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Freedom and Social Justice

The capability approach of Justice, between the ethics of "Good" and "Just"

Jérôme Ballet, Jean-Luc Dubois, François-Régis Mahieu
C3ED/Université de Versailles

How to conciliate Freedom and Social Justice? According to a popular paradox, a free society is unjust and a society of Justice is oppressive. John Rawls (1971) develops a brilliant solution by using the subterfuge of the lexicographic order and overwhelming rights,. Since, many authors (C. Audard, 1993; J. Derrida, 1967) oppose liberal Anglo-American individualism to European personal responsibility. This is a new version of the difference between ethics of Just and ethics of Good, with two alternative sequences. The first (J. Rawls, 1971) begins with a free consensus between individuals, and ends with justice calculus, as accounting responsibility (J. Roemer, 1998). The other is symmetric (P. Ricoeur, 2004); it begins with responsibility and this self-constraint leads to personal freedom.

In this conflict about freedom and justice, what is the place of the capability approach?

Three points are developed.

1. In the rawlsian liberal case, freedom is the first principle, with an infinite utility to Freedom implied by the lexicographic order between social norms. Social Justice is the product of freedom and becomes the Leximin. Social Justice rejects responsibility and is an accountability of freedom use, crossing handicaps and merits. This calculus leads to an « orwellian paradox » where the « type » as the free citizen object of manipulations, implies a central file… to avoid freedom abuses.

2. In the Just case, personal freedom is negative, linked to responsibility. The Just is a person capable of responsibility, intergenerational (E.Levinas) or intragenerational (H. Jonas). Justice then is deduced from an infinite responsibility. Therefore, this extreme responsibility is not adapted to means, according to rationality and reasonability, and may be negative. Amartya Sen focuses his critics on the fetishism of “lists” of primary goods and then on Justice ranking, but lets on the side the self-criticism of Rawls about an anthropology. How to construct a person? But may we conceive Justice as the just acts without deontology? Is the rejection of deontology, permanent in Sen’s approach, compatible with development economics? The capability approach is mainly interpreted as a normative tool by the Sen's fans!

3. Sen’capability is a liberal conception, inherited from Stuart Mill and Rawls. He denies responsibility constraints and more generally deontology. Freedom of choice is a matter of rationality (via the minimal liberalism) and may appear as a justice way. But the poorest (the « free workers » in Marx’s story) may have this capability without any social justice and the capability is a multivalent concept and may be malevolent. The fragility of the person implies the possibility of " negative capabilities ". This new tool of development policy founds neither rationality, nor benevolence. A precaution principle is necessary.

1. The rawlsian subterfuge and its influence on Sen

"A Theory of Justice" (Rawls, 1971) offers exceptional philosophical grounds to economic theory. In peculiar they reinforce Keynes weak final notes to the "General Theory…" on social philosophy. Moreover, "A Theory of Justice" brings an equity principle, the Leximin which solves the paradox of the poorest of the poor. So, Rawls influenced development economics and the works of Sen., and feminist theories (M. Nussbaum, 2000 for instance). Many critics came from english speaking thinkers on the constraints inherent to the leximin (The libertarians and Nozick) and the pretension to a universal justice (The communitarians, Ch. Taylor, W. Kymlicka). Many critics came from the continental phenomenologists on the abuse of civil rights and the omission of the personal imputation and responsibility. Rawls II, in a second period of his creation, revised his theory; for instance by a come back to kantian constructivism and by relativising justice to a contextual relativity. Curiously, Sen concentrated his critics on the rawlsian list of primary goods, overwhelming freedom and forgetting the new perspectives offered by Rawls II[1]. In other words, in the field of social philosophy, Sen is a "right wing" follower and critic of Rawls.

1.1. The subterfuge of the lexicographic order

Utilitarianism is a variant of the ethics of the Good, insisting on Pains and Pleasures. The rawlsian theory of justice is an other variant, « perfectionist », focused on individual rights (education, sanitation) where freedom is first, responsibility being out. Rawls tries to solve the trivial paradox between justice and freedom in the framework of Ethics of Good.

