



Capabilities and Civil Disobedience

A comparative analysis of The Capability Approach

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To speak practically and as a citizen, unlike those who call themselves no-government men, I ask for, not at once no government, but at once a better government. Let every man make known what kind of government would command his respect, and that will be one step toward obtaining it.¹

Henry David Thoreau

¹ Henry David Thoreau, *Civil Disobedience* (Originally published as "Resistance to Civil Government") <http://thoreau.eserver.org/civil.html>, (2014-11-27), [3]

Chapter One

1. Introduction

Encyclopedia Britannica explains the term of *civil disobedience* as a refusal to obey the demands or commands of a government or occupying power, without resorting to violence or active measures of opposition.² It presupposes that a state is not allowed to do whatever it wants to its citizens, and a civil disobedient act must thus be the result of the sensitivity for an injustice.

Within political philosophy a normative analysis is central to assess answers to whether and when civil disobedience is morally legitimate, and if it will support justice.

There is a difference between *transcendental* and *non-transcendental* theories of justice. A transcendental theory of justice is focusing upon the identification of perfectly just societal arrangements.³ A classic transcendental identification of justice seen from the perspective of contractarian fairness is the outcome of Rawls imagination of an “original position”. By deliberations, the people in such position must take note of diversities among the members, and by impartiality agree upon principles of justice that is fair to the entire group. Fairness within the transcendental approach is supposed to identify a fully just society.⁴

In contrast, a non-transcendental theory of justice is a comparative approach that is focusing upon ranking alternative societal arrangements, which can vary less or more in levels of justice.⁵ This essay will emphasize the importance of plurality of identifications of justice and propose a justification for civil disobedience within a non-transcendental theory of justice.

Two contemporary philosophers - Amartya Sen and Martha Nussbaum are proponents of the non-transcendental theory of justice called *The Capability Approach* (TCA).⁶ According to their different versions of the approach certain capabilities ought to be secured, and this essay will investigate if there is a version of TCA that is more coherent for the justification of civil disobedience. While discussing the versions, I will simply call them *Sen's version* and *Nussbaum's version*. A significant distinction between the versions is that Nussbaum provides a list of *basic capabilities* which are central and necessary for a life worthy of *human dignity*, while Sen's version lacks an account of basic capabilities.

² Encyclopædia Britannica, <http://global.britannica.com/EBchecked/topic/119219/civil-disobedience>, (2014 -11-27)

³ Amartya Sen, *What Do We Want from a Theory of Justice?*, The Journal of Philosophy, Harvard University, Volume 103, No. 5, May 2006, p. 216

⁴ Amartya Sen, *What Do We Want from a Theory of Justice?*, pp. 216-217

⁵ Amartya Sen, *What Do We Want from a Theory of Justice?*, p. 216

⁶ Nussbaum prefers the term “Capabilities Approach”.

Since Nussbaum claims that TCA also is an approach concerned with *human rights*, it will be investigated in which way it relates to the conception of human dignity. There is also a close connection between the ideas of human rights and basic capabilities, which will be clarified how they relate to each other.

Through the essay I will defend the thesis that Nussbaum is in a better position than Sen to explain when civil disobedience can be justified. As a prerequisite I will claim that civil disobedience will be justified when people advocate for a change in a policy or a law that limits the securing of basic capabilities. I consider the existent capabilities on Nussbaum's list to be plausible and I will not discuss whether her list ought to be shortened or extended.

In addition to the main task of this essay I need to approach its core of discussion in several steps. First of all, a deeper analysis of the conception of civil disobedience is needed. What is civil disobedience and can a civil disobedient act include threats? J Angelo Corlett argues from a proposed definition of civil disobedience presented by John Rawls, but advocates a modification.⁷ In contrast to Rawls he argues that certain actions are species of civil disobedience even if they employ threats, and I will hold that Corlett is right in that matter.

Second, I will present Sen's and Nussbaum's account of TCA. Sen's version emphasizes the importance in the freedoms, and Nussbaum's version emphasizes the importance of securing basic capabilities.

Third, I will present an account of human rights by James Griffin and propose an explanation of how the idea relates to basic capabilities.⁸ The discussion of human rights will lead this essay further to an analysis of *positive* and *negative liberty*.

Forth, in contrast to Nussbaum's intuitive idea of human dignity I will present an analysis of human dignity by Lennart Nordenfelt.⁹

Fifth, I will discuss two critiques that have been ascribed to TCA. The first critique is specifically aimed against Nussbaum's conception of human dignity, which is a conception that is fundamental and distinctive to her version of TCA. Paul Formosa and Catriona Mackenzie claim that Nussbaum does not sufficiently analyze the conception of human dignity which risks the consequence that certain human beings would lack human dignity.¹⁰ In addition they have presented an argument which is supposed to show that Nussbaum is committed to *perfectionist liberalism* even though she explicitly defends the idea of *political liberalism*.

The second critique notices a conflict between positive and negative liberty within TCA. It has been argued that the striving for improvement of positive liberty within TCA restricts the negative liberty. It seems like this kind of conflict has been noticed by Phillip McReynolds who argues that Nussbaum's

⁷ J. Angelo Corlett, *What is civil disobedience?*, Philosophical Papers, 26:3, 241-259, San Diego State University 1997

⁸ James Griffin, *On Human Rights*, UK, Oxford University Press 2008

⁹ Lennart Nordenfelt, *The Varieties of Dignity*, Health Care Analysis, Vol. 12, No.2, Kluwer Academic Publishers, June 2004

¹⁰ Paul Formosa & Catriona Mackenzie, *Nussbaum, Kant, and the Capabilities Approach to Dignity*, Macquarie, University, North Ryde, Australia, 2014

version of TCA is authoritarian.¹¹ The idea is pragmatic and Sen seems to agree with McReynolds that there is no need for a universal list of basic capabilities since he believes that it is the task of each and every nation to decide which capabilities that ought to be secured. McReynolds notices that Nussbaum's version is concerned with public choices, which means that institutions should help the individuals to achieve their individual goods. He cannot see a coherent strategy to achieve those goods within Nussbaum's version. But Sen also holds that institutions should help the individuals to achieve their individual goods. Therefore, it would as well be rightly to wonder if Sen has a coherent strategy to achieve those goods. McReynolds critique is unwarranted, which I will show by arguing that positive and negative liberties do not exclude each other.

The objections against TCA presented by McReynolds, Formosa and Mackenzie have relevance for whether civil disobedience can be justified within TCA. I intend to discuss the objections by introducing two counterarguments whereof the first explains the irrelevance of Formosa's and Mackenzie's critique, and the second illustrates the failure of the voice of majority.

Sixth, the account of dignity presented by Lennart Nordenfelt will be analyzed and anchored to the discussion of the first critique. I will suggest that the conception of *Menschenwürde* introduced by Nordenfelt can be applied to Nussbaum's version and effectively resist Formosa's and Mackenzie's claim that Nussbaum is committed to perfectionist liberalism. In defense against the second critique it will be argued that rationalization will be necessary to identify basic capabilities, in contrast to an empirical democratic process. For that purpose it will be relevant to discuss the failure of the voice of majority. The discussion will be connected to the questions of how to practically secure a minimal level of basic capabilities and how to strengthen democracy with the help of civil disobedience.

In the concluding and final part of the essay, differences between Nussbaum's and Sen's versions will be clarified. Also, the versions relevance for the justification of civil disobedience will be explained.

