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Some Conditions for Culturally Diverse Deliberation

Richard D. Mohr

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Richard Mohr *

People who argue do not address what we call 'faculties', such as intellect, emotion, or will; they address the whole person, but, depending on the circumstances, their arguments will seek different results and will use methods appropriate to the purpose of the discourse as well as to the audience to be influenced.

Chaim Perelman, *The Realm of Rhetoric*¹

Legal reasoning as communicative action

The call for papers for this special edition invited an inquiry into culturally-reflexive legal reasoning. In this contribution I would like to consider some of the conditions of that sort of reasoning. What sort of institutions, procedures or ways of thinking may permit a legal reasoning which could truly respond to specific diverse cultures? Some of the impetus for such an inquiry comes from a scepticism that law courts within a modern legal framework actually do respond to diverse cultural demands and experiences. In Australia, despite judicial recognition that Indigenous law is a system of laws,² extensive inquiries into the recognition of "customary law,"³ and the recognition of "native title" in case⁴ and statute⁵ law, Australian courts and legislatures have continued to misunderstand, misrepresent or negate the legal and cultural principles pertaining in Indigenous communities. McNamara and Grattan have pointed out that common law conceptions of native title do not correspond with any actually existing Indigenous conceptions of land rights.⁶ I have previously suggested that the inability of the common law to recognise Indigenous legal principles derives from an incommensurability between the laws and legal concepts and the difficulties

* I am grateful to the Law Faculty at McGill University, and specifically to the Canada Research Chair in Law & Discourse, for providing both the initial impulse to this investigation and the facilities for its final development, in which I was particularly encouraged by David Howes.

¹ Quoted in W. Christopher Tindale, *Acts of Arguing: A Rhetorical Model of Argument* (Albany, New York: State University of New York Press, 1999) at 4.

² *Milirrpum v Nabalco* (1971), 17 FLR 141.

³ Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* A.L.R.C. 31 (Canberra: Australian Government Publishing Service, 1986).

⁴ *Mabo v Queensland* (1992), 175 CLR 408.

⁵ *Native Title Act* 1993 (Cth.).

⁶ Luke McNamara & Scott Grattan, "The Recognition of Indigenous Land Rights as 'Native Title': Continuity and Transformation" (1999) 3 *Flinders Journal of Law Reform* 137.

an exclusivist legal system faces in attempting to work with “foreign” principles.⁷

I do not intend here to analyze specific decisions but rather to ask what processes of deliberation or ways of reasoning might be compatible with a genuine recognition of cultural diversity in law. In particular I am interested in probing the minimum conditions for a legal regime to accommodate cultural specificity. Responding to the call for papers, I am not focusing on cultural sensitivity – which leads courts to provide interpreters and hear cultural evidence – but rather on what the editor has called “reflexivity.” By this I understand a legal decision-making process which can respond substantively—that is, at the level of the decision itself – to the cultural values, including (informal) legal norms, of the parties involved.

In seeking processes which lead to just and culturally reflexive decisions, it is not enough to confine ourselves to the procedures of any specific courts. I have already indicated some of the limitations which I have seen in the Australian courts in this regard. The present project requires something more in the way of thought experiments which explore the possibilities of culturally reflexive justice. One of the most sustained thought experiments exploring the conditions of procedural and social justice has been the work of Jürgen Habermas and others in the fields of the theory of communicative action and discourse ethics. In seeking “ideal speech situations” in which all parties can participate equally and fairly, this school has sought to open the field of decision-making processes to a range of democratic alternatives. Whether this project could ever have practical as well as theoretical outcomes, it purports at least to provide a benchmark for just deliberative processes.

The relevance of discourse theory to the study of legal processes derives from its universalist aspirations. Both law and discourse theory make claims for universal application. Laws need only apply universally within a single jurisdiction, but if that is a multicultural jurisdiction then even this claim opens the law to cultural contestation. Discourse theory makes rather grander claims. Having been developed in Germany in the second half of the twentieth century, it has been developed and criticized in a variety of western countries.

The strength and coherence of Habermas’s theory of discourse ethics and the sophistication of the criticisms directed against it offer fertile ground for an exploration of the limits of universalist decision-making processes. Adding to the interest for my present purposes is Seyla Benhabib’s revisionist discourse ethics which purports to reconcile the universalist project with culturally specific values.⁸ This is of particular significance since it comes from a feminist scholar who has in the past been among the

⁷ Richard Mohr, “Shifting Ground: Context and Change in Two Australian Legal Systems” (2002) 15 *Int’l J. Sem. L.* 1.

