

Justice as Fairness and the Capability Approach

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Abstract

This paper revisits the debate between John Rawls and capability theorists, in particular Amartya Sen. Sen has argued that Rawls's notion of primary goods is not able to take sufficient note of interpersonal differences in the conversion of social primary goods into valuable beings and doings (functionings). A second line of critique focuses on the limitations of the social contractarian nature of justice as fairness. In addition, justice as fairness has been criticized for having an unnecessarily restricted scope, and for being too ideal-theoretical. Rawls, on the other hand, has defended justice as fairness against the capability approach, by arguing that the latter entails a comprehensive view of the good, and that it does not deliver a public standard of justice. I will argue that neither critique of the capability approach is fatal. Moreover, the analysis shows that when some plausible extensions are allowed, justice as fairness and Sen's capability approach show much more convergence than generally assumed. Nevertheless, for the time being the capability approach has not yet been developed as a full theory of justice, and therefore any full comparison between justice as fairness and the capability approach remains foreclosed.

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1. Introduction

Among the most important contributions to contemporary moral and political theory are John Rawls's justice as fairness, and the capability approach which was first proposed by Amartya Sen but which has recently been much further developed (albeit in a somewhat different direction) by Martha Nussbaum. This paper reconsiders the differences between Rawlsian justice and the capability approach.¹ While both the capability approach and Rawls's justice as fairness are critiques of utilitarianism, they defend different principles that should form the basis of a theory of justice, and the information on which the interpersonal comparisons in such theories should be based. Rawls advocates that interpersonal comparisons for purposes of social justice be based on social primary goods, whereas Sen and Nussbaum argue that such comparisons should be made in the dimension of capabilities. In addition, the capability approach and justice as fairness differ in several other ways, like the fact that justice as fairness is a social contract theory formulated at the level of ideal-theory, whereas the capability approach lacks a theoretical device (such as the Rawlsian social contract) that could justify why people would commit themselves to support principles of justice in the dimension of capabilities.

In this essay, I want to present and assess the different arguments that have been formulated in the debate between capability theorists and proponents of justice as fairness. The debate started off with Sen's critique that theories of justice should not make interpersonal comparisons in the space of social primary goods, as justice as fairness claims, but rather in the space of capabilities. Sen argues that primary goods would be insufficiently able to take into account the interpersonal differences in the conversion of goods into functionings. A second line of critique on justice as fairness focuses on the limitations of its social contractarian nature, which would restrict the scope of the people that this theory can include. A third critique holds that its scope is also restricted with respect to the societies to which it applies. Finally, its ideal-theoretical character has also created some worries. I will assess each of these critiques in turn. While the capability approach is not vulnerable to those critiques, Rawls has criticized capability-based conceptions of justice by arguing that they entail

¹ As I am particularly interested in exploring the limitations and potential of Sen's capability approach, my main focus will be on Sen's than Nussbaum version of the capability approach, although I will discuss Nussbaum's work briefly where appropriate. My reasons for focusing on Sen's version are clarified in my "Sen's capability approach and gender inequality: selecting relevant capabilities", *Feminist Economics*, 9(2/3).

a comprehensive view of the good. In addition, he has argued that interpersonal comparisons for the purpose of social justice need to be based on workable criteria that can be publicly verified, and to do so do not require impossible kinds or amounts of information. Thomas Pogge has criticized the capability approach for failing to provide such criteria. Bringing these critiques together allows us to reconsidering the relationship between justice as fairness and the capability approach, and opens up a path to understand the capability approach and justice as fairness as complementary and potentially converging theories, rather than purely rival theories of justice. But before embarking on an analysis of these mutual critiques, we start with a brief account of Rawls's theory of justice.

2. Rawls's justice as fairness in a nutshell

Rawls's theory of justice is a theory in the social contract tradition.² This tradition imagines people in the state of nature, that is, before a society is formed. Society is viewed as a fair system of cooperation between free and equal persons. A social contract theory asks which political principles individuals in this state of nature would unanimously agree to respect in the society that follows the state of nature. Rawls develops in his theory the concept of the original position, which corresponds to the state of nature.³ The individuals in the original position are representative parties, that is, hypothetical persons who represent the actual people who will live in the society for which they are deciding on the principles of justice. Rawls further introduces the veil of ignorance, a theoretical device that imposes a lack of information of the parties in the original position. The parties have no knowledge about their place in society, nor do they have any information about which race, gender or class they would belong to, or regarding their natural abilities like intelligence or strength. Nor do the parties in the original position know their conceptions of the good. The parties do, however, know all the general facts about the society, such as basic economic and political principles, and general knowledge about human psychology, and about the relation between people and their social background. As the parties in the original

² I will mainly refer to Rawls's *Theory of Justice. Revised edition*, 1999, rather than the original one which was published in 1971. While this book was not published in English before 1999, the revision is effectively written in 1975, and all translations of *Theory* from 1975 onwards were based on the revised text.

³ *Theory, rev. ed.*, §4, §§20-25; *Restatement*, §6.

position have no information about their place in society, circumstances or life plans, the agreement that they will reach in the original position regarding the principles of justice will be fair to everyone.⁴

Two aspects of the contractarian nature of Rawls's theory require special attention in the debate between Rawls and capability theorists. The first aspect is Rawls's use of Hume's account of the circumstances of justice, that is, the "normal conditions under which human cooperation is both possible and necessary".⁵ Hence these are the circumstances in which it is reasonable that a social contract can be decided upon. Rawls distinguishes between objective and subjective circumstances. The objective circumstances are those that make cooperation possible and necessary, and include a shared geographical space, the possession of roughly similar physical and mental powers, and a condition of moderate scarcity. The subjective circumstances are about the people working together: the people living in the just society are assumed to have roughly similar needs and interests, but they have their own conceptions of the good.⁶

The second characteristic of justice as fairness is its conceptualization of the person. As Rawls puts it, "... we start by assuming that citizens are free and equal moral persons who can contribute to, and honor the constraints of, social cooperation for the mutual benefit of all."⁷ In addition, "Justice as fairness regards each person as someone who can and who desires to take part in social cooperation for mutual advantage."⁸ Rawls conceptualizes each person as being moved by an interest to realize the two powers of moral personality, which are the capacity for a sense of right and justice, and the capacity to form and pursue a conception of the good. While in *Theory of Justice* there was some ambiguity about whether Rawls was relying on a metaphysical account of the person, later Rawls has stressed that justice as fairness does not rely on a metaphysical but on a political account of the person, i.e. a characterization of those aspects of personhood that are relevant when deciding on the basic political principles of society.⁹

⁴ *Theory*, rev. ed., p. 104.

⁵ *Ibid*, p. 109.

⁶ *Ibid*, 109-110.

⁷ "Social Unity and Primary Goods", in Amartya Sen and Bernard Williams (eds.), *Utilitarianism and Beyond*, Cambridge: Cambridge University Press, reprinted in Rawls's *Collected Papers*, p. 365.

