Chapter 13

The Capabilities Approach and the Concepts of Self-Determination, Legal Competence and Human Dignity in Social Services for Older People

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13.1 Introduction

The example at the beginning of this chapter illustrates some of the complexities. According to Swedish law, it is not within the power of a legal representative to apply for special housing for a person who does not want it, even when the person's need could motivate such an application. Legal representation in the form of mentorship or administratorship in Sweden should not be used for compulsory power when it comes to questions of social services for older people and, for example, the need for special housing (Hovrätten över Skåne och Blekinge, mål nr ÖÅ 1368-07). Hence, one could argue that there is a tension between the right to self-determination and human dignity within the Swedish legal system.

Sven is 86 years old and lives alone in his apartment. He is suffering from incipient dementia and has home help services according to the Swedish Social Services Act. Sven doesn't shower for weeks at a time and the smell becomes unbearable. Some days he refuses to take his medicine. As his home conditions deteriorate, the home help staff draw attention to Sven's need for special housing. But Sven doesn't want to move, he is happy in his apartment and makes it clear to the social services officer that he will not apply for special housing. A few months pass and Sven is assigned a mentor who is supposed to support him in his decision-making. Sven is persistent, he does not want to apply for special housing. Since the need for special housing is apparent, the mentor decides to fill in an application on Sven's behalf.

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The law regulates most spheres of life, private as well as public, and applies to everyone. The law also sets the preconditions for people in their everyday lives. The starting point is that every human being has the competence to determine what to do with their life. But what happens when a person is not capable of doing so? The law is anchored in a belief in human dignity and solidarity, which obligates society to take care of people who are not able to take care of themselves. The law has to balance between these values, and the outcome of this balancing act is implemented with the help of institutions and resources established by the authorities or the political system within a society. How this system works and guarantees certain values, such as self-determination and human dignity, is an issue for legal scholarship. To grow old, or to age, is a condition that most people experience. Some of them are or will become dependent on others in their daily lives. How well the system, constructed in law, will work at this point is reflected upon here.

Ageing today is increasingly framed as successful (e.g. Örebro University n.d.; AgeCap at University of Gothenburg n.d.) and there is, at least in a Nordic context, an intense debate about older people's right to continue working based on better health in later life and longer life expectancy. Capability, meaning the individual's ability to perform actions in order to reach goals he or she has reason to value, as a concept and as a normative framework (the Capability or Capabilities approach) used to promote individuals' capability to convert available resources into desired functions – for example enjoying good health, being able to socially integrate and participate, and to maintain independence – can be seen in this context. The focus seems to be on the individual's ability (capability) but, as we will elaborate further in this chapter, supportive structures are equally necessary.

At the same time, older people are not only identified as active agents. They are also addressed as being in need of specific protection and, at least potentially, as vulnerable, in international and national governmental policies and legislation (see e.g. The AGE Platform Europe n.d.). Old age and stereotypical prejudices about age are also addressed as problems (Butler, 1969; Abramsson et al., 2017), not least when it comes to participation in the labour market (see e.g. The European Union Agency for Fundamental Rights n.d.). Since the beginning of the twenty-first century, age has been identified as one of the grounds protected by law against discrimination, and the protection of older people is addressed in international and national policies and legal documents, such as the United Nations Principles for Older Persons, adopted in 1991, the Recommendation (2014)02 on the promotion of human rights of older persons by the Council of Europe Parliamentary Assembly, and adopted by the Committee of Ministers on 19 February 2014. There is also a proposed United Nation Convention on the Rights of Older Persons, promoted by the Open-Ended Working Group on Ageing that was established by the General Assembly in 2010. This convention is based on other instruments with a focus on specific groups, such as the Convention on the Rights of Persons with Disabilities (CRPD) ratified by Sweden in 2008. CRPD is also relevant when it comes to older people, because disabilities increase with age.

