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Comment on Kate Nash/1. States Make Human Rights and Human Rights Abuses Make States

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Comment on Kate Nash/1

States Make Human Rights and Human Rights Abuses Make States

by Daniel Levy

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These are exciting times for students of human rights revolutions (not to mention those participating in them). Popular uprisings in Tunisia, Egypt, Libya, and possibly elsewhere demanding regime change are raising expectations of democratization and the attendant materialization of human rights. We hear about the “people’s will,” “spontaneous calls for rights,” and the potential obstacles to reform in the alleged form of cultural and often essentialized attributes (e.g. Islam, tribalism). What all these assertions have in common is that they pay insufficient attention to the opportunities that particular state structures afford democratic outcomes and the concomitant prospects for the realization of human rights.

Kate Nash provides an invaluable and timely corrective by reminding us that the human rights regime remains a state-centric enterprise. She sets out to “explore variations in state formation that are relevant to the institutionalisation of human rights. [...] The historically conditioned structures of ‘actually existing’ states, the social relationships in which they are embedded, the economic resources to which they have access, and the administration of human rights norms in global governance, officials acting in the name of the state secure the conditions of their own positions in particular forms that result in quite different state formations. These differences in elite strategies and state formations are crucial to how human rights activists must orient themselves in order to realise human rights in practice.” Considering the proliferation of culturological arguments (e.g. primordial tribalism) and other essentializing features clouding our understanding of whether and how human rights princi-

ples are integrated into routine politics, Nash's intervention is indispensable. It is not the tribal structures that matter, but the state structures that facilitate or constrain the salience of tribalism.

In the following remarks I heed Nash's state-centered perspective by addressing the balance between specific state structures and the horizon of global human rights expectations. In addition to her suggestive reference to the relational quality of states in their geo-political context, I direct attention to the limitations of juridical frameworks within which the nexus of state and human rights is frequently taken up. At stake is the nature of contemporary sovereignties and more specifically how they differ and depart from the Westphalian model that has long served as an ideational and analytic guidepost. Nash summarizes the state of sovereignty (and the sovereignty of states) as follows: in Europe (and the Northwest) the global human rights regime cosmopolitanizes Westphalian principles, primarily through the incorporation of international law into domestic legal practices and a human rights imperative that itself becomes a prerequisite for legitimate sovereignty [Levy and Sznajder 2010]; in the context of post-colonial states the Westphalian ideal clashes with the limited capacities of the state to implement policies, even when a normative commitment to human rights principles exists. Here the autonomy of the state is limited by the social relationships within which it is embedded. "Postcolonial states were imported into what Partha Chatterjee calls 'cellular societies': extended networks of reciprocal obligations based on 'moral communities' of kinship, caste, or religion (Chatterjee 2004)."¹ A different set of structural obstacles is attributed to predatory states. "What characterises predatory states [...] is that elite rule can only be exercised by looting and violence. Ruling elites must control access to wealth in order to pay their political and military allies and they must use violence to prevent rival 'warlords' from seizing the state. In such cases elites use 'sovereignty', international recognition of the official government of an independent state, to use aid and to establish business contracts for their own purposes." Human rights aid becomes an integral part of the "extraversion" by strengthening the ruling elite which is committing human rights violations.

Nash exposes the incompleteness of Westphalian as well as human rights idea(l)s and their actualization. Her typology is a first and necessary step in the right direction and a call for more (conceptual) action encouraging sociologists who study the political viability of human rights to encompass additional state types. To this I would add the diachronic circumstances of transitolo-

¹ We should caution against idealizing the economic viability of "cellular societies" since it is only one facet of the state, in addition to which they are often underwritten by the widespread institutionalization of corruption and patronage.

gy – i.e. to what extent the incorporation of human rights is plausible in societies emerging from a recent civil war or a dictatorial regime, to name but two possible scenarios. Last but not least, there is little doubt that transnational advocacy groups and global media events can play a significant role in providing normative and organizational space, not only for triggering human rights revolutions, but also for the reorganization of state apparatuses. The mixture of claim making activities about human, political, economic, and social rights in the current wave of revolutions in the Middle East underscores the need for a relational approach.

