The problem of selecting capabilities: Nussbaum's philosophical road to democracy

Hugo Rajão[1,2]

Introduction

The Capability Approach is a conceptual framework which can be applied to a wide range of different purposes such as the assessment of quality of life, the design of public policies, the construction of theories of justice, etc. For all these purposes the focus is on what people are really able to do and to be, and "what people are really able to do and to be" should be understood in terms of capabilities and functionings. The Capability Approach is presented by its proponents as superior to other alternatives, such as Resource-based or Utility-based approaches. In short, functionings include all states and activities (beings and doings) that a person can undertake throughout life – such as being well-nourished, travelling, etc. – whereas capabilities are the person's effective, real, or substantive, opportunities – therefore, not only formal – to achieve those functionings. So, for example, if being-nourished is a functioning, the real opportunity to be well-nourished is the corresponding capability.

Although capabilitarian theorists agree with the centrality of these concepts, within their respective theories, the same cannot be said regarding the specification of the most important capabilities and functionings. Due to the

value neutrality of the concepts of capability and functioning, such specification is crucial. As mere states and activities, not all functionings seem to have the same importance, so it becomes necessary to distinguish those that are more relevant ones from the others, according to the particular purpose at stake. However, rather than a disagreement about content – that is, about the particular capabilities that each theorist considers to be the most important – the disagreement lies mainly in how the selection process should occur. This debate can be divided into two opposing positions. On the one hand, some authors, such as Martha Nussbaum and Rutger Claassen, argue that, in order to solve the problem of capability value neutrality, selection is a task for philosophers, at the theoretical level – what Claassen calls the *philosophical position*. On the other hand, authors such as Amartya Sen, argue, both for epistemological and political reasons that will be made explicit later, that the selection should not rely on philosophers, but should be left to the democratic process instead – what Claassen calls the *democratic position*. Beyond this dichotomy, Morten Byskov introduces a new research agenda that seeks to find not only a mutually exclusive relationship, but a reconciling one between these two positions Byskov proposes a mixed, or multi-staged, selection method. More precisely what he calls a synthesizing method by which, as the name implies, the main goal is to synthesize the best of both positions.

The most prominent philosopher upholding the *philosophical position* is probably Martha Nussbaum. The author proposes a universal list of ten capabilities, which set out to embody what is required to live a life with the minimum requirements for human dignity. The list is intended to address the twofold purpose of serving as a criterion for assessing quality of life, and as a metric for a theory of justice in which the capabilities on the list should be seen as a set of constitutional entitlements that societies ought to protect and promote. In this article I attempt to assess Nussbaum's epistemological legitimacy to select the above-mentioned list, through the analysis of its underlying theoretical groundings. I conclude that it is not possible to derive this, or probably any other capability list, from the theoretical groundings on which Nussbaum's list is supposedly based, that is, the concept of human dignity. Conversely, the concept of dignity allows rather than justifies a truly democratic process to select a list of capabilities, in which all the people involved are, as far as possible,

in equal conditions to decide. It should be noted that the proposal presented in this article is not in opposition to Nussbaum's theory, but rather an attempt to offer a new interpretation of it, based on the normative groundings of her theory, in order to address some of its theoretical problems. The interpretation presented here brings Nussbaum's theory closer to the project of mutual reinforcement between philosophy and democracy sought by Byskov. In order to demonstrate it, at the end of this article, I try to exemplify how the list proposed by Nussbaum might, hypothetically, fit into a synthesizing selection method, as suggested by Byskov.

This analysis, and its inherent line of argument, occupies the fourth section. Before that, with the intent of framing the analysis in the ongoing debate around the problem of selecting capabilities, I present an overview of the opposing arguments. In the second section, I summarize the central objections to the *philosophical position*. In the third section, I explain the recent contributions to the debate from Claassen, who argues, in the opposite direction, in favour of the *philosophical position* at the expense of the *democratic position*, and from Byskov, who, in turn, seeks a new research agenda, which should, as mentioned, result in the adoption of a selection method that synthesizes the best of both positions.

The Legitimacy of Capability Selection: philosopher versus public process

As I have pointed out, what the capabilitarian theorists have in common is the recognition of capabilities and functionings as central concepts of their respective theories as the most suitable evaluative criteria. That is, the criteria on which personal and interpersonal assessments should be based. Nevertheless, these theorists do not necessarily agree on the selection of the specific capabilities and functionings that really matter.

The relevance of the selection comes mainly from the value neutrality of the core concepts at stake. Capabilities are defined as the real opportunities to achieve certain functionings, while the concept of functioning covers each and every state or activity which might be carried out, whether it is good, bad, or just trivial. If being well nourished, housed and walking the street in safety are functionings, the same could be said about being malnourished, killing, or

snapping one's fingers. Consequently, the applicability of capabilities and functionings for any purpose demands a specification of the most important ones.

Martha Nussbaum criticizes Amartya Sen precisely because of the lack of specification of his theory. Sen argues that personal and interpersonal comparisons should be made in terms of capabilities and functionings. In other words, he identifies the allegedly most appropriate evaluative criteria. However, he refuses to advance a specific list of the most valuable capabilities. Nussbaum considers this refusal to be insufficient. Due to the value neutrality of the concepts, it becomes impossible to build a conception of justice and to evaluate the performance of societies, if the specific elements that make up that conception's metric are not known (NUSSBAUM, 2003, p. 44-47). Thus, Nussbaum proposes a list composed of what she considers to be the most central capabilities for all human beings (NUSSBAUM, 2011, p. 33-34).

