

CULTURE, CHILDHOOD AND RIGHTS

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In 1998, the author published an article examining the relationship between culture and the rights of the child. The current paper involves a further examination of this issue and of the implications of the cultural pluralism model advocated therein, in the light of the United Nations Convention on the Rights of the Child (hereinafter – the UNCRC) and a recent House of Lords decision.

The best interests standard, adopted in article 3 of the UNCRC, is indeterminate. Difference societies and different historical periods will not agree as to what is in the child's best interests. Under the model of cultural pluralism, some cultural practices can be reconciled with the best interests principle, but there are others which fall outside any margin of appreciation (such as female genital mutilation).

There are also other concepts in the Convention whose interpretation will be influenced by cultural norms. For example, while some may argue that Jewish ritual male circumcision is child abuse, others will argue that it is abusive to deprive a baby of his cultural and religious identity. Indeed, it is not clear how to resolve the tension between article 24(3) of the UNCRC, which demands that measures be taken to abolish "traditional practices prejudicial to the health of children," with the right to culture guaranteed to the children of ethnic minorities and indigenous peoples by article 30.

The paper argues that such conflicts may be understood as a conflict between different communities of judgment. In an attempt to formulate a basis to justify claims of abuses of rights, reference is made to the theories of philosophers such as Kant and Arendt, but there are some questions which are difficult to answer. For example, can an entire community be wrong and can valid judgments be made across different communities?

The paper claims that in disputes about children's rights we see competing communities claiming that they provide the appropriate framework for judging. Thus, in order for our vision of children's rights to prevail across communities, who have judgments different from ours, we need to engage in dialogue. The attempt to create a shared common sense might begin with taking seriously the child's right to participate, which is protected by article 12 of the Convention.

One question raised in this context is the extent to which children have the right to enjoy their own cultures. A relatively rare concrete example, which raises questions about the scope of a child's right to culture, can be found in the recent House of Lords decision in the case of Shabina Begum, in which a teenage Muslim girl's challenge to her school's policy of not allowing her to wear the jibab at school was rejected. The article ends with an in-depth critical analysis of that decision.

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I. INTRODUCTION

Some twelve years ago in Durban at a meeting of this Society I gave a paper entitled "Cultural Pluralism and the Rights of The Child."¹ Twelve years is a long time in the history of culture and in the history of rights. A re-examination is therefore, called for. My lecture in 1997 made little reference to the U.N. Convention on the Rights of the Child² (UNCRC); there was no discussion at all of the best interests principle in Article 3. I have since then written a short monograph on Article 3 which does indeed discuss the relationship between best interests and culture.³ I quote Philip Alston—because I believe he is right—to the effect that culture "must not be accorded the status of a metanorm which trumps rights".⁴ There are cultural practices which it is possible to reconcile with the best interests standard, and others which fall outside any margin of appreciation. Examples of the latter are slavery (in all its forms including bonded labor,⁵ sexual slavery) and female genital mutilation (FGM). The example of FGM featured prominently in my Durban lecture, and I do not discuss it again here.

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1 Michael Freeman, *Cultural Pluralism and The Rights of The Child*, in *THE CHANGING FAMILY: FAMILY FORMS AND FAMILY LAW* ch. 17 (John Eekelaar & Thandabantu Nhlapo eds., 1998).

2 Nov. 20, 1989, 1577 U.N.T.S. 3.

3 Michael Freeman, *Article 3: The Best Interests of the Child*, in *A COMMENTARY ON THE UNITED NATIONAL CONVENTION ON THE RIGHTS OF THE CHILD* (André Alen, John Vande Lanotte, Eugen Verhellen, Fiona Ang, Eva Berghmans & Mieke Verheyde eds., 2007).

4 Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, 8 INT'L J. L. & FAM. 1, 20 (1994).

5 It is still common in Asia, despite attempts to root it out.

II. RELATIVISM, MONISM AND PLURALISM

In the Durban paper I distinguished between monism (or universalism), cultural pluralism, and relativism. I rejected then, as I do now, relativism. The relativist believes all values are conventional. To the relativist: "evaluations are relative to the cultural background out of which they arise".⁶ Thus, to Melville Herskovits, whom I have just quoted, it is necessary to recognize the "dignity inherent in every body of custom".⁷ It is easy to see the attractions of relativism: It is anti-assimilationist, anti-imperialist, hostile to ethnocentrism.⁸ It has value, rather as John Stuart Mill understood this, because it enhances the prospects of achieving moral knowledge.⁹ Relativists regard all values as the products of the customs, practices and beliefs which have as a matter of fact developed within a particular tradition. They deny that any value has any authority, epistemological or moral, outside of this cultural context. They deny that conflict between values belonging to different traditions can be settled in any reasonable way, because, so they argue, what is reasonable is itself a product of particular cultures. And so they demand of us that we ask not whether a social practice like child marriage or child genital mutilation is justified by the moral considerations that we find cogent, but rather, whether they are sanctioned by the relevant social understandings of the cultures within which they are practiced. But, of course, if that means that a culture can only be judged by endogenous value judgments, and that moral principles which derive from outside that culture have no validity, morality has become a slave to custom. Mill wrote of the "despotism of custom".¹⁰ Do we wish the "ought" to relinquish any transcendental power it may have to critique the "is"? Once relativists agree, as surely they must, that there are standards for judging justice that are independent of social consensus, they are forced to give up the distinctive premise of cultural relativism. The argument for any practice must be more than that the practice exists. Otherwise, you reach the uncomfortable conclusion—often I find voiced by undergraduate students—that there was nothing wrong with Nazism in 1930s Germany or apartheid in 1970s South Africa. And so a culture must be able to support practices like child marriage or genital mutilation by a stronger argument, or set of arguments, than that there is—if, indeed, this is the case—social consensus.

