

ARTIKELEN

Nussbaum's Capabilities Approach: In Need of a Moral Epistemology?*

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Introduction

What should citizens be able to do and be in order for a society to be just? This is the central question of Nussbaum's theory of justice that she presents as the Capabilities Approach (CA).¹ By way of an answer Nussbaum offers an abstract and general list of Central Human Capabilities (CHC).² The list is presented as a philosophical underpinning for constitutional principles in a democratic society. As such it aims to provide a cutting edge in terms of which actual public choices regarding matters of justice can be objectively justified in constitutional democracies.

The CA qualifies this commitment to objectivity, expressed both at the theoretical level as well as at the practical level, by the claim that it fundamentally differs from relativism, traditionalism or preference-based approaches to justice.³ However, although the CA clearly expresses a commitment to objectivity, I will argue in this article that this commitment is rather ambiguous due to the conception of public

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- 1 Nussbaum's Capabilities Approach is a specific version of the Capabilities Approach, as it is first presented by Amartya Sen in his article "Equality of What" (cf. Amartya Sen, "Equality of what", <www.tannerlectures.utah.edu/lectures/documents/sen80.pdf>, May 22, 1977). The Capabilities Approach puts the concept of capabilities at the heart of, respectively, questions of justice, interpersonal comparisons and cross-national quality of life assessments. Whereas Nussbaum's version offers a canonical list that functions as a foundation "for basic for central constitutional principles that citizens have a right to demand from their governments", Sen is reluctant to identify such a list because of his epistemological concern that such a list might not be warranted without knowing the context of its use. See Martha Nussbaum, *Woman and Human Development: the Capabilities Approach* (Cambridge: Cambridge University Press, 2000), 12; Amartya Sen, "Elements of a Theory of Human Rights", *Philosophy and Public Affairs* 32 (2004): 333. Sen, moreover, criticizes the attempt to use philosophical principles as an underpinning for public reason by arguing that this would limit the domain of public reason too much. See Sen, *ibid*, 333. For Nussbaum's discussion of Amartya Sen's capabilities approach, see Martha Nussbaum, "Capabilities as Fundamental Entitlements: Sen and Social Justice", *Feminist Economics* 9 (2003): 33-59; Nussbaum, *Woman and Human Development*, 11-15.
- 2 See Appendix and see Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge: Belknap Press of Harvard University Press, 2006), 76-77.
- 3 For Nussbaum's (extensive) critique on preference based approaches to justice, see Nussbaum, *Frontiers of Justice*, 73; Nussbaum, *Woman and Human Development*, 111-166; see for a critique on traditionalism and relativism, Nussbaum, *Woman and Human Development*, 34-49; Martha Nussbaum, "Human Functioning and Social Justice: In defense of Aristotelian essentialism", *Political Theory* 20 (1992): 203-205.

reason endorsed by CA. That is, due to certain characteristics of its conception of public reason, the CA cannot account for an objective justification of public reason, at least not for an objective justification in said qualified sense. Because of its conception of public reason the CA risks jeopardizing the substantive aim it has set: to provide an objective justification for public choices regarding the capabilities and their specifications. It will be asserted that if the CA takes its practical aim seriously, i.e. to get citizens above "an appropriate threshold level of capability", its conception of public reason should be amended by means of a substantive epistemology.⁴ Which epistemology it should be and whether it is reconcilable with the fact that the CA, as a kind of "political moralism", gives morality priority over practice, are important questions that arise and that should be answered; nonetheless, these questions will be left aside in this article due to reasons of scope.

Objectivity in the CA

Before we turn to scrutinizing the CA's conception of public reason, it is first of all necessary to substantiate the claim that the CA expresses a commitment to objectivity. On the basis of Nussbaum's discussion of the CA, the commitment to objectivity that can be identified as one that *prima facie* harmonizes with what Williams qualifies as "political moralism", i.e. theories of justice that offer foundational moral principles to be specified in society in order for the latter to be just. As such, political moralism is a kind of applied morality that puts the priority of the moral over the practical.⁵ Political moralism implies the rejection of traditionalism, relativism and mere preference-based approaches to justice. These are approaches that, as to their normative implications, can be said to make morality dependent on actual (objectively identifiable) states of affairs.

The commitment to objectivity, therefore, does not refer to the objective social existence of values or norms or preferences. Rather, in political moralism objectivity is expressed first of all in the fact that it presents principles of justice as morally "right" or "correct". That is, these principles are not put forward as a reproduction of mere opinion, of tradition, or as the result of power relations. On the contrary, they are defended as the outcome of philosophical reflection that is considered appropriate to identify correct principles of justice.

A second element of political moralism that expresses its commitment to objectivity is that it typically offers an account of how its substantive goals are to be realized in the political domain. This element is inextricably linked with the generally accepted idea that the substantive aims of theories of justice should not only be right, but should also be feasible. As a way of observing this feasibility requirement, political moralism not only claims rightness on the level of theory but also claims to account for the objective justification of actual choices to be made in society with regard to justice. Obviously, this is also implied by the notions of "application" and "specification" typically employed in theories of justice that can be qualified as

4 Nussbaum, *Frontiers of Justice*, 75.

5 Bernard Williams, *In the beginning was the deed: realism and moralism in political argument*, ed. Geoffrey Hawthorn (Princeton: Princeton University Press, 2005), 2.

political moralism. These notions indicate that in order to realize a just society political actors should think in the moral terms determined by moral theory itself and be able to act accordingly.⁶

