

MARTHA NUSSBAUM'S CAPABILITIES APPROACH: PERILS AND PROMISES

*Latika Vashist**

I Introduction

MARTHA NUSSBAUM'S capabilities approach emerged out of her involvement with a quality of life project undertaken by a number of philosophers and economists on behalf of World Institute of Development Economics Research (WIDER) of the United Nations University.¹ Nussbaum continued to work on the concept of quality of life even after the WIDER project and set forth a list of central human capabilities.

Nussbaum's approach of *central human capabilities* is a firmly articulated defence of *universalism* grounded in the Marxian/Aristotelian idea of 'truly human functioning'. The aspiration of the project, in her own words, "is to provide the philosophical underpinning for an account of basic constitutional principles that should be respected and implemented by the governments of all nations, as a bare minimum of what respect for human dignity requires."² Her version of capabilities approach is based on the idea of basic social minimum which requires a "*threshold level of each capability*, beneath which it is held that truly human functioning is not available to the citizens."³ Thus, the government must be concerned with assuring the threshold limit at which a person's capability becomes 'worthy of a human being' (or 'truly human', as Marx called it). The heart of her

* Research Associate, Jindal Global Law School, O.P. Jindal Global University.

1. The project led to a coming together of development economists and philosophers and an articulation of quality of life in terms of human capabilities. The WIDER project led to the Human Development Reports published annually since 1991 by the United Nations Development Programme. The reports rank nations according to the Human Development Index (HDI), and recently according to the Gender Development Index (GDI) and Gender Empowerment Index (GEM) to address the gender hierarchies that prevail in the models of development. Since 1996, Capability Poverty Measure has also been added.

2. Martha C. Nussbaum, *Women and Human Development* 5 (Cambridge University Press, New York, 2000).

3. *Id.* at 6, 73-74.



approach is the “*principle of each person’s capability*, based on a *principle of each person as end*.”⁴ The idea clearly is shaped by the Kantian notion of inviolability and dignity of the person.⁵

While advancing her capabilities project, she has proposed a list of central capabilities which she argues “are not just instrumental to further pursuits: they are held to have value in themselves, in making the life that includes them fully human.”⁶ Further, they “command a broad cross-cultural consensus”, enable “any choice of a way of life possible” and thus “have a special claim to be supported for political purposes in a pluralistic society.”⁷ Nussbaum attributes this pervasiveness of capabilities approach to two reasons – first, it is a list of capabilities or opportunities for functioning and not of actual functions and second, because the list protects spaces for people to pursue other functions they value.

Nussbaum claims that her list has evolved after years of cross-cultural discussions. Her current version of the list incorporates changes made after discussions with the people in India.⁸ Thus, she affirms, quite confidently, “(the list) already represents what it proposes: a type of

4. *Id.* at 5.

5. It may be noted that Nussbaum herself does not ground her capabilities approach in the Kantian moral ideal of human dignity. She states that “(t)he basic intuitive idea of my version of the capabilities approach is that we begin with a conception of the dignity of the human being, and of a life that is worthy of that dignity - a life that has available in it “truly human functioning”, in the sense described by Marx in his 1844 *Economic and Philosophical Manuscripts*. See *infra* note 11 at 74.

6. *Supra* note 2 at 74.

7. *Id.* at 74-75.

8. *Id.* at 78 (footnote 82). The primary changes reflect a greater emphasis on bodily integrity and control over one’s environment (including property rights and employment opportunities) and a new emphasis on dignity and non-humiliation. Interestingly, Nussbaum reveals that her milder stress on ‘self-sufficiency’ and ‘dignity’ in the earlier versions of the list was because of the Western feminist critique of these values as ‘male’ and ‘Western’. Nussbaum’s interaction with SEWA (Self Employed Women’s Organization) in India changed her earlier view point. SEWA, one of the most successful feminist employment and credit projects worldwide, makes self-sufficiency one of its ten normative points for women. The feminists of the developing countries “do not take self-sufficiency to entail neglect of others, but they do hold that women care for others best when they are economically situated so that they can survive on their own.” See, for details, “The Feminist Critique of Liberalism” in Martha C. Nussbaum, *Sex and Social Justice* 55-80 (Oxford University Press, New York, 1999).



*overlapping consensuses.*⁹ She endorses the conception of overlapping consensus from Rawlsian theory – “that people may sign on to this conception as the freestanding moral core of a political conception, without accepting any particular metaphysical view of the world, any particular comprehensive ethical or religious view, or even any particular view of the person or of human nature.”¹⁰ Nussbaum, however, is mindful of the fact that even the values falling within the overlapping consensus (“the moral core of a political conception”) are bound to be variedly interpreted by people owing to their diverse life positioning.

The current version of the list is as follows:¹¹

1. *Life*. Being able to live to the end of a human life of normal length; not dying prematurely, or before one’s life is so reduced as to be not worth living.
2. *Bodily Health*. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.
3. *Bodily Integrity*. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.
4. *Senses, Imagination, and Thought*. Being able to use the senses, to imagine, think, and to reason - and to do these things in a “truly human” way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one’s own choice, religious, literary, musical, and so forth. Being able to use one’s mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid non-beneficial pain.
5. *Emotions*. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to

9. *Supra* note 2 at 76.

10. *Ibid.*

11. Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* 76-78 (Oxford University Press, New York, 2006).



grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)

6. *Practical Reason*. Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for the liberty of conscience and religious observance.)
7. *Affiliation*.
 - A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)
 - B. Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of non-discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin.
8. *Other Species*. Being able to live with concern for and in relation to animals, plants, and the world of nature.
9. *Play*. Being able to laugh, to play, to enjoy recreational activities.
10. *Control over One's Environment*.
 - A. *Political*. Being able to participate effectively in political choices that govern one's life; having the right of political participation and protections of free speech and association.
 - B. *Material*. Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.



The list is not a rigid set of rules; it is “open-ended and humble” and “can always be contested and remade”¹² for there are quite a few debatable items on the list. For instance, the role played by literacy or relationship with other species in human functioning. Though some items in the list are ‘fixed’ or incontestable (for instance, the right to bodily integrity), these aspirations have not yet been achieved by all countries. This is where the utility of Nussbaum’s approach surfaces— first, in comparison of quality of life of individuals across religions, faiths, regions and boundaries, and second, for securing a social and political arrangement that delivers to its citizens a certain basic level of capability (the threshold limit).

Nussbaum’s vision of a universalism committed to cross-cultural norms and local particularity gets reflected in the view of *multiple realizability* of the list. Affirming that pluralism and respect for difference are themselves universal values that command respect,¹³ she concedes that items on the list would be differently constructed by different societies and thus, the manner of realization of the items can be varied (till the broad contours of the list are left unaltered):¹⁴

(I)ts members can be more concretely specified in accordance with local beliefs and circumstances. It is thus designed to leave room for a reasonable pluralism in specification.

Further, the items in the list are advanced as *separate components*, distinct in quality, but equally important. This ‘irreducible plurality’ and incommensurability of the list “limits the applicability of quantitative cost-benefit analysis.”¹⁵ Further, the crucial interdependence of the items on the list also points towards equal importance of all. However, *practical reason* and *affiliation* are set apart as being of special importance as “they both organize and suffuse all the others, making their pursuit truly human.” This, however, does not mean that these two ends can be achieved at the cost of others, rather it emphasizes the point that “(a)ll the items on the list should be available in a form that involves reason and affiliation.”¹⁶ This idea is borrowed from Marx who believed that to live a life worthy of dignity of a human being one is required to perform functions in a

12. *Supra* note 2 at 77.

13. *Id.* at 32.

14. *Id.* at 77.

15. *Id.* at 81.

16. *Id.* at 82.



fully human way and not in an animal-like mode. This entails development of one's human powers of practical reasoning and sociability so that every other function one does— from as mundane as eating food to as liberating as self-expression— is shaped by these powers.

Nussbaum has cautiously included 'natural goods' (in Rawlsian terms) in her list i.e. goods that are determined naturally or by luck and thus, governments cannot play a direct role in securing these to its citizens (e.g. emotional health). For these the governments should try to create the *social basis* of these capabilities by "mak(ing) up for the differences in starting point that are caused by natural endowment or power."¹⁷ For instance, government may not be able to assure to its women citizens emotional health but a social basis of this capability can be created through suitable policies in areas of family law, rape law, public employment and safety.

Functioning and capability

As a liberal, Nussbaum is careful that "(c)apability, not functioning, is the appropriate political goal."¹⁸ This is so, notwithstanding the fact that functioning and not just empty capabilities render a life fully human. The approach emphasizes capabilities because of the paramount importance it attaches to practical reason and to steer clear of any paternalism which is antithetical to liberal values.¹⁹ Citizens should just be provided with *real opportunities to be able to do and be* what they value; the ultimate decision as to what they *actually do or become* should be left to them. The primary reason for this, Nussbaum notes, is "the respect we have for people and their choices."²⁰ Further, concentrating only on capabilities the approach escapes the accusations of coerced uniformity or forced choices for Nussbaum understands that "(p)lay is not play if it is enforced, love is not love if it is commanded."²¹

17. *Id.* at 81.

