

The Sociological Discourse on Human Rights: Lessons from the Sociology of Law

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Since when, how, and why have sociologists discussed human rights in their work? In which forms of theoretical and empirical inquiry have such investigations been conducted, and what are some of their consequences for the praxis of sociology as well as for our understanding of human rights? We focus on the manner in which sociologists have conceptualized human rights and approached the topic from a number of analytical perspectives. In general, human rights have only recently begun to move sociologists in any noteworthy degree. This paper traces the difficult birth of a sociology of human rights relative to the place of the notion of rights in the sociology of law. This paper also ponders on the enthusiastic turn towards human rights in more recent times and criticizes some the reasons for this generous embrace of human rights. This critique is intended to enable rather than impede a truly sociological sociology of (human) rights.

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Introduction

In recent decades, the topic of human rights has taken on a more prominent role than ever in the discipline of sociology. What are the conditions and consequences of this adoption into sociology of a subject matter that for the better part of the development of the discipline was absent from its core as well as its periphery? In this paper, we will focus on some lessons for the sociology of human rights from the viewpoint of the sociology of law and the treatment, in this specialty area, of rights and human rights.

We begin our observations by briefly and no doubt incompletely reviewing certain key issues in the contemporary sociological literature on human rights, especially focusing on the programmatic statements that have been formulated in order to make sense of the newly emerging specialty of the sociology of human rights. Such a programmatic framework is necessary for research and additionally, one might hope and suspect, could contribute alongside of other disciplinary approaches to the study of human rights. We then confront the key elements of the sociological human rights program with insights from the sociology of law. Finally, we extend the discussion on the proper role of sociological knowledge, which underlie much of the sociological debate on human rights, in order to formulate some thoughts on the prospects for a veritable sociology of human rights.

A Sociology of the Sociology of Human Rights

It will be useful to clarify what it is we are discussing when evaluating the development and state of the sociology of human rights in order to highlight some of the problems and prospects identified with the sociological study of human rights as they have been articulated by the practitioners of this specialty. This review of the sociology of human rights cannot be said to be based on a well-developed expertise within this growing area of thought. Yet, focusing on certain influential programmatic statements on the sociology of human rights, certain central themes may nonetheless be detected that can be validly addressed from the viewpoint of the sociology of law.

The Sociological Tradition

In almost all programmatic statements about the sociology of human rights, the classical tradition of sociology is seen as generally inhospitable towards the adoption of human rights as a sociological subject matter (see Morris 2006). Human rights sociologists such as Bryan Turner (1993, 2006, 2009) and Gideon Sjoberg (Sjoberg et al. 2001; Vaughan and Sjoberg 1986) have argued that the classical social theorists declined to adopt rights as a legitimate area of study. This traditional resistance against taking up human rights in sociology is held to result from a purported positivistic tendency which would have been imbedded in sociology from the very start. By example, Bryan Turner (1993) argues that Emile Durkheim approached law and rights from a positivistic standpoint, focusing on legal norms as social facts, and thus demarcating the differing tasks of philosophy and sociology. Notions of just and unjust law and rights could in these terms only be approached as a matter of (dys)functionality. Turner criticizes Max Weber's work along similar lines, as revealing a positivistic tendency to view modern law as a rationalized system that dispenses with questions on the universally valid normative foundations of law. Weber's methodological orientation of value-freedom is also said to hinder the study of human rights.

Sociologists of human rights have likewise criticized the writings of Karl Marx, despite that body of work's clear philosophical orientations. The reasons for concern are different than in the cases that are made against Durkheim and Weber. Rather than challenging Marx's work with positivism, it is the Marxian critique of human rights that is being criticized. Marx argued that human rights, such as those expressed during the French Revolution, were essentially individual liberty rights rather than social equality rights. The discourse on human rights, according to Marx, operates as a facade to mask concrete conditions of economic inequality. Thus, as Anthony Woodiwiss (2009) suggests, Marx reduces human rights to their purported role in capitalist social life. Yet, while ignoring the value of (the study of) rights in terms of an economic-deterministic model, it can be learned from Marx that the notion of human rights is a construct that is produced through social relations. For Marx, naturally, these rights are rights of freedom that not only do not entail, but explicitly run contrary to, social rights of equality, thus even exacerbating conditions of (economic) inequality. Related to the Marxian critique, R.W. Connel (1995) has argued that the hesitancy of sociology to engage in the study of human rights is due to the

conflict between sociology's holistic approach and the liberal individualism associated with the discourse on rights.

