

The Possibility of Protecting and Expanding Capabilities via Fundamental Social Rights: The Brazilian Federal Constitution of 1988

A possibilidade de proteção e expansão de capacidades por meio dos direitos sociais fundamentais: a Constituição da República Federativa do Brasil de 1988

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Abstract

This paper analyses the relation between capabilities (regarding Amartya Sen's capability approach and development theory) and fundamental social rights ensured in the Brazilian Constitution of 1988. It seeks to answer whether the fundamental social rights guaranteed in the Constitution serve to protect and expand capabilities. Using the deductive analysis method, as well doing a bibliographic review, we first make a brief discussion of Amartya Sen's theory of development as freedom. After we analyse what are

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fundamental social rights in Brazil's legal system and how they operate, they are compared to Amartya Sen's notion of rights as means and entitlements to capabilities. Finally, we analyse the possibility of protection and expansion of capabilities through those fundamental social rights constitutionally granted. We conclude that fundamental social rights can be means to protect and expand capabilities once they are fully implemented in society. Thus, guarantee of fundamental social rights and its value as entitlements to capabilities cannot be left in the hands of the Judiciary Power as it needs to be observed by all the Public Administration, especially in making public policies.

Keywords: Capability approach; Development; Fundamental social rights.

Resumo

O artigo analisa a relação entre capacidades (no que se refere à abordagem trazida por Amartya Sen em sua teoria sobre desenvolvimento) e direitos sociais fundamentais garantidos na Constituição Federal brasileira de 1988. O objetivo da pesquisa realizada é responder se os direitos sociais fundamentais garantidos na Constituição servem para proteger e expandir capacidades. Usando o método de análise dedutiva, além de fazer uma revisão bibliográfica, primeiro se faz uma breve discussão da teoria do desenvolvimento como liberdade de Amartya Sen. Na sequência, analisa-se os direitos sociais fundamentais no sistema jurídico brasileiro e como eles funcionam, comparando-os à noção de Amartya Sen de direitos como instrumentos de concretização de capacidades. Por fim, explora-se a possibilidade de proteção e ampliação de capacidades por meio dos direitos sociais fundamentais constitucionalmente garantidos no ordenamento jurídico brasileiro. Conclui-se que os direitos sociais fundamentais podem ser meios de proteção e ampliação de capacidades, desde que sejam integralmente implementados na sociedade. Assim, a garantia dos direitos sociais fundamentais e seu valor como instrumentos de efetivação de capacidades não podem ser deixados nas mãos do Poder Judiciário, na medida em que tais direitos e suas capacidades precisam ser observados por toda a Administração Pública, especialmente na formulação de políticas públicas.

Palavras-chave: Capacidades; Desenvolvimento; Direitos sociais fundamentais.

Introduction

Development, as expected, presupposes the occurrence of economic growth, but is not limited to this. For this reason, the capability approach (CA) led by Amartya Sen, and posteriorly by Martha Nussbaum, became essential in analysing the actual meaning of development. Assuming this approach, we must go beyond the accumulation of wealth and the growth of gross domestic product; beyond the examination of income and resources. We

must consider the interdependence of the economic aspect with social and political elements that seek to qualitatively improve the living standards of the people, thus providing the elevation of social welfare.

The conception of development adopted in this work is related with how Fábio Konder Comparato (1999, p. 363) conceptualizes it “as a long process, induced by public policies or programs of governmental action in three interrelated fields: economic, social and political”. As Daniel Wunder Hachem exposes:

The economic field is manifested by an increase in production of goods and services derived predominantly from internal productive factors, not from outside, and achieved without the extermination of irreplaceable goods that are part of the ecosystem. The social field is marked by the gradual conquest of the equality of basic existential conditions, through the widespread realization of social, economic and cultural human rights, such as health, education, housing, labour, social security and social assistance. And the political field presupposes, for development, that citizens can effectively assume their role as a political subject, actively participating in democratic life (Hachem, 2014, p. 120, free translation).

The Brazilian Constitution of 1988 brings in its text an *ethos*: the fundamental right of achieving development, through its open clause of fundamental rights (Article 5, second paragraph, of the Brazilian Constitution of 1988). Taking in consideration the importance of those rights and its intimate relation with development of society, and also regarding the specification of some of them explicitly as fundamental social rights (Article 6 of the Brazilian Constitution of 1988), we take its analysis through Amartya Sen’s theory and his idea of creating and expanding people capabilities as a way to achieve freedoms (seen as mean and end to development).

To achieve this goal, using the deductive method of analysis, as well doing a bibliographic review, we first make a brief discussion of Amartya Sen’s theory of development as freedom. Next, we analyse what are fundamental social rights in Brazil’s legal system and how they work, followed by a comparison of these to Amartya Sen’s notion of rights as means and entitlements to capabilities. Finally, we study the possibility of protecting and expanding capabilities through those fundamental social rights constitutionally granted.