⁸ *Ibid*.

⁹ *Ibid*, pp. 365-368; "Justice as Fairness: Political not Metaphysical", *Philosophy and Public Affairs*, 14, 1985, 223-252, reprinted in *Collected Papers*, pp. 388-414.

The parties in the original position who decide on the principles of justice are assumed to mutually benefit from social cooperation, and to possess certain cognitive abilities that allow them to take part in the decision. In the original position, the parties only decide on the principles of justice, and not on the concrete institutional design and policies that will give these principles content in the actual world. That is done in later stages, whereby the veil of ignorance is gradually lifted and more and more information about their own position becomes available to the parties when they decide about the design of institutions, laws, and actual policies. The representative parties will choose from a list of possible principles of justice those principles that it is rational for them to choose given the information that they have and have not. Rawls argues that the parties will choose the following two principles:¹⁰

1. Each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all.
2. Social and economic inequalities are to satisfy two conditions: [2a] first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; [2b] and second, they are to be to the greatest benefit of the least advantaged members of society (the difference principle).

The basic liberties are listed as follows: “freedom of thought and liberty of conscience; political liberties (for example, the right to vote and to participate in politics) and freedom of association, as well as the rights and liberties specified by the liberty and integrity (physical and psychological) of the person; and finally, the rights and liberties covered by the rule of law”.¹¹ Rawls stressed repeatedly that the two principles have to be seen as working in a tandem. The first principle, the principle of equal basic liberties, has priority over the second principle; in addition, (2a), the principle of fair equality of opportunity, has priority over the difference principle (2b). Applying the difference principle requires interpersonal comparisons of some notion of advantage. Rawls holds that a person’s advantage should be specified by social

¹⁰ *Restatement*, pp. 42-43; see also ‘Social Unity and Primary Goods’, p. 362 and *Theory*, rev. ed. p. 266.

¹¹ *Restatement*, p. 44. This is essentially the same list as in *Theory*. Rev. ed. p. 53. Rawls no longer explicitly includes “the right to hold personal property”, but one could reasonably assume that this would be covered by the rights and liberties covered by the rule of law. Note that in *Theory* the most probable reading is that this is not necessarily an exhaustive list, whereas in *Restatement* this list is presented as a complete list. Compare *Theory*, Rev. Ed., p. 53 with *Restatement* p. 44.

primary goods, which are all-purpose means that every person is presumed to want, as they are useful “for a sufficiently wide range of ends”.¹² Because the parties in the original position do not know which notion of the good life they will endorse, nor their natural abilities, they choose for general all-purpose means.¹³ In response to some of the critiques on the original publication of *A Theory of Justice*, Rawls has stressed that it is not actual persons who are assumed to want those primary goods, but rather persons in their capacity as citizens, as conceptualized by the political conception of the person in justice as fairness.¹⁴

The social primary goods can be classified in five groups:¹⁵

- (a). the basic rights and liberties;
- (b). freedom of movement and choice of occupation;
- (c). powers and prerogatives of offices and positions of authority and responsibility;
- (d). income and wealth;
- (e). the social bases of self-respect.

Due to the priority of the first principle over the second, and the principle of fair equality of opportunity (2a) over the difference principle (2b), the first three groups of primary goods are effectively equalized among all persons before the difference principle plays any role. This leaves us with only income and wealth, and the social basis of self-respect (categories d and e) to identify the worst-off person or group in society. Rawls considers the social bases of self-respect probably the most important primary good, and argues that the best way to provide the social bases of self-respect is by treating every citizen as an equal, that is, by giving every citizen the same rights and liberties.¹⁶ Thus, based on Rawls’s assumptions on human psychology, it follows that if both the first principle of justice and the principle of fair equality of opportunity are met, then everyone is provided with the same social basis of self-respect. As a consequence, the difference principle will make interpersonal comparisons based on estimating the life-time expectations in terms of income and wealth.

¹² “Social Unity and Primary Goods”, p. 367.

¹³ Ibid, p. 361; *Theory, rev. ed.*, p. 54.

¹⁴ “Social Unity and Primary Goods” pp. 365-368, *Restatement*, pp. xvi, 58

¹⁵ “Social Unity and Primary Goods” p. 362; *Restatement*, pp. 58-59.

¹⁶ *Theory, rev. ed.*, p. 386.

Based on Rawls's first outline of justice as fairness in *A Theory of Justice*, many readers have –quite reasonably– interpreted the primary good of income and wealth as net personal income and personal wealth. However, Rawls has later clarified that the primary good income and wealth also includes our partial control of the property and income of groups and associations to which we belong, and the goods and services provided to us by public goods or government spending.¹⁷ As we will see below, this has some consequences for the debate between Rawlsians and capability theorists.

Rawls's principles of justice apply to the basic structure of society, which he defines as “the way in which the main political and social institutions of society fit together into one system of social cooperation, and the way they assign basic rights and duties and regulate the division of advantages that arise from social cooperation over time”.¹⁸ Because basic structures can differ over time and space, it is not possible to list all the institutions of the basic structure in general; however, Rawls does mention some, like the political constitution and economic and social arrangements such as the legal protection of basic liberties, competitive markets and the family.¹⁹ Thus, in contrast to much other theorizing in contemporary moral and political theory that focuses primarily or exclusively on the distribution of particular goods and thus would fall under what Rawls calls “allocative justice”, Rawls's theory is a theory of institutional or political justice.²⁰

Finally, because Rawls is deeply concerned about the possibility that people with very different comprehensive moral views on the good life can come to a reasonable agreement on the principles of political justice, he stresses that the conception of justice must be public and the information necessary to make a claim of injustice must be verifiable to all, and preferably easy to collect. A theory of social justice needs a public standard of interpersonal comparisons, as otherwise the obtained principles of justice between citizens with diverse views on the good life will not prove stable.²¹

¹⁷ ‘Fairness to Goodness’, *Philosophical Review*, 84, reprinted in *Collected Papers*, pp. 271-273; *Restatements*, p. 172.

¹⁸ *Restatement*, p. 10

¹⁹ *Theory, Rev. Ed.*, p. 6.

²⁰ *Theory, rev. ed.*, pp. 76-77; *Restatement*, p. 50.

²¹ Rawls, “Social Unity and Primary Goods”, pp. 370-371; Thomas Pogge, “Can the Capability Approach be Justified?”, *Philosophical Topics*, 22 (2), 2002, § 4.1.

3. The scope of justice as fairness: which individuals?

Over the years, Sen has formulated two lines of critique on Rawls - one related to Rawls's use of primary goods for interpersonal comparisons, and a second critique related to the restricted domain of Rawls's theory of justice. We will deal with the latter critique below. First we turn to Sen's critique on the Rawlsian conceptualization of a person's advantage and the identification of the worst off in terms of primary goods, and the consequences that this has for some 'non-normal' individuals.

