

THE PROBLEM OF SUBJECTIVITY AND THE CRITIQUE OF HUMAN RIGHTS AFTER FOUCAULT

Roberto Buonamano^{*}

The problem of subjectivity – of how to conceptualise the subject – remains at the threshold of our understanding of human rights, both as a historical construct and a functional, juridical technology. Moving away from the idea of liberalism as the thought relating to political society based on the juridico-contractual relation of sovereign to subject, Foucault's account of the economic basis for liberal governmentality, developed in the series of lectures delivered during 1978 and 1979, provides scope to reconsider the problem of subjectivity in human rights. Our focus here should be on the possibility of situating the constitution of the subject of human rights within the historical processes associated with the development of the liberal and neo-liberal arts of government, and more specifically at the juncture at which the heterogeneous forms of subjectivity associated with *homo juridicus* (the subject of rights) and *homo economicus* (the subject of interests) coexist. Further, a critique of human rights with this orientation might be used to address the fundamental political contradiction inherent in the divided subjectivity of the sovereign-subject, and of individual human life as the ultimate biopolitical foundation of the state.

The Problem of Subjectivity and the Governmentality Studies

The question of the how to conceptualise the subject of human rights is among the more difficult and pervasive problems for the human rights discourse. Needless to say, it implicates a broader current of philosophical critique concerned with the ontological and historical understanding of subjectivity, and indeed much of Foucault's body of work is tied up with this concern in one way or another, from the historical analyses on mental illness, clinical medicine and delinquency to the study of Greek, Roman and Christian ethics. Foucault's approach to subjectivity takes as its point of departure the historicity and finitude of the subject. With this approach, the metaphysical presuppositions of the subject reveal themselves in their historical and existential specificities, making it possible to better understand how the subject has been constituted through knowledge systems and institutional and discursive practices. In contrast with the Kantian tradition, in which the subject already takes on the form of a moral subject, the bearer of *a priori* moral characteristics, Foucault's critical genealogical method concerns itself with the subject-in-being, the individual who is always in the

^{*} Lecturer, Faculty of Law, University of Technology Sydney.

process of formation. As Deleuze would comment: 'There's no subject, but a production of subjectivity: subjectivity has to be produced, when its time arrives, precisely because there is no subject. The time comes once we've worked through knowledge and power; it's that work that forces us to frame a new question, it couldn't have been framed before.'¹ This approach, whose concern is with subjectification as a process rather than the subject as an entity, succeeds in being able to assess the claims to truth associated with any particular model of subjectivity at the level of its truth-producing norms and mechanisms, to engage in a political problematisation of both the epistemological base and the forms of rationality that support the process of subjectification.

Of course, to the extent that in his later work Foucault concentrated on subjectivity in terms of the reflective, self-constitutive practices giving form to the individual's identity, there is the vital question of how to conceptualise the individual who is the product of such practices – the object of self-conscious activity and self-knowledge, the 'as not yet subject' that serves 'as point of departure for subjectivation'.² To frame it from the reverse perspective, how should we conceive of the relationship of the individual to his self when it is precisely the individual that we cannot know, and we cannot know him because he is in the process of being formed at any given time through technologies that are always being changed, superseded or replaced? This paradox may suggest that from a methodological point of view there remains a caesura between the genealogical analyses of the subject of power-knowledge (the concern of Foucault's earlier work) and that of the ethical, self-creating subject, a caesura that remains to be thoroughly explored. More pertinently, it demonstrates that the constitution of the modern subject needs to be explored in its manifold forms at the individualised level, with which approach it may not be feasible to reconcile one analytics of subjectivity with another. In any case, this conceptual difficulty inherent in subjectivity – that of defining the self who is at the same time the subject in formation – is at essence the very ontological problem of modern human rights. If we examine the relevance of governmentality – as a framework within which to determine the conditions for the exercise of individual freedom – to the construction of subjectivity in human rights, it is with the intention of projecting the problem of subjectivity on to a new surface of visibility.

The genealogy of power that may be traced through the series of lectures collated in *Society Must Be Defended* and *Security, Territory, Population*, and culminating in the dedicated study of liberal governmentality in *The Birth of Biopolitics*, suggests an alternative approach to the critique of law and legal institutions, rather than the focus on normalising and disciplinary technologies that one finds in Foucault's earlier works. Already with the lectures of *Society Must be Defended*, Foucault moves away from the focused analyses on disciplinary power and traces the

¹ Deleuze (1995), pp 113–14.

² Han (2002), p 166.

outline of a new political problematic and corresponding technology of power: biopolitics, namely the state's concern with 'man-as-living-being' or 'man-as-species'.³ This methodological departure heralds a number of significant differences, even if the two technologies of power are not mutually exclusive, and indeed in some situations may integrate and modify one another.⁴ First, while disciplinary power assumes the existence only of the individual and society, biopolitics is concerned with the population, as both a scientific and political problem. Second, it takes into account 'collective phenomena which have their economic and political effects' that are relevant and observable only at the mass level and only over a period of time. Third, biopolitical mechanisms operate to intervene at the level of general phenomena rather than to modify the individual at the level of the body.⁵ In *Security, Territory, Population*, Foucault introduces the technology of 'security' as a third approach to the study of power after those of law-sovereignty and discipline, but as a 'reactivation and transformation' of the other technologies – 'a way of making the old armatures of law and discipline function in addition to the specific mechanisms of security'.⁶ Here, Foucault develops the notion of security as biopower through an analysis of the political transformations associated with the societies of security: from pastoral power to the technological assemblage of police within the governmental rationality of reason of state. Finally, with the *The Birth of Biopolitics*, Foucault elaborates on the biopolitical foundation of government through an analysis of the birth and implementation of political economy through liberal and neo-liberal discourses.

