CITIZENSHIP AND SECURITY

The constitution of political being

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Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2013
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data

Typeset in Bembo
by Swales & Willis Ltd, Exeter, Devon

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TWO REGIMES OF RIGHTS?[1]

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It is often assumed – tacitly or otherwise – that the modern problem of rights originated in a split between the 'rights of man' and 'of citizen'. Since 1789, we often hear, two regimes of rights have struggled for hegemony. The first regime constitutes rights as inalienable and allocates them to individuals by virtue of being human. Whether it derives its justification from the tradition of 'natural law' or 'human rights' the emphasis is that rights such as the right to life, liberty and security of person (art. 3) and to social security (arts. 22 and 25) belong to all humans by virtue of their being human (United Nations 1948). The second regime constitutes rights as membership in a state and deriving protection and security from that membership. These rights are civil in the sense that they arise from and give expression to the constitutional authority of the state and its people. These two regimes conflict, we are told, because each identifies a different source from which to draw its force. This is also where the problem becomes more vexed. If the state is the source of authority and legitimacy that produces the force of law protecting the rights of the citizen, then what is the source of authority and legitimacy for the rights of man as human? There is, of course, none and that is why the idea of 'natural rights' or 'human rights' is nonsense. This is what Jeremy Bentham said famously: 'Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, – nonsense upon stilts' (Bentham 1793). But it was Edmund Burke who made this argument most forcefully and as famously by saying that he would prefer the rights of an Englishman to the rights of man: 'In the famous law of the 3rd of Charles I, called the Petition of Right, the parliament says to the king, "Your subjects have inherited this freedom," claiming their franchises not on abstract principles "as the rights of men," but as the rights of Englishmen, and as a patrimony derived from their forefathers' (Burke 2009: para. 53).

It is also often assumed that the conflict between the two reached its climax in 1948 with the Universal Declaration of Human Rights by the United Nations.

When Hannah Arendt (1951) responded critically to the declaration she followed the argument of Bentham and Burke. The essence of her objection was that any rights that do not draw their force from state authority are not enforceable and remain as ideological shibboleths. Thus any rights named as human rights or natural rights remain paradoxical precisely because these rights need the force of (state) law for effective and practical enforcement – in other words, the existence of civil rights. The debates over the relationship between national and international laws often featured this paradox since the 1780s, accelerated during, before and after the First World War, and intensified since the Universal Declaration Human Rights to which, of course, Arendt was responding (Koskenniemi 2001).

The reason I particularly mention Arendt here is not only that her argument is rather well known if not famous, at least amongst scholars of international studies. But more recently philosophers Jean-François Lyotard (1993), Jacques Derrida (2001), Giorgio Agamben (1995), Etienne Balibar (1994, 2007), Jacques Rancière (2004) and Slavoj Žižek (2005), each in their own way, adopted Arendt's argument (and by implication that of Burke if not Bentham). Whatever disagreements with Arendt (and with each other for that matter) they might have, each has essentially endorsed the existence of two regimes of rights, or 'Arendt's paradox'.

This chapter has three aims. First, it briefly presents Arendt's argument and argues that it is ambiguous enough that it can lead to philosophical, historical and sociological disagreements. So any ostensible consensus about the essence of her argument should be treated sceptically. Second, it questions a philosophical interpretation of human rights by briefly illustrating how these two rights have always been entangled and how they further converged over the last few decades. It also briefly discusses prominent historical and sociological arguments to that effect. Third, it questions historical and sociological arguments which still (even if only implicitly) accept Arendt's thesis. It then discusses new scholarship on international law from a historical sociology perspective drawing on Pierre Bourdieu. This body of scholarship focuses on rights as a legal field.

Admittedly, this is an ambitious agenda for a chapter but my aim here is to outline a proposal for future work and draw attention to this body of scholarship on international law and how it might (or might not) show the way out of Arendt's paradox. So the chapter provides a focus on the ostensible divergence of the two regimes of rights, documents their convergence, and then illustrates how we might study rights as a regime. It presents both historical and sociological arguments against the divergence and convergence theses and illustrates how an international regime is constituted by various criss-crossing fields, involving judges, jurists, lawyers, activists, academics, and advisors, who, by accumulating different forms of capital, are becoming influential social agents of this regime.

This chapter is a plea to retire Arendt's argument. While the Bentham–Burke–Arendt objection is of historical interest, juridico-legal developments since 1948 have almost completely rendered it obsolete. To put it bluntly, there are not two regimes of rights but one (albeit incipient) regime with conflicting and competing fields – legal as well as cultural. Since 1948, but especially since 1989, these two

regimes have now converged through international covenants, various regional charters of 'human' rights, and their incorporations into national laws to the extent that it has become impossible to practically distinguish between 'human' and 'citizenship' rights, though analytically the distinction persists. The aim of this chapter is to explore how to investigate this new regime of rights with complex and interlocking fields of law and politics.

The rights of man and of citizen: the divergence

It is a matter of disagreement what was actually meant by the distinction between the rights of man and of citizen when it was declared in 1789. It is even more contentious to think of this moment as the birth of human rights. The distinction between 'the Rights of Man and of the Citizen' is at best ambiguous and gives rise to various if not conflicting interpretations. Does it declare 'man' belonging to an international law and 'citizen' a national one? Does it declare that 'citizen' possesses inalienable rights precisely because he is 'man'? Does it declare that the rights of the 'citizen' are 'political' and the rights of man 'human'? All these possibilities and more have been raised yet always with the assumption, or at least giving implicit or explicit credence to the assumption, that we are dealing with two orders if not two regimes of rights. The paradox is that without the force of (state) law human rights remain unenforceable and yet the most vulnerable are those without the protection of the state. To put it differently, to benefit from being human one needs first to be a citizen. The question then turns on how to solve this paradox.

