

v. 8 • n. 14 • jun. 2011
Biannual

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SUR - International Journal On Human Rights is a biannual journal published in English, Portuguese and Spanish by Conectas Human Rights. It is available on the Internet at <<http://www.surjournal.org>>

SUR is covered by the following abstracting and indexing services: IBSS (International Bibliography of the Social Sciences); DOAJ (Directory of Open Access Journals); Scielo and SSRN (Social Science Research Network). In addition, SUR is also available at the following commercial databases: EBSCO and HEINonline. SUR has been rated A1 and B1, in Colombia and in Brazil (Qualis), respectively.

SUR. Revista Internacional de Direitos Humanos / Sur – Rede Universitária de Direitos Humanos – v.1, n.1, jan.2004 – São Paulo, 2004 - .

Semestral

ISSN 1806-6445

Edições em Inglês, Português e Espanhol.

1. Direitos Humanos 2. ONU I. Rede Universitária de Direitos Humanos

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PRESENTATION



Sur Journal has the pleasure to release its issue number 14th, which focuses on the rights of persons with disabilities. The purpose of this issue is to promote a wide debate on the impacts of the adoption of the UN Convention on the Rights of Persons with Disabilities and its Optional Protocol, and to evaluate the consequences of this normative evolution for national and regional systems in the Global South.

The final selection of articles presents a diverse approach to disability-rights, both in terms of regional representation and thematic scope. The dossier's opening article entitled **Analysis of Article 33 of the UN Convention: The Critical Importance of National Implementation and Monitoring**, by Luis Fernando Astorga Gatjens, discusses the role played by States Parties and civil society organizations, specially organizations of persons with disabilities (OPwDs), in implementing and monitoring the compliance with the convention, in accordance with the Article 33 of the Convention on the Rights of Persons with Disabilities.

From a comparative-law perspective, Letícia de Campos Velho Martel analyzes in **Reasonable Accommodation: The New Concept from an Inclusive Constitutional Perspective** the incorporation of the Convention into the Brazilian legal-framework.

On sexuality-related rights, Marta Schaaf, in her article entitled **Negotiating Sexuality in the Convention on the Rights of Persons with Disabilities**, give us a critical account on the dynamics of power and discourse related to disabled sexuality, pointing out the remaining silence on the matter even after the adoption of the Convention.

The UN Convention on the Rights of Persons with Disabilities in Africa: Progress after 5 Years, by Tobias Pieter and Hélène Combrinck, presents a review of the Convention's potential impact on African regional human rights normative framework and on implementation of disability-related rights in selected domestic legal systems (South Africa, Ethiopia, Uganda, and Tanzania).

Based on a critical account of theories of justice, **Human Diversity and Asymmetries: A Reinterpretation of the Social Contract under the Capabilities Approach**, by Stella C. Reicher, critically examines political participation of persons with disabilities, inclusion and diversity in contemporary societies.

Peter Lucas's **The Open Door: Five Foundational Films that Seeded the Representation of Human Rights for Persons with Disabilities** presents a careful description of five landmark disability rights-related films and suggests an original approach on the role of filmmakers in

advancing poetical strategies to represent disability; merging art and political will to break the silence and promote change.

Closing the dossier, we also included an exclusive **Interview with Luis Gallegos Chiriboga, President (2002-2005) of the Ad Hoc Committee that Drew Up the Convention on the Rights of Persons with Disabilities**. The interview was made by Regina Atalla, President of the Latin American Network of Non-Governmental Organizations of Persons with Disabilities and their Families (RIADIS).

Apart from our thematic articles, we have also included the article named **Social Movements and the Constitutional Court: Legal Recognition of the Rights of Same-Sex Couples in Colombia**, by Mauricio Albarracín Caballero, which explores how rights-mobilization by social movements have influenced the approach by the Colombian Constitutional Court to this issue.

Daniel Vázquez and Domitille Delaplace in **Public Policies from a Human Rights Perspective: A Developing Field**, expose a critical view on how to use the tools of the New Public Management in order to include human rights into public policies, bringing particularly the experience of Mexico.

The article by J. Paul Martin on **Human Rights Education in Communities Recovering from Major Social Crisis: Lessons**

for Haiti, discusses Haiti after the 2009 earthquake and elucidates the main challenges facing human rights education in a situation of post-conflict and national reconstruction.

Concepts expressed in the articles are exclusive responsibility of the authors.

