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Capabilities, Entitlements, Rights: Supplementation and Critique

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Abstract Capabilities are closely related to human rights. Capabilities are important human entitlements, inherent in the idea of basic social justice, and can be viewed as one species of a human rights approach. This paper explores this relationship, expanding on earlier publications, notably Capabilities and Human Rights (1997), Women and Human Development (2000), Capabilities as Fundamental Entitlements (2003), and Frontiers of Justice (2005). Capabilities are complementary to and augment, rather than competing with, human rights. Capabilities can supplement the language of rights in clarifying the basic concept of human rights, by emphasizing the material and social aspect of all rights and the need for government action to protect and secure all rights. They also ground entitlements in the lives of ordinary people, without tying them down to a specific cultural context. Human rights can also supplement the language of capabilities. Human rights makes clear that the idea of capabilities is not an optional entitlement, but an urgent demand that should not be ignored nor compromised in pursuit of other objectives such as expansion of aggregate wealth. Human rights have gained support and endorsement the world over, and the idea of rights has the capacity to mobilize political action.

Key words: Human rights, Capabilities, Justice

Capabilities and the language of human rights

Ten ‘central capabilities,’ I have argued, are important human entitlements, inherent in the idea of basic social justice (Nussbaum, 2000, 2003, 2005). My capabilities list includes many of the entitlements that are also stressed in the human rights movement: political liberties, the freedom of association, the free choice of occupation, and a variety of economic and social rights. And a list of capabilities, like a list of human rights, supplies a moral and humanly rich set of goals for development, in place of the focus on Gross Domestic Product per capita as the single important development goal.

Capabilities, as I understand them, clearly have a very close relationship to human rights, as understood in contemporary international discussions. In
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effect, the capabilities on my list cover the terrain covered by both the so-called ‘first-generation rights’ (political and civil liberties) and the so-called second-generation rights (economic and social rights). And they play a similar role, providing both a basis for cross-cultural comparison and the theoretical underpinning for basic constitutional principles.

Both Sen and I connect the capabilities approach (CA) closely to the idea of human rights (see Sen, 2004). In both Women and Human Development and Frontiers of Justice, I have described the relationship between the two ideas at some length (Nussbaum, 2000, ch. 1; 2005, see also Nussbaum, 1997), and I have tried to show how my version of the CA responds to some criticisms frequently made of human rights approaches. For example, the human rights approach had frequently been criticized by feminists for being male-centered, and for not including as fundamental entitlements some abilities and opportunities that are fundamental to women in their struggle for sex equality. They proposed adding to international rights documents such rights as the right to bodily integrity, the right to be free from violence in the home and from sexual harassment in the workplace.1 My list of capabilities explicitly incorporates that proposal. (Sen’s more informal discussion of specific capabilities does so implicitly.) More needs to be done, however, to explain the theoretical reasons for supplementing the language of human rights with the language of capabilities. The aim of the present paper is to clarify the relationship further, in ways that go beyond the analysis offered in my earlier article on the topic (Nussbaum, 1997).

I view (my version of) the CA as one species of a human rights approach. It supplements those approaches in several useful ways. It also differs from some (other) versions of such an approach, and offers a useful critique of those versions. In some ways, I shall argue, it thus offers significant advantages over all (other) versions. The relationship between capabilities and human rights is, then, one of inclusion—the CA is a type of human rights approach—but also one of both supplementation and critique.

Supplementation: clarity about the basic notions

The idea of human rights is by no means a crystal clear idea (see also Sen, 2004). Rights have been understood in many different ways, and difficult theoretical questions are frequently obscured by the use of rights language, which can give the illusion of agreement where there is deep philosophical disagreement. People differ about what the basis of a rights claim is: rationality, sentience, and mere life have all had their defenders. They differ, too, about whether rights are prepolitical or artifacts of laws and institutions. The CA, in my version, has the advantage of taking clear positions on these disputed issues, while stating clearly what the motivating concerns are and what the goal is.

