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

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in their short life they loved much each other and their  
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# Human Rights and Martha Nussbaum's Capabilities Approach. Connections and Interrelations.

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## Introduction

Freedom, equality and brotherhood are the ideals that are at the bases of human rights. The most famous statement about human rights is the *Universal Declaration of Human Rights*, dated 1948. The Universal Declaration is not the first document about human rights. It represents, however, a pivotal point in their history and in the panorama of international relations. The birth of the human rights approach, Cassese notes,<sup>1</sup> introduces, in the international arena, a new parameter, which allows to categorize certain injustices previously deprived of a specific status. Moreover, the status of the individual is starting to get recognition at an international level. Traditionally the international arena concentrates on States. The attention that human rights give to the individual has had, as one consequence, the start of the discussion about the legal personality of the individual at an international level, although this issue is still *in fieri*. The possibility for the individual to have an international legal personality is supported by the fact that, in some cases, individual complaints of violation of human rights is contemplated. This, however, is not possible in many international bodies, and often the *iter* to follow for the individual is quite complex and long. It is still a start for a process that, we hope, will, sooner or later, achieve completion. What are the roots for the modern notion of human rights? Historically, human rights have been developed internally to the Western history.

“Natural law theory led to natural rights theory-the theory most closely associated with modern human rights”<sup>2</sup>

The concept of human right is quite powerful and elusive at the same time. Conceptually, it can be quite frail. In this dissertation I adopt Nussbaum’s definition of human rights, but this is by no means the only one:

A human right is an especially urgent and morally justified claim that a person has, simply in virtue of being an adult, and independently of membership in a particular nation, or class, or sex, or ethnic or religious or sexual group.”<sup>3</sup>

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<sup>1</sup> Cassese (2005), pp. 3-4

<sup>2</sup> Shestack (1998), p. 207

<sup>3</sup> Nussbaum (1997), p. 292

Dembour<sup>4</sup> attempts to classify four different bundles of theories regarding human rights: the naturalistic positions, the protest positions, the deliberative and the discourse positions. They take different stands on four different issues about human rights: foundation, universality, legal statement and how to implement them. These are also the four issues that I will take into consideration in discussing about the interrelation between and the capabilities approach. It is probably useful to expose briefly these theories. As far as we are talking about naturalistic theories, they ascribe the possession of human rights to the humanness of the individual, something the individual is entitled to simply because he is a human being. Their existence doesn't depend on institutions. Their being recognized in a social context doesn't provide them with a foundation, rather it is a sign of their recognition as existing at a pre-institutional level. Human nature, considered in different forms, is taken to be the bases of human rights. The ultimate legitimation can be found, according to different theories, in God, in reason, in the moral stand of individuals, and so on.

The deliberative positions are those built along the line of presenting human rights as the result of an agreement. The universality of human rights can be achieved, then, in the presence of a worldwide consensus over these issues. Probably Habermas is the most famous exponent of this position.

The protest school regards human rights as weapons to eradicate injustices. They are statements and they represent ideal goals to even up inequities. Further, Dembour identifies the discourse positions, which views human rights as born from the debates regarding these issues. It is the very same resonance of the human rights approach the reason of their strength.

The capabilities approach, in the version elaborated by Nussbaum, gives, as Beitz<sup>5</sup> says, a naturalistic interpretation of human rights. What does Dembour say about naturalistic positions over the four issues mentioned above? First, human rights and universality. Human rights are deemed to be universal, since they are rights founded on nature. The issue of universality, however, is a particularly delicate one. Some human rights recognized as such are quite difficult to be considered universal, since they are linked to a specific context and situation. One example could be that of having holiday with pay. Historical universality could be quite difficult to claim, in this instance. Using an approach such as Nussbaum's human rights approach, however, can solve this issue claiming that it is capabilities that retain universality, and that human rights are entitlements posed at protection of the central capabilities, so they can be contingent specifications of universal

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<sup>4</sup>Dembour (2010), p. 4

<sup>5</sup>Beitz (2009), p. 63

issues. Regarding the issue of foundations, nature is, in the naturalistic positions, the foundation of human rights. This can be interpreted in different ways, such as taking human rights as deriving from Gods, or reason. Capabilities can be taken the foundations of human rights: the central capabilities, that are the expression of the essential common nature of human being, are the foundations of human rights. About the third issue, the legal aspect of human rights, naturalistic positions consider positively the embodiment of human rights into positive law. It is important to notice, anyway, that the legal aspect of human rights is not their foundations, rather it is one expression. Sen maintains, similarly, that human rights have an ethical value, although they retain also a legal aspect, in their legal codification.

As far as far as how they can be realized, the naturalistic position, Dembour says, views human rights as

“entitlements to specific objects that every individual should have respected. For them, human beings *have* human rights.”<sup>6</sup>

Human rights are fulfilled in the moment that human beings can actually have, concretely, materially, the objects circumscribed by them.

The very same concept of right can be interpreted in different ways:

“The definitional process is not easier when examining the term human rights. Certainly "rights" is a chameleon-like term that can describe a variety of legal relationships. Sometimes "right" is used in its strict sense of the right holder being entitled to something with a correlative duty in another. Sometimes "right" is used to indicate an immunity from having a legal status altered. Sometimes it indicates a privilege to do something. Sometimes it refers to a power to create a legal relationship.”<sup>7</sup>

I will take into consideration in particular two of them, the consideration of rights as goals or as side-constraints. Human rights have gained more and more power, domestically and internationally. They are entitlements at the defense of the individual, both at a local and at an

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<sup>6</sup>Dembour (2010), p. 7

<sup>7</sup>Shestack (1998), p. 203

international level. I will focus on the legal codification of human rights. This codification has been increasing over the years, and numerous conventions have been ratified by a great number of states. The codification of human rights has established a structure of behavior: human rights fix rules on individual's conduct, they are claim the states is obliged to meet and they warrant the person's protest if the right is violated. Since the topic is so vast, I will concern myself in this work only with civil and political, and social and economic rights. I take as a legal reference the two main conventions on the topic, namely the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). I will divide my reflections in four parts. The first is concerned on the clarification of the notion of civil and political and economic and social rights, and on an examination of the main rights that the conventions ascribe under these labels. Human rights, however powerful rhetorically, have many unresolved issue: in their very definition, for example, in their content and legitimation (what can be counted as a human right, and why), in their foundation. I will consider the capabilities approach, particularly in the version elaborated by Martha Nussbaum, at the light of these issues. I will analyze, in the second chapter, a particular foundation that the philosopher gives to the capabilities approach in her early period. She elaborates a method that she calls Neoplatonist, since it is based on Aristotle's thought. Once I have examined Nussbaum's early way to justify the capabilities approach, the third chapter is devoted to the analyses of the capabilities approach, starting from the capability approach in general and then deepening Nussbaum's version of the approach. I will concentrate on her capabilities list, that it is the core of what she calls the *thick but vague theory of the good*. The fourth chapter is devoted to explore the connections between human rights and capabilities, and in particular Nussbaum's capabilities approach. In particular I will examine what the relations between the two approaches is, and I will verify the assumption that both are strengthened by considering them together. The capabilities approach embodies the conceptualization of human rights, it explicates their content, and capabilities are the goals of human rights and their justification in human rights to be implemented. Capabilities, moreover, can be seen as a valuable foundation for human rights. The reason of human rights is to protect the central capabilities, and which human rights are effectively human rights can be judged by their adherence to the central capabilities of the list. The central capabilities of the list are the minimum precondition for human flourishing and human dignity.

# I Chapter. Human rights

## 1.1 Civil and political rights

### *1.1.1 Issues about civil and political rights*

This work examines the rights that go under the classical distinction of the two generations of human rights: the first generation as given by the civil and political rights, the second by economic, social and cultural rights.<sup>8</sup> The capability approach is taken as foundation and justification both of civil and political, and of economic and social rights. I do not enter the merit of the relations with human rights beyond them.

Although today there are numerous treaties and conventions expressing human rights, I consider as the principal ones the *Universal Declaration of Human Rights* and the two Covenants. The two Covenants are specifically aimed at transforming human rights from recommendation to norms of secular rights. The treaties are aimed at protecting respectively civil and political rights and economic and social rights, the latter expressed in the voices from the 22<sup>nd</sup> to 27<sup>th</sup> of the UDHR. Although they are elaborated in 1953, they are subscribed then in 1966, and they are practically implemented ten years later. So are born the *International Covenant on Civil and Political Rights* (ICCPR)<sup>9</sup> and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).<sup>10</sup>

The legal aspect of human rights, however, doesn't exhaust all their peculiarities. I agree with Amartya Sen that takes human rights as an ethical standard.<sup>11</sup> Sen values positively Hart's position in so far as he states that human rights embodied as moral entitlements are the foundations for a legislative apparatus. Sen argues, however, that these statements cannot be all that human rights are about, and that moreover they cannot be stigmatized solely as the inspiration for legal rights. Further, he states that not all human rights ought to be implemented through law.<sup>12</sup> Sen makes the example of the right of the women to share household's decisions. It would be ridiculous legislating such a right, with the husband being arrested in case he doesn't involve his wife in decision. "The necessary changes would have to be brought in other ways, including media

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<sup>8</sup> Cultural rights won't be treated, however, given the fact that they would need much more space and attention that it would be possible in the present work.

<sup>9</sup> See ICCPR (1966).

<sup>10</sup> See ICESCR (1966).

<sup>11</sup> Sen (2009), p. 361

<sup>12</sup> Sen (2009), p. 365

exposure and criticism as well as public debates and agitations.”<sup>13</sup> I think, however, that the main aim for human rights is to be the foundation for legislation. It is true that it wouldn't be proper to imprison the husband who doesn't share household decision with his wife. It is also true, however, that non discrimination within family can be legislated. I would tend to think that the proper space for human rights is to be embodied in legal rights, although I admit this is a point that would need further reflection and inquiry.

I give ample space to the legal aspect of human rights, however, since I am particularly interested in the connection between the rights stated in the two covenants, that cover the domain of civil and political and social, economic and cultural rights and the capabilities list elaborated by Martha Nussbaum.

The distinction between civil and political and economic, social and cultural rights is accepted with the following proviso:

“economic, social and cultural rights or need based rights. [...] the rights that can be referred to as civil and political or dignity enhancing rights are considered. However, be cautious with the application of these academic distinctions, because as one can clearly see there are many overlaps and much intertwining between the two areas of rights.”<sup>14</sup>

I consider the two Covenant as exhaustive of the content of respectively civil and political and economic, social and cultural rights, and I will refer to them in the present work. Sen and Nussbaum, however, refuses the categorization of these rights in first and second generation rights. Civil and political rights are involved in safeguarding the freedom of the citizens, mainly talking about a freedom-from the intervention of the State or singular or collective bodies. They are considered to be negative rights, conversely from the so-called second-generation rights that are considered to be positive. We will see in the next paragraph how Sen argues about this distinction, underlying the positive implication of the so-called negative rights. Starting from the principle of non discrimination and in a liberty-environment, civil and political rights concern about people as citizens, active and passive citizens of the state and as part of the civil society.

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<sup>13</sup> Sen (2009), p. 365

<sup>14</sup>Doebbler (2006), p. 103

What does it mean that they are negative rights? A negative right is essentially an immunity from: my negative right over something is granted if everybody is prevented from acting in some ways that hinder the possibility that I have to fulfill my right. A classical example is the rights to life. I hold a negative right to life if the others are prevented to attempt at my life. A positive right, conversely, implies the others' positive endeavor toward its implementation. That is, my positive right to life would imply the others' endeavor to do every attempt in their possibilities not to make me die.

I would agree with Amartya Sen, however, who dilutes the opposition negative-positive. Sen questions the idea of negative right conceptually. He questions the fact that a right tied to a negative freedom involves solely non-interference, a right of non-interference with the right-holder in the possibility to fulfill the right. He states that, often, it implies the consequence to positively take action to fulfill the entitlement for the right holder.

He chooses to identify the distinction between positive and negative rights with the distinction of positive and negative freedoms. The negative right, Sen says, focuses not on the actual capacity to do something, rather on the possibility to do something without being interfered or hindered in this possibility. What Sen is concerned to do here is to question the value of this distinction: there is no reason we should value a negative right, that ties in a negative way, and do not care about the actual possibilities, concrete capacity for realizing a right. Sen maintains in fact:

“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)?”<sup>15</sup>

This has consequence also in counteracting a criticism made to second generations rights: that their implementation is too expensive. However, also to simply protect the negative freedom of agents involves significant costs. It is not exactly cheap supporting the government or security structure, basilar, to name one, for the right of security. As Sen notes, in fact, negative freedom involves by necessity positive actions.<sup>16</sup>

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<sup>15</sup> Sen (1984b), pp. 314-315

<sup>16</sup> Sen (1984b), pp. 313-315

“Thus, even if negative freedoms were all we valued, there would still be a strong case for having consequence-sensitive evaluation of negative freedoms, and for accepting contingently some *positive* obligation to protect negative freedoms.”<sup>17</sup>

This line of reasoning is very interesting: to implement a negative right, it is not enough to refrain from doing something, it is often necessary to actively act in order to safeguard somebody’s negative rights. This allows to question the position that holds that positive rights, since they involve the necessity about the material conditions for doing something, are too burdensome and too *thick* to be stated as human rights. To sum up: once we establish that also negative rights involve positive elements, the distance between the two elements gets narrower. The good consequence is not the questioning of negative first generation rights as human rights, but the inclusion of the so-called second-generation rights as human rights.

Sen, and I agree with him, attribute the same stature to civil and political and to social and economic rights.<sup>18</sup> The civil rights are the rights that enhance the individual possibility for equal citizenry in a liberal democracy,<sup>19</sup> and they do not focus on the sphere pertaining state power and organization. They are the rights intertwined with the idea of citizenship, for instance property right, law-protection rights, right to a just process, freedom of conscience and thought, freedom of speech and assembly. The origin of civil rights is due to the Latin circumlocution *ius civis*, or, in other words, the right of the citizen. They are legally expressed first, then come the political and finally social rights. Political rights are involved in the direct or indirect management of the state. Examples are the right to vote, the right to public offices, to be a testimony in court. The distinction between civil and political rights is important if the aim is that of focusing on the diverse spheres of actions. It is, however, objectionable in the case this distinction is used, as it has happened in the past, to treat citizens differently: women, for example, were in the past considered right-holder in the case of civil but not political rights.<sup>20</sup>

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<sup>17</sup> Sen (1984b), p. 314

<sup>18</sup> As I said above, I do not enter the merit of rights beyond this sphere. My choice is not due to lack of interest, but to the complexity of the argument and the necessity to circumscribe it.

<sup>19</sup> Altman (2009).

<sup>20</sup> Altman (2009). Altman suggests further that the concept of civil rights be all including, including then political rights as well. I do not agree, since I consider the distinction useful to retain the difference between these rights.

As I said, I will consider the ICCPR, the International Covenant on Civil and Political Rights, as an instrument to discuss the first generation of human rights.

### 1.1.2 *The International Convention on Civil and Political Rights*

The preamble of the ICCPR is the same as the one on the ICESCR. The preamble has a fundamental importance, since it states that:

- It poses the recognition of human rights as a *conditio sine qua non* to the achievement of freedom, justice and peace globally;
- Human rights fulfill the dignity of the person;
- The third point of the preamble is particularly interesting historically, since it links the Covenants with the elaboration of the *Atlantic Charter* in 1941. There is the intention to protect four freedoms: freedom of expression, religious freedom, freedom from fear and from want.<sup>21</sup> What is known as the *Four Freedom Speech*, that is in reality the 1941 *State of Union Address*, is given by the president of the USA Franklin Delano Roosevelt. He holds these four freedoms as fundamental. This speech deeply influences Eleanor Roosevelt and her work as chairwoman to the drawing of the *Universal Declaration of Human Rights*. These freedoms, plus civil and political liberty can be delivered, states the preamble, only *via* the guaranteeing of the two generations rights.
- Finally, the preamble is important insofar as it identifies in the individual the object of the rights, the ultimate right holder, and the ultimate addressee of the right as well: “the individual, having duties to other individuals and to the community to which he belongs is under a responsibility to strive for the promotion and observance of the rights recognized in the present covenant”<sup>22</sup>. The individual can do so also as citizen of a government, using also its right to vote to pressure the governments in fulfilling human rights.

The first article of the ICCPR is identical with the first article of the ICESCR, and it plots the *right to self-determination*. This right is quite influential and it is often named in the contemporary discourse over human rights.<sup>23</sup> It is, however, difficult to clarify its content, since its naming is so recurrent as much as the problematic aspects of its definition. It is an important principle under

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<sup>21</sup> Shelton (2007), p. 13

<sup>22</sup> ICCPR (1966), preamble

<sup>23</sup> Doebbler (2006), p. 157

many respects: for example, it has been useful in the case of decolonizing a country, stating for independence and the rightfulness of a national government.

It is important to notice, as Doebbler says, that the first articles of the two Conventions link the importance of the right to self-determination, the right to the personal natural resources and the possibility of implementing individual human rights. Putting things another way, the preciousness of the right to self-determination of a State belong, ultimately, in individual human rights. That is, again, that one of the *raison d'être* of a state body is the implementation of human rights.

We should not, however, jump to conclusion and identify the term “people” with a state. As Quane argues, it is not easy to understand clearly what people means: “people” could embody, and this assumption is most readily made, the state population. It could be read as a colony, or, more vaguely, as an ensemble of individual kept together by a common feature.<sup>24</sup> These possible interpretations, Quane states, could lead to a somewhat tense relationship among the different nuisances of self-determination: we can think, then, to the right of self-determination of a state, that means for it to retain its ground and to the right to self-determination of a minority.

The Human Rights Committee, Doebbler states, in his commentation on this right, plots, in fact, the fundamental necessity bearing in mind the fact that the right to self-determination and the right of the minorities are by no accounts the same thing.

“The important procedural point is that while minority rights are individual rights that can be the subject of a communication under the Optional Protocol, the right of self-determination is a collective right and cannot be the subject of a communication.”<sup>25</sup>

To complicate things further, Quane underlines how a further distinctive line must be drawn between the legal and the political principle of self-determination, where the second covers a wider ground in respect to the first. The political principle of self-determination expects to find in “people” more notions than the legal, since it is interlinked with the semantic field covered by the appellative of nation, that arises ideas of linguistic, historic and ethnical likeness.

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<sup>24</sup>Quane (1998), p. 537

<sup>25</sup>Doebbler (2006), p. 158

If we focus on the legal meaning, and more punctually on the reconstruction that the UN gives it, Quane says, we can go three different ways to judge what a “people” is. If we take it as a State, then the principle of self-determination talks about, quite plainly, the necessity to consider all the diverse States on a *niveau* of equality. If we look at it as “NSGT (Non Self-Governing Territories)”, it ought to present a stronger consequences, for it could be used in fancy of independence. The whole reasoning applies also to view it as trust territories.

Quane’s conclusion is restricted to the interpretation of the UN Charter, but it can be extended to the Conventions as well: it is that the principle of self-determination extends over the cases above mentioned, and that we face a legal principle when talking about states, and a moral right to self-determination for the remaining options. In their regards, the moral right to self-determination ought to be explained as a future desirable undertaking. Finally, as Doebbler notes, since the right of self-determination is not to be talked of as the right of the minority, it offers no ground for a secession right.

The article 4 of the ICCPR states that the states who subscribe the covenant may put off their commitment in conditions of peculiar emergency. Certain rights, however, are forcibly shown to be inalienable: the right to life (article 6); the right not to be subjected to torture and “cruel, inhuman or degrading treatment or punishment” (article 7); the right against slavery, both in the form of servitude and coerced labor (article 8); the right that forbids that breaking a contract would result in an imprisonment (article 11); the right that the individual shall not be esteemed at fault when the action committed at that time was not counted criminal (article 15); the right to acknowledgment of the individual as a “person before the law” (article 16); the right to liberty of thought, conscience and religion (article 18).

The *right to non-discrimination* and to *equality* are of fundamental importance, and they have a predominant space in human rights law in general. They are embedded in most treaties and declarations regarding human rights. The first paragraph of the second principle of ICCPR and the second paragraph of the second article of the ICESCR regards the principle of non-discrimination. It is a general declaration, against discrimination on the base of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” while respecting and fulfilling the rights enumerated in the respective covenants.

Article 3 of the ICCPR, and article 3 of the ICESCR, stating the equality of men and women in the implementation of the rights plotted in the covenants are a specification of the non-discrimination

principle. Article 26 of the ICCPR states the “equality of all individuals before the law and their entitlements to equal protection of the law without any discrimination”.<sup>26</sup> Much more than that, it envisions the government aid to avoid any kind of discrimination banishing also by law. This gives the article a thick meaning: referral to it is general. This particular lecture of article is backed up by a comment of the Human Rights Committee:

“The Committee has stated that «article 26 not only entitles all persons to equality before the law as well as equal protection of the law, but also prohibits any discrimination on any ground» [...]

It must also be noted that while other prohibitions of discrimination apply to specific rights or sometimes only to those rights protected in a particular treaty, Article 26 does not specify such limitations. Article 26 thus prohibits discrimination in law or in fact in any field regulated and protected by public authorities.”<sup>27</sup>

The principle of non-discrimination is strictly intertwined with the principle of equality. They are the “negative and positive aspect of the same issue”<sup>28</sup>: if there is no discrimination there is equality, and fostering equality implies non-discrimination.<sup>29</sup> This article, however, present its limitation: the second part of the Article is introduced by the locution “in this respect”, that has a bounding effect, the principle of non-discrimination act as far as the sphere of competence of the State goes. Without this locution, it would have been even stronger.<sup>30</sup>

The fundamental *right to life* is contemplated in Article 6 of the ICCPR. The right to life is structural: it is the *conditio sine qua non* for the enjoyment of all the other entitlements. The right warrants the person from discretionary destitution of its own life. When is this right violated in practice?<sup>31</sup> A clear break of the right is when the State is directly an agent in the killing. Another way to breach the right to life is in the acknowledgment that some state action implemented or possible could lead to death. Again, there is a break when the government falls short of protecting the individual from the danger. The UN Human Rights Committee has considered the right to life expressed in article 6 of the ICCPR so to have a wide range of extention: the right to life

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<sup>26</sup>LiWeiwei (2004), p. 5

<sup>27</sup>Doebbler (2006), p. 104

<sup>28</sup>Weiwei (2004), p. 7

<sup>29</sup>Weiwei (2004), p. 7

<sup>30</sup>Weiwei (2004), pp. 16-17

<sup>31</sup>Doebbler (2006), p. 120

comprehend negative duties, but also a positive one ascribable to the State.<sup>32</sup> The government cannot simply forgo to have exacted its duties, but it ought to act in a positive way, for instance in such topics as child deadliness; it has to strive to extend the possibility to live long; it has to direct its efforts for the eradication of starvation and epidemics. Moreover, this implies the right to life to be breached in the case the famous subsistence rights are not provided for.<sup>33</sup>

The right to life has some exceptions: the death penalty and the situation created by war. The topic of death penalty gathers however a vast effort for its abolition, and the fact of being considered a breach of the human right to life and of the right to liberty from torture and inhuman treatment has been frequently made a case of. However, in general the Human Rights Committee asks, to make death penalty within the bound of the right to life, that the sentence is given prudentially and in a non discretionary mode.

Article 6 of the ICCPR contemplates and allows, then, with many precautions, the case of capital punishment. The first paragraph states, right after having maintained that every individual “has an *inherent* right to life”, that no-one’s life can be *discretionally* subtracted. The following paragraphs deal with the restrictions to the application of death penalty. In particular, the sentence of death must always allow the possibility to appeal, and it cannot be committed to minors. Moreover, the contemplated case of capital punishment doesn’t account in any way to the crime of genocide,<sup>34</sup> that is a strict contravention to the right to life, among other things. The inhibition that the ICCPR put on this issue can be considered as a strive for its elimination,<sup>35</sup> given also the last paragraph of the article: “Nothing in this article shall be invoked to delay or prevent the abolition of capital punishment”.<sup>36</sup> In general, as I said, the human right to life is a must for defending the abolition of death sentences, together with the right to freedom from torture and other inhuman treatments.

Article 7 of ICCPR is important: it is the *right against torture and other cruel, inhuman or degrading punishment or treatment*. Its capital prominence lies also in the fact that it stands for not only constraints from and disciplinary sanction, but for effective preservation from as well: not only a negative, but also a positive duty pertain to the State. Article 10 is analogous to it, in the meantime it is referred to individuals deprived of their liberty. Deprivation of liberty that can signify imprisonment, but also staying in hospitals, being war prisoners and so on... Their aim is

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<sup>32</sup>Doebbler (2006), p. 120

<sup>33</sup>Doebbler (2006), p. 120

<sup>34</sup> Genocide is first described as an international crime in the “Convention on the Prevention and Punishment of the Crime of Genocide”, in 1951.

<sup>35</sup> International Commission of Jurists (1997), p. 167

<sup>36</sup> ICCPR (1966), Article 6(6)

centered in the preservation of the uprightness and dignity of the person. Article 7, its conceptualization is the most complete and cited expression of this right.

This right is in fact of pivotal importance, and the etymological analyses is a first order need, since there ought to be clarity on what exactly count for torture, and for cruel and degrading treatment. In general the UN elaborates in 1984 a Convention on this issue: the “Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment”. The definition of torture stated in the first article of the Convention is certain the most credited to be acknowledged in this sense:

“The term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”<sup>37</sup>

The last brief part, which states sufference deriving from legal punishment not to violate this right, should be considered carefully in its possible meaning.<sup>38</sup> In general, we have to take into account the grade of the suffering inflicted to understand it a violation of this right or not. “The threshold for cruel, inhuman, and degrading punishment is thus crossed when an act creates «feelings of fear, anguish and inferiority capable of humiliating and debasing the victim»”<sup>39</sup> Within this category lies also, Doebbler states, being privy of the enjoyment of human rights and of the commodities to satisfy the individual basic needs. The ICCPR, however, furnish one of the most complete testimony against torture: the convention doesn’t make any reservation on its prohibition, not even in “cases of public emergency”.<sup>40</sup>

Article 9 of the ICCPR is quite important: it poses at the same time the *right to liberty* and the *right to security*. The different articulations determine the right procedures that ought to be followed when a person is under charge of something or under detention. Article 11 is a further

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<sup>37</sup> CAT (1984), article 1

<sup>38</sup> Doebbler (2006), p. 113

<sup>39</sup> Doebbler (2006), p. 112

<sup>40</sup> Twiss (2007), p. 357

specification of the previous article, the right not to be taken into custody when a contract is broken. Article 8 of ICCPR is particularly important. It could be considered a specification of the right to liberty, but a fundamental specification: the prohibition of slavery and analogous activities, such as mandatory job. Slavery is sometimes acknowledged of being overcome, of an issue pertaining to the past. This is absolutely not the case,<sup>41</sup> hence the necessity of it being stated in an article devoted to human rights. Article 9 articulates it further stating particular cases, such as how a person under charge should be handled.

How is the right to security to be understood in comparison with the right to liberty? As Meisels argues, “personal security is a necessary condition for enjoying any serious degree of liberty.”<sup>42</sup> However, security and liberty are somewhat regarded as being conflicting items. In judging it the alleged requirement of a “new balance between security and liberty”<sup>43</sup> in light of what happened on 9/11 in the United States of America, Waldron<sup>44</sup> plots of putting under perusal the same metaphor of the counterbalance between security and liberty. He questions the idea that there is always a counterbalance between the two items, and that this is the result of a mathematical operation: that allowing a wider issue of liberty would commit the individual to an enlarged amount of danger and vice versa. What can be acknowledge, in Waldron own terms, is that freedom is not unlimited: at the very bit, unlimited freedom of a person is kept in check by the right to liberty another person can rightfully claim. What Waldron doubts over is the very own pertinence of expressing in terms of a counterbalance, and he does so advocating four reflections on the topic.<sup>45</sup>

First. Rights language is notoriously not consequentialist. Rights are not there to be handled in consideration of social advantage.

Second: The question concerning allotment: championing a restraint of freedom over indulging security often leads to the fact that there is no symmetrical proportion on the subjects that sees this restraining in their freedoms. Usually the population won't be deprived of some of their liberties in the same homogeneous amount.

Third: heterogenesis of the ends. A restraint of freedom favorably to security present one sure consequence, that is, augmenting state influence. It is legitimate to hypothesize that this discretionary faculty could possibly be utilized to detriment of security of the person.

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<sup>41</sup> Quirk (2006), p. 567

<sup>42</sup> Meisels (2005), p. 170

<sup>43</sup> Waldron (2003), p. 192

<sup>44</sup> Waldron (2003), p. 192

<sup>45</sup> Waldron (2003), pp. 194-195

Fourth: we cannot ascertain whether the metaphor of the balance is accurate. It is really possible to be certain that restraining freedom does, indeed, result in an augmented level of security?

If both security and liberty are bestowed with the status of rights, the whole business can be termed as a case of clash of rights,<sup>46</sup> in any case, the issue is much more nuanced than the offered metaphors of counterbalance conveys.

*Freedom of movement* is contemplated in article 12 of the ICCPR. The human right of freedom of movement is unrestrained, within the boundaries of the individual nations, apart from some reservation, that are, first, legally contemplated, and, second, essential for the protection of “national security, public order, moral and health, or the others’ liberty and rights”. Freedom of movement signifies also the “right to return” that every person is entitled to towards their territory of provenience, and moreover the “right to exit” it. To sum up, the liberty of movement is can be structured by two rights, that is the “right to leave and the right to return”.<sup>47</sup> The right to leave is, universal, since it can be claimed by citizens and it can be claimed by aliens, it warrants either a short or a more extended period outside one’s own country; it makes sure for the state to be in no power to impede the eventual departure; it is however not unregulated, as shown above.<sup>48</sup> “The right to leave”, on another level, is partial, since it is not counteracted by the liberty to move onto a foreign ground. The right to “enter his own country”, however, reinforces the right to leave.<sup>49</sup> Moreover, Article 12 of the ICCPR specifies “his own country”, and this has a wider implications than “country of his nationality”.<sup>50</sup> All these accomplishment, then cannot make the right a perfect right, lacking the right to admission into the border of another nation. The State keeps into its own hands rules over immigration legislation, even in the presence of international regulation on the issue, for instance all those centered on the right to asylum,<sup>51</sup> or the status of Refugees. The most important treaty that establishes rules in this respect is the 1951 Convention Relating the Status of Refugees. Article 13 of the ICCPR plots the exact path to follow to legally throw out an alien legally established somewhere. The European Union, or certain Arab States, allows free movement of their inhabitants. In general, however, the State retain a considerable amount of jurisdiction over immigration regulations, and these are stated to be an intrinsic element of the concept of sovereignty. There are positions, however, that uphold a universal right of freedom of

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<sup>46</sup>Waldron (2003), p. 199

<sup>47</sup>Chetail (2003), p. 54

<sup>48</sup>Chetail (2003), pp. 54-55

<sup>49</sup>Chetail (2003), p. 57

<sup>50</sup>Chetail (2003), p. 58

<sup>51</sup>Right that is not contemplated in the ICCPR.

movement, that would include not only “right to leave”, but also liberty to entry. In other words “open borders”, or at least more open borders.<sup>52</sup> In a seminal essay, Carens argues for open borders under diverse points of view: from a Nozickean, a Rawlsian and a utilitarian stand. He argues that all these views, even if different among each other, can be used in favor of open borders. They are all referring, in ultimate analyses, on the conception of the equal moral worth of the individuals,<sup>53</sup> equal moral worth that is one of the pillar of human rights theory as well. Open border, then, may not be absolute: Carens allows the potential need for a somewhat restricted regulation,<sup>54</sup> but the limitation he is thinking about cannot be compared to the already existing legislature on immigration.

The *right to a fair trial* is quite articulated and complex. In the ICCPR it figures in Article 14, Article 15 and in Article 16. The latter expresses the right of every human being to claim the rank of person in the face of the law, the right to legal personality. Article 14 is quite long: it plots the necessity of an equal treatment in courts and tribunals for every single person. Article 15 states that someone cannot possibly be charged for something it has done if that didn’t constitute, at the time, crime. These articles specifies what a fair legal proceeding entails. Zhang classifies 16 issues, ordering them into three categories, such as “basic rules, minimum guarantees and others provisions”.<sup>55</sup> Doebller notes how there are further utterances of this right in criminal trials, such as for example the entitlement the charged person has of assisting himself, or to denominate a legal defendant, not to inculpate himself, and the entitlement to its security. They all will bestow particular defence when criminal proceedings are at stake.<sup>56</sup> This is, however, how Zhang classifies the issues.

*Basic guarantees* are the equivalence before the tribunal; the right to “a fair and public hearing by a competent, independent and impartial tribunal established by law”;<sup>57</sup> the conjecture of guiltlessness until guilt is established beyond doubt.

Among the *minimum guarantees*: the right that the items of accusation are plainly stated; the right to get advice from the lawyer and articulate a defense, the right that the legal proceeding doesn’t protract too long in time; the right of presence at the legal proceeding, the right denominate a legal

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<sup>52</sup> Sheila Benhabib talks about “porous” borders.

<sup>53</sup>“my findings about immigration rest primarily on assumptions that I think no defensible moral theory can reject: that our social institutions and public policies must respect all human beings as moral persons and that this respect entails recognition, in some form, of the freedom and equality of every human being.” Carens (1987), p. 265

<sup>54</sup>Carens (1987), p. 262; p. 264

<sup>55</sup>Zhang (2009), p. 39

<sup>56</sup>Doebller (2006), p. 109

<sup>57</sup> Zhang (2009), p. 39

defendant, and the opportunity for defending; the right to a translator; the possibility not to inculcate himself.

*Other provisions:* the particular course of action when dealing with under-age individuals; the chance to appeal; the actual opportunity that when a mistake has been made at the trial this is rectified; the right not to be judged two times for the same accusation; the right not to be charged for something that has been done if that didn't constitute, at the time, crime.

They do not cover all the domain of the entitlement to a right legal proceeding: the first part of Article 14 states the general entitlement to a right legal proceeding,<sup>58</sup> of which what follows are some enunciations, not precluding other possible pronunciations. In other words, they are the necessary but not sufficient condition for the right to a fair trial to be fulfilled.

Article 17 of the ICCPR states the *right to privacy*. It advocates the political establishment's protection to caution the infringement of somebody's privacy. The right to privacy is specified to mean right to non-intervention in such spheres as "family, home or correspondence,[...] attack on [someone's] reputation or honor".<sup>59</sup> The right to privacy is somewhat elusive in the sense that it can be challenging to understand conceptually what privacy effectively is. Posner proposes a general definition, that involves the conceal of knowledge. Somebody's right to privacy is "the right to control the flow of information about him."<sup>60</sup>

Article 18 of the ICCPR pertains to the *ensamble* of rights often named expression rights. It would be perhaps useful a small digression considering expression rights in general. Doebbler talks about expression rights, such as freedom of conscience, liberty of expression as the rights that look after the free assertion of the persons, the way they convey their conceptions and act at a political level in their territory. They are also held as a peculiar category by their shared feature: the Convention acknowledge that the government may constrain these entitlements somehow, without hindering, however, the opportunity to grant them. Is there a way to perceive of the constraints cast off by the government are effectively a contravention to one or more expression rights? Doebbler notes how some human rights bodies do, indeed have elaborated a set of criterion to attest that. The analysis, in general, focuses on four interrogatives: one has to wonder whereas the constraining has hindered a number of human rights; if this constraining is legally legitimate; if the goal aimed at is appropriate; if it is a *conditio sine qua non* in a democracy.

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<sup>58</sup> Zhang (2009), p. 43

<sup>59</sup> ICCPR (1966), article 17

<sup>60</sup> Posner (1978), p. 395

Article 18 of the ICCPR regards the right to *freedom of thought, conscience and religion*. It is of pivotal importance for the amelioration of the human form of life and human flourishing. The articulation of the article focuses on religious freedom. Freedom of religion and belief includes the independent and not-coerced election of a confession, its “worship, observance, practice and teaching”.<sup>61</sup> The article gives the parents or tutors of a minor the faculty to shape its upbringing seconding their religious, moral or other feelings. Point three, however, states that this liberty is subjected to constraints by the law, constraints, however, that have to be grounded on reasons of “public safety, moral, health, order, or the respect for the dignity of the individuals”.<sup>62</sup> Liberty of religion and thought is rather a sensitive argument, and, as Van Boven observes, simply advocating the right to legally being protected on a level of equality might be not enough, since every credence and confession usually make diverse demand on human beings.<sup>63</sup> What is at the core of the right to liberty of conscience, thought and religion, then, is not “the search for objective truth, but the enhancement of respect for the substantive rights of individuals, groups of individuals, and communities.”<sup>64</sup> Capital attempt to the achievement of religious liberty and freedom of thought, then, Van Boven maintains, is the orientation towards a considerate exchange of opinion, both inward within the religious association and outward among the variegated confessions and credence.

Article 19 contemplates another expression right, that is, the *right to freedom of expression and opinion*.<sup>65</sup> “Freedom of expression constitute one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man [...]. This means, amongst other things, that every “formality”, “condition”, restriction” or “penalty” imposed in this sphere must be proportionate to the legitimate aim pursued.”<sup>66</sup>

Among its different aspects, language as part of liberty of expression is an interesting issue to mention, as De Varennes points out, since language is fundamental for the individual upbringing, its dignity and its human flourishing. We know the world through linguistic schemes, and we utilize language to mould conception and to filter cognitively the outward wordly shape, and, last but not least to connect with our fellow beings. It can happen that the same language is the distinctive and uniting element of a commonality, or a minority. The freedom of expression is articulated as the

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<sup>61</sup> ICCPR (1966), article 18

<sup>62</sup> ICCPR (1966), article 18

<sup>63</sup> Van Boven (1991), p. 438

<sup>64</sup> Van Boven (1991), p. 447

<sup>65</sup> One interesting way to pursue is to think how to guarantee freedom of opinion.