Sen's critique started with his claim that justice as fairness deals in an unsatisfactory way with severely disabled people.²² The difference principle, which determines how well-off someone is in terms of income and wealth *only*, would not justify any redistribution to the disabled on grounds of her disability. Rawls's strategy has been to postpone the question of our obligations towards the disabled, and exclude them from the development of the theory and the principles of justice. The underlying reason is that Rawls prefers to focus on the classical problems in the history of political thought. He argues that justice as fairness addresses what he regards the fundamental question of political philosophy, namely "what principles of justice are most appropriate to specify the fair terms of cooperation when society is viewed as a system of cooperation between citizens regarded as free and equal persons, and as normal and fully cooperating members of society over a complete life".²³ Rawls certainly does not want to deny our moral duties towards the people that fall outside the scope of his theory, but he thinks that we should first work on a robust and convincing theory of justice for the "normal" cases and only then try to extend it to the "more extreme cases".²⁴ The neglect of the needs of the disabled is thus not so much situated in the conceptualization of the social primary goods, but rather determined by the limited scope of justice as fairness as a social contract theory.

But Sen's critique on the inflexibility of primary goods goes beyond the case of the severely disabled. As Sen puts it, the problem does not end with the hard cases of the severely disabled. He believes that the more general problem with the use of primary goods is that it cannot adequately deal with the pervasive inter-individual differences between people:

²² 'Equality of What?' in: *Tanner Lectures on Human Values, Vol. I*, Salt Lake City: University of Utah Press, pp. 195-220.

²³ Rawls, *Restatement*, p. 176, note 59.

²⁴ *Ibid.*

“the primary goods approach seems to take little note of the diversity of human beings. ... If people were basically very similar, then an index or primary goods might be quite a good way of judging advantage. But, in fact, people seem to have very different needs varying with health, longevity, climatic conditions, location, work conditions, temperament, and even body size. ... So what is being involved is not merely ignoring a few hard cases, but overlooking very widespread and real differences.”²⁵

Sen’s critique of primary goods boils down to the fact that primary goods cannot adequately account for interindividual differences in people’s abilities to convert these primary goods into what people are able to be and to do in their lives. In contrast, so Sen argues, we should focus directly on people’s beings and doings, that is, on their capabilities to function. Primary goods are the means to pursue one’s life plan. But the real opportunities or possibilities that a person has to pursue her own life plan, are not only determined by the primary goods that she has at her disposal, but also by a range of factors that determine to what extent she can turn these primary goods into valuable states of being and doing. Hence, Sen claims that we should focus on the extent of freedom that a person actually has, which he calls her capabilities, and which we will assess below.²⁶

Rawls has indeed stated that in his theory “everyone has physical needs and psychological capacities within the normal range”, and therefore he excludes people with severe physical or mental disabilities from the scope of justice as fairness.²⁷ Rawls justifies this by arguing that a theory of justice should in any case apply for ‘normal cases’ – if the theory is inconsistent or implausible for the normal cases, then it will certainly not be an attractive theory for the more difficult cases, such as people with severe disabilities. In his earlier work Rawls suggested that issues of disability might take us beyond the theory of justice, and his methodological choice of focusing on the core issues discussed in the history of political thought implicitly suggested that we could postpone the question of how to treat people with disabilities to one of

²⁵ “Equality of What?”, pp. 215-216.

²⁶ Some key references by Sen on the capability approach, in particular in relation to social justice are his “Equality of What”; “Rights and Capabilities”, in his *Rsources, Values and Development*, Cambridge: Harvard University Press, 1984, pp. 307-324; *Commodities and Capabilities*, Amsterdam, North Holland, 1985; “Well-being, Agency and Freedom” *The Journal of Philosophy*, 82(4), pp. 169-221; *The Standard of Living*, Cambridge, Cambridge University Press, 1987; “Justice: Means versus Freedoms”, *Philosophy and Public Affairs*, 19, 1990, pp. 111-121; *Inequality Reexamined*, Oxford: Clarendon Press, 1992; “Capability and Well-being”, in Martha Nussbaum and Amartya Sen (eds.), *The Quality of Life*, Oxford: Clarendon Press, 1993, pp. 31-53; “Gender Inequality and Theories of Justice”, in Martha Nussbaum and Jonathan Glover, *Women, Culture, and Development*, Oxford: Clarendon Press, 1995, pp. 259-273, and *Development as Freedom*, New York: Knopf Publishers, 1999.

²⁷ *Theory*, Rev. Ed., pp. 83-84; *Restatement*, 170, 176.

the later stages of the design of the basic structure of society.²⁸ However, Sen argues that “a substantial theory of justice cannot sensibly postpone this question in developing the basic structure of the theory. Need differences –of which ‘hard cases’ are just extreme examples– are pervasive, and they deserve a more central place in a theory of justice such as Rawls’s.”²⁹ In later work Rawls no longer argued that the case of justice towards the disabled had to be postponed to the legislative phase, but rather that we had to try to extend justice as fairness to include those cases. He added:

I don’t know how far justice as fairness can be successfully extended to cover the more extreme kinds of cases. If Sen can work out a plausible view for these, it would be an important question whether, with certain adjustments, it could be included in justice as fairness when suitably extended, or else adapted to it as an essential complementary part.³⁰

Given this debate, we have to ask two questions. First, is it *in principle* possible to include the physical and mentally disabled in Rawls’s theory by extending the social contract drawn up in the original position? And second, if it is not possible to include the mentally and physically disabled within justice as fairness, and the only way to deal with them is in an *ad hoc* fashion, should this be considered to be a problem?

The first question has been investigated by Eva Kittay, Harry Brighthouse, and Martha Nussbaum, among others.³¹ Kittay’s argues that there are five presuppositions in justice as fairness that omit the concerns of the disabled and those who care for them: the circumstances of justice; the assumption that citizens are fully cooperating members of society over their lifetime; the characterizations of persons as free; the characterization of persons as possessing the two moral powers and, based on this characterization, the choice of primary goods as the informational basis for interpersonal comparisons of well-being; and, finally, the assumption of rough equality between the persons, which is a necessary condition for the idea of social cooperation.³²

²⁸ *Theory, Rev. ed.*, p. 84.

²⁹ “Equality of What”, p. 366.

³⁰ *Restatement*, p. 176, fn 59.

³¹ Note that Kittay’s concern is not with the disabled in particular, but with dependent persons and those caring for dependents more in general. I fully agree with Kittay that a theory of justice should discuss what society owes to people who care for children, ill, disabled and frail elderly. However, this poses a problem for *all* theories of justice, including Rawls’s and any capability theory of justice. Independent of whether the currency of justice is primary goods or capabilities, such theory need to argue where the line is drawn between personal and collective responsibility regarding the fulfillment of the needs of dependents. This is a very important issue but one that I can not satisfactory deal with in the present paper.

³² Kittay, p. 81.

