

BOOK REVIEW

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Foucault and the Politics of Rights

Ben Golder

(Stanford University Press, 2015) 246 pages

(including Acknowledgements and Index)

Retail recommended price paperback: US\$24.95 (ISBN: 978-0-8047-9649-1)

Ben Golder's new book on *Foucault and the Politics of Rights* is a landmark text that engages with one of the most intriguing questions regarding Foucault's later work: did his turn to human rights represent a capitulation to the liberal project? Golder's answer is a resounding 'No'. Presenting us with a finely-balanced and careful reading of Foucault's engagement with human rights in the later period of his life, Golder provides a compelling account of how this work was not only consistent with Foucault's earlier critiques of power as well as the liberal subject, but also offers a tactical political strategy that seeks to use human rights to play a different game.¹ The name of this game is the critical counter-conduct of rights that is played according to the rules of both critique and resistance.

Foucault's turn to rights after the mid-1970s has been a source of considerable intellectual jousting. These positions range from the more extreme views that Foucault's account of human rights was either a thoroughly negative one and reflected a rejectionist stand on rights; or that his turn to human rights represented a complete capitulation to the liberal project, a re-embrace of the pre-existing liberal subject and an uncritical acceptance of rights.² More moderate views range from those who consider Foucault's appeal to rights as exposing the contradictory nature of his work, representing an irreconcilable conflict between his philosophy and political activism; or as the least significant part of his repertoire, to be ignored or marginalised, in contrast to his more familiar and relevant work on archaeology as well as the genealogical accounts of discipline and the related forms of modern power. Golder masterfully refutes each of these positions, while simultaneously presenting an argument as to how Foucault's

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1 Ben Golder, *Foucault and the Politics of Rights* (Stanford University Press, 2015) 116.

2 Ibid 18–20.

engagement with rights represents a continuity as well as development in his earlier discussion of rights *as well as* his work on the archaeology and genealogy of regimes of truth and power.

Golder situates Foucault's reading of rights within the context of his earlier critiques of a pre-existing rights-bearing subject as well as his strong critique of sovereign power and articulation of power as constituting and operating at the level of the everyday, in the intimate, in a capillary manner. It is this understanding of power, as disciplinary, biopolitical and governmental, in which Golder presents his readings of Foucault's critical counter-conduct of rights.³ As Golder explains, critical counter-conduct builds on Foucault's earlier scholarship on theorising power and resistance. Rights are simultaneously forms of regulation as well as of resistance, and counter-conduct provides a way in which they may be used to think otherwise, be otherwise, and play a different game. He traces Foucault's conceptions of critique and resistance through the various shifts in his work, from archaeological, to genealogical to the ethical phase. Golder uncovers how the deployment of resistance and critique demonstrates the ways in which power is implicated in the constitution of the subject, regulatory and disciplinary, *as well as* the subject's capacity for self-critique or self-transformation.

In chapter 1, Golder elaborates on critical counter-conduct of rights as seeking out methods of government where power is not understood as oppositional, but as a mode of governing the conduct of others as well as oneself, that is, where the individual is enjoined not only to work upon their relations with others, but also themselves in the exercise of their autonomy. Counter-conduct involves seeking out and challenging or displacing these methods of governing. This is achieved through critique or a critical attitude to destabilise existing governmental arrangements and in the process produce possibilities to be otherwise. As Golder emphasises, critique involves destabilisation that exposes the contingency of social and political arrangements and its effect is to open up the space for alternative possibilities rather than simply adopting a position of opposition and rejection. In Foucault's words, critique must 'be a means for a future or a truth that it will not know nor happen to be'.⁴ Rights are thus a site of counter-investment and appropriation. In the subsequent three chapters, Golder elaborates on the three dimensions of Foucault's understanding and use of rights in the context of specific political claims. These dimensions include their contingency (chapter 2); their ambivalent nature, where they are simultaneously liberatory and subjectifying (chapter 3); and their strategic and tactical political potential (chapter 4).