In my two books about the CA, I argue that the ten central capabilities are fundamental entitlements inherent in the very idea of minimum social
justice, or a life worthy of human dignity (Nussbaum, 2000, 2005: see also Nussbaum, 2003). Where humans are concerned, the basis of these entitlements lies not in rationality, nor in any other specific human property, but, rather, in the bare fact of being a living human being: being born from human parents, and having a minimal level of agency or capacity for activity. That is enough to give a human being a dignity that is equal to that of every other human being (Nussbaum, 2008). Thus a person in a persistent vegetative state does not have these entitlements, nor an anencephalic child. But human beings with high levels of mental retardation, unable to use language, unable to move, and so forth, do have them, provided they have some degree of active functioning or striving. In this way, my approach differs from most human rights approaches, which, historically, have grounded entitlements in the possession of rationality and have excluded human beings with severe mental disabilities (Nussbaum, 2005, 2008).

Nor are human beings the only creatures with fundamental entitlements, according to me: I argue that all sentient beings, at least, have entitlements to the basic conditions of a life according to the dignity of their species (Nussbaum, 2005). So human rights are just one species of rights, and all animals have rights of some sort. Here the CA departs radically from almost all human rights approaches, where the accent is firmly on human.

The capabilities on my list are what I call combined capabilities, by which I mean the internal preparation for action and choice, plus circumstances that make it possible to exercise that function. For example, the capability of free speech requires not only the ability to speak (that would be an internal capability, cultivated through development and education), but also the actual political and material circumstances in which that ability can be used. Governments do not support the capability of free speech, in the sense required by my list, if they educate people to be eloquent speakers but then deny them the political right to speak freely in public.

Of course human beings have all sorts of capabilities, meaning abilities or opportunities to act and choose. The items on my list, however, are the result of an evaluative argument that asks the question: ‘What opportunities are entailed by the idea of a life worthy of human dignity?’ The approach, then, does not read capabilities off from a factual observation of human nature as it is. Many capacities inherent in our nature are bad (e.g. the capacity for cruelty); and many are too trivial to be inherent in the idea of a life worthy of human dignity. My approach, then, does not value capabilities as such, or freedom as such. Some freedoms or opportunities to act are good and some bad, some important and some trivial (Nussbaum, 2003).²

In my view, these central entitlements are prepolitical, belonging to people independently of and prior to membership in a state; and they generate constraints that political institutions must meet, if they are to be even minimally just. In other words, they belong to humans just on account of their human dignity, and would be there even if there were no political organization at all, although no doubt they would not be secured to people. The CA in this way takes issue with those human rights approaches that consider
rights to be an artifact of laws and institutions (see also Sen, 2004). In the absence of a world state (a goal that I do not support), we can speak of duties to secure the capabilities to everyone in the world only if we do think of them as prepolitical in this way. Approaches that make all entitlements the artifact of political organization have a very difficult time justifying redistribution from richer to poorer nations. The CA, then, is like a type of human rights approach that sees human rights as prepolitical, inherent in people’s very humanity. This has been overwhelmingly the most common type of human rights theory.

Entitlements, in my view, are correlative with duties: if people have entitlements, then there is a duty to secure them, even if it is difficult to say to whom the duty belongs (see also Sen, 2004, pp. 340–341). In Frontiers of Justice I argue that the whole world is under a collective obligation to secure the capabilities to all world citizens, even if there is no worldwide political organization. How to assign the duties to specific groups and individuals is a difficult matter, and I attempt to take that on, at least in a preliminary way (Nussbaum, 2005, ch. 5). The difficulty is greatest in the global context, where there is no state, and no good reasons to think that we ought to have a single overarching state. Even here, many of the duties to secure human capabilities are assigned to states (Nussbaum, 2005); but some belong, as well, to non-governmental organizations, to corporations, to international organizations, and to individuals. In that sense the duties are ethical rather than political: they do not require a state enforcement mechanism to be morally binding (Nussbaum, 2005; cf. Sen, 2004).