Much has been said and written about human rights since the 1940s. The sixtieth anniversary of the Universal Declaration of Human Rights (which came into force in 1948) was commemorated with appropriate attention in 2007 since it is the main declaration that codifies the concept and its attendant juridico-legal practices. Some argue that human rights have now become not only a practical (and legal force) but also an analytical tool for addressing injustices around the world (Douzinas 2000). Some even go as far as to argue that the struggle for human rights is the defining struggle of our times, especially since the collapse of communist and socialist regimes in 1989 (Douzinas 2007). Others argue that human rights are the extension of the imperialist and colonialist projects of the nineteenth century through a new empire of law (Baxi 2006; Twining 2009; Williams 2010).

Clearly, human rights are difficult to define but this is not for lack of trying. The massive literature that has sprung up about it attests to that. The British Library lists as of October 2011 more than 6,600 books on the subject. The difficulty is that it is a contested site of social and political struggle. What is at stake is not only its definition but also its codification, implementation and enforcement. These struggles are not only fought in political and legal thought but also in courts, commissions, committees and numerous other juridico-legal practices that have sprung and spawned since 1948. The sites where human rights are struggled over, and the interconnections amongst these sites, are very complex.

If we start with the basic definition of human rights as those rights that humans possess by virtue of being human, these rights are clearly *passive* and *inert* rights as opposed to citizenship rights, which are ostensibly *active* and *acquired*. I say ostensibly because citizenship as active and acquired rights does not always work with every conception of citizenship. Those views that hold rather a thick conception of citizenship, where rights and obligations reinforce each other, subscribe to an active idea of rights where rights appear as outcomes of struggles, practices and claims. By contrast, for those who hold a thin conception of citizenship all it requires to be citizens indeed appears to be passive where citizens exercise or even just simply 'hold' the rights that are given to them. But even for a thin conception of citizenship there are basic obligations such as paying taxes, which might well require more than a tacit contract with the state.

But leaving that aside for a moment, let us assume that the basic definition of human rights is those rights that humans possess by virtue of being human. Take, for example, the definition offered by the United Nations. It says:

> Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.
>
> *(United Nations 2012b)*

It continues:

> Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.
>
> *(United Nations 2012b)*

You can already spot the paradox here: while rights are described as 'human' both their protectors and violators are 'governments'. Human rights practices became much more complex than the declaration with the emergence of transnational and global non-governmental organizations that play a mediating role between people and governments; nevertheless the paradox remains.

It is this paradox that exercised Arendt. Her argument is quite well known and is beyond the scope of this chapter (Isin 2012). But let me emphasize that *The Origins of Totalitarianism* is based on empirical investigations on statelessness and refugees between the wars and, when it was published in 1951, it explicitly took a stand against the declaration of the Universal Human Rights. This was not because Arendt did not endorse 'human rights'. Rather, she was not convinced that human rights

could be protected without citizenship of nation-states (Söllner 2004). Arguably, for its most recent philosophical readership, this rigorous empirical aspect of Arendt's argument has been lost and has led to various abstractions of its arguments (Lyotard 1993; Balibar 1994; Agamben 1995; Derrida 2001; Rancière 2004; Žižek 2005).

Arendt thought that the debate over the rights of minorities between the two world wars showed

> in plain language what until then had been only implied in the working system of nation-states, namely, that only nationals could be citizens, only people of the same national origin could enjoy the protection of legal institutions, that persons of different nationality needed some law of exception until or unless they were completely assimilated and divorced from their origin.
>
> *(Arendt 1951: 275)*

For her,

> if a human being loses his political status, he should, according to the implications of the inborn and inalienable rights of man, come under exactly the situation for which the declarations of such general rights provided. Actually the opposite is the case. It seems that a man who is nothing but a man has lost the very qualities which make it possible for other people to treat him as fellow-man.
>
> *(Arendt 1951: 300)*

Arendt traces the emergence of the question of minorities in Europe and raises questions about the very possibility of human rights, or, rather, the very possibility of founding a politics on human rights. She argues that minority treaties by which 'stateless' peoples were to be protected in the early twentieth century were themselves a product of the logic of nationality and racialized conceptions of the homogeneity of population and rootedness in the soil that undergirded it (Arendt 1951: 270). The status of statelessness could only make sense under conditions where freedom was associated with emancipation symbolized by a nation corresponding to a state. For dominant groups in European states the question of minorities dangerously and rapidly converged on assimilation or liquidation (Arendt 1951: 270, 271). She interpreted this tragic process as the conquest of the state by the nation, whereby the state was transformed from an institution of law into one of nation (Arendt 1951: 273). She thus arrived at the famous conclusion that:

> No paradox of contemporary politics is filled with a more poignant irony than the discrepancy between the efforts of well-meaning idealists who stubbornly insist on regarding as 'inalienable' those human rights, which are enjoyed only by citizens of the most prosperous and civilized countries, and the situation of the rightless themselves.
>
> *(Arendt 1951: 275)*

For Arendt it was impossible to bring any of these rightless people under state law precisely because the state produced the conditions of statelessness, and hence the question of minorities, refugees and the rightless, in the first place. And all efforts to define their rights as inalienable human rights proved ineffective.