18. *Id.* at 87.

19. J.S. Mill's 'harm condition' is extensive enough to preclude the law from intervening even on a paternalistic basis: "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. *His own good, either physical or moral, is not a sufficient warrant.* He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinion of others, to do so would be wise, or even right." See J.S. Mill, *On Liberty* (1859) reprinted in Stefan Collini (ed.), *On Liberty and other Essays* (Cambridge University Press, 2003).

20. *Supra* note 2 at 88.

21. *Ibid.*



The distinction between functioning and capability can be best understood by the example of a fasting man and a starving man.²² A person for religious reasons may choose to fast than have his meals. If the approach stressed on the functioning (here consumption of food), the person would be deprived of his decision to make a choice to fast. *Prima facie*, he may look like a man starving for want of food, but capabilities approach well captures the difference between the two. The former has the available resources at his disposal and is voluntarily staying hungry, but the latter is forced to stay hungry. The objective of capabilities approach is to provide everyone the opportunities to perform their functioning (here by providing them with minimum food), the ultimate choice of eating or fasting is left to them.

However, in case of children, the focus on functionings rather than capabilities is not only warranted but necessitated. It is so because “exercising a function in childhood is frequently necessary to produce a mature adult capability.”²³ Thus, compulsory primary education cannot be objected on the ground that it takes away the child’s (or in some cases of parents’) freedom of choice not to go to school (not to send their children to school). The government can legitimately introduce children’s programmes as some functionings in childhood build capabilities for adulthood, even if its decisions conflict with parental and religious claims. Similarly, a restriction can be placed on promotion of capabilities, in favour of actual functionings for those adults who have not acquired full mental and moral powers.²⁴ Nussbaum believes that even in case of adults, governments may sometimes be justified in promoting functioning, when choices can’t be left to people— for instance, in case of matters of health and safety (regulation of food, building codes, medicine and environmental contaminants). It may appear paternalistic but health and safety are uncompromisable goods in themselves, independent of choice. Nussbaum justifies promotion of functioning in the following words:²⁵

22. Both Amartya Sen and Martha Nussbaum employ this example time and again in their works to explain the central position of ‘choice’ in capabilities approach.

23. *Supra* note 2 at 90.

24. It is interesting to note that the Supreme Court in *Suchitra Srivastava v. Chandigarh Administration* [(2009) 9 SCC 1] held that persons who are found to be in a condition of borderline, mild or moderate mental retardation are capable of being good parents and it is the duty of the government to take care of such victims ensuring safe delivery and also ensure the post-natal care of both the mother and the child. The court, rather than restricting the capability, chose to give due regard to the ‘choice’ (to be a mother) of the pregnant woman who was in a condition of ‘mental retardation’.

25. *Supra* note 2 at 92.



In general, the more crucial a function is to attaining and maintaining other capabilities, the more entitled we may be to promote actual functioning in some cases, within limits set by an appropriate respect for citizens' choices.

Compulsory functions of paying taxes, obeying the law and in some jurisdictions, even voting²⁶ can be justifiably promoted as they ensure presence of capabilities.

II Beyond frontiers of exclusion

In *Frontiers of Justice*, Nussbaum extends her capability project to the persons with special needs, transnational justice and non-human species. She attacks the exclusion of severely disabled as well as non-human species by most theories of justice and offers her version of subject-centred justice as the capabilities project.²⁷ In evolving and developing her own theory, she advances a staunch critique of social contractarianism, especially Rawls's version of social contractarianism, which she believes to be an inadequate theory of justice to the extent it excludes persons with disabilities, people across national boundaries and animals.

Constraints of social contractarianism

Nussbaum believes that persons with special needs, transnational justice and non-human species are those three fronts on which justice as fairness may fail²⁸ and here her capabilities approach does better than social contract doctrine.²⁹ The main problem that Nussbaum sees in Rawlsian

26. In Gujarat, for instance, The Gujarat Local Authorities Laws (Amendment) Bill, 2009 seeks to make voting mandatory in local body polls. Under the bill, if a voter fails to vote for the reasons other than prescribed in the rules, he may be declared a "defaulter voter" and would face consequences for which rules will be framed and placed before the Assembly for its approval later.

27. Nussbaum herself has not used the term 'subject-centered justice' to describe her approach, but the theoretical foundations of the capabilities approach completely conform to it.

28. John Rawls, *Political Liberalism* 20-21 (Columbia University Press, New York, 1993). Though Nussbaum regards Rawls's assertion as an admission of failure, he himself did not regard it as a shortcoming of social contract doctrine but instead a limitation of its scope.

29. Though she does not claim "to have shown that it is better overall, since there may be other issues on which it does worse than contrarianism theories." *Supra* note 11 at 6.



position is that his “his account of social cooperation is in many respects constrained by his very deep adherence to the contract idea.”³⁰ The initial contract situation is largely determined by mutual advantage as the goal of social cooperation. According to her, Rawlsian social contract resembles Hobbesian views, i.e., the contract proceeds from the idea that the purpose of cooperation is mutual advantage based on each person’s self-interest.³¹ She makes a distinction between the ‘classical social contract’ and T.M. Scanlon’s contractarianism which is inspired by Kant (and with which she has affinities).³² Though Rawls is also influenced by Kant but his influence is not on contractarianism in the original position. The assumption in original position is one of mutual disinterest i.e. the parties have no interest in one another’s interests, they are only concerned about advancing their own conceptions of the good, and not of others.³³ Rawlsian theory, thus, acquires an uneasy ‘hybrid character’ of contractarianism and Kantianism.³⁴

Nussbaum identifies four features of Rawls’s contractarianism to which its inability to deal with three ‘unsolved problems’ of justice can be attributed:³⁵

The circumstances of justice: Rawls describes the ‘circumstances of justice’ as “the normal conditions under which human cooperation is both possible and necessary.”³⁶ He believes that unless these circumstances are assured “there would be no occasion for the virtue of justice, just as in the absence of threats of injury to life and limb, there would be no occasion for physical courage.”³⁷ These circumstances of justice can be divided into ‘objective circumstances’ and ‘subjective circumstances’.³⁸

The objective circumstance of the parties bargaining in the situation of social contract are the facts of requirement of co-existence, similarity in physical and mental powers, vulnerability to aggression and moderate scarcity of food and resources available.³⁹ Subjective circumstances, in

30. *Id.* at 57.

31. *Id.* at 58.

32. *Id.* at 67-68.

33. John Rawls, *Theory of Justice* 13 (Harvard University Press, Cambridge, MA 1971).

34. *Supra* note 11 at 57-58.

35. *Id.* at 26-35.

36. *Supra* note 33 at 126.

37. *Id.* at 128.

38. *Ibid.*

39. *Id.* at 126-127.



addition include, difference in people's aims and aspirations and adherence to multifarious comprehensive moral religious and philosophical doctrines that put them into potential conflict with each other.

Outlining these aspects of Rawlsian theory, Nussbaum argues that within the Rawlsian scheme of things, relations of justice exist only among people who are 'roughly similar' in mental and physical powers which in turn means that relations of justice do not exist between a strong and a weak person. Thus, the arrangement excludes people whose mental and physical powers are unequal to those of "normal" beings, people from weaker nations who are unequal in power and resources as compared to dominant nations as well as animals who get excluded just because they are not humans.⁴⁰

Free, equal and independent: The parties to the social contract are regarded as "free, equal and independent". Here Rawls, unlike Hobbes, sees this as a moral rather than natural condition which means that he presupposes that persons are by right morally free and equal and ought to be treated as such. But since once again Rawls vests a right to equality and equal justice on persons with 'moral powers' for moral and practical reasoning, he excludes disabled and animals from his theory of justice.

Mutual advantage as the purpose of social cooperation: The purpose of social cooperation is mutual advantage. Their own advantage is what motivates the parties to the social contract in the Rawlsian original position.⁴¹ Nussbaum observes:⁴²

For the very logic of a contract for mutual advantage suggests that one would not include in the first place agents whose contribution to overall social well-being is likely to be dramatically lower than that of others.

The motivations of the parties: The parties to Rawlsian social contract are not motivated by altruism, benevolence, sympathy or ethical justice;⁴³ instead

40. *Supra* note 11 at 27-28. Samuel Freeman has defended Rawls's position from the attack. He believes that Nussbaum's inference is "quite an unwarranted leap from what Rawls says" and this may be because she reads into Rawls the implications of David Gauthier's Hobbesian view. Gauthier's theory entails that social contract can be understood without reference to moral assumptions: people cooperate simply because cooperation advances each individual's material self-interest. See, Samuel Freeman, "Frontiers of Justice: The Capabilities Approach vs. Contractarianism, 85 *Tex LRev* 385 at 397 (2006).

41. *Supra* note 11 at 34.

42. *Id.* at 20.

43. *Id.* at 34-35.



what motivates them are their own conceptions of good which makes them mutually disinterested and indifferent with respect to others' well-being.