Nonetheless, I do not agree with Sen that rights (or the central capabilities) have no conceptual connection to state action (see Sen, 2004, pp. 320 and 345–348). I agree with my American revolutionary ancestors: one key purpose of the state is to secure to people their most central entitlements. As the US Declaration of Independence puts it, recapitulating a long tradition of argument, ‘[T]o secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed’—and any government that fails to secure basic entitlements has failed in its most essential task.³ If a capability really belongs on the list (or, if a given human right really belongs in a list of human rights), then governments have the obligation to protect and secure it, using law and public policy to achieve this end. The world context is unique, because there is no overarching state, and thus none that can be shown unjust because it flunks this task. When we are thinking of a specific nation-state, however, we are entitled to ask whether it has secured the ten capabilities (the central human rights) to people. If it has not, it is not even minimally just.

Sen attempts to avoid granting a conceptual connection between capabilities and government by citing examples of capabilities (rights) that should not be legally enforced, such as the right of a family member to be consulted in all family decisions (2004, p. 345). Of this example I would say: either such conduct is required by a notion of a life worthy of human dignity, or it is not. If it is, then it ought to be legally enforced (just as we
legally enforce prohibitions on child abuse and domestic violence). If it is not, then it will not belong on a list of central capabilities or human rights. If we do put something on that list, we connect it, both practically and conceptually, to the idea of the purposes for which ‘governments were instituted among men.’ My own view is that such matters of consultation are matters concerning which citizens may reasonably disagree, given differences in their comprehensive doctrines, religious and ethical. They should not be coercively enforced, but by the same token they should not be on the capabilities list, which is said to be the potential object of an overlapping consensus among all the reasonable comprehensive doctrines.

The ten capabilities then, are goals that fulfill or correspond to people’s prepolitical entitlements: thus, we say of people that they are entitled to the ten capabilities on the list. In the context of a nation, it then becomes the job of government to secure them, if that government is to be even minimally just. In effect, then, the presence of entitlements gives governments a job to do, and a central job of government will be to secure the capabilities to people. The existence of human and animal lives gives a reason for governments to exist and generates obligations of a distinctly political kind. When, in the case of the whole world, we decide that an overarching single government might not be the best way of solving problems of capability failure in poorer nations, government still plays a major role in securing them: the government of the poorer nations, in the first place, and, in the second place, the governments of richer nations, who have obligations to assist the poorer (Nussbaum, 2005, ch. 5). Giving people what they are entitled to have, in virtue of their humanity, is a major reason for governments to exist in the first place, and a major job they have once they exist.

The capability goal ought to be set in a way that is realistic for each capability singly, and a way that promises reasonably coherent deliverance of the whole interlocking set of capabilities. Where we face the need to make trade-offs, promoting one capability at the expense of another, we ought to say that this is a tragic situation in which minimal justice cannot be done, and we should get to work to produce a future in which all citizens can enjoy all the capabilities. It is reasonable to set the level of each capability quite high, aspirationally; nonetheless, it would be wrong to set the level in a utopian manner, precluding all possibilities of realization. Thus, I basically agree with Sen that human rights, and capabilities so understood, should not be thought to be absent because they are at present unrealizable (Sen, 2004, p. 326). I would add, however, that the specification has to be responsive to the conditions of human life as it is, and not one that would require a total transformation of the world in order to permit realization. The right way to set the level is a job for judgment and discussion.

When we talk about capabilities as fundamental entitlements, what is the motivating concern? Human rights approaches sometimes leave a blank here, although at times they invoke a notion of human dignity. The dominant intuitive idea, in my view, is that of waste or starvation. Some lives that people are given are pinched and cramped; they are unable to unfold themselves, to
choose, to act, to use key human powers. Their lives are thus not worthy of human dignity. The intuition underlying my version of the approach is that idea of waste or tragedy, coupled with the idea of the inherent dignity of the life of the being in question, which demands better than that. (From now on, putting other animals to one side, I shall speak of human dignity: but it must never be forgotten that this is just one type of dignity that laws and institutions should recognize.)

