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### The fragility of rightness. Adjudication and the primacy of practice

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**Publication date**  
2014

[Link to publication](#)

#### **Citation for published version (APA):**

van Domselaar, I. (2014). *The fragility of rightness. Adjudication and the primacy of practice*. [Thesis, fully internal, Universiteit van Amsterdam].

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“ [...] Experience does not help [...] to escape the precept of theory, but it most only helps [...] to learn how theory could be better and more generally put to work, after one has adopted it into one’s principles.”<sup>340</sup>

“A political community has “good living” as its point, not just possessions and not just mere sustenance [...].”<sup>341</sup>

## **6 The Fragility of Justice III. Nussbaum’s Capabilities Approach solving Rawlsian residues and stabilizing adjudication**

### **1 Introduction**

The previous chapter concluded that Rawls’ theory of justice does not warrant a stabilizing approach to adjudication.<sup>342</sup> This is of course not to say that a stabilizing approach as such is unfounded; there might be a better theory of political morality available that does warrant a reliance on legal commensurability and therefore also a stabilizing approach to adjudication.

In this chapter I make a case for the claim that Martha Nussbaum’s theory of justice, her Capabilities Approach, is indeed a stronger candidate to validate a stabilizing approach to adjudication.

Similar to Rawls, Nussbaum’s Capabilities Approach aims to secure that each and every citizen can live a life in accord with dignity. But the principles of justice that her theory offers are better suited to realize this goal. They bring the practical world to a larger degree under the control of reason and thus they can prevent some of the Rawlsian residues of justice to occur. This residue-solving potential also bears on the moral character of adjudication.

The structure of this chapter is as follows: first I offer an introduction to Nussbaum’s theory of justice and to her conception of adjudication. Subsequently, I discuss two

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<sup>340</sup> Kant, Immanuel, *Practical Philosophy*, ed. Guyer, Paul and Wood, Allen W., trans. Gregor, Mary J., The Cambridge Edition of the Works of Immanuel Kant (New York: Cambridge University Press, 1996), 290.

<sup>341</sup> Nussbaum, Martha C., 'Aristotle on Human Nature and the Foundations of Ethics', in *World, Mind and Ethics*, ed. Altham, J. and Harrison, R. (Cambridge: Cambridge University Press, 1995), 7.

<sup>342</sup> Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 177.

reasons as to why Nussbaum's theory can prevent some of the Rawlsian residues to occur and how this works out for the moral character of adjudication. Or to put it differently: I will show how Nussbaum's theory of justice can make adjudication more stable. I end this chapter with a conclusion.

## **2 Nussbaum's justice. Aristotelian with a Kantian twist (or addressing the needs of empirically situated citizens)**

Nussbaum presents her Capabilities Approach as an amendment to Rawls' theory of justice.<sup>343</sup> As did Rawls, she provides for a set of principles of justice "that should be respected and implemented as a bare minimum of what respect for human dignity requires."<sup>344</sup> According to Nussbaum her principles are better suited for this task than Rawls' principles.

The fundamental mistake that Nussbaum identifies in Rawls' theory is that it deduces its viewpoint of justice from the wrong conception of personhood. It is based on an untenable dichotomy between personhood and animality.<sup>345</sup> That is, Rawls' conception is cut off from the empirical, animal and situated dimensions of human life.<sup>346</sup> The actual needs of human beings as empirical and situated creatures are treated as mere corollaries of moral personality that do not deserve any special attention, at least not from a moral point of view.<sup>347</sup>

Nussbaum explains Rawls' mistake by his main sources of inspiration, i.e. Kant's moral philosophy and the philosophies of social contract theorists like Hobbes and Locke.<sup>348</sup> Nussbaum thinks that these philosophers have in common that they also are not sufficiently responsive to the embodied, needy, animal nature of a life in accord with dignity.

So, due to his mistaken conception of the person Rawls ends up with the wrong

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<sup>343</sup> Ibid., 6-10.

<sup>344</sup> Nussbaum, Martha C., 'The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis', *Journal of Legal Studies* XXIX (2000), 5.

<sup>345</sup> Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, xxiii.

<sup>346</sup> Cf. ———, *Women and Human Development. The Capabilities Approach*, 72-73.

<sup>347</sup> ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 132.

<sup>348</sup> Cf. Ibid., 35-54, 107-109; ———, *Creating Capabilities: The Human Development Approach*, 84-88.

conception of justice, Nussbaum argues. To infer the legitimate claims of actual citizens from the idea of a rational, independent human being is to put the horse behind the cart. Rather than actually securing the conditions under which citizens can make valuable choices in the central domains of their lives, Rawls offers principles of justice that are only of value if these conditions are already fulfilled. Hence, in a just society citizens will still end up unequally positioned where their chances to lead a humanly dignified life are concerned. Nussbaum holds that this is not what justice should justify, but rather should prevent.

In contrast to Rawls, Nussbaum sets off with a conception of the person as in essence an enmattered, vulnerable and temporal being.<sup>349</sup> That human beings are “capable and needy” is a phrase we regularly encounter in her work.<sup>350</sup> According to Nussbaum both dimensions, capability and neediness, are constitutive elements of human dignity.<sup>351</sup> Human dignity would be lost without the dimension of capability, but it would also be lost without the peculiar neediness that characterizes human life.<sup>352</sup> Nussbaum’s idea of human dignity thus points to a complex and dialectical relation between neediness and potentiality as essential for living a humanly dignified life.<sup>353</sup> Nussbaum’s conception of the person is intimately linked to her discussion of ‘basic capabilities’.<sup>354</sup> They are the set of potentialities that all human beings share -save for some extreme cases- in which the dimensions of neediness, vulnerability and ability

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<sup>349</sup> This conception of moral personality also implies that there is no dichotomous distinction between human beings and animals. Cf. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 325-405; Stark, Cynthia A., 'Respecting Human Dignity: Contract Versus Capabilities', *Metaphilosophy* 40, 3-4 (2009), 374; Alexander, *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum*, 128.

<sup>350</sup> Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 221; Nussbaum, Martha C., 'Capabilities as Fundamental Entitlements: Sen and Social Justice', *Feminist Economist* (2003), 54.

<sup>351</sup> Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, xxxvii.

<sup>352</sup> *Ibid.*, 2.

<sup>353</sup> *Ibid.*, 52, 62, 223, xxiii.

<sup>354</sup> ———, *Creating Capabilities: The Human Development Approach*, 22, 23, 28; ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 278.

come together.<sup>355</sup> They are the “innate faculties of the person that make later development and training possible”, such as the capability of thought, of perception, movement and speech.<sup>356</sup> These basic capabilities imply that human beings are in need of “rich kinds of life activities.”<sup>357</sup> This is not something we may ignore. Rather to the contrary, in Nussbaum’s theory the basic capabilities are direct sources of moral claims: they “exert a moral claim that they should be developed and given a life that is flourishing rather than stunted.”<sup>358</sup> If people lack the opportunity to develop these potentialities, then this is “premature death, the death of a form of flourishing that has been judged to be worthy of respect and wonder.”<sup>359</sup> Such situations will give us “a sense of waste and tragedy”, Nussbaum says.<sup>360</sup>

Nussbaum’s central sources of inspirations for her conception of the person are the Greek poets<sup>361</sup> and Aristotle<sup>362</sup>, but also John Stuart Mill<sup>363</sup>, Karl Marx<sup>364</sup> and Amartya

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<sup>355</sup> In this regard Nussbaum states: “the only limitation is that the person has to be the child of human parents and capable of at least some sort of active striving: thus a person in a permanent vegetative condition or an anencephalic person would not be qualified for equal political entitlements under this theory.” Nussbaum, Martha C., 'Human Functioning and Social Justice: In Defense of Aristotelian Essentialism', *Political Theory* 20, 2 (1992), 228. See also: Nussbaum, *Creating Capabilities: The Human Development Approach*, 24.

<sup>356</sup> Nussbaum, *Creating Capabilities: The Human Development Approach*, 24.

<sup>357</sup> ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 221; ———, 'Capabilities as Fundamental Entitlements: Sen and Social Justice', 54.

<sup>358</sup> Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 374.

<sup>359</sup> *Ibid.*, 347.

<sup>360</sup> ———, *Women and Human Development. The Capabilities Approach*, 83.

<sup>361</sup> ———, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*.

<sup>362</sup> Cf. ———, 'Human Functioning and Social Justice: In Defense of Aristotelian Essentialism'; ———, *Women and Human Development. The Capabilities Approach*; Nussbaum, Martha C., 'Nature, Function, and Capability: Aristotle on Political Distribution', in *Working Paper, UNU-Wider* (1988); ———, 'Non-Relative Virtues: An Aristotelian Approach', in *The Quality of Life*, ed. Nussbaum, Marta C. and Sen, Amartya (Oxford: Oxford University Press, 1993); Alexander, *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum*, 125-146.

<sup>363</sup> Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 129; ———, *Women and Human Development. The Capabilities Approach*, 141-142; ———, *Frontiers*

Sen,<sup>365</sup> all of them philosophers who have also largely drawn on the work of Aristotle. In her account of why empirically embodied creatures such as human beings do in fact have dignity Nussbaum also refers to the concept of *awe* as it figures in the works of the Greek poets and in Aristotle's ethical and political philosophy.<sup>366</sup> In this Greek tradition, "[w]e see the person as having activity, goals, and projects -as somehow awe-inspiringly above the mechanical workings of nature, and yet in need of support for the fulfilment of many central projects", she says.<sup>367</sup>

Nussbaum also draws on the Greek tradition for the moral bearing she assigns to dependency and neediness as dimensions of a state of being that by itself gives rise to moral claims. The notion of suffering as it is conveyed by the Greek tragedies and accommodated for in Aristotle's work thereby plays an important role. In the Greek tragedies this suffering gives rise to pity and anger and in a rather immediate way calls for moral effort. According to Nussbaum we can for instance learn from Greek tragedy that "pity means action: intervention on behalf of the suffering, even if it is difficult and repellent. If you leave out the action, you are an ignoble coward, perhaps

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*of Justice: Disability, Nationality, Species Membership*, 87-89, 159; ———, *Creating Capabilities: The Human Development Approach*, 127-128.