These features of Rawlsian social contractarianism exclude people with severe physical and mental impairments. Such people are not protected under the principles of social contract 'except derivatively or at a later stage'. Rawls contends that duties to the disabled are to be addressed after principles of justice have been applied to determine the constitution and the economic and property system.⁴⁴ Then the legislators would have a better idea of the resources the society has, to devote to the problems of impaired and disabled i.e. once claims are satisfied under principles of justice.⁴⁵

For Rawls 'least advantaged' are not the disabled people but those 'normal' people who have the smallest index of primary social goods (income and wealth), and thus the duties owed to disabled in the Rawlsian scheme are not duties of justice at all.⁴⁶

It is in effect out of charity that these interests (of the severely impaired) will be considered later on, not out of basic justice.

Arguing against Rawlsian theory that derives moral principles from the rational agreement of mutually disinterested persons,⁴⁷ Nussbaum contends that what is required are "richer ideas of social cooperation"⁴⁸ where "the purpose of social cooperation is not to gain an advantage; it is to foster the dignity and well being of each and every citizen."⁴⁹ Thus, she evolves a sensitive *jurisprudence of inclusion* by making all those the central subjects of justice whose concerns were hitherto accommodated in the social contractarianism on mere benevolent considerations.

Capabilities and disabilities

Nussbaum believes that social contract theories 'do not do well' with physical impairments and mental disabilities for their assumptions of mutual advantage and 'free, equal and independent' rational persons. For these theories severe mental impairments and related disabilities require

44. *Supra* note 28 at 184.

45. *Ibid.*

46. *Supra* note 11 at 123.

47. Brian Barry advances a similar interpretation of Rawls. See, Brian Barry, *A Treatise on Social Justice* 322-444 (University of California Press, Berkeley, 1989).

48. *Supra* note 11 at 4.

49. *Id.* at 202.



an afterthought, after the basic institutions of society are designed which results in complete marginalization of the needs of citizens with impairments and disabilities. This, she holds, is a 'serious flaw' in social contract theories.

Apart from the foundational assumptions of social contract, it is the Rawlsian use of 'primary social goods' as an indicator of quality of life and interpersonal comparisons of well being that Nussbaum finds problematic.⁵⁰ Rawls's principles of justice are designed to distribute rights and liberties, opportunities, powers and positions of office, income and wealth, and the institutional 'bases of self respect'. Difference principle assesses inequalities in these goods and requires that inequalities to be so arranged as to increase the share of *primary goods*⁵¹ to the least advantaged in the society.⁵² To uncomplicate things, Rawls says that income and wealth should become the objective grounds that enable public agreement on distributive shares as income and wealth are good indicators of how well-off the least advantaged people are in terms of their share of remaining primary goods. Thus, the impoverished masses— minimum wage unskilled workers – are the least advantaged class, with the least income, wealth, powers and positions.

But Nussbaum argues that income and wealth are not good indicators of how well off people are. A person who requires care for herself, say an invalid old lady, can have more income and wealth than unskilled minimum wage workers, yet be worse off than unskilled workers due to lack of care.⁵³ This is because 'conversion rates' of people are different; a disabled person may require much higher income and wealth to achieve the same quality of life as compared to a non-disabled person.

Nussbaum rightly points out that the Humean 'rough equality' assumption that is implicit in the circumstances of justice 'positively breaks down' the social contract theory. Further, the requirement of social

50. *Id.* at 113-116.

51. *Supra* note 33 at 62. According to Rawls, primary goods are the "things that every rational man is presumed to want." They are divided into two categories: natural primary goods, including health, vigor, intelligence, and imagination, and social primary goods, including wealth, power, opportunities, civil rights, such as freedom of thought and speech, and the right to participate in political decision making, and, as Rawls particularly emphasizes, self-respect. The distribution of social primary goods is of basic concern to the participants who choose the principles of justice in the original position.

52. *Id.* at 83.

53. *Supra* note 11 at 114-115.



cooperation for mutual advantage turns contractarianism hostile to assimilate economically unproductive people in the conception of justice.⁵⁴ Contractarianism tends to have very narrow conception of social cooperation as many non-economic benefits accrue from the mentally disabled.⁵⁵ Even the Kantian influence on Rawls does little to address the justice based requirements of mentally disabled. Rawls sees moral powers as the basis for equality and equal justice.⁵⁶ Since the mentally impaired often have impaired moral powers, they do not deserve equal justice in Rawlsian theory. Thus, neither Rawlsian contractarianism nor his Kantianism addresses the rights and needs of mentally disabled.⁵⁷ Rawls acknowledges that severely disabled pose special problems which are not addressed by the two principles of justice he proposes; and thus, needs of severely disabled do not seem to raise issues of justice for Rawls, they are only to be dealt with as charitable duties.

Setting out this critique of Rawlsian theory, Nussbaum asserts that capabilities approach is especially attuned to meet the needs of the severely disabled as it is premised on the fact that all persons being *ends in themselves* are equally entitled to necessities of living a good life.⁵⁸ Persons with mental impairments and physical disabilities should be made 'fully equal as citizens' in exercising their central capabilities for functioning. This necessitates that the society should be duty-bound to provide to the disabled persons "the social basis of all capabilities on the list" of central capabilities.⁵⁹ Capabilities approach as is evident rests on social cooperation not for the sake of mutual advantage but "to foster the dignity and well being of each and every citizen."⁶⁰

Treating all persons as *ends in themselves* puts into question the 'naturalness' of the impairments of disabled persons; the impediments that are social in nature must not be seen as natural. She thus argues that disability is not a natural condition but a socially constructed situation. The physical environment, societal conditions, policy decisions, legal system all contribute together in *making* a person disabled.

Nussbaum in an illuminating discussion of the public policy implications of her capabilities approach for the disabled makes a brave attempt to

54. *Id.* at 129.

55. *Ibid.*

56. *Supra* note 33 at 441-446.

57. *Supra* note 11 at 135.

58. *Id.* at 191.

59. *Id.* at 193.

60. *Id.* at 202.



concretise the hitherto philosophical arguments presented by her.⁶¹ Discussing the question of guardianship she holds that guardianship should not become a matter of dealing with the 'incompetence' of a person, but a way of *facilitating* that person's access to all the central capabilities.⁶² Elaborating on the scope of the function of guardianship, Nussbaum asserts:⁶³

The norm should always be to put the person herself in a position to choose functioning of the relevant sort. Where that is not possible, temporarily or permanently, the sort of guardianship to strive for will be one that is narrowly tailored to assist the person where assistance is needed, in a way that invites the person to participate as much as possible in decision making and choice.

The reform instituted in this area to be in conformity with capabilities approach can be modelled on the laws from countries like Israel (Israel's Equal Rights for Persons with Disabilities Laws passed in 1999 states that people with disabilities have right to participation, to make decisions, to live with full independence),⁶⁴ Sweden (the structure of guardianship in Swedish law has a flexible plurality of such relationships, relationship of mentorship (the *god man*) which does not alter civil rights of the mentee, *god man* acting only with the consent of mentee. He is appointed by the state and paid for his services by the state. Where the nature of person's disability is such that mentorship is insufficient, a higher decisional control is provided by the relationship of administrator or trustee to protect a

61. Significantly, the essence of the approach has been adopted by the recently enforced United Nations Convention on the Rights of Persons with Disabilities, 2006 (CRPD). In Art. 12, CRPD recognizes that all persons with disabilities are persons before the law with full legal capacity (capacity to have rights and the capacity to act). At the same time the CRPD concedes that some persons with disabilities may require support to exercise that capacity and the state parties must make provision for that support.

62. Since Nussbaum does not ouster guardianship but maintains that it should be so constituted that it makes for the flourishing of the persons with disabilities, her approach can be an important milestone in interpreting Art.12(4) which neither prohibits guardianship, nor promotes it. The question whether CRPD should adopt a supported or a substituted decision making model was a highly debated one in the drafting stage of the Convention which ultimately settled at the compromise solution in Art. 12.

63. *Supra* note 11 at 199.

64. *Id.* at 196.



person from the economic effects of improvident transactions but the person still retains civil rights including right to vote. Other types of guardianships and assistance are afforded to disabled – ‘contract person’ who provides companionship activities for an isolated or inactive person, ‘personal assistant’ and the ‘escort person’ – paid by public funds, government or national government in combination with municipalities)⁶⁵ and Germany (Germany’s 1992 reform of its guardianship law mandates the least restrictive alternative and avoids formal legal incapacitation to a degree compatible with the handicapped person’s good. The appointment of guardianships for the mentally impaired should not automatically deprive them of their rights to vote, marry and make a will).⁶⁶

Concept of ‘care’

One key feature that makes Nussbaum’s capability approach unique and workable for the needs of disabled is the importance she accords to the role of care as a “primary social entitlement.”⁶⁷ “Care”, asserts Nussbaum, “is not a single thing” and thus “should not be... introduced as a single separate extra capability in addition to the others. Thinking well about care means thinking about a wide range of capabilities on the side of both the cared for and the caregiver.”⁶⁸ Good care must address the person’s needs in all the areas covered by the capabilities including stimulation for senses, imagination and thought, supporting the capacity of cared-for for practical reasons and choice to name a few. Correspondingly, it should be kept in mind that care givers do not lose out on their own capabilities through bad arrangements. Nussbaum concedes that “[A] decent society cannot ensure that all care givers *actually* have happy lives; but it can provide them with a threshold level of capability in each of the key areas.”⁶⁹ This requires “good public arrangements and a decent public culture” which ensure that care of elderly and disabled does not become a matter of anxiety for their family. Public policies must be floated which make choice to care for dependents “a *real choice*, not an imposition born of social indifference.”⁷⁰

65. *Ibid.*

66. *Id.* at 197.