Why does the task of securing capabilities belong (apart from the global context) to government? I am operating, here, with a very widespread and basic notion of the purpose of government, one that many nations share all over the world: governments are instituted to secure things to people that they could not secure without government, and governments must be measured by the extent to which they fulfill that task (Nussbaum, 2007a). There are many ways in which governments can secure human capabilities, but I have focused on their role in generating accounts of fundamental constitutional entitlements and then securing those entitlements (Nussbaum, 2007a). Thus I would agree with Sen (2004) that capabilities need not always be secured by legislation, but I would remark that almost all modern democracies divide these functions among the executive, the judiciary, and the legislature; if I focus on the part that involves constitutional law and its judicial interpretation, this is not to neglect the role of these other branches. There is much more to be written about the relationship between capabilities and political structure, and I hope to attempt this task in the future.

What is the scope of capabilities? Sen holds that the idea of human rights is broader than the idea of capabilities, because both processes and opportunities figure in the idea of human rights, whereas capabilities are concerned with opportunities and not with process (Sen, 2004, pp. 330–337). I am not convinced; indeed, I just do not understand the reasons for this alleged bifurcation. One of the many things that people need to be able to do, if their life is to be worthy of human dignity, is to have access to the legal system on terms of equality with other people; one way this right is often impeded is to have asymmetrical procedural hurdles put before one. The due process rights that all modern constitutions guarantee, in a way closely bound up with guarantees of equal protection, are procedural rights, but they are also fundamental opportunities to act and be treated as a fully equal citizen. Again, one procedural right that most modern democracies treat as salient is the right to privacy, understood as a type of control over one’s intimate decisions. That right (fundamental to women’s control over their reproductive capacities) is a procedural right, but it is also an individual capability or opportunity. Sen says procedural rights differ from others because they involve governmental structure: but so do all the capabilities.

All the central capabilities, like all human rights, are best seen as occasions for choice, areas of freedom: thus a person can have all ten capabilities on my list without using all of them, and this is true of rights as well. A person may have the right to religious freedom, for example, in a secure form, and
care nothing about religion (see also Sen, 2004, p. 335). The central reason why capabilities and not the associated functions are held to be central goals of government is that it would be wrong for government to push people into functioning in these areas, since citizens reasonably differ over which functions they will choose and which they will not. In this way the CA, like human rights approaches, avoids being ‘imperialistic,’ or imposing a single lifestyle on all. Instead, it asks governments to create and protect contexts of choice.

In this section I have gone over some of the ways in which the CA supplements human rights approaches: by taking clear positions on these disputed and sometimes ignored questions.

Supplementation: capabilities on the ground

There is another way in which the CA usefully supplements the language of human rights: by simply being highly concrete and close to the ground. The language of rights often strikes people as abstract. The daily question ‘What am I able to do and be?’ is, by contrast, down-to-earth and practical. It is a question that people in all walks of life ask themselves every day, even when they do not have any education. It does not require any philosophical grounding to ask and answer this question, nor does it require a formation that is peculiar to one culture rather than another.

Thus when development practitioners or activists discuss with people what they think they need and should have, the language of capabilities seems like a natural extension of their demands, not like a foreign imposition. The important cross-cultural study of Wolff and de-Shalit shows that new immigrant groups, discussing their disadvantages, gravitate naturally to capabilities language and understand the approach very quickly. They are able to use it to add items that my list does not include, and to add general concepts, such as that of ‘capability security,’ which my approach did not foreground (Wolff and de Shalit, 2007). I have heard similar reports from activists in many places.

Throughout my own work on the CA, I have always emphasize this specificity, saying that what is universal in the approach is only a starting point: each nation must and should describe the capabilities it pursues more concretely, using their own history and traditions as a guide (Nussbaum, 2000, 2005; compare Sen, 2004, p. 323). And of course even a constitution is likely to be pretty general: the capabilities then have to be further specified through both legislation and judicial interpretation, together with the work of administrative agencies (Nussbaum, 2007a). Human rights documents do not typically comment on this interpretive process, or perform the further specification of the rights they include (although human rights practitioners do typically perform this further work).