As mentioned before, the CA's commitment to objectivity fits with that of political moralism because it presents the CHC as morally right. These principles are justified by reference to a particular conception of philosophical reasoning for the attainment of evaluative knowledge, i.e. an Aristotelian dialectic for which the shared self-understanding of human beings functions as a starting point.⁷

Next, the CA's commitment to objectivity fits with that of political moralism because it offers an account of how the CHC are to be specified in society. That is, the CA presents a conception of "right" legal and political reasoning by means of which the CHC are to be realized in liberal constitutional democracies.⁸

Additionally, and as part of the CA, Nussbaum herself also works out the normative implications of the CHC, such as the implications for legislation and policies in the domain of freedom of religion, for determining the basic entitlements of mentally disabled children and for the kind of legal reasoning that should be employed by the Supreme Court. Thus, by arguing how the CHC are to be specified, the CA not only accounts for the objective justification of the principles of justice, for an objective justification on the theoretical level, but also for the objective justification of public reason, i.e. the criterion for the use of state power in matters of justice by means of which these principles are to be realized.⁹ Finally the CA's commitment to objectivity, as a form of political moralism, is also expressed in the use of the predicate "actually", "truly" or "really", which is employed in the articulation of its substantive aim: to get citizens above a certain "threshold level of capability".¹⁰ However, it should be noted that these predicates do not indicate that the CA relies on

6 *Ibid.*, 3.

7 Cf. Nussbaum, *Woman and Human Development*, 72-73; Nussbaum, "Human Functioning and Social Justice: In defense of Aristotelian essentialism", 202-246. An Aristotelian moral epistemology is based upon the idea that moral truth can be revealed in human (self-)understanding. This truth can be revealed by means of a dialectical inquiry into the "*phainomena*", into the views of both "the many and the wise". According to this inquiry, it is the task of the philosopher to work these *phainomena* into a coherent and consistent theory, such that the account can lead to a reliable conception of human flourishing. See John Cooper, *Reason and Human Good in Aristotle* (Indianapolis: Hackett Publishing Company, 1975/1986), 67; Cooper, *Reason and the Emotions: Essays on ancient moral psychology and ethical theory* (Princeton: Princeton University Press, 1999), 281-292; Aristotle, *Nicomachean Ethics: Translation, Introduction and Commentary*, ed. and trans. Sarah Broadie and Christoffer Rowe (Oxford: Oxford University Press, 2002), 11; Martha Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (New York: Cambridge University Press, 1986/2001), 243-245.

8 See for instance Martha Nussbaum, "Foreword: Constitutions and Capabilities: 'Perception' against Lofty Formalism", *Harvard Law Review* 21 (2007): 4-97.

9 Nussbaum presents the CA as an extension of Rawls conception of justice, and as part of the framework of political liberalism. See Nussbaum, *Woman and Human Development*, 5 and 74-75, Nussbaum, *Frontiers of Justice*, ix, 6. Therefore, Rawls' definition of the concept of public reason as employed in his book, *Political Liberalism*, will be used. See for this definition John Rawls, *Political Liberalism* (Cambridge: Harvard University Press, 2003), 214.

10 See for instance Nussbaum, *Frontiers of Justice*, 70; Nussbaum, "Foreword: Constitutions and Capabilities", 5; Nussbaum, "Capabilities as Fundamental Entitlements", 40.

moral realism. It should be taken in the sense in which political moralism accounts for it: the CA offers foundational moral principles – i.e. the CHC – that are to be specified by means of public reason, such that the substantive moral values that these principles endorse can be really realized.¹¹

The CA and Public Reason

As already submitted in the introduction, the CA's commitment to objectivity is rather ambiguous. This ambiguity can be explained by the characteristics of the conception of public reason held by the CA. One of these characteristics is that the CA justifies public reason for all levels of specification predominantly by reference to the idea of an overlapping consensus.¹² Nussbaum contends that the use of political power is justified only if its grounds are, or are likely to become, the object of an overlapping consensus between citizens holding different conceptions of the good.

Nussbaum emphasizes that within political liberalism the concept of an overlapping consensus does not point to a consensus between all citizens and their actual points of view, but rather points to a consensus between the points of view of "reasonable" citizens. However, as we shall see hereinafter, the concept of "reasonable" does not suffice for the CA to account for objectively justifiable public choices. That is, unless it is supported by a substantive standard the concept of "reasonable" does not have a cutting edge that is sufficient to determine whether public choices are reconcilable with the CHC. Without such a cutting edge, and in view of its focus on actual agreement, the concept of an overlapping consensus implies a commitment to objectivity in the empirical sense: that of the objectively identifiable state of affairs, rather than a commitment to objectivity in the sense of "being right", not in the least because the CA explicitly excludes the input from epistemological doctrines from the notion of "reasonableness".¹³ Due to this "epistemic abstinence", choices or views that from the viewpoint of a convincing epistemology are wrong or incorrect can nevertheless be part of public reason, and as a consequence might lead to a conflict of the latter

11 Political moralism itself does not suggest a *particular* conception of objectivity, such as for instance moral realism or moral constructivism. The principles of justice political moralism typically brings to the fore are grounded on different epistemologies and ontologies. Bernard Williams, for instance, takes it that the most prominent moral theories are the ones that offer an objective foundation either grounded on substantive beliefs about human nature or on an account of practical reason. See Bernard Williams, *Ethics and the limits of moral philosophy* (London: Fontana Press, 1993), 54. More generally, there is a good reason to separate claims to objectivity from particular claims about the nature of things or the nature of moral knowledge, namely, that if one makes the possibility of objectivity dependent on the plausibility of a particular kind of epistemology or ontology, one might, as Bambrough puts it, throw out "the baby as well as the bath water". For this reason Bambrough has a rather inclusive account of objectivity. He takes it that the "most powerful indicator of being right is the certainty of being wrong". See Renford Bambrough, "Objectivity and Object", *Proceedings of the Aristotelian Society* 71 (1972): 81.