What is really important here is that Arendt locates the origins of this paradox in the very Declaration of the Rights of Man and of Citizen. While on the one hand the source of the rights of man was 'man' himself (as opposed to God or tradition), the guarantor of such rights could only be a people: 'man hardly appeared as a completely isolated being who carried his dignity within himself without reference to some large encompassing order, when he disappeared again into a member of a people' (Arendt 1951: 279). Man was man only insofar as he was a member of a people and being a people was increasingly defined as being rooted in soil and with a state. 'The whole question of human rights, therefore, quickly and inextricably blended with the question of national emancipation; only the emancipated sovereignty of the people, of one's own people, seemed to be able to insure them' (Arendt 1951: 291).

The significance of her argument, and its poignancy then as now, is that human rights proved ineffective not because of ill will or intention but because of the logic of nationality. Her argument was not, as Rancière (2004) suggests, a revival of citizenship rights (civil, political and social) ensconced in nation-states but to call into question the logic of nationality that undergirded citizenship and made the denial of those rights to certain groups possible (Schaap 2010). Arendt's reference to Burke, which troubles Rancière, was meant to illustrate the prescience of Burke's insight rather than to argue in defence of his conservatism or the return to tradition. On the contrary, as her argument about the definition of citizenship as 'a right to have rights' makes clear, Arendt, like Rancière, felt that 'something much more fundamental than freedom and justice' is at stake when humans are deprived of the right to have rights; that is to say, the right to speech, presence and action, in effect, the right to become political (Arendt 1951: 296).

When Arendt speaks about the dark background of mere givenness she seems to critique the logic of nationality that takes the mere existence of humans and turns it into the foundations of a nation. By contrast, the foundation of a state (not a nation or nation-state) for Arendt would militate against mere existence with what she calls human artifice: the state as a result of common human action (Arendt 1951: 300). When people are forced out of the political, they lose 'all those parts of the world and those aspects of human existence' that are the product of human action (Arendt 1951: 300, 301). 'This mere existence, that is all that which is mysteriously given us by birth and which includes our bodies and the talents of our minds,' cannot justify equality because 'We are not born equal; [but] we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights' (Arendt 1951: 301). Equality is not given, but a product of human action – negotiation, struggle, compromise, defeat, and victory. In fact, recalling Rancière here, it is precisely when one enacts 'the rights that one does not have' that one becomes a political subject. As Rancière suggests, 'These rights are theirs when they can do something with them to construct a dissensus against the denial

of rights they suffer' (Rancière 2004: 305). Arguably, and historically, citizenship is always a social struggle. Groups excluded from legal definitions of citizenship entitlement (slaves, women, the poor, etc.) have always made their claims to citizenship first by acting as political subjects and demanding 'the rights that they do not have'. Only by acting as citizens in this way has the legal status of citizenship broadened its boundaries to 'new subjects' (Nyers 2003: 1078).

So for Arendt the declarations of rights such as the American Declaration of Independence (1776) and The Declaration of the Universal Rights of Man and Citizen (1789) were fundamentally different from the United Nations Universal Declaration of Human Rights (1948). Arendt thought that the 1948 declaration created an impossible aim by creating the category 'human' and making it as the bearer of rights (Isin and Rygiel 2007). The question that concerns me here is not so much whether Arendt was right then but how to read the intervening period between 1948 and, say, 1989. Although I share Arendt's view that the state is a social artifice and that equality is produced rather than given, the point now I want to make is that since 1948 historical and sociological studies have challenged Arendt's objection while philosophers have generally endorsed it. It seems to me the work that we need to do is not to engage Arendt in the abstract but respond to her claims by historical and sociological investigations of juridico-legal developments since 1948 and especially since 1989. For some this a simple enough point; but I feel it needs making.

The rights of human and of citizen: the convergence

Much has changed since 1948 and we now need to understand human rights practices that have proliferated. There are different ways of giving an account of the proliferation of human rights practices. There have been influential historical and sociological accounts that I will shortly discuss. But even before that an overview indicates how things have changed. For those who are less familiar with the developments, consider the following. In 1966 the Universal Declaration of Human Rights was followed by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both of which came into force in 1976 since it took that much time to secure the signatures of the UN's constituent states. Also in 1966 the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) came into effect. In 1979 the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), in 1984 the Convention against Torture and other Cruel, Inhuman, or degrading Treatment or Punishment (CAT) and in 1989 the Convention on the Rights of the Child (CRC) came into effect. By saying 'came into effect' we not only recognize the initial declarations themselves, which sometimes take long and hard routes, but also their ratification by states, which is often equally long and hard (Joseph *et al.* 2004). Frequently, states ratify treaties with reservations which create ambiguities and flexibilities for their implementation (United Nations 2012a).

In addition, various 'regional' rights covenants have also been adopted. The most prominent of these are the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953), the American Convention for the Protection of Human Rights (1969), and the African Charter on Human and Peoples' Rights (1981).