One further advantage of using such a down-to-earth language, a language people in nations all over the world use in their daily activities, is
that we do not even appear to be imposing a western construct upon formerly colonized peoples. I do not believe that the idea of human rights is especially western: it has roots in many traditions (Sen, 1997; 2004, pp. 351–355). Moreover, the experience of colonial subjects did not show them that any idea of human rights was central to western culture: for what they saw every day was a blatant disregard of human rights (of freedoms of speech and assembly, of economic entitlements, and many others). When Nehru and Gandhi put rights into the Indian constitution, they did not see themselves as aping western powers, but rather as constructing bulwarks against what, in their experience, the West had stood for. In recent years, the work of human rights activists in many nations has grounded rights talk in local realities. Nonetheless: if we do not want to waste time responding to the postcolonial critique of rights, which is very widespread in places where people do not know much history, we will get some advantage from focusing on the neutral and international language of what people are actually able to do and be.

Because capabilities language is determinate and down-to-earth, when we are operating within a legal or constitutional framework that uses the language of rights, we still need capabilities language to make clear what it is really to secure the entitlement in question. The right to political participation, the right to religious free exercise, the right of free speech—these and others are all best thought of as secured to people only when the relevant capabilities to function are present. In other words, to secure a right to citizens in these areas is to put them in a position of capability to function in that area. To the extent that rights are used in defining social justice, we should not grant that the society is just unless the capabilities have been effectively achieved. This understanding of rights helps us understand what questions judges should be asking when they pose questions about constitutional rights (Nussbaum, 2007a).

Of course people may have a prepolitical right to good treatment in this area that has not yet been recognized or implemented; or it may be recognized formally and yet not implemented. But by defining the securing of rights in terms of capabilities, we make it clear that a people in country C do not really have an effective right to political participation—for example, a right in the sense that matters for judging that the society is a just one—simply because this language exists on paper: they really have been given right only if there are effective measures to make people truly capable of political exercise. Women in many nations have a nominal right of political participation without having this right in the sense of capability: for example, they may be threatened with violence should they leave the home. In short, thinking in terms of capability gives us a benchmark as we think about what it is really to secure a right to someone.

Here we are dealing above all with supplementation, but it will be seen that supplementing rights language with that understanding of what it is to secure a right to someone leads directly to a critique of some versions of the human rights approach.
Critique: positive and negative, action and inaction

Securing the central human capabilities, as I describe them in the CA, clearly involves affirmative material and institutional support, not simply a failure to impede. ‘Combined capabilities’ are the goal: and these require the preparation of the material and institutional environment (and the education of the person) so that the function in question can actually be selected.

We see here a major advantage of the CA over understandings of rights—very influential and widespread—that derive from the tradition within liberalism that is now called ‘neoliberal,’ for which a key idea is that of ‘negative liberty.’ The idea of ‘negative liberty’ is frequently traced back to the work of Isaiah Berlin, but his subtle categories are often ill-understood, and I do not want to digress in order to pursue the correct interpretation of his work, since I am interested in contesting the Libertarian or ‘neoliberal’ understanding of rights that borrows this term.

Often fundamental entitlements have been understood as nothing more than prohibitions against interfering state action. If the state keeps its hands off, those rights are taken to have been secured; the state has no further affirmative task. Indeed, if one reads the US Constitution, one sees this conception directly: for negative phrasing concerning state action predominates, as in the First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

Similarly, the Fourteenth Amendment’s all-important guarantees are also stated in terms of what the state may not do:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This phraseology, deriving from the Enlightenment tradition of negative liberty, leaves things notoriously indeterminate as to whether impediments supplied by the market, or private actors, are to be considered violations of fundamental rights of citizens. By now, as interpreted, our tradition has recognized that the state must in some cases act to prevent private discrimination, but the whole terrain is contested, and the language of rights certainly does not resolve the difficulty.

Of course even libertarians believe that the state must act to secure rights—maintaining a system of contract, property rights, and so forth. Their
list is a lot shorter than the list I favor, but they too believe that state action is required: not even their state is purely negative. However, the libertarian position on the justifiability of state action and positive intervention is fluctuating and, frequently, unclear, whereas the CA makes it clear from the start that the state has an affirmative task of securing capabilities.