For our purposes, what is singularly important about the latter studies is the historical identification of a new mechanism of power that emerged in the eighteenth and nineteenth centuries, distinguishable both from the juridical-political sovereign form and the disciplinary form, whose existence marks the critical development of the nation-state. This new mechanism of power, beyond merely reacting to the state's concern for the economic and physical welfare of the population, or by virtue of doing so, completely reconfigured the structural basis, function and practices of government. Our approach, then, might be summarised by the following series of questions. If, from the eighteenth century on, a new form of governmental reason emerges that operates on a completely different level than the juridical-political mechanism, that assumes different types of regulation, a different rationale for governmental intervention into human lives and ultimately a different conception of freedom, how are we to account for the emergence and pre-eminence of human rights within the international and national-constitutional legal discourses, and the consequent development of human rights institutions as both part of and in competition with the state? Should the two processes be considered to belong to distinct but parallel sets of

³ Foucault (2003), pp 242–43.

⁴ Foucault (2003), p 242.

⁵ Foucault (2003), pp 245–46.

⁶ Foucault (2009), pp 9, 11.

historical conditions? If so, are there points of convergence, and what significance would such convergence have for the genealogical development of human rights? In other words, might we be able to situate the phenomena of human rights within the historical processes interrogated in the analyses on governmentality, and would such a move open up the possibility of new critical approaches to the study of human rights that might in turn offer a more sophisticated understanding of the construction of modern legal subjectivity?

The Form of Governmental Reason: Reconceptualising the Liberal and Neo-Liberal Discourses

In order to attempt a preliminary response to these questions, let us first extract from the detail of historical findings and hypotheses within the lectures the basic theoretical premises underlying the form of governmental reason identified by Foucault. In the most generalised sense, this reason depends upon and supports a conception of public law – of the regulation of public authority – that differs from the juridical approach based on fundamental rights. Where the latter proposes the rights of man as the deductive starting point from which to establish a sovereign constitution that will ensure the limitation of governmentality, the former begins with the factual state of governmental practice and determines, from the viewpoints of both *de facto* and desirable limitations, the limits that are consistent with the objectives of government.⁷ In schematic terms, the contrast is between, on the one hand, the ‘revolutionary’, juridical approach to the limitation of governmental competence, structured around basic rights and public law, and on the other hand, the utilitarian, ‘radical’ approach that analyses the function of government – in terms of economy, resources and population, among other things – and establishes the measures of utility of governmental activity.⁸ Implicated within this schema is the contrast between the juridical conception of freedom – the individual’s possession of inherent freedom, part of which is ceded to the sovereign – and a conception that views freedom in terms of the sphere of independence of the governed with respect to government. Where the former revolves around the theory of rights, the latter is concerned with the interplay of interests defined by governmental utility.⁹

At the structural level, the new governmental reason, derived as it is from the theory of reason of state, operates in the form of intrinsic limitations. That is, rather than limitations being imposed extrinsically through the expression of a juridical reason – whether of natural rights, revealed scripture or the wills of civic subjects – governmental reason reflects limitations that are internal to governmental practice.¹⁰ Thus freedom

⁷ Foucault (2008), pp 39–40.

⁸ Foucault (2008), p 41.

⁹ Foucault (2008), p 42.

¹⁰ See Foucault (2008), pp 10–11.

itself becomes an internal, regulatory mechanism, rather than a sanctified space from which government carves out the requisite domain of legitimacy. As Foucault states, 'this governmental reason does not divide subjects between an absolutely reserved dimension of freedom [from which civil and political rights might be derived] and another dimension of submission which is either consented to or imposed'.¹¹ The division is made not between individuals but within governmental practice itself, in the determination of what should and should not be done, of what action is possible for government to take. Thus, beyond the question of the legitimacy of sovereignty *vis-à-vis* the natural freedoms of individual subjects, the new form of rationality under reason of state is concerned primarily with the question of excessive government, and so aims to calculate internally, from the principle of its own objectives, the desirable scope of governmental practice.

While it is true that Foucault's analyses of governmentality sit in contrast to the more traditional jurisprudential analyses of the state, it is not the case that Foucault has decided to avoid or evade the conceptualisation of the state form; rather, the studies on governmentality suggest alternative means of conceptualising the nature and function of the state – after all, as the reason of state theorists acknowledged, the state exists as a series of phenomena, or more precisely a field of objects, that demands to be observed, investigated and understood at the level of its specific operations, its 'specific plurality'.¹² In fact, it would be more accurate to say that for the theory of reason of state the state is both a given – since one can only govern within a structure that already exists – and at the same time that which does not yet fully exist, that which must be constructed.¹³ Thus, reason of state presents itself as an approach to the rationalisation of the art of government, the governmental reason that aims to produce or develop the state to its maximum functional capacity. What is novel in reason of state is the theoretical self-sufficiency of the state: without reference to origins, foundations or endpoints, the state is conceived as being concerned with its own conservation – its maintenance and preservation. It assumes an indefinite temporality of government: government always and necessarily exists, and thus it is of no consequence from where it derived or whether there are external purposes, at least from the perspective of verifying its legitimacy. The state then exists as a principle of double, reverse causation, by which is meant that the state is the cause of governmental reason – the regulatory idea of that governmental *ratio* – and at the same time functions as an objective in this political reason, the construct that emerges from the process of the rationalisation of the art of government.¹⁴

Let us now concentrate on the nature of the reality with which governmental reason is concerned. According to Foucault, the economic

¹¹ Foucault (2008), p 11.