Preliminaries on Amartya Sen’s Theory of Development

This paper follows the doctrine of Amartya Sen, more specifically his knowledge about the capability approach (CA), to understand whether the fundamental social rights stated in the Brazilian Constitution of 1988 are a way to protect and expand capabilities, and as a by-product, a way to protect and expand individual’s freedom. Therefore, it is important to know the essence of Amartya Sen’s theory on development as freedom, which proposes a view of the discipline of economics other than welfares. Additionally, it suggests a new way of understanding freedom and its substantial relation with the development of societies.

To construct his theory of development as freedom, Amartya Sen shows how welfare economics' theory is insufficient in so many ways to explain modern society that needs to be reviewed by considering in its integrity the ethic's and law's disciplines. Given that, he establishes an interrelation between economics, ethics, and law, highlighting the complex symbiosis between economics and law (a standard part of law education in many countries), noting that:

Economic relations function in a world of human relations that are deeply influenced by the legal framework in operation, and the practice of law, in turn, cannot but take into account the impact of legal decisions on human lives through the economic consequences of the decisions. ... The combination of legal and economic thinking must also have a strong role in helping us to achieve an adequate appreciation of the demands of justice and their extensive practical implications (Sen, 2009b, p. 39).

Besides, Amartya Sen remarks that the "marriage between economics and law demands that each of the two disciplines be taken in an adequately capacious form", and doing that is a "broadening exercise, not a narrowing one" (Sen, 2009b, p. 46). He also explains that these two disciplines must be handled with ethic's discipline, so that it can be possible to fight against the "impoverishment of welfare economics as a result of the distance that has grown between ethics and economics, and particularly on the inadequacy of the evaluative criteria used in economics, especially modern welfare economics" (Sen, 1987, p. 51). For him, the impoverishment of the economics connected to its distancing from ethics, which ends up affecting both "welfare economics (narrowing its reach and relevance) and predictive economics (weakening its behavioural foundations)" (Sen, 1987, p. 57).

Debating about the origin of economics and how it got distanced of law and of ethics, Amartya Sen clarifies that economics has had two sources, both related, in different ways, to politics: one concerned with ethics and another concerned with what the author calls by "engineering" (Sen, 1987). He explains, through the construction of his theory that there's been a misunderstanding by part of the doctrine in Adam Smith's interpretation, and that misunderstanding may be the central figure of the origin of economics how we know nowadays.

It is evident to Amartya Sen that the "misinterpretation of Smith's complex attitude to motivation and markets, and the neglect of his ethical analysis of sentiments and behavior" (Sen, 1987, p. 27-28) have resulted in distancing the economics from ethics in the modern society. In his words:

Smith did, in fact, make pioneering contributions in analyzing the nature of mutually advantageous exchanges, and the value of division of labour, and since these contributions are perfectly consistent with human behaviour sans bonhomie and ethics, references to these parts of Smith's work have been profuse and exuberant. Other parts of Smith's writings on economics and society, dealing with observations of misery, the need for sympathy, and the role of ethical considerations in human behaviour, particularly the use of behaviour norms, have become relatively neglected as these considerations have themselves become unfashionable in economics.

(...) it is precisely the narrowing of the broad Smithian view of human beings, in modern economies, that can be seen as one of the major deficiencies of contemporary economic theory. This impoverishment is closely related to the distancing of economics from ethics (Sen, 1987, p. 28).

On economics, Amartya Sen's analysis of welfare economics (by crossing out the problems in the utility-based approach to economics and showing that humans acts cannot be taken on maximizing self-interest only or that we must consider just well-being when analysing human actions) demonstrates his position about the modern economic theory: it is insufficient.

Bringing other view of society and its way of functioning, criticizing not only welfare economics theory – by showing that society and its development is furthermore complicated than analysing the enhancement of inanimate objects of convenience – but precisely the utilitarian approach, he builds his point: getting the focus in development and its relation to freedom and the expansion of individuals capabilities.

Regarding his critics against utilitarianism (as utilities being the only source of value), interestingly, he dismantles the importance of happiness, desire satisfaction, and choices as the only paths of explaining human behaviour. By this, he affirms, "... it can be argued that utility is, at best, a reflection of a person's well-being, but the person's success cannot be judged exclusively in term of his or her well-being (even if social success is judged entirely by the constituent individual successes)" (Sen, 1987, p. 40-41). He observes that the utility-based welfarist calculus concentrates "only on the well-being of the person, ignoring the agency aspect, or actually fails to distinguish between the agency aspect and the well-being aspect altogether, something of real importance is lost" (Sen, 1987, p. 45).

