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The Basis of Universal Liberal Principles in Nussbaum's Political Philosophy

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Abstract: In her political philosophy, Martha C. Nussbaum defends liberal political principles on the basis of an objective conception of the good of human beings. This paper examines whether her argument succeeds. It identifies three methods to which Nussbaum refers in order to select the central human capabilities, whose exercise is seen as constituting the human good. It asks whether these methods – the interpretation of actual ways of human self-understanding, the search for necessary anthropological features, and the idea of an overlapping consensus – can yield liberal political principles. The paper concludes that it is doubtful that the first two methods will lead to this result. As to the third method, it may yield liberal principles only insofar as it relies on the notion of human dignity which is interpreted in a way that contains a strong view of equality of all human beings. In this way, universal liberal principles are not primarily based on considerations of the human good, but on a genuine moral standpoint.

Key words: capability approach, dignity, equality, liberalism, Nussbaum, overlapping consensus.

In her work on political philosophy, Martha C. Nussbaum combines views that are often believed to be in tension with each other. She expresses support for universal liberal political principles, claiming extended liberties for each individual (such as religious freedom, free speech, and free choice of one's profession and spouse), the right to non-discrimination, and the right to participate in the democratic governance of the state. Thus, each individual should be recognized by the state as a being with an equal status, an equal power of reasoning and the equal capacity to make public and private choices. But Nussbaum bases these principles of liberal equality on a thick and objective conception of the human good, so that the good of an individual is independent of his/her personal desires, beliefs, or values. This objective conception of the good forms an integral part of her "capability approach", which identifies a set of central human capabilities that should be made the target of all political institutions because they permit human beings to achieve well-being.

A conflict between these views is not strictly necessary. It is not incoherent to think that it is part of the good of every human being to be recognized by others as a being with an equal status. But many liberals have insisted that any argument for liberal political principles requires, in one way or another, the idea of a fair adjudication between competing individual interests or claims. The equal moral status of persons, as it is expressed in principles of equal liberties and provisions of non-discrimination, is often not regarded as something that is good or valuable for all individuals as such, but only follows from a genuine moral standpoint. From this perspective, the argument presented by Nussbaum can be seen as a short cut from considerations on what is valuable to considerations on what social institutions should be like, circumventing the moral standpoint of fair

adjudication between competing interests or claims. It may be questioned whether this argument succeeds: Is Nussbaum's approach able to establish an argument for liberal political principles?

This is the question this paper wants to pursue. I will proceed in the following steps: First, I will have a closer look at liberal political principles and sketch Nussbaum's position with respect to different meanings of "liberalism". I will then give an outline of Nussbaum's capability approach that is supposed to present an argument for liberal principles. Following this, the paper will distinguish three methods Nussbaum uses in order to identify the central human capabilities and examine in turn whether they provide us with good reasons to adopt liberal political principles. The conclusion will be that the argument does not succeed if it is based solely on considerations on what is valuable for individual human beings: Liberal principles follow only if substantive moral premises are presupposed.

The details of Nussbaum's capability approach have somewhat developed over her various works in which she defends it. Nevertheless, the central claims of her view have remained sufficiently constant to present it as a coherent project and to draw on different texts in order to explain it. When the paper comes to examine the methods used to identify the central human capabilities, it will pay more attention to different stages of the development of Nussbaum's views than is necessary at the beginning of the paper.

I. LIBERAL PRINCIPLES

What makes a normative conception of the state a "liberal" one? Like many philosophical notions, the notion of "liberalism" is notoriously unclear and is employed in different senses by different philosophers. However, we may broadly distinguish two basic meanings of the term.

In the first meaning, "liberalism" is defined by the *content* of the moral principles for the legitimate use of state power: In this sense, any normative view of the state is only liberal if it requires states to respect extended liberties for all human beings and does not discriminate against specific groups of the population. The exact delimitation of the sphere of individual liberties may differ between different liberal theories, but any liberal view will have to include freedom of religion, free speech, the right to freely choose one's spouse, freedom of association and assembly, free choice of one's occupation, and more.[1] In addition, liberal principles require the state not to discriminate against individuals according to characteristics such as sex, skin colour, political and religious views etc. Liberalism is also strongly associated with the right of every citizen to equal democratic

1] Mill's harm principle, according to which a society may only limit the liberty of citizens in order "to prevent harm to others", may be regarded as the generic principle of liberalism, from which particular liberties can be derived (Mill 1991, 14). Indeed, Feinberg has defined the liberal position (with respect to the criminal law) as the position that the harm principle (complemented by an "offense principle", which he also attributes to Mill) exhausts the class of good reasons for limiting individual liberty (Feinberg 1984, 26).

participation in legislative and executive state power. In this text, by "liberal principles" we will understand primarily these three elements of liberty, non-discrimination and democracy.[2] They give expression to a certain conception of the equality of all human beings with respect to state power: All human beings should have an equal capacity of making public and private choices.