67. *Id.* at 178. The focus on ‘care’ makes Nussbaum’s approach substantively different from Rawls. Rawlsian assumption of ‘fully cooperating’ prevents him from giving care a sufficient central role.

68. *Id.* at 168.

69. *Id.* at 170.

70. *Ibid.*



Again the policy issues that would concretise ethical framework of care are well addressed by Nussbaum. For the capabilities promotion of the caregiver, it is important to reject the liberal distinction between public and private spheres (capabilities approach does it quite successfully) and recognize the political nature of the family institution.⁷¹ She affirms that “it would not be acceptable for the state simply to *mandate* that husbands and wives divide care labour equally,”⁷² but women’s work at home should be recognized as work. Nussbaum advocates for governments’ “direct payment to family members who perform care work” which is not means-tested but is “like a salary, giving social dignity and recognition to the work in question.”⁷³ Nussbaum quickly shirks off allegations of it being an unrealistic strategy by pointing to a number of countries that have adopted similar measures.⁷⁴

Nussbaum seeks to ingrain the value of care even through the national youth services. Citing the example of Germany where young people are given the option of military service for two years or alternative service (care work) for three years, she believes that this would not only “[get] a lot of this work done by energetic young people at relatively low cost”, but the experience could even “be expected to shape their attitudes in political debates and in family life.”⁷⁵ Further she argues that stereotypes of man’s work and woman’s work need to be broken by public education and this can be done by adopting and imbibing the “capabilities approach,

71. *Id.* at 212.

72. Notwithstanding her criticism of liberal division of public and private, Nussbaum’s liberalism does not permit her to firmly mandate equal division of care labour between husband and wife. However, it may be noted that CEDAW in Art. 5(b) states that “To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.”

73. *Supra* note 11 at 212.

74. *Id.* at 212-213. In Finland and Denmark, municipalities contract with a caregiver to provide certain services, and the (home-based) caregiver is paid by the municipality. There are programmes like Invalid Care Allowance and Carer Premium in the United Kingdom and the Carer’s Allowance in Ireland that give means-tested support to family members whose income is low because of care work.

75. *Id.* at 213. However, it may be noted that this idea of military service for two years or alternative service (care work) for three years dilutes the choice centric framework of the capabilities approach.



its political conception of the person, in which need for care is a salient aspect.”⁷⁶

Besides the aforementioned changes, Nussbaum’s zeal to institutionalize care makes her question the work-place culture and norms that centre around ‘prestige and pay’. It is very interesting and appreciable to observe Nussbaum’s philosophy questioning all the structures that dominate today’s fast-paced world and daring to doubt the ‘strategies to be a winner by stretching limits’ which have hegemonised the ambitious minds and hearts of all those caught in the corporate race. “It appears to be getting worse”, she points out, “with the escalating pressure for profit and the growing centralization of work under large corporate conglomerates, many of global reach.”⁷⁷

Strict norms of the remote corporate structure tend to harden even a sympathetic local employer who would have carved out exceptions for an employee who has a parent or a child or a disabled relative to look after. Nussbaum’s “capabilities approach suggests that a major aim of public policy ought to be the transformation of the work place, through new flexibility and new ethical norms.”⁷⁸ Her call is: Workers of world unite –think of care as part of your lives and become less willing to accept rigid workplace – for you have nothing to lose except your chains of indifference.

Capabilities and transnational justice

The idea of justice which endeavours to be truly inclusionary must transcend the man-made borders on land that divide human beings and aspire to address the needs of human beings everywhere. The insider-outsider dichotomy overlooks the fact that it is impossible to obtain the prosperity of one without the prosperity of all since “economic prosperity is a connected enterprise in a globalised world.”⁷⁹ It is this insight which aspires Nussbaum to extend capabilities across national boundaries. Pointing out the rising global inequalities, she affirms:⁸⁰

Any theory of justice that proposes political principles defining basic human entitlements ought to be able to confront these

76. *Id.* at 214.

77. *Id.* at 215.

78. *Ibid.*

79. Amita Dhanda, “The Jurisprudence of Inclusion: Martha Nussbaum’s Frontiers of Justice Disability, Nationality, Species Membership”, 7 *Journal of the National Human Rights Commission, India* 219 (2008).

80. *Supra* note 11 at 224.



inequalities and the challenge they pose, in a world in which the power of the global market and of multinational corporations has considerably eroded the power and autonomy of nations.

As pointed out earlier, Nussbaum contests that the social contract theories are deficient to address the problems of justice among nations as these theories simplify the realities and look at global agreements as the outcome of a contract people make for mutual advantage to leave the state of nature and govern themselves by law. She maintains that even Rawls's *The Law of Peoples* does not provide an adequate account of global justice as it fails to suggest redistribution from richer nations to poorer nations without departing from the contractarian approach.⁸¹ She believes that Rawls overlooks the fact that the global economic order imposes severe disadvantages on the poorer nations. Thus, challenging the idea of social contractarianism (that mutual advantage is the goal of social cooperation), she seeks to globalise the capabilities approach.

Institutions are required to play an important role in promoting human capabilities.⁸² But the institutional structure needed for supporting human

81. *Id.* at 226.

82. Nussbaum entrusts a greater and a more important role to institutional structures than individuals for the promotion of human capabilities. She advances four reasons for assigning duties to institutional structures: collective action problems, issues of fairness, capacity (cognitive and causal powers), issues about personal life (the injunction to promote human capabilities should not devour the life of each person or remove personal projects, concerns and space because that could entail depriving them, the very chance of leading a 'truly human life' (which is the essence of capabilities approach)). *Id.* at 306-309.

83. *Id.* at 311-312. In the domestic case, responsibility of supporting the human capabilities of nation's citizens is entrusted to the nations "basic structure" (as Rawls would call the responsibility bearing structure) – legislature, courts, administration and administrative agencies, system of taxation and welfare, overall structure of economic system, laws defining the institution of family and allocating privilege to its members, the criminal justice system etc. These institutions and their inter-relationships are governed by certain principles which are also considered 'crucial to the promotion of human capabilities'. Separation of powers along with judicial review is one principle that is indispensable for the protection of citizen capabilities. Similarly, federalism or decentralization is another aspect that makes governmental structure protective towards people's capabilities by encouraging local autonomy. Independent administrative agencies protect capabilities in health, environment etc.; mechanisms to detect, prevent and punish corruption are essential as corruption is the biggest threat to capabilities; legal education and training of law enforcement officers (surfacing and addressing the discrimination based on race, religion or sex



capabilities domestically⁸³ is quite different from the one required at the global level for global justice. The idea of a world state to globally realise capabilities is not only too utopian to realize but Nussbaum finds it “far from desirable”⁸⁴ and even “dangerous”.⁸⁵ Moreover, she maintains that “national sovereignty in a world of pluralism is an important part of protecting human freedom” as national sovereignty is “a way people have of asserting their autonomy, their right to give themselves laws of their own making.”⁸⁶ Thus, the institutional structure at a global level must remain “thin and decentralized.” Here, her position resembles others (including Rawls) in relying upon a combination of international agencies (such as IMF and World Bank), agreements and multilateral bodies such as United Nations to carry out the redistributive efforts needed to achieve minimal justice globally among all persons.⁸⁷ Nussbaum firmly believes that globalising capabilities approach would pave way for global justice:⁸⁸

[T]he central human capabilities are not simply desirable social goals, but urgent entitlements grounded in justice...[E]ach and every human being in the world has entitlements to these important goods...and...humanity generally [has] the duty of realising these entitlements.

She claims that her approach is able to attract on overlapping consensus among many of the world’s moral, philosophical and religious traditions, non western and western alike, “and thus there is no barrier of

and sensitizing them about these social problems) also build the foundational structures for advancing human capabilities. Finally, there should be a consistent insistence to prevent inequalities of access and power which creep into the system through plutocratic elements.

84. *Id.* at 313. Absence of accountability and perceived dangers of cultural and linguistic homogenization are two important reasons against a world-state.

85. *Ibid.* Nussbaum notes that an unjust world-state can’t be ‘tamed’ by external pressure, unlike the tyrannies of nation-state.

86. *Id.* at 314.

