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A realistic utopia? Critical analyses of *The Human Rights State* in theory and deployment: guest editors' introduction

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Abstract

We introduce this special issue on Benjamin Gregg's recent theory of a human rights state by contextualising it within current human rights scholarship and explicating its core claims, before we provide an overview of the eight contributions. We argue that the concept of a human rights state addresses two interrelated problems within human rights research by bridging the significant disconnect in the literature between human rights theory and practice. First, it conceives human rights as socially constructed norms whose reach and validity are historically contingent, depending on their free embrace and effective implementation by their local addressees. In this way it dispenses with the ever fruitless, even counterproductive attempts to advance human rights by claims about their putative, ultimate normative foundation. Second, it overcomes the limitations and failures of the top-down, generally unenforceable international human rights regime with a bottom-up alternative: the human rights state as a metaphorical polity in which activists promote human rights-friendly change within the corresponding nation state. In each case of such a metaphorical polity, a network of self-selected activists within the nation state promotes the free embrace of self-authored human rights through incorporating those rights in the nation state's legal and political system. Subsequently, aspirations to an international human rights law would finally be redeemed as effective norms through the overlapping agreement among more and more political communities that have freely embraced their self-authored human rights and institutionalised them at local levels.

Keywords: justice; human rights; human rights state; nation state; normative localism; human rights activism; social construction; international human rights law

Introduction

Social scientific research advances through the development and discussion of new theories, new concepts, new arguments. This special issue seeks to advance the interdisciplinary field of human rights research through a critical, multi-perspectival discussion of a new concept: the ‘human rights state’. As the normative ideal of a cosmopolitan, human rights-based alternative to the contemporary nation state, the social and political theorist Benjamin Gregg first articulated the notion of the human rights state in his widely discussed book *Human Rights as Social Construction*.¹ In his recent publication *The Human Rights State: Justice Within and Beyond Sovereign Nations*,² Gregg revised the concept into a comprehensive proposal for a very particular kind of social movement that pursues human rights change through the politics of metaphor.

This special issue is the first collection of articles that scrutinise the idea of a human rights state and critically explore its potential for advancing both the theory and practice of human rights. The idea to collect and publish these critical replies first developed in an international seminar hosted by the Glasgow Human Rights Network (GHRN) in May 2015, in which a diverse group of researchers and practitioners discussed the not-yet-published manuscript of *The Human Rights State* among themselves and with the author. Most of the contributions in this special issue flow from that conversation at the University of Glasgow, a conversation since then continued in different forms across many different countries. Before introducing the themes and arguments of the articles collected here, we first prepare the ground for this sprawling debate. We contextualise Gregg’s theory of the human rights state in the wider field of human rights research and explicate its key features.

The human rights state in the context of human rights scholarship

The concept of the human rights state directly responds to both a theoretical and a practical problem. First, it replies to the insular and often exclusionary tendencies in philosophical attempts to explain and justify human rights. Second, it addresses the limits of the contemporary international human rights regime to achieve effective and sustainable human rights change within nation states around the world. The theory of the human rights state offers a conceptual solution to both problems by bridging the significant disconnect between them.

Breaking through the metaphysical limbo of legitimation: human rights as social constructions

In the history of the human rights movement, the intellectual force of the human rights idea has always depended on the belief that ‘rights exist as *moral demands* that need to be translated into legal and institutional contexts’.³ This idea continues to be compelling particularly in contexts where people

cannot rely on legal or political institutions. Philosophical ideas of the European Enlightenment, such as natural law, reason, equality and liberty, laid the ground for modern human rights reasoning—and, consequently, for the rise of human rights discourse as a global language giving voice to struggles for social justice. These notions demonstrably informed the drafters of the 1948 Universal Declaration of Human Rights.⁴ Across the range of today's multidisciplinary human rights scholarship, philosophy usually tasks itself with analysing possible normative foundations for the human rights project.⁵ By explaining how we should conceive of human rights, and by providing arguments for why we should want to protect them, philosophers would reinforce the individual's capacity for claiming human rights as entitlements even, or especially, in seemingly hopeless situations. This work is 'crucially important'⁶ to justifying the idea of human rights and criticising social, political, economic and cultural conditions that violate this capacity.⁷