In the second meaning of "liberalism" this term is not defined by the content of moral principles, but rather by the *procedure of justification* through which moral principles for the use of state power are derived. This procedure is modelled in a way that gives weight to voluntary agreements between rational choosers with partially conflicting beliefs about questions such as the good life and substantive metaphysical issues, and consequently sets aside these controversial questions. Rational choosers agree on certain moral principles to be implemented by the state, but deeper metaphysical questions are avoided.

Of course, it is possible to be a liberal in both the procedural and the content-centred senses of the term. This is a position taken (in different versions) by famous liberals such as Rawls, Dworkin, Habermas and others. But it is equally possible to be a liberal only in the content-centred sense of the term, and to justify liberal principles by a wholly different method. This position has famously been taken by John Stuart Mill, who tried to defend liberal principles by using a utilitarian procedure of justification.

Martha Nussbaum has repeatedly emphasized her support not only for universal moral and political principles, but also for liberalism: "Any universalism that has a chance to be persuasive in the modern world must, it seems to me, be a form of political liberalism." (1999, 9) She defends her approach against the objection that it is incompatible with liberal respect for individual autonomy (1992, 225). She has argued for equal treatment of women in social institutions (2000, 213ff.), for the equal rights of homosexuals (1999, 184ff.) and for religious tolerance (2008) – all clearly liberal positions in the content-centred sense. Moreover, it is important for Nussbaum that these liberal principles have universal scope, i.e. are valid for all cultures (2000, 5).

But it is less clear whether Nussbaum is a liberal in the procedural sense. To be sure, she claims to follow central elements of Rawls' political liberalism (2000, 76). But in contrast to many procedural liberals, she makes use of what she calls a "thick vague conception of the good" (1990, 205). She concedes herself that this has not been accepted by many liberals: "liberalism has to take a stand about what is good for people, and I argue that it needs a somewhat more extensive conception of the basic human functions and capacities than many liberal thinkers have used if it is to provide sufficient remedies for entrenched injustice and hierarchy." (1999, 11) This "more extensive conception" of the human good relies on an essentialism about human nature, i.e. the view that it is possible to achieve a determinate account of the essential properties pertaining to all human

2] In contemporary American politics, "liberal" has also come to refer to policies such as the redistribution of wealth from the rich to the poor and strong social policies in matters such as health care and education. This meaning of "liberal" is not the focus of our concern here.

beings, regardless of their culture (1992, 207). This essential account of human nature is then taken as the basis for the norms social institutions should meet. In contrast, liberals have often argued that political institutions should remain neutral with respect to competing conceptions of a good held by different individuals. Basing the task of political institutions on essential human properties has often aroused the suspicion among them that arbitrary (but allegedly objective) valuations would be smuggled into moral and political rules, unduly limiting the liberty of individuals to lead their lives according to their own conceptions of the good. Nussbaum tries to avoid illiberal conclusions by arguing that the task of social institutions should only be to provide *capabilities* for individuals, leaving each individual a free choice whether and how he or she makes use of these capabilities. Furthermore, she points out that for individuals free choice in public and private matters is itself an important component of the objective conception of the good as she sees it (1992, 225). Nevertheless, it can be questioned whether it is possible to present an objective argument for a determinate account of the human good, so that the account does not rely on arbitrary valuations by those defending it. Given the procedure of Nussbaum's approach, are we really provided with convincing reasons to adopt liberal principles in the content-centred sense?

The difficulty of finding an objective argument seems to be greatest in the case of liberal principles because they are often contested, both by different political regimes in the world and by intellectuals. Even some liberals – not least Rawls himself – have argued that liberal principles should not be regarded to have universal scope for purposes of international justice. According to Rawls, the international political order must not pressure states into adopting liberal principles (Rawls 1999, 59-62).[3] Thus, these days the main challenge to Nussbaum's views does not come from a full-blown rejection of universal moral principles – although this may have been the case at the time when she developed the capability approach for the first time (Nussbaum 1992, 203ff.). Rather, it comes from a position that accepts universal rules, but holds these rules to be less expansive than a liberal account. Furthermore, the conception of equality of all human beings as expressed by the liberal principles is often thought to require an argument from a moral point of view, from some kind of fair adjudication of the competing interests or claims of individuals; thus, the argument for liberal principles could not only rely on what is good or valuable for a human individual. The question is, then, if the normative basis on which Nussbaum argues is sufficient to establish that universal moral rules need to have liberal content.[4] In order to investigate this question, we will first have to sketch the basic

3] While Nussbaum also thinks that liberal principles should be adopted by the citizens of a state themselves, and not forced upon them by outsiders, she thinks that the list of capabilities can form the basis of policies of international institutions (Nussbaum 2006, 255ff., 316ff.). This departs significantly from Rawls' "full toleration" for decent non-liberal societies.

