

Emancipation and Domination: Human Rights and Power Relations

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This article questions the extent to which human rights have the ability to emancipate, by scrutinising the conceptions of power and emancipation that underlie contemporary human rights discourse. It begins by considering a pragmatic approach known as the 'liberalism of fear,' which seeks to justify human rights by stressing their emancipatory capacities. The presuppositions concerning the nature of power that lie beneath this understanding of human rights are then identified, and are found to be very close to what Michel Foucault dubbed the 'juridical notion of power.' Such presuppositions are challenged through an exploration of Foucault's productive model of power, and the implications of his ideas for the topic at hand are assessed. The article then considers the ways in which the 'liberalism of fear' may be reconceptualised to accommodate Foucault's insights, and finally argues that, whilst human rights have no inherent emancipatory force, their contingent tendency to emancipate may be advanced by adopting a more realistic view of their capacities, and by supplementing them with other emancipatory programmes.

Introduction: Human Rights and Emancipation¹

[The liberalism of fear] cannot base itself upon the notion of rights as fundamental and given, but it does see them as just those licenses and empowerments that citizens must have in order to preserve their freedom and to protect themselves from abuse.

– Judith Shklar (Shklar, 1998: 19).

I do not think that there is anything that is functionally – by its very nature – absolutely liberating. Liberty is a *practice*. So there may...always be a...number of projects whose aim is to modify some constraints, to loosen, or even break them, but none of these projects can, simply by its nature, assure that people will have liberty automatically...The liberty of men is never assured by the institutions and laws that are intended to guarantee them.

– Michel Foucault (Foucault, 1984: 245).

Human rights are often viewed as a means of securing emancipation from suffering, oppression and cruelty. Whilst there are many potential justifications for human rights that herald from divergent philosophical, moral and political traditions, one pragmatic approach aims to eschew the contentious metaphysics underlying such doctrines and to focus instead upon the emancipatory capacities of human

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rights in practice (Ignatieff, 2001: 54). The consensus for human rights, argue liberal pragmatists such as Judith Shklar and Michael Ignatieff, should not be sought in any shared idea of human nature – which, in any case, seems illusory in today's pluralistic societies – but is to be found in a common fear of the abuse of power, and in recognition of human rights' capacity to curb it. Rather than relying upon a *a priori* considerations for or against human rights, this 'liberalism of fear' is resolutely historical since it models itself upon the declarations of 'never again' that followed the atrocities of the Second World War. (Ignatieff, 2001: 65). Although abuses have obviously continued, increasingly powerful international human rights institutions and non-governmental organisations have successfully pressured abusive governments, and the ideals of human rights have fuelled many emancipatory campaigns such as the civil rights movement and the anti-apartheid struggle. The justification of human rights, the argument goes, lies in their practical ability to reduce suffering by keeping power in check.

This pragmatic defence of human rights may at first, at least for those sympathetic to the human rights project, be disarming in its simplicity and intuitive power, which is a very good reason for scrutinising it before allowing oneself to concur. Although it may initially seem obvious that, given their content, human rights provide an emancipatory barrier against power, more radical political theorists have argued that they are actually an instrument of power, regulation, or even domination. This article aims to evaluate such claims. The issue is not merely of theoretical importance, since the conclusions reached could influence practical decisions of whether or not to include human rights in emancipatory programmes. Nothing less than the political and moral value of human rights is at stake.

Such radical claims concerning human rights and power come in numerous forms, rendering a comprehensive treatment of the topic beyond the scope of this article. Among the various challenges that can be made, the following seem most salient:

1. Given the tension between the categorical and generic idiom of morality and the particularity and partiality of politics, when human rights descend from their moral pedestal and enter the political realm, they are liable to become co-opted, devalued or contaminated by partisan political interests. Lip-service to human rights frequently masks their continued violation.
2. Human rights are culturally insensitive and reflect western individualist values rather than possessing any true universality. The 'human' in human rights is fundamentally the westerner who, in a movement analogous to the imperialism of the past, seeks to impose his rights onto the 'other.'
3. The rights of man, as Marx contends, can never provide the emancipation they promise. Their declarations of freedom and equality depoliticise and privatise inequalities of class, race and gender, which are left to operate unchecked in civil society. Whilst offering narrow 'political emancipation', they cannot provide full 'human emancipation' (Marx, 1987: 89).
4. Human rights, as a political project, will always have unintended side-effects in excess of their stated aims. Despite their apolitical pretensions, human rights are ideological in the sense that they compete with, and may preclude, other emancipatory programmes (Brown, 2004: 453).