We would like to thank the experts who reviewed the articles for this issue. We are especially grateful to Diana Samarasan and Regina Atalla for their involvement in the call for papers and the selection of articles related to rights of persons with disabilities for the current issue. In addition, we would like to stress our appreciation to Matheus Hernandez, who assisted in the elaboration of this issue in the first semester of 2011.

Sur Journal is glad to inform that the table of contents of this special edition on the rights of people with disabilities is also printed in braille, with the link to our website.

Exceptionally, the present issue, dated June of 2011, was printed in the second semester of 2011.

Finally, Sur Journal would like to remind our readers that the next issue will discuss implementation at the national level of the decisions of the regional and international human rights systems and civil society's monitoring role in regard to this process.

The Editors.



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ABSTRACT

The present article seeks to examine the relationship between equality, human diversity, disability and political participation using the framework of Martha Nussbaum's capabilities approach.

Original in Portuguese. Translated by Eric Lockwood.

Received in March 2011. Accepted in May 2011.

KEYWORDS

Equality – Human diversity – Persons with disabilities – Capabilities – Social contract



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HUMAN DIVERSITY AND ASYMMETRIES: A REINTERPRETATION OF THE SOCIAL CONTRACT UNDER THE CAPABILITIES APPROACH

Stella C. Reicher¹

Human beings are diverse in their psychological and biological nature, ethnicity, gender and sexual orientation; as regards life choices, musical preferences, taste in food and religious practices. They organize themselves socially in different ways and have complex interactions as they live in society. There are, however, shared traits regarding political and human nature.

We are inherently heterogeneous and, for this reason, any discourse on equality requires recognizing our differences. Thinking about equality in light of human diversity compels recognizing the existence of individuals and of groups and the relationship between them, taking into account the characteristics of each. Along similar lines, it requires making an effort so that all persons are respected no matter their peculiarities and all can fully exercise their fundamental rights.

In this way, building a just society requires the full political participation of all persons, so that differences can be taken into account in the formulation of collective arrangements and public policies, and in the development of programs and projects.

The present article seeks to examine the relationship between equality, human diversity, disability and political participation using the framework of Martha Nussbaum's capabilities approach. The goal of this article, however, is not to draw conclusions, but rather to encourage the reader to reflect on how these concepts can be applied to implement human rights generally and the rights of persons with disabilities specifically.

1 The capabilities approach

Developed from critiques of the contractualist theory of justice and of economic development models based on notions of utility, equality of distribution and

Notes to this text start on page 178.

the maximization of resources – theories that will not be discussed here – the capabilities approach can be understood as a normative framework that provides space for individual well-being to be evaluated and achieved, the development of public policies, and the implementation of social change with the goal of the full development of human beings.²⁻³

With its focus on certain core abilities, the capabilities approach emphasizes the idea of opportunities, particularly those of choice, the exercising of rights, and the possibility of persons making their own decisions based on their own notions of a good life. By understanding that the realization of rights depends not only on the formal recognition of those rights, this approach calls for the promotion of individual autonomy through the combination of (i) civil and political rights, (ii) economic, social and cultural rights, (iii) the freedom to make choices, and (iv) the guarantee of vindicating rights.

By combining the idea of human development with the guarantee of rights, and by understanding social differences not only through an economic lens, the capabilities approach considers the influence of particular human characteristics in creating/maintaining these inequalities.

For David A. Clark, the capabilities approach takes into account the diversity of human characteristics and considers differences between groups such as, for example, those regarding gender, ethnicity, class, age and disability. It is, thus, an approach that embraces human activity and participation, including the fact that different persons, cultures and societies can have different values and aspirations. (CLARK, 2005a, p. 5)

In this way, in addition to the access that individuals have to assets, rights and resources, the capabilities approach considers the potential such individuals have to enjoy them, their different lifestyles and their social contexts. Furthermore, this approach is sensitive to the barriers that impede the achievement of greater liberty, of opportunities, and of material comfort and that interfere in the fullness of their use and enjoyment, such as the unequal roles and responsibilities delegated to each participant in the familial context, the obstacles that traditional cultural norms and values create for women, and the reduced ease of access, in all its manifestations, for persons with disabilities.