4] This focus on liberal principles does not mean that other elements of the capability approach are less important. Quite to the contrary, the capability approach seems to be most convincing in the case of human needs that are the object of the so-called social and economic rights (nourishment, housing, educa-

elements of Nussbaum's "capability approach" and see how it is meant to support liberal principles.

II. THE CAPABILITY APPROACH AND ITS LIBERAL ELEMENTS

Although in this text it is not possible to give a comprehensive account of Nussbaum's capability approach, we need to outline at least some of its main elements. Nussbaum starts from the Aristotelian idea that the good of an individual has to be determined in relation to the essential properties of the species of which he or she is a member. Thus, the good of all human beings has to be determined by searching for essential properties of human beings – properties that distinguish human beings from other beings (1992, 207). It is central for Nussbaum that first of all we regard ourselves as humans, and not as individuals of a certain sex, nationality, etc. Consequently, she asks us to look for features that we share with all other human beings – for features that "must be there, if we are going to acknowledge that a given life is human" (1999, 40). Closely related to this is the idea that we can identify certain areas of basic experiences of all human beings, such as mortality, physical needs, pain, mobility, cognitive capabilities, affiliation with other human beings etc., which are crucial for our well-being (1993, 263ff.).

Based on these fields of human experience, Nussbaum claims that it is possible to identify a list of central human capabilities which are judged to be important for human well-being. Thus, human well-being is understood to be the development and exercise of these capabilities, i.e. the "actual functioning". Nevertheless, it is left to the choice of each individual whether he or she will make use of any given capability. The role of social institutions is confined to aiming at the establishment of the *capabilities* to function in the ways that are judged to be valuable (2000, 87).

Nussbaum distinguishes three types of capabilities: First, there are basic capabilities, "the innate equipment of individuals that is the necessary basis for developing the more advanced capabilities, and ground for moral concern." (2000, 84) Basic capabilities are that what is given in each human being from the start, they are the constitutive features of human nature. But they are often only rudimentary and cannot be exercised without being developed (e.g., infants are able to learn a language, but this needs time and appropriate conditions). It is in virtue of the basic capabilities that human beings have a claim to support by others; they "exert a moral claim that they should be developed." (2000, 83)

Second, there are internal capabilities, i.e. "developed states of the person that are, so far as the person herself is concerned, sufficient conditions for the exercise of the requisite functions." (2000, 84) (An example would be a person that has learnt to speak and has no bodily impairments preventing him/her from speaking.) And third, there are "combined

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tion, health care etc.), and indeed provides a compelling critique of some approaches to welfare economics and to social justice, although the paper does not argue for this point. The focus on liberal principles rather concentrates on the point that to me seems to be the most problematic and contentious one, given the normative basis of Nussbaum's arguments.

capabilities", which are internal capabilities "combined with suitable external conditions for the exercise of the function." (2000, 85) (In our example, the person has the combined capability to speak if neither his/her own condition nor threats from the outside prevent him/her from speaking.)

As Nussbaum argues, the goal of social institutions should be that every human being be secured the combined capabilities up to a certain threshold (2006, 292). In order to determine this threshold she refers to the "intuitive idea of human dignity": if individuals fall below this level, we judge their lives to be "so impoverished that it is not worthy of the dignity of the human being" (2000, 72). Thus, the list of central capabilities is a list of the combined capabilities that give rise to claims each human being has towards society.

Nussbaum does not claim that the list expresses a metaphysical truth about human nature. Instead, she proposes that it can be based on nothing but the reflection of human beings about what is essential in their lives (1992, 207). Consequently, also she does not think that her version of the list is the final word on the issue. Instead, the list is "open-ended and subject to ongoing revision" within a cross-cultural dialogue, and the list is formulated in a way that leaves room to different specification within different societies (2006, 78). Nevertheless, she thinks that the prospects for finding a broad consensus on most items of the list are good (1992, 223).

After this brief overview over central claims of the capability approach, let us focus on some points that figure on the list of central human capabilities (in the version of 2006). Several points clearly call for liberal political principles:

> "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 for the liberty of conscience and religious observance.)"
>
> "7. Affiliation. […] B. Having the social bases for self-respect and nonhumiliation; 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."[5]

5] We can note that these formulations of point 7B cast some doubt on Nussbaum's claim that *all* elements of her objective conception of the good really take the form of *capabilities*, as opposed to states of affairs or "passive" properties. "Having the social bases of self-respect and non-humiliation" is clearly not a capability an individual can exercise and develop, but rather a property that depends on the social conditions under which an individual lives. While "self-respect" is indeed something that has to be actively developed by each individual, "non-humiliation" is not. Moreover, "being able to be treated as a dignified being" seems to be an awkward formulation; it is not clear in which way it differs from "being treated as a dignified being", which is not a capability. Several authors that are in principle sympathetic to the capability approach have argued that not all human goods to be supported by social institutions are capabilities (see Buchanan 2004, 138; Ladwig 2009, 264).

