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Oriented Theory of Justice
Philosophical Comments

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Cathrine Holst is Senior Researcher at ARENA – Centre for European Studies and Postdoctoral Fellow at the Department of Sociology and Human Geography at the University of Oslo. E-mail: cathrine.holst@arena.uio.no.

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Centre for European Studies
University of Oslo
P.O.Box 1143 Blindern | 0318 Oslo | Norway
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Abstract

The capability approach developed by Martha Nussbaum and Amartya Sen has received substantial attention in recent years, in philosophical exchanges as well as in more applied discussions on policy-making, in particular in developing countries, but lately also in Western countries, including Europe and the EU. This paper contributes to the philosophical exchanges of Nussbaum's version of the capability approach. Nussbaum herself presents her contribution as an alternative to John Rawls' theory of justice, and following her lead, this paper compares Nussbaum and Rawls. The first part presents Nussbaum's position and how it differs from Rawls'; the second and third parts develop arguments against substituting primary goods and a procedural justification of justice (Rawls) with capabilities and an ethical justification of justice (Nussbaum); the fourth part highlights some problems with Nussbaum's conception of justice compared to Rawls'. The fifth and final part discusses how the critical points of the first four parts relate to European studies discussions on legitimacy in general and to RECON's normative framework in particular. The merits of Nussbaum's approach from a gender perspective are given particular attention.

Keywords

Democracy – Gender Policy – Justice – Legitimacy – Philosophy

The capability approach developed by Martha Nussbaum and Amartya Sen has received substantial attention in recent years, both in philosophical exchanges and in more applied discussions on policy-making, in particular in developing countries, but lately also in Western countries (see for example Robeyns 2003, Alkire et al. 2009), including Europe and the EU (see for example Eiffe 2008, Oriane 2008 and 2009).

This paper contributes to the philosophical exchanges of Nussbaum's version of the capability approach. Nussbaum herself presents her contribution as an alternative to John Rawls' theory of justice, and following her lead, I compare Nussbaum and Rawls. In the first part of the paper I describe Nussbaum's position and how it differs from Rawls';¹ in the second and third parts I argue against substituting primary goods and a procedural justification of justice (Rawls) with capabilities and an ethical justification of justice (Nussbaum); in the fourth part I highlight some problems with Nussbaum's conception of justice compared to Rawls'. In the fifth and final part of the paper I discuss how the critical points of the first four parts relate to European studies discussions on legitimacy generally and to RECON's normative framework in particular.²

Nussbaum and Rawls: agreements and disagreements

Rawls' and Nussbaum's theories of justice are both distributive theories; theories about how something is to be distributed from the point of view of justice. But what is this "something"? Nussbaum agrees with Sen (1980): The proper distribuenda are capabilities.³ What justice requires is a certain distribution of capabilities, and not as Rawls has argued, a certain distribution of primary goods, such as income and wealth.⁴ Sen's point of departure is what he refers to as the "pervasive fact of interpersonal heterogeneity" (Sen 1980: 215): Different people are differently equipped and differently positioned and thus different with regard to how effectively they are able to convert primary goods into different functionings. Sen (1980: 215) famously exemplifies his point with reference to a person in a wheelchair. Clearly, he says, this person will need more resources to be mobile and to achieve other functionings than an able-bodied person.

However, the implications of human variation go beyond the case of physical disabilities (Sen 1980: 215). According to Sen the problem is not simply that Rawls overlooks the case of physical disabilities in particular, but that he overlooks diversity altogether: "[...] people seem to have very different needs varying with health, longevity, climatic conditions, location, work conditions, temperament, and even body size [...]. So what is involved is not merely ignoring a few hard cases, but overlooking very widespread and real differences" (Sen 1980: 215-216).

¹ I take as my point of departure Nussbaum's description of her theory in *Frontiers of Justice* (2006), where she gives a more in-depth account of her position than in previous works. For an earlier account, see Nussbaum (2000).

² Reconstituting Democracy in Europe (RECON), see www.reconproject.eu.

³ See also Sen (1999). For his most recent elaboration, see Sen (2009).

⁴ Rawls defines primary goods as goods that any rational person would want, a rational person being person with two moral powers – the capacity for a sense of justice and the capacity to adopt and pursue a conception of the good (Rawls 1993: 178-179).

We are thus dealing with a challenge of a very general kind: How people are able to function, what they in fact are able to do and to be with a given set of resources, may vary a great deal depending on what they are capable of, depending, again, on “health, longevity, climatic conditions”, and so on. Two persons with an equal income are not necessarily equally well off. This is why the focus, instead, must be on the different functionings that differently equipped and positioned people are able to achieve; *this* is what an assessment of people’s well-being must be based on. What must be compared – and distributed fairly – are capabilities, not primary goods; income, wealth or other resources. Two persons are equally well off when they are equal with regard to their ability to function.

