Childrens Rights to Asylum and the Capability Approach

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Children’s Rights to Asylum and the Capability Approach

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Abstract. The prospect of large populations of children migrating across national borders raises urgent political and ethical questions about children’s rights to asylum. In recent years, there has been an increase in scholarly interest in migrating children and children’s rights, but this interest has thus far been scant in political theory. The present article uses the Capability Approach to discuss children’s rights to asylum and to examine the prospects and limitations of the approach in this context. It underlines that, despite a global consensus on the rights of the child, the political and ethical challenges to children’s rights to asylum cannot be reduced to a question of the implementation of universal rights or capabilities of children – a matter of technicalities or mainstreaming of legislation. Instead, the question of children’s rights to asylum is a highly political and ethical matter, characterized by ambivalent conceptualizations of children and conflicting interests that continue to pose a considerable challenge to the organisation of the international political and legal system. The Capability Approach has the potential to fill a theoretical gap with regard to children’s interests and the setting of threshold levels, although it continues to wrestle with questions of how to confront the asylum-seeking child as a political subject within well-functioning democracies and how to determine a specific list of capabilities and corresponding duties in deliberation between the right to self-determination of nation states and universal entitlements of children.

Keywords. Children, migration, asylum, Capability Approach, children’s rights

I. INTRODUCTION

Global migration is one of the greatest political challenges of our time. The UN Refugee Agency (UNHCR) reported that at the end of 2014, 59.5 million individuals had been forcibly displaced worldwide as a result of persecution, conflicts, generalized violence or violations of human rights. Children below the age of eighteen constitute about 50 percent of
this number (UNHCR 2014). The current situation, in which large populations of children migrate and cross state borders in search of protection and a better life, but where the regulation of migration implicates that some are granted asylum while others not, gives rise to a wide range of political and ethical questions that have attracted considerable attention in western and European countries. The media, NGO’s, governments and scholars have been involved in reporting, condemning and responding to the urgent humanitarian needs of asylum-seeking children, for example, the ‘child migrant crisis’ on the southern borders of the US and the children on the Mediterranean Sea, children in detention homes or children in danger of becoming victims of trafficking or at risk of deportation after long periods of residency.¹ In this context, the right to asylum can be a means to ensure access to a basic threshold level of rights (e.g. safety, health, education, participation) or capabilities (e.g. life, bodily health, bodily integrity, practical reason, affiliation) for the child, while a denial of asylum may pose a threat to such entitlements.

This is occurring at a time when a close to global recognition of universal children’s rights under the United Nations Convention on the Rights of the Child (UNCRC) can be noted, while there is strong political pressure for the national regulation of immigration and enforcement of border controls. The spread of child-specific provisions that give special (universal) priority to children has grown significantly over the last decades, but there are recurring reports of asylum-seeking children in humanitarian need as a result of coercive border politics that expose a political ambivalence and underline the acuteness of the question.

From an academic point of view, it is only relatively recently that children and migration have become the object of more thorough scholarly interest, and the amount of literature on the topic is growing.² In the wake of the adoption of the UNCRC in 1989, children’s rights have developed into a separate field of research with an accompanying growth in publications (Reynaert 2009). However, numerous critical voices have also pointed to the lack of a theoretical base and have expressed concern
about the need to find new conceptual and normative foundations for children’s rights (Reynaert 2012; Quennerstedt 2013; Ferguson 2012; Tobin 2013). In political philosophy in general, and in what has been referred to more specifically as the ethics of migration, the interest paid to children as subjects in their own right has thus far been scant and to a large extent children have been left out of the analysis (Josefsson 2014). Seen against this backdrop, it appears that the political ambivalence, the acuteness of the question and what might be referred to as a theory deficit in children’s rights, are in dire need of further theoretical inquiry.

The overall question of this article is whether, and in what way, the Capability Approach, as presented primarily by Martha Nussbaum, can be a fruitful normative framework for discussing some key political and ethical aspects of children’s right to asylum. The aim is to analyse some of the contemporary normative questions related to children’s rights to asylum and to confront these questions with Nussbaum’s approach. At the same time, we will confront Nussbaum’s approach with contemporary questions, in order to examine the prospects and limitations of the Capability Approach in this context. The Capability Approach has expanded notably in a wide range of research fields in recent years, and likewise in the field of children’s rights and childhood studies (Robeyns and Brighouse 2010; Robeyns 2011; Biggeri et al. 2011; Stoecklin and Bonvin 2014). It has served as an instrument to measure, compare and conceptualize wellbeing as a normative framework for social justice and as a way to operationalize formal entitlements such as children’s rights (Stoecklin and Bonvin 2014). However, with only a few exceptions (Ahn 2014, 73; Risse 2009), it has not been discussed in relation to global migration. But what does this approach have to offer as a normative framework when applied to the politically urgent question of children’s rights to asylum?

The article consists of three parts. In the first part, the Capability Approach is presented with specific attention paid to Nussbaum’s ideas of central capabilities as threshold levels, the universal aspirations of her approach and its foundation in the nation state. In the second part some
of the questions concerning children’s right to asylum are outlined, exemplified and analysed by using two asylum cases from the Swedish Migration Court of Appeal (Migrationsöverdomstolen, henceforth MCA) together with Nussbaum’s Capability Approach. In the conclusion, some of the prospects and limitations of the Capability Approach are discussed.