2. A challenge to Rawls idea of civil disobedience

As a basis for the analysis of *civil disobedience* it is worth to consider John Rawls's idea of the conception. He defines civil disobedience as: *a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government*¹⁹

Rawls argues that the right to civil disobedience ought to be a rational agency with the aim to advance one's ends or the ends one wishes to assist. The reason for Rawls to exclude both violent and non-violent threats from a potential definition of civil disobedience is that civil disobedience ought to

¹¹ Phillip McReynolds, *Nussbaum's Capabilities Approach: A Pragmatist Critique*, The Journal of Speculative Philosophy, New Series, Volume 16, Number 2, Penn State University Press 2002, p.148

¹⁹ Corlett, p. 242

appeal a majority's sense of justice. The majority should not be forced to choose. It is important to attempt to convince through a majority's own sense of justice. Forced decisions and natural appeal to a majority's sense of justice cannot co-exist.²⁰

According to Rawls - at least two of three conditions must be met for justifying a civil disobedient act. The third condition has no relevance for the purpose of this essay and will thus be left aside. His *first condition* says that there must be an obvious and substantial form of injustice that is recognized by a violation of either *the equal liberties principle* or *the difference principle* - or both.²² His principles may be understood as follow:

The Equal Liberties Principle

Each person has an equally right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.

The Difference Principle

Social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society.²³

Rawls *second condition* that must be met says that civil disobedience is justified if normal processes of appeals to a political majority already have been carried out in good faith but have failed. Rawls argues that the two first conditions, when satisfied are in many cases sufficient for the justification of civil disobedience.²⁴

J Angelo Corlett partly argues from the proposed definition of civil disobedience presented by Rawls but advocates a modification. In contrast to Rawls he also argues that certain acts are species of civil disobedience even if they employ threats, and these kinds of acts can under the right circumstances also be morally justified. Corlett's modification requires relocating the Rawlsian boundaries of the nature of civil disobedience.²⁵

Corlett holds that civil disobedience can involve threats but still meet the conditions proposed by Rawls. For that purpose, consider the Rosa Parks bus incident in Montgomery 1955:

²⁰ Corlett, p. 243

²² J. Angelo Corlett, *What is civil disobedience?*, Philosophical Papers, 26:3, 241-259, San Diego State University 1997, p 246

²³ Amartya Sen, *The Idea of Justice*, The Belknap Press of Harvard University Press, Cambridge, Massachusetts 2009, p. 59

²⁴ Corlett, *ibid*

²⁵ Corlett, pp. 242, 244

The seat rows were divided in two sections - one for the black passengers and one for the white passengers. Certain rules were supposed to be followed. The black passengers were not allowed to sit next beside the white passengers - not even if the aisle separated them. If no seat row was free for a white passenger then a black passenger was obliged to leave space in advance for the white passenger. Many more black people than white people were using the public transport, and it quickly became a lack of seats for the black people. One day when Rosa Parks was ordered by the bus driver to make seat for a white passenger she replied: "Go ahead, have me arrested for breaking the law prohibiting persons of color from occupying seats in the front of the bus. But if you do, my friends and I will intensely and adversely publicize your action, fundamental laws, and lifestyle, something which will shame you in the eyes of the world"

She was eventually arrested by two policemen, and the incident was followed by 381 days of boycott. In 1956 on December 21 it was concluded by the Supreme Court of the United States that it was against constitutional law to segregate black people who used public transport.²⁶

Rawls admits that civil disobedience may warn and admonish, but still he argues that civil disobedience is not itself a threat. He further argues that threats force the majority to choose, rather than attempting to convince via the majority's own sense of justice. Corlett argues that there is a difference between threats of physical harm or evil and threats of non-physical harm or evil. With threats Rawls refer to the former. His conception of civil disobedience would thus exclude some actions as civil disobedient on the grounds that they constitute or employ an implied coercive threat of a nonviolent kind.²⁷

Rosa Parks action was clearly intended to force. It was a way to get the community's attention, so that she could appeal to the community's sense of justice. Corlett emphasizes that he does not reject the Rawlsian traditional conception of the nature and justification of civil disobedience, but he holds that nonviolence in some cases also must be understood to include the use of threats. Corlett questions Rawls analysis of what constitute a threat, and it is unclear if Rawls distinguishes threat of physical and non-physical harm. Corlett also asks if civil disobedience is not itself a threat. If not, then Rawls must provide a plausible account of threats that distinguishes between types of civil disobedience, which seems to be a problematic task. Corlett thus claims that Rawls faces a dilemma. In principle, an act that employs a threat rules out the Rosa Parks incident as genuinely civil disobedience.²⁸

I will hold that Corlett is right to point out that the use of threats is compatible with civil disobedience. The change of the legislation in force in the Rosa Parks case was preceded by an act that

²⁶ Corlett, p. 252

²⁷ Corlett, pp. 243, 252

²⁸ Corlett, pp. 253-254

opposed violations of justice by breaking a rule of law. In this case the rule not to sit next beside and to leave space in the front for white passengers. A normal process of legislation was not the triggering factor that changed the legislation in force. It can be assumed that during the time being there was an ongoing and parallel process of normal legislation with the aim to change the legislation in force, though not successful, or a process that was moving very slowly. And the act of Rosa Park was not part of any agency compatible with the idea of systematically using violence against civil targets, with the motive to cause fear to achieve political changes, thus her act could not be counted as terrorism. It should not be considered as an assault, and the wrongness in arresting Rosa Parks for simply not having the permission to sit next to whoever she wanted was stated by the Supreme Court of the United States. In this case, that kind of threat seemed justified. Also, the 381 days of boycott were justified as well on the very same ground. Even though the boycott in itself was a kind of passive resistance it was still caused by a civil disobedient act, which eventually led to a desired legal change. There seem to have been an obviously violation of the fundamental idea of human's equal worth in the Rosa Parks Case. Certain conditions must be met to fall within the scope of a moral right to civil disobedience, and in the Rosa Parks case, sufficient conditions were definitely met. Nonviolence can thus in some cases be understood to include the use of threats. The example of Rosa Parks shows that civil disobedience can include acts of nonviolent threats. And it can plausibly be argued that the Rosa Parks incident met Rawls conditions for a justified civil disobedient act. Also, Corlett points out that civil disobedience in itself is a threat, which is a conclusion that I agree with. The use of nonviolent threats thus seems to be an integral part of civil disobedience. Strictly reasoned, civil disobedience in itself is a threat against legal certainty. But on the other hand, civil disobedience can lead to a greater legal certainty. Thus a threat can be a mean for certain species of civil disobedience, but in another dimension of the conception a threat is an integral part of civil disobedience.

Further on this essay will seek fundamental principles that justify civil disobedience within a non-transcendental theory of justice. Thus, in the next chapter a theoretical framework of the TCA will be presented.

Chapter Two

3. A non-transcendental theory of justice

Next task is to investigate more closely under which circumstances civil disobedience is justified. The Rosa Parks incident was somewhat intuitively analyzed. In this chapter two different versions of TCA will be analyzed, and the end result of the analysis will back up the previous intuitions. Since TCA is a non-transcendental theory of justice, it must first be clarified why transcendental theories should be considered as problematic.

Proponents of transcendental theories holds that there is only one perfectly just ideal for justice. In contrast, Sen has presented an illustration about three children and a flute. The purpose is to show a plurality of identifications of justice that may not rival each other within a plural framework, and all of which claim impartiality.

