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Human Rights and Martha Nussbaum's Capabilities Approach. Connections and Interrelations.

Abstract

“ All human beings are born free and equal in dignity and rights. They [...] should act towards one another in a spirit of brotherhood.”¹

This is the first article of the *Universal Declaration of Human Rights* (UDHR), and it is the expression of the meaning, the essence of the creation of the concept of human right. The article, in fact, expresses all the fundamental concepts: human rights spring from the necessity of protecting human dignity, and human dignity is ascribed to beings that are equal, free and they are all “brothers”. These three concepts are meant to delimitate and fill the sphere of existence and of actions of human rights. The concept of human rights precedes, naturally, the *Universal Declaration of Human Rights*. The very elaboration of this Declaration, anyway, reflects the increasing importance and amplitude of the concept not only at a national, but also at a global level. It allows certain issues to be regarded under a different point of view from the traditional one, such as the international legal personality of the individual. Human rights, in fact, are not associated to States, that are the traditional protagonist of the international relations. They are posited to the safeguard of the single human being. There are many consequences to this, and in particular two noteworthy effects: that, as Doebbler says, the Government has been linked more and more to the task of the fulfillment of human rights for its citizens;² and the focus on the possibility of a legal personality for the individual considered internationally.³

¹(1948). UDHR. Universal Declaration of Human Rights: <http://www.un.org/en/documents/udhr/>, art. 1

²Doebbler, C. (2006) *Introduction to International Human Rights Law*. Washington DC, CD Publishing, p. 20

³ Nascimbene, B. (2011), *L'individuo e la tutela internazionale dei diritti umani. Istituzioni di diritto internazionale*. S. Carbone, R. Luzzatto and A.S. Maria. Torino, Giappichelli Editore; p. 426

What are the problems associated with human rights? They are many and variegated. They are conceptually frail and challenging at a definitional level. How can we consider human rights? How can we consider rights? Considering Martha Nussbaum's definition, a human right is an:

“especially urgent and justified claim that a person has, simply in virtue of being a human adult, and independently of membership in a particular nation, or class, or sex, or ethnic or religious or sexual group.”⁴

I took into consideration certain notions about human rights. Problems arise already before treating human rights, when we talk about rights. There are many ways of dealing with the notions of rights, but in the fourth chapter I follow Amartya Sen taking into account the considerations of rights as goals or rights as side-constraint, and further the issue about the fundamentality or instrumentality of nature of the importance of the right. Then, I turn to Martha Nussbaum in order to examine some problems regarding human rights. A right, in order to achieve this status, is necessitated by the existence of a correspondent duty. Can this dilemma be transported in the realm of human rights, and how does it affect this approach? What could be, further, the conceptualization of the idea of human right? Finally and foremost, the foundational aspect of the human rights is faced.

Nussbaum's paper *Capabilities and Human Rights* is one of her most significant intervention on these issues. She studies the options given by the consideration of the approaches of capabilities and human rights in correlation with each other. She refers, naturally, to her account of the capabilities theory. She plots a series of interesting questions: if we must consider the two ideas as complementary, if there is an overlying, and this would mean that capabilities and human rights cover the same content, maybe differing in wording or in the way it is represented. She wonders, then, if the case is one of competition between them, and about their precise connection. Her final aim is in underlying the usefulness of capabilities in unraveling at least some of the problems that concern human rights. We should even ask, the reason for which, once having established the fundamentality of capabilities, there would still be the need of talking about human rights, and wonder if, after all, human rights do not have something, too, that would enrich capabilities themselves.

⁴ Nussbaum (1997), “Capabilities and Human Rights” *Fordham Law Review* 66(2): 273-300; p. 292

She considers the language of capabilities as fitted in expressing the ground covered by the so-named two generations of human rights: civil and political rights and economic, social and cultural rights. My effort is bounded to the above mentioned rights: I do not entreat the question of the other types, or generations, of human rights. I have focused on the two most famous conventions treating these subjects, that is, the *International Covenant on Civil and Political Rights* (ICCPR), and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). They are dated 1953, and they are confirmed in 1966. They are enforced only ten years later, in 1976. I consider them exhaustive on the matter of which are the civil and political and social and economic rights, and consider in dept the rights exposed in them. Of course, in this Conventions it is the legal characteristic of human rights to be considered. I analyze in particular the eventual correlation among the rights of the Covenants and the capabilities theory. It is true that the ICESCR speaks of cultural rights too. I deemed, however, them to be a little too complicated to be handled with the attention that could be given to them in the present project. The inquiry over the connection between human rights and capabilities theory is concerned, then, only with civil, political, social and economic rights. And it is not a minimum field to be covered, I think. I concentrate on the idea of civil and political rights in the first chapter. The first paragraph of it, in order to be precise, is dedicated to the common association, according to Amartya Sen, between civil and political rights and negative rights, and therefore to negative liberty. This involves the idea of *immunity from*. The negative idea is committed to the notion of not getting in the way of the other when it is trying to fulfill its entitlements. I refer to Sen's reflections on this point. He observes that negative entitlements entail certain positive activities.⁵ I have recalled his example that the right to security is fulfilled also thanks to a pricey safekeeping equipment, to name some the police force or the legal organization. To get further, Sen makes inquiries over the very mention of negative right. Sen maintains that acknowledging somebody's negative rights is just a step to the concern for the respectively positive entitlement.

“Why should our concern stop only at protecting negative freedoms rather than being involved with what people actually do? [...] In deciding whether one is under an obligation to help a starving person, should one say “yes” if the person has been robbed (with his negative freedom being violated), but remain free to say “no” if he has been fired (without any violation of negative freedom)?”⁶

⁵ Sen (1984b), *Rights and Capabilities. Resources, Values, and Development*, A. Sen. Oxford, Basil Blackwell Publisher; p. 319

⁶ Sen (1984b), *Rights and Capabilities. Resources, Values, and Development*, A. Sen. Oxford, Basil Blackwell Publisher; pp. 314-315

I have been concentrating on the very idea of civil and political rights. Civil rights stand for the Latin terms *ius civis*: the entitlement of the citizen. That expresses very well the idea that they constitute the entitlements linked to the conceptualization of citizenry. They are constituted by all the entitlements that concern over the potentiality of creating a level of liberty and equality among citizens. For instance, we could name the right to a right judgment, liberty of conscience, liberty of thought, and so on. Political rights constitute those that are required for the participation to the government, for example the right to vote. There are some perplexities in making this difference because it has an historical record of it being used discriminatorily, to name an issue is that of giving women's civil and not political entitlements. The differential treatment, however, is a contingent consequence, it doesn't need to be a necessary utilization of the distinction. Civil and political rights are commonly called first-generation rights, and economic, social and cultural rights are named second generation rights. I concord with Amartya Sen and Martha Nussbaum in putting this differentiation is doubt, since the same significance should be attributed to civil and political and economic, cultural and social rights. Martha Nussbaum, in *Capabilities and Human Rights*, seems to opt, anyway, for a certain precedence to be recognized to civil and political rights, but only in case of striking shortage of supplies. This is recognized, moreover, solely in pretty dire situation, in case there is a necessary choice to be made and no other viable option. Nussbaum, moreover, seems to think better over it, since in *Creating Capabilities* she maintains decisively that no priority should be given within these rights.