Kittay tries to extend and modify justice as fairness to include justice regarding the distribution of care work and the need for care by dependents. Her first modification is that human dependency should be included as a circumstance of justice, as otherwise there is no guarantee that the parties in the original position will take dependency considerations into account. Second, the idealization that all citizens are fully cooperating members of society should be dropped to allow the full inclusion of the severely disabled. Third, the Rawlsian characterization of free persons needs to be dropped, as dependency workers are not free in the Rawlsian sense. Fourth, the list of moral powers should include a capacity to respond to vulnerability with care. Fifth, Rawls's notion of reciprocity needs to be expanded to include dependency work, thereby accounting for the reproduction of generations, and care should be included as a primary good. Nevertheless, despite her attempts to extend justice as fairness to include the disabled, Kittay concludes that the difference principle will fail to meet the needs of dependent people (including disabled persons) and dependency workers, and argues that she sees no way in which justice as fairness can be modified to sufficiently account for dependency concerns, without fundamentally abandoning Rawls's theoretical framework.

Brighouse argues that as far as the physically disabled are concerned, justice as fairness can be extended to incorporate them, as they possess the two moral powers.³³ Such extension of the Rawlsian framework requires that we give up the assumption that persons are economically productive over their complete lives. Brighouse holds that this is a defensible move, as it is only a simplifying assumption in Rawls's theory, and not a foundational one. The original position is then modified to deprive the contracting parties of knowledge about their natural endowments. Brighouse contends that the disabled will then be considered the worst-off in society, and a considerable amount of resources will be devoted to improving the quality of their lives. However, while this extension of justice as fairness will yield very extensive obligations towards the physically disabled, Brighouse is worried that the Rawlsian assumption of the two moral powers makes it impossible to include the severely mentally disabled within such extended version of justice as fairness. Within the Rawlsian framework one could only argue on other grounds than those of justice, such as charity, that we have obligations towards the mentally disabled. But to many

³³ Brighouse, *Ibid.*

it will certainly seem implausible that we have no obligations based on justice, especially since Rawls considers justice to be the first virtue of social institutions.³⁴

Kittay's and Brighouse's work raises the question which assumptions in justice as fairness may be altered in order to count as an extension of the Rawlsian framework, rather than an abandonment of his framework. Kittay doesn't think it is possible to include the disabled (and dependents and dependency workers) in justice as fairness, and Brighouse's analysis ends with the pessimistically phrased question whether Rawls's theory can accommodate the mentally disabled. Nussbaum argues that including the disabled would require allowing the parties in the original position to be benevolent rather than mutually disinterested, "But if the benevolence added were sufficiently deep and inclusive, the change would also require the approach to depart so far from the idea of a contract for mutual advantage that there would be no point to using the metaphor of the social contract at all."³⁵

In conclusion, justice as fairness can only accommodate the physically disabled by giving up the assumptions that the parties are socially productive over their life span, which makes one doubt whether this sits comfortably with the core idea of the social contract as social cooperation for mutual advantage. And more importantly, justice as fairness is not at all able to include the mentally disabled without definitely moving beyond some of its core presuppositions.

This then brings us to the second question. If justice towards the disabled cannot be theorized within Rawls's framework, and the only way to deal with the disabled is in an *ad hoc* fashion, how problematic is that? By postponing the question of our obligations towards the disabled to the legislative stage, we are no longer discussing this as a matter of justice, but as a matter of charity or compassion, as both Brighouse and Nussbaum point out. Kittay and Nussbaum rightly argue that this postponement is deeply problematic, since dependency and care are central to everybody's lives and are a crucial factor in determining our quality of life. In addition, care and dependency are not just "special cases", but are important aspects of human life that at any particular point in time affect a large share of the population, and affect everyone at some point in their lives. This is an argument that feminist political philosophy has been making for some time now. Perhaps more importantly, the distribution of

³⁴ Rawls, *Theory*, Rev. Ed., p. 3.

³⁵ Nussbaum *Tanner Lectures*, manuscript July 2004, Chapter 2, p. 29

burdens and benefits of being cared for (as a child, an ill or disabled person, or a frail elderly), and the distribution of burdens and benefits of caring (as a parent or a caregiver) are as much concerns of social and distributive justice as the distribution of income, wealth, liberties and opportunities. There is no theoretical justification for postponing these aspects of distributive justice, nor for keeping them outside the boundaries of our theories of social and political justice.

One could, of course, try to modify and extent justice as fairness to include the mentally and physical disabled, but this would raise the problem of which aspects of the Rawlsian framework are its absolute core and should therefore not be altered. If one stresses the social contract aspect of justice as fairness, as Nussbaum does, modifications are highly unlikely to include all people. If one regards the focus on the basic structure and the difference principle as the core aspect, as Pogge sees it, it is not impossible that theoretical modifications can be developed which would allow us to include “non-normal” people. If one holds that only the idea of the original position and veil of ignorance are unalterable, again new theoretical possibilities open up. In any of these modifications and extensions, it could also possibly be argued that the parties in the original position would not choose to assess their individual advantage in terms of social primary goods, but rather in terms of another metric, such as capabilities. However, any of these extensions require an agreement on which are the core and unchangeable aspects of justice as fairness.

4. The scope of justice as fairness: which societies?

In *Inequality Reexamined*, Sen formulates a second critique of Rawls, which has received far less attention than his critique regarding primary goods and inter-personal diversity. While Rawls has responded to Sen’s critique on the limitations of making interpersonal comparisons based on primary goods on several occasions, he has never responded to Sen’s objection related to the scope of justice as fairness.

In *Political Liberalism*, Rawls wrote that justice as fairness “understands itself as the defense of the possibility of a just constitutional regime”.³⁶ Indeed, in developing justice as fairness Rawls has repeatedly stressed that the principles of justice should be independent of any controversial philosophical or religious doctrines, which is one main reason why the parties in the original position do not know their conceptions of

³⁶ *Political Liberalism*, p. 101.

the good life, including any religions or ideologies to which they might subscribe. Tolerance for other comprehensive views of the good life thus takes a primary place in justice as fairness.³⁷ In addition, Rawls also explicitly stresses that the scope of justice as fairness is limited to constitutional democracies.³⁸

Sen takes issue with the fact that Rawls works within the boundaries of political liberalism, as this “limits the scope of the concept of justice drastically and abruptly, and it would often make it hard to identify political rights and wrongs that a theory of justice *should* address.”³⁹ He gives the example of the injustices created by Emperor Haile Selassie’s political views during the Ethiopian famines in 1973, and argues that while great injustices took place, neither the Emperor nor his opponents would accept any principle of tolerance of different views of the good except for their own. Sen concludes “many blatant injustices in the world take place in social circumstances in which the invoking of ‘political liberalism’ and the ‘principle of toleration’ may be neither easy nor particularly helpful.”⁴⁰

Is it true that justice as fairness has a restricted scope? It all seems to depend on the interpretation, and also on whether one stresses Rawls’s earlier or later work. Anthony Laden has suggested that there are two ways to read Rawls: one which stresses the “Grand Theory” aspect of justice as fairness, and the social contractarian nature and the substantive aspects of the principle of justice. In the “alternative” reading of justice as fairness, Rawls would have tried to show that “despite the fact that citizens in a democratic society will never come to an agreement about fundamental philosophical, moral and religious matters (the fact of reasonable pluralism), they can nevertheless agree on a framework of fundamental political matters, and thus regulate their collective lives according to principles that are supported by reasons each citizen can accept.”⁴¹ This alternative reading seems to be much more prominent in Rawls’s later work (like *Political Liberalism*), where he is very much concerned with the peaceful and tolerant co-existence of people with otherwise incompatible views of the good life, for example because of the religions they adhere to. Sen’s critique on the later developments versions of justice as fairness thus seem to be correct.

