MAKING CAPABILITY LISTS: PHILOSOPHY VERSUS DEMOCRACY

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Abstract: : the paper discusses a fundamental problem that has to be faced if the general capability approach is to be developed in the direction of a theory of justice: the selection and justification of a list of capabilities. The democratic solution to this problem (defended by Amartya Sen) is to leave the selection of capabilities to a process of democratic deliberation, while the philosophical solution (defended by Martha Nussbaum) is to establish this list of capabilities as a matter of philosophical theory. The paper investigates the debate between these two different positions and argues in favour of the philosophical solution. First, it distinguishes political from epistemological reasons for (not) making capability lists. Second, it shows that the democratic position must incorporate at least some philosophical theorizing in general and a theory of democracy in particular. Third, the paper argues that the democratic position presupposes the philosophical position will bypass the democratic process while actually it doesn't. The philosophical position is actually more respectful of democracy than the democratic position. Fourth, while philosophers may exercise caution and connect their capability lists to actual democratic debates and other empirical sources, this kind of epistemological virtue ironically may heighten the chance of receiving reproaches on the political level.

Introduction

A central issue that divides proponents of the capability approach is whether or not a fully-fledged capability theory should include a substantive list of central (or basic) capabilities. On the one hand, Amartya Sen has argued that philosophers (or academic theorists in general) should not make such a canonical list. On the other hand, Martha Nussbaum has endorsed a specific list of ten central capabilities that she has refined over the years. Her list includes the capabilities for life, bodily health, bodily integrity,

senses, imagination and thought, emotions, practical reason, affiliation, other species, play and control over one's environment (Nussbaum 2006, 76-78). The objection to this is that a philosophically made capability list is illegitimate because such lists should be the outcome of a democratic process, or a process of public reasoning. Thus we are faced with a fundamental dispute about the role of the philosopher versus the role of the democratic public. *Should philosophers make lists of basic capabilities or should they leave this to the democratic process?* It is this 'question of list-making' that I want to address in the present paper. Although we will encounter complications and intermediate positions, at the outset we can restrict ourselves to the dichotomy presented in the question. The answer is either that democratic decision-making is the legitimate place for list-making (hereafter I will refer to this as 'the democratic position') or that this task falls upon philosophical reflection (hereafter: 'the philosophical position').

From one perspective this is a rather narrow question, confined as it is to an internal dispute within the capability approach that may not be of interest to anyone unconvinced about the general merits of this approach. Although there have been occasional remarks and passages about the usefulness or damaging effects of list-making in papers and books dealing with the capability approach, there have not been – to my knowledge – many full-fledged investigations of this question.[1] This paper hopes to add to this topic. From a wider perspective, however, the question of list-making is merely an instantiation of a classic question, namely about the proper relation between philosophy and democracy. In answering this question, we will therefore need to go beyond capability theory and theorize the relation between democracy and philosophy. Thus, the capability dispute turns out to be a – hopefully instructive – 'case study' of the age-old problem of how the (political) philosopher relates to the *polis*.

My answer to the question will be straightforward: capability theories of justice should include lists of basic capabilities. Thus, this paper will offer a defense of the Nussbaum-side of the dispute. First, I will present a more detailed exposition of the dispute, reconstructing the democratic position as it was argued for by Sen and others, as well as the defense of philosophical list-making by Nussbaum. This leads me to

distinguish two main fields of contestation: on the political and the epistemological reasons for (not) making capability lists (section 1). Second, I will analyze in more detail what is at stake in the dispute. This will reveal that the democratic position cannot escape substantial involvement in philosophical theory. It must incorporate at least some philosophical theorizing in general and a theory of democracy in particular. This does not mean that the democratic position is incoherent, but it should render its criticism of the philosophical position more modest (section 2). Third, I will present the political argument for rejecting the democratic position. It states that the democratic position presupposes that the philosophical position will bypass the democratic process while actually it doesn't. I will defend this argument by showing how philosophy and democracy relate to each other in the philosophical position. This will lead me to the – perhaps counterintuitive – conclusion that the philosophical position is actually more respectful of democracy than the democratic position (section 3). Finally, I will discuss the epistemological argument for making capability lists. I will argue that this objection should lead philosophers to exercise caution and connect their capability lists to actual democratic debates and other empirical sources. Philosophical reasoning has to be connected to public reasoning to some extent. Ironically, this kind of epistemological virtue may heighten the chance of receiving reproaches on the political level (section 4).

1. Exposition of the Positions in the Dispute

The case for the democratic position consists of two arguments, one on the epistemological plane and another on the normative plane. One can either argue that philosophers do not have the legitimacy to make capability lists *politically speaking*, or that they are badly placed *epistemologically speaking* to devise such lists. Both objections are related and can be employed in conjunction (Robeyns 2005, 198). Before explaining these objections, however, we need to address a preliminary issue, which has tended to confuse the debate; the issue of scope.

One of Amartya Sen's arguments for not making a list is that the capability approach is a general approach that can be used for a variety of purposes (Sen 1993,

47). It can be used to assess development policies, the quality of life, well-being, justice, etc. And within each of these fields, it can be used for still more specific purposes. The number of applications is almost endless, and the list of capabilities one would use should be flexible to adapt to the context of these specific investigations. I grant this argument. Nonetheless, such a context-dependence does not preclude the possibility that *within* each context there would be one best capability theory, with one definite capability list at its core. If framed in this way Sen has often been concerned with the broad potential of the capability approach to identify 'capabilities that we have reason to value' in different contexts. Nussbaum on the other hand has been concerned with the specific question of which capabilities need to be socially (often also constitutionally) protected as a matter of justice. If thus conceived, there would not be a real dispute between them. It is very well possible to have a capability *approach* in general, without a predetermined list, and several capability theories in specific fields each of them with a fixed list.

