

# Universal Duty of Justice

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0. May political theorists have emphasized the troubles one gets when moving from the domain of domestic justice to the realm of global justice. Here, these two different perspectives are treated under the label of "Leviathan", the mythical biblical monster representing the sovereign state, and "Cosmopolis", with which we indicate the opposite globalist paradigm. There is an evident institutional problem when we confront ourselves with global justice: if when global justice is at stake we meet questions of justice however we do not find at this level the background institutional support given by the state. In this chapter, I emphasize another important problem -connected with this one- we find when moving toward global justice. It is a moral problem. To fully understand its relevance, one must assume a general liberal political position. For political liberals, after Rawls, any conception of justice cannot be directly based on a vision of the good. The pluralist nature of political liberalism forbids this option. There is a "priority of the right" which makes the political relatively independent from the ethical. Such proviso does not make ethics irrelevant for the liberal. It only requires that moral ideals are mediated through popular consent or anyway legitimated. Popular consent transforms moral ideals in political legitimated goals. Global justice, in a situation in which global institutions are much weaker than traditional domestic institutions, can be considered

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like a *sui generis* moral ideal. Many cosmopolitans firmly believe in this moral ideal and organize their IR theories around it. In this chapter, the incoherent nature of this movement is noted and criticized. This kind of incoherence of course concerns only liberal cosmopolitans. It reveals that if you are both liberal and cosmopolitan you cannot smuggle within a political vision of global justice your own moral ideals.

However, there is an exception to this general proviso. I maintain that a direct moral approach to issues of global justice is plausible from a liberal political standpoint if and only if we confront ourselves with extreme case. These extreme cases are collected here under the idea of "urgency". When urgency is at stake many human lives are at risk. In such situations, I believe, the distinction between the right and the good does not hold. Urgency, on other words, permits to act in accordance with one's moral ideals without the need to get popular consent and its legitimacy. Substantial legitimacy -given by the special circumstances of urgency- creates natural duties of justice. These duties are deemed to be coherent with political liberalism. And urgency permits to bypass the moral problem of liberal cosmopolitans.

### 1. *Liberalism and Global Justice*

H.G. Wells' was an energetic advocate of cosmopolitanism. Among his critics was another leading British intellectual, George Orwell. Orwell maintained –based on an understandable patriotic zeal- that Wells' ideas risked favouring the Nazis. Moreover, he felt that cosmopolitanism was somehow illiberal. It is this second claim that I want to consider here. Even today cosmopolitanism seems at odds with the political philosophy of liberalism, at least in its most influential version, that of John Rawls. In the paper, I will discuss global justice –from a liberal point of view- between the prudent outlook of Leviathan and the audacious perspective of Cosmopolis. The theses of Leviathan and Cosmopolis will be represented here by two contemporary distinguished intellectuals: Thomas Nagel and Amartya Sen.

Advocates of cosmopolitanism, believe in global justice.<sup>1</sup> In contrast, advocates of statism place little trust in global justice. This article is devoted to a critical analysis of

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<sup>1</sup> Within the framework of the cosmopolitan point of view, there can be stronger and weaker forms of cosmopolitanism (see Miller 2000, p. 174).

the arguments of both the former and the latter. I uphold the thesis that there is the possibility of a third course - more realistic than the thesis endorsed by the cosmopolitans and more utopian than the thesis espoused by the statist. The third option recognizes that a comprehensive ideal of global justice is not yet theoretically justifiable, although it does not deserve the skepticism expressed by many statist. This intermediate option is supposed to create a kind of continuity between global justice –which I label “Cosmopolis”- and interstate justice – discussed under the name of “Leviathan”.

In my view, this intermediate option satisfies a requirement of great significance, at least for a political theorist with a liberal background. Supporters of Cosmopolis have a propensity for a radical moralization of global politics. Supporters of Leviathan, on the contrary, tend to cut to a minimum the space of morals in international politics. I believe that, for a liberal, both positions should prove scarcely convincing. This article will present (what I think is) a better liberal conception with a critical focus on two arguments, one on the side of Leviathan and the other on the side of Cosmopolis. The first pro-Leviathan statist argument is presented in Section 2 through a discussion of the version formulated by Thomas Nagel.<sup>2</sup> The second pro-Cosmopolis cosmopolitan argument is presented in section 3 through a discussion of Amartya Sen’s vision of justice<sup>3</sup>. The arguments by these authors can hardly be conceived of as symmetrical. Nagel directly discusses global justice, whereas Sen presents a general theory of justice and only indirectly discusses global justice. However, Nagel’s position aims to give a fair rendering of a Rawlsian thesis on global justice, and Sen’s main dissatisfaction with Rawls lies in his opinion according to which contractualism<sup>4</sup> makes global justice impossible. I comment both Nagel and Sen by arguing that they fail to adequately consider the need to draw a distinction between two kinds of anti-globalist argument, the first being institutional and the second being linked to liberal anti-perfectionism and anti-utilitarianism. Liberal anti-perfectionism and anti-utilitarianism amount to maintaining that –when justice is at stake- the right cannot consist in a mere realization of the good. This is the sense of what we can call –along with Rawls- the “priority of the right”. For Rawls, “the priority of the right means (in its general meaning) that the ideas of the good used must be political

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<sup>2</sup> Nagel (2005).