<sup>66</sup> De Varennes (1994), p. 166

opportunity to gather news and ideas, in an input and output mode utilizing every channel at disposition, through paper or in a verbal way, in an artistical shape and so on. The third paragraph, however, states the constriction to this right: the government may constrain this liberty, however just and only if there is unavoidable need and always through legally bound rules. Two are in particular the issue: in order to safeguard the other individual's entitlement and reputation; to protect "national security and public order, public moral and health".<sup>67</sup>

Article 20 of the ICCPR states further some specific constraining to the liberty of expression: the legislation forbids those in regard to war publicity and "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".<sup>68</sup>

It is true that every and single way of expressing oneself is safeguarded with this human right. In general, however, the public opinion is more lenient on accepting those containment that are regarded as not much important from a social point of view, such as expressions on a commercial field. Likewise, often the state apparatus may decide quite freely what is and what is not an issue of national security. And this, let's remember, is one of the "right" constraining argument for keeping this entitlement in check. A blatant issue of liberty of expression's violation, then, is when the government acts so to impede the spreading of content adverse to itself, hindering the free circulation in the media. An issue that mark the contemporary age, then, is the governmental watch over the media, that can be expressed directly or through expeditious ways. Likewise, often the government exercises a good deal of control on which news are spread and in which light. This is a huge impediment to freedom of expression. Some nations, moreover, have stated to be the case of a legitimate constraining of freedom of expression in the case it hinders, or allegedly hinders the economic and social upbringing of the territory.

Article 21 of the ICCPR concerns the *right to freedom of assembly*. As all the expressions rights it is constrained by the state, constraining that has to be, first, legally placed and, second, it is enacted in case it is needed for "national security, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others".<sup>69</sup> The right to freedom of assembly is often forgone. Nonetheless, it has a dignity as a human right. What exactly is this right?

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<sup>67</sup>ICCPR (1966), Article20

<sup>68</sup>ICCPR (1966), Article20 (2)

<sup>69</sup> ICCPR (1966), Article 21

“This freedom is essentially the freedom to cooperate with others in peaceful undertakings”<sup>70</sup>

With every probability the motivation for its fading is that it has been conceived as englobed both in the right to expression and the right to association. We could say, Doebller maintains, that the right to assembly and the right to freedom of expression are not the same thing: thinking about the first we think more of undertakings, that can be as well demonstration or public encounters, thinking about the latter we think more of verbal actions. As Inazu highlights, it is true, however, that the right of expression overlap in safeguarding certain ways that shows expression, instances of that could be temporary gatherings such as so classified demonstrations or parades.

Another kind of liberty, the liberty of association, moreover, safeguards permanent gatherings, that may be religious institutions and social structures. The right to association, Inazu continues, differentiate itself from that of assembly in that what is overcome is the “expressive” feature, the expressive nuances of the assembly. To sum up, Inazu says that even if there is a plausibility in the deconstruction of this right into the right to expression, when its “expressive element” is focused on, and into the right to association, for the remaining options, to allow the right to assembly to fade means to miss certain nuances that are important nonetheless. To view expression and association contemporarily adds something than to pursue them in separate stances. That is, the right to assembly means to conceive of the element of expression and association together:

“first, groups invoking the right of assembly have inherently been those that dissent from the majority and consensus standards endorsed by government. [dissenting assembly] Second, claims of assembly have been public claims that advocate for a visible political space distinguishable from government. [public assembly] Finally, manifestations of assembly have themselves been forms of expression- parades, strikes, and demonstrations, but also more creative forms of engagement like pageants, religious worship, and the sharing of meals [expressive assembly]”.<sup>71</sup>

Article 22 of the ICCPR concerns the *right to freedom of association*. It is strictly intertwined with the right to assembly and with the right to liberty of expression. All three of them are invoked to protect the person in public gatherings and upbringings. Freedom of association, Doebller says, can be used to uphold the right to get together to safeguard the same thing, such as the examples of

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<sup>70</sup>Doebller (2006), p. 133

<sup>71</sup>Inazu (2010), p. 570

trade unions. The third paragraph of the article refers explicitly to the protection of the right of association and to get structured as they are stated in the ILO, the International Labour Organization. The ILO is the first to treat freedom of association, even if in a very circumscribed territory such as trade unions. However, there are also some critical voices regarding ILO's modern articulation of this right and its subsequent policy.<sup>72</sup> The pertaining debate, however, lies outside the aim of this dissertation, nor, by reporting it, I have the intention or the competence to take a stand in it. I simply report the existence of this debate. If the first mention of the freedom of association is therefore by the ILO, the right to freedom of association is first legislated as a human right overall, outside the labor contest, with the ICCPR.<sup>73</sup>

The right to association, Doebbler says, is prized especially by political parties and trade unions. The right to freedom of association has both a negative and an affirmative level: it is the right of association but also the right of non association. The possibility of having free option is basilar. This implies as well that there must be given the option for choosing, that is, it must be given a vector of possible choices. That is, there ought to be the right to establish an association even if it is similar to one already in being. Further, the association must function at its full potential, there must be the possibility of active participation for its associates. The association might assume a number of different shapes, as Doebbler says, it might be a legal, an informal gathering, etc. Its aim is in the implementation of a shared purpose. As all the other expressions rights, it is not absolute: it is constrained by the government, but it cannot be abrogated altogether. In the second paragraph all the cases of a legal legitimate constraining are stated, and they are the same as for the right to freedom of assembly.

The expressions rights are somewhat in the middle between the status of civil and the status of political rights. On the one hand they are civil rights, on the other they are vital for the evolution and right implementation of the democracy.<sup>74</sup>

Article 24 of the ICCPR is about the *right to family*. This right is often paired with the right to privacy. It provides state safeguard for familial unity, it states the element of consent as *conditio sine qua non* to stipulate a matrimonial contract. The fourth paragraph is particularly important, insofar it deals with the necessity of stating the same rights and responsibilities in the couple in all the marital nuances. The article regards the family as a basilar unit, and this is not questioned, and as a natural one. The position of Martha Nussbaum on this regard is quite interesting. She cautions

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<sup>72</sup> For example, see Caraway (2006)

<sup>73</sup> International Service for Human Rights (ISHR), (2009), p. 6

<sup>74</sup> ISHR (2009), pp. 9-10

over an idyllic image of the family as a natural place for love, protection, care of the child and of women, that are usually the weakest elements within. Family can also be the elected place for violence, domestic abuse, power relations.<sup>75</sup> It is important that the association of family to the sphere of privacy doesn't shadow the value of each and single individual as a end in itself, as a being whose dignity has to be protected. And it is not a case that the fourth paragraph of the article 24 is shaped as I have shown above. However, Nussbaum argues, accepting the existence of the family as given by nature can be questionable. She further maintains:

“But in fact it is clear that the shape of the family structure and the privileges and rights of family members are in many respects artifacts of state action.”<sup>76</sup>

It is the government that determines the wording of what can be termed a family and what cannot. Nussbaum doesn't deny, of course, that many aspect of the family are related to privacy and to the internal sphere. It would be strange, she says, if law were to establish exactly who has to do what in the household economy. But the state should intervene so that, even in the family itself, each component is treated as a dignified individual, as an end in itself.

Article 24 deals with the *right of the child*. Children are one of the category that internationally is re-known to necessitate particular safeguard. The Convention of the Child is, not by chance, the most adhered to. The ICCPR provides particular regards for the child in view of its being a minor. It focuses on the necessity that every child is christened and registered. Moreover, it advocates the entitlement that the child has to retain a nationality. The focus on this issue reflects the idea that the government has the first duty in safeguarding human rights, and thus to behold a nationality is *conditio sine qua non* for the safeguard of individual human rights. Both article 24(1) and article 23(4) deals with the need to warrant a particular safeguard for children inside the family.

Article 25 of the ICCPR regulates the *right to political participation*. Its structure is viewed as the best expression of the issue in human rights law. It states three important issues: “non-discrimination, equal participation to public affairs, right to elections”.<sup>77</sup>

It is a crucial right, also due to the fact that human rights are equally preserved when every single person has the faculty to be directly or indirectly part of its own government, notwithstanding its peculiar background. The right to political participation, further, is an issue useful to reinforce the

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<sup>75</sup>Nussbaum (2000b), p. 243

<sup>76</sup> Nussbaum (2000b), p. 261

<sup>77</sup> Fox (2000), p. 53

notion of a cosmopolitan, or trans-national governance. It is important to note, Doebbler argues, that political participation doesn't dictate what exact kind of state is going to be structured. It is, naturally, associated with the notion of democratic power, since it conveys, among others, the idea of fair opportunity to get hold of public posts, the entitlement to vote and to be selected in autonomous and pristine elections, and so on. A democratic mode, moreover, might best insure human rights, and it is the most suited for their protection: the governed have a say in who has access to power, and if it is to retain it or not. The sovra-mentioned right, however, doesn't make clear which exact shape to give to the idea of this all-inclusive notion of political participation, as Doebbler insists upon. It is the participatory feature that is stressed upon. We can say, however, that, ultimately, the right to political participation is a right to democracy.

Article 27 of the ICCPR deals with *minority rights*, and the ICCPR is the sole among the most important documents on human rights to face the issue, although this has for long been object of great preoccupation in the international arena and body of law. Minorities has drawn consideration and it has constituted the main focus antecedently the au courant human rights Conventions and Treaties; the League of Nations post-1919 assumed as its particular obligation the safeguard of minorities. With the establishment of the United Nations, Doebbler says, safeguard of minorities was somewhat shadowed by the worry for individual human rights. Noteworthy, anyhow, is the establishment of a *Sub-Commission on the Prevention of Discrimination and the Protection of Minorities*, then designated as *Sub-Commission for the Protection and Promotion of Human Right*. The greater accomplishments of the Commission, anyhow, has directed themselves towards minorities. Article 27 of the ICCPR is actualized and advanced by this very same Sub-Commission. An element of crucial denotation is the conceptualization of minority: “«a group numerically inferior to the rest of the population of a State, in a non-dominant position» and possessing ethnic, religious and linguistic characteristics that differ from the rest of the population. [...] they show a «sense of solidarity, directed towards preserving their culture, traditions, religion or language» [...] «a collective will to survive and whose aim is to achieve equality with the majority in fact and in law»”.<sup>78</sup> Article 27 is actually concerned about the safeguard of minorities, but this safeguard is not a whole: as Doebbler puts it, it regards only religious, ethnic and linguistic minorities and it preserves them in their cultural, confessional and linguistic entitlements and it doesn't worry over cases other than these. There should be made three further specifications: article 27 cannot be read as an entitlement to split from the nation; economic and social elements are counted for minorities only insofar they deal with cultural safeguard; the linguistic prerogatives are

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<sup>78</sup>Doebbler (2006), pp. 143-144

non warranted unconditionally, let's say just for instance official records. I mentioned here minority rights as stated in article 27 of the ICCPR, but I consider this human right as subsumed under the more general non-discrimination principle, even though I recognize the peculiar situation of the minorities, hence the necessity of an *ad hoc* right.

*Right to property.* The right to property is somewhat contented, both in being assumed a human right and in its precise characterization. The ICCPR doesn't contemplate the right to property, although the Universal Declaration of Human Rights does. I choose to insert it here, however, since Martha Nussbaum considers it to be a human right.

## 1.2 Economic and Social Rights

### 1.2.1 Issues about economic and social rights

The so-called second generation rights concerns the material and psychological contentment of the person.<sup>79</sup>

Socio-economic rights are also renamed as welfare rights.<sup>80</sup> Their inclusion in human rights treaties and their consideration as human rights has been and it is still a somewhat controversial statement. They are stated, however, in the *Universal Declaration of Human Rights*, and they figure in the *Four Freedom Speech* of president Franklin Delano Roosevelt.

“In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms. [...] The third is freedom from want, which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants.”<sup>81</sup>

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<sup>79</sup> They are associated to cultural rights in them being second-generation rights. Cultural rights are the rights that protect the cultural, artistic and scientific life of an individual, in all of its declinations, in a climate of freedom of option, equality and non discrimination, and regard for its dignity. They won't be matter of examination in this work, since they would need much more space to be debated that it would be possible to give them here.

<sup>80</sup> Nickel (2010), par. 3.4

<sup>81</sup> Roosevelt (1984), p. 384

Eleanor Roosevelt as well, chairwoman of the Commission on Human Rights, stands for the recognition of this kind of entitlements as human rights. They are, however, viewed as a different matter other than civil and political rights, and this gives the reason of the redaction of two separate Covenants. The *International Covenant on Social, Economic and Cultural Rights* is the most important human right treaty on the issue, and I will consider it as the source for the determination of these rights.

The two Conventions were elaborated in 1966, and there wasn't, at the start, a great faith on their actual realization. As Gros Espiell<sup>82</sup> says, there were some problematic contingencies:

- The Cold War was there, conditioning the all world. The two poles were the notion of western democracy and communism;
- The post-colonial states were more focused on their economic development than on human rights;
- The legal international personality of the individual hadn't been established, and the idea of human rights as subjects of international law was still new;
- The idea of the conventions that would transform the "indications" contained in the UDHR in legally binding norms wasn't overly well accepted;
- Many regimes hadn't achieved democracy yet.

The cold war is said to be one of the reason for the choice of structuring two different conventions: civil and political rights were affiliated with the west, and socio-economic rights to the communist regime.<sup>83</sup> Another related reason is given by Eleanor Roosevelt herself: she states that civil and political rights are fulfilled by the Nation, whereas it happens to be diverse conjeures about socio-economic rights, on how to fulfil them and on the part the state has to play in it.<sup>84</sup> We will come back to it later. Gros Espiell, however, underlines how the two order of rights are conceptually linked and the realization of the first generation rights cannot prescind from second generation rights and vice versa.

I agree with Amartya Sen: in various of his work, *Freedom as Development* to name one, Sen argues that civil and political liberties are important for the execution of economic and social rights. The absence of right to ballot, for example, shouldn't be compensated by a good level of nourishment. But again, economic and social rights are necessary for the accomplishment of civil

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<sup>82</sup> GrosEspiell (1993), p. 55

<sup>83</sup> Donnelly and Whelan argue, however, that socio-economic rights are intrinsic in Western thought.

<sup>84</sup>Doebbler (2006), p. 91

and political rights.<sup>85</sup> For example, the right to vote is empty if the individual doesn't enjoy a certain level of material security and education that allows it to vote freely and with competence.

Sen sustains, in other words, the idea of the indivisibility of human rights, idea that is, among other things, shared by the UN itself. Nickel has some interesting points on indivisibility and interdependence. He doesn't avail a "strong" indivisibility among human rights. I do not wish to get in depth in his argument.<sup>86</sup> I would like, however, to put forward a small observation. He conflates, in his argumentation, I maintain, the notion of indivisibility and interdependence. He starts by recognizing that "indivisibility and interdependence are not the same"<sup>87</sup>, but then he continues stating that "indivisibility is a very strong form of interdependence (or bidirectional support)".<sup>88</sup>

It is the bidirectional support that I question: if it is true that indivisibility can be "very strong form of interdependence",<sup>89</sup> and I think we should reason on an instrumental level here, it is also true that not all form of indivisibility are "forms of interdependence", and I think we should reason on an intrinsic level. If it is true that the indivisibility of human rights relies instrumentally on their interdependence, and then Nickel's *caveat* can be fully taken into consideration, it is also true that the indivisibility of human rights is true intrinsically, as expression of the human dignity. In this case Nickel's objections are simply not pertinent to the case.

The two Covenants, however, ask for a different kind of commitment. Article 2(1) of the ICCPR asks the Governments who subscribes the covenant to grant to each of the person that is subjected to them the civil and political rights contemplated in it. Conversely, article 2(1) of the ICESCR opts for "achieving progressively the full realization of the rights recognized in the present Covenant"<sup>90</sup>, calling also for global assistance and posing as a clause the caveat of the maximum possibilities for assets. This caution may be called by the justification that at the time of the subscription of the covenant, for the majorities of the Countries it might have been unfeasible to abide to this engagement. This caution, however, has led to a common-place: that socio-economic rights are second order rights, or, even more, they are just goals, they might be enticing but nothing more, and as a consequence they are privy of mandatory elements.

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<sup>85</sup> "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." Nickel (2005), p. 395

<sup>86</sup> For a detailed argumentation about it see Nickel (2008)

<sup>87</sup> Nickel (2008), p. 987

<sup>88</sup> Nickel (2008), p. 987

<sup>89</sup> Nickel (2008), p. 987

<sup>90</sup> (1966). ICESCR. Article 2

My position is that they are human rights, and they are *au pair* with the civil and political rights. I do however share some of the positions held by Nickel on this matter, and I consider them all to be really interesting and clarifying.

While I hold, along with Martha Nussbaum, that human rights are essential for a flourishing and dignified life, I do think Nickel's position that human rights are the minimum preconditions for *eudaimonia* is quite interesting, and it is worth reflecting over. They would establish, in other words, the threshold of approval, they are minimal *conditio sine qua non*. Consequently, they cannot be over the whole jurisdiction of a complete moral or political theory. Brems argues about something of the kind when she notes that the perception of human right is shaped by the idea of "human right violation"<sup>91</sup>. This means, Brems argues, that the major work in this field is the location of a minimal frontier, and in verifying if this has been crossed or not. Of course, much importance lies in fixing with punctuality what is exactly the level of the threshold.

Moreover, a focus on the threshold obscures every perception on the condition existing above or below the threshold. It doesn't take into account the diverse situations above the threshold, regarding how human rights are fulfilled over a certain *niveau*.<sup>92</sup> What Brems proposes is quite interesting: the individuation of a necessary minimal threshold but, at the same time, being focused of the revolving them at their fullest potential. The idea of "progressive realization"<sup>93</sup>, put forward by the ICESCR could be applied, Brems states, to the "general human rights regime".<sup>94</sup>

Taking this position of human rights as minimal positions, Nickel says, we can acknowledge that some sovra-national human rights documents contemplate as human rights some social and economic rights that are probably too much for the impact human rights are deemed to have. I agree with Nickel that this means economic and social rights to "focus on survival, health and education".<sup>95</sup> Let's think, for example, to the right to have holiday with pay, plotted in the European Social Charter, or in article 7(d) of the ICESCR. Nickel thinks that it overcome a minimal idea of human rights. Using Martha Nussbaum's capability list, however, this right could be subsumed under the capability to play, that is, the necessity of recreational time in order to have a flourishing life. My proposal, then, is to consider human rights as minimal standards necessary for a flourishing life. They do not exhaust all the domain of a flourishing life, they are, so to say, the *condition sine qua non* for a minimally flourishing life. And they protect the basic capabilities

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<sup>91</sup>Brems (2009), p. 350

<sup>92</sup>Brems (2009), p. 354

<sup>93</sup>Brems (2009), p. 365

<sup>94</sup>Brems (2009), p. 365

<sup>95</sup>Nickel (2005), p. 387

that, according to Martha Nussbaum, are the core of a dignified life. This is, I think, a somewhat richer conception of human rights rather than the one codified by Nickel, but I think the distance is shorter than it may seem. After all, also Nussbaum's capabilities approach deals with the notion of threshold, being, therefore, incomplete, and Nickel talks about flourishing life.

The ICESCR fits quite well this conception of social and economic rights, and it is my reference point in this work.

There are three common objections to considering social and economic rights as human rights:<sup>96</sup> that they do not embody basilar human interests; that their implementation would be too expensive for the State and it would demand a huge amount of taxation; the unlikely event of their realization in the so called third world Countries or in the emerging Countries.

It is, however, quite an untenable point of view that who holds that social and economic rights do not cover fundamental human interests: if the person doesn't have enough of a material and psychological well-being, and a sufficient level of education, how is he expected to lead a flourishing life? More than that, some economic and social rights are essential to safeguard the person from dying or getting maladies. And, further, how is he expected to enjoy truly all its other rights? Moreover, the status of human rights would give the individual the safety in these fulfillment, safety that he needs in order for *eudaimonia* in all its aspects to be fully realized.

I have partially analyzed in the previous paragraph the statement that socio-economic rights would be rather too expensive in their implementation. As Sen<sup>97</sup> argues, the so-called negative rights as well, once analyzed in dept, are costly, and they involve much more than simple negative actions, much more than the state's aim of immunity-from and non-interference. They presuppose, for example, the considerable effort of a security and legal apparatus. Moreover, Brems uses this argument to propose the utilization of the notion of "progressive realization"<sup>98</sup> to civil and political rights as well.

"today, it is widely recognized that all human rights give rise to obligations to respect, protect and fulfil the latter two categories-implying positive state obligations- in particular requiring the mobilisation of resources. [...] If all positive obligations under civil and political rights have an immediate character whereas state obligations under economic, social and cultural rights are progressive, resource constraints inevitably lead states to always give priority to

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<sup>96</sup>Nickel (2010)

<sup>97</sup>Sen (1984b), pp. 313-315

<sup>98</sup>Brems (2009), pp. 365-366

implementing civil and political rights. This result is undesirable and incompatible with the principle of indivisibility of human rights. Hence a strong argument can be made to apply progressive realisation in function of available resources also to civil and political rights”<sup>99</sup>

Moreover, it is true that the implementation of socio-economic rights can be achieved in different ways. In general, granting socio-economic rights means for the most part that the government has to give a substantial opportunity for the person to be substantially entitled to those rights, for example through proper education, opportunities and an effective *security-net*. In other words, to establish the necessary cornerstones so that the person may conduct itself in a safe work condition, and an appropriate security net in case of its loss or inability for the job.<sup>100</sup>

Finally, denying the existence of socio-economic rights would be, in a sense, begging the question: what about the needs of the needy? They have to be fulfilled somehow, and discharging these duties on private’s care would mean surely an unequal allotment, and they would not reach the same height of safety. Then,

“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.”<sup>101</sup>

As far as their viability goes, the objection states that a lot of developing countries cannot meet the expense for carrying them out. To this several answers are possible.<sup>102</sup> First, if we consider human rights as minimum benchmarks, the possibility for their viability is augmented. Second, the whinge of the failure to arrive at determinate standards ought to be cautiously examined. As Amartya Sen observes in *Development as Freedom*, usually the causes for famines- that are, among other things, also the deficiency in the human right to food- are not so much the effective shortage of provisions but the lack of a good government. For example, Sen talks about the potato famine in Ireland. In the 19<sup>th</sup> century an illness destroyed potatoes cultivation in Ireland. Potatoes were the main source of food for the population, that started to starve. While this violent famine was ravaging, Ireland

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99Brens (2009), pp. 365-366

100 Nickel (2005); Nickel (2010)

<sup>101</sup> Nickel (2005), pp. 398-399

<sup>102</sup> Nickel (2010); Nickel (2005), pp. 399-401

was exporting foods. It was just an expensive kind of food that most of the population couldn't afford. Moreover, the British government (Ireland was then under the Great Britain), could have done something to mitigate the problem. It just didn't take any action in that direction. This doesn't mean, of course, that all the countries have the means realize these entitlements. It means we should be careful in verifying who could and who couldn't. Moreover, the fact that a portion of countries cannot attain practicability doesn't deny the status of a right. Third, the ICESCR calls for a progressive execution, according to possibility. Fourth, the ICESCR calls for global help and cooperation when needed. About the third point, to put it in Sen's words: "this is an empirical observation of some interest on its own, but it is made into a criticism of the acceptance of these claimed rights on the basis of the presumption, largely undefended, that to be coherent human rights must be wholly accomplishable for all."<sup>103</sup>

Sen further argues, continuing on its line to eliminate the ranking between first and second generation rights, that if we accept the feasibility critique in merit of economic and social rights, then we should accept it also for all the other rights. This is in light of what we stated above, about the cost of implementing the first-generation rights.<sup>104</sup>

Then, Sen's answer converge with Nickel's and Brems': to try to achieve the maximum *possible* stage of realization, hoping that the threshold may get higher and higher in the upcoming times.<sup>105</sup>

Sometimes, it is objected further that it is not easy to locate the duty-bearer in case of social and economic rights. Sen calls this the "institutionalization critique".<sup>106</sup> It is the statement that essential constituent for a legal right is the location of a determinate duty bearer. Sen makes on this point a general consideration on obligations linked to human rights overall. He considers human rights as shielding essential freedoms. Since they are so significant, their infringement legitimate and oblige(?) to act whoever is in the place to do so. Can this "reason for action"<sup>107</sup> be transformed in "duty to act?"<sup>108</sup> Sen admits that this is not easy. He recalls the issue of sympathy, reckoning, however, that it is not enough. Then he makes a contingent reasoning: obligations stems from the actual faculty to do something. The issue of human rights is so significant that whoever is able to take steps in their respect, with the due limit of reasonability and taking into account all the state of

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<sup>103</sup> Sen (2009), p. 383

<sup>104</sup> Nussbaum seems to take a slightly different route here. In Nussbaum (1997), p. 300, she argues that in case of the necessity of a choice, the civil and political liberty would come first. This without denying the fundamental importance of economic and social rights. It would be a tragic choice, dictated by scarcity of resources.

<sup>105</sup> It would maybe interesting here talking about Buchanan's conception of human rights as issues of transitional justice.

<sup>106</sup> Sen (2009), p. 382

<sup>107</sup> Sen (2009), p. 382

<sup>108</sup> Sen (2009), p. 382

affairs, should do it. This openness to contingency gives space to some ambiguities, but Sen solves this issue by leaving this approach incomplete. He declares the incompleteness of this approach, acknowledging that variables inputs have to be factor in for a resolution to be formulated. Obligations so shaped are, he says, “loosely specified obligations”. They, however, are still obligations: Sen aims they are “imperfect obligations”<sup>109</sup>. And

“Imperfect obligations, along with the inescapable ambiguities involved in that idea, can be avoided only if the rest of the humanity-other than those directly involved- are exempted from any responsibility to try to do what they reasonably can to help. While that kind of general immunity might seem reasonable as far as a *legal* requirements are concerned, the case for such impunity in the *ethical* domain would be hard to justify.”<sup>110</sup>

This solves the issue of considering human rights as rights in the moral connotations, but it still leaves open the problem of their institutionalization. Sen, however, goes further in noting how a few bodies of law, for example in France, acknowledge that person should “do what they reasonably can to help”.<sup>111</sup> There is still ambiguity, but it is an haziness transposed legally as well.

Coming back to the specific issue of economic and social rights, their institutionalization calls for the establishment of correlative responsibilities. Sen recalls here that on this issue we can speak both of direct and indirect ones. First he argue about the faculty that certain nations have, even in dire situations, to prevent some infringement of welfare rights (we were on the topic above). Further Sen advocates a solution that, in my opinion, is similar to that of Nickel and Pogge.

“The supportive activities of social organizations are often aimed precisely at institutional change, and 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 this rights provides good grounds for seeking realization through their work in pressing for, or contributing to, changes in institutions as well as social attitudes.”<sup>112</sup>

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<sup>109</sup> Sen (2009), p. 375

<sup>110</sup> Sen (2009), p. 375

<sup>111</sup> Sen (2009), p. 375

<sup>112</sup> Sen (2009), p. 383

I think Nickel's good proposal could be seen to some extent as similar.<sup>113</sup> Nickel points out the person as the ultimate source for guaranteeing the realization of human rights, but the human being as citizen who takes steps on its own administration for this rights to be satisfied. In other words, the individual duty is to try to make the government to fulfil human rights, and the government is practically the actual entity who has the task to pledge human rights, with both a positive and a negative function in cases of its own citizens, and negative in other circumstances. A certain resemblance, I think, is revisable in Thomas Pogge's position.

And yet, I think Sen is on a slightly different position. Considering human rights as conceptualized in significant liberties, and liberties as something that is precious inherently, this provides sound grounds for doing something. These motivations are of two types: perfect obligation, that ascribes peculiar responsibilities to peculiar persons, and imperfect obligations, ethical statements that are, however, obligations nonetheless: "these imperfect obligations firmly correlate, in the same way as fully specified perfect obligations do, with the recognition of rights. The difference lies in the nature and form of the obligations, not in the general correspondence between rights and obligations, which apply in the same way to imperfect as well as perfect obligations."<sup>114</sup> We are talking, of course, of human rights in general. Sen's position seems to be not so much institutional as Nickel's or Pogge's: whoever is in a place to be of assistance against an infringement of human rights, within the boundaries of reasonability, should be so, also, but not uniquely, influencing the State or the social institutions. Martha Nussbaum is nearer to Nickel in locating in governments the first and foremost accountability for satisfying human rights.

Do, then, economic and social rights have all the prerequisite to be classified as rights?

I take as the definition of human right the one given by Martha Nussbaum:

"an especially urgent and morally 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."<sup>115</sup>

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<sup>113</sup>Nickel (2005), p. 396

<sup>114</sup> Sen (2004), p. 341

<sup>115</sup> Nussbaum (1997), p. 292

The main elements of a right are: to shield particularly important concerns; to be “norms with right-holders who have claims, powers and immunities”<sup>116</sup>; to establish a duty-holder; to have a peculiar substance. These are all elements that pertain as well to socio-economic rights.

Drawing on Brems’ proposal stated above, namely the extension to both the generations of rights the principle of “progressive realization”,<sup>117</sup> Nickel makes an interesting observation:<sup>118</sup> why don’t we believe economic and social rights as a “right-goal mixtures”? This goal would be similar to right in its mandatory and deontological shape, and to a goal in that it compute in the idea of progressive realization. Progressive realization that doesn’t hinder the “duty to try to realize the goal as quickly as possible”.<sup>119</sup>

This conception of rights, I think, is fully compatible with Nussbaum’s idea of human rights as urgent claims, and resembles Sen’s “goal-right system”, that will be dealt with in the fourth chapter.

To sum up, I agree with Sen as well who argues that economic and social rights are also (not only) important for the implementation of civil and political rights. Civil and political rights, vice versa, are important also (not only) for the implementation of social and economic rights. I think valid Nickel’s proposal to consider welfare rights as goal-rights mixture, and I propose, alongside with Sen, to consider all human rights in this way.

### *1.2.2 The International Covenant on Economic, Social and Cultural Rights*

The preamble of the ICESCR is analogous to the preamble of the ICCPR. Also article 1, about the principle of self-determination, is the same for the ICESCR and for the ICCPR.

Article 2, among other things, such as the principle of non discrimination, contains the provision that has been subject of interest in the previous paragraph: conversely from article 2(1) of the ICCPR, that aims at the sudden fulfilment of civil and political rights, article 2(1) of the ICESCR advocates the “achieving progressively the full realization of the rights recognized in the present covenant”.<sup>120</sup> As observed above, Nickel suggests to attribute this wordings to the fact that at the time of their submission most of the States would have had problems in keeping their words to

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<sup>116</sup> Nickel (2005), p. 395

<sup>117</sup> Brems (2009), p. 369

<sup>118</sup> Nickel (2010)

<sup>119</sup> Nickel (2010)

<sup>120</sup> ICESCR, article 2(1)

implement them. The gap, however, gets reduced if, as Nickel suggests, we consider rights as right-goal mixtures.

Article 3 in the ICESCR is the equivalent of article 3 in the ICCPR. It is the principle of non-discrimination in the particular context of the equality between men and women in the ambit, respectively, of economic, social and cultural rights and civil and political rights.

Article 4 as well, however, trace out article 4 of the ICCPR, with some differences. Both of them outline the clauses for state constraint of the rights stated in the Covenant, clauses that in the ICESCR are “determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”<sup>121</sup> Article 4 of the ICCPR, however, makes some exception, posing some rights, as the right to life, as not infrangible, while article 4 of the ICESCR is much more general, stating simply that the limitation must be “compatible with the nature of these rights”.<sup>122</sup>

Article 6 and article 7 are about the *right to work*. It is a basilar entitlement. The right to work concerns also not only the employment *per se*, but it includes what are the just circumstances of the job. Among the others, the entitlement not to be discriminated, the right to an appropriate fee, to a sensible working schedule, and also a provision that has sometimes been considered too much for the standard of human rights: the right to paid time off. I think, however, that this issue is rightly contemplated in the convention, since it is important for the minimal human flourishing of the individual.

Article 8 regards the *right to form trade unions* and the *right to strike*. In the ICESCR the right to strike is contained in the fourth paragraph of the Article 8, that is about the entitlement to constitute trade unions. As Doebbler rightly argues, the right to structure trade unions can be subsumed under the right to freedom of association, while the right to strike under the right to freedom of expression.<sup>123</sup> Their importance is so great, however, that I think that article 8 of the ICESCR has its reason to be, and it is not redundant. Article 10 contains also provisions and protection for under-aged work.

Article 9 of the ICESCR is the *right to social security*. This right is the “right of individuals to receive services and money from the State when they cannot provide for themselves”<sup>124</sup>. As

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<sup>121</sup> ICESCR, article 4

<sup>122</sup> ICESCR, article 4

<sup>123</sup> Doebbler (2006), p. 100

<sup>124</sup> Doebbler (2006), p. 97

Doebbler argues, the aim is to supply every person with a satisfactory benchmark for the quality of life, complementing what it cannot reach by itself. Obviously the benchmarks to be set are contingent, and they vary according to the different settings and state of affairs. The same can be said of the ways the Nation may implement this right, whether straight up, for example providing money, or indirectly, such as in presenting occupations.

Article 10 deals mainly with the right to family, that has already been treated in a previous paragraph.

Article 11 of the ICESCR is about the *right to an “adequate standard of living”*, and it is articulated in the *right to food*, the *right to suitable dressing* and the *right to housing*.

As Doebbler<sup>125</sup> argues, the issue of food has somewhat overshadowed the other two, although the right to shelter has been subject of debates as well. What is particularly interesting in the right to food, however, apart the obvious fundamentality of this entitlement, is the fact that its implementation, although reachable, it has not been yet attained. In other words, there are enough provisions globally to fulfil the entitlement for everybody to be nourished, the problem lies in the allotment of these resources.

This maybe a paradigmatic case to counteract to the objection that the implementation of welfare rights are impossible. In the case of the right to food, for example, the obstruction is in allocation, not in potentiality. It is an analogous discourse to the one made by Amartya Sen about the causes of famines in *Development as Freedom*.

The right to provisions has several articulations.<sup>126</sup> First, its being provided for: everybody has to have access, straightforwardly or not, to a sufficient quantity of resources. Second: the entitlement to food has to be insured according to “dietary needs”. This implies that the resources have to be satisfactory for everybody according to intrapersonal and interpersonal contingencies. Third: the food to be accessed has to be fit and not spoiled. Fourth: the fourth factor is “cultural acceptability”. This issue concerns about all the cultural insights regarding the nourishment, insights that have to be factored in, as far as possible, to the appraisal of food’s ease of use.

As far as the *right to housing* goes, this right has been the subject of an on-going debate, and it is quite composite and many-sided.

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<sup>125</sup>Doebbler (2006), p. 92

<sup>126</sup>Mechlem (2004), pp. 638-639

“The particular aspects of the right to housing have been defined in terms of the following concepts:/ 1. Legal security of tenure;/ 2. Availability of services, materials and infrastructure;/ 3. Affordable housing: attainment of other basic needs not threatened;/ 4. Habitable housing: physically safe and minimally comfortable;/ 5. Accessible housing: vulnerable individuals can apply and get housing;/ 6. Location: allows access to employment and other services;/ 7. Culturally adequate housing.”<sup>127</sup>

Leckie, however, complains about a certain disregard in the attention given to the right to shelter in the international dispute. He attributes this inattention to various factors.<sup>128</sup> He focuses on the want of precision concerning the right to shelter, and the government’s position in it. A general reason is in the questioned status of economic and social right, to which the right to shelter pertains. I have already discussed about this issue above. The other, more particular reason, is given by the biggest importance given to the right to nourishment, that, as said above, has overshadowed the right to shelter.

And further, there is the issue of the many nuances that the right to shelter presents. Some of them are: the issue of the belongings of the houses, such as if it should be private or common-owned? Should their assembly be allocated to the state or to privates? How deep should the state input be? And at which step? Should there be a governmental legislation over the prize or not?<sup>129</sup>

Moreover, a factor to be taken in consideration, Leckie notes, is the heterogeneity of the addressees: they maybe nuclear families, they may be enlarged families, or only one person... Leckie further argues that another rationale for the overlook of the right to housing is that its acknowledgment would compel nations to meet the terms and would make them liable to grievances in case of noncompliance. The importance of the right to shelter lies, for one thing, in its resonance as the innate necessity of the person, but it also lies in other elements:

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<sup>127</sup>Doebbler (2006), p. 93

<sup>128</sup>Leckie (1989), pp. 525-528.

<sup>129</sup>Leckie (1989), p. 527

“In codifying housing rights, the international community has recognized that inadequate housing is an affront to human dignity and that inadequate shelter can cause economic and societal misfortune. [...] inadequate and insecure shelter, wherever it may be, will lead to social and political instability and will hamper economic development.”<sup>130</sup>

In this way, we see how the right to shelter is important not only *per se*, but also in function of other goals. Another problem with the right to housing, Leckie maintains, is that it is often seen as a second-order right, and, consequently, allotment of resources would be more functional to be directed to other more urgent demands. This objection waters down, however, once we consider the link, recalled in the above citation, between right to housing and other issue, such as economic development...

So far I have used the term right to housing and right to shelter as synonym. This is, however, not fully correct: a shelter is something less than a home. To be qualified as a house, as Paglione points out,<sup>131</sup> a shelter has to warrant the ease of use of natural assets and the occurrence of social services, it has to show consideration for the local customs. Moreover, it has to be adequated for less able people. Paglione, moreover, makes an interesting point when she focuses on the correlation between familial brutality, of whom women are the main sufferers, and the right to housing. More specifically, on the vision of domestic violence as its infringement.