⁸ Seyla Benhabib, *The Claims of Culture. Equality and Diversity in the Global Era* (Princeton: Princeton University Press, 2002) [Benhabib, *Claims*].

critics of Habermas, albeit from an otherwise broadly supportive perspective.⁹

In Habermas's original "theory of communicative action" political and legal deliberation rely upon certain ethical principles. All the parties should be heard and they should ensure that their communications are understood and are not internally contradictory. They should forego the use of force, and cooperate, with sincerity, in the search for truth.¹⁰

To focus on communication between parties and public deliberation over matters of policy or justice draws attention to the position of these publics and to the language that they use. These themes are familiar from classical rhetoric. Legal decisions are neither true nor false. Instead they are plausible or persuasive. In Aristotle's discussion of rhetoric this involves a method of arguing from generally held opinions to conclusions relevant to any problem posed. The resolution of legal debates depends on which argument is the most acceptable, because it corresponds to the most "reasonable" view.¹¹ The basis of rhetoric – and hence legal or political debate – in "generally held opinions" and "persuasive" arguments alerts us to the centrality of a cultural or moral community. Who holds these opinions and who do we persuade? One (human) community or many?¹²

Cultural diversity

Moving into a multicultural and multilingual world adds the question of language to rhetoric's concerns with the sources of opinions and the respective roles of different parties and audiences. Are the various publics or moral communities using the same language? Does a word in one discourse mean the same when used in a different discourse, or by a different community?

Each of these issues is highly relevant to law as a system of public deliberation. Laws are based in language, so that the meanings we invoke

⁹ Seyla Benhabib, "Communicative Ethics and Current Controversies in Practical Philosophy (Afterword)" in Seyla Benhabib and Fred Dallmayr, eds., *The Communicative Ethics Controversy* (Cambridge MA: MIT Press, 1990), Seyla Benhabib, "The generalized and the concrete other" in Seyla Benhabib and Druscilla Cornell, eds., *Feminism as critique: on the politics of gender* (Minneapolis: University of Minnesota Press, 1987) 77, Seyla Benhabib, "Models of public space: Hannah Arendt, the Liberal tradition and Jürgen Habermas" in Craig Calhoun, ed., *Habermas and the Public Sphere* (Cambridge, MA: MIT Press, 1992) 73.

¹⁰ Habermas developed these views from the mid 1970s on. The criteria listed here come from his early work (Jürgen Habermas, *Legitimation Crisis* (London: Heinemann, 1976) at 107-108)), which specified criteria of 'communicative competence' in a 'theory of communicative action' (a term used in Jürgen Habermas, *Moral Consciousness and Communicative Action* (Cambridge, MA: MIT Press, 1990)) *passim*. He later developed his ethical theory of the procedural arrangements of contemporary democracies as 'discourse ethics', based on public deliberation in Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge UK: Polity Press, 1996). Any of these terms may refer to various facets of Habermas's generally consistent work.

¹¹ V. Petrucci, "Retorica, Diritto e Scienza Sociale" (2000) 27 *Sociologia del Diritto* 35 at 36-37

¹² I return to the discussion of the audience to arguments, as developed in "the new rhetoric", below.

determine our legal arguments. They are also embodied in decision makers and founded in the cultural and political *habitus* of our public communications. In each of these areas legal deliberation is based in knowledge and the ways we use it. In each of these areas Habermas's work on communicative action has been criticised by some feminists and pluralists. From this critical perspective the general principles of discourse ethics are seen to privilege particular cultures, or a particular gender.¹³ In dealing with language, Habermas has been accused of neglecting gesture, the spoken tones of language, irony and the vagaries of meaning.¹⁴ Young has pointed to the contingent standpoint of the deliberator, criticising Habermas's assumption of a universal normative reason based in impartiality.¹⁵ Fraser has pointed to the structural inequalities and power imbalances, and the contested boundaries of public and private within "actually existing democracies" to challenge Habermasian theorists to "expose the limits of the specific form of democracy we enjoy in late-capitalist societies (...) while also cautioning people in other parts of the world against heeding the call to install them."¹⁶

In earlier work Benhabib criticised the place of universal moral categories in public deliberation. Rejecting universal principles of morality or natural law as a guide to decision-making in public life, she called attention to the possibility of "a universalist moral dialogue" viewed as an "ordinary moral conversation" rather than on "the model of public fora or courts of appeal".¹⁷

The emphasis now is less on *rational agreement*, but more on sustaining those normative practices and moral relationships within which reasoned agreement *as a way of life* can flourish and continue.¹⁸

In her recent defence of discourse ethics, *The Claims of Culture*,¹⁹ Benhabib comes directly to the point of the present inquiry and asks "is universalism ethnocentric?" While she once saw the possibility of universalism arising out of a moral conversation, in this later work we find more formal requirements for universally valid deliberations. Now Benhabib

¹³ See, for instance, Iris M. Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990), Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy" in C. Calhoun, ed., *Habermas and the Public Sphere* (Cambridge, MA, MIT Press, 1992) 109, J. Butler, *Excitable Speech: A Politics of the Performative* (New York: Routledge, 1997).