<sup>3</sup> See Sen 2009

<sup>4</sup> Here I use contractualism for Kant-Rawls tradition, preferring contractarianism for Hobbes-Gauthier tradition

ideas, so that we need not rely on comprehensive conceptions of the good but only on ideas tailored to fit within the political conception. Second, the priority of right means (in its particular meaning) that the principles of justice set limits to permissible ways of life: the claims citizens make to pursue ends transgressing these limits have no weight. (PL 209)

Liberals that respect the priority of right believe that morality has to be different from politics. In my reading, Rawls' main contribution to the debate on global justice consists in making cosmopolitans understand that –by bypassing institutionalism through moralism- they run into trouble with a liberalism based on the priority of the right. In this vein, in Section 4, I will defend my thesis: there are rights based on urgency that are compatible with the liberal priority of the right. Before we go into the main issue, it is important to note that there are two main versions of cosmopolitanism. The first is of moral nature, usually American, and more philosophical, whereas the second is of legal nature, usually European, and more political. It is quite clear that this paper addresses more the first than the second version of cosmopolitanism (even if there is overlapping between them)<sup>5</sup>.

## *2. On the Side of Leviathan: Nagel*

The statist position, here considered under the name of Leviathan, has been presented by Thomas Nagel.<sup>6</sup> According to Nagel, global justice is not possible outside what is traditionally meant by the state.<sup>7</sup> Nagel does not present in his article a renewed version of political realism.<sup>8</sup> On the contrary, he does recognize that a normative level of international relations, and humanitarian-type duties of solidarity among persons and groups that are not citizens of the same state may not be ruled out. However, in his view, these duties do not depend on a distributive justice theory extended from the domestic

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<sup>5</sup> The first version of cosmopolitanism is represented by authors like Beitz and Pogge, while the second by authors like Held and (perhaps) Habermas.

<sup>6</sup> Nagel (2005).

<sup>7</sup> This is the reason why the identification of Nagel by J. Cohen and Sabel (2006) as a “strong statist” is accurate.

<sup>8</sup> see note 4

to the global sphere.<sup>9</sup> At the most, global commitments will have a humanitarian character and will more closely resemble charity than justice.<sup>10</sup>

Nagel's mentor is Hobbes before Rawls. This is why his thesis can be placed on the side of Leviathan. According to Nagel, Hobbes is right to argue that there is no justice without full sovereignty, and because the latter is missing on a global scale, there can be no such thing as global justice. Always according to Nagel, Rawls' ideal of global justice is of a world populated by separate states that are roughly just internally. In both cases, for Hobbes just as for Rawls, the genuinely political nature of distributive justice would prevent its extension beyond the domestic community. As Nagel states:

If Hobbes is right, the idea of global justice without world government is a chimera. If Rawls is right, perhaps there can be something that might be called justice or injustice in the relations between states, but it bears only on a distant relation to the evaluation of societies themselves as just or unjust: for the most part, the ideal of a just world for Rawls would be the ideal of internally just states (Nagel 2005p. 116).

On a Hobbesian understanding, this conclusion depends on the rational and self-interested motivations of individuals. Hobbesian individuals exemplify an assurance problem. Without the coercive power of the state, they could not be forced to fall in line with the principles of a theory of global justice.

In the same vein, Nagel's thesis affirms the impossibility of a theory of global distributive justice starting with Rawls' paradigm.<sup>11</sup> Hence, it is of direct interest to those who follow the developments of this paradigm such as Beitz, Pogge, Richards, and Kok Chor-Tan who attempt to extend the Rawlsian theory of justice to international relations.<sup>12</sup> Nagel's proposed reading of the Rawlsian theory is called the "political

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<sup>9</sup> According to Rawls' Difference Principle, a just society is one whose institutions are organized in such a way that inequalities are allowed only in order to improve the condition of the worst-off. However, there is no such obligation at a global level. As regards this subject, see Freeman (2006a and 2006b).

<sup>10</sup> If, in this article, Nagel is clear about his propensity for statism, the same cannot be said about his view of humanitarian-type duties. See Nagel 2005, p. 118.

<sup>11</sup> In fact, Rawls neatly separates what he calls "three levels of justice", namely "local justice", "domestic justice" and "global justice". With the consequence that principles suitable for domestic justice are not applicable in the other two domains. See Rawls (2001, pp. 11-12).

