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Comment on Kate Nash/4

Are Human Rights Justiciable?

by Bryan S. Turner

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Kate Nash raises a well known problem in the theory of human rights, but she attempts to give a new response to a conventional dilemma. In my response to her “States of Human Rights,” I do not disagree substantially with anything she says about human rights in relation to nation states, but I think the problems are deeper and more intractable. Indeed I see no solution to the problems she identifies and, while her strategy for a way out of the contradiction between states and human rights is ingenious, I am not ultimately persuaded. The problem, which was identified by Jack Donnelly [1984] in his article “International Human Rights: A Regime Analysis.” and then consolidated in his *Universal Human Rights in Theory and Practice* [Donnelly 2003], is that, in the absence of an effective global authority, human rights are typically enforced by nation states and yet it is nation-states, especially failed states, that are also the main perpetrators of human rights abuses. The contemporary human rights crisis in Libya is a case in point. Consequently jurisprudential criticisms of human rights declarations argue that such rights are not “justiciable” because they cannot be effectively enforced (without the co-operation and involvement of states).

In the formulation of this conundrum, one finds that the literature commonly refers to a position taken up by Hannah Arendt [1951] in *The Origins of Totalitarianism* in the chapter on “The Perplexities of the Rights of Men,” arguing that without the power to enforce rights claims these universal rights of man are empty words. She in turn recognised the force of Edmund Burke’s complaints against the abstract rights of the French Revolution when Burke famously argued that the rights of an

Englishman under common law were a better (perhaps the only) protection against tyranny. Arendt argued that human rights were abstract and secondary to citizenship rights. Stateless people can see immediately that being nothing but human rather than citizens was their most pressing danger. The Jews were the tragic example of a people who, once deprived of German citizenship, could not be easily accepted by any other country and the absence of any documentation of their social membership effectively expunged their right to rights. This formulation of the problem is well known.

One defence of the relevance of human rights is to suggest that this dilemma cannot be described in such a clear-cut fashion, because there are some institutions such as the International Criminal Court (ICC) that in fact periodically coerce the actions of states and their leaders. Some commentators have claimed that the ICC, which was established in 2002 and which is now ratified by some 105 states, has the effect of “recasting sovereignty” [Levy and Sznajder 2010, 91]. The drift of these responses to what we might call the Human Rights Dilemma is to speculate about the contemporary erosion of state sovereignty under the impact of globalization. It is suggested in this response that the sovereignty of the nation state is being eroded and that the relevance of citizenship within the nation state is being brought into question. Here again it is well known that for its critics national citizenship confers social and political rights that are exclusive and hence have an exclusionary impact on minorities, refugees and stateless people who for various reasons have no claim on membership within a polity. In some African societies where many people who have no birth certificate have extreme difficulty in proving their national identity and as a result cannot be registered as citizens of the state. As a result they are only too easily removed by force or exterminated where forceful removal fails [Manby 2009]. There is consequently much discussion in the contemporary political sociology of citizenship about how globalization has forced us to consider more flexible notions of citizenship and about how state borders are becoming more porous and open. There is also the view that, with global labor migration, there is more general acceptance of dual citizenship by sovereign states. There is the view therefore that we need new concepts such as post-national, flexible or global citizenship [Cohen 2009].

Another argument to suggest that the state is becoming more open and porous and that state sovereignty is in decline emerges from work on legal globalization [Twining 2000]. The notion of legal pluralism became significant in the 1970s arising from the field work of anthropologists on law in post-colonial societies. In these anthropological studies, it typically referred to the incorporation of customary law into the state law or its maintenance in a dual system. Legal pluralism has been embraced by postmodernists to describe the fragmentation and competition between multiple

legal systems in modern societies. Many contemporary legal scholars concede that the problem in defining legal pluralism is simply a by-product of the more general problem of defining law [Tamanaha 2008]. Perhaps the most influential attempt to define the law is found in the work of H. L. A. Hart [1977] who distinguished between law as the combination of primary rules (that is the rules that apply to conduct) and the secondary rules (that is the rules that determine which primary rules are valid, how they are created or found, and how they should be applied). However, many institutions apply rules and there is no clear or obvious way to determine which are public and which are not. Are the rules of the boy scout movement in fact laws? There is much conceptual confusion as a result and some theorists who welcome post-modern interpretations of this situation accept the conclusion that “legal pluralism” simply defines any form of normative or regulatory pluralism.