By 2004, ICCPR was ratified by 78 per cent, ICESCR by 77 per cent, CERD by 87 per cent, CEDAW by 91 per cent, CAT by 70 per cent and CRC by 99 per cent of all member states of the United Nations (United Nations 2012a). There were also two so-called optional protocols on civil and political rights. The first of these optional protocols enables individuals to submit complaints to the UN Human Rights Committee. The second protocol prohibits the death penalty. The first is ratified by 54 per cent of states and the second by 26 per cent. Taken together the juridico-legal practices for protecting and promoting human rights have become formidable since 1948; so much so that we can call it an international 'rights regime'. As I shall argue shortly, however, by convergence of these two regimes I mean neither their merger, for it would require also disappearance of jurisdictional boundaries, nor the emergence of a cosmopolitan jurisdiction overseeing a singular juridico-political system of polity. In fact, it is against both images that I will insist on using a complex and interlocking regime of fields to describe rights. But to appreciate this insistence we need to briefly consider not only practices but also the substance of different human rights conventions, covenants and charters.

Now what are the content and substance of rights promoted and protected? These covenants and charters have precipitated a new language of rights in international law. The core idea of the ICCPR, for example, is that it recognizes that its rights 'derive from the inherent dignity of the human person' and that:

> the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.

It also holds states under obligation to create these conditions. ICCPR has 53 articles and it covers just about every civil and political right from security to equality and fairness. ICESCR has 31 articles and covers anything from labour, health and education to family rights.

Taken together, civil and political rights protect the individual from the state and guarantee the ability to participate freely in civil, political and economic spheres. Civil rights include the right to life, liberty, and personal security; the right to equality before the law; the right of protection from arbitrary arrest; the right to the due process of law; the right to a fair trial; and the right to religious freedom and worship. Political rights include the right to speech and expression; the rights to assembly and association; and the right to vote and to political participation. Social and economic rights include the right to a family; the right to education; the right

to health and well-being; the right to work and fair remuneration; the right to form trade unions and free associations; the right to leisure time; and the right to social security. Cultural rights include the right to the benefits of culture; the right to indigenous land, rituals, and shared cultural practices; and the right to speak one's own language and to education in one's native language.

We might now ask: what remains the *substantive* difference between human and citizenship rights? The juridico-legal convergence since 1948 and especially since 1989 makes it impossible now to differentiate human and citizenship rights. The *practical* difference is one of implementation and enforcement: international covenants develop principles and via various mechanisms encourage or coerce states first to sign up to them and then to implement and enforce them. So it seems what happened is that a regime of rights has emerged under the banner 'human rights' and developed various 'rights bundles' by which to govern citizens in sovereign states.

A sceptic following Arendt (or Bentham or Burke for that matter) might well object here. She might say that all these ratifications (although some significant clauses such as on death penalty are still not ratified by prominent states such as the US) indicate that human rights remain ineffective if not unenforceable rights and sovereign states still remain both the sole guarantor and violator of these rights. This is true, but only partially. The proliferation of covenants and charters and their ratifications are only part of the new rights regime and we need to consider practices through which judges, jurists, lawyers, activists, academics, and advisors exert an increasing influence on the way in which international law is effectively both incorporating and precipitated by human rights covenants, charters and ratifications (Koskenniemi 2011). The periodic reports, court cases, public rebuttals, media interventions, demonstrations, and several other practices collectively make up an effective regime constituted by various fields of expertise. In other words, the argument that human rights cannot be reinforced unless sovereign states authorize them, itself became abstract with the emergence of an international human rights regime. Moreover, we have seen over the last decade or so that the dividing line between implementation and non-implementation often concerns broader interests of the states involved than the ostensible force of sovereignty. The following is just one, albeit simplistic, way of illustrating an aspect of how such a regime operates.

The UK was incorporated into this regime with the introduction of the Human Rights Act (HRA) in 2000. The HRA was implemented in full on 2 October 2000. It works in three main ways. First, it places all public authorities (including central and local government, the police and the courts), under a statutory obligation to act compatibly with European Convention on Human Rights (ECHR) rights, and allows a case to be brought in a United Kingdom court or tribunal against a public authority which fails to do so. Second, it requires that all legislation must be read and given effect in a way compatible with the ECHR rights. If it is impossible to do so, the higher courts may formally declare the legislation incompatible with the ECHR (in the case of primary legislation),

or strike it down (in the case of secondary legislation). A formal declaration of incompatibility does not affect the validity, continuing operation or enforcement of the legislation but may trigger the use of a remedial order, a special procedure allowing Ministers to amend the offending provisions or pass fresh amending legislation. A Minister introducing a Bill in Parliament, must make a declaration to the effect that the Bill is, in his or her view, compatible with the ECHR rights, or that, despite his or her inability to make such a declaration, he or she wishes the House to proceed with the Bill. Finally, the HRA requires British courts and tribunals always to take account of the case-law of the European Court of Human Rights (ECtHR) in Strasbourg when determining a question which has arisen in connection with an ECHR right. As all this happens, there are often repetitive and constant discussions as to whether the UK should remain within ECHR or should develop its own Bill of Rights (Wintour and Travis 2011). But these contestations and postures are part of the competitive field of struggles that make up the emerging regime of rights.