<sup>364</sup> Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 74; ———, *Women and Human Development. The Capabilities Approach*, 72-73.

<sup>365</sup> Nussbaum, *Women and Human Development. The Capabilities Approach*, 11-15; Sen introduced his version of the Capabilities Approach in the early 1980. He presented the capabilities as the right metric for the comparative assessment of the quality of life. Sen's and Nussbaum's elaboration of the Capabilities Approach differ, but they mutually influenced each other. ———, *Women and Human Development. The Capabilities Approach*, 11; Robeyns and Brighthouse, 'Introduction: Social Primary Goods and Capabilities as Metrics of Justice', 3-6.

<sup>366</sup> Nussbaum does not assign a conception of dignity to Aristotle. In the revised edition of the *Fragility of Goodness* she sternly criticizes Aristotle for the absence in his work of "any sense of universal dignity and a fortiori of the idea that the worth and dignity of human beings is equal." Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, xx.

<sup>367</sup> ———, *Women and Human Development. The Capabilities Approach*, 73.

also a hypocrite and a liar. If you help, you have done something fine.”<sup>368</sup>

This aspect of being a capable and needy creature does not merely give rise to moral, pre-political claims. In Nussbaum’s political philosophy they are the direct ground for political entitlements, for basic claims of justice, at least in the context of a nation.<sup>369</sup>

Again drawing on Aristotle, Nussbaum holds that it is the task of governments to ensure that citizens can lead a flourishing life.<sup>370</sup> Governments must provide citizens “the conditions that are needed to flourish, to further develop their basic capabilities.”<sup>371</sup>

In order to determine more precisely what the value of equal human dignity implies for the concrete rights and duties of citizens, Nussbaum uses a ‘narrative method’ which she also qualified as ‘internal realism’.<sup>372</sup> A defining mark of this method is that

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<sup>368</sup> ———, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, xxxvii.

<sup>369</sup> The conceptual and practical link that Nussbaum construes between on the one hand the pre-political entitlements to which the basic capabilities give rise and on the other hand the political entitlements is problematic. Not in the least because this link is only very briefly touched upon. The most straightforward answer as to why the mere fact that people have certain needs and potentialities generates claims of justice can be found in Nussbaum’s discussion of Aristotle’s ethical and political philosophy, more specifically in his view on the task of government. According to Aristotle this task is to secure for citizens the necessary conditions to lead a flourishing life. Cf. ———, ‘Nature, Function, and Capability: Aristotle on Political Distribution’, 20; ———, ‘Aristotle on Human Nature and the Foundations of Ethics’, 119. See for a critique on Nussbaum’s argument in this regard also: Düwell, Marcus, ‘Nussbaum, Capabilities en de Waardigheid van Dieren’, *Filosofie & Praktijk* 4, 27 (2006), 36; Claassen, Rutger and Düwell, Marcus, ‘The Foundations of Capability Theory: Comparing Nussbaum and Gewirth’, *Ethical Theory and Moral Practice* April (2012).

<sup>370</sup> Nussbaum, *Creating Capabilities: The Human Development Approach*, 126.

<sup>371</sup> *Ibid.*, 128, 168.

<sup>372</sup> ———, *Women and Human Development. The Capabilities Approach*, 15; ———, *Creating Capabilities: The Human Development Approach*, 11, 81. In particular in her earlier work Nussbaum characterizes her method by referring to Hilary Putnam’s ‘internal realism’. According to Nussbaum this internal realism in turn resembles an Aristotelian dialectic in the sense that the aim of an internal realist is “to preserve the greatest number and the most basic ‘appearances’ -human perceptions and beliefs- on the subject.” According to her Aristotle is an ‘internal realist’. Cf. ———, ‘Human Functioning and Social Justice: In Defense of

it gives a prominent role to shared self-understandings of concrete situated human beings. In accord with Aristotle's dialectical method Nussbaum takes on board a wide range of imaginative understanding and embedded knowledge about what we deem crucial for the kind of beings that humans are. Nussbaum's account of justice is the result of many years of cross-cultural research and discussion, supported by empirical research on (indicators for) human flourishing, drawing on works of art and literature and on real life stories.<sup>373</sup> The central question to be answered is what people must be able to do and be in order to lead a flourishing life, a life in accord with one's dignity.<sup>374</sup>

Having such an evaluative question at its core, it is not surprising that this 'narrative method' is a highly evaluative endeavour right from the start.<sup>375</sup> It does not lead to a value neutral observation of human nature.<sup>376</sup> Nussbaum states: "to find out what our

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Aristotelian Essentialism'; ———, 'Aristotle on Human Nature and the Foundations of Ethics'. See for the term 'internal realism': Putnam, Hilary, 'Realism and Reason', *Proceedings and Addresses of the American Philosophical Association* 50, 6 (1977). Following Rawls, in her later discussions of the Capabilities Approach Nussbaum has also defended her list of Central Human Capabilities as the outcome of a 'reflective equilibrium' and also as the object of an 'overlapping consensus'. Cf. Nussbaum, *Women and Human Development. The Capabilities Approach*, 76, 151, 101; ———, *Frontiers of Justice: Disability, Nationality, Species Membership*; ———, *Creating Capabilities: The Human Development Approach*, 77, 79. It is, however, not so clear how all these methods and justifications are connected. See for this critical point also: Claassen and Düwell, 'The Foundations of Capability Theory: Comparing Nussbaum and Gewirth', 494-501.

<sup>373</sup> In the use of concrete examples and narrative also lies a clear contrast with Rawls' Theory of Justice. The latter can be characterized by a total absence of concrete examples or narrative. Nussbaum, *Creating Capabilities: The Human Development Approach*, 11, 80; Nussbaum, Martha C., 'Aristotelian Social Democracy', in *Liberalism and the Good*, ed. Bruce, R. Douglass, Gerald, M. Mara, et al. (New York: Routledge, 1990), 217.

<sup>374</sup> Nussbaum, 'The Supreme Court, 2006 Term. Foreword: Constitutions and Capabilities: 'Perception' against Lofty Formalism', 4; ———, *Creating Capabilities: The Human Development Approach*, 18, 66.

<sup>375</sup> Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 366; ———, *Women and Human Development. The Capabilities Approach*, 83.

<sup>376</sup> Nussbaum, *Creating Capabilities: The Human Development Approach*, 28.

nature is, seems to be one and the same as to find out what we deeply believe to be important and indispensable.<sup>377</sup> Thus this narrative method must clearly be distinguished from methods that have deductive, analytical or abstract reasoning as their main instrument to arrive at moral knowledge. In this inquiry facts and value are inextricably linked. The concept of dignity is not defined prior to an understanding of what people should be able to do and be. Rather, this value gets its actual contour by answering this question.<sup>378</sup>

Nussbaum presents a list of ten Central Human Capabilities as the tentative outcome of this narrative method.<sup>379</sup> This list offers a description of what citizens are entitled to by the mere fact of being a capable and needy creature, a creature with a range of potentialities in a gamut of spheres of life. The list describes what citizens should be able to do and be in the central spheres of life so as to be able to lead a humanly *dignified* life.<sup>380</sup> This list is emphatically open-ended: Nussbaum welcomes new insights about elements that are possibly redundant or missing in her account of dignity and justice.<sup>381</sup> The list of Central Human Capabilities reads as follows<sup>382</sup>:

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<sup>377</sup> ———, 'Aristotle on Human Nature and the Foundations of Ethics', 106.

<sup>378</sup> ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 162.

<sup>379</sup> ———, *Creating Capabilities: The Human Development Approach*, 33. Precisely by offering a list Nussbaum's Capabilities Approach differs from that of Amartya Sen. Sen is reluctant to identify a list because of his epistemological concern that such a list might not be warranted without knowing the context of its use. Sen also criticizes the attempt to use philosophical principles as an underpinning for public reason by arguing that this would limit the domain of public reason too much. Sen, Amartya, 'Elements of a Theory of Human Rights', in *Philosophy & Public Affairs* (2004), 333. See for Nussbaum's discussion of Sen's Capabilities Approach: Nussbaum, Martha C., 'Tragedy and Human Capabilities: A Response to Vivian Walsh', *Review of Political Economy* 15, 3 (2003), 33-59; Nussbaum, *Women and Human Development. The Capabilities Approach*, 11-15; ———, *Creating Capabilities: The Human Development Approach*, 19-20.

<sup>380</sup> Here also we see a strong Aristotelian strand in Nussbaum's theory. She develops the list of capabilities thereby drawing on Aristotle's virtue-ethics who came up with his list of virtues when answering the question "what is it to choose and respond well within that sphere"? Nussbaum, 'Non-Relative Virtues: An Aristotelian Approach', 245.

<sup>381</sup> ———, *Women and Human Development. The Capabilities Approach*, 77. ———, *Creating Capabilities: The Human Development Approach*, 108.

1. LIFE. Being able to live a human life of normal length to the end; 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, in a way informed and cultivated by an adequate education, including, but by no means limited to, literacy, basic mathematical and scientific training. 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 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. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)
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. (This entails protection of liberty of conscience and of religious observance.)
7. AFFILIATION. A. Being able to live with and toward 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. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation and also means protecting the freedom of assembly and of political speech.)  
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, national 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 and 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, protection of

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<sup>382</sup> Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 76-78.

free speech and association.

B. Material. Being able to hold property (both of land and of other goods) and to have property rights on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being; exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.