In this paper I will – like Nussbaum – be exclusively concerned with capability theory in the field of theories of justice. I do not take a position on the broader question of capabilities that we have reason to value. This may seem to solve the problem, since Sen himself says: 'I see Martha Nussbaum's use of a given list of capabilities for some minimal rights against deprivation as being extremely useful in the same practical way' (Sen 2004, 79).[2] If the 'minimal rights against deprivation' in this passage are meant to refer to the core of a theory of justice, Sen would seem to acknowledge the usefulness of list-making for theories of justice. However, in other place, such as in his latest book *The Idea of Justice* (2009) Sen continues to oppose list-making and to refer to public reasoning in what seems to be a discussion of the specific question of justice. The contrary position is here even qualified as 'absurd' (Sen 2009, 242). So I take it that with respect to the question of justice there is a real dispute about the usefulness of philosophical list-making.

I now turn to the two main points of conflict. Perhaps the predominant objection raised by the democratic position is the political one. Its main point is that Nussbaum's

method bypasses those people that its theory is to be applied to in practice. Thus, Alison Jaggar notes in an apparently dismissive vein:

'I have found no place in her extensive writings on capabilities where she questions her own authority to decide what should be included on the list and what excluded from it. She expresses no misgivings about the fact that, in taking control of the list, she assumes the prerogative not only of determining the philosophical import of others' contributions but also of assessing their moral worth, thus deciding whose opinions should be respected and whose should be rejected as mistaken or corrupt.' (Jaggar 2006, 314)[3]

Similarly, Ingrid Robeyns voices a concern for the legitimacy of Nussbaum's list:

'the process by which the list has been created itself needs to be legitimate. If the people to whom the list will apply reasonably feel that it is imposed on them, then the list will lack the necessary legitimacy that is needed for the list to have any political effect.' (Robeyns 2005, 199)

Academics, the upshot seems to be, should not permit themselves the freedom to draw up lists all by themselves which are then applied to others who have not been allowed to participate in the process of making these lists. It is unclear whether Amartya Sen actually holds the political objection. The following quotation comes closest to such a support:

'My own reluctance to join the search for such canonical lists arises (…) also from a disinclination to accept any substantive diminution of the domain of public reasoning. The framework of capabilities, as I see it, helps to clarify and illuminate the *subject matter* of public reasoning, which can involve epistemic issues (…) as well as ethical and political ones. It does not – and cannot – displace the need for public reasoning.' (Sen 2004, 333)

The fact that Sen phrases his concern as a reluctance to accept 'any substantive diminution of the domain of public reasoning' suggests that his objection is a principled one: the domain of public reasoning has a specific kind of status that should not be undercut. However, whether this amounts to the idea that philosophers are not entitled to draw up lists, remains unclear.

It is important to distinguish this objection to list-making *in general* from the frequently voiced related complaint that *specific* capabilities on Nussbaum's list cannot make true on their pretense to universal validity. For example, when Susan Moller Okin protests that Nussbaum has a 'highly intellectualized conception of a fully human life', she probably takes fault with the centrality Nussbaum assigns to the capability for practical reason. And similarly when Okin writes that Nussbaum is too much inspired by 'artistically inclined' western women, she probably objects to the inclusion of (part of) the capability for using the senses, imagination and thought (Okin 2003, 296). The confusion arises because objections like these have often been the basis for a general rejection of list-making. However, whether or not Okin and others are right that specific capabilities on Nussbaum's list aren't universally valid parts of a good human life, it is a further step to the position that *any* list of human capabilities will *necessarily* lack universal validity. Nussbaum may have gotten things wrong on some particular capabilities, but this does not mean that her project of a universally valid list can be dismissed. It may simply mean we haven't arrived there yet. The argument for the political position, then, must be made not by arguing against some (or even all) specific capabilities on the list, but by the principled argument that legitimate list-making belongs to the democratic public, not to the philosopher.

Let's now turn to the second, epistemological objection, which holds that philosophers cannot possibly know which capabilities are most important to people. As Robeyns has argued, there are 'epistemological limits' to the philosopher's insights:

'Most scholars (…) do not believe that it is possible for one person to truly understand the lives of all people around the world (…) One person will almost

always have a partial perspective and thus partial epistemological access, given the impact of one's situatedness.(…) [t]he epistemological limits of a well-defined list of capabilities become obvious. Instead, we need a process of genuine listening and deliberation until a list, which will necessarily be collective, can be constructed.' (Robeyns 2005, 198)

With the epistemological objection Amartya Sen is very clearly on board:

'[p]ublic discussion and reasoning lead to a better understanding of the role, reach, and the significance of particular capabilities. For example, one of the many contributions of feminist economics has been precisely to bring out the importance of certain freedoms that were not recognized very clearly – or at all – earlier on, for example freedom from the imposition of fixed and time-honoured family roles, or immunity from implicit derogation in social communication. To insist on a fixed forever list of capabilities would deny the possibility of progress in social understanding and also go against the productive role of public discussion, social agitation, and open debates.' (Sen 2004, 80)

The alternative to philosophical list-making, then, is a process of 'public reasoning'. Unclarities remain as to what Sen means with this. For example, if we take his example about the contribution of feminist economics literally, he suggests that one instance of public reasoning is the debate between academic economists. This surely is a long way from a view of public reasoning that includes a non-academic public, let alone the organs of democracy as we know them in most developed countries.[4] Such an absence of a clear picture of public reasoning is problematic. The criticisms just presented call for a constructive view of how the process of public reasoning is to be devised in order to generate capability lists, but in that respect surprisingly little has been done.

One can argue that if something is left to the process of public reasoning, there should be no theoretically created restrictions or guidelines (who to include in the public? how to reason?). The process has to be as undetermined as the outcome itself.