<sup>12</sup> As regards this issue, see also Freeman (2006b).

conception”.<sup>13</sup> According to the political conception, distributive justice duties may not be applied on a global scale. The nature of this impossibility is political. From Rawls’ point of view, interpreted by Nagel, states are not institutional instruments whose purpose is to attain goals other than those that are properly political, even if we consider the most noble among these goals, such as greater fairness in the distribution of the world resources. Only cooperative relationships within a particular state create among fellow citizens “associative” obligations.<sup>14</sup> These obligations may not be extended to those who do not belong to the association and, therefore, beyond the state there is no justice.

This thesis has an overbearing evidence in the perspective of a social contract view. Obviously, a social contract, just like any other contract, only binds its signatories - in the case at hand its ideal signatories - which are, *rebus sic stantibus*, the members of the domestic community.

Rawls’ political conception - as interpreted by Nagel - offers two different arguments for the impossibility of extending the obligations of justice beyond the state. I consider it important to draw a distinction between these two arguments. I will call the first argument, the institutional argument, while I will call the second argument the priority of the right argument. In Nagel’s view, these two arguments strengthen the aforementioned impossibility theorem.<sup>15</sup>

The institutional argument is essentially based on the non-existence at a global level of a “basic structure” such as there is at the state level. If something similar were to exist already, this would entail also the existence of those associative obligations whose actual deficit makes global distributive justice impossible. In Nagel’s view, today’s world is witnessing the significant and increasing presence of many international institutions, and it is unquestionable that the interdependence between nations is much stronger now than before, for instance in the days of Hobbes. Still, the global civil society *in nuce* is not comparable with the civil society within the state and the associative-type constraints on

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<sup>13</sup> Rawls coined the term “political conception” for the first time in Rawls (1985). This idea is central to his later *Political Liberalism* (Rawls 1996 [1993]).

<sup>14</sup> The expression “associative obligations” is Ronald Dworkin’s (1986, pp. 195-205).

<sup>15</sup> A profound critique of the institutional argument interpreted a la Nagel may be found in Pogge (2002). A critique of the anti-monistic argument may be found in Tan (2000). These two books precede the article by Nagel I am referring to and, therefore, rather than criticizing it, they voice different opinions and, at times, opposing views. Besides, owing to reasons that will soon become clear to the reader, given that I have emphasized here the distinction between the institutional argument and the anti-monistic argument, the reasons against one or the other often overlap in both Pogge and Tan.

which, in Nagel's view, the obligations of justice should depend.<sup>16</sup>

In his opinion, the difference between the domestic basic structure and the global basic structure is not a question of the state having powers that the global community does not have. It is something deeper: only the state succeeds in causing the authors of the laws and those subject to the laws to coincide. Therefore, claims Nagel, only the citizens may succeed in creating among themselves those associative constraints on which the obligations of justice depend.<sup>17</sup> This is the institutional argument.

The priority of the right argument still concerns the relation between the individual and the institutions, but it is more directly connected with anti-monism. As Nagel maintains: "these are different cases or types of relations, and the principles that govern them have to be arrived at separately."<sup>18</sup> That is why principles of global justice cannot be reached simply by extending the principles that govern domestic justice. Here, the term "monism" depends on what is the fundamental subject of justice. Cosmopolitans are monist because they believe that theories of justice apply directly to individuals in the same way they apply to institutions. On the contrary, statist *à la* Nagel cannot accept this form of monism, because principles of justice apply to institutions and not directly to individuals. And they maintain that domestic institutions are different from global ones. This is the reason why anti-monism philosophically rejects the moral consistency defended by cosmopolitans.

This form of priority of right is typical of a Rawlsian pluralist reading of liberalism.<sup>19</sup> The intent of it is to keep personal morality separate from political institutional analysis, supporting a neat division of labor between institutions on one side

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<sup>16</sup> Here Nagel has a similar claim to Michael Blake (2001), according to which the institutional side of the statist position depends on the mere fact of coercion and its justification. This distinction is nicely clarified by Tan (2006).

<sup>17</sup> This is also Ronald Dworkin's thesis in *Law's Empire* (1986). According to Jürgen Habermas, this thesis could be bypassed given the actual context that makes the correspondence between nation and constitution old fashioned. The correspondence between nation and constitution –always for Habermas– depended on the revolutionary nature of liberal constitutions and from the idea that sovereignty must be indivisible. Now, since both of these aspects are not so relevant anymore, we may hope for a global constitutionalization of international law. See Habermas (2008).

<sup>18</sup> See Nagel 123, Murphy (1998, p. 254).

<sup>19</sup> Partially reviewed by Rawls in his essay "Basic Structure as Subject" (1977), now included in *Political Liberalism* (1996). Actually, this form of Rawlsian anti-monism has been noted and criticized by Murphy (1998).

