Human rights, Global Justice and the Limits of Law

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Although international human rights law is becoming more developed, it has inherent and internal limits. It is made by state actors, and respect for human rights in practice depends on how states are structured and on the political projects of officials who act 'in the name of the state'. In this chapter I discuss the citizen/human paradox on which international law depends: humans have rights as such, but citizens with rights must give themselves the law. From a sociological perspective, I will argue that human rights are necessarily political, and that the entanglement of the 'international' and the 'national' is unavoidable for the progressive construction of human rights.

<u>Human rights are globalizing…</u>

> Men are born and remain free and equal in rights… The principle of any sovereignty resides essentially in the Nation… *The French Declaration of the Rights of Man and of the Citizen 1789*

The principles expressed in the French Declaration of Rights subsequently became so taken-for-granted as to be invisible: humans have rights as such, and justice is a matter exclusively for citizens of the nation-state (1). In Europe and North America in recent times, it is as an accompaniment to the rhetoric and practices of globalization that questions have been being raised concerning justice beyond the national frame. Human rights defenders and lawyers have contributed to raising questions about the <u>scale</u> of justice that have, at the same time, been raised by activists against the neo-liberalising policies of global elites. Following the end of the Cold War, in the 1990s, 'global justice' became a rallying cry for activists and a topic of debate for political theorists (Held 1995; Fraser 2008).

Human rights may seem to be the 'natural', or at least the inevitable language within which to address issues of global justice. In fact, however, human rights have themselves been

'globalising'. In 1948 the Universal Declaration of Human Rights was not much more than a rhetorical flourish in the margins of the UN Charter, and state leaders signed up to human rights conventions in the 1970s knowing that there were no mechanisms through which they could be held accountable for failing to respect them. Although the UN Charter stresses co-operation and respect for human rights, it established 'equality between sovereigns' and promised that the UN would not interfere in 'matters which are essentially within the domestic jurisdiction of any state' (Article 2:7) (2)

Human rights have been globalising in that they have become the focus of greater interconnectedness across national borders. There are now mechanisms at the UN through which pressure has been brought on states – legal (in the International Criminal Court, for example), moral (through periodic country reports on compliance with international human rights treaties), economic (through targetted sanctions), and even military (the controversial 'humanitarian interventions' now given a firmer legal basis by the 'Responsibility to Protect'). In fact, international human rights law has been developed to the extent that some have gone so far as to call it 'cosmopolitan law'. Cosmopolitan law is defined as international law that reaches <u>inside states</u>, depending for its legitimacy on multi-scalar networks of authority to enforce claims against human rights violators regardless of the national citizenship of the claimant, and even regardless of where the violations took place (Held 2002). Does the development of international law mean that human rights are increasingly becoming a matter of technocratic, rational-legal bureaucratic administration, above the political fray – for better or for worse (Douzinas 2000)?

<u>…through states</u>

Despite these changes, in international law it is still only state actors that violate human rights. Only states (and occasionally, in criminal tribunals, individual state leaders) can be held to account for violations of human rights. In part this is an artefact of law. Legally, it is in the name of states, and only states, that international human rights law is made. It is only officials representing states who sign and ratify Treaties and Conventions, and who agree that compliance with human rights should be monitored by representatives of the UN and NGOs, and judged in national and international courts (2). In addition, however, from a sociological perspective, respect for human rights depends on state structures and the political strategies through which state formations are reproduced, challenged or transformed.

States are distinctive forms of organisation. In very general terms, states are organisations that are unique in their capacities to concentrate and distribute resources, both material and moral. States are structured and reproduced through political strategies that make use of military and economic resources and moral resources of legitimation that can never be fully controlled. Officials acting in the name of states are, therefore, exceptionally dangerous - well-equipped to benefit from torture, rape, and murder, and from turning funds that are ostensibly collected for public benefit through taxes and international aid to their own purposes. At the same time states are crucial to the realization of human rights in practice. It is only states that have the resources to deliver the extensive range of rights that are already encoded in international human rights law, as well as in demands that have not yet reached that status. Even international institutions, like the International Criminal Court and new norms like the 'Responsibility to Protect', which do point to a different form of state sovereignty from that of the 'non-interference in domestic affairs' of the UN Charter, depend on the resources provided by states. States are at the same time the violators <u>and</u> the guarantors of human rights.