Nash's critique of the current literature on the state of human rights is directed at the preoccupation with non-state actors and the alleged juridical "trickle down" effects that are assumed or expected, rather than examined. This literature usually mistakes the European origins and the institutionalization of the human rights regime as expected, by deploying human rights and democracy as a set of universal standards mapped onto very divergent set of state-society relations. As such, the recent literature is (unintentionally) reminiscent of an earlier structural vocabulary underwriting universalistic paradigms such as modernization theory or its equally functionalist counterpart dependency theory. Here the path-dependent features of state formation are turned into residual categories whose interpretive significance is subordinated to a presumed teleological course. Faced with continuous state resistance to the implementation of human rights principles, scholars too often explain this as a temporary aberration, a delay or simply a setback from a prescribed trajectory which is imputed with legitimacy. If early sociological theory was the handmaiden of nation-state formation by "spatializing time," once the nation-state becomes a naturalized category in social and political thought we observe a "temporalization of space." The latter "refers to a mode of explanation that conceives of the difference between two phenomena as a temporal gap. [...] [providing it] with a temporal index, making it possible to study nations and their histories on a timeline of historical development" [Conrad 2010, 174]. Consequently, the failure to democratize is discussed by stipulating that the eventual adoption of democracy, which has become a global codeword with an ensuing purchase on legitimacy, will eventually lead to the incorporation of human rights.

A good example of temporal indexing is apparent in the literature that addresses the diffusion of international human rights principles into national law and the juridification of politics in general. To be sure, the extra-legal dimensions of law shaping norms of acceptability remain vital. The legal field operates not only as a site of adjudication but also as a source of socialization that confers legitimacy, conceivably establishing taken-for-granted norms thus producing the circum-

stances under which judiciaries carve out relative autonomy. The incorporation of human rights legislation is circumscribed, among other things, by discursive shifts and power constellations within states indicating the structural opportunity structures for substantive forms of relative autonomy and localization, that is, particular political cultures delineating how the local appropriation of global legal scripts takes place.

However, the critique of legalism is not merely that it is largely confined to Europe and the Northwest, rather it extends to the equally questionable legal fetishization that tends to render law into a causally privileged realm. Aside from the problematic issue of the relative autonomy of the judiciary, the legal field also has its own logic which limits many of the virtues associated with it. John Hagan and Ron Levi [2007] have pointed out that the recent “legal turn” in the human rights literature underestimates the political foundations of law and its narrow operations as a professional field. They are concerned with the unintended consequences arising from the perception of human rights as “justiciable, legally actionable, and formally criminalized. [...] [emphasizing] how arenas such as law are developed and promoted through sets of actors, constraints, and embedded norms” [*ibidem*, 373]. Here the diffusion of human rights tends to be subjected to the logics that constitute the professional and symbolic boundaries of a field, in this case the legal one. Such unintended consequences can also result from successful legal institutionalization: namely it can contribute to the de-legitimization of those who do not speak with reference to legal arguments, let alone act outside judicial avenues. “The result may further be a restricted historical record that is contemplated and produced with law already in mind, and in which heterodox questions of inequality or politics are ignored or devalued – a record that may be contested or supplemented in other (often informal) sites, but that is equally stamped with the veneer of being official and authoritative” [*ibidem*, 374]. Paradoxically, then the need for relative autonomy as a prerequisite for the successful internalization of the human rights regime, can turn into its main limitation.

Nash’s call to disaggregate the state by considering the relative autonomy of its political branches (especially the judiciary) and by situating it within a relational framework that is attentive to both domestic state structures and geo-political circumstances remains incisive. The (re)introduction of the concept of relative autonomy yields a significant analytic surplus. Its value could conceivably be enhanced by adding the distinction between infrastructural and coercive powers [Mann 1984], providing an important differentiation for the kind of internal autonomy Nash expounds on. The relational component of Nash’s argument could be further complemented through the incorporation of different scales including the local, the regional,

the national, and the global [Sassen 2006; Halliday 2009]. The regional, for instance, often takes a backseat to presumptions of globality, when in effect the majority of human rights transformations and “justice cascades” have taken place in regional contexts [Sikkink and Walling 2006].

Let me end on an optimistic note, if only because it is intellectually more challenging, and return to the Middle East. One of the main points that Hafner-Burton and Tsutsui [2005] make is that by signing up to human rights treaties states are opening a certain discursive space for civil society that otherwise did not exist. Rather than dismissing human rights as mere window dressing, they observe a paradox of empty promises which can, under certain circumstances, become socially, cultural, and politically consequential. It may very well explain the initial success of the recent popular uprisings. However, Nash persuasively shows and cautions us that post-revolutionary human rights goals will only materialize if state structures themselves are reformed.

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States Make Human Rights and Human Rights Abuses Make States

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, time, legalism.

Daniel Levy is Associate Professor of Sociology at Stony Brook University. As a political sociologist he is interested in issues of globalization, collective memory studies and comparative-historical sociology. He has been exploring the global diffusion of human rights norms and their impact on questions of nation-state legitimacy. The result of this research is a monograph entitled *Human Rights and Memory* (co-authored with Natan Sznaider, Penn State University Press, 2010). He is also co-editor of *The Collective Memory Reader* (with Jeffrey Olick and Vered Vinitzky-Seroussi, Oxford University Press, publication date 2011).