I then consider the theme of economic and social rights, that are called as well welfare rights⁷. It is not a straightforward issue, and it is the centre of a very lively debate. At the centre of it their very status of human rights, and their relation with civil and political rights, about an eventual ranking of them. My idea is that they are human rights, and that they have the same rank of civil and political rights, and I have tried to bring some argumentation that support these positions. The material and psychological side of the human good is the material for economic and social rights. The same Eleanor Roosevelt, Chairwoman of the Commission on Human Rights, as I have shown in the second chapter, stands for the economic and social rights to have the full-status of human rights. Notwithstanding this, two different Conventions have arisen for the embodiment of these two sets of rights. Moreover, there is

⁷ Nickel (2010), Human Rights. [The Stanford Encyclopedia of Philosophy](http://plato.stanford.edu/archives/fall2010/entries/rightshuman). E. Zalta: <http://plato.stanford.edu/archives/fall2010/entries/rightshuman>; par. 3.4

the article 2(1) of the ICCPR stating plainly the necessity that the civil and political rights have to be entitled to each person pertaining to the Nation's authority, whereas article 2(1) of the ICESCR speaks of progressive achievement about the entitlements it endorses. We can isolate some motives that account for the two separate Conventions and the diverse phraseology. Historically, even if this distinction has been questioned and challenged, for example by Sen, civil and political rights would be considered as Western ideas, while economic and social rights would belong to Communist countries, and consequently considered with distrust since the drafting of the Covenants were dated during the Cold war.⁸ There is in fact a dispute if historically this distinction holds, but from a theoretical point of view it oughtn't have any motive for existence. Moreover, one group of rights is necessary for the fulfillment of the other, and likewise.

“If people are to be the kind of rightholders who can effectively exercise, benefit from and protect their rights, the availability of subsistence, basic health care, and basic education must be secure.”⁹

Another point is made by Eleanor Roosevelt: she maintains that civil and political rights are naturally domain of the state for their implementation, whereas the same cannot be said of the economic and social rights, since there are various ways that lead to their fulfillment.¹⁰ This cannot obstruct the acknowledgment of socio-economic rights as human rights, having the same rank of civil and political entitlements. The state may have a different role to play in the first rather than in the second, but it is important nonetheless: it has the obligation to give the person the possibility for the implementation of these rights, for instance assuring it an adequate educational level, occasions and a consistent *security-net*. It has, we may say, the necessity to grant the conditions necessary for the person to find a sure employment, and to create a security net in case this is not possible.

Further, there has been a scrutiny over economic and social rights that has been quite different from civil and political rights.¹¹ This scrutiny has lead to four main points of debate, when economic and social rights are at stake. The first is that they do not concern, after all, basilar

⁸ GrosEspiehl, H. (1993). "All'origine dei due Patti internazionali del 1966 sui diritti umani e del Protocollo facoltativo al Patto sui diritti civili e politici. Ricordi e riflessioni." [Pace, diritti dell'uomo, diritti dei popoli](#) VII(3): 53-63, p. 55

⁹ Nickel (2005), "Poverty and Rights." [The Philosophical Quarterly](#) 55(220): 385-402; p. 395

¹⁰ Doebbler, C. (2006) [Introduction to International Human Rights Law](#). Washington DC, CD Publishing, p. 91

¹¹ Nickel J. (2010). Human Rights. [The Stanford Encyclopedia of Philosophy](#). E. Zalta: <http://plato.stanford.edu/archives/fall2010/entries/rightshuman>.

individual interests. The second is the objection based on the impracticability of their realization due to their unbearable price, and the eventual excessive level of taxes that would be necessary. The third observes that non developed or developing Nations might find it difficult to realize them.

These three objection are not at all mean, they, on the contrary, have a lot of weight. If we are talking about *fundamental human interests*, we can quite safely assume that all that concerns the physical and psychological good of the individual is a *fundamental human interest*. This sphere, further, is necessary as well for the realisation of civil and political rights. The second issue, about the unbearable prize of a potential implementation of economic and social rights, should be view in the right shade of light, insofar the common idea that economic and social rights do have the above-mentioned problem unlikely civil and political rights is not exact. I find interesting, moreover, an observation from Nickel, that notes how the spectrum of necessities that are the object of economic and social rights doesn't disappear also in the case their status of right is refuted. This is Nickel:

“the taxes associated with economic and social rights are partial replacements for other burdensome duties, namely the duties of families and communities to provide adequate care for the unemployed, sick, disabled and aged”¹²

The third objection worries over the actual capacity for their realization: it is sadly noted that developing and underdeveloped Nations are not in a situation that allow their implementation. There are some possible observations to this point, one is that human rights face the notion of minimal thresholds, as will be noted below; another made me recall Sen, in *Development as Freedom*. Sen notes that it is of fundamental importance to take notice of the effective distribution of the existing supplies, because this is as meaningful as to take notice of the quantity of supplies. Finally, it is valid the locution of “progressive implementation” and further, there is the provision of the international intervention to help in these fields if it is deemed important.

There are, as said, four main points of objections. The fourth is named by Sen the “institutionalization critique”¹³: for a right to be considered in its legal status, a duty-holder is

¹²Nickel J. (2005). "Poverty and Rights." *The Philosophical Quarterly* 55(220): 385-402), p. 399

needed. It is an issue with human rights in general, but it is particularly intense for economic and social rights. If we can assume that they are individual's entitlements, the issue is in identifying whomever has to warrant them. Sen proposes a solution: he links the idea of the capacity to act, to do something with the formulation of an obligation to help. He is thinking about "imperfect obligations",¹⁴ hypothesizing an explanation that I compared to the ones given by Pogge and Nickel:

"the activities are plausibly seen as part of imperfect obligations that individuals and groups have in a society where basic human rights are violated. [...notwithstanding] the importance of institutions for the realization of welfare rights [...] the ethical significance of these rights provides good grounds for seeking realization through their work in pressing for, or contributing to, changes in institutions, as well as social attitudes"¹⁵

The philosopher Nussbaum talks about States or the international society as holding responsibility for upholding human rights in *Creating Capabilities*. Sen's answer, I maintain, is more complex and nuanced, and it can englobe Nussbaum's position, since, after all, it is the person that has the accountability for deciding the composition of a democratic government.

Amartya Sen and Martha Nussbaum, I think, are right in arguing that civil and political, and economic and social rights have the same rank. Human rights embody, and in this I concur with Nickel and Brems, minimal pre-conditions for an acceptable and good life. If this assumption is translated into Nussbaum's frame of thought, there we have human rights as the minimum threshold posed at the safeguard of *eudaimonia*, their minimum prerequisites. In the light of the same rank being shared by the two sets of rights, Brems¹⁶ talks about the possibility to extend the idea of progressive implementation already in use for economic and social rights, also to civil and political rights. Not doing so would lead to an inevitable ranking among human rights, and this might consequently interfere with the notion of indivisibility of human rights. The idea of progressive implementation well suits the idea of

¹³ Sen, A. (2009). Human Rights and Global Imperatives. *The Idea of Justice*, Harvard University Press: 355-388, p. 383

¹⁴ Sen, A. (2009). Human Rights and Global Imperatives. *The Idea of Justice*, Harvard University Press: 355-388; p. 383

¹⁵ Sen, A. (2009). Human Rights and Global Imperatives. *The Idea of Justice*, Harvard University Press: 355-388, p. 383