In his own defense, Sen (2004, 2005) claims to not be, on principle, against the formulation of capability lists. However, such lists should meet two requirements. On the one hand, they just be sensitive to the context in question, which is variable. On the other, lists must be the outcome of an exercise of democratic participation by the people affected by them – in the realm of public discussion and public reasoning. Sen considers it impossible to satisfy these two requirements with a list, such as Nussbaum's: single and universal – covering all possible and imaginary contexts; fixed – immutable, regardless of the volatility of circumstances; and determined by one or more theorists, regardless of what people affected by it think and value. Thus, Sen has changed the terms of debate. The question of "what to select" is preceded by a more fundamental one on which the latter relies: that is, "how to select". It is precisely this question – "how to select" – that will be addressed in this article.

Trying to answer this question, Sen pointed out various limits, both epistemological (the sensitivity to context) and political (the philosopher's authority to choose) to the justification of a list totally built in the philosophical sphere, such as Nussbaum's. These limits, which can be labelled respectively as epistemological and political objections, have been further developed in a more sophisticated way by Ingrid Robeyns (2003, 2005). According to Robeyns, there are three reasons, two epistemological and the third political, that limit the philosopher legitimacy to select a list of capabilities.

The first epistemological reason, also mentioned by Sen, concerns the purpose/context of the theory. The Capability Approach might be applied to a wide range of theories with different purposes, and each purpose requires a distinct selection. Therefore, a single list does not cover all objectives.

The second reason regards what it is possible to know. The world is wide, diverse and heterogeneous. Different societies have different features. People within societies have plural views among themselves, that together shape the kind of life each person wants to live. Moreover, almost nothing appears to be immutable – circumstances and personal convictions are subject to change. So, it seems to be epistemologically impossible for a single person, such as a philosopher, to know all the facts, to foresee any possible changes, and to summarize the most relevant dimensions into a single list. Furthermore, despite the extensive knowledge she may have, and the sensitivity she may have to the dialogue and the testimonies of others, the philosopher's position is always partial. It results from her own subjective interpretation of the facts, conditioned also by her own experience, references, values and motivations – intellectual bias. Therefore, the list will always lack universal objectivity.

Finally, although not dissociated from the previous points, the third reason refers to political legitimacy. By gathering all the authority for herself, excluding the decision of the people to whom the list is applied directly, the philosopher bypasses the democratic sphere. Consequently, the list that results from it is politically illegitimate.

However, Robeyns stresses that simply delivering the task of selection to the public sphere, as Sen proposed, may not be enough to ensure the fairness of the process. Public choice is, of itself, also vulnerable to arbitrariness and to epistemological and political bias. For instance, it does not prevent some individuals from imposing greater authority over others, becoming more influential in decision making; nor does it prevent the information needed, for a good deliberation, from being incomplete and asymmetrically available among participants, etc. This is one of the reasons why some philosophers, like Nussbaum, assign themselves the task of selecting capabilities. Due to their expertise, the philosopher would work as a normative and epistemological check against abuse of authority and the influence of ill-informed judgments, namely adapted preferences. This occurs when, after a prolonged state of discrimination,

the afflicted people internalize that condition as normal, conditioning their choices. However, as I have tried to show, the philosopher's authority is subject to similar objections.

It thus becomes necessary to identify a method of selection effective enough to neutralize the potentially arbitrary factors to which a public selection process is prone. Such a method would guarantee a truly democratic choice, where everyone's interests are fairly represented and an informed choice, through which everyone has access to the relevant information. What method is capable of satisfying these requirements? I do not intend, at least for now, to propose a particular answer to this question. Several proposals have been presented in the Capability Approach literature, each of which deserves a more detailed analysis. For example: Robeyns (2003, 2005) sets forth a method based on five criteria for capability selection; Sabina Alkire (2002) defends a participatory method; David Crocker (2008) proposes a method based on democratic deliberation; Polly Vizard (2007) and Tania Burchardt (BURCHARDT; VIZARD, 2011) recommend a hybrid between a core list of capabilities derived from international human rights literature, supplemented by democratic deliberation. Jonathan Wolff and Avner De-Shalit (2007) formulate a modified version of Nussbaum's list which results from the submission of the original version to the opinion of the disadvantaged people, through a succession of interviews carried out by them; etc[3].

To sum up, the debate about the problem of selecting capabilities has proceeded as follows. On one side, due to the value neutrality of capability and functioning concepts, authors like Nussbaum support the need to specify a list of the most relevant capabilities. One the other side, authors such as Sen, even though agreeing with the need for specification, challenge the univocal and universal character of such a list, for the epistemological and political reasons mentioned, and the legitimacy of the philosopher to generate it. In this sense, they understand that capability selection must be the result of a democratic and context-based process, instead. Nevertheless, according to Robeyns, in order that the democratic process does not become permeable to arbitrariness, it is essential to make explicit the set of rules that must be respected. This problem

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3   For a global summary of the various selection methods present in the Capability Approach literature, cf. Byskov (2018).

leads some authors to propose several methods, some of which were mentioned in the previous paragraph, to assure an adequate public selection process.

Claassen and Byskov: philosophical position and democratic position, two positions in dispute or in mutual reinforcement?

More recently, the debate around the problem of capability selection has gained new perspectives with contributions from Rutger Claassen (2011) and Morten F. Byskov (2015, 2018). Claassen conceptually reshapes the division in dispute, outlined in the previous section. The side represented by Sen, by which the selection of capabilities should be left to a democratic process, is described as the *democratic position*. Inversely, the side supported by Nussbaum, in which the selection task belongs to the theoretical sphere, is called the *philosophical position*.

Claassen stands in favor of the *philosophical position*[4]. In order to justify it, he follows a line of argument divided into two steps. On the one hand, challenging the supposed "purity" of the *democratic position*, in the sense that it relies on a set of philosophical choices, taken on strictly theoretical lines.

As I pointed out in the previous section, simply delivering the task of selecting capabilities to the public space could not suffice to guarantee the fairness of the process. Therefore, different selection methods have been proposed by *democratic position* theorists, that establish terms in accordance with the public selection process, which must unfold, to ensure proper democratic choices. So, each of these methods reflects, respectively, a specific theory of democracy, fully developed at the strict theoretical level, on which the democratic selection process is shaped.