¹⁴ Iris M. Young, "Impartiality and the Civic Public" in Seyla Benhabib and Drucilla Cornell, eds., *Feminism as Critique: On the Politics of Gender* (Minneapolis, University of Minnesota Press, 1987) 71.

¹⁵ "Like the theories of Rawls and Ackerman, this strain in Habermas's theory relies on counterfactuals which build in an impartial starting point in order to get universality out of the moral dialogue." Young, *supra* note 13 at 106. Young enlists earlier writings of Benhabib in which she proposes a 'concrete' rather than a 'generalized other' in this argument.

¹⁶ Fraser, *supra* note 13 at 137.

¹⁷ Benhabib "Communicative Ethics," *supra* note 9 at 358.

¹⁸ *Ibid.* at 346.

¹⁹ *Supra* note 8.

is happier to replace universal moral principles with a universally agreed upon deliberative procedure, rather than an open-ended moral conversation. With this move towards the possibility of closure, of a definitive decision, Benhabib proposes a more institutionalized form of deliberation, based not in universal principles, but in universal procedures.

Benhabib defends three conditions for procedural universalism: the possibility of communicating across cultures; accepted common standards of impartial reasons for decisions; and attainability of consensus through deliberation.²⁰ The first of these is a necessary condition for cross-cultural conversation, and underlies the other two, one or both of which are required in order to reach a deliberative decision. I wish here to expand on the question of impartial reasons for decisions in the context of culturally reflexive legal reasoning.

Culturally reflexive reasoning in an institutional framework

Before analyzing Benhabib's defence of a common standard of public deliberation as a basis for culturally reflexive reasoning, I would like to situate this discussion within a broader legal and ethical context. Universalist defences of monolithic legal systems have broken down with the retreat, in philosophy, from universal moral categories and in jurisprudence, from a position of determinate natural law. Contemporary legal systems which claim universal jurisdiction can no longer rely on such universal justification and are reduced to various forms of positivism.²¹ The legitimacy of norms is justified in purely constitutional terms relying on the founding documents of states.

These foundations of law are faced by the conflicting, but not strictly commensurable, claim of cultures. Different cultures, as we well know, are characterised by diverse moral principles and social norms. These form the basis of codes of behaviour, ways of thinking and dispute resolution processes by which communities actually live. Not being formally legal, they do not rely upon formal legitimacy, but they do merit allegiance and respect among members of those cultures. Adopted from anthropology, the very concept of culture implies diversity. An important change since the beginnings of anthropological investigation is the realisation that even the West has "culture" (and not just "High Culture"!). Dominant cultures can no longer claim an unexamined privilege *vis à vis* subordinate cultures. Those terms in themselves make it unavoidably clear that relations of domination,

²⁰ Benhabib, *Claims*, *supra* note 8 at 135-146.

²¹ Recent versions of positivism, particularly those associated with MacCormick and Campbell, have made efforts to broaden the base of positivism to include "wisdom, compassion and a sense of justice". See Neil MacCormick & Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (Dordrecht: Reidel, 1986) at 205. Tuori has even proposed to open it to influences from civil society, but without showing how this could override the institutional privilege of law and its separation from politics which underlies even this 'critical' positivism (Kaarlo Tuori, series ed. Tom Campbell, *Critical Legal Positivism. Applied Legal Philosophy* (Aldershot: Ashgate, 2002)).

that is to say, power, are at the heart of the legal relationships between cultures.

Power relations are of particular relevance, of course, in legal situations where binding decisions are to be made. Legal regimes (particularly in postrevolutionary or postcolonial states) have typically been founded in the more or less violent victory of one culture or class over others. While this founding moment may be celebrated by the legal regime, the persistence of subordinate cultures remains a challenge to legitimacy.

Between the legitimacy of enforceable norms and the plurality of cultures lies the domain of institutions. Whether these be government departments, courts of law or the processes of debate in the public sphere, institutions play an increasingly apparent role in the resolution of conflicts among citizens who may not share exactly the same cultural heritage. Institutional arrangements move into the legitimation gap described above, between the transcendent justification of natural law or universal principles, and that bestowed on positive law by a legal regime's foundation.

Theorists of procedural justice, from John Rawls onwards, have worked this patch without notable programmatic specificity. That is to say, while procedural justice theories may be satisfying as philosophy, as thought experiments or foundations for critique, they have not provided much in the way of a brief for a future architecture of institutions. Habermas has provided one of the most specific and well developed theories of procedural justice, based in the criteria for communicative competence discussed above. These criteria may provide some guidance and a position from which to criticize the conduct of civil debate.²² However, if we try to apply these criteria under the circumstances of actual deliberation on practical and legal matters, we rarely find any sort of match between Habermas's ideal and procedural reality. A typical court hearing has very little in common with a Habermasian ideal speech situation. The exhortation to parties to understand each other, to avoid self-contradiction, or to cooperate in a search for truth may have a critical value in identifying some of the shortcomings to be found in the cut and thrust of litigation. Yet they are so far removed from the apparent concerns and procedures evident in legal deliberations that they constitute a counsel of perfection rather than a programmatic outline of procedural good practice. Besides, as I will elaborate shortly, these criteria for ideal communication stop short of guiding the decision, that point at which the parties themselves or a third party decide the outcome of the dispute. Even Habermas's carefully worked out standards offer little in the way of practical or political guidance to those setting out to reform legal or other decision-making institutions.