<sup>20</sup> Actually Murphy points to a certain dualism in Rawls, rather than anti-monism. His article criticizes Rawls' dualism in the name of a greater consistency between personal commitment and just institutions. I accept here Nagel's suggestion, according to which the term 'anti-monism' works better than the term 'dualism', since Rawls is supposedly an advocate of a pluralist rather than a dualistic view.

and individual morality on the other side. In other words, the priority of the right is based on a principle according to which there may be no straightforward continuity between personal conceptions of the good and political visions of justice. The priority of the right involves a proviso: public institutions should not be directed towards goals that correspond to the private values of individuals (or groups), even if those values and goals are as noble as greater equality in the world. Monist cosmopolitanism tends to bypass this proviso. By so doing, it does not respect the freestanding nature of political institutions, and introduces directly comprehensive moral views into the political realm.

On this basis, it is easier to understand Rawls' criticism of cosmopolitan conceptions.<sup>21</sup> Cosmopolitan conceptions deal with the relations of equality among individuals, while for Rawls what matters more for the purpose of justice is at an institutional level. Here, it is institutionalism that blocks any cosmopolitan vision. From another point of view, however it is the priority of the right that prevents a conception of global justice from being taken in earnest. In fact, Rawls takes off from the assumption that major institutions are somehow freestanding, that is to say independent from the conceptions of the good. Any attempt to adapt them to a specific view of the world would mean betraying their eminently public nature.<sup>22</sup> But it is this that cosmopolitans try to do, if we follow a Rawlsian perspective, when they pretend to normatively model global justice independently from the situation of the world institutions. Adopting this comprehensive view, the ethical obscures the political. In so doing, cosmopolitan monists by the institutional enforcement of a specific moral view make pluralism impossible. That's why if we –as liberal pluralists- are inspired by the priority of the right, we should reject monist cosmopolitanism.

Nagel's political conception cannot accept the idea of global distributive justice owing to these two arguments, the institutionalist and the priority of the right. These arguments differ to a significant extent one from the other. According to the first one, legislative autonomy and cooperative constraints correspond at the domestic level and such a correspondence is missing in the global community. According to the second one, the fundamental subjects, from the point of view of social justice, are not individuals but

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<sup>21</sup> Rawls (1999). Rawls famously writes: "The ultimate concern of a cosmopolitan view is the well being of individuals and not the justice of societies...What is important to the Law of Peoples is the justice and stability for the right reasons of liberal and decent societies" (1999, pp. 119-120).

<sup>22</sup> As regards this issue, see Freeman (2006b, p. 41).

institutions, and public obligations cannot originate from comprehensive moral visions that fail to consider the fact of pluralism and the independence of institutions from comprehensive visions.

If this analysis is persuasive, it should not be surprising that one can attack the political conception, and its impossibility theorem on global justice, in two different ways. The first type of criticism maintains that the interdependence among nations and the growth of international institutions are sufficient evidence to enable us to view statism as obsolete. International institutions are not the same as the basic structure of the state, but they take concrete form in a sort of global quasi-order that is partially institutionalized and certainly effective.<sup>23</sup>

The second type of criticism dwells on the priority of the right.<sup>24</sup> What counts here is to defend the substance of a theory of justice against a kind of fetishism of the rules that would seem to characterize Rawlsian liberalism when it aims to protect the freestanding nature of institutions independently from what they do.<sup>25</sup> This criticism can take the form of a proposal for more continuity between personal and institutional morality. As Murphy puts it: “What monism rejects, then, is that there could be a plausible fundamental normative principle for the evaluation of legal and other institutions that does not apply in the realm of personal conduct.”<sup>26</sup>

The two arguments that give rise to Nagel’s thesis, namely the institutional and the priority of the right argument, fail to have the same relevance in my eyes. In fact, I suspect that the polemics between cosmopolitans and statistes cannot be decided at the level of the institutional argument. Moreover, I think that it is particularly interesting to see whether it is possible to defend global justice via principles that can bypass the priority of the right argument.

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<sup>23</sup> See Cohen and Sabel (2006).

<sup>24</sup> Cohen and Sabel (2006).

<sup>25</sup> The point is nicely put by Murphy (1998, p. 280), according to whom contrary to dualism and anti-perfectionism, which limit our moral concerns to the institutional framework, “...monism tells people to do what they can to bring about an improvement directly”.

<sup>26</sup> Murphy (1998, p. 254).

### 3: On the side of Cosmopolis: Sen

An attack on the statist position, here considered under the name of Cosmopolis, has been presented by Amartya Sen in his *The Idea of Justice*<sup>27</sup>. In this book, Sen presents a general theory of justice alternative to that of Rawls. Among the points Sen finds unacceptable within Rawls' position, however, the most important concerns the way in which the contractualist approach paves the way for a statist position. Given this, it is impossible to evaluate the significance of Sen's critique of statism without discussing his general criticism of Rawls.

Sen's core argument is reformulated as a criticism of the neglect by Rawls of what Sen himself in sanscrit calls 'naya', in favor of the opposite 'niti'<sup>28</sup>. According to Sen, Rawls's niti-centered approach, being merely institutional, underestimates the necessary combination of just institutions and correspondent actual behaviors that makes a society reasonably just. Sen consequently champions the opposite naya-centered approach according to which 'what happens to people' must be a central concern for a theory of justice. This argument is still dependent on Sen's old idea according to which the 'primary goods' basis of Rawls' approach to distributive justice is flawed and must be substituted by an approach in terms of capabilities.