The old incompatibility between freedom and justice finds an elegant solution with the lexicographic subterfuge and its application to Justice, the leximin principle. Freedom is the first principle of a society and must be achieved before achieving equity and so on. Freedom has an infinite utility before any other consideration. In the same manner, the poorest of the poor is “freely” helped by the richest and after the other poor are helped without moving the improvement of the poorest. The lexicographic order is applied with an ordered distribution from the minimal income, freedom being guaranteed by the game’s equilibrium between the maximin /minimax strategies of the poor and the rich.

Free citizens who agree on Good design the rawlsian society. Because they are citizens, they are "responsible" of their social position toward society. Justice is then calculated a *posteriori* on handicaps and merits (J.Roemer). Justice is not a matter of Just, but of calculus on opportunist individuals, in so far that a central authority must keep the individual data to avoid any manipulation.

In a society of Good, freedom is an illusion. Experts with their priorities plan Good and Justice is centralised by an orwellian Ministry of Equality of Opportunity; heteronomous individuals are submitted to hedonism and are not responsible persons.

Sen's priority to freedom is very near with a perfectionism based on « capabilities ». Individuals choose freely their own way of life but are reasonable and rational to adopt a social consensus. They are not supposed to accept a personal responsibility about others. Freedom is the first principle in the lexicographic order of Rawls and this priority must be wholly fulfilled before any equity principle: any advance in this second stage must not have a

[1] Rawls II as the self criticism of "A theory of Justice".

recurrent negative effect on liberty. Freedom to use his capabilities to achieve personal goals is the “trivial pursuit” of Sen out of deontology. In a more planned way, Nussbaum(2000) lists the ten capabilities that everybody would choose for a perfect life.

1.2. The rawlsian conception of the Person

The first presentation of a person is functional, a construction on hypothesis without conformity with reality. How citizens could become persons in the case of extended sympathy and co-ordinality (Arrow, 1963; Suppes, 1966; Kolm, 1972)? The problem with the term "person" is "that expression is to be construed variously depending on circumstances" (Rawls, 1971b).

Overall satisfaction of an individual is a vector v, with two components. The first, y, contains all the individual characteristics who might affect interpersonal comparisons such as natural endowments. The vector x is a list of things, which describes an individual's circumstances as tangible assets and social context. The entries in the vector y characterise the person.

$$w = u (x, y)$$

Rawls assumes a function of well being which matches all citizens' judgements in making interpersonal comparisons.

$$G = f (x_i , p^*)$$

In this function, g is the index of primary goods, f is the function that determines the value of g for i, xi is the vector of primary goods enjoyed by i; the vector p* is a constant vector p of individual characteristics who influence interindividual comparisons.

Rawls more and more criticises the kantian economists such that Arrow and Sen who pick up the "kantian imperative" (Arrow) or "imperfect obligations" (Sen), without any difference between "individuals" and "free and equal persons".Sen does not follow the kantian reconstruction of the person by Rawls II. In a later paper (Rawls, 1980), Rawls insists on reasonability as a hypothesis on the person prior to rationality. Reasonability is the ability to sociability and co-operation :

"The Reasonable presupposes and subordinates the Rational. It defines the fair term of the co-operation acceptable to all within some group of separately identifiable persons.."

Rawls constructs the person with two capacities, a capacity for an effective sense of Justice, and a capacity to pursue a conception of Good. But ontological foundations of the persons are not taken in account: capacity to self-constraint and responsibility.

So, Sen takes in account rationality and freedom and stays on a functional relation without subject. He focuses on the rawlsian primary goods as a peculiar case of his theory of capabilities without the person. Sen is a neo-rawlsian, more “right wing"; he fits with the leximin and the list of primary goods to make the difference with his own theory of capabilities. He denounces the fetishism of the list of primary goods, but himself, he stays in the rawlsian wave in overwhelming the “capabilities” and looks like a "right wing” thinker by reducing this “tool” to freedom. More, Sen does not follow the self-critics of Rawls about his

theory of justice, nor the “kantian reconstruction of the person”, nor the “relativity of the justice”.