To illustrate how the capabilities approach operates, let us consider a diagnosis of individual poverty that is based on a hypothetical poverty line based on minimum income. What would we say about the situations of two individuals who find themselves above this poverty line? The first response that comes to mind usually leads us to conclude that their living conditions are equal. Would we feel the same way, however, if we knew that one of them suffers from a grave illness that requires repeated sessions of dialysis or that the other, for example, is a person with a disability who requires daily physical therapy sessions to feel healthy?

To promote true equality, it is first necessary to understand of which kind of equality we are speaking. In raising this question, the capabilities approach suggests that the equality sought is the one which respects the range of human diversity and concerns itself with the potential of each individual to access

and take advantage of goods, resources and rights guaranteed them in light of the difficulties and barriers they may encounter throughout their lives. The capabilities approach incites interest because of its focus on the differences, characteristics, and reality of each individual.

2 Contractualism: unresolved differences and dilemmas

In light of these general considerations, we will briefly discuss the philosophy upon which the contractualist approach was developed and point out some of its limitations, which the capabilities approach tries to address.

Contractualism, as a political doctrine, is based on notions of social cooperation and mutual advantage. It is rooted in the idea that society, by foregoing the use of force and the taking of others' property, enters into a contract whereby it ceases to live in the state of nature and subjects itself to the realm of laws, driven by the will to guarantee its preservation and general well-being.⁴

In this initial stage, the state of nature, individuals would be considered "free, equal and independent" and would not experience any kind of oppression or domination, which would allow, in this context of equality, the development of political rules to protect everyone equally.

For contractualists, by stripping human beings of "artificial disadvantages," such as wealth, social class, and education, the social contract would be based on just principles developed by individuals living in equal conditions. Since the mechanism used for the selection of political principles would operate in a context of fairness and equality, the set of guidelines selected as a result of this process also would theoretically be considered fair, because, as Martha Nussbaum points out, "...from a procedure that does not confer benefits based on individual status, we extract a set of norms that duly protect the interest of all." (NUSSBAUM, 2006, p. 10).

In this arrangement, in which individuals live in equal conditions and social cooperation is a viable path to achieve mutual benefits, justice would be one of the governing political principles and would confer legitimacy to how those principles were selected since, ultimately, they would reflect the choices made by free, equal, and independent citizens about how to govern their lives.

Building on the contractualist logic, Rawlsian theory consists of two distinct features. The first involves the initial choice of moral judgments; the second focuses on equality, as all persons should be recognized as equal and as an end in themselves. In this scenario, the principles of justice would be those that, according to Rawls, "[...] free and rational persons concerned with expanding their rights would accept in an initial position of equality" (NUSSBAUM, 2006, p. 11).

Rawlsian contractualism brought advances to theories of justice. As it is a procedural theory of justice, it rejected the natural rights discourse while asserting that justice is not achieved by results, but by the fairness and impartiality of the procedure adopted – anything derived from this initial just and egalitarian condition will also be just. Moreover, it included moral elements in its definition of the social contract and recognized, under the veil of ignorance, the equality of all human

beings in their value and capabilities, highlighting the moral impartiality that should permeate the choice of political principles.⁵

Although he later described society as a just system of cooperation, according to Nussbaum, Rawls developed the concept of mutual benefit and did not consider integrating ideas of reciprocity, love, and care, which speak to the relationships of dependency and the weaknesses that are part of the human condition, limiting thereby the players likely to participate in the process of establishing political principles – and who are, ultimately, the very beneficiaries of these principles.

On this point, the capabilities approach operates under a different logic. It focuses on the evaluation of the desired results to determine the most appropriate procedure to reduce inequality and promote justice. By looking at the individual, and at the human person, the capabilities approach seeks to address these issues that classic contractualism and Rawlsian theory leave unresolved.

3 Contractualism and Human Diversity: persons with disabilities and other asymmetries

The idea of the political community proposed by Rawls is less a group bounded by historical, emotional, and linguistic ties, amongst others, and more an equitable system of cooperation, which requires the participation of all with the goal of obtaining mutual advantage. For Cicero Romão de Araújo, this community “is conceived, rationally as a ‘cooperative system’ – in the quasi-economic sense of an association whose members, in contributing to the preservation or success of a common enterprise, have the right to expect that gains be distributed equitably.” (ARAÚJO, 2002, p. 80-81).

By idealizing the political community as a place where all cooperate with the expectation of an equitable distribution of the gains, Rawls presupposes that persons, as citizens, have all the capabilities that allow them to be full and normal members of society.