6 MELVILLE HERSKOVITS, *CULTURAL RELATIVISM: PERSPECTIVES IN CULTURAL PLURALISM* 14 (1972).

7 MELVILLE HERSKOVITS, *MAN AND HIS WORKS* 76 (1947).

8 See An-Na'im Abdullahi, *Religious Minorities Under Islamic Law and the Limits of Cultural Relativism*, 9 HUM. RTS. Q. 1 (1987).

9 JOHN STUART MILL, *ON LIBERTY* (1859).

10 *Id.*

Both monists (universalists) and pluralists disagree. Monism is committed to their being an overriding value or set of values, and, if the latter, a ranking scheme on the basis of which values can be compared in a way that all reasonable people would find acceptable. Universal statements of human rights, most particularly in our context, the UNCRC, are primarily universalist documents (though they are flexible enough to accommodate different interpretations, as we see).¹¹ All reasonable people can agree to the provisions in the UNCRC: as you will know, only Somalia, because it does not have a government, and the USA because it does, have failed to ratify the Convention.¹² This, for example, all reasonable people can agree that it is wrong to execute people for crimes committed when they were children, and so the U.S. Supreme Court now holds.¹³ I think all reasonable people can also agree that life imprisonment would not be imposed on offenders who commit crimes, however heinous, when children. It is therefore remarkable that the U.S. Supreme Court, which drew upon the provisions of the Convention to justify its position on the illegality of the death penalty for children, should have ignored the second limb of the very same article (Article 37) which prohibits life imprisonment for offenses committed by children without the possibility of release. It may be added that such selective use of the Convention, citing it when convenient and ignoring it when it is not, compromises the vision of children's rights communicated by the Convention – but that is another matter and is outside the scope of this paper. I should add the U.S. Supreme Court is not alone in adopting this "pick-and-choose" approach to the UNCRC or to children's rights in general.¹⁴

Pluralism is a theory about the sources of value—as, I should add—are relativism and monism. Pluralists believe there are many reasonable conceptions of a good life, and many reasonable values upon which the realization of good lives depend. There are conflicts among reasonable conceptions of a good life as well as among reasonable values. Political ethics needs to cope with these conflicts, to attempt to surmount difficulties caused by the incompatibility and incommensurability of values whose realization is thought to be essential. Where values are incompatible, the realization of one value must exclude the other. Values

11 It therefore attracts the criticism that it is Eurocentric: see, e.g., KAREN WELLS, *CHILDHOOD—A GLOBAL PERSPECTIVE* (2009).

12 It is the most ratified international treaty, and also the most rapidly ratified.

13 *Roper v. Simmons*, 543 U.S. 551 (2005).

14 Another example is *MIMA v. B* [2004] HCA 20 (Australia) (the judgment of Mr. Justice Kirby).

are incommensurable where there is no measuring-rod by which they can be compared. Incommensurable values need not necessarily be incompatible, and, where they are not, they can co-exist. If values were only incommensurable, the problem would not be too great—a vision which allowed for and required discrete but compatible conceptions of the good life is not beyond the scope of our imagination. It is the incompatibility of values that constitutes the stumbling-block. Pluralists accept that conflicts among values can be resolved by appealing to some reasonable ranking of the values in question. They acknowledge that a plurality of reasonable rankings also exists. Pluralists disagree with relativists because they claim there are values independent of the context of the culture in question to which we can reasonably appeal in settling conflicts. There is surely no dispute that there are certain needs which do not vary either temporally (they are historically constant) or culturally (they are the requirement of people everywhere). This does not mean that there are not differences in the ways in which these needs are met. We all need food, but we can be carnivores or vegetarians. We all need shelter, but how this is met may be different in different environments. Nor are these needs physiological only. There are psychological needs too: for comfort, affection, companionship. There are social needs: for order, security, dignity, respect, privacy. There are, John Finnis explained better than anyone—"basic goods of human flourishing".¹⁵ They must be met whatever the conception of what constitutes a good life and regardless of what other values are upheld in any particular culture.

III. BEST INTERESTS AND CULTURE

Of course these values may be interpreted differently. Thus, we may all be able to agree with the norm set out in Article 3(1) of UNCRC: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". I say we can all agree but I personally do not think this goes far enough. Certainly, the best interests of the child should be *the* primary consideration, if not the *paramount* consideration. But I do not intend to argue this here.