While the law has no scientific definition that is ultimately satisfactory, whenever “legal pluralism” is invoked “it is almost invariably the case that the social arena at issue has multiple active sources of normative ordering” such as official legal systems, folkways, religious traditions, economic or commercial regulations, “functional normative systems” and community or culturally normative systems [Tamanaha 2008, 397]. In conclusion the notion that a modern society is held together by a single, common and integrated legal system has been severely challenged. From a historical perspective, legal pluralism had in fact existed in Europe through the medieval period in terms of *ius commune*, commercial law (*lex mercatoria*), and ecclesiastical or canon law. The growth of human rights can be seen in this context as a component of legal pluralism, the existence of which indicates that state sovereignty as a product of the Treaty of Westphalia is in decline. Hence it is believed that the Human Rights Dilemma is confined to an international regime of strong states. Because the international regime is changing, we have to think differently about human rights.

I take it that this is the point of Kate Nash’s intervention. In asking how different state structures might help or impede human rights enforcement, she encourages us to avoid any reification of “the state.” Instead she proposes that we might think about “stateness” and the resulting configurations of force on a continuum. Some states have more “stateness” than others. She considers three ideal type situations: juridical, postcolonial, and predatory states. She describes the working of the juridical state where the presence of rational-legal procedures (including NGOs and “cause lawyers”) prevents states from ignoring their human rights obligations and allows citizens and non-citizens access to human rights protection. She recognizes obviously that, while the rule of law might work relatively well in Europe and North America, there are significant limitations on human rights enforcement in postcolonial societies and in the case of predatory states. She concludes by acknowledging that given the

micro-strategies of power embedded in everyday life in postcolonial and predatory states, a complete transformation of social relations is required in order to begin the task of the institutionalization of human rights.

I have three issues to raise in response against the drift of the contemporary defence of human rights especially in conjunction with any critique of the traditional model of citizenship. Firstly human rights should be regarded as a supplement to rather than substitute for citizenship rights.

Obviously the claim in both sociology and political theory that citizenship is too narrow in a global world has some merit, especially when applied to the European community and to North America, but the claim has scant relevance elsewhere. As I have already indicated, the African experience – as documented so powerfully in Bronwen Manby's *Struggles for Citizenship in Africa* [Manby 2009] – demonstrates that citizenship status is actually fundamental to mere survival let alone to the enjoyment of welfare entitlements. Citizenship is the critical foundation of personal identity and membership of a polity. In the last analysis, only states can enforce rights and in the absence of world government human rights will remain parasitic on the sovereignty of states. Take away citizenship and all is lost. We should not too quickly write off the sovereignty of nation states and the citizenship regimes that are attached to them. The same caution applies to notions of legal pluralism. In the end, legal pluralism – including the growing use of tribunals – depends on the sovereignty of states, because legal judgments are ultimately enforced by courts with the backing of a state. I follow John Rawls [1999, 9] in describing human rights as rights of last resort – “as a special class of urgent rights, such as freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide.” Human rights function where other juridical mechanisms have failed or do not exist.

Secondly, I think human rights are the rights of victims and as such unlike the rights of citizens. In addition to the question of whether human rights are justiciable, there is the problem of the correlativity of rights, namely whether there are comparable duties attached to rights. A strong notion of rights implies an equally strong notion of duty. Citizens typically have clear duties – to pay their taxes, serve on juries, perform military service and many others. There are at present no recognizable Declarations of Human Duties. Therefore human rights are weak rights ascribed to humans *qua* humans who have no other access to basic security. Victims are characteristically people who have been abandoned or neglected by states. The plight of the victims of Katrina in the United States is a good illustration of the issue [Somers 2008].

Thirdly and most problematically, Kate Nash in the concluding sections of her otherwise excellent article fails to distinguish between the legitimacy and the legality

of a state. This problem arose around Max Weber's account of legitimate authority and the political and legal theories of Carl Schmitt in respect of legitimacy of the Reich under Adolf Hitler. Schmitt's *Legality and Legitimacy* was written in the spring of 1932 and played an important part in the crisis of the Weimar state leading up to Hitler's appointment as Chancellor in January 1933. Schmitt's theories remain ambiguous – was he defending the constitution or destroying it? His argument brought into sharp focus the distinction between a state that might be legal in procedural terms but not legitimate in terms of wide public consent. Hitler and the Nazis had a good deal of consent, but was his Chancellorship legitimate? Schmitt appeared to side in a time of crisis with decisionism; power is exercised by the one who has the ability to declare a state of emergency. In an emergency, he favoured extending the role of presidential decrees over parliamentary statutes where the latter merely reflected the volatility of electoral support. The difference between legality and legitimacy in the Weber-Schmitt framework remains somewhat problematic. If legitimacy is merely belief in legitimacy, what is the role of the rationality of the law?