For Claassen this is problematic because each of these theories of democracy probably implies, as a prerequisite, a substantive capability list. Let me explain. For the democratic selection process to be truly democratic, according to the underlying theory of democracy, participating decision-makers must stand equal in respect to each other. However, how do we measure this "equality"? Considering that *democratic position* proponents are capabilitarian theorists, it would not make sense to understand "equality" in any other way than in terms of capabilities and functionings. Therefore, a theory

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4   Claassen does not defend Nussbaum's theory/list, nor any particular one, but the philosophical legitimacy, in general of building a list of capabilities.

of democracy presupposes equality, at least at a minimum level between all participants, of a certain set of capabilities, before public selection, at least, those strictly necessary to enable a democratic exercise with equal conditions (BOHMAN, 1997). For instance: information access; critical reasoning; strong cognitive faculties; physical safety, etc.

These lead proponents of the *democratic position* to face what Claassen calls a "democratic dilemma". They must rely on a theory of democracy, in order to guarantee the fairness of the democratic process, which includes a substantive list of capabilities, developed at the theoretical level. But this is exactly what they have been trying to avoid, as they argue that capabilities should only be selected though the democratic process they intend to establish, and not theoretically. Otherwise, they must choose to reject a previous list of capabilities as a prerequisite for a theory of justice. In the first case the *democratic position* would be circular: the selection of capabilities is only legitimized if it results from a democratic process, but the legitimacy of the democratic process depends on a set of capabilities previously selected, at the theoretical level, to that process. In the second example, the *democratic position* is revealed to be contradictory: on the one hand, its theorists claim to be capabilitarian, but on the other hand they reject capabilities and functionings as part of a theory of democracy.

Thus, this apparent inability of the *democratic position* to escape the "democratic dilemma" strengthens the *philosophical position*. The ultimate choices fall on the philosopher, at the theoretical level.

On the other hand, he seeks to defeat the political and epistemological objections addressed against the philosophical position by proponents of the democratic position, through the introduction of the characters of the philosopher-citizen and the philosopher-investigator. Claassen does not disagree with the first epistemological objection that each specific context/purpose demands a different selection of capabilities, so that no single list can satisfy all contexts/purposes simultaneously. Instead, he argues that this impossibility does not imply that the best list for each purpose could not be identified by the philosopher. Instead of a single universal list, there could be several universal lists, each one corresponding to each of the contexts/purposes at stake.

Concerning the political objection, in Claassen's view, when he proposes that the *philosophical position* bypasses the democratic sphere, he believes

that *democratic position* theorists misunderstand, from square one, the relation between the theoretical level and the practical one. Namely, they misconceive the role of the philosopher as an authentic *philosopher-king*. From this point of view, the legitimacy of implementation – the practice – would derive directly and exclusively from the concept of truth – the theory – claimed by the philosopher. Nevertheless, Claassen states that most proponents of the *philosophical position* do not interpret the philosopher as a *philosopher-king* but rather understand her as a *philosopher-citizen*. The *philosopher-citizen* provides her theory as an input, among many others, to the democratic process, hoping that it will persuade its participants to accept it. So, unlike the *philosopher-king*, the latter acknowledges that the legitimacy of implementing in practice any idea, whatever it might be, stems not from its eventual theoretical merits but from people's choices, made within a genuinely democratic environment.

Finally, in tackling the second epistemological objection, regarding the limits of the philosopher's knowledge, Claassen introduces the *philosopher-investigator*, who is a subspecies of the *philosopher-citizen*. The *philosopher-investigator* acknowledges that the information that can be obtained from solitary philosophical exercises is likely to be quite limited. Accordingly, in formulating a list of capabilities, she seeks to offset her own knowledge limitations with empirical data collected from the real world and from other people: statistical data; reports; discussions, etc.

Byskov (2015), in turn, thinks that this dichotomy – the *philosophical position* versus the *democratic position* – is too narrow to explore the problem of capability selection. Despite agreeing with Claassen that there is no "pure" *democratic position*, Byskov notes that the solution to this problem lies in abandoning this dichotomy. Looking carefully, it can be seen that the virtues of one position correspond to the shortcomings of the other and vice versa.

Hence, instead of two mutually exclusive positions, they should be seen as mutually intertwined. A public process increases the epistemological and political legitimacy of the selection, but it does not alone guarantee immunity against malformed and adapted preferences, or power abuse in the absence of an external normative basis. Conversely, the philosophical theorization may offer the missing normative base for selection, but it lacks the epistemological and political legitimacy only conferred by the public sphere.

Thus, Byskov (2015, p. 11-13) proposes a new research agenda, in order to figure out mechanisms for mutual reinforcement between philosophy and democracy. This new research agenda bore its first fruit in a subsequent Byskov article (2018). Byskov concludes that the best way to reconcile the virtues of the philosophical position and the democratic position is to select capabilities through a mixed method[5]. By "mixed" he means a hybrid between the purely philosophical method of selection and the purely democratic one.

This mixed method would be comprised of at least three stages. *(i)* The first stage would concern the philosophical method, in compliance with the *philosophical position* (*foundational method*). Thus, this stage would be characterized by a movement away from practice to theory. *(ii)* In contrast, the second stage would consist of movement from theory to practice. In accordance with the *democratic position*, in this stage the decision is laid in the hands of the public. The theory/list developed in the first stage is now delivered to the public space for reflection, where it may be criticized, tailored to the context, or simply rejected (*procedural method*). From both these stages, would result, respectively, two lists with potentially some different features.