But what is meant by "best interests"? The Convention does not define best interests. It is indeterminate. And there are different conceptions of what is in a child's best interests. Different societies and different historical periods will not

15 JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

agree. As an example, take the corporal chastisement of children. Twenty nine countries have outlawed the hitting of children by parents, including now two African countries, Tunisia and Kenya; in others brutal punishments continue in schools and at home. The Convention only outlaws violence, injury, abuse, and maltreatment¹⁶ and, so far as schools are concerned, mandates that school discipline is administered in a manner consistent with the child's human dignity.¹⁷ It is my belief, and that of the U.N. Committee on the Rights of the Child,¹⁸ that corporal punishment of children falls foul of those provisions. But some will argue that a smack is not violence, does not inflict injury, is not abuse or maltreatment. Tony Blair, the former Prime Minister of Britain, frequently defended the "safe" smack, even resorting to the oxymoron "loving smack" to defend the hitting of children. And there are legal systems, Canada¹⁹ and England are examples, which purport to uphold compromise solutions to this question. In England the defense of reasonable chastisement is allowed where a child is merely assaulted, but not where actual bodily harm (in lay language, a mark) results.²⁰ None of us finds the abuse of a child acceptable—the child abuser like mother of "Baby Peter" in Britain's recent notorious case—is a contemporary "folk devil".²¹ But there is some disagreement, at least at the margins, as to what constitutes "abuse". Is the ritual circumcision of a baby boy by Jewish parents abuse or is it abusive to deprive such a baby of his cultural heritage and religious identity?²² The problem is most acute when the child is a child of mixed marriage.²³

16 UNCRC, *supra* note 2, art. 19.

17 *Id.* art. 28.2.

18 See U.N. Committee on the Rights of Child, General Comment 8: The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, arts. 19; 28, para. 2; and 37, U.N. Doc. CRC/C/GC/8 8 and 13 (Mar. 2, 2007).

19 See Joan Durrant, Nadine Sigvalason & Lisa Bednor 16 INT'L J. CHILDREN'S RTS. 229-47(2008) (discussing the Canadian public perception of Canadian law).

20 See Children Act 2004, §58 (Eng.).

21 On folk devils and moral panics the classic source, see STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* (1972). On Baby Peter (Connolly), see *THE GUARDIAN*, May 23, 2009, at 12.

22 I have argued it would be abuse to deny such a child a circumcision, see Michael Freeman, *A Child's Right to Circumcision*, 83 BRIT. J. UROLOGY INT'L (Supp.) 74 (1999). See also the children's rights analysis of the circumcision debate in J. Shirtazki's article in this volume: Johanna Schiratzki, *Banning God's Law in the Name of the Holy Body – The Nordic Position on Ritual Male Circumcision*, 5 FAM. IN L. 35 (2011).

23 Re J. [2000] 1 F.L.R. 571 and Re S. [2005] 1 F.L.R. 236 confront this problem.

An excellent illustration of this problem is the English case of *Re M*,²⁴ decided in 1996. It is often referred to as the *Zulu boy* case. The question for the English court was whether it was in a 9-year-old's best interests to remain in London with his foster mother or return to his parents in South Africa. The foster mother was a white Afrikaner; the parents were Zulus. The mother had been the foster mother's nanny and cook/housekeeper when she had lived in South Africa. The child was with the foster mother with the parents' agreement and had been with her in London for four years. The child was settled in England, and there is no doubt that he wished to remain with his foster mother.²⁵ But his view was not sought and his immediate return to South Africa was ordered by the court. The boy resisted and had to be forcibly returned. He spent a few months back in South Africa before his parents bowed to the inevitable and allowed him to return to his foster mother in London. The court reasoned that, other things being equal, it was in the interests of a child that he should be brought up by his natural parents and not, as was happening here, by a psychological parent. Further, the child's development had to be "Zulu development and not Afrikaans or English development".²⁶ And the court invoked rights language—odd you may think when it totally ignored the child's agency—to proclaim that the child had the right to be reunited with his Zulu parents and his extended family in South Africa.²⁷ But the court was under "no illusions whatever about the harm that return to South Africa will cause".²⁸ The court accepted the evidence of a child psychologist that there was a risk that "he will go downhill emotionally, he will go downhill psychologically, he will be a bit of an outsider ... and everything may go horribly wrong".²⁹

The reconciliation of the best interests principle with cultural norms is a major concern, perhaps more so now in our post 9/11 world than was the case in 1989. We are much more sensitive to cultural diversity and arguably more tolerant of it than we were when the principle was being formulated. But even in 1989 there was inserted into the Preamble of the Convention the need to take "due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child".

24 *Re M*. [1996] 2 F.L.R. 441 (*Zulu Boy* case).

25 He refused to return to South Africa, and had to be forcibly put on a plane.

26 *Zulu Boy* case, *supra* note 24, at 454.

27 *Id.* at 455.