II. NUSSBAUM’S CAPABILITY APPROACH: THRESHOLD LEVELS, UNIVERSAL ASPIRATIONS AND NATIONAL SOVEREIGNTY

Since it was developed by Amartya Sen and Martha Nussbaum a couple of decades ago, the Capability Approach has been influential in a broad range of academic fields (Robeyns and Brighouse 2010; Robeyns 2011). The approach has developed in various directions over the years, but the focus here will be on Nussbaum’s account of the Capability Approach and some of its components that are relevant to analyse the normative questions about children and asylum. Nussbaum argues that “[…] the key question to ask, when comparing societies and assessing them for their basic decency or justice, is, ‘what is each person able to do and to be’” (2011, 18). According to her, the Capability Approach can be defined as “[…] an approach to comparative quality-of-life assessment and to theorizing about basic social justice” (2011, 18). Amartya Sen identifies a similar key characteristic of the approach in what he calls “substantial freedoms” that are concerned with “enhancing the lives we lead and the freedoms we enjoy,” or “expanding the freedoms we have reason to value” (1999, 14). The approach has commonly been referred to as an alternative to measurements of development and wellbeing based on income or social primary goods (Brighouse and Robeyns 2010, 2). A shift in focus is made from the possession of material resources or primary goods to the actual functionings that people are able to achieve such as eating, reading or moving, etc. (Sen 1999, 75-76). A central feature is the freedom to choose; so when measuring or evaluating a functioning, it is essential to account for the freedom to choose (Sen 1999, 73). As Nussbaum puts it: “The
crucial good societies should be promoting for their people is a set of opportunities or substantial freedoms, which people then may or may not exercise in action: the choice is theirs. It thus commits itself to respect for peoples powers of self-definition” (2011, 18).

Another building block of Nussbaum’s account, which is essential to the question of threshold levels of central capabilities for asylum-seeking children, is that she suggests a ten point list of central capabilities that a decent political order must secure for all citizens (2011, 17ff.). The ten central capabilities according Nussbaum are: (i) life, (ii) bodily health, (iii) bodily integrity, (iv) senses, imagination, and thought, (v) emotions, (vi) practical reason, (vii) affiliation, (viii) other species, (ix) play and (x) control over one’s environment. According to Nussbaum, the central capabilities form a social justice account whereby every human being is entitled to a minimum threshold level of central capabilities to be met by the world community and the duty of realizing these entitlements is assigned to humanity (2006, 291). By emphasising universal entitlements to human beings, and assigning the world community a general duty to realizing them, her approach clearly has universal aspirations. She argues accordingly that “[...] the whole world is under a collective obligation to secure the capabilities for all world citizens, even if there is no worldwide political organization.” This can imply duties of states, NGOs, corporations, international organizations and individuals (2006, 167). For example, when discussing poverty she stresses that when poorer nations fail in the first instance to secure capabilities for their citizens, place governments of richer nations have obligations in the second instance to assist poorer nations (2006, 169).

In the context of migration, the right to a residence permit can arguably be connected to the access of an asylum-seeker to functionings, capabilities or substantial freedoms and what each person, as Nussbaum puts it, is “able to do and to be”. An asylum application is commonly based on a claim that the fundamental rights or capabilities of the asylum-seeker cannot be secured by his or her own government. The granting of a resi-
dence permit can thus be a first step for the migrant towards a life in which a threshold level of the central capabilities can be secured by another state (e.g. bodily health, bodily integrity and affiliation). Assuming that the claims of the asylum-seeker are acknowledged as credible (e.g. by reference to Nussbaum’s emphasis on freedom of choice and people’s power of self-definition), and the central capabilities of the asylum-seeker are being violated and not protected by the asylum-seeker’s own government, then it is as a human being that the asylum-seeker has an entitlement to the threshold level of the central capabilities suggested. As a consequence, the world community has a corresponding collective duty to secure this entitlement and the granting of asylum by a recipient state could be a means to fulfil this duty.

Even though Nussbaum herself suggests a specific ten-point list of central capabilities with universal aspirations, which Sen refrains from suggesting, the process of decision-making, public justification and fair agreements to determine the relevant set of capabilities is crucial to both Sen and Nussbaum (Sen 1999, 291; Nussbaum 2011, 89). Nussbaum returns repeatedly to the point that “[…] setting the threshold more precisely is a matter for each nation” or “at the level of threshold-drawing, the ordinary political process of well-functioning democracy plays, rightly, an inalienable role” (2011, 42). Hence, the nation state and well-functioning democracies are regarded as authoritative political entities within which the process of decision-making and determining of central capabilities ought to take place. She emphasises that national sovereignty has moral importance “[…] as a way people have of asserting their autonomy, their right to give themselves laws of their own making” (2006, 314). And, although she stresses that the duties can fall on other nations, “[…] one should respect the sovereignty of any nation that is organized in a sufficiently accountable way, whether or not its institutions are fully just” (2006, 256). Coercive intervention in domestic affairs should only take place after negotiations with its duly elected government, and such action “is justified only in a limited range of circumstances” (2006, 316).
What global migration seems to underline is the problem of what state should bear the collective duty to secure a minimum threshold level of capabilities for asylum-seekers and if recipient states themselves ought to have the sovereign power to determine the specific threshold levels of capabilities and corresponding duties towards non-citizens. How ought the specific threshold levels of central capabilities of asylum-seeking children to be set in order to secure a minimal level of social justice to asylum-seeking children as human beings on the one hand, and to respect the sovereignty of the nation state and well-functioning democracies to determine the specific threshold levels and corresponding duties on the other?