Imagine three children Anne, Bob and Carla who quarrels about a flute which each of them claim to rightly possess. The only one who knows how to play it is Anne, which Bob and Carla do not deny. Anne claims that it will be unjust to deny the flute to the only one who actually can play it. If that is all to be known, it will be a strong reason to give the flute to Anne. Bob remarks that he has nothing to play with since he is so poor that he cannot afford any toys. The other children are richer and well supplied and can easily afford a flute of their own. Therefore, the reason for giving Bob the flute is also strong. In another scenario Carla will claim the flute on the basis that she has been working diligently for a long time which makes her worthy of it. She accuses the other children for being expropriators who comes along and try to grab the flute away from her. Therefore, Carla also has a strong reason for having the flute.²⁹

Sen's illustration shows that there is a difficulty in claiming that there is only one perfectly just ideal of justice. What is important is to consider a plurality of reasons for justice. One of the theories that consider this kind of plurality is TCA, but it has been presented in different versions by two leading philosophers within the field. Sen's version emphasizes the importance in the freedoms, and Nussbaum's version emphasizes the importance of securing basic capabilities.

²⁹ Sen, pp. 12-13

3.1. Amartya Sen's version of The Capability Approach

Non-transcendental theories of justice can thus embrace pluralities of perspectives and moral principles. Sen emphasizes the importance of the freedoms, and that people actually have the possibility to choose between different kinds of lives to be lived. He argues that justice is concerned, at least in part, with the distribution of *capabilities*. In fact he holds that social realizations are assessed in terms of people's actual capabilities, and not in terms of their utilities or amount of experiential happiness.³⁰ People's *opportunities* are supposed to be understood as choices of functionings from their actual capabilities. A *capability* within this context means a latent ability, and more specifically an actual ability to fulfill a functioning.

A *functioning* can be a kind of doing but also a state of being. To be a doctor or to be a philosopher is a functioning, and an act is also a functioning based on our capabilities. A functioning is an end that we wish to promote, but since a person A's capability set can vary from a person B's capability set, it is not obvious that they can attain the same wished functioning. The capability sets vary because people have different opportunities based on different circumstances. People also have different preferences and will thus naturally develop certain capabilities distinguished from those developed of others. This entails that people's actual capabilities should not alone be a measure of just distribution when deciding the advantages of people. The example with the three children and the flute illustrates why actual capabilities should not alone be a measurement. Individual utility (i.e. pleasure or happiness) has been seen as the best way to measure how advantaged an individual is and how it compares with the advantages of others. A utility approach is supposed to be understood from the utility that people attain through their lives. But Sen has challenged such a position.³¹ The core in his capability approach lies in the individual freedom to *do* things or to *be* things that has value for the individual in question. Sen argues that freedom gives people more *opportunity* to pursue their objectives, which are things that are valuable. It is thus important to promote the ends that are wished to be advanced. Also, the *process of choice* is important since we are not comfortable in being forced into some state because of constraints imposed by others.³²

The individual freedom-based capability approach that Sen emphasizes is not based on the idea of how a society *should* be organized. It is rather focusing on the available *information* about individual advantages and is judged in terms of people's opportunities to fulfill their desirable functionings. The individual freedom-based capability approach is not aimed at equating everyone's capabilities since it is not a demand for the evaluation of deciding social policies. The individual freedom-based capability approach can be relevant in different areas in society, which depends on whether right information is available and can contribute to the assessment of societies and social institutions. The plurality of capabilities constitutes various combinations of *functionings*, which in turn can be compared and

³⁰ Sen, pp. 18-19

³¹ Sen, p. 231

³² Sen, p. 228

judged against each other on the basis of what people have reason to value.³³

3.2. Nussbaum's version of The Capability Approach

Even though Nussbaum and Sen agree upon many issues it is important to highlight a certain difference that has theoretical relevance in the search of principles that can justify civil disobedience.

Nussbaum's basis for her version of TCA is similar to Sen's and she agrees that the most important elements in people's life are plural, which constitute what she refers to as *life quality*. Quality of health, bodily integrity and education are distinct. Those are examples that cannot be reduced into one single metric. The idea of plurality and non-reducibility is a key element of TCA. Discrimination and marginalization causes capability failures which ascribe a task to government and public policy to improve people's quality of life as defined by their capabilities.³⁴

Nussbaum mentions *combined capabilities* which are supposed to be understood as a totality of the opportunities one has for choice and action in a specific political, social and economic situation. The state of humans that are not fixed but dynamic is constituted of what Nussbaum calls *internal capabilities*. In many cases combined capabilities are developed abilities in interaction with the social, familial, economic and political environment. The support of the development of the internal capabilities is a duty of society when it comes to promoting the most important human capabilities. It is about promoting conditions for securing people's *basic capabilities* – as for instance providing resources to enhance physical and emotional health. Internal capabilities may be produced by a society, but at the same time a society may not sufficiently promote the opportunities to function in accordance with those capabilities. She mentions an example: “Many societies educate people so that they are capable of free speech on political matters - internally - but then deny them free expression in practice through repression of speech.”

But internal capabilities are not innate equipment. What counts as innate equipment is what Nussbaum refers to as *basic capabilities* that are either nurtured or not.³⁵ A main difference between Nussbaum's and Sen's version is that Sen does not provide an account of basic capabilities.

3.3. Nussbaum's list of the Basic Capabilities

Nussbaum has presented ten central capabilities for which a political decent order must secure a threshold level for all citizens. They are not only central capabilities, but also *basic capabilities*. I will further use the term basic capabilities but without excluding that they are also *central*. According to

³³ Sen, pp. 232-234

³⁴ Nussbaum, Martha C, *Creating capabilities : The Human Development Approach*, Cumberland, RI, USA : Harvard University Press, 2011, pp. 18-19

³⁵ Nussbaum, *Creating capabilities : The Human Development Approach*, p. 21

Nussbaum all of the basic capabilities need to be secured to make a life worthy of human dignity. Nussbaum gives comprehensive comments about each of the capabilities on her list, but there is not enough space to cover each and every in this essay.

It must be clarified that I do not take a stand on whether Nussbaum's list is necessarily completed. Each of the items on the list can be questioned and people can propose to add more capabilities to it. But still, the assumption that there exist basic capabilities whether or not people agree upon which they are, will not adventure my thesis. Nussbaum's ten basic capabilities are the following:

1. Life
2. Bodily health
3. Bodily integrity
4. Senses, imagination, and thought.
5. Emotions
6. Practical reason
7. Affiliation
8. Other species
9. Play
10. Control over one's environment

With the idea of *life* Nussbaum means that people should have the ability to live a life of normal length. It ought to be lived without reduced as not worth living, or not dying prematurely.

Bodily health consists of three different conditions. First of all people must be able to have a good health, and a reproductive health included. Second, people have to be adequately nourished. Third, people must have adequate shelter.

Bodily integrity consists of two ideas. People must be able to move freely from one place to another and be secured from violent and sexual assault - including domestic violence. Also, people must have opportunities for choices in matters of reproduction and for sexual satisfaction.

With the idea of *senses, imagination and thought* Nussbaum means that people must be able to use their senses broadly which means the ability to imagine, think and reason in an informed and cultivated way. Nussbaum highlights the mathematical and scientific training even though education

should not be limited to those subjects. People must be able to connect their broadly used senses with experiencing and producing works and events of their own choice, whether it for example has a religious, literary or musical connection. People must be able to have experiences that are pleasurable and they must be secured from non-beneficial pain. People must be able to use their minds in a free way of expression but still in respect for political and artistic speech, and freedom of religious exercise.