Nussbaum presents this list as a partial account of social justice that is to be guiding for the central concerns of a constitutional democracy.<sup>383</sup> Each and every citizen must be secured each and every capability on the list up to an adequate threshold level. If a citizen structurally ends up below the threshold level of one of the capabilities on the list, “this should be seen as a situation both unjust and tragic, in need of urgent attention -even if in other respects things are going well.”<sup>384</sup>

The Central Human Capabilities thus function as rights in the classical sense of the word: they grant people “justified and urgent claims to certain types of urgent treatment, no matter what the world around them has done about that.”<sup>385</sup> Here we find a salient Kantian element in Nussbaum’s theory. Drawing on Kant’s moral philosophy Nussbaum holds that each and every citizen is to be treated as an end in himself, as a bearer of rights regardless of his social positions and all other kinds of empirical factors.<sup>386</sup> So, in spite of the fact that from a moral point of view the person is vulnerable and dependent, this is not to deny that each person has fundamental rights that can be invoked against and trump other concerns of society. Therefore, similar to Rawls’ principles of justice, the Central Human Capabilities can also be compared to Kant’s categorical imperatives in that they have priority over all other pressing considerations, including for instance the protection of the interests of groups.<sup>387</sup> As Nussbaum states: “the person not the group, is the primary subject of political justice, and policies that improve the lot of a group are to be rejected unless

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<sup>383</sup> ———, *Women and Human Development. The Capabilities Approach*, 75.

<sup>384</sup> *Ibid.*, 71.

<sup>385</sup> ———, 'Capabilities as Fundamental Entitlements: Sen and Social Justice', 40.

<sup>386</sup> ———, *Creating Capabilities: The Human Development Approach*, 18; ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 70; ———, *Women and Human Development. The Capabilities Approach*, 69.

<sup>387</sup> Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 119.

they delivered the central capabilities to each and every person.”<sup>388</sup>

Nussbaum moreover stresses that the list describes a set of ‘combined capabilities’, which are in turn constituted by both internal and external capabilities.<sup>389</sup> Where the former point to certain developed states of persons in their emotional, intellectual and cognitive capacities, the latter have to do with the opportunities that a specific external context offers to someone who actually has the relevant internal capabilities. For instance, a child can be perfectly able to learn to play a musical instrument, but if it is not provided an instrument and training it will lack the external capability to actually learn to play music. Or, drawing on the famous example of Amartya Sen, without well-adapted public spaces a physically disabled citizen will experience genuine obstacles to freely move around.<sup>390</sup> Whether a society honours the demands of justice depends on how well it secures the conditions needed if citizens are to have these combined capabilities at least up to an adequate threshold level.<sup>391</sup> The focus is thus on outcomes, not on procedures. “Justice is in the outcome and the procedure is a good one to the extent that it promotes this outcome”, Nussbaum says.<sup>392</sup>

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<sup>388</sup> Dworkin, Ronald, 'Rights as Trumps', in *Theories of Rights*, ed. Waldron, Jeremy (Oxford: Oxford University Press, 1984); Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 216. Here we can identify a Kantian element in the Capabilities Approach. All citizens should be treated as ends in themselves and no one may be sacrificed for the common good or the good of others.

<sup>389</sup> Nussbaum, *Women and Human Development. The Capabilities Approach*, 84-85; ———, *Creating Capabilities: The Human Development Approach*, 20-21.

<sup>390</sup> Nussbaum, 'The Supreme Court, 2006 Term. Foreword: Constitutions and Capabilities: 'Perception' against Lofty Formalism', 12, 13; ———, *Creating Capabilities: The Human Development Approach*, 24.

<sup>391</sup> So, focusing on a threshold level of capabilities Nussbaum’s theory of justice is sufficientarian; it does not have distributive implications for the situation that all citizens have realized this threshold level. Nussbaum, *Creating Capabilities: The Human Development Approach*, 40.

<sup>392</sup> *Ibid.*, 95-96. Nussbaum makes the comparison with a top-cook who aims to convince his guests about the quality of the pasta he makes by referring to the tremendous quality of the pasta machine. By contrast, “[t]he outcome theorist says, the guests want to taste the pasta and see for themselves.” ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 82-84.

Thereby it is important to note that the capabilities on the list form an intimately related and coherent set of constituents for a life in accord with dignity. Nussbaum insists that they must be seen as separate elements of what constitutes human dignity. They are valuable by and in themselves; a loss regarding one capability cannot be compensated for by gain regarding another.<sup>393</sup> The Capabilities Approach does not allow for trade-offs and balancing where the protection of the threshold level of each and every capability is concerned.<sup>394</sup>

At the same time Nussbaum assigns a special status to two of the capabilities. Affiliation and practical reason play an “architectonic” role.<sup>395</sup> The idea is that these capabilities are assumed in all other capabilities on the list. This means that all areas and aspects of human life that find expression in the Central Human Capabilities must be permeated with the dimensions of choice and sociability if a life is to have dignity. Here we find another strong Kantian element in Nussbaum’s theory in the sense that respect for choice is to be secured in all areas of life. As Nussbaum states: “Part of this respect will mean not being dictatorial about the good, at least for adults and at least in some core areas of choice, leaving individuals a wide space for important types of choice and meaningful affiliation.”<sup>396</sup>

So, although Rawls’ theory may share the same actual concerns, Nussbaum holds that her conception of justice has a better chance of actually addressing these concerns. This because it starts with an empirically more realistic conception of the person. As a consequence the resulting principles of justice, the Central Human Capabilities, need no constant corrections or ad hoc amendments once they are applied to society, as is the case with Rawls’ theory.

To conclude this section, we could say that Nussbaum’s Capabilities Approach as a *theory* of justice claims to have the ‘best’ of two worlds. On the one hand this theory strives for the features of a theory: generality, objectivity, consistency and

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<sup>393</sup> Nussbaum, *Women and Human Development. The Capabilities Approach*, 81; ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 84.

<sup>394</sup> Nussbaum, *Creating Capabilities: The Human Development Approach*, 175.

<sup>395</sup> *Ibid.*, 39.

<sup>396</sup> ———, *Women and Human Development. The Capabilities Approach*, 69.

coherence.<sup>397</sup> Similar to Rawls, Nussbaum considers her account of justice as an expression of theoretical reason rather than an articulation of what citizens happen to value in a certain place and time.<sup>398</sup> The Central Human Capabilities are proposed as an objective viewpoint that is meant to have critical and aspirational potential. Nussbaum deems such a viewpoint to be necessary because citizens' actual desires and preferences may be distorted.<sup>399</sup> An objective viewpoint of justice that is generated by theory can function as an important anti-dote to all kinds of irrationalities. On the other hand, the Capabilities Approach presents itself as a theory of justice that stands out because of its responsiveness to actual human experience, grounded as it is on "detailed knowledge of the variety of circumstances and cultures in which people are striving to do well."<sup>400</sup> As a normative theory of political morality it nonetheless tries to give voice to the concerns that concrete human beings experience in their daily lives.

### **3 Nussbaum's conception of law and adjudication**

Little has been written so far about the implications of Nussbaum's Capabilities Approach for political structures.<sup>401</sup> Nussbaum herself has focused extensively on the institutions of law and adjudication, on the latter both in the context of the Capabilities Approach as well as independently of it.<sup>402</sup> This section briefly discusses

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<sup>397</sup> ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 1; ———, 'Why Practice Needs Ethical Theory. Particularism, Principles and Bad Behaviour'.

<sup>398</sup> Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 70, 78, 82, 181.

<sup>399</sup> *Ibid.*, 279. Nussbaum stresses that convergence between the Capabilities Approach and informed desires approaches is a good thing, because this means that indeed the Capabilities Approach expresses human self-understanding.

<sup>400</sup> ———, *Women and Human Development. The Capabilities Approach*, 69.

<sup>401</sup> ———, *Creating Capabilities: The Human Development Approach*, 179-180. The precise implications for institutions that bear responsibility for the realisation of justice and the consequences for our common understanding of these institutions is thus a field of inquiry that yet remains to be explored.

<sup>402</sup> In general Nussbaum has not often discussed the issue of political structure. Which private actors or public institutions are responsibility bearing institutions and to what extent, and what this implies for the workings of these institutions is an issue that she hardly addresses.

law and adjudication from the viewpoint of the Capabilities Approach, thereby offering a specification of the more general section of chapter three that discussed law and adjudication in the more general context of theories of morality.

Throughout her work Nussbaum clearly stresses that law and adjudication are crucial institutions for the realisation of citizens' Central Human Capabilities<sup>403</sup>, as they are two of the most important institutions that bear responsibility for the realization of justice.<sup>404</sup> Through a system of taxation and welfare, contract-law, family law, criminal justice, educational law, environmental law and the like, the Central Human Capabilities can be served.<sup>405</sup>

Precisely because of its individualized character Nussbaum considers adjudication to be an institution that is particularly well-equipped to secure citizens' political entitlements.<sup>406</sup> Through the piecemeal work of adjudication the abstract Central Human Capabilities can be made more specific. Judges "[...] have time to hear the entirety of a minority person's story, and their job is understood as involving the careful consideration of it in all its particularity."<sup>407</sup> In their turn the Central Human Capabilities are to function as moral source for legally enforceable rights.

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The institution of adjudication is an exception in this regard. See for a discussion of adjudication in the context of the Capabilities Approach: Dixon, Rosalind and Nussbaum, Martha C., 'Children's Rights and a Capabilities Approach. The Question of Special Priority', *Cornell Law Review* 97 (2012); Nussbaum, *Creating Capabilities: The Human Development Approach*, 166-180; Nussbaum, Martha C., *Poetic Justice. The Literary Imagination and Public Life* (Boston: Beacon Press, 1995).

<sup>403</sup> Nussbaum, *Creating Capabilities: The Human Development Approach*, 180.

<sup>404</sup> ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 311.

<sup>405</sup> Ibid.

<sup>406</sup> ———, 'The Supreme Court, 2006 Term. Foreword: Constitutions and Capabilities: 'Perception' against Lofty Formalism', 61.

