

## **Considerations of Social Justice: Primary Goods & Functional Capabilities**

Considerations of social justice within liberal frameworks are often bound up with the notion of equality of opportunity. Equality of opportunity within liberal theory is generally discussed as requiring the determination of principles, or procedures to be used in distributing general “means-goods” such as income and wealth in the society. These may be called “means-goods” because they have no intrinsic value. They are means to realising various ends, and they are “general” insofar as they can be used to realise a wide range of possible ends. John Rawls exemplified this by treating the question of distributive justice principally in terms of the distribution of “primary social goods” such as income and wealth.

This understanding of the problem of social justice is theoretically adequate, but too narrow in practice. In theory, Rawls posited that citizens would have developed moral powers (a sense of justice and a capacity to form conception of the good), would view each other as similarly free and equal, and be normal co-operating members of society. In practice, these assumptions regarding citizen capacities are too strong; and have the effect of conflating *poverty* with *disadvantage*.

Building on the work of Amartya Sen and Martha Nussbaum, I argue that prior to, and in addition to questions of general means-goods, the problem of social justice requires attention to the development and maintenance of basic human functional capabilities. The reason for this is that “primary social goods” define a person’s advantage in terms of being “well-off”, rather in terms of “well-being”. To put it briefly, it does not matter how many “means-goods” a person has if that person does not have the functional capability to use these kinds of goods to express their (reasonable) ends.

Rawls posited that democratic citizens were both free and equal. Rawls stated:

Let’s say they are regarded as equal in that they are all regarded as having to the essential minimum degree the moral powers necessary too engage in social co-operation... [T]hat is, since we view society as a fair system of co-operation, the basis of equality is having to the requisite minimum degree the moral and other capacities that enable us to take part fully in the cooperative life of society.<sup>1</sup>

[W]e say that citizens are regarded as free persons in two respects. First, citizens are free in that they conceive of themselves and one another as having the moral power to have a conception of the good... A second respect in which citizens view themselves as free is that they regard themselves as self-authenticating sources of valid claims. That is, they regard themselves as being entitled to make claims on their institutions so as to advance their conceptions of the good...<sup>2</sup>

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<sup>1</sup> John Rawls, Justice as Fairness: A Restatement (Cambridge, Massachusetts: Harvard University Press, 2001), 20.

<sup>2</sup> Ibid., 21-23.

The freedom and equality of persons in Rawlsian thought is premised on the assertion that citizens in a democratic and plural society would have developed certain cognitive and moral capacities, which Rawls described as “moral powers.” Having asserted the moral powers and the capacity to be fully cooperating members of society, Rawls then advanced “primary goods” as means to citizens’ reasonable and rational conceptions of the good.

Rawls posited that citizens required the means to achieve their ends, and he argued that certain all-purpose means (primary goods) could reasonably assure this. Rawls defined primary goods as defined as:

...things which it is supposed a rational man [or woman] wants whatever else he [or she] wants. Regardless of what an individual's rational plans are in detail, it is assumed that there are various things which he [or she] would prefer more of rather than less.<sup>3</sup>

Specifically, Rawls identified rights, liberties, opportunities, power, income, wealth and the social bases self-respect as primary goods. People's basic needs were also assumed to be encompassed by primary goods. The use and understanding of primary goods is straightforward with the exception of the social bases of self-respect, which I do not consider here.

If citizens differ substantially concerning their abilities to convert Rawls’s means (primary goods) into their ends (conceptions of the good), then considerations of social justice require more than an account of the means to freedom. They will also require a consideration of the extent of freedom, the extent to which citizens are able to convert their means into their ends. This leads one to consider freedom and equality and “advantage” in different ways than Rawls did.

Nussbaum in particular has argued that the capability approach and the Rawlsian approach to questions of social justice have much in common. She, however, argues that Rawls contractarianism in concert with his understandings of advantage and the concept of citizens are problematic.

