A Review of Njoya's *Economic Freedom and Social Justice*

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Wanjiru Njoya's impressive book *Economic Freedom and Social Justice* will be required reading for all involved in the debate over antidiscrimination law. In my comment I will focus on the part of her analysis which is concerned with the relationship between antidiscrimination law and the market (chapter 5). Referencing my earlier debate with Richard Epstein, Njoya doubts whether there can be a pro-market case for the antidiscrimination principle. Because we can't easily make a judgment on how far antidiscrimination law might serve to constitute or extend the market, we are better off leaving classical private law to do the job: it is enough that people have the right to hold property and the freedom to make the contracts they see fit to agree (Njoya 2021, pp. 218-219; Epstein 2002, p. 58).

The position defended by Epstein and Njoya requires us to put our *faith* in certain legal institutions, property and contract, without any further inquiry being needed. They are not offering any empirical evidence to back up their claim that these legal mechanisms are sufficient for the operation of the free market. Nor did Hayek offer any such evidence for his arguments against labour laws, or indeed for anything else he wrote. Hayek's theory of spontaneous order (Hayek 1982) is just that, a very nice theory. It is a sophisticated account which slots law into a tradition of thinking which has much to offer: a view of society as complex and emergent; spontaneous, yes, but an 'order' which is capable of delivering communal goods while preserving individual freedoms. What is not to like?

The problem is that the theory flies in the face of everything we know about the way markets have worked throughout history. Markets, and market societies, are emergent and complex, yes, but also unstable at the best of times. At the worst of times they are dangerously so. This is why we have institutions like labour law and the welfare state, and indeed why we have law. I have made this argument in various places but above all in my book with Frank Wilkinson, *The Law of the Labour Market*, which was not an exercise in moral or analytical philosophy, but a work of economic and legal history (Deakin and Wilkinson 2005). As far as I know, the empirical case we set out there has not been seriously challenged. The challenges have come from critics, on both left and right, who do not like the normative conclusions we drew from our analysis, which were broadly supportive of the institutions of the twentieth century welfare state and argued for their renewal in the twenty-first. Because those criticisms did not themselves engage in the kind of historical analysis we undertook it is difficult to see how they can undermine the case we made.

A core part of Njoya's argument is the need to defend Enlightenment values (Njoya, 2021: 5). On this, she and I completely agree. However, it is important to acknowledge that this cannot be Epstein's position. In his reply to my comment on his paper 'Equal opportunity or more opportunity?', Epstein could only defend himself against my critique by giving up any alignment he might have had with the classical political economy of the Enlightenment: in suggesting that employers might have inherently more power than workers, Adam Smith was simply wrong (Epstein 2002, p. 62).

The exchange I had with Epstein was revealing. Truly, modern libertarian thought has little in common with the liberal tradition it claims to draw on. There is nothing liberal about the Pareto principle, unless a 'liberal' is someone prepared to defend a world in which a single person could own everything (Sen 1969).

The economic case for discrimination law is ultimately a functional one: things have moved on since the nineteenth century, and private law is no longer up to the job of providing a normative framework for the market, if indeed it ever was. It wasn't, actually, even then. The advent of freedom of contract in the labour market was accompanied by the use of the criminal law to enforce labour discipline. It was, literally, a crime to be poor at the height of Victorian laissez faire. Under the poor law, migrants and the unemployed were subject to forcible removal; looking at the way migrants are treated in Britain today, we might say, plus ça change! Assertions to the contrary notwithstanding (Epstein 1983, p. 1357), there was no golden age in the nineteenth century when private law alone governed work relations, and there isn't one now.

History tells us what really happened. Between 1750 and 1870 the UK Parliament passed over 4,000 Enclosure Acts. These were basically land-grabs, legitimised by a legislature dominated by the landowning class. Around a sixth of the country's territory which had been common law was taken into private hands (Fairlie 2009). Njoya writes (2021, p. 111): 'Socialism is system which prioritises a dominant role for the state in wealth distribution'. Perhaps so, but actually this is even better as a definition of *capitalism*. The enclosure movement was finally halted by middle class resistance, in a period when, thanks to the extension of the franchise after 1867, the bourgeoisie had achieved Parliamentary representation; the working class was not to achieve this for several more decades.

When the working class did finally achieve access to the vote, and with the related instituting of the universalist welfare state in the first decades of the twentieth century, the labour exchange and the hospital finally replaced the workhouse. It wasn't a case of the state 'intervening' to displace 'free' employment contracting, the state had always been there. Thanks to things like the Factory Acts, social insurance and progressive taxation, the state became somewhat less coercive, and the protections it provided somewhat more inclusive. The libertarian project of rolling back the social progress made in the twentieth century has seen the revival of a carceral state in place of the welfare one (Wacquant 2010).

Antidiscrimination legislation has preempted what the common law might well have done had it been given longer to evolve. The theory of legal evolution teaches us that judge-made law responds to the economic and social circumstances of its time, but is slow to do so. Legislation is frequently the only way to break the logjam. The UK's Equality Act creates a series of statutory torts which are, in effect, strict liability wrongs, requiring neither intention nor any other fault. Nor is it necessary to show damage or loss in the sense required by the modern tort of negligence. The wrongs set out in the Equality Act are closer to trespass and nuisance in this respect. Considering how much of tort law is present in the structure of antidiscrimination law, it is really quite strange that the same Richard Epstein, a defender of strict liability in tort law (Epstein 1973), should be the author of antidiscrimination law critiques.

