RIGHTS TALK

By

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In my last column I had argued that the 'liberty' norm of the Common Law tradition based on *prohibitions* of feasible actions was epistemologically sounder (as it was verifiable) than that of the Continental tradition based on *permissions* for feasible actions. For feasible actions being infinite, the Continental tradition would continually have to list feasible actions which were permitted, and be subject to constant litigation from those who claimed that a particular permission infringed their rights or caused them harm. Even if we accept the superiority of the Common Law over the Continental legal tradition on this score, it still leaves the question of what on the Common Law tradition are the 'property rights' and 'human rights' which so many votaries of freedom have sought to defend?

So called property rights are mistakenly called rights. If an individual is free to do something which is not wrong, that is it does not violate obligations and causes no harm to others, this liberty must include the freedom to do what he likes with his property which includes his body as well as various material possessions like his car or his clothes. *Liberties are different from rights.* I own a house which I am at liberty to do with what I will. Suppose I lease it out to a tenant through a contract. This contract obliges me to relinquish my liberty to use my property in certain ways by giving up the liberty to live in it, and gives the tenant a right to use it in the way and on terms stipulated in the lease. While the property owner has the *liberty* to use his property, the non-owner has to get the *right* to use it which is provided by the lease. Thus, whereas liberties are not conferred by anyone , rights require someone else to have agreed to fulfill some obligation.

But how do I come to own property which I am at liberty to use as I may? Much is acquired through the proceeds of work. Others through exchange like that of assets. Still others from gifts and inheritance .As in each of these ways of acquiring property, besides those based on exercising my own liberties, I am also the beneficiary of others who have exercised their liberty of using what they themselves own as they wish. These means of acquiring property meet the requirements of justice, as they are the results of exercising a liberty without transgressing any obligation or causing harm to others.

However, as far as land is concerned there is the question which has troubled classical liberals since Locke. As we go back in history there was a time when land was free and hence unowned; it could be looked upon as a gift of nature. How, then could land which was a gift of nature be owned? For over time we know that land was appropriated and enclosed, largely for economic reasons as it became scarce, and the marginal benefits for an individual from enclosing land were equal or greater than the marginal costs of excluding others. However, as the land was not owned by anyone else, no one else's liberties were thereby infringed by this enclosure and hence this appropriation cannot be called morally unjust. But, conquest and seizure have been equally if not more important throughout history in the acquisition of land. These means would be

morally unjust and calls for restitution by the original owners would be justified.

This is of course at the heart of the controversy about the 'right to return' of the Palestinians in the Arab-Israeli dispute. But, though the claim maybe morally just it is not expedient. For most societies throughout history have recognized the chaos that would be caused by seeking to redress any fault in the historical descent of every current title to property, no matter how far back the chain of transfers stretches. They have, therefore, correctly applied some form of statute of limitations- if for no other reason than recognizing that the sins of their fathers should not be visited upon their grandchildren and great grandchildren. Just imagine the chaos that would be caused on the subcontinent with its long history of conquests and seizures of property if the principle of restitution of all past unjust acquisitions of land over the millennia were to be rigorously applied. Faut mieux, most societies have accepted the expedient principle not to look too closely at the descent of titles to property in land beyond a few generations.

But, what of "human rights?" We have seen that rights arise from contracts- actual or implicit. These rights give rise to obligations which have been accepted by someone else. Thus Tony de Jasay rightly notes: "every right of one person has the *agreement* of another as its source, cause and evidence". Agreement is crucial in generating rights and the corresponding obligations. Thus, what are often called social rights, are not rights but *entitlements*. For instance the right of the unemployed to unemployment insurance or the poor to welfare are not rights, but entitlements created by the State, which as they are not based on contract can be changed or repudiated. By contrast a genuine right arising from a contract cannot be limited or withdrawn without the right holder giving his consent. These rights are sometimes called *specific* rights, and most legal systems recognize them.

In addition it has been claimed that there are 'human rights' - a *general* right arising from the assumption that being *human* in some sense provides a justification for some rights which go beyond specific rights. These are the modern descendants of 'natural rights'. The late Oxford legal philosopher H. L.A. Hart claimed that they arise from the general right, namely "the equal right of all men to be free". They include the right to free speech, free worship, to walk about, to breathe. But, this "right" is redundant in the Common Law tradition. One is simply free to undertake any feasible action, which does not infringe one's obligations (the specific rights of others) and does not cause others harm. It is only in the Public Law tradition that there would be the need to specify these 'rights' because all feasible actions require *permission*, including these 'human rights' to breathe, to be able to speak freely, to perambulate etc. But as there are an infinite number of such 'rights', it will be impossible to delineate them all, leading to endless legalistic disputes. Individual liberty is much better protected by the Common Law tradition where one is free to take any feasible action subject to the constraints of harm and specific obligations (rights).

Most of the human rights claimed, for example not to be tortured, are redundant in the Common Law tradition. Torture causes harm to others and so though feasible would be prohibited on that ground. There is no need to appeal to some human right not to be tortured.

Finally, for there to be human rights there must be someone who has contracted with humanity to take on the obligations conferred by these rights. Who has made this contract with humanity? To ask the question is to show the absurdity of the notion. Jeremy Bentham was right when he said that the notion of human rights is " nonsense on stilts".