

THE AGENCY PROBLEM FOR DE-COLONIAL INTERNATIONAL LAW STUDIES*

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Abstract

Classical approaches to international law accept States as the basic law agent both as a lawmaker and obligation holder. Limited and functional legal agency of international organizations and relatively passive legal personality of individuals are also gradually mentioned in this context. However, it is clear that neither of these render “human” the active legal agent. The present study elaborates to analyse this very problematic issue using the basic parameters of the de-colonial international studies that seeks to bring a fresh look at social sciences. The primary goal is to handle the problem of how to replace the prevailing understanding based on “individual” with one based on “human”. In this context, it is examined and suggested that epistemologically decolonised social sciences and individuals/humans may well have the potential to bring a different look at, inter alia, international law.

Keywords: International legal personality, agency problem in social sciences, decolonisation, human

SÖMÜRGESİZLEŞTİRME ÇALIŞMALARINDA ULUSLARARASI HUKUKUN ÖZNE SORUNU

Özet

Klasik uluslararası hukuk anlayışı, temel özne olarak hak ve yükümlülükler kadar hukuk yaratma yetkisine de sahip olan devletleri görmektedir. Ayrıca, sınırlı ve daha da önemlisi işlevsel bir özne olan uluslararası örgütlerle kimi hak ve yükümlülükler temelinde uluslararası hukukun görece pasif bir parçası olan bireylerle birey grupları da bulunmaktadır. Oysa, tüm bunların hukuk sisteminde “insan”ı aktif bir hukuk kişisi/öznesi kıldığını söylemek pek kolay gözükmemektedir. Bu çalışmada genelde sosyal bilimlerde özelde de uluslararası ilişkiler alanı için yeni bir anlayış önerisi getiren sömürsüzleşme çalışmalarının temel parametreleri ve önermeleri çerçevesinde bir

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analiz yapılmaktadır. Temel amaçsa, sosyal bilimlerin mevcut “birey” algısı yerine bir özne olarak “insan” anlayışının kurgulanması sorununu ele almaktır. Bu bağlamda, bilgi üretme biçimi ve ereği başta olmak üzere her anlamda her türlü sömürgeleştirici unsurdan olabildiğince arınmış “insan”ın uluslararası hukuk sistemine farklı bir bakış açısı getirme potansiyeli irdelenmektedir.

Anahtar Kelimeler: *Uluslararası hukuk kişiliği, sosyal bilimlerde özne sorunu, sömürsüzleşme, insan*

1.

The agent-structure problem is one of the basic critical questions of all “social sciences” in general, and international relations and international law¹ studies in particular. Although there are schools that give precedence to either of them (not to mention the ones that almost totally ignore one at the expense of the other), this paper would be based on an understanding that the two are inseparable and “co-determined” (see structuration theory adapted to international relations theory by Wendt, 1987). However, particularly in case of international law studies, the question starts at this very point, rather than securing a convincing solution. This is because, assuming that the structure is defined in an as wide as possible manner, the agent problem still hangs in the balance out there. Not only realist and even liberal schools but even Wendt’s structuration theory basically takes (i.e., presumes or acknowledges) State as the “minimum” agent (or, unit of analysis) of international law.

It is true that not only international organizations, as groups of States, but also NGO’s and even other groups of individuals (minorities, refugees, and even suspects falling under universal jurisdiction of the ICC) have now been added to the list in relatively recent times and particularly the latter two has been hailed by progressive/critical studies for a “truly global” world politics.

However, it should not be an exaggeration to argue that these two disciplines still are probably amongst the first which ignore the subjectivity of human beings to a great extent. This is basically because, or a result, of the homogenizing (i.e., the national interest jargon) and quasi-metaphysical language (i.e., inter-State system) they adapt. This present argument will be based on two sets of reasoning: First, contrary to what the progressive schools suggest, these “new subjects” are, by definition, still far from being duly capable/powerful/determinant ones, especially when compared with the

¹ Unless otherwise indicated, the reference to “international law” would also include “international relations” for present purposes.

conventional ones, i.e., nation-State in particular. Be that as it may, they have a very problematic nature as a result of which they, just like the conventional ones, are far from helping us in creating a humane, that is to say “human-made”, world, one of the *sine-qua-non* targets of the de-colonial look.

2.