If the procedural justice implications of Habermas's theory are lacking programmatic specificity in the crucial area of decision-making or legal

²² Some of the procedural principles of the international Green parties bear a family resemblance to these principles, and suggest how they might operate in an institutional framework. The common heritage in post-war Germany through the early ascendancy of the German Greens suggests a more than coincidental link to Habermas.

reasoning, it is all the more important to discover whether Benhabib's *The Claims of Culture* offers any more guidance. I noted above that her conditions for the possibility of culturally reflexive deliberation included cross cultural communication, common standards of impartial reasons for decisions and the attainability of consensus. These standards, and particularly the first of them, derive from criteria of communicative competence based in discourse ethics. The last two refer to the possibility of resolving the dispute, either by a reasoned decision or by consensus.

In principle, it is not difficult to concede that communication across cultures is possible, particularly under those conditions of good communication and good faith to which both Habermas and Benhabib refer. We then reach the more difficult point where the conversation *must* end, because it is time to act. It is characteristic of law that it involves not just endless communication or argument, but that it must proceed to a decision. In practical and legal matters, the "conversation of humankind"²³ is not open-ended, but is limited by the necessity of coming to an agreement or of reaching a decision. Benhabib's second argument for a universal deliberative democracy is founded upon the possibility of impartial "public reason-giving" as a basis for decision making. If public reason-giving is to satisfy a diverse audience that it is impartial, then it will need to either conform simultaneously to diverse standards, or it will need to find a common standard. This formulation interrelates two issues which I will treat in turn: impartiality and a diverse or plural "public".

Impartial reasoning

To fairly accommodate a multicultural society Benhabib's model requires that impartiality between different groups and legal regimes may not privilege one over others. Indeed, the very idea of impartiality seems to be contiguous with this requirement not to privilege one group over another. However, the application of impartiality in the context of contemporary jurisprudence, where impartiality means literally that the judge is not to favour either party over the other, entails two paradoxes. First, impartiality alone is unable to decide matters: the judge must usually find in favour of one or the other of two parties. We may say that the merits of each case are to be approached without extraneous preconceptions or influences, and are to be weighed up dispassionately and fairly. However, there remains the requirement that some elements must lead the judge to decide, since perpetual "impartiality" would leave the case unresolved.

At this point jurisprudence would normally raise the issue of law: the judge *applies the law* dispassionately. However, to fall back on this position leads to impartiality's second paradox, namely that the law cannot decide in

²³ Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1995) at 348.

a specific case: only a judge can decide.²⁴ This derives from the fact that laws can only be general principles, and hence cannot be applied to specific situations without considerable efforts of interpretation. Positivist jurisprudence, demands for legal predictability, and witch hunts against “judicial activism” favour the image of the judge as something of an automaton. Under the demands for economic and legal rationalism, Weber proposed,

the judge is more or less an automatic statute[sic]-dispensing machine in which (...) you insert the files together with the necessary costs and dues at the top, whereupon he will eject the judgment together with the more or less cogent reasons for it at the bottom: that is to say, where the judge’s behaviour is on the whole predictable.²⁵

Yet if we are to be able to judge fairly in concrete instances it must be possible to interpret the law in relation to all the circumstances of the case and the parties. Only the judge can bring judgment to the decision between the parties.

The judge who brings more than the legal texts to a judgment works within a hermeneutic tradition, which recognises the active process of interpretation. The judge interprets more than the texts of law, and must interpret the actions and meanings of players in the case, of documents before the court, of evidence given. In moving from the texts of law to the decision in the case, judges also bring something of their own humanity to the process. The corporeal, living, speaking judge is not only distinct from Weber’s automaton, but is also distinct from all the other judges. Each of us brings the totality of our past experiences to bear on any interpretative task, and that totality is a product of our interests and passions as well as our reason.

From this brief discussion of impartiality as a basis for judgment we see that impartial judgment requires both negative and positive conditions. On the negative side we find requirements not to favour one party over another, to be free from external influences (of prejudice or cupidity). On the positive side, in order to reach a decision, we require that the law be interpreted according to a hermeneutics, which might encompass the specificity of the case and the parties to it, while taking a broad view of principles, which may have a bearing on the case and the ways the parties and the public perceive it. The act of interpretation is not a simple mechanistic application of the law to objective facts: the facts themselves must be interpreted within a legal *and social* context. The judge is a participant in – and indeed a part of – that context. Nedelsky has put it thus: “To understand judicial impartiality we must ask who judges are, and with whom they imagine themselves to be in

²⁴ I use the term “judge” as a shorthand for any third party who may be involved in deciding a case according to publicly given reasons for decisions.