The ideal-type of the state through which respect for human rights is to be realised is the juridical state. The juridical state is one in which officials who act 'in the name of the state' are organised and constrained by law; and in which law is made through proper procedures. When a politician ratifies a human rights treaty (at least as far as it is assumed to be made in sincerity) what is presupposed is that she or he is embedded in legal and bureaucratic structures (or will be soon) which ensure that what has been promised will be respected in practice. It is Northwestern European settler states which most resemble the ideal-type of the juridical state. In fact, the ideal-type itself is based on analyses of the long (and itself idealised) historical formation of European states. Although the ideal-type of the juridical state is problematic in many respects – especially because it is very far from existing in most of the world – as an ideal it has significant influence in human rights circles. In Northwestern states it tends to be assumed that 'getting the law right' is foundational for human rights – and strategic litigation in courts is the most valuable lever by which respect for human rights can be realised. In fact, however, even in Northwestern states, even in the circumstances that most closely those of the ideal-type of the juridical state, realising respect for human rights always requires a good deal more than getting the law right (3).

The effectiveness of officials who are empowered to carry out actions 'in the name of the state' depends on the organization of material and moral resources that they can never fully

control. States are never unified, nor 'complete'. Except perhaps in conditions of extreme authoritarianism there is inevitably political conflict within states and across nominal boundaries that separate states from civil societies and from each other. There is competition over resources between politicians, bureaucrats and experts within states, and between these officials and managers of corporations, organized workers, members of political parties, NGOs, social movements. There is also competition for resources between state officials and the officials of other states, and with experts, diplomats and bureaucrats in IGOs. State officials try to influence how resources are collected and concentrated 'in the name of the state' and how they are used; and they try to block the ambitions and projects of others with designs on the same resources. Ultimately these are political struggles over the form of the state itself.

A key resource on which states depend, and which state officials cannot fully control, is military force. The juridical state is defined as such (most famously in the work of Max Weber) by its monopoly on violence within its territories (Weber 1948: 82-3). As Charles Tilly puts it, states are the outcome of 'organised crime': the history of state formation is in large part the history of successful armed gangs that have consolidated their ability to continue warring by extracting money and labour from settled populations (Tilly 1985). In fact, no state has ever had an army and police force that fully monopolized the means of violence within its territory. However, forms of violence that support or threaten the projects of state officials vary a good deal in different states. There are organized and violent criminals in all countries; armed militias control parts of some state territories; and some areas are more vulnerable than others to bombing and invasion by the armies of other states. In addition, because there are no international military forces, it is states that 'lend' troops and equipment to other states and to the UN for peacekeeping operations.

How state officials create and make use of military resources to realize their projects, how they respond to armies and armed militias that appear to threaten or to strengthen their position, and how their decisions are encouraged or constrained by other actors nationally and internationally: these are all crucial to how states guarantee or violate human rights. In the juridical state, use of force is largely constrained by law. Very often, however, decisions are taken that are legally considered 'exceptional'. All states allow themselves the <u>legal</u> possibility of making exceptions when faced with dangers to national security. Infringements of civil rights within Northwestern states in what has become virtually a permanent 'state of

