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Why Study States of Human Rights? A Reply to the Comments

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Why Study States of Human Rights? A Reply to the Comments

by Kate Nash

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What a great opportunity the editors of *Sociologica* provide for discussing contemporary sociological questions and how to address them! And in the case of the respondents to “States of Human Rights” what a rich set of ideas and questions they propose. It is an honour to think with them on the topic of human rights, which is increasingly coming to be seen as central to the tasks of sociology, as their significance grows in the world. As Procacci and Steinmetz both note, the paper represents an attempt to go beyond ideas of “post-national,” “transnational,” or “cosmopolitan” that have been so popular in the discipline in recent times and that are so often tied to assumptions about historical progress. On the other hand, I very much appreciate Steinmetz’s comment that the essay questions some of these assumptions without “countering this wishful thinking with bloody-minded, amoral realism.” It is impossible to be normatively neutral in studying human rights. I like Levy’s view that in studying human rights optimism is “intellectually more challenging.” As sociologists after Marxism and feminism we find it very easy to critique concepts of rights; what is much more difficult is to find the right tools to study what rights do, and can do, in practice. I am unashamedly sympathetic to ideals of human rights, which I take to be the outline of global social democracy; and I think “armchair” critique is disrespectful to the many people today who put their political energies into trying to make rights work. No doubt those sympathies make me an optimist in a certain sense. On the other hand, when we think about states as the addressee of human rights claims (rather than, for example, focussing on mobilisations to gain rights, which are

inherently hopeful), the obstacles to realising these ideals seem overwhelming. There is something about studying human rights as a sociologist that seems to require us to give an account of where we stand politically and morally. Somewhere between “interested optimism” and “amoral realism” may be as satisfactory an account as we can give.

Taking each topic in turn, then, I’ll begin with the question of the relationship between citizenship and human rights raised by Turner and Procacci. There is much I agree with in what they say. Turner suggests that in the debate over whether and how citizenship rights are exclusionary, “human rights” is not a more inclusive response to their limitations. He argues that human rights are themselves limited with respect to what underpins citizenship: while citizenship ultimately rests on obligations (historically of military service, work, and motherhood as well as paying taxes and voting), there are no clear duties to which human rights are correlated; and, unlike citizenship, which is guaranteed through the national state, there is no agency for enforcing human rights claims. For Procacci, the main problem is that human rights are individualist in comparison with citizenship; without a basis in political community, it is unclear how human rights-claimants can build solidarity. But the problem with these objections is that they posit an ideal-type of citizenship which seems no longer to be viable in many respects. It is in question in Northwestern states generally with the rise of “turbo-capitalism,” the increase in precarity, and the erosion of socio-economic rights; the use of exceptionalism in response to heightened fears about security and the erosion of civil rights; and increased migration (in Europe) and diverse multiculturalism, which lead to new issues concerning the rights of non-citizens as well as around cultural rights. Above all, as the excellent book to which Turner refers on citizenship in Africa so ably demonstrates, “citizenship” as such simply has not worked to secure routine rights for most people in most countries in the world [Manby 2009].

I take it that the rise in significance in human rights is global, though it takes different forms in different parts of the world. In general, the politics of human rights involves attempts to build *transnational solidarity*, to link NGOs, IGOs, and representatives of other states in order to build pressure from within and without that might shame and persuade state elites to grant basic rights [Keck and Sikkink 1998; Risse *et al.* 1999]. In many cases, these are basic civil rights to freedom of association, expression, life, and liberty that most citizens in juridical states take for granted. It is true that currently in Northwestern states it is predominantly non-citizens who are identified with uses of human rights because basic rights have historically been won through struggles over citizenship. But this may be the exception rather than the rule, and it may be changing. Efforts to secure human rights by means of transnational solidarity make sense precisely because, in signing and ratifying international human