28 *Id.* at 460.

29 *Id.* at 461.

IV. RIGHTS AND CULTURE

However, under the UNCRC the child is given a much greater role in deciding what are in his/her best interests than would be the case in traditional societies. Geraldine Van Bueren argues that the rights approach in the Convention would be "wholly undermined if Article 3(1) allowed back in either the traditional best interests approach or an extreme stance of cultural relativism".³⁰ And, she notes, this argument is strengthened by the Vienna Programme of Action "which links and gives equal weight to the principle of non-discrimination, best interests and the views of the child".³¹

Different societies have different understandings of childhood. We first saw this with the Ariès thesis,³² itself now heavily criticized.³³ But even in contemporary terms, there are different views on such questions as to whether children should work (even be involved in the "worst forms of labor"), when they should be allowed to marry (there is no minimum age for marriage stipulated in the Convention), and what choice, if any, they should have (arranged and forced marriages are sometimes difficult to distinguish). Even on such questions as to whether they should obey their parents (which the Israeli legal system mandates).³⁴ As Ncube recognizes "the normative universality achieved in the definition and formulation of children's rights has to contend with diverse and varied cultural and traditional conceptions of childhood, its role, its rights and obligations".³⁵ He describes some aspects of the traditional African conceptions of childhood that are very different from the model found in the developed world:

in the African cultural context childhood is not perceived and conceptualised in terms of age but in terms of inter-generational obligations of support and reciprocity. In this sense an African "child"

30 GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* (1995).

31 *Id.*

32 PHILIPPE ARIÈS, *CENTURIES OF CHILDHOOD* (1962).

33 *See, e.g.*, LINDA POLLOCK, *FORGOTTEN CHILDREN* (1983).

34 *The Legal Capacity and Guardianship Law, 5722-1962*, 16 L.S.I. 106 (Isr.). This section is symbolic and not enforced in any way.

35 Wellington Ncube, *Prospects and Challenges in Eastern and Southern Africa: The Interplay Between International Human Rights Norms and Domestic Law, Tradition and Culture*, in *LAW, CULTURE, TRADITION AND CHILDREN'S RIGHTS IN EASTERN AND SOUTHERN AFRICA* 5 (1998).

is often always a "child" in relation to his or her parents who expect and are traditionally entitled to all forms of support in times of need and in old age'.³⁶

There may be difficulties also with the Convention's emphasis (in Article 12) on participation, since the traditional African family "expects 'childhood' to be a continuous period of self-effacing obedience to traditional authority".³⁷

When culture is discussed in the context of human rights, it is easy to assume we are talking only of cultural practices in the developing world (or in the world, where religion dominates certain questions—for example the Jewish bill of divorcement, the *get*). Certainly, those who drafted Article 24(3) of the UNCRC, which demands that effective and appropriate measures be taken to abolish "traditional practices prejudicial to the health of children", had cultural practices of the developing world in mind (in fact FGM). They didn't have male circumcision in mind – a practice in decline but one which was almost routine in the U.S., Britain and elsewhere until recently. Or other traditional practices in the developed world.

A valuable way of looking at the debate is suggested by Alston, who uses an analogy drawn from European human rights jurisprudence of a "margin of appreciation".³⁸ This would give States Parties a degree of discretion, enabling cultural considerations to be accommodated within the best interests forum. Nor should Article 30 of the UNCRC be overlooked. This guarantees the children of ethnic minorities and of indigenous peoples a right to culture. How one resolves the tension between Articles 24(3) and 30 is not clear.

Much has, I believe, been overlooked in these debates. At root, the conflicts may be understood as conflict between different communities of judgment. For Kant,³⁹ and Hannah Arendt,⁴⁰ judgment is neither about truth claims nor about mere

36 Wellington Ncube, *The African Cultural Fingerprint? The Changing Concept of Childhood*, in *id.* at 11, 18.

37 *Id.* at 19.

38 Alston, *supra* note 4; see also *See Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 22 (1976) (in which the European Court of Human Rights used the margin of appreciation for the first time).

39 IMMANUEL KANT, *CRITIQUE OF JUDGMENT* (trans. Werner S. Pluhar, Hackett Publishing Co., 1987) (1790).

40 HANNAH ARENDT, *BETWEEN PAST AND FUTURE* (1961); HANNAH ARENDT, *LECTURES ON KANT'S POLITICAL PHILOSOPHY* (1982).

subjective preference. For Kant, the core of what makes judgment possible is our "common sense" shared by other judging subjects. It is this shared sense that allows us to exercise on "enlarged mentality" by imagining judgments from the standpoints of others.⁴¹ For Kant, the ground for our "common sense" is the identical cognitive faculties of imagination and understanding that all human beings share: in exercising the enlarged mentality we put ourselves in the place of every other person. Judgments are thus universally valid. For Arendt, the common sense that makes judgment possible is not based in universally-shared cognitive faculties, but on shared community. She writes that '[t]he capacity to judge is a specifically political activity 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'.⁴² 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.