¹⁶Brems E. (2009). "Human Rights: Minimum and Maximum Perspectives." *Human Law Review*9(3): 349-372, p. 369

interpreting rights as “goal-rights mixtures”,¹⁷ as Nickel puts it. This idea combines deontology, that is a trait commonly ascribed to rights, and the option of the progressive achievement, that is more suited to the idea of goal. I compare here Nickel’s idea with Sen’s elaboration of rights as “goal-right system”.¹⁸

The second and third chapter, after having dedicated the first to highlight the notion and content of civil and political, and economic and social rights, concerns over the capabilities approach and Nussbaum’s early neo-Aristotelian method considered as one interesting way of justifying Nussbaum’s capabilities approach and in particular her capabilities list. The second chapters plots Nussbaum’s neoaristotelian method for the justification of her capabilities list, and the third chapters examines the general theory of the capabilities approach, especially as held by Amartya Sen, and Nussbaum’s own capabilities theory. The dissertation relies particularly over Nussbaum’s early thought, where she develops a kind of neo-Aristotelianism. During this period her concentration is focused on the individuation of a third way that would be able to conciliate universalism and particularism, objectivism, pluralism and relativism. It gives a direction, and it leaves open some issues, but it is an original and interesting attempt. The second chapter focuses over Nussbaum’s Neoaristotelian way and the correlated notion of the human good, the human flourishing. The human beings must be entitled to live a flourishing and dignified life, and Nussbaum considers the capabilities both as its expression and as the content of this flourishing and dignified life. The minimal prerequisite for human flourishing are a list of ten capabilities that she isolates, identified also as the second level of the so-called “thick but vague conception of the good”. Nussbaum follows Aristotle in holding that the human flourishing is conceived in terms of the achievement of the human being in certain meaningful zones, located thanks to a definition of the individual. In fact *eudaimonia*, the human flourishing or the good life, is the self-realization of the human being, that is possible, Aristotle argues, when the human beings behave in the best way accordingly to its nature. This is, clearly, an essentialistic conception.

Nussbaum follows Aristotle also in individuating human flourishing as the purpose of the government, making it in this way the centre of her theory of social justice. Her neo-Aristotelianism doesn’t hinder Martha Nussbaum’s statement of hers being a liberal position:

¹⁷ Nickel J. (2010). Human Rights. The Stanford Encyclopedia of Philosophy. E. Zalta: <http://plato.stanford.edu/archives/fall2010/entries/rightshuman>.

¹⁸ Sen A. (1984a), Rights as Goals. Equality and Discrimination: Essays in Freedom and Justice. United Kingdom, Association for Legal and Social Philosophy eleventh annual conference at University College, London, 6th-8th April, 1984. S. Guest and A. Milne. Stuttgart, Franz Steiner Verlag Wiesbaden GmbH: 11-25, p. 15

capabilities, then, is also one of the tools utilized to be able to speak of essentialism and human good and liberalism. Through what she calls a neo-Aristotelian method she elaborated a normative notion of the human being, that she builds as the first level of her *thick but vague theory of the good*. This normative notion of the human being corresponds to a peculiar kind of essentialism, that Nussbaum refers to as internalist essentialism, it constituting an alternative, a middle way, between objectivism and subjectivism. It is not linked to metaphysical ideas, such as on metaphysical realism. Metaphysical realism, says Nussbaum,¹⁹ would allow to find unobjectionable truth and certainties on a worldly structure that is not in any way dependent on human perception. Denying this possibility, however, doesn't lead, and this is the centre of her reasoning,²⁰ to abandon all together the certainty to isolates truths that are *sure enough*. Only, they would have to be searched in an inside dimension, that is, an internal human dimension, taking into account human practices and experiences, and in this way known directly by individuals. Seen in this light, we can assess the capacity to individuate common characteristics shared by human beings, not necessarily through the referral to metaphysical statements. How then can we find them? Nussbaum talks about an evaluative investigation lead by the individual. She finds two particular instruments, characteristically human: the critical reason and the so-called *narrative imagination*. The inquiry is lead through a critical appraisal of all the ways humans live, and the formation of a conception over themselves. This is feasible especially keeping a close eyes to human creations, legends, myths, narratives that depict a specific conception of the human being. One element she relies on particularly in finding a common denominator in the human situation is the element of contingency and of limitation: she thinks particularly on an individuation of the *shared features of humanness* by contrasting human and other shapes of life, the life of a God or of an animal. Politics and Ethics as known by human are typically human product, product of human limits and an environment of scarcity of resources: let's take, she says, myths regarding Greek Gods. They, to make an example, are unaware of what humans call and experience as love, because this feelings is inevitably intertwined with human openness to lack, human contingency, limits and defective life, exposition to death and illness. This inquiry, that is to be made inter-culturally, has some hope that:

¹⁹ Nussbaum (1992) "Human Functioning and Social Justice: in Defence of Aristotelian Essentialism." Political Theory 20(2): 202-246, p. 215

²⁰ Nussbaum (1992) "Human Functioning and Social Justice: in Defence of Aristotelian Essentialism." Political Theory 20(2): 202-246, p. 215

“The great convergence across cultures in such recognition gives us some reason for optimism that if we proceed in this way, using our imaginations, we will have in the end a theory that is not the mere projection of our customs but is also fully international and a basis for cross-cultural attunement.”²¹

This is the result of a neo-Aristotelian method based on internalist essentialism: given this premises, is it consequential that the results won't be absolutely certain, but open to mistakes, and self-conscious of the contingent element of these results. In this way, however, Nussbaum hopes to find a universalism that is context responsive, reactive to the issue of pluralism, but at the same time not relativism, universalism nonetheless. It is not, we may say, a “full” universality, because it is based on contingencies, certain contingencies that are more important, more trustworthy than others, but contingent as contingent is whatever has to do with human beings. Moreover, full universality could be impossible to reach since human beings may refuse to use the neo-Aristotelian investigation, to invest on critical reason. It will still be universality enough, it is the best we can achieve, and, moreover, it is certain and universal only for humans who have our own structure: the results achieved in this manner are not evaluation-free, they are built upon our perceptions, our thoughts, our experiences, wishes and desire.

Nussbaum upholds a non-relativistic anthropocentric position. How to justify this position? Nussbaum talks about “self-validating structures”.²² With this locution she means the existence of particular features so embedded in the human way of living that the mind cannot conceive to be abstracted by those. For instance, she refers to the principle of Non-Contradiction: this principle is characteristic of the human dimension, and the human way of life cannot prescind from it. Nussbaum wants to show it through referring to the Aristotelian argumentation to some person who may happen to object to the principle of Non-Contradiction.²³ She maintains that Aristotle blames of being deficient in *paideia* whomever would question the principle of Non-Contradiction. Nussbaum considers Aristotle's position meaningful: the disbeliever ought to be considered extraneous to the human sphere of life. After having said that, it is quite clear why Nussbaum believes that shared elements of

²¹ Nussbaum (1992) "Human Functioning and Social Justice: in Defence of Aristotelian Essentialism." Political Theory 20(2): 202-246, p. 216

²² Nussbaum (1995), Aristotle on Human Nature and the Foundations of Ethics. World, Mind, and Ethics. Essays on the Ethical Philosophy of Bernard Williams. J. E. J. Altham and R. Harrison. Cambridge, Cambridge University Press, pp. 116-117

²³ Nussbaum (1986). The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy, Cambridge University Press. p. 252

humanness could be found through this internal evaluative investigation, totally conducted from within the human way of life: the result is an evaluative and normative conception but also a naturalistic one of the individual. If we wanted to draw the conclusions, we can say that Nussbaum starts from the Aristotelian point of view that the human flourishing is given by the full realization of the individual's nature. This means basing the *eudaimonia* over a conception of the human being. The conception of the human nature is born thanks to Nussbaum's neo-Aristotelian method, that has its presuppositions on the internalist essentialism. Finally the internalist essentialism shapes her approach of social justice, being the aim of the government human, or citizen's good.