When it comes to the question of capabilities of children and corresponding duties, Nussbaum has been relatively silent. Dixon and Nussbaum (2012) discuss the Capability Approach as a foundation for children’s rights and the special priority of children. They argue that special priority can be given to children – who are particularly vulnerable, and for reasons of cost-effectiveness - but also point out that this special priority can come into conflict with other interests of the given society (2012, 554). Exactly what special priority children ought to have, its limits and specification, is supposed to be the outcome of the political processes in well-functioning democracies and to be upheld by constitutional law of the nation state. In the section that follows I will continue by analysing some of the more specific ethical and political questions concerning children’s rights to asylum in relation to Nussbaum’s Capability Approach.

III. CHILDREN’S RIGHT TO ASYLUM: WHAT ARE THE CHALLENGES?

Sweden is one of several European and western countries where the rejection of asylum-seeking children has resulted in strong public reaction and anti-deportation campaigns. From a European perspective, Sweden is one of the countries that grants the largest numbers of residence permits to asylum-seekers and unaccompanied minors. Nevertheless, the deportation of asylum-seeking children has been regarded in news
reporting and public debate as threatening the very foundation of their rights or central capabilities: their access to basic health, wellbeing and affiliation with the community, as well as being considered in conflict with international law such as the United Nations Convention on the Rights of the Child or the European Convention on Human Rights (ECHR). On the other hand, Swedish authorities claim that they are following laws and procedures in accordance with democratic institutions and are acting even less restrictively than national and international law requires.

At a political level, asylum-seeking children have emerged as a category of special concern with specific legal rights and with a moral status distinct from that of adults (Bak 2013; Watters 2008; Bhabha 2014). The UNCRC was adopted in 1989, and nearly three decades later the convention has been ratified by almost every country in the world, thus becoming the most ratified of all UN conventions. The attribution of special rights to children is notable in media discourse, policy documents and legislation, and it has resulted in a significant growth of scholarly production (Reyneart 2012). The most significant marker in the context of migration is perhaps the incorporation of child-specific provisions from the UNCRC, such as the Best Interest Principle (art. 3) and the right to be heard (art. 12) in national and international policy. Despite a growing recognition of children’s fundamental rights to protection, family life, education, health care, participation etc., such rights tend in many cases not to be enforceable in practice for asylum-seeking children (Bhabha 2009). Drawing her analysis from a range of jurisdictions over the world, she identifies a significant group of migrant children that cannot get access to their inalienable rights, e.g. undocumented immigrants, trafficking victims and children whose birth is never registered. She regards these children as de facto or functionally stateless and argues that the gap between theory and practice of children’s rights can be explained by the fact that the said children lack their own government, i.e. a political community that enforces their rights in practice. The solution, according Bhabha,
must be a ‘bottom-up’ approach in which “naming, shaming and aggressive mobilization of advocacy strategies” are essential to secure the fundamental rights of this group (2009, 451). This kind of critique against the failure of states to fulfil the intentions of the UNCRC has been a recurrent theme in the growing literature on children’s rights. Most recently, however, the debate has also been directed back to the very theoretical foundations of children’s rights and what is perceived as a theory deficit and lack of critical engagement with the unilateral focus on standard setting, implementation and monitoring (Reyneart 2009; 2012; Quennerstedt 2013; Ferguson 2012; Tobin 2013).

Normative questions regarding the right to asylum are not unique to children or to the political debates referred to above. In recent decades, political theorists have been puzzling over questions about who should have the right to admission and who should not, and on which ethical, political or legal basis (Carens 1987; 2013; Miller 1993; 2011, Benhabib 2004; 2011, Schotl 2012; Lindahl 2013; Näström 2014). The debate about freedom of movement and states’ rights to immigration control has been going on for at least 30 years in what has been referred to as the ‘ethics of immigration’ or the ‘open/closed borders debate’ (Bader 2005; Seglow 2005; Wilcox 2010; Wellman and Cole 2011; Benhabib 2004; Carens 1987, 2013; Miller 1993; 2011). Historically the right to control and regulate immigration has been a way to protect sovereignty and has been found at the heart of the international nation state system commonly traced back to the 16th century. The right of liberal states to sovereignty, immigration control and exclusion has also been a central idea in modern political philosophy (Walzer 1983; Miller 1993; 2011; Wellman and Cole 2011) and international law (Koskenniemi 2005; Moyn 2010) during the 20th century, although it has been challenged from a range of political and legal theoretical positions over the last years (Benhabib 2004, 2011; Bosniak 2008; Carens 1987; 2013; Lindahl 2013; Schotl 2011; Wellman and Cole 2011; Wilcox 2009). One of the key challenges for a political theory about migration, Benhabib notes, is that
“[…] transnational migrations bring to the fore the constitutive dilemma at the heart of liberal democracies: between sovereign self-determination claims on the one hand and adherence to universal human rights principle on the other” (2004, 4).

In the following pages we offer an analysis of two cases (MIG 2009:8; 2010:6) from the Swedish Migration Court of Appeal in order to outline and exemplify two crucial aspects of children’s rights to asylum. The first concerns the legal and political determination of central capabilities and threshold levels for asylum-seeking children. Focus is placed on how the specification of fundamental entitlements (expressed as rights, interests or capabilities) of asylum-seeking children and the corresponding duties, the threshold levels of the recipient state, are determined in the legal and political context of the nation state. According to the law, in cases concerning children some special considerations must be made and special priorities must be established. But what happens when universal ideals about children and rights are put into practice in a legal domestic setting of immigration control, and how does this interplay with ideas of the child as a legal and political subject? This intersects with the second aspect that can be referred to as ‘capabilities in conflict’, which are concerned with the potential legal conflicts that migration agencies and courts are faced with. On the one hand, there are universal and individual entitlements to a threshold level of capabilities for the asylum-seeker, and on the other, the interests of the state in controlling immigration as a way to protect the central capabilities of the political community and the sovereignty of the nation state, and thus the central capabilities of the citizens.