12 See Nussbaum, *Frontiers of Justice*, 16; Nussbaum, *Woman and Human Development*, 76.

13 Martha Nussbaum, "Political Objectivity", *New Literary History* 32 (2001): 891.

with the substantive goals the CA has set.¹⁴ This is difficult to reconcile with a commitment to objectivity as it is found in political moralism, which offers not only right moral principles but also an account of how these principles are to be rightly specified. Therefore, within the framework of political moralism a commitment to objectivity seems difficult to reconcile with the way the CA legitimates public reason, i.e. without criteria to ascertain whether public reason is correct.¹⁵

The assertion that the CA's epistemic abstinence might imperil its commitment to objectivity can be illustrated by the discussion in the Netherlands on whether and how prostitution should be regulated by state intervention. From the viewpoint of the CHC, the question of prostitution is clearly a matter that is relevant for justice. This is so because the characteristics of prostitution as an occupation are intimately linked with a broad range of the capabilities that are listed in the CHC, such as the capability to be treated as a dignified being and to have self-respect, the capability to have opportunities for sexual satisfaction, the capability to form a conception of the good and to engage in critical reflection about the planning of one's life and the capability to exercise practical reason in work and to seek employment on an equal basis with others.¹⁶ In the Netherlands, the discussion about the regulation of prostitution is more or less dominated by the emphasis put on the value of free choice and on the rejection of arguments that are considered "moralistic". Arguing from the perspective of the value of free choice, one might conclude that state intervention regarding the possibility of becoming a sex worker is no less illegitimate than public policy aimed at preventing that citizens become plumbers.

Due to the fact that this argument is widely supported, public reason according to the CA might give it decisive weight in answering the question whether and under what conditions prostitution should be facilitated, notwithstanding the availability of knowledge which is relevant from the viewpoint of the CHC for the evaluation of prostitution as "an occupation like any other". For example, psychological research indicates that the "freedom" that is assumed in the concept of "free choice" must be put into a critical perspective. This research shows that a vast majority of sex-workers has a traumatic past and often has been the victim of sexual abuse.¹⁷ In light of the CHC, this research points to the fact that the choice of this category of persons to become a sex worker, can better be accounted for in terms of a lack of (an internal) capability – a lack that should be addressed, rather than in terms of an actual capability: practical reason – that public reason should protect through

14 I am indebted to Joseph Raz for the phrase "epistemic abstinence". See to this effect his article, "Facing Diversity: The Case of Epistemic Abstinence", *Philosophy and Public Affairs* 19 (1990): 3-46.

15 David Estlund makes a similar point against Rawls' claim that in a political liberal framework public reason can be objectively justified. See "The Insularity of the Reasonable: Why Political Liberalism must Admit the Truth", *Ethics* 108 (1998): 265. For a defense against the charge that Rawls, in *Political Liberalism*, cannot account for the objectivity of public reason see Alexander Kaufman, "Rawls' practical conception of justice: opinion, tradition and objectivity in Political Liberalism", *Journal of Moral Philosophy* 3 (2006): 23-43.

16 Nussbaum, *Frontiers of Justice*, 76.

17 Cf. Abigail Zuger, "Many prostitutes suffer combat disorder, study finds", *New York Times*, August 18, 1998; Dorgen Leidholdt, "Prostitution and Trafficking in Woman: An intimate relationship", in *Prostitution, Trafficking and Traumatic Stress*, ed. Melissa Farley (Philadelphia: Haworth Maltreatment & Trauma Press, 2003), 172.

respect for freedom of choice. If thus conceived, reference to the notion of “free choice” might lose its force, and arguments based on this value would not evidently outweigh the knowledge expressed in such research. However, because the CA excludes privileged knowledge from public reason, it leaves open the possibility that the CHC will be forgone because of certain dominant ideas in society. Surely, it can be argued that to categorically protect sex workers out of respect for free choice may nonetheless be reconcilable with the CHC; but then separate arguments based on a convincing epistemology are needed. In any case, the outcome-orientedness of the CA – it aims to get citizens “really” above a certain threshold level of capability – the interrelatedness of the CHC and the emphasis put on internal capability – i.e. on developed states of the person sufficient for the exercise of meaningful functioning – implies that respect for free choice is always qualified. That is, respect for free choice is required to the extent that it enables citizens to live meaningful lives. Therefore, if it may be suspected that (an absence of) a particular form of human functioning as defined by the CA is “really a sign that the capability itself has been surrendered”, respect for free choice in the domain of this functioning loses its point.¹⁸ In that case, categorically sticking to the value of free choice would lead citizens to becoming but a “shadow of themselves”.¹⁹ Respect for free choice would then impede the acknowledgment of a sense of waste and tragedy, a sense that from the viewpoint of the CHC should give rise to state-intervention that encourages a certain human functioning in order to support the capability that has been surrendered.²⁰

Another problematic aspect of the CA's conception of public reason, given its commitment to objectivity, is that public reason is rather under-determined. The CA explicitly attributes to public reason the function of determining citizens' entitlements in constitutional democracies. These entitlements are referred to in terms of the “adequate threshold level” of capabilities.²¹ The CA takes it that in a just society all citizens should be equally entitled to be provided the necessary conditions for an “adequate threshold level” of capabilities to function.