The tension between increased capability and the need for protection among older people is also of interest regarding the specific issue of social services for older people in Sweden. Social services in Sweden aim to meet individual needs

among people who are particularly vulnerable or experiencing difficulties. The objectives of the government policy are to assist older people:

to be able to lead active lives and have influence in society and their own everyday lives, for them to be able to grow old in security and retain their independence, for them to be met with respect and to have access to good health and social services. (Prop., 2018/19:1 Utgiftsområde 9, 16)

The municipalities, which are responsible for providing social services to older people, should, according to the law, focus on creating conditions that ensure older people can lead a life of dignity and well-being.

Social services are based on the two pillars of self-determination and protection from harm (human dignity). Self-determination, a concept close to capability, seems to require what in legal terms is constructed as two separate concepts: ‘to have an ability’ and to have ‘legal competence’. Everyone has a (potential) ability, but competence can be limited and the most obvious group having restricted competence is children. People with limited, or even no, ability to make decisions nevertheless have the right to self-determination. Consequently, self-determination cannot be synonymous with individual autonomy or the capability to make decisions. Self-determination is a fiction that is sometimes performed by someone other than the person her/himself, a representative (rules on legal representation are included in The Children and Parents Code as well as in the Guardianship Ordinance).

Self-determination in the context of social services for older people (according to the Social Services Act) means that everyone has the right to decide whether they need social services and, if so, in what way. At the same time, there is an obligation for the municipalities to ensure human dignity for everyone and a life that is in accordance with fundamental values, such as a reasonable standard of living, irrespective of the person’s own wishes. This obligation could, at least hypothetically, be in conflict with the individual person’s self-determination. What happens if a person does not have the physical or cognitive ability to make decisions, or if a person decides to live in a way that is not in accordance with a reasonable standard of living? The legal system provides certain tools to handle these situations. If a person does not have the ability to make a decision, she or he may be represented by someone else, through some kind of legal representation. A situation in which a person makes decisions that are contradictory to human dignity, or to some other fundamental value, is more complicated and quite controversial at a time in which self-determination and individual autonomy are increasingly emphasised.

In this chapter, we will address the tensions between self-determination on the one hand, and human dignity on the other, within the Swedish legal system regarding social services for older people, with help from the capabilities approach.¹ The

¹The capability approach, formulated by Amartya Sen as an alternative approach to welfare economics and further elaborated by Martha C. Nussbaum (who extended the capability concept to the plural), has been predominant as a paradigm for policy debate around human development. A range of ideas that were previously excluded from (or inadequately formulated in) traditional approaches (measured by, e.g., GDP) to the economics of welfare were brought together in this approach. The capabilities approach is sensitive to inequalities and lack of resources for a part of the population, and meets the need to acknowledge distribution and, additionally, to improve the levels of quality of life (Nussbaum, 2013).

increased focus on self-determination, which has been around for some years, based on philosophical presumptions of individual autonomy and free will, together with a quest to enable increased capability for older people, might, in the context of a dismantled welfare state, turn out to be a double-edged sword, leaving the individual with self-determination but no (or insufficient) available social services to decide about. The capabilities approach, which is influential in the global human development agenda for measuring levels of quality of life and address human dignity, resonates with the responsibilities of the Nordic welfare state. It emphasises the responsibility of the State (or a similar subject) and can be used to analyse the impact of legal and political obligations imposed upon nation-states for the specific group of older persons, and to balance the somewhat one-sided quest for individual autonomy.

Even though the core focus of the capabilities approach is on the individual person's ability (or capability) to make decisions, in its broader version² it implies the importance of a supportive societal system or structure that enables the realisation of self-determination and individual ability, including for individuals who are not fully capable of making arrangements for themselves. The most important aspects of the broader approach are the focus on human dignity (in addition to enhancing individual freedom), normativity (a set of fundamental capabilities is identified), and the central role of the nation-state (as the political subject responsible for the achievement of minimum thresholds for all capabilities). These three aspects are all of specific relevance in the Swedish legal context when it comes to social services for older people.