5. The idea that human rights are intrinsically emancipatory derives from an unrealistic and narrow understanding of power. Once this is swept away, we can appreciate that they are inextricably bound up with its operation. Human rights act as ‘conduits’ for relations of power, regulation, or even domination (Iverson, 2007: 180).

I shall focus upon the latter proposal. It seems to me to have the most depth, as it claims that human rights are *inherently* enmeshed with power relations. In evaluating this claim, I shall begin by examining the conception of power presupposed by liberal pragmatism and challenge it through a close reading of Michel Foucault’s work on power. I then move on to analyse the implications of this challenge for the ‘liberalism of fear’, and see whether it can be sustained.

Juridical versus Foucauldian Power

Although human rights are often regarded as being somehow meta-political, it would be a mistake to think that human rights are viewed, even by the most thoroughgoing liberals, as completely inimical to power relations. This can be readily shown by way of a few distinctions. In terms of their *justification*, human rights are indeed thought to have strong moral foundations, and are supposedly imposed on politics as a restriction on power. Similarly, in terms of *political orientation*, human rights are taken to be positioned outside of the left-right spectrum, since they are compatible with any political doctrine that does not involve their violation. However, liberals can consistently admit that human rights interact with power on certain levels since, in order for their emancipatory aims to be realised, they must operate in the political sphere. Thus Ignatieff claims that, as an *activity*, human rights constitute a form of politics (Ignatieff, 2001: 67). Once they are institutionalised, human rights clearly have a coercive edge, as shown by the emergence of an International Criminal Court which aims to indict human rights violators for crimes against humanity.

Despite these cases where human rights and power interact, liberalism’s fundamental claim stands: human rights emancipate. Although, as the argument goes, they are *involved* in power in certain ways, they fundamentally work as a *challenge to*, rather than a *form of*, power. As Ignatieff has argued, human rights function to secure agency or ‘negative liberty,’ which he understands as freedom from interference (Ignatieff, 2001: 57). However, this appeal to negative liberty carries with it some substantial presuppositions concerning power. Firstly, the ‘liberalism of fear,’ alongside classical Marxism and liberalism more generally, views power as a phenomenon which can be possessed and wielded. On this view, my negative liberty is limited when somebody uses *their* power to restrict me. It is clear that Judith Shklar, for instance, sees ‘the liberalism of fear’ as a means of securing freedom from the power of state and institutional tyranny, thereby seeing the paradigmatic holder of power as the sovereign or the legislator (Shklar, 1998: 10-11). Secondly, it tacitly contrasts power with freedom, suggesting that when one is subject to power, one’s freedom is thereby compromised or negated. Emancipation stands in

opposition to power. Thirdly, it also admits the possibility of being positioned outside of power relations, since negative liberty consists of freedom from interference by others' power. Power is seen as a phenomenon which merely inhibits individuals whose identity precedes its operation. It is also viewed in predominantly negative terms, as a repressive or prohibitive force, whether in relation to the corrupt judge or the abusive policeman. In short, this approach to human rights presupposes almost exactly what Michel Foucault has dubbed the 'juridical notion of power' (Foucault, 1990: 86). Although these presuppositions may seem natural or unproblematic upon first glance, one of Foucault's most important philosophical projects has been to demonstrate their inadequacy, contending that they render an analysis of power's concrete operations impossible (Foucault, 2003: 265). As I shall now outline, Foucault aimed to facilitate such an analysis by developing an alternative model of power.