<sup>407</sup> Ibid. See for a critique on the role that Nussbaum's assigns to the judiciary in enforcing the list of Central Human Capabilities: Wood, Diana P., 'Constitutions and Capabilities. A (Necessarily) Pragmatic Approach', in *Justice and the Capabilities Approach*, ed. Brooks, Thom (Farnham: Ashgate, 2012). Wood holds that judges are ill equipped to determine in concrete cases where a threshold level of a political entitlement lies. For Nussbaum's reply to this critique see: Nussbaum, Martha C., 'Reply to Diane Wood. Constitutions and

Nussbaum thereby presents the Capabilities Approach as having highly explanatory force for actual constitutional democracies and their legal and judicial cultures. As she states: “[m]any nations by now enumerate entitlements in a way that connects them to the idea of a life worthy of human dignity [..].”<sup>408</sup> Also, notions of dignity as Nussbaum understands it -albeit not explicitly- have played a role in jurisprudential practices in constitutional democracies.<sup>409</sup>

Nussbaum moreover identifies some clear practical implications of the Capabilities Approach for law and adjudication. One such implication is that judges must interpret the constitutional rights to which their legal orders are committed as the aforementioned ‘combined capabilities’, as a set of substantial freedoms, of modes of being and doing that should be open to each and every citizen. “The right to political participation, the right to religious free exercise, the right of free speech -these and others are all best thought of as secured to people only when the relevant capabilities to function are present. In other words, to secure a right to citizens in these areas is to put them in a position of capability to function in that area”, Nussbaum says.<sup>410</sup>

This implies that the often-made distinctions between civil, political and social legal rights dissolve.<sup>411</sup> According to the Capabilities Approach to secure a constitutional right, if anything, also means an investment in the social conditions that are necessary for citizens to really exercise that right. To protect civil and political rights only by non-interference is not to really secure these rights, according to the Capabilities Approach.<sup>412</sup> Hence, assessing whether these rights are violated implies having a keen

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Capabilities. A (primarily) Pragmatic Approach', *Chicago Journal of International Law* 10, 2 (2009).

<sup>408</sup> Nussbaum, *Creating Capabilities: The Human Development Approach*, 166; ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 155.

<sup>409</sup> Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 156.

<sup>410</sup> ———, 'Capabilities as Fundamental Entitlements: Sen and Social Justice', 37.

<sup>411</sup> *Ibid.* ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 286, 288-289.

<sup>412</sup> Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 372. ———, 'Reply to Diane Wood. Constitutions and Capabilities. A (primarily) Pragmatic Approach', 434. ———, *Creating Capabilities: The Human Development Approach*, 67.

eye for “subtle impediments that stand between them and the full or equal access to the right”.<sup>413</sup>

Next, the Capabilities Approach sees it as the professional responsibility of judges - other things equal- to interpret settled law in such a way that it maximally protects the threshold level of each of the Central Human Capabilities. These must at least function as a ‘compelling state-interest’ for limiting the (legally protected) freedom of citizens.

Finally and related to the former two implications: from the viewpoint of the Capabilities Approach imagination is a crucial quality for judges.<sup>414</sup> The Capabilities Approach “requires a particular method of interpretation, one that asks searchingly about the real opportunities and freedoms of people [...]”, Nussbaum says.<sup>415</sup> By definition judges cannot “afford to remain at the level of generality or to take refuge in an approach that is merely formalistic.”<sup>416</sup> Precisely because the Capabilities Approach focuses on what citizens are actually able to do and be Nussbaum takes great pains to argue against lofty formalism, or too cool an attitude on the part of the judiciary. Within the Capabilities Approach legal reasoning is thus not so much an analytical and detached activity, but rather boils down to a sympathetic understanding of and responsiveness to a citizen’s concrete legal case.<sup>417</sup>

In this respect, Nussbaum’s conception of adjudication does not harmonize well with the rather rationalistic conception of adjudication that -as we saw earlier- characterizes normative theories of political morality and connected to this a stabilizing approach to adjudication.

Nussbaum’s focus on the competences of judges and the stress she puts on the

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<sup>413</sup> Nussbaum, 'Reply to Diane Wood. Constitutions and Capabilities. A (primarily) Pragmatic Approach', 431.

<sup>414</sup> ———, *Poetic Justice. The Literary Imagination and Public Life*; ———, 'The Supreme Court, 2006 Term. Foreword: Constitutions and Capabilities: 'Perception' against Lofty Formalism', 59.

<sup>415</sup> Nussbaum, 'Reply to Diane Wood. Constitutions and Capabilities. A (primarily) Pragmatic Approach', 410.

<sup>416</sup> ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 176.

<sup>417</sup> Of course, this attention for the particular case is intimately linked with the conception of the person on which justice is grounded.

adequate discernment of the particulars of a legal case, may at the outset even suggest a full-fledged virtue-ethical approach to adjudication. Yet, this is mere appearance, as in the end the Central Human Capabilities offer the final background principles for the legal system, adjudication included. Within the Capabilities Approach adjudication is a principled practice. The judge must bring a vast and explicit set of principles of political morality to bear on a legal case, i.e. the Central Human Capabilities. In this sense the Capabilities Approach does fit with a reliance on legal commensurability. For in the end in the Capabilities Approach the justification and explanation of judicial decisions rests on a final measure offered by the Capabilities Approach itself.

That is, at pains of giving up on the primacy of theory that characterises the Capabilities Approach, in determining citizens' concrete legal rights and duties the judge must let himself be guided in his interpretation of settled law by the Central Human Capabilities above all, rather than by anything else. These are to function as a final commensurans, as a prior and independent measure that not only has guiding force for the judge, but that is also assumed to exhaustively enumerate the interests that may be at stake. Hence, if all is in place in society, within the Capabilities Approach adjudication is construed as a 'principled' institution that is highly transparent, intelligible and only incidentally the source of genuine moral loss. So conceived, Nussbaum's conception of adjudication does qualify as a version of stabilizing approach to adjudication.

#### **4 Solving some of Rawls' residues, making adjudication more 'stable'**

##### 4.1 Conceptual richness

One reason why Nussbaum's Capabilities Approach can solve some of the residues of justice that Rawls' theory of justice allows for or generates is that to some extent it can solve the latter's 'conceptual poorness'. In the previous chapter we saw that Rawls' principles of justice exclusively focus on the primary social goods, i.e. liberties, income, wealth, opportunities, and the social basis of self-respect, as metric for justice. We also saw that as a consequence justice by itself does not offer the concepts that can secure that in practice citizens will also be able to convert these goods into valuable functioning. Because of its exclusive focus on the distribution of primary social goods, Rawlsian justice is unable to detect the serious obstacles that citizens may experience in using these goods in a valuable way.

By contrast Nussbaum's Capabilities Approach does offer a metric of justice that is relatively 'rich' in that its concepts are better suited to identify and address citizens' 'needs' when it comes to their capacity to convert the primary social goods into valuable functioning.<sup>418</sup> There are three reasons for qualifying this list as conceptually rich. First, as we saw above, to put the concept of a 'capability' at the heart of justice indicates that the central question to be asked when determining the concrete rights of citizens necessarily focuses on what they are *really* able to do and be. This implies that a just society will be highly sensitive to the concrete position of individuals. Justice will secure a highly individualized tailoring to the specific needs and endowments of citizens and to all other kinds of factors that influence their chances to function well, i.e. to use the primary goods in a valuable way.<sup>419</sup> By the mere fact of employing the concept of 'capability', the Capabilities Approach imports empirical realities as part and parcel of reasoning about justice. Justice is not merely to be

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<sup>418</sup> In this discussion I largely draw on the insights gained from the debate between resourcist theorists and capability theorists and it will be clear that I take side with the latter. If the aim of this book was to offer an exhaustive discussion of Nussbaum's Capabilities Approach compared to Rawls' theory of justice, then an in depth study would be needed for all kinds of arguments on both sides. However, due to the scope of this book I limit myself to simply pointing out that there are strong reasons to prefer the Capabilities Approach above Rawls' theory. But this is not to suggest that Nussbaum's Capabilities Approach cannot be put in critical perspective. Such a more critical perspective of the Capabilities Approach I offer in the subsequent chapter. See for crucial contributions to the resources versus capabilities debate: Pogge, Thomas, 'Can the Capabilities Approach be Justified?', *Philosophical Topics* 30, 2 (2002); Anderson, Elisabeth, 'Justifying the Capabilities Approach to Justice', in *Measuring Justice: Primary Goods and Capabilities*, ed. Brighouse, Harry and Robeyns, Ingrid (Cambridge: Cambridge University Press, 2010); ———, 'What is the Point of Equality?', *Ethics* 109, 2 (1999); Daniels, Norman, 'Equality of What: Welfare, Resources, or Capabilities?', *Philosophy and Phenomenological Research* 1 (1990); See for a clear overview of this debate: Anderson, 'Justifying the Capabilities Approach to Justice'.

<sup>419</sup> This is not to deny that the Capabilities Approach allows for certain groups to be designated for the purpose of public policy and legislation. However, these categorisations are as good as they allow citizens to really flourish.

applied to practice, but it is also most directly and continuously informed by it.<sup>420</sup>

Citizens' rights and duties will thus be tailored in a way that allows citizens the opportunity to convert the primary goods into valuable functioning.

Second, as we also saw above, the list of Central Human Capabilities is a list of *combined* capabilities, indicating that justice is sensitive to all kinds of conditions that are needed for the development of an internal capability, as well as for the conditions under which external capabilities can be guaranteed. A just society therefore has the task to take care of the quality of the range of practices in which internal capabilities are developed, such as the family, all kinds of educational arrangements and others kinds of practices that add to physical and emotional health.<sup>421</sup> Next to that, in order to secure external capabilities a state must see to it that there are no genuine external obstacles to make meaningful choices in the designated contexts. Again, this will add to the conditions under which citizens can use the primary social goods.