¹² Foucault (2008), p 5.

¹³ Foucault (2008), p 4.

¹⁴ Foucault (2009), pp 286–87.

theorists of the eighteenth century reformulated rather than replaced the thinking of reason of state. One important manifestation of this reformulation was the concern with the naturalness of society, the naturalness of the relations between men, of their common existence, which may be contrasted with the artificiality of the police state within the doctrine of reason of state. The concern with the naturalness of human relations within society has certain implications for the nature of governmentality. First, if there are natural processes at work in civil society, then it is incumbent upon government to understand these processes, to gather knowledge on the way in which the population is affected by such things as birth and mortality rates, wealth, exchange prices and wages. Thus government comes to depend upon a certain scientific knowledge that is able to analyse the natural forces that shape the economics and preservation of society. Second, knowledge of natural processes must deal with the new problem of population – which, as Foucault suggests, is a phenomenon that ‘appears as a both specific and relative reality: it is relative to wages, to the possibilities of work, and to prices’, while it is specific in the sense of having its own laws of transformation and movement, and in the fact that it is composed of a multiplicity of interests reflecting the spontaneous bond between the individual and others, a bond that is not constituted by the state.¹⁵ Hence there is a different type of governmental practice required, a different way of managing the population: whereas the population, when conceived as a collection of subjects, would require government in the form of rules, regulations and other forms of interdiction, the population conceived as a set of natural phenomena necessitates that the state assume responsibility in the form of social intervention – intervention through the development of social-scientific knowledge and practices bearing upon this natural reality. Finally, and most significantly for our purposes, freedom has a new role, or perhaps a supplementary function, to play within governmentality. While individuals as subjects of political power viewed from the perspective of juridical sovereignty may be said to retain freedom in the form of fundamental rights against the sovereign, freedom now also has an important – indeed integral – part to play within governmentality itself. It is a premise of effective government that freedoms be respected insofar as the management of the population requires this, not as a principle of negative intervention as with the police state, but as a principle of positive intervention through institutions and mechanisms that react to the naturalness of the set of forces associated with this new conception of the population.¹⁶

Needless to say, this supplementary function of freedom, to the extent that it reflects a more complex reality – of economic practices and population management in addition to the police apparatus – suggests a more heterogenous conception of freedom than that associated with the juridical paradigm of fundamental rights and the police state. In one sense, it is an

¹⁵ Foucault (2009), pp 351–52.

¹⁶ Foucault (2009), pp 353–54.

infinitely open concept, since it must always adjust to the phenomena of the population as it appears at any given moment, while the population constantly undergoes change. This marks a stark contrast with the notion of freedom under the theory of juridical sovereignty, which is necessarily static, perpetually reifying a foundational relation between subject and sovereign. In another sense, it nevertheless presupposes the existence of some notion of freedom, whether based upon principles of natural law, theological-political necessity or social-civic consent, even if the conceptual groundwork for this preliminary idea of freedom remains unimportant insofar as the freedom integrated within governmentality has a seemingly instrumental existence. What is the framework by which freedoms can exist at all, let alone be considered fundamental? What is it that renders these fundamental rights efficacious from the point of view of the utility of governmental practice? We may note here that there is no real discussion within Foucault's lectures of the relationship between these two forms or functions of freedom, and it is left for us to take up the thesis on governmentality and further investigate the ways in which freedom operates. What is clear, however, is that the implied relationship between the two functions of freedom creates a problem with respect to the recognition of the subject of rights under this new governmental reason. Further, we may tender the hypothesis that it is precisely the indeterminacy of freedom that marks the difficulties associated with engaging in a critique of human rights.

In the lectures conducted in early 1979, Foucault attempts a starting point for analysing the problem of freedom – more precisely, of multiple forms of freedom – as we have formulated it, through a more sophisticated understanding of the relationship between liberalism and neo-liberalism. In his reading of the early, post-war, neo-liberal theorists, an important aspect of neo-liberalism is rethinking the relationship between the juridical and economic orders, and certainly of the thesis that equates the economic order with infrastructure and the juridical-political order with superstructure.¹⁷ Inevitably, the relationship is more convoluted than the instrumental hypothesis would allow, with a mutually constitutive set of relations through which the economic order provides the imperative for juridical regulation, and in turn the juridical order gives form to the economic. Thus they speak of an integrated economic-juridical order, with the economy conceived as a set of regulated activities, rather than a distinct order that is separate to and affected externally by law.

In fact, liberalism has always dealt with the conjunction of these two dimensions – the economic and the juridical – even if in different ways at different times. Its concern with the market economy and of the means of regulating the spontaneity of economic processes goes hand in hand with its interest in the formality of legal interventionism. It is not surprising, then, that Foucault's analysis of liberal governmentality takes us into an examination of the function of the rule of law in liberal theory. The principle of the rule of law, as derived from eighteenth and nineteenth century

¹⁷ Foucault (2008), pp 162–63.

political and legal theorists, is polygenetic, and thus reveals itself to be based upon a bundle of concepts and assumptions: that the sovereign rules in accordance with law rather than arbitrarily or despotically; that the acts of legislative and public authorities are limited by pre-established laws or foundational legal principles; that laws create rights by which citizens may challenge the legitimacy of the actions of public authorities; and that there exists a system of judicial arbitration – which, at least according to the English position, would not be merely administrative courts organised by the state, but the ordinary courts of justice – through which individuals may obtain a legal remedy against the state. What, then, is the significance of the rule of law for the economic order?