Firstly, for Foucault, power is utterly ubiquitous (Foucault, 2000: 292). Through his genealogical analyses of phenomena such as madness, delinquency and sexuality, he has shown that power is by no means restricted to the state or sovereign. Although the state is very often implicated in power relations, it is never purely at the centre of them, and never exhausts them (Foucault, 1984: 64). Foucault's concept of governmentality – which broadly designates the 'art of government' (Foucault, 2002b: 205) – is not only applicable to the state, but to the 'conduct of conduct' more broadly (Ivison, 2007: 190). In addition to state power, modernity has seen the rise of 'disciplinary power' which operates through techniques such as hierarchical observation, normalising judgement and examination (Foucault, 1984: pp. 188-205). Today, excessive attention to sovereign power masks the operation of 'biopower,' which regulates populations (Foucault, 1990: Part 5; 2003: Lecture 11).

Secondly, Foucauldian power is inescapable in a deeper sense. Liberalism, as a descendant of the Kantian tradition, tends to view the self as an *a priori* or transcendent given, whether originating from the noumenal realm, or detached from its social identities in a Rawlsian 'original position' (Rawls, 1999: ch. 3). However, Foucault's genealogies treat subjects as moulded, worked upon or even constituted by power. Power has such priority over subjects that the latter are 'effects' of the former (Brown, 1997: 113). Given power's active and 'productive role,' we must abandon the liberal view of power as negative, prohibitive and repressive (Foucault, 1990: 94).

Thirdly, power cannot be possessed, or reside in one's body, for it is far more scattered, diffuse, mobile, transitory and heterogeneous than that (Foucault, 2000: 292). As Foucault puts it, power lacks a 'single centre' but is always 'part of a chain,' operating 'through networks' and 'exercised from innumerable points' (Foucault, 2003: 27, 29; 1990: 94). Power is not the property of a sovereign legislator but passes through him, forming a 'dense web' (Foucault, 1990: 96). Methodologically, power can only be plausibly characterised through an 'ascending analysis' which begins by observing its 'infinitesimal mechanisms' rather than assuming a picture of homogenous domination (Foucault, 2003: 30). In short, power is not a fixed *entity* but a fluid *process*, which explains why Foucault did not aim to reach a formal theory of power in the abstract, but rather sought an 'analytics' of power, privileging the question of *how* power operates over *what* it is (Foucault, 1998: 82; 2002c: 327; 2003: 24). Moreover, Foucault also

contends that power is both 'intentional and non-subjective' (Foucault, 1990: 94). This means that, on the one hand, each form of power clearly has tactics, objectives and rationalities but, on the other hand, no-one formulates them. Particular forms of power are emergent from a set of historical and social conditions that converge at a particular time and place, 'attracting and propagating one another' until they form 'comprehensive systems' (Foucault, 1990: 95). There is no conspiracy of power, even though particular operations of power may end up serving the interests of certain groups.

Lastly, power is, in Foucault's eyes, by no means automatically malign. Since liberalism posits the great value of liberty on the one hand, but tends to contrast liberty with power on the other, it seems to have a great suspicion of power (Searle, 1995: 94). Indeed, it appears that this distrust explains many misreadings of Foucault's work (Heller, 1996: 83). One highly pessimistic interpretation construes Foucault as claiming that freedom is illusory, resistance is futile and that history consists of a series of inescapable dominations (Heller, 1996: 79). Although Foucault indeed claimed that 'humanity installs...its violences in a system of rules and thus proceeds from domination to domination' (Foucault, 1984: 85), in his later work he was at pains to stress power's capacity as a benign force (Foucault, 2000: 293, 298). Although he seems to work with a more modest notion of freedom – as the availability of various options for action – than the superlative, metaphysical conception found in the Kantian tradition, Foucault achieves this result by claiming that power, rather than precluding freedom, actually presupposes it, for it is only 'possible insofar as the subjects are free' (Foucault, 2000: 292; 2002c: 343). Moreover, he suggests that we understand the exercise of power as 'action upon the actions of others;' a formula which affirms, rather than negates, individual agency (Foucault, 2002c: 340). Foucault thus rejects liberalism's implicit assumption of a mutually exclusive relation between power and freedom.