> "10. Control over One's Environment. A. Political. Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association."[6]

These points are meant to express "combined capabilities": capabilities that all human beings should be able to exercise. For reasons of brevity, let us call the three central capabilities "practical reason", "social affiliation" and "political control", but we should keep in mind Nussbaum's somewhat longer descriptions of these capabilities. We should also keep in mind that there are basic capabilities underlying these combined capabilities, exerting "a moral claim [to] be developed". For example, we may assume that all human beings (from a certain age on) possess at least rudimentary forms of "practical reason", deliberating on basic decisions about their lives, although not all of them live under conditions under which they are allowed to exercise their choices.

According to Nussbaum the recognition of the three mentioned capabilities directly leads to universal liberal principles referring to social institutions, namely liberty of conscience and religious observance, provisions of non-discrimination, the right to political participation and the protection of free speech and association. The paper will refer to these policies in a somewhat simplified way as liberty rights (covering both the "private" use of liberty, such as religious activities, and the "public" use, such as free speech in political contexts), non-discrimination and democracy.

What we will now investigate is whether Nussbaum's approach does indeed provide good reasons to call for these liberal principles as universal rules to be implemented by political institutions in all societies. Therefore, we will not question the normative basis of her approach, but rather examine how far it will lead us.

III. THE ARGUMENTS FROM ACTUAL SELF-UNDERSTANDINGS AND FROM ANTHROPOLOGY

For the present inquiry the crucial question is, of course, how the items on the list of central human capabilities are selected. Nussbaum's answer to this question seems to have changed over time: in different texts she explains the method used for the selection of the capabilities in somewhat different terms. It is possible to identify three different methods mentioned by her. We do not necessarily have to see these methods as excluding each other, but they point into different directions.

The method proposed in Nussbaum's earlier writings "proceeds by examining a wide variety of self-understandings of people in many times and places." In particular, she suggests consulting "myths and stories that situate the human being in some way in the universe" (1992, 215). Thus, fictional works from all cultures should be taken as material which tells us something about what human beings think about the elements

6] All points occur in Nussbaum 2006, 77 and with little modifications in previous versions of the list.

of well-being. We should note that this method concerns the *actual*, already *given* (if only implicitly) self-understanding of people from different cultures.

A second method consists of the intuitive reflection on necessary anthropological attributes. Essential human properties have to be shared (in their basic form) by all human beings, so that reflecting on what all human beings have in common will yield these properties. Therefore, Nussbaum asks us to ponder two questions, namely about "personal continuity" – "which changes or transitions are compatible with the continued existence of that being as a member of the human kind and which are not" – and about kind inclusion: "what do we believe must be there, if we are going to acknowledge that a given life is human?" (1999, 39-40) This method does not seem to emphasize our actual self-understanding in its entirety, but rather aims at sharpening this self-understanding through an anthropological reflection. The idea of the conditions of belonging to the species of humans is supposed to be the crucial criterion for selecting the list.

A third method consists of the idea of a cross-cultural dialogue on a common list. This dialogue does not aim so much at eliciting the self-understanding different people already have, but rather at constructing a list on which all can agree: the dialogue is "seeking a conception by which people of differing comprehensive views can agree to live together in a political community." (2000, 102)

We will now examine whether these three methods yield the liberal principles that, according to Nussbaum, follow from her list. The first two methods will be treated in this section, the last one in the following section. We will take the methods for granted and will not question their normative significance, but rather ask if they yield the result they are supposed to yield. Throughout we should keep in mind that reflecting on the capabilities does not only apply to the identification of the *basic* capabilities. Once we have identified these, a *further* reflection will be needed in order to determine the threshold up to which the *combined* capabilities have to be a public concern, i.e. "the appropriate level beneath which it seems right to say that the relevant entitlement has not been secured." (2006, 291)

But let us start with the basic capabilities underlying the points of the list quoted above: practical reason, social affiliation, and political control. It seems that the claim that at least the first two of these should be identified as essential human characteristics has considerable intuitive force, by either method of comparing the actual self-understanding of people from different cultures or of anthropological reflection. Let us briefly consider each of the three points in turn.