³⁷ *Theory, rev. ed.*, pp. 186-190.

³⁸ *Ibid*, p. xi.

³⁹ *Inequality Reexamined*, p.77; italics in original.

⁴⁰ *Ibid*, p. 79.

⁴¹ Anthony Laden, “The House that Jack Build: Thirty Years of Reading Rawls”, *Ethics*, 113, 2003, p. 383.

However, another reading is possible. Thomas Pogge argues that Rawls's later work has been more abstract, vague and conservative, and that the potentially radical and progressive consequences of justice as fairness have not been sufficiently developed and exposed.⁴² In undertaking this task, Pogge argues that two Rawlsian ideas are central: the basic structure and the maximin principle (the difference principle). Defending a broad notion of basic structure, Pogge argues that “any comprehensive social system has a basic structure and thus falls within the purview of Rawls's conception of justice”.⁴³ Thus, on this reading of *Theory of Justice*, it emerges that Rawls has prematurely concluded that justice as fairness would only apply to societies that are democratic and have citizens who are tolerant of each other's views of the good life. Sen's objection can therefore be met, but it requires some interpretational choices and further development of Rawls's work, as has been done by Pogge and others.

There is another way to interpret Sen's critique that justice as fairness cannot deal with cases of injustice such as the famine crises in Ethiopia. It might be that Sen's worry is not just about the fact that the scope of justice as fairness is limited to constitutional democracies, but that he is also worried about the limits imposed by the ideal-theoretical character of justice as fairness. Sen is right that the scope of justice as fairness is unnecessarily limited, and if Kittay's arguments are correct, then the full repercussions of the idealisation in justice as fairness are not just the exclusion of those societies where people are not tolerant of others' conceptions of the good, but also the exclusion of all dependents and dependency workers.⁴⁴

Rawls repeatedly says that justice as fairness should be read as ideal theory.⁴⁵ This means that we assume that everyone complies with the principles of justice. Rawls believes that such ideal theory should be able to help us deal with existing injustice.⁴⁶ It is clear that scholars in moral and political philosophy and justice in particular, are divided on the usefulness of ideal theory to deal with issues of existing injustice, with those having some background in the social sciences being much more inclined to stress the limitations of ideal theory. It is a plausible claim that ideal theory sharpens our thinking on justice, but too often makes unrealistic and unrealizable assumptions

⁴² Pogge, *Realizing Rawls*, pp. 4-6.

⁴³ *Ibid*, p. 24, italics in original.

⁴⁴ Kittay, *Ibid*, pp. 88-93.

⁴⁵ *Theory*, *Rev. ed.*, p. 8, 215-216; *Restatement*, pp. 13, 65.

⁴⁶ *Ibid*, p. 13

about human nature or societal conditions, resulting in theories that provide very little guidance to deal with actual cases of socio-economic injustice, especially when socio-economic and socio-cultural factors are intertwined.⁴⁷ In justice as fairness, all judgments of actual inequalities are against a background of equal basic liberties and fair equality of opportunity. This is, as Rawls himself notes, why justice as fairness does not discuss issues of gender and race, as in the ideal well-ordered society there would be no racial or gender discrimination and fair equality of opportunity would be secured to all.⁴⁸ In no country in the world, however, either of these conditions is met. In addition, current knowledge about the causes of gender and racial inequalities strongly suggest that these causes cannot be reduced to violations of the basic liberties only.⁴⁹ The upshot is that based on Rawls's writing itself, it is far from clear how useful justice as fairness is for non-ideal situations, and that this is another reasons why its scope is limited, probably unnecessarily so.^{50, 51}

5. The capability approach as a liberal theory of justice

The arguments and analyses in the previous sections have shown that justice as fairness can be criticized for not sufficiently dealing with inter-personal diversity. While Sen's second (and minor) objection to Rawls is, in my view, ultimately not fatal, his main objections that social primary goods are not the correct metric for interpersonal comparisons of advantage, and that the social contract excludes certain

⁴⁷ Roland Pierik and Ingrid Robeyns, "Resources versus capabilities: social endowments in egalitarian theory", mimeo.

⁴⁸ *Restatement*, pp. 64-65.

⁴⁹ See, for example, Sally Haslanger (2000). 'Gender and Race: (What) Are They? (What) Do We want Them to be?', *Noûs*, 34, pp. 31-55. Michael Kimmel (2000). *The Gendered Society*. New York: Oxford University Press.

⁵⁰ Pogge argues that justice as fairness needs to be developed to the more practical level if we are to be convinced of its plausibility, as Rawls himself requires. See Pogge's *Realizing Rawls*.

⁵¹ In contrast, the capability approach introduces abstractions, but doesn't rely on idealizations. Thus, there is no theoretical reason why issues of gender, race, care and dependency should not be fully incorporated. As with all other theorizing, the capability approach can be applied in an androcentric or otherwise biased way. However, this is not inherent to its foundations but rather a bad application of the approach. Indeed, many writers have stressed the importance of care and dependency in the capability approach and its resources to theorize our duties towards the disabled. For the differences between idealization and abstraction, and why the former is problematic while the latter need not be, see Onora O'Neill, "Ethical Reasoning and Ideological Pluralism", *Ethics* 98 (4), 1988, 711-713. On care and dependency and the capability approach, see; Nussbaum, *Women and Human Development*; Ingrid Robeyns, "Sen's capability approach and gender inequality: Selecting relevant capabilities", *Feminist Economics*, 2003, 9(2), among others. On dependency and disability, see Kittay, *Love's Labor*, p. 202, fn 130; Nussbaum, *Women and Human Development*, chapter 3; Tania Burchardt, 'Capabilities and Disability: The Capabilities Framework and the Social Model of Disability', *Disability and Society*, forthcoming, among others.

groups of people from the scope of justice as fairness poses a fundamental challenge for justice as fairness. One could deal with this challenge by trying to extend and modify justice as fairness in such a way to include those people presently excluded from its scope. Alternatively one could start all over and radically choose for a theory of justice which includes an alternative notion of individual advantage. That is the route which Sen has chosen. When Sen first formulated his main critique on Rawls in his 1979 Tanner Lecture, he sketched the outlines of his proposed alternative, the capability approach. In what follows I will assess the two Rawlsian critiques on the capability approach, and ask whether the capability approach can do any better than justice as fairness.

