

## **Katrin Flikschuh** **How far human rights?**

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## Jurisprudence Symposium

### 'How Far Human Rights?'

#### Introduction

The two papers presented in this short human rights symposium are among the first fruit of a recently formed international research network, funded by the Leverhulme Trust. The network comprises participants from African, British, German, and US universities; we seek to foster intellectual exchange on issues of potentially common concern among African and Western philosophers, legal and political theorists, and social scientists. The project was originally conceived in the context of a global justice debate whose claims to universality of scope contrast markedly with the parochialism of its dominant liberal egalitarian theoretical framework. In its original call for applications, the Leverhulme Trust specified that it was looking for internationally co-operative projects that demonstrate 'a refreshing departure from established working patterns'; a 'willingness to take appropriate risks in setting research objectives'; and a willingness 'to transcend traditional disciplinary boundaries'. Engaging in the kind of dialogue attempted by the current project is genuinely risky for African and Western participants alike: such engagement does require a departure from established working patterns, so risks possible self-marginalization relative to each participant's relevant 'mainstream' research paradigm. Nor are the risks negligible for research outlets – academic journals such as *Jurisprudence*. In agreeing to publish symposia of the present sort they take a step into the unknown, with all the market risks that involves. I want to begin, therefore, by taking this opportunity to thank the Leverhulme Trust, the editors of *Jurisprudence*, and network participants – in the present case, especially Simon Hope and Kofi Quashigah – for having taken the relevant risks that have made this symposium possible.

I said that the research network seeks to engage African and Western scholars with one another intellectually in an attempt to overcome a currently overly parochial global justice debate. I should add that we are not aiming to arrive at a grand theoretical consensus. This would be premature, but may not in any case be desirable; we may each learn much more from appreciating one another's differences. The two papers that make up this symposium were originally presented at what was in effect the project's inaugural conference on African perspectives on global justice held at LSE in September 2012. In their respective papers, Hope and Quashigah do not explicitly engage with or respond to one another's positions – they simply try to articulate, each from their own immediate contextual experience, some of their reservations about all too ubiquitous human rights reasoning. Both come at the topic from different disciplinary perspectives: Quashigah is Dean of Law at the University of Ghana, Legon, Hope is Lecturer in Philosophy at the University of Stirling. Yet there are clear points of contact between the two papers. Let me begin with a few remarks on each paper; I shall then ask how advocates of divergent human rights perspective may respond to the two moderately skeptical positions here presented.

Kofi Quashigah chiefly focuses on the legal conundrums that arise for the typical post-colonial African state when it attempts to triangulate modern

constitutional law with multiple systems of customary law on the one hand and increasingly vociferous demands for international human rights abidance on the other hand. Among Quashigah's most startling conclusions is his claim that the local implementation of international human rights requirements often produces a sense of injustice among intended beneficiaries of traditional societies. International human rights law and modern constitutional law more generally, often violate peoples' expectations of what is justly their due as conceived under traditional social and legal practices. Indeed, given that much international human rights law and advocacy seeks to secure the formal legal equality of men and women, it disproportionately affects those customary laws that govern matrimonial and property relations between husband and wife and, by extension, between extended families, clans and village more generally. Human rights legislation that would be seen as unremarkably routine because consistent with daily social practice in many Western countries are often perceived as aiming at the heart of social relations in traditional settings, threatening to rent these apart even when, for socio-economic reasons, the more traditional relations often prove the more enduring.

One consequence of the diagnosed threefold tension between modern constitutional law, customary law, and international human rights law is that the law itself becomes contested territory. Quashigah's analysis of a plethora of individual cases, including opposed verdicts in relation to factually identical cases, is indicative of the delicate balancing acts which individual judges perform in seeking to satisfy the diverging requirements of traditional, constitutional and international human rights law. The fact that, in reaching their verdicts, judges often resort to the so-called repugnancy test – itself a dubious legal relic from colonial times – hardly helps foster confidence among members of traditional society in the state's role as impartial adjudicator between conflicting claims.

Quashigah's overall verdict is a little hesitant. He does not reject international human rights law in principle, nor does he believe a return to pre-colonial traditional society feasible. Yet as a lawyer, he is morally troubled by his frequent experience of traditional society's perception of constitutional courts as meting out injustice rather than justice to its appellants. This is evidently not the intended role for courts. In response, one may point to unavoidable birth-pangs associated with the march of modernity. Quashigah notes this line of argument but responds appropriately: while the law must keep up with socio-economic change, it oversteps its authority when it is asked to engineer such change. Where socio-economic conditions are such as to make continued reliance on customary law practically and morally apposite, dogmatic insistence on international human rights law may end up undermining the authority of law as impartial adjudicator of conflicts.