²⁵ Quoted in Georg Lukács, *History and Class Consciousness* trans. by Rodney Livingstone (London: Merlin, 1971) at 96.

conversation as they make their judgments.”²⁶ I will come back to those questions shortly.

Let us now explore the conditions of successful public reason-giving in a multicultural public sphere. Benhabib proposes that decisions be made in such a way that they be supported by publicly given reasons which can be seen as impartial by a diverse public. This provides the elements which motivate the deliberative decision in Benhabib’s schema. She requires that reasons for decisions must be accepted by a culturally diverse public according to common standards. These are not just the standards of a common set of legal principles, but of ways of interpreting them and reasoning to a decision in a specific case. This raises the question whether we could find any common standards of reason-giving which addressed the ways of reasoning of all cultural groups or found a common cause among their ways of reasoning.

To talk of ways of reasoning in the plural already suggests a movement away from universal rational criteria, which must by definition be singular. The remainder of this discussion will be devoted to a critique of several of the assumptions founding universal criteria for reasoning. I will then explore the implications of this critique for the possibility of any common standards of cross cultural decision-making. I will outline three conditions, which appear to challenge these criteria. I will then assess claims for common standards for reason-giving which purport to be impartially applicable across a range of cultures.

Reasoning to standards publicly accepted across diverse cultures rests on three rebuttals of the traditional standards of universalism. First, since reasoning is to conform to the standards of a multicultural public, it must address a diverse audience. Second, reasoning cannot be confined to a transcendent “faculty of reason” detached, in the Cartesian manner, from the corporeal being who is doing the reasoning. Third, reasoning is not a private and privileged mental process conforming to a unique set of rules for reaching correct decisions.

Audience

Benhabib uses “public” in the strong sense that a broad public is convinced by these reasons. She insists that her model of the public sphere “is not a unitary but a pluralistic model that acknowledges the variety of institutions, associations, and movements in civil society”.²⁷ Being able to persuade such diverse participants demands the possibility of cross-cultural discourse (which I have taken as given), but with the additional proviso that we have

²⁶ Jennifer Nedelsky, “Embodied Diversity and the Challenges to Law” (1997) 42 McGill L. J. 91 [“Embodied Diversity”] at 107.

²⁷ Benhabib, *Claims*, *supra* note 8 at 138. Benhabib here refers to the further development, by Cohen and Arato, Fraser and herself, of Habermas’s original notion of the public sphere found in *The Structural Transformation of the Public Sphere: an inquiry into a category of bourgeois society*, trans. by Thomas Burger (Cambridge, MA: MIT Press, 1991), first published in German in 1962.

just seen: the discourse must contain reasons which lead to a conclusive resolution. A conclusive resolution is one which is convincing to all the parties (where parties may represent various cultural interests). What sort of reason is going to be universally convincing?

To put the question in this form assumes that there will be ways of reasoning, which can – or should – convince *any* audience. We may begin this part of the investigation by asking what we know about the reasoning, which may convince a particular audience. This is a question central to the study of rhetoric, the “faculty of discovering in the particular case what are the available means of persuasion.”²⁸ There are two dangers in limiting reasoning to the requirements of a particular audience. The first is that the audience may itself be unreasonable: arguments likely to convince an audience of racists may be very bad arguments. The second is that audiences among culturally diverse publics may be convinced by quite different kinds of arguments. Perelman’s concept of the “universal audience” suggests ways in which the second of these problems may help in overcoming the first.²⁹ We should use arguments, which may convince various sorts of audiences, and the best arguments will be those most persuasive to the widest range of audiences. To avoid falling back into the potentially ethnocentric assumptions of universal reason, the “universal audience” must not be constructed as an abstract ideal, but is rather an aggregation of real audiences.³⁰ This provides the opportunity to maintain the rhetorician’s focus on the particular contexts of arguments, while making efforts to broaden that context to include those, which are relevant to wider publics.

This is the point of Nedelsky’s attention to the “imagined conversation” of the judge.³¹ The imagined audience of judicial and legal colleagues from an unrepresentative demographic sliver of society can be seen as a serious obstacle to expanding law’s audiences, and hence its reasoning, to convince all those people who may be affected by its decisions. To convince a broader audience would require changed modes of reasoning, and not the cosmetic combination of authority and public relations, which are commonly invoked in calls to improve “public confidence in the judiciary.”

There is clearly a wide gulf separating the deliberation procedures of narrowly focused municipal judicial regimes from the ideals propounded by Benhabib or any of the other advocates for the more pluralist and inclusive

²⁸ Aristotle, *The Rhetoric of Aristotle*, ed. by Lane Cooper (Englewood Cliffs, N.J.: Prentice-Hall, 1960) at 7.