How does she shape this theory of the good? Her early period sees the conception of the so-called *thick but vague* theory of the good: its first level is a normative account of the human being, and the second level are the central capabilities, which are the expression of the common features of the human being. She does also, in her early work, locate these common elements. Nussbaum talks about: *mortality; the human body; capacity for pleasure and pain; cognitive capability, such as perceiving, imagining, thinking; early infant development; practical reason; affiliation with other human beings; relationship to other species and to nature; humor and play; separateness.*²⁴

Why *thick but vague theory of the good*? The locution *thick* is specifically elaborated to vehicle the idea that what is at stake are ends, not means, that constitute the human flourishing. The locution *vague* is aimed at making the theory tuned over the possibility of a "universalistic", naturally in the Nussbaumian understanding of the term, conception that has to deal with the reality of pluralism. The term *vague* remands to the context-responsiveness of this notion of the good. Martha Nussbaum elaborates two possible meanings of this vagueness: the *plural specification* and the *local specification*. The idea of *plural specification* signifies the capacity of adaptation of the general elements to the particular character of the individual and of the pertaining culture. The idea *local specification* signifies the adaptation to the contingent elements of the context.

As already mentioned above, Martha Nussbaum uses the language of capabilities to fill the content of her theory of the good: the internalist essentialism and the Neoaristotelian method

²⁴ Nussbaum (1992) "Human Functioning and Social Justice: in Defence of Aristotelian Essentialism." Political Theory 20(2): 202-246, pp. 216-220;

are the early justification of her capabilities theory. The third chapter is devoted to capabilities theory according to Amartya Sen and Martha Nussbaum.

The capabilities approach has had a strong resonance, and many version of it have been elaborated. The major and first theorist of the capabilities approach is Amartya Sen. He talks first about it in a Tanner Lecture, *Equality of What?* The idea of capability concerns the real capacity to do or to be something. Functioning is a *state of being or doing*, and it can cover a broad spectrum, one of the simplest one can be being well-nourished, a more complicated and nuanced is, for instance, achieving self-respect.²⁵ The capabilities are actualized by functionings, and one of the most interesting element of the capabilities approach is, as Sen first argues, that it considers the contingent factors that play into the conversion of resources into actual achievements or potential achievements. That would be to say that having the same amount of resources at disposition can lead to different results, different levels of functionings and capabilities, due to different contingent elements. Sen and Nussbaum point out that a pregnant woman and a woman that is not pregnant are going to need a different quantity of food in order to achieve the same functioning to be well-fed. Sen talks about the main inter-personal and intra-personal factors that might have weight in the rate of conversion.²⁶ There is the obvious fact of the differences of the persons, and of the same person at different times of their life. There are differences, for instance, in the physique, illnesses can make a difference, and other similar things. We could talk about environmental diversities: the diverse climatic condition of an environment are influential in the level of well-being the same level of income can assure. There is the matter of diverse social conditions, such as living in a violent neighborhood or not, or having access in a bad or good scholastic system. Sen recalls also a problem foreseen by the same Adam Smith: the relative differences. The cultural and personal background influences the amount of contentment starting from the same premises: Adam Smith talks about the possibility of being in public without being ashamed. Wearing shoes is in some part of the World essential for it, and it is not for others.

A capability is the capacity to realize a determinate set of functionings, and it is also associated, both in Nussbaum's and in Sen's view, to substantive freedom. Substantive

²⁵ Sen (1992), *Inequality Reexamined*. Cambridge, Harvard University Press, p. 39

²⁶ Sen (1999a), *Development as Freedom*. Oxford, Oxford University Press pp. 74-75; Sen (2004) "Elements of a Theory of Human Rights." *Philosophy & Public Affairs* 32(4): 315-356, p. 333

freedom²⁷ is a concept that involves both positive and negative liberty: it focuses on the ideal and also on the substantial conditions for the realization of the rights, the actual ability of the individual and the absence of external interferences against them. I do think Bernard Williams²⁸ is right in making an observation to the idea of capabilities: he aims that the capability to something must imply the capability not to achieve it as well. That is, for instance, that if there is the capabilities to be well-nourished, it must imply that the person can opt, among the diverse faculties of choices, for a vector of functionings that contemplate the functioning to be well-nourished, and a vector of functionings that doesn't contemplate that functioning, let's say, the individual decides not to eat for religious motivations.

Capabilities have the same meaning for them both in the vision of them as areas of freedom to choose²⁹, and this is not of secondary importance, since it supports their statement to belong to the liberal point of view. Amartya Sen and Martha Nussbaum, however, do not have exactly the same idea of capability.³⁰ Sen talking about capabilities implies an opportunity for functioning; Martha Nussbaum views capabilities as external possibilities but also internal abilities. They have different view also in what can be the utilization of the capabilities approach. Sen considers it as the right space used to evaluate different issues, that could be well-being, development, poverty, while Martha Nussbaum thinks of them also in another way, substantively, as expressing a theory of social justice, or, in her formulation, an incomplete theory of social justice. Objects of her social justice approach is the list of the central capabilities, and they are what has to be fairly distributed by the State, insofar they constitute the minimum account of human flourishing and dignity. Sen doesn't use capabilities in this way, and, contrary to Nussbaum, never attempts to elaborate a definite list:³¹ this has to be, in his view, the result of a public debate in a democratic environment.

There are some objections to the capabilities approach. Probably the most cogent one, acknowledged by Sen and Nussbaum as well, is how to measure the diverse sets of

²⁷ Crocker (1995), Functioning and Capability. *The Foundations of Sen's and Nussbaum's Development Ethics. Part 2 Women, Culture and Development: A Study of Human Capabilities*. J. Glover. Oxford, Clarendon Press, p. 163

²⁸ Williams (1987) *The Standard of Living: Interests and Capabilities*. *The Standard of Living*. G. Hawthorn. Cambridge, Cambridge University Press: 94-102.

²⁹ Sen (1992) *Inequality Reexamined*. Cambridge, Harvard University Press, p. 41

³⁰ Crocker (1995), Functioning and Capability. *The Foundations of Sen's and Nussbaum's Development Ethics. Part 2 Women, Culture and Development: A Study of Human Capabilities*. J. Glover. Oxford, Clarendon Press, p. 163

³¹ Sen (1993), Capabilities and Well-Being. *The Quality of Life (WIDER Studies in Development Economics)*. A. Sen and M. Nussbaum. Oxford, Oxford University Press p. 48

capabilities and of functionings.³² The accepted fact of a conception of the good dominated by intrinsic pluralism, accepted by both, doesn't simplify the matter: there is the potential risks of unavoidable tension among incompatible elements, and of their possible incommensurability. Another point of interest is the question of what is the focus of the approach, if it is on functionings or capabilities, on realization of state of doing or being, or in their potentiality. Capabilities, contrary to functionings, are open to choice: the individual can choose whether to implement or not a certain capability. This explains, at least partially, the reason both Sen and Nussbaum, although not always univocally, view capabilities as the correct space for evaluation.³³ This choice augments the difficulties related to measurement, since talking about capabilities means talking about something that is a possibility, not an actuation.