Sen’s argument is adopted by Nussbaum (2006: 114).⁵ However, Nussbaum goes on to present a list of what should be considered as central human capabilities. And on this point, the two diverge. Sen has thus far refused to subscribe to a definite list of capabilities. The problem, he says, is: “[...] not with listing important capabilities, but with insisting on one predetermined canonical list of capabilities, chosen by theorists without any general social discussion or public reasoning. To have such a fixed list, emanating entirely from pure theory, is to deny the possibility for fruitful public participation on what should be included and why” (Sen 2005: 335).

Accordingly, Sen allows himself to talk, in general terms, about items such as nutrition, health and basic liberties, which are items many, arguably, have endorsed in public debate as significant capabilities (Sen 1992, Alexander 2008: 64). However, he avoids bringing philosophy into it. It is “social discussion” and “public reasoning” that should guide us in these matters, not “pure theory”. The specifics, moreover, are left open.

To a certain extent, the latter is also what Nussbaum does. Her list consists of ten capabilities she defines as fundamental, but at the same time the list is intended to be both “open-ended”, “subject to ongoing revision and rethinking, in the way that any society’s account of its most fundamental entitlements is always subject to supplementation (or deletion)”, and “abstract and general”; the items on the list are presented in a way that leaves “room for the activities of specifying and deliberating by citizens and their legislatures and courts” (Nussbaum 2006: 78-79).

On the other hand, Nussbaum is – and intends to be – far more specific than Sen. Her list of items reads as follows:

1. *Life*. Being able to live to the end of a human life of normal length; not dying prematurely, or before one’s life is so reduced as to be not worth living.
2. *Bodily Health*. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.
3. *Bodily Integrity*. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.
4. *Senses, Imagination, and Thought*. Being able to use the senses, to imagine, think and reason – and to do these things in a “truly human” way, a way informed and cultivated by an adequate education [...]. Being able to use imagination and thought in connection with experiencing and producing works and events of one’s own choice, religious, literary, musical and so forth. Being able to use

⁵ See also Nussbaum (2005).

- one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid non-beneficial pain.
5. *Emotions*. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety [...].
 6. *Practical Reason*. Being able to form a conception of the good and to engage in critical reflection about the planning of one's life [...].
 7. *Affiliation*. A) Being able to live with and towards others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another [...] B) Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of non-discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, natural origin.
 8. *Other Species*. Being able to live with concern for and in relation to animals, plants, and the world of nature.
 9. *Play*. Being able to laugh, to play, to enjoy recreational activities.
 10. *Control over One's Environment*. A) *Political*. Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association. B) *Material*. Being able to hold property [...] and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others. [...]. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with others.

(Nussbaum 2006: 76-78)

One could ask why Nussbaum makes this list, departing from Sen's approach. Why not simply do as Sen is recommending? Why not leave the list making to the "public"? The fundamental reason is, clearly, political in the more concrete sense of political: Nussbaum wants her ideas to have impact. This, she believes, demands a certain level of - "open-ended", "abstract and general" - concreteness. Citizens, governments and courts cannot act as justice requires if they only know "hopelessly vague" things about the "content" of justice (Nussbaum 2005: 49).

However, there is no trade-off with regard to philosophical coherence. Nussbaum regards her move to be argumentatively valid and in accordance with her more general philosophical commitments.

The question, then, is how we are to make sense of Nussbaum's list, from an argumentative and philosophical standpoint. How did she develop it? Where did it come from? For one thing, Nussbaum's (2006: 78) approach is presented simply as "intuitive". Nussbaum asks her audience - we who are reading her or listening to her - to imagine "a life without" the listed items (ibid.). Her claim is that this would not be a life "worthy of human dignity" - and that we, more or less intuitively, will agree with her (ibid.). There is, in short, an *intuition argument* in favour of her list.

However, Nussbaum *also* says that her list has been designed and modified "over time", and that it probably will be further modified in the future, "in the light of criticism" (ibid.). Again, Nussbaum does not present her list as written in stone. The idea is to confront different audiences with it and subject it to "ongoing revision and

rethinking" (ibid.). Nussbaum's approach is therefore intuitive, but also "discursive": Her audiences are invited to respond, modify, and criticize, since they might not agree with her, at least not in all respects (ibid.). In this sense, her list as it is now is the outcome of deliberations, and it will most likely be re-designed later due to continuing deliberations. The definition of the central human capabilities is – and must continue to be – determined and re-determined in a discursive "process" (ibid.). We could call this Nussbaum's *public reasoning argument*.