However, since this strategy would leave open the possibility of massively unjust processes of public reasoning, some theorists have proposed a more substantive alternative. Thus, Ingrid Robeyns has argued in favour of a list of criteria that are to guide the selection of capabilities.[5] David Crocker has proposed a version of the theory of deliberative democracy as the right approach to supplement the capability approach (Crocker 2008, 309-329). For those who believe in the democratic position, these are highly welcome contributions. However, the substance of the constructive proposals does not yet match the vehemence of the criticism directed at the philosophical position.

If we now turn to the other side of the dispute, Nussbaum has not left these criticisms unanswered. She has responded to both objections. On the epistemological level she has argued that

'If capabilities are to be used in advancing a conception of social justice, they will obviously have to be specified, if only in the open-ended and humble way I have outlined. Either a society has a conception of basic justice or it does not. If it has one, we have to know what its content is, and what opportunities and liberties it takes to be fundamental entitlements of all citizens. One cannot have a conception of social justice that says, simply, "All citizens are entitled to freedom understood as capability. (…) [s]uch as blanket endorsement of freedom/capability as goal would be hopelessly vague. It would be impossible to say whether the society in question was just or unjust."' (Nussbaum 2003, 46-47)

Nussbaum's reaction is that a theory of justice without a definite capability list would be incomplete (Nelson 2008, 106-107). This response does not in itself refute the existence of epistemological limits. Probably the best way of understanding her point is that such limits – however serious – cannot be a reason for refraining from philosophical list-making, since otherwise no complete theory of justice could be offered. This is not a conclusive answer, of course, since one could equally well conclude that – if this is the case – no complete theory of justice *should* be offered.

Nussbaum also responds to the political objection. Here she claims that those people needing justice aren't served when these questions are left open:

> '[s]ome human matters are too important to be left to whim and caprice, or even to the dictates of a cultural tradition. To say that education for women, or adequate health care, is not justified just in case some nation believes that it is not justified seems like a capitulation to subjective preferences of the sort that Sen has opposed throughout his career. (…) In short: it makes sense to take the issue of social justice seriously, and to use a norm of justice to assess the various nations of the world and their practices. But if the issue of social justice is important, then the content of a conception of justice is important.' (Nussbaum 2003, 47)[6]

Thus, although Nussbaum is willing to permit some degree of local specification of her ten basic capabilities, she also holds that the definite content of the list at the abstract level serves a valuable critical function towards unjust societies and practices that could not be fulfilled without a substantive list.

It is possible to ground the democratic position on either the political or the epistemological objection to capability list-making. One could hold that the political objection is the more pertinent one, while the epistemological objection provides additional support: if the public has better access to knowledge about people's capabilities, this is an additional reason to think the public is the legitimate instance to make capability lists. However, if the public consistently makes wrong and deceived decisions, it still is the most legitimate list-maker, since bypassing it fails to respect the persons of which the public consists. Alternatively, one could make a case that does not rest on the political objection (one has no principled objections to philosophical list-making), but holds that such a purely philosophical strategy simply cannot succeed on grounds of failure of epistemic access to the relevant normative sources. For these reasons, in the following I will assess both objections separately, first presenting my

argument for the philosophical position on the political level (section 3) and then taking account of the epistemological objection (section 4).

2. The Democratic Position's Dependency on Philosophy

As a preliminary matter, one might wonder whether the democratic position is coherent, that is, whether it can deliver the independence from philosophical theory that it aspires to. In this section I will investigate two reasons that might be thought to throw doubt on this ambition. While we will see that these reasons restrict the extent to which the democratic position can make good on its anti-philosophical stance, we will also see that they do not render the position incoherent.[7] This section, I must note in advance, accepts the tacit presupposition that underlies the dispute as represented in the previous section: that democratic decision-making and philosophical theorizing are alternative (i.e. mutually exclusive) means to make capability lists (it is this presupposition that will be attacked in the next section).[8]

First, let us have a sharper idea of exactly what it is at stake. The democratic position proposes that capability theories should leave some decisions within the theory undecided by philosophical argument. Rather, for these matters, a democratic process (or a process of 'public reasoning') should take over. Which are these decisions? David Crocker recently made a useful list of ten choices within capability theory that can be 'outsourced' to democracy (Crocker 2008, 303-306):

1) The choice of agents and participants
2) The choice of the process of decision-making
3) The choice of agency versus well-being
4) The choice between functioning and capability
5) The choice between functionings (or capabilities) now and functionings (or capabilities) in the future
6) The choice and weighting of valuable capabilities and functionings
7) The choice of basic capabilities and thresholds

8) The choice between basic capabilities and expansion of all valuable capabilities

9) The choice to specify general capabilities and functionings

10) The choice of distributive and other values.

With the help of this list, we can give a reinterpretation of the dispute between the democratic and philosophical positions. Let us imagine that these choices can be rearranged on an imaginary spectrum of choices, from the most fundamental one on the one hand to the most applied one on the other hand.[9] The most fundamental choice is not on Crocker's list (since he is a capability theorist): the choice of metric of justice – a choice between capabilities, utility, resources, primary goods, etc. So let us add this choice as an 11th item to Crocker's list. Once this choice is made we go over to a slightly less fundamental choice: the choice of which basic capabilities should be on the list (Crocker's 7th item). If this has been done, some intermediate choices come into play, such as when to promote capabilities and when functionings (4th item), or the choice between present and future capabilities (5th item). Finally, at the completely applied side of the spectrum we probably have the choice to specify the general capabilities in terms of the local context to which it is applied (9th item).