I have also focused on some other criticisms moved to the capabilities approach. Gasper, for example, criticizes the notion of capabilities as areas of freedom arguing that such wording is not always pertinent.³⁴ He makes concrete this objection exposing an hypothetical case of a woman whose sets of functionings always comprises malaria. However, if capabilities are substantive freedom, we would be led to say that this woman chooses malaria. I believe we can use Nussbaum's three-folded notion of capabilities to answer to this criticism, as the same Gasper seems to hint.³⁵ The woman possesses the internal capability, not to be ill with malaria, but she misses the combined capabilities, the external contingencies preventing her from being malaria-free.

I took into consideration another objection made by Bernard Williams: Williams concentrates on the correlation between capability and ability.³⁶ Is the correctness of saying that somebody has a capability related to the ability to do that in that precise slice of time? Do people living in Los Angeles lack the capability to breathe clean air? Williams says that they lack this

³² Crocker (1995), *Functioning and Capability. The Foundations of Sen's and Nussbaum's Development Ethics. Part 2 Women, Culture and Development: A Study of Human Capabilities*. J. Glover. Oxford, Clarendon Press, p. 163

³³ Nussbaum (2011a), *Creating Capabilities. The Human Development Approach*. Cambridge, The Belknap Press of Harvard University Press, p. 125

³⁴ Gasper (1997), "Sen's Capability Approach and Nussbaum's Capabilities Ethics." *Journal of International Development* 9(2): 281-302, p. 291

³⁵ Gasper (1997), "Sen's Capability Approach and Nussbaum's Capabilities Ethics." *Journal of International Development* 9(2): 281-302, p. 291

³⁶ Williams (1987) *The Standard of Living: Interests and Capabilities. The Standard of Living*. G. Hawthorn. Cambridge, Cambridge University Press: 94-102, pp. 98-99

capability “here and now”,³⁷ because if they would move they would have this capability. Nussbaum’s notion of capabilities could take into account Williams’ position. Nussbaum’s idea of capabilities is composed by internal capacity and external favorable circumstances: who inhabits in Los Angeles has the internal capacity, however it doesn’t have the external possibility for clean air, if it remains in Los Angeles.

Martha Nussbaum elaborates her own version of the capabilities approach, starting from the very same concept of capabilities. The conception is diverse, being capabilities in Sen opportunities and in Martha Nussbaum also internal capacities, and also being diverse the way the concept is structured. The philosophers ideates a three-folded notion of capabilities. They are distinguished in three notions: basic, internal capabilities and combined capabilities.³⁸ The first notion, that Nussbaum appeals as a basic capability, is there in every single human, and its presence is necessary for the growth of all the other capabilities. As perhaps the notion of basic capability shows, the theory of capabilities is taken by Nussbaum in inspiration from Sen’s position, but it has strict ties with Aristotle as well. Sen has acknowledged some link to Aristotle too, neither he or Nussbaum however, agree with him entirely. For instance, although the notion of basic capability is clearly Aristotelian, it is used by Aristotle in a way that Nussbaum would never accept. Aristotle justifies with it a not egalitarian conception of the human being. Nussbaum doesn’t follow this path in the moment she states that being a member of the human kind entitle the individual to the basic capabilities. Internal capability is the internal ability or capacity to achieve something. In other words, in the absence of external barriers, the capability is fulfilled. Nothing is as simple as one would like it to be: internal capabilities and external elements are not completely separable. There are internal capabilities, Nussbaum argues, that can be developed only thanks to favorable external elements. The third notion is that of combined capabilities. They are so-called insofar they combine internal capabilities and right external elements, together with the lack of external obstructions to the implementation of that capability. Human dignity itself is put by Nussbaum using the language of the capabilities: the ten central capabilities are the expression of human dignity, safeguarding them implies ensuring the opportunity for a life of dignity.

³⁷ Williams (1987) *The Standard of Living: Interests and Capabilities*. The Standard of Living. G. Hawthorn. Cambridge, Cambridge University Press: 94-102, pp. 98-99

³⁸ For example see Nussbaum (1987), *Nature, Function and Capability: Aristotle on Political Distribution*. Aristotle's "Politik". Akten des XI Symposium Aristotelicum. G. Patzig. Goettingen, Vandenhoeck&Ruprecht, pp. 59-76

Attentive to the contemporary world as Nussbaum is, it is clear that the capabilities approach cannot not face the issue of pluralism. If the capabilities list goes toward a certain objectivism, pluralism is not an issue she forgets or denies, on the contrary: Nussbaum tries every possible way to find a conciliation among the two elements. It is not a case that she labels the list and the results of her reflections as “open and humble”, open, that is to be revised and to undergo constant interaction with the contingent element of life and of the contemporary debate. She tries to shape a kind of universality attentive to pluralism, and there are two main paths she follows. She draws subjective bases for her universalism, or, a subjective objectivity who can aim at the maximum of the certainties that are within our reach, and the universality that is the maximum we can reach, not the absolute universality. Further, is “vague” universalism, liable to be bend and adapted by local contingencies. Another way to conciliate pluralism and universalism is the direction explored both by Martha Nussbaum and Amartya Sen, that maintain that even very different cultures can host, internally, common elements, common values. This is why they are very attentive on examining the notion of culture. It would be wrong, they say, to speak of culture as something that are there for good and are non-contradictory intrinsically. Culture as a miscellaneous of diverse ideas and positions, diverse and possibly contrasting, that is this two thinker’s point of view. Moreover they observes as a culture is not an isolated item, but it is constantly in touch with other cultures, influencing each other reciprocally. Martha Nussbaum reiterates more and more that the fact of considering capabilities and not functioning as the proper space for judgment is another sign of the respect for pluralism, as it is the importance she gives to the freedoms that safeguard it, as can be liberty of speech, of association, of conscience. To put in another way, respecting pluralism doesn’t imply the ideal of neutrality: it implies to sustain the values that may safeguard it. All that has been said about capabilities, moreover, doesn’t justify, Nussbaum makes it perfectly clear, using strength to implement them: they, although so important for human dignity and for human flourishing, have to be endorsed by pacific ways, as may be a persuasion campaign.

To sum up: Nussbaum uses, differently from Sen, capabilities in a substantive way, furnishing a list of central capabilities as expression of her idea of the good, the minimum elements of human *eudaimonia* and dignity. This makes them the purpose the a partial theory of social justice. Partial insofar as Nussbaum elaborates the idea of threshold, that is the level within her capabilities theory holds. She doesn’t elaborate a theory of distribution over this threshold.

The list of capabilities has been the object of a specific paragraph in the third chapter. It is maybe important to notice that Nussbaum distinguishes particularly the notion of practical reason and sociability, called architectonic capabilities. The reason of this name is that they gives all the other capabilities the connotation of “humanness”, of being possessed in a “truly human way”.

