

# PERSON, CAPABILITIES AND HUMAN RIGHTS

## *Two contemporary trends\**

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**Abstract:** *Contemporary theories of justice may be categorized in mainly political and natural justice theories. The former are generally conceived as an instance of the Kantian philosophical tradition, whereas the latter are rooted in classical-philosophy theories. Each of them is furthermore grounded on a different conception of the person: “political”, or “ontological”. This paper aims to bring them in rapport, taking in special account Martha Nussbaum’s and Sergio Cotta’s justice theories. The paper argues that the universal respect of individuals’ rights –which is at the core of Nussbaum’s theory– finds better support in Cotta’s onto-phenomenological approach to justice, rather than in Rawls’ political liberalism.*

**Contents:** 1. From a “partially comprehensive” to a “political” conception of the person, 2. Some theoretical and practical limitations of Nussbaum’s “political” conception of the person, 3. An “ontological” definition of the person, 4. Human capabilities within Cotta’s “onto-phenomenological” approach.

\* An extended version of this paper was originally presented at the HDCA Conference, “Ideas Changing History”, New York, September 17-20, 2007. The HDCA Association, headed by Martha Nussbaum, and founded by the Nobel Prize for Economy, Amartya Sen, aims at furthering the study of human development and capabilities, by bringing together scholars from different disciplines and countries. Whilst this explains the present paper focus on Nussbaum’s political conception of the person, the choice to endeavour in a comparison with Sergio Cotta’s onto-phenomenological approach derives from my personal commitment to his school of thought.

1. FROM A “PARTIALLY COMPREHENSIVE” TO A “POLITICAL”  
CONCEPTION OF THE PERSON

Since her endorsement of a Rawlsian type of political liberalism, Nussbaum proposes to ground norms on a “political”, rather than a “partially comprehensive” conception of the person (Nussbaum 2000). The same concept could be conveyed, in terms more familiar to the legal scientist, with the word “juridical person”. In fact, like the most widespread use of this word –which refers to an abstract, artificial subject given relevance to, or brought into existence by law– the “political” conception of the person refers to the citizen, or the rights’ bearer, whose identity is socially construed. More specifically, it is by means of a Rawlsian type of overlapping political consensus that the identity of the citizen, or its relevant fundamental capabilities, are determined (Nussbaum 2006, p. 70)<sup>1</sup>.

On the other hand, “comprehensive” conceptions of the person, for realists at least, refer to the pre-political or ‘real’ identity of living individuals instead<sup>2</sup>. That is to the identity of the individual as he, or she, really is: an identity which needs of course to be known and acknowledged by reason, but not created *ex-novo*, so to speak, by public consensus. Since Nussbaum has always defended the idea that it may not be possible to know the person as he, or she, really is –our public scrutiny being limited to the sorting out of ‘appearances’ (Nussbaum 1986)– by comprehensive conception of the person she means to refer to what we think a person really is. This explains why “comprehensive” conceptions of the person –being in her view comparable to Kant’s ‘internal’, mental phenomena– differ and change with people’s points of view. Whereas she initially partakes for the possibility of arriving to a shared “par-

1. See Appendix for the complete list.

2. What in legal terms would be defined the “natural person”.

tially comprehensive" conception of the person –which constitutes a sort of medium-point amongst different 'internal', comprehensive conceptions of the person– she recently drops this conception with her endorsement of a Rawlsian type of political liberalism.

In fact, she has recently matured the conviction that the "comprehensive" conceptions of the person are not only mental 'artefacts' but they are also inherently incommensurable, so that they can not constitute –unlike the "political" person which is the object of consensus– a legitimate, or shared basis for rights claims (Deneulin 2002). Some classical, comprehensive definitions of the person are, for instance, a "being created in God's image", the "self-agent subject", an "individual substance of rational nature", etc. Unarguably different, these essentialist definitions may nonetheless be regarded by philosophers belonging to the metaphysical tradition as commensurable, if only for the fact that they all converge in identifying the "natural" person, or living, real individual, with the member of the human species (Cotta 1989, p. 76).

## 2. SOME THEORETICAL AND PRACTICAL LIMITATIONS OF NUSSBAUM'S "POLITICAL" CONCEPTION OF THE PERSON

Not everyone would share Nussbaum's hope that the "political" conception of the person could gather wide and critical support. Rawls himself admits that the capabilities he deems important for one to be considered part of civil society (particularly the capacity to reason and to follow one's conception of the good) are widely accepted as reasonable only in liberal democracies where the values of individual freedom and rationality are already embedded in the culture and the Constitution (Rawls 1996). According to Rawls, they would not stand the test of open and critical scrutiny in countries such as, to cite a few, China, India, and the rest of Asia. (Nussbaum 2006; Sen 2004).

