

FREEDOM VERSUS LIBERTY
By

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There is an ongoing subtle attack on capitalism (as espoused by classical liberals) from adherents of various socialist ideologies. It is summarized in their slogan “capitalism with a human face”. I deal with this slogan, which has been taken over by the current coalition, in greater detail in a later column. But in this column I wish to show how the New Dirigisme it commends is based on misappropriating the notion of freedom beloved of classical liberals.

The classical liberal economist- philosopher Anthony de Jasay has argued in his *Before Resorting to Politics* that the notion of freedom needs to be jettisoned and replaced by that of liberty. This is because it is difficult to provide a justification for freedom as an ultimate value. There are two arguments on which individual freedom can be considered to be of value. The *first* that freedom is itself a final value opens the way to relativism. For while individual freedom maybe valuable to me, there is no reason it should be valuable to someone in a different culture. There are many cultures, eg. the Sinic, which have not valued it as the only or even an end, placing the equally valuable end of social order above individual freedom.

The *second* possible justification is that individual freedom allows us to choose what we prefer. But this ability to lead one’s life as one chooses, or autonomy as others have called it, makes individual freedom merely of instrumental value. But then the question arises: what final value is this instrument serving? If we reply “freedom”, we are in a circular argument, whilst if we posit some other final value, someone from another culture could once again deny it as being valuable.

But, the most basic reason for not relying on the concept of freedom to justify a classical liberal society and polity is because in ordinary speech ‘freedom’ involves not having deliberate obstacles being placed in the way of individuals actions. This immediately leads to a slide, where being free to do something and being able to do it are confounded. As de Jasay notes: “one depressing end result is that we now call without the least semantic embarrassment, both the freedom to choose and the set of things available to be chosen by the same name freedom, distinguishing between them only by the misplaced adjective ‘negative’ and ‘positive’”. The discourse of freedom then degenerates into one about all good things, and their availability is also called ‘freedom’. This crudely is the position maintained in the Nobel prize winning economic theorist Amartya Sen’s “Development as Freedom”. It allows various policies forming part of the socialist ‘enterprise view’ of the world to be smuggled in as being part of freedom.

Instead Jasay, relying on the English Common Law tradition, defines the basic rules that the State seen as a ‘civil association’ should uphold. “The basic rule is that a person is free to do what is *feasible* for him to do. This presumption is subject to two compatibility conditions. One relates a person’s proposed actions to his own obligations, the other to harm to others”. The burden of proof lies on someone who wants to prohibit an action of an individual, because he has an obligation - as in a contract, or promises made- not to do it, or if it would harm others. This process is equivalent to an accused being presumed innocent unless found guilty by due process.

In contrast to this Common Law tradition of justice there is an alternative tradition. It

can be labeled the Continental system of justice, or of “public law” as Jasay calls it. Under this, unlike the Common Law tradition where people are free to do what is feasible and not expressly forbidden by the two compatibility conditions, individuals in this alternative tradition are presumed to be forbidden from feasible actions unless they are expressly *permitted* by various ‘rights’ granted under constitutional provisions. In fact, these ‘bills of rights’ are only coherent if they provide a suspension of a tacit presumption that everything not covered by them is forbidden by “legislative discretion if not by legislative fiat”. These ‘rights’ ignore the central norm underlying classical liberalism that “whoever proposes to stop another from doing what is feasible must show a right to prohibit or obstruct the particular feasible action”.

But, just as with freedom as a final value, this norm of ‘liberty’ too could be questioned by someone from a different culture. Jasay then provides an epistemological argument, not a moral intuition, to justify this ‘liberty’ norm. The epistemological argument concerns what can be readily verified. Of the two alternative legal traditions, that of the Common Law based on a list of *prohibited* actions, is more readily verifiable than the Continental Public Law tradition based on a list of *permitted* actions. For feasible actions are limitless, and listing what we must not do is less onerous than listing what we are permitted to do.

Even if the Public Law tradition accepted the liberal norm that individuals were at liberty to undertake feasible actions unless they harmed others or violated an obligation, it would have a problem. For it presumes that “unless it can be shown that the proposed action *is* harmless and breaches no obligation, it must *not* take its course”. If, as is usually the case, there is no clear boundary to the possible harms a particular action could cause, it will be impossible to prove (verify) that a feasible action is harmless. Similarly with obligations (which confer corresponding rights), it will be impossible to prove that some ‘right’ has not been violated. In the common law tradition the *prosecutor* has to prove that, in pursuing a particular action the defendant has violated obligations or caused harm to others. In the Continental public law tradition it is for the *defendant* to prove that he has not violated *any* right or caused *any* possible harm.

The Public Law tradition based on ‘bills of rights’ also leaves the judicial process open to all kinds of opportunistic behavior, where innumerable third parties can make claims (spurious or not) of limitless harms and obligations being violated. These “render ordinary processes of social cooperation excessively legalistic, litigious, costly and precariously dependent on judicial, administrative and regulatory review”. A judgment which is corroborated by the experience of the leading ‘rights’ based polity, the United States, and increasingly in the ‘mixed’ legal system in India with the explosion of the public interest litigation by NGO’s allowed since Justice Bhagwati’s tenure as Chief Justice of the Supreme Court .

If we are to accept the ‘liberty’ norm of the Common Law tradition based on prohibitions of feasible actions as being more sound on epistemological grounds (as it is readily verifiable) than that of the Continental tradition based on permissions (which would have to be endless if all feasible actions are to be considered), what of ‘property rights’ and ‘human rights’ which so many votaries of freedom have sought to defend? I take up these issues in my next column.