The Indian Constitution, by contrast to the US Constitution, typically specifies rights affirmatively. Thus for example: ‘All citizens shall have the right to freedom of speech and expression; to assemble peaceably and without arms; to form associations or unions; … [etc.]’ (Indian Constitution, Article 19). These locutions have usually been understood to imply that impediments supplied by non-state actors may also be deemed violative of constitutional rights. Moreover, the Constitution is quite explicit that affirmative action programs to aid the lower castes and women are not only not incompatible with constitutional guarantees, but are actually in their spirit. Such an approach seems very important for gender justice: the state needs to take action if traditionally marginalized groups are to achieve full equality. Whether a nation has a written constitution or not, it should understand fundamental entitlements in this way.

The CA, we may now say, sides with the Indian Constitution, and against the neoliberal interpretation of the US Constitution. It makes it clear that securing a right to someone requires more than the absence of negative state action. Measures such as the recent constitutional amendments in India that guarantee women one-third representation in the local panchayats, or village councils, are strongly suggested by the CA, which directs government to think from the start about what obstacles there are to full and effective empowerment for all citizens, and to devise measures that address these obstacles.

One place where Enlightenment notions of state inaction and negative liberty have been especially pernicious is in the state’s relation to the household or family. The classic liberal distinction between the public and the private spheres aids the natural stand-offishness that many liberal thinkers have about state action: even if it is fine for the state to act to secure people’s rights, there is one privileged sphere in which they should not do this, the sphere of the family. Some liberal thinkers, for example John Stuart Mill, have pointed out that non-intervention in the family allows egregious rights-violations to go unaddressed: marital rape, domestic violence, child abuse. The notion of the ‘private domain’ simply shields such abuses from scrutiny and correction (see Nussbaum, 2000, ch. 4).

The language of capabilities does not automatically guarantee a critique of this baneful distinction. It all depends how one frames the capability list. If, however, one is in the habit of asking what each person is actually able to do and be, one will be very likely to notice that vulnerability to violence within the home stops women and children from doing and being many things they want to do and be, and have a right to do and be. More generally, asking about capabilities leads us to notice all sorts of inequalities women and girls suffer inside the family: inequalities in resources and
opportunities, educational deprivations, the failure of work to be recognized as work, insults to bodily integrity. Feminists in the human rights domain have long been insisting that the notion of rights must be expanded to include women’s rights to be free from abuse within the family, and they have achieved public recognition of women’s rights against abuse in documents such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Furthermore, the Declaration on Violence Against Women, the appointment of the Special Rapporteur on Violence Against Women, and the General Recommendations of the Committee on the Elimination of All Discriminations Against Women have clarified that CEDAW does cover abuses that take place within the family. Nonetheless, the history and philosophical background of the notion of rights has made this a difficult struggle, given the traditional association of rights talk with the public–private distinction. Traditional rights talk neglected these issues, prior to the feminist critique of the past 30 years, and, even after CEDAW (which the USA, a nation with one of the highest rates of domestic violence, has never ratified), the feminist critique of rights continues to be contested. This is no accident, I would argue: for rights language is strongly linked, historically at least, with the traditional distinction between a public sphere, which the state regulates, and a private sphere, which it must leave alone.

**Critique: first and second generations**

Commonly, the human rights tradition has divided rights into two groups: the political and civil rights, which are often called ‘first-generation’ rights, and the economic and social rights, which are called ‘second-generation.’ This way of carving things up suggests that the political and civil rights have no economic and social preconditions. The CA has always insisted that they do. When we keep our eyes focused on what people are actually able to do and be, we quickly see that they do not have the ability to participate in political debate, to vote, to run for office, and so forth, if they are inhibited by extreme poverty, lack of education, and ill health—at least they do not have these entitlements securely, or on a basis of equality.

Thus the CA has insisted from the start that we refuse to make this misleading separation. All entitlements have material and institutional necessary conditions. Education, for example, is a distinct entitlement on its own, but it is also a precondition of the adequate exercise of a group of political rights. Domestic violence is bad per se, a violation of women’s entitlement to bodily integrity. But it also impedes women from the exercise of many other capabilities, including the political capabilities.