I want to argue that this distinction between legality and legitimacy is not simply a function of a political crisis, but raises a general problem for Kate Nash's notion of the rule of law. Modern Singapore is a legal state, but one in which the People's Action Party (PAP) has been in power since the creation of the Republic of Singapore in August 1965. Lee Kuan Yew who was the first prime minister has now become MM Lee (the Mentor Minister) and his son Lee Hsien Loong replaced him in 2004 as Prime Minister. In Weber's terms when a charismatic leader hands over power to his son in what we might call inherited charismatic authority such as North Korea or Singapore, it is not entirely clear that this is any longer legitimate authority with widespread consent. This type of charismatic transmission appears to have failed dramatically in Egypt and Libya. However, Mr. Lee has been successful not in the arbitrary use of force but in rational-legal measures such as turning regularly to the courts to crush any criticism of himself, his family or his government through the libel laws. The PAP came to power and remains in power because it enjoys overwhelming success in elections. However, critics of the PAP argue that it retains power by gerrymandering the electoral boundaries of parliamentary seats and it can appoint a certain number of people to seats to bolster its support in parliament, although this group of representatives has no voting rights. Under the Emergency Laws inherited from the colonial past, protests and street gatherings are strictly regulated by the issuing of licenses, because a gathering of four people or more is an illegal assembly. The government has persistently claimed to abide by human rights laws and yet supports capital punishment for first-degree murder which is used frequently against serious offenders and it favours judicial corporal punishment (such as caning) against other

criminal offences. Amnesty International has reported that Singapore, relative to the size of its population, has the highest rate of executions. The jury system has been abolished. It is believed by its critics to influence the media such as the *Straits Times* to provide public support for its policies. The Elected President of Singapore has ceremonial functions but no power.

I would describe the Singapore government as an extra-judicial state, as one that employs the law to sustain its power by suppressing opposition and therefore there is some doubt about the legitimacy of the Singapore state but no question about its legality. Its legitimacy is in doubt because there has been no change of government since 1965; political consent is carefully managed and rests unsurprisingly on the economic performance of the government. The normal function of elections in changing governments does not appear to operate and hence paradoxically it is the very legality of states such as Singapore that cast doubt on their legitimacy. An extra-judicial state may give its citizens security and stability, but it is doubtful that it can unquestionably deliver legitimacy. I conclude that a judicial state, while clearly different from a postcolonial and a predatory state may be equally problematic from the perspective of human rights. While accepting aspects of procedural legality, many Asian societies might be said to follow a “rule of virtue” rather than a “rule of law,” stressing obedience rather than participation [Peerenboom 2004]. In conclusion the liberal assumptions underpinning the International Covenant on Civil and Political Rights may have little purchase in societies that are legal but are based on neo-Confucianism and “soft authoritarianism.”

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Comment on Kate Nash/4

Are Human Rights Justiciable?

Abstract: In this reply to Kate Nash's "State of Human Rights" I argue, having agreed with her over whether or not human rights are justiciable, that the problems facing the enforcement of human rights are far more complicated than she suggests. I raise three objections to her position. Firstly I suggest that human rights discourse is too quick to reject the rights of citizens – however exclusive these may be. Secondly, there is a problem of correlativity namely that there are no human duties and hence human rights are Rawlsian "urgent rights." Thirdly, juridical states in her typology can also suppress human rights and we need to examine the distinction between legality and legitimacy.

Keywords: Citizenship, correlativity, justiciable rights, legality, legitimacy, sovereignty, state.

Bryan Turner is Alona Evans Distinguished Visiting Professor of Sociology, Newhouse Center for the Humanities, Wellesley College. His research interests include globalization and religion, concentrating on such issues as religious conflict and the modern state, religious authority and electronic information, religious, consumerism and youth cultures, human rights and religion, the human body, medical change, and religious cosmologies. Bryan Turner is Joint Chief Editor of the journal *Citizenship Studies*. He is a Research Associate of GEMAS (Centre National de la Recherche Scientifique, Paris) and an Adjunct Professor at Murdoch University, Western Australia.