

The International Human Rights Regime since 9/11: Transatlantic Perspectives

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The Rise and Limits of Biopolitical Critiques of Human Rights Regimes

This is very much work in progress and this paper is just a hurried and brief first draft
not for citation.

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Abstract

Post-9/11, Foucauldian critiques of international human rights regimes have become central to the critical literature in this field, especially in the UK. This paper seeks to draw out why biopolitical frameworks appeal to many theorists doing critical work in this area and also to begin to draw out the limits of biopolitical frameworks as a challenge to the liberal internationalism of human rights advocates. It will focus on recent (all 2007) 'Foucauldian' studies of human rights regimes in the areas of development studies, IR, and international law (by UK-based academics, Mark Duffield, Vivienne Jabri and Costas Douzinas). Biopolitical frameworks have a potentially wide intellectual appeal as they descriptively capture the hierarchical and divisive framing of regulatory regimes of human rights and how this undermines the Cold War framework of international law based on rights of sovereign equality. However, it will be argued that these frameworks are inherently problematic as: 1) the deconstructive approach tends to pay more attention to the analysis of discourse than to practices, resulting in an idealist understanding which pays little attention to the question of political agency in the asserted rise of 'empire' or neo-liberal global governance; 2) the description is powerful but both human rights and biopower remain essentially untheorised and ambiguous concepts and the critique takes on board the assumptions of its ostensible object, liberal internationalism, particularly in the detachment of rights from socially constituted legal subjects; and 3) in reading the power of liberal governance as universal and incontestable they tend to justify a retreat from politics as a social engaged, instrumental, universal project, with political transformation seemingly only possible at the level of a highly atomised individualism; the only alternative being Duffield's 'solidarity of the governed', Jabri's 'political cosmopolitanism', or Douzinas' 'cosmopolitanism to come'.

Introduction

In the 1990s human rights advocates appeared to be challenging the power of states. This paper will argue that critical debate over human rights has in the 2000s been stood on its head. Today, radical critics argue that universal human rights frameworks are a tool of power, of biopolitical neo-liberal global governance. However, there is much common ground. Firstly, both radical advocates and radical critics agree that the state-based framework of international law has been undermined by new universalising discourses of human rights (the universal agent is different, either this is the progressive force of global civil society, challenging this framework from the bottom up, or it is the reactionary force of global empire, challenging this framework from the top down). Secondly, both radical advocates and radical critics of human rights frameworks are dismissive of formally constituted frameworks of rights: the advocates of human rights argue that ethico-legal groundings are more progressive than purely legal ones; the radical critics argue that any grounding of rights is exclusionary and divisive. Thirdly, both radical advocates and critics argue that the key site of the political is the international sphere, the difference is merely in the political relation between the individual and the Other, where the post-structuralist approach is even less socially mediated than the liberal relationship of advocacy.

Universal Discourse without Agency

The debates around human rights in the 2000s revolve around acceptance that the human rights framework reflects an immanent universalising power. For the 1990s radicals, this universalising power which sought to undermine the power of state sovereignty and privilege the rights of individuals was implicitly seen to be a progressive force. This universal was grounded in a view of an emerging cosmopolitan or universalist or global consciousness in the wake of the ending of the Cold War (for example, Shaw 1994). The discourse of human rights was a universal one, therefore it was assumed that states were not capable of originating and bearing this discourse, the leading agents of human rights approaches were assumed to be non-state actors, primarily NGOs, often described as ‘norm entrepreneurs’ (Finnemore and Sikkink 1998). The rise of this universalist discourse was often understood in a social constructivist framework, based on the ‘power of ideas’ and the importance of global information networks (Risse, Ropp and Sikkink 1999). For human rights advocates, such as Mary Kaldor, since the end of the Cold War we have been witnessing a fundamental political struggle between civil society and state-based approaches (Kaldor 2003, 2007).

For the 1990s radicals, the universal discourse was driven by progressive agency ‘from below’ and therefore was a challenge to power. In our more disillusioned 2000s, particularly since 9/11, there has arisen an alternative critical reading of the discourse of universals. Often the starting point for these critics is the work of German legal theorist Carl Schmitt, who, writing in the mid 20th Century was highly critical of US claims to uphold universal human rights in opposition to what he saw as the European view of international law which privileged sovereign rights (see Schmitt 2003). Schmitt claimed famously that ‘however invokes humanity wants to cheat’ (Schmitt 1996: 54). Rather than a new progressive universal subject arising from below, critical theorists in the 2000s saw a new universal subject arising from above. Michael Hardt and Antonio Negri in their path-breaking book *Empire* (2001), first published in 2000, saw global neo-liberal governance as superseding the state-based international system, with the US no longer viewed in traditional terms of state-based imperialist power but as a representative of the universalising power of *Empire*.