Institutionalized Human Rights

The liberal reading of rights, which sociologists of human rights argue to be one of the obstacles towards the development of a sociology of human rights, is already a specific interpretation and a concrete realization of rights in (Western) societies. Sociologists of human rights therefore suggest, as does Woodiwiss (2009), that it needs to be taken seriously that human rights and the discourse(s) on human rights take place within a specific socio-historical context. Rights always exist socially as concrete claims and institutionalized measures. Importantly, sociologists of human rights argue, these institutionalizations of human rights need not be restricted to legal norms. In fact, with respect to the legal institutionalization of human rights, sociologists of human rights often argue against the restricted idea that human rights must relate to legal protections. Law becomes a suspect category in the sociological discourse on human rights. For this reason, it can be assumed, Woodiwiss (2009) mentions the work of H.L.A. Hart as among the first explicitly formulated sociological perspectives of human rights. Yet, Woodiwiss argues, Hart developed a human rights approach that was based on a legal-positivistic framework.

Even some experts in the sociology of law have warned against certain perspectives on the legality of human rights. John Hagan and Ron Levi (2007) argue that when a scholarly approach is restricted to the institutional boundaries of human rights law, there is a danger of the analysis becoming confined to a technical arena of jurisprudence, which is not conducive to questions of substantive human rights justice. The language of law then becomes the predominant or even the exclusive means to communicate about human rights and human rights violations, not the needs and perceptions of those to whom human rights apply. As a result, it would become difficult to discuss human rights violations separate from law and the legal processes through which they are enforced.

As a correlate to the legality of human rights, other human rights sociologists have related human rights with the notion of citizenship. Bryan Turner (1993), most clearly, argues that citizenship has served as a substitute for the study of human rights. This substitution, however, has only displaced the problem of taking rights seriously in sociology because citizenship always involves rights. Besides, the human rights of the global era move beyond

citizenship, because citizenship remains bound to nation-states. Turner (1993) therefore argues in favor of a perspective that recognizes the institutionalization of human rights as a central component of globalization, thus becoming more and more a fact of social life, whereby human rights are defined as (social) claims for institutionalized protection. Likewise shifting the focus away from (nation-state) law and citizenship, Connell (1995) treats rights in terms of the mobilization of rights in social movements.

The Boundaries of Sociology (as Practice)

Analyzing the slow development of the sociology of human rights, Margaret Somers and Christopher Roberts (2008) view the obstacles broader than the intellectual foundations of sociology and also consider the position and ideal role of sociology as a social practice. Thus, they argue that sociologists have avoided human rights because of a resistance to philosophical questions. In social research, consequently, human rights are often dispensed with in favor of citizenship studies. As another impediment, finally, human rights present a conceptual problem in terms of finding a widely agreed upon definition.

Somers and Roberts go a step further and in a different direction than Bryan Turner and other human rights sociologists by arguing that a sociology of human rights should entail a transcending, negotiating, or deconstructing of the obstacles of social sciences resistance to foundationalism and normativity. Additionally, the conflict between the universality and abstractness of rights, on the one hand, and the social and institutional characteristics of citizenship, on the other, must be overcome, as must the hierarchical privileging of civil and political rights over socioeconomic rights. Somers and Roberts thus discuss more fundamentally the professional boundaries and role of sociology. They suggest that a sociology of human rights need not be afraid to take up normative issues into its analysis. From a similar viewpoint, Gideon Sjoberg and colleagues argue that a sociological focus on the moral order, as a social reality, implies that moral inquiry in sociology is justified (Sjoberg et al. 2001). While sociologists typically have trouble approaching universal concepts, the authors argue, applying such universal principles to empirical situations would be illuminating.

From this review it is clear that sociologists of human rights have criticized the classical tradition of sociology because of its presumed impotence to study rights. As a more specific component of this critique, a focus on the legal institutionalization of human rights is seen as imposing an

unwarranted constraint on the sociological study of human rights. We will argue that this dual critique is misplaced and suggest that sociology, in general, and the sociology of law, in particular, are the victims of a misguided criticisms by sociologists of human rights. Our arguments relate to both the sociology of law as it has emanated from the classics as well as to the broader role sociology should play, both intellectually as well as socially.

(Human) Rights: Lessons from the Sociology of Law

The first author of this paper has recently reviewed the history and systematics of the sociology of law in the form of a book-length study (Deflem 2008). Although this work does not offer a complete review of all developments in this sociological specialty, the study was comprehensively aimed at laying bare the intellectual and institutional contours of the sociological study of law. Whatever the merits of the work, it is striking to observe that there are only three mentions of human rights in the book. Additionally telling is the fact that the term rights was mentioned well over 100 times. A brief discussion of these usages of human rights and rights in the sociology of law may reveal some essential characteristics of both the realizations and limitations of the development of a sociology of human rights from within the specialty of the sociology of law.