Nussbaum persuasively argues that justice ought to fulfil basic human entitlements, which arise from dignity, not proceduralism. Further, she argues that the basis of political stability is dignity and socialability, not mutual advantage. She adds that people are dependent and interdependent in order to account for an ethic of care in considerations of social justice. Thus, Nussbaum sees four basic problems with Rawls' approach to social justice:

- 1) The account of primary social goods emphasises wealth instead of advantage.
- 2) The political conception of the person is presented as "normal" and requires high degrees of rationality and capability, which are assumed rather than developed.

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<sup>3</sup> John Rawls *A Theory of Justice* (Cambridge, Massachusetts: Harvard University Press, 1971), 92.

- 3) The parties in the original position are considered as having roughly equal powers and abilities.
- 4) The purpose of social cooperation is to pursue mutual advantage.<sup>4</sup>

This paper proposes to consider Nussbaum's criticisms of Rawls' theory and suggests an approach to questions of social justice that combines both the primary goods approach (Rawls) and the capability approach (Nussbaum). We begin by considering the four main criticisms of Justice as Fairness (Rawls' theory) outlined by Nussbaum and indicated above.

*The difficulty of Primary social Goods as Indicators of Advantage*

Rawls used primary goods in a number of ways. One of them was as an indicator of a person's advantage. After examining how Rawls used primary goods as an indicator of one's advantage, we find that the capability approach better indicates one's advantage than does the primary goods approach. If advantage is easier seen, then so too will be disadvantage. Once disadvantaged positions are identified, it becomes possible to direct public policy to ameliorate many of the disadvantages.

Rawls argued that primary goods are means to differing ends. Rawls argued that once the least advantaged position is identified "only ordinal judgements of well-being are required from then on."<sup>5</sup> Society's institutions are to be judged from this position, and changes in the basic structure (society's main institutions) can be made if required to improve the position of the least well-off. Rawls argued that: "... comparisons are to be made in terms of expectations of primary social goods."<sup>6</sup>

A person's bundle of primary goods is to be used to express one's (rational and reasonable) vision of the good. Through the work of Amartya Sen, however, we find that any distribution of means-goods will not lead to fair life chances for those with low levels of functional capability. The reason for this is that people minimally require the functional capabilities to *convert* the means-goods into ends.

Amartya Sen asserts that there is a "connection between what a person regards as valuable and the value of the person's well-being".<sup>7</sup> Since peoples' well-being differs, there is a problem with Rawls' primary goods approach to issues of social justice. People's actual needs in their particular lives are so diverse that the primary goods approach will not be the best way to judge their relative advantages.

Rawls understood *primary goods* to be *means* to differing ends. The more "means" one has, the more likely one will be successful in pursuing one's goals. This is only true,

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<sup>4</sup> Martha Nussbaum Frontiers of Justice: Disability, Nationality, Species Membership (Cambridge mass: Belknap Press of Harvard up, 2006), 64-66.

<sup>5</sup> Rawls, A Theory of Justice, 91.

<sup>6</sup> Ibid., 92.

<sup>7</sup> Amartya Sen "Equality of what", in Robert E. Goodin and Philip Pettit (editors), Contemporary Political Philosophy: An Anthology (Oxford: Blackwell Publishers, 1997 pp 476-485), 483.

however, if one can, in fact, make use of the "means." If one has low levels of functional capability, one may not be able to make use of the means and, therefore, not gain advantages because of them.

Taking "advantage" to mean "beneficial situation", Sen argues that Rawls understood "primary goods" to be the expression of favourable circumstances. Sen inverts this and asserts that favourable circumstances are comprehensible only in reference to a person's functional capabilities. Rawls argued that a person's good could be pursued if that person had access to primary goods, which were to act as the means to the person's ends. Sen's point is that the same means (primary goods) cannot act to help everyone achieve their ends because of the diversity of people and their ends.

Personal variations must be considered in accounts of well-being because even those of us who have no disabilities whatsoever will require different things. Thus, given the multiplicity of ways people can vary from one another in converting (means) goods into basic human functionings, the primary goods approach is too narrow in its focus for interpersonal variations.