In a direct challenge to the advocates of human rights, these critical approaches have been constructed within post-structuralist frameworks; drawing on theorists such as Carl Schmitt, Michel Foucault and Giorgio Agamben and suggesting that a new universal subject may be emerging, not from below, but from above. In the recent work of Mark Duffield (2007) Vivienne Jabri (2007) and Costas Douzinas (2007) this framework is melded with post-Foucauldian readings of human rights as an exercise of biopower. In this framework, new global governmental practices are highlighted which are legitimised through the privileging declarations of the rights of the human over and above the formal rights framework of sovereignty and non-intervention. For Duffield, the focus on human rights, expressed in the discourses of state failure and the merging of security and development, creates a biopolitical blank cheque to override the formal rights of sovereignty on the basis of the needs of securing the human. For Jabri, the recasting of military intervention in terms of the human undermines the state-based order and the line between domestic and global politics constituting a new global biopolitical order. For Douzinas, human rights discourses

undermine territorial forms of sovereignty but enable the emergence of a new ‘super-sovereign’ of global hegemonic power.

Here, the universalism of liberal human rights advocates is ‘stood on its head’ to argue that it is the universalising interests of power, understood in vague terms of biopolitical neo-liberal global governance, rather than the cosmopolitan ethics of empowerment, which drives the discursive practices of human rights regimes. As the 1990s liberal discourse has been challenged by the 2000s post-structuralist discourse, we seem to be caught up in a contestation over which academics have the most progressive or radical interpretation of new universal discourses of international relations.

However, I don’t think that this debate about whether human rights regimes reflect a challenge to power or a new more oppressive exercise of global power has much to do with empirical facts, which appear to be selectively applied to fit the academic’s preference. It seems to me that there is an unhealthy reliance on the universalist discourse itself as the source of value judgements. This view would seem to be supported by the fact that those who support liberal universalism (i.e. liberals) tend to be supportive of human rights regimes, while those critical of liberal universals (i.e. post-structuralists and post-Marxists) see them as new articulations of liberal frameworks of power.

At the level of discursive analysis the choice between these two approaches, to my mind, is a purely subjective one. Neither one satisfactorily grounds the existence of a new universal subject which is the agent of human rights regimes as a universalising discourse. Both approaches suggest that human rights regimes reflect the transformed nature of international relations, yet neglect to investigate why the human rights discourse has been mainstreamed by leading Western states and state-based international institutions or to explain why there should be so little contestation over such an allegedly radical reshaping of power relations.

Many years ago, in a critique of German idealist philosophy, which could be equally applied to the approach of human rights advocates and critics today, Karl Marx argued that:

In direct contrast to German philosophy which descends from heaven to earth, here we ascend from earth to heaven. That is to say, we do not set out from what men say, imagine, conceive... in order to arrive at men in the flesh. We set out from real, active men, and on the basis of their real life processes we demonstrate the development of the ideological reflexes and echoes of this life-process... In the first method of approach the starting point is consciousness taken as the living individual; in the second method, which conforms to real life; it is the real living individuals themselves, and consciousness is considered solely as their consciousness. (Marx 1982: 47)

Rather than study the ideological appearances, in order to understand the changing practices of states or the transformation of the international system, Marx suggested studying the context and relations of the actors themselves. Rather than assessing the discourse or the ‘ideological reflexes and echoes’ of changing international relations on their own terms, I suggest a much more mediated and contingent approach to

understanding the appeal of human rights frameworks (see further, Chandler 2007a; 2007b). If there is no universalising agency in the form of global civil society or *Empire*, then we need to explain the ideological forms in which international relations is conceived starting from the need to locate and explain the agency behind them. This investigation would need to engage the apparent paradox of why Western states have sought to project their power in post-territorial, post-national, post-sovereign terms. It is possible that it is the hollowing out of the state as a framework for domestic politics which results in the projection of a post-state ideological framework, but suggesting the weakness of states as the political subjects of the international arena would not be the same as asserting the rise of new universal subjects driving human rights regimes. It would also invest these regimes with much more contingency than the unmediated universalising discourses of rights. In fact, the post-structuralists are more idealistic in their unmediated reading of the universalist discourse as they see no barriers or limits to universal human rights frameworks.