The first point is practical reason. In one sense of this term, all human beings (from a certain age on) do indeed have a capability to make reasoned choices. Consider choices such as the selection of a future spouse or the decision on how to make one's living: It may be true that some beings are not very good at making such choices and that in some societies such choices are heavily restrained by social norms. But it seems preposterous to assume that human beings are in principle unable to reflect on these choices, and it is doubtful that they are often portrayed as such in literature. It also seems that if we

encountered intelligent beings that proved wholly unable to make reasoned choices, we would regard them as profoundly different from human beings.

In a similar way, social affiliation is, in a rudimentary form, a feature of human beings that is as universally shared as can reasonably be demanded. While certain exceptional individuals may achieve a state of detachment from and indifference towards others in the course of their lives, all human beings need the company of others to develop into mature beings.

With political control the case may be somewhat different. A labour slave in ancient Rome may be supposed to not have had any political control whatsoever, not even in a rudimentary form, but we can clearly recognise him or her as a human being. Maybe the combined capability of political control does not have a clear correlate among the basic capabilities, but rather rests on more general basic capabilities, such as that of practical reason.

Once we move to the combined capabilities, it becomes much more doubtful whether the methods proposed yield the intended results. With respect to the anthropological method, we have to notice that it is of no use here. The very idea of the combined capabilities is that they define the features "of a life that is worthy of […] dignity", not a life of bare survival (2006, 74). This entails that human beings can, in fact, fall below the relevant threshold and still be recognisable as human beings (although as ones leading miserable lives). The criterion of belonging to the species of humans would have to put the threshold at the level of bare survival, which is clearly not Nussbaum's intention – and would also not yield liberal principles, since there are many dictatorships with severely restricted rights under which people nevertheless survive.

It is more difficult to ponder what would result from the method of examining the ways of self-understanding of human beings embedded in the literary heritage of different cultures. This method seems to call for a comprehensive research project which would have to confront a huge amount of material containing a great variety of the ways of self-understanding of human beings. We can certainly expect that most testimonies of human self-understanding will set the threshold for a good life considerably higher than bare survival. But it seems problematic to assume that most sources will set the threshold where it should be in order to justify liberal political principles. This is because political communities guided by liberal principles have been a relatively rare phenomenon in human history. We should not think that these principles are unique to the modern Western world. But if we only stay within Western history, the political recognition of these principles is a rather recent achievement. For most of the time, people have lived under conditions in which they had unequal civil and political rights, and in which these fundamental inequalities were not questioned by the dominant political thinking. It would be very surprising if most literary accounts of a good life from these times would indicate that a good life needs liberty, non-discrimination and democracy.

Indeed, there is evidence that some relevant sources – both from Western and from non-Western literary heritage – deny that human beings need to live in a political

community guided by liberal principles in order to lead a good life. These sources do not have to deny that a good life needs a measure of practical reason, social affiliation and political control: but they may deny that the relevant threshold for the fulfilment of these capabilities is lower than the threshold commanded by liberal principles, which entail an equal status of all human beings with respect to state power. But instead of demanding that everyone be recognized as an equal, some relevant sources might claim that equality is more than is needed for a good life. For example, pre-modern tales sometimes use organicist metaphors for explaining the relation between the individuals within a society, suggesting that the proper place for all members of society is the role to which they have been assigned by birth and custom. Social and political inequalities have often been justified this way. This is the upshot of the parable of Menenius Agrippa, as reported by Livy, which has been influential throughout many ages (Livy 1988, 325).

There is another possibility that we have to consider: Instead of holding that the necessary conditions for a good life require *less* than liberal equality, some sources might hold that a good life requires *more* than equality – that it requires to be an individual standing out from the crowd, to have more powers than the ordinary people in one's society. One could call this idea an aristocratic conception of the good life. We might find traces of this conception in the texts of Friedrich Nietzsche which have had a quasi-mythical influence on people from several generations: Consider Nietzsche's appraisal of the "sovereign individual" of whom Nietzsche says that "mastery over circumstances, over nature, and over all less reliable creatures with less enduring wills is necessarily given into his hands" (Nietzsche 1996, 41).[7] The aristocratic conception entails, of course, that the human condition is tragic: if the conception was correct, it would, in principle, be impossible to create social conditions under which *every* human being could lead a good life. But if our reflection takes as given what relevant sources in different societies consider a good life, we cannot rule out from the start that this tragic situation might exist.

Therefore, the interpretation of human ways of self-understanding *alone* cannot tell us whether the central human capabilities – understood as being the capabilities that are necessary for leading a good life – include liberal principles. We get many contradictory answers to this question. If we want the literary heritage to give us a clear answer without these contradictions, we need to be highly selective in the choice of literary sources that we take into account.[8] But then, we cannot claim that the method of making up the list of central capabilities consists only of interpreting the actual ways of self-understanding of people from different cultures. Rather, it consists of interpreting only those ways of self-understanding that have been chosen according to another method. This brings us to the next section.