And yet over the last three decades philosophers have sent human rights scholarship into a metaphysical limbo of claims and counter-claims about the source, validity and scope of human rights. Engaged in often fruitless 'competition to provide a better, more persuasive foundation for the universal legitimacy of human rights' with 'allegedly less demanding assumptions',⁸ scholars in fact construct ever more boundaries on the horizon of this limbo as human rights philosophy grows increasingly estranged from human rights practice, forsaking its own particular role in advancing the human rights project.⁹ No universal basis of legitimacy that might render human rights more accessible, and no compelling answers that could inform new strategies and techniques to advance human rights practice, have ever emerged in this landscape. This metaphysical limbo only 'works *against* the human rights project by leading to positions that *exclude* some groups of people from human rights'.¹⁰ Consider five examples.

The legal theorist Michael Perry rejects secular understandings of human rights as thoroughly implausible as such. He insists that human rights necessarily require belief in God and recognition of what he takes to be the 'sacredness' inherent in every person.¹¹ According to ethicist James Griffin, by contrast, human rights are grounded not in the individual's species membership but in his or her 'personhood', his or her capacity as an autonomous, 'functioning human agent'.¹² Hence '[i]nfants, the severely mentally retarded, [and] people in an irreversible coma'¹³ possess no human rights. For Jean-François Lyotard, a scholar of postmodernism, people achieve human rights—or at least the foundational 'right to speak'—by freeing themselves of their 'animal nature' through a process of cultural civilisation.¹⁴ For the communitarian scholar, Amitai Etzioni, citizens of liberal democracies realise human rights fully by freeing themselves from the influence of 'alcohol, drugs', or a 'high dose of mass culture' that renders them, like the 'mentally handicapped', 'blind to even the most shining normative light'.¹⁵ Finally, the noted philosopher of political liberalism, John Rawls, regards

human rights-abiding communities as morally obliged to subject ‘outlaw regimes’ to the rule of ‘reasonable and just law’—by military intervention, if necessary—in this way finally to overcome the enduring state of nature in world politics.¹⁶

Ensnared as they are among the conflicting imperatives of almost any understanding of human rights—the imperatives of coherence, rational persuasiveness and accessibility—these few examples immediately demonstrate that the ‘metaphysical limbo of intractable debates over nature, source, contents, and entailments of human rights [...] generates puzzlements, not answers’.¹⁷ Rather than enhancing people’s moral imagination, instead of providing an inclusive vocabulary of social justice, these arguments in their never resolved competition with each other end up contributing to the isolation of philosophical discourse from the practical tasks of human rights advocacy.

The theory of the human rights state, by contrast, construes human rights as socially constructed, hence as a political project still to be undertaken. The theory offers a vision of a new strategy for human rights activism. At the centre of this strategy is the human rights state itself, ‘a metaphorical polity constituted by interested, self-selected members of a corresponding nation state’.¹⁸ The members of this polity author their own human rights, which they recognise and observe among themselves while they pursue the incorporation of these human rights within the domestic constitution of the corresponding nation state. The members advance the free embrace of these self-authored rights beginning with their local communities and then spreading outward, overlapping with other locally instantiated communities of human rights advocates, with the ultimate goal of persuading the political and legal systems of the corresponding nation state to institutionalise human rights effectively in the sense of state-recognised, state-enforced legal norms reinforced by the nation state’s political culture.¹⁹

The human rights state as both complement and alternative to international human rights law

Apart from providing an alternative conceptual and normative foundation of human rights grounded in the social practice of norm construction, the theory of the human rights state proposes a unique form of activism towards human rights-friendly change within nation states, indeed on a local level with the self-motivated participation of ordinary people. It envisions a network of self-selected activists promoting the free embrace of self-authored human rights by political communities and, eventually, the realisation of these rights through juridification: their incorporation into the nation state’s legal and political system. In this way it responds to the inherent limits and practical failures of the international human rights regime—problems confirmed by recent studies across the field.