A case concerning voting rights for prisoners is a good illustration. In 2005, the ECtHR ruled that the UK violated the convention by denying a prisoner the right to vote (ECtHR 2005). The UK government immediately appealed to overturn this decision. In 2011 it lost its final appeal against giving prisoners the right to vote following a ruling by the ECtHR. The court issued a statement and said: 'The court now gives the UK government six months from 11 April 2011 to introduce legislative proposals to bring the disputed law in line with the [European Human Rights] Convention' (Quinn 2011). In addition, the court dismissed the UK government's request for an appeal hearing and decreed its original verdict final. This case, amongst other things, is of interest for a good reason. Of course, the right to vote is a political right and a sovereign state would rather maintain its sovereignty over whether certain citizens – in this case prisoners – should be granted this right. The franchise is one of the cherished rights and obligations of sovereign power and has an illustrious history. But is it a human right? In theory, if we take the definition of human rights as rights that are due by virtue of being human, of course, it is not. Yet, the point here is exactly that actual practices make it increasingly difficult to maintain that position as many rights that used to be categorized as citizenship rights, such as voting, have become incorporated into an international rights regime. Second, if this was only about voting rights for prisoners the UK government would probably quietly ignore it without much fuss. But what is at stake is the mode and degree of incorporation of UK legal and juridical practices into that of the human rights regime.

As the case in ECtHR was being considered, in 2008, the UN Committee on Human Rights issued a periodic report on the progress of UK's incorporation and observance of human rights. It stated that it was 'concerned that the State party [UK] has continued its practice of detaining large numbers of asylum-seekers, including children' (United Nations 2008a: para. 21). Again, the treatment and governing of refugees is amongst the most significant of sovereign prerogatives. The report continued:

> the Committee reiterates that it considers unacceptable any detention of asylum-seekers in prisons and is concerned that while most asylum-seekers are detained in immigration centres, a small minority of them continue to be held in prisons, allegedly for reasons of security and control.

Moreover, the Committee was

> concerned that some asylum-seekers do not have early access to legal representation and are thus likely to be unaware of their right to make a bail application which is no longer automatic since the enactment of the Nationality, Immigration and Asylum Act 2002.

Finally, 'the Committee [was] also concerned by the failure to keep statistics on persons subject to deportation who are removed from Northern Ireland to Great Britain, as well as their temporary detention in police cells. (arts. 9, 10, 12 and 24)'. The report concluded that

> the State party should review its detention policy with regard to asylum-seekers, especially children. It should take immediate and effective measures to ensure that all asylum-seekers who are detained pending deportation are held in centres specifically designed for that purpose, should consider alternatives to detention, and should end the detention of asylum-seekers in prisons. It should also ensure that asylum-seekers have full access to early and free legal representation so that their rights under the Covenant receive full protection. It should provide appropriate detention facilities in Northern Ireland for persons facing deportation.
>
> *(United Nations 2008a: para. 21)*

These two cases illustrate, first, how the substantive and practical convergence between what used to be called citizenship rights and human rights is happening, and, second, how this is precipitated by and giving rise to the emergence of a regime of rights constituting various fields of practice in international law and politics. The first point has been the subject of historical and sociological studies. Amongst historical studies Samuel Moyn's *The Last Utopia* (2010) stands out for its critique of historicist claims about human rights. Moyn is critical of histories tracing human rights to Greek, Jewish and other origins. He insists that the invention of human rights is much more recent, in fact as recent as the 1970s, and arises from the failures of both nationalist and internationalist utopias. As the last utopia, it is telling its own stories as immemorial just as the Hagiography of the Church, or any establishment for that matter, had done. But Moyn calls his own the true history of human rights by endorsing Arendt's argument that human rights required the enforcement of the nation-state. Moyn accepts that human rights became a politics of suffering abroad and citizenship rights functioned within 'domestic' politics (Moyn 2010: 12). Nonetheless, Moyn illustrates that internationalism is a late nineteenth- and early twentieth-century development. Despite the talk of universal

rights there never was a talk about universalizing human rights beyond the state. This development began in the 1940s and did not acquire the sufficient force that we recognize today until the 1970s. What has been happening since the 1970s can be effectively described as the emergence of international law. This is an important analysis that not only shows the recency of human rights within international law but also illustrates how the constitution of a field depends on eternalizing its own object, in this case human rights (e.g., Ishay 2004, 2007; Hunt 2007). Yet, after providing an insightful and incisive historical account of the constitution of human rights in international law, Moyn reverts to Arendt's objection. He concludes that indeed Arendt was right in arguing for the primacy of the state in enforcing and upholding not only the right of the citizen but also of man (Moyn 2010: 12, 31, 42). Moyn comes close to but does not consider the second point above on the convergence of human and citizenship rights into a regime.

Two prominent sociological studies have also made the first point about the convergence of human rights. Yasemin Soysal drew our attention to this when she argued that rights provided, sanctioned and enforced by the nation-state were too limiting to understand the status of immigrants and their de facto citizen status in liberal democracies and she named the emerging citizenship regime as postnational (Soysal 1994). She argued that postnational citizenship

> reflects a different logic and praxis: what were previously defined as national rights become entitlements legitimized on the basis of personhood. The normative framework for, and legitimacy of, this model derive from transnational discourse and structures celebrating human rights as a world-level organizing principle.
>
> *(Soysal 1994: 3)*

For Soysal,

> the incorporation of guestworkers in Europe reveals a shift in the major organizing principle of membership in contemporary polities: the logic of personhood supersedes the logic of national citizenship. This trend is informed by a dialectical tension between national citizenship and universal human rights.
>
> *(Soysal 1994: 164)*