With the idea of *emotions* Nussbaum basically means the ability to love, to grieve, to experience longing, feel gratitude and justified anger. People's emotional development is not supposed to be blighted by fear and anxiety.

Nussbaum's idea of *practical reason* tells that it is important for people to have the ability to form a conception of what is good and plan their lives with a sense of critical reflection. An important condition for such engagement is that the liberty of conscience and religious observance is protected.

Affiliation is divided into two conceptions. First, people must have the ability to engage in various forms of social interaction which entails that people must be aware of the situations of others. Second, people must have the ability to feel dignity, self-respect and realize that their worth is equal to that of others, which entails provisions of nondiscrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion or national origin.

The idea of *other species* means that people must be able to live with concern for and in relation to animals and nature.

The idea of *play* is about people being able to play, laugh and to enjoy recreational activities.

Nussbaum's idea of *control over one's environment* is divided into two conceptions. First, people must be able to participate in political life, which presuppose the protection of free speech. Second, people must be able to have property rights on an equal basis with others. Nussbaum also emphasize people's right to seek employment on an equal basis with others, and develop meaningful relationships of mutual recognition with other workers.³⁶

As stated in the introduction of this essay, I consider the existent capabilities on Nussbaum's list to be plausible. In all of the ten mentioned areas she argues that it is required that citizens ought to be placed above a sufficient threshold level in respect for human dignity.³⁷

Before this essay will investigate the conception of human dignity more closely, an account of human rights and the ideas of positive and negative liberty will be analyzed and explained how the conceptions relates to TCA.

³⁶ Nussbaum, *Creating capabilities : The Human Development Approach*, pp. 33-34

³⁷ Nussbaum, *Creating capabilities : The Human Development Approach*, p. 36

4. Human Rights

Nussbaum claims that TCA also is an approach concerned with *human rights*.³⁸ But in what way does it relate? I will argue that James Griffin's account on human rights gives supplemented force to a list like the one presented by Nussbaum.

Griffin proposes that its ethical content of the term human rights should be highlighted, and all theological content should be abandoned.⁴⁰ Human rights are protections of the human status, which is a status that depends upon our rational normative agency.⁴¹ He argues that we cannot establish the existence of a human right just by declaring it to be one because we can get it wrong. For example, The Universal Declaration contains a right to periodic holidays with pay, which seems not to be a human right but more likely a civil right. In a similar way, democratic participation, a right also stated by the Universal Declaration, can be questioned whether it should be considered as a human right or not. The resolution must be reasoned, and there must of course be good reasons. What is needed is a criterion for what is right and wrong, and he suggests that we should seek reasons that protect human dignity.⁴²

Ethics is not only about identifying what is right and wrong but also to prevent what is wrong and realize what is right. The term human right is important for the understanding of preventing the wrong. Certain rights have a foundational status in a society not because of their place in the legal system or by conventions but because of their moral status.⁴³ There are many different morally important considerations of both equality and fairness. Some of these considerations of fairness are internal to human rights. People are bearer of human rights in virtue of being normative beings, and men and women are equal in normative agency. Therefore it would be unfair to deny women's equal human rights in a society and at the same time respect the human rights of men. A fair trial is another form of fairness that includes human rights. Griffin points out that the domains of human rights and fairness overlap but are not congruent.⁴⁴

According to Griffin there are only two grounds for human rights: personhood and practicalities. Those two supply existence conditions for a human right. In establishing the existence of a human right it must first be shown that it protects an essential feature of human standing and second that its determinate content results from practical considerations.⁴⁵ Human rights can be seen as protections of our personhood, which is an idea that can be broken down into clearer components if breaking down the idea of agency.

To be an agent in the fullest sense of which we are capable - three criteria must be met according to

³⁸ Martha C. Nussbaum, *Women's Bodies: Violence, Security, Capabilities*, Journal of Human Development, Vol. 6, No. 2, The University of Chicago, IL, USA July 2005, p. 176

⁴⁰ Griffin, p. 2

⁴¹ Griffin, p. 4

⁴² Griffin, p. 5

⁴³ Griffin, p. 19

⁴⁴ Griffin, p. 41

⁴⁵ Griffin, p. 44

Griffin:

1. Autonomy

A person should not be controlled or dominated by someone or something else. One must be able to choose the own path of life.

2. Minimum provision

A person must be able to make real choices and therefore have at least a certain minimum information and education. To be able to act in accordance with real choices one must have at least the minimum provision of resources and capabilities that it takes.

3. Liberty

What one sees as a worthwhile life and pursues shall not forcibly be stopped by others. We see the individual personhood's domain of exercise is high valued and privileged, and thus should be protected.⁴⁶

I conclude that Griffin's idea of minimum provision is similar to the idea of Nussbaum's basic capabilities, which also fits well with Griffin's idea of autonomy. He emphasizes that people's real choices demand at least a certain information and education - in other words, some kind of experience. It can be interpreted that experience forms people's actual latent ability to fulfill a functioning. In the case of Nussbaum's list people for example have not only a capability of bodily integrity but also a wish to maintain the bodily integrity, and also the latent ability to fulfill the functioning of maintaining bodily integrity, basically because bodily integrity has good value that will be realized by experience. It can be experience of information and from education, as well as seeing the world by one's own eyes.

But when it comes to Griffin's third criteria and his idea of *liberty* it can be objected that the criteria is in conflict with his criteria about minimum provision. Nussbaum has noticed that the idea of human rights developed in very close relation to the idea of *negative liberty*, which is the idea of a state's inaction. According to the idea of negative liberty a state that does not interfere will secure human rights. The human rights thus constitute a bulwark against an oppressive state.⁴⁸ That is, law limits the state in its performance of violence or threat of violence of individuals.

⁴⁶ Griffin, p. 33

⁴⁸ Nussbaum, *Women's Bodies: Violence, Security, Capabilities*, p. 176

4.1. The conflict between negative and positive liberty

Nussbaum argues that TCA rejects the idea of negative liberty on the grounds that it is misleading. A standard conception of the negative sense of liberty has been described by Isaiah Berlin.⁴⁹ According to him the negative sense of liberty answers to under which circumstances subjects (a person or a group of persons) should be left to do or be whatever subjects are able to do or be, and that is without interference by other subjects.⁵⁰ In a negative sense of liberty a minimum area of personal freedom must be preserved which entails that each and every one must give up some of the liberty for the sake of others.⁵¹ On the other hand Berlin describes that a positive sense of liberty pinpoints the source of control which decides what subjects are supposed to do or be.⁵² For example, a state can be a source of control in the positive liberty sense, but in a negative sense a state can also be passive. It can thus be argued that positive liberty can give rise to a propensity to violate the agent's dignity and integrity. But on the other hand, positive liberty can prevent such violations as well.