emergency' in the global war on terror have been very well-documented in recent years, with laws in the US and Europe enabling racial profiling, detention without charge, and extensive surveillance over citizens and non-citizens. In addition, we have seen the civil rights of unauthorised migrants into Northwestern states violated when they are incarcerated in prison-like facilities without due process of law – a violation that has been ruled legal in the European Court of Human Rights (Dembour 2015: 378-81). Outside states' territories, violations of human rights are also very evident, and often legally permitted within the state as the prerogative of the executive, the defender of state security. It is rare that they are considered by constitutional courts within states. To some extent this legal sanctioning of human rights violations is what is changing with the development of international human rights law: heads of state and military leaders can now be prosecuted for torture, disappearances, summary executions and war crimes in international courts. On the other hand, the administration of law in international courts is extremely uneven. There is clearly no question of prosecuting George Bush or Tony Blair for the part they played in the illegal invasion of Iraq, for example, and to date it is striking that it is <u>only</u> African leaders who have been prosecuted in the ICC since it was established in 2002. Where the administration of human rights in international courts is so uneven, it looks more like another way of doing geo-politics than law administered by rational-legal institutions.

States are also organisations that rely on the centralisation and redistribution of economic resources which state officials cannot fully control. The exceptional capacities of states, and the degree to which they depend on or are autonomous from the owners of capital, has long been debated in the Marxist tradition (see Jessop 1992). All states, irrespective of politicians' ideological preferences, or their personal ambitions, depend on the collection and distribution of wealth. In juridical states money is collected by officials acting 'in the name of the state' through law and regulation – backed by force - as taxation, and then distributed in political programmes and projects decided on by state officials and realised through legislation and policy. As a result the leaders of businesses that promise to contribute to national economic growth will generally be listened to very carefully. But this does not mean that shareholders and the managers of corporations control states. The dependence of states on capital investment for economic growth is not one-way. Even transnational corporations must go through states to be able to achieve their aims: states provide (or do not provide) many of the conditions that make business profitable, including infrastructure, relative peace and security, monetary stability, guarantees for legal contracts. In addition, state officials have other

sources of income besides taxation. They may negotiate loans from other states and international banks, and they may have access to international aid. States vary according to whether they are borrowers, lenders or donors. Whether a state is a lender or a borrower, a donor or a beneficiary, and the terms on which they are able to negotiate with International Financial Institutions and Inter-Governmental Organisations all have implications for the realisation of political projects within that state.

Neo-liberal public policies clearly show that the enjoyment of all rights depend on structures that go far beyond the juridical state and the rule of law. They depend on how governments deal with global capitalist elites in national economic policies, how transnational corporations are treated, and how markets, including financial markets, are created and regulated nationally and internationally. It is not just social and economic rights and workers' rights that depend on economic policy. Civil and political rights are also expensive to organise in practice: training and paying police properly, ensuring that people arrested have access to a fair trial, arranging fair and free elections. Tight limits on public spending also have an impact on civil rights. Cuts to legal aid in the UK, for example, which mean that people on low incomes are now less likely to have access to legal representation in court, exacerbate inequalities in rights to a fair trial (Boycott 2016).

Finally, in addition to material resources, state officials also rely on <u>moral</u> resources to carry out their political projects. Officials rely – to a greater or lesser extent in different cases – on authority to act 'in the name of the state', to make use of the state's resources and capacities in ways that are considered justified or legitimate. There is a variety of types of authority (see Nash 2015). What we are interested in here is 'popular authority', paradigmatic of democracy. 'Popular authority' rests <u>not</u> on <u>transcending</u> politics, either in law or in moral claims, but on representing the the people. A key source of authority to act 'in the name of the state' today is that which is claimed by politicians elected to be the voice of 'we the people'.

Two sovereignties

If it seems odd to think of states as the <u>guarantors</u> of human rights, that is because states tend to be seen as <u>obstacles</u> to the realization of respect for human rights in practice. State sovereignty, the principle that there should be no outside interference in the affairs of states or in what goes on inside their territories, is generally seen as a problem for the realization of

human rights: it must be contradicted or transformed so that everyone, no matter where they are born or where they are living, can enjoy universal human rights (see Levy and Sznaider 2006). Much of what counts as cosmopolitan law is an attempt to limit state sovereignty.