13.2 The Rights to Self-determination and Protection from Harm in Social Services for Older People

Social services for older people, as for everyone, are based on the two pillars of self-determination and protection from harm (human dignity). In this matter, the relevant Swedish legislation (Social Services Act, Social Services Ordinance, Children and Parents Code and Guardianship Ordinance) is in line with EU and international human rights documents, such as the United Nations Principles for Older Persons, adopted in 1991, the Recommendation (2014)02 on the promotion of human rights of older persons of the Council of Europe Parliamentary Assembly, and the Convention on the Rights of Persons with Disabilities (CRPD), as well as with the proposed Convention on the Rights of Older Persons. Nevertheless, the two pillars might sometimes be contradictory. Protection from harm can sometimes restrict an individual's self-determination.

²Here represented by Martha C. Nussbaum (2006), but even more elaborated by e.g. Jonathan Wolff and Avner de-Shalit (2007).

13.2.1 *Self-Determination and Legal Competence*

The right to self-determination as a legal prerequisite for social services is designed to enhance individual freedom, in line with what is captured through the capability concept, but this is upon the condition that a person has the ability to perform actions in order to reach goals he or she has reason to value. Only focusing on the individual right to self-determination can obscure the dilemmas that arise when there is only limited ability. The capability concept, especially in the Capabilities approach context, carries with it a potential to balance individual self-determination and its limitations when so required in the name of concern for a person's dignity. What is also interesting is that the legal concepts corresponding to capability can be helpful in reaching a more nuanced perception of capability and also of the concept of self-determination.

Capability, or a person's ability to perform actions, is elaborated in a legal context in terms of two aspects. Every person is a legal subject who has 'legal capacity' (the Swedish legal term is *rättskapacitet*), meaning the potential capacity to possess rights and duties that can be upheld by law. Legal capacity does not in and of itself entail that a person also has the authority to determine something or express the determination, or, in legal terms, has 'legal competence' (*rättshandlingsförmåga*). To have legal competence means having the ability to act, to make decisions and agreements, and to litigate, and with such ability there follow legal consequences. Legal competence is described as the essential issue in balancing the right to autonomy and decision-making with the right to protection from harm (Mäki-Petäjä-Leinonen & Juva, 2015; Odlöw, 2005; Fridström Montoya, 2015).

Legal capacity can never be limited, in contrast to legal competence, which can be limited due to certain reasons. If a person's ability is limited, and if she has a need for legal representation, that person may be legally represented by someone else.³ Old age as such is not a reason for limitations on a person's legal competence, but the consideration forming the basis for the law is that older people are considered to be at risk of suffering from physical or mental disorders that could motivate a query as to whether a person understands the decision at hand. A significant proportion of individuals with some sort of legal representation are older people suffering from neurocognitive disorders due to a dementia disease, such as Alzheimer's disease (SOU, 2004:112, p. 421). The risk of dementia increases significantly with age (Ds, 2003:47, p. 39).

³Rules regarding limitations on legal competence are expressed in the Swedish Children and Parents Code, not only for underaged persons represented by a guardian and/or a custodian (often the same person/-s), but also for adults. The individual's opinion about the selection of a representative in mentorships and administratorships shall be a determining factor for the appointing authority, if the suggested person is suitable for the assignment and accepts the appointment, Children and Parents Code, ch. 11, para. 12. There is also a possibility for a person to appoint a representative beforehand by issuing a continuing power of attorney (CPA) (Swedish: *Framtidsfullmakt*), see lag (2017:310) om framtidsfullmakter (Continuing Powers of Attorney Act), prop. 2016/17:30; Ds 2014:16; SOU, 2004:112.

How a person's ability or inability to make decisions is assessed, and how a limited ability is handled, varies between jurisdictions. Certain legal assumptions and considerations at the structural level establish potential limitations at the individual level. One way, as in the Swedish context, can be to establish legal representation for the person. Legal representation can be established in two forms, 'mentorship' (godmanskap) and 'administratorship' (förvaltarskap).