²⁹ Chaim Perelman, *Justice, Law, and Argument. Essays on Moral and Legal Reasoning* (Dordrecht: D. Reidel, 1980) summarises some aspects of this concept, particularly in the introduction. They are developed more fully in C. Perelman & L. Olbrechts-Tyteca, *The New Rhetoric. A Treatise on Argumentation* (Notre Dame, Indiana: University of Notre Dame Press, 1969).

³⁰ Tindale proposes that the universal audience ‘is developed *out of* the particular audience and so is essentially connected to it’ Tindale *supra* note 1 at 117. By proposing that this connection is one of *aggregation* I have tried to make this development more specific than Tindale does. To this extent I am moving away from Perelman’s universal audience (which is grammatically required to be singular) to a collection of audiences.

³¹ Nedelsky, “Embodied Diversity” *supra* note 26 at 107.

processes that I have been discussing. But are Benhabib's proposals adequate to achieve a truly multicultural deliberative procedure? I am suggesting that a shift of focus to the rhetorical requirements relevant to specific cases in particular (expanding) contexts is a more adequate formulation than the ones we find in *The Claims of Culture*. There Benhabib has advocated universal *standards* for reasoning, which, as will be clearer below, have a culturally specific locus. We cannot achieve impartiality and a universal reconciliation in particular decisions by specifying standards derived from some epistemological (and hence cultural) context, which are then imposed as binding on diverse cultures. A preferable approach pays attention to the specificity and diversity of audiences, not the universality of modes of reasoning. Rather than imposing standards, however rigorously developed from a tolerant reading of the Western intellectual tradition, we will do better to broaden our repertoire of ways of deliberating by building them up from below in dialogue between diverse audiences in specific cases.

Corporeality

I quoted Perelman, at the head of this essay, to the effect that arguments are addressed to whole persons and not just to particular "faculties", such as the intellect. That quote points to another insight which rhetoric offers into the social context of public reasoning, one that is shared with feminist critiques. Reason cannot be completely detached from all its social, corporeal and affective connections. Nor should we attempt a cognitive violence, which would separate judgment and reason from emotions, including empathy or care.³² The whole person includes a body, social attachments, language and gesture. Iris Young has argued that policy arguments and public deliberation should include "bodily and affective particularity, as well as the concrete histories of individuals."³³

Benhabib defends her conception of public reasoning against these arguments for an embodied reason: "Why are we so quick to assume that reason corresponds to domination, while the body corresponds to marginalization and promises some form of liberation?"³⁴ Why indeed? This seems to be more an assumption of Benhabib than of the advocates of an embodied reason.³⁵ The critique of disembodied reason does not only apply to women and subaltern or "racialised" groups, but equally to those in socially dominant arguing positions (including judges). Like social position, bodies are not the exclusive preserve of the oppressed. And when we refocus our attention onto the bodies as well as the minds of our judges, politicians and experts we become well aware of the variety of influences, so different

³² *Ibid.* at 100 ff.

³³ Young, *supra* note 14 at 76.

³⁴ Benhabib, *Claims*, *supra* note 8 at 139.

³⁵ Elizabeth Grosz, *Volatile Bodies: Toward a Corporeal Feminism* (Bloomington & Indianapolis: Indiana University Press, 1994), Elizabeth Grosz, "Bodies and Knowledges: Feminism and the Crisis of Reason" in Linda Alcoff & Elizabeth Potter, eds., *Feminist Epistemologies* (New York & London, Routledge, 1993) 187.

from those of the oppressed, which have shaped *their* cultures, affections and corporeality.

Where decisions are made, however public their reasons, from a social position of dominance and corporeal privilege, then they embody a certain sort of reason and favour certain sorts of argument. Individuals belonging to dominant groups experience privilege, comfort and security more of the time than do subordinate groups. Threats, insecurity, powerlessness and misunderstanding are more commonly experienced by people in subordinate positions. Deliberators who have had these experiences are better prepared to understand the related experience of parties involved in disputes.

To draw attention to the body of the deliberator is not to insist on drawing attention to the body of the Other.³⁶ Instead it normalizes the body of the victim or other participant by drawing equal attention to the embodiment of the rest of the agents involved, including the more powerful. In addressing our arguments, as Perelman advocates, to the whole person we expect empathy as well as rigour. Cultural reflexivity can only work if decisions can proceed from arguments addressed to all sorts of people, and embedded in all sorts of cultures.

“Enlarged mentality”

Benhabib’s universalist justification for a cross-cultural mode of deliberation rests on particular “habits of mind” which should be learned. These are not narrow rationalist principles but they can nonetheless be specified. It also becomes clear that, even though Benhabib derives them from the notion of “enlarged mentality,” they can be associated with some cultures more than others. (I quote at length because this intersection of consensus, deliberation and law is crucial.)