This equality with respect to the ability of all persons to be members of society and to participate actively in society’s affairs would manifest itself in two distinct ways: (i) in the distribution of gains generated by joint participation; and (ii) in the development of political principles. This “equality,” however, merits further attention. First, it deserves further scrutiny because the guarantee of an “equitable share” of the gains, or the right to participate equally in the gains achieved by mutual cooperation, does not ensure that persons can enjoy the gains equally.

Although the distribution of the gains yielded by this cooperative system is equitable, the capacity to enjoy the gains, be they goods, resources, and/or rights, does not follow the same logic since the aforementioned capacity is variable according to the specific characteristics of each human being.

The view that possessing equal capabilities ensures to all full cooperation and, from that, full participation in all that is generated in this equitable system is flawed, or, at least, limited in that it disregards the peculiarities of each individual and the notion of human diversity.

As Amartya Sen points out, human beings differ with respect to external characteristics and circumstances, the natural environment in which they live, the number of opportunities available to them depending on the society in which they live, as well as with respect to personal characteristics, such as age, sex, and physical and mental abilities. (SEN, 2008, p. 50-51). Due to these differences, individuals contribute to the collectivity and enjoy the gains earned in different ways.

For example, let us consider the guarantee of the right to education and to work. Although most democratic constitutions ensure this right equally to all citizens, factors such as gender, ethnicity, and disability directly interfere with one's ability to enjoy these rights. Consequently, in order for a given right to be enjoyed by different persons, it is sometimes necessary to adopt measures that make possible their full enjoyment, as is the case with the use of quotas for persons with disabilities in the job market and the policy of inclusive education.

Human diversity is, therefore, an important factor in assessing social inequalities because they affect how persons interact or participate (or not) in this "system of cooperation" and the results generated. In this way, any theory of justice seeking to promote equality should measure several aspects of life without disassociating them from individual peculiarities. In Rawlsian contractualism, differences, whether innate or not, that affect how persons function in this cooperative system are not taken into consideration.

The capabilities approach, on the other hand, does not provide anything analogous to the contractualist notion that human beings "are equal in power and ability," asserting instead that "persons vary greatly in their need for resources and care and a given person might have a wide range of needs throughout her life" (NUSSBAUM, 2006, p. 98).

The ability to recognize human diversity and the peculiarities that affect the life of each person is, without a doubt, one of the most important contributions of the capabilities approach.

In the same vein, it is worth noting that the contractualist doctrine does not include persons with disabilities in the list of actors who can structure political principles that should govern the activities of social life. Is this a mere coincidence? It appears not.

Contractualist theories are based on the assumption that persons considered "free, equal and independent" would be able to participate in the creation of the basic structure of society"; they would be citizens who could defend their own interests as "fully cooperating members" and are generally endowed with a certain "idealized rationality." (NUSSBAUM, 2006, p. 98).

By understanding the trilogy of liberty, equality, and independence as a condition for the active participation of persons in the development of political principles, the contractualist approach disregards the fact that not all human beings are free, equal, and independent and that such attributes can, aside from varying from person to person, be enjoyed differently by a given person throughout her life.

The inequalities that permeate individuals' lives, their different skills, and the way in which they exercise their skills is not taken into consideration by

contractualist theories, which explains the little attention it pays to vulnerable groups generally, and persons with disabilities, specifically.

In Rawls's procedural model, to attain mutual cooperation and reciprocity amongst persons who enter into the social contract, it is necessary to evaluate *by whom the principles will be defined and to whom they will be directed*.

Recognizing that the selection of political principles is the responsibility of those persons living in equal conditions, or those endowed with the same capabilities – mainly economic and productive – makes it difficult for vulnerable groups, such as women, the elderly, children, and persons with disabilities to participate in the political process of building society – a situation that, as a theory of justice, is discriminatory and inconceivable.

Although Rawls recognizes that persons can be affected over the course of their lives in their capacity to participate equally in this system of mutual cooperation since there is no guarantee that one will never become ill or suffer an accident, for example, and since such contingencies should be foreseen to duly execute his theory of justice, “[...] permanent physical disabilities or mental illness so serious as to keep persons from being full and normal members of society in the usual sense” are not taken into consideration in defining the governing principles (RAWLS, 2000, p. 217).

Not being considered “full and normal members of society in the usual sense,” persons with severe disabilities cannot join the group responsible for developing political principles, because “they are not among those for whom and with whom the basic institutions of society are structured” (NUSSBAUM, 2006, p. 98).