Paglione underlines how the right to housing is worded in term of sufficient lodging, and she reports the general comment number 4 by the CESCR committee. Here the right to housing is “the right to live somewhere in security, peace and dignity”.<sup>132</sup>

As we may see, a lot of connotation are attached to this right. What Paglione complaints about, however, is the fact that the main focus is given to substantial and outside conditions, so that abuses inside the household are often not refused, but simply not contemplated.

“The private location of domestic violence and the status of the abuser as a private individual have, in the past, prevented this form of violence from being correctly considered a human rights violation. Developments in

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<sup>130</sup> Leckie (1989), p.542

<sup>131</sup> Paglione (2006), p. 127

<sup>132</sup> Paglione (2006), p. 125

international law and human rights law have gone a long way in determining state responsibility towards human rights violations committed by private actors.”<sup>133</sup>

However, she says, nowadays the government is responsible also for human rights infringements made by private, since there is not only a negative, but a positive obligation as well to positively safeguards the human beings in its human rights, regardless of the identity of the transgressor. The nation has been committed to value, guard and insure human rights. Paglione wants to shed the light on the importance on the right to housing in counteracting domestic violence, and to highlights the almost incredible disregard of this point.

Article 12 states the *right to health*. An element that is quite interesting is that it states the right to the “highest attainable standard of physical and mental health”. To be truthful, there are several elements here that are interesting. The article advocates for the “highest standard”, that is quite an ambitious claim, but it specifies the “highest attainable standard”. Moreover, all the articles in the Covenant, right to health included, are under the provision stated in Article 2 (1) and 2 (2), and in article 4. They, we have seen, accept the notion of progressive implementation of those rights. Moreover, they accept the idea that, whenever there is want for supplies, the government of developing nations might restrain the completion of these rights for non-national. Article 4 states the clauses given to the possibility of limitation of the welfare rights.

The second paragraph in article 12 presents some of the compulsory proviso for the accomplishment of this rights. They all focus on the aspect of physical health. I find it interesting, however, that the first paragraph of the article talks also about mental health. This element has often been undervalued, also in developed country. Often the element of mental stress and uneasiness is not treated as it should be, as a kind of illness for which there should be all the attention and the care possible, exactly as it is for other kind of illnesses. A strong depression, ill-cured or not cured at all, can be as fatal as a serious illness, such as, for example, cancer. I find, consequently, impressing that the Covenant would talk about not only physical, but also mental health. This should be an element to be given more attention. Another interesting element, moreover, lies in the General Comment of the UN Committee on Economic, Social and Cultural

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<sup>133</sup> Paglione (2006), p. 141

Rights. Among other things, it states that the accomplishment of this entitlement, that is a universal human right, might subtract supplies from other areas, such as defence.<sup>134</sup>

Toebes is quite effective in filling the concept of the right to health, that, she states, can be perceived as hazy and complex to realize.<sup>135</sup> She provides the right to health with an aim, loading it theoretically, and with a content specifically. The latter is provided by all the elements that the Nation has to grant to persons in order to respect this human rights.

She maintains how the content of the right to health is broader than the concept of healthcare.

“The right to health can be said to embrace two larger parts: (1) elements related to “healthcare” and (2) elements concerning the “underlying preconditions for health” (these may include a healthy environment, safe drinking water and adequate sanitation, occupational health, and health related information).”<sup>136</sup>

As Toebes interestingly argues, to develop something signifies also to be aware that something else has to be excluded: every demarcation, in virtue of its definition, comprises something and keeps out something else. Usually, the more is kept out the more precision is achieved. In the case of the right to health care, then, we shouldn't take into consideration every single issue connected to health, or we don't have the definition anymore. For example, it is not about the right to shelter. Conversely, the right to health cover sometimes the dominion of other entitlements: Toebes makes the example of the right to health comprising the cutback of child mortality, mortality that is, as well, an infringement of the right to life.

For better clarity, Toebes classifies into four groups the elements pertaining the right to health. The first comprises broads elements, and it It contains the requirements States must endeavour to oblige to insure the implementation of this right for individuals. They include: the above mentioned shifting of available resources from other fields; the formulation of a policy pertaining it; and the presence of a public healthcare system, regardless the existence of the quality of private services.

The second *ensamble* pertains to healthcare, and it includes all elements that go under the classification of “availability, accessibility, affordability and quality of healthcare”.<sup>137</sup>

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<sup>134</sup>Doebbler (2006), p. 95; Toebes (1999), p. 666

<sup>135</sup>The two elements, she states, are related.

<sup>136</sup>Toebes (1999), p. 676

The third group, about the “underlying preconditions for health”,<sup>138</sup> refers in part to the universe of human rights, for instance taking into account the standard of living: it focuses partially on other elements. Particularly interesting is the mention to the environment. Whatever pertains to it, it is important to notice, it is important in this regard only if and for its effects on the right to health.<sup>139</sup>

The fourth group, “vulnerable groups and health-specific subjects”,<sup>140</sup> regards the health care attentions adopted in the case of minorities and weak groups.<sup>141</sup>

Articles 13 and articles 14 concern the *right to education*. Article 13 is particularly important:

“The States parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms”<sup>142</sup>

The Convention argues for free primary education, and progressively free secondary education.

The right to education is of capital, fundamental importance. Martha Nussbaum has, over the years, reiterated the importance of education. She argues, even more importantly, for the implementation, along with scientific, a humanistic education. As we have seen, often human rights deal with a low level, with the level of human rights violation. A right to education, then, is primarily a right to primary education. Moreover, probably the focus will be given to scientific or technical education. I want to recall, however, what Nussbaum has to say over humanistic education, in order to underline its importance for the development of the human being.

In her most recent work on the issue, *Not for Profit*, she uses the pugilistic expression “to be on the ropes”, to express the situation of a humanistic education.

Today this feeling is constant in our everyday life. There is the economic crisis, the crisis of value, the growing precariousness in life and work. Nussbaum in *Not for Profit*, however, refers to another crisis. This crisis is creeping, and it is apparently of secondary importance in the global

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<sup>137</sup>Toebes (1999), p. 666

<sup>138</sup>Toebes (1999), p. 668

<sup>139</sup>Toebes (1999), p. 668

<sup>140</sup>Toebes (1999), p. 669

<sup>141</sup>Toebes (1999), p. 669

<sup>142</sup>ICESCR (1966), Article 13 (1)

precarious context. It is the crisis of the humanistic education. In her absolutely and explicitly non-objective defence of humanistic education she wants us to reflect on what a humanistic education means today. She refers to two basic statements: one, that the humanistic education is fundamental to the creation of free and complete individuals, citizens of the global world; two, the humanistic education is necessary also for the economic growth. Nussbaum underlines how there is a downgrading of these kind of studying. This trend is present globally in the contemporary world.

Why is it that? Because they are considered superfluous, useless. They are considered to be somewhat a luxury, that we cannot allow ourselves anymore, or, as far as developing or underdeveloped countries go, that they cannot allow themselves yet.

She brings as evidence of her position concrete examples, paradigmatic events or characters who have expressed in time, with different ways and methods, the core of the humanistic education. Some of these people are philosophers, like Rousseau, educators like Froebel, Alcott, Mann, Pestalozzi. She has, however, two main reference points. It is interesting to notice that one belongs to the Western world, such as John Dewey, American philosopher and psychologist, and the other to a non-Western reality, that is Rabindranath Tagore, nobel prize for literature in 1913. It is not so surprising, after all, if we think that they are expression of the two realities that Nussbaum knows better: the American world, that is her natural habitat, and the Indian reality. Nussbaum has experienced directly the Indian reality and has written much about it. The beginning of this interest may be due to her collaboration with the nobel prize Amartya Sen.

Despite their differences, however, Dewey and Tagore are united against a model of passive education, short-sightedly directed to profit. They both denounced the risks of this kind of vision. The very citations she quotes at the start of the book, one from Tagore and the other from Dewey, are illuminating. Dewey talks about the scope of education as the realization of human flourishing in all its aspects. Tagore warns against the shifting from the “moral man” to the commercial man.

It is important to notice that Nussbaum’s aim is not the contraposition between a scientific and a humanistic education, where the first is considered too mechanical and the latter useless and superfluous. What she wants to aim is that they are complementary, one is necessary to the other. The scientific element gives an aim to the humanistic education, it makes it finalized to the critical thought. It makes her sciolist-free. The humanistic element, then, makes the scientific thought broader, not purely technical. It is important to preserve the humanistic element of a scientific education, that is, the creative and imaginative part, the critical thinking.

One of the problems, Nussbaum maintains, is a thought shared by the majority in the contemporary world: to put profit and economic growth as the only purpose of education. Consequently, there is the idea of using economic parameter as the only one to measure the quality of life and the happiness of the individuals. But, she notices, as already Aristotle maintained, the economic element is only a tool for the realization of the human flourishing, it is not an end in itself.

Tagore's and Dewey's very same countries share this thought. Nussbaum recalls Obama's speech on education in 2009. Obama, whose formation is rich of humanistic elements, takes as model those among the Asian nations that are exclusively oriented towards a technical education. At the same time, Nussbaum denounces the decline of the Santiniketan school, school that was, previously, the center of Tagore's efforts.

This single-minded attention to profit, moreover, is counterproductive, since the humanistic element in education is important for the realization of the very same profit. As we have seen, the two important elements of a humanistic education, the critical thought and imagination and empathy are really useful in business as well. To achieve growth, we need to be able to innovate, to have quality such as flexibility, open-mindedness, to be self-responsible and autonomous. Humanistic education can help with that.

In order to conceptualize the humanistic education, Martha Nussbaum uses two very powerful images: Socrates and the idea of an examined life as a flourishing life, and the concept of narrative imagination as the basis for the development of empathy and compassion. The core of literature and arts in general is the development of this critical thought, of what she calls "the internal eye" of the human beings.

What is the narrative imagination? It is the ability to enter in empathy with the others, and to share their emotions, their feelings. This leads to sympathy and compassion, that are moral feelings. They are not created, of course, by the humanistic education. Human nature has them potentially, they have to be strengthened and made more powerful.

The realization of profit is not, of course, it's only field of utility: it is fundamental in order for the human beings to live meaningful lives. It is fundamental so that human beings can cultivate their humanity.

Humanistic education, last but not least, is essential to democracy. It is essential for its stability: it is necessary for individual to be able to live in the contemporary world, shaped as it is by

globalization. Democracy is not, by any means, an easy task. It consists in the necessity of a peaceful cohabitation human beings that are highly heterogeneous.

Fundamental for democracy is the principle of equal respect. If it is true, Nussbaum maintains, that the feeling of respect for the other can be born from human nature, it is not immediate nor it is a given. It is much more difficult considered the pluralistic and global world we live in. Here the arts enter in the picture. They have to shape the character of the individual in order to make it possible. The humanistic education get the individual used to the critical thinking, to the capacity of transcending local reality and to be a global citizen. It develops the narrative imagination, which allows the capacity to consider the other a human being, to respect it. More than that, to understand that the other's reasons and argumentations have the same dignity as ours. And this is essential for the democratic debate.

The respect for the other is born from the ability, Nussbaum says, to examine oneself, to a correct use of empathy and compassion. This allows to overcome the internal criticalities and it avoids their external projection. Really interestingly, Nussbaum recall human psychology in the picture. She cites, in *Not for Profit*, Donald Winnicott, that is a famous American psychoanalyst.

She notes that often a conflict that is interior to the human being becomes projected outside, and it is the hidden root of the clash of civilizations, tensions, stigmatizations, discriminations. Nussbaum sees in them the conflicting relationship that the human being has with its fallacy, its mortality, its contingency. The refusal of this negative elements signs the human will of transcending humanity, connotation called *hybris* by the Greeks. The refusal to face these negative elements projects them outside, on the other, creating racial, social, religious and gender tension.

Ultimately, a humanistic education can develop our positive potentials and correct the negative elements that we can find in ourselves. We can start by accepting our imperfection, our contingency and our mortality.

Article 15 deals with *cultural rights*. I won't enter in merit of cultural rights, however, since the topic is really complex, and it has to be given more attention than I could do in this present work.

## **II Chapter. The early foundation of Nussbaum's Capability Approach.**

### **2.I The Aristotelian connotation of Nussbaum internalist essentialism**

#### *2.I.I Martha Nussbaum, the good and essentialism about human nature*

In her early writings Martha Nussbaum relies heavily on Aristotle in building her own theory of social justice and in the justification of her capability approach. She uses Aristotelian concepts in two specific ways: first, she gives a personal, and sometimes not canonical interpretation of Aristotle; second, she uses Aristotelian concepts without relying on every aspect of Aristotle's thought, such as his upholding of slavery or his remarks on human inequality.

The importance of Aristotle get considerably scaled down in time in the panorama of her thought. He remains a cornerstone in her position, but only as one of many other important references.<sup>143</sup> In particular, we can distinguish between a Nussbaum's Neoaristotelian liberalism and Nussbaum's political liberalism. There is a string of thought, for example Barclay (Barclay 2003) and Biondo (Biondo 2008), that says that her Aristotelian roots are so deep that it is quite difficult for her to adapt to the political liberal frame. I consider in this work her neoaristotelian liberalism, and I try to highlight his defects but also its interesting and original elements.

Nussbaum's Aristotelian period is nonetheless essential for the whole development of her political and ethical thought. Nussbaum's Aristotelian phase is, in fact, the phase in which she develops the basic elements of her theory, elements that, even if revised, are still the fundamental material for her theorization. Moreover, the kind of methodology she develops from Aristotle, and her peculiar kind of naturalism, are an original achievement and, I am going to verify if they can be an original solution to the problem of the foundation of human rights.<sup>144</sup> Her early position on essentialism and her normative idea of the human being can be used to try to give a foundation to a theory of human rights. This is the reason why I am going to consider it and to focus on it. In the next section I am going to consider briefly the various evolutions of her thought, evolutions that bring to a necessary contextualization of this early period.

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<sup>143</sup> Nussbaum (2007), p. 33; Nussbaum (2011a), p. 123

<sup>144</sup> Solution that is certainly not free of problems. It gives nonetheless, I maintain, an interesting direction that is worth to pursue.

Nussbaum links the idea of human flourishing depicted through her Aristotelian approach to the concept of the valuable capabilities and functionings necessary in order to have a good and dignified human life. Thus, Nussbaum's early Aristotelian approach gives a clear foundation to her capability approach. Capabilities approach whose function in this case would be to specify and to ground human rights.

First of all, Nussbaum draws from Aristotle the conception of an ethics that is oriented toward the praxis, and that is closely connected with politics. It is interesting to note that it wants to be a liberal conception insofar as the aim is the realization of free and equal individuals.

In *Aristotelian Social Democracy*<sup>145</sup> she explicitly cites Aristotle's *Politics*, where Aristotle worries about the practical means to achieve freedom and equality among citizens, and he states that political authority has to be exercised among free and equal<sup>146</sup> citizens. The latter statement, Nussbaum argues, has two meanings: on one side, the necessity for governments and citizens to be considered equals, on the other the necessity for both categories to have access to public offices. "Hence reciprocal equality is the preservative of states, as has been said before in *Ethics*. [...] all the citizens are equal in their nature, yet at the same time it is only just, whether governing is a good thing or a bad, that all should partake in it".<sup>147</sup>

Nussbaum draws from Aristotle the concept of human flourishing, that has an absolute ethical priority in her thought. "Human flourishing" is her translation of the word *eudaimonia*.<sup>148</sup> She takes from Aristotle the basic structure of this conception: human flourishing is conceived in terms of action, as the full realization of the human being in some core areas. Those core areas are individuated on the base of considerations related to human nature. These considerations, however, are not metaphysical, rather ethical: they form a normative conception of the human being.

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<sup>145</sup>Nussbaum (1990), p.104

<sup>146</sup>If in Nussbaum's reading of Aristotle equality can be justified, it is more difficult to do so in Aristotle's own thinking. Aristotle upholds equality among citizens. The problem is that he has a fairly restricted notion of citizens, and he uses the concept of capabilities as a bias to exclude certain categories, such as slaves and women, from his conception of human being. Nussbaum answers this challenges in different ways: first, distinguishing between an Aristotelian influenced position and an Aristotelian conception as such; second, outlining the possibility to correct Aristotle's fallacies by clearing up the incoherence within his own position (Nussbaum 2000a). We could distinguish, for example, from what belongs to the structure of his thought and from what is due to the historical and social context he lived in. The justification of slavery we encounter in Aristotle's *Politics*, ("Thus the female and the slave are by nature distinct" Aristotle (1934) p. 5) for example, can be read as ideological, since it is in contrast with his view on human nature. A third strategy used by Nussbaum consists in drawing from Aristotle only some conceptions, while rejecting what she deems incompatible with her position: if, to make an example, Aristotle lacks the basic idea of human equality, universally valid, we simply have to look somewhere else to find it. Nussbaum (2011a), pp. 128-129

<sup>147</sup>Aristotle (1979), p. 73

<sup>148</sup> Aristotle means, with *eudemonia*, living well, activity according to excellence.

Nussbaum, on the track of her Aristotelian interpretation, founds the human good on a peculiar kind of essentialism about human nature. This confers it a peculiar universality. She founds, consequently, the political conception on this idea of the good, being the human flourishing of citizens the aim of politics. The state, in other words, has the function to guarantee the institutional, material and educational conditions that allow them their full realization as human beings.

“The partnership finally composed of the several villages is the city-state; [...] it exist for the good life”<sup>149</sup>

Adopting a capabilities approach, this is translated as the necessity to guarantee the availability of certain capabilities that are necessary for every individual to achieve his human flourishing, to lead a good life. The liberal aspect of this theory is defended also by the claim that these capabilities individuates a minimal conception, that can be integrated in multiple directions.

She founds her theory of social justice on what she calls a thick but vague theory of the good, rooted in a normative conception of the human being, while claiming, at the same time, this to be a liberal conception. Her essentialism, the related universalism and the thick and vague theory of the good are the necessary conditions for an adequate basis of a theory of social justice.<sup>150</sup>

Her method is essentially twofold: on the one side she shows how her Aristotelian position is compatible with liberal issues, such as the importance of choice, respect for pluralism, for individuals as free and equal; on the other side, claiming how liberal positions can be much closer to these Aristotelian assumptions than it seems. The issue about neutrality and liberal values, for example, doesn't lead to an easy answer. Upholding liberal values in a theory of the good can be one way. Another problematic aspect could be the liberal value of autonomy. Can an Aristotelian position such as Nussbaum's escape the charge of not respecting people's autonomy. Nussbaum uses the method depicted above.<sup>151</sup> On the one hand she underlines the importance of choice and autonomy in her Aristotelian conception: the list of capabilities expressing the thick vague theory of the good is based on capabilities and not functionings; that the role of choice is central, thanks to the pivotal function of the practical reason. On the other hand she notes also how giving importance to autonomy means to take into consideration the material conditions for upholding it.

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<sup>149</sup> Aristotle (1934), p. 9

<sup>150</sup> Nussbaum (1992), p. 205

<sup>151</sup> Nussbaum (1992), p. 225

“Thus the Aristotelian claim that her own comprehensive concern with flourishing across all areas of life is a better way of promoting choice than is the liberal’s narrower concern with spontaneity alone, which sometimes tolerates situations in which individuals are in other ways cut off from the fully human use of their faculties”.<sup>152</sup> But what I would like to do here is to see where the Neoaristotelian liberalism of Martha Nussbaum leads to, and to retain the interesting aspects, pointing out its problematic ones. Nussbaum’s ongoing dialogue is essentially with the string of liberalism championed by John Rawls.

Her Neoaristotelism is, under a certain respect, problematic. Her essentialist account of human nature, the proposal of a theory of the good, clashes with the liberal issue of neutrality, and expose herself to the accuses of paternalism. What she tries to do is to show that there is not neutrality as such, and that it is feasible to build a minimal theory of the good based on a particular notion of human nature that it is possible to consider universal enough, and on liberal values. Her theory of the good, moreover, relies on the idea of the individuals being free and equals. Using the language of capability, then, reinforces the liberal aspect of her thought. Hers is an original attempt and it is worth exploring. The problematic aspects of her thought, the accuses of paternalism she is exposed don’t hinder the fact that she wants to point a way that tries to retain essentialism and avoid paternalism.

To sum up, her neoaristotelian liberalism is based on: an internalist essentialism about human nature, a thick but vague theory of the good, the language of capability, the assumption that a kind of universality can be achieved, so that the government can still be liberal and pursue those elements that are at the base of every single conception of the good, even in a pluralist world. The kind of universalism possible, according to Nussbaum, is not absolute. Since it is the product of an internal evaluative inquiry, “it aims to be as universal as possible”<sup>153</sup>, but although this universality may not be complete, it may be wide enough to consent to be an international critical standard and the basis for political reflections.

### *2.1.II The peculiarity of Nussbaum essentialism: “internalist” essentialism*

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<sup>152</sup> Nussbaum (1992), p. 225

<sup>153</sup> Nussbaum (1992), p. 215

What is essentialism? Martha Nussbaum gives a specific definition of essentialism as the view that human being has some central defining characteristics.<sup>154</sup> Her naming the kind of essentialism she supports internalist essentialism finds meaning in her aim to give a strong anti-relativist account that can be universal without avoiding to be context- and historical- responsive. It is actually quite an ambitious claim, and we will see how she builds her third way between universalism and relativism.<sup>155</sup>

Nussbaum<sup>156</sup> holds that in order to shape an acceptable conception of essentialism it is necessary to distinguish between a kind of essentialism that is based on metaphysical realism and essentialism that is not dependent on it.

Metaphysical realism relies on the idea of the existence of a structure of the world independent from our cognitive perception of it. This implies the possibility of an account of human essence as it is in itself, independently from experience, from every kind of self-understanding, from historical contingencies. However, the well-founded criticism on metaphysical realism has shown also the impracticability of the kind of essentialism that relies on it. As Wittgenstein said:

“We have got onto slippery ice where there is no friction and so in a certain sense the conditions are ideal but also, just because of that, we are unable to walk. We want to walk, so we need *friction*. Back to the rough ground!”<sup>157</sup>

Nussbaum holds that the justifiable rejection of that position leads often to a common mistake: to a conflation into extreme realism and subjectivism about all matters of evaluation.<sup>158</sup>

This position can be seen as a symmetrical mistake to those who hold on metaphysical realism, and it is linked to a theme that is central for Nussbaum's thought: the foundational aspects –in a theory of the good- of the elements of limit, imperfections, of the sphere of needs.

Human beings hold a problematic relationship with their constitutive limits, fragilities and weaknesses. On the one hand, these elements shape the human dimension at all levels, ethical,

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<sup>154</sup> Nussbaum (1992), p. 205

<sup>155</sup> See Magni (2006).

<sup>156</sup> Nussbaum (1992)

<sup>157</sup> Wittgenstein (1953), §107

<sup>158</sup> Nussbaum takes relativism and subjectivism to have the same relation of the genus to the species. Her definition of relativism is the view that local groups or the individuals are the only standard of value. Her definition of subjectivism relies on the conception of subjective preferences of individuals as the fixed evaluative standard.

political, cognitive. On the other hand, human beings are often reluctant to acknowledge their importance and their constitutive aspects, and they try continuously to transcend humanity. They do it in a lot of different ways. One is, then, the refusal of accepting the possibility of truth and knowledge from within the human dimension, as shaped by contingency, vulnerability and fallacy. This refusal takes two forms: on the one hand the search for rock-hard metaphysical truths, on the other the skepticism triggered by the inevitable failure of this enterprise. Skepticism is, in this case, expressed as relativism and subjectivism. And this has disastrous consequences:

[They] saw what the subjectivist did not perhaps so clearly see: that to give up all evaluation and, in particular, a normative account of human being and human functioning was to turn things over to the free play of forces in a world situation in which the social forces affecting the lives of women, minorities, and the poor are rarely benign.<sup>159</sup>

There is, however, a third alternative explored by Nussbaum: there is the possibility to renounce to the ambition of a transcendental, metaphysical basis for evaluative judgment. This renounce wouldn't imply, nonetheless, the possibility of making evaluative judgments altogether. The third possibility is in founding evaluative judgment through an inquiry internal to the human dimension. We can achieve certainties –that is- through the critical evaluation of our practices of analyzing and reasoning, through the critical evaluation of human and historical reasons, through debates and exchanges of ideas throughout human history.

She calls this approach internalist essentialism, and it is a view that Nussbaum gathers from her interpretation of Aristotle. Internalist essentialism, however, shares something with Putnam's internal realism. The kind of certainties, of truth, achievable in this way hold the same status as the one individuated by Hilary Putnam's internal realism.<sup>160</sup>

Aristotle's general philosophical method is at the roots of Nussbaum's essentialism. Essentialism that is made concrete as an essentialist account of the human being, defined as the individuation of certain features of human life that characterize it, and that are the ground for defining what is a good human life for such a being. She does it through an evaluative inquiry that answers the basic question of which features -features of humanness- are so important to be the necessary and sufficient condition to consider a life a human life.

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<sup>159</sup> Nussbaum (1992), p.213

<sup>160</sup> Nussbaum (1992), pp. 213-214; Nussbaum (1992), p. 243

The essentialist account tries to map out the general, universal, shape of the human form of life. On an intuitive level, this universality is based on two premises: first, that we recognize the other as a human being, even if it holds different metaphysical or religious conceptions; second, that people's opinion meet over which characteristics are essential, for without them there would be the end of the human form of life.<sup>161</sup> The inquiry is –as quickly mentioned above- evaluative and internal to human history. It aims not at uncovering belief-free facts, on the contrary, it aims at searching critically through the ways human beings understand and view themselves. This search has to be conducted on a trans-cultural level, and it gives a privileged attention to myths and stories that place the human being on a precise place in the order of the universe, determining which characteristics makes him human. In order to do that, there is often a comparison by contrast with “better” or “worse” forms of life. The human being is often defined by contrast, compared with the description of beings that are “inferior” to humans, such as beasts, and with beings that are “superior” to human, such as Gods.

Nussbaum concentrates particularly on the descriptions of the Greek Gods: they look like human but they are not human, because they lack certain essential features that makes it impossible for them to experience a human form of life. What is interesting is that all the lacking features pertain not to positive, rather to negative, traits: they have to do with human limitation, finitude and openness to luck. One of the important points of Nussbaum's reflection, we will see better in the next paragraph, is her insistence on the importance of the “negative” constitutive aspects of human beings, aspects that have to do with needs and limitation, that are essential both in understanding an essentialist account of human being and in achieving human flourishing, that is the human self-realization as free and equal individuals.

To sum up, Nussbaum takes from Aristotle his non-relativistic anthropocentrism and his “human” universalism. She trusts the reliability of the human practical reason in conducting a critical inquiry and in arriving at sound conclusions. Nussbaum, moreover, attributes to emotion an important status in formulating evaluative judgments. They cannot, however, be trusted alone: they always need to be carefully scrutinized by reason. So corrected, they have their specific reliability. Nussbaum is persuaded that this trans-cultural critical inquiry will uncover so many similarities to justify her statement of universality and objectivity. Statements that then acquire the status of critical stand for the criticism of values, cultures, practices. Standards for criticism that are internal, and not external to the context.

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<sup>161</sup> Nussbaum (1992), 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 own customs but is also fully international and a basis for cross-cultural attunement.<sup>162</sup>

Her universalism and essentialism, like everything else that is human, is not rock-hard: her achievements are “humble”, objects of inquiry and open to the constant possibility of changing and revision. She recognizes, moreover, that it could be impossible to reach a full universalism based on this premises contingently, since it may be possible that people refuses to use this critical evaluation, or that arrive to different conclusions. Then, she aims at a sort of “enough” universality, enough widespread so that it can be considered valid.

This peculiar essentialism comes to be, in this way, strongly context-responsive and attentive to particularism. Once we have established the common framework of the common humanity, Nussbaum argues, there is plenty of space to explore the concrete circumstances that inevitably shape and give their peculiarity to a human form of life. To acknowledge the importance of the local tradition, of the cultural element and the effects it has on the constitution of the human being, is fundamental in order to establish an internal dialogue, internal ways to fulfill a universal human flourishing.

What we have to keep in mind, however, is that Nussbaum is always concentrated on building a theory of social justice: all the various aspects of her thought have to be read under this unifying element. That can explain why one of her main worries is to link her essentialism to public policy. Her essentialist account is important because it shapes her political position. She holds, in fact, that an essentialist account of the human being is necessary for public life, insofar as it provides the necessary indications for an account of distributive justice and for an orientation in public life. Since it is the bases for a theory of the good, in fact, it provides the paradigm to assess what is missing from a life in order for it to be a dignified human life. It makes it possible to individuate, consequently, which areas have to be implemented. Moreover, without this term of comparison it is impossible to establish the unjustness of any tradition that is deeply rooted in society.

An essentialist account of the human being, finally, is the appropriate ground for two moral sentiments that have an important political importance: compassion and respect. The way

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<sup>162</sup> Nussbaum (1992), p. 216

compassion is shaped renders intrinsic the presence of limits and vulnerabilities, and the recognition of the element of a shared humanity.

To recognize our common humanity is essential not only for compassion, but for respect as well, and compassion and respect are the two main reasons for action in the case of other-regarding actions. Usually respect is viewed as respect for the dignity of humanity, and it is materialized in the possession of certain human powers or capacities.

One need to have an account of what those power and capabilities are, and it had better be an account that links many times and places together. Otherwise, we will have no moral motive for other-regarding action toward people at a distance or toward people of other races and genders.<sup>163</sup>

Respect for humanity, then, deems as necessary an essentialist and universal account of the human being.

Internalist essentialism is, however, open to objections. How is it possible to arrive at objective conclusions starting from subjective assumptions? It is clear that the kind of universality that can be achieved is not rock-hard, nor fully universal. What I find interesting in Nussbaum's however, is that she ascribe certainties on human limitation. It is because we are limited that we can contemplate her solution: to give the way to a reasoned understanding of the available data – available to us- and to accept the conclusion as universal. It is a universality that cannot be fixed, that can and it has to be revised, and, mostly, that it is a universality for us: it is valid for those beings that share our structures, physical and mental, because all the possible inquiries made are already evaluative, and cannot be considered without the human factor.

Is it possible to define certain constitutive elements of human beings starting from an evaluative inquiry of human beings and their production, using practical reason and a narrative imagination? It is an ambitious claim, but I think that is an interesting direction and stimulus. I think it is important to retain that all human beings shares some elements that shapes inevitably their way of life. The fact, for example, that they have two legs and two arms, that they walk standing, those are all elements that define a certain way to interact with the outside dimension. All the limiting elements of human beings, their mortality, their finitude. Their capacity for emotions and so on. Using

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<sup>163</sup> Nussbaum (1992), p.239

practical reason, Nussbaum says we can try to isolate certain constitutive elements, even if at a very basic level, and even if they can take very different shapes in very different contexts.

It is a humble position, open to reconsideration and criticism, it is however appealing, and it contains many elements of truth: the human limitation, the importance of the human limitation in our judgments, the human strive to reach for universality even in the face of the plain impossibility to achieve a rock hard version of it. It is a third way between universalism and relativism, and, as all third ways, it is a base for reflection.

### 2. I. III Saving the appearances

The method depicted above draws an inspiration from what Nussbaum interprets to be Aristotle's general philosophical method. She investigates it thoroughly in *The Fragility of Goodness*. This method is aimed at "saving the appearances".<sup>164</sup> Aristotle discusses his method in the seventh book of the *Nicomachean Ethics*. Appearances is the term Nussbaum adopts in translating the word *phainomena*, used by Aristotle. Appearances are the object of the philosophical method both in the sense of being what it deals with and in the sense of being all that philosophy *can* deal with.

Aristotle says that we have first to consider the appearances, the *phainomena*, then try to raise all the difficulties we encounter in facing them. After that we have to consider all the *endoxa*, the received opinion, about that. If we cannot manage to do this for all the opinions, we should do it at least for the greatest number and the most authoritative. That is, if the use of practical reason is confirmed by the received opinion, we can consider the matter solved. Then the philosophical method has done enough. It has done all it is supposed to do.

"But, just as in other cases as well, after positing the phenomena and first raising perplexities about them, one ought in this way to bring to light especially all the received opinions about these experiences or, failing that, the greatest number and most authoritative of those opinions. For if the vexing questions are solved and the received opinions remain standing as well, then the matter would be adequately explained."<sup>165</sup>

Aristotle gives a general statement here, outlining a general method valid for ethics, for science and metaphysics as well. Nussbaum wants to defend the philosophical method so defined from two

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<sup>164</sup> It is perhaps useful to remind that I am not facing the important issue of the orthodoxy of Nussbaum's reading of Aristotle: my aim in the project is to show Nussbaum's method, not to question whether her exegesis is a faithful one.

<sup>165</sup> Aristotle (2011), p. 136

different kinds of danger: first, she wants to give it a precise interpretation, that she hold as the most faithful to Aristotle's ideas; second, she wants to defend this method against the accusation of it not being philosophical at all, being so anchored to held beliefs and appearances.

She concentrates first on the very term Aristotle uses: the word *phainomenais*, literally, appearances. It can be understood also as "what we believe", or "what we say".

Claiming to base and circumscribe the philosophical method to *phainomena* means to take quite a strong stand in the ancient world: Aristotle is trying to save the *phainomena* from the demeaned position they held in the Greek thought. He has in mind mainly Plato, but his predecessors as well, all the thinkers who try to demise appearances on the ground of their being products of human subjective perception, interpretation and beliefs. Because of that, they are not reliable enough to be used in the search for truth. The truth has to have more stable foundations than that. Such views oppose appearances and truth, and they hold that no good and no truth can be found within human dimension, being humans and their products flawed, imperfect and limited.

The philosophical method depicted so far abide itself to anthropocentrism. It is, however, an "objective" anthropocentrism: it does not imply relativism. On the contrary it aims at achieving objectivity and universality within the human dimension: the limits of human experience is what defines, not defies, the possibility of a human knowledge that is certain.

From this perspective Nussbaum beware from a common trend of assimilating the Aristotelian philosophical method to the Baconian method in natural science. Under this interpretation, *phainomena* are translated as observed fact. What it is implied here is the possibility of a neutral observation of empirical reality, abstemious of any interpretation. The data so gathered are then explained by the construction of a comprehensive theory.

This doesn't fit, however, with Aristotle's statement of his method in the seventh book of the *Nicomachean Ethics*, where he links the *phainomena* to the *endoxa*, the beliefs we hold. Aristotle's aim is not to gather data that are evaluation-free: his method aims at sorting out and arranging precisely our descriptions and interpretations of the world. We don't find, says Nussbaum, the

sharp Baconian distinction between perception-data and communal beliefs, we find in Aristotle [...] an inclusive notion of experience, or the way(s) a human observer sees or “takes” the world, using his cognitive faculties.<sup>166</sup>

Nussbaum argues that Aristotle’s method is the same for every matter, for science as well as ethics, and she is interested in showing how this method is primarily interested in setting a perimeter that is at the same time limit and standard for knowledge, in a very Kantian fashion. Even the first principles of science -as analyzed in the *Analytics*- are based on deep and basic human appearances. Scientific first principles are traditionally considered *a priori* truths, objects of special acts of intellectual intuition, detached by experience. She argues this interpretation to be mislead. We can still retain their characteristics according to that interpretation: truthfulness, indemonstrability, their being necessary and primary, *a priori*.<sup>167</sup> We don’t need, however, to deviate from a correct understanding of appearances, in order to do that.

This is clear if we investigate further Aristotle’s method according to Martha Nussbaum. The kind of foundations intended by her for the notions of truth, objectivity and universality are free of metaphysical or religious background. The first step to do in order to arrive at certain conclusions in every field is, as we have said, the taking into examination of the pertinent *phainomena*. There are two important elements to consider here. The first is that *phainomena* are both ordinary beliefs and sayings and the scientific and philosophical positions on some particular issue. The second is the boundary of the class to be considered as relevant for the evaluation of the appearances. The boundaries are set not only by species-specific elements, but by the “sharing of some general features of the way of life as well”.<sup>168</sup>

Why is that so? Because the sources of every knowledge that is ours, even the most certain, are given by two parameters that are closely interrelated: our experience of the world, the *phainomena*, and the constitutive features that shape the particular way of experience.

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<sup>166</sup> Nussbaum (1987), p. 244

<sup>167</sup> According to a particular definition of *a priori*.

<sup>168</sup> Nussbaum (1987), p. 245

Data for an inquiry into our conception of F can come only from peoples whose ways of life are similar to ours with respect to those conditions that gave rise to our use of the term “F”. Other groups and species not so related to us could not have “F” [...] in their language, and we do not, therefore, need to ask them what they think about it.<sup>169</sup>

The second step, after having gathered all the relevant *phenomena*, consists in solving the contradictions and the problems that can arise from them. The first phase of the second step is in ordering all the conflicting opinions over one matter, weighting them against each other, and considering the overall consequences on other aspects in adopting one view rather than another. This doesn't end up, however, on a relativistic position, thanks also to another peculiar position of Nussbaum's. There is nothing but a human *conatus*, that is, beyond the possibility of truth and foundation. Nussbaum reminds us of Aristotle's opening of the *Metaphysics*, where he says that all human beings -by nature- reach out for understanding. And this is what makes it possible to go beyond skepticism.

The *phenomena* so gathered and organized are both the object and the paradigm of a scrutiny based on the principle of non-contradiction, that is characterized as “the most basic of all our shared beliefs”.<sup>170</sup> Saving the appearances means, at this level, the search for clarity and consistency, a kind of consistency that cannot be reached, consequently, at the expenses of the appearances: they concur to prove the validity of a thesis.