87. Rawls argues that a world state is not feasible and that many different kinds of organizations and federations are needed to achieve the requirements of the law of peoples. See John Rawls, *The Law of Peoples* 36 (Harvard University Press, Cambridge, MA, 1999). Kok-Chor Tan also calls for an ‘institutional focus’ to addressing global inequalities, in part through reforms of agencies such as the IMF and World Bank. See, Kok-Char Tan, *Justice Without Borders* cited in Freeman, *supra* note 40 (foot note 59).

88. *Supra* note 11 at 290-291.



principle or argument against pursuing the central human capabilities as goals for every nation, and for international society.”⁸⁹ She articulates ten principles for a world order that would be instrumental in re-designing institutions for promoting capabilities in a world of inequalities.⁹⁰ They are elaborated in the following paragraphs.

Nussbaum calls the first principle *over-determination of responsibility: the domestic never escapes it*. There is always an argument against richer nations giving aid to poorer nations. Rawls arguing on these lines relies on Amartya Sen’s theory that every nation can achieve a minimum threshold level by a decent system of entitlements together with free press and political democracy.⁹¹ But seen from the capabilities perspective, the argument that poor nations can internally promote capabilities without recourse to distribution cannot be accepted because “it is unjust if poorer nations have to struggle against greater obstacles than rich nations in order to meet their fundamental commitments.”⁹² This, however, does not mean that domestic structure is excused from responsibility; there is indeed joint and inseparable responsibility on both domestic structure and world economic structure to conjointly work towards fulfilment of capabilities.

The second principle calls for *respect of national sovereignty, within the constraints of promoting human capabilities*. Following Grotius and Kant, Nussbaum seeks to present a moral/political argument in favour of the concept of national sovereignty. Conceding that there might be great differences in the internal rubric – political, ethical moral – of nations which might lead to justified cross border criticisms but they do not give any nation the right to intervene in the affairs of erring state (militaries or through economic sanctions) till the latter clears the test of accountability.⁹³

National sovereignty is not a tradable good, it is an “expression of human autonomy.” Grotius vehemently defends the sovereignty of nation-state as it is the fundamental unit through which people exercise their freedom to join with each other to live together. Moreover, in today’s world order nation-state is the most fundamental unit which is accountable to its people. Thus, there is and should be a gap between what we can

89. *Id.* at 305.

90. *Id.* at 315-324.

91. *Id.* at 315-316.

92. *Id.* at 316.

93. Nussbaum points out that South Africa under apartheid could not meet the standards of accountability as a large majority of population was excluded from governance and hence outside intervention in South Africa was justified.



justify morally for all and what we are morally entitled to implement. No coercive interventions can be permitted even on the pretext of enhancing capabilities till the democratic processes of a country are working well. However, other means can be adopted to 'correct' the erring nations *viz.* international treaties and agreements, diplomatic exchanges, planned and focussed funding and aid, public persuasion etc.

Nussbaum further argues that the *prosperous nations have a responsibility to give a substantial portion of their GDP to poorer nations*. Richer nations of the world are required to undertake higher levels of redistribution responsibilities. Nussbaum fixes (though quite arbitrarily) the figure of 2% which the richer nations are expected to give to poorer nations from their GDPs. This principle is to be understood in its essence, rather than concentrating on the precise figure. The aid could be directly rendered to the governments, and where there are problems of governmental corruption or governmental biasness, to NGOs.⁹⁴

Nussbaum contends that a *thin, decentralized and yet forceful global public sphere* should be cultivated. Though she is against a 'world state', she maintains that a "thin system of global governance, with at least some coercive powers" should be aspired for. This system should include a world criminal court to deal with human rights violations, environmental regulations with enforcement mechanisms and a tax on the industrial nations of the north to support the development of pollution controls in the south, a set of global trade regulations, global labour standards, a 'global resource tax' that would affect transfers of wealth from richer to poor nations etc. Existing global institutions such as WHO, ILO, UNDP, UNICEF and UNESCO are required to play a valuable role in this system but their structures must undergo considerable alterations to keep pace with the new developments and requirements of time.

Globalising capabilities further requires entrusting multinational corporations with responsibilities for promoting human capabilities in the regions in which they operate, re-designing the main structure of the global economic order such that it is fair to poor and developing countries, directing institutional and individual focus on the problems of the disadvantaged and on care for the ill, the elderly, children and the disabled,

94. Nussbaum's faith in NGOs must be put to critical scrutiny given the stark facts of NGO 'bureaucratization' and corruption. NGOs lack accountability in the present structure and thus vesting them with the huge responsibility as Nussbaum envisages would be a dangerous exercise. See Upendra Baxi, *The Future of Human Rights* 216-220 (Oxford University Press, New Delhi, 2008).



treating family as a sphere that is precious but not “private” and finally supporting education, as key to the empowerment of disadvantaged people.

These principles are ‘extremely general’ and Nussbaum accepts that their implementation would not be an easy endeavour. But this exercise cannot be rendered futile for the sheer threat of implementational hardships that it entails. The philosophical inquiry done by Nussbaum is an important contribution in paving way for globalising capabilities approach and directing the shift “from goals and entitlements to the construction of a decent global society.” Ideas and dreams shape the realities, Nussbaum has done the first bit, the onus is now on the other disciplines and practitioners to carry out structural changes for realization of these principles.

Justice for non-human species

The idea of justice has been the exclusive domain for human beings. Rooted in *anthropocentrism*,⁹⁵ rights language has been for humans; ‘animal rights’ is not an idea that has been taken up by any of the major moral and political philosophers.⁹⁶ Though Nussbaum is not seeking the recognition of absolute rights of the non-human animals, she asserts, “there seems to be no good reason why existing mechanisms of basic justice, entitlement and law cannot be extended across the species barrier?”⁹⁷ Her capabilities approach presents an argument in favour of non-human animals, such that they are able to secure a ‘dignified existence’ in which they can flourish by exercising species-specific capabilities.⁹⁸

Rawls limits duties of justice (based on rights and entitlements) to humans; animals, according to him, impose duties of compassion and humanity as they have the capacity to feel pleasure and pain.⁹⁹ The reason

95. *Anthropocentrism* (human-centered) is a term used to describe certain philosophical perspectives that claim that ethical principles apply to humans only, and that human needs and interests are of the highest value and importance.

96. Bentham objected to mistreatment and abuse of animals on utilitarian grounds while advocating painless slaughter ‘for a useful purpose’. Contemporary utilitarians such as Peter Singer advocate duties to animals; their arguments are not usually couched in terms of justice and animal’s rights and entitlements. He argues that human duties to animals flow from a generalized duty to minimize suffering. Peter Singer, *Animal Liberation* cited in Freeman, *supra* note 40 (foot note 269).

97. *Supra* note 11 at 326.

98. *Ibid.*

99. *Supra* note 33 at 512.



why Rawls does not attribute duties of justice to animals is because he sees animals as *passive subjects of compassion*. Nussbaum, on the other hand, says that “thinking of animals as active beings who have a good naturally leads us to have the further thought that they are subject to pursue that good.”¹⁰⁰ Since the ‘basic moral intuition’ behind the capabilities approach is not just human dignity but “the dignity of a form of life that possesses both abilities and deep needs,”¹⁰¹ Nussbaum extends her approach to non-human beings.

Since capabilities approach “treat(s) animals as agents seeking a flourishing existence”,¹⁰² animals are conferred entitlements based upon justice. But the entitlements of animals are ‘species-specific’ and are “based upon their characteristic forms of life and flourishing.”¹⁰³ The essence of capabilities approach is that no creature is to be used as a means to the ends of others or of society as a whole and accordingly, under the capabilities approach flourishing of a creature must not be blocked by the harmful agency of another – even if that another is the all-so-powerful human being.¹⁰⁴

It may be noted that Nussbaum is more pragmatic when she discusses the claims of non-human animals as she does not opt for compulsory vegetarianism or a total ban on the use of animals for scientific experimentation. However, at the same time she goes on to contend that humans have ‘positive’ or paternalistic duties to animals¹⁰⁵ - humans are *directly responsible* for the nutrition, health and flourishing of animals who are under our control (pets, farm animals, zoo animals), are duty-bound to maintain habitats of other animals etc.¹⁰⁶ Thus, in the case of animals she shows continued relevance of paternalism, a kind of paternalism that is sensitive to the different forms of flourishing. Her species sensitive paternalism, is an ‘intelligent respectful paternalism’ that cultivates space for choice,¹⁰⁷ and thus, causes her to distinguish between domestic and wild animals - while wild animals may require the right to be left alone,

100. *Supra* note 11 at 337.

101. *Id.* at 346.

102. *Id.* at 337.

103. *Id.* at 392.

104. *Id.* at 349-51.

105. *Id.* at 375.

106. *Id.* at 374-75.

107. *Id.* at 377.



the domestic animals may need human companionship for their flourishing.

She, however, almost bordering on absurdity, goes on to suggest that human beings have duties towards animal predators and their victims. She believes that there is a duty to prevent 'painful torture' that the tiger inflicts on the gazelle "if we can do so without doing greater harms. The capabilities approach is entitlement-based and outcome-oriented...The problem is that the needs of the predatory animal must also be considered."¹⁰⁸ She, thus, seems to be suggesting that nature's food chain should also be 'humanised' since her capabilities approach treats each creature as an agent, an end in itself.