In Sweden, legal representation by a mentor is often described as a form of 'supported decision-making' rather than 'substituted decision-making'. Supported decision-making does not limit a person's decision-making competence⁴ (i.e. the formal power to perform legal actions), while substituted decision-making does allow for significant removals of a person's right to perform legally binding acts of her own. According to the Committee on the Convention on the Rights of Persons with Disabilities (CRPD), supported decision-making is in line with a human-rights-based model of disability (UN/CPRD/C/GC/1, section I, para. 3).

Even though the establishment of legal representation is always, to a certain degree, a limitation on a person's legal competence and hence infringes their self-determination and autonomy, it is not as interventional as 'guardianship', which was used in Sweden until 1989. Sweden was one of the first countries to introduce supported decision-making, in a two-step reform, in 1975 (prop., 1974:142) and 1989 (prop., 1987/88:124). Mentorship, introduced in 1975, is a voluntary measure, hence the person concerned must give consent if this is at all possible. Administratorship, introduced in 1989 as a replacement for the former guardianship, is a more interventional arrangement and denotes certain limitations on the person's legal competence in specific, clearly identified respects.

The requirements for establishing a mentorship are that the individual: i) due to a disease, a mental disorder, a weakened state of health or a similar condition (medical requirement), ii) needs help to manage her private and/or financial affairs (functional requirement), iii) that this need cannot be met by a less restrictive measure, e.g. by assistance from relatives, granting a power of attorney or likewise (principle of minimum intervention) and iv) that the individual consents to the establishment of the mentorship (Children and Parents Code, chapter 11, para. 4).

The establishment of a mentorship does not in and of itself limit the person's decision-making competence. The mentor is considered primarily to be an assistant to the person (principal) and consequently a supportive decision-maker (prop., 1987/88:124, pp. 141f). The mentor can represent the principal in all matters covered by the assignment, provided that there is consent from the principal. However, if the decision concerns the upholding of the household, or if the principal is unable to communicate a reasonably informed opinion⁵, the mentor does not need consent

⁴Legal competence can be further divided into 'decision-making competence' (rättshandlingsbehörighet) and 'decision-making ability' (rättslig beslutsförmåga) (Odlöv, 2005; Fridström Montoya, 2015). Fridström Montoya uses the terms saklig rättshandlingsförmåga and personlig rättshandlingsförmåga instead of rättshandlingsbehörighet and rättslig beslutsförmåga.

⁵If they are incapable of expressing any view whatsoever or, although capable of speaking and answering, clearly lack sufficient comprehension of the matter.

in order to act on their behalf. In the first case, the mentor is considered to have presumed consent. In the latter case, consent is not even needed. The mentor is not legally obliged to actively involve the principal in the decision-making process. Therefore, despite the legally constructed role of the mentor as an assistant, and despite the formal requirement of consent from the principal, it happens that in practice a mentor can misuse the role and take full control over the principal's affairs, especially in relation to financial matters (Giertz, 2018).

Administratorship is a protective measure that is taken if and when there are grave concerns regarding the individual's ability to represent herself, and if they cannot be sufficiently resolved by a mentorship. Administratorship entails the limitation of a person's legal competence, and as such constitutes substitute decision-making, although only in specified matters and to meet the individual's specific needs. Some matters can never be limited, e.g. the right to vote. This specific issue was an essential argument against plenary guardianship for adults (Odlöw, 2005). The requirements are the same as in the case of appointing a mentor, except for the functional requirement. In this case, the court has to ensure that the person concerned is not only in need of help but in fact is also incapable of managing her own financial and/or personal affairs. With regard to the principle of minimum intervention, i.e. to intervene as little as possible, the legislation explicitly states that the court is prevented from appointing an administrator if it is sufficient to appoint a mentor, or if the individual's needs can be provided for in a less restrictive way.