A starting point for our analysis is that the granting of a residence permit can make it possible for the asylum-seeking child to access fundamental entitlements, while its denial can block access to the said entitlements. The Swedish Migration Court of Appeal serves as an example of an institutional setting in which political, moral and legal judgements develop norms and normative limits for threshold levels of inclusion and exclusion of asylum-seeking children and the corresponding duties of the
recipient states. As the last instance in the Swedish asylum process, the MCA represents the outcome of a democratic political process and hands down the ultimate sovereign decision. The jurisdiction and institutional settings have been contextualized to Sweden, but it is important to note that the cases exemplify more general dilemmas and questions that confront institutions in many recipient countries in Europe and other parts of the world.

IV. CAPABILITY OF ASYLUM-SEEKING CHILDREN

As other countries have done, and in line with the UNCRC, Sweden decided to pay particular attention to the best interests of the child in asylum cases involving children (e.g. art. 3 and art. 12). The wording, incorporation and application of child-specific provisions vary between national legislations, but they share the formulation of general legal principles that pay particular attention to children’s interests or welfare. Under immigration law, at least under some circumstances, the threshold levels for granting asylum to children are lower. Children get special priority. Practical and theoretical questions then arise about what constitutes a child, the best interests or capabilities of a child, and how these can be determined in a political and legal order? What weight should they have in opposition to the state’s interest in immigration control, and at what level should the thresholds be set?

The following case, MIG 2009:8, is one of a few cases from the Swedish Migration Court of Appeal in which reasoning about the best interests of the child has been elaborated on. The case concerns an unaccompanied girl from Burundi, about 15 years of age, who had been resident in Sweden for two to three years. In her 2006 application she alleged that by returning to Burundi she risked being killed by persons who were persecuting her family. Her grandfather and uncle had been killed, and the men who were arrested and imprisoned for the murders had been released and were seeking revenge. The family was harassed, and she had
been beaten and threatened in her Burundian school. In her claim, she asserted that she was strongly attached to Sweden and was very well integrated in Swedish society through school, work, friends and social networks. She had nothing to return to in Burundi and had periodically been in poor health due to the insecurity of her situation.

The court dismissed her appeal to be regarded as a refugee or otherwise in need of protection under the Aliens Act (2005:716; chapter 4, sections 1 and 2). Instead their verdict focused on the possibility of granting a residence permit on the grounds of exceptionally distressing circumstances (humanitarian grounds). In the general provisions of the Swedish Aliens Act it is stated that: “[…] particular attention must be given to what is required with regard to the child’s health and development and the best interests of the child in general (Swedish Aliens Act; chapter 1, section 10)." Special attention to children is also highlighted in the subsidiary provision “exceptionally distressing circumstances” which states that particular consideration should be taken concerning the “status of health, adaptation to Sweden and situation in the home country” and that “children may be granted residence permits under this section even if the circumstances that come to light do not have the same seriousness and weight that are required for a permit to be granted to adults” (Aliens Act 2005:716; chapter 5, section 6, paragraph 2). The best interests of the child are accordingly formulated as a matter of setting a lower threshold for the seriousness of circumstances when judging children as compared to what is required for adults. But as both the court decision and the preparatory work of the Aliens Act decisively notes, “[…] considerations of the child’s best interests cannot, in relation to the Aliens Act, be given such far-reaching meaning that being a child almost becomes a separate criterion for receiving a residence permit” (MIG 2009:8; Gov. Bill 1996/97:25, 247ff.).

In the court ruling, the exceptionally distressing circumstances were assessed and no medical evidence was found that “[…] demonstrates that the state of health is so serious that her future development in a decisive
way is in danger with a return to the home country” (2009:8). The girl had been legally residing in the country for two years which, according to the court, was to be regarded as a relatively short time, taking into consideration that she was a child. It stated that: “Even though A to some extent has had time to adapt well to Swedish conditions, she must be regarded to have even stronger attachment to the home country than to Sweden.” In the motivation for a rejection they also referred to the best interests of the child when they declared: “[…] under-aged children ought to stay with their parents and no investigation shows that the family has disappeared or is not alive. The circumstances must rather be considered as indicating that the family remains in Burundi and that A can receive satisfactory care upon return by reunification with her relatives or in any event by an organisation or institution in Burundi” (2009:8). In the court’s view, her basic material needs, as well as the need for care and schooling, could be met in the home country. The court concluded that “Even if it is taken into consideration that the circumstances in a child’s case do not have to have the same degree of seriousness or weight as with an adult in order to receive a residence permit, the Migration Court of Appeal finds that neither the overall assessment nor the circumstances of the case are such that A can be granted a residence permit because of exceptionally distressing circumstances” (2009:8).

According the court decision, it is evident that her claims of health, adaptation and the situation in the home country do not exceed the legal threshold level for granting a residence permit. From the court’s perspective, the poor state of her health had not been demonstrated sufficiently, her two years in Sweden were considered too short and she was regarded as being able to find satisfactory care on returning to Burundi, even when the fact that she was a child was taken into consideration. If one goes beyond the legal norms and instead takes a point of departure in Nussbaum’s central capabilities, it appears from the perspective of the girl that the threshold level of several capabilities was in danger of violation if she was deported to her home country. These included:
Bodily health – being able to have good health;  
Bodily integrity – being able to move freely and be secure from violent assault;  
Emotions – being able to have attachments to things and people outside oneself and not having one’s emotional development blighted by fear and anxiety; and  
Affiliation – being able to live with and in relation to others, having the social bases for self-respect and non-humiliation and being treated as a dignified being whose worth is equal to that of others (Nussbaum 2011, 33).