The Equality Act isn't perfect. Its problem is that disadvantage in a capitalist society is ultimately derived from class, not from sex or race, or from the other protected characteristics set out in the 2010 Act. Gender or ethnic identity is an important signifier of inequality when combined with class. In practice, class, sex and race are intertwined, but it is important to distinguish between them for the purposes of analysis. In focusing on the protected characteristics, the Equality Act is addressing surface symptoms, not the ultimate causes, of inequality. It is actually a distraction that the Act regards 'class' itself as a relevant characteristic for certain very limited purposes. Class-based inequality needs to be addressed at source, in

the way the law secures and protects the rights of capital on the one hand (extensively and structurally) and labour on the other (peripherally and contingently).

In a market economy of the type we live in, it is capital that hires labour, not the reverse. Coase recognised this, as did Marx before him. Coase (1988) explained it in terms of efficiency, where Marx (2008) saw exploitation. Or rather, Marx understood that in capitalism, accumulation and innovation go together. Capitalism is productive and progressive, *because* it is exploitative. So began a long debate. The idea that in order for capitalism to work, capital must be free to exploit labour, is what lies behind contemporary neoliberal and libertarian thought. Some contemporary Marxists, wary of the welfare state, think the same. They see no alternative but to argue and organise for the end of capitalism. Their politics may be very different, but they share with libertarians and neoliberals the same Manichean diagnosis of what a market economy is and what it can achieve.

Indeed, you can share Marx's analysis of capitalism, and still be a capitalist. Douglass North claimed to be 'a Marxist of the right' (Bryan 2015). Niall Ferguson tweets, 'I am essentially a Marxist but on the side of the bourgeoisie'.[1] Deirdre McCloskey argues for the 'bourgeois virtues' (McCloskey 2006). These are not my own views but I acknowledge the clear-eyed approach these writers take to the analysis of capitalism. If only libertarianism was so clear in its vision.

If we are being clear-eyed about it, we should accept that the employment contract is necessarily a relationship between a party that holds power and one that does not. The 'employer', almost invariably these days a corporate person, is the legal representative of capital; that is, of a collective power. The worker, the individual human person, is faced with a collective counterparty, capital, which has the coercive power of the nation state, with its professed monopoly over the use of force, at its disposal. The philosophy of libertarianism is a long exercise in obscuring this elementary truth.

Naturalism is part of the obscuring strategy. There is a long history to the sacralization of private property. Long before the Chicago School, there were Blackstone's *Commentaries* ('the sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe'), and a few years later the revolutionary hand that drafted Article 17 of the *Déclaration des droits de l'homme et du citoyen* ('La propriété étant un droit inviolable et sacré…'). With the passage of time we can see these statements for what they are. Every system of thought needs a founding dogma, an assertion deemed to be self-evident, but it is important not to confuse norms and facts. Murray Rothbard's naturalism, adopted by Njoya (2021, p. 30), is not much of an advance on that of the *Déclaration*. What is said to be 'natural' here lies strictly in the realm of myth. The tendency in contemporary 'law and economics' to construct a mythical state, the world of perfect competition, 'zero transaction costs' or 'spontaneous order', against which to compare the real one, is what makes it possible to characterise antidiscrimination law as 'artificial'.

Injustice, on the other hand, is an ever present reality in capitalism. The system is bound to produce unjust results. It would be a daunting prospect to construct a complete theory of justice to rival that of Rawls, but it is more straightforward to see, as Rawls understood, that remedying injustice is a condition of preserving the social order, a way of deferring the war of all against all which lies just below the surface of liberal society.

Rawls's achievement was to explain, from first principles, how liberal and social democracy were linked; how a liberal order, constructed on the subjectivity of the individual human person, could not be anything other than a social one as well. Rawls was not describing a scheme that could easily be realised in practice, however, and looking back we can see that the circumstances which enabled a version of social democracy to be constructed in liberal market societies in the middle decades of the twentieth century were fleeting and contingent.

Rawls' error, from the vantage point of libertarian critique of his work, was precisely to conjoin liberalism and social democracy. From the time of the Mont Pélerin Society, the target of libertarianism was never socialism as such, but the possibility that social democracy, implying democratic control of the means of production, might be possible within the confines of capitalism. To this end, it became imperative to de-

scribe the modest reforms of the welfare state as the 'road to serfdom', when all along they represented the path *away* from it.

Libertarianism elevates norms over facts, and legal form over empirical substance. This strategy denies to liberal democratic societies critical tools which could help sustain them. Libertarians are busily sawing off the branch on which they, and the rest of us, sit.

These are reflections prompted by reading Wanjiru Njoya's *Economic Freedom and Social Justice*, a deeply informed and beautifully written contribution to modern liberal thought. Even those who do not in the end agree with her arguments will find much to reflect on.

NOTES

1 https://twitter.com/nfergus/status/1051963131239358465?lang=en-GB

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