Two types of freedom are relevant to discussions of well-being. Sen explains that:

[T]he well-being aspect of a person calls for dual accounting—in terms, respectively, of freedom and achievement. The significance of the distinction relates to the agency aspect of a person...Well-being freedom...concentrates on a person's capability to have various functioning vectors and enjoy the corresponding well-being achievements...A person's 'agency freedom' refers to what the person is free to do and achieve in pursuit of whatever goals or values he or she regards as important.<sup>8</sup>

For Sen, '*well-being*' is to indicate a person's relative 'advantage'; it indicates *capability*, what a person could pursue and achieve. *Agency* refers to the freedom to pursue one's specific ends (*functionings*).

Freedom is represented by a person's capability set, not simply the primary goods he or she holds. Primary goods do not convert into capabilities equally for all.<sup>9</sup> Sen states: "It is important to see the distinction both (1) between freedom and the means to freedom, and (2) between freedom and achievement."<sup>10</sup> A consideration of one's means cannot always identify whether one is advantaged or not, and simply re-distributing wealth may not raise the level of well-being for disadvantaged persons.

### *The Political Conception of the Person*

Rawls assumed citizens would be roughly equal in their capacities to realise their goods. This assumption is too strong in practice. If citizens differ substantially in regard to their

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<sup>8</sup> Amartya Sen "Justice: Means versus Freedoms" in *Philosophy and Public Affairs* Volume 19, number 2. Spring 1990, pp-111-121, 112-116.

<sup>9</sup> *Ibid.*, 203

<sup>10</sup> *Ibid.*, 117.

abilities to convert Rawls's means (primary goods) into their ends (conceptions of the good), then considerations of social justice require more than an account of the means to freedom. A consideration of the extent of freedom; the extent to which citizens are able to convert their means into their ends, is what is required.

Rawls's account of freedom was generalised and abstract. Citizens were to have equal liberties so that they could express their rational and reasonable goods. Rawls account of equality is less abstract; it is concerned with raising the expectations of society's least advantaged members and establishing a fair equality of opportunity. The problem is that without considering freedom relative to concrete people's cognitive and other capacities, society's least advantaged members may not be properly identified in practice, and this would negate a "fair equality of opportunity". That is, Rawls assumed that the least advantaged would be those with lower levels of income and wealth (two primary goods). This, however, conflates "poverty" and "disadvantage". We must employ a broader conception of disadvantage because we cannot assume that citizens will have the requisite capacities to convert "means" (Rawls's primary goods) into their ends (conceptions of the good). We must consider the real differences among people in regards to their capacities to be free and equal. By focusing public policy on the development of capacities relative to freedom, equality, and agent-specific ends—the practice of democratic politics would be much improved, as it would identify society's least advantaged members, and attempt to establish a fair equality of opportunity.

Rawls asserted that people have two moral powers. The first is that one has the capacity for a sense of justice. The second is that one has the capacity to form a conception of the good.<sup>11</sup> The exercise of moral capacities requires a number of related capacities. People must be capable of rational thought and judgement. Individuals must be able to form a conception of the good, which can be interpreted by a reasonable doctrine. Finally, people are assumed able and willing to co-operate with other members of their society.<sup>12</sup> Rawls argued that citizens would be "reasonable" in two senses. First, citizens would have reasonable comprehensive doctrines. This is to say, they would have doctrines that would be publicly justifiable in light of the 'principles of justice'. Second, Rawls assumed citizens would be "reasonable". Citizens would be reasonable because they accept the 'principles of justice' as fair, and that those principles shape and constrain their public activities in a number of ways.

