Introduction

Human Rights as Local Constructions of Limited but Expandable Validity

Jeremy Bentham's pungent critique of one conception of rights – rights valid independently of all institutions, and valid regardless of whether they are recognized by anyone – remains more quotable than any other, even after 170 years or so: "*Natural rights* is simple nonsense; natural and imprescriptible rights, rhetorical nonsense, – nonsense upon stilts" (Bentham 1843:501). Aimed at the revolutionary French Assembly's *Déclaration des droits de l'Homme et du Citoyen* of 1789, his critique follows directly from his premise: rights are the "child of law: from *real* laws come *real* rights; but from *imaginary* laws, from laws of nature . . . come *imaginary* rights" (Bentham 1843:523). How has Bentham's claim fared after so many years? On the one hand, the ancient legacy of natural and imprescriptible rights retains its attraction today, most powerfully in the notion of human rights. Perhaps Bentham might sense at least some vindication in the fact that, as a matter of empirical observation, we find in the world today, as ever, no agreement as to whether human rights exist or even can exist – and if they exist, of what provenience, let alone what rights those might be in particular, and which are fundamental, and which secondary. For the social constructionist approach I take, provenience is a matter of history and contingency rather than, say, necessary truths discoverable by man if not eternal verities revealed to the elect.[1] And as a matter of contingent fact, there are no generally accepted histories of the idea of human rights or even of movements for human rights; there are instead more than a few competing histories. To take but one recent example: Samuel Moyn asserts that the

---

[1] By "social constructionism" I refer to a sociological and philosophical tradition that finds one significant expression in Berger and Luckmann (1966) and another in Searle (1995). This book hopes to contribute to this tradition.

1

human rights idea emerged, at least in its current status in global political discourse, only in the 1970s rather than, say, with the moral intuitions of venerable and primordial religions, or in the American and French Revolutions, or with the post-Holocaust United Nations(UN) in the 1940s, or with the *Universal Declaration of Human Rights* in 1947. In Moyn's account, human rights emerged as the next great utopia following the exhaustion, if not failure, of various earlier utopias from which morally needy idealists now sought to distance themselves. Such utopias span quite an arc, from anticolonialist nationalism to communism to humanism to hopeful visions of the nation-state: "Born of the yearning to transcend politics, human rights have become the core language of a new politics of humanity that has sapped the energy from old ideological contests of the left and right" (Moyn 2010:227).

What Moyn does not contend, but what his account (like other recent accounts)[2] suggests, is that the history of human rights, indeed the very idea of human rights, all too frequently is a projection onto the past of one or the other contemporary understanding, assumption, or preoccupation in realms moral, legal, religious, or philosophical. But where Moyn sees the weakness of the human rights idea as merely one more utopian politics, I see possibilities for a human rights politics whose purchase and practice might be magnified powerfully along all the dimensions I develop in each of my nine chapters. In each I view human rights as social constructions. I take their constructedness as a license to recommend their local fabrication, if possible by their addressees themselves, ultimately in ways that would transform the nation-state into a human rights state. I go far beyond Moyn, who cannot identify an advisable human rights politics other than to urge its "minimalist" quality: that advisable politics be built around a small core of claims such that human rights "cannot be all things to all people" (Moyn 2010:227). But a minimalist core by itself implies nothing about content; in particular, it provides no guidance on questions such as: Which norms and why those? What conception of the "good life" do they presuppose? By itself, a core, minimalist or otherwise, says nothing about how human rights might be brought about in the everyday life of countless individuals diverse in belief and practice. Fearing a politics of impossible goals and unrealizable expectations, or a politics diluted conceptually by moralism and rendered impotent practically, Moyn offers no model of a politics of human rights, even of the realist vision he vaguely favors: one that would prevent "catastrophe through minimalist ethical norms"

---

[2] In later chapters I discuss those of Quataert (2009) and Hunt (2007).

rather than build "utopia through maximalist political vision" (Moyn 2010:226) – more a "general slogan or worldview or ideal" than a "recipe for the displacement of politics" through the "moral transcendence of politics" (Moyn 2010:227). This book embraces politics, eschews moral transcendence, but still provides a distinct vision of human rights.