But what are the consequences for this excluded group of not directly participating in the development of political principles in Rawls's theory? The absence of a voice and the obstacles imposed upon persons with disabilities reflects an internal contradiction in contractualist theory. As Martha Nussbaum points out, in human beings “[...] more or less equal in powers and capabilities, it seems arbitrary to confer upon some greater authority and opportunity than upon others.” (NUSSBAUM, 2006, p. 31). Therefore, excluding persons with disabilities from participating in shaping governing political principles results in the discriminatory and unequal treatment of the author vis-à-vis this and other vulnerable groups.

In practice, due to the exclusion of this group in the formulation of political principles, issues relevant to the achievement of social justice with respect to this group of persons, such as for example, the discussion about the allocation of the care they require, the costs of their inclusion in the job market and in the educational process, as well as the structure necessary to maintain social security programs, could be left by the group responsible for developing political principles for future consideration (NUSSBAUM, 2006, p. 33).

From the standpoint of justice, in ignoring the innate fragilities of human nature and the situations of extreme dependence to which we are all subject, Rawlsian theory excludes persons with disabilities (and members of other vulnerable groups, such as the elderly, women, and children) from the process of formulating political principles to govern their lives. This exclusion precludes the

needs of these populations from being considered by those defining the rules of society and, consequently, in how policies concerning the promotion of justice should be structured.

Under Rawls's proceduralist theory, justice is guaranteed through the process in which political principles are chosen. In this way, by being neglectful, incomplete, or exclusive – impeding certain groups from participating in this process – the public policies that flow from it may be considered unjust from their inception.

Another interesting aspect of Rawlsian contractualism, which is criticized by the capabilities approach and has its origins in classic contractualist theory, is the notion of “independence” included by Rawls, in addition to the equality of capabilities, as a prerequisite to full participation in political life and defined as the possibility for each individual to pursue her own projects and to cooperate socially.⁶

As Nussbaum points out, on this issue Rawls “[...] omits from the process of selecting basic policies the most extreme forms of dependency that human beings can experience [...], not having, therefore, in the scope of his idea of social cooperation a space for relations of extreme dependence” (NUSSBAUM, 2003, p. 24).

Assuming that all persons need the same goods and resources in equal amounts, Rawlsian contractualism recognizes for all people with equal skills the right to an equal share of the fruits resulting from their participation in this system of social cooperation. In this sense, it shows itself insensitive to the fact that some persons need access to certain goods and forms of individualized care, such as, for example, children, the elderly, persons with disabilities or others who, for any reason, have their physical and/or mental health temporarily weakened.

Note that in developing his list of primary goods, despite including basic freedoms (of thought, of conscience, etc.), freedom of movement and freedom to choose one's occupation, the powers and prerogatives associated with roles and positions of responsibility, income, wealth, and the social bases of self-respect, Rawls did not consider the notion of care.

This alleged lack of “independence” and the need of care served as a justification so that persons with disabilities and other segments of society deemed vulnerable could be excluded, yet again, from participating in the formulation of political principles that would be the foundation for a society that, in theory, is just.

Showing respect for human diversity, the capabilities approach incorporates care and dependency as essential elements in the establishment of a truly just society. As Nussbaum points out, every society gives and receives care and for this reason must find ways to deal with these facts that arise from human necessity and dependency, which are compatible with the self-respect of those who receive care and which should not be a motive to exploit those who provide care.⁷

The capabilities approach understands that equality in the capabilities of individuals and their “independence” is not eternal. In this way, it asserts that contingencies that might affect people throughout their lives, such as the notions of dependence and care, must be taken into consideration when formulating political principles.

In order to not fully discard from the capabilities approach this contractualist foundation, Nussbaum proposes the inclusion of the need for care on her list of

Rawls's primary goods and the recognition that individuals are beings endowed with distinct capabilities and necessities, thus requiring a range of life activities.

For the author, since the measurement of care does not meet the same requirements as the analysis of wealth and assets, the proposed supplement, although possible, only reaffirms the idea that the list of goods selected by Rawls should be conceived as a set of primordial capabilities provided to all individuals, rather than a set of goods to be distributed in equal terms to all human beings – a discussion we will not have the opportunity to further develop in this article.