How would eventual conflicts between these two lists be handled? Byskov holds that the philosophical and democratic methods must not only be mixed but also synthesized. Under his *synthesizing method*, both stages are ascribed equal priority and communicate through a dialectical and ongoing dialogue between one another. Although this dialectic dialogue may be pervasive to all stages, the synthesis mainly concerns the third. *(iii)* At this stage, the respective outcomes of the preceding stages are compared, analyzed, and critically discussed, with the aim of reaching a consensus list.

For Byskov, this method serves two purposes: on the one hand, to allow democratic exercise to inform the normative theory, developed by the philosopher; on the other, to provide the public space with a critical view of the outcome of the democratic process, through the normative theory produced by the political philosopher. Thereby, the shortcomings assigned to the philosophical position would be offset by the virtues attributed to the democratic position and vice versa. Although this would therefore be the best method for selecting capabilities, the method is not perfect. The conflicts between the first

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5   Byskov is particularly interested in the selection of capabilities related to human development purposes.

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two stages may be difficult, or even impossible, to overcome. That is, Bykov's effort to reach synthesis between them. may face the problem of indeterminacy in two ways. Firstly, he points out that disagreement is inherent to politics. Small consensus and compromises that can be accomplished at a given moment, even when they are non-ideal solutions, are important. Secondly, nothing invalidates current disagreements from turning up in agreements in the future. This is a continuous method, so the non-ideal list of capabilities stemming from it should be subject to permanent scrutiny and re-evaluation, through ongoing repetition of the three stages. I will come back to this topic in the next section.

Martha Nussbaum: the philosophical road to democracy

As stated before, Martha Nussbaum is probably the principal representative of what Claassen calls the *philosophical position*. To recapitulate, Nussbaum proposes a universal list comprising the capabilities she believes to be the most important, according to the intuitive idea of a life worthy of human dignity. This list encompasses: 1. Life; 2. Bodily health, 3. Bodily integrity; 4. Senses, imagination and thought; 5. Emotions; 6. Practical reason; 7. Affiliation; 8. Other species; 9. Play; 10. Control over one's environment (NUSSBAUM, 2011, p. 33-34). In this section – accepting Claassen's thesis that any method of selecting capabilities, be it closer to the *philosophical position* or to the *democratic* one, always relies on a set of philosophical choices – I intend to scrutinize precisely Nussbaum's philosophical choices. That is, my aim is to assess whether her list of capabilities can be epistemologically justified or not in light of the theoretical groundings underlying it, overcoming the two epistemological objections, mainly the second, mentioned previously. In other words, I seek to understand to what extent it is possible to derive the capabilities that mirror a minimally dignified life from Nussbaum's concept of dignity. More precisely, I explore whether these properties coincide effectively with the capabilities of the list presented[6].

My conclusion is negative. According to the concept of dignity which has been adopted there is no way to dissociate the idea of what a life worthy of

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6   It should be noted that this consists mainly in an internal analysis of Nussbaum's theory. What I intend to do here is to try to understand whether the acceptance of the "premises" of the theory – that is, its theoretical groundings – forces the acceptance of the list of capabilities, as its "conclusion".

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the value of human dignity is from what each and every affected person thinks that kind of life is. Thus, from this concept of dignity it is only possible to derive a democratic process of capability selection, in which everyone, affected by it, is on an equal footing regarding the decision. Therefore, Nussbaum's list results from a theoretical extrapolation, whose justification is lacking. This reinterpretation of Nussbaum's theory brings it closer to the new agenda of mutual reinforcement between philosophy and democracy, proposed by Byskov, since the democratic process of selection turns out to be the logical consequence of her own philosophical choices.

How could Nussbaum deal with the objections presented in the previous sections?

Concerning the first epistemological objection, by which each purpose requires a different list, Claassen's answer seems to be quite satisfactory. Although it is implausible to meet each and every purpose through the same single list, this does not mean that the most suitable single list for each of them cannot be found.

However, Nussbaum's list points not to a single purpose but to a twofold one: to specify a space of comparative quality-of-life assessment; and to constitute a metric for a theory of justice (NUSSBAUM, 2011, p. 18-19). Can both purposes be fulfilled by the same list? The answer lies in the way the author conceives justice. For Nussbaum, a society is not minimally fair until all its members, taken one by one, without exception, are effectively able to live a life at a minimal level of human dignity. That is, a life in accordance with the worth of human dignity, inherent to each one. So, the *telos* – ultimate end – of justice is, above all, to promote the level of life that people have access to, up to at least, a minimal threshold below which there is no dignified life any longer.

That said, the design of a metric of justice is dependent on a previously devised notion of quality of life. Only from the latter is it possible to define what a dignified life is and comparatively assess the position that people live in relation to it. But how does it define a dignified life? First of all, using Nussbaum's view, the concepts directly reflect, in comparison with the alternatives (resources, for example), what people are really able to do and to be, a dignified life must be defined in terms of functionings and capabilities. However, as has been clear so far, due to the value-neutrality of these concepts, this, by itself, is not

enough. So, it is crucial to identify those capabilities that exclusively matter, regarding the value of dignity stated. This is exactly what Nussbaum aims for with the list proposal. Therefore, turning to the initial question, the set of elements, in this case, that make up the metric of justice, coincide with the ones that embody a notion of quality of life, based on the concept of human dignity. So, in answering, a single list may cover both purposes at stake simultaneously.

A different question is whether the specific list put forward by Nussbaum is indeed the most suitable one to carry out the task. This leads to the second epistemological objection. How can Nussbaum gain all the knowledge required to define what a life worthy of human dignity is, and summarize it in a single list, valid for all people in all circumstances?

At least from the book *Women and human development: the capabilities approach*, Nussbaum (2000) embraces an intuitive notion of human dignity. The latter has three main features. Firstly, it is based on Kantian principles, under which each person must be considered as an end in him/herself – *each person as an end.* Secondly, it is inspired by the philosophies of Aristotle and Marx, against Kant, with regard to the scope of human dignity. Thirdly, this notion is, in Nussbaum's view, embedded in the political liberalism tradition.