Rights without Subjects

The biopolitical critique of the discourse of human rights is that rather than a mechanism of empowerment it is an exercise of power. As with the agreement on the universal agency, here the post-structuralist critique is the mirror image of the liberal discourse. For liberal human rights advocates there is no distinct difference between human rights and democratic and civil rights. All rights claims are seen to be equally empowering and able to tame power in the name of ethics and equality. Here, the extension of law is read to be the extension of the realm of freedom and a restriction on sovereign power. The post-structuralist response is to argue that the liberal discourse reveals the truth in its blurring of the relationship between democracy and dictatorship, law as ad hoc and arbitrary power and law as a reflection of the autonomy and agency of legally constituted subjects (Agamben 1998: 10).

For the critics of human rights regimes, the extension of a discourse of rights and law merely enhances the power of liberal governance. Indeed, Giorgio Agamben has captured well the ethico-juridical blurring of human rights regimes as a 'state of exception', by which he means not a dictatorship but a hollowing out or emptying of the content of law:

...the state of exception has today reached its maximum worldwide deployment. The normative aspect of law can thus be obliterated and contradicted with impunity by a governmental violence that – while ignoring international law externally and producing a permanent state of exception internally – nevertheless still claims to be applying the law. (Agamben 2005: 87)

However, in reading the state of exception as the essential nature of the sovereign state and law, Agamben argues that the lesson is that the progressive politics can never operate within the modern state form: 'Politics has suffered a lasting eclipse because it has been contaminated by law, seeing itself, at best, as constituent power (that is violence that makes law), when it is not reduced to merely the power to negotiate with the law.' (2005: 88) In his earlier work, *Homo Sacer*, he argued:

It is almost as if...every decisive political event were double-sided: the spaces, the liberties, and the rights won by individuals in their conflicts with central powers always simultaneously prepared a tacit but increasing inscription of the individual's lives within the state order, thus offering a new and more dreadful foundation for the very sovereign power from which they wanted to liberate themselves. (Agamben 1998: 121)

For both the liberal advocates of human rights and the radical post-structuralist critics there is no specific understanding of the problem of human rights as based on non-socially constituted legal subjects. For both liberal human rights advocates and post-structuralists rights are understood to be independent of rights subjects. For liberal advocates, it is precisely because the poor and excluded cannot enforce their rights that an external agency needs to step in to empower them. For post-structuralists this is clear in the view that the declaration of rights constitutes the subject, rights precede and interpolate the subject (Douzinas 2007: 92). Douzinas stresses the darker side of rights; 'the inexorable rise of registration, classification and control of individuals and populations' (2007: 129). Post-structuralist critics exaggerate the claims of rights as independent from subjects to view all rights claims as made by non-subjects (Agamben's bare life).

For radical post-structuralists the ambiguity of human rights frameworks, which can only empower those who decide on the content and ad hoc implementation are read to be, not an attack on modern frameworks of rights and law, but are essentialised as the key to understanding the modern state as a biopolitical power. The radical critics critique the claims of the liberal advocates of human rights by essentialising them as liberal rights claims per se.

This one-sided understanding of rights, through breaking their connection to rights subjects, produces an exaggeration of the liberal human rights critique of the political sphere of representation. For liberal advocates of human rights, representational claims are problematic because they may undermine rights protections, for post-structuralists any participation in the political sphere of the territorial state is inherently disempowering.

For advocates of human rights regimes it appears that all rights are good and liberatory, for the post-structuralist critics it appears that all rights are bad and oppressive. What they share is a lack of understanding of rights frameworks which is shaped by political subjects. For both, humanity is cast as 'bare life', rights are necessary to protect vulnerable human subjects and these are rights without subjective content, rights of dependency. Rather than a critique of human rights for denying rights to the political subject, the biopolitical critique argues that this is the case for all rights-based discourses.

What neither the liberal or biopolitical perspectives offer is a more reflective or historicised understanding of why law is being hollowed out and why the rights of autonomy appear to be increasingly problematic. Both approaches make highly essentialised claims about the nature of rights and make little attempt to locate the content of rights claims within social struggle. Here the discourse does all the work as indicated above, either interpolating citizen subjects as the objects of power or empowering the excluded without challenging power relations. Neither the advocates

or the critics reflect on the historically specific context in which the subject has been taken out of rights discourses, nor on the indeterminacy of law, described as the 'permanent state of exception'.