In Nussbaum's article *Women's Bodies: Violence, Security, Capabilities*, she especially emphasizes the exposedness of woman. Women are not free if they are left alone by a state of inaction. The protection of even a minimal set of liberties requires affirmative state action. It must protect the rule of law itself, and for example property, and the system of contract. TCA insists that state action is needed for the required and deserved protection of fundamental entitlements. For minimal justice all of them must be supported. The absence of the state's intervention is thus not a good benchmark.⁵³

John Christman has argued that positive liberty is related to people's desires and beliefs, and how they are formed. Positive liberty demands *rational* self-reflection and a consistent internal relation between the agent and the desires and beliefs.⁵⁴ Freedom is fundamentally a self-governing concept equivalent to individual autonomy.⁵⁵

To be moved by desires and values that have been oppressively imposed is not a self-governing status. That is, even if the motivated desires and the resulting actions do not face restraints.⁵⁶ A self-reflective process may contain formations of preferences and lead to changes in people's set of preferences.⁵⁷ This kind of meta-choices must be made freely in absence of external manipulation and interference. For example, in absence of drugs and emotional stress.⁵⁸

Positive liberty does not regard the *content* of individual desires. Therefore, the promotion of positive liberty need not involve only one straightforward and correct answer to how a person ought to

⁴⁹ Isaiah Berlin, *Two Concepts of Liberty*, Four Essays on Liberty, Oxford University Press, 1969

⁵⁰ Berlin, p. 121-122

⁵¹ Berlin, p. 126

⁵² Berlin, pp. 121-122

⁵³ Nussbaum, *Women's Bodies: Violence, Security, Capabilities*, *ibid*

⁵⁴ John Christman, *Liberalism and Individual Positive Freedom*, *Ethics*, Vol 101, No. 2, The University of Chicago Press, January 1991, pp. 349-350

⁵⁵ Christman, p. 344

⁵⁶ Christman, pp. 345-346

⁵⁷ Christman, p. 346

⁵⁸ Christman, p. 347

live.⁵⁹ It does not need to allow or even be compatible with a society that forces its citizens to behave in accordance with given patterns.⁶⁰

TCA, which seems to collaborate with the idea of positive liberty, is obviously an approach that does not advocate violations of dignity or integrity. The securing of basic capabilities and human dignity seem thus to undermine the idea of negative liberty. But are the two conceptions of liberty really rivals? I do not argue that negative liberty is not good in itself. A state's inaction protects citizens from being killed, assaulted or being deprived of property. Or at least the negative liberty is supposed to do so. If it is a positive liberty to secure basic capabilities and human dignity then the negative liberty will be strengthened if minimal justice is secured to a higher extent. None of the two liberties exclude each other but the positive liberty and the action of the state is a prerequisite for securing basic capabilities.

In light of the above account it seems like Sen's and Nussbaum's versions of TCA is related to the idea of positive liberty, and the justification of civil disobedience can be motivated by both violations of negative and positive liberty. Though the securing of basic capabilities is specifically adapted to non-transcendental theories of justice, and the conception of human rights can be applied more broadly within both non-transcendental and transcendental theories of justice. I believe that a state is responsible to actively secure the basic capabilities, and also to be sensitive to changes in rules, systems and laws, for the sake of basic capabilities.

5. Nordenfelt's account of Human Dignity

In the previous section it has on a reasonable interpretation been shown that the ideas of basic capabilities and human rights are part of the same idea, namely the idea of human dignity. An interesting analysis and clarification of human dignity has been made by Lennart Nordenfelt in his article *The Varieties of Dignity*. He mentions four different types and dimensions of dignity:

The *Dignity of Merit* is the kind of dignity that comes with positions. Hereditary monarchy is an example of merit that can be accommodated from birth. The qualifications of a doctor are another example that is not dependent on heritage. Both examples count as *formal dignities of merit*. There are also cases of *informal dignities of merit*. People can earn general merit through their different respectful kinds of deeds. It is common that artists, scientists and athletes are highly acknowledged. What is significant about both kinds of dignities of merit is that they can come and go and vary in levels. A person can suddenly be deprived of his or her good reputation.⁶⁴

The *Dignity as Moral Stature* is dependent upon a person's thoughts and deeds. A highly moral person deserves respect and a good reputation. Though, an extremely (ordinary) moral person will not acquire any rights in the same way as a prime minister who has certain rights because of his or her

⁵⁹ Christman, p. 359

⁶⁰ Christman, pp. 355-356

⁶⁴ Nordenfelt, pp. 71-72

dignity of merit.⁶⁵ Also, the dignity of moral stature can not only be a matter of person's opinion, it is dependent of the public image and thus can be considered as an objectively matter (Nordenfelt emphasizes that he does not refer to objectiveness in a Platonic sense).⁶⁶

There is also a kind of dignity that is not dependent on a person's merits or has nothing to do with a person's moral status. It is called The *Dignity of Identity*, and what is significant is that it can be taken from persons by external events like the acts of others, injury, illness or ageing.⁶⁷ It is a kind of dignity attached to the person's integrity and identity as a human being. All people are integrated and autonomous persons with a history and as well a future with all relationships to other human beings. Most people have a basic respect for the own identity, but this kind of self-respect can easily be shattered and humiliation of different kinds can rob people of their dignity of identity.⁶⁸ For example, a person can be abused both physically and mentally, be put in jail or be ridiculed in public. It can cause changes in people, changes that violate a person's integrity which entails a change in the person's identity. Nordenfelt argues that The Dignity of Identity is also an objectively matter.⁶⁹ He mentions the case of the late stage of senile people. Even though senile people are not aware of what happens around them their dignity can be violated. Even dead people's dignity can be violated, if for example a person spit on a dead person's grave. If there was not an objective ground for the dignity of identity this cases of violations cannot be understood.⁷⁰

The *Dignity of Menschenwürde* refers to capacities crucial to humans. Human beings differ from other creatures in the world and have self-consciousness and can reflect upon themselves. They are also free to decide their own way of life. Nordenfelt claims that The Dignity of *Menschenwürde* is dependent on basic human rights. An elderly person has the same human rights as a young person. The Dignity of *Menschenwürde* is the ground for human rights and cannot be taken away from any person.⁷¹ The Dignity of *Menschenwürde* cannot vary over time and is a fixed value that differs from The Dignity of Identity. If a person gets a deformed face in a car accident, he or she might complain that the dignity of identify has been lost, but The Dignity of *Menschenwürde* will remain. The same goes for people who get diseases and are hindered by age. But when it comes to dead people the Dignity of *Menschenwürde* is gone even though The Dignity of Identity remains.⁷²

Nussbaum's list of basic capabilities can be considered as a concrete proposal on of how to optimize the promoting of human dignity. But what kind of dignity does Nussbaum refer to and what are the requirements of a life worthy of human dignity according to her?

⁶⁵ Nordenfelt, pp. 72-73

⁶⁶ Nordenfelt, p. 74

⁶⁷ Nordenfelt, pp. 74-75

⁶⁸ Nordenfelt, p. 75

⁶⁹ Nordenfelt, p. 76

⁷⁰ Nordenfelt, p. 77

⁷¹ Nordenfelt, pp. 77-78

⁷² Nordenfelt, pp. 79-80

5.1. Nussbaum's intuitive idea of human dignity

According to Nussbaum TCA should be focusing on protection of central areas of freedom. If these areas are not protected it would make a life not worthy of human dignity. In the idea of human dignity a given liberty is implicated.⁷³

Nussbaum emphasizes that dignity is an intuitive notion that is by no means entirely clear. It is not a self-evident or a solid notion. All of the notions of dignity should be seen as interconnected and which derive illumination and clarity from one to another. The notion of respect is particularly important. The important and basic idea that make people able to live a life that is worthy of their assessed human dignity is that certain living conditions must be delivered. Dignity receives its content among related notions in a network.