It is, however, fundamental in order to understand Nussbaum's thought at this early stage to understand well the kind of foundationalism she ascribes to Aristotle. She<sup>171</sup> examines an argumentation that Aristotle gives when he considers how to behave towards somebody who questions the principle of Non-Contradiction.

She holds that the appropriate answer is, on a very specific sense, avoiding to answer: to a skeptic that demands us a demonstration of the truth of the principle of Non-Contradiction Aristotle argues that we have nothing to say to him. He has a peculiar way to face the challenge. The very same challenge is, in fact, described by him as a sign of lacking of *paideia*, of moral education. It is interesting, Nussbaum says, that he accuses him of that, rather than, for example, of stupidity. The

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<sup>169</sup> Nussbaum (1987), p. 246

A particularly fitting example is the concept of justice and ethics: only human beings, nor Gods nor beast, have experience of ethical and political concepts; therefore only they can conceptualize them. And only they can have such an experience because of certain constitutive features they, and only they, have: they are both reasonable and lacking of self-sufficiency.

<sup>170</sup> Nussbaum (1987), p. 247

<sup>171</sup> Nussbaum (1987)

core of Aristotle's reasoning is that this principle is so embedded in our practices, in the human way of life, that we cannot conceive anything that goes beyond it. That is, his truth relies on being so embedded in the human practices that it is a necessary condition for them.<sup>172</sup> This means, however, that we cannot say anything about it outside this dimension, not even to find a foundation for its truth. On the one hand,

we cannot satisfy the skeptic's demand for external purity; we can ask him to accept our fellowship. But perhaps, if he is a skeptic bent on securing his equanimity against the risks attendant on community and human involvement, he will refuse that. We cannot, in any harder sense, show him that he is *wrong*.<sup>173</sup>

Wittgenstein said similarly: "Scepticism is *not* irrefutable, but obviously nonsensical, when it tries to raise doubts where no questions can be asked."<sup>174</sup>

On the other hand, the only way to successfully refuse to accept the truth of principles on the base of the human way of doing things is to stop acting in a human way. The condition is to refuse one's own humanity altogether. And this necessity provides the kind of certainties Nussbaum's Aristotle aims at.

What is the strength of this method? What we can retain from this method is the unavoidability of the element of human subjectivity. Even in the scientific world, objective knowledge is impossible. Or, better, it is possible an objective knowledge that is internal to the human dimension. The very same presence of the scientist alters the experiment. The statement of saving the appearances has to be read, in my opinion, in this context: all human knowledge is inevitably shaped by certain human features. Illuminating is the example of the principle of non contradiction: its refusal put the person outside the human dimension, making interaction with him impossible. At the same time, what we believe has an influence to the conclusion we arrive, and, if we use practical reason, that doesn't hinder the validity of the conclusion. In other words, subjectivism is not avoidable, the human element set the parameter and the boundary for what we can look for, but this is not necessarily a tragedy: consistency can be achieved within human practices.

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<sup>172</sup> In the specific case of the principle of Non-Contradiction, Aristotle answers not by giving a demonstration of the truth of this principle, but by examining the opponent's behavior. If he says something, he instantly betrays his position, since he cannot speak without using that principle. If he doesn't say anything, that means we don't have to worry about it, because he put himself out of the human dimension, the human way of life, and so we don't have -and, more correctly, we have no means- to establish a contact with him.

<sup>173</sup> Nussbaum (1987), p. 253

<sup>174</sup> Wittgenstein (1921), § 6.51

Are there any weaknesses in the method? For example Nussbaum says that the successful method leaves the *endoxa* in places. It is evident that, if we use practical reason to evaluate all the *phainomena*, it will not always be so. But, at this point, we need to contextualize: as already said, Aristotle is writing in polemic with those who refuses all the *endoxa* altogether, such as Plato. Also, as a scientific method, this can be questionable. But I think we have to consider it as an assumption of the unavoidability of the human element in it. There is not such a thing as neutral observation of facts, the human factor needs to be considered. And at the same time Nussbaum wants to retain a certain objectivity.

It is not an easy task, but, I think, it is an honest one: recognizing the limitation of the human being and at the same time looking for universality within this imperfection and limitation. And using practical reason to arrive at conclusions that do not depart drastically from the *phainomena*. This is more defensible in ethics, perhaps, than in science. But, as I have already said, the insistence on the *phainomena* can be read as the insistence on the human factor that shapes inevitably every kind of knowledge, even the scientific one.

## **2.III Human flourishing and the normative account of the human being**

### *2.II.I From the normative conception of human nature to human flourishing*

This essentialist and universal account of the human being is, at the same time, normative, internal and evaluative. The normative account of the human being is the basis for a conception of the good and for a subsequent theory of social justice.<sup>175</sup>

In other words, she follows Aristotle in linking an account of the human being to the answer to the question “how should one live?”

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<sup>175</sup>To understand the essential feature of the human being is to understand how the human good is shaped, what is a human flourishing. Consequently, it guides legislators and institutions in their politics for the distribution of benefits and burdens in society

The Aristotelian idea about the characteristic activities of a being defining its essential nature is a revision of a commonly held belief in his time. Nussbaum<sup>176</sup> refers to his “human function” argument. Aristotle’s “human function argument” states that, given something’s function or activity, what can be defined as the good way of doing is doing that function or that activity well. For human beings, this constitute their human flourishing.

Let’s say E is the function of an E-craftsman: the good activity for him would be to do E well. The starting point, then, would be an account of E. The good activity for a human being, consequently, would start with an acknowledgment of what are the functions or activities that defines him, that is, thanks to which he is a human being. These defining features are the ground to establish what is a good life for him, and, consequently, how he can achieve it.

The flaw of this argument is that of deriving a value, normative implications, from a fact. Even if we would acknowledge, for example, that humans are political, sociable animals, why should we derive from that the normative assumption that we ought to opt for a communal idea of the human flourishing rather than a solitary one?

Nussbaum, however, objects that this fallacy is not applicable to Aristotle: according to her interpretation, what Aristotle proposes is not a self-validating argument that functions in this way.

On the contrary the Nussbaumian/Aristotelian essentialistic account of the human being is aimed, in fact, at answering this objection. We can avoid the dichotomy between fact and value by assuming a point of view that is already internal to the human dimension. We can say that what is relevant is not the belief-free, empirical fact, but that what is relevant are the evaluative judgments and beliefs of the humans over the humans.

This position is still, of course, a naturalistic position. At the same time, however, it is peculiarly different from common naturalism due to Nussbaum’s effort to individuate the particular kind of foundation we have talked about so far. It allows her to avoid some of the common criticisms made to naturalistic positions, such as the naturalistic fallacy.

It raises, naturally, other kinds of criticism, due, for example, to the difficulty of giving a strong theory of internal foundationalism, of a universalism based on human self-interpretation or, again, to the difficulty of paying attention to particularism and pluralism without ending up in relativism. The difficulty of the position I am describing here doesn’t hinder, however, its appeal as one of the

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<sup>176</sup> Nussbaum (1995), p. 112

possible solution to the problem of the justification of universal foundations in a pluralistic society. This is also the main issue about the upholding of universal human rights. It needs, then, to be carefully investigated.

To return to the main point: to arrive at individuating the essential elements of the human nature, as we have seen, we have to make an inquiry that is both evaluative and internal.<sup>177</sup> This inquiry investigates our deepest evaluative judgments utilizing both practical reason and emotions. Among them, we have to isolate the ones that defines the way in which human beings have pictured themselves, both in the literary production and in all other ways of self-expression and self-perpetuation. The inquiry is going to be made on a trans-cultural level, comparing different cultures and different tradition, both with respect for them and with a critical approach. She is optimist that through this reasoned examination of local values and tradition we can arrive to conclusions that can be considered quite universal. And we will have arrived to these conclusions using critical reason to achieve them from within, through an internal criticism and eventual rejections of local values from within the culture itself.

We will have, then, an objective, reasoned and universal answer to the question “what are necessary and sufficient conditions of my continuing to exist as a *human* being?”<sup>178</sup>

The inquiry is evaluative,<sup>179</sup> because it is an evaluation of what are the most important things in human living. It is internal, because it is made from within human conceptions and beliefs.

Human nature cannot, and need not, be validated from the outside, because human nature just *is* an inside perspective, not a *thing* at all, but rather the most fundamental and broadly shared experiences of human beings living and reasoning together.<sup>180</sup>

This conception of the human nature derives universality from its broad acceptability through time and place, and it has a self-validating structure.

What does Nussbaum means in talking about a self-validating structure? She aims at saying that what we can count as essential features of humanness are so because they are the essential ways in

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<sup>177</sup> Nussbaum (1990)

<sup>178</sup> Nussbaum (1995), p. 91

<sup>179</sup> The evaluative elements of the argumentations used for an account of the human being are evident, says Nussbaum, when this account is involved in human practices: an example can be that of doctors that have to give a definition of death, who have to individuate the features that count in defining a life as the life of a human being.

<sup>180</sup> Nussbaum (1995), p. 121

which humans are and in which humans do things. They are self-validating because we are obliged to use them, and moreover, we wouldn't recognize our life as a human life without them. This is the case of the principle of non-contradiction, mentioned above, or of practical reason and sociability. Practical reason and sociability are the two foundational elements of human nature according to Nussbaum. The case of practical reason is interesting to understand what Nussbaum means by self-validating structure.

She begins by saying that choosing is an exercise of practical reason.<sup>181</sup> Then she recollects Aristotle's argumentation against the idea that a good life is a life of pleasure. Choosing a life of pure pleasure, he says, is choosing the life of an animal. And this not only conveys the idea that a life of pure pleasure, without any plan, any choice, is not fully human, but, in a more subtle way, it conveys the idea that there is an inconsistency in choosing to live a life without choice. This is already a choice, that is, it presupposes an exercise of practical reason in the very same act of choosing to deny something. This is the self-validating connotation of practical reason, as an essential feature of humanness.<sup>182</sup>

Can this be considered illiberal? After all, freedom of choice means also freedom to abdicate this freedom. Nussbaum makes this very same assumption. In later works,<sup>183</sup> in fact, she will say something different: she will extend the value of choice to the choice of a way of life without choice. She will say, that, as long as it is chosen, a choiceless life has the same value that a life where choice is exercised. It would be paternalistic to maintain otherwise.

This, however, doesn't change here the strength of the self-validating argument: she still maintains practical reason and choice to be essential elements of the human flourishing, even in the choice of a plan of life that doesn't contemplate this exercise. What it is important is the possession of the capability for it. To have the concrete, substantial opportunity for the capability to choose is essential for every form of human flourishing.

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<sup>181</sup> Nussbaum (1995), pp. 116-117

<sup>182</sup> In later works, for example in Nussbaum (2007), she will say something different: she will extend the value of choice to the choice of a way of life without choice. She will say, that, as long as it is chosen, a choiceless life has the same value that a life where choice is exercised. It would be paternalistic to maintain otherwise.

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<sup>183</sup> Nussbaum (2007), p. 15

This account of human nature has consequences for consideration of social justice: there is a characteristically human way to implement even the basic activities, such as feeding, that men has in common with beasts. Nussbaum cites often Marx's observations about the difference between the way a human eye and a non-human eye sees the world, the human way of eating and the non-human.<sup>184</sup> This means that the dignity of the human being has to be preserved in assuring him possibility for the "human" way of functioning. This has important repercussions on what can be justified as human right: some rights that are within the group of the so-called second generation of rights, such as economic rights, are based, in Nussbaum's approach, precisely on these ideas.

No good is done by giving people food, money, and medical care, unless government also promotes the truly human use of these objects, in a life governed by personal choice of good.<sup>185</sup>

Finally, in an account of the human being that is truly human, it is central the focus on the elements of needs and limitations. They shape inevitably the human dimension, making the human being a peculiar *ensamble* of capabilities, needs and limitations.

In the earlier writings Nussbaum tries to isolate the essential features of humanness, talking about them as the first step of a thick and vague theory of the good. They are the bases for the individuation of Nussbaum's ten central capabilities. The capabilities list is the foundation to determine which rights can count as human rights.

These are the central elements:<sup>186</sup>

*Mortality.* Human beings have to face mortality in a number of different ways, both through the experience of their own and other's mortality. A being who is not mortal wouldn't be recognized as human.

*The Human Body.* The overall shape of the human body, its capacities and vulnerabilities are true in a cross-cultural way. There is space, of course, for the culturally contingent factors, but there are bodily limitations for what can be experienced. Nussbaum individuates some features that she deems metaphysically neutral: *hunger and thirst, the need for food and drink; need for shelter; sexual desire; mobility;*

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<sup>184</sup> Nussbaum (1995), p. 119

<sup>185</sup> Nussbaum (1995), p. 119

<sup>186</sup> This version is found in Nussbaum (1992), pp. 216-220; but she shapes it also elsewhere, for example in Nussbaum (1990).

*Capacity for pleasure and pain.* Experiences –even if they could be culturally molded- of pleasure and pain can be found in every human being;

*Cognitive capability: perceiving, imagining, thinking.* They are among the central features of humanness. Although it is not clear what sort of obstacles, and which level in these areas would make a human life not human at all, a total deficiency of these elements would impede to recognize someone as a human being.

*Early infant development.* The common shape of the childhood causes experiences that are in common and lead to the formation of desire and emotions. Emotional experience, and the fact that it has been formed by the common experience of childhood, then, is a powerful vehicle in the possibility to recognize common humanity in the other, even in the presence of otherwise very diverse lives.

*Practical reason.* It gives the possibility to plan the life of an individual, to form a conception of the good, to exercise the power of choice.

*Affiliation with other human beings.* This, along with practical reason, is a crucial element. Two are the type of affiliation we recognizes ourselves through: “*intimate family and/or personal relations and social or civic relations*”.<sup>187</sup>

*Relationship to other species and to nature.* The importance is in acknowledging to be a part of a more complex order, among non-human animals and plants.

*Humor and play.* There is the need for humor and play in human life, and the human being is known as the “animal who laughs”.<sup>188</sup>

*Separateness.* We are social animal, we live among people, yet we are separate. The closest form of human interaction has to be read in terms of “responsiveness, not of fusion”.<sup>189</sup>

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<sup>187</sup> Nussbaum (1992), p. 219

<sup>188</sup> Nussbaum (1992), p. 219

<sup>189</sup> Nussbaum (1992), p. 220

This has to be considered as an attempt, more than a fixed, definitive account. What is interesting, however, is that the elements of need, limit and contingency shapes *in toto* the human dimension and the cognitive possibilities of the human being: they shape the type of her essentialism, of her foundationalism, her subsequent conception of the human being and her idea of human flourishing.

The importance of her conception of the good as the object of social justice derives also from the peculiar characterization she gives to the human flourishing. Human flourishing is exposed to contingency, limits and vulnerability. A conception of the good shaped as a list of capabilities to be insured can help, even if it cannot avoid, to face the element of vulnerability implied in the human flourishing. The openness to luck that shapes the possibility of the human flourishing is important in this context, then, since it is one of the justification for Nussbaum's adoption of the language of capabilities first, and of a list of central capabilities, second. The focus on the vulnerability and the contingency of human flourishing leads, in fact, to pay attention to the material conditions for fulfilling the human flourishing, that is well expressed by the language of capabilities. Further, it leads to a justification of the adoption of a list of basic capabilities, being their possession the best equipment to achieve a good life, given the openness to luck and vulnerability of a real human life.

The element of the human, hence of the contingent, limited and vulnerable, enter human flourishing in a number of different ways.<sup>190</sup>

First, the quest for a good life ought to be the quest for a good *human* life. That means that we have to use a notion of the good that is derived from the considerations about the nature and the features of the being they are referred to. An idea of the good abstracted from this considerations is simply empty. Human flourishing and openness to luck are intertwined in many different ways.

Second, Nussbaum links closely human flourishing to activity: it is not enough, she claims, to have excellences of character to achieve *eudaimonia*. The same definition of human flourishing in terms of activity denotes its openness to the contingent and voluble external world. Human flourishing, says Nussbaum, is vulnerable to the elements of luck in different ways. Uncontrolled circumstances interfere with excellent activity when they deprive it of some instrumental means or resources. They can be either absolutely necessary, so that its absence blocks the activity, or its absence may simply constrains them. Circumstances can not only hinder some instrumental means to achieve the

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<sup>190</sup>Nussbaum (1987), p.318

activity, they can deprive the activity of its object as well. Again, this could be completely blocked, when there is a permanent or complete loss, or impeded, when the loss is temporary or only partial.

Third, human flourishing can be impeded from internal conflicts. The gap between being good and living well in this case relies on a conflict that hinders the possible expressions of the goodness of character. The *Antigone* by Sophocles, Nussbaum notes, offers some paradigmatic cases of it. Creonte and Antigone are both a partial expression of legitimate ethical values. Their collusion is an expression of the plurality of the good: there is, consequently, the acknowledgment of the possibility of an internal tension among different ethical values. The obstacles to the possibility of acting well, and realizing *eudaimonia*, appear hindered from the inside, in an indissoluble way. What is needed, then, is not a unilateral view, an attempt to simplify the ethical universe in order to avoid the conflict, as both Creonte and Antigone try to do, but to recognize this very same possibility, and accept it as part of the peculiar expression of ethical life that is an ethical human life. Another paradigmatic case is that of Agamemnon sacrificing his daughter: Agamemnon acts in full awareness. His actions cannot be justified by pleading ignorance. And further, Agamemnon acts in according to his goodness of character: the sacrifice is required by the Gods. And yet, he cannot avoid to act badly, hindering his *eudaimonia*. His is a no-win situation:

Pious service to Zeus is inseparable from the murder of his child; protection of that child would have been inseparable from impiety and cruelty to his suffering soldiers.<sup>191</sup>

Nussbaum ascribes the recognition of the plurality and of the potential conflict of the elements of the good to Aristotle himself. On this point, however, there is an ambiguity in Aristotle's position. On the one hand, he maintains that a good person cannot do really bad actions despite the openness to luck. In the *Magna Moralia*, moreover, he reiterates that excellencies usually strengthen each others.

On the other hand, talking about friendship, he agrees that there could be internal elements of conflict arising from within, and in the *Nicomachean Ethic* he recognizes the possibility that a case of conflict can cause a person to perform bad and shameful actions, actions that she wouldn't have performed otherwise.

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<sup>191</sup> Nussbaum (2001a), p. 334

In these cases, however, there is an appropriate human reaction, that can soften the conflicting consequences: the recognition of the conflict. Again, it is the recognition of human finitude that is the turning point to overcome a difficulty. This allows the feeling of pity towards the other, and not the act of judgment. There is, in fact, the acknowledgment that the situation he is into is objectively unsolvable from an ethical point of view.

The plurality of the good is well expressed, Nussbaum maintains, by the plurality of capabilities and by their incommensurability. This can be an answer, as well, to the plurality and commensurability of human rights.

Fourth, at a deeper level, external circumstances and luck may hinder the very possibility for a good character. A good character, Aristotle says, is something stable and strong: a good person will act according to excellence in every situation of life. That is, Aristotle doesn't want to say that good life is completely exposed to luck. Nonetheless, big reversals and misfortune in life can erode the good character, or hinder its formation. Further, Nussbaum argues, Aristotle doesn't stop here: success, not only misfortune, can be a powerful element of corruption.

Aristotle makes even a further point: there are cases in which excellencies, being so embedded with activity and with the facts of the world, make the person less self-sufficient. In this way, they make the person more vulnerable, more at risk of losing his *eudaimonia*.

Certain valued excellencies, particularly courage, political commitment, and love of friends, will take the good agent, far more often than the defective agent, into situations in which the requirements of character conflict with the preservation of life itself- therefore with the continued possibility of all excellent activities. This is a special type of value conflict.<sup>192</sup>

Some important excellencies require, for their very existence, a considerable degree of openness to the world, causing this openness to be sources of vulnerability for the possibility of individual human flourishing.

Fifth, another particularly interesting element regarding the connection between risk and richness of values goes even deeper than this: Nussbaum is interested in showing how risk is a constitutive part of the *eudaimonia*, of a human flourishing that can be said human. As we have seen about the

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<sup>192</sup> Nussbaum (2001a), p.336

evaluative account of the human being, limitation and need shape the human form of life. They shape intrinsically, consequently, what humans value and deem good. Some fundamental human values, says Nussbaum with Aristotle, are given, and they are appreciable, only in a given human context, entrenched with the elements of risk and limits.<sup>193</sup> Human ethical values, Aristotle argues, are meaningless for needless being, such as Gods.

It is plain that [...] central human values- which are, in the bulk of Aristotle's ethical writings, treated as ends in themselves, important constituents of human *eudaimonia*- cannot be found in a life without shortage, risk, need and limitation. Their nature *and* their goodness are constituted by the fragile nature of human life.<sup>194</sup>

And this is not an epistemological condition, it is a matter of evaluation. This is particularly true for a certain type of goods such as the good activities that concern citizenship, political attachment, love and friendship.

Nussbaum calls them relational goods: what they have in common is, in fact, to be relational in nature, and to relate to a deeply vulnerable human situation. Why are the relational goods different from the other excellencies of the characters?

Because the latter are "states of the person"<sup>195</sup>, and worldly activity allows complete or perfection them. The degree of openness to vulnerability is much lower respect to the relational good such as, for example, love. Love, to name one, is a contingent relationship with another loving -and loved- person. There is not such a thing as a "loving state of character plus a suitable context for its activation"<sup>196</sup>. If the relation fails, perishes, we do not have anything left.

This shows how deep and in how many different ways luck, limitation and contingencies are embedded in our possibility for human flourishing. Should we conclude that human flourishing is open completely to luck, so the role of the government in protecting it is useless? Absolutely not.

This is Aristotle's conclusion that Nussbaum is, in the end, interested in focusing on:

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<sup>193</sup> The very same notion of justice, for example, is the "notion of the equitable distribution of limited resources." Nussbaum (2001a), p. 341

<sup>194</sup> Nussbaum (2001a), p. 341

<sup>195</sup> Nussbaum (2001b), p. 344

<sup>196</sup> Nussbaum (2001b), p. 344

Against the defender of solitary self-sufficiency Aristotle argues that these vulnerable relationships and their associated activities have both instrumental value as necessary means to, and intrinsic value as component parts of, the best human life. But, he argues, this does not put the best life intolerably at the mercy of fortune. For it is possible to realize each of these values, properly understood, within a life that is not intolerably unstable, one that possesses an appropriately human kind of self-sufficiency.<sup>197</sup>

Nussbaum notes how Aristotle, to arrive at this conclusion, applies exactly his general philosophical method. He takes into consideration, in fact, two diametrically opposed views about the connection human flourishing-luck. Aristotle's philosophical inquiry is aimed at "saving the appearances", it has to be conducted inside the human dimension, experience and belief, it has to be limited by their very same limitations.

If we consider appearances, *phainomena*, Aristotle says, we could find a tension in trying to understand how we have to consider a good human life, a life lived according to practical reason.

On the one hand appearances tribute ethical importance to luck; but appearances also consider luck incompatible with a the role that practical reason has to play in life, the possibility to control and make plans over one's own life. These beliefs find their explications in two different stands: one that ascribes the possibility of human flourishing to luck alone, the other that considers luck to be not influential to a good human life.

The second strategy can be further divided in two strategies. One<sup>198</sup> that eliminates luck by considering only a restricted notion of human flourishing, deleting all those elements and activities that have an element of contingency in it, and that can be open to vulnerability. The second that restricts the conception of human flourishing to good, a virtuous condition, denying that activity has anything to do with it.

His solution to this tension is to recognize partial elements of truth in both the "appearances". They need to be retained, and then combined together to arrive at the conclusion above. Nussbaum examines Aristotle's answers. As far as it regards this latter positions, Aristotle answers to the first strategy by maintaining that such a restriction of the human goods would impoverish ethical life too much, on the one hand, and that would be too abstract from the human dimension on the other. He

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<sup>197</sup> Nussbaum (2001b), p. 345

<sup>198</sup> The Platonic condition.

answers to the second showing, on the one hand, how activity is a necessary part of the good human life, that cannot be reduced to excellence of character. On the other hand, as we have seen, he maintains that even if it is not easy, a good, excellent character can be ruined and deteriorated by external circumstances.

What I am interested here, however, is something slightly different. This is a particular example of a topic I mentioned above, that is really important to understand Nussbaum's position: between the first and second option, Aristotle says, we should consider less contingent the first. The idea of a preponderant role of luck in the human flourishing, is, in fact, *less desirable for us*: what has been done here is not an empirical survey, but an evaluative deliberation about which kind of life we think it is worth living.

The luck view is not rejected because it has been found to be at odds with scientific fact about the way things are in the universe, discovered by some value neutral procedure, but because it strikes a false note, i. e. is too much at odds with our other beliefs, and specifically with our evaluative beliefs about which sort of life would be worth living. For we believe that human life is worth the living only if a good life can be secured by effort, and if the relevant sort of effort lies within the capabilities of most people.<sup>199</sup>

What we think good, what we desire good, has its importance in assessing what it is actually good, and this underlines both the value given to the *phainomena* and the evaluative nature of every human inquiry.

At this point, I have shown Nussbaum's Aristotelian influenced methodology; I have talked about the peculiarity of her internal essentialism; reasoned over the normative account of the human being and the related understanding of the human flourishing, both in relation to luck and to her evaluative approach. They offer the backbone of what Nussbaum calls the thick and vague theory of the good.

## 2.II.II *The thick vague theory of the good*

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<sup>199</sup> Nussbaum (2001a), pp. 320-321

The essentialist account of the human being and of the human flourishing forms the “thick and vague theory of the good”.<sup>200</sup> It is structured on two levels. The first, as we have seen in the previous paragraph, is a list of the most important features of humanness. The second, we will examine in the next chapter, is a list of basic human capabilities, individuated on the bases of the normative account of the human nature. Human rights, in this perspective, have to be considered as having their *raison d'être* in the defense and the implementation of the human good. In other words, the defense of the implementation of the basic capabilities.

Nussbaum's definition, *thick and vague theory of the good*, is dense with meaning. First, the list is a normative list: it is the result, as we have seen, of an evaluative inquiry, it is not derived from value-free facts.

The term *thick*, used in contrast with Rawls' thin theory of the good, focuses on the fact that her conception of the good deals with ends, rather than on all-purpose means, such as Rawls' primary goods.<sup>201</sup> *Thick* is referred also to the fact of dealing with the shape and the content of the human form of life.

One possible objection is the fact that concentrating on items that wants to be universal, or at least universal enough, is not sustainable in a world shaped by pluralism, by different cultures and beliefs.

Nussbaum's answer is that the theory is not only *thick*, but also *vague*. Its vagueness is referred to the fact that it is liable to many specifications, according to local traditions and practices. This allows, in Nussbaum's intention, to answer to the concern for the neglect of historical and cultural differences that the focus on an essentialist theory of the good may trigger. Each of the component of the good life identified in the list, in fact, is liable to multiple specification and different realization in different societies. This element is particularly important, we will see, in the field of

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<sup>200</sup> Nussbaum (1990)

<sup>201</sup> In *Women and Human Development* and in other more recent works, however, Martha Nussbaum compares explicitly her list of basic capability to Rawls' primary goods.

On the one hand this is related to a shift in her position, a shift towards political liberalism. What I am interested in, however, is the early Nussbaum. This particular version of essentialist account of the human nature, I argue, is of interest as a valid foundation for human rights, through the mediation of the capabilities approach. As it is, I am going to briefly view the evolution of her thought, but I am going to deal only with its early stages.

On the other hand, Nussbaum means two different things when she says that the word thick is chosen in contrast to Rawls' thin theory of the good, opposing capabilities and primary goods, and when she says that they are similar. They are different insofar capability are, in this first stage, expression of this thick vague theory of the good in the terms explained above. They are similar insofar the list of capabilities, as the primary goods (as shaped in *A Theory of Justice*), are “like a long list of opportunities for life-functioning, such that it is always rational to want them whatever else one wants. If one ends up having a plan of life that does not make use of all of them, one has hardly been harmed by having the chance to choose a life that does.”( Nussbaum (1997), p. 290)

human rights. First, their universality as well need to be tempered by attention to local circumstances, given their local implementation. Second, it could justify and explain the claim of universality for some human rights, claim of universality in space and time that would be otherwise quite difficult to be accepted.<sup>202</sup>

The attention to pluralism is given, Nussbaum maintains, in two different ways: the way of plural specification and the way of local specification.<sup>203</sup>

*Plural specification:* Nussbaum says that at a political level, a particular notion of the good is used at a deep degree of generality, so that single citizens can deal with each component specifically, in accordance both with individual preferences and/or local traditions.

*Local specification:* Nussbaum means with it a profound attention, in the use of practical reason, to the concrete context. One example of the importance of the responsiveness to the contingent and particular circumstances is given by an analyzes of the ways to promote education: the aim of promoting education, to be fulfilled, need to be contextualized. An effective way of promoting education in some place could reveal itself not adequate in another. Responsiveness to the context necessitates, often, the use of a “participatory dialogue” with the individuals who find themselves in the context.

Further, this theory of the good is obviously not metaphysical, given its internal foundations. It does aims, however, at the maximum universality possible. “The maximum universality possible” does not, however, necessarily imply a universal consensus,

for people who have not been willing to engage in the cross-cultural study and the probing evaluation that is behind the list may well refuse assent for varied reason.<sup>204</sup>

Is the conception of thick but vague enough to conciliate universalism and pluralism? It is not privy of difficulty, since it is, after all, a theory of the good. Nussbaum tries, however, to conciliate this universality with particularism, allowing a great space to cultural and local traditions and specifications. If we want to retain universalism, even in the form of internalist foundationalism, this is a valid attempt to conciliate it with pluralism and particularism.

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<sup>202</sup> One example could be the right to democracy.

<sup>203</sup> Nussbaum (1992), p. 224

<sup>204</sup> Nussbaum (1992), p. 223

### 2.II.III From non-relative virtues to the capability approach

To understand the peculiarity of certain concepts of Nussbaum's early thought, such as her kind of objectivism, universalism, the non-relativistic relation between universalism and particularism, it is useful to refer to one of her seminal essay: *Non-Relative Virtues. An Aristotelian Approach*.

Here she proposes an Aristotelian account of virtues<sup>205</sup> in non-relative, objectivist terms. It is useful to refer to her position about virtues here because the method she uses to individuate them in a non-relativistic way presents many analogies with her way to individuate and characterize capabilities.<sup>206</sup> The capacity to combine "rigor with concreteness, theoretical power with sensitivity"<sup>207</sup> to the contingency and plurality of human life is shown in Aristotle's account of the virtues, and it is reflected in Nussbaum's capability approach. At the basis of an Aristotelian theory of virtue and of her Aristotelian justification of the list of capabilities is the general philosophical method analyzed above.

It is a two-level method: the first stage is the identification of meaningful areas of human experience in the case of the virtues, and of features of humanness in the case of the thick and vague theory of the good. The second stage is the substantial specification of the first level: in the case of the virtues, through the specification of what constitute the appropriate choice in the specified area, in the case of the thick and vague theory of the good by the individuation of the central capabilities. "The central capabilities identified by Nussbaum can be compared to virtues, since Nussbaum clearly relies on Aristotle's idea of *eudaimonia* in terms of virtuous activity".<sup>208</sup>

Aristotle's account of virtues has to be considered, she argues, not on a relativistic key, but as combined with his objective account of the human good, or human flourishing. Their objectivity derives from their justifiability not on the basis of local traditions and practices, rather from human characteristics that are independent from the fact of being embedded or not in them.

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<sup>205</sup> Virtue theory has been recently revalued. Usually, however, an account of the good life based on virtuous actions takes a relativistic turn.

<sup>206</sup> Capabilities are central in her thought since they are the articulation of her theory of the good and the focus of her theory of social justice. The capability approach provides, further, the appropriate grounding for a theory of human rights.

<sup>207</sup> Nussbaum (1993), p. 242

<sup>208</sup> Crocker (1995), p. 174

The theory of virtues is utilized by Aristotle to take a critical stand towards local customs: it is not a case –says Nussbaum- that in the *Politics* he reiterates that human beings are seeking the good and not the way of their ancestors.

Aristotle conducts his inquiry about virtue in two stages. The first stage consists in the individuation of the fundamental spheres of choice. The fundamental virtues are what is expressed by choosing well in a determinate sphere. That is, it is possible to individuate certain grounding experiences, experiences that are typically human, “ that figures in more or less any human life, and in which more or less any human being will have to make *some* choices rather than others, and act in *some* way rather than some others.”<sup>209</sup> They are the reference for the related virtues. These experiences are strictly connected with the shared condition of human life, with human limits and mortality. The second stage of the inquiry tries to determine exactly what is the appropriate choice in the sphere.

In answering some of the objections that can be made to such an Aristotelian account of virtue ethics, Nussbaum makes some further points that are useful to focus on central features of her capability approach.

One of the objection, in fact, attacks the very same idea of the possibility of isolating certain spheres of experience that could have universal or cross-cultural value. The objection is based on the cultural component of these fundamental experiences.

Our best accounts of the nature of experience, even perceptual experience, inform us that there is no such thing as an “innocent eye” that receives an uninterpreted given.<sup>210</sup>

The answer to this objection has been built in the previous paragraphs: it is in Nussbaum’s internal essentialism. On the one hand, it is necessary to acknowledge the fact that we have to be culturally-sensitive. The Aristotelian Approach aims at taking contingencies and pluralism into account. On the other hand, it insists that:

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<sup>209</sup> Nussbaum (1993), p. 245

<sup>210</sup> Nussbaum (1993), p. 252

Despite the evident differences in the specific cultural shaping of the grounding experiences, we do recognize the experiences of people in other cultures as similar to our own. We do converse with them about matters of great importance, understand them, allow ourselves to be moved by them.<sup>211</sup>

Moreover, Nussbaum talks about the necessity of acknowledging the importance of the particular specification, the importance of responsiveness to the features of the particular context. This, we will see, is particularly important as far as capabilities are concerned. The basic capabilities she individuates, in fact, are highly context-responsive. They are susceptible of being declined in a number of different ways. So they can face the very same objection moved to Aristotle's account of virtues.

To sum up, in *Non-Relative Virtues* Nussbaum makes her point quite clearly: there has to be a balance "between general rules and a keen awareness of particulars".<sup>212</sup> We can even talk of the *priority of the particular*: a norm has to be considered as a "summary" of all the specific cases. She attempts to combine particularism and objectivity maintaining that if something has to be context-responsive that doesn't mean that it cannot be objective. Talking about virtues, she says:

It is right absolutely, objectively, anywhere in the human world, to attend to the particular features of one's context; and the person who so attends and who chooses accordingly is making, according to Aristotle, the humanly correct decision, period. If another situation should ever arise with all the same ethically relevant features, the same decision would again be absolutely right.<sup>213</sup>

Again, these assumptions are particularly important in the human rights field. They have the same problems of Aristotle's virtues and Nussbaum's capabilities: the necessity of balancing universal and particular, objectivity and pluralism.

These conclusions -to which Nussbaum arrives in talking about virtues and about an account of the good human life according to the virtuous decisions- are of central importance to understand her capability approach.

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<sup>211</sup> Nussbaum (1993), p. 261

<sup>212</sup> Nussbaum (1993), p. 257

<sup>213</sup> Nussbaum (1993), p. 257

She proposes the conceptual space of functionings and capabilities as the foundational space of moral concern. The focus is on the concern of *what people are able to do and to be*, their achievement and their liberty to achieve, and this is the primary source for every other ethical inquiry.

What I have examined here is her early foundation of the capability approach. I consider it original. It is a path full of problematic issues, but it is deeply fascinating, and it is worth exploring. It is a position that can be of interest in being entered in a dialogue with the language of human rights, and can offer a foundation for them, through the language of capability.

## III Chapter

### Martha Nussbaum and the Capability Approach

#### 3.I The general theory of the capabilities approach

##### 3.I.I Capabilities and functionings

The capability approach is a well-known theory, or better a bundle of theories, that has become quite influential as a framework for reasoning over development, quality of life, social justice and political theory in general. Many are the contributions to it from many prominent scholars. I am concentrating, however, on the position held by the major theorist of the approach, Amartya Sen, and on the particular version elaborated by Martha Nussbaum. At this point I have to specify something about my position on Martha Nussbaum. The Aristotelian method theorized in her early writings is an interesting foundation for her capability approach. As far as the capability approach goes, however, Martha Nussbaum keeps shaping her position over the years, and she finalizes it in her most recent work on the topic, *Creating Capabilities*. I am going to take into account this latest evolution to clarify the concepts of capabilities and functionings.

The notion of functionings and capabilities is first elaborated by Amartya Sen in a *Tanner Lecture* in 1979, by the title of *Equality of What?* The capability approach counts several influences, spread in time and space.<sup>214</sup> Probably, however, one of the strongest is the Basic Need Approach to development, of which Paul Streeten is a prominent representative.<sup>215</sup>

For what is of interest here, however, it is the Aristotelian influence that has the most importance. Martha Nussbaum is the first to theorize this connection,<sup>216</sup> but Amartya Sen as well has recognized it in more than one place.<sup>217</sup>

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<sup>214</sup> For an overview of the various positions that have influenced the capability approach see Clark (2006), Nussbaum (2007), Nussbaum (2011a)

<sup>215</sup> Clark (2006), p.33

<sup>216</sup> The clearer reference on the topic are Nussbaum (1987), Nussbaum (1990)

<sup>217</sup> Sen (1992), pp. 5, 39; Sen (1993), pp. 46-48; Sen (1999), pp. 24, 73, 75

The Aristotelian account of the human good is explicitly linked with the “necessity to ascertain the function of man”, and then it proceeds to explore life in the sense of activity. The basis of a fair distribution of capability to function is given a central place in the Aristotelian theory of political distribution.<sup>218</sup>

And, in general:

Aristotelianism sees “the good life” for humans as requiring the possession and appropriate use of a *distinctive range* of powers, including reason which helps to foster powers from potentials and to use them well.<sup>219</sup>

Aristotle, moreover-as we have seen- considers the aim of the government to be the human flourishing of its citizens in term of self-realization. It is unavoidable, then, to focus on a theory of how the human flourishing is articulated.

