

Beyond contractarian limits of justice: nussbaum's capabilities approach

NUSSBAUM, M. C. *Frontiers of Justice. Disability, Nationality, Species Membership*. Harvard University Press, Cambridge, Massachusetts/London, England 2006, 487 pages.

RESENHA

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There is no morality without a moral community. But who belongs to it? Moral theories provide structural elements to answer this question in different ways. Although the extensionality of the sphere of morality and the sphere of justice is not the same, the theoretical situation of moral theories is similar to the one of theories of justice: it is the particular architectures of justification that define who is belonging to the community of subjects of justice, that is the community of those, who can formulate demands based on reasons of justice. This is the starting point of Nussbaum's reflections in this book – first presented in *The Tanner Lectures on Human Values* (Cambridge University 2003).

Because of their structures of justification some widely accepted theories of justice show serious difficulties regarding three intensively discussed important cases: (1) justice for human beings with mental and physical disabilities; (2) the extension of the realm of justice to include all citizens of the world; and (3) justice regarding the treatment of non human animals. These very different cases are summed up under the common denomination of "frontiers of justice". A conception of real social and global justice might offer answers to each of those cases. But it is exactly in relation to those cases that the actually developed theories of justice show their limitations. This doesn't only apply to utilitarian theories, which in Nussbaum's opinion are problematic and unacceptable anyway, but also to contractarian theories, which she considers as the most productive theories of justice in the present times. Because they give the same status to the follow-

ing questions: "who participates on the determination of the principles of justice?" and "for whom apply these principles?" contractarian theories cannot articulate acceptable answers for any of the three cases outlined above. This might also be true in the case of Rawls' theory of justice, which Nussbaum considers the most subtle version of contractarian theories. Therefore Nussbaum asserts, critically but regarding Rawls' theory (whom she dedicates the book) with a cooperative spirit, that her capabilities approach offers "promising insights" to the mentioned problematical cases, which are "superior to those suggested [...] by the social contract tradition" (5).

Regarding the cases (1) and (2) Nussbaum organizes her argumentation in the context of a detailed and instructive discussion of Rawls' ideas. In a traditional way she distinguishes classical contractarian theories on the one hand and contractarian theories of Kantian inspiration on the other hand. The former are based on the promotion of one's own interests through the guarantee of reciprocal advantages. The latter are based on the value of impartiality i.e. theories that are presupposing the moral motivation of the partners of the contract. Rawls' theory is "hybrid" because it integrates elements of these two strains of thought. This leads to an insoluble internal tension within the theory.

According to the classical contractarian theories there are no reasons to recognize persons with serious mental and physical disabilities as valid interlocutors for making a contract: their capacities for cooperation and coercion are too much limited and therefore the advantages

that are expected to be guaranteed by a contract are limited too. The contractarian theories of Kantian inspiration lead also to exclusions because, to be able to presuppose the moral motivation, it is necessary that the subjects have the moral capacities that are enabling them to be morally motivated. That is why those theories cannot integrate persons with serious mental disabilities in contractual processes.

As a result of its “hybridist character” Rawls’ theory has both of the problems. Primary: in the original position the participants must suppose that while not being in this special position they always have a minimum of mental and physical capacities at their disposal. Rawls expresses this by affirming that the participants are “rough equals”. The availability of these basic mental and physical capacities is a necessary assumption in the theory to make sure that according to the anticipated advantages it is worth it to recognize the other subjects as partners of the contract. Because of the “circumstances of justice” (competing preferences, relative shortage of resources and the limited generosity of the human nature), first described by Hume and playing an important role in Rawls’ theory, the “rough equals” are motivated to establish a contract that promotes one’s own interests through the guarantee of reciprocal advantages. But human beings with mental and physical disabilities do not count as “rough equals” and therefore it is not possible to recognize them as subjects of justice. Secondly: with the original position, where “veil of ignorance” generates an impartial situation for choosing the principles of justice, Rawls assumes a (Kantian) concept of person. This concept is characterized by the so called “two moral powers”: the capacity to have a conception of one’s own good, and the capacity to have a sense of justice. But this concept makes the participation in the contractual process impossible for such human beings that lack the two moral powers and therefore it excludes individuals with serious mental disabilities.