By now some versions of the human rights approach would appear to grant the centrality of economic factors in securing the ‘first-generation rights.’ But then the whole distinction ought to be dropped, and we should look at each entitlement separately, asking what its material and institutional preconditions are.
Consequentialism and deontology

The family of human rights approaches looks distinctly deontological: it says that overall good social consequences may not be pursued in ways that violate the items on the list of rights. Sen, however, has long argued convincingly that rights may be incorporated into an approach that focuses on producing overall good social consequences (Sen, 1984). I agree with that analysis, although I would add the stipulation that the rights play a special role: they are entitlements for each and every person, and if they are violated, or not secured, there is a failure of basic justice, which cannot be adequately captured in the language of cost-benefit analysis (Nussbaum, 2001). There is thus a tragic aspect to a rights violation (to the failure to secure a central human capability) that distinguishes it from other failures to secure some social benefit.

Thus my version of the CA can be seen as a cousin of consequentialism, in the sense that it is what I call ‘outcome-oriented’: whether the society is just is determined by looking at the outcomes it produces, importantly including whether it secures the central capabilities to all citizens. It is in that way distinct from procedural approaches to justice that determine whether a situation is just by looking at the procedures that generated it (see Nussbaum, 2005). It is, then, an outcome-oriented approach in which the securing of central capabilities plays a central role. Many human rights approaches have a similar structure, if they are developed as an overall account of political justice. Here, then, the CA seems to march in harmony with human rights approaches, even though it seems to be closer to consequentialism. As Sen has insisted, consequentialism need not be insensitive to the special importance of rights (Sen, 1984; see also Sen, 2004).

There is one way, however, in which my CA, albeit a cousin of consequentialism, is not a form of consequentialism. Consequentialism is an overall view of the good and right: it says that the rightness of any choice is measure by whether it maximizes good consequences. I have argued, however, following John Rawls, that in a pluralistic society, containing many different religious and secular comprehensive views of the good, it is undesirable and disrespectful to base political choice on any comprehensive doctrine (see Rawls, 1996; Nussbaum, 2000, 2005). Instead, political principles should be only a partial view of the social good, and one that can, we hope, become the object of an overlapping consensus among the major religious and secular comprehensive doctrines. I have argued that my CA, and the capabilities list, can become the object of such a consensus (Nussbaum, 2005).

The reason why I use the term ‘outcome-oriented’ rather than the term ‘consequentialist’ to describe my approach is that I view consequentialism as a comprehensive ethical theory and thus not (I hold) an acceptable source of political principles in a pluralistic society.

While we are on the topic of political liberalism, it may be time to clear up (again) a common misreading: the CA is not a form of ‘cosmopolitanism’ (Nussbaum, 2007b). Although the approach includes an account of global as
well as domestic justice, it would be just mistaken to identify it with the comprehensive ethical theory known as ‘cosmopolitanism,’ which is usually defined as the view that one’s first loyalty should be to humanity as a whole, rather than to one’s nation, region, religion, or family. Cosmopolitans can probably accept most of what I recommend, but one does not have to be a cosmopolitan to accept the idea that all citizens (in one’s nation, and then, in a second step, in all nations) should have a threshold amount of the ten capabilities. Most of the major comprehensive doctrines, religious and secular, can, I argue, accept that idea, and few of them could accept a comprehensive cosmopolitanism. Whether my own comprehensive ethical doctrine is cosmopolitan or not is a separate questions (it is not, but it is close). The point that is relevant here is that the CA is a political doctrine. As such, it should not recommend any comprehensive ethical doctrine or be built upon one. Thus calling the CA a form of cosmopolitanism is tantamount to saying that it does not respect the diversity of religious and secular doctrines that all modern nations contain. But respecting that plurality is a central aim of my theoretical approach.

There is one criticism of the human rights idea that I wish to resist: this was the claim once made by Sen that we should think of rights as part of a system of goals but not as having any power to ‘trump’ the pursuit of social welfare (Sen, 1984). I argued against this claim in detail in Nussbaum (1997), and I will not repeat my arguments here. Suffice it to say that the central capabilities on my list, like human rights, are ‘trumps’ in the sense that they have a very strong priority over the pursuit of welfare generally: if any one of them is not fulfilled, the nation is not even minimally just. Sen was arguing against Robert Nozick’s account of property rights as ‘trumps’ stopping redistribution of wealth and income in society. I agree with Sen that Nozick’s position is wrong, but I disagree about what is wrong with it. In my view, Nozick has the wrong account of property rights and ownership. We should not grant that people own what they happen to be holding on to; we should agree with Mill that, if some property is needed for the support of other people’s basic entitlements, it is fine to take that property through taxation, and the person from whom it is allegedly taken did not even have just title to that property (see Nussbaum, 1997). Both capabilities and rights, then, are ‘trumps,’ and I reject Sen’s claim that capabilities are more soft or negotiable than rights—at any rate, not the central capabilities on my list.