Reasonable citizens, Rawls posited, would be ready to engage in fair terms of co-operation. They would also recognise that some comprehensive doctrines could not be publicly justified. Citizens would also want to be recognised as normal and co-operating members of society. Finally, Rawls asserted that citizens would have a reasonable moral psychology.<sup>13</sup>

The positing of citizens represented as fully capable in the hypothetical "original position" allowed Rawls to (generally) consider "advantage" in terms of the primary

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<sup>11</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 81.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, 82.

social goods a citizen held, such as income and wealth. This results in poverty and disadvantage being conflated at the "constitutional" stage of the argument. Rawls disagreed and argued that after the constitutional essentials and the principles of justice are rendered, philosophy would give way to politics. That is, further considerations regarding the amelioration of disadvantaged positions are to occur at the "legislative" stage where citizens are to vet their reasonable claims. At the legislative level, reasonable citizens would likely see the development of functional capabilities in concert with the fair distribution of primary social goods as a reasonable way to establish fair life chances.

Nussbaum finds the consideration of capability at the legislative stage problematic because it indicates that those below the normal range of capability are not represented at the constitutional stage. That is, those with low levels of capability are not party to the selection of the principles of justice.

*Parties in the original position as having roughly equal powers and abilities*

In the spirit of the contract tradition, Rawls began his account of autonomy by imagining an "original position", which was a hypothetical device designed to focus reflection on what the *representatives* of free, rational and equal citizens would accept as principles of justice to guide their society. The "veil of ignorance" functions to hide the representatives' knowledge of the particular circumstances of the lives of those they represent. Hypothetical representatives behind the "veil of ignorance" (to help model impartiality) are thus understood as unbiased in their deliberations regarding the just principles required to regulate a free society. Rawls reasoned that the representatives of free, rational and equal citizens would choose principles of justice that guarantee their freedom and seek to maximise the advantage of the least well off, lest it be those they are attempting to represent.

Rawls originally characterised the original position as a situation of fair bargaining.<sup>14</sup> In his later writings, Rawls shifted his understanding of the original position from the idea of a fair bargaining situation to the idea of a fair model of representation. This makes imagining the original position in non-competitive terms more plausible. He argued that the original position should be understood as an heuristic, rational exercise by reasonable representatives. Actual persons become the rational deliberators when they put the "veil" in front of their own eyes to check the fairness of the deliberations. For Rawls, it was essential that a distinction be made between those in the original position (hypothetical representatives) and actual people, (what some have called "selves"). We must also be clear on the purpose of the original position.

Some early critiques of Justice as Fairness focused on the original position and the supposed Rawlsian understanding of the self attached to it. In particular, Michael Sandel argued that Rawls' conception of the person was metaphysically flawed. People in the original position were "unencumbered selves" who appeared to be constituted prior to their significant attachments (which the "veil of ignorance" hides from them). Rawls, however, was not offering a conception of the person. Rather, he was generating a view

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<sup>14</sup> Rawls, A Theory of Justice, 139.

of moral autonomy—he was attempting to illustrate what rational and reasonable representatives of democratic citizens (understood as free and equal), would accept as fair if they were unbiased in their deliberations. This is only a very specific and partial portrait of the person—it is persons *qua* generalised citizens who are represented in the original position.

The original position is meant to model fair representation among citizens characterised as free, equal, and morally autonomous. The original position generates a view of autonomy based on Kant's formulation. Rawls intended the original position to be concerned with situating free and equal persons so they might arrive at a fair agreement regarding how to regulate society's main institutions what he called the "basic structure". Rawls explained that: "... the significance of the original position lies in the fact that it is a device of representation or, alternatively, a thought-experiment for the purpose of public and self-clarification."<sup>15</sup> Rawls then, thought of the original position as being both hypothetical and non-historical. A "reasonable moral psychology" was asserted to make agreement possible.<sup>16</sup> This agreement is on how to regulate the basic structure and is between artificial persons (hypothetical citizen representatives) modelling morally autonomous citizens, not actual persons.<sup>17</sup>

Nussbaum's conception of the person, in contrast to Rawls, is expressly Aristotelian. We are social and political animals from the start—not scattered individuals. We care about the good of others. Following Kant, Rawls defined people in reference to rationality. Nussbaum rejects this. We ought to understand the requirements of social justice in relation to human dignity. Rationality is part of humanity, but not the only aspect of us that allows for human functioning.<sup>18</sup> Nussbaum's conception of the person is one that says human beings are social, rational, needy, and entitled to dignity.