Nussbaum's account of capabilities based treatment of animals is far from satisfactory. Though she has successfully surpassed Rawls's idea of duties of compassion and provided a sound argument for their agency, she has left a lot of unanswered questions and loose gaps during the course of her arguments. 'An intelligently respectful paternalism' that she wants humans to endorse *vis-à-vis* non-human living beings is bound to impose exceptional responsibilities and burdens for humans. Samuel Freeman is justifiably disturbed with the questions that emerge from Nussbaum's account.¹⁰⁹

It is hard to know how to make tradeoffs between animal needs, especially since claims of justice are involved. Which animal's rights to flourishing should be given priority, and how can the tiger's flourishing ever outweigh the gazelle's right to life?

How is it actually expected to carry out the paternalistic duty of rescuing or minimising the pain of the predatory animal? Is it expected that the social costs of these hugely paternalistic duties to animals be overlooked even if it affects the claims of distribution among men and women who are far from being 'truly human'? If there is a conflict between redressal of human capabilities and species-capabilities, how should the prioritization be done given the fact that the capabilities approach considers all living beings an end in themselves? Nussbaum accepts the complexity of these issues. She is well-aware that there will be inevitable conflicts of claims to well-being among humans and animals once animal entitlements are recognised but deliberately refrains from addressing them, saying:¹¹⁰

108. *Id.* at 379.

109. Freeman, *supra* note 40 at 429.

110. *Supra* note 11 at 403.



We have not yet even begun to deliberate well about such questions, and I believe it is premature right now to say, what the precise result of such deliberations would be.

She may be right to this extent but the stark reality remains that it is human beings who make principles, laws and rules. It is difficult to imagine principles giving equal entitlements to humans and non-humans coming from humans themselves unless we grow into truly selfless beings with rather limited desires and a clipped survival instinct. The very fact that Nussbaum refrains from arguing for compulsory vegetarianism (since nobody really knows what the impact on the world environment and children's health would be by a total switch to 'vegetarian sources of protein') and focuses on treating animals well during life and painlessly killing them for consumption, shows that she is aware of the difficulties of extending capabilities approach in the same manner to animals as it applies to humans. No doubt "there is no respectable way to deny the equal dignity of creatures across species",¹¹¹ but capabilities approach, though better than other approaches, does not seem to be the panacea that can ensure an all creature flourishing.

III Limits of Nussbaum's liberalism

Nussbaum's capabilities approach and feminism are both entrenched in liberalism. Her approach is rooted in the liberal tradition is evident from its high regard for *individual choice* and human dignity, commitment to the centrality of *practical reason* to a well-led life and an unquestioning endorsement of individualism and individual worth. While asserting the liberal foundations of capabilities approach, she defends her universal approach as "it appears to endorse explicitly at least one universal value, the value of having the opportunity to think and choose for oneself."¹¹² Thus, her approach is both universal in terms and anti-paternalistic in spirit.

The post-colonial and the subaltern scholarship have always viewed the universal rhetoric of liberalism with suspicion for its willful blindness and inattentiveness to certain latent realities. However, most liberal thinkers have blatantly dismissed the postcolonial critique. Nussbaum's liberalism follows a similar trajectory when she fails to address (if not answer) the criticism of third world/post modern feminist scholarship. Instead she

111. *Id.* at 383.

112. *Supra* note 2 at 51.



contends:¹¹³

Some feminist philosophy, *particularly the type influenced by postmodernist literary theory*, has involved a type of abstraction that turns the mind away from reality, and that does not help us see or understand real women's lives better.

Alleging the post-modernist theory to be a ground of *unreal* abstractions, Nussbaum proceeds to evolve a theory 'responsive to reality' by employing the stories of a handful of Indian women! Such a dismissal of post-modern/postcolonial feminist project not only unmasks Nussbaum's disregard of the vast feminist literature, its relevance and scholarship, but on a broader level displays the self-inflicted *shut-upness* (to evoke Kierkegaardian terminology) of liberalism, caused by "wilful blindness (and)...inattentiveness to the problems and promise of authority."¹¹⁴

The speaking absence of questions of *hegemony* and *power* in Gramscian and Foucauldian terms from Nussbaum's work is another facet that is alarming as well as disturbing. The journey to justice for the *postcolonial subject* is hard to commence without understanding not only the complexities and limitations of rights/laws as a strategy but the whole liberal project itself. Liberal thinkers' undue optimism with liberty and individualism often fails to recognize the realities of the *wretched of the earth*. Robin West rightly remarked about liberals:¹¹⁵

They often see liberty or choice where others see, beneath the surface or perhaps not so far beneath, coercion and masked power.

Having said that, it needs to be pointed out that Nussbaum is not entirely oblivious or inattentive to this fact. Commenting on her list of capabilities, she points out that "the list contains many items that *women over the ages haven't wanted for themselves* and some that even today many women don't pursue."¹¹⁶ Therefore, capabilities list seeks to change "not just other people's preferences *about* women, but more controversially, against many preferences (or so it seems) *of* women about themselves and

113. *Id.* at 11.

114. Robin West, "Human Capabilities and Human Authorities: A comment on Martha Nussbaum's *Women and Human Development*", 15 *St Thomas L Rev* 757 at 762 (2003).

115. *Id.* at 762.

116. *Supra* note 2 at 112.



their lives.”¹¹⁷ Further, she is not ignorant of the production of *preferences*¹¹⁸ through the *hegemonic* order of society, as she states:¹¹⁹

My universalist approach seems to entail that there is something wrong with the preference (if that’s what we should call it) to put up with abuse, that it just shouldn’t have the same role in social policy as the preference to protect and defend one’s bodily integrity. It also entails that there is something wrong with not seeing oneself in a certain way, as a bearer of rights and a citizen whose dignity and worth are equal to that of others.

Interestingly, however, she chooses not to evoke Gramsci, or the postcolonial theorists who have dealt with the idea of ‘production of will’ in an extensive and rigorous manner. Instead she prefers to draw only upon the liberal tradition to reach her conclusions:¹²⁰

(T)he idea that some preferences are deformed by ignorance, malice, injustice and blind habit has deep roots in the liberal tradition of political philosophy as well as in Adam Smith’s ideas about greed and anger, in Mill’s ideas about the sexes, in Kant’s ideas about the many ways in which people get accustomed to treating one another as means rather than ends, in John Rawls’s ideas about the ways in which unjust background conditions shape desire and choice.

In the contemporary mainstream economic and political thought, the idea of ‘preference deformation’, she notes, can be found in the writings of Amartya Sen, Jon Elster and Gary Becker. She also incorporates another type of preference-deformation into her work, which she calls, ‘adaptive preferences’. In the phenomenon of ‘adaptation’, an individual’s preferences are shaped to accord with the (frequently narrow) set of opportunities she actually has. A woman who does not know how it feels to be adequately nourished would be easily content with the

117. *Ibid.*

118. Nussbaum follows the Becker-Sen view of ‘preference’. According to them, preferences are “psychological items that lie behind choices and influence them, but in many different ways.” This account needs to be contrasted with the one forwarded by Samuelson and others who hold that “preferences are not psychological factors lying behind choices but are contained in the actual choices a person makes, meaning thereby preferences are ‘revealed’ in choice”. *Supra* note 8 at 147.

119. *Supra* note 2 at 113.

120. *Id.* at 114.



undernourished state she lives in; who has never learned to read and is always told that education is not meant for women would easily internalize her own second-class status, believe with all her heart that education is the forte of men and in most cases would even learn not to desire, leave alone strive for all those things which the societal traditions and customs have put beyond her reach.

Staying rooted in liberalism, Nussbaum, thus, proceeds to assert that the issues of preference deformation should be approached without any presumption of a problematic tension between a normative sorting of preferences and liberal-democratic values. Unfortunately these conclusions are reached without responding to the postcolonial feminist critics. They are rather premised on subjective beliefs – “there is something wrong with the preference” – theoretically unsupported sweeping statements of harmony between peoples’ preferences and democratic politics etc.

In contrast, Nivedita Menon captures the paradox of choice quite intricately and elaborates how pro-choice can many times be anti-women.¹²¹ Taking the example of right to abortion (that is advocated as a woman’s right to autonomous decision-making in the liberal rights discourse- a position endorsed by Nussbaum),¹²² Menon argues that granting an unregulated right to abortion to women proceeds on the “assumption that the subject of our politics is *already* feminist” (that is to say that every woman is well aware of the operations of patriarchal discourse) while the reality may be otherwise. For instance, a pregnant woman, who has internalized the patriarchal notion of preference of son over daughter, while exercising her right to abortion may go ahead and abort her female foetus for wrong reasons.