The Aristotelian analogy is, then, coupled with a significant departure from him. As far as Sen is concerned: he considers the Aristotelian general justification of his own approach as similar to his justification for his capability approach; he agrees with Aristotle that wealth and income cannot be the only paradigm of measure, nor, often, the most trustworthy; he tends to view human flourishing, as Aristotle did, as “valued activities”; he shares Aristotle’s stress on the evaluative importance of choice for human flourishing.<sup>220</sup>

Nussbaum, moreover, argues that Aristotle’s position can be interpreted to hold two key issues both for her and for Sen: the idea that distribution is concerned over capabilities and not over effective achievements; that one fundamental capability in every field is the capability to choose autonomously their plans of life.<sup>221</sup>

There are, however, many points of departure from Aristotle, both for Nussbaum, as shown above, and even more for Sen.

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<sup>218</sup> Sen (1993), p. 46

<sup>219</sup> Des Gasper (1997), p. 282

<sup>220</sup> Human flourishing that is, in other words, analyzed through the way we choose human activities.

<sup>221</sup> Nussbaum (1987), p. 50

Sen, for example, underlines that the Aristotelian position completes the capability approach in a way that is not intended by him:<sup>222</sup> Aristotle specifies a certain number of functionings that constitute the good human life. Sen never gives a substantive list of this kind, while Nussbaum does, taking a more substantive position on this respect. Nussbaum's list, however, is a list of capabilities and not of functionings, and it is intended to be the minimum necessary provision to achieve human flourishing in all its possible declinations.

How can the notions of functionings and capabilities be conceptualized?

Sen distinguishes among different meanings:

Functionings. They can be seen as “parts of the state of a person”.<sup>223</sup> A functioning is a state of being or doing. It is an individual achievement. There is a wide variety of functionings, some simple, for instance being fed, staying healthy, some more nuanced, such as having self-respect.<sup>224</sup> “A functioning is an active realization of one or more capabilities.”<sup>225</sup>

Saith clarifies the concept in a well-chosen example: let's take a commodity, let's say a sack of rice, and its feature, in other words nutrition. The functionings achievable with the same amount of this commodity can be different given the different rate of conversion. If, for example, it is consumed by a healthy person, he can achieve the functioning to be reasonably well-fed. If it is eaten by somebody with a parasitic infection, then the functioning will result in being poor nourishment.<sup>226</sup> The results from the use of a collection commodities quantified in functionings achievable depends on a range of intra-personal and interpersonal issues.

Sen individuates a specific sets of factors.<sup>227</sup> The heterogeneity of peoples: human beings are endowed with diverse physical and psychological features, given, just to name a few, to different bodily structures and health conditions. Environmental diversities: the same bundle of commodities or of income combined with variegated climatic scenarios, for example, can result on different qualities of life. Social conditions: variations in non-personal resources, such as presence of violence or the quality of the available schools. Relative differences: this issues has been brought up by Adam Smith as well. Smith makes the example of the possibility of appearing in public without shame. This will require different commodities according to local convention, customs and

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<sup>222</sup> Sen (1993), p. 46

<sup>223</sup> Nussbaum (1993), p. 31

<sup>224</sup> Sen (1992), p. 39

<sup>225</sup> Nussbaum (2011a), p. 25

<sup>226</sup> Saith (2001), p. 7

<sup>227</sup> Sen (1999), pp. 74-75; Sen (2004), p. 333

the average standard of life. Under this respect, a cultural variance in the space of commodities is mirrored in an invariance at the level of capabilities.

Capability. The capability is the ability to realize specific set of functionings.<sup>228</sup> Sen and Nussbaum view them as substantive freedoms.<sup>229</sup>

“It represents the various combinations of functionings (beings and doings) that the person can achieve. Capability is, thus, a set of vectors of functionings, reflecting the person’s freedom to lead one type of life or another”<sup>230</sup>

This term is closer to a notion of positive rather than negative freedom. What Sen is interested in, in talking about substantive freedom, is in underlying the concrete possibility somebody has in realizing something: he means not only non-interference from reaching the task, but the presence of material and psychological conditions as well suited for its implementation.

What makes Sen’s approach appealing is that it focuses on *real* or *substantive* freedom, not only on formal freedom or on the distribution of the means for freedom. [...] Real freedom also involves a dimension that is not fully encompassed in the real-libertarian approach, namely the capacity to adequately recognize our own fundamental purposes, and to overcome our emotional fetters, as well as being free from external obstacles. [...] This requires a degree of self-understanding. Freedom cannot just be seen as an opportunity concept. Real freedom imply consistency, self-esteem, a sense of belonging, and commitment.<sup>231</sup>

Having the capability to do something, then, means having the freedom to choose whether to do certain achievements.

Clark, however, referring also to Saith,<sup>232</sup> talks about capability as ability to achieve a certain functioning<sup>233</sup>, although he acknowledges that Sen typically uses it in the sense explained above.

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<sup>228</sup> On this point there is a conceptual divergence between Sen and Nussbaum according to different commentators, for example Crocker (1995), p. 163: Sen talks about capabilities in terms of opportunities, while Nussbaum in terms of abilities, powers and skills. I will come back to it later.

<sup>229</sup> Freedom is important intrinsically, per-se, and instrumentally. Both aspects of freedoms are necessary to achieve well-being and to the concept of development. Sen (1999), p. 41

<sup>230</sup> Sen (1992), p. 40, see also Nussbaum (2011a), p. 20

<sup>231</sup> Andersson (1996), p. 72

<sup>232</sup> Saith (2001), p. 10

<sup>233</sup> Clark (2006), p. 4

The capabilities for certain functionings include also the option not to achieve a functioning, given the liberal nature both of Sen's and Nussbaum's positions.

For example, the capability to be well-fed implies the possibility to choose different vectors of functionings. There being enough food to satisfy the capability, there will be one vector of functionings in which the person chooses to eat so to be well-nourished, and another vector in which he chooses not to eat, for example for religious motivations.

This means accepting one of Williams' observation to the concept of capability, that to have a capability to X means also to have the capability not to do X. I think this is one way to accept Sen's suggestion of capabilities being areas of freedom.

Functioning n-tuple. It can be symbolised with a vector, and it is the union of doings and beings that represent the condition of an individual's life. A functioning n-tuple is a "way of life."<sup>234</sup>

Capability set.<sup>235</sup> For capability set Sen means the potential diverse vectors of functionings, sets of functioning that individuals can opt for.<sup>236</sup> It is the freedom to "choose from possible livings".<sup>237</sup> It collects all the actual capabilities that are accessible to individuals.

Sen associates the concept of capabilities with substantive freedom. He argues, however, that the concept of capabilities cannot cover all the domain of freedom. He distinguishes between two aspects of freedom: substantive opportunities and freedom of processes.<sup>238</sup>

The process aspect of freedom involves a sort of procedural freedom. There is a violation of the process freedom, for example, if somebody who has thought about going out is coerced into going out: there is a violation of this kind of freedom even considered the fact that she would have done it in any way. The opportunity aspect of freedom is more infringed if a person who has considered going out is forced to remain at home. That doesn't mean that in the first case there is no violation of the opportunity freedom. It means that we are talking about two different issues, and there is an asymmetry between the two cases: the opportunity aspect of freedoms is more violated in the second than in the first case.

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<sup>234</sup> Sen (1992), p. 40

<sup>235</sup> Sen (1992), p. 40; Sen (1993), p. 33; Sen (1999), p. 80

<sup>236</sup>As Clark in Clark (2006) notes. This allows Sen to agree with Williams' suggestion to think of capabilities not singularly, but in terms of "co-realizable possibilities".Williams (1987), p. 99

<sup>237</sup> Sen (1992), p. 40

<sup>238</sup> Sen (2004), p. 330

The concept of capability is a valuable approach only regarding the opportunity aspect of freedom.<sup>239</sup>

Sen gives an example of the incompleteness of the capability approach in this respect. Let's consider the fact that, at parity of conditions, women have longer life expectancy than men. If we concentrate on capabilities, on the equality of the capability to live a lengthy life, we would reach the conclusion that we have to administer women less medical care than men. This assumption is, of course, not acceptable, and it is a violation of the process aspect of freedom. But a concentration only on capabilities would arrive to this kind of unacceptable conclusion. This point is deeply interesting for the various use of the capability approach.

A possible answer could be that of the importance of the evaluational base chosen for capabilities: that conclusion would be avoided if we concentrate, for example, on the capability to have equal access to medical care, rather than on equality to live long. Even the procedural aspect of freedom can be the subject of a capability. To acknowledge both aspects, we could think about Williams' proposal to think of capabilities like "co-realizable possibilities", we can consider a capability set, to take into consideration all the possible aspects of freedoms.

The conceptualization of the notion of capability is more articulated in Nussbaum rather than in Sen, since she distinguishes among basic, internal and combined capabilities. Moreover, as some commentators argue, the very same concept of capability is interpreted differently by Sen and by Nussbaum.<sup>240</sup> Sen means by capability an "opportunity or possibility of functioning". Nussbaum seems to imply with them "powers and faculties" that are implemented through functionings. I agree partially with this distinction. My opinion is backed up also by a particular passage of Nussbaum's latest work on the subject, *Creating Capabilities*, where she says that the concept of capability imply both the notion of "internal ability and of external opportunity".<sup>241</sup> This is possible due to her distinction between internal and combined capabilities. For both Sen and Nussbaum, however, the notion of capability is linked to that of freedom of choice.

"Choosing may itself be a valuable part of living, and a life of genuine choice with serious options may be seen to be –for that reason- richer."<sup>242</sup>

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<sup>239</sup> Sen (2004), p. 332

<sup>240</sup> Clark (2006); Crocker (1992), p. 599; Crocker (1995), p. 162

<sup>241</sup> Nussbaum (2011a), p. 61

<sup>242</sup> Sen (1992), p. 41

Nussbaum elsewhere<sup>243</sup> views capabilities as areas of freedom and choice. This is a crucial point. It is, however, not free of criticism, as I will show in the following paragraph.

Sen defines the capability approach by contrasting it to other alternative ethical approaches: the commodity approach, included Rawls' primary goods, the welfaristic approaches, in particular utilitarians, the basic need approach.<sup>244</sup> The commodity approach focuses on certain commodities or goods as intrinsically good or at least basic in some important way. For instance, income can be taken as the item, or a specific and peculiar version of it is Rawls' theory of primary goods. Sen identifies a problem with this approach which he names the "commodity fetishism": the mistake, that is, to view as ends what are only means. The commodity approach gives an objective perspective, but, Sen aims, it doesn't focus on the correct evaluative elements. The main issue oughtn't be the commodity in itself, rather what the person can do with it. A focus on commodities, moreover, shadows, as we have seen, the intrapersonal and interpersonal variance factors, elements that determine the different rates of conversion from commodities to actual undertakings or possibility to achieve them. Focusing on commodities, finally, may uphold conventionalism or cultural relativism: while the capability or the functioning can be culturally invariant, the bundles of commodities needed to achieve them may not be.

Rawls' focus on primary goods is a particular and original version of the commodities approach. It escapes partially the criticism to the commodity approach, also because Rawls doesn't consider primary goods as intrinsically good. There are many similarities, moreover, with the capability approach. The *querelle* regarding the contraposition capabilities-primary goods is a long and articulated one, and Rawls has answered to some of Sen's criticism to his approach. To complicate things further, Sen and Nussbaum depart partially on their criticism to Rawls. It would lead us too far to give adequate space to this topic, given in particular Nussbaum's complex and ever-evolving relation with Rawls.<sup>245</sup>

Sen criticizes, then, the welfaristic<sup>246</sup> approach, and utilitarianism<sup>247</sup> in particular. He criticizes utilitarianism in all his versions, whether it concentrates on felicity, satisfaction or desire-

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<sup>243</sup> Nussbaum (2011a)

<sup>244</sup> Clark (2006); Crocker (1992); Nussbaum (2011a); Sen (1999), pp. 63-68;

<sup>245</sup> For a good summary of the debate, see Crocker (1992), pp. 592-599; Nussbaum (2011b), pp. 56-58

<sup>246</sup> Crocker so defines welfarism: "the goodness of states of affairs must be judged entirely by the goodness of the set of individual utilities in the respective states of affairs." Crocker (1992), p. 600

<sup>247</sup> See for example Qizilbash (2008), pp. 54-56

implementation. Sen follows Rawls in maintaining that taking utilities as meter of judgement fails to distinguish among the type of items that are taken into consideration. What about offensive tastes? For example those that are due to racism or misogyny. Or expensive tastes? If a person is satisfied with fish and chips, and another need caviar to be equally satisfied, ought we still be confiden with the language of utility? Moreover, subjective states can be heavily intertwined with mental conditioning or adaptive preferences.<sup>248</sup> Subjective mental state is deemed to be deceiving in a number of different ways.

Sen and Nussbaum, however, do not mean to reject subjective mental states altogether in upholding the capability approach. They are still important, but they cannot be the sole issue at stake. Nussbaum, in particular, values the moral and ethical role of emotions, properly corrected and helped by practical reason.<sup>249</sup> They are, in a sense, objectivist: their effort can be directed towards the search for an objective, true answer to the Aristotelian question of what is the good life. Finally, personal utility doesn't constitute the whole domain of well-being, let's think, for instance, about other-regarding actions. They often influence the well-being of an individual.

The basic need approach (BNA) is the most similar to the capability theory, as Clark argues. Sen, however, individuates five main possible criticisms to it.<sup>250</sup> The foundations criticism: Sen doubts over the possibility for the basic need approach in identifying the main needs and their essence. Sen doesn't think that needs can be taken as the foundational moral stands to overcome commodities, rights, and so on. The individual variability criticism: this is the same objection posed against the commodity approach. Sen warns about the possibility that the basic need approach could conflate into the commodity approach. The social interdependence argument: Sen maintains that the BNA fails in determining those needs regarding the undertakings concerned in the actions or judgment of others. The BNA faces here a dilemma: either it is indistinguishable from the commodity approach, and then it is open to the very same objections expressed above, or not. If it doesn't collapses in it, however, the BNA fails in specifying the basilar needs. The minimality criticism: the BNA deals with a quantitative level. First, it makes a discrimination between basilar and non basilar needs, and, second, il consider basic needs in a quantitative way. Here lies the minimalism of the approach, since it is mainly used to isolate types of deprivation, and, consequently, it sets the threshold of their aims and goals too low.

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<sup>248</sup> Nussbaum (2001c); Qizilbash (2006)

<sup>249</sup> Nussbaum (2001d), for a deeply interesting view of the role of emotions in general and compassion in particular see Abbate (2005).

<sup>250</sup> See Crocker (1992), pp. 602-607

Therein lies the value of the capability approach.

“[We] signify something different by “basic capability” than the BNA intends by “basic need”. The latter is a quantitative threshold that one must be above if one is to survive or live decently. The former is a qualitative evaluation of what sorts of functioning are most valuable. What continues to be useful is the notion of threshold, and what Sen himself will employ with respect to his notion of basic rights, is that good government will ensure that all social members, by crossing the threshold, are able to choose to lead a life of valuable functioning.”<sup>251</sup>

The fifth criticism is called the passivity criticism: the conception of needs is passive, therefore less appealing than the notion of capability. The latter conceives the idea of the human being as an agent, and not simply retaining goods that are disposed to him.

The capability approach allows to focus on a particular question, that is: “what are individuals actually able to do and to be?” Sen, and Nussbaum with him, views capabilities as the right space of comparison in issues of justice. Nussbaum, however, attributes them also a normative function within a theory of social justice. In order to play this role they have to be used in a substantive mode: Nussbaum does so isolating certain central valuable capabilities.<sup>252</sup>

The capability approach can be taken as the evaluative ground in many and diverse ways. Sen first conceptualizes it as one position within egalitarian justice. In *Equality of What?* he proposes capabilities as the items to be equalized, concurring with other notions such as wealth, Rawls’ primary goods, Dworkin’s resources... Sen shows how the space of capability, then, can be used for referring to well-being, to the quality of life and to the standard of living,<sup>253</sup> to poverty, and among others, it is important for the concept of human rights. The evaluative platform- Sen maintains- will tune itself on these different issues: for example, an evaluation on poverty will demand a concentration on a more restricted and probably diverse *ensamble* of capabilities rather than, for instance, if we take into consideration well-being. A pivotal use of capabilities is in the concept of development. Sen argues for the necessity to consider development in terms of capabilities.<sup>254</sup> This assumption is particularly important since the capabilities approach becomes, in this way, the conceptual framework of the HDRs, *United Nations Human Development Reports*. Sen has

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<sup>251</sup> Crocker (1992), p. 606

<sup>252</sup> Nussbaum (2003)

<sup>253</sup> For the differences among these concepts and the different role capabilities play for them see Sen (1993),

<sup>254</sup> Sen (1999)

contributed on several of their editions, and he has influenced in particular the first, the HDR in 1990.<sup>255</sup>

The HDR of 1990 redefines the concept of development. Development doesn't rely anymore exclusively on income, but it concerns also the attention to the options available to human beings. This Human Development Report re-defines development in terms of human capabilities:

“Development enables people to have these choices. [...] But the process of development should at least create a conducive environment for people, individually and collectively, to develop their full potential and to have a reasonable chance of leading productive and creative lives in accord with their needs and interests. Human development thus concerns more than the formation of human capabilities, such as improved health or knowledge. It also concerns the use of these capabilities, be it for work, leisure or political and cultural activities.<sup>256</sup>

As Gasper rightly notes, however, thinking about development doesn't mean only maximization of capabilities, but it should consider also the idea of equity and rights.<sup>257</sup>

### *3.1.II Main challenges to the capability approach*

Bernard Williams makes an objection<sup>258</sup> to the concept of capability and its relation to functioning. He objects to the possibility of talking about functioning in the case of a deranged man who is always singing, and who cannot avoid to do so.<sup>259</sup> In this case he is internally coerced into singing. We could try and save the bi-univocal connection functioning-capability by using Nussbaum's three-folded notion of capability: we could say that the man has the external capability to functioning, since there is no external coercion into him singing, although he doesn't have the internal capability for it, since he is deranged. What about, however, if the deranged man wasn't not only not able not to sing, but externally coerced into singing? In that case, would we be saying

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<sup>255</sup> For a reference of the links between Sen's capability approach, the concept of development and the HDRs see Fukuda-Parr (2003)

<sup>256</sup> HDR (1990), p. 1

<sup>257</sup> Des Gasper (1997), p. 286

<sup>258</sup> Williams (1987)

<sup>259</sup> Williams (1987), p. 97

that singing is not a functioning? Would that be a problem? I don't think so. One answer is that, if capability is always a capability for functioning, functioning is always the actuation of a capability. Let's remind Nussbaum's words: "a functioning is an active realization of one or more capabilities".<sup>260</sup>

The capability approach as determined by Sen is left at an higher level of incompleteness<sup>261</sup> in respect to Nussbaum. This incompleteness is both in "generating substantive judgements and in providing comprehensive theory of valuation."<sup>262</sup> There are three main areas of incompleteness. In determining which are the valuable functionings and capabilities. Sen often acknowledges the existence of valuable functioning and valuable capabilities, making examples.<sup>263</sup> He never gives, however, a fixed list of them, ascribing this function to a public and democratic discussion. Moreover, he acknowledges the difficulty when it comes to evaluate bundles of functionings and capabilities: we should not forget that there are interpersonal and intrapersonal likening to be drawn. The difficulty is given not so much because subjective state of affairs are considered, rather by the intrinsic plurality of the good, the ambiguities in the concept of capabilities and the possible incommensurability among them. Finally, there is the issue of how to evaluate freedom and opportunity. Sen regards positively this incompleteness, in fact he considers it a strength of his theory. The evaluative fields it focuses on, is, being open and not complete, able to adjust to diverse foundational answers about the relative values of capabilities and functionings, and about how to work them out. This can be considered both as a "liberal" element in Sen's thought and a pragmatist turn.<sup>264</sup> However, Sudgen criticizes strongly Sen's reluctance to elaborate a fixed evaluative method, arguing that this enhances the trouble of operationalizing<sup>265</sup> the capability approach.<sup>266</sup>

Nussbaum has probably made the most well-known trial in completing the approach with a well-defined theory of the good. She shares Sen's view, however, on the plurality of the good, and on the consequent presence of some unavoidable internal conflicts that may be not entirely solvable.

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<sup>260</sup> Nussbaum (2011a), p. 25

<sup>261</sup> Qizilbash (2008), p. 53

<sup>262</sup> Sen (1993), p. 48

<sup>263</sup> For example Sen (1992), p.40

<sup>264</sup> Qizilbash (2008), p. 64

<sup>265</sup> The concept of operationalization includes: definition, measurement and commensurability. Gasper (1997), p. 287

<sup>266</sup> "Given the rich array of functionings that Sen takes to be relevant, given the extent of disagreement among reasonable people about the nature of the good life, and given the unresolved problem of how to value sets, it is natural to ask how far Sen's framework is operational." Sudgen (1993), p. 1953

As we have seen, capabilities have to be taken as the preferential ground for evaluation both by Sen and Nussbaum. The capability is the freedom to choose among different combinations of functionings. This freedom has an intrinsic value: as both Sen and Nussbaum argues in more places, the worth of an undertaking is intertwined with the freedom to choose it particularly. For example, there is a big difference between a person who fast because he doesn't have enough to eat or a person fasting because he so chooses, say for religious motivations, having the ability to eat enough altogether.<sup>267</sup>

As we have seen, functioning is the achievement, and capability is the freedom to achieve. Which is the appropriate ground for evaluation? This is quite a delicate matter, that has been subject to more than one line of criticism, as we will see in the next section. Both Nussbaum and Sen argues for the importance of capability as the "primary informational basis",<sup>268</sup> valuing the freedom to achieve more than of the achievement in itself. There are however many ambiguities, in that respect, that will have to be dealt with. Nussbaum, for example, bases her list on a theory of human nature. But it is functioning or capability the right focus for evaluation? Let's remember that both Sen and Nussbaum want to remain within the liberal framework. Martha Nussbaum, for example, has shown some oscillations on this respect for some time. Nussbaum's earlier writings give space to a variety of interpretative possibilities. On the one hand, the understanding that living a dignified life implies a plan of life incentrated on the central functionings of her list. We could say, along the line of this interpretation, that a failure in implementing these results in a life that is not human in the full sense of the word. On the other hand, the basilar role of choice is undisputed: the same Crocker<sup>269</sup> interprets Nussbaum as saying that *eudaimonia* is given only by those functionings that are both worth and opted for.

Even with this particular stress on choice, this position can still be called paternalistic: a life in which an individual doesn't choose well, in other word, he doesn't choose voluntarily to enact those very same functionings is not good. It is not, however, bad: the life of an individual who chooses not to enact those "good functioning" has chosen nonetheless, therefore its life has still some value, value that is not at the same level, however, to that of whose life is imprinted by the good functionings. It is easy to see why this solution is still paternalistic. There are some grey areas in Sen's and Nussbaum's writings that would seem to allow this direction.

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<sup>267</sup> For one example, Sen (2004), pp. 334-335

<sup>268</sup> Nussbaum (1993), p. 38

<sup>269</sup> Crocker (1995), p. 166

It is true, however, as said above, that Sen views explicitly capability as “the primary evaluative space”.<sup>270</sup> And Nussbaum considers capability to be the “right political aims”<sup>271</sup>, and she does so since her first writings on the topic. Further, for example, the relevance of respectively functionings and/or capabilities, and the attention to one or the other is also dependant on what is at stake:

“I think we must interpret Sen as arguing that an evaluation of well-being is a function of both the capability set (representing the extent of positive freedom) *and* the chosen combination of functionings (representing dimension of well-being other than positive freedom). When discussing issues of justice, however, it may not be appropriate to focus on well-being. [...] Sen seems to saying that, for a theory of justice, capabilities are more relevant than functionings.”<sup>272</sup>

Qizilbash, then, observes how Sen’s quite practical approach leads him to blur, sometimes, the distinction about taking capabilities or functioning as grounds for evaluations. Different fields, moreover, ought to focus on diverse bundles of functioning and capabilities. In his work for the UNDP Qizilbash notes that every now and then Sen doesn’t keep properly separated functionings and capabilities.<sup>273</sup> In the end, however, Sen argues that it is capability the right ground for issues of justice.<sup>274</sup> As far as Martha Nussbaum is concerned, she has more and more stressed the role of capabilities as the political aim, and she has explicitly maintained<sup>275</sup> that what is important is the availability of a certain capability, and not its actual concretization in a functioning. The systematization of her thought over the relationship functioning-capability takes place both in *Women and Human Development* and in *Creating Capabilities*. I will come back to that in the next section.

A related problem concerning the normative priority ascribed to capabilities is brought up by Qizilbash and Gasper.<sup>276</sup> Qizilbash, in particular, argues about what he calls the “compensating abilities”.<sup>277</sup> He notes that some human beings are able to use, sometimes in a conscious sometimes in an unconscious way, a disadvantaged environment through the formation of some abilities that permit them to gain equality of capabilities compared to other who have had a good starting

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<sup>270</sup> Sen (1993), p. 38

<sup>271</sup> Nussbaum (1990), p. 122

<sup>272</sup> Sudgen (1993), p. 1952

<sup>273</sup> Qizilbash (2008), p.65

<sup>274</sup> Sudgen (1993), p. 1952

<sup>275</sup> Nussbaum (2007), p. 14. The role of choice is so important that even people who choose a kind of life without choice is worthwhile, if chosen consciously. Nussbaum (2007), p. 15

<sup>276</sup> Qizilbash (1997), Gasper (1997)

<sup>277</sup> Qizilbash (1997), p. 253

condition. Qizilbash's point is: "*is equality of capability just when there are adjustments of this sort?*"<sup>278</sup> One would be lead to consider a negative answer to this question: there should be "compensating measures"<sup>279</sup>. These take into consideration the initial disparity of conditions, and the fact that the equalization is reached thanks to these compensating abilities, to challenging labour and privations.<sup>280</sup> An example Qizilbash makes is the case of the situation of many men and women in the work environment: women are usually considered somewhat less than men in the workplace, and usually they are more involved than men in the household dimension. Given these pre-conditions, to achieve equal consideration, and equality of well-being, women may work harder, and thus developing, sometimes, harder work abilities compared to men. An equality of capability in expected prosperity, so achieved, however, it is, Qizilbash argues, not enough. It just isn't the just kind of equality. One possible answer to this is given by Gasper: "However, where effort is not disutility, and if initial 'advantage' induces slackness and initial 'disadvantage' is a powerful disciplining force, one hesitates to use the terms '(dis)advantage'."<sup>281</sup>

Qizilbash himself takes into consideration two possible answers, and he rejects them both. I think, however, they are worth to be looked at. A first articulation of the defence of the capability approach is to consider the initial situation of unfairness worded as inequality of capabilities. Posing the situation in these terms implies the fact that we have inequality of capabilities at a precise point in the timeline, and also in the entire course of a human life. Qizilbash has a reply to both these statements: the first point can be counter-argued by saying that we will still have equality of capability some time after, and the second by saying that the achievement of the compensating abilities may balance the situation so to be able to talk about equality of capability in the general temporal line.

I do think Qizilbash is too quick in dismissing the objections since, if we take the particular slice-time point of view, the potential equality of capability at a certain time doesn't compensate *per se* the inequality of capability at another time. If we considered the whole-life time period, maybe the parameter we should use is not the sum of the level of capability at the different points of time, that may add or may add not to equality of capability, but maybe we should consider the comparison of

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<sup>278</sup>Qizilbash (1997), p. 253

<sup>279</sup>Qizilbash (1997), p. 253

<sup>280</sup>Qizilbash makes a difference between the compensating abilities that are developed with sacrifices made in full awareness, which calls for a sort of amendment justice, and the ones resulted from unaware plans of life, in which case he considers equality of capability a just result.

<sup>281</sup> Gasper (1997), pp. 287-288

the level of capability at all given time-points, in this case the initial inequality of capability remains still as something that has to be accounted for.

Another possible defence, Qizilbash argues, is to regard the first disadvantage not in the terms of inequality of capabilities, rather to view it as -simply- a low standard of capability. Consequently we would talk about a “low level of expected well-being”.<sup>282</sup> In this case, he argues, there is an inappropriate use of the notion expected well-being and of capability. Notions that should be distinguished are used as almost interchangeable: equality of capability doesn’t necessarily entails equality of potential well-being and vice versa. I think this objection holds.

Gasper<sup>283</sup> takes up another problem in the capability approach. Sen (as Nussbaum) views capabilities as freedom. There are cases, Gasper states, where this point of view is unsustainable. For example, in the case of somebody for whom all the set of functionings include malaria, we are lead to the conclusion that the capabilities associate with its well-being include constantly being ill in that way. This would lead to say that, by the given definition of capabilities, she cannot avoid but opting for malaria. This is, I believe, a serious problem if we accept the notion of capabilities as spaces of freedom.

We could answer to Gasper’s concern that he makes explicit with this example utilizing Nussbaum’s articulated notion of capability<sup>284</sup>: we can say, then, that the woman has the internal capability to choose to avoid malaria, but she lacks the combined capability for it, since she lacks the external condition to avoid it. In other words, she has the ability, but she lacks the opportunity. This is closely linked to one of Williams’ concerns about the concept of capability.<sup>285</sup> Williams builds up an objection to the notion of capability on the base of the assumption that, in order to say that we have a capability for x we should have also the liberty not to implement x. Sen replies to this criticism challenging this assumption:

“in general one could question the belief that a person's capability to do  $\infty$  *must* imply his or her ability to do *not*  $\infty$ , without fail. One might be able to do  $\infty$  whenever one chooses, but one's efforts at doing *not*  $\infty$  may well be sometimes successful and sometimes not. In such a situation a person does have the capability to achieve  $\infty$ , but *not* the full capability to achieve *not*  $\infty$ .”<sup>286</sup>

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<sup>282</sup> Qizilbash (1997), p. 255

<sup>283</sup> Gasper (1997), p. 291

<sup>284</sup> As the same Gasper seems to hint, in Gasper (1997), p. 291

<sup>285</sup> Williams (1987), pp. 98-99

<sup>286</sup> Sen (1987), p. 111

Given the liberal aims that Sen and Nussbaum share, however, the capability to choose X should include the capability not to choose X.

Nussbaum's three-folded notion of capability helps in answering one of Williams's objection to the concept of capability: Williams is discussing about the link between capability and ability, the connection between the capability to realize something and the capacity to realize it in *this* precise moment. He objects to the correctness of saying that people staying in Los Angeles lack the capability to breathe unpolluted air.<sup>287</sup> Williams answers that it is not true that they don't have the capability for it, they just lack it in a precise moment, since they ought to go elsewhere in order to achieve it. As Crocker notes,<sup>288</sup> if we consider Nussbaum's conception, Williams' objection is accepted and included in the already given definition. Nussbaum, in fact, considers capabilities both as "internal abilities and external opportunities".<sup>289</sup>

Finally, there is a particularly cogent issue for the capabilities approach: the problem of gathering data.<sup>290</sup> Taking functionings into focus poses the difficulty of how to consider the differences among different peoples and to how to account for all the contingent elements that play a role in the space of transformation from commodities to functionings. If we get capabilities as the main issue, the matter is even more nuanced. The data required in this case deal with opportunities, possibilities, potential, not actual. What has to be circumscribed is the bundle of potentia, and not necessarily actual functionings. This side of the capability approach is quite challenging, but much effort and investigations have been conducted to find a way to compute functionings and capabilities.<sup>291</sup>

At this point I would like to focus on Nussbaum's conception of capabilities and her capabilities list, and on the problems issued by this conception. I am going to take them into consideration after having deepened Martha Nussbaum's version of the capabilities approach.

### 3.II Capabilities according to Martha Nussbaum

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<sup>287</sup> Williams (1987), pp. 98-99

<sup>288</sup> Crocker (1995), p. 162

<sup>289</sup> Crocker (1995), p. 162

<sup>290</sup> Clark (2006); Sen (1994), p. 336

<sup>291</sup> Clark (2006)

### 3.II.I Nussbaum's taxonomy of capabilities

As we have seen, one of the peculiar characteristic in Nussbaum's conception of the capability is her internal taxonomy of the notion. She argues that this distinction has its roots in Aristotle.

In her early writings, in fact, Nussbaum links this distinction to an analogous one made by Aristotle.<sup>292</sup> She distinguishes among basic, internal and combined capabilities.

The basic capabilities are the ones that are every person's by birth, and just in virtue of their human birth. Their possession is the *conditio sine qua non* for the potential human entitlement to all the other capabilities. The concept of basic capability is one that has to be dealt with cautiously: Aristotle uses it in a decisely non egalitarian way, to justify, that is, unequal address founded on an alleged unequal (or being privy of) possession of basic capabilities. Nussbaum argues, however, that once we anchor the possession of basic capabilities to simple humanness we have a powerful instrument. The simple possession of these basic capabilities, possession that can be claimed by each and every human being, establishes a moral entitlement, that states that the central capabilities need to be warranted, and, consequently, it signs the presence of corresponding social and political responsibilities.

The internal capabilities are those traits that makes the person practically able to achieve something. They are features pertaining to the individual: the human being, if there are no external issue against, has the power to implement the very specific capability. Some internal capabilities are acquired almost spontaneously with growing. The major part, however, are entangled with favourable external elements, such as a positive social, economic, familial habit to effectively form themselves.

Finally, combined capabilities are intended to be internal capabilities plus the external elements that make it possible the effective exercise of that capability. Usually, when she speaks of capabilities, it is of combined capabilities that she is talking.

Nussbaum, moreover, introduces the notion of the threshold to complete her theory of social justice. Every capability has to be assured up to a certain threshold: Nussbaum doesn't give any regulation on distributive issues above this very same threshold.

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<sup>292</sup> Nussbaum (1987), pp. 59-76

### 3.II.II *The role of capabilities in Nussbaum's work*

Nussbaum is quite clear on one point: to talk about capabilities means to ask “what people are able to do and to be”, and more specifically, what “each and every single individual is able to do and to be”.

She links the concept of capabilities to individualism and to the Kantian notion of considering each person as an end. In other words, she says that treating people as ends is another way of saying that each and every individual is entitled to the central capabilities.

The capabilities approach is used by Nussbaum in a comparative way, exactly like Sen, for assessing notions such as development and quality of life.<sup>293</sup> It has, however, also a normative aspect that is more structured for her than it is for Sen: Nussbaum's capabilities theory provide a normative bases for a theory of justice. Capabilities are considered to be the most favourable items to express individual rights on the political and constitutional side.

Nussbaum is involved on a substantive level: she draws a list of basic human capabilities, ten, that are supposed to be the *conditio sine qua non* for every flourishing life and, consequently, the object of social justice. They are the area that human rights have to protect: the status of human right is given by its role in protecting one or more of the central capabilities, that are at the core of the possibility of a good and dignified life. To understand better the role of capabilities in her thought, I should examine further a topic taken into consideration in the previous section: the relation between functioning and capabilities. The conclusion I arrived at there is that capabilities are the appropriate focus for evaluation and the just political objects. There is still something to be said.

She uses the words functioning and capabilities in a neutral way: functioning is every kind of “beings and doings”<sup>294</sup>, and capabilities are the capacities and the possibilities to implement certain functionings. That means that there can be better, worse, insignificant functionings, and better, worse or insignificant capabilities. This is a crucial point: both her and Sen talk about the

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<sup>293</sup> In her most recent writings, however, she maintains that her theory of justice based on the capability approach cannot be the base of any comprehensive theorization of any kind, not event of the quality of life, given her turn to political liberalism. (Nussbaum 2011a, p. 19).

<sup>294</sup> Sen (1992), p. 39

Aristotelian influences on the issue of functioning. For Aristotle functioning is the appropriate way something work in relation to the nature of the subject of the functioning. Sen and Nussbaum are often not clear on this point, since they shift from a more Aristotelian to a neutral conception of functioning. I think their theories work better by adopting a neutral conception of functioning, a descriptive one. So, for example, Sen says: “living may be seen as consisting of a set of interrelated functionings, consisting of beings and doings.”<sup>295</sup> He then talks of which are the important functionings. Elsewhere, he says that we have to isolate those important functionings, “many functionings are of no great interest to the person (e.g. using a particular washing powder)”.<sup>296</sup> Nussbaum says as well: “functionings need not be especially active, or, to use the term of one critic, “muscular”. Enjoying good health is a functioning, as is lying peacefully on the grass.”<sup>297</sup>

If we reason conceptually, we could opt for the notion of functioning as the basilar: capabilities are capabilities for functionings, they are perfected by them. The relevance of capabilities, from this point of view, is embedded in what links them to real functionings. Moreover, we could doubt about the importance of the capability to function in a certain way, if we wouldn't give value to functionings in themselves. It wouldn't be very sensible, in this sense, to provide persons who slept continuously all the relevant capabilities and then affirm they have achieved *eudaimonia*.<sup>298</sup> She even goes further to state that it is functioning, and not capabilities, that gives the mark of humanness to humanity.<sup>299</sup> Nussbaum, however, reiterates often in her works that the right political aims are capabilities, not functionings. She is mainly preoccupied with respect for pluralism and for the importance of choice. Under this respect, capabilities are intrinsically precious, since there is intrinsically embedded in them the notion of freedom to choose. And the aim of the government has to be to enforce capabilities, areas of liberty and options, and not the correlative functionings. The latter option would be paternalistic, and not respectful of human dignity, since it wouldn't be respectful of individual's opportunity to choose. Further, Nussbaum says that the value of a human life is not diminished in the choice not to function in a specific mode, permitted that all the correspondent valuable capabilities are there.