Nussbaum argues that an ethic of care must enter into considerations of social justice because many people do not fit into so-called normal categories, nor is any individual independent for their entire life. Everyone has times in their lives where they are asymmetrically dependent on others. Some are always so. Care is not a single capability—it involves many. What constitutes good care is related to enabling capabilities required to live a dignified life.<sup>19</sup>

Nussbaum finds the original position problematic on two counts. First, is the idea of the generalised citizen conceived as normal and co-operating. Second, is the idea of mutual advantage. In terms of the conception of the person, Nussbaum persuasively argues that the free, equal, and independent idea of the citizen that Rawls presents is problematic because it appears to leave a significant number of people unrepresented in the deliberation of and agreement on the principles of justice.

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<sup>15</sup> Rawls, *Justice as Fairness: A Restatement*, 17.

<sup>16</sup> *Ibid.*, 16-18.

<sup>17</sup> *Ibid.*, 133.

<sup>18</sup> Nussbaum *Frontiers of Justice*, 159.

<sup>19</sup> *Ibid.*, 168.

In alternative, Nussbaum argues that we should abandon social contract arguments in favour of starting points based in a natural law approach, which she argues yields the idea of human entitlements—which is how she conceives of functional capabilities.

*Basis of social cooperation is to pursue mutual advantage is problematic*

Rawls understood the circumstances of justice along Humean lines, but also in reference to the conditions, which gave rise to modern democracies. The 'objective circumstances' of justice are:

[M]oderate scarcity and the necessity of social cooperation for all to have a decent standard of life. Also especially important are the circumstances that reflect the fact that in a modern democratic society citizens affirm different, and indeed incommensurable and irreconcilable, though reasonable, comprehensive doctrines in light of which they understand their conceptions of the good.<sup>20</sup>

Mutual advantage is central to Rawls' notion of contract. Nussbaum wants to use the idea of social cooperation, but argues it must be moralised and socialised. This is because she is concerned for those who may not be capable contributing, or of being 'productive'.

Nussbaum then, does not think the point of social cooperation can merely be mutual advantage. She requires a broader conception of the person, one that includes the idea that some may not be productive, but still ought to be included in considerations of justice. Her conception of the person is one that says we are naturally social, dependent, and generally capable of reason. Some will be less capable than others, but all human beings, as a basic consideration of social justice, are entitled to a dignified life. Nussbaum states:

We do not have to win the respect of others by being productive. We have a claim to support in the dignity of our human need itself [which is social]. Society is held together by a wide range of attachments and concerns, only some of which concern productivity. Productivity is necessary, and even good; but it is not the main end of social life.<sup>21</sup>

[T]he bases of social cooperation [are seen] as complex and multiple, including love, respect for humanity, and the passion for justice, as well as the search for advantage. Its political conception of the person holds that human beings are vulnerable temporal creatures, both capable and needy, disabled in many different ways...<sup>22</sup>

A central difference between Rawls and Nussbaum is that Nussbaum accounts for care as a "primary social entitlement". Rawls' presentation of citizens as "normal cooperating members of society over a complete life" is problematic because some human beings will never be this, and all human beings have periods in their lives when they require

<sup>20</sup> Rawls, *Justice as Fairness: A Restatement*, 84.

<sup>21</sup> Nussbaum *Frontiers of Justice*, 160.

<sup>22</sup> *Ibid.*, 221.



asymmetrical care. Thus, Rawls would appear to have left out significant portions of the known population in considerations of justice.<sup>23</sup>

### *Combing the Approaches*

The capability theorists have made persuasive arguments regarding the problems with using "primary social goods" as the sole means to social justice. Primary goods emphasise how well-off a person is in relation to her fellows. This becomes problematic because it has the effect of conflating poverty with broader category of disadvantage. One cannot assume that primary goods alone ameliorate disadvantages. Primary goods are understood as all-purpose means, but if one does not have the capability to convert these means into their ends, then one's well-being will not be increased by increasing one's bundle of primary goods. This does not mean primary goods are unhelpful in considerations of social justice, it rather indicates that they cannot, by themselves, increase the well-being of those who do not have the functional capabilities necessary to convert these general means into their ends (conceptions of the good).