However, Nussbaum's primary argument seems to be an *ethical argument*. In the end, her list is valid because it reflects a particular "independent account of human good"; a certain "outcome" that we could "account" or argue for ethically (Nussbaum 2006: 82, 83). Nussbaum contrasts her justificatory approach to that of the proceduralist. A proceduralist will argue that an outcome is to be preferred because it is the outcome of a procedure with certain qualities. This is what Rawls would claim. In *Political Liberalism* (1993: 133-172), Rawls argues that a conception of justice is acceptable if it can be justified as reasonable in public deliberations, i.e. if it can serve as an object of an "overlapping consensus" among reasonable persons with different comprehensive doctrines. We could call this Rawls' *public reasoning argument*. Rawls' proposal of such a conception is "justice as fairness", introduced in *A Theory of Justice* (1971: 47-170). This is the conception to which parties with certain characteristics in a certain hypothetical contract situation – "the original position" – would agree. We could call this Rawls' *social contract argument*. Hence, for Rawls, what matters is procedure. Justice as fairness is first generated by a hypothetical contract procedure, and then proposed as the preferable conception of justice, because it would be what reasonable persons would agree to in deliberative processes.⁶

As we have seen, even Nussbaum is not unconcerned with procedure. She describes her list both as generated by us using our intuition (the intuition argument) and as the outcome of a discursive process (the public reasoning argument). However, if the procedure directs us away from what we can account for as "independently" good, and what follows from this, we must stick to the latter whatever the qualities of the former. Accordingly, Nussbaum refers to herself as an "outcome-oriented theorist" (Nussbaum 2006: 83). The proceduralist, she says, is like a "cook" with "a fancy, sophisticated pasta-maker" who "[...] assures her guests that the pasta made in this machine will be by definition good, since it is the best machine on the market. But surely, the outcome theorist says, the guests want to taste the pasta and see for themselves. They will be inclined to decide for or against the machine on the basis of the pasta it produces" (ibid.).

Thus, eventually, procedure is secondary for Nussbaum. A particular procedure is valid if and only if it generates a valid outcome: "Justice is in the outcome, and the procedure is a good one to the extent that it promotes this outcome" (Nussbaum 2006: 82). If our pasta machine makes bad pasta, we should get a new one. Sen (2005: 335) is perhaps wrong in claiming that Nussbaum's list emanates "entirely from pure theory". "Theory", i.e. a certain theoretical "account of human good", does seem, however, to be its primary source.

⁶ The relationship between what Rawls says in *A Theory of Justice* and *Political Liberalism* can be given different interpretations. Nussbaum avoids this discussion. A reason may be that she regards it as irrelevant for the point she tries to make: The idea is to criticize proceduralism, not to identify the more exact character of Rawls' proceduralism.

More specifically, we are presented with an ethical theory of “truly human functioning” (Nussbaum 2006: 74). What is independently good, according to Nussbaum, is what enables people to live in a truly human way, as this is elaborated philosophically by Aristotle⁷ and Marx, and what follows from “the Aristotelian/Marxian conception” (Nussbaum 2006: 85). In short, Aristotle and Marx regarded human beings as “social and political being[s]” or “animals” who “flourish” and “find fulfillment in relations with others”, and have complex material, intellectual and emotional needs (Nussbaum 2006: 85-86). This “conception” is then contrasted with the view of human beings developed by thinkers in the social contract tradition, from Grotius, Hobbes, Locke, Hume and Kant – to Rawls and other modern contractarians, such as David Gauthier and Brian Barry (Nussbaum 2006: 35-69).

Nussbaum stresses, however, that her Aristotelian/Marxian conception is used “for political purposes only”, and “not as the source of a comprehensive doctrine of human life”, aware of the fact that Aristotle and Marx themselves made “no such distinction” (Nussbaum 2006: 74). Nussbaum herself takes this distinction from Rawls’ political liberalism. Rawls (1993: 3-88) argues that the “basic structure” of a liberal society must be regulated by “free-standing” principles, i.e. principles that refer to “political values” only, and not to any more comprehensive ideas of goodness, since, inevitably, such ideas would be controversial among citizens, due to “the fact of pluralism”. Hence, on this point there is no disagreement between Nussbaum and Rawls. Rawls’ liberal requirement is perfectly reasonable. Justice, Nussbaum (2006: 79) says, cannot have “any grounding in metaphysical ideas of the sort that divide people along lines of culture and religion”. Her Aristotelian/Marxian goodness conception *is*, however, un-comprehensive and uncontroversial in the sense that a list of central human capabilities – Nussbaum’s list – could emanate from it that could be made into the object of an “overlapping consensus” (Nussbaum 2006: 70). Nussbaum’s conception of justice is thus meant to be liberal and strictly “political”, according to the criteria set out by Rawls, even if it is not procedural.