In contrast to Quashigah's legal and generally empirical approach, Simon Hope's paper raises a moral-cum-conceptual question when he asks whether human right talk may not sometimes be 'one thought too many'. Later on, Hope suggests that insistence on human rights talk may lead us to 'get the nature of the injustice wrong'. More specifically, it may lead us to misunderstand the historical wrongs in terms that are inappropriate to the perceived character of their wrongness. Along the way Hope, like Quashigah, draws attention to the uncomfortably bi-cultural perspective from which descendants of former colonized peoples remain constrained to experience their social realities. Hope's

context is the ongoing uneasy relation between the Maori and the Pakeha (white settlers) of New Zealand concerning the latter's historical commission of injustice against the former. Although many current non-Maori defenders of Maori rights cast those historical injustices and their consequences in terms of human rights language, the Maori themselves generally resist conflation of what they regard as Maori special rights with general human rights. Hope asks why the Maori take this stance, given that most contemporary Maori are not antithetical to human rights talk in general. Hope's eventual response to his question is that those who invoke human rights talk in relation to ancient wrongs may get the nature of the injustice wrong. It is in this sense that Hope invokes Bernard Williams' 'one too many thoughts': the problem is not that one can of course *also* characterize the ancient wrong in human rights talk but that doing so adds nothing – rather, there is only one reason for why the ancient wrong was a wrong, and human rights violations are not that reason.<sup>1</sup>

So what is the wrong-making reason, and why are human rights an inappropriate way of characterizing it? Hope offers a summary account of the settlers' land-grab as having amounted, from the Maori point of view, to a violation of Maori birthrights – birthrights the conception of which is embedded in general Maori metaphysics of whakapapa. These birthrights cannot be equated to human rights in part because not everyone has them: only the Maori have them, and only in relation to their particular historical land. To suggest that the original violation was a human rights violation is to suggest that anyone could in principle have had a birthright to those lands. Another way of putting the point is to say that the Maori consider the wrong a wrong not because their general human rights were violated but because their special birth-rights were.

One might ask whether the Maori are not living in the past. The metaphysics of whakapapa is all very well, one might say, except that it is historically dead; the quicker the Maori move on the better for all concerned. Hope's response to this objection is enormously subtle. The modern Maori appreciate that in one sense the metaphysics of whakapapa is dead – that modern day Maori can no longer conduct their daily lives in accordance with traditional Maori beliefs. But in another sense it is precisely the original injustice that keeps whakapapa alive. For the modern day Maori to abandon talk of Maori birth rights in favour of talk of human rights would amount to a betrayal of their ancestors, who suffered the original wrong, and who would not have been able to understand it in any terms other than whakapapa terms. Keeping moral faith with their wronged ancestors requires modern Maori to keep faith with the metaphysics of whakapapa in full knowledge of the fact that it is in one sense dead and that it cannot, in another sense, be put to rest. This is the bi-cultural perspective which modern Maori, as descendants of originally wronged Maori, find themselves condemned to live by: to substitute human rights talk for the violation of ancient birth rights is then to understand neither the nature of the original wrong nor the nature of that's wrong's continuing impact on modern Maori.

As noted, Quashigah and Hope did not set out to write two papers that neatly dovetail each other. Each theorist examines the problem of human rights from his own post-colonial context, each brings a different disciplinary

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<sup>1</sup> Cf Bernard Williams, *Moral Luck* (Cambridge University Press, 1981), 18.