The claims of human dignity may be reduced to the corresponding notions of internal capability and combined capability. Social, political, familial and economic conditions may prevent people to choose functionings in accordance with a developed internal capability. The prevention can be compared to imprisonment. There is a risk that bad conditions can stunt or warp the development of internal capabilities. Whatever a person's conditions might be the basic human dignity remains and the person is still worthy of equal respect.⁷⁴

5.2. The argument of insufficiency within the conception of human dignity

Paul Formosa and Catriona Mackenzie have argued that there is tensions within Nussbaum's conception of human dignity. According to them her conception is under-theorized and in a way it seems to commit her to Perfectionist Liberalism even though Nussbaum explicitly has declared herself to political liberalism since she claims it is superior to perfectionist liberalism as a basis for political principles in a pluralistic society.⁷⁵

Formosa and Mackenzie notice that Nussbaum tries to integrate distinct and what seems to be opposed Aristotelian and Kantian elements into her conception of human dignity. Within the Aristotelian elements there is a linking dignity to specific norms of flourishing of species, and the Kantian element has the idea of each person as an end in themselves. Her idea of her conception of human dignity as political means that any controversial metaphysical assumptions about persons or on any comprehensive moral conceptions should be avoided, that the assumptions rather should be the subject of an overlapping consensus over time. But at the same time the right and the good are intertwined according to Nussbaum. Also, she explicitly adds that her conception of dignity is

⁷³ Nussbaum, pp. 31-32

⁷⁴ Nussbaum pp. 29-33

⁷⁵ Formosa & Mackenzie, p. 1

Martha C. Nussbaum, *Perfectionist Liberalism and Political Liberalism*, Wiley Periodicals, Inc. Philosophy & Public Affairs 39, no. 1, 2011, p. 4

evaluative from its basis and contains pre-political entitlements.⁷⁶

Formosa and Mackenzie distinguish between two sub-concepts of dignity which they call *status dignity* and *achievement dignity*. A person either has status dignity or not. It is not a matter of degree and it is often permanent and it is to have a dignified or respect-worthy status. The other concept, achievement dignity refers to the respect-worthy status of a person's beings and doings and it is not a stable property since it can come and go.⁷⁷ Formosa and Mackenzie mean that Nussbaum do not distinguish between status dignity and achievement dignity which implicates that her account of human dignity seems to equivocate between these two kinds of dignity.⁷⁸

According to Formosa and Mackenzie, Nussbaum seems to mistakenly interpret the Kantian view as that status dignity demands capacity for morality in the internal capability sense, which will imply a lack of status dignity among children. But according to Kant, children do not lack status dignity since they ought to be treated as end in themselves and not only as means. Rather, status dignity demands capacity for morality in the basic capability sense.⁷⁹

According to Nussbaum, human beings lack dignity if they are not capable of agency or active striving. She mentions specifically anencephalic infants and persons in persistent vegetative states. These are members of the species that are not human beings in the relevant sense and thus lack status dignity. The reason is because she interprets her conception of dignity as political and emphasizes the focus on the obligations of justice and leaves the moral obligation entailed by human dignity aside. From Nussbaum's view it will follow that we do not have any obligations of justice to such beings, according to Formosa and Mackenzie⁸⁰

In one way Nussbaum's political liberalist view implies that human beings only can possess human dignity if the basic capabilities are fulfilled. But Nussbaum is not in need to ascribe human dignity to human beings who do not fulfill the basic capabilities, since the purpose of her list is to enlighten what contributes to a life worthy of human dignity. In fact, her list of basic capabilities can be seen as the lower limit for human dignity. Still, it seems unreasonable to assume that Nussbaum would not ascribe human dignity in no sense to human beings who do not fulfill the basic capabilities. Formosa and Mackenzie specifically discuss status dignity and achievement dignity, which are two sub-concepts that seem to correspond to Nordenfelts's idea of Dignity of Merit and Dignity of identity. The Dignity of *Menschenwürde* is another dimension of dignity to considerate. The introduction of *Menschenwürde* within this context would not necessarily be an equivocation between status dignity and achievement dignity. It is compatible to say that an infant lack status dignity and at the same time possess *Menschenwürde*.

It seems clear that Nussbaum within the context of basic capabilities does not refer to the notion of

⁷⁶ Formosa & Mackenzie, p. 2

⁷⁷ Formosa & Mackenzie, p. 3

⁷⁸ Formosa & Mackenzie, p. 4

⁷⁹ Formosa & Mackenzie, p. 10

⁸⁰ Formosa & Mackenzie, p. 8

human dignity that has to do with The Dignity of Merit nor The Dignity as Moral Stature. The respect for The Dignity of Menschenwürde and The Dignity of Identity are the kinds that Nussbaum seems to cover within her version, though the The Dignity of Identity is subsidiary The Dignity of Menschenwürde.⁸¹ The fact that she claims that whatever a person's conditions might be, the basic human dignity remains and the person is still worthy of equal respect, supports the idea of The Dignity of Menschenwürde.

The critique that says that Nussbaum's view is not *completely* political liberal is legitimate, but in no way crucial for her version of TCA and the justification of civil disobedience. In a way her supposed tension within her conception of human dignity contributes to this equivocation but it is difficult to see how she completely would fall into perfectionist liberalism. That is because the idea of The Dignity of Menschenwürde seems compatible with political liberalism without any tensions. Nussbaum's openness for positive liberty and her political liberalism has in fact given rise to a more serious critique of her version of TCA, which will be the subject for next section.

6. Phillip McReynolds pragmatic critique of The Capability Approach

Phillip McReynolds argues that there are significant limitations within Nussbaum's approach. And that her attempt to affirm universals without falling into authoritarianism is unsuccessful.⁸² He further points out that Nussbaum's approach is not substantive enough for a moral development that is coherent.⁸³

McReynolds is convinced about the force of experimentalism and democratic inquiry and therefore rejects the need of a substantive list of basic capabilities. He further argues that Nussbaum's liberal approach limits rational inquiry and discourse of the natural good into a public realm that is minimalistic. McReynolds holds that inquiry needs not to be restricted to one realm or the other – i.e. not restricted to the public or the private sphere. And according to McReynolds – Nussbaum does not provide a guide for a moral theory and social/ethical inquiry in both spheres. He thinks she goes too far in emphasizing a substantive notion of what should be considered as good.⁸⁴

McReynolds notices that Nussbaum's version is concerned with public choices, which means that institutions should help the individuals to achieve their individual goods. But McReynolds cannot - within Nussbaum's version - see a coherent strategy to achieve those goods. In evaluating one's own ends and project, McReynolds says, one are left to a more or less arbitrary operation, or in other words, a subjective welfarism.⁸⁵

⁸¹ Except for cases that specifically involves dead people, (The Dignity of Identity then trump The Dignity of Menschenwürde).

⁸² McReynolds, p. 148

⁸³ McReynolds, p. 147

⁸⁴ McReynolds, pp. 147-148

⁸⁵ McReynolds, p. 147

McReynolds is specifically criticizing Nussbaum's version of TCA. But it can be assumed that the critique also has force against Sen's version in a certain way. Sen would obviously share McReynolds position that experimentalism and democratic inquiry will show societies which capabilities they ought to promote. At the same time Sen holds that institutions should help the individuals to achieve their individual goods. Therefore, it would be rightly to wonder if Sen has a coherent strategy to achieve those goods as well.

I believe that both McReynolds pragmatic critique and Sen's version of TCA contain a problem common for empirical operations. To initiate with the quite simple argument from majority - an argument that is considered as a fallacy within philosophy. Imagine a majority in a nation which preaches capital punishment. The voice of the majority cannot settle what is morally right, and I would claim that the will of majority is neither necessary nor sufficient in the matter of moral status of capital punishment. Democracy does not always consider what is morally right and inappropriate decisions can be implemented in societies. Therefore I believe it is obviously wrong to maximize the will of the majority in striving for moral principles. A government cannot be based on justice if it is ruled by the majority *in all cases*. Instead it is the prerequisites for the support of basic capabilities that ought to be maximized, and such a viewpoint is not transcendental because of its pluralism. To maximize the will of the majority is on the other hand a transcendental approach for justice since it lacks the plurality that characterizes TCA.