Moreover, Nussbaum’s conception of justice differs in content from Rawls’ in the sense that the distribuenda are different, but also in the sense that the distributive principles are different. Justice as fairness requires that primary goods are distributed according to Rawls’ two principles of justice. According to Rawls (1993: 5), “[...] each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all”. This is Rawls’ first principle of justice. His second principle concerns social and economic inequalities, and says that such inequalities must satisfy “two conditions” (Rawls 1993: 6). They are, first, “to be attached to positions and offices open to all under conditions of fair equality of opportunity”, and, secondly, “to be to the greatest benefit of the least advantaged members of society” (*ibid.*)⁸

Rawls’ (1971: 37-39) principles are, furthermore, ordered in a so-called lexical order.⁹ The first principle has lexical priority over the second principle – nothing can be done to implement the second principle that violates the principle of equal basic rights and

⁷ See Nussbaum (2006: 159-160), but see also previous works, such as Nussbaum (1990) and (1995).

⁸ For a statement of the two principles, see also Rawls 1971: 266-267.

⁹ A lexical order is “an order which requires us to satisfy the first principle in the ordering before we can move on to the second, the second before we can consider the third, and so on. A principle does not come into play until those previous to it are either fully met or do not apply” (Rawls 1971: 38). See also Brighouse 2004: 46-47.

liberties for all – and the first condition of the second principle lexical priority over the second – nothing can be done to improve the situation of the worst off that violates the condition of fair equality of opportunity.

Nussbaum, in contrast, operates with only one distributive principle. The items on her list are to be distributed so that each person gets above “a threshold level of each capability, beneath which it is held that truly human functioning is not available” (Nussbaum 2006: 71). What is required from the point of view of justice is “a basic social minimum” for all (Nussbaum 2006: 70), an amount of each central human capability that is sufficient for preserving human dignity. In this sense, the capabilities approach is a variant of sufficientarianism, as noted by Richard Arneson (2006: 17): “The Nussbaum and Sen approach can usefully be interpreted as sufficientarian”, in the sense that according to this approach, “justice above all requires that each and every person be sustained at a threshold adequate level of capability to function in all of the ways that are important to human well-being” (ibid.). “[...] a society that does not guarantee these to all citizens, at some appropriate threshold level, falls short of being a fully just society” (Nussbaum 2006: 75).

This means that Nussbaum, initially, does not have a priority problem; she subscribes to one and only one distributive principle. However, she could have prioritized the items on her list. She could have argued, for example, that guaranteeing bodily integrity – for some reason – is more important than guaranteeing the capability to play, or that health – for some reason – is more important than the ability to enter into meaningful relationships at work, and so on. But this is not what Nussbaum argues. She instead says that all capabilities are to be “understood as both mutually supportive and all of central relevance to social justice”; society cannot promote some of them, and neglect others (Nussbaum 2006: 75). She admits that “in practical terms priorities may have to be set temporarily” (ibid.). But she says nothing about prioritizing in principle. This task is thus left to “citizens and their legislatures and courts” that will always, and legitimately so, interpret, specify – and prioritize – relative to what is “right”, given the “histories and special circumstances” of different “nations” (Nussbaum 2006: 79).

Distribuenda: capabilities and the problem of residual welfarism

Amartya Sen is right in describing “interpersonal heterogeneity” as a “pervasive fact”. Factors such as “health, longevity, climatic conditions, location, work conditions” and so on do influence people’s ability to convert capabilities into functionings. Such influences are, moreover, influences that seem to be beyond our control, and thus *prima facie* problematic from the point of view of justice. In short, there does seem to be a problem.

The question is how we are to deal with it. Generally, Rawls (1971: 174) addresses the problem of interpersonal heterogeneity by postponing it to a later so-called “legislative stage”. Rawls describes the original position – the situation in which principles for the distribution of primary goods are chosen – as the first of several stages in the process of identifying and applying justice as fairness. The following stage is “the constitutional convention” where the task is to make a constitution protecting “the fundamental liberties of the person and liberty of conscience and freedom of thought” and “that the political process as a whole be a just procedure”,

i.e. a constitution faithful to the first principle of justice (Rawls 1971: 174-175). The third stage, then, is the “legislative stage” where the more particular economic and social policies are made to secure fair equal opportunities and the best situation possible for the worst off, as prescribed by the second principle of justice (Rawls 1971: 174).¹⁰ At this stage legislators can, for example, opt for policies that compensate for burdens that individuals or groups suffer due to the fact of interpersonal heterogeneity, if it can be argued that these burdens are in conflict with securing fair equal opportunities and with improving the situation for the worst off – and the policies proposed do not conflict with either of these two aims or with the constitution agreed to in the second phase.