The conception of the "enlarged mentality" is an important framework for understanding that subjectivity need not collapse into arbitrariness. By basing judgment in real community, Arendt makes us ask about judgment: good judgment for and according to whom? With Kant, with his transcendental universality, this is an unnecessary question. But Arendt's reliance on actual community provides us a way of using the Kantian framework where there are doubts about a universality of judgment.

But whose standpoints are to be considered and by whom? What is meant by community? If the common sense essential to judgment is not that of Kant's transcendental world of all human beings with identical faculties of imagination and understanding, what is it? The concept of the "enlarged mentality" is valuable, but does it work in a diverse, contested, and fragmented social world?

These are not, or not just, theoretical questions. They throw light on the circumstances which bedevil our thinking about children's best interests and culture. These debates too—and obviously—require a theory of judgment. They require an understanding of the relationship between the universal and the particular in human judgment, and they required a clear source of the community (or communities) from which claims of judgment are made. The core of this debate is over claims about the universality of human (and thus children's) rights. And this comes sharply into focus

41 Ncube, *The African Cultural Fingerprint? The Changing Concept of Childhood*, *supra* note 36, paras. 35, 150-51.

42 ARENDT, *BETWEEN PAST AND FUTURE*, *supra* note 40, at 221.

when a practice like FGM is in issue.⁴³ We may condemn such a practice in the name of universality, but others condone it in the name of culture.⁴⁴ Our claim to normative universality is challenged by others as merely the imposition of a particular Western conception on those who have different conceptions of core human values.

How then is one to justify claims of abuses of rights? What is the basis for such claims? With reference to which community is the judgment about abuses of rights made? Is it the community of all six and a half billion of us, a community to which we all belong because we are human? Does being "human" mean the same to all mankind? Or are we necessarily invoking, even here, a Western conception of what being "human" is? Should we instead be looking to the particular community in which the abuses are taking place? And, if so, is there any greater reason to envision that community as monolithic, so that it has only one relevant shared "common sense"?

Why should we do this when practices alleged to be abuses frequently take place where there are multiple overlapping communities with different "common senses"? Or should we rather say there is a world community, that is not transcendental in nature, but is rather an empirical, social world, constituted by communication and actions such as ratifications of international conventions on human and children's rights? And is it not possible to express such norms in universal terms, and yet apply them in ways which are responsive to social context? For example, it may be possible to condemn child marriage but be sensitive to different understandings of the concept of "child" in different cultures.⁴⁵ Surprisingly—and, of course, not using this route—an English court adopted this culturally sensitive approach as long ago as 1968. It asked not whether a girl of 13 from Northern Nigeria was in "moral danger" by the standards of South London, where she was living, but in terms of the culture from which she had come.⁴⁶ My paper in Durban started with this case study and I do not say any more about it here. Suffice to note the decision was controversial then and remains so today.⁴⁷

43 See Stephen A. James, *Reconciling International Human Rights and Cultural Relativism*, 8 *BIOETHICS* 1 (1994).

44 Not necessarily FGM as such, but certainly other cultural practices.

45 We (in the U.K.) say a child can marry at sixteen: others pitch it lower or, indeed, higher.

46 *Mohamed v. Knott* [1969] 1 Q.B.1.

47 *Supra* note 1, at 289-90.

There is another danger in these discussions, and that is that it pits "us" against "them".⁴⁸ But there are people in our communities who do not accept human rights ideals or children's rights. Indeed, it has become respectable to reject children's rights—more's the pity! There are also people in communities which reject such ideals who happily endorse them. Unhappily, many such people are in gulags or under house arrest. What is it, then, that makes it possible for some people to judge not only differently from, but in opposition to, their communities? Arendt herself was ambivalent. In the last analysis, she thought, one is a member of a world community by the sheer fact of being human. This is one's "cosmopolitan existence".⁴⁹ When one judges and acts in political matters, "one is supposed to take one's bearings from the ideal, not the actuality, of being a world citizen" and—and here she quotes Kant—a world spectator (*Weltbetrachter*).⁵⁰

But what do we mean when we say an entire community is wrong? We all know that the Nazis were wrong, that enslaving children is wrong, that rape is wrong. Most of us know that torture is wrong.⁵¹ But how do we know this? Are we saying that those who uphold genocide or slavery are not exercising judgment? Or that their judgment is bad judgment, distorted in some way? Or that their common sense is distorted? From what standpoint do we make such a claim? How do we exercise our judgment? The argument so far has assumed that our judgments are grounded in local communities, but most communities are not homogeneous. We are exposed to overlapping communities, and these differ in their "common sense", at least in some respects. How then do we exercise our enlarged mentality when different judgments appear valid depending upon which community's 'common sense' we have reference to? Are we to choose from different common senses of different communities, and, if so, how?

V. CHILDREN'S RIGHTS AND CULTURE

A set of norms like the UNCRC requires us to make judgments across different communities. Can valid judgments be made across different communities? The European jurisprudence use of margin of appreciation has already been referred to.⁵² Of course, the functional equivalent of this in the Convention is the entering of

48 *Supra* note 40, at 218.