While many scholars have long assumed that the international codification of human rights would automatically yield positive effects around the world,²⁰ recent scholarship casts doubt on the efficacy of international human rights law and its various organisations. Scholars have documented an ever-widening gap between the willingness of state governments to ratify human rights treaties, on the one hand, and little if any commitment to implement these rights effectively, on the other.²¹ They have bemoaned the inherent ineffectiveness of international human rights law,²² and they have monitored and criticised the tendency of Western states to justify imperialist foreign policies with the need to protect international human rights standards.²³

The notion of human rights as local social constructs²⁴ that underlies the idea of the human rights state tackles these problems in several ways. It rejects the idea of human rights as a metaphysical or theological given that is valid a priori. It does not see human rights as a gratuitous grant from one elite or another (such as the United Nations or other international organisations). It does not regard them as consensually understood, immediately enforceable and everywhere valid rights somehow called into existence by their mere proclamation in any of a number of declarations (which agree with each other only in part and none of which is free of some incoherence). It views with scepticism claims that human rights have achieved an effective status in international law that is recognised and enforced across national boundaries even and especially in opposition to regimes that violate human rights, regimes that may or may not reject human rights as such or the particular version preferred by would-be interveners (as if there were such interveners). Further, the notion of human rights as local social constructs understands the idea of universally valid norms as a contingent, historical achievement to which advocates aspire, rather than as a moral realm not of human hand yet discoverable by special persons or particular worldviews.

To locate human rights as authored by the very persons to whom they apply—and to construe the meanings of human rights, their concrete applications and possible validity in intersubjectively shared understandings of particular political communities—is not to reject the potential of the idea of international human rights law. Rather, it is to understand that potential as yet to be realised. It is to understand that potential as one day realisable because nation states will have incorporated human rights freely into their own domestic legal systems and political cultures, rendering international law more or less reflective of domestic conviction and for that reason, among others, finding some degree of domestic enforcement. It is to understand international human rights law as a norm developed bottom up, from domestic populations faithfully represented by domestic elites, rather than as a norm imposed, top down, by foreign powers and hostile forces.

In short, the notion of a human rights state bridges theory and practice by overcoming two bottlenecks that have bedevilled the human rights project. First, it dispenses with a decades-long

search for ultimate foundations, a search that cannot succeed and that wastes efforts better spent on advancing what hardly requires otherworldly validation anyway.²⁵ Unlike idle theoretical efforts unable to recognise the moral adequacy of humankind's capacity to give itself norms for the just treatment of others, this notion encourages human rights activism, beginning with norm construction by the actual addressees of any plausible human right. Second, the device of a human rights state can do work that international law cannot: it can generate a local commitment to human rights on the part of ordinary people. It can contribute, then, to the likelihood that human rights norms will be observed locally (and the local venue is always the primary venue for human rights practice). And it may be able to steer the nation state in human rights-supportive directions because it comes from within the nation state, as a product of citizens, rather than something advocated and imposed by distant, foreign elites.

The special issue

In their diversity in perspective and argumentation, the articles comprising this special issue reflect the multidisciplinary of human rights research as well as the fact that Gregg's theory of the human rights state itself feeds on, and speaks to, different bodies of literature within this proliferating field. We have here analytical paradigms and disciplinary lenses that range from sociology, political science and philosophy to education, law, history and religious studies. Some articles combine multiple perspectives.

These articles are also representative of a growing interest of scholars and practitioners in alternative theories, justifications and strategies to advance the human rights project. As scholars identify the multiple weaknesses and constraints of the current international human rights regime (some authors even perceive 'the endtimes of human rights'²⁶), academics and activists alike are searching for new ways to facilitate human rights beyond existing institutions and the usual mechanisms of human rights protection. In that spirit, the contributions to this special issue scrutinise the theory of a human rights state with an eye to its potential for informing empirical human rights research and advancing human rights practice. They do not simply adopt or apply the theory as it stands but engage it in critical dialogue, and some suggest ways to extend or revise it in light of specific national case studies or other practical experiences in the field.