To these hypothetical objections of his, Nussbaum replies that 1) capabilities and freedoms flow from the universal, intuitive, values of human dignity and sociability, two “freestanding ethical claims out of which one might build a political conception of the person” (Nussbaum 2006, p. 36) and that 2) even in countries, such as China, “where there is not yet a liberal constitutional democracy (...) there are also long-standing seeds of such ideas”, like human rights and human dignity (Nussbaum 2006, p. 304). These clarifications, though, are not sufficient to explain and demonstrate the possibility of a long-standing practical consensus based only on the twin ideas of sociability and human dignity. The example of China is paramount: although present in seed, the notion of human dignity has not yet given rise to a consensus on the values of universal central human capabilities as conceived by Nussbaum. Dignity and rights (or capabilities) are only attributed to some members of civil society and not others. Women and baby girls are considered ‘inferior’ or ‘less dignified’ than baby boys if we consider the common practice of killing baby girls at birth for want of a male, family heir. Furthermore, even the former rights’ are often limited and conditional to the individual abidance to the principles of the socialist regime (Corradini 1984).

The problem with the idea of human dignity –from which Nussbaum suggests to derive her political conception of the person– is its indefiniteness. As Putnam points out, it is an idea of Judaeo-Christian origin (Putnam 1991) that Nussbaum takes from Grozio, without sharing his justification or metaphysical grounding (Nussbaum 2006, p. 36). In some passages it is vaguely defined as what makes a human being an end (Nussbaum 2006, p. 36), or as that in which good human functioning consist of (Nussbaum 2001, p. 120). But what good human functioning is, or what makes a human being an end, is intentionally (at least since Nussbaum’s endorsement of political liberalism) left undefined. To advance a definition of what good human functioning consists in amounts to imposing a comprehensive, and thus parochial, conception of the

good (Nussbaum 2006, p. 182). So the passage from the two free-standing ethical claims of human dignity and sociability to the list of human capabilities is left unexplained. We are left wondering why people and nations otherwise divided by their religious, or comprehensive doctrines, would accept unanimously (after serious rational scrutiny) the political conception of the person. Even if it were the case that people from all over the world do in fact accept this conception, its ubiquity would not by itself provide a good argument for its universal normative acceptability.

Furthermore, the “political” conception of the person is not inclusive of all human life forms. It is true that, unlike Rawls’, Nussbaum’s “political” person is characterized by the Aristotelian capacity to establish relationships, and includes potential (rather than only actual) capabilities. Nonetheless, this capacity –like all others contained in the list– are empirical, or contingent (Nussbaum 1988, p.169) being not only actually but also potentially absent in the same individual at different times. Not all individuals manifest or will ever show the capacity to feel compassion for, or joy, at the presence of their caregivers. The result is that some individuals are left out from political membership, and the rights which follow. It would have been different, were the free-standing ethical notion of sociability (from which the capability to relate to others is derived) defined from the beginning to the end<sup>3</sup>, as an ontological, intrinsic or structural characteristic of the human being, rather than –for instance– as the “impelling desire for fellowship” (Nussbaum 2006, p. 36). In such case, the human being would have been depicted as sociable just for the fact of being born from human parents, and depending for his physical and psychological life from the existence of

3. There are passages where Nussbaum seems to adhere to this ontological indent notion of sociability –describing the human being as both needy and dependent– but apparently she does not seem to apply it consistently, excluding some individuals (i.e. the anencephalic child, and the person in a persistent vegetative state) from human-species membership.

others (Cotta 1992, pp. 31-32). In some passages, Nussbaum seems to consider human sociability just in this light, by defining human beings as “temporal animal beings who begin as babies and end, often, in other forms of dependency” (Nussbaum 2006, p. 160). Nonetheless, she does not seemingly apply this meaning consistently, as we will see in the examples which follow.