Third, some of the capabilities on the list, in spite of being valuable in themselves, also point to such preconditions for a valuable use of primary social goods. The capabilities of play, emotions and affiliation are cases in point.<sup>422</sup> For instance, if citizens have not been provided the capacity for play and affiliation in their childhood because of domestic violence, they may experience serious obstacles in using their liberty rights, for instance the right to family life.

In brief, where Rawlsian justice provides for a standardized package of resources meant to enable citizens to live in accord with dignity -regardless whether they really are able to do so-, Nussbaum's Capabilities Approach focuses on a range of combined capabilities and thereby does take into account citizens' actual empirical needs where their ability to lead a life in accord with human dignity is concerned.

However, before we can grant this advantage to Nussbaum's theory of justice, fairness demands that we address the critical response of Thomas Pogge to capability-theorists like Nussbaum. This because Pogge, himself a Rawlsian, puts it that they

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<sup>420</sup> This point is strongly connected to the fact that the metric of capabilities points to outcomes rather than to means.

<sup>421</sup> Nussbaum, *Creating Capabilities: The Human Development Approach*, 21.

<sup>422</sup> See for a critique on the fact that Nussbaum has selected the capability of play as giving rise to a political entitlement: Claassen and Düwell, 'The Foundations of Capability Theory: Comparing Nussbaum and Gewirth', 496.

overstate the difference with a resourcist like Rawls.<sup>423</sup> Although the special needs of citizens as concrete embodied creatures are not directly relevant for Rawlsian justice or other resourcist theories, according to Pogge this does not exclude the possibility that such theories will take the concerns of the capability-theorists into account. They can do so, not so much as a matter of justice, but of ‘humanity’ or ‘solidarity’.<sup>424</sup> Pogge in addition refers to the primary social good of self-respect, the importance of which Rawls himself has also stressed.<sup>425</sup> For Pogge the fact that this good is of central importance in Rawlsian justice indicates that there is no strict divide between a resourcist and a capabilities approach. That is, the social good of self-respect encompasses a range of social conditions that are involved in the list of Central Human Capabilities. For instance, relative differences in income between citizens can be mitigated on the basis of this social good and other kinds of practices that negatively influence citizens’ sense of self-worth may also be regulated on the ground of protecting the social good of self-respect.

Indeed, on the basis of Pogge’s analysis we have reason to consider the divide between a resourcist approach and a Capabilities Approach to justice as not so deep and wide. However, this analysis does not weaken the argument that the Central Human Capabilities offer a conceptually richer metric of justice than that of Rawls’ social primary goods. Pogge’s argument leaves the rhetorical force of Elisabeth Anderson’s point fully intact: “why choose an indirect measure, when a direct measure is available?”<sup>426</sup> This point is intimately linked to an important difference between a resourcist approach and a Capabilities Approach to justice: the former focuses on means, the latter takes ends or outcomes as the metric for justice. What is more, Pogge’s argumentation leading to reducing the difference between a Capabilities Approach to justice and a resourcist approach is troublesome on some points. As to his ‘humanity’ or ‘solidarity’ argument: whether in a concrete society officials or institutions (such as members of parliament, policy-makers, the judiciary,

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<sup>423</sup> Pogge, Thomas, 'A Critique of the Capabilities Approach', in *Measuring Justice*, ed. Brighthouse, Harry and Robeyns, Ingrid (Cambridge: Cambridge University Press, 2010), 17, 32.

<sup>424</sup> *Ibid.*, 32.

<sup>425</sup> *Ibid.*, 21-22.

<sup>426</sup> Anderson, 'Justifying the Capabilities Approach to Justice', 89.

or the majority of citizens) will see reasons of ‘compassion’ or ‘humanity’ to address the concrete needs of citizens so as to enable them to convert the primary goods into valuable functioning, will be a matter of contingent fact. In a resourceist approach these reasons will in any case not be built into the way the central institutions (should) work. Whether these needs will be addressed will be a matter of contingent facts -for instance how sensitive a legislator actually is to reasons of humanity. The question then arises why citizens who are not served and who ‘fall below the line’, should accept the burdens stemming from that particular normative political order. Pogge’s reference to humanity and solidarity is troublesome from the viewpoint of political legitimacy, to say the least.

In addition Pogge’s arguments do not change the fact that in securing the social basis for self-respect to each and every citizen, a resourceist approach will still typically focus on formal institutional arrangements -i.e. the arrangements that in fact have authority over these resources-, even if citizens need other things for the development of their self-respect. For instance, citizens may need “group stigmas, stereotypes, oppressive discursive norms and de facto group segregation” to be tackled.<sup>427</sup> To adequately address these obstacles it does not suffice to focus on formal institutional arrangements.

Hence, although the divide with Rawls’ social primary goods may be less strict than first assumed, I think we still have a reason to prefer Nussbaum’s viewpoint of justice to that of Rawls’ primary social goods, because of its conceptual richness. I will further corroborate this claim by the way Nussbaum’s Capabilities Approach deals with the position of divorced mothers as well as with the position of cognitively challenged and socio-economically weak consumers. I use these examples because these were the cases of residues of justice that I discussed in the previous chapter in the context of the conceptual poverty argument against Rawls. We shall see that Nussbaum’s Capabilities Approach can indeed overcome these residues.

As to divorced mothers: in the previous chapter I pointed out that because of its focus on primary social goods Rawlsian justice cannot identify or address the troublesome character of their position. As it is not the result of a violation of Rawls’ principles of justice, their position is accounted for in terms of procedural justice as one of the outcomes that justice permits and thence as one for which these women can be held

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<sup>427</sup> Ibid.

responsible. By contrast, the Capabilities Approach can rather straightforwardly both identify and address this position as an injustice because of the concepts it deploys for its metric of justice.<sup>428</sup>

That is, recalling the description of the position of divorced mothers, we can establish that the threshold level of a range of capabilities is in peril, for instance the ability to enter into meaningful relationships of mutual recognition with other workers, the ability to live with others, the ability to recognize and show concern for other human beings, the ability to imagine, think and reason in a truly human way, the ability to enjoy recreational activities, the capability to seek employment in a competition on an equal basis with others and the capability of practical reason. In addition, this position is also troublesome because of a serious relative inequality: compared to divorced fathers, divorced mothers often have less substantive freedom in areas of life that are constitutive for their well-being. Therefore the capability of self-respect is also endangered. Nussbaum has put this point as follows: “It takes the average divorced man only about ten months to earn as much as the couple’s entire net worth. And

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<sup>428</sup> One could even say that it is the vulnerable and underprivileged position of women all over the world that -among other things- has functioned as a motive for Nussbaum to construe a theory of justice. The Central Human Capabilities are -among other things- introduced as an (more) adequate conceptual framework to address the plight of women as a matter of justice. Nussbaum starts her book *Woman and Human Development* as follows: “women in much of the world lack support for fundamental functions of a human life.” Nussbaum, *Women and Human Development. The Capabilities Approach*, 1. See for Nussbaum’s defence of the Capabilities Approach in relation to women also: ———, ‘Justice for Women!’, Nussbaum, Martha C. and Glover, Jonathan, eds., *Women, Culture and Development. A Study of Human Capabilities*. (Oxford: Clarendon Press, 1995); Nussbaum, *Women and Human Development. The Capabilities Approach*. At the same time it is important to note that Nussbaum herself stresses that Rawls has made it clear in his response to Okin in ‘The idea of Public Reason Revisited’ that he shares the same concerns as to the position of women in society, in particular their role within the family. ———, *Women and Human Development. The Capabilities Approach*, 270-283; Rawls, ‘The Idea of Public Reason Revisited’; Nussbaum, ‘Rawls and Feminism’. However, although Rawls may share the same concerns, this leaves the point of conceptual poorness unaffected.

divorced men are now more likely to meet their car payments than their child support obligations.<sup>429</sup>

So, within the Capabilities Approach the state has as a matter of justice a positive duty to take all measures necessary to get these women above the threshold level and thus also to reduce the inequality compared to the position of divorced fathers. It provides the responsibility bearing agents such as legislators and policymakers with reasons of justice to pay special attention to the position of divorced mothers and to come up with special measures to secure the threshold level of the Central Human Capabilities for them. Family law, matrimonial law, labour law, social welfare legislation, policies that guarantee child-care facilities and all kinds of public provisions that might affect women's educational opportunities must be arranged so as to counter-balance or prevent obstacles that divorced mothers face in deploying the primary social goods in valuable way.<sup>430</sup> The Capabilities Approach may even indicate that the cultural entrenchment of gender itself must be targeted, for instance by programs raising consciousness among girls at primary and secondary schools.<sup>431</sup> In the preceding chapter on Rawlsian residues I also discussed the precarious position of cognitively and socio-economically weak consumers on the financial service market. This position was identified as one in which residues of justice may occur. These consumers may beyond their own clear fault end up 'below' the line, experiencing genuine obstacles to lead a life in accord with their dignity. I argued that Rawlsian justice cannot prevent such residues to occur. Measures to protect this group would be disqualified as incontrovertibly paternalistic.

Conversely, because it uses the Central Human Capabilities as metric of justice the Capabilities Approach does offer reasons of justice to regulate the consumer market with a keen eye for the vulnerable position of this particular group of consumers and hence to maybe limit the freedom of contract. Justice in any case indicates that there is no ground to a priori rely on the competences of consumers to meaningfully

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<sup>429</sup> Nussbaum, 'Justice for Women!'.

<sup>430</sup> Giullari, Susy and Lewis, Jane, 'The Adult Worker Model Family, Gender Equality and Care. The Search for New Policy Principles, and the Possibilities and Problems of a Capabilities Approach', in *Social Policy and Development Programme Paper* (United Nations Research Institute for Social Development, 2005).