Even if Sen is eager to recognize that there are positive lessons to be taken from the Rawlsian approach,<sup>29</sup> we are more interested in the critical points. Among these, Sen starts with separating what he calls 'problems that can be addressed effectively' (p. 65) -

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<sup>27</sup> Penguin, London 2009. Sen confronts himself with Rawls, whose main works considered here are *A Theory of Justice*, Harvard University Press 1971 and *Political Liberalism*, Columbia University Press 1996 (second edition).

<sup>28</sup> The niti approach is typically transcendentalist in the Kantian sense and legalistic, whereas the naya approach focuses on local injustices and on the relation between institutions and persons. On this basis, Sen aims to base his own naya view on specific comparisons between alternative outcomes in terms of injustice avoiding the highly idealized and centralistic niti view à la Rawls.

<sup>29</sup> The principal lessons to be taken from Rawls for Sen are connected with the following points:

- (i) the idea that fairness is central to justice;
- (ii) the thesis about the objectivity of practical reason;
- (iii) the distinction between 'reasonable' and 'rational', and more generally the reconstruction of the moral powers of persons as related to their capacity to have a 'sense of justice' and a 'conception of the good';
- (iv) the separate and overriding concern for liberty (compared with other primary goods);
- (v) the insistence on a 'fair equality of opportunities' as an enrichment of the literature on inequality;
- (vi) the special attention for the worst-off people;
- (vii) the way in which primary goods are conceived which gives people the opportunity to do what they would like with their own lives.

within the Rawlsian account- from what are defined as ‘difficulties that need fresh investigation’ (p. 66).<sup>30</sup>.

The hard core of Sen’s criticism is supposed to rely on those difficulties which cannot be solved within the Rawlsian paradigm. Among them, there is the relevance of actual behavior which Rawls is supposed to underestimate. This problem depends on the strong institutionalism Rawls is committed to. Consequently, the contractualist approach tends to be too limiting. This very fact makes it impossible to avoid parochialism considering voices beyond the contractualist group. The previous point implies stressing the relevance of cosmopolitan perspectives going beyond the pursuit of justice within the limits of a determined polity.

This is in fact the reason for which we are invited to firmly reject Rawls’ *transcendental institutionalism* in favour of Sen’s *realization-focused comparativism*. Sen’s pro-naya anti-niti argument can be reduced to the ‘resources’ versus ‘resources related to people’ (id est “capabilities”) thesis according to which Rawls defends institutionalism too easily by making extremely strong assumptions on the post contract behavior of the persons and assumptions less strong than necessary on their before the contract attitudes.

Resources are considered here as “not something we value for its own sake” (p. 253). Capabilities instead, focus on the actual ability to do different things that a person values. For example, a person with large wealth cannot be considered advantaged if she suffers from a severe disability. Rawls’s primary goods –and all resourcist approaches– are for Sen “feticist” because they (wrongly) consider primarily means where they should rather consider ends. This mistake is made transparent if we examine global poverty. Poverty cannot be properly understood just in terms of income. Of course, an index of

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<sup>30</sup> Among the first problems two deserve special attention:

(i) the extreme nature of the priority of liberty as conceived by Rawls, already emphasized by Herbert Hart shortly after the release of *A Theory of Justice*. There can be some priority of liberty but total unconstrained priority is surely too much. Here the example –presented by Sen p. 65- of hunger and starvation considered as worse than a loss of liberty seems inappropriate, because to attain Rawls’ principles of justice one needs to have realized the s.c. ‘circumstances of justice’ that include moderate scarcity. Given that moderate scarcity is an ambiguous expression –does rural India reach the line of moderate scarcity?- one should remember that Rawls makes the priority of liberty depend on a minimum average economic well-being of the population. This implies that the priority of liberty does not apply where conditions of hunger and starvation are normal.

(ii) The fact that Rawls does not provide a way in which primary goods can be converted into good living. In this sense, capabilities work –for Sen- better than primary goods, albeit not representing a ‘foundational departure’ (p.66) from Rawls program. This last comment –as noted- seems a bizarre understatement in the light of Sen’s whole argument against Rawls.

primary goods represents a vector and so it includes more than income, but its analysis is still guided by a ‘search for general all purpose means’ (p. 254). This is wrong –Sen says- because what really counts is the way in which different persons convert income or primary goods (resources) into good living. So, poverty is contingent on the different characteristics of people and of the environment in which they live. Disabilities are another relevant example, because they instantiate an evident ‘conversion handicap’ (p. 258).