What are the core characteristics of the capability approach? The capability approach makes interpersonal comparisons by focuses on people's real or effective opportunities to do what they want to do, and be who they want to be, instead of focusing on the social primary goods of persons. These beings and doings are called a person's functionings, and include such basic functionings as being healthy, being sheltered, not being mentally ill, engaging in social relations, and more complex and specific functionings such as combining a job with family life, or being as athletic as one can be. Capabilities are the effective opportunities that a person has to attain these functionings. A stylized non-dynamic representation of the capability approach is presented in figure 1 below.

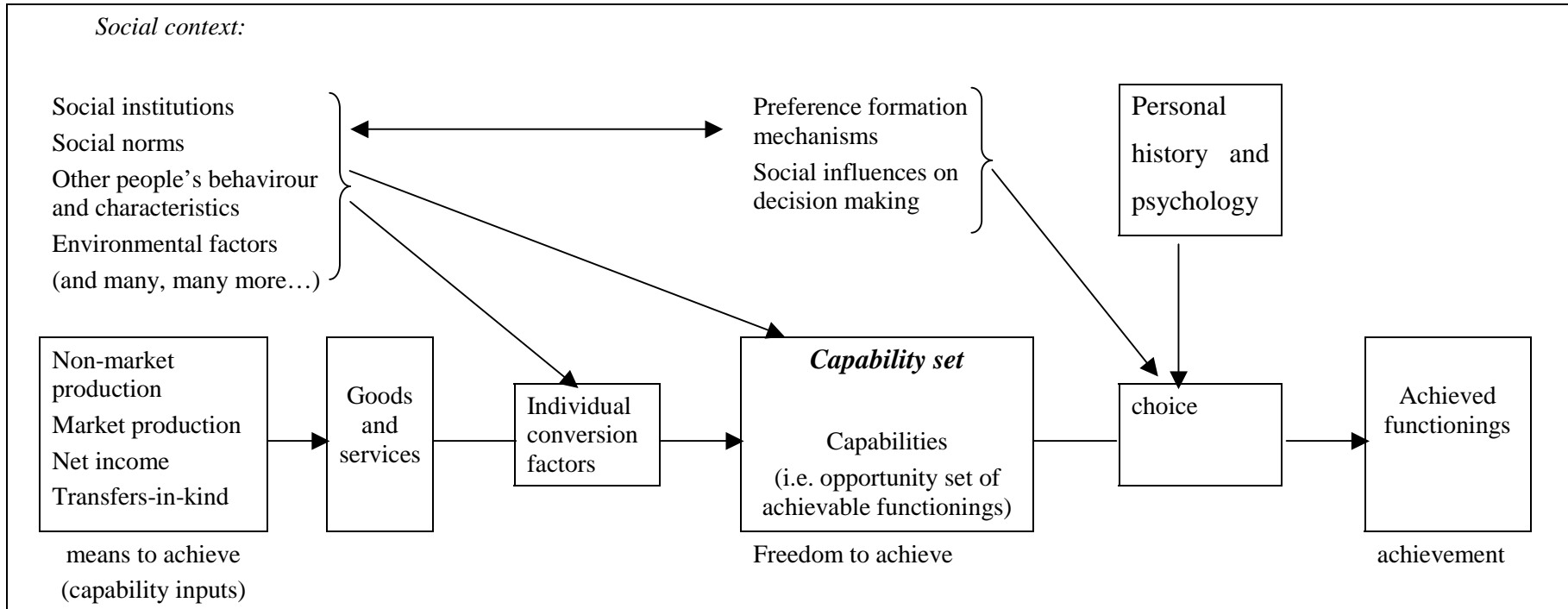
As already noted, Sen argued that Rawls's use of primary goods led to the inability of justice as fairness to account for inter-individual diversity in the conversion of these resources into valuable states of being and doing. Over time, Sen has discussed three categories of such conversion factors. Firstly, personal conversion factors (e.g. metabolism, physical condition, sex, reading skills, intelligence) influence how a person can convert the characteristics of the commodity into a functioning. If a person is handicapped, or in a bad physical condition, or has never learned to cycle, then the bicycle will be of limited use in enabling the functioning of mobility. Secondly, social conversion factors (e.g. public policies, social or religious norms, discriminating practices, gender roles, societal hierarchies, power relations, public goods) and environmental conversion factors (e.g. climate, infrastructure, institutions) play a role in the conversion from characteristics of the good to the individual functioning.

Justice as fairness postulates that the object of justice is the basic structure of society, that is, the totality of societal institutions. The object of the capability approach could include the basic structure, but would most likely go beyond it. At present, it is impossible to say, as there is no fully developed capability theory of justice to be compared with Rawls's theory. However, if a capability theory of justice would not just include the basic structure but also pay explicit attention to the "egalitarian ethos", that this would make it a stronger theory. Rawls writes, for example, that the family belongs to the basic structure and therefore needs to be regulated in accordance with the two principles, but that the behavior of the members of the family need not be regulated by such principles. In part, Rawls postulates that in the well-ordered (and therefore just) society people will be compelled to follow the principles of justice, and thus the behavior of members of social institutions could be very different from the injustice-generating behavior that we observe in reality. Unfortunately, this is an idealization that is not very helpful for thinking about current injustices within families. The quality of life of individuals in terms of their capability sets is profoundly affected by the behavior of other family members and indeed behavior of people outside the family. The injustices that such behavior generates need to be part of a theory of justice, and not relegated to moral theory.

Generally speaking, the capability approach advocates that we should be concerned with people's capabilities, and not with their achieved functionings. Exceptions are children and mentally disabled, as their limited cognitive capacities justify a (partial) focus on achieved functionings instead of capabilities.⁵² The basic assumption is that if people have the same opportunities, and their willpower to make decisions and bear personal responsibility for their choices is not more restricted than of other people, then justice should be concerned with their opportunities (capabilities) and not with their achieved functionings.

⁵² Nussbaum, *Women and Human Development*; Madoka Saito, "Amartya Sen's Capability Approach to Education: A Critical Exploration", *Journal of Philosophy of Education*, 37(1), 2003, pp. 17-33.