This is precisely the difference between when Arendt wrote about human rights and when Soysal offered her seminal analysis of the dialectical tension between two regimes of rights. But if we suppose, as Soysal does, that somehow human rights are superseding citizenship, it becomes necessary to revert back to the assumption that indeed there are two regimes of rights rather than one. Bryan Turner, too, has drawn attention to the slippage between human rights and citizenship rights but still assuming the existence of two regimes (Turner 2009). Kate Nash considers this emerging regime as an 'actually existing cosmopolitan citizenship', which

recognizes its practical existence (Nash 2009a: 1072). Nash uses the term 'intermestic' to indicate that a sharp distinction can no longer be maintained between international and domestic law and jurisdiction regarding how human rights are practised. She says that human rights are not just international or transnational. Rather, 'human rights are intermestic: legal claims to human rights which draw on international law in national courts disrupt and sometimes re-configure jurisdictional borders between the international and the domestic from within states' (Nash 2009b: 15). Although useful in pointing out the entanglement of these two regimes, to conceive it as 'intermestic' is, I think, misleading since it makes it appear as though the entanglement is merely jurisdictional whereas, arguably, it is also substantive. Clearly, historical, sociological and political studies have identified the convergence or entanglement of the two regimes of rights – of man and of citizen – but are searching for ways of naming, recognizing and investigating it.

Rights: regimes, fields and capital

So far I have used words such as 'regime' and 'field' to indicate the scope of human rights as transnational or international. I will now elaborate both these concepts as regards rights. Of particular note is the new body of scholarship concerning the emergence of transnational or international law as fields of practice which deploys concepts developed by Bourdieu to investigate academic, bureaucratic, cultural and artistic fields (Bourdieu 1987, 1989, 1990, 1996). Bourdieu used concepts of field and capital together. This is because the value of capital depends on the existence of a field in which it can be invested. A field is constituted by social agents with possession of different forms of capital. The overall volume and composition of capital determines the position that an agent occupies in a field. A form of capital pertains to a field both as an instrument and a stake of struggle. It allows agents who possess it to exercise power and influence in the field under consideration (Bourdieu and Wacquant 1992: 98). For Bourdieu,

> a form of capital does not exist except in relation to a field. It confers power over the field, over the materialized or embodied instruments of production or reproduction whose distribution constitutes the very structure of the field, and over the regularities and the rules which define the ordinary functioning of the field, and thereby over the profits engendered in it.
>
> *(Bourdieu and Wacquant 1992: 101)*

Bourdieu insists that drawing the boundaries of a field is always difficult because its limits are always at stake in the field itself (Bourdieu and Wacquant 1992: 100). Although field and capital proved useful analytical concepts, as we will see shortly, they also resulted in rather too tightly drawn limits or boundaries in and through which agents exercise power. For this reason I use 'regime' in the sense that Foucault used 'regime of truth' or 'regime of power' to indicate the ways in which things become sayable and visible. For Foucault,

> each society has its regime of truth, its 'general politics' of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true.
>
> *(Foucault 1980: 131)*

The regime of truth enables fields of expertise to traverse each other and social agents to move across them. In this way, a regime of rights, together with its fields and forms of capital, can constitute the starting point for investigation of the emergence of an international regime of rights.

It is often said that Bourdieu rarely concerned himself with the 'international' and most if not all the fields he investigated were 'national'. More recently, however, a number of scholars have begun deploying his concepts to international fields with effective results (Bigo and Guild 2005; Bigo *et al.* 2010; Bigo 2011). More specifically, the investigations by Dezalay and his colleagues on the emergence of international law as a professional field have been noteworthy (Dezalay and Sugarman 1995; Dezalay 1998; Dezalay and Garth 2011a). Amongst these Bourdieu-inspired investigations the most relevant for the emergence and functioning of an international regime of rights is the work of Mikael Rask Madsen (2011, 2012). Starting by rejecting conflicts between national and international and between law and politics, Madsen illustrates that investigating human rights as a field allows us to see how its actors (judges, jurists, lawyers, activists, academics, advisors) take up positions in the field across these boundaries. The conflict and competition, he argues, is not between an ostensibly sovereign state and an international or cosmopolitan order but between and amongst these actors struggling to establish their hegemonic grip on the field. The very definition of human rights is deeply contested not because there is a conflict between national and international actors but because it is a stake of struggle amongst competing actors within the field (Madsen 2011: 267–268). Madsen says in fact that 'it is precisely by understanding this tension that it becomes clear why legal actors to a large extent have become the couriers – not to say the brokers – of the national and international law and politics of human rights' (Madsen 2011: 271). The most significant analytical intervention, then, is to shift the analysis from already given entities such as states and courts to actors and agents who constitute not only a field that traverses such entities but also markets in and through which they accumulate and convert forms of capital such as symbolic, cultural, social and economic capital (Dezalay and Garth 2011b). Thus, 'studying international human rights in terms of a relational field, the positioning of the actors vis-à-vis the other main positions of the field (the state, international institutions, academia, civil society, and so on) is a very central issue' (Madsen 2011: 266). Although Madsen does not use 'regime' to indicate the make-up of various fields and their relations, it is a useful term to also indicate the structural homologies between and amongst fields through which actors constitute their positions. By a regime, however, I do not mean a super field with

coherent, consistent and unified rules of operation that, for example, 'global governance regime' implies (Nickel 2002; Madsen 2011: 264). Rather, it is more like a regime of truth as described above through which it becomes possible to mobilize and assemble various distinct fields, such as legal or bureaucratic, in which an actor is active. Unlike Nash (2009b: 32), I think Bourdieu's concept of the field is too specific to describe the emerging 'rights' scene. It makes more analytical sense to define it as the 'rights regime' and investigate its constituent and constituting fields such as the legal, cultural and political. The rights regime traverses these fields. For me, the picture that emerges from decades of juridico-legal and cultural development is one of an international regime of legal experts, advocates and activists who have become dedicated to developing a series of legal, binding and abstract rules through various international instruments and mechanisms and enforcing them through national executive, legislative and deliberative bodies and operating across and traversing various fields.

