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THE PECULIAR QUALITY OF PROGRESS*

Sheldon Leader[†]

INTRODUCTION

It has been said that we stand on the brink of several centuries of change so fundamental that we have as little idea of how we will lead our social and political lives in the future as would someone at the end of the Middle Ages asking what was to come two centuries later. Standing here at the entrance, something already exists to make us uncomfortable: the demand to change seems to have run beyond the ring of values which commonly surrounds the actors who impose it, as well as those who resist it. Instead, we have stepped into a confusing area in which radical change in aspects of our lives is called for without there being in place a radical social project: a project that would show all of those affected exactly why they should follow along. There is a collective will to maintain progress, but it is set against the backdrop of a loss of faith in such progress. We pursue change, more remorselessly than ever. However, we have lost the tools with which one can recommend any given modification of the way things are done which begins in some local area, such as the workplace, as healthy for society at large or, less ambitiously, even for the whole of those directly involved in the institution making the changes.

The lack of an overall social aim is certainly thought by some to be a good thing. It seems to be what a free society offers. Such advocates would side with thinkers like Isaiah Berlin in arguing that a society's quality lies precisely in the refusal to see ultimate values as fitting into a grand, orderly pattern.¹ However, before pronouncing so clearly for or

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¹ See ISALAH BERLIN, *TWO CONCEPTS OF LIBERTY* (1958) (inaugural lecture delivered before the University of Oxford, Oct. 31, 1958).

against this state of affairs, it is worth looking more closely into it. In fact, the absence of a social project has not meant that the value of liberty has won out over social engineering, but that a distinct form of regulating principle which no advocate of fundamental values really wants has come to dominate.

I. THE CLASSICAL DEBATES

We can see this when we observe how debates addressing changes in conditions of working life are out of touch with the way we actually deal with them. Different advocates will favor different changes as 'progressive' in light of the cluster of fundamental values claimed to be advanced. The dispute carries on in well-known terms, involving questions about how far any given change in access to work, level of pay, etc. will further equality; how far equality should be pursued at the expense of the right of the employer to run his/her establishment as he/she sees fit; or how much one sort of equal treatment for workers—based on marketable skills—should give way to another—based on gender needs. The most important aspect of this 'official' form of debate is that all sides want to avoid going down a path at the end of which lies a society not worth having, a society that has sacrificed too much liberty, or one that has done the same to equality. No one believes in something called the virtue of change per se: all link change to some animating set of values.

This is seen most clearly in the seminal work by Robert Nisbet on the history of the idea of progress. For some, he writes, individual freedom from external constraint has been seen as the "criterion and ultimate objective" of progress, while for others (reaching earlier into the history of thinking about the issue), it was individual improvement via identification with, and the shaping power of, the community that provided such a defining criterion. Each of these positions had a moral value as the defining quality of change that was to be allowed and furthered: "progress as freedom" or "progress as power."² The same could be said for those who locate the virtues of change in values of achieving greater equality.

² See ROBERT NISBET, *HISTORY OF THE IDEA OF PROGRESS* 179-296 (1980).

II. THE NEW TERRAIN

Another view has quietly grown up in the shadow of this longstanding debate, and in practice has begun to displace it even as the same rhetorical battles continue. Social change is now said by some to call for a sacrifice of rights even when there is no particular moral value served at all. Instead, many of the objectives behind such change are themselves morally neutral: we simply register them as objectives of an enterprise or of the state, see if they are not independently illegal, and see if they can be imposed with the least amount of damage done to the values that we started out wanting to protect. In this, an inversion has taken place. Whereas those promoting liberty or equality measure progress by the steps a change takes toward the vindication of the value they consider to be fundamental, this political and legal reasoning promotes these values as side constraints on the bringing about of progress. That is, there is a *prima facie* claim in favor of one or more of the values, but they must ultimately yield if the imperative of change is strong enough. What *counts* as progress, in this second approach, changes in the process: it is no longer defined in its content by any values. It is instead surrounded by values as a provisional but vulnerable ring of protection.