There is no presumption that moral and political dialogues will produce normative consensus, yet it is assumed that even when they fail to do so and we must resort to law to redraw the boundaries of coexistence, societies in which such multicultural dialogues take place in the public sphere will articulate a civic point of view and a civic perspective of “enlarged mentality.” The process of giving good reasons in public will not only determine the legitimacy of the norms followed; it will also enhance the civil virtues of democratic citizenship by cultivating the habits of mind of reasoning and exchange.³⁷

In an example following this passage, these habits are clearly associated not only with liberal thought, but with some particular societies, rather than others. Lumping together “the hierarchical and inegalitarian practices of

³⁶ In specific cases or debates on judicial impartiality the racialized or gendered body of the judge has been an issue (*eg. R. v. S. (R.D.)* [1997] 3 S.C.R. 484). In advocating that we recognize the white male body as much as any other, I draw attention to *all* the corporeal influences on our decisions, those arising from privilege as well as those associated with a subaltern position.

³⁷ Benhabib, *Claims*, *supra* note 8 at 115.

many of India's sub communities – Hindu, Muslim, Buddhist, and others", Benhabib concludes that "egalitarian deliberative models (...) would seem to require an almost total transformation of such societies."³⁸

The very idea of an "enlarged mentality" seems to be shrunk by this formulation. Hannah Arendt revived the idea from Kant's *Critique of Judgment* in an attempt to explore the range of issues which we must take into account in judging.³⁹ While Arendt's development of this idea was hardly directed at developing cross-cultural sensitivities, she did relate it to the Aristotelian concept of a moral education. We need such an education to develop all those faculties required for practical wisdom (*phronesis*). Whereas the discovery of truth (*episteme*) may be a private pursuit, as Arendt points out, the development of wisdom can only result from dialogue with others, and an increased understanding of their points of view. In this way, our mentality is enlarged by expanding our ethical horizons as our character develops.

There are two ways, I suggest, that Benhabib's formulation of "enlarged mentality" as a means of learning the correct habits of mind is really a narrowing of the conception. The first comes from the very idea that we learn "habits" at all. If we are to be open to the arguments of other groups, if we regard an enlarged mentality as an exercise in lifelong development of an ethical character, then habits seem to be counterproductive. Habits may help us type faster or apply techniques and calculations more efficiently. I doubt that they help us to slow down while we learn other peoples' ways of thinking, arguing and judging.

The other problem with the "habits of mind" which Benhabib says are required for a deliberative democracy is that they are explicitly identified as those, which we learn in the West. It is the members of those other societies who must do the moral learning. Having learnt, of course, they will have the correct habits of mind to decide on the correct principles. Rather than being a way we can all enlarge our thinking to help to fill in the gaps between us, this is an exercise in acquiring a paradigm of moral judgment and argument. No doubt it would be beneficial for various communities in India to broaden their perspectives by increased dialogue with other communities; it would be just as beneficial for those in the West.⁴⁰ Advocating habits of mind is more reminiscent of the closing and directing of thought which Foucault identifies with discipline, than with the expansion into new ways of thinking, or even the ideal communicative environment imagined by Habermas. When it must

³⁸ *Ibid.*

³⁹ Hannah Arendt, *Between Past and Future* (New York: Viking, 1961) at 220 ff.

⁴⁰ I use this example with some embarrassment, only to follow Benhabib. I am fully aware of the irony involved in lecturing Indians, Bangladeshis and Pakistanis on the benefits of "western" thinking. The influence of western educated intellectuals, jurists and political figures has been conspicuous in each of these countries, and the perspectives they have derived from their own cultures have of course been influential in the West. On some of these ironies, see the review of Dipesh Chakrabarty's *Provincialising Europe: Postcolonial Thought and Difference* by Amit Chaudry, "In the Waiting Room of History" (2004) 26 *London Review of Books* 12.

be applied to a diverse community or a multicultural society, Benhabib's attempt to expand communicative ethics emerges as a Foucauldian discipline, a way of thinking by which we learn a certain form of discourse while we learn self-regulation.

It is tempting to compare the western liberal and rational ideal, always in the back of our minds when we read about the ideal type of deliberative democracy, with the representations of reality we get through the dominant partisan cable networks and the debased political manoeuvring which passes for public debate in these dominant societies.⁴¹ Likewise we could compare the habits of mind of some of the less sophisticated groups in the West (fundamentalist Christians, racists) with those of intellectuals from India, China or the Arab world. I do not intend to embark on invidious comparisons, because it reduces the debate about the best forms of deliberation to competitions between cultures. My point is not that the West is any more or less morally or politically bankrupt than any other society. It is, rather, that epistemologies, which assume the superiority of particular embedded cultural claims need to examine these assumptions. By trying to develop an epistemology, which will justify universal claims for justice, Benhabib has to rely on normative demands for certain habits of mind which masquerade as universal epistemologies. Benhabib's procedural claims for universalism rest on standards, which share western assumptions about social progress and superiority. They fail to recognise the inequality and power coded into ways of reasoning.