If Jamie (born with down syndrome), Arthur (who has a type of high functioning autism) and Sessa (a mentally retarded young woman) are justly considered equal citizens, despite their inability to either develop high levels of reasoning, or social skills (Nussbaum 2006, pp. 96-97), this is not the case of the “anencephalic child” or “the person in a persistent vegetative state” (Nussbaum 2006, p.187), given their inability to feel or show minimal levels of consciousness, gratitude and affection. But –we may object– they also live in a human body, and are dependent, or needy, as all the rest of the people at specific moments of their life (a characteristic of human dignity which, as anticipated, she applies only to some individuals, and not others). Furthermore, they may own intentionality and be self-conscious, even though they are not able to manifest these capacities and suffer from brain damage (Spaemann 2006)<sup>4</sup>. If we trace a line of demarcation between them and the other human beings, or disabled persons, it may be possible that we soon end up discriminating – on the basis of an indeterminate conception of human dignity, and a contingent type of sociability – people with Alzheimer disease, or epilepsy, just to cite a few examples. We would embark in the so called “slippery slope”, on behalf of which once we take a first step towards the exclusion of certain individuals from citizenship, it will be easier to take further steps in the same direction (D’Agostino, 2004).

4. Intentionality and self-consciousness, as we will argue, are not empirical capacities which may be perceived through sight, touch, and the other external senses. They do not necessarily depend for their existence on the brain, even though they manifest themselves in the activities of the brain.

It must be reckoned that Nussbaum has modified previous statements, “which might have been read to suggest that if any one of the capabilities is totally cut off, the life is no longer a human life” (Nussbaum 2006, p. 432). She now specifies that “if enough of them are impossible (...) we may judge that the life is not a human life at all, any more” (Nussbaum 2006, p. 181). Nonetheless, Nussbaum leaves unspecified who and why should decide how many and which capabilities failures are enough to consider someone not a person anymore. She only sets the extreme threshold after which a life is not human anymore, close to the medical definition of death (Nussbaum 2006, p. 181), overlooking the fact there is more than one medical definition of death and, more importantly, the fact that medical definitions of death do rest on specific philosophical, and comprehensive conceptions of the person (Palazzani 2002, 183-200). So to abide to a medical definition of death is identical with espousing, intentionally or unintentionally, a specific notion of who a person really is.

Furthermore, the change in the definition of personhood endorsed by Nussbaum is quantitative, not qualitative. A more radical change would be needed to guarantee the rights of all living individuals. A change, that is, which leads to the identification of personhood with biological membership in the human species (Spaemann 2006, p. 80). An identification which in turn rests on a non-dualistic conception of the mind-body relation, and a non-materialistic conception of the mind (which does not reduce the mind to the brain and its cerebral functions), both features of an “ontological” conception of the person, that we will start to illustrate in the following paragraph. Only this sort of identification would be able to explain what in some places Nussbaum defines (without consistently applying it) the dignity of our animal body, or bodily need (Nussbaum 2006, p. 160). In fact, the ontological definition of the person –albeit seemingly abstract– brings to the forefront the intrinsic value of the human body and may itself be derived from an a-posteriori investigation of human agency (Palazzani 1996, p. 237).

### 3. AN "ONTOLOGICAL" DEFINITION OF THE PERSON

In a very general sense, ontology refers to the "science of being" (Putnam 2004, p. 17), or to the study of "what there really is" as opposed to what seems to be, or appears to us immediately in perception. External, contingent properties –like shape, colour, or size of objects– may be referred to as 'appearances', in the sense that they do not constitute an object/or subject intrinsic identity, but are nonetheless immediately perceived by our senses. On the other hand, "what there really is" corresponds to what remains the same throughout an object/subject's changing properties. Within this very broad definition of ontology, at least two different approaches to the study of being are identifiable: an a-priori investigation which starts from an analysis of Forms, or principles (and which has for some been erroneously ascribed to Plato); and an a-posteriori study of being, which takes its start from an analysis of linguistic practices and human agency (MacIntyre 1990). If the first kind of approach may be considered "inflationary" (Putnam 2004, p. 17), or dogmatic, as it presupposes a "God's Eye point of view" (Putnam 1981, p. 50); the second kind of ontological approach assumes that we can only have access to "what there really is" through the study of phenomena, things perceptible to the senses. For this reason it has been defined as an "ontophenomenological" approach (Cotta, 1991). It is this second approach that we will now take into consideration, as it applies to the concept of the person, or to "who a person really is".