Now, the under-determinacy of public reason results not only from the rather under-determined character of the concept of “adequacy”, but also from the fact that the CA leaves the specification of “appropriateness” open to the discretion of the authoritative institutions in the society in question.²² Therefore, what counts as “appropriate” or “adequate”, and thus which concrete entitlements citizens actually should have, depends fully on the actual choices of these institutions. Nonetheless, Nussbaum does contend that the determination of the threshold level of capability is a question of “wise practical reasoning”.²³ Moreover, she argues that the CA ascribes an important role to government in human life, i.e. “to secure for

18 Nussbaum, *Woman and Human Development*, 93.

19 See for a casuistic discussion of what the state ought to do in case certain capabilities have been surrendered, Nussbaum, *ibid*, 89-96.

20 *Ibid*, 83.

21 Nussbaum, *Frontiers of Justice*, 75; Nussbaum, “Foreword: Constitutions and Capabilities”, 12.

22 Nussbaum, *Frontiers of Justice*, 79 and 180; Nussbaum, “Foreword: Constitutions and Capabilities”, 16.

23 Nussbaum, “Foreword: Constitutions and Capabilities”, 13.

citizens a comprehensive set of necessary conditions for a life worthy of human dignity".²⁴ So, it is crystal-clear that as to the determination of the threshold level of capabilities it cannot be the case that "anything goes". However, because they are themselves under-determined, these "guidelines" or suggestions the CA offers are not sufficient to compensate for the under-determinacy of public reason. Consequently, within the CA public reason might justify public choices that from the viewpoint of the CHC are simply wrong, not as a matter of an incidental clear mistake and not as a negligible incident, but because of structural characteristics of the institutions that are relevant for the determination of citizens' basic entitlements. Because it might (help to) justify wrong outcomes, this under-determinacy of the CA's conception of public reason cannot be reconciled with a commitment to objectivity as it figures in political moralism.

One could argue, of course, that in liberal constitutional democracies the broad ranges of choices available for institutions that are to decide about matters of justice, are indifferent from the viewpoint of the CHC. But in that case separate arguments favouring one claim above another should be brought forward. Not in the least, because *prima facie* the reverse seems more plausible, particularly when the "outcome-orientedness" of the CA is taken into account.²⁵ As Nussbaum puts it, "[j]ustice is the outcome, and the procedure is a good one to the extent that it promotes this outcome".²⁶ In light of the substantive goals the CA has set, i.e. to get citizens above a threshold level of capability, it seems plausible, therefore, to suggest that both the way in which institutions determine the threshold level of capabilities as well as the way in which the CA is institutionally anchored, can compromise the CHC. That is, whether and how the CHC are constitutionally protected is likely to influence what citizens are actually capable of; from the viewpoint of justice these arrangements are unlikely to be contingent, let alone indifferent.²⁷

For instance, if the capability of thought would be "secured" merely through constitutionally protected negative freedom rights, i.e. those of freedom of consciousness and freedom of speech, legislative bodies and administrative agencies would have considerable discretion to decide whether and to what extent to guarantee the social conditions necessary to develop the internal capability of thought for which a certain quality of family, of education and of cultural practices are obviously crucial. If governments choose not to support these practices, for instance for budgetary reasons, it is a matter of brute fact whether the conditions necessary to develop the capability of thought will be equally available for all citizens.

Likewise, if the aim of the CHC is among other things to prescribe that the emotional development of citizens will not be "blighted by fear and anxiety", *prima facie* it does make a difference whether there are constitutional arrangements to secure a certain

24 Nussbaum, *ibid*, 11.

25 See for an extensive discussion of this characteristic: Nussbaum, *Frontiers of Justice*, 82-92.

26 Nussbaum, *ibid*, 82.

27 The idea that actual characteristics of institutions are significant for the determination of the threshold level is also indicated by Nussbaum's critical discussion of the formalist style of legal reasoning employed by the Supreme Court of the United States during its 2007 term. See Nussbaum, "Foreword: Constitutions and Capabilities", 24-33.

quality of family life for children.²⁸ Surely, one might disagree with these empirical conjectures, but again, in that case separate arguments are necessary, showing for instance that state-intervention is harmful for actual social practices. Anyhow, without constitutional arrangements the extent to which the conditions necessary for the development of the CHC of all citizens are realized is dependent on the choices of authoritative institutions and the quality of certain social practices in society. What is more, if a theory of justice relies too much on this quality, the question arises whether it maintains the characteristics of “political moralism”, i.e. of putting moral principles prior to practice, hence whether it can maintain its critical function. Nussbaum takes it that in this regard “the systematic arguments of theory have an important practical function to play in sorting out our confused thoughts, criticizing unjust social realities, and preventing the sort of self-deceptive rationalizing that frequently makes us collaborators with injustice”.²⁹ Thus, because the CA leaves it up to social discretion to decide what counts as an “appropriate threshold level”, i.e. because the standard for correctness does not come from, nor is guided by the theory, the CA’s commitment to objectivity as it is identified in “political moralism” is compromised. Its under-determinacy leads to the possibility that public reason is determined by brute fact rather than by reason, hence it leaves open the possibility that the CHC are put in peril.