In terms of the inherent limits of international human rights law, however, and of political strategies to work with and against those limits, it is important to note that popular sovereignty as national self-determination is itself a human right. Article 1 of the ICESCR states that:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The ICESCR came into effect at the UN in 1976, and Article 1 is large part a product of de-colonisation, which was already well underway by this time. It codifies respect for the national self-determination of citizens in all states. As we have noted, the priority of citizens as the bearers of human rights had already been proclaimed in the great eighteenth century declarations of human rights. Although citizenship was not extended to all adults within Northwestern states until the twentieth century, and people in states that were European colonies never had citizenship rights, the principle that the law is only legitimate if it is 'we the people' who give it to ourselves was established at the very beginning of the principled use of human rights to guide public life. It is as the confirmation of this commonsense principle of democracy, and at the same time its extension to peoples liberated from empire, that national self-determination appears in international human rights law.

There is a paradox at the heart of the project of globalising human rights. On the one hand, human rights are universal, the lives, freedoms, capacities, the dreams of all human beings on the planet must be treated as of equal value if there is to be global justice. On the other hand, citizens have priority: it is citizens who 'give the law to themselves', at the same time giving legitimate authority to elected politicians to represent them, their interests and values, hopes, dreams and fears, at home and abroad. State sovereignty, generally seen as an obstacle to the realisation of universal human rights, is entangled with popular sovereignty: it is only national citizens who should decide on the content, value and reach of human rights law that constrains the democratic state.

The citizen/human paradox

The citizen/human paradox is at the heart of human rights. It is encoded in international human rights law itself, which therefore pulls in quite opposite directions. Moreover, the citizen/human paradox is not just a paradox in law; it is a paradox on which international human rights law itself depends. If it is only states that have the capacities to deliver the extensive range of rights encoded in international human rights law, and if in states in which the right to national self-determination is respected it is only citizens who can legitimately will the law by which state actions should be constrained, human rights can only be fully realised when citizens will law that binds their state to respect the universal rights of citizens and non-citizens alike.

The citizen/human paradox has several consequences for international human rights law and its limits. Firstly, it follows that political conflicts over what is owed to citizens and what is owed to non-citizens, whether resident on the territory or not, are inherent to the realisation of respect for human rights. Globalisation involves interconnections and at the same time inequalities of political influence (that often map onto and reproduce colonial inequalities). Many campaigns for human rights within the national frame concern the rights of non-citizens, of migrants and refugees. Some campaigns try to build solidarity in which voters in one country use their influence over the state of which they are citizens to address violations elsewhere (5). Sometimes it is powerful states which are themselves violating the rights of non-citizens in other territories. In all these cases, campaigns are mobilised to convince voters of their responsibilities towards fellow humans who happen not to be fellow citizens.

Secondly, conflicts concerning what is due to citizens and what is due to non-citizens results in the politicisation of human rights law. This politicisation is currently very evident in the UK, where the current Prime Minister Theresa May leads a party that has committed itself to leaving the European Convention of Human Rights if the Council of Europe does not agree with the government's reforms of national human rights law. These commitments follow a long campaign against human rights law on the part of right-wing newspapers. It is not just on the side of conservatism, however, that human rights law is politicised. Generally, human rights NGOs that support 'test cases' are engaged in strategic litigation intended to establish a new interpretation of legislation or to prompt new law that will steer the polity in a different direction. As Conor Gearty argues, it is telling that in the highest national and international

courts judgements are always made by several judges: highly contentious interpretations of law are settled by 'a show of hands'. In such cases, legal judgements look less like finding the truth of the law and much more like a political (even a quasi-democratic) decision (Gearty 2006: 88-9).