As is well-known, “agents” or “subjects” of international law can be both passive (law-abiding) and active (law-creating): Law-abiding agents may well have certain rights concerning even participation to law-making, but this does not change the basic fact that they are obligation-holders in the final analysis, as their very character of being right-holder is ultimately decided, defined and established by law-creating agents. So, hailing NGO’s, minorities and immigrants (regardless of their nature and stance) as new and civil agents of international law and “celebrating” their albeit limited right to speak/vote/impose/create as a progress would be a shortcoming, if not an unfortunate, approach for de-colonial studies. Bearing in mind the Foucauldian normalization concept, one may even argue that many such “civil groups” may even be called as “weapons of mass normalization”. Indeed, minorities, immigrants and even individuals subject to the universal jurisdiction of the ICC² are only those that are deemed to fall under the scope of relevant instruments created, interpreted and implemented by States themselves. They should therefore be regarded as quasi-subjects and even objects, rather than real/full subjects, of international relations and international law. Besides, the globalization process not only has subsumed them but “super empowered” agents are also simultaneously getting highly engaged in world politics. Multinationals, individual persons (such as politicians, money-speculators) and so on, which directly or indirectly involve in politics using their personal networks or other connections, are increasingly becoming more influential even than States, let alone “new agents”, thanks to the excessive pragmatist understanding of neo-liberal globalization. So, “civil agents”, which are far from being independent full subjects or agents in the correct sense of the word (i.e., active as well as passive), *are still the relatively weakest chain of the story*.

3.

Be that as it may, it would be argued that saluting such “new agents” with a progressive approach would also be quite misleading, unproductive and even counter-productive. This is because they, just like the conventional actors

² As I have argued elsewhere (Denk, 2009), the ICC simply replaces the “victor’s justice” understanding with that of “sovereigns’ justice”, and does this in the name of rooting out the sovereigns’ justice at domestic level. It therefore seems to be far from giving a right answer to those desperately seeking an unqualified justice.

against which they “revolt”, are either conceptualized or function in a way that, in the final analysis, ignore the subjectivity of human beings. Therefore, the most crucial task for de-colonial studies, the eventual goal of which is securing a paradigmatic shift locked onto a truly cosmopolitan world, cannot be finding ways of making (new) agents capable of effecting world-politics, be it through legal or political means. The priority and most crucial task is finding ways of making all human beings (particularly including, but definitely not limited to, *subalterns* of Gramsci-Spivak, the *damnés* of Fanon or the *disconnected* of Atay) *true subjects* of international law and international politics.

This first and foremost requires studying the two not as isolated disciplines but, in line with the Fanonian sociogenealogy concept, in a holistic, trans-disciplinary way, as has been discussed widely elsewhere. Moreover, such an attempt would also require setting the departure point (more) accurately, acknowledging that the contemporary struggle to find out whether agent or structure is more important, more determinant or more explanatory would not be that productive.

This task apparently requires focusing on the point where the *consent* that produces and re-produces all sorts of hegemony (as Gramsci would say it) is generated. So, taking fully into account the Foucauldian *dispositif* and Gramscian hegemony concepts, it will be suggested that it is the “minds and hearts” of human beings that is to be de-colonized first for an all-embracing de-colonial international law outlook.

It follows that de-colonial studies should first and foremost re-define what “being human” means in the consciousness of human beings, or to put it in another way, *which* human being is to step forward for a truly de-colonial, pluri-versal (Mignola), counter-hegemonic (de Sousa Santos) world politics.

This requires analyzing the relevant prevailing understandings in a historical context first.

4.

It would be argued that there are roughly three mainstream perceptions regarding how “being human” is understood, perceived, asserted, suggested and practiced in social sciences, particularly including international law: *homo economicus*, as the (neo-)modernist (neo-)liberal perception; *homo citizenus*, as the (neo-)modernist (neo-)rational perception; and *homo communitarius*, as the post-modernist (neo-)liberal perception. These three all are, one way or

another, built on self-oriented and other-dependent understandings (either ego- or ethno-centric, i.e., either “I” or “we” saying, human beings).³

-*Homo economicus*: As is well-known, “being human” has been described predominantly by the notion *homo economicus* in the (capitalist) modern era. This solipsistic/ego-centric (“I saying”) understanding, pre-requiring, and built on, enlightened, rational and modern human beings, has been assumed to be the central unit of the modern political system (i.e., nation-State) and thus modern social sciences. As it has been believed and understood that it is the nation-State that would best serve to the ego-centric interests and needs of *homo economicus*,⁴ *homo economicus* has lived hand-in-hand with nation-State for a long time. This in turn made it possible to built the whole inter-State/international legal system on the notion, and the unique agency, of nation-States pursuing their national interests, i.e., “we saying” States.