13.2.2 Self-Determination and Human Dignity

The responsibility that rests on the municipalities when it comes to social services for older people is twofold. The municipalities shall enable self-determination about decisions concerning social services⁶, and also create conditions that ensure older people can live a life of dignity and well-being or, in other words, enjoy human dignity. Self-determination as a prerequisite for legal decisions, meaning that a person must have legal competence, is not always possible, as explained in the section above. Self-determination is therefore, in practice, promoted as far as possible.

Self-determination and individual freedom to live your life as you wish can, however, conflict with fundamental values such as a reasonable standard of living, or a life lived in human dignity and well-being. When an older person chooses not to apply for social services or is reluctant to receive such services, and as a consequence of such decisions lives in a way that is not considered decent or reasonable, it is relevant to consider whether that person is capable of making informed decisions about social services. At what level should or could the individual's decision not to receive social services be neglected and replaced with a responsibility for the municipality to secure that the person achieves some level of dignity? Where should

⁶Social Services Act, Ch. 1, section 1.

the boundary between self-determination and individual freedom and the responsibility of the state be drawn? The Social Services Act gives no compulsory power to the municipalities. Older people have the freedom not to apply for or receive social services, according to the Social Services Act. Should fundamental values, such as a reasonable standard of living, human dignity and well-being, be prioritised in cases when self-determination and individual freedom lead to non-satisfactory living conditions? Since the Social Services Act is based on self-determination, one could argue that the legal answer is simple, the act gives no compulsory powers to the municipalities. However, at some point there may be a need to protect a person from his/her own decision-making. In practice, some people might be unable to understand the meaning and/or consequences of decision-making or non-decision-making that runs contrary to their own interests or well-being.

Social services officers sometimes have difficulties in bringing about certain measures that they deem necessary in order to ensure that a person is given the opportunity to live a life that is in accordance with the fundamental values of society, such as human dignity and maintaining a reasonable standard of living (see e.g. the survey conducted by the Inquiry on Guardians and Deputies for Adults, described in the government official report SOU, 2004:112, p. 702). A crucial question here is, of course: what does it mean to 'live a life that is in accordance with the fundamental values of society'? Since there are no objective criteria for how to assess whether these fundamental values are being met in a specific case, the assessment will depend on the views expressed by the social services officers, and these might differ from the view of the person concerned.

The municipalities have an obligation to ensure fundamental values for everyone, such as a reasonable standard of living. An older person, according to the Social Services Act (Ch. 4 section 1), has a legal right to social services, for example through a home help service or special housing, if the person is unable to satisfy his/her needs by himself/herself and these needs cannot be satisfied through other means. Furthermore, the need for a home help service or special housing must be considered necessary to ensure the individual has a reasonable standard of living. A reasonable standard of living, and a life lived in dignity and well-being can therefore, from a legal point of view, be described as fundamental values and constitute certain aspects of life that older people should be guaranteed through, or with the help of, the Social Services Act.

13.2.3 Self-Determination with the Help of a Legal Representative

Since the Social Services Act is based on self-determination, social services need an application and consent from the person concerned in order to grant him/her social services. When a person lacks the ability to make decisions about social services or needs to be protected from his/her own decision-making because it is contrary to

their interests or well-being, the question of legal representation is sometimes raised. If a person may need some kind of legal representation (Social Services Ordinance, Ch. 5, para. 3), social services are obliged to notify the Chief Guardian, i.e. the municipal authority responsible for the supervision of mentors and administrators. If the Chief Guardian concurs with the social services' assessment, the Chief Guardian in turn is obliged to apply to the district court for the appointment of a mentor or an administrator (Guardianship Ordinance, Para. 5). Which of these representatives is appropriate depends on the nature of the person's needs and her ability to make decisions about personal or financial matters, as pointed out above (Children and Parents Code, chapter 11, para. 4 and 7). The district court then decides whether the prerequisites for appointing a legal representative have been met and, if so, appoints someone to be a mentor or an administrator for that person. The mentor/administrator then has the power to apply for, or consent to, a measure that requires self-determination. The mentor/administrator is given the power to make legally binding decisions on behalf of her ward; hence, the mentor/administrator assumes the role of the agent aspect of the person as a legal subject (Odlöw, 2005; Fridström Montoya, 2015, 2017).