2. Justice and the Just

On the observation of the world, more and more people are under the authority of an ethic of the Just and obey to a revealed religion or a global moral (Buddhism) with a huge growth of new religions. Many observations enlighten the growing importance of traditional religions and morals: three quarters of humanity live in a context of revealed religions with a list of obligations as the Decalogue or in "feticho-animism" with community initiatic rules and hard sanctions. Community revival and religious sectarism spread in the US and lead to the political idea of american exceptionalism and the duties of an elected people. How can freedom be postulated as an absolute principle in a society based on revelation and strict morals?

Justice concerns the “just” acts; “just” refers to the Law, applied under obligations and rights linked to the responsibility of each person. Freedom is not absolute, but deduced from my way of managing my constraints. Freedom lies in my responsibility agency. This kantian approach of a personal self-constraint is rejected by Sen as “deontology”.

2.1. The Just as a self-capability to constraint my freedom

Ethics of the Just refer to a priority of the Law on Good. Moral or Religion is first and economic rationality is a mean to the Just as an end. Economics are the servant to men salvation. Person is an end, never men are means. They respect categorical imperatives, especially golden rule: every person is respectable because able to create his own Law as a universal Law. The Just is a person self declaring priority of Law obedience and of the Other responsibility.

Ethic of the Just implies the strict priority of obeying to Law to self-determination of happiness. The Law as the Decalogue determines relations between persons, God but not nature. Freedom begins with the capability of self-constraint:

« Now, as man is a free (moral) being, the notion of duty can contain only self-constraint (by the idea of the law itself), when we look to the internal determination of the will (the spring), for thus only is it possible to combine that constraint (even if it were external) with the freedom of the elective will. The notion of duty then must be an ethical one » (Kant, 1780).

Freedom results from my capability to assume my obligations to others according to the Law. Moral as the way of “respecting himself” implies social constraints. The Just is the virtue for a person to be responsible and then respectable by conforming to the Law; the Law being declared by any autonomous person as if it was universal. The categorical imperative (Kant) is addressed to every person:

"Act only on that maxim through which you can at the same time will that it should become universal law"

Freedom lies in the capability of self-constraint. In the revealed religions, this means for instance, to reject the other beliefs (false gods) for the presumed « true » god. Freedom in

the positive sense, Kant says, is “the power of pure reason to be of itself practical”. "Thus we are practically free and are held morally properly responsible for our actions whenever we have the power to follow the moral law, whether we do so or not" (Rawls, Lectures, 2000).

So is asked the pertinence of the radical philosophic project that supports utilitarianism. It might be interesting to deduce the consequences of ethics of the Just. The Subject, main focus and his capability to be responsible, becomes a person, very different from individual. The relation between persons implies respect and priorities as foreseen in some contemporary economic theories. In many ways, the economic calculus must be different as assumed from micro and macroeconomic points of view. Secret gardens (Simmel, 1998) are source of impossibility and inefficiency.

Does it ever fit with the persons of a society of the Just? Out of pertinence with the positive ethics, how to adapt current economic calculus?

Freedom lies in the diversity of interpretations of the Law and applications of norms. Economics depend on a network of obligations which, fulfilled, allow rights. So economics begin with inter- relations between persons as able of transcendence against their egoism. The economic consequences are important, the relation between the persons and the alternatives, being responsibility and not utility. Responsibility may be infinite along time and space towards actions of other persons, institutions, principles etc., with a problem of means to get this potential responsibility effective. Responsibility contains in most of the case strict priority, non-substitution, between persons; it is an order of rights and obligations. Capability is the ability to recognition, especially responsibility towards others. In a society of Just, old generations protect young generations legacy against the State policies, "one to one". This responsibility is an expression of duty and "enjoyment" comes from being responsible in fact, from self-recognition.