However, basically with the start of the neo-liberal globalization era roughly in 1970’s, *homo economicus* has decided to, and in fact was bound to, revise and change its mind about the nation-State, as the whole economic and sociological conditions have changed dramatically, which in turn made ideological and discursive shifts compulsory. This partly explains the cosmopolitanist and neo-idealist trend and rhetoric of the new middle classes, i.e., white-collars/professionals, who firmly believe that they are educated, cultured, professional and capable enough to work at any corner of the world and thus question their loyalty to the nation-State. Since the critical question for them has always been to find out, and control, the best administrative tool that can serve their interests, they are now of the view that that nation-State, as a political unit, that is to say the policy and law-making unit, is far from being the adequate tool for accomplishing their goals. Nation-State may still be seen as one of the basic administrative tools, but it is now the neo-liberal institutions that plays (or, should play) the crucial role in policy and law-making. The loyalty of *homo economicus* can no longer be towards the nation-State then. One thing is clear, though: *Homo economicus* is a solipsistic/ego-centric (“I saying”) approach and therefore a de-colonial approach can have nothing to do with it.

³ In case of international law, while *homo citizenus* and the prevailing understanding of *homo economicus* are represented by “State” in terms of legal agency, *homo communitarius* as well as the contemporary understanding of *homo economicus* are represented by “global” and “trans-State” actors in terms of legal agency.

⁴ This is particularly the case for the citizens of the colonizer States, as the whole colonization process made the notion “we” as concrete, and explanatory, as possible unlike the rest where the “sub-structure” of any reference to “we” was quite empty, which in turn made it unavoidable to over-emphasise the ideological and rhetorical tools, i.e., nationalism and even dictatorship.

Homo economicus represents the “being human” perception of capitalist (neo-)liberalism.

-*Homo citizenus*: As is well-known, nation-States, imagined/assumed to represent monolithic groups, are seen as the basic unit of analysis for modern social sciences, particularly including “international relations” and “international law”. Thanks to the modernization and colonization process as two sides of the same coin, not only the colonizer but also the colonized States and societies (through their elites) have seen the nation-State as the main, if not sole, agent of national and international law-making, as well as the main way of organizing, administrating and analyzing political life. As noted above, the nation-State was seen as the main apparatus to meet daily, as well as general, requirements of *homo economicus*. The loyalty thus established gave birth to another way of “being human”, i.e., *homo citizenus*. *Homo citizenus* not only enjoys the right to benefit from all advantages of the nation-State but also agrees to serve to it in all aspects of life in exchange for its centralizing/homogenizing nature. To this end, all States have created their own bureaucrats, elites and so on, i.e., traditional middle classes, which are (seen as) the most important guardians of the system.

However, with the start of the globalization process, traditional middle classes and the entire set of modernist values represented by them are now questioned and even threatened. The threat does not only stem from the new dominant form of *homo economicus*, but also from, so to speak, below, as “victims” of the oppressive homogenizing practices of nation-States have been provided with a new alternative particularly with the end of the Cold war (see *homo communitarius* below). So, nation-Statism is now re-arising world-wide partly as a reaction to these dual threats coming both from above and below.

This trend will presently be called as neo-modernism, as *homo citizenus* is now re-discovering the power of the modernist jargon and methodology (and doing this in a quite “wild” way, as was the case in the first part of the modern era, i.e., circa 16.-17 centuries).⁵ This neo-modernist stance, for the sake of preserving its conventional status, fuels xenophobia, racism, discrimination, exclusion, State-control and all sorts of authoritarian/panoptical practices.

⁵ Social exclusion and homogenising trends (particularly against, but not limited to, immigrants) within national boundaries and occupation abroad (particularly of “failed States”) are the most common practices. A striking example that symbolizes the two aspects is the expression “rogue”. This term, which was first used in England in late 16th and early 17th century (*Vagabonds Act*) to “delinate” those to be punished, excluded and “removed” from the community, is now re-discovered by the “sovereigns” of the “international community” to to “delinate” those excluded from the “international community”.

At this very juncture, another notion, *homo civilizationus*, should also be touched upon. Again just as was the case for the very first part of the modernist era, civilization-based analyses are also quite fashionable in the current neo-modernist era. Civilizations, which are conceptualized in quite essentialist ways, are now argued to clash and all these are legitimized by means of a neo-orientalist package. Presumably against the overwhelming attacks of the neo-liberal globalization, this perception seemingly provides a safe(r) harbor for nation-States and *homo citizenus*. So, for example, even its “objects” are re-producing it with their “alliance of civilizations approach” with an illusion that they are becoming the subjects of the process. However, such good-willed, futile initiatives share the *homo civilizationus* perception and hence can have no remarkable outcome other than re-producing and even giving a kiss of life to the neo-modernist look. The shared essentialist and anti-emancipatory core based on a bi- or multi-polar world-view cannot produce a meaningful “alliance” or even coherence, either.