7] Nietzsche consequently states that the idea of „a state of law", in which „each will must recognize every other will as equal, would be a principle hostile to life, would represent the destruction and dissolution of man, an attack on the future of man". (Nietzsche 1996, 57)

8] This point is also emphasized by Müller (2003, 324).

IV. THE ARGUMENT OF OVERLAPPING CONSENSUS

The third method for selecting the items of the list of central human capabilities is closely connected to what Nussbaum calls the "political" character of her approach. Indeed, she presents her approach as being "political, not metaphysical" and a "freestanding conception" in the way that John Rawls described his theory of political liberalism (2000, 76). This means that her theory does not aspire to be metaphysically grounded. Persons with conflicting metaphysical views could agree on the list of central human capabilities without agreeing on the reasons why they consider this list to be accurate. Thus, there could be an "overlapping consensus" on the list: The list could emerge from a process in which all persons consider the judgments of their fellow citizens on the elements of a good life, "seeking a conception by which people of differing comprehensive views can agree to live together in a political community." (2000, 102)

This method is quite different from eliciting a common view of the elements of a good life from the *actual* ways of self-understanding of different people. What Nussbaum now claims is that a consensus on the list *could* emerge from a discursive process with a given aim, namely the search for a conception acceptable for people with different comprehensive views. Moreover, this process starts from the "abstract idea of human dignity" (2006, 75). The argument is that "by imagining a life without the capability in question," persons from different cultures will come to believe "that such a life is not a life worthy of human dignity." (2006, 78)

But how can we be confident that this process will lead to a consensus at all, and furthermore to a consensus on items similar to those on the list? Nussbaum's reference to Rawls may give us two hints on possible answers to this question.

The first answer would emphasize that the overlapping consensus in Rawls' political liberalism depends on the prior existence of common democratic institutions. As Rawls points out, his conception of justice, which he calls "justice as fairness", constructs political principles by starting out from normative ideas that are implicitly contained in the institutions and the political traditions of a particular society: "Society's main institutions, and their accepted forms of interpretation, are seen as a fund of implicitly shared ideas and principles. Thus, justice as fairness starts from within a certain political tradition" (Rawls 1993, 14). *Given* a liberal democratic society, we can assume that the institutions of this society gain broad support among the citizens, even if they do not share the same metaphysical views. This line of argument has the consequence that, according to Rawls, any overlapping consensus is valid only for a certain particular society with common political institutions;[9] it cannot be taken to the international level where there exist societies with different political institutions.

9] According to Francesco Biondo, the particularity of the overlapping consensus has the consequence that it cannot be used in the way Nussbaum does (Biondo 2008, 317-18).

In contrast to Rawls, Nussbaum aims at an overlapping consensus with universal scope (2006, 304-5). The question arises, then, whether already existing political traditions indicate an overlapping consensus on liberal principles. One way to show that this is the case might be to point to the institutions that exist at the level of each society. The problem with this approach is that liberal principles are far from being universally accepted. Many states lack democratic structures and do not respect central liberties such as freedom of the press,[10] and not in all of these states a strong public movement exists that demands equal civil and political rights. It might well be true that the public opinion in these countries has a tendency to accept more and more liberal ideas over time, as Nussbaum argues for the case of China, but she acknowledges herself that, for the time being, the universal acceptance of liberal institutions remains a hope to be fulfilled in the future (2006, 304). Thus, one cannot base present claims associated with universally valid political principles on institutions and public opinions prevailing in different states around the world.

Another way to identify universal institutions resting on liberal ideas would be to point to international law. The International Covenant on Civil and Political Rights from 1966, which has been ratified by more than 160 states, contains strong provisions of individual liberties (art. 18, 19, 21, 22), of non-discrimination (art. 26) and of democratic rights (art. 25). But according to international law itself, this broad support for liberal principles does not suffice for them to be universal norms. Under international law, each state is bound by treaties only if it has ratified them (Cassese 2005, 170). Even if a large majority of states has ratified a treaty, this does not mean that the remaining states are bound by it. In contrast, international customary law may forbid certain *grave* violations of human rights, such as genocide or deliberate killings of political opponents, but it does not condemn all violations of liberal principles (Cassese 2005, 59). Furthermore, persistent abuses, even by many signatories of the relevant human rights treaties, show that support for liberal principles (insofar as it is recognizable in the behaviour of states) is weak. Therefore, the existence of liberal norms within international law is not sufficient to establish that there is a widely shared political tradition of support for liberal principles. Rather, it seems that a considerable portion of the signatories of international human rights documents merely pay lip service to the norms they claim to support.