Discernable within this diversity of approaches, however, are several overarching themes that run through the various authors' arguments. In one way or another, they focus on the liberal individualistic foundations of the human rights idea as well as of the human rights state; they examine the core concept of a human rights cognitive style; and they analyse the merits and drawbacks of

Gregg's prioritisation of the free embrace of locally defined human rights norms. One recurring subject of debate in this special issue is the relationship between Gregg's normative localism, on the one hand, and existing norms and institutions of the contemporary international human rights regime, on the other. With each article examining the idea of a human rights state through its own unique lens, taken together the contributions offer a series of insights, each original yet all interrelated. They establish a variety of starting points, again interrelated, for an ongoing conversation critically probing the theory's possible benefits as well as its inevitable shortcomings.

This special issue begins with two articles each of which, with very different objectives, address the conceptual and theoretical side of a human rights state. In 'The Institutionalisation of Human Rights Reconceived: The Human Rights State as a Sociological "Ideal Type"',²⁷ René Wolfstetter deploys the human rights state as a vehicle for constructing a framework for the empirical sociological study of human rights institutionalisation. Drawing on Gregg's original formulation of the human rights state as a hypothetical alternative to the nation state,²⁸ Wolfstetter reconceptualises Gregg's normative political theory as a Weberian ideal type. It identifies the necessary structural conditions for the effective institutionalisation of human rights as locally valid, state-based norms of social justice. If understood, in distinction to Gregg's formulation, as a *non-prescriptive* concept that can be abstracted from selected elements of actual human rights practice, the ideal type of the human rights state can guide the qualitative study of empirical factors in institutionalising human rights within states. The ideal type then serves as both analytical grid and benchmark for the critical evaluation of these empirical factors. It allows for normative distance to the institutions of the international human rights regime. And it corrects for the excessive positivism of the largely quantitative body of evaluative literature that conceptualises human rights institutionalisation simply as formal compliance with the norms of international law.

In "'Achieved Not Given": Human Rights, Critique and the Need for Strong Foundations',²⁹ Yingru Li and John McKernan scrutinise, from the perspective of moral philosophy, the normative foundation of Gregg's theory of a human rights state. They argue that the anti-foundationalist and pragmatist conceptualisation of human rights that underlies Gregg's theory limits its potential to criticise relevant forms of injustice. The authors rework Gregg's justification of human rights by drawing on Rainer Forst, where he speaks of humans' inherent quality as autonomous moral persons who enjoy a natural right to demand and receive reasonable justification for all actions, rules and structures to which they are subject. According to Li and McKernan, grounding human rights in the individual's moral right to justification releases the true potential of a human rights state to identify and criticise unjustifiable political constructions. It also allows the theory to extend its reach beyond

any state-based law to include contexts of business and corporate behaviour, contexts enormously relevant to the human rights project and too often underestimated if not ignored.

Then follow three articles, each of which explore conceptual elements of the theory in terms of a particular nation state. In ‘The Human Rights Project and the Transformation of Social (B)orders: On the Political Nature of Human Rights Activism in the Wake of the Zapatista Uprising’,³⁰ Richard Georgi analyses the normative prerequisites of Gregg’s human rights state theory. He suggests extending it so as to account for some of the ways in which human rights activism, premised on the liberal individualism of the European Enlightenment, may in fact ‘aggravate protracted social conflicts and contribute to their violent escalation’.³¹ By contrast, the theory of the human rights state, and the empowering device of a human rights cognitive style in particular, aim at an inclusionary politics of persuasion, presupposing a communicative model in which the freedom of each autonomous participant is the condition for the freedom of every other autonomous participant. Drawing on Gayatri Spivak, Georgi objects to what he takes to be the theory’s implicit presumption of a liberal individualist subjectivity and a rights-based culture. He argues that this presumption fails to understand large parts of postcolonial societies in the Global South, where the springs of social solidarity lie in responsibility and kinship, not in rights and individualism. A human rights project reconfigured in its self-understanding to include these communities—communities it heretofore overlooked—would require a transformation of social order more profound than Gregg acknowledges. Examining different forms of human rights activism during the Zapatista uprising in Mexico in the 1990s, Georgi argues that human rights activists will only hear the voices of perpetually excluded, subaltern communities if they listen for both reconciling and antagonising strategies in human rights advocacy. He therefore reworks Gregg’s theory towards acknowledging the sometimes deeply conflictual nature of human rights activism, towards recognising the diversity in potentially legitimate strategies of activism, to render the human rights project accessible for otherwise excluded communities in Mexico and elsewhere in the Global South.