If we conceive of things in this way, the difference between the democratic position and the philosophical position becomes a *gradual* instead of a categorical one. It is not about leaving *all* of these choices either to philosophy or to democracy. Rather, the most fundamental choice(s) is (are) made in philosophical theory, and the difference is about where on the spectrum to cut off the task of philosophical theory and leave further matters to the democratic process. Any theory will include a reliance on both philosophy and democracy, although the relative weights will differ. Thus, even Nussbaum does not want to decide all matters on the level of philosophical theory. She has explicitly endorsed the idea of 'multiple realizability', i.e. the idea that her ten capabilities have to receive further local specification (Nussbaum 2000, 77). She also states that the determination of a threshold (part of Crocker's 7th item) and the determination of what to do when capabilities conflict (part of the weighting of Crocker's 6th item) are not matters for philosophical theory.[10] On the other side, even

Sen does not entrust all decisions to democracy since he doesn't leave the choice of metric to democratic debate. This is not self-evident: why should philosophers know better than a democratic public engaged in public reasoning whether justice is a matter of utility, resources or capabilities? If a legitimate role for philosophy would be denied at this most fundamental end of the spectrum, then there would actually not be anything left for normative philosophy.[11] Apparently Sen does not want to take that step. But then it becomes less evident why the slightly less fundamental question of choosing basic capabilities should not also be a matter for philosophy. And so on up to the more specific and context-dependent choices to be made.

This illustrates that the democratic position, if thought through to its extremes, has a *self-effacing potential*: the same reasoning that is applied to more specific choices can also be applied to more fundamental choices and in the end removes the need for any task for philosophical theorizing. However, it would be unfair to hold that the democratic position will inevitably slide off towards this most extreme position, actualizing its full self-effacing potential. Cutting off philosophical reasoning somewhere near the fundamental end of the spectrum (leaving a large range of decisions, amongst which the construction of the capability list to democracy) is as coherent as doing that at the most applied end. Such a relatively more democratic position still is a challenge to a Nussbaum-style position which proposes a much larger role for philosophy. Nonetheless, this shows that the reproaches made to Nussbaum will have to be mitigated in their ambition, since theorists taking the democratic position also make philosophical choices, the choice in favour of capabilities to begin with.

This conclusion is reinforced by considerations that arise when we think about a second reason for doubting that the democratic position can fully hold on to its anti-philosophical credentials. For it to be complete, the democratic version of the capability approach needs a (philosophically developed) theory of democracy. If the democratic position holds that only a democratic process can deliver the requisite legitimacy, then it needs to answer the question whether any democratic process will do; or, to put it differently, what it means for a process to be (sufficiently) democratic. This will lead the democratic position to develop a (or endorse an already existing) theory of

democracy, e.g. one of the theories of deliberative democracy. As we saw in the previous section, this is exactly what some theorists are now doing. This means that the philosophical modesty at one point (in the theory of justice) requires philosophical outspokenness at another point (in democratic theory). Now these theorists may be happy to admit this, arguing that this combination of theories of justice and democracy still leave more room people to make democratic decisions about capabilities. Even if this were true (the next section will argue that it isn't), we still have to note one important problem for those taking this strategy.

This problem is that the relevant theory of democracy may need a (fully developed) capability theory itself. I say 'may' since it is possible, of course, to hold a capability-independent theory of democracy. But consider why this is problematic. Some authors have argued that for a democratic process to be legitimate, participants in the process need to be *equal* in respect to each other. But what kind of equality is required? Parallel to the debate in distributive justice democratic theorists may come to the conclusion that the relevant type of equality is not equality of resources, utility or primary goods, but equality of basic capabilities. Some form of capability equality then is a necessary prerequisite to democratic deliberation (Bohman 1997; Knight and Johnson 1997). Of course it is possible to argue in favour of a different conclusion (e.g. an inegalitarian democratic theory, or a democratic theory which makes use of equality of resources). Nonetheless such a capability-informed theory of democracy will be most likely to be appealing to those who were capability theorists in the first place. Thus the capability theorist who takes the democratic position and needs a democratic theory to supplement his capability theory of justice now faces a dilemma. Either he chooses to rely on a capability-informed democratic theory, in which case he needs to have a substantive capability theory of justice to insert in the democratic theory. But this philosophically-made substantive theory is what he cannot deliver because it has to await the outcomes of a democratic process. Thus his theory is circular. Or he chooses not to rely on capability equality as his interpretation of the prerequisites of a legitimate democratic process. In this case he falls into a contradiction: he is both a capability

theorist (in his theory of justice) and he rejects capability theory (as part of democratic theory).

One way to escape the dilemma would be to argue that the capability theorist of justice waits until the democratic public (in its first, constitutional meeting) has constructed a list of capabilities and then to use this list as an input both into his theory of justice and into his democratic theory, which is to guide future democratic deliberations about the application of capability theory to concrete issues. However, this will not do, since this first meeting itself has to be properly democratic as well for it to have the legitimacy to construct a capability list. This means that this first meeting has to held under proper conditions, including the availability of the right kind of equality amongst participants. But whether these conditions are in place can only be decided when we have a complete theory of democracy. We are faced with the prospect of an infinite regress. Now such an infinite regress is not specific to capability theory; any democratic theory faces the same problem. However, as Frank Michelman argues, the problem does not arise for 'rights-foundationalists'. It is specific to those who want to argue for an independent role for the validity of democratic procedure (Michelman 1997). Thus the dilemma which plagues the democratic position can be escaped by the philosophical position.

Whether or not this is fatal depends on how bad one judges the predicament to be. Michelman argues that democratic theorists may be satisfied with adherence to a democratic process that "(i) is in force, and (ii) we judge to be reasonably defensible as justice-seeking" (Michelman 1997, 166). Unfortunately I cannot here discuss the merits of this proposal and the further debate on this dilemma further. Even if Michelman's solution seems to me somewhat unsatisfactory, we can grant the democratic position this way out (or presuppose that it finds another way out). If so, it remains a coherent challenge to the philosophical position.