Certainly the structural limits of his theory were not unknown to Rawls. It makes sense that he doesn’t propose an even less transpar-

ent veil of ignorance excluding, for example, the knowledge about having serious mental or physical disabilities outside the original position instead of assuming the “rough equality”: this thicker veil of ignorance would implicate to give up the concept of “primary goods” which has been defined exactly within the theory: (i) liberties and fundamental rights, (ii) opportunities for the access to jobs and social positions, (iv) resources in the sense of income and wealth, and (iv) the social basis of self respect. This concept of “primary goods” plays a crucial role in the theory: because primary goods allow people to develop plans of life, the establishment of comparative social ranges is possible by measuring the quantity in which the primary goods are possessed. The renunciation of this concept would seriously undermine the operability of the theory. And that would be a problem not only for this theory but for each theory that is articulated regarding means that are to be distributed equally to every subject for the achievement of its aims (like, for example, Dworkin’s theory of equality of resources). Human beings with disabilities don’t just want to have more primary goods at their disposal, which would eventually be possible with a new distributive principle. What they want is to have other goods at their disposal – different goods which enable them to achieve characteristic valuable human functionings and in this way enable them to be integrated in the society keeping their dignity. According to Nussbaum this kind of goods should be better expressed as “capabilities”. She offers a reworked list of capabilities (76-78), which is open to be complemented: “A decent society will organize public space, public education, and other relevant areas of public policy to support such lives and fully include them, giving the caregivers all the capabilities on our list, and the disabled as many of them, and as fully, as is possible” (222).

Rawls’ proposal to attend to the special necessities of individuals with disabilities at another level of his theory, like, for example, the parliamentary level, but not at the level on which the principles of justice are being chosen,

is criticized by Nussbaum: In this way these individuals are not being considered as primary subjects of justice. This objection is convincing: the special interests and necessities of individuals with disabilities should be considered at the primary level of a theory. If the price for the achievement was giving up the full operability of the theory, it would be a price worth it to be paid to accomplish the liberal promises related to a really inclusive concept of citizenship.

Nussbaum recognizes that in a different way than in the cases (1) and (3), in which contractarian theories cannot offer any answer (because of structural reasons) these theories can be more productive in case (2). But she criticizes this possibility as well. She distinguishes two contractarian models which could support the extension of a theory of justice to the global level. The “two-stage-contract”-model and the “global-contract”-model. Nussbaum discusses Rawls *The Law of Peoples* (1999) in a detailed but not so much in a structured way as a representative of the first model. The fundamental idea of the classical contractarian theories – according to which individuals leave the state of nature behind them by finding rules to organize a cooperative way of a common life – leads to consider the idea of a national state as a central element of the theory: the partners of the contract understand themselves as choosers of the principles for the institutional organization of a single (national) state. The determination of principles to rule the interaction between states takes place on a secondary level of the theory, on which states (or peoples) are considered in analogy to the individuals on the primary level. Nussbaum's main arguments against Rawls' theory of international relations follow a similar pattern as the one that is used in the discussion of case (1): States are not “rough equals”. Therefore the expected common advantages are no reason to include poor and weak states in the contract: “when the contract is envisaged as taking place among nations, it cannot be cast in standard social contract form unless we omit not only nonliberal states, but also pretty much everyone except the G8” (268). It is in this

sense that Nussbaum criticizes Rawls' exclusion of principles of distributive justice at the international level of his theory.

The second model, which Nussbaum discusses regarding the theories of Beitz and Pogge, seems to be more convincing to her: because of the consideration of individuals (and not of states) as the last instance for the justification, both, the citizenship and the advantages related to it are considered as arbitrary. These arbitrary elements influence, sometimes in a determinative way, relevant opportunities which individuals can take advantage of in their life. Therefore they have to be corrected by principles of global justice, which certainly must include global principles of distribution. A problem in these theories is not only their indeterminate and speculative character and correspondingly the difficulties for sketching a global state of nature, but also that these theories do not considerate traditional premises of the contractarian tradition, like for example the “rough equality” of the partners of the contract, or like the “circumstances of justice” as a motivational element to achieve an agreement. Such theories focus on certain human rights instead. But then they cannot be understood as procedural theories anymore and must be understood as “outcome-oriented” theories i.e. theories defined according to their orientation on fixed results. Correspondingly they cannot defend their theses within a contractarian theoretical framework.

As an “outcome-oriented” theory the capabilities approach offers a better starting point for the formulation of a theory of global justice. For the development of a dignified human life it is necessary to have the capabilities Nussbaum has listed at one's disposal – at least a certain required minimum of these capabilities. Therefore capabilities should constitute the nucleus of a theory of global justice. Nussbaum has the pretension (as opposed to Sen, who also argues in favor of a version of the capabilities approach) that her list of capabilities is or can be acknowledged intercultural. Like Rawls she defends a kind of political liberalism and not a

comprehensive liberalism, and she affirms that her list of capabilities as focus of an overlapping consensus can constitute the nucleus of a conception of political liberal justice. But by considering her list it is possible that legitimate questions related to her optimism arise: Her list of capabilities is based on a doctrine about flourishing forms of human life with a heavy metaphysical burden, and therefore it rather seems to correspond to a comprehensive doctrine and not to a political one. It is not by chance that Nussbaum frequently refers to "Natural Rights" as the appropriate tradition to establish a conception of global justice. That doesn't mean her idea, that the capacity to have these capabilities at one's disposal as a necessary condition for a dignified human life is to be rejected. But it does mean that her thesis that these capabilities constitute the nucleus of a political liberal conception must be rejected.