Human Rights as Politics: Social Construction Without Theology or Metaphysics

I articulate that vision by reconceiving human rights as social construction, and I construct human rights as valid initially only for communities that embrace them. Human rights can be "grown" locally by their addressees themselves. They would carry an exceptional motivating power, for theirs would be a validity that is indigenous rather than imposed from without or coerced from within. My vision contrasts starkly with much human rights thinking that insists that such rights can be valid only if that validity is immediately universal, indeed a priori. Such thinking tends toward the otherworldly, either metaphysical or theological. I analyze both at length, showing that universal human rights so conceived are demonstrably unattainable, whereas my realistic, locally sensitive, small-bore, quotidian alternative allows for the expansion of validity across diverse cultures and political communities even as it takes account of the unique and particular features of any local environment and any concrete milieu. It allows for human rights universally valid if validity is constructed as mundane, this-worldly, and contingent: as something achieved not given or revealed. By avoiding treacherous metaphysical or theological assumptions, it avoids the hornet's nest of problems they entail. Consider, for example, what might seem to be the single claim most likely to find immediate agreement, everywhere: the widespread idea of a human right to life. Does it mean a right of a human embryo to the life it has? Would "the life it has" mean a right to be free of genetic manipulation? Might it mean a right of an embryo in vitro to be implanted into a uterus, if a right to life means a right to an uncertain and precarious opportunity for life, to conditions that allow for further development? Is a right to a *chance* of life (borne by an embryo in vitro) also a right to be free of genetic manipulation? At just what cell stage might the embryo possess this right? As I show, answers plausible and in that sense capable of wide embrace in the twenty-first century are much more likely to be socially constructed than supernatural.[3] And theological or

---

[3] Chapter 9 addresses human rights in the context of genetic manipulation.

metaphysical assumptions would provide human rights foundations that are nothing short of otherworldly. We nature-bound humans, evolved organisms that we are, may be sorely tempted to regard a supernatural basis as the strongest, most objective or secure one possible precisely because it is not dependent on the human beings to whom it is addressed and to whom it would apply. This way of thinking tellingly betrays a deep suspicion about the capacity of humankind for moral behavior. For it suspects that a norm that applies to human beings yet is not created by them is, *for that reason*, "better" or "stronger" or "truer" than norms of some nonhuman, indeed preternatural provenience.

My counterargument asserts two things: first, that transcendental norms can only be a figment of imagination and, second, that human beings are *not* cast adrift morally if norms do not exist independently of human culture and imagination. Indeed, the moral self-ennoblement of human beings is precisely that of humankind giving itself norms of social and political behavior. And it does so precisely by means of social construction. Humankind's task is then to construct, for itself, in its manifold communities across immense differences in history, culture, experience, level of socioeconomic development, and so forth, a compelling code of behavior for human beings – and, over time, compelling beyond the local venues where in each instance it begins. That task requires us to struggle with the daunting challenges of a naturally evolved species of unparalleled cognitive capacity, emotional sensitivity, and psychological fragility.

This book attempts that postmetaphysical, post-theological moral self-ennoblement in terms specific to human rights. Those terms refer to a particularly ambitious form of behavioral norm: one that would obtain initially only within the community that freely embraces it yet aspires to obtain across the profound confines, more cognitive than geographical, that separate human communities and divide many communities within themselves. The theological and metaphysical sources I reject have always already been challenged (and with time increasingly challenged) by natural science and, to a lesser extent, by social science. Both these ways of looking at the world offer resources for moving toward behavioral norms of wide validity. For example, natural science understands members of the human species as so similar that the DNA of any particular member can represent, at a biological level, all members, bar none. Here we have one possible basis on which a kind of normative universalism might be constructed: all members of the species are equal members. My approach is not at all natural scientific but rather proceeds mainly along dimensions philosophical, sociological, anthropological, and jurisprudential (and, in

one chapter, even neurobiological). That those dimensions offer bases for binding norms of wide validity should be clear in each and every chapter.

The Term "Human Rights"

In speaking of "human rights," I refer usually to the *idea* of human rights. To be sure, for human rights theory and practice alike, it matters a great deal just *how* human rights are specified individually as well as in relation to each other (for example, moral norms in particular are likely here and there to conflict with each other). I develop the idea of human rights as a kind of rhetorical vehicle, open to different contents and capable of transporting different conceptions of human rights as well as varying lists of basic and secondary human rights. The human rights idea is contingent along several dimensions, and I propose a pragmatic approach to dealing with these contingencies.[4] Thus I argue that human rights are best understood in terms of the pragmatic imperative for desired results, as distinguished from, say, an epistemological imperative for objective truth. For example, an inventory of human rights composed of those behaviors likely to be widely challenged is pragmatic; there is nothing to be gained practically by including behaviors of little concern to most people.