Nussbaum and Sen opt instead for an intervention at the first stage to address the problem of interpersonal heterogeneity: What should be chosen, they say, are principles of how to distribute capabilities, not primary goods.¹¹ Initially, this might seem like the better solution. Instead of compensating for burdens later, we intervene so the problem does not arise in the first place: When the requirement is guaranteeing all central human capabilities on an adequate threshold level, there is no need for later stage policies compensating for burdens caused by the fact of interpersonal heterogeneity, since guaranteeing all capabilities on an adequate threshold level means in effect to guarantee that no one is burdened simply because he or she is “different”.¹²

But it is not clear that one should not – sometimes – be burdened because one is different: The implications of individual differences that are experienced by someone as burdensome are not necessarily illegitimate burdens. Burdens due to individual differences that are caused by circumstances beyond our control are *prima facie* unjust. However, our individual differences might also be something we could be held responsible for. We may, for example, be different in the sense that we have particular “offensive and expensive tastes”. The point is made by John Roemer (1996: 191-192), who argues that a residue of welfarism (i.e. the idea that what is just is what maximizes subjective welfare or well-being), “residual welfarism”, haunts the capabilities approach; some of the functionings that we should be made capable of are not “independent of self-conceived notions of welfare”. Sen (1992: 54), for example, talks of “being happy” as “an important functioning”. It may, however, take much, and far too much from the point of view of justice, to make people with particular “offensive and expensive tastes” capable of happiness (Roemer 1996: 192). We are then talking about a burden due to the fact of interpersonal heterogeneity – a person with expensive tastes will be less capable of being happy than a person with less expensive tastes with a similar income – but hardly an illegitimate burden.

Roemer is charging Sen's variant of the capabilities approach. As an attack on Sen, it is probably not fatal. Sen's notion of functionings – beings and doings we should be capable of – is unspecified. When he talks about “being happy” and other more concrete functionings these are but examples of what Sen believes have been or could

¹⁰ The fourth and last stage “is that of the application of rules to particular cases by judges and administrators, and the following of rules by citizens generally” (Rawls 1971: 175).

¹¹ Nussbaum and Sen do not talk about their intervention in these terms. Rawls' (1971: 171-176) prescription of his “four stage-sequence” is part of his particular social contract argument. Given the terms of this argument, Nussbaum's and Sen's intervention is, however, a first phase intervention.

¹² Consider Nancy Fraser's (2003) distinction between an affirmative and a transformative approach to a politics for justice with the capabilities approach exemplifying the latter.

be endorsed in public debate. If he is wrong, if “being happy” for example depends on “self-conceived notions of welfare”, closer public scrutiny and criticism among reasonable persons would result in reformulation. Sen has not committed himself philosophically to a conception of goodness that requires “being happy” and other particular items to be on the list of functionings all should be capable of.

For Nussbaum the charge of residual welfarism is harder to handle. To be sure, her list refers to several items that seem to be relatively independent of subjective tastes and preferences. Whether or not you are living “to the end of a human life with normal length”, whether or not you “move freely from place to place” or “hold property”, whether or not you are “sexually assaulted”; these and other functionings on Nussbaum’s list are not, at least not obviously, dependent on “self-conceived notions of welfare”.

But if we look at some of the other functionings, things are not so clear. A person with unusually demanding and expensive tastes might very well be less able to live a life “worth living”, less able to be “adequately nourished” and “adequately sheltered”, have a harder time entering “meaningful relationships” at work, and have less “opportunities for sexual satisfaction” and “pleasurable experiences” than a person with less demanding and expensive tastes. And all this may be experienced as burdensome, but that something burdens us may or may not imply that we are treated unjustly.

Eventually, in view of this, addressing the problem of interpersonal heterogeneity at a later legislative state, as suggested by Rawls, seems like a better solution. It has been argued that Rawls’ approach is problematic from the perspective of particular groups, for example that it gives insufficient protection to the “severely handicapped”.¹³ If so, this is a severe problem that must be addressed. However, when Nussbaum grounds her notion of justice in ideas of goodness that are notoriously hard to distinguish from subjective notions of welfare, this is not only a problem from the perspective of one or the other group, but something that threatens the proposed universal status of her theory of justice on a very basic level.

Justification – ethical or procedural?