Rawls attempted to cover off this difficulty by positing that citizens were to be understood as "normal cooperating members of society over a complete life". This assumption allowed Rawls to posit that primary social goods would act as general all-purpose means because he was assuming that citizens had the necessary functional capabilities to convert these means into their ends. In particular, Rawls assumed that citizens would have developed their two moral powers (have a sense of justice and the ability to form and revise a conception of the good). The difficulty is thus a practical, not a theoretical one. In practice, one cannot assume that all citizens fall within the so-called "normal range". It is simply empirically untenable to argue that all citizens have adequate capability development. This further indicates that primary goods, in practice, cannot always satisfy the goals of social justice.

*Instead of positing that representatives in the original position represent citizens understood as fully capable, equal and free, why not simply assert that these hypothetical representatives are to represent the **known range** of human beings (rather than the "normal" range) in a given society?* The 'veil of ignorance' would force the representatives to choose 'principles of justice' that maximise the position of the least advantaged; lest it be those they represent. This need not change the two principles of justice. Rawls stated:

[T]he first principle [of justice] covering the equal basic rights and liberties may easily be preceded by a lexically prior principle requiring that citizen's basic needs be met, at least insofar as their being met is necessary for citizens to understand and to be able fruitfully to exercise those rights and liberties. Certainly, any such principle must be assumed in applying the first principle.<sup>24</sup>

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<sup>23</sup> *Ibid.*, 178.

<sup>24</sup> Rawls, *Political Liberalism*, 7.

This prior principle of needs can be understood as principle of human entitlements. In line with capability theory, we might further argue that this principle of human entitlements—those things required to live a dignified human life, is best understood as a principle of functional capabilities.

Thus prior to, and in addition to, the fair distribution of primary social goods would be a principle or set of principles designed at the 'constitutional stage' of the argument that directs public policy to the development and maintenance of functional capabilities.

At the 'legislative stage' of the argument, the veil ignorance no longer functions to hide knowledge of those represented in the original position. That is, we would know what normal levels of capability were in our society, and we could direct public policy to raise the positions of least advantaged by developing the functional capacity of the least advantaged in the name of social justice. Once persons had adequate levels of functional capability, they would be able to convert primary social goods into the realisation of their reasonable and rational ends.

Nussbaum has developed an open-ended list of basic functional capabilities, which she argues satisfy the requirements of a dignified life. The list is as follows:

- Life.* Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.
- Bodily health.* Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.
- Bodily integrity.* Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and choice in matters of reproduction.
- Senses, Imagination, and thought.* Being able to use the senses, to imagine, think, and reason—and to do these things in a 'truly human' way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and avoid non-beneficial pain.
- Emotions.* Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)

*Practical reason.* Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (this entails protection for the liberty of conscience and religious observance.) Being able to live with and toward others, to recognise and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)

Having social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of non-discrimination on the basis race, sexual orientation, ethnicity, caste, religion, national origin.

*Other species.* Being able to live with concern for in relation to animals, plants and the world of nature.

*Play.* Being able to laugh, to play, to enjoy recreational activities.

*Control over one's environment*

*Political.* Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association.

*Material.* Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.<sup>25</sup>

Recall that Rawls' principles of justice were to be chosen by hypothetical representatives of citizens from among a list of possible contenders. The same could be done with various lists of functional capabilities, such as Nussbaum's above.

Thus, some changes to Rawls' original position could yield an account of social justice, which sees the capability and primary goods approaches combined. Instead having the representatives in the original position merely represent the "normal range" of citizens, they ought to represent the known range. Thus, the 'veil of ignorance' would hide two facts from the representatives to ensure as far as possible, unbiased reasoning. Those two facts would be the socio-economic positions of those they represent (Rawls also hides this from the representatives), and the level of functional capability of those they represent (Rawls assumed citizens to be free, equal and fully capable).