At the time of the legal procedure, the girl was approximately 15 years old and nothing indicated that she was not competent to make reasonable judgements about her own life-situation. From the girl’s perspective of self-definition, which is a central tenant of the Capability Approach, the verdict of the court appears to be a violation of a minimum threshold level of capabilities. The fact that the court and the girl had different accounts of what is to be regarded as valid claims does not necessarily suggest an answer to the question of what is a right or wrong judgement in the case. Nor does it provide a verdict on the credibility of the girl’s story. The judgement instead points out how the institutional context sets limits for what the court is able to recognize as a legally valid claim. Therefore, both the girl’s experience and the decision of the court may be correct.

What we must bear in mind here is that the decision can only be made within a limited normative framework of what can be legally recognized. The question for the court is not primarily to judge whether her experience and claims are true in an ethical or existential sense, but whether they meet the standards of laws, statutes, principles, rules, criteria, requirement of evidence, precedents and the intentions of the legislator. The court used a general and established interpretation of the best interests of the child, i.e. being with his or her parents. This interpretation is found, for instance, in the preparatory work for the Aliens Act (Gov. Bill 1996/97:25, 246) and the UNCRC (art. 9:113), and it was applied to
this particular case. Other legal norms concerning the girl’s best interests in relation to her state of health, her adaptation and the situation in her home country can similarly be traced back to both the preparatory work for the Aliens Act and the legal precedents found in previous decisions of the court. Although the girl most likely would claim that her own best interests and central capabilities could best be secured by staying in Sweden, her claims were not considered strong enough for the court to make an exception from the general norms. Instead it was the political and legal institutions of the Swedish state that had the sovereign power to establish the threshold levels and to formulate the interests and special priority of the child. The argument used by the court in this case thus differed from the arguments in cases concerning adults by making references to the universal interests of children and by claiming that the rejection was not in conflict with the best (universal) interests of the child.

This leads to a question of principle about how the central interests or capabilities of the child can and should be determined legally and politically to legitimately represent the child. In the institutional setting of the MCA, the procedural opportunities for the girl to express her views on her best interests are clearly limited. Oral hearings are very rare in the MCA, especially regarding children, and the girl’s interests were presented by her legal representative and by summaries of oral hearings from previous instances. At a political level, the girl has never been a member of the political community *qua* child *qua* non-citizen and thus had limited opportunities to impact the institutions and laws that governed her.

This points to one of the critical challenges, namely the fact that the asylum process is characterised by a significant power imbalance between the girl and the institutions of the state. The judgement took place within what Nussbaum would regard as the ordinary political process in a well-functioning democracy, but one that is bound by the nation state and marginalises the asylum-seeking child at a basic political and procedural level. The sovereign power of the state to define and universalise children’s interests, rights or capabilities can open new avenues for some
children to be granted a residence permit; but to other children it can become a powerful tool of the state to legitimize rejections and to protect the interests of immigration control.

V. Capabilities in Conflict

Some of the dilemmas with which the courts are confronted concerning children and asylum questions are not unique to children. The fact that a child is the subject of the case might blur even more profound and general questions about asylum-seeking and immigration control regardless of whether the applicant is a child or an adult. A fundamental characteristic of the ethics and law of migration is that individual entitlements to freedom of movement and protection from persecution, as declared in international treaties or normative theories about migration, may come into conflict with state sovereignty and its interest in regulating immigration. Formulated in terms of the Capability Approach, the individual entitlements of the asylum-seeker, child or adult, to a threshold level of capabilities may collide with the capabilities of the people in the recipient state. The capabilities do not necessarily need to be in conflict; it may be imaginary. However, as the following case demonstrates, a tangible field of tension may exist at both the practical and theoretical levels. The question is not simply about securing the threshold levels for the asylum-seeker, but also setting levels with respect to the capabilities of the people and the political community of the receiving state.

The case used here as an example is MIG 2010:6. This case is interesting because it exemplifies the threshold levels of humanitarian grounds and the normative limits of what circumstances and evidence are required to gain legal recognition and be granted a residence permit. It concerns a family consisting of a mother and her three children, aged 9, 13 and 14 years, from Serbia and Montenegro. They arrived in Sweden together in February 2007 and applied the same day for residence permits. In the first place the family applied on grounds of the ‘need for protection’ as
refugees, and in the second place ‘exceptionally distressing circumstances’. The need for protection was motivated by the fact that, after the death of her husband, the mother had been subject to serious abuse and threats from her brother and father-in-law and that the authorities, if she returned, could not protect her and her children from future abuse.

In the first instance, the MCA dismissed the argument that the family should be regarded as “refugees” or were “otherwise in need of protection” (Aliens Act 2005:716; chapter 4:1, 4:2 and 4:2a), because they had not provided evidence that it “[…] was probable that the authorities lacked the will or ability to protect her and the children or that the family in the future would not be able to get government protection against possible abuse” (MIG 2010:6). Instead the main focus of the court judgement became whether residence permits could be granted on the grounds of ‘exceptionally distressing circumstances’ by making an overall assessment of the state of health of the mother and the children, of their adaptation to Sweden and of the situation in their home country. In line with the psychologist’s declaration, the court found that, although domestic violence, abuse and the sudden and unexpected death of their father had “[…] affected the children’s psycho-physical development extremely negatively” and that “the constant stress and fear of new conflicts had a stressful impact on them”, without further evidence of medical investigation their state of health could not be regarded as being of exceptional character and thus could not alone serve as a reason to grant residence permits. With regard to adaptation, the children had been legally residing in the country and had gone to school for three years, but in line with precedents of the court, this period of time could not be regarded as ‘a considerable time’ and could therefore not be given sufficient weight to be considered as exceptionally distressing circumstances (MIG 2010:6).