From Hayek's *The Constitution of Liberty*, Foucault extracts the defining features of the function of the rule of law, the principles justifying legal intervention in economic processes.¹⁸ Under the rule of law, law must intervene in a purely formal way: it establishes the possibility of adopting certain measures but does not actually determine those measures – that is, it does not engage in economic deliberation and choice, but merely sets up the legal arrangement through which economic choices may be put into effect. As a corollary, law 'must be conceived *a priori* in the form of fixed rules and must never be rectifiable by reference to the effects produced'.¹⁹ It establishes the framework within which economic agents may make decisions freely, complemented by directing the behaviour of public authorities so that everyone may know in advance how the state may react. As a consequence of these features, the rule of law ensures that the state has no overriding knowledge of the economic processes, such that the economy appears as a game for both the state and its citizens. In short, law under the principle of the rule of law provides the requisite juridical-institutional framework to govern the spontaneous processes within the economic order rather than any form of economic and social control. This includes the development of judicial institutions and procedures that are capable of dealing with instances of conflict created by the spontaneous nature of economic regulation.²⁰ Of course, the need for arbitration derived from the multiplicity of types of conflicts that emerge where enterprise itself remains unregulated is an enduring problem for liberalism – it is a problem that largely dominates the liberal discourse on the correct institutional balance for this economic-juridical order.

In some respects, this problem appears more patent in the basic theoretical premises of American liberalism because, as Foucault points out, from its inception 'liberalism was appealed to as the founding and legitimising principle of the state', crucial to the political debates on independence, unity and the rule of law.²¹ In comparison with European liberalism, in which liberal governmentality reacted to the already

¹⁸ See generally, Foucault (2008), pp 171–74.

¹⁹ Foucault (2008), p 173.

²⁰ Foucault (2008), p 175.

²¹ Foucault (2008), pp 217–18.

established reason of state, American liberalism propounded a theory of the state – of the relationship between the individual and government – explicitly formulated in terms of the juridical conception of freedom. For the American neo-liberals, it was a natural movement to approach the question of economic interventionism from the perspective of human capital (the economic analysis of labour) and the problem of individual criminality (the economics of penal justice), both of which are concerned with the function of freedom in the citizen–government relationship.

Neo-liberalism emerges through the imperative of intervention, both economic and legal, which results from the fact that the true economic subject is neither the man of exchange nor the consumer, but the man of enterprise and producer:²² he is his own capital and the producer of his own satisfaction.²³ This is to say that, for neo-liberalism – and this marks a shift from the classical liberal model in which economics is concerned with the mechanisms of production and exchange and the calculation of consumption – economics is instead concerned with human activity; its task is to analyse a form of human behaviour and its internal rationality. Thus the neo-liberal economic analysis of labour is in terms of the worker not simply as an object of supply and demand, where labour represents a mere cog in the processes of capital and production, but as a subject whose work, conduct, calculation of interests and choices may be assessed at the level of strategies or modes of rationality. The individual's ability to make choices on the allocation of scarce means to alternative ends establishes the individual as an active economic subject, and permits the reorientation of the analysis of *homo economicus* towards the notion of human capital, as that income-producing capacity that inheres in the individual.²⁴ As Colin Gordon aptly summarises: 'It becomes the ambition of neo-liberalism to implicate the individual citizen, as player and partner, into this market game.'²⁵

The dynamics of free economic subjects, who interact within a social field in which irregularities and conflicts surface in the vast space left by the 'de-functionarization of the economic action of plans', necessitate intervention by the state.²⁶ In the first place, where the classical liberal notion of competition as a natural, spontaneous phenomenon gives way to a notion of competition as a principle of formalisation, with its own internal logic and structure, competition becomes an 'historical objective of governmental art', the object of economic regulation.²⁷ This implicates a new set of relations between the individual and the economic order – for example, the individualisation of the wage relationship gives effect to the permeation of

²² Foucault (2008), p 147.

²³ Foucault (2008), p 226.

²⁴ See generally Foucault (2008), pp 222–26.

²⁵ Gordon (1991), p 36.

²⁶ Foucault (2008), p 175.

²⁷ Foucault (2008), p 120.

competition among individuals and within the individual himself.²⁸ Arguably, this corresponds to a generic process of the production of neo-liberal subjectivity, involving the 'incorporation of all subjective potential, the capacity to communicate, to feel, to create, to think, into productive powers for capital'.²⁹ Thus the individual, as a unit of enterprise, is no longer merely the legal subject of rules and interdictions, nor is he merely the political subject who serves the civic common good; the individual is an entrepreneur of himself, whose freedom to act (as his own capital and producer) is the very condition for economic activity. In the second place, this process of individualisation, far from excluding government intervention, requires that government act to implement 'individual social policy', to 'intervene on society so that competitive mechanisms can play a regulatory role at every moment and every point in society'.³⁰ This would then be a much more pervasive interventionism than that implicated in the welfare state model since, by contrast with economic government concerned primarily with economic laws, the neo-liberal model conceptualises a government of society with competition as the regulatory principle. The logic of this social policy is premised upon the assumption of an integral relationship between competition and inequality, while maintaining a vigilant concern for the technologies of individualisation that spur competitive conditions:

The specific role of government is then, on the one hand, to detect 'differences' of status, incomes, education, social insurances, etc., and to set these inequalities to act effectively one against the other. On the other hand, it is a question of amplifying the politics of individualization – of salaries, of careers, of the monitoring of the unemployed – inside each segment, each situation, as a way of inciting competition.³¹

In the third place, as a corollary imperative, the multiplication of enterprises, loosed from an over-arching plan and provided with free rein, gives rise to the multiplication of environmental effects and of sites of friction and disputes, and thus to an increased demand for judicial oversight and arbitration. This judicial intervention operates in parallel with an increasingly formalised governmental intervention, such that justice becomes 'an omnipresent public service'.³²

The Heterogeneity of *Homo Juridicus* and *Homo Economicus*

The interrelationships between the juridical and economic spheres that we have schematically presented above suggest a potentially novel approach to

²⁸ Bourdieu (1998); discussion in Hamann (2009), p 43.