3. The Relations between Philosophy and Democracy

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In this section I will lay out what I take to be the strongest argument in favour of the philosophical position, which I hope is able to resolve the dispute about legitimacy (the political objection) identified in the first section. It will consist of two steps. First, I will try to show that the democratic position is able to play upon a conflation of two levels that should be kept distinct: the level of philosophical theory and a 'meta-level' at which one holds a particular understanding of the relation between philosophy and democracy. This conflation only arises as long as one holds on to a specific conception at the meta-level, in which philosophers are seen as philosopher-kings. Second, I will argue, the democratic position presupposes the anti-democratic view that it reproaches the philosophical position of taking and is thus less respectful of democracy than the philosophical position. It has to be kept in mind that when I refer to 'the democratic position' in this section I only refer to the position that is based on the political objection (as identified in the first section). I think that some who hold the democratic position do not make the conflation discussed in this section; their argument is mainly based on the epistemological objection, and will be discussed in the next section.

The core of the argument is simple. It states that the democratic position presupposes that the philosophical position will bypass the democratic process while actually it doesn't. This can best be fleshed out in terms of a distinction between three levels. The first level is the *level of practice*. At this level matters are decided one way or another. For example, in practical reality, a dictator in country *x* decides to grant or withhold his subjects the capability for play, or a parliament in country *y* decides to take measures to grant all its citizens the capability for literacy. Let us for purposes of the argument abstract from dictatorships and say that this is the level of 'actually existing democracies'. This level should be distinguished from *the level of theory*. This is where philosophers (and other academics) in proverbial ivory towers write their articles and books. New developments on the level of theory in themselves make no automatic change on the level of practice. The fact that Rawls published a theory in which the difference principle was presented, did not by itself make social reality conform to the difference principle. The distinction between these two levels sounds familiar, almost

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trivial. It leaves one question unresolved: what is the relation between theory and practice? This is the subject of a third and separate level.

At the *meta-level*, there are several possible views of the relation between theory (philosophy) and practice (democracy). Let us discuss three meta-theoretical conceptualizations of the relation between philosophy and democracy (here I abstract from intermediate positions – but see next section). For the sake of imagination, let's call them by the role they assign to the philosopher.

The first view is the one in which the philosopher is a *philosopher-hermit*. If philosophers are hermits, they retreat completely from the political community. They consider their theories to have no practical relevance whatsoever. They do not want to guide or advise any legislation, or principles for legislation. Their theories are devised merely for the pleasure of seeking the truth, for earning an income, for annoying people, or any other motive - except the motive of influencing or helping policy making. Philosophy should not have the ambition to generate practical consequences. It may be clear that this is the philosophy-democracy-nexus that neither Sen nor Nussbaum envisages. It is offered here merely by way of contrast.

A second option is the philosopher as *philosopher-king*. Here the philosopher, by virtue of his claim to truth, wishes his theories to be enacted upon immediately and without reserve. Ideally, the figure of philosopher and ultimate decision-maker are one and the same and this figure has absolute powers. But in a more democratically oriented version, we can imagine the philosopher to run for election as philosopher-president to achieve the same results. However, even if the philosopher leaves the implementation of his theory to someone else, the essential point for this view is that the claim to practical legitimacy is completely derived from the claim to philosophical truth at the level of theory. No compromise or change to the philosopher's theory is allowed, since its truth is the overriding reason for citizens to conform to its content. The theory is supposed to be granted a direct effect upon practice.

Finally, a third relation is the one in which the philosopher seeks influence on the practical level for his theories by way of a more indirect process. Here he is *philosopher-citizen*, who offers his theory as input into a democratic process run by

others. He will hope that his theories receive adherents who will stand up for their realization, he may even fight for that himself by giving lectures to the public, writing in the newspaper, even joining a political party. Nonetheless, as Michael Walzer rightly noted, he recognizes that the philosophical truth of his theories does not confer practical legitimacy upon them. As citizen, he prefers that a competing, untrue theory is chosen above his true theory if this is the outcome of the democratic process.[12]

With this conceptual apparatus we can now state the crucial point of the argument. The democratic objection to the philosophical position presupposes that the latter position holds on to a certain relation between the levels of theory and practice: the philosopher-king relation in which philosophical theory somehow finds a way to bypass actually existing democracies and make its dictates into laws (Nussbaum's constitutions). Otherwise, it is incomprehensible why the democratic position would hold that the philosophical position does not leave certain essential elements to the democratic process (the 'substantial diminution of the domain of public reasoning' that Sen fears). However, in fact the philosophical position holds the philosopher-citizen view. It offers – or at least in its most defensible version it should offer – its philosophical theory as a piece of input into the process of actually existing democracies. Thus, it seems to me that the interpretation that the democratic position (again: only according to its political objection!) holds from the philosophical position suffers from a crucial confusion between levels and different views of the relation between philosophy and democracy (for the epistemological case for the democratic position, see next section).

Another question is whether Nussbaum holds the philosophical position as presented here. I take it that she does. Not only haven't we seen Nussbaum rallying people to vote for the Nussbaum-party that has in its manifesto the establishment of a Nussbaum-dictatorship. Her texts also suggest an affirmative answer. Take the following passage:

> 'Sixth and finally, I insist on a rather strong separation between issues of
> justification and issues of implementation. I believe that we can justify this list

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as a good basis for political principles all around the world. But this does not mean that we thereby license intervention with the affairs of a state that does not recognize them. It is a basis for *persuasion*, but I hold that military and economic sanctions are justified only in certain very grave circumstances, involving traditionally recognized crimes against humanity. So it seems less objectionable to *recommend* something to everyone, once we point out that it is part of the view that state sovereignty, grounded in *the consent of the people*, is a very important part of the whole package.' (Nussbaum 2006, 80) (italics mine).