The court also referred to the legislative history of the act where it was stated that “[…] it is natural that a child in many respects more quickly adapts to new conditions than adults”, but that “the adaptation
of a child to Swedish conditions cannot alone be given decisive impor-
tance” (Gov. Bill 2004/05:170, 281). In a similar way the court recognized
the difficult experiences that preceded the journey to Sweden, their sud-
den loss of their father and the witnessing of the serious abuse of their
mother to have affected them extremely negatively. These facts, never-
theless, were of such a nature that they alone could not provide sufficient
reason for granting a residence permit, even if the best interests of the
child were taken into consideration.

If the case is analysed through the lens of Nussbaum’s Capability
Approach, it seems that from the perspective of the family members some
of the central capabilities were in danger of being violated, such as bodily
health, bodily integrity, affiliation and emotions. Some of the factors dis-
cussed are also directly related to the applicants as children and activates
child-specific provisions in the legislation. As in the former case, 2009:8,
It can be debated as to what special priority the children ought to have
and how the best interests of the child could be taken into consideration
to secure the central capabilities for the children. But the case can also be
discussed from another more profound political viewpoint, in which the
legal tension of asylum-seeking and immigration control are considered,
namely the tension deriving from universal individual entitlements as
opposed to the state’s right to sovereignty and immigration control.

The purpose of the Aliens Act and the MCA is not only to give pro-
tection and secure a threshold level for asylum-seekers, but also to protect
the national interests of the Swedish state by regulating immigration.
Legal norms and migration authorities have dual functions. This can be
seen in the preparatory work for the Aliens Act, according to which the
best interests of the child should be given “strong and meaningful con-
tent” but without “in general taking over the societal interest in regulating
immigration” (Gov. Bill 1996/97:25, 247ff.). Migration laws and institu-
tions are means to protect fundamental interests of the Swedish state as
a political community, and national interest and immigration control are
underlying premises. The protection of the political community can
be related to several of the building blocks of Nussbaum’s capabilities (2011, 34). These include, practical reason – being able to form a conception of the good and to engage in critical reflection about the planning of one’s life – and affiliation – being able to live with and in relation to others, to recognize and to engage in various forms of social interactions. Protecting this capability means “[…] protecting institutions that constitute and nourish such forms of affiliation” (Nussbaum 2011, 34). This includes the integrity of the state, which in many other respects is supposed to guarantee other capabilities of the people, or control over one’s environment – being able to participate effectively in political choices that govern one’s own life, having the right of political participation, protection of free association or materially, being able to hold property.

In the case under analysis, explicit references to immigration control and national interests as limiting the right of the child were more or less absent, which is a common feature of child cases in the Migration Court of Appeal. The prospects for the asylum-seeker to get legal recognition are limited by a general will to protect the interests of the state, without providing arguments for the ways in which the interests of the state are threatened or what the consequences of granting asylum will have for the state. The political will to regulate immigration is instead embedded in all legal provisions, standards, rules, norms, and principles in the Aliens Act and the verdicts of the Migration Court of Appeal. Immigration control forms the very premise upon which the Migration Court of Appeal rests.

Conflicts of capabilities, I would argue, are evident here. These are conflicts between individual entitlements of asylum-seekers to a threshold level of capabilities on the one hand, and the right of the state to control immigration as a way of securing sovereignty, autonomy and the central capabilities of its citizens, on the other. Nussbaum does not discuss capabilities in conflict to any significant degree, but mentions that “tragic choices” reminds us that in some cases, “minimal justice cannot be achieved, and people must be denied what they have a right to have” (2012, 593). Individual entitlements and claims of capabilities can in some
respects be limited by governments on grounds of “compelling state interest” or if they constitute a “substantial burden” to the society (Nussbaum 2011, 171). To determine the set of capabilities and the level at which the thresholds are drawn, she relies on practical reason and the ordinary political processes of a well-functioning democracy. Conflict solving seems to be assumed to take place primarily within a national context in line with a principle of dignity, practical reason and fair agreements. When it comes to obligations towards non-citizens, she is less explicit. She is clear that every human being is entitled to a minimum threshold level of central capabilities and that the world community has a collective duty to realise these entitlements. For example, if the citizen’s state fails to fulfil its duties, she indicates that the duties can be extended to other entities, such as NGOs, international organizations, corporations or other states. She demands that under specific circumstances ‘richer states’ (state B) should provide assistance when ‘poorer states’ (state A) fail to protect their citizens, at the same time respecting national sovereignty. She also stresses that there should always be room for criticism and persuasion of other states, but again with respect for the state’s sovereignty.

The question of migration and asylum-seeking adds additional dimensions to the question. What still remains unclear in Nussbaum’s account is the question concerning the obligations of state B to non-citizens (citizen A) when it comes to securing individual entitlements at a minimum threshold of capabilities. This is especially problematical when the claims to entitlements of a minimum threshold level of citizen A, by means of the residence permit, seem to be in conflict with the ‘compelling interests’ of state B, or with what state B in accordance with an ‘ordinary political process’ and ‘well-functioning democracy’ is able to provide. The court obviously recognizes some of the serious circumstances of the case but does not regard them as serious enough to meet the legal standards and norms of the Swedish state as a result of a ‘fair agreement’, a political process involving parliament, government and courts within the boundaries of the democratic nation state.
When discussing the right to asylum as a way of accessing central capabilities, it is tempting to use Nussbaum’s approach as a kind of universal interest theory to be applied or operationalized to secure a minimum threshold of capabilities. She has anchored her ideas in human dignity and the universality of individual entitlements, which paves the way for such moral universalism. But the firm foundation in the nation state with its respect for the role of political sovereignty in determining the set of capabilities, points in contrast towards a moral particularism. Faced with this resulting tension, the question ultimately becomes political. The interests of individual asylum-seekers with universal entitlements need to be deliberated in relation to the interests of foreign states in controlling immigration in a political process. All this takes place both nationally and internationally (Benhabib 2004, 2011). She would probably not deny this, but rather agree with the political dimension of the issue.