One question that arises is whether legal representation through a mentor or an administrator is equivalent to self-determination for the individual who is being represented. It could be argued that the legal system, through its rules regarding legal representation, offers a method for circumventing rules that express self-determination as a fundamental legal value. Furthermore, the legal system constitutes a view on vulnerable adults that needs to be discussed: the identification of the mentor/administrator as being, in the legal sense, the person whom she represents. The fact that a person appointed by a public authority, due to a request by another public authority (the municipality), can assume her principal's legal persona and by virtue of that power apply for or consent to social assistance that the individual themselves might explicitly reject, gives reason to question whether the criterion of self-determination is actually being met. It could be argued that this is a legal fiction that creates a chimera of self-determination, when in fact it is, or at least can be regarded as, an indirect compulsory power.

To sum up, one could argue that the legal system in Sweden does not deal with the tension of self-determination and limitations on legal competence to a sufficient extent. This is also what the CRPD Committee has expressed in its opinion specifically regarding the measure of administratorship (CRPD/C/SWE/CO/1⁷). Hence, it can be argued that the Swedish model is in fact not one of supported decision-making but rather its opposite, i.e. a substitute decision-making model. The claimed self-determination is in fact constructed and fictional.

⁷The committee recommends that 'the State party take immediate steps to replace substituted decision-making with supported decision-making and provide a wide range of measures which respect the person's autonomy, will and preferences and are in full conformity with article 12 of the Convention, including with respect to the individual's right, in his or her own capacity, to give and withdraw informed consent for medical treatment, to have access to justice, to vote, to marry and to work.' (CRPD/C/SWE/CO/1, section IIIB, para. 34)

13.3 The Capabilities Approach and the Tension Between Individual Self-Determination and State Responsibility to Ensure Human Dignity

The right to personal autonomy is recognised in law as a basic right, and the principle of respecting individual autonomy, including the freedom to make one's own choices, is expressed in all UN Human Rights Conventions, including the CRPD (Art. 3), which protects and promotes the rights and dignity of persons with disabilities. Even though some older people are disabled, this is not the case for all, or even the majority. However, in an international human rights context, older people are increasingly addressed as vulnerable and subjected to ageism, i.e. discrimination based on age. These concerns are also expressed in a resolution that was adopted by the United Nations General Assembly in October 2010 (A/RES/65/182), establishing the Open-Ended Working Group on Ageing for the purpose of strengthening the Human Rights of Older Persons (OEWGA), and in the additional resolution adopted in 2012 in the context of discussions regarding a Convention on the Rights of Older Persons (A/RES/67/139). The purpose of such an international legal instrument, supported by, among others, AGE Platform Europe, is to promote and protect the rights and dignity of older people, and also to stipulate that older people in society ought to have independence, the ability to participate in society, access to social services and healthcare, and be entitled to self-fulfilment and the full dignity of life, among other rights. As we have shown, individual autonomy is a value that is also expressed in Swedish legal rules concerning social assistance for older persons. Individual autonomy, or self-determination, however, is more complicated. Not every person has the cognitive ability to make decisions, and what is more, what if a person makes decisions that conflict with a sense of human dignity and care for others?

The quest for specific human rights for older people can be understood as a general trend in which individual rights and autonomy are strengthened. This might be understood as the promotion of freedom of will and an obstacle to interfering in individuals' lives. On the other hand, it might also be understood as acknowledging that structures enabling individuals to achieve individual rights and autonomy are required. There are reasons to believe that a human rights document is not a sufficient structure. Individual rights are not enough.