perspective to bear on the problem. Yet the moral predicament which, on Hope's account, the Maori find themselves shares much with the legal predicament which, on Quashigah's account, citizens of modern African states find themselves in. The predicament was well described by Kwame Gyekye at a recent project conference in Ghana, when he contrasted what he calls 'evolutionary connect' with 'evolutionary disconnect'.<sup>2</sup> By the latter Gyekye means the violent disruption to otherwise natural cultural development occasioned by the experience of colonialism. Had colonialism not happened, the most likely historical trajectory of affected cultures would have been their 'natural' dynamic development and change – these cultures would likely have borrowed from diverse other cultures with which they would have come into more or less peaceful, more or less occasional contact. The problem of colonial disruption is that it created two value systems – the traditional but suppressed value system whose natural evolution was now arrested, and the new colonial value system which colonial subjects were taught to aspire to as the more civilized of the two. Nor did decolonization occasion a harmonious growing together of those two value systems: birthrights did not metamorphose into human rights, and customary law did not transform itself into modern state law. Hope's analysis show why this failure of harmonization is not accidental: for descendants of the formerly colonized to align traditional values with post-colonial state law would be akin to their retrospectively underwriting the legitimacy of the erstwhile colonial violation, including the colonial denigration of traditional practices and beliefs. Whatever the pragmatics of such retrospective assent, morally it is not possible for the descendants of the formerly colonized to acquiesce in this manner in the violence committed against their ancestors. In consequence, many formerly colonized peoples live with a permanently bi-cultural perspective, turning to traditional courts here, and to modern state law there, to birth-rights here and to human rights there, often in full awareness of the fact that they are themselves fully at home in neither world.

How might a human rights advocate respond to these two moderately skeptical papers: could or should he or she acknowledge that insistence on human rights implementation can result in the perception of injustice or can at least sometimes amount to 'one thought too many'? One relevant difference in the two accounts given may be the diachronic one: while for the modern Maori, Maori birth-rights are in one sense dead, for the current person in a traditional African set-up, customary law remains very much alive. It seems to me that someone who subscribes to the so-called political conception of human rights should have no difficulty in recognizing that the ancient Maori could not have understood the original wrong as a human rights violation. According to the political conception, human rights are themselves a recent, post-1945 development that responds primarily to the moral need for states' respectful treatment of individuals.<sup>3</sup> So proponents of the political conception should agree with Hope that those who characterize that historical wrong in human rights

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<sup>2</sup> Kwame Gyekye, 'Evolutionary Disconnect as a Source of Institutional Instability' (unpublished conference paper, University of Ghana, March 2015)

<sup>3</sup> Cf. Charles Beitz, *The Idea of Human Rights* (Oxford University Press 2009). I borrow the distinction between the 'political conception' and the 'orthodox view' from Beitz' book.

terms get the nature of the original injustice wrong. Proponents of the political conception may not agree that modern Maori should continue to characterize the *legacies* of the original injustice in terms of the violation of birth-rights rather than human rights. Still, and insofar as the modern Maori are concerned about the original injustice rather than its legacies, proponents of the political conception may well agree that it is appropriate even for modern Maori's to continue to invoke birth-rights in relation to that original injustice. They may of course also think this morally un-strategic of the present Maori, given that modern human rights protection has priority, for them, over past violations of ancient birth-rights.

By contrast, proponents of co-called 'orthodox views' would presumably not agree that characterizing the wrong in human rights terms gets the nature of the injustice wrong. For them, human rights hold timelessly: slavery in ancient Greece was a human rights violation even if people like Aristotle did not (or could not have) know(n) it. Would proponents of the orthodox view say that it is the traditional Maori who got the nature of the injustice wrong when they characterized it in terms of the violation of Maori birth-rights? This seems to me to be an implication of the orthodox view. If human rights are valid timelessly, the traditional Maori were wrong to conceive of the original violation in terms of the violation of Maori birth-rights. Like Aristotle, they can be forgiven for not having realized this. Still, present day Maori should conceive the original violation correctly, i.e., in human rights terms. I find this implication of the orthodox view counterintuitive, both with regard to present Maori and with regard to the ancient Maori. If the traditional Maori *could* not have known that what they mistook for their birth-rights were actually their human rights, I do not understand in what sense human rights can be said to be the relevant category of ascription or description. If, on the other hand, they could have know but *didn't*, I would like to hear how what the orthodox view takes to be as morally self-evident as the timeless universality of human rights could have eluded both Aristotle and the traditional Maori. If the traditional Maori had well-grounded reason to embrace birth-rights, the present Maori should not abandon birth-rights talk in favour of human rights talk in relation to the historic injustice: if they did, they would get the nature of the original injustice wrong in exactly the manner Hope suggests.