Since Rawls agreed that, "...basic capabilities are of first importance and that the use of primary goods is always to be assessed in light of assumptions about those capabilities."<sup>26</sup> And that Rawls had stated that: "[T]he first principle [of justice] covering the equal basic rights and liberties may easily be preceded by a lexically prior principle

<sup>25</sup> Nussbaum *Frontiers of Justice*, 76-78

<sup>26</sup> Rawls, *Political Liberalism*, 183.

requiring that citizen's basic needs be met".<sup>27</sup> It would appear that there is room within the Rawlsian framework for a principle of functional capabilities.

Clearly, Rawls had preferred that capability issues be dealt with at the 'legislative stage'<sup>28</sup>, but the rationale for this is less than clear—especially given his statements above. One of Nussbaum's concerns was that the original position did not represent all those who would become the subjects of social justice. Our adjustments to the original position appear to satisfy this concern. Indeed, Nussbaum would have us view her capability list as one of constitutional guarantees,<sup>29</sup> so it makes sense to consider alternative lists of these at the 'constitutional' stage of the argument. In addition, there appears to be no necessary reason why the rationale (social cooperation as good) in the original position could not be understood in terms of human socialability and dignity, in addition to mutual advantage.

People may agree to a social contract- to cooperate, for different reasons, or for a combination of reasons. Many may still view mutual advantage as the reason for consenting to the social contract, for agreeing that the Rawlsian principles of justice and the prior principle of functional capability are fair. Others, particularly those with low levels of functional capability, may agree to the same principles because they recognise they need the care of others to live a dignified life. Still others may consent to the hypothetical agreement because they recognise they have had, or will have periods in their lives when they are productive (and thus view the cognitive agreement as a fair way to pursue mutual advantage), and have had, or will have periods in their lives when they require the assistance of others and may not have anything to offer in return (and thus view the agreement in the original position as fair from this perspective).

A socially just democracy ought to ensure, as far as possible, that all citizens will be capable of expressing their reasonable goals. It should ensure the basic *needs* of societal members are met; it ought to fairly distribute *primary goods*, and it should seek to ensure that as many people as possible have the *functional capabilities* necessary to convert these general means into their meaningful goals.

That is, it remains desirable for primary goods to be distributed through the institutions of the basic structure in the ways Rawls indicated. This is because primary goods will act as means to the meaningful goals for many, and improve the position of disadvantaged members of society by minimally making them better-off in an economic sense. The development of functional capabilities would enable more people to use primary goods as means to their meaningful goals, even if Sen is correct and primary goods do not act as the means to everyone's significant ends.

By placing the debate over the desirability and choice of basic functional capabilities at the constitutional stage of the argument, functional capabilities have a more secure status free from the political preferences of those in power who may be ready to deny them for

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<sup>27</sup> *Ibid.*, 7.

<sup>28</sup> Rawls, *Justice as Fairness: A Restatement*, 173.

<sup>29</sup> Nussbaum *Frontiers of Justice*, 155.

economic reasons. There is no reason why continuing debates regarding which capabilities are most urgent, or what levels of them are desirable could not occur through institutions of the basic structure.

### *Concluding Remarks*

It must be noted that this essay does not address all of Nussbaum's concerns with the Rawlsian project. In particular, Nussbaum has argued that Rawls' contractarianism ought to be abandoned in favour of natural law approach, and considerations of social justice must be extended internationally, to the animal world, and to the natural environment. Though space does not permit an adequate address to all these points, I should like to say a word about the practical difficulties of this expanded approach.

In considering Nussbaum's list of capabilities, one sees they are rather specific to liberal democracies, not to human societies generally. Nussbaum insists that the list is revisable, but neglects to indicate where the revisions might take place. We might suspect that the list may grow, but not shrink. Nussbaum argues that a dignified human life is not possible without the capabilities she indicates above. The practical difficulties are twofold.

First, contrary to Nussbaum's protestations,<sup>30</sup> the list does not capture the range of pluralism in the world. It would appear to offer a rationale for a particularly dangerous type of moral imperialism. Instead of exporting favoured lists of capabilities to foreign cultures, perhaps it is appropriate for them to develop their own.