The capabilities approach in its broader version emphasises human dignity rather than enhancing individual freedom at an individual level (Nussbaum, 2009; Gluchman, 2019). The focus on human dignity that is formulated as an objective to live in dignity and to have a feeling of wellbeing, as implemented in the Swedish Social Services Act of 2010, also corresponds to the wellbeing objective of value for older people that has been agreed upon internationally. The goals of being able to live in dignity and have a feeling of wellbeing in the Swedish context were explicitly intended to clarify the fundamental, normative and ethical values for elderly

care⁸ and were construed as a means of steering the municipalities and their management of the social services (Wennberg, 2017: 185), and not as an infringement of individuals' self-determination. However, at some point, could the value of human dignity mean that the choices of an individual can be ignored?

The capabilities approach is clearly normative and identifies a set of fundamental capabilities. To normatively identify fundamental capabilities and not only rely, as Sen (year) does, upon individual freedom, corresponds to the Nordic welfare state context, according to which certain aspects of life are identified as aspects of a decent life. Nussbaum points out ten core capabilities that are essential for people to be able to do and be what they like. These are also familiar in a Swedish context as parts of the welfare system. According to Nussbaum (2000), a political order can only be considered decent if it secures at least a threshold level of every one of these capabilities for all inhabitants. The fundamental capabilities are (Nussbaum, 2000);

- life
- bodily health
- bodily integrity
- senses, imagination and thought
- emotions
- practical reason
- affiliation
- care of and coexistence with other species
- play
- control over one's environment in two aspects, politics and the material

This theory clearly delineates the state's responsibility to build a supportive structure. It requires active measures to build such a societal structure. The welfare system based on tax revenues is one method of resource allocation, to guarantee a certain minimum level of living conditions. The act of adopting UN conventions, such as the CPRD or the proposed Convention on the Rights of Older Persons, which appoint the state as responsible for promoting, protecting and ensuring the full and equal enjoyment of all human rights and fundamental freedoms, is in itself not a guarantee of active measures. However, in a context in which the welfare system is being challenged, a combination of a human-rights based argument with an argument based on redistribution could be strengthened by the capabilities approach, which highlights an active state. A welfare system that ensures a minimum level of human dignity requires a combination of individual rights and corresponding societal responsibilities.

Nussbaum (2013) gives the nation-state a central role as the responsible political subject for the achievement of a minimum threshold for all capabilities. These core capabilities should be supported by all democracies. To give the nation-state this central role is, according to Nussbaum, not only a handy starting point, it also has a

⁸ 'Elderly care' is the official English term used in the Government Policy, see the Government Offices of Sweden webpage, <https://www.government.se/articles/2017/02/security-and-presence-in-elderly-care/>, accessed 04-04-2019.

moral meaning. The nation-state is a system of principles and laws which, ultimately, rely upon the people. They are important expressions of the autonomy of the people, i.e., their right to live under laws they have chosen themselves. The capabilities approach, especially in its respect for practical reasoning and political self-determination, assigns the nation-state a central role and aspires to a world in which nation-states with an acceptable level of democracy enjoy protection of their national sovereignty. In such a world, nation-states would not risk losing their power to multinational companies and global financial networks with minimal, if any, accountability. This, according to Nussbaum, is a significant risk today. Whether the nation-state is the only unit that embodies the right kind of accountability is an empirical question, she adds, but so far, no other unit has taken sufficient responsibility to guarantee the minimum level of core capabilities to all inhabitants.

To sum up, the capabilities approach might be of help in an argument that stresses the importance of balancing the, somewhat contradictory, concepts of legal competence, self-determination and human dignity in order to promote the capabilities of older people. Capability, according to such a balanced understanding, is not only a matter of individual ability to make decisions (or not), self-determination and autonomy. The global pandemic of Covid-19 in 2020 has certainly shown that there is a delicate balance to be found between care for and protection of on the one hand, and individual self-autonomy on the other hand for older people. To explore the distinction between the concepts of legal capacity and legal competence can also be of assistance in elaborating a more nuanced perception of capability. It is also a matter of care and consideration for individuals who are not in a situation where they have, or are able to have, concern for themselves. To enable and empower someone requires support, and the law is part of the structural support that forms the living conditions for individuals.

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