It is considering those problems and others that Amartya Sen brings the idea of development and of making a broader analysis of economics, getting into it, the discipline of ethics and law, just as mentioned above. He notices that "the origin of economics was significantly motivated by the need to study the assessment of, and causal influences on, the opportunities that people have for good living" (Sen, 2000, p. 25). And so, in his lectures, he proposes a view of development that is a process of expanding the real freedoms that people enjoy, evidencing the fact that economics discipline has "...tended to move away from focusing on the value of freedoms to that of utilities, incomes and wealth" (Sen, 2000, p. 27).

By focusing on human freedom, Amartya Sen shows the narrowness of identifying development only with the "growth of gross national product, or with the rise in personal incomes, or with industrialization, or with technological advance, or with social modernization" (Sen, 2000, p. 3). There are other determinants that freedom depends. For him, seeing development "in terms of expanding substantive freedoms directs attention to the ends that make development important, rather than merely to some of the means that, inter alia, play a prominent part in the process" (Sen, 2000, p. 3).

Once we brought a narrow view of Amartya Sen's development theory and noticing the importance of freedom to him, it is imperative to understand what capabilities are and how they can be expanded, once freedom can be seen as expansion of capabilities. Also, it is interesting to understand the role that rights have in this theory, so that the Brazilian

Constitution can be analysed under Amartya Sen's perspective and answer the hypothesis proposed in this work: if the fundamental social rights stated in the Brazilian Constitution of 1988 are means of protecting and expanding capabilities.

The Capability Approach

What is important is that people must be free to determine their own course of life. Free to live the life they have chosen, that they value and have reason to value. As Martha Nussbaum declared: "We can see the list of capabilities as like a long list of opportunities for functioning, such that it is very rational to want them whatever else one wants". She completes this though with: "If one ends up having a plan of life that does not make use of all of them, one has hardly been harmed by having the chance to choose a life that does" (Nussbaum, 2000, p. 88-89).

As so, the CA is based on the idea of supporting human beings in the development and the expansion of some central human abilities, "prominent among which is the faculty of selection and choice" (Nussbaum, 2006, p. 10).

As explained above, Amartya Sen's theory is developed from contrast with the utility-based and resource-based lines of thoughts. And so, regarding that contrast, different than the aforementioned approach, in the "freedom-based capability approach", the individual advantage is judged by "a person's capability to do things he or she has reason to value" (Sen, 2009a, p. 231). In the CA, "a person's advantage in terms of opportunities is judged to be lower than that of another if she has less capability – less real opportunity – to achieve those things that she has reason to value" (Sen, 2009a, p. 231). The focus, as mentioned, is on the freedom that an individual actually has to do this or to be that, considering what he values doing or being. The concern is with the "ability to achieve various combinations of functionings" which are comparable and can be judge between people concerning what they have reason to worship (Sen, 2009a, p. 233).

So, it is possible to say that a person's capability is

(...) the set of functioning vectors within his or her reach. In examining the well-being aspect of a person, attention can legitimately be paid to the capability set of the person and not just to the chosen functioning vector. This has the effect of taking note of the positive freedoms in a general sense (the freedom "to do this," or "to be that") that a person has (Sen, 1985, p. 201).

The goal of the CA, as it is possible to observe, is capability expansions. It is intimately related to respect for people's power of choice. The idea of freedom, in CA, "also respects our being free to determine what we want, what we value and ultimately what we decide to choose" (Sen, 2009a, p. 232). As it we see, the concept of capability is thus linked closely with the opportunity aspect of freedom. It focuses on information of individual advantages, "judged in terms of opportunity rather than a specific 'design' for how a society should be organised" (Sen, 2009a, p. 232). However, this does not mean that the organisational structure of a

society is not crucial to the development and expansion of capabilities, as we will observe in further analysis.

The CA is based on regarding individual's entitlements, in a way that the State and society has a kind of obligation to support some list of primary opportunities to people. Similarly, we can say that the CA focuses on what people are actually able to do and be, leaving behind the notion of desire satisfaction as the utility-based approach established. We can also say that the CA is related to plural and non-commensurable opportunities: "The opportunities protected by the CA are not simply quantities of some single homogeneous value: they are distinct, plural, and different in quality. Because they are distinct, one cannot satisfy one entitlement by giving people a very large amount of another" (Nussbaum, 2006, p. 13-15). However, it is the plurality and distinctness does not mean that they do not often support one another, whilst influencing each other.