<sup>431</sup> Olson, Kevin, 'Recognizing Gender, Redistributing Labor', *Social Politics* 9 (2002).

exercise their freedom of contract, just because they do not belong to the limited group of citizens who are clearly cognitively incapacitated. Consumer law and policies should accommodate the facts that all consumers are both capable and needy, that they are all differently situated on a continuum of capability and vulnerability and that both these dimensions are inextricably linked. Thence, respect for consumers' freedom of contract should be combined with due care for their specific vulnerabilities regarding their potential to meaningfully exercise this right.

More specifically, the Capabilities Approach for instance offers reasons of justice to identify and address vulnerabilities that stem from the relatively low internal capability of practical reason of certain groups of consumers, for instance elderly people, adolescents and people who happen to have a low intelligence. The precarious socio-economical positions of consumers may be an indication of a lack of external capability that on that account should be addressed as a matter of justice. That is, both kinds of vulnerabilities make consumers prone to exploitation and abuse by traders and to ending up below the threshold level of the Central Human Capabilities. In securing that these vulnerabilities will not lead to a consumer ending up below this threshold level, the state may provide for consumer education<sup>432</sup>, for legal rules establishing duties of care for financial institutions and companies<sup>433</sup> and for rules that authorize judges to nullify contracts if their enforcement puts a threshold level of any capability in peril.

As to the latter: the list of Central Human Capabilities thus offers substantive criteria for distinguishing between relevant harm and irrelevant harm stemming from a

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<sup>432</sup> See for instance the Directorate General for Health and Consumers of the European Union that aims to promote the financial education of consumers and aims to raise the level of awareness of consumers “so that they are better equipped to make informed, considered and rational choices in financial services.” Cf.

[http://ec.europa.eu/consumers/rights/fin\\_serv\\_en.htm](http://ec.europa.eu/consumers/rights/fin_serv_en.htm) (visited in August 2013)

<sup>433</sup> The European Consumer Rights Directive holds a special duty of care for suppliers and traders in providing information about products. They must “take into account the specific needs of consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee.” See:

<http://www.nottingham.ac.uk/business/forum/documents/researchreports/paper78.pdf>

contract. If for instance the debts that flow from financial service contracts are such that the contracting citizen is likely to end up below the threshold level of one of the capabilities on the list, -other things equal- this may be a ground for a compelling state interests to not effectuate such contracts.

As all this shows: within the Capabilities Approach the regulation of the position of consumers on the financial service market requires empirical knowledge regarding the cognitive powers of the consumers in question, their background situations and the consequences of certain contracts. This information is a matter of justice and highly pertinent for the regulation of financial service markets and the concrete legal rights and duties of consumers and traders.<sup>434</sup>

Let me summarize: because it uses the Central Human Capabilities as a metric of justice the

Capabilities Approach can, at least to a larger degree than Rawls' theory of justice, secure that citizens can make valuable use of the social primary goods. Due to its conceptual richness the Capabilities Approach can thus solve some of the residues of justice that Rawls' principles of justice allow for.

Before concluding this section two things must be noted. First, this 'conceptual richness' argument not only works for certain well-defined large-scale groups of citizens. I singled out two groups to make felt that the Central Human Capabilities can resolve residues of justice on a rather substantial scale. But as said, the Capabilities Approach claims that it does better for each and every citizen, also for those that are not categorized or identified as members of groups with relevant special vulnerabilities. What is more, precisely because it aims to address the actual vulnerabilities of citizens, justice as the Capabilities Approach sees it, implies a kind of decision-making that is highly tailored to the individual case, at least when these needs are relevant for getting citizens above a threshold level of the capabilities on the list.

Second and related, Western constitutional democracies of course already show many public arrangements, procedures and decisions that can be seen as attempts to meet the concrete needs and vulnerabilities of individual citizens. These can be seen as

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<sup>434</sup> See for a (brief) discussion of Nussbaum's Capabilities Approach in relation to (European) contract law also: Hesselink, Martijn, 'European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?', *European Journal of Private Law* 3 (2007).

specifications of fundamental social rights that are regulated under the regime of administrative law. This is a domain of law that has as one of its important characteristic that it grants discretion to policy-makers precisely to enable them to adequately tailor administrative decisions to the needs of individual citizens. In this sense the Capabilities Approach has considerable explanatory force for existing ‘need-addressing arrangements’. As such it can also prevent residues of justice to occur because it can anchor these arrangements by a relative articulate viewpoint of justice. Without being able to anchor them in a viewpoint of justice and hence to conceive them as specifications of fundamental claims of citizens -other things equal- these practices can only be accounted for in terms of the aforementioned unstable and vague notions such as ‘humanity’ and ‘solidarity’. Precisely because policies and decision-making that address citizens’ needs are highly particularized, the list of Central Human Capabilities can be of value by making such ‘need responsive practices’ more principled and less likely to be determined by arbitrary factors. The Central Human Capabilities offer the conceptual tools that can justify why existing concerns and policies are in place and even required as matters of justice. This may of course be particularly valuable in times of adverse political or economical circumstances.

#### 4.1.1 Conceptual richness in adjudication

As said in the introduction, this chapter also claims that the potential of the Capabilities Approach to solve some of Rawls’ residues bears upon the moral character of adjudication. With the Central Human Capabilities at their disposal as moral background principles of law and adjudication, legislators, policy-makers and judges are conceptually better equipped to prevent that concrete citizens end up ‘below the line’. Judges interpreting and effectuating settled law may draw legal reasons from the Central Human Capabilities to settle a case one way rather than another and on this account the Capabilities Approach has a better chance to successfully support a stabilizing approach to adjudication. Its metric manifests ‘representative adequacy’ to a larger degree. It covers more of the interests that we want to see served in concrete cases in order to protect the value of equal dignity. If judicial decisions accord with this metric, then citizens do have an exhaustive reason to accept the burden of such a decision. They are treated as equals, with equal respect and equal concern. Below I will illustrate how this conceptual richness works out for

adjudication by discussing the legal cases I introduced in the previous chapter, cases in which the precarious position of divorced mothers and of vulnerable consumers on the financial service market are at stake.

*The case of Jamie Muller*

Jamie Muller was the woman who after her divorce worked as a dental assistant and lived with her three children. When her employer, the dentist, asked Jamie to work more hours and on a more flexible basis she refused because of the care that she wanted to provide for her children, including her mentally handicapped son who needed a secure, stable and regular domestic situation. Thereupon she was dismissed. Muller went to court claiming that the dismissal was unreasonable. In court she argued that her employer had not adequately balanced the interests at stake. For the dentist it would have been relatively easy to find a second assistant for the extra hours, whereas she is not able to find another job as dental assistant as her employer was the only dentist in her residential area. She also argued that losing her job would bring her family in a precarious socio-economical position, ending up below the poverty line.

In the previous chapter I pointed out that according to Rawlsian justice, in interpreting the relatively open norm of ‘reasonableness’ the judge is allowed -other things equal- to ignore Muller’s specific situation as a divorced mother, including her limited flexibility and the severe consequences of a dismissal for her and her children. By contrast, if the judge is bound to the Central Human Capabilities as background principles of law and adjudication, he must interpret the applicable law such that, among other things, an adequate threshold level of these capabilities is guaranteed for Muller as well as for her children. Protecting this threshold level will then function as a compelling state interest to constrain the freedom of the employer to determine labour arrangements.<sup>435</sup> For this case this may lead the judge to conclude that the dismissal was in fact unreasonable.

*The case of Bill van Dyck*

Van Dyck was the elderly man of almost eighty who lived a rather isolated life and who after an agreeable conversation with a bank employee signed a contract to borrow money in order to improve the financial situation of his handicapped son. Mister Van Dyck ended up with a debt of € 20.000, because he had to repay the loan with interest to the bank. He went to court and argued that the contract should be declared void because the bank had abused his vulnerable position and violated its duty of care. He had not understood that the contract said that the bank was to invest the credit in stock. Nor had he understood that after the term of the contract had passed he could end up with a serious debt and without any stock.

In the previous chapter I argued that from the viewpoint of Rawls’ principles of justice the judge is justified to interpret the applicable law in a way that ignores Van Dyck’s actual cognitive

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<sup>435</sup> Cf. Nussbaum, *Creating Capabilities: The Human Development Approach*, 207.

limitations<sup>436</sup> and his vulnerability because of his old age and social isolation, as well as the actual consequences of the contract. This because Van Dyck -as has been established- does not belong to the group of "scattered individuals" who lack the minimal moral powers.<sup>437</sup>

By contrast, Nussbaum's justice indicates that the judge is duty bound to use his discretion to specify relevant concepts such as 'average consumer', 'good faith', 'duty of care', or 'abuse of circumstances' with a keen eye for (the protection of) the threshold level of capabilities of the parties involved. In a case like this the protection of the threshold level of the Central Human Capabilities does imply a state-interest to limit the freedom of contract. So, in determining whether the bank abused Van Dyck's situation or complied with its duty of care, the Central Human Capabilities provide the judge reasons of justice to take his actual situation and his limited capacities to affiliate with others and of practical reason into account: these may not be exploited, but rather demand due care. Taking advantage of this client's vulnerabilities would amount to an abuse of circumstances. Also, Nussbaum's justice indicates that the judge should take the consequences of enforcement of the contract into account.<sup>438</sup> These may in any case not be such that Van Dyck will structurally end up below the threshold level of the Central Human Capabilities. Thus, in this case the Central Human Capabilities may well offer the judge a reason of justice to declare the contract void.

#### The case of *Lisa Burroughs*

Lisa Burroughs, age eighteen, was the girl who under the influence of her boyfriend entered a revolving credit contract for a grand total of € 60.000, which was rather excessive relative to their budget. Not surprisingly, soon the couple failed to pay the interest. The couple broke up and in the end -according to the terms of the contract- they were jointly and severally held liable for € 85.000. Thereupon Lisa Burroughs went to court and argued that the bank had violated its

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<sup>436</sup> Of course, in case of severe incapacitation on the part of the consumer Rawls' principles of justice could also indicate the nullification of a contract. But as said, from a Rawlsian perspective this only holds for a limited number of categories of people who, where their legal status is concerned, more generally are assumed to be unable to take care of their own interests.