Here Nussbaum makes it clear that all she does is recommending her theory to a democratic public, trying to persuade them, all the while respecting the consent of the people. Those critics who want to 'urge that she view her list not as something directly enshrined in constitutions but as a stimulus for public debate in the construction, interpretation, modification and application of constitutional principles' seems to me already to have want they want (Crocker 2008, 198).

But even if these critics would be right in their suspicions about Nussbaum, her theory could easily be brought in line with the philosophical position (and it is with the principled issue of list-making that the democratic position is concerned, not with Nussbaum's theory for its own sake). For after all, such conformity does not require the change of one letter in her capability theory of justice; all it requires is a change in the meta-theoretical position on the relation between philosophy and democracy which backs up such a substantive theory. This change can be made independently from the theory itself. The result is a theory which 'leaves things to the democratic process' in two different ways. First, at the level of theory itself certain elements are left to democracy since not much useful things can be stated about them in the abstract (the familiar idea of local specification of capabilities). Second, the theory as a whole – with its substantive choices and its blank spots – is recommended to the public as the best theory of justice according to this philosopher. For certain elements the public gets a recommendation, while for those elements for which a recommendation does not make

sense, the public has to start from scratch. In both cases the choice in practice is up to the public.[13]

Now I want to go one step further and argue that matters are even worse for the democratic position. Let us ask: which position is more respectful of democracy? Although the obvious answer seems to be the democratic position, I think reflection shows that the philosophical position actually should have the credits.

The philosophical position offers the democratic process something to digest. It enriches public debate by offering the most enlightened theories that it can come up to. At the level of theory, of course, there are likely to be competing philosophical theories instead of one. So the public will quickly realize that truth is a complicated matter in philosophical theory, or else it will be forced to realize this by proponents of competing views in the public arena, calling upon competing philosophical theories. It will then use philosophical theories as clarifications, systematizations, sources of inspiration, etc. of the positions that it wants to defend. If philosophers would refuse to offer substantive theories, public debate would only be impoverished. As John Stuart Mill once noted, truth can only win by having as many different positions espoused and tested in the arena of public debate. The attitude that best supports this battle is 'may the best one win', not 'who are you to say this?' The debate in academia between several principles of justice, like other academic debates in other disciplines, may trickle down to public debate, helping citizens to make up their minds. And the fiercer and more explicit in all its parts these philosophical theories fight each other, the more there is to be eventually taken up in the public arena.[14] The academic debate will only improve if theorists are not reluctant to fight each other as intensely as possible to tease out the implications, advantages and drawbacks of their respective proposals and experiment with new ideas.[15]

All this is unavailable on the democratic position, for proponents of this position have to leave the public debate empty-handed. They have to let citizens struggle for themselves what to think about capabilities. The unsatisfying fact at the level of theory that these theories only offer us incomplete theories of justice is matched by their uselessness at the practical level. And the more democratic they are (on the scale of

decisions presented in section 2), the more useless they are to democracy. If we delve into the reasons for this voluntary refusal, we can only come to the conclusion that the democratic position not only presupposes - wrongly - that proponents of the philosophical position adhere to a philosopher-king view, but they hold such a view with regard to themselves as well. For if philosophers could also be citizens, why would they be so reluctant to give the best advice they are capable of? Thus, by thinking that they cannot be anything else than philosopher-kings, they miss the opportunity to take up the role of philosopher-citizens.

I think a proponent of the democratic position can make two possible replies to this line of argument. One is to reconceive the democratic position as a position not on the level of theory but on the meta-level, namely as the position which advocated a philosopher-citizen view. This 'meta-democratic' position is obviously identical with the philosophical position as I outlined it. If the democratic position as it currently stands would be such a meta-position, then there would be no point in the whole debate. But as the reconstruction in the first section suggests, I do not think this is the case. So there would be something won by such a transition of the democratic position to the meta-level. The advocacy of democracy could then be combined with substantive proposals by theorists at the level of theory. This 'surrender' to the philosophical position merely shows from the democratic angle how the philosophical position already incorporates a respect for democracy (namely, at the meta-level).

A second, more challenging reaction would be to insist, as Amartya Sen has recently done, that philosophical reasoning itself is always democratic. The gap between democratic and philosophical reasoning is closed in three steps. The first step here is that philosophical reasoning about justice is 'impartial reasoning': reasoning from the standpoint of someone deprived of specific knowledge about himself (original position) or of some 'impartial spectator'. The second step is that impartial reasoning, in turn always is 'public reasoning': 'the ability to survive challenges from informed scrutiny coming from diverse quarters' (Sen 2009, 45). The third and final step is to connect public reasoning to democracy, by showing that it is central to some form of

deliberative democracy that is superior to more formal (voting-centered) ideas of democracy.

A fully satisfactory counter to this reply would need to specify exactly what we mean by 'philosophy'. Obviously that it is a rather difficult task. In this paper I have relied on an intuitive understanding that philosophical reflection on justice (since that is the field to which I restricted the argument) is a type of reflection which is, broadly speaking, normative and argumentative. This reflection should not necessarily be confined to professional philosophers: members of the public at large may engage in philosophical reasoning as well. Philosophers have to take seriously the thought that members of the public at large have reasons to supply that are philosophical as well, so that he needs to consider them in making his own philosophical theory. However, in order to counter the reply just stated, we would need to make clear wherein exactly the contrast lies between philosophical reasoning and democratic reasoning and decision-making.

The most promising route, I think, would be to show how other factors than public reasoning will necessarily play a role in democratic argumentation and decision-making: ideological commitments, considerations of personal status, power relations, electoral strategies, etc. Thus, we would deny the third step in the democratic position's reply, while acknowledging that philosophical reasoning and public reasoning can be brought together to some extent (the first two steps). This latter acknowledgment can be better appreciated when we bring into play the epistemological objection and my suggestion to answer it, that the philosopher-citizen needs to become what I will call a 'philosopher-investigator'.