Regarding the features of this perspective, Amartya Sen states that the focus of the CA is thus not just on what a person actually ends up doing, but also on what she is in fact able to do, whether or not she chooses to make use of an arbitrary opportunity. Therefore, it is important to notice that what matters to this approach is what individuals can really do, not what they choose to do. It is not right to see life as of what really happens and not of what could have happened if the individuals involved were differently inclined, since our freedom and choices are parts of our actual lives and, therefore, must be taken into consideration (Sen, 2009a, p. 235).

Once the capability perspective "is concerned with people's ability to live the kind of lives they have reason to value brings in social influences both in terms of what they value ... and what influences operate on their value" (Sen, 2009a, p. 244), it has total link with what we usually see in how persons in society think, choose and act being influenced by the nature and working of the world around them (Sen, 2009a, p. 244-245). For Amartya Sen, in "valuing a person's ability to take part in the life of the society, there is an implicit valuation of the life of the society itself, and that is an important enough aspect of the capability perspective" (Sen, 2009a, p. 246).

Besides, if the CA is involved with the freedom and the capability that people have to live the life they worship, and if their choice of life can be influenced by many factors of the society they live, do rights have that influence too? Can rights be understood as means to expand what people can do? (Skogly, 2002).

The Brazilian Constitution of 1988 and its Fundamental Social Rights Statements

To get into this analysis in a more exemplified way, it is important to uncover what are the fundamental social rights stated in Brazilian's Constitution first, so that we can study them through the CA.

First, we must have in mind that the Brazilian Constitution of 1988 is characterized by the contour of the Social State of Law. Although it has devices that preach rights to freedom, it has

a different posture than the absentee characteristic of the Liberal State of the twentieth century. Its essence is centred on the idea of satisfying the essential needs of citizens and intervening, in a way, in the economy to reduce the social inequalities caused by the market (essentially capitalist).

The Brazilian Constitution of 1988 is a democratic Constitution that assumes the task of removing the social barriers that impede citizens' access to goods of a social, economic, and cultural nature.

(a) The Fundamental Social Rights and its Constitutional Prescription in Brazil

Present in the 1988 Brazilian Constitution, fundamental social rights have their fundamentality guaranteed in the constitutional text and its relation with values and objectives are recorded in this same document. These fundamental rights, in both their subjective and objective dimensions, are given as conforming principles of the way in which the State that consecrates them must be organised and act.

In Brazil, after a period of military dictatorship, in which rights were harmed and society lived under the shadow of censorship and torture, the 1988 Constitution emerged as the milestone of a new era of democracy, focused on citizen rights aiming and protecting liberties and equality among individuals. The new Charter gave special attention to the consolidation of fundamental rights to ensure basic guarantees to people, providing a dignified life to the population (Miranda, 1993, p. 9-10). Therefore, we can say, that the Constitution expresses a set of political commitments and, as well, it is an expression of "how a community wishes to be governed" (Ewing, 1999, p. 112).

Those fundamental rights encompass social rights. They are mostly human rights, which were incorporated into positive Brazilian law. In Brazil's law system, these are rules of public order, imperative and inviolable, being indispensable requisites for the exercise of individual rights. Social rights reflect rights historically linked to social struggles for the recognition of better living conditions.

According to José Joaquim Gomes Canotilho, the economic, social, and cultural rights are programmatically defined. They layout tasks and purposes of the social state, as organisational norms attributing competence to the emanation of relevant measures, serving as institutional guarantees, obliging the State to protect certain institutions and adopt measures appropriate to its social value (Canotilho, 2008). Hereafter, we can say that social rights were provided in Brazil's Constitution by the so-called program norms, and these consist of provisions indicating the social ends to be achieved by the State, regarding the achievement of primary objectives outlined in the Constitution.

Additionally, those rights have, in our legal system, immediate effectiveness (at least, is what says the Constitution text). The Brazilian Constitution prescribes that the norms that define fundamental rights, freedoms and guarantees have direct applicability (Article 5, first paragraph of the Brazilian Constitution of 1988), but that simple statement of immediacy does not exclude the need for rigorous support of the presuppositions of this applicability.

By default, social rights are known as claims on one's resources in the terms of income, services, or employment. Special attention deserves the Article 6 of that Constitution, which prescribes that people have the social right of having education, healthcare, nourishment, a labour (Mantouvalou, 2013), a housing, public transportation, leisure, safety, social security, maternity protection, childhood protection and assistance to the defenceless.