rights agreements, and even more thoroughly when those agreements are incorporated into national law, states do now have obligations to guarantee rights for citizens and non-citizens within their territories. Those obligations are clear, precise, and are increasingly judged in national and international courts. There are of course frequent examples from the Europe Court of Human Rights, concerning both citizens and non-citizens [Dembour 2006], as well as from national courts in Europe that uphold the European Convention on Human Rights [Morris 2010; Nash 2009a]. Examples are much rarer in the US, but we might consider here the controversial judgement of the Supreme Court in *Roper vs. Simmons*, which decided that it should be guided by world opinion and abolish capital punishment for juveniles with learning difficulties [Roper vs. Simmons 2005]. In Somers's analysis of the aftermath of Hurricane Katrina, cited by Turner, she argues that human rights are increasingly being used in the US to bring the state to account for neglecting the poorest and most marginal *citizens* [Somers 2008]. Outside Northwestern states, Risse and his colleagues have carefully charted the success of transnational campaigns against state killing throughout Latin America, Asia, and Africa of which the campaign against apartheid in South Africa is just the best known example [Risse *et al.* 1999]. In all these cases, citizenship rights are included *within* human rights, which do not "abolish" the distinction between citizens and non-citizens as such. I absolutely agree that citizenship remains hugely important to enjoying rights, though it is important to note that they do so in conjunction with access to economic resources and status [Nash 2009b]. I like very much how Procacci puts it: it is tensions *between* citizenship and human rights that animate democratic politics.

I also agree with Procacci that it is more difficult to build transnational solidarity to put pressure on states than to work with existing sentiments of national solidarity [see Tarrow 2001]. Indeed, in my comparison of the US and UK, I was surprised to find that human rights activists sometimes try to mobilise "national pride" rather than high principles of universality precisely to gain popular support [Nash 2009a]. On the other hand, the enormous growth of local and international human rights NGOs is testimony to the hope and energy with which attempts at transnational solidarity are invested. And they are directly linked to changes in states, which are becoming "stretched" across borders in networks of government regulators, bureaucrats, judges, and legislators who meet and communicate regularly with their counterparts in other states, both inside and outside formally constituted IGOs like the UN and the EU [Sassen 2006; Slaughter 2004].

However, debate over different forms of the state in relation to projects to secure human rights has been limited, practically non-existent in any discipline. In sociology the little discussion of the state in relation to human rights that has taken

place has mostly followed the terms of international human rights law, focussing on “sovereignty.” It is in part dissatisfaction with the terms of this debate, to which I have myself contributed, that inspired this article. In *The Cultural Politics of Human Rights* I looked at how the conditions within which sovereignty – as the ultimate authority within a state to “have the last word” – is transformed by discourses of human rights mobilised by activists and in the media in the US and UK, sometimes but not always backed by the force of law. It is on the occasions on which international human rights law as such does make a difference to how a government acts, which are not so rare inside Europe with its well-developed “supranational” system of human rights, and very much rarer outside Europe, that I would agree with Levy that “Westphalia is cosmopolitanised.” But I now think that the terms of the debate over sovereignty are too limited. The problem is that it does not question assumptions about what states *are* that are so widely shared in thinking about human rights. The ideal of the cosmopolitan state, developed implicitly by activists and explicitly by cosmopolitan political theorists, in which officials accept that legitimacy now depends on conformity to international human rights norms, presupposes an already existing juridical state constrained by law and bureaucratically administered. From the juridical state to the cosmopolitan state it is a relatively short journey, at least conceptually.

In contrast, once we consider how states have developed differently historically, including how state elites use resources (including sovereignty itself) strategically in relation to other states, it is evident that far more than legal reform is required to secure human rights. What is needed is nothing less than a complete restructuring of the social relationships in which such states are embedded if they are to come anywhere close to respecting international human rights law. Rather than entering into speculation and predictions about the future development of cosmopolitan states, which is what is implied in debates over whether and how *sovereignty* is transformed by human rights norms, we must look much more carefully at state *autonomy*, at the form of actually existing states and at what would be required to make them into states that would routinely guarantee, rather than routinely violate, human rights.