Finally, the heterogeneous character of public reason and the related conception of public reasoning which the CA proposes need critical scrutiny from the viewpoint of their commitment to objectivity. In contrast to contract theories of justice, the CA qualifies human beings as both “capable” and “needy”.³⁰ These two essential human characteristics cannot be reduced to one another, nor can they be prioritized on the basis of a superseding moral value. Therefore, the CHC that derive from this conception of human beings are inherently heterogeneous.³¹ Harm to one capability cannot be compensated for by gain for another capability.³² The heterogeneous character of the CHC, and hence of public reason, has implications for the standards of public reasoning. The CA rejects two dominant conceptions of public reasoning offhand, because they are unable to incorporate a heterogeneous account of justice, i.e. means-end reasoning (which allows trade-offs by putting maximization as the standard for rationality) and deductive reasoning (which implies a priority rule). The CA, as befits all political moralism, is committed to a practical aim. Besides offering foundational principles of justice, it also holds a conception of public reason as a means of solving practical conflicts. It needs such a conception, because whilst in the abstract the CHC do not conflict and they form a coherent theory of the human good, in practice conflicts will occur. For example, protecting the environment at a level that is necessary for the capability of enjoying nature can conflict with respecting the liberty of the economic market where citizens’ capability of practical reason could be at stake. Nussbaum proposes an Aristotelian conception

28 Nussbaum, *Frontiers of Justice*, 75.

29 Nussbaum, *Woman and Human Development*, 36.

30 Nussbaum, “Capabilities as Fundamental Entitlements”, 54.

31 Nussbaum, *Woman and Human Development*, 81; Nussbaum, *Frontiers of Justice*, 84.

32 Nussbaum, *Woman and Human Development*, 81.

of public reasoning as a standard for the specification of the CHC, and thus for the solution of these practical conflicts.³³ This Aristotelian conception integrates the heterogeneous character of the CHC. It allows for the concept of tragic choice, i.e. choices that from the viewpoint of justice are right, but nevertheless give rise to a morally relevant residue. This is so because, on this conception, the justification for public decisions is grounded upon *phrônesis*, i.e. upon the practical wisdom of the decider and not upon formal decision procedures. Nussbaum compares public officers concerned with the good of citizens with Pindar's gardener.³⁴ This "gardener" is wise and hence sees what is needed for a grapevine to flourish. However, to the extent that practical conflicts are solved by means of democratic decision procedures, the practical wisdom of citizens in general plays a crucial role in the realization of the CA's aim as well. Nussbaum takes it that in a just society citizens are "sympathetic perceivers" who understand that and how external circumstances might impinge on the development of the capabilities of their fellow citizens, and why certain measures should be taken to foster them.³⁵ Therefore, except where issues which are contingent from the viewpoint of the CHC are concerned, within an Aristotelian conception of public reasoning democratic decision procedures used to specify the CHC have a normative force on the condition that citizens have attained a certain level of practical reason. If not, then from the viewpoint of the CHC it would not make sense to view these procedures as the ground for public reason.

Now, in light of the CA's commitment to objectivity the Aristotelian conception of public reason is problematic. Let's assume the CA aims to account for an objectively justifiable public reason in terms of an Aristotelian framework. This framework demands that officials and citizens are rightly trained in order to "perceive" well. Precisely for that reason the CA emphasizes the importance of education.³⁶ However, as already mentioned, discretion is left to the (authoritative) institutions – discretion to decide what counts as an appropriate threshold level for any capability. The CA therefore, does not guarantee the necessary quality of institutions and of deciders; it does not guarantee the knowledge necessary to choose the right specifications. For example, if a Secretary of State were brought up in a Christian-Orthodox family, attended a Christian-Orthodox school, and his social life were totally embedded in a Christian-Orthodox environment, he would not be well equipped to perceive that, under particular circumstances, the freedom of religion might conflict with gender equality. To expect him nevertheless to specify the necessary conditions for women to flourish in accordance with what the CHC require is to ignore the importance of training and habituation in an Aristotelian conception of public reasoning.³⁷

Training and habituation in this case demand his partaking in social institutions in which "perceiving well" is actually trained. As Aristotle puts it, "it does not make a

33 Martha Nussbaum, *Love's Knowledge: Essays on Philosophy and Literature* (Oxford: Oxford University Press, 1990), 66-75; Nussbaum, "Foreword: Constitutions and Capabilities", 24-33.

34 Nussbaum, "Foreword: Constitutions and Capabilities", 5 and 24-33.

35 *Ibid.*, 101-104.

36 Nussbaum, "Foreword: Constitutions and Capabilities", 69-73.

37 Aristotle, *Nicomachean Ethics*, 103-105 (1098b15-1099b20), 111 (1103 a 15-20); Nussbaum, *The Fragility of Goodness*, 243-245.

small difference whether people are habituated to behave in one way from childhood on, but a very great one; or rather it makes all the difference in the world".³⁸ Thus, if the CA proposes an Aristotelian conception of public reasoning, it must also explain how, by which means and in what way it actually gets public officials and citizens sufficiently competent to rightly specify the CHC.