But responsibility is not a virtue *per se*, it can incite to malevolence for others for political reasons, for instance a war under ethics of conviction (M.Weber,1995). A person responsible is vulnerable and fallible, in a political context. All the socio-economic development concepts are most of the time ambivalent.

Responsibility is an ordered relation R between persons and alternatives. Consider first than it concerns personal features X such as goods (x1, x2, xn) to survive, my survival is a matter of responsibility linked to the responsibility I have to "others ", in fact natural and social environment, Y.

Responsibility for social environment depends from my altruism (α) and from altruism (β) of others concerning my person and my rights and obligations. Responsibility may be determined by malevolence and then be perverse. Y is volatile and then the responsibility for X may conduce to doing evil to others in function of their identity.

2.2. Sen focuses too much on external freedom

Amartya Sen condemns "deontology" without any positive analysis of "internal" freedom (H. Arendt) as self-constraint. Capabilities in the Sen's recent presentations, are assimilated to external freedom, and contrast more and more with positive ethics. Freedom is assimilated to capabilities to develop in Sen's recent works, without any consideration to the fallibility of the person.

Eudemonism rejects constraints and responsibility. Soul experiment of pains and pleasures allows freedom of choosing an equitable society, freedom to use capabilities in the end to obtain functionings, or in a different manner. Citizens have rights, empowerment, entitlements, basic goods, but never obligations.

Tenants of Good invoke Kant, but they retain a heteronomous agent who is determined by pleasures and pains. They stay to hypothetical imperatives without any respect to the Subject and his internal freedom; men are means, opportunist individuals, able to mimetism without ability to think to their end and to transcend. As for anthropology, rawlsian thinkers ban any reference to ontology. "The moral law is a law of freedom" (Rawls, 2000).

The pertinence of this egocentric object fits only with young children, under the age of Reason (Kohlberg); it does not fit with an autonomous person responsible. So this ethic is a degenerative program and has lost its aggressive belt to become a liberal dogma.

A.Sen condemns morality as a deontology made of social rules, but it stays an ethical project (in fact a plan of development) toward Good with ordered lists of basic goods or capabilities. In fact the planning of access to Good implies social moral. Social choice is the way of choosing the social contract and could be interpreted as an objective choice under a veil of ignorance; but social choice adopts moral rules to prove their incompatibility with rationality.

The teleology of Good is the core of development economics. Development economics is the key example of teleology of Good as well for expert objectives as for agent's behaviour. Never it could be said that fragility and fallibility at these two levels could lead to teleology of evil and malevolence. Ethics of Good appear as a dynamic program to happiness under the constraints of liberalism or utilitarianism. It refuses any responsibility or social constraint on individual freedom. If justice is invoked, justice is subordinated to freedom.

3. Amartya Sen : Justice evaluation and « negative capabilities »

Justice is concerned with the Other and the just actions. Justice implies a hypothesis about the Other and a question about agency achievement of just actions. Ricoeur (2005) insists on the conflict between the "self justification of the pure idea of just" and the weakness of a corrective justice. Sen’s considerations on justice are narrowed by his preconceptions about altruism, deontology and rejection of anthropology. He is convinced of the efficiency even the goodness of the capability approach for a better evaluation of Justice. But in the context of the duties toward others, human fragility may develop negative capabilities, more freedom for a malevolent agency achievement.

3.1. The capability approach, a weak version of the capacity

Freedom does not exist without a subject "capable", "capable of imputation, capacity impossible for the things" (Kant, Doctrine du droit). The first question is anthropological: Who? Who speaks? Who is capable? Who is capable of responsibility? In this last case, responsibility is intersubjective and implies the other. I must respect rules, for instances achieve my promises.

Capacity is near from "agency", the ability to be and to do. This capacity gets an ethical dimension when its concerns the self-estim and a moral dimension with the obligation fulfilment. The capacity achievement is a personal process, for instance of choosing an equilibrium between rights and obligations.