²⁹ Read (2009), p 33.

³⁰ Foucault (2008), p 145.

³¹ Lazzarato (2009), p 119.

³² Foucault (2008), p 176.

the study of subjectivity. We can see at the outset that the concern with population in the thinking of the eighteenth century economists has important ramifications for the conceptualisation of the subject of human rights. Because the population is seen not as a collection of individual subjects bound to the government by an impervious juridical bond but as a set of natural processes in which a multiplicity of interests take effect, the individual within this economic order (*homo economicus*) is more accurately conceived as a subject of interests than a subject of rights. The relationship between the subject of rights and the subject of interests is not necessarily one of opposition; to the extent that legal structures, such as a contract, may be based upon a calculation of interests—in the premise that, ultimately, one obeys a contract because it is in one's interest to do so, since even a sense of obligation has a source in self-interest—the subject of interests can be said to coexist with and subsist the formation of the subject of rights, with the former being irreducible to the latter.³³ On the other hand, the two forms of subjectivity are governed by different logical models. Where the subject of rights is a divided subject, which is to say, divided into one who possesses natural, inalienable rights and one who agrees to relinquish rights, the subject of interests is not required to relinquish his interests, and instead must egoistically pursue such interests, the effect of which is to multiply and intensify the interests as each individual's will harmonises with that of others.³⁴ Thus, each has its own distinct relationship to political power. The contractual form of relationship between the subject of rights and the governing power operates on the principles of certainty, security and the totalising nature of sovereign authority. By contrast, the subject of interests operates in a world of infinite interests and non-foreseeable accidents, and thus he is unable to comprehend the totality of the economic order, even if his actions in pursuing his own advantage positively work to produce the advantage of others.³⁵ Foucault summarises the significance of this essential heterogeneity of subjective forms when he states that: 'Liberalism acquired its modern shape precisely with the formulation of this essential incompatibility between the non-totalizable multiplicity of economic subjects of interests and the totalizing unity of the juridical sovereign.'³⁶

What, then, is the place of human rights within this schema? How does this thesis on the emergence and dominance of the subject of interests help us to understand the prevalence of the human rights discourse in juridical-political thought, and of human rights as one of the most representative products of liberal thinking? It has to be said that even though human rights have traditionally taken on the form of inherently and inalienably held legal claims against the state, they cannot be subsumed by the figure of the subject of rights, at least in the stark and minimalistic way in which it is portrayed by Foucault. This is because human rights presuppose more than a

³³ Foucault (2008), p 274.

³⁴ Foucault (2008), pp 275–76.

³⁵ Foucault (2008), p 277.

³⁶ Foucault (2008), p 282.

contractual, juridical relationship between the individual and the state; they depend upon an ontological theory of man, of human being, and of the manifold ethical, political and economic relations through which he or she derives an identity. If we are to abandon the metaphysical conceptualisation of the subject of rights, which in the end – and certainly in a secularised context – would present the human being as a purely abstract entity, we need to examine how the human being has come to be constructed as a juridical-economic subject. The juridical-economic subject would not be a subject that is somehow jointly bound by both legal and economic relations, as though there might be a shared subjective space in which the legal and economic spheres function complementarily, but rather one that is not entirely constituted by either sets of relations and instead exists in the zone of difference between the two. In this sense, the modern subject of human rights – which is irreducible both to the subject of rights and the subject of interests – exists, as a product of liberal thinking and liberal relations, in the fact of their incompatibility, at the intersection of these competing mechanisms. The inherent incommensurability between *homo juridicus* and *homo economicus* suggests a subjective form entirely subsumed by neither the negative and determined authority of the juridical will nor the unfettered processes organised according to the principle of economic interests. It is here that we find the problem of subjectivity as a question of government, and of the nature of sovereignty, rather than a purely metaphysical problem.

Liberal governmentality is concerned with the rationalisation of this mediatory subjective space, to render intelligible the relationship between subjectivity and sovereignty. As Antonio Negri argues, in talking about the state, ‘one is talking about a complex and stratified ontological dimension which, internally, comprises a series of levels that from time to time have been available for the territorialisation of domination. These segments not only make up the state, but are produced and reproduced in subjectivity itself.’³⁷ Thus the constitution of the state does not depend upon the difference between individual subjects and the sovereign, this difference being the condition for individuals entering into political relations as contractual agents; rather, it is the production of individual and collective subjectivity that gives form to the state, and in turn reproduces subjectivity. The liberal enterprise forces into relief competing sovereign forms. On the one hand, we have the classical juridical-political problematic of sovereignty: to define the state of balance between the sovereign which is at the same time both the principle of unity (of the totality of individual rights) and the principle of their limitation.³⁸ On the other hand, with liberal economics the sovereign is absent – certainly decentred – since the sovereign cannot grasp the totality of the economic sphere. Indeed, the presumption of invisibility at the core of Adam Smith’s theory of the invisible hand, and of its function in providentially guiding the common good, suggests that government cannot intervene in the cause of the common

³⁷ Negri (1989), p 162.