Second, grounding arguments for basic capabilities in natural law is helpful in developing an account of moral rights. In practice, moral rights have limited force unless they are also political rights. Consider, for example, the extensive list of so-called human rights passed by the United Nations over one half century ago. The most cursory of glances across the globe clearly shows that these "human rights" are trampled on at least as much as they are supported. Indeed, they are only supported where they are also political or social rights.

A political right is backed up by a political power and in the case of most democracies, constitutional guarantees. Recall that Nussbaum views her list of capabilities as constitutional guarantees. That is, she is attempting to support the moral entitlements she articulates with political power. We may view capabilities as moral entitlements, but their realisation requires political will.

Capabilities are understood as basic human entitlements. Nussbaum argues that a natural law approach is helpful in identifying these. The difficulty is that asserting moral entitlements does not lead to human dignity (however conceived) unless these 'entitlements' are thoroughly supported by political agreements supported by political will. That is, a natural law approach is helpful in articulating moral rights, but the social contract approach provides better guarantees for advancing and upholding political rights. If the concern is to actually advance a fair equality of opportunity, which I have argued

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<sup>30</sup> *Ibid.*, 80.

requires the development and maintenance of functional capabilities, then this would be better assured by a social contract, rather than a natural law approach to social justice.

Similarly, we can extend this line of thought to Nussbaum's considerations of our 'animal friends' and the natural environment. We may posit that it is morally wrong to cause both harm to animals and the environment. But what is the penalty for acting in ways that cause harm to these? The answer, of course, depends on where we are and the laws of that place. The moral intuition that it is wrong to cause harm to animals only has force (as opposed to persuasion) if it is supported by law and political will, and social practice. Again, we find that a natural law approach is helpful in articulating moral ideas, but to have effect, these must be supported by a political power. The same can be said of activities effecting the natural environment.

Finally, internationally, Nussbaum argues that states are viewed (by Rawls) as analogous to moral persons, roughly equal and in a state of nature relative to one another. States are further characterised as self-sufficient. None of these assumptions appears to adequately characterise the international arena.

In alternative, Nussbaum proposes to develop a different account of the purpose of social cooperation. Reason and sociability are combined with the idea of a common good. Nussbaum argues people have a 'moral intelligence' that instructs human beings to view each other as ethical and needy beings entitled to equal dignity. Nussbaum states, "[C]ommon life must do something for us all, fulfilling needs up to a point at which human dignity is not undermined by hunger, or violent assault, or unequal treatment in the political realm."<sup>31</sup> Nussbaum articulates several principles to guide our thinking about what human dignity requires internationally. These may be understood as helpful in terms of developing moral insights and guidelines, but again, we must conclude that they require political will.

There are especially difficult problems here. Nussbaum argues that national sovereignty should be respected. If a country is arbitrarily harming its citizens or subjects, do others have the moral responsibility to intervene? What if a country fails to ensure human dignity along lines Nussbaum indicates; do other countries intervene? Must all regimes be democratic? She adds wealthy nations owe something to the poor. She asserts multinational corporations have the responsibility of promoting capabilities in the places they operate.<sup>32</sup> Many of these moral assertions would be rejected from many points of view. It would seem in terms of capability theory the concept 'global justice' is both under-developed and especially controversial.

Though I am not convinced by either Rawls or Nussbaum in regards to global justice, I think they both have much to recommend to plural, democratic societies. In broad terms, democracy entails the freedom and equality of citizens. Both Rawls and Nussbaum make extensive contributions to considerations of what democratic freedom and equality mean and require to be realised. I have argued that the best away to advance justice as fairness

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<sup>31</sup> *Ibid.*, 274.

<sup>32</sup> *Ibid.*, 315-322.

in practice and to realise the equality of opportunity entailed, is to combine the primary goods and functional capability approaches under a Rawlsian social contract, where people would accept the fairness of the hypothetical agreement for reasons of mutual advantage and mutual dependence.