So, what can be deducted from this notion of dignity? Under the principle *each person as an end*, each person, only in virtue of his/her own humanity, must be seen as an end in themselves, and not merely a means in favor of the ends of the others. In other words, each one, without exception, is bearer, by him/herself, of intrinsic and unconditional worth, and not exclusively instrumental.

So, each person, individually considered, constitutes the ultimate unit of moral concern. That is, any normative exercise, such as the fairness assessment of a society, depends only and solely on how people, taken one by one, are affected. This intrinsic worth, for Nussbaum, exhorts society's duty to treat people according to it. More concretely, the duty to respect, protect and provide to each one the appropriate conditions so that he/she is able to live a life minimally as an end in him/herself.

However, although the principle relates to Kantian ethics, Nussbaum disagrees with Kant, and with the contractualist tradition he inspired, with regard to the scope of human dignity. That is, for Nussbaum (2003, 2011, p.

84-89), what makes people bearers of dignity is not the fact that they would have a pure reason, separated from the natural world and, therefore, immune to the various contingencies, which would put them always ready to exercise with "normality" their physical and mental faculties, as fully equal, free, and independent persons. Rather, for Nussbaum (2011, p. 23-25), inspired by Aristotelian and Marxist philosophies, the human dignity relies on the human's potential innates powers (which Nussbaum calls "basic capabilities"), physical and mental, which could be fully developed if properly protected and nurtured. On the one hand, in virtue of human diversity, these innate powers could be asymmetric between people. The development of those powers may require different bundles of means for each person. On the other hand, the "means" necessary t, may involve not only legal protection, but also social, material, and environmental adequate conditions (NUSSBAUM, 2011, p. 21). Moreover, the development and protection of those innate powers implies relations of dependence between people. These are particularly evident in the early stages of childhood and old age, which contrasts with the self-sufficient character of the Kantian canon.

So, Nussbaum does not reduce these "appropriate conditions", which society has the duty to provide to each one to be able to live a life as an end in oneself, in respect of a set of formal rights, in order to protect the supposedly normal working of human faculties. Rather, she understands that society has an obligation to furnish the substantive means that guarantee that people's innate powers are able to flourish, and, therefore, that such a life can effectively be carried out. That is, defines these "appropriate conditions" in terms of capabilities – as reflect of *what people are able to do and to be* – which leads to the interpretation of the principle of *each person as an end* as the principle of *each person's capability* (NUSSBAUM, 2000, p. 4-5). What does life, according to this principle, consist of, however minimally? Once again, the principle is embedded in political liberalism tradition. If everyone has the same moral worth, then they must be treated with equal concern and respect. On one hand, this entails respecting equally the interests of each person. In Nussbaum's words (2011, p. 90): "Equal respect for persons seems to require government to avoid taking a stand [...] on the religious and metaphysical issues that divide citizens along the lines of their comprehensive doctrines [...]". On the other, this

means that it is up to each person, based on their conception of the good life, to make choices about the kind of live they want to live – what Nussbaum (2011, p. 18-19) call a commitment to "respect for people's power of self-definition.".

This implies the former principle to be detached from any perfectionist – metaphysical, moral, etc. – specific conception of a good life – flourishing life – and, consequently, that it is up to each person to define and pursue what he/she respectively understands by it. In this sense, the notion of dignity adopted by Nussbaum is not dissociated from what people think, and the freedom to, within their circumstances, formulate, revise, and pursue a concept of a good life. Thus, society's duty is supplying its members with the minimum appropriate conditions – the capabilities – that put them in a position, as agents, to be effectively able to choose the kind of life they, respectively, might wish to lead. However, not all kinds of life should be allowed. Since all people, regardless of their differences, are, as an end in themselves, bearers of equal moral worth, and therefore equal units of concern and respect by society, any option that reflects the worthy supremacy of one over the others must be rejected: killing, coercing, enslaving, etc. From this point of view, if society embraced a certain conception of a good life or favored the conceptions of a good life for some to the detriment of others, it would not be treating everyone as equal.

Therefore, answering the initial question, from the notion of dignity adopted by Nussbaum, we can deduce that everyone, as an end in him/herself, an equal bearer of the same moral worth as everyone else, should be able to plan and carry out the kind of life he/she might consider to be in accordance with that worth, without prejudice to the same aspiration of all the others. Accordingly, the duty of society is to treat everyone with equal concern and respect and protect and guarantee, the appropriate conditions – the capabilities – so that they are effectively able to carry out that life.

But how can the whole range of different conceptions of the good life that people might legitimately pursue be covered by a single list of capabilities, without favoring one at the expense of the others? More concretely, how did Nussbaum come up with the list she proposes? The latter seems to be already a univocal conception of a good life, imposed on everyone.

This is undoubtedly an issue that Nussbaum seeks to address. In line with the reasoning that has being developed so far, the author also holds that

respect for human dignity entails respecting the choices of each person. So, her list of capabilities should be understood not as a conception of a good life, as such, but rather as the set of minimum preconditions required for each one to be an agent, above a certain threshold.

In this way, Nussbaum emphasizes that the list did not result only from her own philosophical exercise, but rather from a cross-cultural and cross-national ethical inquiry, made alongside many voices and developed over the years. In this sense, Nussbaum resembles the *philosopher-investigator,* idealized by Claassen. Through this ethical inquiry, people are asked to ponder what is implied by the notion of human dignity and a life lived in accordance with it (and its opposite), through the confrontation of their intuitions with the various possible normative principles. The ultimate aim is to reach a "reflective equilibrium", that is, a stable consistency between the particular judgments and the general normative principles, endorsed by the people (NUSSBAUM, 2011, p. 77-78). The author thus resorts to the same method of justification that John Rawls (1996, p. 133-172) has used in his theory of justice. Like Rawls, Nussbaum does not intend, through the list, to establish a comprehensive conception of a good life, but rather a common core, detached from any specific doctrine – metaphysical, moral or philosophical –, that would be used as an object of consensus among people adopting the most diverse comprehensive conceptions of a good life – what she calls an "overlapping consensus" (NUSSBAUM 2000, p. 76, 2011, p. 79). Analogously to Rawls' primary social goods, the consensus is possible insofar as the capabilities of the list allegedly constitute the minimum requirements, recognized by all, to formulate, revise, and pursue the most varied kinds of life, whatever they might be (NUSSBAUM, 2000, p 74-75, 2011, p. 89-93).