³⁸ Foucault (2008), p 282.

interest precisely because it cannot know the mechanisms required to totalise the individual interests.³⁹ In short, political economy, functioning as a critique of government, attempts to strip the sovereign of essential meaning and disconnect him from political reason, or at least disqualify him, instead leaving him as an administrative sovereign whose capacity for intervention is restricted by the invisibility of economic processes and a lack of mastery over the economic field of the market.

If sovereignty remains plagued by the heterogeneity of the legal and the economic, it is arguably through the concept of civil society, as the 'new reality' or 'new field of reference' for the art of government,⁴⁰ that liberal theory attempts to prevent the functionary fracture of sovereignty. Foucault equates the discourse on civil society with the attempt to answer the question of 'how to govern, according to the rules of right, a space of sovereignty which for good or ill is inhabited by economic subjects'.⁴¹ Ferguson's text, *Essay on the History of Civil Society*, is identified as an exemplary form, among the many variants, of the characterisation and analysis of civil society that articulates a novel, non-juridical set of relations between the social bond and governmental authority. For Ferguson, civil society serves as a correlative technology to liberal governmentality, in the sense that its objective is its own self-limitation. In the first place, civil society is understood as an historical-natural constant, by which is meant that it is the very nature of human nature to be social – there is no separation of human nature from society, and thus no natural state that is not already social. The theoretical and permanent alignment of society with the state of nature excludes the possibility that nature could serve as the ontological source of a subjective humanism; if there is no pre-social state of nature, then there can be no foundation for natural rights that does not already presuppose a communion of individuals, thus an extant network of relations that are somehow organised according to a set of principles, norms or laws. Second, the spontaneity and naturalness of the social bond ensures that individuals are bound to one another through a synthesis of interests rather than by social pact or the renunciation of natural rights, interests which are not necessarily egoistic but instinctual, sentimental, benevolent and sympathetic. However, unlike the market – in which the multiplication of economic interests draws individuals together without the strictures of territory and locality – civil society is communitarian: it is through the community (whatever the level – village, city or nation) that the synthesis of the individual with the whole takes place.⁴² Third, the functioning of political power in civil society is also spontaneous: contrary to the juridical construct

³⁹ Foucault (2008), p 280. On this point, there is an argument that Foucault's emphasis on the invisibility of the economic order runs the risk of obscuring the actual mechanisms, instruments, policies and architectures that produce the epistemological claims to authority being investigated in such a critique: see Tellmann (2009).

⁴⁰ Foucault (2008), p 295.

⁴¹ Foucault (2008), pp 295–96.

⁴² Foucault (2008), pp 300–2.

of the social contract, in which the individual surrenders sovereignty and in turn is granted constitutional and participatory rights, political power in civil society is formed from the very fact of individual differences that produce divisions of labour with respect to the processes of collective decision-making. 'Consequently, the fact of power precedes the right that establishes, justifies, limits, or intensifies it; power already exists before it is regulated, delegated, or legally established', and thus subordination to authority is a necessity of society.⁴³ Fourth, to the extent that the social bond and the necessary correlate of power appear spontaneously, civil society can be said to exist as a stable equilibrium. By the same token, the egoistic pursuit of economic self-interest that is the market always threatens to dissolve this equilibrium, with the consequence that civil society is subject to perpetual transformation – the continual generation of new social relations, new economic structures, and thus new forms of government.⁴⁴

This analysis of civil society avoids the concern with the origin and legitimacy of political power by positing that social relations have always existed and power operates from within the interstices of the social bond. Thus the problem of political power is that of regulating and limiting power 'within a society in which subordination is already at work'.⁴⁵ Liberalism, through its referent of civil society, establishes a rational basis for the unified art of government, notwithstanding the fact that those who are governed remain subjects of rights as well as economic subjects. 'Civil society represents a *de facto* economic bond between men, a kind of uniting primordial power which exists prior to any juridical or political structure.'⁴⁶ Thus liberalism is no more a product of juridical thought than it is a consequence of economic analysis. Because it takes the existence of society rather than the state as its starting point, its concern is with the necessity of government rather than the justification of government as its own end, based on a contractual theory of political association. It is in fact from this theoretical basis – with civil society as given and in historical transformation – that the apparent conflict between civil society and the state is able to emerge and take root as the radical moment of liberal politics. At best, however, such an analysis only serves to reorient the juridical problem of the exercise of power within civil society; ultimately, the question remains: 'With its juridical structure and institutional apparatus, what can the state do and how can it function in relation to something, society, which is already given?'⁴⁷ More precisely, with the new form of rationality – which is that of the governed as economic subjects rather than of the sovereign who identifies the rationality of government with himself – it is the task of liberalism to define the relations and mechanisms by which government is to be modelled so as to give effect to the rational conduct of economic subjects.

⁴³ Foucault (2008), p 304.

⁴⁴ Foucault (2008), pp 305–8.

⁴⁵ Foucault (2008), p 309.

⁴⁶ McNay (2009), p 69.

⁴⁷ Foucault (2008), p 309.