This thesis makes Sen skeptical about Rawls’ contractualism, which concentrates upon primary goods. The idea here is that even if Rawls recommends correctives for ‘special needs’, this is not enough because the problem of the conversions of primary goods (resources) into good living implies a “departure from Rawlsian theory” (p. 262). This departure is directed toward a theory –like capability theory- in which ends are the focus rather than means. Given these premises, it is not surprising that Sen takes happiness into consideration. In fact here we have that kind of utilitarian turn implied by Sen’s main argument (the *naya* versus *niti* argument). After all, the main characteristic of utilitarianism consists in focusing on the relationships between goods and persons.

This seems to give us some advantage, at least in terms of global justice, but it is difficult to not to see its inconveniences. These inconveniences are of two species, epistemic and ethical-political: unless we know people’s values and tastes - there is a significant risk of paternalism when we consider happiness as the last word<sup>31</sup>. This is why Rawls contrasts –in *A Theory of Justice*- his liberalism with a liberalism of happiness, liberalism of happiness being a kind of perfectionist and paternalistic vision.

Sen has given us –since the 1970’s- a strategy to avoid Arrow’s impossibility theorem in collective choice theory. Within this strategy, enriching the informational basis seems a necessary step. This move of course relocates us in proximity of the utilitarian tradition. Sen however thinks that utilitarianism is not a good guide in this

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<sup>31</sup> To be analytical, one should clearly separate the epistemic and the ethical-political side of paternalism. Unfortunately, such internal distinction is not easy. To go within the analysis of the epistemic side of the problem is in fact complicated and requires elements of empirical psychology. In his PL Rawls –rather vaguely- connects the ‘burdens of judgments’ with pluralism. Here, I limit myself to arguing that we can assume some relation between the two aspects –epistemic and ethical-political- of paternalism without going into the argument. I hope that this strategy can be forgiven, if one considers that I am not particularly interested here in the epistemic side of the issue.

direction, due to the fact that utilitarianism limits its informational apparatus to welfare information.

The very concept of capability is supposed –Sen says– to overcome this difficulty by taking well-being into consideration in the framework of substantive freedom. An assessment of capabilities for Sen must start with two important distinctions: (i) between freedom and agency; (ii) between freedom and achievement. This dynamics introduces procedural elements connected with fairness in an otherwise almost neo-utilitarian paradigm. The problem here consists in seeing whether the shift Sen operates from means to ends and from epistemic prudence to the acceptance of interpersonal comparisons, still allows to be immune from some risks that are usually connected with utilitarianism.

Now, there is no doubt that an index of primary goods like that of Rawls “does not approximate very accurately what many people must want and value as judged by their comprehensive views” (PL, p 189). But here incompleteness is the price we pay for neutrality. The trade-off between liberty and preference satisfaction is meant to avoid paternalism within the political ambit. It presupposes –as Rawls says– “a social division of responsibility” (PL p. 189) within which the political sphere provides general means and the rest –including significant ends– are left to individuals and associations. To do otherwise would entail politically imposing some controversial ends. To claim that politics should pursue fundamental ends misrepresents politics like a form of applied ethics. It is not so, within a liberal political conception like Rawls’. This is the same reason that renders it difficult –for Nagel– to bypass statism, and it is a reason based on the priority of the right argument.

According to Sen, “the contrast between primary goods and capabilities is in a limited arena” (p. 299). The rest, in particular the demands of procedural fairness, can be left to Rawls’ theory. Is this plausible? Perhaps not. The very logic of capabilities could be in conflict with the logic of political liberalism, due to the fact the political liberalism –and its priority of the right– requires to avoid the interpretation of people’s ends.

#### *4. Between Levathan and Cosmopolis*

I must admit that –even if I am unconvinced by Sen’s general argument- there is a part of it that could well integrate Rawls’ vision on global justice. People’s preferences and desires are generally opaque. This is why to try to realize people’s ends via politics – like Sen wants- implies some form of paternalism and can be taken as anti-liberal.

It is not, however, always so. There are cases in which people’s desires and preferences do not appear opaque. If you think of hunger and starvation or severe diseases, you understand why. In similar cases, people’s desires and preferences are transparent. Here, it is easy and not paternalistic to guess what people want and consequently to argue that we should try to help them to convert their needs into substantive opportunities.

To make public sense of interpersonal comparisons we need some a priori consensus, like we have when ‘urgency’ –to use Thomas Scanlon’s term- is at stake. When we make interpersonal comparisons we compare the goodness of the individual in situation A with the goodness of the individual j in situation B. The problem with utilitarianism in assessing these judgments lies in its dependency on the subjective experiences of i and j. This renders the utilitarian way of making interpersonal comparisons arbitrary from a public point of view. We should rely on some objective standard other than the simple preferences of i and j themselves.

Only when there is urgency can we grasp the meaning of people’s conversion handicaps, and consequently accept the idea that for instance disabled and hungry persons that populate the planet should be living with specific “functionings”. Here the capability approaches works avoiding the danger of illiberal paternalism<sup>32</sup>. In this light, it is not surprising that many of the examples of Sen concerning the limits of resourcism come from cases in which we are confronted with persons affected either by severe diseases or extreme poverty.