<sup>437</sup> Cf. Rawls, *A Theory of Justice*, 442-443; ———, *Political Liberalism*, 302.

<sup>438</sup> Cf. Hesselink, Martijn, 'Capacity and Capability in European Contract Law', *European Review of Private Law* 4 (2005), 501. Hesselink has pointed out that judges in using their discretion in fact already effectuate such more substantive notions of social justice, for instance when nullifying what they deem 'unbalanced' contracts. The Capabilities Approach can offer conceptual clarity regarding the relatively inarticulate interpretations of legal standards of 'reasonableness', 'fairness', and to legal categories such as 'own fault' (on the side of the consumer), but also of 'average consumer' that judges use in what comes down to securing a threshold level of the Central Human Capabilities.

duty of care. The bank should have informed her better about the risks of the contract, all the more so in view of her young age, her financial illiteracy and the dominance of her boyfriend at the meetings with the bank employee who had advised the couple.

Again, Rawls' principles of justice allow the judge to interpret the applicable standards while ignoring all said obstacles that Lisa experienced in making valuable use of her freedom of contract. Contrary to this, if we take the Central Human Capabilities as background principles of law and adjudication these obstacles are precisely relevant for justice. In any case the judge is duty bound to take into account her youth, her ignorance in financial matters, her being dominated and the consequences of holding her fully liable according to the terms of the contract. He should weigh these factors in view of the interest of the state to secure the Central Human Capabilities up to an adequate threshold level for Lisa. Thence, the judge may well decide not to enforce the terms of the contract and this would not be an act of unjustified paternalism. Rather, from the viewpoint of the Capabilities Approach it should be seen as a way of treating Lisa as an equal, that is, as a citizen who is both capable and needy.

At the end of the previous section I stated that the conceptual richness of the Capabilities Approach not only bears upon the position of well-defined groups of citizens. Nussbaum's Capabilities Approach aims to get each and every citizen above a threshold level of the Central Human Capabilities and this by implication indicates the availability of decision-making arrangements that address the concrete individual needs of citizens. We pointed out that the Capabilities Approach by means of its list with the Central Human Capabilities can conceptually anchor 'need responsive practices' as they already exist in Western constitutional democracies. It can make these practices more principled and reduce the risk that these practices because of being so much focused on the specific position of concrete citizens will be determined by arbitrary factors. How this added value bears on adjudication we shall see by the discussion of a fresh case.

The case of *Oswald Brinkman*<sup>439</sup>

Oswald Brinkman is in his mid-fifties, he lost his job five years ago because the factory where he worked went bankrupt. Because of his age Oswald has a hard time to find a new job and

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<sup>439</sup> For the construction of this case I took inspiration from: Centrale Raad van Beroep, July 5 2005, ECLI:NL:CRVB:2005: AT9436; Centrale Raad van Beroep, March 29 2005, ECLI:NL:CRVB:2005:AT3483, Centrale Raad van Beroep, May 20 2008, ECLI:NL:CRVB:2008:BD2365.

already for quite some time he lives on welfare. Then his father dies. Oswald lacks the financial means to pay for the funeral and he does not have any siblings. He therefore submits a request for special and incidental financial support at the social welfare agency. The policy of the welfare agency is that this support will only be granted to citizens who are on welfare and who have to make exceptional costs that are necessary for their subsistence, costs that cannot be paid out of their 'regular' welfare support. The decisions of the social welfare agencies in this field of policy are by their very nature highly tailored to the concrete facts of the case. The policy rules therefore allow for quite some room of discretion for the public officials who have to decide about these requests.

In the case of Brinkman the agency refuses the request. It does not consider the costs of the funeral as 'necessary costs'. Brinkman thereupon goes to court and argues that in similar cases citizens have been granted financial assistance, for instance for the costs of the funeral of their children. In an administrative review procedure the judge now has to decide whether the decision is lawful. He has to determine whether the funeral costs of Brinkman's father qualify as 'necessary' costs for subsistence. From a Rawlsian viewpoint such a question -save for the demands of the rule of law- will exclusively be a matter of policy. From a Rawlsian perspective it may well be that the judge as a matter of 'solidarity' or 'humanity' will qualify Brinkman's costs as being covered by the relevant criteria, of course, only if the law allows him to. However, such a decision will be a mere expression of the judge's subjective understanding of the demands of humanity or solidarity. Another judge could well arrive at another conclusion and thus arbitrariness looms.

Nussbaum's Capabilities Approach by contrast does offer the conceptual tools for the judge to make a principled decision. The Central Human Capabilities offer a viewpoint in terms of which the judge can critically assess the considerations that possibly 'naturally' arise out of his sense of humanity and solidarity. On the basis of Nussbaum's list he may come to the conclusion that he has in fact a reason of justice to decide that the costs for a decent funeral for one's father do amount to 'necessary costs for subsistence'. That is, providing for these costs can be seen as a way to secure an adequate threshold level of the capability of affiliation -which includes the possibility of mourning and grieving about loved ones-, one of the architectonic and hence most crucial capabilities on the list. If the judge rejects the request, he will in any case have to motivate why this refusal does not boil down to a violation of the threshold level of said capability and hence to a violation of a basic right of Brinkman. In this way the Central Human Capabilities enhance the intelligibility and the principled character of the decision that the judge has to make.

In brief, through the discussion of some legal cases I have tried to show how the conceptual richness of the Central Human Capabilities bears upon the moral quality of adjudication. As a normative background theory of law and adjudication Nussbaum's principles of justice can prevent some of the moral losses and relatively

arbitrary decisions that occur when Rawls' principles would be used. We could say that because of their conceptual richness the Central Human Capabilities make for a better candidate-final commensurans, at least where the requirement of 'representative adequacy' is concerned. Compared to Rawls' theory of justice, Nussbaum's Capabilities Approach warrants a reliance on legal commensurability to a larger degree and connected to this, also offers more support for a morally reassuring conception of adjudication.

#### 4.2 Relative determinacy

In the previous chapter we saw that the definite content of Rawlsian justice is to a large degree determined by contingent or arbitrary factors, rather than by a moral point of view. This because of the 'thinness' of its concepts, i.e. the primary social goods. Because of this 'thinness' the application of justice will largely depend on the choices of the relevant responsibility bearing agents and institutions in society. These choices may violate citizen's dignity and as such they may lead to residues of justice. The Capabilities Approach can solve some of these residues because its viewpoint of justice is more determinate. The Central Human Capabilities offer more guidance to and put more constraints on the decision-making by the responsibility bearing institutions, because they are 'thicker' than Rawls' primary social goods.<sup>440</sup> As they are to a larger degree laden with factual content, these value concepts have a stronger 'internal' relation to a wide range of situations in the world: once certain factual conditions are fulfilled, this more or less directly invokes certain reasons of justice. Hence, these concepts of justice leave less room for 'discretion' or 'freedom' on the part of agents who bear responsibility to realize justice. The establishment of facts and valuation are interdependent activities.<sup>441</sup>

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<sup>440</sup> Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 280. In chapter eight I will delve deeper into the features of 'thick value concepts'. Note that the relative 'thickness' of the Central Human Capabilities is a direct result of the narrative or 'internal realistic' method that Nussbaum deployed in developing her viewpoint of justice. As we saw above, these capabilities are to be taken as the discursive expression or as the articulation of concerns that concrete human beings actually experience in their daily lives throughout history and across different cultures.

<sup>441</sup> Putnam, Hilary, *The Collapse of the Fact/Value Dichotomy and Other Essays* (Cambridge, US: Harvard University Press, 2002), 62-63.

For instance, one of the Central Human Capabilities on the list is that of play. This concept suggests a relatively well-confined constellation of facts. No extensive reflection is needed to more or less directly know whether this capability is present, in peril or absent. Of course we may have doubts and disagreements at some points, but if we do, we generally need to take a closer look rather than simply determine our own stance on the matter and use discretion.

What is more, once we have recognized a situation in which for instance a child is unable to play, we do not need separate arguments for the assertion that this particular state of affairs is disturbing.<sup>442</sup> The evaluation accompanies the discernment of the ‘fact’, so to say. John Alexander has made this point about the Central Human Capabilities in a slightly different way: “when one invokes them in public discourse and tries to justify them, one has to necessarily assume a certain evaluative point of view.”<sup>443</sup>

Note that this ‘relative determinacy argument’ is far from suggesting that when applied to society the Central Human Capabilities point to one single or well-defined range of specifications. The account of justice that Nussbaum proposes is realizable in multifarious ways. As Nussbaum puts it, it can “be more concretely specified in accordance with local beliefs and circumstances. It is thus designed to leave room for a reasonable pluralism in its specification.”<sup>444</sup>

To further support the ‘relative determinacy’ argument, I will discuss how the Central Human Capabilities, to a larger degree than Rawls’ principles of justice, constrain the workings of criminal justice, in particular the institution of punishment.<sup>445</sup> In the

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<sup>442</sup> For this reason it has also been argued that democratic institutions will (naturally) address the concerns that are on the list because it is likely that citizens will recognize the concerns that Nussbaum designates on the list. Cf. Anderson, ‘Justifying the Capabilities Approach to Justice’, 95.

<sup>443</sup> Alexander, *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum*, 133.

<sup>444</sup> Nussbaum, *Women and Human Development. The Capabilities Approach*, 77.