What role for rights language?

If we have the language of capabilities, do we also need the language of rights? The argument of this paper so far has defended the ongoing relevance and importance of the central concepts involved in the human rights tradition, since the CA, as I have defended it, is a species of the human rights approach. At this point, however, we still need to ask what the language of rights adds to the language of capabilities: why should we continue to
employ both, if we are convinced, as I am, that a version of the CA preserves what is best in the human rights tradition and avoids some deficiencies that some versions of that approach at times slip into.

We might want to be pragmatists here: the language of human rights has such wide currency and resonance in global politics that it would be rather unwise to try to do away with it—all the more since the CA is just a species of that approach, not a rival. But it would be good if we could say something more about why the language of rights is independently useful and illuminating. I believe that we can.

The word ‘capability’ does not by itself suggest the idea of an urgently important entitlement grounded in an idea of basic justice. The rest of my theoretical approach makes this point, by invoking ideas of human dignity, basic justice, a threshold amount of opportunity, and so forth. But the idea that capabilities are not just optional needs to be hammered home in any way we can, since people are all too inclined to think that we may deny people this or that important thing in order to pursue aggregate wealth. Indeed, when we note that the dominant approach in development economics still measures quality of life in terms of Gross Domestic Product per capita, without asking whether these central individual entitlements have been secured, we can see why we should continue hammering.

Human rights language helps us perform that task (see also Sen, 2004). When used as in the sentence ‘A has a right to have the basic political liberties secured to her by her government’, the language of rights reminds us that people have justified and urgent claims to certain types of treatment, treatment that secures their central capabilities—no matter what the world around them has done about that. This is a key idea in my CA (although less clear in the more open-ended approach to entitlements mapped out in Sen, 1999). So I can welcome the focus and intensification given to these key ideas by the language of human (and animal) rights.

By now, too, the human rights tradition has built up a wide array of valuable documents that describe central human entitlements in ways that have gained the support of the world community. Political action has mobilized around these documents, national constitutions have been written under their influence, and so forth (see Sen, 2004). We should not junk that tradition, we should instead make sure that it is connected to an analysis of what rights are; the CA supplies that analysis. When coupled with the idea of capabilities, as in the *Human Development Reports* of the United Nations Development Programme, the idea of rights provides a valuable intensification, connecting the idea of capabilities to the idea of social and political urgency and human centrality. I would argue, then, that the capabilities theorist or practitioner should not be skeptical of the language of rights, but should employ it in close connection to the language of capabilities, thus making clear what analysis of rights is being offered.

The human rights tradition is a heroic struggle for basic justice. It would be foolhardy to turn away from that tradition. Nonetheless, the tradition has points of vagueness and unclarity: here the CA can supplement it usefully.
And it also has versions or offshoots that lead the mind away from important issues of justice. Here the CA supplies a valuable critique. The two approaches (one being a species of the other) should march forward as allies in the combat against an exclusive focus on economic growth, and for an approach to development that focuses on people’s real needs and urgent entitlements.

Notes

1 As I discuss at the end of the ‘Critique: Positive and Negative, Action and Inaction’ section, this situation evolved dramatically in the late 1980s and early 1990s, although the feminist expansion of the terrain of rights remains contested, not least in the USA.

2 Sen (2004) seems to grant this point (see pp. 319 and 321); however, I argue in Nussbaum (2003) that in Sen (1999) he treats freedom as an all-purpose good, even something that ought to be maximized.

3 Declaration of Independence, 4 July 1776.

4 Not invariably: Article 14, closely modeled on the equal protection clause of the US Fourteenth Amendment, reads: ‘The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.’

References

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