Moreover, Foucault makes a key distinction between power and domination. Whereas power is only possible if we are free, domination occurs when there is 'no room to manoeuvre' (Ivison, 2007: 192). Whereas power is 'mobile,' 'reversible and unstable,' domination occurs when power relations become 'frozen' (Foucault, 2000: 292, 283). The ubiquity of power by no means renders resistance impossible, since the latter is not ontologically distinct from the former (Heller, 1996: 99). Since the possibility of resistance is guaranteed by the reversibility of power relations there are, in Kevin Heller's phrase, both 'hegemonic' and 'counter-hegemonic subject-positions' (Heller, 1996: 79). In short, liberals need not regard power as an insidious denial of liberty. For instance, the bond between lovers and the teacher-pupil dynamic may involve beneficial exchanges of power that enhance, rather than undermine, agency and well-being (Foucault, 2000: 298).

In short, the justification of human rights offered by the 'liberalism of fear' presupposes that power is limited in reach, negative, possessed, sinister and opposed to freedom. In contrast, Foucauldian power is ubiquitous, productive, heterogeneous, intentional yet non-subjective, potentially benign, compatible with freedom and distinct from domination. The task is now to see what implications all this has for the attempt to pragmatically justify human rights in terms of their emancipatory force. It is not my intention here to submit Foucault's conception of power to scrutiny, although I believe that it is at least partially vindicated

by observation of power's operation in society. My aim is rather to ascertain its implications for the liberal pragmatist approach to human rights. If Foucault's conception of power is endorsed, must we abandon the 'liberalism of fear,' or can it be reconceptualised and modified to accommodate it?

Human Rights, Regulation and Domination

The most obvious consequence of Foucault's views for the problem at hand is that, given the ubiquity of power, human rights can no longer be seen as operating independently of it. They are, like everything else, inescapably implicated in its operation. Human rights may indeed limit the use of power, yet only by exercising it themselves. Given power's productive capacities, human rights do not merely 'Protect the Human', as Amnesty International UK's latest slogan enjoins, but actively '*Produce* the Human.' As a form of power, human rights regulate and contribute to the production of identity and subjectivity, and a genealogy of human rights would uncover their complicity in all manner of power relations (Douzinas, 2007: 7, 26-33). Crucially, however, this realisation should prompt caution rather than alarm amongst liberals since, as we have seen, the fact that human rights 'act upon the actions of others' is not necessarily morally problematic.

Therefore, Foucault's arguments do not necessitate a knee-jerk rejection of human rights, but merely a careful *reconceptualisation* of them. Indeed, Foucault himself does not reject rights, but forces us to consider them differently (Foucault, 2002a: 474-475). What Foucault does show is that a theory of human rights such as the 'liberalism of fear' cannot be sustained if it depends upon a narrow juridical understanding of power. If power and emancipation are seen as dichotomous, then we indeed must abandon the idea that human rights are emancipatory. However, given both the inseparable nature of power and emancipation, and the distinction between power and domination, power *per se* is no longer the problem. We can reconceptualise the aim of human rights as being to end *harmful* operations of power, and rework emancipation as the process of freeing oneself from *domination*, not power. It seems that domination is a paradigm of this damaging kind of power, since it admits no opportunity for resistance, or freedom from the suffering it causes. The ills that human rights seek to combat, such as torture and unfair imprisonment, all result from harmful or dominating deployments of power. Indeed, Foucault himself saw the task of 'playing with as little domination as possible' as the 'hinge point of...the political struggle for respect of rights' (Foucault, 2000: 299). Perhaps liberalism ultimately distrusts power because it conflates power with domination and, by assuming that it is always damaging, confuses the *abuse* of power with power *per se* (Foucault, 2000: 299). Therefore, we can add human rights, as a force against damaging and dominating forms of power, to the list of power's potentially positive operations. The penetration of human rights by power does not necessarily invalidate them.