What is this list, in the end, supposed to be characterized? It is “open and humble”, having been given the possibility of constant revision and evaluation. Nussbaum’s early thought associates it with the *thick and vague conception of the good*. The central capabilities do constitute quite a thick ensemble, and they need a strong structure of validation. What are the features of the ten central capabilities? As already said, they are humble and open, liable to be changed with the progress of the contemporary debate in general and over these issues in particular. Nussbaum holds that they are characterized by incommensurability. Another interesting point is perhaps her statement that equalization is not the aim of every single one of the ten central capabilities. The equalization is the opportunity for every single being for equal dignity and human flourishing, and this leads, Nussbaum says, to equality of capability for some capabilities, and to the reach of a threshold of adequacy for others. The former could be symbolized by religious liberty, while the latter the right to housing. It is not easy the fulfillment of the central capabilities: some of them can be classified into Rawls’ categorization of natural goods. What can the State do at this point? Nussbaum has an answer for that,³⁹ saying the it should furnish the social bases in the above mentioned cases. Similarly, Rawls speaks of the necessity of implementing the social basis of self-respect.

Nussbaum’s capabilities approach is of, course, not unchallenged, on the contrary, there have been many criticisms, especially regarding the list of capabilities. I mention some of them. Nelson, in an interesting paper, formulate some. Capabilities are necessitated by all human beings for their human flourishing, they are the *conditio sine qua non* for it. And, Nussbaum reiterates often this, it is having a certain central capability that is fundamental, not the correlated functioning, that we may or may not decide to enact. These elements, if viewed under a concrete point of view, makes some problematic aspect come to the surface. One is a problem of stability, the other of justice. The first concerns on the motivation people who do not want to transform a central capability into functioning could possibly have in agreeing on the importance of the possession of that particular capability. The second digs further

³⁹ Nussbaum (2000b), Women and Human Development. The Capabilities Approach. Cambridge, Cambridge University Press, p. 81

highlighting the necessity of a precise governmental uses of resources in a certain direction to implement certain capabilities. However, taxes are at the base of State resources. That would mean that, at the same amount comparatively of taxes paid, somebody who doesn't consider its *eudaimonia* dependent on the conversion of the central capabilities into functioning has less resources put at disposition by the State to achieve its human flourishing.

Is there a solution to these statements? A possible idea, ventilated by Nelson himself, is using Nussbaum's neo-Aristotelian framework, and the conception of an objective idea of the good. In this way we could safely say that capabilities are the central focus, that this is enough to ensure the individual possibility for human flourishing, that is, human flourishing is not hindered if this capabilities are possessed but not implemented into functionings. And we can say the same that the ten capabilities of the list are the *conditio sine qua non* for every human flourishing. Using the Neo-Aristotelian method, it could be said that these capabilities encounter a broad agreement, if practical reason and narrative imagination are used in the right way. This leads, Nelson notes, to doubt the liberal flavor of this theory so shaped. Nussbaum, however, is well determined hers to be a liberal position. Among the liberal points she stress are the freedom of options that capabilities allow, and the defend of liberal values in the conception of *eudaimonia* upheld.

Martha Nussbaum has been much criticized in her essentialism and her methodology. Clark,⁴⁰ to start with, mentions the fact that the list of capabilities hasn't changed much over the years, whereas Nussbaum holds the necessity of it being in constant interaction and revision as the product of the progress of the contemporary debates. There is, moreover, the accusation of the Western character of the list, and, as Jaggard notices,⁴¹ it being the result of choices somewhat *a priori*, that do not take into account the will of the addressee of it. Martha Nussbaum, in truth, reiterates the temporary nature of the list, characterizing it as open to other position and she is not contrary to an augment in participation.⁴² It is true, perhaps, that she hasn't enacted enough these statements. Using the neo-Aristotelian method implies, then, the notion of a trans-cultural ethical investigation about how individuals view

⁴⁰ Clark (2006) *The Capability Approach: Its Development, Critiques and Recent Advances*. Working paper GPRG-WPS-032, <http://economics.ouls.ox.ac.uk/14051/1/gprg-wps-032.pdf>, published under the title of *Capabilities Approach* The Elgar Companion to Development Studies. D. A. Clark. Cheltenham, Edward Elgar

⁴¹Jaggard (2006), "Reasoning about Well-Being: Nussbaum's Method of justifying the Capabilities." *Journal of Political Philosophy*14(3): 301-322, p. 314

⁴² Stewart suggests something of the kind, in Stewart (2001), "Women and Human Development: The Capabilities Approach by Martha Nussbaum." *Journal of International Development* 13(8): 1191-1192, p. 1192

themselves and their fellow-beings. What has to be clear, in the end, is that the capabilities list is an endeavor, and it can be revised without challenging the methodology behind it, that could be challenged, probably, but for different reasons.

What the capabilities list in particular and the capabilities approach in general has to do with human rights, and can it be a point of strength for both the approaches considering them in correlation with one another? The starting reasoning goes more or less like this: capabilities list as the minimum precondition for a flourishing and dignified life; human rights as the minimum precondition that safeguard human dignity and *eudaimonia*. This is, essentially, the content of the fourth chapter, only I maintain the focus on the link between capabilities and the list of central capabilities and civil and political, economic and social rights. This maybe makes clear one of the observation made by Nussbaum in *Capabilities and Human Rights*, that is if there is an overlapping over these two theories, or if they are complementary. We could individuate an overlapping in the meaning that there is both the focus on human flourishing and human dignity, and they are both necessary for insuring it. They both aspire to universality and Nussbaum views them both as ideal bases for constitutional formulations.⁴³ Nussbaum says, moreover, that capabilities are a clarification that enhances the connection human rights and human dignity since they constitute the *trait d'union* between them. Dignity, in fact, is embodied in the ten central capabilities and human rights in safeguarding capabilities, safeguard human dignity. There is also the possibility of considering them complementary: human rights safeguard capabilities, and capabilities can be considered at the basis of human rights. Nussbaum thinks that a referral of capabilities can deal with the issue of duties concerning human rights. If human rights safeguard capabilities, the necessity to implement a central capabilities implies the necessity of a duty to realize it. Martha Nussbaum sees in governments the main rights-bearer where human rights are concerned, but I tend to consider Sen's position, mentioned also above, as quite interesting. Sen refers to imperfect obligations, and he view the human being as ultimately responsible to realize these obligations. This is true also in a "loose" way: the human being, in virtue of its nature as citizen, can act to form the government he elects and to influence its behavior, for example through apposite campaigns.

This is, to sum up, the core of the interrelation between the two of them. On the one side, considering the foundational aspect of capabilities in respect to human rights is one answer to

⁴³ Nussbaum (2011a), [Creating Capabilities. The Human Development Approach](#). Cambridge, The Belknap Press of Harvard University Press, p. 62

the issue of which bases to give to human rights. It is not privy of problems, as I have shown in the fourth chapter. On the other side, talking about rights has a precise meaning for capabilities: it provides them the normative power they may not achieve considered alone, and human rights are an efficacious instrument to their safeguard. To get more in dept in the argumentation, I have examined Sen's assumption that the connection between capabilities and human rights vehicles a particular notion of rights, that Sen calls the "goal-right system". This system views rights as aims, as goals, that have to be enforced. This doesn't mean, in Sen's view, being completely consequentialistic. Rather he elaborates a theory called by Alexander "broad consequentialism".⁴⁴ If we were to hold consequentialism in its purest form, we should consider as sole meter of judgment of actions their consequences. In this particular case, we would judge solely basing our judgment to the actual implementation of the rights considered as goals. Sen, instead, acknowledges the importance of the consequential link. What he questions is the eventual exclusive attention given to it. Other factors has to be considered in matter of judgment and evaluation. This may lead to a system where consequentialism cohabit with deontological elements. I have followed Sen in considering what could be some criticism to this "goal right system". Sen⁴⁵ challenges the common idea that the consideration of rights as goals would lead to an intuitionist-based pluralism. He articulates this challenge from different points of views. First of all, he says, we should prove that intuitionism is not a right concept, and this is not granted automatically. But, perhaps more importantly, he doesn't see a necessary relation between pluralism and intuitionism: we can recognize pluralism without accepting intuitionism. Sen⁴⁶ further arguments in favor of the advantage of considering rights as goals. This advantage, he acknowledges, can be challenged, and it can be not immediately seen. It relies on the assumption, made by Sen, that this is the only way to acknowledge the fundamentality of rights. If rights are considered goals they ought to raise an obligation⁴⁷ on any person, obligation that is directed to the maximization of the rights, and not simply in trying not to violate them. Sen, at last, unites conceptually capabilities and rights thanks to his peculiar