6.1. How to secure a minimal level of the basic capabilities?

Within a democratic society the political system and institutions must secure a minimal level of the basic capabilities. Nussbaum means that the threshold conception of the basic capabilities must be the main source for political principles, which further can be translated into just political institutions. Nussbaum argues that the whole world is under obligation to secure the basic capabilities to all world citizens. That has actually nothing to do with political obligation - it has rather do with *ethical obligation*. The idea of securing the capabilities does not require a state enforcement mechanism to be morally binding. This thought stems from Aristotle who argued that one of the government's main tasks is to secure the people's entitlements, which is also an important reason for establishing governments in the first place. And the way U.S Declaration of independence puts it - if certain capabilities are supposed to be promoted then governments are obliged to protect and secure those by using law and public policy to achieve that end. If a specific state or nation has not secured the basic capabilities it is not even minimally just.⁸⁸

For example, a state or a nation should not just strike down laws that penalize people for their religious believes. It needs to focus on the problem of unequal liberty and the specific burden people

⁸⁸ Nussbaum, pp. 166-168

of minority groups faces for choices they have made. Nussbaum states that certain policies based on minority choices give fundamentals for a dispensation from general laws, although dispute about that matter will continue.⁸⁹ During time the U.S Supreme Court had difficulties in understanding any religion that was not like Protestantism. The Court especially lacked understanding for alternative religions performed by Native Americans. But as time went on The Court became more enlightened about the burdens that restrictions could cause certain minority groups.

Nussbaum's favorite example, which I find very interesting, is the tradition of snake handling. It involves a sect from Tennessee that handled poisonous snakes. Was there a compelling state interest in avoiding the danger posed by the snakes? Actually, the U.S Supreme Court considered the centrality of snakes to the sect's worship and concluded that the most dangerous snakes must be allowed during the sect's worship, otherwise it would be a substantial burden to the sect.

Since minorities are in a disadvantage state within the majoritarian political process - the need to *focus on the rights to minorities to equal treatment* must be a feature of a good judicial interpretation of a constitutional right. The risk to suffer a substantial burden is at stake as long as the majority makes the rules.⁹⁰

If people within a society have mutual interests in basic capabilities then that is a good enough reason to secure them by constitutional law. Injustice may occur if these states and nations elaborate the basic capabilities differently or do not consider a certain capability or capabilities at all. And in the case of Nussbaum and her proposed list - some states and nations do not place their citizens above a sufficient threshold level of capabilities, which do not fits well with the idea of human dignity. If a sufficient threshold level is not being settled it may likely result in misfortunes such as poverty, starvation and alienation etc.

6.2. The striving for consensus within democracy

The democratic idea needs to be promoted since it is this far the best government for a state, but still it needs development. Civil disobedience can be an effectively tool to strengthen democracy and the securing of basic capabilities and human rights.

To McReynolds critique about the absence of a coherent strategy to achieve individual goods, I would like to claim, as a defense, that TCA is not sufficiently developed in its practice. Democracy is not even a practical coherent strategy since inequalities and unfairness can emerge even in the best of the best democracies. So what is a coherent strategy then? Is it the democratic process in itself? Sen has partly defined justice as an ongoing process which implies that there is no such thing as perfect justice, but that it is worth striving for justice that is sufficiently good. The democratic process is not in itself something that gives people sensitivity for injustices, but reasons do. Nussbaum have a clear idea

⁸⁹ Nussbaum, p. 171

⁹⁰ Nussbaum, p. 176

of *why* a minimal level of the central capabilities must be secured, and that is good enough.

To come back to the question about authoritarianism - is there a possible defense for Nussbaum that will avoid her theory to fall into authoritarianism? I believe there is since Nussbaum argues that a minimal level of the central capabilities must be secured in a way that goes beyond a democratic majority vote. Also, Griffin's account of human rights backs up Nussbaum's position. A democratic regime is a part of a legal system and rights have their fundament in society because of their moral status. It implies that a democratic regime and the decisions made within cannot exclusively be considered as rightly made decisions. The democratic process opens for the possibility of a violation of human dignity, as understood as not considering humans equal worth and the rational normative agency which are unique for human beings. In the case of Nussbaum, her list of basic capabilities is the basis for the idea of fundamental political entitlements and constitutional law. The conclusion that can be drawn from both Griffin and Nussbaum is that morality is prior the legal system. It is an important conclusion since McReynolds rejects the need of a substantive list of basic capabilities, and it can even in a way be interpreted as a rejection of human rights. The force of experimentalism and democratic inquiry is thus not the best way to conclude which capabilities or rights that ought to be promoted. It endangers the idea of equal worth of humans and will risk blurring rational normative agency. The reasons for protecting basic capabilities and human rights must on the first hand support human dignity. Nussbaum's account is a rational framework that can serve as a guideline for what ought to be promoted. It certainly gives good reasons for what fundamental political entitlements and constitutional law should be built upon. The rational process of what it takes to conclude the basic capabilities and human rights can plausible discharge into consensus if people of a society are sensitive enough to realize peoples equal worth and the being of a normative being.

Chapter Three

7. Differences between Nussbaum's and Sen's versions

The Capability Approach can be summarized as an approach that are comparing the quality of life assessment and theorizing about basic social justice. A key question in investigating a society's basic decency or justice and compare with others is: "What is each person able to do and to be?". Each person is supposed to be taken as an end according to the approach, and the opportunities available to each person should be considered and not only asking about the average well-being. It should be focused upon choice and freedom, and peoples set of opportunities or substantial freedoms should be promoted. The people should be given a choice to exercise the opportunities and freedoms in action. It gives people their own definition. The achievements that are central to people may differ in quality and not only in quantity. And the approach is also concerned with capability failures that are the result of discrimination and marginalization. It gives governments and public policies an important and urgent task to improve all peoples quality of life, as defined by their capabilities.⁹¹ These are essential elements of the approach that both Nussbaum and Sen agree upon.

Central notions in Nussbaum's version are the emphasizing of human dignity, political liberalism and the idea of a threshold level for certain basic capabilities. Even for comparative purposes Nussbaum's version refrains from offering a comprehensive assessment of the quality of life in a society (Sen does propose that the idea of capabilities can be the basis for a comprehensive quality of life assessment in a nation), and thus is departed from familiar theories of welfare. The role of political liberalism in her approach requires withdrawing from offering any comprehensive account of value. According to Sen the identification of capability is the most pertinent space of comparison for purposes of quality of life assessment, which changes the direction of the debate about development. Sen's version is clearly normative and he emphasizes justice as an important issue. But he does not propose an account of basic justice even though he mentions that health and education have a particular centrality. Also, he acknowledges the importance of human dignity but he does not make central theoretical use of it.⁹²

Even though Sen focuses on the comparative use of capabilities he singles out certain capabilities as more important than others. He mentions health, nondiscrimination on the basis of race, religion, education, political participation and gender. That clearly shows an interest in the use of capabilities to define an idea of basic justice. But Sen's version is much more pragmatic and result-oriented than

⁹¹ Nussbaum, pp. 18-19

⁹² Nussbaum, pp. 19-20

Nussbaum's version. He had a major intellectual role in framing the capabilities and arming the policy debate with comparative information. But according to Nussbaum, he has not advanced a systematic or political system in a sufficient way.⁹³