When I speak of the "human rights idea," the reader should imagine, at least as propositions, some of the more capacious of the alleged rights against the modern nation-state, such as rights to life, safety, and personal liberty; to belief, expression, and conscience; and to privacy and property. What I do not primarily intend are alleged rights no less capacious but of a different order: rights to a "decent" standard of living, say, or to the integrity and perseveration of distinct and fragile cultural groups.

And when I refer to the human rights idea, the reader should also imagine negative rights, that is, rights to be protected from something, rights to be free of interference by others. Negative rights constrain the state (among other institutions and organizations) in its treatment of the individual. My project does not preclude human rights as positive rights, that is, rights to something, rights that require more than noninterference, for example to a decent standard of living. The goal of developing as wide a validity as possible, ideally one eventually global, allows for negative rights much more than for positive ones because almost any right

[4] Elsewhere I develop a pragmatic social theory, on which I draw in this book, to deal with the indeterminacy of social norms (Gregg 2003a) as well as problems of social integration in normatively pluralistic communities (Gregg 2003b).

entails an obligation.[5] First, those persons or institutions against which
one has a right are obligated not to interfere with that right. And as the
number of persons who possess a particular right increases, the num-
ber of persons on whom it poses obligations increases correspondingly.
A regime of universal human rights would entail a regime of universal
human obligations; today for everyone everywhere to take that kind of
responsibility, and to accept being held accountable, remains as distant
a goal as can be imagined. However difficult it might be to justify and
practice negative rights, the discursive justification and practical applica-
tion of positive rights is significantly more difficult. Consider: a universal
negative right to life and personal safety would entail each person's obli-
gation to respect the life and safety of all other persons. That obligation
is much more easily realized than a universal positive right to a certain
standard of living, which would entail the obligation of all persons to
secure an adequate standard for all other persons. But against whom,
for example, does the individual enforce the rights specified in Article
25 of the *Universal Declaration of Human Rights*: "Everyone has the right
to a standard of living adequate for the health and well-being of himself
and of his family including food, clothing, housing and medical care
and necessary social services, and the right to security in the event of
unemployment, sickness, disability, widowhood, old age or other lack of
livelihood in circumstances beyond his control"?

Overview

I articulate this approach in four parts. Part I includes the first three chap-
ters. The first two explain why (and how) I reject traditional otherworldly
foundations for human rights. The third chapter develops my alternative:
human rights as this-worldly norms initially of local not universal validity.
    Part II comprises Chapters 3 and 4 and explores two unacknowledged
but promising resources for constructing a this-worldly foundation for

[5] But obligations rarely imply rights. Whereas the obligation to pay taxes might be thought
to imply a right to vote on the legislators who enact taxes, the obligation to care for
one's child need not imply that one has a right to decide the nature of that care, even
as many communities leave such decisions to the parents or other caregivers. John
Searle posits obligations that do not entail the obligated persons' rights: he speaks of a
"universal human right to be helped by others in desperate situations when one is unable
to help oneself and when others are so situated as to be able to help one," but also in
circumstances in which people are "unable to fend for themselves. Thus infants and
small children have a right to care, feeding, housing" and "people who are incapacitated
due to injury, senility, illness, or other causes also have absolute rights to care," as a right
"necessary for the maintenance of any form of human life at all" (Searle 2010:193–194).

human rights: the cultural and political dynamics of a human rights-capable personality, and the neuropsychological dynamics of human rights-supportive emotions.

Part III brings together Chapters 6 and 7, each of which draws on sociological insights to show how the human rights idea might be "grown" in local soils.

Part IV, composed of Chapters 8 and 9, sketches two long-term concerns of human rights as social construction, issues that may define the future of the project for human rights: the possible transmutation of the nation-state, and the potential transformation of our species-wide conception of human nature, biologically understood.

Now in somewhat greater detail: Chapter 1 analyzes two competing accounts of human rights: as a theological expression of a supernatural realm (a major and abidingly influential account) and, alternatively, as a socially constructed artifact. I reject the theological approach on several fronts: on the one hand, anthropology casts doubt on theological grounds for a universal embrace of human rights; on the other hand, social constructionism is much less culturally exclusive than religious faith, and it better allows for the moral agency of individual rights bearers. My social constructionist approach offers a prudential logic of mutual benefit, valid for all persons with respect to each person's capacity for culture, and the promise of his or her formation in processes of enculturation.