4 Final thoughts

In recognizing and accepting human diversity as a singular and indispensable element to the effective promotion of equality and in seeking to reconcile conflicting interests with a more inclusive perspective, the capabilities approach is an interesting alternative tool that can be used to grapple with questions of justice and human rights.

The more we perceive that the asymmetries that are part of human life create relations of dependency and need and interfere with the ability of individuals to participate in the system of social cooperation in which they live, the more we distance ourselves from the classic idea of contractualist justice and the more we approach a decision-making framework that takes into consideration the diversity of situations of inequality that inform how individuals lead their lives.

In this statement lies, therefore, a major contribution of the capabilities approach to human rights discourse: the affirmation that the peculiarities of human life should be taken into consideration during the formulation, execution, evaluation and monitoring of laws, public policies, programs, and projects.

This rereading of the social contract under the capabilities approach leads to an understanding of equality in light of human diversity through the recognition and acceptance of differences. It helps us understand that reciprocity is not only between equal parties where benefits are equally shared but also between different parties, thereby recognizing and respecting individual differences.⁸ Finally, it highlights the importance of guaranteeing to all the means and resources necessary so that they may exercise their rights and participate in the process of formulating governing political principles.

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NOTES

1. The author thanks Professor Cícero Romão Resende de Araújo, Lais de Figueiredo Lopez and Facundo Chavez Penilla for their complete confidence, incisive critiques and for sharing their knowledge, and Paula Raccanello and Marcia Golfieri for the constant encouragement and support.
2. The word “capabilities” or “capacities” suggests substantive liberties that individuals can exercise in diverse ways to self-actualize, putting into practice that which they most value in their lives. For example, an extremely religious person can choose not to be well nourished to the extent that she values fasting; another individual could, for whatever reason, lead a life of celibacy rather than one of sexual expression; a third, despite having considerable financial resources, might choose to work intensely to enjoy leisure and recreation (NUSSBAUM, 2001, p. 87).
3. Capabilities and functionalities are concepts that, in the framework of this approach, walk side by side and are linked by a causal relationship – capabilities correspond to the potential to exercise a liberty right, in the substantive sense, or a power to act – necessary to facilitate the diverse ways in which an individual can self-actualize – functionalities are physical and psychological states of being and doing, whose range depends on the presence of minimal capabilities.
4. For Rousseau (2008), “[...] [a]s long as several men in assembly regard themselves as a single body, they have only a single will which is concerned with their common preservation and general well-being. In this case, all the springs of the State are vigorous and simple and its rules clear and luminous; there are no embroilments or conflicts of interests; the common good is everywhere clearly apparent, and only good sense is needed to perceive it. Peace, unity and equality are the enemies of political subtleties [...]”.
5. According to Nussbaum, Rawls’s approach moves away from classic contractualism first by being a purely procedural theory of justice, where adopting the correct procedure ensures a correct result, rejecting the argument that human beings possess natural rights; and by involving moral considerations in the process of defining the social contract, recognizing that all human beings are equal, endowed with value and capabilities.
6. According to Nussbaum, independence for Rawls presupposes that the parties, in the Original Position, have no interest in the interest of others, not because they are necessarily selfish but because they are concerned with advancing their own notions of what is good rather than those of others. (NUSSBAUM, 2006, p. 33).
7. An interesting point that Nussbaum makes, but which we will not have the opportunity to explore in this article, concerns the importance that should be given to persons who care for dependents to the extent that a just society should also concern itself with the recognition owed these individuals. For further information, see Nussbaum (2006, p. 100).
8. According to Martha Nussbaum, adopting measures to bring justice to persons with disabilities is costly and, for this reason, would not be justified as mutually advantageous from a strictly economic point of view.

RESUMO

O presente ensaio pretende examinar a inter-relação entre igualdade, diversidade humana, deficiência e participação política, a partir da crítica que a abordagem das capacidades, sob a ótica de Martha Nussbaum, faz a respeito do tema.

PALAVRAS-CHAVE

Igualdade – Diversidade humana – Pessoas com deficiência – Capacidades – Contrato social

RESUMEN

Este ensayo pretende examinar la interrelación entre la igualdad, la diversidad humana, la discapacidad y participación política, a partir de la crítica que el abordaje de las capacidades, visto desde el punto de vista de Martha Nussbaum, plantea sobre el tema.

PALABRAS CLAVE

Igualdad – Diversidad humana – Personas con discapacidad – Capacidades – Contrato social

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