The conclusion of the last paragraph offers the possibility of a reconciliation. We can draw an imaginary line that separates ‘normally cooperating members of society’

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<sup>32</sup> Perhaps we should distinguish between two different forms of paternalism. On one hand, we can have paternalism toward the victims, as for example starving or disabled people. On the other hand, we can have paternalism toward the normal citizens, for example if they are obliged to pay taxes to help starving or disabled people. In this second case, the risk of paternalism implies the compulsory transformation of a super-erogatory sentiment into an obligation, and runs as consequence the risk of over-demandingness.

(Rawls) and the other persons that are not so lucky. Above this line people can well be treated by liberal political theories à la Rawls. Underneath this line, however, it is not so. People living clearly underneath the line are in conditions of ‘urgency’, therefore deserve special attention and for them liberal neutrality is not enough. The notion of “urgency” implies a criterion through which we can objectively discriminate among goods and satisfactions connected with them.<sup>33</sup>

This notion of urgency seems to be an attractive bridge between Nagels’ and Sen’s views. Urgency is presented –by Scanlon– as a doctrine capable of comparatively assessing benefits and burdens from the point of view of political morality. Thus conceived, this doctrine is required to satisfy some properties: (i) must represent a kind of consensus among those to whom justification is addressed; (ii) must allow for the fact that individuals have different tastes and interests. Such doctrine cannot be –for Scanlon– formulated in terms of subjective criteria like many utilitarians would basing their models on preference satisfaction. On the contrary, it requires an objective criterion coherent with the objective idea of moral judgment. Urgency is assessed in terms of increments or decrements along the different scales on which we locate our concerns. The idea is that –once we begin to understand the desirability of the benefits and the undesirability of the burdens at stake– one can create a “hierarchy of relative urgency”<sup>34</sup>. Interesting enough, this conception of urgency is rather *naya* to use Sen’s dictionary, in the sense that it depends on the comparisons among different lives in various contexts around the world.

Rawlsian liberal contractualism can work like an obstacle when questions of global justice are at stake. Difficulties derive from the necessity of this paradigm to separate ethics from politics. Within a Rawlsian view, political justice must be coherent with the “basic structure” of the society it addresses. The basic structure being a network of institutions, political justice presupposes reliable institutions. In the global domain, however, institutions are often not reliable. This makes the ethical appeal, implicit in the idea of justice, contrast with its political basis. We know that global justice is needed but we do not know how to make it properly political. The *naya* path Sen indicates can function here as a strategy to go from our ethical intuitions –supposed to be in favor of

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<sup>33</sup> “Preferency and Urgency” p. 75

<sup>34</sup> PU p. 75

global justice- to the construction of a renewed basic structure more coherent with global justice. Sometimes, ethical evidence must anticipate the political structure. This is so –in a vague and provisional sense- whenever human inter-subjective relations create substantive problems of justice incapable of receiving an immediate institutional response. It is extremely so in case of urgency (think of the Holocaust).

We could investigate further possibilities of reconciliation between the paradigms I have discussed. Reflecting on them, it is difficult to avoid the impression that Rawls' theory of justice originates from a wealthy nation. In the US to protect liberty as individual choice is more important than elsewhere. For example, it is more important than in rural India. So, the idea is that whenever we expand the original Rawlsian paradigm from the US setting to the globe or to a particular region of it, we should be more careful in redesigning the relation between persons and institutions. This is, after all, what Sen recommends. Mine is an invitation to take history more seriously than many analytically trained political theorists usually do. I imagine indeed that such an argument is coherent not only with the position of Sen but also with that of Rawls. If we consider Rawls' vision of justice, we note that the concept of basic structure must not be an invariant. It is rather a historical notion that presupposes a link between civil society and institutions.

In special difficult circumstances –when there is urgency- we can comparatively assess people's well-being coherently with a general liberal outlook. But, for the rest, we need to reject neither institutionalism nor contractualism. Perhaps, however, we can use the *naya* approach also to expand the possibilities of a too severe institutionalist approach in direction of a more human centered view.

Even if we were convinced of the wrongness of the cosmopolitan thesis that upholds the presence of a global basic structure, this would not entail the acceptance of statism. The obligations I have in mind don't need to have associative nature, as claimed by Nagel about the obligations deriving from justice and implicitly accepted by his cosmopolitan critics. In my thesis, there is another source of moral obligations towards the poor of the earth, a source that establishes duties independently of the alleged existence of an actual structure of cooperation at a global level.<sup>35</sup> It consists in a duty of

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<sup>35</sup> A similar thesis is upheld by Allen Buchanan (1990). Buchanan's idea is to set the duties apart from the idea of reciprocity in order to link them with the idea of subjectivity.

justice connected with urgency.