Thirdly, it follows from the citizen/human paradox that human rights is not a language through which nationalism is likely to be replaced by cosmopolitanism any time soon. Most of us who are interested in human rights are more likely to identify as cosmopolitans than as nationalists. We are very familiar with the dangers of nationalism, of the xenophobia and cultural racism to which it is aligned and which give rise to a range of 'human rights wrongs', from discrimination through personal violence, ultimately to genocide. We are more likely to identify as favouring a world in which papers and passports are irrelevant, and to wish to live in cities where differences of language and customs are a matter of interest and enjoyment rather than fear and hatred (Ignatieff 1994: 7-9).

However, as Craig Calhoun (2007) argues, nationalism has also been, and remains, an often-overlooked source of solidarity which, through commitment to public institutions and civic values, is one of the conditions of democracy itself. In one respect it is true that 'national' is no more than an administrative category; it is 'a collectivity existing within a clearly demarcated territory, which is subject to a unitary administration' (Giddens quoted in Calhoun 2007: 58). However, as Calhoun argues, to consider 'national' solely in bureaucratic terms is to ignore 'banal nationalism', the everyday reproduction – which is at the same time the continual changing - of common understandings of who makes up 'we the people' and how we orient ourselves towards those who are not (sometimes not yet) included as citizens in the nation. As Calhoun puts it: 'Distinctive national self-understandings are produced and reproduced in literature, film, political debate – and political grumbling, political jokes, and political insults. These structure the ways in which people feel solidarity with each other (and distinction from outsiders)' (Calhoun 2007: 156). Solidarity need not mean uniformity; reflexively multi-cultural polities can surely also be solidaristic. Shared understandings may be hateful or they may accommodate and take pleasure in differences, they may be open-minded and generous or fearful and closed-minded – perhaps even more likely, they may be ambivalent and contradictory. But it is important to recognise that such understandings are, in part, the basis on which human rights will founder and fail, or find fruitful ground in which to flourish.

There is much debate over the rise of national-populism in Europe, and now in the US, today. If we take the Brexit vote as an example of national-populism, it is clear from the rhetoric that was used by leading 'leavers', and from the rise in attacks that have followed the vote to leave the EU, that xenophobia and racism are part of the reaction to immigration that is being fuelled by right-wing nationalist parties. However, it also seems that there are concerns about social justice at work too. National-populism is not just hostile to migrants, it is also against elites (even if its political representatives need not themselves come from impoverished or marginalised backgrounds). In part the Brexit vote also represents disaffection with neo-liberal economic policies: it represents desires for social protection from global 'free markets' (in a similar way to the movements analysed by Polanyi in response to nineteenth century liberalism (Polanyi 2001)). Not having been educated at university and working in a semi-skilled or unskilled job were factors (along with being over 50 and living outside a big city) that made it more likely that an individual would vote to leave the EU. At the same time, it seems very evident in the UK that the vote to leave the EU is also a challenge to the legalisation of human rights. It is consistent with the long-running campaign against human rights by right-wing newspapers, which incessantly repeat stories about the freedoms and privileges allowed to foreign criminals, terrorists and 'bogus asylum-seekers' by the judiciary, national and European, as well as with Tory party rhetoric against European human rights law (see Nash 2016; Gearty 2017). The association of human rights with Europe, with undesirable migrants, and with the curbing of parliamentary sovereignty also played a part in the UK vote to leave the EU.

Ignorance and lies are serious problems. If it is how officials acting 'in the name of the state' organise military, economic and moral resources that ultimately impacts on the life chances of citizens and non-citizens, within the territory or in other parts of the world, how well-informed and how effective in targeting particular political projects are the voters who decide how government should represent 'we the people'? For the most part - and especially when it is a matter of foreign policy (which quite often depends on executive decisions and which is also often covert) law, or economic policy (the details of which are apparently difficult for professionals themselves to understand) – the answer is clearly 'not very'. Multilateralism and the co-operation of states in IGOs, which is itself essential to global justice, surely exacerbates the problem. The difficulty of democracy in such a complex world is too big to go into here. What is clear, however, is that there must be mediators between democratically elected governments and 'the people'. It is political parties that play this role most obviously,

and perhaps more importantly where human rights and matters of global justice are concerned, international NGOs linked into transnational advocacy networks. NGOs are needed to mediate the expertise that is indispensable to understanding issues of global justice, to make voters aware of consequence of their government's actions that they could not otherwise know, and to mobilise campaigns that move people to action – not only in their own interests but also on behalf of strangers, whether citizens or not - to influence the political projects of state officials.