Nussbaum remarks that Sen does not make use of a theoretical framework for the conception of human dignity. Sen talks about freedom as an overall good and leave the task to each nation to decide which capabilities that will be protected by constitutional rules. It has been criticized by Nussbaum who means that the idea of promoting freedom is not a political coherent project, basically because some freedoms seem to limit others. As an example Nussbaum mentions that industries have freedoms to pollute the environment which limits people's freedom to enjoy an unpolluted environment. According to Sen's approach there is no good way to limit certain freedoms or rule out conflicting freedoms. Nussbaum also remarks on the idea of constraint and shows on conflicting freedoms. A person P is not free to do an action A if not other people are prevented from interfering.⁹⁴

By contrast, Sen's version can be interpreted as if all capabilities were valuable zones of freedom. The overall social task might then be to maximize freedom. Sen speaks of freedom as arbitrary and that capabilities are simply instances in the purpose of social good. Nussbaum is using her list of ten basic capabilities as a basis for the idea of fundamental political entitlements and constitutional law. Nussbaum means that the task of selection is crucial if anything is supposed to be said about justice. Triviality can emerge when comparing certain capabilities. Nussbaum considers the freedom to ride a motorcycle without a helmet, compared to the freedom not to wear a seat belt.⁹⁵

7.1. The versions relevance for civil disobedience

It seems like the difference between Nussbaum's and Sen's versions has relevance for the investigation of *how* to justify civil disobedience and *when* it can be justified within a theory of justice that deals with capabilities. I would claim that the protection of human dignity is an important premise for justifying an act of civil disobedience, and it seems like Nussbaum is in a better position than Sen to explain when it can be justified to act civilly disobedient. Basically because I think it is a problem to leave the task to each nation to decide which capabilities that ought to be secured. It can result in promoting inequalities in society. What if a basic capability would be the right to freely pollute the environment in any way? It would not be fair to those caring for the health of themselves and of others, even if it would be a freely right of everyone. I consider that one of the main conditions for a basic capability is that people have a common interest in promoting the capability because it is mutually desirable, which implies that the fulfilling of basic capabilities is not subjectively desired.

Human dignity has inherent normative significance and constitutes a source to human rights which

⁹³ Nussbaum, p. 17

⁹⁴ Nussbaum, pp. 71-72

⁹⁵ Nussbaum, p. 70

in turn is connected to the idea of basic capabilities. The most important part of the conception is the idea of Menschenwürde which has a basic value equal to all humans. It is a part that can never be taken away from anyone. The Dignity of Identity is another part of human dignity that people have a mutual desire to maintain. Therefore The Dignity of Identity ought to be equal to all humans as well.

The mutual desires can only be based on reflection upon human dignity. Because it is from there we can realize which capabilities that ought to be secured. We need to ask ourselves what we owe to each other in the light of human dignity. And we have to consider reasons very carefully. In the case of the right to freely pollute the environment there is reasonable not a mutual desire among people. Therefore I think that in that case an act of civil disobedience is not justified if a law or a rule prohibits a person from polluting the environment in a certain way.

Is there a basic capability on Nussbaum's list that is not being secured in the Rosa Parks Case? It seems like at least the idea of affiliation on her list is being infringed. People must be able to feel dignity and realize that their worth is equal to that of others. People should not be discriminated by the state and its political system on the basis of race, sex, sexual orientation, ethnicity, caste, religion or national origin. The principle is mutually desirable and based on the idea of human dignity. By Nussbaum's account it is then justified to act civilly disobedient if the basic capability of affiliation is violated. In the case of Rosa Parks and the segregation of black people using the public transport - the Supreme Court of the United States got to the same conclusion.

8. Conclusion

Through the essay I have compared which of Sen's and Nussbaum's versions of TCA that fits best as a justification for civil disobedience. As a prerequisite for the investigation I have shown in which way the performance of civil disobedience is both indulgent and limited, and I will propose my definition of civil disobedience as follows:

Civil disobedience is an act that has an essential element of breaking a rule of law with the aim of bringing about a change in the law or policies of the government for the purpose of protecting and maximizing the prerequisites to support basic capabilities and human rights, by primarily non-violent means with exception for certain threats that lacks motive to cause violence.

Nothing in the definition explicitly explains what actually justifies civil disobedience. What the definition rather does explain is that there is no absolute moral obligation to obey the existing political authority, and a civil disobedient act can involve threats but never physical violence. The use of nonviolent threats seems to be an integral part of civil disobedience. Strictly reasoned, civil disobedience in itself is a threat against legal certainty. But on the other hand, civil disobedience can lead to a greater legal certainty.

The justification of civil disobedience must basically be localized by reflection upon the meaning of

human dignity, which further leads to an understanding of why basic capabilities must be secured. It has been concluded that basic capabilities are part of human rights, whereof both conceptions stems from the idea of human dignity.

It is unclear what kind of respect Nussbaum refers to within the conception of human dignity, but Nordenfelt's account on human dignity clarifies in a way that gives fundamental support to the discerning of a domain that includes basic capabilities. The Dignity of Menschenwürde is the ground for human rights and cannot be taken away from any person. The Dignity of Menschenwürde cannot vary over time and is a fixed value that differs from The Dignity of Identity. The Dignity of Menschenwürde also seems compatible with political liberalism without any tensions.

The securing of basic capabilities is specifically adapted to non-transcendental theories of justice, and the conception of human rights can be applied more broadly within both non-transcendental and transcendental theories of justice.

It seems like Nussbaum within her version of TCA is in a better position than Sen to explain when civil disobedience can be justified. It is hard to see in which way civil disobedience within Sen's version can be justified since it first of all lacks an account of basic capabilities, and second, capabilities that are closely connected to human dignity. Arbitrary majority decisions about which capabilities that deserves a securing threshold level, does in no way guarantee any considerations about human dignity. Sen's idea that individuals must have the freedom to do things or to be things that have value for the individual in question is not in itself a bad idea. Though it is a weak and arbitrary basis for the understanding of when the restraining of a freedom can justify civil disobedience. On the other hand Nussbaum's list gives an adequate guideline for public action, with the aim to strengthen institutions in society, and to detect when basic capabilities are not being secured. The securing of the basic capabilities ought to forego and give reasons to constitute civil law, and in that sense, morality stands above the civil law. As Griffin puts it, the foundational status of rights is established by something else than the legal system.

It is a positive liberty to secure basic capabilities and human dignity, but the protection of negative liberty should not be considered as undermined. In fact, negative liberty will be strengthened if minimal justice is secured to a higher extent. It seems like the justification of civil disobedience can be motivated by both a violation of negative and positive liberty. Thus none of the two liberties exclude each other, but the positive liberty and the state's action is a prerequisite for securing basic capabilities.

It is through reasoning a natural step to assume that constitutional law must secure the basic capabilities - as a structure of consensus within democracy. The securing actually limits democracy but from a moral standpoint it limits people to harm other people by disregarding their basic capabilities. The moral argument in favor of the securing of basic capabilities actually weakens the essence of democracy but at the same time strengthen the democratic possibilities for a higher extent of justice. The moral argument gives people reason to oppose a social, political and/or legal system if

violating human dignity. If the pursuit of justice is an on-going process then civil disobedience is a means and also morally justified for maintaining the process if there is no other alternative available to secure the basic capabilities. The securing of the basic capabilities for all world citizens is an ethical obligation.

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