But indeed, Nussbaum has increasingly emphasized that a consensus is yet to be achieved over time (2006, 304). In order to show that such a consensus is likely to evolve, at least under certain conditions, one might point to another feature of Rawls' conception. This is the view that the overlapping consensus is only a consensus among *reasonable* comprehensive doctrines (Rawls 1993, 100). What is relevant for his political liberalism is not whether *all* persons agree on certain basic principles, but whether "reasonable and rational persons suitably specified" do (Rawls 1993, 115). In other words, the consensus

10] As indicative data, one may note that the Freedom in the World Survey 2010 by Freedom House lists 43 independent states as "not free".

can partly be seen as a hypothetical one, a consensus that we can expect to be reached given certain, specifiable conditions.

This element of the overlapping consensus resonates well with Nussbaum's view that a consensus is only likely to be achieved given certain discursive conditions. As she says, "people from a wide variety of cultures, coming together in conditions conducive to reflective criticism of tradition, and free from intimidation and hierarchy, should agree that this list is a good one, one that they would choose." (2000, 151) The conditions mentioned in this quotation, though they only seem to express necessary conditions for rational deliberation in a formal sense, depart already from many reflective processes taking place in the real world. Yet they are not sufficient to make a consensus on liberal principles likely: Even in academic discourse, where one tries to approximate the conditions of rational deliberation as far as reasonably possible, non-liberal political ideas persist. For example, the thought that individual liberties and the principle of non-discrimination can be curtailed in the name of the culture of the whole group seems to keep popularity among some authors.[11]

So it is not surprising that Nussbaum gives further requirements for the procedure through which a consensus is to be achieved. As she says, persons have to reflect on the intuitive idea of "the dignity of the human being", i.e. they have to ask what the conditions for a human life with dignity are (2006, 74). But when the idea of human dignity is to be taken as a starting point, a substantially moral idea is presupposed within the discursive procedure. To be sure, the idea of human dignity has been associated with a variety of meanings, and it is difficult to make a definite judgment about its particular features. But it seems to be rather widely accepted that the idea, in its contemporary use, is meant to indicate a profound equality of the moral status of all human beings. Whereas in pre-modern contexts dignity was often attached to particular social roles, so that the notion was used to indicate status differences between persons, the modern use of the notion is a deliberate countermovement against differential treatment of human beings of different sex, colour, religion, and ethnic, political or other groups. Since dignity is supposed to "inhere" in every human being and gives rise to a set of fundamental rights, every human being has this set of fundamental rights and is in this respect equal to all others. Moreover, the fundamental status of every human being with respect to the power of the state is *solely* determined by the dignity which every human being equally has. This is the thought underlying the use of the notion of dignity in the Universal Declaration of Human Rights from 1948, which states in Article 1: "All human beings are born free and equal in dignity and rights." Nussbaum herself points out that the idea of dignity is closely connected to the idea of equality (2006, 292).

11] An example might be Makau Mutua. Mutua argues that the group should be able "to determine for its individual members under what political, social, cultural, economic, and legal order they […] live." In virtue of this demand, individual human rights, such as freedom of religion, may be restricted (Mutua 2002, 108).

It follows that if the idea of human dignity is taken as a starting point in searching for an overlapping consensus on central human capabilities, the procedure by which this consensus is found makes strong moral presuppositions. The participants in the procedure are not only asked to reflect on what is good or valuable for individual human beings and to determine universal political principles with respect to the promotion of this good. They are also asked to presuppose, in their search for universal political principles, an admittedly abstract, but strong moral point of view. The list of central human capabilities is not only determined by considerations of what is good or valuable, but also by strong moral considerations. The list expresses not only what human beings *need* in order to lead a good life, but also what they can *legitimately claim* from each other and from the state. If the moral point of view is presupposed, it cannot be ruled out that the scope of what human beings may legitimately claim is larger than the scope of what they need. This is why it might be the case that some items are on the list not because they are universal prerequisites of leading a good life, but because they express a universal moral standpoint.

Especially the liberal elements on the list might be better explained by this reason. Given the idea of human dignity and the idea of a fundamental equality of all human beings associated with dignity, it is quite convincing to adopt liberal political principles. The principle of non-discrimination seems to follow immediately from it. A principle of democracy is suggested by it, because it is only when human beings have, in one way or another, an equal right to participate in the collective use of the state power that their equal moral status with regard to state power is respected and that no one has, by virtue of the institutional design, more formal power than others. Individual liberties can also be seen as the expression of the equal right of individuals to express their views, make choices about their lives etc., because any restriction of liberty that cannot be justified by the need to respect the equal liberty of other human beings amounts to giving some human beings (to those who find a particular restriction of liberty desirable) more power than others to use coercive measures.