On the one hand, then, capabilities are the right political aims. On the other hand, however, Nussbaum makes room for exceptions even in this case: sometimes, she argues, it is unavoidable to implement determinate functionings, for example during childhood, to have as the result, in the

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<sup>295</sup> Sen (1992), p. 39

<sup>296</sup> Sen (1993), p. 32

<sup>297</sup> Nussbaum (2011a), p. 25

<sup>298</sup> Nussbaum (2011a), p. 25

<sup>299</sup> Nussbaum (2000b), p. 87

adults, the fulfilment of all the central capabilities.<sup>300</sup> This could be the case of education, for instance. There are situations, however, where, with a major impact, one could value a functioning so much that the government is deemed to protect it in itself, not only the capability. In *Women and human Development* she makes a case about health care. In *Creating Capabilities*, eleven years later, she accepts one and only one breaking of the rule of capabilities as political aims: the State ought not to contemplate the option of choice in case the choice is towards a life privy of respect and the right not to be humiliated. The value of choice, then, is so overcoming in Nussbaum to make her say that, despite all the possible grey areas in her thought, it is capabilities who have the predominant position at a political level.

At the light of what has been said, however, it is still possible to wonder about the precise role of functionings and capabilities in the balance over the value of life.<sup>301</sup> We have seen that there is one direction that could be pursued, that is to choose functioning as the predominant elements, since Nussbaum does acknowledge some functionings a pivotal role in shaping the human connotations of a life. Definitely, however, she does insist on capabilities as the only possible political goals and on the fact that human flourishing doesn't get flawed would the person opt for not converting certain capabilities into functionings.

Should we close at that, by saying that capabilities are the evaluative ground? But again, Nussbaum says that a life lacking of functioning, would not be under the mark of *eudaimonia*, no matter the capabilities assured to it. Should we say that the correct answer is functioning, and her position about capabilities would consequently be justified by the assumption that we have to choose a certain functioning, for it to be precious? But even this solution is not satisfactory: in this case, we should acknowledge that when a capabilities is not enacted in a functioning we lose something, and Nussbaum maintains exactly the opposite of that: it is the individual who has to decide if a certain functioning is precious or not. I agree with Barclay's proposal for the solution of the dilemma: Nussbaum says also that capabilities have intrinsic importance, they are not just instrumentally good for the realization of functionings, they alone can make a life fully human. "Capabilities have values in and of themselves, as sphere of freedom and choice".<sup>302</sup>

And now it is clear why capabilities, and not functioning, are the evaluative ground, not only on a political level: "It seems to me that Nussbaum's theory of capabilities is best and most consistently described as a theory that takes as its most central value the realisation of each individual's capacity

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<sup>300</sup> Nussbaum 2000b, pp. 108-109

<sup>301</sup> Barclay (2003), p. 14

<sup>302</sup> Nussbaum (2011a), p. 25

to choose and pursue their own conception of the good life. It is the capacity for choice in certain key areas of human activity that is the central value underlying her approach”<sup>303</sup>

Nussbaum links closely her capability approach with the concept of human dignity. She introduces the notion of human dignity and of a dignified and good life. The central capabilities are the ones who assure the possibility of a good life, of a life with dignity: insuring the ten capabilities of her list means having respect for the dignity of men. She compares the notion of human dignity to that of basic capabilities: every single human being does have them, simply because they are human. If the notion of basic capabilities could hypothetically permit differential treatment, dignity is something that belong to all human beings in the same and equal way.

Nussbaum talks about human dignity in two different ways. In one way it is, Kantian speaking, inviolable. In another sense, however, it can be thwarted in many ways. Nussbaum individuates two main categories: a denial of human dignity can be risked because an individual is hindered in transforming into functioning an internal capability it actually possess; more drastically, a denial of human dignity is even more spoiled when the internal capabilities are impeded from developing.

How to understand what does living a dignified life entails, from the point of view of capabilities? In other words, how to individuate and justify the list of capabilities, expression of human dignity? One way is Nussbaum’s Aristotelian method. Over time, however, she develops different possible strategies of justification.<sup>304</sup>

Another feature of Nussbaum’s capability approach is its deontological character. Sen is more consequentialist, while Nussbaum’s approach is closer to deontologism. Nussbaum does characterizes the capability approach, however, both in terms of consequentialism and deontologism.<sup>305</sup>

Capabilities for Nussbaum have deontological traits, in so far as people’s basilar rights, that is capabilities, are side-constraints to the development of social welfare. The deontological commitment of Nussbaum’s capabilities approach is shown by the centrality, in her thought, of the Kantian principle of considering each person as an end.

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<sup>303</sup> Barclay 2003, p. 16

<sup>304</sup> For example, see Jagggar (2006).

<sup>305</sup> She defines consequentialist approaches as those who establish the kindness of an option on the ground of the maximization of the preferred outcomes, retaining, of course, a notion of what they are. Deontological approaches have a specific definition of the duty or of the right action, and they are side-constraint for the possible actions in a plan of life.

The capabilities approach, however, has close links with consequentialism as well, since it concentrates on outcomes to consider a state of affair. The rightness of a society is given by the granting of the basilar capabilities to its citizens. In the end, however, Nussbaum's version of it is not a form of consequentialism. She rather uses the term of *outcome-oriented view*.<sup>306</sup>

Finally, the capabilities approach according to Martha Nussbaum is particularly attentive to the topic of pluralism. Nussbaum is concerned over the necessity to fit an objective<sup>307</sup> approach -such as that of capabilities- in a world marked by cultural pluralism and pluralism in general. This necessity is even more vivid when it comes to her capabilities approach, given her strong substantive stand exemplified by the capabilities list. There are different ways Nussbaum uses to defend pluralism from within her capabilities perspective.

First, the capabilities list is explicitly not-finished and not-pretentious: it is susceptible to be re-organized and rewritten due to further reflections and discoveries. Second, capabilities are deeply culturally responsive in the way specified above: they are universal albeit abstract. They are apt to different and contingent declinations and realizations in a diverse mode, that compute in the more nuanced practical situations and native customs and habits. Let's take freedom of speech as an example, as Nussbaum herself does: the realization of this capability can be understood differently, at least to a point, if implemented, let's say, in the USA or in Germany. Given Germany's past records, the understanding of the freedom of speech could reasonable be more circumstantiated than in the USA.<sup>308</sup>

Third, we could say that Martha Nussbaum characterizes the relation capabilities-culture by a double movement: on the one side capabilities are structured so to be highly respectful of local culture and tradition. Any normative stand ought to respect the signifying areas of liberty—that tend inevitably to be outlined by one's own environment, hence culture as well- that permit an individual to act so to achieve its human flourishing. This respect implies –then- the respect of the cultural, religious, political, ethnical self-recognition that is a *conditio sine qua non* for a person to make conscious life-choices. On the other side, however, Nussbaum agrees with Sen that the values underlying the “good” capabilities are universal in the sense that they can be point out and are implied any culture.<sup>309</sup>

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<sup>306</sup> Nussbaum (2011a), p. 95

<sup>307</sup> In her declination of the word “objective”.

<sup>308</sup> Nussbaum (2011a), p. 108

<sup>309</sup> See Nussbaum (2000b); Nussbaum (2011a); Sen (1999)

Moreover, Nussbaum points out the troublesome tendency in considering the worth of tradition as claiming a “normative strength”:<sup>310</sup> the culture is not an homogeneous set of fixed values, a “monolith”, to use her expression. Culture is a word that includes within many contrasting points of view, it comprehends a continuously evolving reality. Moreover, cultures are not like islands, they are interlinked to each other, and they influence themselves reciprocally. Moreover, we mustn’t think that every cultural value is accepted in a non-critical way within its own culture: usually the perceived shape of a culture is given either by the most numerous group, or by those who detain political, social or economic leverage. From here the need to take into consideration all the contrasting components that form the intrinsic mosaic of a culture, not only the predominant ones.<sup>311</sup>

To sum up: cultural provenience ought to be considered insofar as it is of relevance for the person to form its own identity and its life-goals, but its nature has to be considered with full critical attention.

Under this respect the relevant capabilities can claim, on one side, a justification “from within” a culture. On the other side they aim at the status of critical standing for every other evaluative exercise.

Fourth, pluralism is respected then, both Nussbaum and Sen hold, once we consider capabilities - not functionings- as the main political focus.

Fifth, another way to achieve respect for pluralism is by taking into consideration the major freedoms that protect it, that can be the freedom of speech, the freedom of association, the freedom of conscience, that are among the central items of the capabilities list.<sup>312</sup>

Sixth, subsuming a different angle: respect for pluralism need that the issues that warrant it are taken as evaluative standards. If we consider, for instance, freedom of religion, for it to be defended it has to be considered a value in itself.

Finally, Nussbaum argues for a distinction of the element of justification and that of implementation. The capabilities list is a mean of persuasiveness not of coercion. The use of military, economic embargo is not contemplated. Nussbaum allows the use of force and embargo only in very border-line situation, such as can be genocide. Even then, a democratic internal way is to be first tried.

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<sup>310</sup> Nussbaum (2011a), p. 107

<sup>311</sup> Nussbaum (2011a); Nussbaum (2000c), ch. 1 and ch. 4

<sup>312</sup> See Nussbaum (2003), pp. 42-43; Nussbaum (2011a), pp.109-110

A last important element to consider is the status of the capabilities in respect to the government. Nussbaum poses the capabilities as the bases for her theory of social justice and as the aims of the State. The relation is thus quite strong. Could we call the relation capabilities-government a conceptual one? Nussbaum denies that. Capabilities are “goals that fulfil or correspond to people’s pre-political entitlements”.<sup>313</sup> The conclusion, then, is that capabilities embody the *raison d’être* for the State, that has, as a duty and a prerogative, to fulfil the central capabilities for everybody. To put things another way, capabilities are before and abstracted from the political framework. This is an important statement, if we want to consider them as foundational of human rights.

### 3.II.III Ten central capabilities: the capabilities list

Although Martha Nussbaum’s capabilities list is plainly disposed to be revisited and re-thought, the various lists outlined throughout the time are not contradictory.<sup>314</sup>

The item described are combined capabilities: this is the content.<sup>315</sup>

1. *Life*. Having the capability for an acceptable life, dignified, long enough and qualitatively good;
2. *Bodily health*. It implies being reasonably well-fed, having a house, having the possibility to stay healthy, among which there is reproductive health;
3. *Bodily integrity*. It entails liberty to move, liberty from being seized by violence, possibilities for sexual gratification and too free option when speaking of reproductive matters;
4. *Sense, imagination and thought*. Their utilization in a human way, that can be perfected thanks to education. Liberty of expression, of artistic and religious one in particular, liberty of religion.

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<sup>313</sup> Nussbaum (2011a), p. 169

<sup>314</sup> Example of the list are in Nussbaum (1990); Nussbaum (2000b); Nussbaum (2003); Nussbaum (2006); Nussbaum (2011a)

<sup>315</sup> I take as a main reference Nussbaum (2011a)

5. *Emotions*. Entailing the possibility for an average emotional upgrowth and the capacity to show one's own emotion and the liberty to feel them.
6. *Practical reason*. Having the capacity for a notion of the good. Having an idea of how to planify one's own life. It is linked to freedom of conscience and religion.
7. *Affiliation*. (a) having the capability for a full-rounded social life, having the capability for empathy. It is linked to freedom of assembly and of political speech.  
(b) Having the social basis of self-respect. It implies the acknowledgment of the equal dignity of every person. Insurance of not being discriminated.
8. *Other species*. Having an interactional relation with the other species and with nature in general.
9. *Play*. Nussbaum makes the example of laughing. We distinguish human beings also because they are the "animals who laugh".
10. *Control over one's environment*. (a) Political. Associated to it all the entitlement to participate politically one's own government, liberty of speech and of association.  
(b) Material. It entitles the capability to the same property rights, the entitlement to a job, and to an appropriate work place, warranty against being arrested arbitrarily.

The list of central capabilities is combined with the idea of a "threshold", and it doesn't add to a complete theory of justice. It is concerned with the minimum level to be implemented for every capability to achieve a minimum flourishing and dignified life.<sup>316</sup> Nussbaum's position is, in fact, an incomplete theory of justice: it worries over notions of justice only up to a set level.

Two of these central capabilities, practical reason and affiliation, have a peculiar role: Nussbaum calls them "architectonic capabilities" and she says that they "inform" all the other items of the list. In other words, their presence is the *conditio sine qua non* to be able to talk about really human

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<sup>316</sup> Nussbaum (2000b); Nussbaum (2006)

functionings. This does not add up to saying, Nussbaum argues, that they are the only proper focus and that all the other capabilities are instrumentally, and only instrumentally, considered.

The list is highly heterogeneous. It is originally conceived by Nussbaum as the second step of the “thick and vague conception of the good”. That is, it is conceived as the expression of abilities and needs based on a normative account of the individual, on what Nussbaum calls the Marxian/Aristotelian conception. The starting point is an intuitive conception of the fundamental functionings that can be ascribed to human beings and of what can be argued by that.<sup>317</sup> The evaluative investigation conducted results in the isolation of determinate central capabilities, and this implies that they, morally, are entitled to be implemented.

The early Aristotelian justification is an original instrument Nussbaum has to justify them. Referring to the notion of internal essentialism is an interesting way to justify a universal non-metaphysical foundation. The capabilities list is quite demanding, and it wants a powerful back-up structure.<sup>318</sup>

There are two main lines of criticism possible when capabilities are viewed as what is needed for the fulfilment of human flourishing. Nelson puts it like that: it should be explained why a person who opt for not implementing into functioning a determinate capability would concur into considering that particular capability as essential to human flourishing.

Nelson speaks further observing that the government needs to put resources to fulfil for every person the implementation of a certain capability. The individual who opt for not utilizing a certain capabilities, however, has necessarily less resources put at disposition by the government to implement its human flourishing. To say more, government’s resources are drawn from taxes. Nussbaum’s position about the list of capabilities is not that they are simply linked to immunity rights: they imply the fulfilment of the substantive capacity to do something.<sup>319</sup> So why would somebody agree to put his money into granting the effective, substantial possibility to do or to be something that he has no intention, or worst, that he is against doing or being?

Nussbaum’s Aristotelian framework would turn to the “thick and vague conception of the good”, affirming that any conception of human flourishing, of the *eudaimonia*, includes the cultivation of

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<sup>317</sup> Nussbaum (2000b), p. 76

<sup>318</sup> Nelson (2008), p. 99

<sup>319</sup> Nelson (2008), p. 100

these capabilities. This would mean an objective<sup>320</sup> theory of the good. After all, she does say that capabilities have an intrinsic and not an instrumental meaning.

The list, however, is open-ended and not-pretentious, it can, consequently, be always modified and rethought. This fact is made clear by Nussbaum many times. That means we can agree with her position and at the same time granting the need to think over the substantial content of the list. Having said that, I think that adopting her Aristotelian framework of justification can answer to this criticism.

Of course, this would open the way to other objections, the main being the illiberal flavour of her theory. This is a serious objection, since Nussbaum aims at a conception that is internal to liberalism. She tries to work at it from within different angles. She could choose to work from within both her *thick and vague conception of the good* and from within the notion of liberalism, to show the liberal elements of her theory, and the internal issues of liberalism, in the way drawn in Nussbaum (1990). She could say that the thick and vague notion of the good embeds in itself liberal elements, and it is the best way to guarantee liberal issues.

The plurality of the capabilities, and their variegated character is meaningful also of the statement Nussbaum takes on the plurality of the good. Every central capability is important on its own, and they can be not comparable with one another. We cannot compensate, in other words, the failure in assuring one central capabilities with another. It is true, Nussbaum argues,<sup>321</sup> that there are situations of necessity in which precedence has to be necessarily given to a capability rather than another, but this has always to be temporary.

The incommensurability of the central capabilities, however, doesn't entail that they have all to be fulfilled equally. What has to be rendered equal, Nussbaum argues, is the dignity of every individual. Equal dignity means, in her words, that the central capabilities have to be assured over a certain level. Some capabilities have to be indeed insured equally, while talking about adequacy is enough for others. Nussbaum makes the example of the political, civil, religious liberties, that have to be guaranteed equally to everybody, and the right to a shelter, that has to be considered in terms of adequacy.<sup>322</sup> Moreover, Nussbaum warrants, sometimes, that certain capabilities are regarded to be

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<sup>320</sup> Objective in the sense Nussbaum use the word, so it is a relative objectivism

<sup>321</sup> Nussbaum (2011a)

<sup>322</sup> Nussbaum (2006)

more established, less discussed, than others.<sup>323</sup> This could, again, be rendered in terms of the open flavour of the list.

Nelson,<sup>324</sup> however, gives a different interpretation: he criticizes Nussbaum on the ground that, if equal dignity is intertwined with the list of capabilities, and every single capabilities is necessary, then we cannot acknowledge for the differenziation she operates. The only reason for which she does make this distinction, then, must be that

the fact that some of her entitlements are “fixed” while others are not, and that some require equality while others do not, reveals that they are simply not the same sorts of things.<sup>325</sup>

This criticism, however, can be answered in Nussbaum’s term, by underlying the notion of the plurality of the good. Under this respect, it is true that these entitlements are “not the same sorts of things”, and there is no need and no wish to say that. The very own reason for the incommensurability of the capabilities is that they embody the heterogeneity of the human flourishing. Consequently, if an article needs equality and another only adequacy to substantiate equal dignity, that doesn’t mean that every single capability is not essential, in an equal fashion, to enhance the dignity in every human being. It means that we are actually talking about diverse concepts. Nussbaum, moreover, acknowledges that some of the central capabilities may be considered as what Rawls names “the natural goods”. As far as these goods go, the State may have difficulty in implementing them. In these cases, the task of the State is to provide their social basis.<sup>326</sup> For instance, we could talk in these terms of emotional health when it comes to women.

Finally, the incommensurability of capabilities doesn’t imply that they do not show any link with each other. On the opposite, connections among them can be found through different paths. For example, the right to political participation is perfectioned and made effective through education.<sup>327</sup>

Nussbaum’s position has been further criticized in a number of ways. The harsher criticism has been towards her methodology and her essentialism. In particular, serious doubts have been raised for how she formulates her list. In spite of claiming that the list is given by a continuously trans-cultural ethical inquiry, Clark<sup>328</sup> says, there haven’t been great modification in time. Moreover, she

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<sup>323</sup> Nussbaum (2000b), pp. 77-78

<sup>324</sup> Nelson (2008), p. 97

<sup>325</sup> Nelson (2008), p. 98

<sup>326</sup> Nussbaum (2000b), p. 81

<sup>327</sup> Nussbaum (2000b), p. 81

<sup>328</sup> Clark (2006)

has been accused of paternalism, since the universal reach of the list has been seen as flawed, given Nussbaum's specifically Western belonging.

There is what Claassen calls a "political objection to a philosophical list making": Jaggar has challenged, for example, the appropriateness of Nussbaum's list basing it on the exclusion of its referees.

"She expresses no misgivings about the fact that, in taking control of the list, she assumes the prerogative not only of determining the philosophical import of others' contributions but also of assessing their moral worth, thus deciding whose opinions should be respected and whose should be rejected as mistaken or corrupt."<sup>329</sup>

Stewart, then, has suggested a more participatory stand, in the specific through a sort of brainstorm with "representative groups" which identifies the fundamental entitlements.<sup>330</sup> This is not in contrast with the Aristotelian investigative method, that aims at collecting all the data at disposal, including how human beings view themselves and their values.

Her universalism, again, has been challenged.<sup>331</sup> Thinking about her internalist essentialism remind us, however, of the peculiarity of her universalism.

To the political objection Nussbaum answers by asserting the basilar critical standing of the capabilities list, as a strong statement against injustices.<sup>332</sup> It is true, however, that much more attention should be paid to who exactly is entitled in shaping the content of the list.

There is, further, what Claassen calls the "epistemological objection" in drafting the list. Nussbaum's reaction to this objection is not in its refusal altogether, but in the idea that, even acknowledging epistemological limits, we shouldn't take as a consequence the rejection of the list. The capability list is in fact necessary for a theory of justice.<sup>333</sup> And a theory of justice is necessary for its practical applications.

I agree with Clark<sup>334</sup> and with the same Nussbaum that the practical application of her theory, that is, the list of capabilities, has to be considered as an attempt, attempt that can be viewed as successful or not. It leaves space for revision, but I do not think it necessary to challenge the method in itself.

As Gasper says, we can consider Nussbaum's list

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<sup>329</sup>Jaggar (2006), p. 314

<sup>330</sup> Stewart (2001), p. 1192

<sup>331</sup> Stewart (2001), p. 1192

<sup>332</sup>Nussbaum (2003), p. 47

<sup>333</sup> Nussbaum (2003), p. 47

<sup>334</sup> Clark (2006)

Not as a headcount of present-day options, but as hypothesis about what would over time become an acceptable starting point for discussion in each society, as a rationale interpretation [and] implication [...] of their values.<sup>335</sup>

An effective defence of the necessity of making a list of capabilities on a philosophical level is given by Claassen.<sup>336</sup> Claassen defends in particular Nussbaum's capability list, leaving open the possibility of revision.

The philosopher-investigator's strategy, when seriously conducted, provides an answer to the epistemological objection. He remains a philosopher-citizen in that his goal is to provide his theories as a recommendation to the *polis* (the philosopher-investigator role is a subspecies of the philosopher-citizen). However, the philosophical capability list is not the mere result of isolated reflection but now also informed by empirical observation. The philosopher's individual epistemological limits are compensated for by drawing upon the knowledge of (many) others.<sup>337</sup>

His proposal is that of considering the philosopher who draws the list as a "philosopher citizen" who offers the list as a proposal, and who is open to revise the list in light of empirical research, as Nussbaum is. His proposal, however, departs partially from that of Nussbaum. Nussbaum aims at reaching a result that would be accepted ideally, if not practically, to all comprehensive theories, while Claassen proposal doesn't want to take such a strong stand.<sup>338</sup>

And lastly, Alexander makes a good point on the defense of a capabilities list:

"the realization that a flourishing human life could be spoiled or wasted by elements of tragic events most of which are human-made and some others that are not totally under the control of human agents. [...] A theory of social justice that enumerates a list of a minimum of entitlements that people are obliged to provide one another is therefore better equipped to if not totally overcome the impact of these reversals but at least to minimize it".<sup>339</sup>

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<sup>335</sup> Gasper (2004), p. 187

<sup>336</sup> Claassen (2011), p. 505

<sup>337</sup> Claassen (2011), p. 505

<sup>338</sup> Claassen (2011), p. 506

<sup>339</sup> Alexander (2004), p. 8

## Fourth Chapter. Capabilities and Human Rights. Connections and Interrelations

### 4.1 Capabilities and Human Rights: Amartya Sen and Martha Nussbaum

#### 4.1.1 Rights and capabilities: Amartya Sen

Both Amartya Sen and Martha Nussbaum consider a close interrelation between human rights and capabilities. Amartya Sen considers the concept of capability as conducing to a certain conception of right: right as a 'goal-right system'. Sen links the concept of capability and that of right to the concept of freedom. The concept of freedom is central in Sen's thought. Sen questions Dworkin threefold distinction of political theories in goal-based, right-based and duty-based. What he proposes is to consider rights as goals, founding what he calls a "goal-right system". A "goal-right system" is a theory that consider rights as goals to be pursued.

What are the advantages of this assumption?

In *Rights as Goals* Sen makes an explicit connection with capabilities. Considering rights as goals implies an obligation on whoever is in a position to implement that right. This is useful in the case of positive freedom.

But positive freedoms are defined by capabilities, hence rights as goal is the way to pursue if we want to establish a close connection between rights and capabilities. When we are dealing with negative freedom the consideration of rights as goals become useful when there isn't a case of "perfect compliance", since there is the possibility to make claim on third parties. Further, Sen argues also for the possibility of a trade-off: to violate a minor liberty in order to safeguard a bigger one. In *Development as Freedom*, however, Sen talks about capabilities as substantive freedoms, that is a concept encompassing both negative and positive freedom.

It is useful to understand Sen's position on freedom. As Giovanola argues,<sup>340</sup> Sen recalls Berlin's famous distinction between positive and negative freedom. A negative freedom is freedom from something, from external elements or ties. Positive freedom is the freedom to do something. Giovanola puts it like this: "in other words we can say that positive freedom focuses on a person's

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<sup>340</sup>Giovanola p. 2

capability to choose to do or not do something, rather than on external constraints that prevent someone to do something”.<sup>341</sup>

Sen, however, dilutes the contraposition between negative and positive freedom. He views positive freedom, Giovanola argues,<sup>342</sup> as an ampler notion. The effective ability to do something, in fact, implies the possibility also to be free from external limitations. The two concepts don't conflate together, however, since, Giovanola argues,<sup>343</sup> Sen wants to retain the distinction between the two, although there is not a contraposition but a correlation. This implies, moreover, that on the one side a violation of negative freedom is also a violation of positive freedom. The opposite, on the other side, is not necessarily true. Later, for example in *Development as Freedom*, Sen introduces the idea of substantive freedom, that provides a definition of capability. Consequently: in an earlier period Sen seems to link capability with positive freedom (but, let's remember, positive freedom is, in one sense, encompassing negative freedom, without however making it devoid of its content and independence); when later he talks about substantive freedom (in contrast to formal freedom) he seems to be talking both of the freedom to choose something and the absence of external limitation in doing that thing.

Another advantage is the construction of what Alexander calls “broad consequentialism”.<sup>344</sup> The “goal-right system” is at the same time consequentialist and it can include deontological elements as well. How is that possible?

Sen doesn't consider his approach as a pure consequentialist approach. Let's define consequentialism as an approach whose only evaluation bases on the goodness of actions is the consideration of states of affairs that are derived from actions. The ‘goal-right system’ recognizes the consequential link through actions and evaluation of states of affairs, in the present situation the fulfillment of rights as goals. But this consequential link is not exclusive: it is mixed with other considerations as well, and this open the door to deontological elements, for example the necessity of the respect of rights.<sup>345</sup> The actions are evaluated considering states of affairs, but not only that. A clear example is the agent-relative issue:

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<sup>341</sup> Giovanola p. 2; In Nussbaum's point of view, however, this is not completely exact. Nussbaum let's remember, distinguishes between internal and combined capabilities, where the combined capabilities combined the internal ability to do something and the external factors that allows the individual to do something: both positive and negative freedom is involved in here.

<sup>342</sup> Giovanola, p. 2

<sup>343</sup> Giovanola, p. 2

<sup>344</sup> Alexander (2004), p. 6

<sup>345</sup> Nussbaum (2011a), p. 94

“Those who have argued- with much force- that action judgments have to be agent relative (e.g. the action of doing some discrimination oneself cannot be treated in the same way as not preventing some preventable discrimination done by another) cannot possibly be satisfied with a consequentialist system with positive rights as the only goals, since the format would militate against intrinsically agent relative judgments in a prohibitive way. However, this problem is not a difficult one in the present context of advocating a consequence-sensitive (but not necessarily consequentialist) system with positive rights among the goals (not necessarily the only goals).”<sup>346</sup>

Sen highlights the advantages of his position in comparison with others conceptions of rights, such as, for example, the instrumental conception of rights and the view of rights as side-constraints.

In the instrumental conception of rights they would not be intrinsically important, rather they serve instrumentally for the fulfillment of other goals. One of the most important example of this view is given by the utilitarianism. Sen associates the instrumental view of rights with welfarist consequentialism. The instrumental view of rights is unsatisfactory because rights, being associated with liberties, have an intrinsic importance.

What about considering rights as side-constraints? Sen calls it a deontological view: rights operates as limitation for the permissibility of actions and social goals. No matter what action or social goal you want to achieve, you cannot prescind from the observation of these rights.

The vision of rights as side-constraints implies the intrinsic importance of rights, but a total disregard for the evaluation of state of affairs derived by their observation.

Nozick proposes the view of rights as side-constraints:

“In contrast to incorporating rights into the end state to be achieved, one might place them as side constraint upon actions to be done: don’t violate constraints C. The rights of others determine the constraints upon your actions.”<sup>347</sup>

Nozick links the view of rights as side constraint with the Kantian principle of always treating the individual as end, rather than means. It expresses the separateness and inviolability of persons. Putting some entitlements that don’t have to be violated whatever else someone pursue is a way of respecting the individual whose entitlements are there.

These are positive elements of the view of rights as side-constraints. Sen, however, criticizes other aspect of Nozick’s theory, less appealing.

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<sup>346</sup> Sen (1984a), p. 23

<sup>347</sup>Nozick (1974), p. 29

Sen argues that a constraint view of rights cannot deal with questions arising from rights that protect positive freedoms. More than that, it is too rigid, also in the case of negative freedom, in not admitting any trade-offs between liberties, often with the result to achieve a violation of a more important liberty in order not to violate a less important one.

A constraint view of rights has traditionally been made nearer to rights protecting negative freedom. This is too limiting: if somebody is starving because he doesn't have a job, there may be no external limitation or coercion, so no infringement of negative freedom. He doesn't have the capability, however, to live a life without hunger. But, as I have already stated, Sen, notwithstanding the importance he recognizes to the concept of negative freedom<sup>348</sup>, finds the exclusive attention to negative liberty inadequate. This is because it ties the individual in a negative way, as abstaining from interfering, way that he finds insufficient. More than that, the simple reference just to negative freedom implies positive attentions.<sup>349</sup>

Rights as side-constraints, moreover, are seen to be strongly procedural: "in this form, rights do not specify directly what a person may or may not have, but specify the rules that have to be followed to make his actual holdings or actions legitimate."<sup>350</sup> Sen faces Nozick's notion of rights as side-constraints. This notion, we have seen, considers a breach in the respect of the right as a breach in the inviolability of persons, in their separateness and in their rights to be treated as ends and not as means.

Sen, however, asks if respecting rights considered as side-constraint would justify catastrophic state of affairs, such as huge famines. The very same Nozick, Sen maintains, is attentive to exceptions in case of a "catastrophic moral horror". But this very same acceptance, Sen argues, can lead to a breach in the idea of pure proceduralism.

I think there is not an easy way out here. Sen is very convincing in arguing, for example, that a violation of a minor liberty to safeguard a greater one is not only admissible, but desirable.<sup>351</sup> This is, however, a very dangerous assumption and it is well expressed in Nozick's concern about the inviolability of people. What Sen proposes in his "goal-right system" is a compromise between these two positions.

A balanced conception of rights, Sen argues, has to deal at some level with some consequence-evaluation. Also a deontological approach, as we have seen, is forced to deal with some consequence evaluation. But this is, Sen maintains, exactly what a side-constraint conception cannot do.

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<sup>348</sup> Giovanola, p. 2

<sup>349</sup> Sen (1984), p. 313

<sup>350</sup> Sen (1984b), p. 311

<sup>351</sup> Sen (1984b), p. 314

This is Sen's reasoning, since he views rights in terms of freedoms: "if freedom is important, it may well be valuable. If freedom is valuable, it may have some consequential relevance to the choice of action."<sup>352</sup>

To sum up, a pure consequentialist view of rights would be instrumental: their intrinsic value would be lost. Consequentialism, then, has been much criticized. Sen defends it: it can be rendered more or less acceptable according to the shaping of which state of affairs are evaluated for the analyses of consequences.

A conception of rights, then, cannot be pure consequentialist nor pure deontological, if deontological is taken to consider rights as side-constraints.

There is, however, a third way:

"A substantive moral theory can be non-consequentialist but consequence-sensitive. Consequent states of affairs may not be the *only* things that matter, but they can nevertheless matter."<sup>353</sup>

Sen faces some possible objections to the vision of a goal right system.

The first question Sen makes is: is it that admissible?

He highlights several possible objection. One is that having rights as fundamental goals would lead to a pluralism that cannot escape intuitionism. First, we would have to accept the fact that intuitionism is a bad concept, and this is not a given. Second, we could consider the hypotheses that the system could be construed as homogeneous, that means, we could avoid pluralism. The focal point, however, is that Sen questions that a necessary connection should be established between pluralism and intuitionism.

This inference is not necessarily correct: pluralism is a "substantive claim", whereas intuitionism is a methodological device. The apparent irreconcilability of posing rights as goals may come, Sen argues, from the historical association of a goal based approach with utilitarianism, association, however, that is historical, and not logical.

The second issue is that of advantage. Why not just stop to a right-based moral system? What a consideration of right as goals add to this theory?<sup>354</sup>Sen consider the matter important when rights are taken to be fundamental.<sup>355</sup>

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<sup>352</sup> Sen (1984b), p. 314

<sup>353</sup> Sen (1984 b), p. 313

<sup>354</sup> Sen (1984a), p. 15

<sup>355</sup> He makes, in *Rights as Goals*, some clarifications. He acknowledges the existence and the importance of instrumental rights next to the fundamental ones.

He distinguishes between the dichotomy fundamental/instrumental and absolute/prima facie rights.

“But what fulfillment of these rights are not goals at the same time? I could, of course, still respect the rights of everyone and try not to violate them. But I am under no obligation to pursue the goal of maximization of fulfillment of rights, or minimization of violation of rights.”<sup>356</sup>

He maintains that this is the only way to consider rights as fundamental, as intrinsically important, and at the same time to maximize their realization. The system is able to accommodate certain consequence-sensitive evaluations.

At this point there is the issue of the fundamentality of rights to be taken into consideration. We have seen that rights defend fundamental freedoms, we have seen that this freedom can be conceptualized through capabilities. Can we still say that rights are fundamental?

Sen asks the very same question starting from Scanlon’s position in merit. Scanlon holds the necessity of finding a justificatory bases for rights, and he holds that this is the protection of fundamental human interests, on a system that he calls “broadly consequentialist”. In this case rights couldn’t retain their fundamental value. How does Sen solves this issue? Let’s assume that people’s interest are envisioned in terms of capabilities. Then Sen poses the concept of rights as positive<sup>357</sup> freedom, and freedom as conceptualized by capabilities. In this case “the fulfillment of rights will not be instrumentally conducive to interest being served, but inseparably linked with interests being served.”<sup>358</sup>

In *The Idea of Justice*, however, he recalls a foundationalist approach to human rights on interest as given by Raz, and he finds it inadequate.<sup>359</sup> He argues, in fact, that we are talking about two different issues: an individual has to be free to choose something even if this is contrary or neutral in terms of its interests. He acknowledges however the possibility of making the association he himself has made in *Rights as Goals*: the association between right, freedom of choice, and capabilities, in order to retain the fundamentality of rights. Under a certain point of view, there is a sort of analytical connection between rights-freedoms-capabilities, where capabilities can be seen as also a conceptualization of rights. Freedoms can be expressed as capabilities, and they are englobed in the conceptualization of rights.

To sum up.

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The first dichotomy concerns the fact that fundamental rights are seen as goals, whereas instrumental rights are consequentially linked to the fulfillment of goal instrumentally.

The dichotomy absolute/prima facie concerns the strength of rights.

<sup>356</sup> Sen (1984a), p. 15

<sup>357</sup> This in *Rights as Goals*, we have already seen that in *Development as Freedom* he talks about substantive freedoms

<sup>358</sup> Sen (1984a), p. 23

<sup>359</sup> Sen (2009), p. 378

The goal-right system is the best conception of rights, according to Sen, insofar it can accommodate consequence-sensitive evaluations on actions.

This allows to accommodate certain issues, such as agent relativity, and other deontological elements, for example, the respect for human dignity no matter what the consequences are.

Since rights protect freedom, this is the way to acknowledge their fundamental importance without the implausible consequences that a deontological approach could lead to. They are fundamental because they are partially conceptualized by what they protect, that is capabilities.

Since freedom is conceptualized through capabilities, rights are seen as rights to capabilities.

It better preserves both rights linked to positive and negative freedoms.

Then, it doesn't focus on the two person relationship of right addressee and right bearer, but on the necessity of the fulfillment of a certain right.

Finally, this approach is quite open, or incomplete:

“The approach of seeing right-realizations as goals leads to a class of moral system that may be called “goal right systems”. This is a wide class, [...] One goal-right system can differ from another in many crucial ways, depending on what rights in particular are treated as goals, what other goals (if any) are admitted, how the trade-offs between the different goals are determined, how actions are judged in light of consequences, what non-consequential considerations (if any) are admitted in the determination of correct or acceptable actions.”<sup>360</sup>

#### *4.1.2 Rights and capabilities: Martha Nussbaum*

Martha Nussbaum is taken to have quite a different stand on the conception of rights, a more deontological one. She gives a capability list, and she argues that rights are to act precisely as side-constraint: they have to be respected no matter what else society promotes. Hers and Sen's however, have some convergent elements insofar as Sen elaborates a “broad consequentialism”<sup>361</sup>, whose aim is to reconcile deontological elements in it, and Nussbaum elaborates what Alexander calls an “integrative deontology”.<sup>362</sup> This approach considers the central capabilities as important intrinsically and as side-constraints, and the human rights associated to them along with it.

What are the strengths compared to a more traditional vision of rights as side-constraints? She recognizes, however, the necessity of some consequential, or, better, outcome-oriented

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<sup>360</sup> Sen (1984a), p. 19

<sup>361</sup> Alexander (2004), p. 6

<sup>362</sup> Alexander (2004), p.10

consideration when tragic situation of conflicting elements arise within the sphere delineated by the central capabilities. Sen, of course, would never avail a list of capability, but the two positions are more convergent than it is often deemed to be. Sen would never avail a list of capability, since they are contingently chosen through public scrutiny and public reason, and they vary according to the ends they are used for.