By approaching rights as an emerging regime rather than two incompatible regimes of man and of citizen and considering it as a dynamically constituted regime of fields, it is possible to argue that the relevant political questions that this regime of rights triggers are not whether human rights or citizenship rights offer best form of protection, whether they are incompatible, and whether human rights distracts us from where the real protection is located (with citizenship). Rather, it raises the question of how such a regime is impacting on possibilities for political action and the enactment of protection. More precisely, it raises three distinct, but interrelated, questions. First, how does the international rights regime actually legitimate, perhaps even reinforce, state-driven citizenship practices and their exclusive hold on population management and government? Second, how does this emerging regime displace social and political struggles over rights with legal battles largely run by an emerging international class of professional legal experts, advocates and courts, which most often operate away from deliberative bodies and contestable sites? Third, by recasting citizenship rights as human rights how does the emerging regime create an increasingly rigid and technocratic image of rights rather than a flexible, negotiable and open conception? That more recently 'fundamental rights' replaced the phrase 'human rights' increases the relevance of this question. Let me briefly elaborate each of these questions.

(i) *Recoding sovereignty*: Does the international regime of rights actually strengthen states? Consider the fact that the protocol of bringing cases to human rights committees or courts in the last instance always resides with individuals and depends on an individualizing rights discourse. Since the international regime of rights is enacted primarily through juridico-legal sites such as courts, tribunals and committees, access to such sites requires exhausting all other avenues, which entails the invoking and legitimizing of state authorities by individuals. The actors of the regime become brokers between these sites and individual claimants. Consider also the fact that by taking states as its equal and its addressee, the international human rights regime reinscribes their legitimacy while appearing to undermine

it. The discourse on rights that the regime produces increasingly constitutes two sovereign bodies as its addressees: the sovereign individual and the sovereign state. Admittedly, the emergence of transnational and non-governmental organizations as intermediating actors has complicated the picture but it has not altered the legal relationship between the sovereign individual and the sovereign state. Still, the sovereign individual is sovereign not only insofar as its sovereignty is recognized by the state but also by virtue of being human. This might sound circular but the language of the international rights regime does not constitute the stateless persons as sovereign individuals (Waas 2008). The covenants do not recognize the rights of others to enter or reside in the territory of a state. It is a matter that each state decides. Only when the other is allowed to enter the territory of a state is she or he then entitled to the rights set out in the covenants (Joseph *et al*. 2004: 352). In its juridico-legal practices, the international rights regime does not address the injustices of the state system of population management, only their consequences. Finally, consider the fact that by disabling individuals from bringing up cases (if they are not directly implicated by these consequences), it effectively renders individuals as isolated individuals and transfers their political subjectivity (as their capacity to relate to others) from them to judges, activists and lawyers. In essence, the international rights regime makes it difficult to defend the rights of others. This sounds paradoxical since human rights appear as though it is entirely about the rights of others. It is impossible to emphasize an injustice without a victim. Yet, the regime has even enshrined the concept of 'human rights defenders' as expertise. Arguably, the practices of the emerging rights regime, in quite complex ways, are recoding both relationship between the sovereign individual and the sovereign state and the regime itself, or more precisely those social agents who are endowed with various forms of capital in its constitutive fields, as arbitrators or brokers in between these two sovereignties.

(ii) *Depoliticizing rights*: Is the international regime of rights displacing a politics of claiming (new) rights with that of enforcing (existing) rights? Through the strong protocol and procedure based system of adjudication, which is one of its defining elements, the international rights regime makes it increasingly difficult to question or alter the rules that make up the regime or to question the substance of their adjudication. The logic of human rights demands the inalienability of human rights in situations where it has already been determined that certain individuals have lost their rights. But as Rancière notes, 'this identification of the subject of the Rights of Man with the subject deprived of any right' leads to 'an actual process of depoliticization' (Rancière 2004: 306). Perhaps counter-intuitively, the power of human rights lies precisely in the fact that there is a gap between the ideal as an abstract concept and their realization in practice. For it is this gap that engenders politics, facilitating the process of becoming political as agents claim the rights they do not have, and in so doing, acquire the first condition necessary for having human rights, that of the right to being political. Human rights become problematic, therefore, because in deciding who has, and does not have, rights from the

outset they 'become humanitarian rights, the rights of those who cannot enact them, the victims of the absolute denial of right' (Rancière 2004: 307). In other words, human rights discourse is used to give rights to individuals determined to be without rights, something akin to a charitable donation such as medicine or clothes, which are donated to the poor, rather than rights that they have a right to define as a way of becoming political (Rancière 2004: 307–308). I wonder though if this is the result of the fact that human rights are abstract rights and that unlike citizenship rights they cannot be enforced as Arendt thought. Rather, is it not due to the fact that the international regime of rights has given over the capacity to act to those social agents who are active in its fields? I wonder, too, if it is that the logic of human rights is such that it renders political subjects ineffective, as Rancière thought, or it is that subjects cannot become political without the mediation of those social agents who are endowed with forms of capital through which they exercise power and influence.