4. The Public's Role in Making Philosophical Theory

Some who defend the democratic position will be unimpressed with all of this, since their case for this position rests on the epistemological rather than the political objection to philosophical capability list-making. They will accept that philosophers are indeed citizens who offer their theories as a recommendation to their fellow citizens.

Nonetheless, they will hold that it should still be up to the democratic process to make capability lists. Just as Nussbaum holds that nothing much useful can be said about the specification of capabilities at the level of an abstract theory of justice, they will hold that the same is true for the identification of these capabilities. Epistemological constraints on what the philosopher can possibly know about which capabilities matter to all citizens, render such theoretical efforts fruitless. Such efforts will only lead to worthless recommendations to the public.

An answer to this objection requires us to complicate our tripartite scheme presented in the previous section and add a further view about the relation between philosophy and democracy. This extension from the scheme arises when philosophers admit that it may be too hard for them to find the correct capability list all on their own, by way of private reflection. While they still feel that the strict separation between the realm of philosophy and that of actually existing democracies is politically important (correct theory cannot be more than a recommendation to the polis), the separation may have to be less hard when constructing their theories. These philosophers, whom we may call *philosophers-investigators*, regularly cross the boundaries to gather data in the 'real world'. They may learn from public debates about capabilities, or they may even conduct social-scientific research to find out which capabilities people value most. They will retain their right to construct their theories as they deem best; for after all, the fact that a group of people empirically holds the belief that realizing capability *x* is a moral demand, does not mean that these beliefs are morally correct. However, with suitable modification, they will allow themselves to let the results of their practical investigations influence their theories and think the latter enriched by these efforts. A good example is the research done by Jonathan Wolff and Avner de-Shalit, who used Nussbaum's list as the basis for in-depth interviews and then modified the list to account for the results of these interviews (Wolff and De-Shalit 2007, 49-61).

The philosopher-investigator's strategy, when seriously conducted, provides an answer to the epistemological objection. He remains a philosopher-citizen in that his goal is to provide his theories as a recommendation to the *polis* (the philosopher-investigator role is a subspecies of the philosopher-citizen). However, the philosophical

capability list is not the mere result of isolated reflection but now also informed by empirical observation. The philosopher's individual epistemological limits are compensated for by drawing upon the knowledge of (many) others (one might say this is not enough; but then it seems one requires an epistemic perfection that is so deterrent as an ideal that it makes all philosophical projects *a priori* impossible). This brings him closer to the motivating concerns of the democratic position, as explained at the end of the previous section. Thus, he engages in public reasoning qua philosophical reasoning (but not: qua democratic decision-making!). This still leaves open the precise nature of the philosopher's methodology when he acts like an investigator. Probably there are several fruitful ways to give shape to this way of working. Nonetheless, the investigator role is sufficiently specific to reject some models of public reasoning that have been proposed in connection to the capability approach.

One model that is not compatible with the philosopher-investigator approach is David Crocker's model of deliberative democracy. Crocker takes over the general idea from the literature on deliberative democracy that the aim of deliberation is to come to 'an agreement that is mutually acceptable.' (Crocker 2008, 313). In contrast to this, since the end result of the philosopher-investigator's efforts is an individual product for which he alone is responsible, he does not need to defend the position that his fieldwork has revealed as the one that all members of a certain public mutually accept (if ever such a position can be found). The fact that his engagement with the public is limited to the instrumental goal of developing and testing his own theories, gives him the legitimate leeway to differ from what the public as a whole (or a majority within it) can agree to. The philosopher can afford to say 'I respectfully disagree', even to the outcome of a process of perfect public reasoning. This freedom is an important prerequisite for his position as an advisor to the *polis* that is at the core of the philosopher-citizen model.

For similar reasons, the investigator approach also is uncommitted to the view of reflective equilibrium that Nussbaum – following Rawls's political liberalism – defends. The problem with this view is not that it takes into account the reasoning of other citizens (this is exactly what the investigator is doing). The problem is the more

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stringent requirement that this will have to lead to a theory which is acceptable to all citizens with different comprehensive conceptions of the good life (Nussbaum 2000, 102). While this would require a discussion of the value of political liberalism that I cannot engage in here, suffice it to say that we want to leave open the possibility for philosophers to construct (perfectionist) philosophical theories that do conflict with some citizen's conceptions of the good life. Foreclosing this option seems to me as constraining as requiring of the philosopher only to defend theories that can be mutually accepted by all citizens after a deliberative process of public reasoning.

The model that the investigator approach comes closest to, I think, is David Miller's model when he discusses the relation between political philosophy and social science in the context of research on justice. Miller departs from Rawls's notion of a 'considered judgment':

'But can we decide whether a judgment is considered simply by scrutinizing it in solipsistic fashion (…)? It is surely of the greatest relevance to see whether the judgments we make are shared by those around us, and if they are not, to try to discover what lies behind the disagreement. (…) Looking at what other people believe about justice, and in particular trying to understand when people disagree and what the grounds of their disagreement are, are integral to the process of deciding which of my own beliefs deserve to be taken as "the fixed points of my considered judgment"' (Miller 1999, 55-56)

Thus the philosopher investigates the divergence between his views and those of the public, but his final considered judgment need not be one in which he has established congruence with other citizens. To the contrary, he may criticize citizen's ideas (for example, because he judges that they are incoherent, insufficiently clear, or based on faulty empirical data) and come to a different, but equally reasonable, position. The 'burdens of judgment' (Rawls 2005 [1993], 54) apply. In this respect, while engaging with their ideas, intellectually he stays at a critical distance.