Nussbaum faces directly Sen's conception of rights as goals.<sup>363</sup> She thinks that Sen generalizes what is a particular version of rights as side-constraints, that of Nozick. The problem, then, would be not so much its deontologism, but the rights that are chosen to be side constraints. A correct list of rights, or capabilities, can avoid, Nussbaum maintains, Sen's catastrophic prevision. They can be, then, side-constraints. So Nussbaum maintains that both human rights and capabilities should function as side-constraints: "we are doing wrong to people when we do not secure to them the capabilities on this list. The traditional function of a notion of rights as side-constraints is to make this sort of anti-utilitarian point, and I see no reason why rights construed as capabilities- or analyzed in terms of capabilities- should not continue to play this role."<sup>364</sup>

Human rights, and the list of capabilities as well, have a deontological character insofar they have to be satisfied, no matter what. Human rights are the element that internationally and domestically cannot be avoided in their fulfillment, regardless of the consequences.

She also, however, seems to leave a window open for the conception of goals: "we are both conceiving of capabilities as a set of goals- a subset of total social goals- and saying that they have an urgent claim to be promoted, whatever else we promote".<sup>365</sup>

She agrees, further, that there must be some sort of consequence-responsive evaluation in some cases, where there are internal conflicts within the elements of the good, such as the central capabilities, or within human rights. The choices in this case are tragic choices, since they have to be made within the sphere of deontological issues, but they are, as well, unavoidable.

Without denying the necessity to view rights as side-constraint, then, she recognizes the possibility of an internal conflict: there may be cases where trade-offs are unavoidable, or there are not enough resources for implementing all the capabilities or securing the rights. Nussbaum argues then for prioritizing political liberties and liberties of conscience.<sup>366</sup>

She argues, however, for empirical considerations, and the necessity to evaluate claim by claim. It is in this context, Alexander<sup>367</sup> argues, that outcome-oriented consideration enter the picture.

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<sup>363</sup> Nussbaum (1997), pp. 298-300

<sup>364</sup> Nussbaum (1997), p. 300

<sup>365</sup> Nussbaum (1997), p. 300

<sup>366</sup> Nussbaum (1997), p. 300

<sup>367</sup> Alexander (2004), p. 10

Further, she says

“In another way, however, the Capabilities approach can be seen as a cousin of consequentialism, or even as a form of [...] non welfarist consequentialism. It announces that the right way to judge whether a given political situation is adequate, from the point of view of justice, is to look at outcomes. Are the fundamental entitlements of citizens met, and in a secure way? It does might be called an outcome-oriented view, by contrast to proceduralist view that are often preferred by deontologists. [...] Of course there are some capabilities that involve an idea of fair procedure (in the criminal law, a right to fair trial; in other areas, due process rights of a range of types). But those become part of the good outcome against which society’s operations are assessed.”<sup>368</sup>

In this way, Nussbaum, exactly like Sen, tries to reconcile deontological with consequence-responsive elements. While Sen’s point of departure is consequentialism, however, her point of departure is deontology.

In other words: Sen argues for a view of rights as goals, view that is consequence-sensitive. The good outcome, in this case the fulfillment of the right, is what has to be taken into consideration to judge the goodness of the action. Pure consequentialism, however, disregards important elements, such as procedure or the agent-relative issue. He argues then for a type of consequentialism that is consequence-sensitive, but it can make space for other consideration as well, for example deontological issues.

Nussbaum has a deontological position: rights and capabilities have to be satisfied, no matter of the consequences. Or, in other words: “social welfare should never be pursued in a way that violates people’s fundamental entitlements”.<sup>369</sup> Where does consequential elements comes in? She, as shown above, endorses an outcome-oriented view, that she contrasts with a procedural one. The good outcome is what has to be considered, in judging whether social justice has been achieved or not. The approach, moreover, is consequence-responsive in the case of internal conflicts between the deontological issues. That is, internal conflict for the fulfillment of human rights or capabilities. Sen, then, can allow some deontological issues to be considered while evaluating the consequences, while Martha Nussbaum has a deontological approach, and she allows outcome-oriented view when we face tragic choice internally to the pluralist dimension of the good, and in considering the fulfillment of the fundamental entitlements of citizens as meter of judgment.

I have considered both Sen and Nussbaum’s position on rights and capabilities, since I consider Sen’s conception of a goal-right system to be quite interesting, and I think it necessary in order to understand Nussbaum’s position as well.

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<sup>368</sup> Nussbaum (2011a), p. 95

<sup>369</sup> Nussbaum (2011a), p. 94

### 4.1.3 Human rights and capabilities: Martha Nussbaum

What, ultimately, is the point of this work?

In 1987 Bernard Williams writes:

The notion of a basic human right is obscure enough, and I would rather come at it from the perspective of basic human capabilities. I would prefer capabilities to do the work, and if we are going to have a language or rhetoric of rights, to have it delivered from them, rather than the other way around. But I think that there remains an unsolved problem; how we should see the relations between these concepts.<sup>370</sup>

As already stated, I take Martha Nussbaum's definition of human rights: "an especially urgent and morally 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."<sup>371</sup>

I want to verify if the capabilities approach, as justified by the Aristotelian method elaborated by Martha Nussbaum in her earlier thought, can be a foundation for some human rights theory. This statement raises quite a few issues.

The concept of human right, however powerful, is conceptually fragile, especially when it comes out the issue of their foundation.

Both human rights and capabilities, in Sen's but also in Martha Nussbaum's view, are "vital moral claims".<sup>372</sup>

What is Nussbaum's conception of the connection between capabilities and rights? Beitz argues rightly that Nussbaum uses the capabilities at least in three ways regarding human rights: as

"as an analytical device to specify the goods and opportunities protected by human rights, as a basis for defining the proper scope of human rights, and as an explanation of the reasons for action to which valid claims of human rights give rise".<sup>373</sup>

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<sup>370</sup>Williams (1987), p. 100

<sup>371</sup>Nussbaum (1997), p. 292

<sup>372</sup>Alexander (2004), p. 11

<sup>373</sup>Beitz (2009), p. 63

Nussbaum points out to the complexity and the problematic issues of the term rights. She names the conception of rights as goal or side-constraints, their correlation with duties. I have examined the two issues above. Finally, she turns to the big issue: how do we have to conceptualize the notion of right. Her answer, of course, is the necessity to consider rights as rights to certain combined capabilities. But the language of rights is particularly important for capabilities as well.

So there are a number of elements to be considered: are the two theories complementary, or do they occupy the same space, only through different angles? Are they in competition between each other? What can the rhetoric of rights offer to the capabilities approach? A capability based approach to the language of rights can solve some issues about them? Why should we use the language of rights at all, if we start with the capabilities approach?

Consequently, I believe that the answer to the first question is that they are complementary, and they occupy the same space. This, however, cover only the so-called first and second generation of human rights. I am not dealing, in this project, with other kinds of human rights.

The two approaches are complementary insofar as capabilities have a foundational role regarding human rights, and have the function to make the right substantial, and not only formal or nominal. At the same time the notion of rights adds normative strength to that of capability. They occupy the same space insofar as capabilities are used to conceptualize the notion of right. They are not in competition with each other, since the language of capability complements that of right and vice versa.

The fact that we can see the right as a combined capabilities, as she argues in her seminal essay in 1997, is a point of strength. The advantage of this move is to go beyond the formal aspect of rights: the idea of combined capabilities, in fact, contemplates both the idea of internal ability and actual external opportunity to do something. “In short, thinking about capability gives us a benchmark in thinking about what is really to secure a right to someone.”<sup>374</sup> It provides the scope of the rights.

In this paper she also speaks about another kind of identification of right with the notion of basic capabilities, as entitlements every individual has no matter what in virtue of some basic capabilities, possessed by every human being. This right is entitled to the person even when this hasn't been implemented effectively yet.

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<sup>374</sup> Nussbaum (1997), p. 294

“When we use the term “human right” this way, we are saying that just by virtue of being human, a person has a justified claim to have the capability secured to her”<sup>375</sup>

It is in this sense that capabilities are reasons for action of human rights. The justification of human rights used in this way relies on some basic capabilities all humans have.

“I have suggested that this role of rights language lies very close to what I have called “basic capabilities”, in the sense that the justification for saying that people have such natural rights usually proceeds by pointing to some capability-like feature of persons that they actually have. [...] *And I actually think that without such a justification the appeal to right is quite mysterious.*”<sup>376</sup>

In *Creating Capabilities* she speaks of the opportunity of viewing rights in terms of capabilities, and the fact that the capability list cover the so-called two generation of human rights. A human right is an entitlement human beings possess no matter what on the bases of the possession of certain basic capabilities, even when the rights is not being implemented. It can be seen as a combined capability: for it to be implemented means to ensure to the subject the combined capability attached to it. Capabilities are also, in this way the scope of human rights.

In *Capabilities and Human Rights* she makes another important distinction on which she doesn't come back in later works. She distinguishes between civil and political rights, to be seen *tout courtas* combined capabilities, and economic and social rights. For the latter, she recognizes the possibility for them to be analyzed in terms of resources, or utilities. She concludes, however, that it is best to consider even economic and social rights in terms of capabilities:

“Analyzing economic and material rights in terms of capabilities would thus enable us to understand, as we might not otherwise, a rationale we might have for spending unequal amount of money on the disadvantaged, or creating special programs to assist their transition to full capability.”<sup>377</sup>

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<sup>375</sup> Nussbaum (1997), p. 293

<sup>376</sup> Nussbaum (1997), p. 295

<sup>377</sup> Nussbaum (1997), p. 295

In *Creating Capabilities*, however, she doesn't accept the differentiation between first and second generation rights, since she maintains that civil and political rights need the economic and social sphere in order to be developed.

If rights can be seen as combined capabilities, why do we have to retain the language of rights at all?<sup>378</sup> First, because the language of right is stronger. It is rhetorically stronger to have a list of rights rather than a list of central capabilities. It- she says- "communicates more [...]: it says what normative conclusions we draw from the fact of the basic capabilities."<sup>379</sup>

Second, the notion of rights emphasizes the importance of choice, and it stresses the liberal element of the theory.

To conclude, there is more agreement on it empirically and rhetorically than on the notion of capabilities, although the notion of human right is conceptually fragile. However, the notion of capabilities has a great advantage on the notion of right: the notion of rights have often been accused to be a Western product, while capabilities do not have this problem.

Can we still retain the universality of human rights given the pluralistic world and the different cultures that exist in the world? Sen defends the universalist element of human rights proposing to adopt a concept of public reason that goes beyond domestic justice:

"We can demand, on the contrary, that the discussion has to include, even for domestic justice (if only to avoid parochial prejudices and to examine a broader range of counter-arguments), views also from a certain distance."<sup>380</sup>

Moreover, Sen is skeptical about the conviction that cultures differ so radically from each other that it is impossible to find common points, and that their values are standing on their own, that is, without any possibility of comparison and dialogue with that of other cultures.

Both Martha Nussbaum and Amartya Sen highlight the fact that the concept of culture is quite complex, since it is not monolithic, but heterogeneous: there are many streams of thought, and cultures are deemed to change in space and time. They influence each other, and there is no value

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<sup>378</sup> Nussbaum (1997), p. 295

<sup>379</sup> Nussbaum (1997), p. 296

<sup>380</sup> Sen (2005), p. 161

that is pure prerogative of a specific culture. For example, Europe has known, in the seventeenth century, religious intolerance, while the Indian Emperor Ashoka, many years before, was an example of tolerance.<sup>381</sup>

“The point to note here is not so much whether we are allowed to chat across borders and to make cross-boundary moral scrutiny, but that the discipline of the critical assessment of moral sentiments- no matter how locally established they are- requires that we view our practices inter alia from a certain distance. Both the understanding of human rights and of the adequacy of a list of basic capabilities, I would argue, are intimately linked with the reach of public discussion- between persons and across borders. The viability and universality of human rights and of an acceptable specification of capabilities are dependent on their ability to survive open critical scrutiny in public reasoning”<sup>382</sup>

It is true that, historically, human rights have been born in the West, and they reflect the slogan of the French revolution: freedom, equality and brotherhood. They have been elaborated, however, to have a certain level of universality, to create broad acceptance from many different cultures and many different points of view. To talk empirically, moreover, human rights have been codified in a lot of international convention that have been ratified by a huge number of different states, with different cultures, that have accepted them.

I think it is true, however, that it would be difficult to argue for the universality of human rights across time and place. This is when the language of capabilities can be useful, one of its point of strength.

Which are, ultimately, the points of strengths of considering rights in terms of capabilities?

In *Creating Capabilities* she better articulates the connection between human rights and capabilities. She says that her capability approach is a kind of human right approach.

Both of them, she says, have in common the idea that the humanness in all people gives them some entitlements, that have to be implemented and respected by society. They have a similarity in content, there being an overlapping of the list of capabilities with the first two generations of human

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<sup>381</sup>Quite interesting is on thispoint Sen’s intervention on the topic of Asian values. For a detailed exposition of the issue, see Sen (1997)

<sup>382</sup> Sen (2005), p. 163

rights. They have an analogous role, such as universal<sup>383</sup> validity and statements for constitutional formulations.

The capabilities approach adds something to human rights approach: it provides a foundation for the possession of human rights based on the belonging to the human kind and to minimal agency. This justifies better the fact that mentally impaired people have them than other approaches that rely, for example, on rationality.<sup>384</sup>

“The dominant tradition has typically grounded rights in the possession of rationality and language, thus implying that [...] mentally impaired human may not have them”<sup>385</sup>

It clarifies the correlation of human rights and dignity, whereas dignity is specified by the central capabilities of the list.

It faces the issues of human rights and duties. She says “there is a conceptual connection between the idea of the central capabilities as fundamental entitlements and the idea of duties. Even before we can assign the duties to specific people or groups, the existence of an entitlements entails that there are such duties.”<sup>386</sup> Duties that she ascribes primarily to the government, and to the other governments in case the domestic one cannot fulfill them.

Moreover, the idea of capability conveys the idea of positive or substantive freedom, so a capability-based human rights approach is critical of the rights associated to negative liberty.

“The very idea of “negative liberty”, often heard in this connection, is an incoherent idea: all liberties are positive, meaning liberties *to do orto be* something; and all require the inhibition of interference by others.”<sup>387</sup>

Nussbaum’s capabilities approach can be taken as foundational of human rights.

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<sup>383</sup> We have already discussed in which sense human rights can be said universal. We can say that they have universal aim, but it cannot be the kind of universality unchanging in space and time.

<sup>384</sup> Nussbaum (2011a), p. 63

<sup>385</sup> Nussbaum (1997), p. 273

<sup>386</sup> Nussbaum (2011a), p. 63

<sup>387</sup> Nussbaum (2011a), p. 65

To sum up. The human rights are seen as combined capabilities and as fundamental entitlements based on the possession of certain basic capabilities. These basic capabilities are possessed by every human being with minimal agency. Capabilities are analytical devices insofar they provide the content for human rights. Since rights are rights to certain capabilities, capabilities provide the scope and the reason for action of human rights. Which rights are human rights? Since human rights are combined capabilities, and Nussbaum draws a list of central capabilities, central for every dignified and flourishing life, the capability list will be the bases for human rights. The central capabilities, in fact, are the minimum precondition for a flourishing and dignified life. This is also Beitz's position, who talks about Nussbaum's as a naturalistic theory of human rights.

“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”.<sup>388</sup>

Which are the weaknesses of such a position? They are going to be analyzed in the next paragraph.

I wanted to highlight the connection between capabilities and rights. I want also to verify if capabilities give a foundation for a theory of human rights, in the sense of being able to conceptualize the notion of human rights, to be, as Beitz says, analytical device for the content of human rights, but also to be their scope and reasons for action. Consequently, a list of basic capabilities that is the core of human flourishing would be able to decide which human rights are effectively human rights. All this reasoning is limited to the first two generation of human rights, since I am not dealing with the rest in this work.

“The list of “central human capabilities” serves to identify the types of claim that satisfy this condition. The centrality of these capabilities as constituent of a wide range of ways of life, together what (Martha Nussbaum holds it) their intrinsic value, also explain to us why it should matter to us that people enjoy human rights that protect them.”<sup>389</sup>

Let's see some of the criticism Beitz moves to Nussbaum's position over human rights.

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<sup>388</sup>Beitz (2009), p. 63

<sup>389</sup>Beitz (2009), pp. 63-64

#### 4.1.4 Beitz's criticisms with reply

Beitz calls naturalistic positions over human rights those positions that consider human right as pertaining to the notion of natural rights, or that endorse at least one of the four features assessed to natural rights. Over this comparison, human rights are “possessed by all human beings (at all time and places), simply in virtue of their humanity.”<sup>390</sup>

Under this light, human rights are not derived by positive law, and they are the benchmark for its evaluation. Moreover, they are accredited to every human being thanks to its humanness. Most important: “it may also mean that the grounds on which a particular human rights may be claimed are available to everybody because they inhere somehow in each person’s nature or status as a human being.”<sup>391</sup>

Naturalistic positions over human rights maintain that their conceptualization is not dependant on human rights practices or public opinion,<sup>392</sup> and they are the foundation of human rights practice and their embodiment in positive law. Ultimately, they are the foundations of the human rights prescribed in the international doctrine.

Beitz acknowledges that historically human rights are developed from the notion of natural rights. He questions, however, the issue starting from a philosophical point of view.

There are four characteristic human rights as inherent to natural rights have.

They are abstract from local morality and conventions, being, in this way “critical standard for a society’s conventional and legal rules.”<sup>393</sup>

They are pre-institutional: their conceptualization is not dependent from the features of the institutions. That makes them fundamental.

The following two characteristics makes them universal, insofar they pertain to everybody regardless space and time, and they “belong to people as such”, thanks to their humanness.

Beitz questions the opportunity to understand human rights on a naturalistic bases.

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<sup>390</sup>Beitz (2009), p. 49

<sup>391</sup>Beitz (2009), p. 49

<sup>392</sup> Martha Nussbaum’s Aristotelianism, however, is quite nuanced on this point, since the isolation of the central capabilities is made also looking at human practices and public opinion

<sup>393</sup>Beitz (2009), p. 52

He takes into examination all four characteristic, translated into human rights. As far as their independence from local moral traditions and convention goes, this is acceptable in considering them as benchmark for evaluation, such as also Martha Nussbaum maintains, in *Creating Capabilities*. It is not acceptable, Beitz argues, if it is drawn the consequence of existing in a separate normative order.

“Human rights [...] are unlike natural rights in not presupposing any one view about their basis or justification”.<sup>394</sup>

Beitz recall Maritain declaring that human rights are “practical conclusions, which, although justified in different ways by different persons, are principles of action with a common ground of similarity for everyone”<sup>395</sup>

The capability approach given by Martha Nussbaum, in the specific case the capabilities list, provides, however, a specific justification to human rights, given by the justification of capabilities through the internal evaluative inquiry that goes by the name of the Aristotelian method.

Beitz contests as well the plausibility of the idea of human rights being pre-institutional. Most human rights are specifically contextualized, for example the right to political participation. A solution, contemplated by Beitz,<sup>396</sup> is to distinguish between first order rights, that can be pre-institutional, and second order rights, that are not so but are derived from the former.

The problem arising is that the normative content given by the listing of the first order rights conditions which second order rights can be derived, with the result that there is often an insufficiency in justifying the contemporary human rights doctrine.

On the contrary, the other strategy to arrive to the justification of the contemporary human rights risks to enlarge the normative order, so to lose its naturalness:

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<sup>394</sup>Beitz (2009), p. 54

<sup>395</sup>Beitz (2009), p. 54

<sup>396</sup> A similar device has been adopted by Martha Nussbaum as far as the list of capabilities is concerned.

“The attempt to produce a view whose foundations are sufficient to justify a catalog of rights something like contemporary human rights risks giving up the generic pertinence to the human situation “as such” that one might have though attainable by exploiting the idea of naturalness”.<sup>397</sup>

This problem may be overcome by the capability theory: founding human rights on the capabilities list means that the problem of pre-institutionality is shouldered by the capabilities, and not by the human rights, and this is a easier task to manage.

As far as the universality goes, considered as changelessness in space and time, Beitz questions this assumptions.

Human rights cannot obviously be immutable in space and time: some human rights are closely linked to the context. A capability based approach can answer this objection, as posing the central capabilities, at a certain level of abstractness, as universal in this sense. The universality of human rights would be derived from their reason to be, to protect the central capabilities, and they would be context sensitive without losing their value.

Another kind of universal claim that Beitz contests is that they are possessed by the human beings simply in virtue of their humanity. Here Beitz confronts directly with Nussbaum’s position.

Beitz writes:

“the considerations that determine the content of Nussbaum’s conception of human rights are plainly normative. Whether a value should be counted as a human rights depends on whether he belongs on the list of central human capabilities and this, in turn, depends on a judgment about the centrality of the value in any human life.”<sup>398</sup>

This is particularly important, because the second part of the chapter will consider and verify this exact claim.

Beitz makes certain specific criticisms to the naturalist theories such as Nussbaum’s.

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<sup>397</sup>Beitz (2009), p. 56

<sup>398</sup>Beitz (2009), p. 64

Human rights are conceived independently of the “discursive functions of human rights within the existing practice”<sup>399</sup>. This is not true, however, as far as Nussbaum is concerned. In *Creating Capabilities*, she holds that human rights are a benchmark for international and national demand.

Further, Beitz argues that this kind of positions are not strong enough for the “problem of contribution”.<sup>400</sup> They focus on the subject whom is entailed the right, but not on who is supposed to fulfill it. Nussbaum, however takes in consideration also the “problem of contribution”. There is a “conceptual connection between central capabilities and the government. [...] the government is accountable for the presence of the ten capabilities of my list, if the nation is to be even minimally just.”<sup>401</sup>

This can be enlarged, as Martha Nussbaum does, in saying what Beitz maintains: human rights are wages on the government, and in case of failure of the domestic government, on the other states and on the international community.

Further, Beitz argues that their normative elements risks not to cover the whole domain of the human rights doctrine.

“The general point applies to Nussbaum’s construction of the capability view as well: if the idea of an interest’s being important in all or most human lives is taken seriously, then the list of capabilities that qualify is likely to be more restricted than the account allows.”<sup>402</sup>

Nussbaum, however, holds that the capabilities list cover the domain of civil and political rights, and of economic and social rights. Considering that these are the most established human rights, it is not of secondary importance. I am going to verify, however, the truthfulness of this statement.

I have not investigated, here, the possibility for them to cover also other kinds of human rights.

Moreover, we need some criteria to limit the proliferation of entitlements that claim the status of human rights.

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<sup>399</sup>Beitz (2009), p. 65

<sup>400</sup>Beitz (2009), p. 65

<sup>401</sup>Nussbaum (2011), p. 64

<sup>402</sup>Beitz (2009), p. 67

There is a last issue: in case of divergence between the international doctrine and those theories, then it is the international doctrine that has to be revised, at least theoretically.

Nussbaum's list of capabilities, however, is open to change, so it could be the case that an examination of human rights could trigger some change in it. It is true, however, that this is a contingent feature, and that it is the list the bases for determining human rights.

Probably Beitz most difficult question is: why should it be so?

“Why should we insist that international human rights conform to a received philosophical conception rather than interpret them, as they present themselves, as a distinct normative system constructed to play a certain special role in global political life?”<sup>403</sup>

The answer to this criticism lies in what already said below, about the contribution that capabilities can give to human rights: clarity of content, provision of the scope and the reason for action. The list of capabilities provides a basis for human rights, and the language of capabilities is not so considered to be a Western product as the notion of human right is. While, moreover, human rights can remain formal, nominal, to think about them in terms of capabilities imply the substantial fulfillment of that right.

The language of human rights can be strengthened from the language of capabilities. Then, of course, the burden of the proof, so to say, relies on capabilities, rather than on human rights.

The rest of the chapter wants to be a practical exercise: taking into examination the list of capabilities and the so-called two generations of human rights.

I want to verify if they can be justified by the capabilities list.

## **4.2 The Capabilities List and Human Rights**

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<sup>403</sup>Beitz (2009), p. 68

#### 4.2.1 Capabilities and civil and political rights

What I would like to try in the last part of the research is to compare directly the major human rights as stated in the Covenants taken into consideration in the first chapter with the capabilities list. I have, in the second chapter, drawn the justificatory line of the capabilities list that I deem to be the most original, although it is not free difficulties.

The first article of the ICCPR is identical to the first article of the ICESCR, and it plots the *right to self-determination*. This is, however, a collective or group right, and I do not deal in this work the connection between capabilities and group rights. They will have to be dealt in another location.

Let's take into consideration the *right to non-discrimination and to equality*. They are covered by the capability of *affiliation*, and in particular by the guarantee of the social stands of self-respect. Is it reductive to base the principle of equality on the sense of affiliation? I think this could be justified if we think of equality on comparative bases. Without the sense of affiliation, if human being were isolated, there would be no sense in talking about equality.

The right to life cover, of course, the capability of *life*, of a life of natural duration.

The *right against torture and other cruel, inhuman or degrading punishment or treatment* protects the capability of *bodily integrity*, and, I would say, also of *senses, imagination and thought*, of *emotion* and of *practical reason*, that pertain to the psychological side.

The *right to liberty* is justified mainly, I would say, from *practical reason*. Practical reason is, in fact, about planning freely the personal life and deciding about one's own good.

The *right to security* protects *bodily integrity*, but also, in my opinion, *control over one's environment*. This last statement can be controversial, since often matters of security conflict with the latter. It is true, however, that without security the control of one's own surroundings is impossible.

As far as *freedom of movement* is concerned, Nussbaum associates it with *bodily integrity*. The notion of bodily integrity has to be taken as a general one, in my opinion, contemplating also the psychological aspect of this integrity.

What about the right to a fair trial? Nussbaum contemplates "having the freedom from unwarranted search and seizure"<sup>404</sup> in "*material control over one's environment*". There is, effectively, a link

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<sup>404</sup> Nussbaum (2011a), p. 34

between the two. I would justify it also on the bases of *affiliation* and in particular of having the social inputs for self-respect: “being able to be treated as a dignified being whose worth is equal to that of others.”<sup>405</sup>

As far as the *right to privacy* is concerned, it could be justified by referring to the fourth point of the list, the one pertaining to *senses, imagination and thought*, since the human cultivation of these faculties necessitates a private sphere. I would associate the *right to privacy*, however, also to the element of *affiliation*, in particular to the *social bases of self-respect*.

Article 18 of the ICCPR regards the *right to freedom of thought, conscience and religion*. These rights protects, Nussbaum maintains, a great area of capabilities. They are attached to the capabilities of *senses, imagination and thought*, that is, to “use the senses, to imagine, think, and reason- and to do these things in a “truly human way”.”<sup>406</sup> They are attached to *practical reason*, since they fulfill its use in forming people’s personal point of view on the good and in decide critically over their own lives.

Then let’s consider the *right to freedom of expression and opinion*. Martha Nussbaum associates this right to the protection of *senses, imagination and thought*. They are essential to their good development.

Then there is *the freedom of assembly*. Nussbaum links it to the capability of *affiliation*: “being able to live with and towards others, to recognize and show concern for other human beings, to engage in various form of social interaction; to be able to imagine the situation of another.”<sup>407</sup>

The *right to association* is linked by Nussbaum to the “*control over one’s environment*”, in particular politically speaking. I would linked it to the capability of *affiliation* as well.

The *right to family*, I would say, pertain to the capability of *affiliation*. Affiliation is articulated, infact, also as the actuation of social interactions, and family is probably the most important social interaction of all: the formation of the individual starts within the family, its childhood is conditioned *in primis* by the family. I would also link it to the capability of *senses, imagination and thought* and that of *emotions*. The family is essential in the good development of these capabilities.

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<sup>405</sup> Nussbaum (2011a), p. 34

<sup>406</sup> Nussbaum (2011a), p. 33

<sup>407</sup> Nussbaum (2011a), p. 34

The right of the child subsumed a number of capabilities of the list, since the state of childhood is crucial for their development. For example *senses, imagination and thought, emotions, play, practical reason, affiliation, control over one's environment*.

Article 25 of the ICCPR is the right to political participation, and it stands over *political control of one's environment*.

The right to property. It can be quite controversial, Martha Nussbaum considers it a human right and it poses under the *material control over one's environment*.

#### 4.2.2 Capabilities and economic and social rights

Article 6 and article 7 are about the *right to work*. Even if not explicitly, this right is contemplated by Nussbaum as protecting the *material control over one's environment*. Without the right to work, that gives independence, the individual is not autonomous and it cannot control itself or its environment. It is also linked, consequently, to *affiliation* and to *having the social elements of self-respect*. But it is linked as well to *practical reason*, to *senses, imagination and thought* and to *emotions*, since without independence the individual cannot exercise all these features. It involves *bodily health* as well

The same can be said, I argue, about the *right to social security*, since social security gives the possibility of sustainment in case the individual cannot find work.

The *right to form trade union* is quite specific, and I think it can be subsumed under *the right to association*. It protects the *control over one's environment*, and, I would say *affiliation*, in particular in the form of the social grounds of self-respect.

It is the same area protected by *the right to strike*.

The *right of an "adequate standard of living"* protects all the capabilities in general. In particular, its articulation in the right to nourishment and the right to shelter is covered by, in Nussbaum's words, *bodily health*.

The *right to health* is particularly interesting. The article states the right to the "highest attainable standard of physical and mental health".<sup>408</sup> This can be justified from *bodily integrity*, but as well

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<sup>408</sup>(1966) ICESCR, Article 12

from *senses, imagination and thought*, from *emotions*, the capability to *play*, from *practical reason, affiliation*. All these capabilities are impaired without the element of physical and mental health.

The *right to education* could pertain to the sphere of the right development of the capability of *senses, imagination and thought*, the capability of *emotion*, the capacity for *practical reason*. It is a key right for the right development of the possibility for the individual to live a dignified and meaningful life.

I haven't dealt with cultural rights, since this topic is quite complex to be faced in the present work. Nussbaum seems to link them, however, to the capability for *senses, imagination and thought*:

“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.”<sup>409</sup>

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<sup>409</sup> Nussbaum (2011a), p. 33

## Conclusion

“ All human beings are born free and equal in dignity and rights. They [...] should act towards one another in a spirit of brotherhood.”<sup>410</sup>

The first article of the *Universal Declaration of Human Rights* (UDHR) well expresses the purpose, the *raison d'être* of human rights. Human rights are aimed at safeguarding the dignity of the individuals thought of in its essence as human beings, free and equal. Freedom, equality and brotherhood cover the whole conceptual field generated by human rights. The Universal Declaration is not the first draft speaking of human rights; it is the first, however, to have world reflection and caliber. As Cassese<sup>411</sup> rightly notes, using the human rights approach in the international arena introduces a new parameter. In this way certain injustices, that didn't have a specific status, have been able to be categorized. Consequently the issues arisen by human rights are encapsulated into a structure. The engrossment in human rights at a sovra-national level has had, as a consequence, the stressing of the importance of the single person at this level. International law has been, as a matter of course, linked with states. Human rights, instead, protects individual human beings. Individual human rights have come to be associated as one of the aim of the state.<sup>412</sup> Further, the individual has become, also internationally, a legal subject. There is always more and more literature on the international legal personality of the individual, but this process is still a task to be reached.<sup>413</sup>

Although human rights have global resonance and global impact, they are, on a conceptual level, quite frail. There is no agreement on the answer to the simple question of what human rights are. The very definition of human rights is a complicate matter. As I said, I take 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.”<sup>414</sup>

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<sup>410</sup>(1948). UDHR, art. 1

<sup>411</sup>Cassese (2005), pp. 3-4

<sup>412</sup>Doebbler (2006), p. 20

<sup>413</sup>Nascimbene (2011), p. 426

<sup>414</sup>Nussbaum (1997), p. 292

In this work I have examined some of the issues surrounding human rights. First of all, there is disagreement on the very definition of the term “right”. I have examined in the fourth chapter the possibility of considering rights as goals or rights as side-constraint and the conceptions that consider rights as fundamentally or only instrumentally important, following Amartya Sen. Second, I have followed Martha Nussbaum over the consideration of some issues regarding human rights. A right, to be considered in this way, need some correspondent duty to be located. How to consider the issue of duty and of duty bearer in the field of human rights? Further, how to conceptualize the notion of human rights? What is the foundation of human rights?

In her seminal paper *Capabilities and Human Rights* Martha Nussbaum examines the possibilities of considering the notion of human rights in correlation with the capabilities approach, in particular with her version of the approach. She ponders if the theories are complementary or if they overlap, and consequently they deal with the same material, only shown through different angles. She asks further if there is competition between these two positions, and what exactly is the correlation between the two of them. That is, if the capability approach can be used to solve some issues surrounding human rights, what the practice of human rights can offer to the capabilities approach, and why, if we consider the capabilities approach as fundamental, we would still need the language of human rights.

Nussbaum aims that the capabilities approach can be used to cover the field of the so-called two generations of human rights, that is, civil and political rights and economic, social and cultural rights. I have limited this work to these rights, and I do not enter the merit of the other kinds of human rights. I have taken into consideration the two Conventions to determine what exactly are these rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). They are submitted in 1953, and then ratified in 1966, to enter into force in 1976. I have examined in dept the human rights contemplated by these two conventions. I take into examination the legal aspect of human rights, and I am focused on the conception between the human rights contemplated in the two Covenants and the capabilities approach. Although the ICESCR contemplates cultural rights as well they are too complex for the space that could be given them in the present dissertation. The investigation of the correlation between human rights and capabilities approach deals with, consequently, civil, political, social and economic rights only. They are already quite a broad spectrum to be analyzed. I consider civil and political rights in the first chapter. Always in the first chapter, in the first paragraph, to be specific, I question the common idea that associates civil and political rights to

negative rights, and hence to negative freedom. Negative freedom involves the notion of immunity from. The negative conception deals with the right of not being interfered in the exercise of the entitlement. I have advocated Sen's conclusions that:

- first, negative rights involve some positive actions.<sup>415</sup> For example, the right to security is insured through maintaining an expensive security apparatus, such as all the police force and the legal system;
- second, Sen questions the very reference to negative rights. Once we recognize someone's negative rights, there is no reason not to get concerned about his correlative positive right.

“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)?”<sup>416</sup>

What is intended with civil and political rights? Civil rights comes from the Latin words *ius civis*, the right of the citizen, and they are all the rights associated to the idea of citizenship. They are the rights that safeguard the possibility of freedom and equality among citizens. Some example is the right to a fair trial, freedom of conscience, freedom of thought, and so on. Political rights are the rights necessary for the citizen to participate in the government, such as the right to vote. We have seen that this distinction has been used in the past in a discriminatory way, for example granting women's civil but not political rights. This is, of course, a wrong way to use this distinction. Civil and political rights are often considered first-generation rights, while economic, social and cultural rights are called the second generation rights. I have agreed both with Amartya Sen and Martha Nussbaum in questioning this distinction, in saying that the same importance must be attributed to civil and political and economic, cultural and social rights. It is true, however, that in dramatic case of scarcity of resources, when a choice has to be made, Martha Nussbaum, in *Capabilities and Human Rights*, affirms that priority should be given to civil and political rights. It is only, however, when a choice has to be made and there is no other possibility. In *Creating Capabilities*, however, she states firmly that no distinction should be made that implies a question of ranking.

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<sup>415</sup> Sen (1984b), p. 319

<sup>416</sup> Sen (1984b), pp. 314-315

The issue of economic and social rights, also known as welfare rights<sup>417</sup>, is a very debated one. Can they be considered human rights? Do they have the same status as civil and political rights? I have opted for the answer “yes” to both questions, but this answer has to be argued in favor for. First, economic and social rights care about the material and psychological aspect of the human flourishing. Eleanor Roosevelt, Chairwoman of the Commission on Human Rights, has argued, we have seen in the first paragraph of the second part of the first chapter, for the consideration of economic and social rights as human rights. Nonetheless, civil and political rights and social and economic rights have been codified into two different Conventions, and, while article 2(1) of the ICCPR contemplate the granting of the rights stated in the Covenant to every individual under the state’s jurisdiction, article 2(1) of the ICESCR talks about the progressive achievement of the rights contemplated in it.

There are some reason for the distinction and the different wording:

- 1 Civil and political rights are associated to the West, while economic and social rights to the Communist countries, and then watched with suspicion at the time of the Cold War;<sup>418</sup>
- 2 The same Eleanor Roosevelt says that while civil and political rights have to be granted by the government, there are many ways of granting economic and social rights;<sup>419</sup>
- 3 Economic and social rights have been questioned in a way that civil and political rights have not.<sup>420</sup> I have taken into consideration four different issues regarding economic and social rights: the claim that they do not cover fundamental human interests; the idea that putting them into practice would be too burdensome on governments, comporting a high level of taxation; the fact that non developed or developing countries may have a hard time complying with them.
- 4 The fourth issue regarding economic and social rights but not civil and political is what Sen calls the “institutionalization critique”<sup>421</sup>: a legal right, to be considered a right, needs a specific duty bearer to be taken into consideration. The problem is particularly felt for economic and social rights. If it is true that individuals are entitled to them, who has to warrant these entitlements?

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<sup>417</sup> Nickel (2010), par. 3.4

<sup>418</sup> GrosEspiehl (1993), p. 55

<sup>419</sup> Doebbler (2006), p. 91

<sup>420</sup> Nickel (2010)

<sup>421</sup> Sen (2009), p. 383

As far as the first point goes, there is a debate on the effective historical truth of this distinction, but theoretically this distinction doesn't have any reason to exist. Economic and social rights are necessary to the development of civil and political rights, and vice versa.

“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.”<sup>422</sup>

The second point doesn't hinder the fact that socio-economic rights are to be considered human rights, with the same status as civil and political rights. We could say that to fulfill them means, on the part of the government, the duty to put the individual in the position to have these rights implemented, for example through proper education, opportunities and a functioning *security-net*. The government, for example, has to superintend to the possibility for the individual to achieve job security, and a security net when the individual is unable to get a job.