Moreover, from the viewpoint of objectivity the concept of tragic choice also needs to be elaborated differently. As it has already been argued, the heterogeneity of the political principles that public reason is grounded upon – i.e. the CHC – requires that public reason incorporates (inescapable) tragic choices as public concepts. Although Nussbaum emphasizes the tragic character of some of the choices public deciders have to make, she nonetheless proposes that reasoning by analogy is adequate in the judicial domain, especially where the determination of citizens' concrete entitlements is concerned.³⁹ This kind of reasoning possibly suits the American common law tradition particularly well. But reasoning by analogy leaves no room for tragic choice because, according to that way of reasoning, the right weight can be given to the interests at stake. The right weight is determined on the basis of a final value, which will lead to the right (i.e. maximizing) decision, leaving no relevant residues behind. As a consequence, analogous reasoning denies the occurrence of (tragic) practical conflicts. The same goes for civil law traditions in which legal reasoning is generally justified in terms of formal decision procedures like deduction, weighing and balancing.

Thus, a proposal for the right specification of the CHC in terms of one of the currently dominant conceptions of legal reasoning is not compatible with the heterogeneous character of the CHC, which is so often emphasized on the theoretical level. Conceptions of legal reasoning that do not allow for tragic choices might therefore, although justified as part of public reason, structurally produce "false outcomes" by denying the inherently heterogeneous character of the CHC. This is because these dominant conceptions do allow for trade-offs. Objectivity as to the specification of the CHC requires that the CA's conception of public reason can account for the heterogeneity of the CHC. As a consequence, CA's conception of public reason must also make room for tragic choice, both as a political and as a legal concept. With regard to the determination of citizens' legal entitlements this implies that legal choices might be tragic. In so far as the CA sticks to the dominant conception of legal reasoning and does not allow for tragic choice as both a legal and a political concept, it might jeopardize its commitment to objectivity.⁴⁰

38 Aristotle, *Nicomachean Ethics*, 112 (1103b24-26).

39 Nussbaum, "Foreword: Constitutions and Capabilities", 33. For a discussion of the potential tragic character of public choices see Martha Nussbaum, "The Cost of Tragedy: Some Moral Limits of Cost Benefit Analysis", *Journal of Legal Studies* 29 (2000): 1005-1036.

40 For a discussion of tragic choice as a legal concept see Iris van Domselaar, "Tragic choice as a legal concept" *Archiv für Rechts- und Sozialphilosophie*, forthcoming.

The CA and political objectivity

One could suggest that by questioning the CA's conception of public reason from the viewpoint of objectivity, its explicit shift from an Aristotelian justificatory framework to that of political liberalism is insufficiently taken into account. Such questioning might disregard the fact that the objectivity the CA is committed to, is political in the politically liberal sense of the word.⁴¹ This shift would indicate that different standards should be applied in order to assess whether public reason is objectively justified, and thus whether the CA sufficiently substantiates its commitment to objectivity as it is found in "political moralism".

When discussing the concept of objectivity for the political domain, Nussbaum defends the "principle of avoidance" of political liberalism.⁴² She contends that respect for citizens in modern constitutional democracies that are characterized by the fact of reasonable pluralism, requires that contested conceptions of objectivity should be excluded from public reason, although from a philosophical point of view they might be "right" or "correct".⁴³ To ground public reason on a contested conception of objectivity, and thus to use such a conception as grounds for the exercise of state power, would according to Nussbaum be an infringement of the respect for the "views of many people about what truth is and where it lies".⁴⁴

Endorsing Rawls' political liberal account of public reason, Nussbaum takes it that public reason does not aim for mere objectivity, but for "political objectivity", i.e. a corpus of ideas and standards of public reasoning that reasonable citizens are likely to accept.⁴⁵ Within the CA, public reason and hence the CHC and their specification must be derived from "common sense", from shared ideas and from non-controversial scientific facts. This is necessary in order to avoid "indulging" in a conception of objectivity of a "divisive sort".⁴⁶

However, in view of this turn towards a politically liberal notion of public reason, it is not clear how the CA's commitment to objectivity can have substantive meaning for the specifications of the CHC other than by its reference to widely shared ideas as objective facts in the empirical sense. If this is the case, the question arises whether the CA as it now stands, can really be a form of political moralism, i.e. whether it can provide philosophical principles of justice and an objective justifica-

41 Nussbaum, *Woman and Human Development*, 74; Nussbaum, "Political Objectivity", 884; 887.

42 Nussbaum, "Political Objectivity", 894.

43 *Ibid*, 887. It remains to be seen whether Nussbaum's conception of public reason excludes only metaphysical and comprehensive conceptions of objectivity, or whether it excludes all conceptions of objectivity "of a divisive sort", including the ones that are most convincing from a philosophical point of view. See Nussbaum, "Political Objectivity", 897. In this article, Nussbaum embraces the second option, dismissing convincing moral epistemologies like those of Putnam and Cohen as candidates for being part of public reason.

44 *Ibid*, 888.

45 *Ibid*, 887; see Rawls, *Political Liberalism*, 224.

46 Nussbaum, "Political Objectivity", 897.

tion for public reason – other than by pointing to its objective existence.⁴⁷ The problem with conceiving the CA's commitment to objectivity in terms of political objectivity is that it is not clear in what sense the latter is actually objectively justified. That is, the likelihood of actual public acceptance cannot explain the "rightness" of public reason, at least not without further arguments supporting a reliance on the quality, for instance of dominant ideas in society, or of broadly shared preferences of citizens, or of the authoritative practices relevant for justice, such as the law or political decision-making processes.