In short, *homo citizenus* (and *homo civilizationus*), just as was the case for the modernist era, is a solipsistic/citizen-centric (“we saying”) approach and therefore a de-colonial approach can have nothing to do with it.

Homo citizenus represents the “being human” perception of (neo)modernism.

-*Homo communitarius*: Partly as a “legitimate” reaction to the centrist and homogenizing attitude of the nation-State and partly as an unfortunate tool of the neo-liberal globalization process, the third way of “being human”, i.e., *homo communitarius*, has raised its voice roughly in the 1990’s. People(s) forced or accepted to abandon to leave/hide/silence almost all their identities (language, culture, belief, religion, sect etc.) in favour of those set by the centrist/homogenizing nation-State and legitimized by traditional middle classes, have found a chance to pursue and re-gain their “rights” in the post-modern era. However, duly respecting the legitimacy and justness of opposition to the oppressing policies of the nation-State, this “trend” probably evolved into yet another ethno-centric (“we saying”) way of being human as, probably unavoidably, such groups rushed into extremes in defining their identity basically because of their rather essentialist feature. This process, which may be called as NGO’ization, Balkanization, atomization and so on, may well have, or has already had, consequences such as, say, creating new forms of *homo citizenus*. It is obvious that such an outcome will not only mean a change only in the “language of the colonizer/exploiter” but can also serve to the needs of neo-liberal globalization, particularly in cases where independence is accomplished with the help of “international actors”. Besides, the so-called governance trend, as one of the holy concepts of neo-liberalism, and its illusionary and detrimental effects should also be born in mind in all debates on *homo communitarius*.

Be that as it may, as the biological characteristics of human beings (or the “object aspect” of as pointed out by Cangızbay) was highlighted and upheld in a rather essentialist way, this has also been a rather counter-productive way of opposing *homo citizenus*, which was at least a fictive (thus potentially more embracing,⁶ although the practice has ended in the opposite/wrong direction) way of “we saying”. Indeed, with due respect, the unintended (but probably not unseen) side-effect of *homo communitarius* (together with *homo economicus*) in “subsidizing/prompting” *homo citizens* cannot be disregarded.

In short, *homo communitarius*, as another ethno-centric (“we saying”) way of being human, cannot be the right answer de-colonial studies desperately seek for, as their primary target and task is to construct a world in which all human conditions and identities are embraced in a non-essentialist way, that is to say in an emancipatory way that gives every single human being the opportunity to choose, establish and realize its own subjectivity freely through political and legal means.

Homo communitarius represents the “being human” perception of post-modernism.

5.

As is obvious, these three notions defining how “being human” is perceived presently are solipsistic/ego-centric/ethno-centric world-views and they therefore produce or re-produce a power-centric, inequality-generating, possessive, hegemonic and discriminative political climate. What is worse, these perceptions are, as Fanon and Dussell would say it, upheld and reproduced by the colonized, as well as the colonizer. Moreover, it would be argued, starting the human history with (European) modernist/capitalist era would not prove that much. Although it is clear that both modernism and capitalism, hand in hand, have made the situation even worse in the widest sense of the word, it would indeed be a very unrealistic, meaningless and even quite illusionary approach to declare these two as the scapegoats of the whole human history, as if inequality, dominance, exploitation, hierarchy and so on have not existed before then. Moreover, as Anghie put it (2005: 319), the point is using this duality “to undermine the dichotomy between colonizer and colonized, self and ‘other’.”

A holistic battle for a planetary critical consciousness (Mignolo, 2007: 74) is the only way for accomplishing a total de-colonization, i.e., de-colonization both in “minds and hearts”. A paradigmatic shift regarding how

⁶ For further discussion, see Cangızbay (2003).

“being human” is perceived and implemented, i.e., a new praxis, seems the only rights answer to this end. The de-colonial studies (including international relations and international law), in short, needs to define and conceptualize its basic parameters as to “being human”, that is to say its human agent, from scratch.