Ulisses Tertó Neto applies Gregg’s idea of the human rights state as a social movement in ‘Democracy, Social Authoritarianism, and the Human Rights State Theory: Towards Effective Citizenship in Brazil’.³² Although Brazil is a constitutional democracy that has ratified major international human rights treaties, social authoritarian structures within state and society discourage the effective implementation of human rights norms. Tertó Neto suggests establishing a political coalition of human rights organisations within civil society to create a metaphorical human rights state to challenge the nation state to recognise human rights. This Brazilian human rights state would advocate an egalitarian, democratic society composed of individuals who recognise each other as human rights bearers. In this way it would facilitate a domestic human rights culture and encourage

state actors to adopt human rights-compliant behaviour. Terto Neto also argues that such a human rights state, understood as a national campaign for domestic human rights change, can only be based on the norms of international human rights law. Symbolic authority and political leverage, he suggests, can and must draw from the government's ratification of international human rights treaties.

Gorana Ognjenović and Jasna Jozelić advocate the adoption of a human rights culture in 'The Human Rights State and Freedom of Religion in Southeastern Europe: The Case of Bosnia-Herzegovina'.³³ Only such a culture might bridge the ethno-religious conflicts in southeast European societies re-inventing themselves in the post-communist era. While secularised society in Tito's communist Yugoslavia formally recognised freedom of religion, which then disappeared from public life, since the wars of the 1990s over religious belief and ethnicity have become politicised and intertwined in today's Bosnia and Herzegovina. In the absence of an effective domestic constitution, the authors argue, the Dayton Peace Agreement of 1995 and international human rights treaties function as a substitute for a domestic constitution, yet the agreement and its spirit remain distant to the local community, deeply divided along ethno-religious lines. To overcome that division, Ognjenović and Jozelić propose a new common ethos for multicultural Bosnia and Herzegovina. They imagine an ethos based on locally defined, freely embraced cosmopolitan values. Gregg's vision of the human rights state might lead the way to that common ethos if a human rights state could be incorporated into the education system, in this way to help socialise younger generations into a human rights cognitive style.

The final two contributions discuss aspects of Gregg's theory in the context of various practical problems, but also prospects, of human rights universalism in a world of profound moral difference. Johannes Hendrik Fahner challenges Gregg's assertion that the right to democratic government lacks universal authority and should be decoupled from the human rights project, in this way not to undermine at least minimal human rights change in nondemocratic communities (which, after all, compose the largest number of states in the world today). Based on the analysis of international human rights treaties and selected case law, Fahner's contribution 'Revisiting the Human Right to Democracy: A Positivist Analysis'³⁴ shows that democratic government is widely recognised as a standard of positive international law. According to this standard, states, even in their great diversity, are all obliged to let citizens take part in political decision-making and to conduct free elections. Fahner also demonstrates that, even though many governments reject a purported right to democracy, such a right can be successfully invoked before international judicial and quasi-judicial bodies to address failures in the provision of equal political participation even and especially within nondemocratic communities. And regardless of this issue of legal positivism, Fahner argues that Gregg's idea of the free local embrace of human rights by political communities can only be realised

through processes of democratic decision-making. Their social construction—in ways local, decentralised, and democratic—would account for the dynamic, contingent nature of moral convictions as well as for legitimate differences in the adoption and interpretation of human rights among different communities across the globe. The free local embrace of human rights in general is then best secured by recognising and implementing a human right to democracy.

