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Comment on Kate Nash/2

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In the last decades sociological literature on human rights has been essentially oriented to stress a crisis of national states's prerogatives by effect of globalization processes. New narratives have been proposed about a post-national, trans-national, cosmopolitan political order as characterizing politics nowadays; human rights have appeared as the main path towards a denationalized politics as a solution of our current political problems, despite difficulties with their institutionalization in effective practices and with enforcement of their respect. Sociological speculations on mobility, nomadism and the like have grown, although supported by little evidence, while attachment remained important [Savage, Bagnall, and Longhurst 2005] and the ethical demand for hybridity, crucial to the proponents of cosmopolitanism, has been more and more overwhelmed by demands for security playing in an opposite direction [Turner 2006].

It looks like time has finally come for going beyond such enthusiasm for international normative regimes and their progressive stance, for taking into account also their weaknesses, for deepening the analysis of their relations with the state and bringing back in the discussion states themselves. Already Saskia Sassen [2008] in her *Territory, Authority and Rights* proposed to analyze transformations provoked within the national state by processes of globalization, rather than simply considering how it is eroded by the latter (*endogeneity trap*). The social construction of the national and the global as historical formations shows that their mutual interplay is

far more complex; therefore de-nationalization and re-nationalization can both apply as analytical perspectives, according to specific processes taken into account.

For Kate Nash, the impulsion to overcome narratives about human rights and cosmopolitan law comes from the need to question contradictory trends, often overlooked, in human rights politics: states play at the same time as the guarantors and the violators of human rights. The law theorist Antonio Cassese [1999] had already remarked that this is indeed a peculiar circumstance affecting human rights and assigned it to a dual system of authority, the contrast between state sovereignty and international order; although states have gradually limited their sovereignty, they still dominate international settings that have no sanctioning power on their own. This is why he claims that it is important to look into the states's structure and their specific history; one realizes then that not only states with authoritarian structure violate human rights, but even open structure, pluralistic states are nowadays so complex that their relations to citizens are rarely transparent and governments are unable to control all internal pressure groups.

Kate Nash takes a similar analytical perspective starting from the issue of institutionalization of human rights in effective practices: she suggests that acceptance and violation of human rights are both acted in the name of states's autonomy. Therefore we need to take into account conditions for state's autonomy by distinguishing different types of stateness, in order to understand how their specific limits do affect processes of institutionalization of human rights. More particularly she distinguishes three types of states: the juridical, the post-colonial, and the predatory state, for each of them she shows how their capacity of making human rights effective deeply varies.

I find highly welcome and convincing her attempt to differentiate types of state in order to restore historic variations against an undifferentiated discourse about states's sovereignty, most often molded on the basis of North-Western states, as though this could be considered as a universal experience. The role of law is not the same in all types of state, and legalization appears as the most effective strategy for institutionalizing human rights, although law proves to be not enough for protecting human rights not even in the juridical type of state.

It is less convincing in my view the link between her analysis of the types of state and the general frame she take from Charles Tilly's ideal-type of state formation. I wonder how useful is such frame for the discussion of the role of law in each type of state, and not only because it is an abstract general model of state formation built on the historical experience of Western European states. But also for a crucial reason that Nash herself remarks: according to Tilly's model, states owe their formation only

to processes in the domestic arena, while issues concerning human rights are not limited to internal control, and often play in the inter-relations among states.

Let's take the case of migrations, which typically calls human rights into play and yet is left out of Tilly's state formation model. The increase of migrations due to globalization is regarded as a challenge to state sovereignty, in so far they break the link between territoriality, sovereignty and citizenship that modern state had unified. And yet migrations offer a fruitful field, often the most fruitful field to reinforce the state, by strengthening the need of national identity and social cohesion with respect to which the state claims to be the best defender. Control over migrations belongs to state prerogatives and becomes an occasion for reinforcing state sovereignty, internally as well as in relation to other states (namely, the state of origin). And indeed supra-national institutions recognize state autonomy by leaving wide margins to national law in matter of migration control, visa policies, denial of access or rejections; supra-national norms do not oppose effectively to autonomous exercise of state power over migrants. If it is true that state autonomy is limited by international norms in terms of human rights and non-discrimination, it is also true that here the universality of human rights clashes with policies of control, the implementation of human rights finds obstacles in security requirements from state politics, even institutionalized human rights become frail if not discretionary, exposing migrants to a "contradictory dualism" [Lochak 2007].

As we see in this case, all tensions are internal to the process of legalization of human rights and keep a strong tie to state autonomy even where the latter looks highly challenged. This is not to say that expansion of universal norms such as human rights is ineffective, rather to stress that their potentiality towards social progress can only be evaluated if we look at them within a fundamental tension with rights of citizenship: although the latter are non-universal rights, by anchoring rights in membership they are suitable to influence the process of state autonomy formation and action. Tensions between the two sorts of rights inextricably animate democratic politics.

As a conclusion of these brief comments, one may suggest in a more doubtful perspective that a basic question still remains unexplored: are human rights a politics after all? As Shafir and Brysk [2006] note, human rights come from a different tradition than citizenship rights and pursue a specific aim, universalization of rights; but they also have crucial weaknesses in terms of solidarity patterns (what community?) and enforcement (the need to pass through states). It is exactly this incapacity of human rights to build a community and their essential link to individualism that brings Marcel Gauchet [2002] to a provocative conclusion: "Les droits de l'homme ne sont pas une politique," human rights are no politics.

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Abstract: Sociologists have barely begun to address the paradox that states are both violators and guarantors of human rights. This is necessary if we are contribute to understanding how human rights may be institutionalized in practice. There is a need to go beyond the discussion in which cosmopolitan theorists have engaged concerning international human rights law and its effects on states sovereignty, to shift the focus to state autonomy. It is only insofar as states are autonomous that state actors can comply with the international human rights agreements to which they have signed up (in the face of resistance from others who will be disadvantaged by this compliance). And it is also state autonomy that is at stake when officials act in defiance of international human rights norms. Using Charles Tilly's ideal-type of "state-ness" and neo-Marxist theory concerning the basis for the relative autonomy of states, the article explores variations in state formation that are relevant to the institutionalization of human rights.

Keywords: State, human rights, migrations, Tilly.

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