⁴⁴ Alexander (2004), "Capabilities, Human Rights and Moral Pluralism." Working paper <http://cfs.unipv.it/sen/papers/Alexander.pdf>, published in The International Journal of Human Rights 8 (3), p. 6

⁴⁵ Sen (1984a), Rights as Goals. Equality and Discrimination: Essays in Freedom and Justice. United Kingdom, Association for Legal and Social Philosophy eleventh annual conference at University College, London, 6th-8th April, 1984. S. Guest and A. Milne. Stuttgart, Franz Steiner Verlag Wiesbaden GmbH: 11-25, p. 15

⁴⁶ Sen (1984a), Rights as Goals. Equality and Discrimination: Essays in Freedom and Justice. United Kingdom, Association for Legal and Social Philosophy eleventh annual conference at University College, London, 6th-8th April, 1984. S. Guest and A. Milne. Stuttgart, Franz Steiner Verlag Wiesbaden GmbH: 11-25, p. 23

⁴⁷ Even if we face an imperfect obligation.

notion of freedom. Rights safeguard basic liberties, and capabilities are envisioned as substantive freedoms. Consequently, rights safeguard basic capabilities. After having clarified this point, Sen tries to answer to another argument, that is, why should we still say that rights have a fundamental importance, and not just an instrumental one, since they safeguard the capabilities. The passage here is tricky, however well thought of: Sen aims that rights do not solely safeguard substantive freedoms, but, in their conception of goals, they are expressed as freedoms. Capabilities as well are conceptualized in this way. That is why rights are fundamental, not just instrumental.⁴⁸

Martha Nussbaum, however, starts from a different idea of rights: rights are considered side-constraint. This implies the necessity of respecting them notwithstanding what could be societies' goals.⁴⁹ And yet, Alexander sees in Nussbaum's position something that he calls an "integrative deontology".⁵⁰ Nussbaum, in fact, acknowledges the necessity for what she terms "outcome oriented" considerations. They come into play, for example, when there is a conflict internal to the central capabilities, and this possibility is due, is remembered, by Nussbaum's idea of the plurality of the good, that can give space to internal tensions. Another way she follows in trying to combine deontological and consequence-responsive elements is in her attention paid to results, more than to procedures. Outcomes allow to judge whether a situation is just or not.⁵¹ Justice is given, she says, when everybody's entitlement is insured. That is why she talks about an "outcome-oriented view".⁵² I have observed, at this point that Nussbaum's and Sen's idea, do depart from opposite points of view, but, in the end, they get nearer and nearer. This is one of the reasons why I refer to Sen's idea of the "goal-right system". Sen doesn't complete this system, and I think one way is to move towards a

⁴⁸ Sen (1984a), Rights as Goals. Equality and Discrimination: Essays in Freedom and Justice. United Kingdom, Association for Legal and Social Philosophy eleventh annual conference at University College, London, 6th-8th April, 1984. S. Guest and A. Milne. Stuttgart, Franz Steiner Verlag Wiesbaden GmbH: 11-25, p. 23

⁴⁹ Nussbaum (1997) "Capabilities and Human Rights" Fordham Law Review 66(2): 273-300, p. 300

⁵⁰ Alexander (2004), "Capabilities, Human Rights and Moral Pluralism." Working paper <http://cfs.unipv.it/sen/papers/Alexander.pdf>, published in The International Journal of Human Rights 8 (3), p. 10

⁵¹ Nussbaum (2011a), Creating Capabilities. The Human Development Approach. Cambridge, The Belknap Press of Harvard University Press, p. 95

⁵² Nussbaum (2011a), Creating Capabilities. The Human Development Approach. Cambridge, The Belknap Press of Harvard University Press, p. 95

deontological course. That would allow to go near, in this way, Nussbaum's "integrative deontology".⁵³

After having clear the concept of rights, I consider in more depth the reason of the importance of capabilities for human rights. Where does Martha Nussbaum stand? She proposes to view the idea of rights as combined capabilities. This is one way to obviate to the formality of the idea of rights⁵⁴: being entitled to a right implies the substantial, formal, material conditions and the freedom for implementing the very same rights. Beitz affirms that there is one way in which capabilities fill the concept of human rights, and they embody their composition.⁵⁵ This, I think, is another way of saying that human rights can be seen in terms of combined capabilities. There is another way of connecting human rights and capabilities, according to Beitz's interpretation of Martha Nussbaum's position:⁵⁶ capabilities constitute the right aim of human rights. In her early writing Nussbaum mentions another correlation human rights-capabilities. She talks about the basic capabilities, possessed by every human being solely thanks to its humanity, this possession grants the individual the entitlement to human rights. This is why capabilities are, to use Beitz's terms, "reasons for action"⁵⁷ for human rights.

In *Creating Capabilities* Nussbaum states quite clearly that the central capabilities are exactly concerning themselves with the same conceptual field of the two generations of human rights. Talking about the two generations of human rights, however, is not advisable, in Nussbaum's opinion, if this vehicles a ranking reason. If it is true that capabilities are the core of her thought, human rights are important as well, and, moreover, she says that human dignity and human flourishing cannot be safeguarded by the sole capabilities⁵⁸. The advantage of the rights approach lies in having more normative strength than capabilities alone: if the idea of capabilities can fill the notion of human rights, the idea of human right implies in a stronger way the necessity for implementing the capabilities. As remembered above, both Amartya Sen and Martha Nussbaum, attentive as they are to the liberal character of their theories, view capabilities as areas of freedom of choices, but referring to right, Nussbaum says, enhances

⁵³ Alexander (2004), "Capabilities, Human Rights and Moral Pluralism." Working paper <http://cfs.unipv.it/sen/papers/Alexander.pdf>, published in The International Journal of Human Rights 8 (3), p. 10

⁵⁴ Nussbaum (1997), "Capabilities and Human Rights" Fordham Law Review 66(2): 273-300, p. 294

⁵⁵ Beitz (2009), *Naturalistic Theories. The Idea of Human Rights*. Oxford University Press, New York. p. 63

⁵⁶ Beitz (2009), *Naturalistic Theories. The Idea of Human Rights*. Oxford University Press, New York. p. 63

⁵⁷ Beitz (2009), *Naturalistic Theories. The Idea of Human Rights*. Oxford University Press, New York. p. 63

⁵⁸ Nussbaum (1997), "Capabilities and Human Rights" Fordham Law Review 66(2): 273-300, p. 296

the closeness to the concept of choice, that is linked to rights. When human rights come into play, moreover, there is an idea of major concreteness and involvement, even emotional, than if we are dealing only with capabilities⁵⁹.