This brings me to Turner’s question concerning legitimacy. Looking back at my paper, I am rather surprised to see that I have used this term, which I generally do not find very helpful. Turner has correctly noted that I use it tautologically, to mean the same as legality. Consulting scholars of Weber, I find that this may not be so foolish. On the one hand, Weber’s definition of legal-rational legitimacy seems to be deliberately circular: laws are legitimate if they have been enacted correctly, and their enactment is legitimate if it follows the procedures laid out in legal norms [Weber 1970: 294; discussed in Turner 1984, 357-359]. Weber does see legitimacy

as linked to belief and action: action may be grounded by “belief in the existence of a legitimate order” [Weber 1978, 31; discussed in Albrow 1990, 161-165]. But belief in a legitimate order is a separate issue from how the state legitimates itself, and from how people orient their action towards a particular state. In general I have not found the concept of “legitimacy” helpful to think about how and why states comply with or reject human rights: it is too monolithic, suggesting that international human rights are adopted or rejected wholesale when in fact such progress as is being made is piecemeal; and too uniform, when such successes as have been achieved have depended on a range of justifications, and invariably involve conflict with others over what the law should be in substantive not just formal terms. I prefer to think of human rights as defined through struggles between actors with different kinds of institutional authority (e.g. journalists, politicians, judges, activists) and modes of justification in a human rights field [Nash 2009a]. In “States of Human Rights,” I have followed Weber’s formalism in using “legitimacy” and “legality” interchangeably to denote rational-legal, bureaucratic procedures: following procedures is how the juridical state legitimates *itself*. I do not see any theoretical difficulty with using “legitimacy” in this way, though I agree with Turner that this usage does seem to beg questions. Is legitimation enough to convince people of a state’s legitimacy? And does simply following procedures make a state legitimate?

It is for this reason that Turner prefers to separate “legitimacy” and “legality,” to raise questions about whether a particular legal-rational order of domination (i.e. a particular state) has widespread popular consent. In the case of Singapore, we are not dealing with a juridical state: is it based on a different principle of legitimacy from that of rational-legality? Singapore is a very important example in terms of human rights, not least because China is modelling itself on the “Asian Tigers.” I prefer to think of them as “developmental states.” According to Castells’s definition, “A state is developmental when it establishes as its principle of legitimacy its ability to promote and sustain development, understanding development as combining steady high rates of economic growth and structural change in the productive system, both domestically and in relation to the international economy” [Castells 2000: 283]. Rather than being built on neutral, procedural bureaucracies, developmental states are “technocracies”: the government has a clear sense of the direction they intend development to take, and uses technical knowledge and the instruments of the state consistently to maintain it. And rather than being subject to the rule *of* law, the officials of developmental states rule *by* law, using it as an instrument to enforce control rather than recognising it as protecting challenges to state power.

China certainly seems to fit the ideal-type of the “developmental state” in terms of its policies on human rights, which Chinese officials represent as demonstrating

an alternative model to that of the West. Although China is a signatory to the major UN human rights treaties, in the White Papers that are published each year officials insist that China will set its own human rights standards, defending the developmental model that privileges social and economic benefits over abstract freedoms, whilst attacking Western states for hypocrisy, racism, and imperialist intentions against China. In terms of foreign policy, China insists on the value of sovereignty and not interfering in the affairs of other peoples. It is on these grounds that officials defend the fact that they put no conditions on aid or investment in development projects: they represent themselves as respecting sovereignty, and as against imperialism [Rotberg 2008]. Both internally and externally, then, Chinese authorities promote social and economic rights over civil and political rights in ways that fit very well with the principles of legitimation of the developmental state [see Nash forth.].

I very much welcome the opportunity for discussion of all these issues, which are important to the emerging sociology of human rights, and I hope our exchanges will inspire wider debate on “states of human rights.” As Steinmetz notes, sociologists of human rights have not taken states, empires, and the unequal and exploitative terms of geo-politics as seriously as we must if we are to make any real contribution to their study. And this is especially odd in so far as thinking about political processes of state formation have been integral to the development of the discipline. If theorists of globalization in the 1990s have been proved wrong, and we now agree that the state is not “in decline,” and if securing human rights is only possible through states, it becomes imperative to look into their possibilities and limitations to gain a real understanding of how it is that alongside the exponential growth in mobilisations around human rights, their continuing and widespread violation is what is most striking in the world today.

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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 sovereignty, state autonomy, juridical state, postcolonial state, predatory state.

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