49 *Id.* at 76.

50 *Id.*

51 See PHILIPPE SANDS, TORTURE TEAM (2008).

52 See *supra* notes 4 & 38.

reservations, a practice which I deplore. For obvious reasons, States Parties cannot enter reservations to the best interests principle in Article 3 any more than they can opt out of the non-discrimination principle in Article 2. When we are critical of the use of reservations, as we should be, we act as members of a community committed to children, and as such we work to change the common sense of our own and others' communities. We can exercise our judgments *against* our community. This opens up the debate and may lead to change. It is a route to progress. We have, it should not be forgotten, no rights that have not been fought for: rights are an inconvenience as far as the powerful are concerned. Exercising judgments against other communities—against countries, for example, which still execute children,—takes on new discussions: it is both easier (because there will be support from many others, including those who do not see problems in their own communities), and more difficult (because we are intrusive outsiders, and because we must understand before we can judge).

In disputes about children's rights what we see are competing communities claiming that they provide the appropriate framework for judging. The greater the capacity to form links between competing frameworks, the greater the possibility of claiming validity *across* communities. If we want to see our visions of children's rights prevail across communities, some of which do not currently accept our judgment, we must engage in dialogue. Our aim must be the enlargement of a shared common sense. Children's rights discourse (as human rights discourse also) must not be seen, so it frequently is, as a foreign imposition, but rather as an element of a shared common sense.

It is thus, necessary to participate in dialogue that seriously engages local perspectives. We must avoid "holier than thou" stances. The practical meaning and application of children's rights is contested more or less everywhere. We "proclaim" children's rights, and condemn their abuses elsewhere. The developed world must carefully scrutinize its own policies, for example toward refugees and asylum seekers. How many of these uphold "best interests" standards.⁵³ Those practiced in the United Kingdom certainly do not. And the asylum-seeking child is an interesting case-study for culture and rights. Disputes often hinge on age since children have advantages over adults. In 2002 the number of children claiming asylum in the U.K. stood at over 6,000; by 2005 it was less than 3,000, but there were an additional 2,425 applications from applicants claiming to be children but whose age the Home

53 See Jane McAdam, *Seeking Asylum under the Convention on the Rights of the Child*, 14 INT'L J. CHILDREN'S RTS. 251 (2006).

Office disputed.⁵⁴ Of course, many of these children come from societies where age is not precisely recorded; birthdays are not celebrated as in the developed world where age has a different significance. It can easily be forgotten that the precise chronology of ageing in relation to life cycle identities is a relatively recent phenomenon of modernity. Age has huge implications for the asylum process, for welfare and education support, but it is of lesser significance to children and young people from countries and cultures that do not attach the same importance to chronological age. Children who are forced to grow up quickly to survive may see no advantage in remaining "childlike", and so may be categorized as adults when they are under 18. Crawley quotes the child of 15 from Afghanistan who said a Home Office official told him he was 18. But, as he explained, "I am not like a British child. They don't work. My fingers and my hands, they have all got hard and old and soiled by work. That's why it's different".⁵⁵

We need, I stress, to find ways to engage in debate to enable distinct communities of judgment to hear each other sufficiently to include each other in their exercise of enlarged mentality. We need to open channels of communication. The challenge is the creation of 'common sense', where currently this does not exist. And, of course, this may begin with children if we take their right to participate—called for in Article 12 of the Convention and the articles which follow—seriously.

This raises many questions. In our context I wish to address just one. Do children—this applies especially to those of minority cultures and religions and to indigenous people—have the right to enjoy their own cultures? Article 30 of the Convention says such children shall *not be denied* the right to enjoy their own culture, to profess or practice their own religion, or use their own language. For what we have assumed to be obvious reasons, Article 30 does not give such rights to children of majority cultures—they may be thought to have these rights anyway, though, of course, this is not always so. French children are denied the right to wear a cross at school, just as French Jewish children are not allowed to display a *Magen David* (a star of David). Harry Brighouse thinks it "very strange" to think about children as "bearers of rights".⁵⁶ So it is not surprising that Article 30 should concern him. Indeed, he thinks giving children the right to culture would "jeopardize the family as an institution" and that this would be to the detriment of the developmental

54 HOME OFFICE, ASYLUM STATISTICS, U.K. 2005 (2006).

55 HEAVEN CRAWLEY, WHEN IS A CHILD NOT A CHILD 16 (2007).

56 Harry Brighouse, *What Rights (If Any) Do Children Have?*, in THE MORAL AND POLITICAL STATUS OF CHILDREN 31 (David Archard & Colin M. Macleod eds., 2002).

interests of children. Martin Guggenheim, in his recent book *What's Wrong with Children's Rights*,⁵⁷ is also concerned about the impact that children's rights have on parents. I have criticized him elsewhere⁵⁸ and say no more about his book here. Culture is anyway, not his concern.