About the pragmatic function of social rights, Daniel Wunder Hachem explains in his thesis that they can be understood as fundamental rights that have as an objective the guardianship of goods of economic, social, and cultural nature, essential for a dignified life. Those goods could be obtained by the individual also through a particular way if he had the financial conditions to purchase them once they were available on the market (Hachem, 2014, p. 509). It is also related to the notion of public services, once

(...) public services are activities of offering economic goods of a material nature, destined to the satisfaction of the relevant needs of human beings, linked to the guarantee and promotion of their dignity, which the State has considered too important to relegate to the fate of private initiative, with the fear that they would cease to be offered or become inaccessible to a portion of the population that needed them. In short, what the holder of the fundamental social right lacks is what the State through the public service has the duty to offer: economic goods (because useful, scarce and able to meet human needs), which can be commercialized in the market if the legal order thus authorize, essential to the realization of the dignity of the person (Hachem, 2014, p. 509-510, free translation).

Therefore, in Brazil's law system, citizens have the constitutional right to a minimum standard of civilized living, being the State obligation to respect and guarantee those fundamental social rights previously mentioned. It is imperative to mention here what the Preamble of the Constitution says regarding those social rights: the Democratic State was established to ensure them, and also individual freedoms, freedom itself, safety, welfare, development, equality, and justice as the supreme values of the fraternal and plural Brazilian society.

One of the priorities of the State is, therefore, the social development and the feasibility of the adequate elevation of the living conditions of the population. As foreseen in the Constitution we are analysing in this paper: social development is a fundamental objective of the Republic (Article 3 of the Brazilian Constitution of 1988).

Thus, we can say that the State must create material conditions to satisfy those fundamental social rights in their integrity, giving people opportunities and capacities. The State has the duty to do so whilst respecting the equality of the conditions created and giving people the freedom to choose the life they want to lead, protecting and expanding the possibilities that people have to make such a choice, the choice to live the life they value. As Daniel Wunder Hachem stated: the Brazilian Constitution recognize to each Brazilian citizen the fundamental right to effective administrative protection (Hachem, 2014, p. 9).

(b) Can Those Fundamental Social Rights Be Directly Translated to Amartya Sen's Capability Approach?

In Amartya Sen's approach of development as freedom, he explains that development is "a process of expansion of the real freedoms that people enjoy" (Sen, 2000, p. 3). For him, freedoms are the primary ends and the principal means of development (Sen, 2000, p. 10).

Considering the importance that freedom has, he says that it is primordial to understand the remarkable connection that bonds freedoms of different kinds with one another (Sen, 2000, p. 11). It is possible to make a distinction between substantive and instrumental freedoms. By substantive freedoms, he refers to the ultimate end of the development process; by instrumental freedoms, he relates to the means of the development process.

Regarding the interrelation between different freedoms, he says, freedoms of different kinds can strengthen one another. His freedom-centred approach of economics and of the process of development is an agent-oriented view, once he concludes that "with adequate social opportunities, individuals can effectively shape their own destiny and help each other" (Sen, 2000, p. 11).

Regarding social opportunities that individuals can effectively have in their lives, we can say that rights, under the CA, can be understood as entitlements to capabilities. Thus, fundamental social rights, for example, having the right to be healthy or to have access to education, can be seen as a grant to being able to actually have good health and been educated (capabilities). Therefore, regarding Amartya Sen's approach, the fundamental social rights as established in the Brazilian Constitution can be seen as also entitlements to capabilities.

When talking about rights which were guaranteed by the State, it places a view of abilities that people could enjoy in a kind of list of things that people ought to be able to do and to be. As Martha Nussbaum (2000, p. 100) already mentioned: "To say, "Here is a list of fundamental rights" is more rhetorically direct. It tells people right away that we are dealing with an especially urgent set of functions, backed up by a sense of the justified claim that all humans have to such things, by virtue of being human".

We can say that capabilities are the primary goals of policy. Thus, going further in the relation between capabilities and rights as means to achieve and expand them, we can state that rights also are goals of policies, while "helps us to lay extra emphasis on the important fact that the appropriate political goal is the ability of people to choose to function in certain ways, not simply their actual functionings" (Nussbaum, 2000, p. 101).

The Possibility of Protecting and Expanding Capabilities: the Fundamental Social Rights in the Brazilian Constitution of 1988

Once we brought Amartya Sen's approach to development of society, showing the importance that capabilities and freedom have, it is interesting to try to apply this knowledge in our society and in understanding the way it has been structured. As we begin to do so, some questionings usually pop up in our minds:

What are people able to do and to be? And are they really able to do or be these things, or are there impediments, evident or hidden, to their real and substantial freedom? Are they able to unfold themselves or are their lives, in significant respects, pinched and starved? What about their environment — material, social, and political? Has it helped them to develop their capacities to be active in important areas of life? How have the basic constitutional principles of a nation, and their interpretation, promoted or impeded people's abilities to function in some central areas of human life? Does the interpretation of constitutional entitlements yield real abilities to choose and act, or are the constitution's promises more like hollow verbal gestures? (Nussbaum, 2006, p. 5-6).