Ironically, to the extent that the philosopher acts like an investigator, his presence in practices of public deliberation may provoke the impression that he is intermingling with these practices. A philosopher who is writing newspaper articles, talking at public meetings, participating in government-organized expert meetings, etc. may do so in order to test the strength of his arguments and learn from other citizen's arguments, and use all this information as input for improving his own work. Or he may be in the business of presenting finished work, as his recommendations to the *polis*. In both cases he guards the line between philosophy and democracy at the meta-level. However, he may also be trying to have his voice heard and influence political decision-making directly, in which case he seems to blur the line. It is not always easy to tell from the surface of the philosopher's presence what role he is playing. This confusion between different roles may be part of the reason why the democratic position has gained appeal. The safest way to avoid such confusion would be to retreat from public view. This paper has hoped to show that such a strategy of retreat, while safe, would impoverish both philosophy and democracy.

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[1] The only article-length treatments I know of are (Robeyns 2005) and chapter six of (Crocker 2008).

[2] Ingrid Robeyns als notes that Sen and Nussbaum operate at different levels of abstraction and that 'Nussbaum's list *may* be justified for normative ideal theorizing' about social justice. See (Robeyns 2005, 208) Nonetheless, Sen's criticism of Nussbaum is unintelligible without the presupposition that he thinks Nussbaum indeed formulates a 'canonical' list 'for all purposes'. See (Sen 2004, 333). This criticism seems to me misguided. It may partly arise from the suspicion that theories of justice themselves are something overarching, instead of only one – admittedly important and far-ranging – domain of application besides others.

[3] A similar concern is stated by (Menon 2002, 159).

[4] In more recent work Sen does discuss the important role of democratic processes, but without relating this explicitly to the question of capability list-making.

[5] The criteria are 'explicit formulation', 'methodological justification', 'different levels of generality' and 'exhaustion and non-reduction.' See (Robeyns 2005, 205-206) A slightly different version is presented in (Robeyns 2003, 70-71).

[6] She even calls the absence of such substantive content 'dangerous'. (Ibid. 48)

[7] I leave out of consideration Nussbaum's *ad hominem* attack on Sen that he has been incoherent, since he himself has taken positions on many important capabilities in his work, which could be reconstructed into a capability list. (Nussbaum 2003, 48) I do think that she is right. By protesting against famines, Sen implicitly endorses a basic capability for adequate nutrition, by advocating democracy he endorses a basic capability for political participation, etc.

[8] This means that the philosopher-citizen model that I explain in section 3 should be applied to this section. When I say that we need a philosophical theory of democracy, that theory itself will be one input which people in actual democracies may consider when deciding upon the form of democracy they want to implement. The discussion in section 2 is a discussion between two positions (the democratic and philosophical one) which both should be located at what I will call (in section 3) 'the level of theory'.

[9] One choice is more fundamental than another one if the latter cannot be made before the former is made. E.g. one cannot specify basic capabilities if it hasn't first been decided which are the basic capabilities.

[10] About the setting of thresholds she images that 'the judicial process is one place where this sort of incremental work will be done.' On conflict, she says that when not all central capabilities can be secured 'it becomes a purely practical questions what to do next, not a question of justice.' (Nussbaum 2006, 175)

[11] The only philosophically relevant issues would then be metaethical ones (e.g. "what is a normative principle, rule, value, etc.?") and/or linguistic ones (e.g. "what is the meaning of the term capability?").

[12] Walzer discusses this paradox at the heart of democratic theory. According to him the paradox is resolved by realizing that the rightness of a theory is not the right reason for implementing it, but only for 'hoping that it will be implemented and so for defending it in the assembly.' See (Walzer 1981, 386) In this article Walzer defends the philosopher-citizen view with admirable clarity: 'The philosopher has withdrawn from the community. It is precisely because the knowledge he seeks can only be found outside this particular place that it yields no rights inside. At the same time, it has to be said that since the philosopher's withdrawal is speculative only, he loses none of the rights he has as an ordinary citizen. His opinions are worth as much as any other citizen's; he is entitled like anyone else to work for their implementation.' (Walzer 1981, 396) Similarly, Adam Swift and Stuart White have recently made the case that philosophers give advice in a division of labour with politicians and policy makers. Philosophers are a 'democratic underlabourer' in this constellation. See (Swift and White 2008, 54).

[13] Given the fact that Nussbaum sees her capabilities as analogous to Rawlsian primary goods, it is quite surprising that Rawls has never received the same amount of criticism on his list of primary goods. I do not have an explanation for why the attempt to list primary goods hasn't been characterized as philosopher's *hubris* while Nussbaum's list has. The discussion in the case of Rawls mostly focused on arguments pro and con specific primary goods, which is just what I am advocating here for capability theory. There are exceptions. Habermas, for example: '[t]he two-stage character of his theory generated a priority of liberal rights which demotes the democratic process to an inferior status.' (Habermas 1995, 128) For Rawls's reply, see (Rawls 2005 [1993]) For a comprehensive treatment of the idea that 'justice as fairness improperly subordinates democracy to a philosophical conception of justice', see (Cohen 2003) I take it that he comes to a similar conclusion as the one reached here about capability theory, when he writes: 'Why should the availability of a good argument for the principles (…) lead us to think that our political autonomy is compromised when we act on them?' (p. 126).

[14] For an excellent example of the right kind of attitude, see Wolff & De-Shalit who constructively work upon Nussbaum's list by discussing the merits of each item and proposing to add some items. (Wolff and De-Shalit 2007).

[15] Whether or not there is an uptake of this academic debate in the political arena is a wholly different matter. And in any case the academic debate is only one source of inputs from which the political debate is fuelled and inspired. Here I only defend that to the extent that there is a connection between both debates at all, it will be to the detriment of the quality of the political debate if the academic debate is not allowed to be strong and fierce.