Chapter 2 is a pendant to Chapter 1, addressing the other venerable and enduring effort to ground, understand, and interpret human rights: metaphysics. I identify crippling difficulties of this approach and offer a political alternative: we humans *can* pull ourselves up morally by our own normative bootstraps. Central to this effort is Georg Simmel's notion of "webs of affiliations." I show that non-normative "webs" can integrate members normatively across their normative differences. Affiliation of this sort can still deliver human rights.

Chapter 3 argues for human rights as culturally particular and valid only locally such that human rights might be spread without cultural imperialism. And it argues that recognition of the incommensurability of different cultures need not entail an uncritical tolerance of just about anything. Recognition actually allows for a critical, objectivating stance toward other communities or cultures: locally valid human rights *can* possess a critical capacity as well as promote a community's self-representation in ways allowing for diversity.

Chapter 4 shows how human rights might be "self-authored." Self-authorship has three features: it emerges through collective political

action; it has a critical capacity; and it can be borne by nonidiosyncratic norms. To author one's own human rights requires a personality structure of "assertive selfhood" as well as a "field of recognition," that is, a social structure supportive of assertive selfhood. Whereas personality structure concerns the *internal* or psychological disposition of the individual insofar as it motivates his or her political behavior, social structure concerns the *external* or institutional arrangements of political community.

Chapter 5 deploys neurobiology and developmental anthropology to advance the human rights idea in terms of emotional affect, specifically in terms of a fictive kin relationship in its rich emotionality. Given the behaviorally motivating force of emotions and the fact that affect is universally shared by humans, fictive kin relationships could contribute directly and powerfully to the global promotion of two core requirements of human rights: altruism and reciprocity.

Chapter 6 draws on the example of Islamic communities to show how interpreters might develop human rights *within* their own culture even as they promote extralocal ideas and practices. Local interpreters can do so despite points of significant conflict between the local culture and the human rights idea, and they *need* to do so in ways that resonate with the local culture but also challenge it. Because they possess a "dual consciousness," cultural and political translators can be outside intermediaries and, at the same time, local participants.

To any local culture, Chapter 7 develops a cognitive approach as distinguished from a normative one. Chapter 7 advances human rights as *internal* to any given community's culture. Human rights can be advanced internally by means of "cognitive reframing," as I show with respect to two empirical examples: female genital mutilation in Africa and child prostitution in Asia.

Chapter 8 argues that a naturalistic conception of human life and society is consistent with the possibility of constructing universal human rights. A naturalistic conception interprets biological membership in terms of a cultural category. This chapter also addresses the question of where human rights so conceived might "begin": only as a person after birth, someone socially recognized, or at any prior point along that developmental pathway leading from sperm and ova to an unmistakable human being?

Chapter 9 questions the widespread conviction that human rights must be based on one or another notion of "human dignity." It bases them instead on positive law because human rights can only be available in concrete, particular political communities. As long as any given political

community is contingent and particular, so too are human rights. They can only be had through politics. Yet politics of this sort is unlikely in the fundamental political organization of the world today: the nation-state. My alternative is the "human rights state." It would recognize and enforce human rights at local levels, by local norms, but guided by an inclusionary logic as distinguished from the exclusionary logic of the sovereignty-fixated nation-state. That is, the human rights state assigns the status of "unmistakable human being" to all biological humans, but now in the political sense of claiming that each person is entitled to a right to have rights, to the existence of human rights.

The Coda briefly addresses this question: What might be lost by taking a social constructionist approach to human rights? Responding to this question also allows me to recapitulate what is gained.

My effort to reconceive human rights as social construction builds on perspectives developed in earlier work. One would improve conditions for normative agreement within heterogeneous communities, and across different communities, by reframing contentious issues in terms more "normatively thin" than "normatively thick."[6] The other shows how justice and rights might be generated at local levels of political communities, indeed in ways sensitive to the particular circumstances of any given community or subcommunity.[7] Localism can achieve some of the key goals of a very different approach – justice conceived as universally valid – without the severe and debilitating problems that beleaguer all universalist approaches. This book applies each of these perspectives to the problems and promise of the project for human rights. It also advances the argument of each beyond the earlier state of discussion.

[6] *Thick Moralities, Thin Politics* (Gregg 2003b).
[7] *Coping in Politics with Indeterminate Norms* (Gregg 2003a).