However, this leaves us with the question of what Nussbaum’s approach offers more than the preservation of today’s international order? There are international agreements on asylum laws in place, as well as a human rights framework that to some extent offers a minimum threshold level of duty to assist of recipient nations (e.g. the Convention Relating to the Status of Refugees, CRSR 1951 and the additional protocol of 1967). There are additional domestic legal provisions for assisting migrants in need of protection due to humanitarian reasons, but where the legal process, application, interpretation and legal decision-making primarily take place within the borders and legislation of the nation state.14

VI. Conclusions

The question of threshold levels of capabilities for asylum-seeking children is politically acute. The number of displaced people worldwide is reaching new levels and distressing asylum cases and humanitarian crises concerning child migrants are a recurring feature in the media and public debate. At the same time, a nearly universal support for children’s rights
can be noted. A majority of western states do, however, insist on enforcing immigration regulation and control with reference to national sovereignty and interests, where the inclusion of some children also means the exclusion of others. A theoretical discussion of Nussbaum’s Capability Approach and a minimum threshold level of social justice appear in this context to be relevant as a constructive input to the debate. Children’s access to asylum can clearly facilitate the protection of a threshold level of central capabilities for non-citizens when their own states are unable to do so. In this respect, the Capability Approach has the potential as an interest or entitlement theory that could fill a theory gap in the study of children’s rights and provide an ethical framework for legal and political decision-making. The application of Nussbaum’s central capabilities as universal individual entitlements would probably suggest a change in the present regime of immigration control and that we owe to asylum-seeking children a setting of threshold levels of central capabilities to secure a minimum level of social justice.

Some serious challenges remain, however. Firstly, the court deliberations between individual entitlements and national interests in matters of immigration control mirror a theoretical field of tension inherent to Nussbaum’s approach. While she is arguing for the universal dignity of human beings and a just society, it is sometimes unclear if this alludes to a global society or only the nation state. This just society, however, should provide a minimum threshold of central capabilities. She simultaneously emphasises that the nation state, its sovereignty and a people’s right to self-definition are keys to the approach. It remains ambiguous as to how the capabilities ought to be specified and corresponding duties distributed outside the boundaries of the nation state, while at the same time the sovereignty and respect of the political community for the nation state are upheld. Her approach is torn between universal aspirations and a firm anchoring in the legal, political and moral structures of the nation state. Although the sovereignty of democratic nation states plays a central role, it does not seem as if Nussbaum herself would argue for a discretionary
right to exclude immigrants at any price, or that she would argue for a restrictive immigration policy in general. When discussing poverty, Nussbaum regards it as a duty of richer states to assist non-citizens in poorer states; a corresponding duty assigned to richer states faced with migration would not be surprising. One can wonder, however, what her approach adds to the discussion about migration from the state of international law today or from other classical or modern accounts of political philosophy, such as Immanuel Kant, John Rawls or Charles Beitz. These emphasise the duty of richer states to assist or rescue in cases of humanitarian crises or when refugees need protection. But the duty to assist or rescue as a response to a migration crisis is something distinct from securing a global threshold of central capabilities that would demand a more profound change in the basic social, political and legal structure of international society.

Secondly, one of the child-specific challenges that remain to be explored is how a list of children’s capabilities, thresholds and priorities is to be legitimately determined and responsive to children’s interests and political agency. Dixon and Nussbaum argue for the Capability Approach as a theoretical foundation for children’s rights; they also maintain that the special priority of children can be legitimized within the framework of democracy and constitutional law on grounds of vulnerability and cost-effectiveness. The approach neglects, nonetheless, the question of how the specification of children’s capabilities can be politically and ethically defined, advanced and made accountable to children themselves within a democratic order. According Dixon and Nussbaum, the interests and capabilities of children still ought to be specified and advanced primarily by other actors than children themselves. Some children have obviously limited abilities to participate in a political life and a legal process on the same terms as adults. Other children possess relevant competencies and capacities, as much or as little as adults, to make judgments about their own situation. The girl from Burundi might be one such example. If we take Nussbaum’s idea of the power of self-definition
seriously, what consequences will it have for the organisation of the political and legal order in a way that is responsive to children’s political subjectivity and where children’s interests do not merely become powerful rhetorical figures for other groups or states? In immigration cases, the courts and the legislative institutions of the state have the sovereign power to define and decide upon the central capabilities of children and threshold levels within what Nussbaum would regard as an ordinary political process and a well-functioning democracy. Still bounded by the nation state and excluding the asylum-seeking child at a basic political and procedural level *qua* child and *qua* non-citizen. The Capability Approach has the potential to fill a theoretical gap in questions of children’s rights and capabilities in this context, but it still begs the question as to how we can conceptualize the child and the non-citizen outside or at the boundaries of a political order.