How to manage responsibility is a problem of cognition: what are my duties, what is the structure and behaviours of the relatives of my community. What is my personal status[2]? What are the norms in which I am plunged? In this phenomenology, fragility lies also in coping with an inconsistent corpus of norms at a moment of time. It is also a dynamic problem: how to manage its community if it grows such that it gets inefficient and even malevolent ?

Person is identifiable with responsibility agency towards herself and others, and responsibility achievement with her capabilities. This rationality may be strategic to manipulate the elements of responsibility, to report or to differ the obligations, to enlarge its rights. A rationale behaviour may consist in throwing away all the relatives and obligations. But this is limited by the social necessity to be Reasonable, to co-operate with the community. Responsibility is the great missing concept of the rawlsian construction of the person. Responsibility is the capability of a person to imputability: ascribing to himself the origin of a finite action (Ricoeur). This action is often interpreted from the oikonomos as the protection or guaranty, under the form of rights and obligations, of the capabilities of others persons who therefore may reach functionings. This responsibility is very common: parents to children, teachers to scholars, firm managers to their employee's etc. Consider the familial responsibility, it reveals a preference on others. This kind of preferences is strictly ordered in a society with a priority of the Just over the Good, for instance of the Decalogue over my desire.

Freedom in this case of constrained or « deformed » preferences is very relative and subject to sanctions. Positive freedom (the ability to go to school) of my Kid is linked to my arbitrage between my "duty" and my utilitarianism (the subjective wolframs).

This responsibility asks the traditional questions: who is concerned with my Rights and Obligations, what are their forms (ordering, nature, etc.), when to accomplish them?

- The number of persons under my responsibility may be infinite; I have a potential responsibility, which can concern intra and intergenerations. But I must adapt these preferences to my possibilities in a utilitarian perspective.

- I can revise the forms: ordering otherwise the relatives, substituting the contents (goods, money, time, affection, etc.) between them.

- I can report my responsibility on other persons who are obliged to me or on other generations. In this case, I have a responsibility on other responsibilities, a preference of n degrees.

[2] This recognition or rejection is a fundamental source of trauma in standards of life. The capability of self recognition toward others is omitted by Rawls and Sen. Either traditional (for instance feticho animist) or modern societies (with psychanalysis) consider this main problem requires important economic means. But this dimension is furiously rejected by economist thinkers as “barbarian” (Hayek being a leader of intolerance in that autoritarian restriction of thinking).

This relation between rights and obligations can be formalised by introducing a specific entitlement map: the Rights and Obligations Maps (ROM)[3]. Each person has his own ROM, which defines the set of obligations and potential rights he is subjected to, according to age and sex, the role within the family, the social status at a given time.

This capacity to manage rights and obligations is not present in the capability approach, Sen conceives an instant achievement and assimilates capacity to freedom, following the philosophical radicalism.

Very important in the Sen's theory is the functioning of a person who transforms positive freedom in capabilities; in the same manner the entitlement map transformed the endowments in alternative resources. But in that way, Sen's theory is shorted by his refusal of deontology; his theory of capabilities being normative!

Focusing on this transformation, Sen gives a weak version of the old philosophical capacity, without responsibility and specification of the person. Then the capability as a weak capacity may be applied to the animals, as enounced by Martha Nussbaum (1993): " Humans are the animals, which have to have the following capabilities to flourish … ".

Amartya Sen, following Rawls, begins his capability approach with freedom until social responsibility. The continental sequence of phenomenologist symmetrically, begins with responsibility and fallibility, until freedom.

3.2. Is the capability approach a new theory of Justice?

In fact, Amartya Sen develops critics to Rawl's theory of « primary goods » and to the aristotelician lists of these goods as the ten fundamental capabilities of Nussbaum. Sen thinks that his theory is more general and that the economist « ranking method » is more efficient for Justice that the transcendental considerations of philosophers. As for the capability, the Sen's theory of Justice is functional and very few philosophic. Sen reduces Justice to the evaluation of freedom to use means; he criticises the fetishism of means by Rawls.

