles, there is no more revered figure than Rawls. To them, Rawls' socialist collectivism represents a moral consensus, a starting point, from which all reasonable people must nec-

essarily proceed. If I had a dollar for every time a legal scholar paid homage to Rawls' veil of ignorance, I would be a wealthy man.

To her great credit, Njoya begins *Economic Freedom and Social Justice* by rejecting the Rawlsian framework as her starting point. In one of my favourite sections early in the book, she explains Rawls' status as the great philosophical enemy of those who wish to live and let live:

The progressive political agenda finds succour in Rawls's Theory of Justice, a theory which offers a sophisticated, theoretically robust and utterly seductive justification for egalitarian legislative policies. Rawls's theory, as it has come to be understood by his academic acolytes, establishes socialist political ideology as an impartial 'overlapping consensus' with which all scholars, being reasonable people, would be expected to agree. Rawls's theory is generally relied upon to defend overtly socialist policies on grounds that such policies are impartial, 'neutral as between a private, pluralistic economic order and total, state-monopoly socialism'. This implies that the tenets of socialism which underpin the modern welfare state, with principles of equality and non-discrimination treated as central to wealth distribution, may be understood as a 'neutral' position, floating benignly between capitalism and that form of 'total state-monopoly socialism' known as communism (p.11).

The veil of ignorance is Rawls' imaginary tool in his thought experiment to design a just society. Behind the veil, no one knows their own circumstances and attributes—wealth, abilities, intelligence, race, gender, and so on—and so cannot know what social rules will benefit them or whether as individuals they are destined to prosper or fail. To progressive legal theorists, this ignorance provides justification for legal rules that require substantive equality. Since no one knows if they will be on top of the heap or at the bottom, every reasonable person would agree that redistribution of wealth and status is the only rational aspiration. But, of course, the veil of ignorance demonstrates no such thing. My ignorance of the person I will be does not change my values. Given the choice between socialism and liberty, I would rather be free than managed, and take my chances. Rather than representing the everyman, Rawls' "reasonable man" has a specific set of personality traits and predilections. Njoya writes:

He wishes to avoid risks ... He would not want to end up at the bottom of the scrap heap of life because he would not relish the challenge of working his way up with the attendant grave risk of failure. He seems predisposed to envy and jealousy, hence his desire to avoid ending up with substantially less material wealth than other people. ... we discover that the reasonable man is a socialist. He favours positive rights and social comforts which are guaranteed by the state, which in turn requires a legislative framework designed to implement wealth redistribution (p. 88).

3. EQUALITY

At the core of Njoya's project lies the distinction between two competing conceptions of equality: formal equality, also known as "equality of application" or "equality of treatment"; and substantive equality, also commonly referred to as "equality of outcome" or "equity". These two kinds of equality are not simply alternatives, but opposites. They are mutually exclusive and incompatible. Formal equality means that the same legal rules and standards are to be applied to everyone regardless of their personal characteristics, and regardless of disparate outcomes that equal treatment of the law produces; while substantive equality is based upon the proposition that the same legal rules and standards must not be applied to everyone, but that different rules and standards must apply so as to achieve equal or comparable outcomes between identity groups, and in particular, racial groups.

Formal equality is the foundation for blind justice, which is the notion that the law should not care who you are, but instead should apply its rules in a neutral, dispassionate, disinterested manner without regard for crafting specific results. Substantive equality is the foundation for social justice, which is the opposite of blind justice. Njoya writes:

The classical ideal of justice which underpins the rule of law in liberal democracies is blind, meaning that it treats everyone the same without fear or favour. Rights and liabilities are determined without regard to race or creed. But blind justice is insufficient for egalitarian progressives as it fails explicitly to recognise racial identity or other personal traits and characteristics protected by equality legislation. Blind justice is also criticised for failing to embrace expectations surrounding the group entitlements which confer special legal protection on the colour, culture, religion, opinions, or even physical attributes of racial minorities. Blind justice is denigrated for showing favour to those said to be undeserving of favour due to their ‘white privilege’ (p. 10).

The idea of substantive justice depends on the existence of identity groups—racial, sexual, gendered, religious, and so on—and upon the premise that belonging to some groups provides inherent privilege and to others inherent disadvantage. One’s degree of oppression depends upon the intersection of disadvantaged identities: a transgendered black woman is more victimized than a gay black man, who is more victimized than a straight Asian man.