Rawls justifies justice as fairness partly through a social contract argument and partly through a public reasoning argument. The validity of both arguments could be questioned. One could question justifying justice with reference to a hypothetical

¹³ Rawls (2001: 176, n. 59) has, in an answer to Sen, suggested that the case of the “severely handicapped” ideally should have been addressed already at this stage, and that it is one of his theory’s shortcomings that it fails to do so: “The more extreme cases I have not considered, but this is not to deny their importance. I take it as obvious, and accepted by common sense, that we have a duty towards all human beings, however severely handicapped. The question concerns the weight of these duties when they conflict with other basic claims. At some point, then, we must see whether justice as fairness can be extended to provide guidelines for these cases; and if not, whether it must be rejected rather than supplemented by some other conception [...]. If Sen can work out a plausible view for these, it would be an important question whether, with certain adjustments, it could be included in justice as fairness when suitably extended, or else adopted to it as an essential complementary part”. Nussbaum (2006: 96-44 (“Disabilities and the Social Contract”) and 155-223 (“Capabilities and Disabilities”)) contributes to the work Rawls suggests lies ahead regarding the case of the severely handicapped. Whether her argument for replacing primary goods with capabilities is conclusive, is a different question.

contract procedure, and – if one did accept this move – the more specific set-up of Rawls' hypothetical contract procedure, including the assumed characteristics of the contracting parties and the assumed characteristics of the contract situation (the social contract argument). One could also question justifying justice with reference to a public reasoning procedure, and – if one did accept this – the more specific set-up of Rawls' public reasoning procedure (the public reasoning argument).

Moreover, the relationship between Rawls' social contract argument and his public reasoning argument is not clear. What happens if justice as fairness cannot be made into the object of an overlapping consensus in public deliberations? Are we then to stick to this conception of justice? Or should we replace it with another that could be made into an object of an overlapping consensus? In short, which of Rawls' suggested procedures has primacy – the contract procedure or the public reasoning procedure?

However, even with this in mind, Rawls' justificatory strategy seems more promising than Nussbaum's. As noted, Nussbaum refers to herself as an outcome-oriented theorist. This implies that her ethical argument must be considered as her primary argument. In the end, Nussbaum asks us to accept her list because it reflects a particular, superior ethical account of goodness acceptable to people subscribing to different comprehensive doctrines.

The question is why exactly we should consider this account – “the Aristotelian/Marxian conception” – to be superior. Clearly, it has something to do with the relationship between this account and “our intuitions about dignity and fairness”. The Aristotelian/Marxian conception and the political implications of this conception – which is Nussbaum's list – are “an outcome that squares well with our intuitions about dignity and fairness” (Nussbaum 2006: 82-83). But why is this so? What is the relationship between our “deep moral intuitions [...] about human dignity” (P), Nussbaum's ethical theory, i.e. the Aristotelian/Marxian conception (Q), and the different items on her list (R)? Or to put it differently: What is the structure of Nussbaum's ethical argument?

Nussbaum suggests three options: The relationships between P, Q and R are either *conceptual*, *intuitive* or established *procedurally*. A conceptual relationship between P on the one hand and Q and R on the other is suggested when Nussbaum (2006: 82) describes her outcome (Q and R) “as having a necessary connection to a life worthy of human dignity”. The suggested conceptual relationship is, however, not spelled out. This makes it hard to assess this possible version of her argument.

Another option would be that Q intuitively followed from P, and that R intuitively followed from Q or directly from P. This latter is suggested by Nussbaum's intuition argument. Nussbaum (2006: 78) takes it that “a life without” the items on her list (R) would not be a life “worthy of human dignity” (P), and that different audiences intuitively will agree with her. However, for one thing, the intuition argument cannot easily be conceived of as an outcome-oriented argument for justice; people's use of their intuition seems more like an alternative procedure to that of a public reasoning procedure. Hence, if the relationship between P and R is intuitive in the sense suggested by Nussbaum, it is in this sense also a procedurally established relationship. If so, Nussbaum is in the end a proceduralist, despite her claim to the contrary.

Moreover, if the relationship between P and R is intuitive, why do we need Q? What is the role of the Aristotelian/Marxian conception, if Nussbaum's list could be intuitively established with reference to our moral intuitions about human dignity?

And finally, could it? Is it the case that R follows intuitively from P? Is Nussbaum's list, intuitively speaking, uncontroversial and un-comprehensive? Is R something that would be intuitively subscribed to by people committed to different comprehensive ideas of goodness?

For the moment, this is not the case. Empirically speaking, Nussbaum's conception of justice is controversial. Of course, this is not a problem unique to Nussbaum: None of the different conceptions of justice proposed by different political philosophers, or by others, have so far been accepted by all.