In my view, the compliance of the list with the notion of dignity at stake is, however, still dependent on the fulfilment of two conditions, one related to the outcome, and the other to the selection process. Regarding the first condition, it is crucial to confirm whether Nussbaum's list actually reflects an overlapping consensus – that is, the choices of at least a sizeable number of people – and how large that consensus is. It should be recalled that the prospect of its applicability is universal, and not simply for a single country, region, or community. So, the consensus would have to exist on a significant worldwide

basis. The second condition, which is partially related to the first, requires making more explicit, both in political and epistemological terms, the procedural rules through which these choices have been made, in reference to the participants and issues related to scale, representativeness, decision-maker power, and available information.

Beginning with the first condition, appealing to intuition, the hypothesis of such a consensus seems to be contradictory. As underlined by Robeyns (2005, p. 207), this would require a basis of tolerance, shared by all, which is very unlikely to exist in a real world marked by many cultural, social, political, religious, personal, etc. divisions. So, although the overlapping consensus could possibly be an adequate justification device within an ideal theory of justice, such as Rawls', it is unfeasible when it is applied, as Nussbaum intends, to assess the quality of life of real people.

In this regard, Nussbaum's stance is somewhat ambiguous. At times she appears to suggest that the list already reflects an overlapping consensus, among people with different conceptions of a good life (NUSSBAUM, 2000, p. 76), at other times it is noted that this has not been accomplished yet, at least for all capabilities of the list. It is merely plausible that it will be in the future (NUSSBAUM, 2000, p. 104, 2011, p. 79, 91).

From my perspective, this second path leads to a certain contradiction. One the one hand, the list is, apparently, legitimized by the consensus which represents the people. One the other hand, there is no consensus, at least yet, by which it is concluded that the list is, exclusively Nussbaum's creation, at the theoretical level, thereby without consideration of people's choices. There is only the hope that they will be persuaded to accept it someday.

A possible way of trying to avoid this contradiction would be to appeal to the distinction between justification and implementation, which Nussbaum, being close to the *philosopher-citizen* theorized by Claassen, seeks to make. Thus, it might be argued that the list is justified from a philosophical point of view, but that it does not grant, in itself, political legitimacy to be implemented. Implementing legitimacy belongs only to the sovereign decision of each society and to their respective citizens. The philosopher can only hope that they will agree with him/her (NUSSBAUM, 2011, p. 111). The problem is, as I have said before, taking the notion of dignity that the author uses, it is not

possible to derive a list of capabilities, which reflects the preconditions to live a life worthy of that value, regardless of the choices of people affected by it. Therefore, the issues alluding to justification and implementation, and consequentially epistemological and political objections, are intertwined. That said, simply stating that there will be a consensus in the future is manifestly unsatisfactory. Until this happens it remains a merely speculative exercise. In the absence of additional information to suffice Nussbaum's reasoning, the same hope of a consensus may be put to any other list than hers, instead.

Does such information exist? The lack of such a broad consensus does not mean that it is impossible for smaller, more local ones, to be attained. Above all, it does not necessarily eradicate the eventual role of people's opinions, and additional empirical evidence, from those Nussbaum has been in touch with, in the formulation and revising of the list. However, it is necessary to grasp both the extent of those people choices on the content of the list, and whether the circumstances under which they have been made are suitable enough, in political and epistemological, terms.

This drives us to the second condition mentioned above, related to the procedure of selection. This is not explicitly described by Nussbaum, who has received criticism from other authors such as Okin (2003), Menon (2002), Jaggar (2006) and Alkire (2002). One of those criticisms, in political terms, concerns representativeness. Even though the aim envisioned is to reach a universal consensus whereby successive discussions are held on "reflective equilibrium", Nussbaum does not clarify who, and under what pretext, is part of the inquiry, and who, on the contrary, is excluded. That is, she does not specify her sampling criteria. Thus, there is a risk of biasing the representativeness in favor of certain groups of people at the expense of other under-represented groups (ALKIRE, 2002, 41-43).

Another criticism refers to the criteria for weighing the information. Despite having dialogue with people, due to the absence of objective and independent criteria, Nussbaum ends up, voluntarily or not, maintaining full control over the evaluation of their judgments. In other words, the ultimate authority to decide between what can be considered relevant –and can inform the list – and what can be considered irrelevant – and thus omitted. This evaluation is unlikely to be impartial and objective. As has been stated before,

any philosopher's interpretation of the facts is prone to be permeable to his own experiences, values, motivations, and limits. Moreover, this full authority can lead to a type of confirmation bias. That is, to accept and weigh as good the preferences of others that meet her own preferences, using them as "evidence" in order to justifying them. All the while, weighing as bad – distorted and/or adapted – those ones that, instead oppose their preferences. (JAGGAR, 2006, p. 319-320).

Therefore, the list ultimately represents Nussbaum's own choices.