(iii) *Repoliticizing rights*: Is the international regime of human rights moralizing rights while claiming to repoliticize them? This repoliticization occurs through various practices but most prominently with the 'enforcement' of international covenants by the UN's Human Rights Committee (HRC), especially the ICCPR. Article 13.3 addresses the liberty and security of person and occasions many misgivings raised by the HRC. For example, in 2001 in respect of the UK, the Committee noted

> with concern that, as acknowledged by the State party [UK], there is increasing racial tension between asylum-seekers and the host communities, which has led to an increase in racial harassment in those areas and also threatens the well-being of established ethnic minority communities. The Committee also recommends that the State party take the lead by sending out positive messages about asylum-seekers and protecting them from racial harassment.
>
> *(United Nations 2001: para. 15)*

Similarly, in 2003, the Committee expressed concern

> that a disproportionately high number of 'stops and searches' are carried out by the police against members of ethnic or racial minorities. The Committee encourages the State party to implement effectively its decision to ensure that all 'stops and searches' are recorded and to give a copy of the record form to the person concerned. The Committee invites the State party to address this issue in more detail in its next periodic report.
>
> *(United Nations 2003: para. 19)*

More recently, in 2008, the Special Rapporteur was

> alarmed about reports that schoolchildren in Northern Ireland are often targets of abuse or physical attacks owing to their school uniforms or their

> itinerary to school, which are deemed to identify their religious affiliation. The Government has a duty to protect children against such attacks and should adopt the best interests of the child as a paramount consideration in all legislation and policy affecting children throughout its territory. In legislation on offences aggravated by hostility it may be advisable to refer not only to actual religious belief but also to the accused's perception of the religious, social or cultural affiliation of the targeted individual or group.

The Special Rapporteur was told that 'sectarianism is deep-rooted in many minds; apparently even in casual conversations people try to seek indications – such as residence, education or support for a specific football team – about the religious affiliation of their interlocutor'. Finally,

> in terms of prevention, the Special Rapporteur recommends schools to raise awareness, stimulate debate and encourage people to discuss the root causes of sectarian tensions and what role they can play in challenging religious prejudice. In this regard, football clubs throughout the United Kingdom may also have a role to play in dealing with the sectarian behaviour of their own or visiting fans.
>
> *(United Nations 2008b: para. 64)*

Clearly, areas and scope of expertise that used to be considered under the jurisdiction of a sovereign state are increasingly being raised through covenants, charters and their instruments.

These are a few indicative examples of how the administration of covenants inscribes mundane and routine practices by which the HRC, ECtHR and other bodies gradually repoliticize rights via technical and instrumental injunctions. By so doing it establishes a protocol whereby the negotiation of civil and political rights shift from contested and negotiable sites of struggle composed of various social actors (governmental or non-governmental) to juridico-legal fields where the main contestants are the UN and signatory states.

Conclusion

Since 1948 but especially since 1989 there has been a significant convergence of human rights and citizenship rights and hence a convergence of two rights regimes that ostensibly emerged after 1789. This convergence has occurred largely through the proliferation of human rights conventions and the associated juridico-legal practices occurring in the context of international and regional bodies. Classical rights, such as civil, political and social rights, that have operated in and through sovereign states (regime of citizenship rights) have increasingly been incorporated into a regime of rights that operates through various international and regional bodies and actors (a regime of human rights). These bodies exercise authority that has been recognized and endorsed by many states through periodic mechanisms

of ratification. Historical and sociological studies have increasingly emphasized this convergence from various perspectives. Moreover, the image of human rights politics as being played out by national versus international, or domestic versus transnational actors is seriously undermined by the emergence of interlocking legal and cultural fields in which judges, jurists, lawyers, activists, academics, advisors and other actors such as journalists take competitive positions and dispositions and, in doing so, effectively create a regime of rights. The paradox that Arendt identified pointing out the unenforceability of human rights without the force of sovereignty has resolved itself and, in the process, consigned itself to the dustbin of history. While still used as a convention it is doubtful if it is any longer meaningful to describe the converged regime as a regime of merely 'human rights' especially as if it is unrelated to citizenship rights. In relation to the question of protection, this leads us to ask whether it is still sensible to continue interpreting the politics of refuge and migration or human security as a choice over the primacy of citizenship rights versus primacy of human rights.

Perhaps the time has now come to just simply talk about a 'regime of rights'. If the three questions I articulated have any weight, the task then becomes how to investigate the international regime of rights and its constitutive and constituent fields, and with rigorous and robust methods of social and political research to identify emerging political subjects of rights.

Note

[1] This chapter originated as a lecture to the annual conference of the Centre for Research on Socio-Cultural Change (CRESC) in September 2008. Thanks to Tony Bennett and Mike Savage for the invitation. Thanks to Jef Huysmans and Xavier Guillaume for inviting me to the European Consortium of Political Research (ECPR) workshop in Lisbon (April 2009) to discuss a revised version and subsequently inviting me to write this chapter. They also read three successive drafts and provided insightful and critical comments. I am grateful to Leah Bassel for also reading two drafts, for providing valuable insights and for a series of stimulating conversations in Paris and London on the vexed relationship between human rights and citizenship rights. She was also my co-convenor of a workshop on human rights in London entitled 'After Human Rights?' (February 2010) in which the keynotes by Costas Douzinas and Conor Gearty were signifi cant contributions. I am grateful to Kate Nash for providing crucial insights on the final draft. The research leading to these results has received funding from the European Research Council under the European Union's Seventh Framework Programme (FP7/2007-2013) / ERC grant agreement n° 249379.

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