Moreover, without these further arguments the CA not only jeopardizes its commitment to objectivity but also limits the critical function generally attributed to moral theories that fit the description of political moralism, because it would otherwise simply acclaim the status quo. As Williams puts it, it is generally thought that "if there is some general and abstract framework of principles of justice in theories qualified as 'political moralism', such as Rawls' theory, local practices and traditions can be criticized".⁴⁸

One could make a strong case for the concept of political objectivity by arguing analogously to Rawls' response to Habermas' critique of the concept of an overlapping consensus. In that case Nussbaum could argue in line with Rawls that the overlapping consensus the CA proposes as the justificatory ground for public reason does not refer to the "idea of consensus that comes from everyday politics". Rather, it "tries to put no obstacles in the path of all reasonable doctrines" by eliminating from public reason "any idea that goes beyond the political, and which not all reasonable doctrines could reasonably be expected to endorse".⁴⁹

However, although the suspicion of being the outcome of everyday politics might be rebutted, the objective justification of public reason is not sufficiently secured by mere reference to the reasonableness of the views that it includes. The predicate "reasonableness" does not by itself explain why public reason, and thus the specification or application of the CHC, would be objectively justified.

Thus, unless a substantive account of "reasonableness" is provided, it does not help the CA to substantiate its commitment if one merely asserts that the consensus must take place between reasonable citizens: it begs the question why these "reasonable citizens" or "reasonable views" should be the privileged group or category that counts where the justification of the CA's specifications is concerned.⁵⁰

Next, the CA has difficulties in accounting for the objectivity of public reason in political liberal terms, in articulating an important difference between the CA's and

47 This point does not mean that within an Aristotelian framework a commitment to objectivity regarding the justification of public reason could easily be substantiated. This is particularly the case because an Aristotelian framework *prima facie* does not "fit" with the characteristics of political moralism, i.e. the characteristics that the CA seems to endorse. In an Aristotelian framework the final justificatory ground for moral reasoning is the virtuousness of the agent, rather than foundational moral principles. See Nussbaum, *Fragility of Goodness*, 300.

48 Williams, *In the beginning was the deed*, 33.

49 Rawls, *Political Liberalism*, 389.

50 Because this lacuna in the justification of public reason is a problem already and extensively directed against Rawls' political liberalism, it might point to a tension within the framework of political liberalism – particularly between its "epistemic abstinence" and its commitment to objectivity.

Rawls' conception of a person. Rawls grounds public reason on a conception of the person that assumes moral competence, according to which, from the viewpoint of justice, citizens are conceived as equally free and rational.⁵¹ The CA, by contrast, does not assume moral competence of citizens, but holds a conception of the person as being "both capable and needy". As a consequence of this conception, within the CA it is a requirement of justice that public reason must take notice of the conditions under which citizens become morally competent, i.e. can become able to make valuable choices in life. As already submitted, this is the reason why the CA ascribes an important function to government. Precisely because of the needy aspect of being human, Nussbaum takes it that it is insufficient for the law not to hinder people in leading a valuable life; "it also must actively support" them.⁵² Therefore the requirement that public reason should avoid controversy, regardless of whether the conditions for moral competence are sufficiently fulfilled, might lead to choices and outcomes that are simply wrong from the viewpoint of the CHC because they insufficiently take into account the neediness of (future) citizens. For instance, empirical research shows that the Glenn Mills method and other military-styled prison regimes for juvenile delinquents do not reduce criminal behaviour of adolescents and also have significant negative side effects.⁵³ These are side effects which, when judged from the viewpoint of the CHC, *prima facie* threaten the political goal set by the CA, particularly when taking seriously the neediness of adolescents (i.e. these side-effects threaten, amongst others, the capability of physical integrity, of sociability and of practical reason). Nonetheless, in a political climate in which a large majority thinks that severe sanctions are the best way of dealing with juvenile delinquents, this research may be excluded from public reason. So, even though research points to possible violations of the CHC due to disregard of the needs of a vulnerable group of (future) citizens, public reason does not require shutting down these institutions and camps, because it cannot allow for privileged knowledge.

Finally and by extension of the former argument, the CA's shift to the framework of political liberalism as defended by Rawls, does not accord with Nussbaum's emphasis on an Aristotelian conception of public reason. As already argued, "political liberalism" justifies the content of public reason with reference to the idea of an overlapping consensus between reasonable citizens, without providing a substantive account of "reasonableness". By contrast, an Aristotelian conception of public reasoning does rely on a substantive moral epistemology as to the specification of the CHC, and consequently allows that some citizens have a better judgment about justice than others, even if these better judgments are controversial. Nussbaum takes it that judges and public officers must be "wise" and must have or make use of expert knowledge about how best to achieve the goals of justice. As such, it might make perfectly good sense for the CA to attribute a political or legal role to experts in view of determining the demands of justice or of offering the information necessary for this determination, such as the information indicated in the examples mentioned before. Because of the fact that the inherent characteristics of political

51 Rawls, *Political Liberalism*, 19.

52 Nussbaum, "Foreword: Constitutions and Capabilities", 12.

53 Bureau for Social-Cultural Planning, *Social Safety Analyzed* (The Hague: SCP-publication, 2008).

liberalism do not fit well with an Aristotelian framework, the CA has to clarify the relation between the political liberal conception of public reason it holds and an Aristotelian conception, if it is to account for the objective justification of public reason.