Locating the subject of human rights in the zone of difference between *homo juridicus* and *homo economicus* substantially broadens the analytical field within which to critique the human rights discourse. From a topological view, there is a disavowal of the idea of a fixed and abstract point of reference for the relation of right to sovereignty: that of divine right, natural law or contract. Instead, governmentality has a more pragmatic mode of operation, being concerned with the multiple existential relations through which laws, institutional structures and regulatory practices operate. Thus governmentality interrogates the ways in which rights, freedoms and liberty serve utilitarian and strategic functions that both redefine the role of the state and have the effect of divesting sovereignty of its privileged association with right. Foucault, in fact, explicitly heralds this approach at the beginning of his 1978 lectures, where he states that ‘freedom, both ideology and technique of government, should in fact be understood within the mutations and transformations of technologies of power’, and that ‘freedom is nothing else but the correlative of the deployment of apparatuses of security’.⁴⁸ This is to say that the apparatuses of security utilise, depend upon and propagate freedoms understood not as exemptions or privileges but as ‘the possibility of movement, change of place, and processes of circulation of both people and things’.⁴⁹ These economic freedoms support the apparatuses of security in a formative rather than restrictive way: rather than acting in counterpoint to the legal-political constraints of sovereignty, they contribute to a social reality (of free circulations and economic agents) through which sovereignty may be reconstituted. As Jacques Donzelot comments, ‘there is no freedom that is not produced, that is not to be constructed, and this construction takes place through interventions by the State, not by its mere disengagement’.⁵⁰ Thus the presupposed antagonism between the individual and the state (between individual rights and sovereign right) under the traditional juridical-political conception of rights gives way to a differential, productive relationship governed by, on the one hand, the free play of individual interests, and on the other, the self-limitation of governmental action.

This leads to another observation on the nature of state intervention. If the modern state is characterised by two heterogenous schemas for government – the juridico-deductive and the economic-utilitarian – that do not rule out ‘coexistence, conjunction, or connection’,⁵¹ the function of public law cannot but be affected by the co-application and potential intersection of these approaches, whatever form they may take. Public law is not necessarily rendered irrelevant by the new governmental rationality, but its frame of reference is no longer centred on the sovereign who rules over subjects, or even – as with reason of state – of the state as an end in itself. Rather, public law must attend to a public sphere that is increasingly disparate and pervasive, with institutions and techniques concerned with the

⁴⁸ Foucault (2009), p 48.

⁴⁹ Foucault (2009), pp 48–49.

⁵⁰ Donzelot (2008), p 122.

⁵¹ Foucault (2008), p 42.

maintenance and management of public interests rather than merely interdictory rules to constrain social conduct. 'Law thus, as part of a juridico-economic order within the scope of market rationality, acts to constitute environments.'⁵² Given the importance of human rights within the framework of public law, there is the imperative to understand how the rights discourse reflects or responds to the dynamics of this complex public sphere, a space in which freedom plays a critical role, not merely through imposing juridical limitations on public power, but also in facilitating economic processes (principally under the logic of competition) against the ever-present threat of social disunity.

Human Rights as a Biopolitical Problem

Inevitably, the foregoing analysis has concentrated on the economic dimension of biopolitics as a dominant manifestation of liberal governmentality, reflecting particularly Foucault's preoccupation in the 1979 lectures. However, the concept of biopolitics has also been utilised, notably by Giorgio Agamben, to problematise the nature of sovereignty and the sovereign-subject relation, an approach that critiques the juridico-political paradigm of human rights, albeit from a different perspective. The separation of man and the citizen at the heart of liberalism, and upon which the Marxist critique of human rights is premised, opens up a more extensive problematic in the sovereignty-subjectivity relation. It is already implicit in Rousseau's work that the presence of a people as political subject – which is to say, capable of political expression in the form of a unitary, indivisible force, the general will – is rendered possible only by a fundamental contradiction of sovereignty. Recalling that, for Rousseau, man's natural freedom cannot simply be alienated, which would amount to renouncing one's very self, by the same token, 'if the people are *one* free being, it cannot repudiate its freedom (alienate its sovereignty) without repudiating its own being'.⁵³ The general will thus correlates the necessity of individual being and the possibility of collective being: the will is generalised because it represents the essence of the people as a subject, and it is this essence that renders the people sovereign rather than merely the aggregate of particular individuals. The equation of the people with individual freedom at the heart of Rousseau's social contract thesis betrays a more enduring difficulty than the more commonly recognised threat posed by the distinction between the people and the government. The subjectivity of the people as sovereign cannot but be fractured, indeed multiplied, which in turn undermines the viability of a singular political form of sovereignty. This is because the sovereign people, as the general will, exist within a process of double subjectification: they constitute themselves as subjects in the sense of 'the self-relation of each in the relation of all to the others and as the subjection

⁵² Venn (2010).

⁵³ Ferry and Renaut (1992), p 52.

of all to this relation. But since the relation to self is infinite, the people is also infinitely lacking to, or in excess of itself.⁵⁴

It might be suggested, then, that both liberalism and Marxism respond to, albeit from opposed poles – and thus are unthinkable without – the problem of constituting sovereignty from the starting point of the irreducibility of individual and collective subjectivity. In this sense, the division of subjectivity proposed by the separation of man and citizen returns political theory (conceived as the thinking of the relation of constituting power to constituted power) to its original ontological domain. The modern political question may be none other than the question of the possibility of conceptualising a non-subjective sovereignty or even a non-sovereign politics, as Nancy hypothesises.⁵⁵ Whatever the case, human rights may be seen as the ultimate consequence of the sovereign contradiction, since the subjective relation inherent in the assumption of human freedom is inscribed into the juridical-political site of sovereignty. We may argue here, along with Giorgio Agamben,⁵⁶ that the supplanting of the man–citizen division with that between naked or bare life and social-political life, by which politics becomes ‘biopolitics’, is precisely what is at stake in the appearance and hegemony of human rights in modern politics, and what remains as both the foundation and limitation of the nation-state. The very fiction of the nation-state, that naked human life ‘comes into being immediately as *nation*, so that there may not be any difference between the two moments’, thus that naked life is the foundation of the state’s sovereignty,⁵⁷ supports the claim of human rights to invest the citizen as political subject with life-preserving, inalienable properties. Human rights reify the identification of political life in human life, of the citizen that is man, and of the state that is the people, only by reiterating the fiction that allows bare life to serve simultaneously as the foundation and vanishing point of the nation-state. This biopolitical presupposition of the human rights discourse permits the individual human being to be categorised as the true sovereign-subject, with all the contradiction inherent in the fact that political sovereignty is fundamentally tied to the divisibility of subjectivity and thus the impossibility of a subject that is not immediately reducible to its own self-relation.