The Unmediated Relationship between the Particular and the Universal

Where both liberal advocates and post-structuralist critics agree is on the problematic nature of domestic representational politics. Both seek to bypass the bonds of territorial politics in a mirror image of each other. But, again, the post-structuralists exaggerate the rejection of the liberal universalists. For liberal proponents of human rights regimes advocacy for the Other is opposed to representation, for radical post-structuralist opponents disengagement from state-based politics is premised on a non-advocacy relation to the Other.

In focusing on biopower as a means of critiquing universalist discourses of human rights, Duffield, Jabri and Douzinas are reducing critique to moral statements about power. In effect they take the conclusions of Foucault, that liberal discourses are an exercise of power, without making any attempt to further our understanding. In fact, they manage to invert the intentions of Foucault which was to clarify the importance of human subjectivity for governmental power and authority.

Foucault himself stated that his analysis of biopower was 'not in any way a general theory of what power is. It is not a part or even the start of such a theory', merely the study of the effects of liberal governance practices, which posit as their goal the interests of society – the population - rather than government (Foucault 2007; 1). Biopolitics describes government in the age of liberal modernity, where the state is no longer alien and external to society. The population are no longer an alien mass to be coerced or manipulated, as in the pre-modern time of Machiavelli; instead, the needs of society as a whole 'offer a surface on which [power] can get a hold', or 'secure' itself (Ibid.: 75).

Rather than the disciplinary sovereign power of external rule, the state operates on the basis of 'governmentality' of the liberal freedoms of the political and the economic sphere, where society (capitalist social relations) internally generates the need for regulatory governance (Ibid.: 91-99). Foucault is, in fact, describing the dynamic of liberal modernity, understood as a society-orientated process, with a social, collective purpose or goal, rather than a process of narrow regulatory governance by the disciplinary techniques of the sovereign. Foucault states: 'I think this marks an important break. Whereas the end of sovereignty is internal to itself and gets its instruments from itself in the form of law, the end of government is internal to the things it directs; it is to be sought in the perfection, maximization, or intensification of the processes it directs' (Ibid.: 99).

Ironically, whilst Foucault himself understood his work on biopower as a correction to the reading of his work on disciplinarity, which created the impression of merely asserting 'the monotonous assertion of power' (Foucault 2007: 56; see also Jean Baudrillard's assertion [1987: 33] that for Foucault, power always wins, at issue is merely its modulation) Duffield, Jabri and Douzinas, in effect, read biopower with society taken out of the analysis. They do this through reading Foucault through

Agamben, who reads biopower as the discourse of human rights, the indistinction between being a subject and object of rights, who writes:

The Foucauldian thesis will then have to be corrected or, at least, completed, in the sense that what characterizes modern politics is not so much the inclusion of *zoē* in the *polis*... Instead the decisive fact is that, together with the process by which the exception everywhere becomes the rule, the realm of bare life... gradually begins to coincide with the political realm, and exclusion and inclusion, outside and inside, *bios* and *zoē*, right and fact, enter into a zone of irreducible indistinction. (Agamben 1998: 9)

While Agamben at least openly explains his critique of Foucault in his use of the concept of biopower, most authors just take on board his use of biopower as if there was little difference or Agamben was merely drawing out the logic of Foucault. Douzinas, for example, argues that: ‘Agamben has radicalised Foucault’s approach by arguing that power has always operated on bare biological life.’ (2007: 116) Jabri provides a good example in the elision between the two. She states the distinction:

The subject of biopower in Foucault is fully the subject capable of self-government, ever shifting as well as subject to constraint within the trajectories of power. The subject of Agamben’s bare life, however, is devoid of subjectivity and its existential complexities and differentiations.

However, in shifting Foucault’s view of biopower from a national context to one of international relations, she argues that Foucault’s famous formulation that war is no longer fought on behalf of the sovereign but on behalf of society, can be reformulated or understood in terms of war fought ‘in the name of humanity’ inscribed in the terms of the ‘neoliberal global order’ (Jabri 2007: 134-5. Here, in taking Foucault from a domestic context - where the fact that war could only be fought on behalf of society, in the name of national interests, gave war a distinct social content, indicating that actions of the sovereign could only be legitimised on the basis of citizenship demands - to an international context, fundamentally blurs Foucault’s critique of liberal democratic rights with the critique of the fictional rights of global human rights advocacy.