In order to safeguard herself from objections of this kind, Nussbaum puts forward some arguments claiming that she has less authority than might be supposed. Nonetheless, none of them are, in my opinion, satisfactory. Firstly, she draws attention to the non-immutability of the list. That is, the list is open-ended and subjected to ongoing criticism and revision. However, according to the previous exposition, the decision-making power to modify the list relies absolutely in her own hands. She also underlines the multiple realizability of the capabilities. These are vague enough, allowing room to be realizable in multiple ways, depending on the respective choices of each person and society, considering their particular circumstances. For example: the promotion of the capability to live a life of normal length, might either lead a society to legalize euthanasia, or another to criminalize it; a vegetarian person exercises the capability to be well-nourished differently from another who eats meat. Finally, Nussbaum also emphasizes the list of capabilities – that is, effective opportunities to achieve – and not directly the functionings – the immediate achievements. So, it is completely up to each person to decide to exercise the capabilities, or even forgo them. Consequently, no one would be forced, paternalistically, to live an undesirable life: the capability to be well-nourished does not prevent anyone from fasting (NUSSBAUM, 2011, p. 108-111). Notwithstanding the virtues of these two last arguments, the same problem remains. Although there is a broad range of choice allowed, the list of capabilities adopted by Nussbaum, as a set of preconditions, ends up facilitating the planning and pursuit of certain kinds of concepts of a good life at the expense of others. Even if they could carry them out, which is not a minor point, those people for whom the capabilities of the list were not especially useful, in supplying their respective concepts of a good life, would still come off doubly harmed. Firstly, insofar as the

set of capabilities on the list would fit some people's conceptions of a good life more easily than theirs, less value would be ascribed to their own aspirations, disrespecting the principle of treating everyone as equal. Secondly, if the list were to be implemented, in addition to not receiving the same support as other people, they would perhaps also have to contribute to its promotion, financially, through taxes, which could mean that it could be used instead in favor of their own choices. However, this would depend on the established pattern of distribution of the burdens of cooperation, about which Nussbaum's theory says little or even nothing (ROBEYNS 2017, p. 157).

Thus, summing up the main question, from the conception of dignity adopted by Nussbaum, embedded in the tradition of political liberalism, it is only epistemologically deduced that it is up to each person to decide and pursue what she may consider to be a life in accordance with that value – that is, a life worthy of human dignity. Insofar as the feasibility to run a particular kind of life depends on the presence of certain adequate preconditions – capabilities –, so the specific type of existing preconditions determines, positively or negatively, the kinds of life that can effectively be followed. Therefore, deciding and pursuing what is meant by a dignified life means having the power over those preconditions required to enable it. In this sense, Nussbaum, by selecting a list of capabilities, understood as a list of those preconditions, is choosing for other people how they should run their own lives. So, this is a philosophical step inconsistent with the concept of human dignity she adopts. Consequently, one can deduced that the selection of capabilities should be, instead, made directly by the people affected by them, through a democratic process.

However, it cannot be concluded that the selection should be simply left to the public sphere. Although nothing can be derived about the content of the choices from the concept of dignity, the same cannot be said regarding the requirements for choosing. According to the concept, as bearers of equal moral worth, everyone has the same legitimacy regarding their respective aspirations. This means, having equal weight, as far as possible, in collective decisions. Nevertheless, reiterating what was discussed in second section, the public sphere is prone to arbitrariness and asymmetries of information, which threaten such equality. Some people in virtue of their great power, social and economic influence, or privileged access to relevant information, etc. might

be in a better position to influence decisions for their own benefit at the expense of the others.

Therefore, the concept of human dignity demands a method of selection, developed philosophically, that assures a process of democratic decision in which everyone is represented fairly and equally. Which method guarantees this? As I stated before, I do not intend to offer a definitive answer in this article. Nor do I think it is possible to derive a specific method from the concept of dignity that has been adopted. The latter seems to simply require that it must be sophisticated enough to ensure that there is a reasonable and informed representation of everyone, as equals. And it is in light of these principles that the suitability of any method, such as those illustrated above, must be assessed. Nothing prevents the existence of several candidates/methods with similar virtues. Suitability will often depend on the context and circumstances involved, as Amartya Sen points out. In fact, just as there is no global democracy, the democratic process could hardly be applied with the same degree of universality that Nussbaum ascribed to her list.

I would like to clarify one point. Contrary to what it may seem, I do not aim, with my interpretation of Nussbaum's theory, to take a stand in favor of the *democratic position* at the expense of the *philosophical position*. According to the arguments outlined by Claassen, described in the previous section, one could object that the selection of capabilities presented here is not democratically pure, in the sense that it is based on and depends on a set of choices previously made by Nussbaum, at a philosophical level. I could not agree more. What I have tried to do is to precisely analyze Nussbaum's philosophical choices and I have concluded that nothing arising from them, namely the adopted concept of dignity, justify the list of capabilities proposed. That list is a theoretical extrapolation. On the contrary, the philosophical consequence that could be derived from that concept of dignity is rather, as I have tried to show, the people's freedom to select capabilities with true democratic equality. In other words, instead of two mutually exclusive positions, in this case the *democratic position* is, as a logical corollary, an integral part of the *philosophical position*. Likewise, Claassen, alluding to the "democratic dilemma", might echo that this democratic process must rely on a theory of democracy that implies endorsing a pre-democratic substantive list of capabilities. Even if it was possible to derive

from this notion of democratic equality a thin set of capabilities necessary to enhance the democratic exercise properly – that is necessary for everyone to deliberate and decide democratically on an equal footing (in Bohman's way) – the same does not apply, as I have tried to demonstrate, to a substantial and complete list, which fulfils the capabilities required for a life worthy of human dignity at a minimal level, whatever it might be. Once again, the latter must be the outcome of the democratic process.

Thus, this interpretation of Nussbaum's theory has the potential of meeting Byskov's new research agenda, by which the *democratic* and *philosophical* positions are sought to be seen as mutually reinforcing, rather than mutually exclusive, insofar as, based on the normative groundings of theory, there is a clear set point where the role of philosophy ends and that of democracy begins. Democracy needs philosophy to ensure that the decision-making process is truly democratic, while the philosophical choices made by the philosopher need democracy to be legitimized. In order to demonstrate this argument, I now intend, in conclusion, to exemplify how Nussbaum's theory might integrate a synthesizing selection method, according to the model introduced by Byskov.