This is why arguments other than intuition arguments are needed. And Nussbaum's public reasoning argument does suggest a different argument, namely that P would generate Q and R by means of a public reasoning procedure, i.e. that the relationships between P, Q and R are procedurally established. However, Nussbaum would then, again contradict herself when criticizing proceduralism.

Furthermore, it is not clear that Nussbaum's public reasoning procedure reflects our moral intuitions about dignity (i.e. P). Democracy could exemplify. Many people would place democracy, the idea of citizen's collective self-governance, among "our intuitions about dignity and fairness" (Nussbaum 2006: 82-83). To what extent and in what sense Nussbaum means for her public reasoning procedure to be democratic is, however, a somewhat open question.

To have "political control over one's environment" is one item on her list. However, in her more concrete institutional prescriptions, little emphasis is put on the significance of citizens' involvement. For example, Nussbaum (2006: 315-324) lists "ten principles for the global structure" without mentioning the significance of political equality and broad participation. Very often the public in the public reasoning process she imagines seems to be a public inhabited mainly by do-good philosophers and experts. Her discussion of global structure requirements ends characteristically with the following comment: "There is no natural place to stop this list of principles. One might have had a list of twenty principles, rather than ten. Moreover, the principles are extremely general, and many hard questions wait in the wings as soon as we begin to implement them. At this point philosophy must turn the job over to other disciplines" (Nussbaum 2006: 163). The question is whether philosophy and "other disciplines" should not also at some point "turn the job" over to citizens. Is achieving justice primarily the task of reasoning philosophers and scientists?

Such passages make one wonder whether Nussbaum, to the extent that she is a proceduralist, is a democratic proceduralist. Regarded as an outcome-oriented theorist she is concerned with democracy in the sense that democracy is on her list (i.e. having political control over one's environment). The ethical justification of her outcome-oriented position is, however, either unclear or invalid, i.e. if the relationship between P, Q and R is to be considered as conceptual it is unclear; if it is to be considered as intuitive it is invalid – and if it is to be considered as procedurally established, Nussbaum is – after all – a proceduralist.

To be sure, the more exact character of an adequately democratic proceduralism is not simply given by our intuitions. Perhaps there is a special role for philosophers and experts to play in discussions of the nature and implementation of justice? Nussbaum, however, avoids addressing the challenge of democracy and the dilemmas involved altogether. This is puzzling, since to be capable of political equality and participation is an item on her list and thus in this sense belongs among her moral intuitions about dignity (i.e. R).

It could also be discussed to what extent and in what sense Rawls' proceduralism is adequately democratic. However, even if we concluded that his approach is inadequate from a democratic point of view, Rawls' justificatory strategy would be generally preferable to Nussbaum's, because his proceduralism is so thoroughly outlined that it constitutes a sophisticated object of assessment. In contrast, Nussbaum's public reasoning argument is vague and sketchy and thus difficult if not impossible to assess, due to the fact that she believes it to be secondary.

Sufficientarianism and the problem of priority

With regard to Nussbaum's sufficientarianism, it is questionable, because it is indifferent to distributions above the threshold. When all are guaranteed central human capabilities at an adequate threshold level, the remaining inequalities are secondary from the point of view of justice. This is stressed by Nussbaum herself. "The capabilities approach", she says: "[...] is not intended to provide a complete account of social justice. It says nothing about how justice would treat inequalities above the threshold. It is an account of minimum core social entitlements, and it is compatible with different views about how to handle issues of justice and distribution that would arise once all citizens are above the threshold level" (Nussbaum 2006: 75).

Nussbaum's conception of justice is thus compatible with the second condition of Rawls' second principle (distributing social and economic inequalities in a way that improves the situation of the least advantaged). It is, however, also compatible with leaving inequalities above the threshold level, however huge, as they are. This makes her conception indeterminate - and most likely invalid, according to all the above mentioned justificatory strategies. To leave inequalities, however huge, as they are, is probably neither among our intuitions about dignity or fairness, something the parties of the original situation would subscribe to, nor part of what citizens with different comprehensive doctrines would agree to in an overlapping consensus (see also Forst 2005).