Even her overall defense of the liberal project- that failure is not intrinsic to liberalism itself but it is actually the failure of liberal thinkers¹²³ is completely inadequate. The fact, as Ratna Kapur asserts, is that “the problem is not that liberalism fails to live up to its own practice, but

121. Nivedita Menon, *Recovering Subversion* 210-211 (Permanent Black, New Delhi, 2007).

122. *Supra* note 8 at 101-102. Nussbaum defends the abortion rights taking them to be ‘basic to women’s equality’ as the decision to bear a child is vital to a woman’s ‘dignity and autonomy, her ‘personhood’ and ‘destiny’, her ‘conception of ... her place in society’, her right to participate equally in economic and social life of the nation, her ability to realize her potential or in other words her autonomy to determine her life’s course.

123. *Id.* at 65.



rather that failure is constitutive of the tradition.”¹²⁴ The biggest limitation of liberalism is “its inability to transcend assumptions about the Other on which legal reasoning and the liberal project are based.”¹²⁵ Postcolonial theory exposes “the ways in which liberalism was based on promises of universality, while justifying exclusions in practice.”¹²⁶ Thus, Nussbaum’s aversion of postcolonial theorists and subaltern scholarship is fatal to her own project of defending liberalism. What it does is, it makes her theory ‘yet another version of liberalism’ and hence, too inadequate to *free* the postcolonial subjects.

At this juncture it may be noted that the argument here is not to discard Nussbaum’s analysis and findings just because she chooses to stay away from postcolonial criticism, the point rather is that it is difficult to appreciate as to why she adopts such an insular approach, discarding the other epistemic developments advanced by the postcolonial theorists. It would have been much more enchanting and enriching had she responded to such criticism (or at least not neglected the same) as this would have given a holistic perspective to her own work.

Constraints of an *overlapping consensus*

In devising her capabilities approach, though Nussbaum rejects Rawls’s social contractarianism, she continues to rely upon his concept of ‘overlapping consensus’¹²⁷ in order to present her theory as a political

124. Ratna Kapur, *Erotic Justice: Law and New Politics of Postcolonialism* 17 (Permanent Black, New Delhi, 2005).

125. *Ibid.*

126. *Id.* at 23.

127. The problem in relying on Rawlsian overlapping consensus is that its accommodation of religious and philosophical difference would again yield those traditions and practices that perpetuate gender inequality. In *Political Liberalism*, in his endeavour to outline a political conception of justice, he defines the political so as to exclude questions of justice within the civil society and the domestic sphere (thus repeating the mistakes of *A Theory of Justice*). He moves away from the liberalism of Kant and Mill, making a distinction between his own political liberalism and their comprehensive liberalism. He defines overlapping consensus in such a way that it has sufficient space for the flourishing of different comprehensive doctrines. Thus, he applies political liberalism only to ‘the main institutions of political and social life’ (which do not include the family). In his “Public Reason Revisited”, he argues that family is both part of the basic structure and yet not political. Though he is anxious to address gender inequalities within the non-political realm, he continues to argue that the principles of justice do not apply to the internal life of



framework for justice within which competing conceptions of the good can be accommodated. This continuing appeal to the idea of overlapping consensus, has substantially curtailed the emancipatory potential of her theory.

Though Nussbaum claims her list to be 'open-ended' and 'humble', subject to revision and correction, many times Nussbaum has been reluctant to move beyond the constraints of an existing consensus. For instance, initially she was reluctant to include sexual orientation within her list of the prohibited grounds of discrimination owing to a lack of consensus on the issue, but her view changed after the release of Deepa Mehta's film *Fire* in India and the discussions it generated in the intellectual circles.¹²⁸ Nussbaum definitely cannot be accused of being rigid for she has revised and developed the list over the years, but her initial reluctance to include lesbi-gay rights "highlights the potential constraints on feminism in appealing to an overlapping consensus."¹²⁹

A graver problem with Nussbaum's overlapping consensus is that it is not sufficiently supplanted with procedures of continuous dialogue and negotiations that are the ways to get closer to an overlapping consensus. There is also an absence of a loud and clear call for participatory strategies; *voice* and *power* are not delineated explicitly (they seem to be centered in the 'we' that Nussbaum employs continuously throughout her work without explanation)¹³⁰ which raises legitimate suspicions of the anti-universalists who allege that undesirable western paternalism and a denial of agency to the subjects of justice is embedded in the Nussbaumian framework.

the family, nor is it desirable, or consistent with liberty of conscience or freedom of association, that they should. See, Siobhan Mullally, *Gender, Culture and Human Rights: Reclaiming Universalism* 41-57 (Hart Publishing, Oregon, 2006).

128. *Supra* note 2 at 79 (foot note 84). For debates circling around *Fire* see, Mary John and Tejaswini Niranjana, "Minor Politics: 'Fire', Hindutva and Indian Culture", *EPW* 581 (March 6-13, 1999); Ratna Kapur, "Cultural Politics of Fire", *EPW* 1297 (May 22, 1999); Carol Upadhy, "Counter-Fire", *EPW* 1299 (May 22, 1999). It may be noted that despite Nussbaum's inclusion of capability of sexual orientation in her list, her understanding of homosexuality is parochial; her belief, "that there is a strong link between women's sub-ordination in traditional sexual relationships and their interest in same-sex relationships" is highly contestable. Ratna Kapur's critique of Mary John and Tejaswini Niranjana's reading of *Fire* is perfectly applicable to Nussbaum as well.

129. *Supra* note 127 at 64.

130. Sabina Alkire, *Valuing Freedoms: Sen's Capability Approach and Poverty Reduction* 41-43 (Oxford University Press, New York, 2002).



Siobhan Mullally unmasks the undercurrents of an imperialist version of western feminism in Nussbaum's approach:¹³¹

While her move beyond a Rawlsian deference to domestic cultural claims is welcome, her rhetoric does at times suggest an 'us-them' opposition.

It cannot be a mere coincidence that all the examples of harm to women that she cites are mostly drawn from African and South Asian practices - female genital mutilation, veiling and dowry murders. Nussbaum might plead that the reason for this non-western focus falls squarely within the scope of her research (which is primarily focused on the 'third world'), but that does not answer why her focus has only been on those issues of third world women that have become over-sensationalized in western feminism and have been appropriated by the western imperialist discourses in advancing rather barbaric, uncivilized and patriarchal pictures of the east.¹³² There are also instances in her work where she has built her arguments on *essentialised* images of third world women based on stereotypes and misleading assumptions. For instance, while arriving at the proposition that family does not exist by nature, instead it is a construction of society and customs, she enters the troubled waters that drown the aspirations of all versions of universalism.¹³³ Drawing contrasts between Indian families and their U.S. and European counterparts, she writes:¹³⁴

While American mothers spend a lot of time focused on the faces of their young infants, eyes meeting eyes, faces rapidly responding, Indian mothers from a variety of social classes tend

131. *Supra* note 127 at 66.

132. For a critique of such sensationalization of the 'exotic other female'; see Ratna Kapur, "The Tragedy of Victimisation Rhetoric: Resurrection the "Native" Subject in International/Post-colonial Feminist Legal Politics", 15 *Harvard Human Rights Journal* 2 (2002).

133. Nussbaum tries hard to present her version of universalism in contradistinction with other forms of universalism which "characterize developing cultures as uniformly reactionary and their own as progressive, neglecting the history of sexism in the West and of progressive traditions in the "East"." She argues that "universalism need not have these defects, and universal values may even be necessary for an adequate critique of colonialism itself", but her approach exhibits that *any* form of universalism is bound to suffer from the defects of the typical form she alienates herself from.

134. *Supra* note 2 at 258 (emphasis added).



to carry the child on the hip, making much less eye contact as they carry the child around with them in a larger social setting.

Relying on Stanley Kurtz's study of Indian child rearing practices (*All the Mothers are One: Hindu India and the Cultural Reshaping of Psychoanalysis*), she goes on to draw her conclusion of the difference between mother-child relationship:¹³⁵

(T)he middle-class American mother constructs an intimate relationship of individual responsiveness with her child, whereas a *typical Indian mother* is less likely to romanticize the relationship, more likely to attend to the *child as one among many people and tasks in her world*.

It is beyond understanding how has she reached these conclusions about Indian mothers and their feelings towards their children. It actually does not require more than a cursory reading of Indian literature (which Nussbaum otherwise seems very interested in as is evident from her narrative) which is inundated with anecdotes of mother-child play, to recognize that there is indeed no *typical Indian mother* that fits her description.¹³⁶ It cannot be anything other than premonition notions or prejudices which led her to these conclusions.

She exhibits similar (mis)understanding of *other* cultures when she claims that Indian women, do not look for a relationship of 'romantic love' in their lives. Drawing on Martha Chen's study of Hindu widows most of whom did not express the desire to remarry, and "many were glad to be done with life with a man", she concludes that in the Indian setting "[E]ven when marriage is prized, its *raison d'être* is typically not taken to be romance."¹³⁷ What seems to strengthen her belief is that neither Jayamma nor Vasanti (the two women on whose real experiences she bases her feminist philosophical project) "spoke of love as a goal of their lives, and neither of them appeared to be searching for romantic love."¹³⁸ The readers are left to wonder what exactly she means by

135. *Id.* at 260 (emphasis added).