A synthesizing method: Nussbaum and the democratic process

(i) Stage 1: from practice to theory

The first stage of the synthesizing method corresponds, essentially, to Martha Nussbaum's theory, as I understand it. Nussbaum seeks to formulate a universal list of capabilities that characterizes a life lived with dignity at a minimal threshold. In that sense, it does not stick to a comprehensive conception of a good life. Rather, the list should be subjected to a consensus among people with the most diverse conception possible of the good life. Embodying the character of the *philosopher-investigator*, Nussbaum carries out an ethical inquiry in which people, perhaps from different places and cultures, are asked about what they understand by a life, in accordance with human dignity. During this procedure, Nussbaum analyses the information collected, distinguishing what should be considered, using genuine and well-informed preferences rather than adapted and ill-formed ones, identities abuses and power

asymmetries, etc. In short, Nussbaum assesses the compliance of the various testimonies to the concept of human dignity.

(ii) Stage 2: from theory to practice

The second stage consists of the public decision-making process. In the public sphere, people affected by the decisions, democratically select the list of capabilities with respect to a life lived with minimal dignity. In this process, the Nussbaum list is likely to be useful. People might want to adapt the list to the context of their society, thus giving it the contextual sensitivity referred to by Sen. Seen as ideal, Nussbaum's list could operate as a reference model for the elaboration of a new list, or when seen as not ideal, tailored to the concrete circumstances of the society in question. It may also play an informative role. People may be confronted, through the list, with dimensions and problems which they may have not thought about before, therefore contributing to more informed choices. However, the ultimate decision lies with them and they might simply reject Nussbaum's list altogether.

(iii) Stage 3: synthesis

In this step, the two lists of capabilities resulting from the previous steps are compared and discussed. In cases where the two lists coincide, the legitimacy of the selection seems to be reinforced. On the one hand, it has the normative support provided by the philosophical exercise. On the other, it stems from the choices of people affected by it, and not from the philosopher's preferences. Contrariwise, conflicting cases lead to a problem of indeterminacy. However, this might enrich both stages. For instance, Nussbaum may disagree with the list resulting from the second stage, either by identifying flaws in reasoning or representative imbalances which she views as threats to human dignity. The next time the public is called upon to deliberate, this data is likely to be considered in the discussion, which will contribute to the improvement of the selection. Conversely, people may also disagree with the list proposed by Nussbaum: because they believe that it is not sufficiently context-sensitive or that it reflects values not shared by them. This could encourage Nussbaum to revise her theory in the light of these testimonies, strengthening its epistemological and political legitimacy.

Therefore, the ongoing repetition of these three stages would prompt an increasing neutralization of the gaps, both in relation to the philosophical exercise and to the democratic process, referred to above, giving hope that the much-desired consensus might be reached someday.

Final remarks

In this article, I proposed to address the problem of capability selection. In order to do so, I began by presenting an overview of the existing debate around this issue.

Once the terms of the debate were made explicit, I moved on to the central purpose of the article: assessing Martha Nussbaum's theory of epistemological legitimacy to justify the universal list of capabilities that she has proposed. I concluded that nothing in the normative groundings of her theory, namely the concept of human dignity she adopts, sufficiently achieves the task. On the contrary, they lead to the conclusion that the selection of capabilities must result from a process of democratic decision, among people concerned as equals. This places Nussbaum's theory close to Byskov's new research agenda.

Further research is needed to investigate the features this democratic process should have, in order to be truly democratic and informed, between equals[7]. However, Byskov's synthesizing method appears to be quite promising.

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7   Solving the problem of the adapted preferences in a non-paternalist way seems to be a hard task. This issue would demand further research, besides this article.

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The problem of selecting capabilities: Nussbaum's philosophical road to democracy

Abstract: Capability Approach theorists have placed the recognition of capabilities and functionings at the core of their theories. However, they disagree about the selection of relevant capabilities. In this article, I argue that contrary to what the author claims, it is not philosophically possible to derive a list of central capabilities in this way, from the concept of human dignity underlying Martha Nussbaum's theory. From that concept it is only possible to derive a process of democratic decision, in which everybody is represented fairly and equally. It should be noted that the proposal presented in this article is not in opposition to Nussbaum's theory, but rather an attempt to offer a new interpretation of it, based on the normative groundings of theory, in order to address some of its theoretical problems. This thesis occupies forth section. In the second and third sections, I summarize the debate around the problem of selecting capabilities.

Keywords: capability; dignity; democracy; list; selection.

O problema da seleção de capacidades: o caminho filosófico de Nussbaum em direção à democracia

Resumo: Os teóricos da abordagem das capacidades reconhecem em comum a "capacidade" como o conceito central das suas respectivas teorias. Contudo, discordam em relação à seleção das capacidades mais importantes. Neste artigo argumento que não é filosoficamente possível derivar uma lista de capacidades a partir do conceito de dignidade humana que subjaz à teoria de Martha Nussbaum, ao contrário do que a autora pretende. Do último só é possível fazer derivar do conceito um processo de decisão democrática, no qual todos os intervenientes estejam representados como iguais. Importa ressalvar que a proposta apresentada neste artigo, não se contrapõe à teoria de Nussbaum, mas é sobretudo uma tentativa de lhe dar uma nova interpretação, com base nos seus pressupostos normativos, de modo a lidar com algumas das suas dificuldades teóricas. Esta tese ocupa a quarta seção. Nas segunda e terceira seções, procuro resumir os termos nos quais tem ocorrido o debate acerca da seleção de capacidades.

Palavras-chave: capacidade; dignidade; democracia; lista; seleção.