Human Rights and Law

In the sociology of law, the theme of human rights is discussed exclusively with respect to the globalization of law and the internationalization of law and justice. In her work on the development of the global prohibition regime against female genital cutting, for example, Elizabeth Heger Boyle (2002) observes that there are important variations in the processes whereby national legislations have been passed and, additionally, what the impact is of these laws on genital-cutting practices, despite the fact that the practice has in recent years universally been outlawed. Boyle argues that the movement to prohibit female genital cutting has been motivated by concerns over health, gender equality, violence against women and children, and human rights.

In the work of sociologist John Hagan, the theme of human rights is approached in terms of the development of an international criminal court (Hagan, Schoenfeld, and Palloni 2006). Hagan argues that the prospects of such a globally recognized court can rely on a new global consensus on

norms, especially with respect to human rights. Several concrete legal developments can be seen as institutionalizations of such a discourse. The successful operation of the International Criminal Tribunal for the Former Yugoslavia shows that advances in a global spread of the rule of law may be possible as part of a trend towards the global diffusion of democratic norms and human rights. However, the prospects of a global court are not favorable in view of the inability (or refusal) of the international community to intervene in certain conflicts involving genocide and war crimes (e.g., Darfur). Additionally hindering the effective installation and implementation of a global legal regime is the refusal of some partners in the world community, especially those politically and economically strong nations whose positions can have ripple effects into other national contexts. There still exists today this thing called national sovereignty.

In the context of the sociology of law, mention should finally also be made of the fact that the globalization of law (as globalization in general) is often understood in highly normative terms which relate closely to a likewise normative discourse on human rights. Heinz Klug (2005), for instance, argues in favor of an emerging field of transnational human rights on the basis of an integration of the domains of (international) human rights, humanitarian law, and constitutional rights. Underlying this approach is a conception of law as being inescapably close related to normative concerns, whereby the globalization of law, specifically, is intimately tied to a global discourse on rights, which becomes almost unavoidably connected to human rights.

Law and Rights

In stark contrast with the underdeveloped discussions of human rights in the sociology of law stands a very elaborate tradition of a rights discourse and related research in this sociological specialty field. Restricting this discussion to some of the most poignant discussions of rights in the sociology of law, both classic and modern, some of the key characteristics of this tradition can here be reviewed.

While classical sociology was born out of the dual traditions of social philosophy (Europe) and social policy (United States) and from there sought to itself as an academic enterprise, there did not occur an expulsion of rights from the classical sociological discourse. Quite to the contrary, for classical sociology was deeply invested in seeing to contribute to the multiple discourses on rights on the basis of the accomplishments of sociological

scholarship. Various classical scholars can be mentioned in this respect. William Graham Sumner, for instance, in his 1906 book *Folkways* argued that the customs of a society can turn into mores that become endowed with sanctions (Sumner 1906). Embedded within these mores are rights, which Sumner conceives as ethical conceptions of justice. Importantly, Sumner argues that mores can also develop into laws, yet that laws can never fully or adequately express rights.

While other examples can be mentioned of classical scholars discussing rights within a scholarly framework (e.g., Ferdinand Tönnies, see Deflem 2008), the work of Emile Durkheim stands at the apex of the classical sociology of rights. Particularly relevant in this respect are Durkheim's lectures on professional ethics and civic morals (Durkheim 1900). In this series of lectures, Durkheim devoted special attention to the role of the state in the creation of rights (see Deflem 2008).

Durkheim conceives of moral and juridical facts as the observable expressions of morals and rights. In contemporary (organic) society, Durkheim argues, crimes against the person and against personal property arouse the greatest resentment and receive the harshest sanction because they violate a morality that places the qualities of the individual above all else. The rules concerning crimes against the person and against property extend beyond the boundaries of any particular society.

By example, Durkheim analyzes the evolution and nature of property rights as the basis for a sociological theory of contract and contract law. Private property, he maintains, is a right to possession that is exclusive, at least towards other individuals, as in some circumstances the state may still claim certain rights. The basis of this private property right is not the thing that is owned nor the sacred or divine blessing it has received, but society as such, for society endows property with an exclusive right. The social basis of this right is articulated in the contract.