Nationalist hostility to human rights, and to those who claim them, must be challenged through formal political channels and in the courts, but perhaps even more importantly, it must be challenged in the media and in everyday life. In terms of the cultural politics of human rights, the political party Podemos, which achieved a meteoric electoral success in Spain in recent years, is instructive. Podemos has unapologetically adopted populist rhetoric, and tried to engage voters through national identification. However, it does not demonise non-nationals or minorities, and as well as demanding better conditions of entry and work for migrants, at the same time it also makes use of human rights language to demand the social and economic rights with which many of those tempted by right-wing populism are concerned in Spain. Podemos is an example of a political party which has both engaged with the state, suggesting structural changes to Spanish and European Union government, and with nationalist identifications in Spanish civil society, setting up discussion groups in housing projects and workplaces, and reaching new audiences through debates on TV (see Nash 2016).

Human rights are political

In conclusion, then, political sociology enables us to understand how human rights are necessarily political. International human rights law can never simply be technocratic as long as democracy is also an aspiration, and as long as the world is organised by and through states. What is most important to whether human rights are violated or respected, at home and abroad, are fundamental structures of states and civil societies, and the political strategies of officials who make use of the exceptional material and moral resources of states. Sociological analysis takes us far beyond concerns with encoding and administering human rights in international human rights law. Beyond law it is necessary to consider not just politics in formal settings, in parliaments and in the committee rooms and corridors of IGOs,

but also the cultural politics, the definitions of 'us' and 'them', 'human' and 'rights' that are represented in mainstream and social media, in popular culture, in music and on film, and in conversations in meeting places, streets and shops.

As Hannah Arendt argued, at the very beginning of the contemporary human rights regime in the 1950s, it is in the political community that people gain the 'the right to rights', which then allows them to appear in public as worthy of justice (Arendt 1979). In a world organised through states in which 'we the people' have at least some say over how officials use the considerable resources concentrated in national states, for good or for ill, the political community within which a person may appear as having the 'right to rights' is almost invariably the nation. What is important, then, for global justice, is that 'we the people' do not only turn inward, to each other; we must also turn outwards, to listen to the stories of those who barely have a voice in our milieus. If human rights are to be of relevance, the paradox of the citizen/human must be confronted.

Footnotes

1. As post-colonial sociologists have pointed out, the naturalisation of justice as exclusively a national matter happened despite economic structures across territorial borders and geo-political links between states that systematically disadvantaged people in countries that were not 'European settler' states (Bhambra 2007; Go 2013).

2. It is important to note that although equal in sovereignty, states are nevertheless formally as well as informally unequal at the UN (see Donnelly 2006).

3. The fact that it is only states that make international human rights law raises difficult questions concerning other important actors, including terrorist groups and transnational corporations, who cannot, then, easily be made accountable for human rights violations for which they have responsibility in terms of their actions – but not in international law (Clapham 2006).

4. As a result of different, though interlinked, histories of state formation, states are not all structured in the same way in relation to other states, international institutions and national civil societies. There are few states in the world that resemble the juridical state – and even the Northwestern states of the US, Western Europe and Australasia differ from the ideal-type. I discuss differences in state structures that are relevant to

the possibilities of realising human rights in *The Political Sociology of Human Rights* (Nash 2015).

5. This type of campaign is what is analysed in the 'boomerang model': activists make connections across borders (in transnational advocacy networks) to influence one (or more) state(s) to put pressure on another to alter policies, legislation and practices that violate rights (see Keck and Sikkink 1998).

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