The right to culture raises many issues. I have already said that certain practices are unacceptable, and so acknowledge that we are involved in a line-drawing exercise. There are limits to tolerance. Minorities within minorities exist, and we would fail in our duty if we did not protect them. We need a principled argument for distinguishing practices that we can accept from those we must reject. John Stuart Mill's "harm principle" is, I would suggest, as good a place to start as anywhere.⁵⁹ He distinguishes between self-regarding actions and other-regarding actions. Alison Dundes Renteln adopts a similar view: "With respect to the broader question of limits, [her] view is that individuals should have the right to follow their cultural traditions without interference, unless the traditions pose some greater risk to members of the ethnic group or to society at large".⁶⁰ She qualifies this by saying that the risk must be "extremely grave, so as to threaten irreparable physical harm". This goes too far: There are, of course, many harms that are not physical in nature from which a case for protection can be made.

Much discussion of the right to culture tends to be in the abstract. Renteln is a notable exception. But rather than duplicating what she says, and she uses many examples including cultural practices of children and in respect of children, I intend for the rest of this paper to concentrate on one example drawn from a recent English case.⁶¹ I think the decision of the House of Lords (the highest court in England) is wrong, and I particularly deprecate some of the language used by the judges. But other supporters of children's rights have approved of the decision and the reasoning, in particular Jane Fortin.⁶²

57 MARTIN GUGGENHEIM, *WHAT IS WRONG WITH CHILDREN'S RIGHTS* (2005).

58 M.D.A. Freeman, *What's Right with Rights of Children*, 2 INT'L J. L. IN CONTEXT 89 (2006).

59 MILL, *supra* note 9, at ch.1.

60 ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* (2004).

61 R (on the application of Begum) v. Head Teacher and Governor of Denbigh High School [2006] UKHL 15.

62 *But see* Eva Brems, *Above Children's Heads: The Headscarf Controversy in European Schools from the Perspective of Children's Rights*, 14 INT'L J. CHILDREN'S RTS. 119 (2006); Susan Edwards, *Imagining Islam ... of meaning and metaphor symbolising the jilbab – R (Begum) v Headteacher and Governors of Denbigh High School*, 19(2) CHILD & FAM. L.

VI. THE SHABINA BEGUM CASE

The case is that of Shabina Begum. She is a Muslim girl, at the time of the litigation 17 years of age. A young woman in fact, and certainly competent on the *Gillick* standard,⁶³ formulated back in 1985. In *Begum*, the House of Lords rejected her challenge under Article 9 of the European Convention on Human Rights to her school's policy of not permitting her to wear the *jilbāb* at school. The *jilbāb* is a long, shapeless garment that covers the entire body, except for hands, feet and face. This is worn, for religious reasons, by some Muslim women. The case could not have been brought under Article 30 of the UNCRC. This is not part of English law—but Article 9 of the European Convention on Human Rights protects religious freedom including the freedom to manifest one's religion. Religious freedom can only be limited "as necessary in a democratic society for public safety, the protections of public order, health or morals, or the protection of the rights and freedom of others".⁶⁴

The Court of Appeal—the court below the House of Lords—had held that the school's policy violated Article 9 and could not be justified on the limitation principle. The House of Lords did not agree, and it reversed the Court of Appeal's decision. Two of the judges accepted that Begum's freedom to practice her religion had been limited, but said it was justified. The other three judges saw no limitation on her freedom, and thus, did not need to search for a justification. The reasoning of the majority seems very difficult to understand. How can the policy have not curtailed Begum's religious freedom? That the school allowed Muslim girls to wear the *hijāb* or the *shalwar kameeze*, but not the *jilbāb*, clearly shows a particular form of religious clothing was proscribed because of the particular belief system it represented. And it is surely not good enough for the school to argue that Begum could manifest her religion by wearing these garments instead. We are talking of *her* religion, not the religion of other Muslims. The second question is obviously the more difficult one since it might be possible to justify the restriction on the exercise of her freedom. But none of the Lords made any attempts to explain why limiting

QUARTERLY 247 (2007), and Alexandra Pimor, *The Interpretation and Protection of Article 9 ECHR: Overview of the Denbigh High School (UK) Case*, 28(3-4) J. Soc. WELFARE & FAM. L. 323 (2006).

63 *Gillick v. West Norfolk and Wisbech Area Health Authority*, [1986] A.C. 112.

64 European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9(2), Nov. 4, 1950, 213 U.N.T.S. 222.

Begum's freedom was "necessary in a democratic society", which is required by the Convention.⁶⁵ The judges concentrated instead on whether the school had made a reasonable or proportional judgment about whether the dress code would best promote the school's general interests. They paid no attention to whether this could have been achieved by less restrictive measures.⁶⁶

It is not just the conclusions of the court which I find difficult to accept. It is the language used, and what this reveals. A few brief quotations show what I mean.

Lord Bingham, the senior law lord, narrates the facts of the case, but he casually inserts the following sentence: "They [i.e. Begum, her brother, and another man] talked of human rights and legal proceedings. Mr. Moore [the assistant head] felt their approach was unreasonable and he felt threatened".⁶⁷ It is clearly wrong to use appeals to human rights! Lord Bingham's sympathies are firmly with the assistant head, confronted by three young Muslims eager to assert their rights.