Jan Selby, in his recent attempt at a ground clearing critique of Foucauldian IR, poses the question of the problem of the translation of Foucault from a domestic to an international context (Selby 2007). He argues that the inscription of universal liberalism is accidentally a product of this move, rather than seeing that this is essential to critique the human rights discourse as an act of liberal modernity. The post-structuralist critique is parasitical on the liberal human rights discourse, which in separating rights from their grounding subjects opens up the possibility of critiquing liberalism as essentially based on the subjection of citizens and their interpolation in the language of rights. This has little to do with Foucault’s understanding or concerns, which revolved around extending Marx’s critique of the ‘freedoms’ of liberal modernity. In effect, the post-Foucauldian’s seek an easier topic, the ‘unfreedoms’ highlighted by Agamben, where the concentration camp, the totalitarian state and Guantanamo Bay constitute the moral indictment of liberalism (Agamben 1998:4).

Liberal advocates of human rights assert that the causes of the human are more important than the representative decisions of the citizen, and seek to bypass the masses in the direct lobbying of power and calls for the judiciary to take a larger role in policy-making. This elitist dismissal of the masses takes a more exaggerated form in the critique of the political of post-structuralist theorists, who suggest that the purity of radical critique can only be preserved by avoiding instrumental activity and focusing merely on the radical identity of the theorist.

Duffield suggests that the only alternative is to assert that we are all victims of governmentalism: 'we are all governed and therefore in solidarity' (2007: 232). Apparently we should focus on what we share with post-colonial societies, not offering the hierarchical 'solidarity' of development or political autonomy but instead the solidarity of learning from the poor and being marginalised as equals; once humbled: 'through a practical politics based on the solidarity of the governed we can aspire to opening ourselves to the spontaneity of unpredictable encounters' (2007: 234). In highlighting the hegemonic frameworks and interests underpinning Kaldor's idealistic approach to new frameworks of 'human' rights, Duffield appears to throw the baby of human agency out with the bathwater of development, rejecting modernizing aspirations towards democracy and development for recreating oppressive neoliberal biopolitical frameworks of control and regulation.

Jabri argues that we need a new cosmopolitanism, but one that reflectively recognises that 'any discourses that view their worth in universal terms, are but expressions of "forces of domination" based upon explicit principles of exclusion' (2007: 177). Instead, the '*politics of peace*' [emphasis in original] emphasises a solidarity which:

...makes no claim to universality, nor is it teleological in outlook... Rather, the politics of peace expresses local and often rather invisible acts, expressions of solidarity that are neither hierarchically defined nor suggestive of any claim to universality. (2007: 177)

For Douzinas, political opposition has to take the form of a 'cosmopolitanism to come' of individualised protest:

Dissatisfaction with nation, state, the international comes from a bond between singularities. What binds me to an Iraqi or a Palestinian is not membership of humanity, citizenship of the world or of a community but a protest against citizenship, against nationality and thick community. This bond cannot be contained in traditional concepts of community and cosmos or of polis and state. What binds my world to that of others is our absolute singularity and total responsibility beyond citizen and human, beyond national and international. The cosmos to come is the world of each unique one, of whoever or anyone; the polis, the infinite number of encounters of singularities. (2007: 295)

Despite the differences in their views of whether the development of universal human rights regimes is to be welcomed or criticized, both liberal advocates and post-structuralist critics seek to ground their position of critique on the basis of their 'global solidarity' with the non-Western poor and marginal. Both seek a vicarious

radicalism or legitimacy in their distancing from representational demands and their ability to stand outside of politics seen as an instrumental aspiration for power.

The rejection of political representation of the advocates and the critics of human rights demonstrates the ideological nature of radical discourse today. The further radical political claims shift from engagement with society the more radical they become. The advocates of human rights in the 1990s were the first to distance themselves from state-based politics, finding a freedom in the free-floating rights of global advocacy. The post-structuralist critics of the 2000s exaggerate this rejection of society, finding an even more radical way to express their subjectivity and at the same time a more radical critique of the prison or 'concentration camp' of state-based politics. The irony is that it is not just radical critics which seek to escape the responsibilities of the politics of representation. It is possible that state leaders and political elites in the West similarly are more at home when making radical declarations about global rights than they are when it comes to engaging with their own societies.

Conclusion

Rather than being a stand against the human rights assault on liberal democratic frameworks of formal legal and political equality, the biopolitical critics of the emerging human rights regimes argue that they are oppressive precisely because they are framed in terms of liberal rights. The alternative they offer is not a defence of liberal democratic equality but a further retreat from political engagement. The rise of the human in international relations discourse reflects the implosion of political frameworks of contestation. The biopolitical critique of human rights does not seek to highlight the contingent nature of this framework or to articulate an alternative. It highlights the depth of the problem, the implosion of the political subject which gave content to frameworks of rights, rather than the solution.

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