The three issues contemplated in the third point are quite important. As far as the objection that they do not cover *fundamental human interests*, I have argued, it is quite difficult to maintain that entitlements regarding the physical and psychological well-being of the individual are not related to *fundamental human interests*. And, moreover, granting that is important to the establishment of the security necessary for civil and political rights to be implemented.

The second issue, that concerns the prohibitive costs of effectively implementing economic and social rights, has to be considered also in the right perspective: it is a myth that holds that economic and social rights are too costly and civil and political rights are not. And, further, the needs covered by economic and social rights remain even if the rights is denied. I have quoted 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”<sup>423</sup>

The third objection is about the effective possibility to implement them. It is often reiterated that developing and underdeveloped Countries cannot, simply, afford them. I have answered in

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<sup>422</sup>Nickel (2005), p. 395

<sup>423</sup>Nickel (2005), p. 399

different phases: first, human rights deal with minimal thresholds<sup>424</sup>; second, I have quoted Sen, in *Development as Freedom*, where he states that a huge factor into play is how the available resources are used, and this is as important as how many resources are available; third, we are talking about “progressive realization”<sup>425</sup>; fourth, international subsidy and co-operation is considered when necessary.

About the last point, Sen talks about the necessity of recognizing a duty to help where there is the capacity. This includes also the notion of “imperfect obligations”.<sup>426</sup> Sen proposes a solution that in my opinion is not much dissimilar from that of Pogge and of 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”<sup>427</sup>

Martha Nussbaum, in *Creating Capabilities*, individuates in governments, or in the international community, the duty bearer for fulfilling human rights. I think, however, that Sen has a point here: it is the individual that is, ultimately, responsible for its government in a democracy.

I agree with Sen and Martha Nussbaum, moreover, in denying any difference in status between civil and political and economic and social rights. I consider, along with Nickel and Brems, human rights to set minimal standard. Applying this notion to Martha Nussbaum’s position, human rights are the minimal threshold that protect human flourishing, their minimal precondition. Brems, moreover, proposes to consider the notion of “progressive realization”<sup>428</sup> as valid both for civil and political rights and for economic and social rights: a hierarchy would be necessarily formed, otherwise, and this would go against the idea of indivisibility of human rights. The idea of “progressive realization”<sup>429</sup> is suited to considering the notion of rights as what Nickel calls “goal-rights mixtures”.<sup>430</sup> They would retain a deontological trait of the rights, and the possibility of

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<sup>424</sup>I will come back to this later.

<sup>425</sup>Brems (2009), pp. 365-366

<sup>426</sup> Sen (2009), p. 383

<sup>427</sup> Sen (2009), p. 383

<sup>428</sup>Brems (2009), p. 369

<sup>429</sup>Brems (2009), p. 369

<sup>430</sup> Nickel (2010)

progressive achievement of the goal. This notion is similar to Sen's conception of rights as a "goal-right system".<sup>431</sup>

Once I have established my position on civil and political and social and economic rights, I have taken into consideration the capabilities approach. I have divided my examination into two chapters, one regarding Nussbaum's Neoaristotelian method for the justification of her capabilities list, and the other regarding the capabilities approach in general and Nussbaum's capabilities approach in particular. I have taken into consideration Nussbaum neo-Aristotelianism, that correspond to the early period of her thought, since I deem it quite an original attempt to balance universalism and particularism, objectivism and pluralism and relativism. Like all the original attempts it has its open issues, but it shows directions that it is worth pursuing.

In the second chapter I have explored her Neoaristotelian method and the related idea of human flourishing. She uses the language of capabilities, in her early neoaristotelian period, to express the individual possibility to a flourishing and dignified life. She draws a list of capabilities that she holds to be the minimum precondition to a flourishing life and to be the second step of what she calls the "thick but vague conception of the good". Nussbaum holds that the human flourishing is conceived in terms of the realization of the individual in some specific fields. To locate those fields it is necessary, following Aristotle's idea, to have a conception of the human being. Human flourishing, or *eudaimonia*, is the good realization of the individual, and its good realization, always following Aristotle, is to function well according to the nature of the individual. Aristotle holds, in other words, an essentialistic conception of the good.

The human flourishing is at the core of Nussbaum's theory of social justice, since the aim of the government has to be the achievement of the good of its citizens. Nussbaum's theory wants to remain, however, within the liberal framework. The capabilities approach is one of the instruments she uses to retain both essentialism about human good and liberalism. Her peculiar kind of essentialism, that she calls internalist essentialism, is based on a normative conception of the human being that she builds up on what she names neoaristotelian method and that constitute the first step of the *thick but vague theory of the good*.

We have seen that Nussbaum elaborates the internalist essentialism as being a third way between absolute objectivism and absolute subjectivism. The internalist essentialism doesn't rely on metaphysical positions, in the specific, on metaphysical realism. Nussbaum states,<sup>432</sup> however, that

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<sup>431</sup> Sen (1984a), p. 15

<sup>432</sup> Nussbaum (1992), p. 215

refusing the idea of the possibility of relying truth and certainties on a reality of the world totally independent from us -and that it would be impossible for us to assess rationally- doesn't mean to give up all the hope to find truth and certainties true enough, in a dimension that is internal to the human way of life, hence assessable by us. The possibility to find common features of humanity doesn't need to rely exclusively on metaphysical truths. She holds that this is possible through an evaluative investigation conducted by humans, through the human critical reason and through what she calls the narrative imagination, that are the human tools for excellence. This investigation is conducted evaluating critically all the humans ways of life, and the way humans sees themselves. Materials of evaluation are especially human productions, histories, myths, everything that betrays the way humans sees themselves. Nussbaum is particularly attentive, and I find this the most interesting, on the issue of limit and contingency. She maintains that often the truly human characteristics can be located by a comparison with other forms of life, for example divine or beastly forms of life. Political or ethical values are shaped, for example, also by human limitation and by a situation of need and contingency. She refers to the myth regarding the Greek Gods. Greek Gods do not know, for instance, what is love, the human way of love, because they lack all the elements of human limitation, finitude and openness to luck.

She says:

“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.”<sup>433</sup>

It is important to notice that the universal conclusion she reaches pertain to a specific type of universalism: Nussbaum's achievements don't want to be rock hard, but humble. In the specific, her universalism wants to be context responsive and attentive to pluralism, even if it doesn't want to give way to relativism. She recognizes, then, that it could happen that a full universalism is impossible to reach, starting from contingent premises. People could abstain to use critical reasoning, this is the reason why we can accept a sort of universality “enough”. It is the maximum universality that can be reached and it is true only for the beings who share our structure, since all

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<sup>433</sup> Nussbaum (1992), p. 216

the conclusion reached in this way are already evaluative and they cannot disregard the way *we* think, we experience, we want and we desire. It is a non-relativistic anthropocentric view.

The non-relativistic turn is justified by Nussbaum through what she calls the self-validating structures.<sup>434</sup> There are certain elements that are so intrinsic in the human life that it is useless to think to do otherwise. One example is the principle of Non-Contradiction. This is so essential that human practices wouldn't be human without considering it. Nussbaum reports the case of the Aristotelian considerations about the challenge to the principle of non-contradiction.<sup>435</sup> She says that Aristotle accuses of lack of *paideia* he whom doubts over the principle of non-contradiction. Nussbaum says that this is significant: it means that this move would put the individual outside the human dimension. Based on these premises there is Nussbaum's optimism about the possibilities to find common features of humanness deriving from an internal evaluative account, internal, that is, to the human dimension. This would lead to an account that is already evaluative, normative, and, at the same time, it is still a naturalistic position.

To sum up. She makes the consideration that the Aristotelian assumption is valid: the good for a being is to explicate its nature. Derivatively, an account of the human good, or human flourishing, is based on an account of the human nature. Human nature that is individuated through Nussbaum's Neoaristotelian method, based on her internalist essentialism. Consequently, the internalist essentialism is at the root of her theory of social justice, since the aim of it is to assure human flourishing to the individual, or better, to the citizen.

In her early writings she elaborates what she calls the *thick but vague* theory of the good, whose first step is the normative account of the human being, and the second step are the central capabilities that express and develop these features of humanness. Nussbaum, in her early period, tries to locate these features of humanness. She individuates: *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.*<sup>436</sup>

The term thick is thought to underline that we are dealing with ends-and not only with means-regarding the human good. The theory is dense with a content. The term vague is thought to

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<sup>434</sup> Nussbaum (1995), pp. 116-117

<sup>435</sup> Nussbaum (1986), p. 252

<sup>436</sup> This version is found in Nussbaum (1992), pp. 216-220; but she shapes it also elsewhere, for example in Nussbaum (1990).

answer to the possible objection of rendering compatible a “universalistic”<sup>437</sup> position with a pluralistic world: the vagueness implies that the elements of the theory of the good are context-responsive. Martha Nussbaum talks about two different ways to explain this vagueness: the *way of plural specification* and the *way of local specification*. The locution *plural specification* wants to mean the possibility that each individual has to adapt the general principles to its preferences or the local traditions of the culture it belongs to. The locution of *local specification* stands for the sensitivity to the contingent circumstances of actuation.

Martha Nussbaum has chosen to express her theory of the good through the language of capabilities. Her internalist essentialism and the Neoaristotelian method depicted so far are the early foundation of her capabilities approach. At this point, in the third chapter, I have examined the capabilities approach in general and her version in particular.

It is not easy to talk about the capabilities approach, also because it encompasses a bundle of different theories. Amartya Sen is the creator of the approach, exposed first in a Tanner Lecture, *Equality of What?* The core notion is, however, well expressed by Sen saying that it focuses on the actual capacity to do or to be something. What are capabilities and functionings? Functioning is a *state of being or doing*. It can vary from the simplest, such as being well-nourished, to a more complex pattern, such as achieving self-respect.<sup>438</sup> A functioning can be seen as the actuations of capabilities. One important issue in focusing on functionings and capabilities is that it takes into consideration the different rates of conversion that cover the space between commodities and capabilities. In other words, the same amount of commodities or resources can result in different functionings, or capabilities, according to a series of different factors. To reach, let’s say, the same amount of nourishment, for example, a pregnant woman will need a major amount of food in comparison to a woman who is not pregnant. This is an example both Sen and Nussbaum make. Sen individuates some classes of both inter-personal and intra-personal factors that influence the rate of conversion.<sup>439</sup> The first and probably the most intuitive is the very same diversity of the individuals, but also of the very same individual in the timeline. Individuals differ, for example, in bodily structures, in illnesses, and so forth and so on. Then there are the factors due to environmental diversities. To make an example, the different climatic condition of a place can partially define people’s different possibility of well-being with the same level of income. Further, we should take into consideration different social conditions. An individual who is brought up and

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<sup>437</sup>Universalism that has to be understood in term of Nussbaum’s internalist essentialism.

<sup>438</sup> Sen (1992), p. 39

<sup>439</sup> Sen (1999), pp. 74-75; Sen (2004), p. 333

who lives in a violent neighborhood, or it has access to a bad scholastic system, has a different possibility, other variables being equals, of another whose environment is more friendly. Finally, there is the issue brought up by Adam Smith himself: the relative differences. The cultural and mental habit of the environment one lives in can determine different levels of satisfaction given the same bundle of commodities. Adam Smith makes the example of the capacity of being in public without being ashamed: in some culture, for example, having a pair of shoes is a *conditio sine qua non* to achieve that, in other it is not.

What is a capability? We have seen that a capability is the ability to achieve a certain set of functionings. A capability can be viewed also in terms of substantive freedom.<sup>440</sup> A substantive freedom encompasses both positive and negative freedom. It is the actual ability to do something, given also the material pre-condition for achieving it and the absence of external obstacles. I have accepted one observation Bernard Williams<sup>441</sup> makes to the notion of capabilities, namely, that having the capability to something implies also the capability not to achieve it. To make an example, if a person has access to enough food for it to satisfy the capability to be well nourished, it can choose, among different possibilities, between a vector of functionings in which he achieves the functioning to be well-nourished, and a vector of functionings in which he doesn't achieve that functioning, because, for example, he decides to fast, let's say for religious reasons.

Capability means, for them both, areas of freedom of choice.<sup>442</sup> The notion of freedom of choice is crucial for them, also because it strengthens their claim to move internally to the liberal paradigm. The notion of capability is slightly different in Sen and in Martha Nussbaum.<sup>443</sup> Sen means with capability the opportunity for functioning. Martha Nussbaum implies with it both an internal ability and an external opportunity. Sen and Nussbaum differ also in their use of the capabilities approach. Sen views it as the appropriate space of comparison for the evaluation of different issues, such as well being, development, poverty. Nussbaum views capabilities as something more than simple parameters: they can be used in a substantive way, to be to core of a theory of social justice.<sup>444</sup>

She individuates a core of central capabilities that are the base of her theory of social justice, since they are the entitlements to be insured by a fair distribution of resources by the government. They are, as we have seen, also the core of the human flourishing and of human dignity. That is to say,

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<sup>440</sup> Sen (1999), p. 41

<sup>441</sup> Williams (1987)

<sup>442</sup> Sen (1992), p. 41

<sup>443</sup> Crocker (1995), p. 163

<sup>444</sup> It is perhaps important to remind that Nussbaum elaborates a partial theory of social justice

one big difference between Amartya Sen and Martha Nussbaum is the fact that, contrary to Nussbaum, Sen never gives a substantive list of capabilities,<sup>445</sup> leaving it the deliberation of a public and democratic debate. One difficulty, recognized both by Sen and Nussbaum, is that of evaluating the different sets of capabilities and functionings.<sup>446</sup> It is an open issue, since it involves also interpersonal comparisons. The matter is further complicated by the intrinsic plurality of the good, a topic over which there is agreement between Sen and Nussbaum. The plurality of the good means not only potential unsolvable conflicts among the different issues of the good, but also potential incommensurability among them. We have talked about functionings and we have talked about capabilities. Shifting the focus on one or the other, however, is important, since functionings are the actual achievements, and capabilities are the possibilities for those achievements. They leave open areas of freedom of choice, a liberal area, possibility, this, that a focus on functioning does not. This is one of the reason why, although leaving some grey areas, both Sen and Nussbaum indicate capabilities as the proper evaluative space.<sup>447</sup> A related problem with this choice, however, is that of enhancing the difficulty of measurement: being capabilities possibilities, being potential and not actual, they are still harder to measure than functionings themselves. I have taken into consideration some issues regarding the capabilities approach. In particular one objection made by Gasper<sup>448</sup>, that focus on the idea of capabilities as areas of freedom. Gasper questions the appropriateness of this locution. He makes the example of a woman who can only choose among sets of functionings that includes having malaria. We conclude that, he says, due to the definition of capabilities, she always chooses to have malaria. I believe we can use Nussbaum's three-folded, as the same Gasper hints,<sup>449</sup> notion of capabilities to answer to this criticism. The woman has the internal capability, the internal faculty to avoid malaria, but she lacks the combined capabilities, given the unfavorable external circumstances.

Another problematic issue I have faced is raised by Bernard Williams<sup>450</sup>. Williams is reasoning over the connection between capability and ability. Having a capability means or not having the ability to implement that capability in that precise moment in time? He concentrates over the capability to have clean air for individuals in living Los Angeles. Williams says that we could aim that there is not the capability "here and now", but the inhabitant of Los Angeles could move and gain this capability. Williams' objection can be accepted and included in Nussbaum's conception

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<sup>445</sup> Crocker (1995), p. 163

<sup>446</sup> Sen (1994), p. 336

<sup>447</sup> Nussbaum (2011a) p. 125

<sup>448</sup> Gasper (1997), p. 291

<sup>449</sup> Gasper (1997), p. 291

<sup>450</sup> Williams (1987)

of capability: the notion of capability is divided between internal ability and external possibility. So the people living in Los Angeles have the internal ability, but they lack contingently the external circumstances to achieve the combined capability correlated, unless they move.

Martha Nussbaum's conception of capabilities is slightly different, as we have seen above and in the third chapter's, from that of Sen. What is different is not only its definition, insofar as Sen conceives of capabilities as opportunities and Nussbaum both as internal ability and external opportunity, but also its internal articulation. Martha Nussbaum conceives of the notion of capabilities as articulated into three different concepts: basic capabilities, internal capabilities, combined capabilities.<sup>451</sup> The basic capabilities are given in every human being. They are the necessary precondition for the development of all the other capabilities. Nussbaum develops her capability theory from Sen's, but this theory is also closely linked to Aristotle.<sup>452</sup> The idea of basic capabilities is closely related to Aristotle. Differently than Nussbaum, however, Aristotle uses it to justify inequality among human being. Nussbaum avoids this unequal trend by posing the membership to humanity as the sole precondition for the possession of the basic capabilities. The internal capabilities are the internal ability or capacity to do something. That means that, if there is no external impediment, the individual has the capability insured. The link internal capabilities-external factors, however, is quite nuanced: some internal capabilities are developed with the simple growth of the individual, others, however, needs external factors to be formed. Finally, there are the combined capabilities: combined because they are a combination of the internal capabilities and the favorable external conditions, and/or the absence of external obstacles for the satisfaction of that capability. Nussbaum views human dignity in terms of capabilities as well. The central capabilities are the core of human dignity, and their protection safeguard the possibility of a dignified life.

Nussbaum is particularly worried about conciliating her capability approach, whose list of capabilities give an objectivist perspective, with the issue of pluralism. This is why she declares her list and her findings to be "open and humble", liable to revision and comparison with the contingent situation. Their universality is peculiar in two different ways: first, because it is a universality based on subjective premises, or better, on premises whose objectivity is not total, but it is the maximum objectivity "we can hope for"; second, because it is a "vague" universality, and it can be tuned over the contingent circumstances. Pluralism is defended also by Sen and Nussbaum's position over the fact that, despite their differences, there are some values that can be traced in

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<sup>451</sup> For example see Nussbaum (1987), pp. 59-76

<sup>452</sup> Also Sen has recognized the importance of Aristotle in the capability theory, although nor Sen or Nussbaum follow completely Aristotle: on the contrary, they depart from him in many significant ways (see the third chapter for a deeper examination of this issue).

every culture, internally. This brings into attention the very same definition of culture: culture cannot be something fixed and homogeneous, rather it is a miscellaneous of different streams of thought, often even contrasting with one another. Cultures, further, do not exist separately from each other, rather they tend to influence each other continuously. Finally, respect for pluralism is evident both in taking capabilities, and not functionings, as the appropriate evaluative space, and in the importance that it is given to the freedoms that warrant pluralism, such as freedom of speech, of association, of conscience. In other words, respect for pluralism is not given by perfect neutrality, rather by endorsing those principle that can protect it. It is quite interesting, then, a distinction Nussbaum makes between issues of implementation and issues of justification. In other words, the best way to insure capabilities is through pacific methods, through a persuasion campaign, for instance; implementing capabilities do not justify the use of strength.

As we have said, capabilities are used by Nussbaum in a substantive way, since she gives a list of capabilities that are part of her theory of the good, they are the minimum preconditions for a flourishing and dignified life and the object of a partial<sup>453</sup> theory of social justice.

In the third chapter I have examined this list, and I have stressed how the concept of practical reason and sociability are particularly important, since Nussbaum calls them architectonic capabilities: their presence is the condition that allows the individual to possess the capabilities in a truly human way.

To conclude, the list is supposed to be open and humble, constantly apt to revision, and according to Nussbaum's Neoaristotelian period, it is supposed to be part of the thick and vague conception of the good. The capabilities list is quite demanding, and it needs a robust justificatory apparatus. What are the characteristics of the capabilities of the list? The list is, as said above, humble and open, so that it is apt to changing according to the development of the reflection upon its components. They are, Nussbaum says, incommensurable among each other. Finally, not all the capabilities of the list have to be equalized. What has to be equalized is the individual dignity and the possibility for human flourishing. In order to do that, it will be needed the equality of capability for certain cases, and a level of adequacy for other cases. An example for the first could be that of religious liberty, while for the second the right to a shelter. A problem with assuring the capabilities of the list is that some of them are included in what Rawls calls natural goods, and the

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<sup>453</sup> Partial because, as we have seen in the third chapter, she conceives of a threshold for the capabilities, above which she doesn't formulate any theory on how justice should work.

government may have an hard time to secure them. In this case, Nussbaum argues,<sup>454</sup> we should insure the social bases of these capabilities, in the same way in which Rawls talks about, for example, insuring the social basis of self-respect.

Nussbaum's attempt has been much criticized from a number of different points of view. I have taken into consideration some of these criticisms. Nelson, for instance, moves some of them. We consider capabilities as what people needs for their human flourishing, as the minimum precondition for it. At the same time we say, with Nussbaum, that what is important is the possession of the capabilities, and not their conversion into functionings. These statements, put in practice, raise some issues. One is a problem of stability, the other of justice. The first concentrates on the reason why those people who would choose not to transform the capabilities into functionings would agree that the possession of those capabilities is important. The second concentrates on the fact that to assure those capabilities what is needed for their possession implies for the government a precise use of resources. Governmental resources are financed by taxes. An individual whose human flourishing doesn't imply the conversion of the central capabilities into functioning has necessarily less resources at disposition, although he pays the same amount of taxes.

How to solve the situation? We can answer by recurring to Nussbaum's Neoaristotelian framework, hypothesis theorized by Nelson as well, that implies the use of an objective theory of the good. Then although it is true that the focus is on capabilities, and that the human flourishing of an individual is not diminished by not enacting the relative functioning, it is still true that the central capabilities are the precondition for every human flourishing, the minimum precondition for a theory of the good. Through the Neoaristotelian method, one would agree that the central capabilities can be the object of a vast consensus, thanks to the use of practical reason and the narrative imagination. This opens the road, Nelson objects, to a criticism about the belonging of this theory to a liberal framework. We have seen how Nussbaum defends her liberalism by pointing out the freedom of choice guaranteed by the focus on capabilities, and the fact that she defends liberal elements in her theory of the good.

Nussbaum's methodology and her essentialism, moreover, have been the object of much criticism. Clark,<sup>455</sup> for example, notes how the items of the capabilities list have remained fairly constant through the years, although the list is supposed to be open to an ever-going revision. The list,

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<sup>454</sup> Nussbaum (2000b), p. 81

<sup>455</sup> Clark (2006)

further, is considered to be a Western product, and to take up an issue raised, among others, by Jaggar,<sup>456</sup> it is the product of a decision made without consulting its objects. Nussbaum, however, agrees with the idea that her list is temporary, being open to other opinions and to a more participatory approach<sup>457</sup>. The Neoaristotelian method depicted in the second chapter, moreover, involves the idea of an evaluative inquiry over the way human beings depict themselves, and this involves a trans-cultural operation. The list, finally, has to be considered as an attempt, but that doesn't need to question the methodology behind it.

How can referring to a capabilities list strengthen a theory of human rights? The capabilities list, we have seen, are the minimum precondition for a flourishing and dignified life. Human rights are the minimum precondition put at protection of human dignity and human flourishing, as I have said in the first chapter. The fourth chapter is focused on the correlation between capabilities, in particular the capabilities list, and human rights, in the specific civil and political and economic and social rights. This helps to answer one of Nussbaum questions that I reported at the start of this section. Do these two approaches overlap, or are they complementary? In one sense we could say that they overlap: they are both the minimum precondition for a flourishing and dignified life. They have both a universal<sup>458</sup> claim and they aim at being inspiration for constitutional formulations.<sup>459</sup> Nussbaum maintains, then, that referring to capabilities clarifies better the connection of human rights with human dignity: dignity is made explicit by the ten central capabilities of her list, human rights, protecting capabilities, protect human dignity. In another sense, however, they are complementary: human rights protect capabilities, and capabilities are the foundations of human rights. Moreover, referring to capabilities clarifies the issue of duties: a right implies also a duty to fulfill it. Linking human right to capabilities implies that, where there is a central capability to be implemented, there is a human right protecting it, and there must be a duty to fulfill it. Martha Nussbaum ascribes these duties primarily on governments, but I have shown, in the first chapter, Sen's conclusion to be quite interesting. Sen talks about imperfect obligations, and he locates in the individual the ultimate responsibility holder for fulfilling the duties, although also in a "loose" way, as a citizen of the government elected or through appropriate campaigning.

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<sup>456</sup>Jaggar (2006), p. 314

<sup>457</sup> As suggested by Stewart. Stewart (2001), p. 1192

<sup>458</sup> I have discussed all along, especially in the second and fourth chapter, in which sense we can talk of universalism in Martha Nussbaum, and in which sense we can talk about universal human right, I will come back to it, however, in the next paragraph of the conclusion.

<sup>459</sup> Nussbaum (2011a), p. 62

This is, in short, the essence of the correlation between the two of them. On the one hand, taking capabilities as foundational can solve the problem of the bases of human rights, although it raises some issues, that I have considered in the fourth chapter. On the other hand, the language of rights is important for capabilities, since it gives them normative strength and it is an effective tool for their protection. But I have elaborated these issues further. Linking capabilities and human rights, moreover, implies, according to Sen, a peculiar notion of rights, that he terms the “goal-right system”.<sup>460</sup> It is a conception that considers rights as goal to be pursued. Sen rejects, however, a full consequentialist view: he builds what Alexander calls *broad consequentialism*<sup>461</sup>. A pure consequentialistic approach judges actions from the consequences it creates. In Sen’s case, from the fulfillment of the goals that are the rights. However, Sen says that the consequential link is important, but it cannot be exclusive, other consideration has to enter the field as well. This opens the door to a system in which consequential reasoning can be mixed to deontological issues. I have taken into consideration some possible objections to the consideration of the goal right system. Sen<sup>462</sup> objects to the common opinion that taking rights as goals would result in a pluralism based on intuitionism. His objection is focused on different levels. First, he challenges the idea that we should take for granted that intuitionism is a bad concept, and this is not necessarily true. Second, pluralism and intuitionism are not necessarily linked. We can have pluralism without it. Then Sen<sup>463</sup> argues against a possible criticism about the advantage of considering rights as goals. The advantage relies on the fact, Sen maintains, that this is the only possibility to consider the rights as fundamental, since posing rights as goals would imply an obligation -even if it is an imperfect obligation- on everybody, to maximize the rights, rather than a simple effort in non-violating them. Finally Sen poses a conceptual link between capabilities and rights through the concept of freedom. Rights defend fundamental freedoms, and freedoms are conceptualized through capabilities. This means that rights defend fundamental capabilities. Sen then takes into consideration a possible further objection: how can we say that rights are fundamental and not instrumentally important for the protection of capabilities? We can say that rights do not only protect substantive freedoms, but, being considered as goals, they are conceptualized in terms of freedoms. But also capabilities are conceptualized in this term. Therein lies their fundamental, not just instrumental meaning.<sup>464</sup> Further, we can see why rights can be seen as protecting capabilities. Martha Nussbaum, however, has a different conception of rights: rights are seen as side constraint, that is, they have to be

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<sup>460</sup> Sen (1984a), p. 15

<sup>461</sup> Alexander (2004), p. 6

<sup>462</sup> Sen (1984a), p. 15

<sup>463</sup> Sen (1984a), p. 23

<sup>464</sup> Sen (1984a), p. 23

respected no matter what else society promotes.<sup>465</sup> And yet, Alexander talks about Nussbaum's as a sort of "integrative deontology".<sup>466</sup> Nussbaum allows some place for what she calls "outcome oriented" consideration. One example can be the use of outcome-oriented considerations in the presence of conflicts arisen from within the central capabilities. Moreover, she tries to reconcile deontological and consequence-responsive elements also in considering results, more than procedures, as important. The meter to see whether justice is achieved, she says, is that of outcomes.<sup>467</sup> In practice justice is achieved when all the individuals are insured their entitlements. This is what she calls an "outcome-oriented view".<sup>468</sup> I have argued that Nussbaum's and Sen's position, although starting from opposite points of departure, are not so different from one another. This is the reason why I agree over Sen's conception of the goal-right system. Sen leaves the approach incomplete, and I have suggested to direct it towards a deontological direction, meeting, in this way, Nussbaum's "integrative deontology".

In which sense capabilities are important for the language of human rights? I have analyzed Nussbaum's position. Nussbaum poses the concept of rights in terms of combined capabilities. In this way, she argues,<sup>469</sup> the formality of the notion of rights is overcome: to have a right means to have the substantial, formal and material and, at the same time, freedom to exercise that very same right. Beitz says that capabilities, in a sense, conceptualize human rights, and they specify their content.<sup>470</sup> This, in my opinion, is one way of considering human rights in terms of combined capabilities. This also defines another connection between rights and capabilities, that Beitz individuates in Nussbaum:<sup>471</sup> capabilities outline what is the right aim of human rights. Nussbaum elaborates also another kind of connection between human rights and capabilities. The possession of basic capabilities, intrinsic, as shown in the third chapter, in every human being, entitles to the possession of human rights. In this sense capabilities are, as Beitz says,<sup>472</sup> "reasons for action" of human rights.

Nussbaum maintains, in *Creating Capabilities*, that her capability list cover the same conceptual space as the two generations of human rights, although she doesn't agree on the distinction between first and second generation of human rights, if this distinction implies a ranking reason. Although

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<sup>465</sup> Nussbaum (1997), p. 300

<sup>466</sup> Alexander (2004), p. 10

<sup>467</sup> Nussbaum (2011a), p. 95

<sup>468</sup> Nussbaum (2011a), p. 95

<sup>469</sup> Nussbaum (1997), p. 294

<sup>470</sup> Beitz (2009), p. 63

<sup>471</sup> Beitz (2009), p. 63

<sup>472</sup> Beitz (2009), p. 63

capabilities play such a primary role on her account, the role of human rights is basilar as well: the language of capabilities alone wouldn't be enough to protect human dignity and human flourishing<sup>473</sup>. The language of right is normatively stronger than just referring to capabilities, capabilities clarify the content of human rights, but human rights are determining in conveying the idea of the obligation for the capabilities to be fulfilled. Being so careful to remain within the liberal frame, Nussbaum praises the idea of right also as being closely connected with the idea of choice, and also capabilities, both in Sen and Nussbaum, are related to areas of freedom of choice. Talking about human right, finally, has a more immediate and concrete impact than talking about capabilities alone<sup>474</sup>.

The capabilities approach, further, can help human rights theory also with regards to the idea of universality. Human rights have universal pretences, yet, they are often said to be a Western product. Historically, this can be true: human rights are the expression of what was the manifesto of the French Revolution: freedom, equality and brotherhood. Their elaboration, however, aims at making them universal, at making them able to be agreed upon from many different cultures. Human rights, moreover, are embodied in Conventions that have been widely ratified. It would be difficult, however, to argue over the universality of human rights across time and place. Sen and Martha Nussbaum defend the possibility of universality in a pluralistic world, even though in a moderate way. They acknowledge pluralism and the variety of cultures, but are optimistic on the possibility to find common points among them, and they reflect over the very notion of culture. They contest the idea of culture being a monolithic item, and they observe that there are many streams of thought in it, often even contrasting. Moreover, cultures are not isolate, but they constantly influence each other, and they always have. Anyway, the language of capabilities can help the universality of human rights insofar human rights can be seen as more precise and contingent specifications of universal ideals that are embodied in capabilities.

Nussbaum's capabilities approach can be taken as having a foundational role regarding human rights, as Beitz maintains<sup>475</sup>. The central capabilities of the list are the minimum pre-condition for a flourishing and dignified life. I have quoted Beitz:

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<sup>473</sup> Nussbaum (1997), p. 296

<sup>474</sup> Nussbaum (1997), p. 277

<sup>475</sup> Beitz (2009), p. 63

“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.”<sup>476</sup>

Beitz ascribes Nussbaum’s position as being a naturalistic position over human rights, and he strongly criticizes naturalistic positions in general and Nussbaum’s position in particular. Beitz considers naturalistic positions over human rights those that assimilate the idea of human right to that of natural right, at least in one of the four characteristics he individuates in natural rights. The basilar idea is that human rights are possessed by human being, thanks to some feature that they share just in virtue of their humanness. In this shape, they are the foundation of positive law and of the international doctrine of human rights. In particular, Beitz ascribes to naturalistic theories of human rights four principal characteristics. First: they, being inherent to human beings in virtue of their humanness, do not depend from local morals or regulation, rather they are the meter of judgment for them. Second, they are pre-institutional, they are not shaped by existing institutions. The third and the fourth features pertain to the universality of human rights. Third: human rights are universal insofar they are individual entitlements that prescind from space and time. Fourth: human rights are entitlements human beings possess by being simply human.

Beitz accepts the role of human rights as critical standard for local traditions and custom, but he refuses the idea of human rights, as natural rights, as belonging to a specific normative level. He cites Maritain, that considers human rights as rightful claim that can accept many different specific justifications, pertaining to different and diverse cultures. We can use the capabilities list to justify human rights, and we have seen, in the second and third chapter, Martha Nussbaum’s attempt to justify the list of capabilities through an internalist essentialism, in a trans-cultural way.

Beitz objects strongly to the very same possibility for human rights to be pre-institutional: many human rights are connected conceptually with institution, such as in the example of the right to political participation. Here also referring to the capabilities approach can be useful, in the sense that the issue of pre-institutionality can be taken to referring to the capabilities list, while the human rights can be seen as specifications, attentive to contingency and to the world human beings construct. A similar objection Beitz poses to the idea of human rights being universal in the sense of being unchanged through space and time. Human rights are closely, for the most part, interlinked with the specific time and space they occupy. Also here a possible answer can be the same: the

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<sup>476</sup>Beitz (2009), p. 63

issue of universalism, considered in this way, can be taken on by the capabilities list, rather than on human rights. As far as it regards the idea of human rights pertaining to human being just in virtue of being human, Beitz seems to consider the idea as void of content. Nussbaum considers human rights as justified by every individual possession of the basic capabilities.

Beitz criticizes Martha Nussbaum's approach directly: human rights conceived in a naturalistic way in general and in Nussbaum's way in particular are abstracted from their would-be role in the contemporary practice. In other words, they don't fulfill the function they should as statements, parameter of judgment in the modern discourse. Nussbaum, however, clearly states, in *Creating Capabilities*, that human rights should be considered parameter and issues to be confronted with in national and international practice. The second direct objection Beitz makes to Nussbaum is that human rights conceived in a naturalistic way raise the "problem of contribution".<sup>477</sup> That individual are right-holders in the case of human rights is clear, what it is not clear is the adjudication of who or what has to be the right-bearer. I have already taken this issue in consideration, however, both in this paragraph and in the first and fourth chapter. It is the government who has to fulfill capabilities, hence human rights.<sup>478</sup> When the government cannot fulfill his duties, the international community and the other governments have to take over. Let's not forget, however, Sen's position: since the responsibility of the government, of a democratic government, is ultimately the individual's, individual are the ultimate right-bearers, although they do not all have direct obligation, all have indirect ones. Another point of criticism is the doubt over the fact that what the naturalistic theories holds as justification for human rights cannot really justify all the human rights recognized in human rights practice. As far as Nussbaum's position is concerned, she holds that her capabilities approach cover the field of the so-called first and second generation of human rights. It is true, however, that she doesn't confront with the others human rights. I have chosen to follow her pattern, given also the fact that confronting with human rights belonging to the first and the second generation is a wide enough work for this project. Another issue Beitz takes on is the implausibility of naturalist claims in general and of Nussbaum's in particular. Beitz says, in fact, that it is not plausible, in case of divergence between the international doctrines and the naturalistic positions, to theorize that it is the international doctrine of human rights that should be revised, and not the opposite. Nussbaum could face this issue in two complementary ways. First, the list is humble and open to revision, so that a critical comparison with the international doctrine of human rights could be one way of revising the capabilities list. It is true, however, that this is a contingent

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<sup>477</sup>Beitz (2009), p. 65

<sup>478</sup>Nussbaum (2011a), p. 64

situation, given to the fact that the list is still temporary. In theory, it is true that the items of the list determine which rights are human rights. However, I do not think this is a defect: it is one of the consequences of a justificatory approach of human rights. Second, if we want to give a foundation to human rights, then, of course, the foundational elements will have influence on what can be considered a human rights and what cannot. This can also limit the proliferation of human rights, giving more strength to the rights that can be considered human rights. Nussbaum's criterion to individuate whether a certain right is a human rights is to determine if it covers the items of the capabilities list, and to understand which items pertain to the capabilities list is to understand what can be counted as central to human flourishing according to human nature.<sup>479</sup>

I think that the more challenging criticism Beitz makes is questioning why it should be so. Why we should accept a philosophical foundation to human rights, and then having to deal not only with issues surrounding human rights, but also with the issues arising from the philosophical conceptions that are at the basis of human rights. To answer using Nussbaum's paradigm, we can say that a properly formulated foundation for human rights strengthens the theory, rather than weakening it.

To sum up, capabilities provide conceptual clarity to the idea of human rights, substantiating this idea with a specific content. They give human rights their scope and the motivation to act. To think of a human right as a combined capabilities implies to overcome the nominal and formal idea that risk to be involved in the notion of right. To have the right as a combined capabilities means the fulfillment of the material conditions that help to realize concretely the right, including, but not limiting to, the negative issue of non-impediment. Moreover, the language of capabilities doesn't demand to a Western origin, such as the concept of human right does. Taking the capabilities list as foundational of human rights means to take the burden of proof from the theory of human rights to the capabilities theory, and that is the reason why I took into consideration very carefully the capabilities approach in general and Nussbaum's capabilities approach in particular. The very last part of the dissertation is dedicated to a practical exercise: I have taken into consideration every single human rights considered in the ICCPR and in the ICESCR and reasoned over the possibility of it being based on one of more capabilities contemplated in the list. I have found, I think, a plausible defense of each human right basing it on the capabilities list.

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<sup>479</sup>Beitz (2009), p. 64

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