The link between liberal governmentality and biopolitics that is developed through the 1978–79 lectures, while certainly limited in scope by Foucault’s selective historiography, nonetheless suggests a theoretical perspective within which to understand the emergence of human rights. It is feasible to surmise that human rights have played a decisive role in the rationalisation of the exercise of government associated with liberalism in its concern with population and human life. In this sense, understanding the subject of human rights as one of the principal products of liberal

⁵⁴ Nancy (2007), pp 100–1.

⁵⁵ Nancy (2007), p 101

⁵⁶ See Agamben (1998, 2000).

⁵⁷ Agamben (2000), p 21.

governmental rationality entails coming to terms with the historical processes by which the politicisation and juridification of human life have come to dominate as political technologies of the modern state. At the threshold of this interrogation lies the fundamental question of whether it is possible for the human being to have a political presence without being subsumed by the citizen as a juridico-political subject, a question with which liberal thought has long struggled. We have in mind here the figure of the refugee, which Agamben,⁵⁸ and Arendt⁵⁹ before him, held up as the quintessential bearer of human rights, in the sense that in its extreme mode the refugee eschews all other forms of social identity while demanding the protection of rights precisely by virtue of his bare humanity, a paradoxical situation in which he is simultaneously subject to and outside of the state's jurisdiction. But there are other manifestations of the current urgency of this question. The juridical formulation of social and economic rights, with all the inherent problems of definition and justiciability, always threatens to unveil the historically contingent structure of human rights as the rights of the civilian subject. Similarly, the movement and institutions of humanitarianism, maintaining a presence especially where armed conflict has rendered the rule of law at its weakest, potentially come into conflict with the principle of sovereign right upon which the nation-state claims to be founded, and thus with the constitutive rights of the political subject.

References

- Giorgio Agamben (1998) 'Biopolitics and the Rights of Man', in *Homo Sacer: Sovereign Power and Bare Life*, Stanford University Press, pp 126–35.
- Giorgio Agamben (2000) *Means Without End: Notes on Politics*, University of Minnesota Press.
- Hannah Arendt (1975a) 'The Decline of the Nation-State and the End of the Rights of Man', in H. Arendt, *The Origins of Totalitarianism*, Harcourt, Brace & Company, pp. 267–302.
- Pierre Bourdieu (1998) 'The Essence of Neoliberalism', *Le Monde diplomatique*, December, <http://mondediplo.com/1998/12/08bourdieu>.
- Gilles Deleuze (1995) *Negotiations 1972–1990*, Columbia University Press.
- Jacques Donzelot (2008) 'Michel Foucault and Liberal Intelligence' 37(1) *Economy and Society* 115.
- Luc Ferry and Alain Renaut (1992) *From the Rights of Man to the Republican Idea*, University of Chicago Press.
- Michel Foucault (2003) *Society Must Be Defended: Lectures at the Collège De France, 1975–1976*, Allen Lane, The Penguin Press.
- Michel Foucault (2008) *The Birth of Biopolitics: Lectures at the Collège De France, 1978–1979*, Palgrave Macmillan.
- Michel Foucault (2009) *Security, Territory, Population: Lectures at the Collège De France, 1977–1978*, Palgrave Macmillan.

⁵⁸ See Agamben (1998).

⁵⁹ See Arendt (1975).

- Cloin Gordon (2001) 'Governmental Rationality: And Introduction' in Colin Gordon, Graham Burchell and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality*, Harvester Wheatsheaf.
- Trent H Hamann (2009) 'Neoliberalism, Governmentality, and Ethics' 6 *Foucault Studies* 37.
- Béatrice Han (2002) *Foucault's Critical Project: Between the Transcendental and the Historical*, Stanford University Press.
- Maurizio Lazzarato (2009) 'Neoliberalism in Action: Inequality, Insecurity and the Reconstitution of the Social' 26(6) *Theory, Culture & Society* 109.
- Lois McNay (2009) 'Self as Enterprise: Dilemmas of Control and Resistance in Foucault's *The Birth of Biopolitics*' 26(6) *Theory, Culture & Society* 55.
- Jean-Luc Nancy (2007) *The Creation of the World or Globalization*, State University of New York Press.
- Antonio Negri (1989) *The Politics of Subversion: A Manifesto for the Twenty-First Century*, Polity Press.
- Jason Read (2009) 'A Genealogy of Homo-Economicus: Neoliberalism and the Production of Subjectivity' 6 *Foucault Studies* 25.
- Ute Tellmann (2009) 'Foucault and the Invisible Economy' 6 *Foucault Studies* 5.
- Couze Venn (2010) 'Foucault's Analysis of Neo-Liberalism: Implications for the Present', *Theory Culture & Society Online*, www.sagepub.net/tcs/?page=couzeneolib.