Conclusion

The CA, or so it has been argued, is committed to objectivity as it figures in “political moralism”, i.e. in theories of justice that offer foundational moral principles that are to be specified in society if society is to be just. However, the CA's commitment to objectivity is ambiguous because of the main characteristics of its conception of public reason. These characteristics are the justificatory use of the concepts of “overlapping consensus” and “reasonableness”, the under-determinacy of its conception of public reason, and its (in)capacity to accommodate the heterogeneous character of the CHC. In particular, the use of the concepts of ‘overlapping consensus’ and ‘reasonableness’ is evaluated in the light of the CA's shift towards a politically liberal framework and its subsequent search for political objectivity as opposed to a conception of objectivity grounded on a particular moral epistemology. From the viewpoint of the CHC the characteristics of the CA's conception of public reason are problematic: they are such that within the CA public reason might conflict with the moral principles the CA itself offers. This is regrettable because, as already submitted, the CA is outcome-oriented, i.e. it has a substantive concern. Its practical aim is to get citizens “really” above a minimum threshold level of capability. From the perspective of the CA, a society that does not guarantee the minimum social conditions for citizens to flourish cannot be just. Such a society leaves citizens to lead a life that “blights powers of human action and expression”.⁵⁴ One might therefore conclude that if the CA is really committed to objectivity, i.e. to the moral principles it proposes, it must supply a moral epistemology that can provide public reason with a cutting edge in the light of its practical aim. Obviously, due to the fact of reasonable pluralism in a constitutional democracy, there is not one right answer with regard to the specification of the CHC. But this does not mean that, within the CA, all the answers public reason gives are right. It seems that the CA cannot claim to be just without offering the epistemic ground for a wide, but nonetheless determinate, range of correct specifications.

The question arises, then, whether the ambiguity in the CA's commitment to objectivity can be avoided. *Prima facie* the answer seems to be affirmative. In order to incorporate the value of respect for citizens' choices and the fact of pluralism in the way that political liberals do, one need not shift to a political liberal framework in which (moral) epistemology is excluded from public reason. A moral epistemology does not necessarily prevent citizens from either making their own choices or finding their own specification of a good life through their human functioning as the CA defines it, once they have passed the threshold level of capability. That is, a claim to moral knowledge does not imply that public reason produces unique right ans-

54 Nussbaum, *Woman and Human Development*, 83.

wers with regard to the specifications of the CHC. Consequently, it can be concluded that a moral epistemology does not inherently conflict with the value of free choice. Besides, Nussbaum herself stresses that the abstract and general character of the CHC guarantees respect for citizens' free choices. These principles leave room for individual specifications. Also, Nussbaum presents practical reason as an architectonic capability. As a political principle, this capability guarantees free choice as to the good life individuals want to live. In other words, citizens are entitled to this capability in, amongst others, the sense of negative freedom, which is to be distinguished from actual functioning. Hence, the value the CA endorses – free choice given the fact of reasonable pluralism – does not necessitate the shift towards political liberalism and its related conception of public reason.

Although the CA's ambiguous relation with objectivity is regrettable from the viewpoint of the CHC, one might ask whether a commitment to objectivity in the sense of Williams' notion of "political moralism" can be substantiated at all within this framework. Williams is very critical about the aspiration of political moralism to account for the objective justification of actual choices in terms of foundational moral principles. He takes it that moral principles that are the outcome of philosophical reflection can never function as the rational justificatory ground for choices in the practical domain. Objectivity as he understands it, can only be accounted for in terms of "thick concepts", rather than in terms of the "thin" ones that are provided by political moralism.

This point against political moralism clearly needs further scrutiny. To identify a remedy against the "wrong outcomes" that the CA allows for, it is necessary to establish first of all whether the CA gives rise to these "residues of justice" or whether the problem resides on a more general level, namely in the assumptions of political moralism itself. If the latter is the case, the ambiguity of the CA's commitment to objectivity can be explained in these terms: the failure of political moralism to account for objective justification both of the moral principles and of their specification in society. As Williams suggests, because a theory of justice cannot "determine by itself its own application", it might be that this claim to objectivity can only be validated in terms of the concepts that actually exist and make sense in modern societies.⁵⁵ This is what Williams means by citing Goethe's phrase, "in the beginning was the deed".⁵⁶

Appendix

The principles of the CHC are: "1. *Life*. Being able to live a human life of normal length to the end; not dying prematurely, or before one's life is so reduced as to be not worth living. 2. *Bodily health*. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter. 3. *Bodily Integrity*. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual

55 Williams, *In the beginning was the deed*, 28.

56 *Ibid*, 24.

satisfaction and for choice in matters of reproduction. 4. *Senses, Imagination and Thought*. Being able to use the senses, to imagine, think and reason and to do these things in a 'truly human' way, in a way informed and cultivated by an adequate education, including, but by no means limited to, literacy, basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid non-beneficial pain. 5. *Emotions*. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.). 6. *Practical Reason*. Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection of liberty of conscience and of religious observance.) 7. *Affiliation*. A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also means protecting the freedom of assembly and of political speech. B. Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of nondiscrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin. 8. *Other Species*. Being able to live with concern for and in relation to animals, plants, and the world of nature. 9. *Play*. Being able to laugh, to play and to enjoy recreational activities. 10. *Control over one's environment*. A. Political. Being able to participate effectively in political choices that govern one's life; having the right of political participation, protection of free speech and association. B. Material. Being able to hold property (both of land and of other goods), and having property rights on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being; exercising practical reason and entering into meaningful relationships of mutual recognition with other workers." See Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge: Belknap Press of Harvard University Press, 2006), 76-77.