Advocates of the orthodox view may respond that so long as the present Maori continue to invoke the violation of special birth-rights, the Pakeha will not know what they are talking about since the Pakeha do not share the metaphysics of whakapapa. From the Pakeha point of view, no violation then happened at all. In other words, Maori birth-rights lack the requisite universal form that would enable both sides to acknowledge that a wrong was committed. The orthodox view can demonstrate to both sides that a wrong was perpetrated, albeit not the wrong which the ancient Maori had in mind but an altogether different kind of wrong. Altogether different inasmuch as the violation, in human rights terms, could not have been the Pakeah deprivation of Maori birth-rights but rather the deprivation of land, in principle *any land*, which the Maori needed to ensure their basic human needs or to secure their cultural identity or some such. If this is the best proponents of the orthodox view can do, I find rather more enlightened the modern Pakeha response, as Hope describes it, to present Maori's persistent insistence that the wrong at stake was a violation of birth-rights. Hope's

description of the Pakeha response is of a slow, grudging but reflective shift in perspective – a sort of half acknowledgement that Maori birth-rights might indeed have been violated, or that it is at least not unreasonable of the present Maori to talk in those terms. So contrary to the claims of the orthodox view, the Pakeha can in fact learn to acknowledge that Maori birth-rights might have been violated.

What, then, of the sense of injustice in contemporary traditional societies brought on by insistence on international human rights standards? Let me focus now on advocates of the political conception of human rights: what might be their response to Quashigah's diagnosis by proponent? Proponents of this view might most naturally reach for a pragmatic response: *tant pis, mais c'est la vie!* We can't always determine our fates, least of all our political ones, and sometimes it is best to reconcile ourselves with the way things panned out. This, after all, is how the conception of human rights came into being in the first place, according to the political conception. No a priori necessity attached to their emergence: human rights were a reasonable response to the disastrous consequences of tolerating a morally anarchic international order of states. Still, and despite the contingency of their emergence, human rights have proven extremely successful in establishing themselves as the new global *lingua franca*. No modern state today can decently keep the company of other states unless it demonstrates its broad respect for human rights domestically and internationally. Being in that sense fairly pragmatic, advocates of the political conception may acknowledge that some states or some parts of society will likely lose out, at least temporarily. Being pragmatic, they may well counsel caution – they may appreciate the 'strains of commitment' which members of traditional society and judges of modern courts invariably undergo in seeking to negotiate the slow passage from traditional practices to modern human rights respect.

The problem with this imagined response to Quashigah is that Quashigah can agree with all of it: modern Ghana and other African states are constrained to go along with the new international dispensation – as noted, Quashigah is not urging a return to the pre-colonial status quo ante. To the contrary, he acknowledges the inescapability to modern African states of international human rights requirements. However, the pragmatic response does not silence Quashigah's moral worry. Part of Quashigah's moral worry is over what the insistence on international human rights standards does to the already fractured relationship between post-colonial state and citizen in Africa.<sup>4</sup> As a creation of erstwhile colonial subjection modern constitutional law in Africa is already perceived as deeply untrustworthy by members of traditional society. Overly insistent pressure by the 'international community' for legally enforced domestic conformity with international human rights law often has the effect of deepening traditional members' distrust of institutions that are nominally meant to be theirs. In short, unrestrained international enthusiasm for the newly emergent *lingua franca* can further to undermine the historically already fragile relationship between citizens and state in post-colonial Africa.

Is the political conception able to respond to those concerns? In one sense the political conception (and indeed the orthodox view) should be sympathetic

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<sup>4</sup> Cf. Peter Ekeh, 'Colonialism and the two publics in Africa: a theoretical statement', *Comparative Studies in Society and History* 17 (1975), 91-112.

to those concerns: after all, a morally tolerable relation between state and citizen are among the main desiderata of human rights advocacy. The trouble is that Quashigah believes that the law should track the socially transmitted sense of justice of those who are subject to its verdicts. Where instead, the law is seen, by those subject to it, as an imposition from on high, it stands to lose their allegiance. So for Quashigah the courts should not be made to impose international human rights requirements on those subject to their juridical authority – modern constitutional law can properly respond to human rights calls only when they come from below, i.e. from those who are to be subject to the courts' verdicts. This is not, on the whole, how the political conception conceives the relation between state law and citizens. According to the political conception, states agree at international level to implement human rights law domestically. On this account, citizens are the domestic recipients of internationally agreed domestic law: the law is indeed imposed, once more, from on high. For Quashigah, this cannot bode well for the social acceptability of human rights law in post-colonial contexts.

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