If the reflective procedure that Nussbaum asks us to follow in order to determine the central human capabilities does indeed presuppose a strong moral view of fundamental equality of all human beings, this does not mean, of course, that there is something wrong with the procedure. But it means that the procedure shows less than one might think. First, one cannot claim that, with respect to the justification of universal liberal political principles, Nussbaum's approach presents an alternative to other theories which employ a similar universal moral standpoint. Nussbaum's argument for liberal principles does not rest on the peculiarities of the capability approach. Rather, it depends on the universal moral standpoint she shares with other theories. Second, the procedure makes no effort to justify this universal moral standpoint, it simply presupposes it. A consensus is sought only with those who already share this standpoint. This does not mean, of course, that the universal moral standpoint is unjustified. There may well be good reasons to adopt it or to demand from other people to adopt it. But the reflection on the elements of a good human life does not help us much with finding these reasons. This reflection may flesh out what

an abstract political principle of equality concretely requires, but it does not provide this principle itself.

Therefore, the paper concludes as follows. Nussbaum claims to provide an argument for liberal political principles that is based on a reflection on the elements of a good human life. She mentions three methods of determining the central capabilities which have to be secured by social institutions for all human beings. The first two methods consist, respectively, of a comparison of the actual ways of self-understanding of people from different cultures and of a reflection on necessary anthropological attributes. These methods do not yield convincing arguments for the adoption of liberal principles. The third method, in contrast, supports liberal principles, but only because it starts from a moral point of view containing a strong principle of equality. This moral point of view is not peculiar to Nussbaum's approach. Insofar as this is true, Nussbaum's political philosophy does not provide a basis for universal liberal principles that is independent of other approaches to political theory. Her capability approach may be helpful to flesh out abstract political principles and to formulate them in a way that can be applied in different contexts, but it should be viewed as being in close alliance with other approaches, not as being in contrast to them.

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REFERENCES

Biondo, Francesco. 2008. Is Martha Nussbaum really political liberal? *Archiv für Rechts- und Sozialphilosophie* 94: 311-24.

Buchanan, Allen. 2004. *Justice, Legitimacy, and Self-Determination. Moral Foundations for International Law.* Oxford: Oxford University Press.

Cassese, Antonio. 2005. *International Law.* Second Edition. Oxford: Oxford University Press.

Feinberg, Joel. 1984. *Harm to Others.* Oxford: Oxford University Press.

Freedom House, ed. 2010. *Freedom in the World Survey 2010.* New York: Freedom House.

Ladwig, Bernd. 2009. Anthropologische Argumente in der menschenrechtlichen Moral. In *Politische Anthropologie. Geschichte – Gegenwart – Möglichkeiten*, ed. Dirk Jörke and Bernd Ladwig, 245-69. Baden-Baden: Nomos.

Livy. 1988. *From the Founding of the City. Books I and II.* Trans. B. O. Foster. Cambridge: Harvard University Press.

Mill, John Stuart. 1991. On Liberty. In *On Liberty and Other Essays*, 1-128. Oxford: Oxford University Press.

Müller, Jörn. 2003. Das normative Verständnis der menschlichen Natur bei Martha C. Nussbaum. *Philosophisches Jahrbuch* 110: 311-29.

Mutua, Makau. 2002. *Human Rights. A Political and Cultural Critique.* Philadelphia: University of Pennsylvania Press.

Nietzsche, Friedrich. 1996. *On the Genealogy of Morals.* Trans. Douglas Smith. Oxford: Oxford University Press.

Nussbaum, Martha C. 1990. Aristotelian Social Democracy. In *Liberalism and the Good*, ed. R. Bruce Douglass, Gerald M. Mara and Henry S. Richardson, 203-52. New York and London: Routledge.

———. 1992. Human Functionings and Social Justice. In Defense of Aristotelian Essentialism. *Political Theory* 20: 202-46.
———. 1993. Non-Relative Virtues: An Aristotelian Approach. In *The Quality of Life*, ed. Martha C. Nussbaum and Amartya Sen, 242-69. Oxford: Clarendon Press.
———. 1995. Aristotle on Human Nature and the Foundations of Ethics. In *World, Mind, and Ethics: Essays on the Ethical Philosophy of Bernard Williams*, ed. J.E.J. Altham and Ross Harrison, 86-131. Cambridge: Cambridge University Press.
———. 1999. *Sex and Social Justice*. Oxford: Oxford University Press.
———. 2000. *Women and Human Development. The Capabilities Approach*. Cambridge: Cambridge University Press.
———. 2006. *Frontiers of Justice. Disability, Nationality, Species Membership*. Cambridge: Harvard University Press.
———. 2008. *Liberty of Conscience: In Defense of America's Tradition of Religious Equality*. New York: Basic Books.
Rawls, John. 1993. *Political Liberalism*. New York: Columbia University Press.
———. 1999. *The Law of Peoples*. Cambridge: Harvard University Press.