In their ‘Note from the Field: Applying a “Human Rights Cognitive Style” in the Raoul Wallenberg Institute’s Work on Human Rights Education with Universities’,³⁵ Olga Bezbozhna and Helena Olsson explore the potential of Gregg’s theory to inform practical strategies in their collaboration with universities across the globe. For Bezbozhna and Olsson, the greatest challenge in their work with institutions of higher education is to facilitate positive attitudinal change toward human rights. While they criticise Gregg’s normative localist approach in defining and recognising human rights as a counter-productive dilution of international standards, they see great potential in his conception of a human rights consciousness as a particular human rights cognitive style. To develop a perspective that recognises individuals as worthy of human rights even in contexts that merit the greatest scepticism, a human rights cognitive style must converse with local cognitive styles. Drawing on examples from their collaboration with the Belarusian State University, Bezbozhna and Olsson show how the concepts and strategies developed by Gregg might be translated and contextualised in university teaching. These concepts and strategies might then be deployed also in non-Western, nondemocratic countries, in this way to facilitate a free local embrace of human rights norms even beyond liberal democratic communities.

In the concluding ‘Reply to My Critics’,³⁶ Benjamin Gregg responds to the criticisms and suggestions put forward by the several contributions to this special issue, focusing on several overarching themes. One is normativity. In response to Wolfsteller, he urges sensitivity to the unavoidable interpretability in the deployment of any analytic tool that would measure degrees in the practical implementation of human rights: to interpret is to apply norms, yet value-neutral measurement in Wolfsteller’s terms is not possible. In response to Li and McKernan, he rejects the notion that any normativity at all presupposes a specifically transcendental normativity (and shows how a this-worldly form of validity can be effective). Another theme concerns the nature of groups in the project to advance human rights. Gregg discusses Georgi’s notion of group rights in a potential Mexican human rights state and stresses the need for individual rights in the face of group oppression. With respect to Terto Neto’s conception of a Brazilian human rights state, he argues that the relevant scale of group rights is national not global. And he responds to Ognjenović and Jozelić’s depiction of a Bosnian-Herzegovinian human rights state by stressing the danger inherent in a core goal of the human rights project: intersubjectively shared norms. Any norm is vulnerable to manipulation that

violates its intended ends, and this holds all the more so for group norms. A third theme concerns the extent to which the human rights project should orient itself not on its aspiration to universal reach and validity but on the practical work that is relative to any given venue and context. In response to Fahner, Gregg argues that the rule of law, but not democracy, is universally necessary for the local possibility of human rights. And he shows that the Raoul Wallenberg Institute's practical work in advancing human rights, as portrayed by Bezbozhna and Olsson, in fact operates with a notion of moral relativism even as it ultimately seeks moral universalism. At the end of his Reply, Gregg draws on each of the contributions to sketch possible directions for future research programmes on the idea and practice of a human rights state.

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Benjamin Gregg (BA Yale University, PhD Princeton University) teaches political and social theory, informed by political science and sociology, at the University of Texas at Austin but also in Germany, Japan, China and Austria. Two of his books, *Thick Moralities*, *Thin Politics* (2003) and *Coping in*

Politics with Indeterminate Norms (2003), confront challenges of social justice in complex modern societies, especially in liberal democratic states. Another two books, *Human Rights as Social Construction* (2012) and *The Human Rights State* (2016), analyse problems and prospects for justice across national borders. His current book-in-progress, *Human Nature as Cultural Design: The Political Challenge of Genetic Enhancement*, explores core issues in bioethics: rapid advances in genetic engineering, particularly of human embryos and fetuses, pose difficult social, political, moral and legal questions that challenge a range of different conceptions of a just society. His current research was supported by a Fulbright Professorship at the University of Linz, Austria, Spring 2016; by Visiting Scholar positions at The Hastings Center (Garrison, NY) and the Yale Interdisciplinary Center for Bioethics, Summer 2016; and by a Visiting Scholar position at the Oxford Uehiro Centre for Practical Ethics, University of Oxford, 2018. In 2016 he delivered invited lectures on this project in Sweden, Iceland, Norway, Finland, Spain, Austria and the USA and, in 2017, in Brazil.

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- ³⁵ Olga Bezbozhna and Helena Olsson, 'Note from the Field: Applying a "Human Rights Cognitive Style" in the Raoul Wallenberg Institute's Work on Human Rights Education with Universities', *The International Journal of Human Rights*, this issue.

³⁶ Benjamin Gregg, 'The Human Rights State: Theoretical Challenges, Empirical Deployments: Reply to My Critics', *The International Journal of Human Rights*, this issue.