<sup>445</sup> Similar to Rawls, Nussbaum herself hardly discusses the institution of punishment or that of criminal law in general, at least not within the context of the Capabilities Approach. — —, *Creating Capabilities: The Human Development Approach*, 104; Dixon and Nussbaum, ‘Children’s Rights and a Capabilities Approach. The Question of Special Priority’, 572-573. See for a more elaborate discussion of Nussbaum’s views on criminal law: Nussbaum, Martha

previous chapter we saw that because of their ‘thinness’ Rawls’ principles of justice offer little guidance in this regard and that this may lead to residues of justice, situations in which citizens’ dignity is compromised. Because of its relative determinacy Nussbaum’s viewpoint of justice can prevent such situations to occur.<sup>446</sup> For one thing, if a system of criminal justice is to comply with justice, then according to the Capabilities Approach the criteria for criminal liability must take into account the extent to which a defendant has an adequate threshold level of the capabilities on the list.

For this assessment the capabilities of practical reason and affiliation are the keys, as they pervade all other capabilities. Both capabilities have substantial factual content. As to affiliation: this capability at least implies that citizens "have the capability for both justice and friendship" and according to Nussbaum protecting this capability "means protecting institutions that constitute and nourish such forms of affiliation [...]."<sup>447</sup> If a defendant has not realized these capabilities up to the threshold level, his criminal behaviour must at least also be seen as a possible indication that society has failed to provide him sufficient care. In any case it will be a potential ground to mitigate the repressive and retributive response and also to provide the defendant with due support and concern. As Nussbaum has put it, in these situations defendants must at least also be seen as “inhabitants of a complex web of circumstances, circumstances which often, in their totality, justify mitigation of blame or punishment.”<sup>448</sup>

The same goes for practical reason, i.e. “the ability to form a conception of the good and to engage in critical reflection of one’s life.”<sup>449</sup> If a defendant does not have this capability up to an adequate threshold level, justice indicates that criminal responsibility should be mitigated or must even be excluded. From the viewpoint of the Capabilities Approach, holding citizens fully responsible for their deeds only

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C., 'Equity and Mercy', *Philosophy & Public Affairs* 22, 2 (1993).

<sup>446</sup> Similar to Rawls’ Justice as Fairness, the Central Human Capabilities offer a -albeit weak- justification for the institution of punishment in so far it can be said to protect citizens from violence and physical assault by their fellow citizens.

<sup>447</sup> Nussbaum, *Women and Human Development. The Capabilities Approach*, 79.

<sup>448</sup> ———, 'Equity and Mercy', 110-111.

<sup>449</sup> ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 77.

makes sense if they have at least had the opportunity to make meaningful choices in the areas of life as they are described on the list.

Next, the Central Human Capabilities invoke a range of considerations that constrain the kinds of punishment and measures that justice allows. These constraints are such that offenders will not (structurally) end up below a threshold level of one of the capabilities on the list. A criminal system can therefore only be just if it also takes into account the empirical information that is needed to assess whether this is the case. Penal law from the viewpoint of the Capabilities Approach have to arrive at a delicate equilibrium. On the one hand it must protect citizens against harmful behaviour by their fellow citizens that threatens capabilities. On the other hand it must secure that 'wrongdoers' who have not been provided the necessary conditions for the threshold level of the Central Human Capabilities will not further deteriorate regarding these capabilities and preferably get them to or above threshold level. Also, it must ensure that punishment itself does not push them below a threshold level of one of the capabilities. Whatever the actual outcome is, the Capabilities Approach provides for a range of reasons of justice that inform the decision-making of responsibility bearing institutions and officials in the domain of criminal justice. Again, as was the case in the conceptual richness argument: in so far the considerations of justice that the Capabilities Approach generates are already present and felt in society, they can be anchored and supported by the articulation that is offered by the list. In fact, precisely because of their thickness, the Central Human Capabilities are likely to have explanatory force for a range of prominent concerns that figure in society. Here also the offering of explicit anchor points can be useful in times of political and socio-economical upheaval, as these concerns may be blurred in the political turmoil.

#### 4.2.1 Relative determinacy in adjudication

The relative determinacy of the Central Human Capabilities and their potential to reduce residues of justice also bear on the moral character of adjudication.

Adjudication will be more directly guided and constrained by justice so that citizens' concrete legal rights and duties will depend less on arbitrary factors and substantive outcomes that fit the value of equal dignity will be more likely to be secured. Once more I will illustrate this by a brief discussion of the legal cases that were already introduced in the context of the under-determinacy argument in the previous chapter.

The case of *John Gadget*

John Gadget was the man who due to a grave accident suffered from a posttraumatic frontal brain syndrome with epilepsy. Gadget lost his job, his wife and eventually ended on the street, drinking beer all day and causing nuisance to the neighbourhood. Gadget was verbally aggressive and regularly burgled cars. After being arrested by the police, he was prosecuted in accord with the legal regime for 'repeat petty offenders' that made it possible to sentence him to a substantially longer term than the crime in itself would allow.

In the previous chapter I argued that Rawls' principles of justice hardly guide the judge in deciding whether or not John should be sentenced as a 'repeat petty offender' and to a relatively long term of imprisonment. These principles will for instance not inform him how to weigh the (in)adequate care John received and the (detrimental) effects of imprisonment on his already precarious mental state.

Adversely, because of the determinacy of the Central Human Capabilities a judge will have a range of reasons of justice to take into account in this case, reasons that can in fact channel his decision-making. All kinds of facts, such as his homelessness, lack of social ties and both physical and emotional handicaps invoke considerations of justice. That is, these facts indicate that in this case the threshold level of a range of Central Human Capabilities is at stake.

Without adequate care, 'naked imprisonment' can for instance be genuinely harmful for John's capabilities. The judge should therefore as a matter of justice use his leeway to take into account that imprisonment may seriously endanger John's mental health. From the viewpoint of the Capabilities Approach John's interest in getting adequate care will override the importance of protecting other citizens from the nuisance he causes, not in the least because the threshold level of the Central Capabilities of other citizens is most likely not involved.

The case of *Melvin Bates*.

Melvin was the adolescent who was severely neglected and abused as a child. He lived on the streets committing all kinds of crimes until he was put in a residential school for male juvenile delinquents. This school was notorious for its extremely severe disciplinary regime. Directly after leaving this school Melvin started to rob supermarkets and casinos as a way to make a living. Melvin did not have any professional qualification and it was clear that he was not used to dealing with real life situations in a normal way. This was also expressed in the crimes Melvin committed: during the robberies he used extreme violence, assaulting employees and customers and threatening them with a gun.

In the previous chapter it was shown that from a Rawlsian point of view the judge has considerable leeway to decide whether to try Melvin under adolescent penal law or adult penal law. Indeed, the law prescribes that in case of a delinquent between the ages of sixteen and

eighteen, the judge may apply adult penal law if the personality of the defendant, the concrete circumstances of the crime or the severity of the crime demands it.<sup>450</sup>

What weight to assign to Melvin's rather extreme crime-inducing background and the neglect and abuse he suffered in his childhood? What weight to assign to the violent character of his deeds, to the fact that he has no job or vocational qualification and to his lack of social and emotional capacities? Rawls' principles of justice hardly inform or constrain the judge in answering these questions.

Nussbaum's Central Human Capabilities by contrast do invoke various concerns of justice that the judge must try to honour. From the perspective of these principles the judge must on the one hand see to it that citizens are protected against Melvin's violent personality as their right to physical integrity and control over their environment is at stake. On the other hand, the facts characterizing this case straightforwardly point to Melvin's legitimate claims to care and help and the judge's duty to honour these. The facts concerning Melvin, dismal, gloomy and depressing as they may be, are no reasons to abstain from efforts to socialize and educate him: important goals of juvenile penal law.<sup>451</sup> Even though the physical integrity of his fellow-citizens is at stake, according to the Capabilities Approach the judge may not 'give up' on Melvin, but rather is duty-bound to sentence so that he advances Melvin's chances of developing his capabilities up to the threshold level of functioning.<sup>452</sup>

Of course, the 'determinacy' argument is emphatically not limited to concrete legal cases in the domain of criminal law. The relative determinacy of the Central Human Capabilities potentially bears upon cases in all legal domains, none excluded. Rawls' primary goods are too indeterminate to actually function as a commensurans for a whole range of decisions: they cannot guide the reasoning of the judge (and that of policymakers and legislators). Therefore they allow incomplete and biased discretionary reasoning, also in domains where this is most problematic from the viewpoint of equal dignity.

## **5 Conclusion**

This chapter argued that Nussbaum's Capabilities Approach offers more support for a stabilizing approach to adjudication than does Rawls' theory of justice. The main reason for this is that the conception of the person on which Nussbaum's theory hinges is to a larger degree empirically loaded. Nussbaum's theory seeks to give

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<sup>450</sup> Cf. Article 77b Criminal Code (Wetboek van Strafrecht).

<sup>451</sup> Dixon and Nussbaum, 'Children's Rights and a Capabilities Approach. The Question of Special Priority', 587.

<sup>452</sup> Ibid.

citizens, conceived of as dependent, needy and capable creatures, a life in accord with their dignity. As a consequence the viewpoint of justice she proposes to realize this goal accommodates for and is sensitive to all kinds of empirical knowledge in determining the legitimate claims of citizens. Because of being empirically laden, justice as Nussbaum sees it is not only conceptually richer; it is also more determinate, providing more guidance to the responsibility bearing institutions. Due to this Nussbaum's justice can solve some of the residues of justice that Rawls' conception of justice allows and this residues-solving potential bears upon the moral character of adjudication. To put it in the terms of a stabilizing approach to adjudication: the list with the Central Human Capabilities fits the criteria of a final commensurans better. This viewpoint has more representative adequacy for the actual interests that are at stake in legal cases and it is more determinate and as such has more action-guiding force for the judge than Rawls' principles. If judges as part of their professional responsibility use Nussbaum's list as a background theory of law and adjudication, their decisions will, at least from the viewpoint of equal dignity as both Rawls and Nussbaum understand it, be less likely to be arbitrary and cause moral loss. This of course adds to adjudication's morally reassuring character.