This brings us to a third point. Although a theory such as the Capability Approach has the potential to provide us with an ethical framework for making judgments in cases of children seeking asylum, it is theoretically problematical to simply apply or operationalize a moral theory of capabilities. Although tempting, the political and ethical questions of children’s rights to asylum cannot be reduced to universal interests or capabilities of children to be implemented, as suggested by activists and some children’s rights scholars. Such approaches have come to a dead end. The political dimension, to specify and negotiate a specific list of capabilities within nation states, is built into today’s international legal order as well as in Nussbaum’s approach. As a consequence, children’s right to asylum becomes a highly political matter, characterized by ambivalent conceptualizations of children and conflicting interests that pose a considerable challenge to the contemporary international order. A relevant political theory of children’s rights to asylum must therefore offer both a moral utopia beyond contemporary day to day politics of coercive and brutal border policing and, simultaneously, account for children’s subjectivities and conflicts of interests in a changing international landscape.
It seems relatively easy to agree on fundamental entitlements to children in line with Nussbaum’s Capability Approach or the UNCRC. After all, we have a more or less global consensus regarding the universal rights of the child. As such it constitutes a real and unique test case of the theoretical idea of overlapping consensus in a Rawlsian tradition. But still, after nearly 30 years, the consensus on children’s rights seems to have had little effect on the issue of children and asylum, where children’s rights and access to central capabilities tend to collide with national interests of immigration regulation that are backed by far more political power.

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**LEGAL SOURCES**


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**NOTES**

1 In recent years, public and academic debate about children and asylum has been a recurrent theme in countries such as Norway, Denmark, the Netherlands, the UK, Australia and the US. The debates vary in character and need to be seen in their respective contexts. Nevertheless, what unites the public debates is the focus on children as a category that in one way or another is in a particularly vulnerable situation, having a special moral or public value and that evokes political controversies about immigration policy. For the UK, see: Andersson 2012, Giner 2007; for the US, see: Bhabha 2014, VOX 2014; for Norway, see: Vitis and Liden 2011, Ekendal 2014; for Denmark, see: Vitis and Liden 2011; for the Netherlands, see: Kromhout 2009, *Defence for Children* 2015; for Australia, see: *Children Out of Immigration Detention* 2015.

2 For more comprehensive studies on children and migration see, for example, Bhabha 2014; Ensor *et al.* 2011; Watters 2008. See also, special issues White *et al.* 2010; 2011).

3 See supra note 1.

4 Sweden is the country in Europe (EU28) that granted the second largest number of residence permits. In total 30,650 residence permits were granted in 2014, in comparison with
Germany that granted 40,560 permits. The sum for the entire EU in that year was 160,080. In Sweden the percentage of granted asylum applications has increased from 28% in 2010 to 58% in 2014. (Swedish Migration Agency, http://www.migrationsverket.se/English/About-the-Migration-Agency/Facts-and-statistics-/Statistics/Overview-and-time-series.html). From 2014 to 2015 the number of asylum applicants to Sweden increased significantly from 81,301 to 162,877 and unaccompanied minors increased from 7049 (total number in EU was 23,075 in 2014) to 35,369 (Eurostat, Asylum and Managed Migration, http://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/main-tables). At the time of writing, there is as yet no data on the number of approved applications for 2015. That said, it is essential to bear in mind that it is only a minority of refugees that are applying for asylum in Europe. According to the UNHCR global trend report, the top refugee hosting countries are Turkey (1.6 million), Pakistan (1.5 million), Lebanon (1.2 million) and Iran (1 million) (UNHCR Global Trend Report 2014).

5 Somalia ratified the UNCRC in January 2015 and became the 195th country to do so. At this point, only the US has not ratified the convention. http://www.unicef.org/media/media_78732.html.


7 See Ethical Perspectives 4/2014 on the recent debate on Joseph Carens’ book The Ethics of Immigration.

8 E.g. the classical writings of Machiavelli, Bodin and Hobbes, or the more contemporary political thoughts of Benhabib 2004; Miller 1997; Walzer 1983; and Wellman and Cole 2011.

9 For classical defenses of the right to control borders, see, for example, Miller 1993, Walzer 1983, and Wellman and Cole 2011. Several scholars regard the principle of state self-determination and sovereignty at the very core of the Human Rights project and in contemporary development of international law through a number of treaties and cases during the 20th century. See, for example, Koskenniemi 2005, Moyn 2010 and 2014. For defenders of porous borders/open borders positions, see, for example, Benhabib, 2004, 2011; Carens 1987, 2014; Wellman and Cole 2011; Wilcox 2009; and for critical approaches to state centrism in legal theory, see, for example, Hans Lindahl 2013; Linda Bosniak 2008; Bas Schol 2011.

10 In 2005, Sweden adopted a new Aliens Act and a new legal process for determining the granting of residence permits, citizenship and other related issues (2005:716). It is part of the system of administrative courts and the vast majority of the decisions are dealt with at the first level by officials of the Swedish Migration Agency (Migrationsverket). The applicant has the right to appeal to a second level, the four regional Migration Courts (Migrationsdomstolen). The Migration Court of Appeal (Migrationsöverdomstolen) is the final and highest-ranking court in the system. It hears only the small percentage of the cases that are considered to have grounds for appeal; its decisions form precedents for the lower courts.

11 The provision is an incorporation of the UNCRC art. 3:1 and was introduced in the 1997 act after the Swedish ratification of the convention in 1990 (Lundberg 2011, 56). In Swedish, the Best Interest Principle is translated Principen om barnets bästa.

13 “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence” (UNCRC Art 9:1)

14 I do, however, agree with many legal and political scholars who stress the global character of law, politics and ethics. The normative boundaries and foundations are certainly not limited to the nation state (e.g. Lindahl 2013). And even though international and European law has found its way to some extent into the national courts in asylum cases, it is evident that that the national institutions such as parliament, government and courts play an essential role to set the norms (Josefsson forthcoming; Sandberg 2014).