Nussbaum uses the language of capabilities also to some issues of human rights related to their universalism. Human rights are said, or better, they aim at being universal. Yet, they are usually considered to be a Western idea, and this could be true from an historical point of view. Human rights are born from the same ideals that spread in the French Revolution: freedom, equality and brotherhood. From a conceptual point of view, they want to be elaborated in order to gain universality, and to gain agreement from many different cultures. From a practical point of view, we can notice that the Conventions over human rights have been widely subscribed. It must be acknowledged the difficulty of considering human rights' universality in time and place. Nussbaum's universalism, however, wants to be a "moderate" universalism, able to survive and reconcile with the pluralism and the existence of many different cultures. Her way of conciliating the two poles (and also Sen's, up to a certain point) is in the attempt to identify issues common to every culture, and in a steady reflection about the idea of culture. Both Sen and Nussbaum, as said above, are against the view of culture as a monolith, an homogeneous entity: they point out the existence of many different points of view from within, and not always they get along well with each other. How does capabilities help in the issue of universality of human rights? In the sense that human rights may be considered as specific and contingent declination of the universal idea represented by the capabilities.

Beitz views Nussbaum's capabilities theory as being a foundation for human rights.⁶⁰ This is Beitz:

"Nussbaum has proposed a list of central human capabilities which she argues are of central importance in any human life, whatever else the person pursue or chooses. She holds that these capabilities are the basis of human rights. This follows a suggestion of Bernard Williams."⁶¹

⁵⁹ Nussbaum (1997), "Capabilities and Human Rights" *Fordham Law Review* 66(2): 273-300, p. 277

⁶⁰ Beitz (2009), *Naturalistic Theories. The Idea of Human Rights*. Oxford University Press, New York. p. 63

⁶¹ Beitz (2009), *Naturalistic Theories. The Idea of Human Rights*. Oxford University Press, New York. p. 63

Beitz considers Nussbaum's in the galaxy of the naturalist theories of human rights, and he is a strong critic of naturalistic theories in general and of Nussbaum's idea in the specific. Naturalism over human rights, Beitz says, is explained by considering the notion of human right as deriving from the idea of natural right. Or, to be more precise, that possess at the minimum one of the four features associated to natural rights. The naturalistic idea for excellence is that human beings *have* human rights, just because they are human beings, usually due to some element they have in common. They are also the roots of positive law, and, in this case, of the positive legislature over human rights. As said above, Beitz individuates four features typical of natural rights. The first point is that since they are possessed thanks to individual humanness, do not rely on local morals, regulations, convention. On the contrary, they are their critical standards. The second observation is that they are pre-institutional, meaning that are not relied upon existing apparatus. The third and the fourth characteristic regards human rights' universalism. The former sees universality as independent from space and time. The latter conveys the meaning that human rights are possessed by human being simply because they are human.

Beitz can agree to view human rights as critical standards to evaluate local traditions and custom, but he cannot bring himself to view human rights as natural rights pertaining to a specific normative level. He refers to Maritain: he views human rights as rightful entitlements who can be accepted upon, *via* many different justifications, by many different cultural belongings. A solution to this is the use of the capabilities list to justify human rights, and Nussbaum's neo-Aristotelian method and internalist essentialism to justify trans-culturally capabilities.

Beitz doubts seriously over the pre-institutionalism of human rights, also in the light that many of them are linked inseparably to institution. For instance, let's think of the right to political participation. Capabilities approach can help to solve the issue: we can think of capabilities as pre-institutional, and of human rights as particular declinations due to the nuanced existence of the human-built world. Similarly Beitz points out to the problem that would be created to human rights in thinking them as universal in time and place: human rights are often dependent to the historical and special reality they are conceptualized in. As said above, the solution can be given by the consideration of the capabilities has the ones that have to burden universality, and not human rights. Further, Beitz considers nonsensical the idea of human rights belonging to human as such. Nussbaum justifies them thanks to the individual possession of the basic capabilities. Finally, Beitz moves some criticism to Martha

Nussbaum's theory in the specific. The naturalistic version of human rights, and Nussbaum's among them, is out-of-place: it cannot fit what would be its role in the contemporary world. To put things in a better way, they cannot retain they should-be status of parameter of judgment in the modern discourse. Nussbaum's potential answer to this can be found in *Creating Capabilities*, where human rights are said to constitute parameter and issues to be confronted with in national and international practice. Beitz criticizes directly Nussbaum in saying that a naturalistic understanding of human rights raise the "problem of contribution".⁶² If the naturalistic theory makes perfectly clear that individuals are entitled to human rights, it doesn't reach the same clarity in understanding the identity of the right-bearer. This issue, however, has been widely discussed above. The State is deemed to be the right-bearer, since it is his duty to fulfill capabilities, that are safeguarded by human rights.⁶³ In case the state is unable to abide, the duty is of the international community and of the other States. I may remind, once more, Sen's idea on the subject: government have to respond to, and are elected, in a democratic regime, by the citizens. It is ultimately the individual persons that are the ultimate right-bearers, either through direct or indirect obligations. Beitz individuates another critical issue: naturalistic positions are not able to provide a justification for all the human rights that are so recognized in human rights practice. Nussbaum argues, we have said, for her capabilities list being able to account for the so-called two generations of human rights. She doesn't name the other generations of human rights, and I, too, do not examine them in this work. My choice is due also to the fact that talking about the civil and political and social and economic right is a wide field enough. The other issues about human rights are very interesting and would merit more space of reflection that I could allow in the present dissertation. Beitz, finally, declares naturalistic positions, including Nussbaum's, implausible: it is counterintuitive, in fact, in case of contradiction between the international human rights practice and a naturalistic position, to choose the latter over the first. Nussbaum may have two different answers to this. The first is that the list is humble and open to be revised, and this would open to the possibility that in case of a critical comparison it would be the international doctrine of human rights to revise the central capabilities and not the opposite. This is, however, a contingent position, due to the provisory character of the list. Theoretically speaking, the central capabilities are the bases to determine which rights are human rights. This is not necessarily a defect, but rather a feature of the justificatory

⁶²Beitz (2009), *Naturalistic Theories. The Idea of Human Rights*. Oxford University Press, New York. p. 65

⁶³ Nussbaum (2011a), *Creating Capabilities. The Human Development Approach*. Cambridge, The Belknap Press of Harvard University Press., p. 64

approach of human rights. The second answer is that every foundation we give to human rights will determine what can be considered a human rights and what cannot. It is a point of strength, on the contrary, in so far as it limits the multiplication of human rights, giving also more credibility to the items that can be properly said human rights. If we follow Nussbaum, we say that to understand if a claim has the status of human rights we should see if it safeguard the central capabilities, and, moreover, to view a capability as a central capability means to consider it *conditio sine qua non* for the human flourishing.⁶⁴

Beitz formulates at last his most challenging remark: he asks why should we look for a philosophical foundation to human rights at all, since this implies a complication, and not a simplification of the situation. The issues to face are, in fact, multiplied, since they are not only the ones linked to human rights, but also to their justificatory theory. Nussbaum would say to that that the right foundational theory solves the issues surrounding human rights, rather than making them more complicated.

⁶⁴Beitz (2009), *Naturalistic Theories. The Idea of Human Rights*. Oxford University Press, New York. p. 64