The modern sociology of law has been more ambivalent towards a discussion of rights. In fact, most analyses on rights in the multidisciplinary field of law and society studies have taken place, and continue to take place, in jurisprudence and in the philosophy of law, not in the more specialized field of legal sociology. Looking at discussions on rights in the contemporary sociology of law of the past few decades, it is striking that the most conspicuous and intellectually challenging contribution has come from Jürgen Habermas, from a scholar, in other words, who essentially merges philosophical and sociological perspectives. In his historical work on the evolution of the juridification of rights, Habermas (1981) analyzes the

development of welfare law in the context of the (European) welfare state. It is the gradual unfolding of individual and social rights in this development that is of special interest to the theme of this paper.

Historically, Habermas argues, four waves of juridification can be described. First, in the traditional bourgeois states of the absolutist regimes in Europe, the expansion of the capitalist economy was accompanied by the development of civil laws that grant liberal freedom rights and obligations to private persons engaged in contractual relations on the market. Second, with the development of constitutional states, the private rights of citizens to life, liberty, and property are constitutionally guaranteed over and against the political sovereign, who is now bound by law to not interfere with these rights. The right to participate in government is granted during a third juridification wave when, under the influence of the French Revolution, democratic constitutional states develop and political participation rights are granted in the form of an expansion of voting rights. Finally, during the twentieth century, the democratic welfare state develops and welfare regulations bridle the workings of the free-market system in order to ensure a modicum of economic equality.

Importantly, Habermas's perspective on the evolution of (legally guaranteed) rights lays bare the development of individual (freedom) and social (equality) rights. This co-existence of rights is basic to, and indeed imbedded within, human rights, even when, or at least to the extent that, the discourse of human rights does not recognize this fundamental conflict.

Whatever the specific merits of the sociological treatment of rights, it is clear that rights have *de facto* received attention in sociology in a way that is not restricted to any so-called positivistic conception of sociology. The sociology of law has devoted attention — a decidedly sociological attention — to the study of rights within a broader framework of study oriented to the analysis of law. It is a mere function of the thematic orientation of the sociology of law that this understanding of rights always relates to law. More critically, from the viewpoint of building a sociology of human rights, the sociology of law shows that a sociology of rights is possible.

What sociologists of human rights in their criticisms fundamentally regret, we suspect, is not any inability on the part of sociology to study rights, and hence to study human rights (as rights), but the simple fact that sociology cannot by virtue of its disciplinary boundaries engage in philosophical ways to the analysis of (human) rights. Sociologists of human rights appear to regret to be sociologists. Their problem is not that sociology is not more than sociology but that sociology cannot be more than sociology.

This understanding of the possibilities of a sociology of human rights relates, more broadly, to the fundamental tasks of sociology.

The Rights (and Obligations) of Sociology

The famous description by C. Wright Mills on the various roles of the sociologist remains one of the most explicit formulations of the rights (and duties) of the sociological profession. Mills (1959) differentiates the philosopher-king from the royal advisor and the social-science scholar guided by the sociological imagination. The philosopher-king represents the model of the social scientist who takes full command of the political agenda on the basis of acquired expertise and knowledge. The royal advisor bureaucratically recommends the most efficient means for whatever ends that are determined by the king. And in the role Mills advocates, finally, the sociologist unites private troubles and public issues and is directed at kings and publics alike. It is the role of this sociologist inspired by the sociological imagination that is also favored by many sociologists of human rights and that, in American sociology, has recently been adopted and promoted under the banner of so-called public sociology.

Human Rights Sociology as Public Sociology?

The background of the curious development of public sociology need not entertain us here (see Deflem 2004, 2007). What is striking and relevant in the context of this paper is that many of the comments made by public sociology, especially concerning their discontents about sociology as it exists, harmonize with the criticisms raised by sociologists of human rights against traditional sociology. Public sociology “defines, promotes and informs public debate about class and racial inequalities, new gender regimes, environmental degradation, multiculturalism, technological revolutions, market fundamentalism, and state and non-state violence” (cited in Deflem 2007). Public sociologists not only study these issues; they also seek to “challenge the world as we know it, exposing the gap between what is and what could be” (ibidem).

The normative orientation of public sociology is eerily reminiscent of some of the pleas made by sociologists of human rights. But there is an immediate problem with this perspective because it imposes a dual limitation. First, public sociology is limited to specific topics of research and,

as we know from some advocates of public sociology, human rights is among the favored subject matters (e.g., Blau and Moncada 2007; Burawoy 2006). Second, the objectives of public sociology, like many of the programmatic proposals of a sociology of human rights, are not merely oriented at analyzing the social world; they additionally and importantly seek to challenge the world.