Figure 1: A stylized non-dynamic representation of a person's capability set and the social and personal context of this person



Sen thus stresses the normative primacy of capabilities rather than achieved functionings because he wants to respect many different notions of the good, and this requires a normative focus on opportunities rather than outcomes. This core characteristic of the capability approach makes it a liberal theory, just as Rawls's. Sen and Nussbaum hold that people should have the positive freedom to have effective possibilities to shape their own life and attain a high quality of life, but given that they are capable of making responsible decisions, it is up to them to choose which capabilities they would effectively like to realize. However, in contrast to some other liberal theories, the material and non-material circumstances that shape people's opportunity sets, and the circumstances that influence the choices that people make from the capability set receive a central place in the interpersonal comparisons. For example, both Sen and Nussbaum have paid much attention to the social norms and traditions that form women's preferences, and that influence their aspirations and their effective choices.⁵³ Thus, the capability approach is not contented with a focus on people's capability sets, but insists that we also need to scrutinize the context in which economic production and social interactions take place, and in which people's well-being is set, and whether the circumstances in which people choose from their opportunity sets are just.

6. Does the capability approach entail a comprehensive notion of the good?

Rawls undoubtedly would take issue with my claim that the capability approach is a liberal theory, as he has argued that the capability approach entails a comprehensive notion of the good, in contrast to the political liberalism of justice as fairness.⁵⁴ Rawls hints that the capability approach relies on a particular conception of the valuable ends in life, and therefore does not respect the diverse comprehensive views of the good life that citizens of a plural society might endorse. Political liberalism, in contrast, claims to be fair between different comprehensive conceptions of the good, and only endorses principles of justice that citizens with diverse and conflicting comprehensive notions of the good can endorse as the result of an overlapping consensus.

⁵³ Sen, "Gender and Cooperative conflict", in Irene Tinker (ed.), *Persistent Inequalities*, New York: Oxford University Press, pp. 123-149; Nussbaum, *Women and Human Development*.

⁵⁴ Rawls, "The priority of the Right and the Idea of the Good", *Philosophy and Public Affairs*, 17, 1988, reprinted in his *Collected Papers*, p. 456. See also Sen, *Inequality Reexamined*, pp. 82-83.

Sen has replied that Rawls's claim that the capability approach would endorse one unique view of the good, is mistaken.⁵⁵ The capability approach holds that the relevant focus is on the combination of capabilities that a person can access, in other words, a focus on people's capability sets. And this capability set "stands for the actual freedom of choice a person has over alternative lives that he or she can lead."⁵⁶ An interpersonal comparison focusing on a set of achieved functionings would endorse a comprehensive notion of the good, but this is precisely what Sen and Nussbaum have stressed repeatedly: the focus is not on achieved functionings, but on capabilities to achieve those functionings.

This reply strikes me as correct. But is it sufficient? One possible counter-reply to Sen's defense is that the capability approach ultimately relies on a specification of the list of valuable capabilities, and as such imposes a specific view on the good life. One may argue that by listing the capabilities that are going to count for purposes of social justice, we are imposing a comprehensive notion of the good life. If a particular functioning is important to my notion of the good life, and it is not included in the list of capabilities, then the conceptualization of justice will be biased against my notion of the good life.

Of course, it is well-known that Sen has refused to endorse one particular list of capabilities, and as such stays clear from facing this problem. Nussbaum, in contrast, has proposed and defended a list of those capabilities that a capability-based theory of social justice should promote.⁵⁷ Thus, it seems that the objection that the selection of capabilities could indirectly entail the endorsement of a comprehensive notion of the good life, is only relevant for Nussbaum's version of the capability approach, and not for Sen's.⁵⁸ Nussbaum believes that this list can be obtained as part of an overlapping

⁵⁵ 'Justice: Means versus Freedoms'; *Inequality Reexamined*, pp. 82-83.

⁵⁶ *Ibid*, p. 114.

⁵⁷ The latest versions of Nussbaum's list can be found in *Women and Human Development*, and in her "Capabilities as Fundamental Entitlements".

⁵⁸ While Sen first proposed the capability approach, there are now a number of people who have proposed (partial) capability based theories of development, justice and equality, most notably Martha Nussbaum. Nussbaum's capabilities approach aims to specify capabilities as the fundamental constitutional entitlements that every person in every country should be guaranteed, and that are non-negotiable. In addition, while Sen has deliberately kept his capability approach open and underspecified, Nussbaum has drawn up a list of ten capabilities guaranteed. Nussbaum has also argued that if Sen wants his capability approach to have any bite for purposes of social justice, he should also endorse a list of capabilities, whether that list would be partial or complete. See her "Capabilities as Fundamental Entitlements: Sen and Social Justice", *Feminist Economics*, 9(2-3), 2003, pp. 33-59.

consensus of people as citizens who have otherwise diverse views of the good life, but this has been questioned both on philosophical as well as political grounds.⁵⁹

Sen has repeatedly stated that capabilities can form the informational basis for a theory of justice, but he has never developed such a theory himself. So we are left with the open question on how to select the capabilities without imposing a notion of the good life. This is a key question in the development of the capability approach into a theory of social justice, and a full proposal on how this could be done is beyond the scope of the present paper.

However, let me briefly sketch the outline of an alternative way to select capabilities for purposes of justice that is not vulnerable to the objection that it cunningly introduces a notion of the good. All liberal theories, including those in political liberalism, endorse some limits on which comprehensive moral views of the good life are permissible. In justice as fairness, not all comprehensive notions of the good are permitted, but only those that are in accordance with the basic liberties. In a similar vein, capability theorists could be developed to specify some principles that legitimate notions of the good life would need to meet. The list of relevant capabilities would then be derived by pulling together all the capabilities that those legitimate notions of the good life would entail. One could add additional criteria, such as restricting the list of capabilities to those that fall within the domain of political justice, after such domain has been appropriately specified. Such additional criteria might be necessary to avoid claims of injustice by people with a certain facial feature, say being depressed from having a small nose.⁶⁰ Such a criteria-based selection of capabilities would have the advantage of being respectful of all legitimate comprehensive notions of the good life, and it would avoid the problems of political legitimacy that plague any list that is (rightly or wrongly) perceived as being non-democratic, such as Nussbaum's.

⁵⁹ In my view, Nussbaum's list cannot be derived from an overlapping consensus, and lacks the legitimacy that a list of capabilities requires. I don't have the space here to argue that in detail, but for critiques along this line, see Elizabeth Spelman, "How do they see you?", *London Review of Books*, 16 November 2000, pp. 11-13; Frances Stewart, "Book review of Women and Human Development", *Journal of International Development*, 13, 2001, pp. 1189-1202; Nivedita Menon, "Universalism without Foundations?", *Economy and Society*, 31(1), 2002, pp. 152-169; Linda Barclay, "What kind of liberal is Martha Nussbaum", *SATS – Nordic Journal of Philosophy*, 4(2), 2003, pp. 5-24; and Ingrid Robeyns, "Sen's capability approach and gender inequality: Selecting relevant capabilities", *Feminist Economics*, 9(2-3), 2003, pp. 61-92.

⁶⁰ Pogge raises an objection along these lines in his "Can the capability approach be justified?"