This may seem to be a good get-out clause for the liberal who is sympathetic to both the human rights project and to Foucault's conception of power. However, some thinkers have drawn upon Foucault's work in order to argue that human rights are not merely an instrument of power, but that they may also

promote its harmful, or even dominating, forms. Thus Giorgio Agamben has argued that human rights are caught up in biopower, and maintain a 'secret solidarity' with sovereign power (Agamben, 1998: 133). Other thinkers reach less drastic conclusions and consider that, although human rights do have the potential to emancipate, they could also be harmful in some circumstances. This is not to revert back to the simple point that human rights can be co-opted for political ends, but that, in their genuine operation by well-meaning human rights advocates, they may end up as a damaging, or even dominating, force. For instance, Wendy Brown combines Marx's critique of rights with Foucault's notion of productive power to argue that, since human rights do not take account of identities, they mask the powers that produced such identities by depoliticising and privatising them (Brown, 1997: 89). It is not just that rights ignore or fail to address identities constructed by power; they actively disavow them since, in their resplendent universality, they declare differences such as class, race and gender to be politically insignificant (Marx, 1987: 44).

On the other hand, Brown claims that when group rights step in to take account of identity, the danger then becomes that they may end up reinscribing and recodifying the very identities that have been produced through domination. Since group rights promise to protect identities without regard for how they developed, they may entrench the results of oppression, and tacitly support the regimes that originally created them (Brown, 1997: 88). For example, when human rights do not address womanhood, they depoliticise the unequal treatment of women in civil society, but when group rights seek to redress this balance, they may end up ossifying in law the idea of women as violable victims (Brown, 1997: 127). Either way, rights perpetuate, rather than challenge, harmful forms of power.

Arguably, this potential for harm and domination is simply a consequence of power's ubiquity and complexity. Given that power often works in opaque, multifarious and amorphous ways, it may at times be very difficult to differentiate between its harmful and benign operations. Wendy Brown has observed the paradox that, although human rights work in a moral and 'universal idiom', their emancipatory capabilities depend upon a wide range of specific cultural, social and political factors (Brown, 1997: 86-87). Human rights can at one moment emancipate, such as in the civil rights movement, but at another almost dominate, say, through property rights which privilege the dominant economic class (Brown, 1997: 87). Given this paradox, Brown contends that it is practically impossible to say 'anything generic' about the emancipatory capacity of human rights (Brown, 1997: 88).

Similarly, Foucault would have probably agreed that generalisations concerning human rights and emancipation are highly problematic. Even though we have seen that Foucault readily admitted the potentially positive effects of power, he also believed that although 'nothing is evil in itself...everything is dangerous' (Foucault, in Gordon et al, 1991: 46). Likewise, although power is not an intrinsic ill, he considered that the 'rules' and 'universal principles' which 'limit it can never be sufficiently rigorous' (Foucault, 2002d: 452). Therefore, both Brown and Foucault show that domination is, as it were, an occupational hazard for anything that operates in the political sphere. Perhaps the 'liberalism of fear' is guilty of, in Nietzschean terminology, a 'will to truth,' in that it takes one contingent trait of human rights –

namely, their emancipatory ability – and posits it as their essence. Yet this ability is far from being inherent in human rights. Even if human rights *tend* to emancipate, or nearly always do, their *potential* for domination in certain circumstances cannot be fully discounted.

One consequence of the paradox is that this potential for domination undermines the universalist pretensions of human rights. Those who still wish to utilise them in emancipatory political projects are faced with the challenge of differentiating between deployments of human rights that indeed emancipate, and those which regulate or even dominate. However, given human rights' claim to be universal and categorical, they are not open to utilitarian calculation as to whether to apply or withhold them. Selective application of human rights may render them unenforceable in practice and drain them of their moral force. Indeed, it will be important to see in what follows if this challenge can be met.

However, it does seem that the occasions in which human rights act as a dominating force will be rare. In Foucauldian parlance, domination is a very strong term, denoting a situation in which there is absolutely no opportunity for resistance, such as slavery. Whereas human rights certainly reconfigure power relations, they are – given their aims and content – nevertheless far more likely to combat domination than they are to impose it. However, rather than denying outright the possibility that human rights have the potential to dominate, the task now is to show how such a situation may be minimised and avoided.