According to the claims of urgency, we have a duty to protect human dignity and fragility, regardless of the presence of a real global basic structure.<sup>36</sup> Besides, we must make sure that a few fundamental basic rights are guaranteed. Quite naturally, these basic rights include a few socio-economic human rights as those to subsistence and health. Indeed, as Primo Levi wrote in *If This is a Man*, when one is in the presence of a systematic “demolition of a man” there is little reason to argue and to wait.

There are human rights, including the main socio-economic rights, failure to protect which renders it impossible to live life in full. Something similar is reflected in the main human rights that guarantee fundamental functionalities. We may call this type of rights “basic rights”.<sup>37</sup> We may conceive of them as a sort of meta-rights, namely rights without which no other rights may be enjoyed<sup>38</sup> This is the reason they not subject to the scrutiny of pluralism and does not depend on a single specific conception of the good. It rather precedes the conceptions of the good or is supposed to be a part of all of them.

The basic rights and the correspondent duties rest on the characteristic of human vulnerability as captured by the notion of urgency.<sup>39</sup> They are shaped by special circumstances in which we as human beings can be immersed. It is indeed this type of argument that offers a valuable solution to liberals who are affected by the priority of the right argument. Pluralism makes the direct passage from a given view of the world to the institutional realization of its fundamental principles impossible for a liberal Rawlsian. All this is connected with the distinction between what is good and what is right. The thesis that founds a duty of justice on urgency predicates an overlapping of the good and the right in a specific ambit and in limited cases. When the vulnerability of human beings is not adequately protected, then the good of ensuring basic rights to those who lack everything, turns also into a duty of justice. This happens because the good and the right together presuppose that general moral community.

As a rule, in a post-metaphysical world, as Habermas calls it, group ethics may not be transferred - in the name of pluralism defended by the priority of the right – into

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<sup>36</sup> Within a contractarian framework Richards (1982) upholds a similar thesis.

<sup>37</sup> Shue (1996 [1980]). Henry Shue, *Basic Rights*, Princeton University Press, 1980, second edition revised in 1996.

<sup>38</sup> See the chapter in the preceding book of the same series.

<sup>39</sup> The term is used in a consequentialist framework by Robert Goodin (1985).

the morals of justice. There are exceptions. The holocaust, as dealt with by Primo Levi, is perhaps the most typical exception. In the presence of such an event, whether or not we are responsible for it and whatever our opinions, we cannot wash our hands of it. The genocide of millions of persons who lack basic rights to security and subsistence – that is the core problem of global justice - is similar to the Holocaust. In the horizon of such a far-reaching drama, it is reasonable to transform a good into a right, that is a binding obligation. In other words, the exceptionality at stake here allows to overcome liberal anti-perfectionism.

Thomas Pogge recognized that liberal anti-perfectionism applies when we set ourselves ambitious targets.<sup>40</sup> The priority of the right is much less justified when goals are minimal and dramatic. Security and survival are minimal and dramatic objectives and, therefore, to resort to the defense of pluralism against those who propose them seems specious and unreasonable. The consequence of this reasoning is both theoretically and practically relevant. If in a few special cases - such as the genocide of the poor - the good coincides with the right, then the obligations deriving from the duty of justice based on urgency are binding. There is nothing supererogatory in them. Indeed, they legitimately fall within a concept of justice that is less strong than the one based on cosmopolitan assumption, but not as minimal as the statist postulation.

It should be said that one could legitimately ask what the liberal priority of the right has to do with global justice. First, one can wonder why we should be worried about the priority of the right only at the global level. What, in other words, makes this global level particularly sensitive to the risk of incurring the pitfalls connected with the priority of the right? My answer here is that cosmopolitans moralize global politics and that's why they run into the problem of the priority of the right. Second, one may think that a liberal political conception a la Rawls already sought to avoid the risk of incurring the priority of the right at the domestic level. Why should this risk come back when we leave the domestic level to approach the global one? My answer here is more articulated. On the one hand, I could repeat what I have already said about the first objection. It is the attempt to moralize global politics that pushes many cosmopolitans toward reintroducing at the global level comprehensive visions of politics already discharged at the domestic level. On the other hand, I also believe that often cosmopolitanism avoids considering

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<sup>40</sup> Pogge (2000).

how much the “reasonable” is context dependent. When we leave the safe benches of the domestic basic structure, we will find another political situation, in which we cannot take for granted that our vision of what is reasonable and what is comprehensive is widely shared. Behind the will to hold a liberal position, there could be also a desire to avoid imperialism.

The main source for obligations of global justice consists in a duty to protect the security and the subsistence of all human beings. On the one hand, this duty is not a purely humanitarian duty –as could be accepted even by statist- because the political substance of it corresponds to the content of important human rights. On the other hand, this duty captures the ethical appeal of cosmopolitanism: we often believe there are normative constraints exceeding mere humanitarianism at the global level. However, it does so but without getting into trouble with the liberal priority of the right. Perhaps, I suggest, global politics requires more demanding norms than those dictated by mere humanitarianism, but less demanding norms than the ones recommended by a cosmopolitan egalitarian approach.

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