Consider, as an illustration, the way in which the right to equal treatment is sacrificed to the imperatives of change in the law of sex and race discrimination in the workplace. As is well known, while legislation forbids indirect discrimination, it also allows such discrimination to occur by way of an open-ended proviso. This proviso permits the employer to justify disparate treatment for reasons other than the sex (or race) of the individual.³ Similarly, while employees are given the right to equal pay for equal work, that right may be overridden when the employer can show a "material difference" between the situations being compared.⁴

³ See Sex Discrimination Act, 1975, ch. 65, § 1 (b)(ii) (Eng.), available in LEXIS, Enggen Library, Statis File; cf. Race Relations Act, 1976, ch. 74, § 1 (Eng.), available in LEXIS, Enggen Library, Statis File.

⁴ See Equal Pay Act, 1970, ch. 41, § 1(3) (Eng.), available in Enggen Library, Statis File.

Clearly, these expressions are at the very least meant to recognize differences in men's and women's possession of skills or qualifications for a given job: differences which would justify differences in treatment and pay, despite the differences in their sexes. However, the courts have gone further in their interpretation of the provisions: they have allowed employers wide latitude, upholding a variety of disparate reasons for introducing or altering practices of pay or job allocation with discriminatory effects. So long as a given enterprise can provide a justification for its actions based on a very open-ended and general notion based on the requirements for its functioning as an organization, or what is sometimes called business necessity, it can proceed. The result is that the futures of employees can be affected in precisely the way that gender discrimination law sets out initially to prevent: an apparently neutral change in organization which involves, for example, dismissing part-time employees before full-time ones can and does have far greater impact on largely female portions of the workforce—who make up the bulk of part-time workers—than it does on males.⁵

This is a well-known part of the law. However, look at it from the angle we have been considering. Why exactly does the introduction of these justifications for organizational changes which affect basic rights manifest a sort of concern for progress which is different from the classical views? In the conceptions of progress described by Nisbet, we have seen that a *change* is not worth pursuing if it involves sacrificing the values which define it as progressive; whereas on the view implicit in modern law, a *value* is not worth pursuing if it involves sacrificing the change which is wanted. It is this latter perspective that allows the right to equal treatment to be overridden in the statutes by an open list of reasons, operating under the rubric of business necessity, each serving the goal of organizational change per se, and each opening up the prospect that the change can be purchased by way of downgrading the right that the law starts by recognizing. Equality is not simply traded

⁵ The full picture is more complex, but not in a way that should affect the central argument here. For a review of the law in the United Kingdom, see the chapters on reorganization in S. ANDERMAN, *LABOUR LAW* (3d Ed. 1998). For United States law, see MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* § 3 (1994).

against liberty, or one species of equality is not traded against another. All of these values have instead become exchangeable against a wide range of morally neutral objectives, all of which define in very different ways what progress is now all about. This makes vulnerable the moral and political values of equality and of liberty in a way that none of the parties to the classical debate would have found acceptable.

The basic right to liberty is as much at stake here as is the right to equality. The power to discriminate along gender lines that is allowed to the employer, for example, is not recognized as flowing from his/her basic right to the free disposal of property in the enterprise. Instead, it is permitted only on condition that the exercise of such power passes through the filter of the courts. These courts see themselves as charged to make sure that the change sought is not independently illegal, that it falls within the global class of permissible objectives, and is implemented in a way that provokes the least amount of damage to the employee's interests.⁶ The employer, in other words, is not allowed to invoke his/her right to *autonomy* in the control of his/her affairs. Instead, the employer must give positive reasons for imposing the inequality in each and every case, showing that he/she is furthering an interest of the enterprise in some palpable way.

Improvement may have come, but at a price that the participants in debates about progress whom Nisbet portrays would consider not worth paying. However better off individuals may be—richer or in other ways happier—it is no accident that where these balances are allowed the result is a society that sacrifices *both* equality and liberty, rather than promoting one of these values at the expense of the other. This shift contributes in its own way to the fragmentary and confused picture of progress which confronts us: it does not just add some fresh values alongside the ones we are used to; it transforms the whole position values occupy in our appreciation of what counts as a beneficial change.

These developments concern the private sector of the economy as much as the public sector. This approach by discrimination law to the relationship between values and change

⁶ See *Bilka-Kaufhaus GmbH v. Weber von Hartz*, 2 C.M.L.R. 701 (1986) (U.K.).

covers both domains. We might say that the law is guiding us gradually away from the broad belief in a two-world polity, in which public values of justice are not allowed to penetrate the private sector, and in its place we are beginning to substitute a polity that defers to change. We look for its benefits first and then hope that its impact on values will not be too serious: values that we are ready to cede once the imperative for change is strong enough. In short, we are slowly leaving the charms of the public/private distinction behind and turning to those of an innovating polity, for which we are once again tempted to write blank checks.