In chapter 2, Golder focuses on who is the subject of Foucault's rights. He addresses the position that Foucault's turn to rights represented a reintroduction of some sort of liberal humanist subject that was less determined by the effects of power-knowledge, a strong feature of Foucault's work in the early 1970s. He

3 Ibid 20–3, 51–9.

4 Ibid 36–7, quoting Michel Foucault, 'What is Critique?' in Kevin Paul Geiman (ed), *What Is Enlightenment? Eighteenth-Century Answers and Twentieth-Century Questions* (University of California Press, 1996) 382, 383.

engages at length with the claims made to this effect, especially by Eric Paras.⁵ Golder contends that Foucault's attention to the interaction between the self and other as well as ethical self-formation did not represent a break with the formative dimensions of disciplinary power, but were both aspects of Foucault's understanding of subjectivity and power relations. While subjects are formed in and through power relations, this does not suggest that they are determined by these relations – always acted upon and never acting. Instead the subject is constantly in a state of forming itself in accordance with forms that are already given though not static, which is the inescapable condition of the Foucauldian subject.⁶ There is no metaphysical essence that suddenly manifests in Foucault's late subject, but one that is simultaneously achieving as well as unravelling.

Golder proceeds to draw attention to Foucault's use of human rights in some of his own political activism to illustrate their ungroundedness and contingency, that is, how he disavowed the conventional normative grounds of rights. These include Foucault's support for the Polish solidarity movement;⁷ his 'Open letter to Mehdi Bazargan', the Iranian Prime Minister installed after the Iranian revolution, where he restates the importance of the judicial system that affords the accused 'every means of defense and every possible right'⁸ in light of the emerging abuses post-revolution; and his declaration on human rights that he wrote and read at a meeting in Geneva on the creation of an International Committee against Piracy.⁹ Golder illustrates how this late articulation of human rights was not a retreat to liberalism, but a re-imagining of human rights. He argues that Foucault's articulation of humanism during this period was one that served to determine and circumscribe the limits and diminishment of the liberal subject. Foucault was seeking to turn humanism against itself in the name of the excluded and not-so-human as well as the human-to-come.¹⁰ This was again consistent with Foucault's articulation of how the human has been disciplinarily and discursively marked and produced. Human rights remain a space where who and what counts as human continues to play out. The subject in this reading remains a variable product rather than a static one. This contingency of rights claims does not render them as problematic, but as constituting an ethico-political choice that opens up future possibilities.

In chapter 3, Golder reads the ambivalence of Foucault's rights as political instruments – as both emancipatory and regulatory. He specifically addresses Foucault's involvement with and response to LGBT rights advocacy and political community to illustrate the dual function of rights. While they expanded the sphere of action to bring new communities and worlds into being, especially through asserting the right to sexuality, Foucault emphasised how rights also constituted the very subjects and communities that are brought into being, reinscribing them within existing power arrangements and neutralising the political

5 Eric Paras, *Foucault 2.0: Beyond Power and Knowledge* (Other Press, 2006).

6 Golder, above n 1, 73.

7 Ibid 16.

8 Ibid 15, quoting Michel Foucault, 'Open Letter', *Le Nouvel Observateur* (Paris), 14 April 1979, 260–3.

9 Golder, above n 1, 16.

10 Ibid 82.

challenge that they pose. Rights then can enlarge and expand the sphere of action of subjects, disclosing an immanent possibility for rupture, and can serve a crucial political function, as in the context of civil rights struggles in the United States or to address women's sexual subordination in law, where gendered advocacy can produce 'a crack in the wall'.¹¹ But they also serve as a conduit for re-inscribing gendered subjects and communities within existing power arrangements. It is this ambivalent dimension of rights that becomes key and that Foucault seeks to negotiate and work through. Citing Judith Butler, it is a subject that is simultaneously 'crafted and crafting'.¹²

Chapter 4 addresses how, by taking part in the game of human rights in a dialogical manner as well as polemically refusing the game, Foucault was able to play the game of human rights in a way that amounted neither to an acquiescence and reproduction, nor refusal, but was tactical and strategic. This possibility emerges in Foucault's own political use of rights, that is, the space between dialogue and polemics. The tactical and strategic dimension of rights makes use of them in an instrumental way that does not respect their stated function, but appropriates them for different and selective purposes and ends.¹³ Golder interrogates this use of rights in a fascinating and incisive reading of two different political interventions in the context of life and death under biopolitical rule. The first is where Foucault engages with rights talk within the context of the debates on suicide and the right to die. The second is in the context of the abolition of the death penalty where Foucault refuses to engage with rights talk. The tactical use of rights is not intended to satisfy political demands within a liberal system, but articulated to support the larger political goals of rupture and contestation of power relations between types of subjectivity.