Having in hand the Brazilian Constitution of 1988, the question that arises is: does the Brazilian Constitution, in light of reaching development, ensure and expand capabilities by protecting fundamental social rights? Do these rights ensure people freedom to choose to live the life they value?

The view of freedom assumed by Amartya Sen involves both the processes that allow freedom of actions and decisions, and the real opportunities that people have, given their personal and social circumstances. For him, unfreedom "can arise either through inadequate processes ... or through inadequate opportunities that some people have for achieving what they minimally would like to achieve" (Sen, 2000, p. 17). He says that very many people across the world suffer from varieties of unfreedom, which usually are related to famines, little access to healthcare, to sanitary arrangements, to clean water, to functional education, or gainful employment, or economic and social security, and premature mortality. These are related also to the fact that "a great many people in different countries of the world are systematically denied political liberty and basic civil rights" (Sen, 2000, p. 15).

Notwithstanding, what we need to give proper attention here, once our work takes into consideration capabilities, is what Amartya Sen states about the expansion of capabilities: "These capabilities can be enhanced by public policy, but also, on the other side, the direction of public policy can be influenced by the effective use of participatory capabilities by the public" (Sen, 2000, p. 18).

It is essential not to miss one of his main ideas about development as freedom: freedoms are the main object and the primary means of development. This is why he states that "the objective of development relates to the valuation of the actual freedoms enjoyed by the people involved" (Sen, 2000, p. 53). Besides, the author also claims that individual capabilities crucially depend - amongst other things - on economic, social, and political arrangements. That is why the State, in making appropriate institutional arrangements, must take in consideration instrumental roles of distinct types of freedom, further than the foundational importance of the global freedom of individuals (Sen, 2000, p. 53).

Regarding his knowledge about substantive freedoms, they include elemental capabilities, including avoiding starvation, undernourishment, escapable morbidity and premature mortality, as well as the freedoms that are associated with being literate and numerate, enjoying political participation and uncensored speech and so on (Sen, 2000, p. 36).

For Amartya Sen, “development involves expansion of these and other basic freedoms. Development, in this view, is the process of expanding human freedoms, and the assessment of development has to be informed by this consideration” (Sen, 2000, p. 36).

Considering freedom as an essential and useful instrument of the development process and further analysing different types of freedom, which are interrelated and can contribute significantly to the promotion of each other, Amartya Sen brings five distinct types of instrumental freedoms: (i) political freedoms; (ii) economic facilities; (iii) social opportunities; (iv) transparency guarantees; (v) protective security (Sen, 2000, p. 10). Each of these aids in advancing the general capability of a person to live more freely and complement each other.

In the scope of the current work, it is critical to have in mind that “public policy to foster human capabilities and substantive freedoms in general can work through the promotion of these distinct but interrelated instrumental freedoms” (Sen, 2000, p. 10). All these instrumental freedoms are interconnected, having all respective roles in the promotion of overall freedoms of people. Fundamental social rights are interrelated with social opportunities and protective security instrumental freedoms. This is because, social opportunities “refer to the arrangements that society makes for education, health-care and so on, which influence the individual’s substantive freedom to live better” and because protective security “is needed to provide a social safety net for preventing the affected population from being reduced to abject misery, and in some cases even starvation and death” (Sen, 2000, p. 39-40).

Amartya Sen affirms that while development analysis must be concerned with the objectives and aims of the importance of this instrumental freedom, it must also be involved with the “empirical linkages that tie the distinct types of freedom together, strengthening their joint importance” (Sen, 2000, p. 38). These interconnections influence the process of development:

Corresponding to multiple interconnected freedoms, there is a need to develop and support a plurality of institutions, including democratic systems, legal mechanisms, market structures, educational and health provisions, media and other communication facilities and so on. The institutions can incorporate private initiatives as well as public arrangements and also more mixed structures, such as nongovernmental organizations and cooperative entities (Sen, 2000, p. 53).

Facing development as freedom enables people to be actively involved in choosing their own destiny. State and society must “have extensive roles in strengthening and safeguarding human capabilities” (Sen, 2000, p. 53).

But how do rights fit in this view? As Martha Nussbaum clearly states:

Capabilities, I would argue, are very closely linked to rights, but the language of capabilities gives important precision and supplementation to the language of rights. ... Regarding fundamental rights, I would argue that the best way of thinking about what it is to secure them to people is to think in terms of capabilities. ... In other words, to secure a right to citizens in these areas is to put them in a position of capability to

function in that area. To the extent that rights are used in defining social justice, we should not grant that the society is just unless the capabilities have been effectively achieved (Nussbaum, 2003, p. 37).

How we noticed, to secure a right to citizens in a determinate area in terms of capabilities is to grant people the capability to function in that area. This does not mean that people do not have that determined capability to function regardless the right that has been secured by a normative text.