Such a comprehensive and in fact assertive effort should first and foremost make sure that it acts/moves from a fundamentally different departure point, which is to be set in a way that not only rejects but do its best to root out all sorts of theories and practices that generate colonization, domination, inequality, hierarchy, discrimination and so on. In other words, *homo economicus*, *homo citizenus* and *homo communitarius* should be abandoned once and for all and replaced with a new understanding on “being human”. And this requires a new terminology, methodology and paradigm. Above all, a new “agent” to be urged to take action is called for.

And it is *homo humanus*. Moving from the basic understanding that being human first and foremost is being distinct from machines, animals and all other “objects” by virtue of the characteristics that make humans the only true subjects, it is obviously the human being which will break the consent given (which also fuels the very structure) and create a new world and legal paradigm. Capable of being fully aware of our humanness, it is obviously the human being which will dismantle prevailing understandings that renders some part of human species subject to the rest, i.e., the workers and immigrants in case of *homo economicus*, the minorities and strangers (including the immigrants) in case of *homo citizenus*, majorities as well as all political (not identity) groups in case of *homo communitarius*, and the subalterns (or Rajagopal’s “Third World”) in all circumstances. No single one can be subject to another one, if the human being is to be made the only/main agent of (world-)politics and international law.

The way to this end apparently departs from a point where the human consciousness is re-constructed on an altruist, rather than a solipsistic, understanding. It should therefore be firmly acknowledged that human beings should question and revise their very being and subjectivity, that is to say their very consciousness that produces, feeds and re-produces ego- and ethno-centric world view, in addition to simultaneously questioning, say, the structure in the widest sense of the word. This is simply because constantly putting the blame to the outsiders, be it the world system, the structure, strangers, colonialist States, authoritarian rulers and so on, is quite problematic, ill-founded, misleading and even counter-productive way of struggling against prevailing understandings, which, with their excluding approaches, do also put the whole

blame on the others.⁷ So, an anti-power humane understanding that is meant to reject to (re-)produce the dualistic language, terminology, way of thinking and methodology of the prevailing perceptions should begin by removing all such rhetoric, practices and usages from its inventory and call upon all to re-define “being human”. We do not need scapegoats. Neither should we wait for the barbarians. We should start realizing the role of our consciousness, not solely as the right point to start a total struggle but also as the source of all those colonial practices.

Furthermore, the way to this end also goes in through rendering all “biological characteristics” of each and every human solely as natural features (as pointed out by Cangizbay) and yet do this in a non-essentialist way. Duly respecting every one’s *choice* regarding his/her identity should not be construed in a rather excessive way according to which identity is a frozen feature that must be upheld by, or attributed to, each and every member of a particular group. As it is solely the political-choices that will count, no “culture” or “civilization” would be allowed to take an essentialist (and therefore a potentially dominating and even superiority-claiming) look vis-à-vis others. Neither would they be permitted to put “their members” in a position to either champion (all sorts and forms of “nationalism”) or discard (assimilation) their “identity”. Being fully aware of, or fully enjoying the right to freely live, one’s by-birth features can only be possible where talking about such features are not even a talking point, let alone being a political/social motivation/criterion.

“Identity” will thus return to its “normal” role/function/place and only political choices will count in all sorts of human activity. Politics will come back. A political “we” understanding devoted to accomplish and secure a world of equality and justice would/should re-place contemporary “we” understandings based on ethno- or ego-centric worldviews. Human-beings will thus re-gain their political and legal subjectivity.

⁷ As Said has rigorously, and rightly, asserted that criticizing solely Israelis would not prove that much for the Palestinians unless they also criticized Palestinian (domestic and foreign) policies, it is clear that a political stance built on criticizing the other is not that meaningful, if not ill-founded, miss-leading and even counter-productive. A similar example is the case of human rights in Turkey-EU relations. As both the EU officials and pro-EU liberal Turkish elites have pursued such a Euro-centric, excluding and even “humiliating” civilizationary rhetoric and methodology that the wider public is now alienated. Even the term “human rights” sounds almost as antipathetic as possible for many and the very human rights cause (surely not the “politics of human rights”) now seems the loser (For a detailed analyze of the pitfalls and deficits of the human rights struggle in Turkey-EU relations, see Denk, 2005).

Homo humanus may thus be the right agent that represents the “being human” perception of de-colonial “international relations” and “international law” studies. The point for de-colonial international relations and international law studies is then to re-conceptualize each and every topic from this perspective and develop a new literature.⁸

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⁸ A modest attempt may be Denk ("A Geo-human resource in the Middle-East: Water", 2008), in which the water question is studied in a way that puts the problems of humans (including environmental concerns) at the very center of the analyzez and State- and nation-centric all arguments, claims and even "concerns" are simply ignored.