Sen's ethics concern individual "agency", in fact the freedom or capability to obtain functionings.

But their capability approach is divorced from its anthropological context. The person with an ontological[4] responsibility is out of consideration. However, the question is who supports and achieves the capabilities, in which social context ? Malevolent persons in a bad social context may achieve capability.

According to this anthropology, Justice based on freedom is not a good virtue per se; it depends of the concerned persons and their fragility, especially in the relations with the others (cf. the framework of the imperfect obligations in Kant).

Agency in an altruistic context is fallible, according to the vulnerability of the human nature. A development project grounded on freedom may be directly or not malevolent to a part of the stakeholders. May be a project of a natural park (cf. The Iks of John Turnbull, 1972), assimilating local populations to predators or a project of "tradable" fish like Nile Perch. These projects enhanced by experts of development agencies reveal a huge nocivity

[3] Cf. Mahieu, 1989.
[4] In the sense of Jonas, responsibility as specific to humanity.

against local populations, using a capability approach. They pretend "free" the local stakeholders by tradable or labour intensive activities. But they are responsible of conflicts and genocides.

So negative capabilities have to be considered according to an anthropology of the person. This dimension is rejected by Sen, but this component makes the Justice evaluation more complex and implies a precaution principle. If enhancement of capabilities implies more freedom to act unjustly against others, therefore Justice has declined. Capabilities, positive freedom as well as other social variables (agency, altruism, sociability, etc.) are not benevolent per se. They can reveal to be benevolent, malevolent or neutral. Sen, in this field, criticises John Harsanyi but keeps the hedonist reject of malevolent economics.

The evaluation of a dematerialised justice grounded on the capabilities assimilated to freedom is not easy? How to do personal intercomparisons about Justice and aggregate personal freedoms in a social freedom? This question has no consistent answer since the impossibility theorems of social choice sect. Sen sees in this theory freedom as the free preference on n-tuples of alternatives (Sen, 2005), but minimal liberty as a preference has very few rational sense. More, a social choice theory with the UPID+Leximin conditions will be more inconsistent, the inconsistency of the four rules system being demonstrated by definition (Mahieu, 1987) or by the process of preferences (Arrow, 1963). Freedom as a pre-condition of social choice such that minimal liberalism is logically inconsistent and does not guarantee any justice. If Justice is dematerialised, how to obtain freedom envy freeness? The same paradox holds, anyone may envy the freedom of others.

Back to Justice, freedom is far from grounding Justice. The « free worker » of Marx or the ancient predators of the natural parks, may choose their job, consume more, but is Justice achieved ? Freedom may assume many different justices or injustices which will refer to a social rationality. Freedom may, by definition, take all the social values, for better or for worse.

Concluding remark: sharing fallibility, a first step in economic justice

The poor are always responsible of the faults in the process of under development and more in the conflicts and genocides. This feeling of guilt is a general way of thinking poverty; never the expertise could share the drama such as social crimes. This "irresponsibility" of the expert and the infinite responsibility of the poor is paradoxically associated to the irrationality of the poor and the perfect rationality of the development "planners"!

The social sustainability development project tries to give to the poor a capability to impute responsibility of development misfortunes to experts and institutions. Expectations may be done of the impacts of social policies, for instance of enhancing capabilities in a vulnerable society. Drawing a social precaution principle implies to simulate the impacts of development policies and to discuss how to share responsibilities. In all the cases the shareholders might prosecute experts and development institutions. This would reconsider the anthropology of the poor with a new balance of power: giving poor a special capability to evaluate the irresponsibility of destabilising policy makers and to obtain compensations.

Capability approach is normative! This new and celebrated development policy tool will begin to be just if his devoted experts are responsible in front of the local justices.

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