However, we have to consider the State that grants and guarantees fundamental social rights to citizens to protect and expand their capacities, yet, under the assumption that the fundamental guarantees are actually in the hands of citizens. Therefore, rights (and consequently, fundamental social rights) can be means to capabilities only if individuals really can enjoy such rights and if indeed such rights can give people opportunities to have the life they want.

Followingly, it can be accented that the development as expansion of people capabilities and freedoms consists of the removal of types of unfreedoms that leave individuals with little choice and little opportunity of exercising their reasoned agency. As Amartya Sen stated, the “removal of substantial unfreedoms, ..., is constitutive of development” (Sen, 2000, p. xii), and once again, for this reason, conceding fundamental social rights (as the Brazilian Constitution does in an affirmatively way) could be a mean of protecting and expanding people’s freedom and capability.

Furthermore, we can say that expanding capabilities is the appropriate political goal. “Government ought to give people a full and meaningful choice; at that point, the decision whether to take up a given opportunity must be their own” (Nussbaum, 2006, p. 12).

It is possible to see rights also as a combination of capabilities. Just as the right to political participation and the right of free speech, fundamental social rights are all best thought of as capacities to function. In other words, the State, on securing rights to citizens puts them in a position of combined capability to function in the area related to that right.

Once the goal of the CA can be described as people being able to achieve those things that they have reason to value and that the list of capabilities can be seen as a long list of opportunities for functionings, it is possible to relate capabilities to granted fundamental social rights in a way that the latter can be keys to the former. For instance, the fundamental social right to have a proper public education has great importance in enhancing people’s lives. We can say that a developed society is one society that oppressed illiteracy and conclude that the capability to read and to write should be a set standard for everyone. The capability to read and to write, therefore, can be very empowering:

In short, on the one hand, education is an important factor in broadening human capabilities, which include human capacities. On the other hand, human capabilities play a role in influencing both intrinsic and instrumental values. Therefore, it seems appropriate to say that education plays a role in influencing both intrinsic and instrumental values. What the concept of human capabilities has contributed to this discussion is to clarify the process of influencing intrinsic and instrumental values

through education. Clarifying this process helps to show education as concerned with both intrinsic and instrumental value (Saito, 2003, p. 25).

Therefore, it is possible to notice the way that rights, executed through public policies, could have an intrinsic and instrumental relation to create and expand capabilities. That is why, assuming the CA, public policies can be judged to be successful or not by enhancing people's capabilities.

Still, regarding the CA, education as a right is a moral reason upon others to fulfil this right; as a capability, education is intrinsically valuable as an end in itself. It goes further than other approaches and clarifies the reasons why education is important. When talking about the expansion of freedoms that people value, education is the core to this process (EFA Global Monitoring Report, 2002, p. 33).

The problem in analysing fundamental social rights granted in the Brazilian Constitution is that they are not fully implemented in society, and thus, not fully effective. As Daniel Wunger Hachem explains in his thesis, the Brazilian legal system did not fully incorporate the central categories of contemporary dogmatic of fundamental social rights, which relativize axioms, namely: the immediate effective applicability of norms defining fundamental rights; the double dimension of these fundamental rights (subjective and objective); and its multifunctionality (Hachem, 2014, p. 4). As so, we cannot say that they are, necessary, expanding capabilities, once they are not, *de facto*, fully granted.

The integral realization of fundamental social rights depends more on them only a constitutional provision (even more than a clause of immediate application – Article 5, first paragraph of the Brazilian Constitution). It depends on the creation of organisations, procedures, and efficient public policies by the State that allows in a universalized way the enjoyment of these rights by the citizens (without them being forced to resort to the Judiciary to benefit from such rights). It is within the objective dimension of the fundamental social rights that State obligation of implementation, as Daniel Wunger Hachem specifies (Hachem, 2014, p. 245).

Another thing that we observe in Brazilian society is that the mechanisms of implementation of fundamental social rights are not effective. The Judicial Power has taken over the responsibility in granting those rights to individuals, once the public policies made by the Legislative and Executive Powers are, in some cases, ineffective (*e.g.*, we can cite some cases interesting Brazilian judicial cases: ADPF 45 MC/DF, RE 2712868/RS, RE 367432/PR AgR, RE 410715/SP AgR, RE 4369966/SP, RE 595595/SC AgR, RE 607381/SC, etc.) The full implementation of fundamental social rights cannot be realized integrally by the Judiciary. That implementation must be done through the entire three powers of government and, we can say, most part of it should be done through public policies.

