Human rights, children’s rights and judgement – some thoughts on reconciling universality and pluralism

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The world’s population gets bigger by the day and whether we like it or not the increases take place in the less developed world where so-called “universal” human rights are less likely to be recognised. The standards we take for granted daily become more and more minority norms.

In this paper I pose questions, largely philosophical in nature, to try to understand what is involved in judging norms and practices. We need, I would suggest, a theory of judgement and it is perhaps hardly surprising that we do not find this understanding in the writings of lawyers and other proponents of human rights and children’s rights.

For too long judgement has been assumed to be based on claims of neutrality and objectivity. We know that this is not so, that there is an irreducible political and subjective element even in that most objective of disciplines, the natural sciences. This was clearly demonstrated more than 30 years ago by Thomas Kuhn (1970). Critical jurisprudence seized upon this insight in the 1980s (Peller, 1985; Boyle, 1985) and feminist writing has made major contributions too. The writings of Iris Marion Young (1990, 1997), for example, showing how the ruling model of impartiality has subverted recognition of difference and how this has had negative consequences for women and other subordinated groups. MacKinnon (1987) and others have shown how the unstated norm in law is a male norm.

So scientists and critical lawyers have recognised the subjectivity inherent in human judgement. But it does not stop there. Many of the contemporary debates about the nature of moral decision making or of the values people hold are, it must now be recognised, a debate about how it is possible to make reasoned, defensible judgements on matters about which there is no universal, clearly demonstrable or objective truth (Nussbaum, 1994, see also 1990; Winter, 1994 and 2001; Hacking, 1999).

This does not mean that we enter the world of the arbitrary. There are values that must be upheld. For example, I do not think that we can ever remove from our judgements about law core values of the rule of law (Thompson, 1975) or from our ethical judgements a recognition of the
sanctity of human life (Dworkin, 1993). There are, incontestably, some universal values (Nussbaum, 2000, ch. 1).

Our inquiry must therefore be into the institution of judgement. We need to know what is involved in judgement, and what are its norms. On the whole those of us who think about children’s rights would agree on our judgements. We are a community: we have been socialised in similar countries and we uphold similar values. The debates over “universal” human/children’s rights versus alleged abuses defended in the name of culture and tradition (see particularly Coleman, 1996; Volpp, 1996, 2000) can be understood as conflicts between different communities of judgement. We may understand these debates better by exploring the role of community in judgement. This is a major enterprise and what follows is a tentative exploration (penned initially as a response to Brems, 2002) but one which may explicate the ongoing debates.

I intend to use the thought of one classical thinker, Kant (1790), and one near-contemporary, Hannah Arendt (1982, 1961) (and see Bernstein (1983) for an exploration and Beiner (1997) for a critique). The latter’s ideas are built upon the former but may have greater resonance for the problems we encounter.

For both Kant and Arendt, judgement is neither about truth claims nor about mere subjective preference. For Kant the core of what makes judgement possible is our “common sense” shared by other judging subjects. It is this shared sense that allows us to exercise an “enlarged mentality” by imagining judgements from the standpoints of others (1790, §35, 150–151). For Kant – and this is why international human rights advocates find intellectual nourishment in his thinking – the ground for our “common sense” is the identical cognitive faculties of imagination and understanding that all human beings share. The common sense is thus universal: in exercising the enlarged mentality we put ourselves in the place of every other person. Judgements are thus universally valid. For Arendt, the common sense that makes judgement possible is not based in universally – shared cognitive faculties, but in shared community. She says

The capacity to judge is a specifically political ability in exactly the sense denoted by Kant, namely the ability to see things not only from one’s own point of view but in the perspective of all those who happen to be present. (1961, p. 221)

The claims for validity are thus not universal (as with Kant) but for the community of judging subjects involved in the exercise of the enlarged mentality. I think the conception of the “enlarged mentality” is an important framework for understanding that subjectivity need not collapse into arbitrariness. I think also that, by basing judgement in real community, Arendt makes us ask