Transgressions of Human Rights Sociology

To the extent that the sociology of human rights is a manifestation of, or at least harmonizes with, public sociology, we argue, it is a fractioned and perverted sociology. Let us briefly consider some of the indicators of this distortion.

(1) The activism of human rights sociology.

Quoting from the writings of Alasdair MacIntyre, Bryan Turner (2009) makes the unwittingly telling comment that MacIntyre put it “brilliantly” when he argued against value-freedom in social science by stating that one could never argue, from a value-neutral viewpoint, that a political regime collapsed because it was unjust or illegitimate. In truth, however, a sociological perspective committed to analysis rather than critique reveals that a political regime can fail when it is considered unjust or illegitimate. Rather than continuing to be immersed in a sociological regret, the sociology of human rights should have the courage to become sociological.

(2) The absolutism of the human rights discourse.

Human rights sociologists typically position themselves as supporters of human rights to promote the development of ways to curtail human rights violations and find ways to institutionalize human rights protections. But who is or who can be against human rights? And if we cannot be against human rights, does it imply that we also must, rather than can, accept a human rights sociology? The normativity of human rights sociology at the least appears to demonize its opponents. A constructionist view instead would urge sociologists to focus on the cultural construction of human rights and on the social reality of human rights, including its use and violations thereof. Abandoning an essentialist understanding of human rights will enable an authentic sociology of human rights as much as the expulsion of natural law from the history of social thought enabled the development of the sociology of law.

(3) The krypto-legalism of human rights sociology.

While critiquing the restricted vision of legalized human rights institutionalizations, sociologists of human rights rely on the law as an efficient instrument to prevent or respond to human rights violations (e.g., Blau and Moncada 2007). This legalistic viewpoint is especially curious in light of the ample research that exists in the area of sociology of law and criminological sociology that shows the (potential) gap between the objectives and the consequences of law as well as the unintended consequences of criminalization practices. The understanding of law, criminal justice, police, and other legal institutions by human rights sociologists — as by many other non-insiders of the field of sociology of law, crime, and social control — is profoundly unsociological. Rather than assuming that the law is an effective instrument against human rights abuses, the discrepancies that may and often do exist between the functions and consequences of law must be taken seriously.

(4) The singularity of rights.

Rights, it is often remarked in the sociological discourse on human rights, necessarily involve a social relationship because rights entail claims towards others. The right to be heard and the right to be left alone, for instance, entail an appeal that invokes obligations from others. Yet, human rights appear to have no such complement in a notion of ‘human obligations.’ Developing such a conceptual counterpart, it is to be noted that these obligations do not refer to the duty on the part of states and non-state actors to respect human rights, but to obligations on the part of all humans towards one another as a complement of their human rights.

(5) The use and abuse of human rights.

Related to the legalism of human rights sociology, the practitioners of the field appear to insufficiently realize that human rights can be abused precisely by being advocated. Writing at the beginning of the Reagan era of the Cold War, T. R. Young (1981) in this respect astutely observed that human rights can be used by any social formation, such as a nation-state, in such a way “as to make itself look good in contrast to its chief rival”. This abuse of human rights is politically motivated, of course, but it is made possible because human rights are formulated in highly abstract terms and because human rights entail a variety of rights that need to be weighed. Rightly, Young reminds us, human rights can be a weapon in a social conflict. Moreover, even at the abstract level, where human rights purport to claim

universality, human rights can be conceived in different ways. It is important, therefore, for sociologists to unmask the abuse of human rights by specifying the historical context in which it takes place.

Conclusion: Towards a Sociological Sociology of Human Rights

This discussion on the sociology of human rights takes us back to the central question on the objectives of sociology. Sociology, we fundamentally argue, cannot be involved in promoting or defining anything other than systematically gathered, well-theorized and well-researched, knowledge about social life. In the case of human rights, any simplistic intrusion of normative questions (back) into sociology is, we suspect, a function of the politicization of sociology and a misguided orientation towards the understanding of rights (and their violations). For the revolutionary quality of sociology is precisely its ability to transcend normative debates to engage in analysis of the existing world.

Therefore, we argue that, similar to the sociology of democracy, where the best and most sociological work is done on the multiple ways in which democratic ideals are violated (Deflem 2008), sociology can contribute in most exemplary and useful ways to the analysis of human rights violations. Especially in light of the persistence of human rights violations, which are as much a global reality as the diffusion of human rights norms (Klug 2005), the need to recognize the true and truly valuable potentials of sociology is more urgent than ever before.

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