Intersectionality says that people have more than one axis of identity, which is obviously correct. However, instead of furthering the cause of identity law and politics, the logic of intersectionality should short-circuit the whole enterprise. Intersectionality’s premise is that everyone has a different combination of numerous characteristics: genes and ancestors; parents and childhood circumstances; cultural influences and affiliations; personalities and psychological tendencies; mental and physical attributes and weaknesses; dreams and ambitions; wealth and education; faiths and beliefs; and so on. Inevitably, goes the doctrine, any one person has multiple “identities”. Imagine a disabled lesbian woman who is part Irish, Mayan and South African, is a Rhodes scholar and specialist in Dutch art, comes from a wealthy family with a reserved father and an alcoholic mother, was home-schooled, is slightly short-sighted, has above average looks and below average height, suffers from eczema, is a chess master, is Roman Catholic, and speaks English and German. Of course, this description just scratches the surface of the characteristics of this person, who shares each of her features with some number of other people but her exact combination of features with no one. The logical conclusion of intersectionality is that the only person who belongs to her group is her. As many classical liberals and libertarians have observed, the smallest minority is the individual. Acolytes of substantive equality and “anti-racism” policies profess to protect minorities yet denigrate the autonomy that allows individuals to be unique.

Substantive equality requires equal or comparable outcomes between identity groups. Without groups to compare, substantive equality would mean literal communism: equal outcomes for every individual. Some Rawlsian intellectuals might approve of that, as long as it necessitated, as collectivist systems always do, an elite class (to which they would belong) to watch over its execution. All animals are equal, etc.

4. TRUTH AND LIBERTY

One quibble I have with *Economic Freedom and Social Justice* rests in its treatment of the concept of truth. At certain moments Njoya appears to proceed on the premise that adherence to objective truth is a feature of classical liberalism. Disputes over ideological claims, moral values, and social visions, she writes, “must be evaluated by reference to whether they are based on objective truth” (p. 48).

But ideologies, moral values, and social visions are not the kinds of things that can be proven to be true or false. No one knows for sure what is good, right, or just, and if they think that they do, they cannot prove it, which comes out to the same thing. The quest for truth—moral, religious, social, scientific—may be es-

sential but that does not mean that we must come to a consensus on the results. Liberalism means the freedom to determine one's own moral truths and values, a position that at other moments Njoya also appears to endorse. She writes that the methods of liberalism "lie only in the exchange of ideas, in debate and in persuasion. Thus people may seek objective truths founded in natural law without setting out to coerce others to embrace what they believe to be true" (p. 97).

It is one thing to assert facts, which can be disputed with evidence. Whether the Earth goes around the sun or whether children without fathers are statistically less likely to graduate from high school are questions that can be assessed on the weight of evidence for and against. Equity policies are replete with factual claims that have a thin grasp on reality and beg to be defeated with evidence.

Factual disputes, however, are a distraction from the core issue, which is whether there should be laws to enforce a particular version of reality. When laws impose the preferences of some people over other people, law and violence are synonymous. The issue is not truth but liberty. In a free society, people find their own truth and make their own choices. They can portray themselves as a woman, man or neither. They may worship as they choose. They may marry whom they like. Other people are free too, and they may regard the choices of their fellow citizens as they see fit. The newspaper may disparage gods and ridicule religions. People can use whatever pronouns they wish to refer to their neighbours. Freedom is universal and reciprocal. The truth becomes a problem only in those moments when the state seeks to enforce its own version.

Postmodernism insists that there is no objective truth, and that everything is subject to interpretation. Classical liberals should be fine with that, since it leads to the conclusion that truth must be left to the individual. If objective truth cannot be established, then morality must be regarded as subjective, and therefore left to individuals to decide for themselves—and should be left alone to do so.

The classical liberal knock against the forces of the progressive left is not that they insist that truth is subjective, but that they do not follow that position themselves. Instead, their opponents' truths are condemned as not merely subjective but wrong. Since truth is subjective, say the woke, a man can declare himself a woman, but then they say that everyone else must go along because to assert otherwise is false. Within the agenda of the progressive left, truth can be subjective or absolute depending upon the cause and the interests to be served.

Economic Freedom and Social Justice is a marvellous book. It will provide ammunition and courage to those who dissent from dogma of the equity brigade, including those who have not yet stuck their heads above the parapet.