136. The author would not attempt to carve out a list of verses flowing with *vatsalya rasa*. A little reminder of Subhadra Kumari Chauhan's 'Ye Kadam Ka Ped'; Tagore's 'The Beginning' and poetry on Krishna's *bal-leela* and Yashoda should be sufficient to counter Nussbaum's ideas of mothers *making much less eye contact* and *child as one among many people and tasks*.

137. *Supra* note 2 at 259.

138. *Id.* at 260.



‘romantic love’, especially after she states that “(e)ven Jayamma’s daughters, who had premarital affairs, seem to have been looking for pleasure and independence, rather than for romantic love in the Western sense.”¹³⁹ It perhaps is some abstract ideal which the third world in its struggle to make ends meet has not been able to identify and inculcate. The above references in her work are not pointed out to inquire into the concealed orientalism in Nussbaum’s ethical theory, but only with an intention to state that if with these stereotypical, essentialised images of third world women, Nussbaum wants to proceed to an overlapping consensus for values, the result would be disastrous for the feminist theory.

The ‘us-them’ opposition is not limited to the aforesaid observations but gets reinforced by a constant use of the pronoun ‘we’ across her major work. Nussbaum uses it without explanation which leaves one wondering which ‘we’ is making all these claims. For example, while explaining the centrality of practical reason and affiliation, she points out that recognition of their centrality “sets constraints on where *we set* the threshold, for each of the separate capabilities, and also constraints on which specifications of it *we will accept*.”¹⁴⁰ Similarly, while explaining the value of capability over functioning she affirms, “*We set stage* and, as fellow citizens, present whatever arguments *we* have in favour of a given choice, then the choice is up to *them*.”¹⁴¹

Given the fact that Nussbaum has not explained how participation of all the actors – across economic and educational classes, as well as across cultures and borders – must be secured to come up with a list of unanimously agreed capabilities, her approach stays “vulnerable to self-selected elites who might legitimize their own views in eloquent capability language.”¹⁴² The ‘us-them’ rhetoric thwarts the possibility of negotiating cultural conflicts by reinforcing the suspicion raised by difference feminists. The aspiration of an overlapping consensus is impossible to achieve in the absence of an amicable platform for negotiation where all the actors are equal in position as well as power.

IV Conclusion

Martha Nussbaum’s capabilities approach is not advocated as a complete theory of justice. It is not a comprehensive moral doctrine, it is

139. *Ibid.*

140. *Id.* at 83 (emphasis added).

141. *Id.* at 88 (emphasis added).

142. *Supra* note 130 at 42.



merely a political doctrine that specifies some “basic entitlements” or “necessary conditions for a decently just society”. It only lists ten central capabilities whose minimum threshold level must be achieved by and for each person. Inequalities above the threshold may continue to persist in Nussbaumian framework as complete equality at all levels is not the concern of her version of capabilities approach.¹⁴³ Nussbaum’s argument of equality of capabilities only upto the threshold limit is a partial account of equality which cannot yield a complete account of justice.

Although a partial account of justice, Nussbaum’s capabilities approach is a refreshing contribution to the ethical theories which speak in a universal language. With a shift in focus from income and GDP to actual ‘beings and doings’, capabilities approach provides the desiderated way of understanding and addressing inequalities existing between people. The language of capabilities is a significant improvement over the language of human rights as it not only surpasses the philosophical divisions and dichotomies of the human rights discourse but also makes the rights language more meaningful by concentrating on the actual environment in which rights are granted. The question whether rights are mere precepts granted to people or are they really weapons that individuals have against the mighty state can only be interrogated meaningfully by supplementing the rights language with capabilities. Most importantly, the focus on capabilities transcends the barrier of public-private which still remains dominant in the rights discourse. Issues like marital rape which remain legitimised in the rights jurisdictions have no space to exist in the paradigm of capabilities which treats every human being as an end in herself.

Capabilities approach has reached greater heights by dismantling the exclusionary discourse that guides even the most profound of all theories of justice. Nussbaum’s critique of John Rawls’s social contractarianism is highly appreciable; she discards the assumption of *mutual advantage as the purpose of social cooperation* and presents a detailed account to include the hitherto marginalised subjects of justice – people with disabilities, people of other nationalities and non-human animals. In her project to expand capabilities for these forgotten subjects of justice, Nussbaum sets herself free from the chains that clutch her fellow philosophers. Though Nussbaum’s account lacks sophistication when she deals with the issue of transnational justice and justice for non-human animals, she should be accredited for the ‘imaginative courage’ of her philosophical arguments.

143. *Id.* at 75.



Being aware of both the strength and weakness of her approach *vis-a-vis* the three unsolved problems of justice, she concedes:¹⁴⁴

Even though I have not yet shown that the realization of justice as I construe it is possible, I do believe that my argument here removes one obstacle to seeing it as possible. For it establishes that a particular picture of who we are and what political society is has for some time imprisoned us, preventing us from imagining other ways in which people might get together and decide to live together.

What, according to her, would realize the potential of her ‘utopian project’ is a sustained attention to moral sentiments and their cultivation in child development, public education, public rhetoric and arts. She believes that realization of the principles of a just society depends on its ability to inculcate “right attitudes and sentiments in people, such that they will support very extensive changes in the existing distribution of goods.”¹⁴⁵ This can only be achieved through “extensive efforts of sentimental education” that restores the feelings of sympathy and benevolence.

No doubt capabilities approach has sound philosophical foundation and a benign aspiration but between the word and the deed falls a cruel shadow. Set in the context of political liberalism, where capabilities are specially political goals, free of meta-physical grounding and thus, an object of overlapping consensus, Nussbaum presents a philosophy “that is strongly universalist, committed to cross-cultural norms of justice, equality and rights, and at the same time, sensitive to local particularity and to the many ways in which circumstances shape not only options but also beliefs and preferences.”¹⁴⁶ With this powerful yet accommodative brand of universalism, Nussbaum wishes to silence not just the cultural relativists but also the post-structuralist and postcolonial voices of difference. The fact, however, is that despite these attempts Nussbaum’s language of capabilities continues to be vulnerable to the scepticism of all those who see through the sweep of modern discourses, free-will rhetoric and meta-narrative norms of justice.

Besides her rootedness in liberalism, many other prepositions and assumptions of her theory warrant a critical scrutiny. She eulogises the

144. *Supra* note 11 at 414.

145. *Id.* at 411.

146. *Supra* note 2 at 7.



nation-state and traditional political structures and believes that they would offer adequate solutions to the problems inflicted by globalisation. She accepts the modern state in its current form as the right arena of politics for capabilities which considerably dilutes her arguments of transnational justice. It is whimsical to believe that borders would automatically melt for the flow of wealth to the poorer citizens of the world without re-conceptualisation of the nation form. Though she seeks to impose responsibilities on the MNCs in their regions of operation, but her account lacks the insight into the politics and power of the big corporations that rule the world today. The power that vests in the “empires of Coca-Cola or MTV”¹⁴⁷ is indisputable and the extent to which they influence and *hegemonise* the preferences and priorities of individuals as to the kind of lives they “have reason to value”, is unimaginable. Mental conditioning, with economic clout and political power of MNCs and communications technology is fatal for the effectiveness for capabilities approach. But even when Nussbaum theorises about “deformed preferences” she stays clear of commenting on the *hegemonised* preferences in the global economic order. This gap is too stark to be ignored by any reader familiar with the propaganda of the ruling elite promoted by the power of transnational corporations. MNCs across the globe, far from accepting responsibilities, have even appropriated the human rights movements to their own ends (or what Baxi calls ‘conversion of human rights movements into human rights markets’).¹⁴⁸

Notwithstanding these criticisms (serious as they are), Nussbaum’s theory deserves high acclaim. By focussing as much on ‘emotion’ as ‘practical reason’, her theory reflects the sensitivity that the most theories bred in the tradition of rational and objective reason lack. The conceptualisation of the concept of care is the most fascinating aspect of her approach as it successfully theorises something as abstract as love and emotions. The allegations of impracticality of the theory are not baseless but are definitely not the ones on which Nussbaum’s approach should be critiqued, for the lofty goal that she has set for capabilities approach cannot be reached by the conventional structures. Mammoth changes are required across the thought structure and institutional arrangements that are bound to appear incredible in the first instance.

147. An evocative expression used by Amartya Sen in *Development as Freedom* (Knopf Press, New York, 1999).

148. *Supra* note 94 at 200-233.



Martha C. Nussbaum is a dreamer, a true romantic. Firm to make philosophy relevant to the contemporary world, she believes that philosophers should be 'lawyers for humanity'; she herself, certainly is one. Though many a times her romanticism makes her oblivious to the complexities of power structures, to combat the grim reality and chilling truths of development and progress, what is needed is the warmth of compassion and a vision that dreams and dares to imagine a whole new world. Nussbaum's theory has both these attributes which enable her to overcome the *hegemony* of exclusionary discourses of justice. There definitely are grey areas in her account but her relentless desire to evolve a truly just world is the phoenix of hope that has the potential to re-define the values of justice in the years to come.