Lord Hoffmann, like Lord Bingham, a firm believer in human rights—he achieved notoriety by sitting in the *Pinochet* extradition hearing when a member of Amnesty International—says she could easily have gone to another school. That is, I think, no answer. He adds: "Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's choosing. Common civility also has a place in the religious life".⁶⁸ I fail to see what this juxtaposition achieves. It looks to me like a complete *non sequitur*. But he explains, a few sentences later, that "[t]hey sought a confrontation and claimed that she had a right to attend the school of her own choosing in the clothes she chose to wear".⁶⁹

But history tells us that we must often seek our rights aggressively, as Lord Hoffmann well knows. He objects to Begum's being "intent on enforcing her 'rights'". And he puts "rights" into quotation marks!

65 *Id.*

66 *Id.*

67 *R v. Head Teacher and Governor of Denbigh High School*, *supra* note 61, para. 10.

68 *Id.* para. 10.

69 *Id.*

Lord Scott of Foscote—like Lord Hoffmann as a judge who left apartheid South Africa—is also critical of her grounding her case "by speaking of human rights and legal proceedings".⁷⁰

There is emphasis in the judgments also of the fact that Begum had worn the *shalwar kameeze* for two years prior to the onset of her dispute with the school over its dress code. Read the judgments and you get the impression that Begum is almost estopped from complaining because she had acquiesced in the school policy for some time. Only Baroness Hale, and she briefly acknowledges that in this period Begum had gone through the stages of puberty—that she had ceased to be a girl and had become a young woman—that she was now a different person. She now had breasts and hips to hide. She was now more conscious of her own sexuality and of her identification by others as a sex object. In other words she had good reasons to want to change the ways she dressed. What would the Lords have said to a young woman who wished to wear a longer skirt than the school permitted—you used to be quite happy wearing mini-skirts? Are the Lords not just over-reacting to the "alien", the "other", the "exotic"?⁷¹

In rather similar terms the Lords try to nourish their conclusions by seeking the views of other Muslims. Thus Lord Scott writes: "The specific design of the ... school uniform was approved by the school governors after consultation with ... the imams of three local mosques".⁷²

And Lord Bingham notes:

In [September 2003] there was forwarded to the school a statement made by the Muslim Council of Britain on the "Dress Code for women in Islam": there was no recommended style; modesty must be observed at all times; trousers with long tops or skirts for school wear were *absolutely fine*.⁷³

But surely the question is what Begum's conscience tells her, not what authority – and it is, of course, male authority, dictates.

70 *Id.* para. 79.

71 *Cf.* EDWARD SAID, *ORIENTALISM* (1979).

72 *R v. Head Teacher and Governor of Denbigh High School*, *supra* note 61, para. 77.

73 *Id.* para. 15 (emphasis in original).

We need to address not just children's voices in "governance", but also their participation in civil society—and the school is an obvious starting-point. There is much more emphasis today, than even a decade ago, on the importance of participation, but it is too often adult-led, and as Nigel Thomas writes in his introduction to a new collection of essays, "spaces for children's autonomous activity ... are severely restricted in all parts of the world".⁷⁴ A case like *Begum* offers the scope to actualize children's participation in a matter which deeply affects an individual's perception of herself. The opportunity was not grasped.

It may be said against this that Begum's actions were not deserving of recognition because they were harmful to other Muslim girls or to Muslims as a whole or to school discipline or morale or order: Begum's rights have to be seen in relation to the rights of others. This is Jane Fortin's argument, and I respect it. But I don't ultimately find it convincing. Begum was not saying that other Muslim girls should also don the *jilbāb*. There is no reason why other Muslim girls in the school should feel discomfort or embarrassment or a sense of being shamed. Some of them may wish to follow her example; most will not. That this may reflect badly on Muslim society in Britain is another matter. People react badly to Muslim fundamentalism and may see Begum as an example of it. But wearing the *jilbāb* is not blowing up buses or preaching hatred, and there is no reason why it should lead to such abhorrent activities. If it reflects badly on Muslim society, it is more likely to be the result of majority society intolerance. And it is this we should be addressing rather than a young woman's expression of her individuality. John Stuart Mill's classic '*On Liberty*', published 150 years ago, explained why this was necessary. Unfortunately, he excluded children from his thesis and, I suspect, Muslims. But we can pass over these Victorian accretions. What he says about individuality remains significant and, since it is highly apposite to Begum's case I close with a sentence from *On Liberty*. "As it is useful that while mankind are imperfect there should be different opinions, so it is that there should be different experiments of living; that free scope should be given to varieties of character, short of injury to others".⁷⁵

74 Nigel Thomas, *Introduction, in CHILDREN, POLITICS AND COMMUNICATION: PARTICIPATION AT THE MARGINS 2* (Nigel Thomas ed., 2009).

75 See *supra* note 9, ch. 3.