The first philosopher who has engaged in what Cotta<sup>5</sup> defines an "onto-phenomenological" analysis –even though naming "dialectical" its approach– is, according to some interpreters, Aris-

5. Sergio Cotta (1921-2007), one of the most prominent contemporary Italian philosophers of the law, has taught for several years at the University "La Sapienza" (Rome). Furthermore, he has been Director of the "Rivista Internazionale di Filosofia del Diritto" and President of the Italian Union of Catholic Lawyers.



tote. For him, we may “advance to the more intelligible” –that is to things, as they really are in themselves– by focusing on “what is less intelligible by nature” – that is on those very things that appear to us immediately, in perception (Wians 1992; Aristotle, *Metaph VII 3*, 1029b3-12). As it applies to the study of living beings, Aristotle’s epistemological method suggests that we begin with the study of their capacities, or potentialities (Finnis 1995), which in turn point to what they are in themselves, that is to their essence, cause, or actuality. In fact, “animals do not (have the capacity to) see in order that they may have sight, but they have sight that they may see. And similarly men have the art of building that they may (have the capacity to) build, and theoretical science that they may (have the capacity to) theorize; but they do not theorize (have the capacity to theorize) that they may have theoretical science (...)” (Aristotle, *Metaph IX 8*, 1050a10-15). Human beings’ actuality, essence, real being –or ontological nature– explains their actions, movements and behaviour. Potency (capability) can only derive from actuality, and not the other way around.

We could not even say “I was born on such a day of such year”, if our self or personal identity were reduced to its manifestations, or only came into being at a certain moment of our life’s existence (at the outset of our capacities, for instance, or at the moment of their brain full development) (Spaemann 2006). That is why for Aristotle, the essence, or soul, of man<sup>6</sup> may be defined as that which is beyond those human qualities, capabilities, or brain activities, perceptible to the senses<sup>7</sup>, with that which

6. Here and elsewhere in this paper, the word ‘man’ refers to both females and males belonging to the human species.

7. In some of Aristotle’s works, the essence of man is identified with the soul, in others with the unity of soul and body. The apparent contradiction may be solved by showing that the body enters Aristotle’s essentialist definition of man only insofar as it is a condition of the soul’s manifest expression.

remains the same through all changes, and may be referred to, in modern language, with the concept of man's *constitutive* identity, as opposed to his contingent, or *constituted identity* (Romera 2005, p. 109).

In order to explain the passage from the empirical capabilities to the ontological and metaphysical essence of living beings, it may be helpful to refer to the concept of eidetic intuition, or "eidesis", first used by Husserl (the founder of phenomenology). Like Aristotle, Husserl believes that the discernment of living beings' essences requires some sort of 'reduction', or 'purification' of experience. We imaginatively eliminate from our definitions, those properties without which an object, or living being, can still remain the same (Sokolowsky 2000). In the case of the sphere, for instance, we are able to say that bronze is not part of its essence, and "that sphericity can be realized in many different sorts of matter". Likewise, the essence of a lion can be obtained by eliminating its shape, size, or colour. Lions may be essentially defined as animals which need meat, "that they are proud and strong, that when they are hungry they take great risks to attack sheep-folds (...)" (Nussbaum 1978, pp. 71-72).

Aristotle, as we have seen, would define the human being by reference to the soul, or ontological self. Man's ontological self, or constitutive identity, is that in which resides the equal dignity of individuals, otherwise so different in needs and capabilities, and may offer a more satisfactory basis, than the political conception of the person, for the idea of human rights' universal ownership. The ontological definition of the person, however, makes use of concepts such as substance, essence and soul that, being metaphysical, Nussbaum may find divisive (Nussbaum 2006, p. 182). Hopefully, we have already started to show that even though comprehensive, and indeed metaphysical, the ontological definition of the person is not ideological, or parochial. Besides being a common heritage of different cultures, the concept of the soul is deduced from an "eidetic analysis" of human practices and

existence (including man's capabilities): not from an apriori, self-evident truth, of the sort Nussbaum –and Putnam– rightly fear we can have no rational knowledge of<sup>8</sup>.