Foucault discusses the issue of suicide not in terms of legalising it or in terms of morality, but more as an aesthetic and creative act. He supports the right to die not in terms of how it is to be managed by the state and medical profession, but how it might assume an aesthetic and even 'Bacchanalian' form.¹⁴ He also places this discussion on the right to die in the context of rethinking our lives. In this latter understanding, Foucault's work on self-care and meditating on death in life to bring about self-transformation is the context in which his call for the right to die can be understood. In these ways, Foucault uses the right to die in a different way to play a different game. In contrast, Foucault does not address the issue of the death penalty in terms of individual rights, and Golder suggests that this tactical retreat from using rights is a strategic assessment by Foucault that rights would not advance the cause of abolition of the prison nor result in the unmasking of penal power, which for him was about the disciplinary regime that needed to be exposed and subverted.¹⁵

11 Ibid 99, quoting Catharine MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press, 1989) 242.

12 Golder, above n 1, 111, quoting Judith Butler, 'What Is Critique? An Essay on Foucault's Virtue' in Sara Salih and Judith Butler (eds), *The Judith Butler Reader* (Blackwell, 2004) 301, 320.

13 Golder, above n 1, 117.

14 Ibid 133.

15 Ibid 138–9.

In the final chapter, Golder addresses the influence of Foucault's critical counter-conduct of rights and what it means to reoccupy and re-signify rights. Golder addresses the limits and possibilities of such politics and some of the broader political questions it raises: what is the value of a tactical and critical intervention into rights discourse that avoids the traps of co-option by the hegemonic force of rights? Or as Golder asks in an earlier chapter, '[i]n thinking rights differently and critically, do the possibilities of alternative organizations and figurations of political become fainter?'¹⁶

Golder does not locate Foucault's account of rights within a revisionist history of human rights, such as that set out by Samuel Moyn. Moyn argues that the history of human rights needs to be situated in the 1970s, and is triggered by the failure of the left political utopia of state socialism and revolutionary communism. According to Moyn, human rights become the new outlet for left idealism and a breeding ground for a lost utopia.¹⁷ In this last chapter, Golder argues that this revisionist history does not help us understand Foucault's turn to rights. Foucault sought to bring 'something more' to politics. His critical counter-conduct of rights was neither a rejection nor embrace of rights, but a 'contrary excavation and interrogation' that taps into their contingent and ambiguous dimensions, revealing the 'hidden margin of freedom and possibility' that is, of rights being otherwise.¹⁸ In this respect, Golder also belies the characterisation of Foucault as a negative philosopher, pessimistic and nihilistic, but instead, as presenting ways of being otherwise; and using counter-conduct as the immanent possibility within existing forms of conduct. It is a more revealing framework within which to understand Foucault's politics of rights as contingent artefacts that can be appropriated for contrary uses, and playing a different game.

Foucault and the Politics of Rights is a rigorous and eloquently written book. There are two important respects in which the book left a postcolonial feminist reader such as myself wanting more, and this concerns the broader context and horizontal influences on Foucault. First, Golder's analysis of Foucault's turn to rights is almost entirely read in relation to Foucault's earlier work and considered in contrast to those who have been critical of his turn. While Golder is correct in not locating this work within a rights revisionist history as epitomised in Moyn's account, Foucault's work could nevertheless be aligned with postcolonial critical accounts of human rights and international law that are not attended to in Moyn's work.¹⁹ The very dimensions of contingency, ambivalence and strategy that are part of counter-conduct rights are all characteristic of, and have resonance with,

16 Ibid 3.

17 Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap Press of Harvard University Press, 2010).

18 Golder, above n 1, 153.

19 Moyn's text primarily focuses on human rights in the West and stories that are specific to the West, while the histories of the postcolonial dissident and critical scholar are simply effaced from this narrative: see Vasuki Nesiah, 'The Rise and Fall of the Human Rights Empire' on *Foreign Policy in Focus* (28 June 2012) <http://fpif.org/the_rise_and_fall_of_the_human_rights_empire/>.

postcolonial understandings and deployment of rights.²⁰ In these accounts, the critiques of human rights have partly been directed at deconstructing the ways in which the project of 'Empire' has operated and continues to operate in and through international human rights law, and are tethered centrally to the idea of civilisational maturity and cultural difference. Such interventions not only forcibly eliminated other legal traditions, codifying and entrenching a specific understanding of the world, but also bonded the colonised subject to a specific understanding of the human as well as sovereign power, two central features in Foucault's work.