Of course, we cannot stop, and should not stop, much structural change. So what, if anything, should we do? We can explore some of the possibilities, probing further into what is involved in overriding a claim to equal treatment by appeal to this open-ended conception of progress so as to see what an alternative might look like.

III. EXCLUSIONS AND INEQUALITIES IN POLITICAL THEORY AND LAW

Refer back to the provisos in discrimination law which allow an enterprise to override claims against gender discrimination upon a showing that it needs to adopt a practice for the sake of its functional requirements. In many countries, these needs of the enterprise can serve as a complete defense, permitting unequal treatment with no compensation due for a claim of discrimination. The law achieves a result which, from the point of view of principle, is curious. We are used to justifying inequalities in a very different manner, and it is worth briefly reminding the reader of this more orthodox approach so as to throw into relief the challenge created by this important part of our recent political and legal culture.

Political theories of equality usually contain an explicit or implicit addendum, which is a theory of justified inequalities. The latter is normally identified in stages. The first stage involves determining just what are the characteristics people have which call for the same treatment: If, for example, we take skill and level of responsibility taken on at work as the

criterion,⁷ then if X has the same skill and level of responsibility as Y, she is entitled to the same reward. At the second stage, we can identify legitimate inequalities: these are what we can call the *mirror image* of the legitimate equalities. That is, the criteria for appropriate inequalities are a reflection of the criteria for legitimate equalities. If Z is less skilled and responsible than either of her two colleagues, then it follows from the initial criterion of reward that she is not entitled to the same wage. Some characteristics are ruled out as the basis for different treatment, such as X being of one sex and Z of another, but that alone would not be enough to justify closing the gap between the pay of the two—if they have different degrees of skill and of demanding work, they continue to deserve different pay. The legitimate demands of the job generate an understanding of what is relevant and what is irrelevant in giving rewards, and the two thereby complement one another.

Finally, standing behind and guiding the whole selection of relevant characteristics singled out for the same and for different treatment is what could be called a principle of solidarity. It addresses itself to everyone differently treated along some dimension, and similarly treated along other dimensions, telling them that from the point of view of *each and every one* of them, this is the reasonable solution to be had. This is what John Rawls has in mind when he says that a particular distribution of something is legitimate when it works out to “everyone’s” advantage. He does not mean that everyone is better off after a distribution than he is before it, since the best-off will not be: they must give up something in favor of those worst-off.⁸ Instead, he claims that everyone finds themselves in the position of getting something that represents the most reasonable adjustment of their interests against everyone else’s, once all are willing to accept an impartial way of distributing that thing. No single person is *sacrificed*, in the sense of the word that implies that they lose in the name of some independent goal which has not even a remote connection with that

⁷ Let us assume here that we do. The choice of appropriate criteria here is a separate matter of debate.

⁸ See J. RAWLS, A THEORY OF JUSTICE (1971) (index on the “difference principle”).

person's interests. Instead, the justification runs between each and every person affected by the distribution, giving every one of them a reason to be committed to the success of the enterprise.

Now, the inequalities which the law permits in the examples we are considering violate this way of proceeding. They do not build up a picture of legitimately different treatment as a mirror image of treatment that has to be the same. Instead, the reasons for allowing X to be treated less well than Y have nothing to do with personal qualities that differ between them, and they are not remotely linked to the losing person's interests. Instead, even though X is the same as Y in the relevant respect, such as having the same skill, X can still lose employment or keep it but be paid less, and Y will retain it and/or be paid more, for reasons that cut across these similarities and which neither can control: the fact that the enterprise is restructuring itself. It is here, for example, that we can locate the claim by a hospital to hire a man at a higher wage than it already pays a woman in its employ for work at an equivalent level of responsibility, the extra premium reflecting what the man is able to claim in the market place. The hospital claimed that he was the best candidate and that it needed to attract him in order to open a new prosthetic department. Once the hospital also showed that this particular premium was reasonably necessary and not just convenient for it to be able to recruit the best candidate, the court allowed this as a complete defense.⁹