The most ambitious chapters of the book are the ones that deal with case (3). For contractarian theories it is particularly problematic to include non human animals into the sphere of justice. On the one hand the power-related differences between human and non human animals are too big to allow the justification of a contract between them, because there is no guarantee of reciprocal advantages. To ensure our advantages with respect to the treatment of non human animals we only have to treat them as we have done thus far, i.e. as means for our aims. On the other hand non human animals don't have the necessary capacities to participate in the contractual process at their disposal. Nevertheless a true conception of global justice might include justice for them.

In its traditional interpretation the moral community according to the capabilities approach includes all human beings. The question is now if this community can be extended beyond the humanity as a whole and thus embrace non human beings as well. According to Nussbaum's interpretation the capabilities approach offers the basis for an extended understanding of a theory of justice including non human animals in the context of justice. Following this

interpretation the specific forms of animal-flourishing must be identified and the necessary capabilities to achieve these flourishing forms have to be protected. To harm a particular being means to reduce its opportunities to achieve the specific flourishing forms of its species by affecting the corresponding capabilities. Nussbaum reinterprets the list of capabilities regarding non human animals (393-401). To have these capabilities at its disposal is a central condition for the dignified life of an animal.

This theory can build the basis for a strong protection of the huge variety of the capabilities of animals. Nevertheless according to Nussbaum this protection has to be limited with respect to the protection and promotion of important and morally sound human capabilities. Referring to an example of Nussbaum's, if animal tests are necessary to promote important human capabilities, it should be allowed, even if the animals' capabilities are harmed with it (401-405). Nussbaum considers even the use of animals for food as justifiable, if the animals have been bred in appropriate conditions and are slaughtered without pain. Certainly these opinions correspond to widely shared intuitions. But the important question is: how could this preferential treatment of human beings be justified within her theoretical framework? Nussbaum tries to justify it with the argument that until now there is no overlapping consensus regarding the status of the specific capabilities of animals. Therefore an absolute protection of their capabilities doesn't belong to the nucleus of Nussbaum's political liberalism. But we could use her own way of argumentation to argue against her idea that her list of human capabilities is intercultural valid and correspondingly constitutes the nucleus of a global conception of the political liberalism! For example: it is clear that not everybody in every culture would support her idea that women should have sexual autonomy, even if the critics of this idea are certainly wrong. She tries to justify the preferential position of humans also referring to an argument, commonly used by utilitarian authors. According to this ar-

gument the possible harm depends on the level of the complexity of the condition of the being. But based on this argument she cannot permit the use of animals for nourishing, at least not of mammalians. In my opinion the fundamental problem of this preferential position of human animals relates to the kind of reasons for justifying this preferential position – the kind of reasons that can be coherently articulated in the theoretical framework of the capabilities approach: the flourishing forms of non human animals must be considered as less valuable than some flourishing forms of humans. But this argument can only be based on disputable metaphysical (and not on political (!)) assumptions. For this reason and against Nussbaum's pretension her theory cannot be considered as non-speciesist. There is only one passage where Nussbaum mentions that her theory could implicate a form of unjustified preferential treatment of human animals: "We should admit that we are likely to be self-serving here, and biased toward our own form of life" (387). In this point she is certainly right.

Nussbaum has already argued convincingly in favor of the capabilities approach in her book *Women and Human Development* (2000). It is an attractive theory and in the same way a very influential one. The book discussed in this article not only extends the field of validity of the approach and offers more arguments in favor of it but also presents a subtle and informed discussion on the different contractarian theories and especially of Rawls' theory of justice. The rejection of such theories that determinate the egalitarian metric exclusively according to

means without attending to the quality of life (the so called fetishism of goods) and also the alternative focus on a variety of capabilities that enable the development of a dignified human life offer a more subtle and differentiated interpretation of the implications of the equalitarian justice. This can clearly be shown with Nussbaum's discussion of case (1), in which she considers individuals with mental and physical disabilities as primary subjects of justice. Although there are legitimate questions regarding the claimed political character of the theory the treatment of case (2) is instructive as well. In my view this theory corresponds to a comprehensive conception (that doesn't mean it should be rejected). This comprehensive character emerges clearly in her discussion of case (3). As Nussbaum claims there are certainly good reasons to propose obligations towards non human animals (and not only obligations regarding non human animals). But her justification of these obligations refers to traditional metaphysical elements (which Nussbaum traces back to Aristotle). Certainly this is not a good reason for rejecting the capabilities approach in Nussbaum's interpretation. But it is important to note that all we can win from her theoretical refinement on the one hand, will probably be lost on the other hand regarding argumentative force towards those who are not willing to accept these metaphysical premises. Although Nussbaum's arguments extend the sphere of justice according to her aim to achieve a global theory of justice, this theory implicates a loss of universality regarding the justification-mechanisms of her theory.

Notas

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