Conclusion

Means for ensuring that deliberation – including legal reasoning – responds to diverse cultural constituencies must go beyond communications protocols to address the various relevant contexts of the participants. In addressing our arguments to whole persons we recognise that people are inscribed by and have constructed their capacity to deliberate out of a diverse range of moral, legal, epistemological and corporeal experiences. Those experiences are the stuff of the culture which each of us carries.

Arguments must address specific but enlarged audiences. They must be framed in contexts relevant to those audiences, without assuming or attempting to impose universal standards for reason-giving or correct habits of mind. Acceptable ways of reasoning must be developed in each case, addressing and incorporating the deliberative processes of a diverse range of participants' voices. The demand for diversity becomes most challenging to institutional arrangements when it is applied to the corporeal being of the participants. On one hand it translates into demands for a culturally and racially diverse bench, while more radically it involves appreciating the

⁴¹ On the degradation of public debate in Australia and some other western countries see Don Watson, *Death Sentence: The Decay of Public Language* (Milsons Point, NSW: Knopf, 2003).

cultural, social and bodily experiences that have led all the parties (including the third) to their own knowledge and ways of reasoning.

In this essay I have tried to find some minimal conditions for legal reasoning, which could respond to cultural diversity. Accepting the demise of universal norms and noting the challenges which cultural diversity poses to the foundation stories on which positive laws are based, I have looked for minimum conditions of deliberation in a social context. The demands of discourse ethics, from Habermas to Benhabib, were found to ignore cultural experience or to privilege particular cultural characteristics. In seeking universal standards for decision making, discourse ethics can only impose benchmarks derived from a particular mentality, even if it purports to be “enlarged”. Universal standards fail to recognise that culture, derived from diverse experiences, is inseparable from exactly those aspects of mentality, which enable us to debate with others, and reach reasoned conclusions to those debates.

The limitations of universal standards may be overcome by attention to the specifics of cases, audiences and cultural contexts. Rhetoric, and particularly the “new rhetoric” deriving from the work of Perelman, suggests a number of ways in which audiences may be expanded so that we may *broaden* our persuasive and deliberative methods to accommodate them all. This approach suggests a more fruitful program than one, which limits those methods by imposing a universal standard which, by its nature, must be derived from one epistemology – which is to say culture – rather than another.

Résumé

Cet article analyse les façons dont le raisonnement s’attache aux contextes culturels et pondère les fondements de la prise de décision dans une sorte de terrain commun ou dans une reconnaissance de la diversité. Il considère la critique féministe de l’éthique du discours selon Habermas et les efforts de Benhabib de réviser cette approche pour répondre à la diversité culturelle. Alors que la bonne volonté et de bonnes procédures peuvent certes créer les conditions de la *communication* trans-culturelle, le défi est autre de créer les conditions pour arriver à des *décisions* consensuelles ou qui lient les parties. L’auteur rejette la possibilité de standards universels de décisions raisonnées sur trois points. Les raisons conformes aux standards d’un public multiculturel ne peuvent s’appuyer sur une mesure unique. Le raisonnement ne peut être détaché, de manière cartésienne, de l’être incorporé qui raisonne. L’acte de raisonner n’est pas un exercice mental privé et privilégié qui se conforme à un ensemble unique de règles. S’appuyant particulièrement sur les traditions de la rhétorique, d’Aristote à Perelman, l’article conclut que les raisons doivent s’adresser à diverses audiences, que la spécificité affective et corporelle de ceux qui délibèrent est d’une importance cruciale (il importe *qui* sont les juges) et que nous devons tous poursuivre notre « éducation morale » en dialoguant avec divers groupes et manières de penser.

Abstract

This is an inquiry into the ways in which reasoning attaches to cultural context. It considers whether to seek grounds for decision-making in some common ground or in a recognition of diversity. The essay considers feminist criticisms of Habermas's discourse ethics and Benhabib's efforts to revise such an approach in response to cultural diversity. While the conditions for *communication* across cultures may be readily met with good will and good procedures, the conditions for reaching binding or consensual *decisions* are more challenging. The essay rejects the possibility of universal standards for reasoned decisions on three grounds. Reasons conforming to the standards of a multicultural public cannot rest on a single yardstick. Reasoning cannot be detached, in the Cartesian manner, from the corporeal being who is doing the reasoning. Reasoning is not a private and privileged mental process conforming to a unique set of rules. Drawing particularly on traditions of rhetoric from Aristotle to Perelman, the essay concludes: that reasons must be addressed to diverse audiences; that the affective and bodily specificity of deliberators is of central relevance (it matters *who* judges are); and that we must all continue our "moral education" in dialogue with diverse groups and ways of thinking.

Richard Mohr
Faculty of Law
University of Wollongong
Wollongong NSW 2522 Australia
rick_mohr@uow.edu.au