The same goes for Nussbaum's silence on the issue of priority. The task of prioritizing the items on her list - in situations where prioritizing is unavoidable, due to for example scarce resources - is simply left to "citizens and their legislatures and courts", which are given permission to prioritize relative to what is "right", given the "histories and special circumstances" of different "nations" (Nussbaum 2006: 79). This makes it permissible, for example, to violate people's civil and political liberties if this is needed to improve the "material control over one's environment", and if to do so is a national tradition. Again, such a conclusion seems hard to justify, irrespective of which of the previously mentioned justificatory strategies one opts for, and again, at least on this point, Rawls' approach seems preferable, generally, because it addresses the problem of prioritizing as a fundamental problem of justice - Rawls (Rawls 1999 [1971]: 109-111) regards scarce resources as one of the "circumstances of justice", and

not as a contingent circumstance that complicates application – and since lexical priority excludes the above option in particular.

Nussbaum in a RECON context

Nussbaum herself does not address a European studies audience in her work. Anyway, her contribution touches upon both European studies discussions and RECON discussions in particular. First, Nussbaum's theory of justice is made to fit into a post-national context. Her theory is thus generally RECON relevant in the sense that assessing EU legitimacy and interrogating legitimacy criteria are central RECON research tasks. Secondly, Nussbaum's theory has been suggested by RECON contributors as a possible alternative to the theory of deliberative democracy that is the general normative point of departure for RECON discussions on legitimacy, justice and democracy.¹⁴ Thirdly, Nussbaum's (2006: 83) framing of her theory as an outcome-oriented theory of justice replacing existing procedural theories parallels attempts within European studies to replace "input" criteria of legitimacy with "output" criteria (Scharpf 1995, Majone 1998, Moravcsik 2002). These attempts have been accused of underestimating the normative significance of democracy, i.e. for accepting a less than fully democratic rule as legitimate,¹⁵ and this naturally raises the question of whether Nussbaum's theory can be criticized along similar lines.

What has been highlighted in my discussions, are rather fundamental problems for Nussbaum's approach: a residual welfarism threatening the pro-claimed universal status of her proposal, significant difficulties related to her sufficientarianism and reluctance to prioritize normative concerns, and a proposal for an outcome-oriented justification of justice that is hard to make sense of. Paradoxically, given her dismissal of proceduralism, Nussbaum's most promising justificatory strategy is not her primary ethical outcome-oriented strategy, but her secondary procedural strategy, which, however, is insufficiently elaborated.

These problems cast of course doubt on whether Nussbaum's approach to legitimacy and justice could be of use in a RECON context. On the other hand, her approach may be promising in other respects. When RECON contributors have highlighted Nussbaum's framework as valuable, it is among other things due to its merits from a gender perspective compared to the theories defended by figures such as Rawls and Jürgen Habermas. Nussbaum explicates central feminist claims to a just society. According to her list, all are to be secured reproductive health and choice and secured against sexual discrimination, sexual assault and domestic violence (capabilities 2, 3 and 7). Also, her list guarantees the right to be cared for when dependent and in need of care, the right to be able to care for and respect others and oneself (self-respect), and the right to be able to gain a level of emotional maturity that makes it possible to enter meaningful intimate relationships (capabilities 4, 5 and 7).

These explications reflect deeper normative concerns for Nussbaum: her conviction that oppression of particularly vulnerable groups such as women must be directly

¹⁴ For a general statement of the normative framework of RECON, see Eriksen & Fossum (2007), and also Eriksen (2009). O'Brien (2008) refers specifically to Nussbaum. Galligan & Clavero (2008) introduce a list of feminist contributors.

¹⁵ Consider once more Eriksen & Fossum (2007). For an instructive overview of the normative-theoretical debate on EU legitimacy, see Gaus (2009).

highlighted – a general humanistic vocabulary will not do; her conviction that many injustices, and many gender injustices in particular, take place in what conventional political philosophy has defined as the private sphere and so outside the scope of justice; and finally, her conviction that we need to be respected and cared for emotionally and have the ability to care for and respect others if we are to develop into reasonable citizens with a sense of justice. With regard to all of these concerns, the Habermas-Rawls perspective is arguably in need of revision: this perspective seldom explicates implications for women directly; it challenges conventional public-private distinctions, but arguably inadequately; and it underestimates both the moral significance of care and the gendered division of unpaid and low paid care work as a problem of justice.

However, such revisions have also been provided by feminist re-interpreters of Habermas and Rawls, such as Seyla Benhabib and Nancy Fraser (Habermas) and Susan Moller Okin and Drucilla Cornell (Rawls). One must not subscribe to Nussbaum's outcome-oriented theory of justice to take the gender perspective properly into account. Moreover, the fact that Nussbaum also underestimates the normative significance of political equality and participation makes her theory less attractive, generally, but also from the point of view of feminism. Galligan & Clavero (2008) highlight a democratic deficit in feminist theory. As I have tried to show in my discussions, Nussbaum's theory does not really challenge this deficit, but rather reflects it.

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