In my judgement, there are at least two options open to those who wish to minimise the potential of human rights as a harmful or dominating force, and to use them for emancipatory ends. Firstly, we can stress the capacity of human rights to reduce suffering *over* their capacity to emancipate. Indeed, a certain ambiguity has run throughout this article, between emancipation *from* cruelty and suffering, and emancipation *per se*. For instance, rights may well either mask or ossify identities that have resulted from oppression, but they might at least provide the bearers of such identities respite from the sufferings that have partially constituted them. In the original pragmatic spirit of the 'liberalism of fear,' human rights may not be perfect, but they may still have great use as a means of reducing suffering.

Secondly, one could argue that human rights are merely one part of a broader struggle for emancipation, and that other political programmes are necessary to mitigate or offset their potentially harmful or dominating effects. If human or group rights occupy the pre-eminent position in politics, then there may indeed be nothing to counteract their tendency to either disavow the operation of power in civil society, or to solidify subordinate identities. Indeed, it is important not to exaggerate the capabilities of human rights since, far from being a panacea for all social problems, they will inevitably leave many inequities and injustices intact. As I shall briefly show, these supplementary programmes can work at the level of the state, society and the individual.

Firstly, if human rights disavow the power relations that produce subjects in civil society, then the state can draw attention to, and redress, this situation through other programmes. For example, if human rights are a governments' only instrument for emancipation, then the right to property may entrench the dominant power of the most affluent. However, if the government, say, also introduces redistributive

measures, then the regulative effects of human rights may be mitigated. Secondly, the dominating dimension of rights can also be counteracted by sub-state struggles. Since human rights operate on the state-centred macro-level and, as Foucault argues, power extends far beyond the boundaries of the state, they leave untouched the micro-powers that shape us. In order to resist, say, the disciplinary powers that operate beneath the state, we must develop what could be termed as a micro-politics that would complement human rights' work towards emancipation. For example, such a campaign could consist of defying the forms of surveillance, classification and examination that restrict us. Thirdly, emancipation can be furthered through personal struggle. We can, through what Foucault calls 'the care of the self,' seek to 'manage the space of power' in 'a non-authoritarian manner' (Foucault, 2000: 287). Through experimentation that pushes the boundaries of our subjectivity, we may limit the operation of dominant power (Pickett, 1996: 462). Therefore, the potential within human rights for domination is that much weaker when they are supplemented by other struggles that work on different levels.

Conclusions

In this article I have sought to critique a theory of human rights that justifies them in terms of their emancipatory force, by considering the ways in which human rights are inseparably bound up with the workings of power. It has been seen that recognition of the force of Foucault's views on power necessitates a reconceptualisation of both human rights and emancipation, acknowledging that the complex networks of power they are situated within are not necessarily morally problematic. However, Foucault's philosophy does show that human rights have no *inherent* capacity for emancipation, and that there is at least the danger that, in certain circumstances, human rights may regulate, harm or even dominate.

Given this danger, those who seek to salvage the 'liberalism of fear' must explore the ways in which the dominating potential of rights may be minimised. To this end, it is important not only to bear in mind that human rights may be more adept at reducing suffering than securing full emancipation, but also to ensure that the abilities of human rights are not exaggerated, and that they are supplemented by other struggles that operate at the level of state, society and the individual. Whilst human rights have no inherent capacity to emancipate, and may potentially dominate, we can at least concur with the 'liberalism of fear' that, over the course of their history, they have been highly effective in ending many cases of torture and oppression. Rather than essentialising the emancipatory effects of human rights, however, we may adopt the more modest claim that they have a contingent *tendency* to emancipate people *from* suffering. Given this tendency, although the categorical idiom of human rights may mask, and fail to reflect, the variable tactics of power that implicate them, it is ordinarily not – in all but the most extreme circumstances – necessary to be selective about their deployment.

As we have seen, there are other variants of the problem that this essay has not dealt with, that may call the validity of human rights into question in other, potentially more serious, ways. However, with this

analysis to hand, activists can deploy human rights with greater caution, in the knowledge that the normative foundations of human rights may have been partially strengthened through reconceptualisation. Thus, the ‘liberalism of fear,’ once qualified and adjusted in the light of Foucault’s insights, may turn out to be capable of going a long way towards a justification of human rights after all.

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