#### 4. HUMAN CAPABILITIES WITHIN COTTA'S "ONTO-PHENOMENOLOGICAL" APPROACH

In different works, Sergio Cotta endeavours to derive an ontological definition of the person from what we have previously defined, following Husserl, an "eidetic analysis" of legal customs. In fact, Cotta notes, there is no country where some form of legal regulation is absent. In particular, there are some legal customs which, despite the specific content they take in different cultures, are, in their core structure, common to humankind (and thus correspond to what Roman stoics used to call *ius gentium*). In all cultures, for instance, there are forms of legal-property (public, private, social, or personal); legal-associations (private, public, financial, political or cultural); inheritance of material or spiritual goods (like one's surname); and judicial settlement practices (Cotta 1992, p. 23)<sup>9</sup>. Furthermore, all these manifest, or point to the existence of common needs, such as the need for stability, or duration in time (of one's family name, goods, activities); the need

8. It is important not to identify the concept of rationality with the concept of exact knowledge of the mathematical, deductive type. We can have a rational apprehension of something (the soul), even though we may not be able to grasp it either empirically, or deductively.

9. To these, Francesco D'Agostino (1996, pp. 249-269) –renown disciple of Cotta– adds the universal prohibitions on homicide, incest and cannibalism, whose universality has been brought to the front by the work of cultural anthropologists like Lévy Strauss, Arens and Gouldner. Their existence points to the relational character of human beings, who need to coexist peacefully in order to prosper and develop their own being.

for security (in an impartial judgement); the need for assistance from others (in the pursuit of common objectives) and so on (Cotta 1992, p. 24).

At a second glance, applying “eidetic analysis” further, these legal practices reveal other, essential, or properly ontological dimensions of man. The need for assistance, for instance, points to one’s *finitude*. For if man’s capabilities or potentialities –in understanding, in action, in judgement and being (Cotta, 1992, p. 26)– were not finite, one would not need the assistance of others. In the second place, we have *mortality*: if one did not live in a mortal, fragile body and were not *self-conscious* of his, or her mortality, one would not feel the need, or desire for stability and duration. One would rather rest content and live in an ethereal condition like the Gods, or else live unconsciously like the animals. Furthermore, one would not turn to the law in order to overcome, or transcend, his/her weaknesses and thus counterbalance the risks one’s finitude exposes him/her to (Cotta 1992, p 27). Likewise, the need for help and assistance points to others’ inescapable presence and to man’s relational character (*sociability*).

To Nussbaum’s readers, the resemblance between her “political” conception of the person and Cotta’s “ontological” definition of the person may appear striking. While finitude, mortality, self-consciousness and sociability are shared by Nussbaum’s “political person”, they take a different meaning in Cotta. First of all, they are rooted in men’s objective, and ‘external needs’ or desires rather than on a free-standing, wide, reflective equilibrium. In the second place, Cotta recognizes that man’s self-consciousness –which is really distinctive of man and not of other nonhuman animals– has a metaphysical, rather than an empirical nature. In the sense that it is not measurable or perceivable through the senses (like the capacity to care for, or to manipulate the environment, for instance), but only through self-reflection (D’Agostino, 2006, p. 103). For this reason, it may not be reduced to the empirical

dimensions of the brain either<sup>10</sup>. Rather it may well be identified with man's soul.

From such conclusions –in particular, from the metaphysical definition of selfconsciousness, and the definition of man as the unity of body (finitude) and soul– Cotta recognizes that all individuals belonging to the human species, have a dignity. Thus, they are rights' bearers (Cotta, 1989), even though they do not exhibit any of their contingent, or empirical, capabilities. He is thus able to include in the ontological conception of the person, those individuals, like the severely disabled, who are left out from juridical consideration by Nussbaum's political conception of justice and the person.

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10. Scientific studies further demonstrate this idea by showing that individuals who have suffered brain damage and whose 'old' neurons are replaced by others are still able to recollect and remember past events: events that are prior to the damage they have suffered. If memory were totally dependent on the brain neurons, these events would be inexplicable.

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## APPENDIX

### *The central human capabilities* (Nussbaum, 2006, pp 76-77)

1. Life. Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.
2. Bodily Health. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.
3. Bodily Integrity. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.
4. Senses, Imagination, and Thought. Being able to use the senses, to imagine, think, and reason – and to do these things in a "truly human" way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training (...).
5. Emotions. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger (...).
6. Practical Reason. Being able to form a conception of the good and to engage in critical reflection about the planning of one's life.
7. Affiliation.

- a) Being able to live with and towards others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another (...).
  - b) Having the social bases of self-respect and non-humiliation (...).
8. Other Species. Being able to live with concern for and in relation to animals, plants, and the world of nature.
9. Play. Being able to laugh, to play, to enjoy recreational activities.
10. Control over One's Environment.
- a) Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association.
  - b) Being able to hold property (...).



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