Thus, while it is crucial to understand Foucault's work as consistent with his early oeuvre as Golder so convincingly argues, it is also productive to put this work in conversation with postcolonial scholarship on rights and international law. Not only does such a connection serve as an effective riposte to Moyn's understanding of human rights as replacing the left's shattered political utopias, it also provides a more expansive basis for reading Foucault's work beyond connecting it to his earlier period. These critical histories help to broaden the map within which to locate Foucault's later work on human rights.

Second, and relatedly, an extraordinary feature of Foucault's work was his interest in, and ability to draw upon and be open to, knowledge paradigms and epistemes outside of the liberal box and Western civilisation, demonstrated precisely at the time that he was turning to rights. For example, during a visit to Japan in 1978, during the period in which Foucault's turn to rights was made, he demonstrated an interest in Zen Buddhism, and commented:

The crisis of Western thought is identical to the end of imperialism. ... There is no philosopher who marks out this period. For it is the end of the era of Western philosophy. Thus, if philosophy of the future exists, it must be born outside of Europe or equally born in consequence of meetings and impacts between Europe and Non-Europe.²¹

Thus while it is important to take on the critiques of Foucault's turn to rights, it is also important to locate his work within a broader discursive space from which Foucault clearly also drew inspiration. Golder discusses for example, Foucault's letter to Mehdi Bazargan, the Iranian Prime Minister appointed after the Iranian revolution, where he refers to human rights.²² Yet it is equally important to point out that Foucault demonstrated a keen interest in the writings of Ali Shari'ati, a leftist, anti-clerical intellectual who became one of the most

20 These narratives have been based primarily on dismantling the central pillars of the Enlightenment, in particular, the sovereign subject and sovereign power, rather than just about replacing shattered leftist utopias, an experience and story that is itself exclusionary of the colonial encounter and the dark side of human rights (and international law more generally) that have been so compellingly revealed in postcolonial accounts: see, eg. Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press, 2005); Antony Anghie, 'International Human Rights Law and a Developing World Perspective' in Scott Sheeran and Sir Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge, 2013) 109; José-Manuel Barreto (ed), *Human Rights from a Third World Perspective: Critique, History and International Law* (Cambridge Scholars Publishing, 2013).

21 Foucault, quoted in Jeremy R Carrette (ed), *Religion and Culture: Michel Foucault* (Manchester University Press, 1999) 113.

22 Golder, above n 1, 15, 18, 75–6.

influential Muslim thinkers during the early phase of the revolution, providing a radical re-reading of Shia identity and activism, and presenting Shia identity as one that actively revolts against injustice and oppression.²³ Foucault's interest in the early phases of the Iranian revolution was influenced both by Shari'ati's ideas of justice to come as well as of revolution that was focused on self-transformation, and hence completely distinct from Western/European notions of revolution. The importance of drawing attention to these influences is that Foucault's work during this period was not only a continuous development of his early thinking, it was deeply influenced by alternative paradigms of thought that clearly influenced his thinking. In other words, it is possible to consider Foucault's work on human rights as not only consistent with his earlier work, but *also* horizontally influenced by these alternative traditions, adding more depth and body to Foucault's turn.

Golder's book is a considered and thoughtful analysis of Foucault's attention to rights and makes clear to the reader that Foucault did not present a theory of rights nor did he seek to prescribe a specific political solution. Foucault's critique was consistently directed against distinct political positions. And his politics rested in critique and the problematisation of politics.²⁴ It is a genealogical politics, which in relation to rights, focuses on how they are constructed and the political effects that they can have, rather than serving as a blueprint for political action. Golder's book is an innovative book and an exemplary contribution to Foucault studies, critical legal theory and human rights scholarship. It is a beautifully crafted and powerfully argued text that brings an important, original dimension to Foucault's work and his approach to human rights.

23 Ali Shari'ati, 'A Discussion of Shahid' in Mehdi Abedi and Gary Legenhausen (eds), *Jihad and Shahadat: Struggle and Martyrdom in Islam* (Institute for Research and Islamic Studies, 1986) 230; Michel Foucault, 'What Are the Iranians Dreaming About?' *Le Nouvel Observateur* (Paris), 16 October 1978, reprinted in Janet Afary and Kevin B Anderson (eds), *Foucault and the Iranian Revolution Gender and the Seductions of Islamism* (University of Chicago Press, 2005) 203–9.

24 Golder, above n 1, 24.