When people are denied equal treatment at work in these circumstances, this is not the result of compromises among the interests of all concerned individuals, within the terms of the Rawlsian principle of solidarity. When the company is ultimately allowed to pay a woman less because of the need for structural change, then the loser's right to equal treatment is sacrificed to some objective which arbitrarily falls across her situation. No theory of democratic justice permits this way of discounting a person's interests in favor of a separate goal with which she has no on-going concern. That is what authoritarian and exploitative societies are all about. At the very least, on

⁹ See, e.g., *Rainey v. Greater Glasgow Health Bd.*, 2 C.M.L.R. 11 (H.L. 1987) (U.K.); *Enderby v. Frenchay Health Auth.*, 1 C.M.L.R. 8 (1993) (U.K.).

any of our standard theories of justice—Rawls being a leading example—the female employee in the above example would be entitled to compensation for the wrong done, and assisted in the transition to another productive activity. We instead have a result in which the law's desire to allow structural change in the name of progress has outrun the values that were meant to tell us what progress is all about: progress is transformed into something that calls for the sacrifice of interests of large parts of the population, not their fair compromise and compensation.

IV. A RESPONSE

So we see, built into the heart of our laws searching for equal treatment, a principle which transforms that entitlement into something no principle of justice would accept. Yet, this has happened for understandable reasons: we cannot stand in the way of structural change. Does that mean that we have no choice but to accept this newer, more brutal, conception of progress? If we do, then we can look forward to deepening the gap described at the outset—between our will to progress and our faith in such progress. At the moment, societies are more prepared to compensate people for losing their homes in natural disasters than they are for losing the same homes in humanly imposed ones, such as changes in the enterprise with which they could not follow along. It is no answer to say the company is private: we saw that the law no longer isolates the private sector from the demands of equality. What, instead, isolates all sectors is a supine attitude to technical and structural change.

To overcome a supine attitude to change is not to block it. It is to assume responsibility for it. This must mean that we must reinstate a role for Rawls' principle of solidarity when coping with the effects of innovation. If the enterprise is not able—on a clear demonstration—to help someone to adjust to changes it imposes, and that it hasn't the resources to compensate them, then it is the duty of society at large to fill the gap. The polity does people a wrong when it trades their rights against the objectives of productive innovation, however socially beneficial that innovation may be. It also does people a wrong when it forces them to choose between an inferior set of rights surrounding a resource, such as work, or not having

that resource at all. It caps this all with a false set of options for society at large: either to resign itself to the stasis of social justice or to embrace the job and wealth-creating possibilities of a conception of progress that breaks free of any such constraint.

The reason this is a false choice is that the polity is in a position to divide responsibility for the promotion and regulation of change. Some responsibility devolves onto the enterprises aiming to progress, and some devolves onto society at large when enterprises show that they cannot do enough. This is quite distinct from society's obligations towards the less well-off arising from welfare considerations. Compensation to the victims of change and guarantees of minimal resources in the population are distinct responses to distinct demands of social justice.

Concretely, the resources for meeting the former might come from tax on enterprises, or, if these cannot fit the requirements, from funds provided by general taxation. Of course, the state, on behalf of the tax-paying public, will rightly claim that it has finite resources, and that such supplementing efforts are expensive. However, that goes to the question of how it is to allocate resources among rights with different priorities: some to employment, others to possibly more urgent needs such as health care. This is quite different from cutting off a resource or withdrawing a right in the name of helping technical and structural changes in the economy to happen. The latter removes the rights of victims of change from the list of social priorities altogether. We do so at the price of turning into societies that lose respect for their innovating energies, becoming instead grudging and skeptical witnesses of forces too big to handle: with everyone hoping that they will not be the next victim.

CONCLUSION

To reiterate, there is no place for a radical social project to accompany the pace of radical social change. We live with the latter without the guidance of the former, and few would want some grand authoritarian design to fill the breach. However, there is no reason, as a result, to treat change as if it were the product of Darwinian natural law. Change is a product of hu-

man decision and discovery and is amenable to human control. The slowly emerging, new form of polity that we are being forced by circumstances to think about, might provide an opportunity for us to recapture a sense of progress by taking charge of our drive to innovate. Lawyers have no small role to play in the process.