The Brazilian Constitution of 1988 has clear conception of development in its text: the conception of development employed in it, in addition to the actual concession of fundamental social rights, is linked to the value of equality. Therefore, if we take into account the Brazilian constitutional text, in addition to being related to the granting of freedoms, development is linked to the idea of social equality.

The central point of the idea of sustained development is linked to the idea of reducing inequalities. It seeks the egalitarian social development and the extension of the duties of State in relation to the universalized promotion of fundamental social rights (Hachem, 2014, p. 117). It is for this reason that we leave here our criticism against the omission of the Brazilian Legislative and the Executive and its position regarding the development and application of public policies that are efficient in practice and that meet the social desires of the population in general. We believe that effective public policies, which attend constitutionally guaranteed fundamental social rights, are one of the keys to the expansion of capabilities (they can preserve some capabilities that demand attention of the State and all the society due to its relevance: like freedom to be well nourished, to have where to live, to live disease free lives, to be educated, to be able to move around without suffering any kind of violence, to participate in public life, to have access to information, to be assisted when needed etc). Those fundamental social rights protect some minimum and basics capabilities that people have.

At the same time, it is curious: even when, for some reason, the State does not regard to its duty to preserve those fundamental social rights, and the capabilities that they protect or expand, and those rights are conceded through the Judiciary, we can say that capabilities are protected or expanded in some way. For instance, it is common to see people requesting access to a particular life-critical medicine from the State to the Judiciary, since it has not been granted by the public health system for some reason. Once the drug is granted by the Judiciary, whose decision is based on the right to health and human dignity, the individual has increased his freedom of live disease-free live, to be healthy and so on.

The same analysis could be done to other fundamental social rights and capabilities, for example, the individual who does not have access to public education and gets it through the Judiciary. That individual will have his freedom to be educated guaranteed.

This is because, in promoting people's well-being, the State must take into consideration the entitlement of each citizen to a decent life. Fundamental social rights are, in the first place, individual rights to have access to a decent life. The notion of 'general welfare' is related to the welfare of all individual citizens. The notion of fundamental social rights, as already exposed in this work, can be taken into subjective and objective analysis (both are important when talking about expanding capabilities).

Moreover, the subjective notion of development concerns the implementation of material conditions of a dignified life, allowing each citizen the free development of his personality (Fachin, 2010, p. 180;193). This is related to the idea of bringing fundamental social rights in the Constitution. And it is linked with expanding capabilities in a form that each person can be able to achieve what they value.

Another thing that must be pointed here is that the degree of satisfaction of these fundamental social rights immediately reflects on human development.

Nonetheless, we must take in consideration that rights in the CA, even though they are seen as entitlements to capabilities and have important roles in public discourse, they are unsatisfactory features. And being so, we must ask: If we have capabilities, do we also need

rights? If the answer is yes, why? The answer to that question is thought by Martha Nussbaum:

The language of rights still plays, I believe, four important roles in public discourse, despite its unsatisfactory features. First, when used as in the sentence “A has a right to have the basic political liberties secured to her by her government,” it reminds us that people have justified and urgent claims to certain types of urgent treatment, no matter what the world around them has done about that. It imports the idea of an urgent claim based upon justice.

(...)

Rights language also has value because of the emphasis it places on people’s choice and autonomy. The language of capabilities, as both Sen and I employ it, is designed to leave room for choice, and to communicate the idea that there is a big difference between pushing people into functioning in ways you consider valuable and leaving the choice up to them (Nussbaum, 2003, p. 39-40).

Conclusion

As observed in this work, the CA can be used for different purposes, like poverty evaluation, assessment of human rights, or human development.

Fundamental social rights can be means to expanding capabilities once they are fully implemented in society. Public reasoning and discussion are important and, in some way, necessary for selecting relevant capabilities and weighing them against each other in each context (Sen, 2004, p. 77-80); some, are granted through rights, just like the Brazilian Constitution does to the fundamental social rights that are listed in its text. Consequently, the guarantee of fundamental social rights, and its importance as entitlements to capabilities cannot be left in the hands of only the Judiciary Power, it needs to be observed by all the State Powers, especially in making public policies.

Nonetheless, we must consider that rights in the CA, even though they are entitlements to capabilities and have essential roles in public discourse, are unsatisfactory features. The CA takes much more into account. We can also argue that the CA has a further advantage over rights, once “it is not strongly linked to one particular cultural and historical tradition”, as rights are believed to be (Nussbaum, 2003, p. 39).

Nevertheless, the idea of development, as well as the implementation of fundamental social rights aiming the creation and expansion of capabilities, must integrate the agenda of the State in various forms, either by the intervention of the State in the economic sphere, by the granting of public policies or by the realization of public services. Protecting and expanding capabilities by ensuring fundamental social rights can be a way to effectively transform the socioeconomic structures of the Brazilian reality.

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