7. The publicity critique on the capability approach

I will now consider one final objection that a Rawlsian could make of the capability approach. It has been argued, both by Rawls and more recently by Pogge, that a theory or principle of social justice should be a workable and a public criterion, that is, inequalities and injustices should be able to be assessed by the public and should not need to rely on impossible amounts of information.⁶¹ As Rawls puts it:

What is crucial is always to recognize the limits of the political and the practicable... we must respect the constraints of simplicity and availability of information to which any practicable political conception (as opposed to a comprehensive moral doctrine) is subject.⁶²

The suggestion is that as capabilities are very hard to measure or assess in such a public fashion, and as they would require very large amounts and difficult sorts of information, the capability approach is unworkable as a theory of social justice.

The first part of the claim is that a capability-based theory of social justice would require too much information. But it's hard to see why it would count as a decisive argument that a greater need for information would count against a conception of justice. It is true that *ceteris paribus*, the less information a particular conception of justice requires, the better; but given that Rawls regards justice the first virtue of society, this surely can never be a decisive argument against a certain conception.

The second part of the claim is that the information needed to make interpersonal comparisons and claims of injustice has to be publicly verifiable. Given stability considerations and incentive problems, this is indeed a justified requirement for a plausible conceptualization of justice. But are Rawls and Pogge right when they claim that it is too difficult to know for each individual which capabilities his or her capability set contains, and that such evaluation would not rely on publicly verifiable information?

There are two ways to assess the capabilities of a person, and both ways can be used in a complementary fashion. The first strategy is to try to measure a person's capabilities directly. However, generally one does not have information on a person's capabilities, and one would have to assess her achieved functionings levels and infer from those levels of achievements a person's capability set. So far, the existing empirical studies measuring or estimating capabilities have been limited to compare

⁶¹ Rawls, *Political Liberalism*, p. 182; Pogge, "Can the Capability Approach be Justified?".

⁶² Rawls, *Political Liberalism*, p. 182.

group differences in inequalities or the quality of life, either by making use of econometric techniques or based on the assumption that group differences in achieved functionings mirror group differences in their capability sets.⁶³ However, to assess an individual's capability set rather than group differences in capability levels, this technique obviously can't work.

Here the second methodological strategy might be more helpful. One could start by analyzing the capability inputs. As figure 1 makes clear, these are both the institutional system (and basic structure) in which an individual functions, as well as the interaction of others, and a broad range of resources. These capability inputs also include all Rawlsian primary goods, together with some other social primary goods that Rawls's critics have suggested to add, such as leisure and care.⁶⁴ In addition, we would carefully scrutinize the social, environmental and personal conversion factors. If one of those conversion factors can be argued to lower the conversion of income (or other primary goods) into valuable capabilities, then this could possibly provide a claim for either extra resources, or other social policies or public goods (such as ramps for wheel chair users, child care facilities for parents, effective anti-racist social policies, and so forth). Finally, the capability approach would also require that the social constraints on the choices that people make from their capability set would be scrutinized, but this can easily be done as a complementary task to the evaluation of the distribution of resources, and the redistributive and other policies resulting from the analysis of the conversion factors.

If a capability-based theory of social justice performs the interpersonal comparison of individual advantage in this second way, and not by aiming to assess capabilities directly, it not only becomes a standard of justice that is much more public, but the complementarities with a resources-based evaluation become evident. The capability approach can thus be developed into a theory of justice in a way that incorporates the Rawlsian focus on social primary goods. However, the critiques of capability theorists on justice as fairness would gain much more legitimacy and strength if this project would actually be undertaken, rather than just leaving it undetermined whether the

⁶³ The latter technique is based on the premise that the distribution of preferences among groups is the same. For a survey of these empirical studies, see Wiebke Kuklys and Ingrid Robeyns, "Sen's capability approach to welfare economics", Cambridge Working Paper in Economics, 0415, February 2004.

⁶⁴ Thomas Pogge suggested adding leisure, Eva Feder Kittay suggested adding care. See Pogge, *Realizing Rawls*, and Kittay, *Love's Labor*.

approach would be able to deliver. Moreover, if the capability approach would be developed into a theory of justice, it would also allow for the much fairer exercise of comparing such a capability theory of justice with justice as fairness, instead of lifting out only one aspect, while ignoring the rest of Rawls's work.^{65,66}

It goes without saying that I have only provided a sketch of how the capability approach could be developed into a theory of social justice that relies on public standards of justice. It goes beyond the scope of the present paper to provide a detailed account of that. In addition, to put any flesh on the skeleton sketched here, one would need to integrate the best of empirical knowledge, and take into account general facts about the relevant context or society, both of which require much more work than can reasonably be presented here.

8. Conclusions

In the theoretical literature on social and distributive justice, the capability approach and justice as fairness are most often presented as strict alternatives. Capability theorists (and others) have made three main critiques on justice as fairness. First, social primary goods are not the appropriate dimension of individual advantage for purposes of justice, because it underestimates differences in human diversity and needs, and does not focus on what is ultimately important. Second, justice as fairness excludes certain people, because of its social contract structure. Thirdly, Rawls unnecessarily restricts the spatial scope to democratic societies. I have argued in this paper that the last critique is not very strong, and that a plausible interpretation of justice as fairness includes all societies. The second critique has some plausibility, but whether it is fatal or not depends on what are to be considered the core characteristics of justice as fairness, and which are the ones that we allow to be modified. It is possible – though, as far as I know yet not proven, that justice as fairness could be modified to include all human beings and to pay sufficient attention to human diversity – but this would in any case require considerable modifications to the Rawlsian framework. Sen's first critique is, in my view, the strongest: a theory of

⁶⁵ I am echoing some of Pogge's comments here. See Pogge, "Can the Capability Approach be Justified?". However, this does not imply that I agree with Pogge's arguments in that paper.

⁶⁶ Martha Nussbaum can obviously not be accused of this, as her Tanner Lectures deal with Rawls at considerable length. This does not imply that I regard her critique of Rawls and her subsequent defense of her version of the capability approach convincing. Her critique of Rawls and defense of her capability theory need a full-length analysis and assessment which I cannot provide here.

justice should start by considering what is really important to people, and these ultimate ends are capabilities, and not social primary goods.

Rawls, on the other hand, has criticized the capability approach for endorsing a particular conception of the good, and for not offering a public criterion of justice. Based on the arguments presented in this essay I submit that the two main objections that Rawlsians have on the capability approach are not fatal, and that future work will need to establish whether the rough outlines sketched here can provide a theory, which is not vulnerable against Rawls's charges. Moreover, the capability approach does not suffer from the limitations of justice as fairness which have been reassessed in this paper – and that makes it all the more urgent to investigate the viability of a capability-based theory of social justice. Only then will a full and fair comparison be possible.

In contrast to Sen's critique of Rawls and vice versa, the analysis in the present paper also suggests that there might be much more convergence between a well-elaborated capability theory of justice and justice as fairness. While a theory of justice should, in my view, start by considering people's capabilities, it is highly plausible that the basic structure of society and social primary goods would play a major role in a well-elaborated capability theory of justice which would meet the publicity requirement.