

**JUSTICE AND CAPABILITIES: A COMPARATIVE
STUDY OF THE WRITINGS OF RAWLS AND
NUSSBAUM**

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CERTIFICATE

This thesis titled “Justice and Capabilities: A Comparative Study of the Writings of Rawls and Nussbaum” submitted by Ms. Somya Gupta, Centre for Political Studies, School of Social Sciences, Jawaharlal Nehru University, New Delhi, for the award of the degree of **Doctor of Philosophy**, is an original work and has not been submitted so far in part or in full, for any other degree or diploma of any University or Institution.

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Chapter 1

Introduction

Abstract

The capability to function is necessary to create individuals that are more than just a bare existent entity. The idea explicitly pronounced in Nussbaum's capabilities approach is closer to a morally determinate person espoused by Rawls in *A Theory of Justice*. Nussbaum translating this whole project, for providing more clarity to this capable to live a flourishing life with the possibility of exercising her determination to be and to do, recalls for grounding this on an 'equal moral worth of persons.' Thus taking a leaf out of Rawlsian inputs on a reasonable and rational person in a well ordered society, Nussbaum decidedly equates the list of capabilities with the functioning capacities of an individual, as enumerated in Rawls's notion of primary goods (primary goods such as health, imagination, intelligence etc.). A citizen, to round off the whole argument, is to possess a political conception of justice and such individual's capacities seem to be stated in Rawls in the idea of 'deliberation', and in Nussbaum it seemingly is highlighted in her concept of 'practical reason'. While the former seems to have been based on the notion of 'political constructivism', the latter has been explained within the framework of 'desires and preferences' (as stated in *De Motu*) and physiological processes such as 'perception' (as in book *De Anima*).

Justice- comprehensive philosophical doctrine

Rawls's theory of justice considers justice as 'the first virtue of social institutions' with the basic structure of society as its primary subject -the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation. Rawls assumes in his theory of justice that society is well-ordered wherein first, everyone accepts and knows that the others accept the same principles of justice, and two, the basic institutions generally satisfy and are generally known to satisfy these principles. Although society is well-ordered, it is characterized by both an identity and a conflict of interests. Principles of justice are therefore needed to provide a way of assigning rights and duties to the basic institutions of society.

The principles of justice result from a hypothetical contract that citizens would accept in a well-defined initial situation called the original position. The original position is the strictly hypothetical situation in which citizens are behind a "veil of ignorance," that is, they do not know their own position in society and hence might be the least advantaged ones. Since citizens do not know their own position in society thus they cannot tailor the principles of justice to their own convenience. They also do not know their own socio-economic situation like natural talents, mental and physical abilities, religion, education, philosophical views, although they do have some relevant information about society, which they need in order to choose principles of justice. They know what the primary goods are, that is, things that every person would rather have more than less of, no matter what her plan of life is. Social primary goods (also called "chief primary goods") include wealth, liberties, rights, and opportunities. Intelligence, health, strength, and imagination count as natural primary goods. In the original position citizens act not only rationally and mutually disinterestedly but also choose what is rationally best for themselves thereby not taking an interest in one another's interests.

Free and equal citizens would reasonably choose two following principles of justice under this condition. The first principle calls for the most extensive equal basic liberties: "Each person is to have an equal right to the most extensive liberty

compatible with a similar liberty for others¹.” The second principle states that social and economic inequalities are to be arranged so that they are both (a) to the greatest expected benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity².” The first principle is prior to the second, which means that no violation of basic liberties is justified in order to bring about greater socio-economic equality. The second principle is however necessary in order to guarantee that basic liberties are not merely formal, but can be effectively exercised by individuals.

While political communities present themselves under the banner of ‘the true’, pluralist societies can only present themselves under the banner of ‘the reasonable’. The turn towards the reasonable has its roots, rather, in the incentive to maintain societal organisational principles where fundamental political matters are concerned, principles which can be accepted by everyone as reasonable or, at the very least, not dismissed as unreasonable. Since there is no longer a comprehensive doctrine, which, politically speaking, refers to an external, transcendent authority or to a natural order, the citizens, now free because they are no longer bound to a point of view “external to their own point of view,” are left with no other option than to develop, by mutual agreement, a foundation for social living, which everyone can accept as reasonable. In a pluralist world, an order can only appear as the result of a fair agreement between individuals who proceed further with their motivation to live together, approach each other as reasonable, rational, free and equal individuals that under such an agreement, allow themselves to be led by their common practical reason, says Putte³.

This fact is sufficient grounds for Rawls to return to the idea of the social contract and to present the conception of justice as the result of a procedure of construction in which fairly and symmetrically balanced, rational parties, motivated by their desire to find a free and transparent ground of consensus in political life and representing free, equal, reasonable and rational persons, come to an agreement acceptable by all, on a conception of justice for a well-defined object, namely the basic structure and regime of a democratic society together with the related rights and obligations of the

¹ Rawls, John, *A Theory of Justice*, Harvard University Press (1971). p 60

² Ibid 72

³ Putte, Andre Van de (1995), Rawls’s Political Liberalism- Foundations and Principles, *Ethical Perspectives*: p109.

citizens⁴.

Summing up reasonable doctrines lay the basis for answering the fundamental question as to how citizens who remain deeply divided on religious, moral and philosophical doctrines, can still maintain stable and just democratic society. The answer is citizens' reason or public reason in the public forum about basic questions of justice⁵.

Rawls has defined the reasonable and rational people as persons with two basic virtues. One, when they agree to fair terms of cooperation; two, they are the units of responsibility in political and social life⁶.

Justice and capabilities approach

The term justice is a virtue of social institutions as well as a virtue of individuals is a definition (of justice) that has been ascribed by philosophers to be an, according to Robeyns, important property of the theory of justice⁷. The most important work in this direction has been Rawlsian theory of justice that attaches itself to: first, a commitment towards some form of liberalism; second, shows willingness towards accepting various definitions of the good life⁸. 'Rawls turned to the social contract

⁴ Ibid 110

⁵ Rawls, John, *Political Liberalism*, Columbia University Press (1996). p10

⁶ Ibid 50

⁷ Robeyns, Ingrid, Equality and Justice, in Severine Deneuline and Lila Shahani (ed), *An Introduction to Human Development and Capability Approach*, Earthscan (2009). chapter 5

Justice taken to be a virtue of individuals is often considered to be part of the theory on ethics than a part of political philosophy. There are theorists who however diverge from this and propose a theory of justice for social institutions that encapsulates the entire range of social institutions sometimes even including family, the system of class/caste, social institutions etc. There is an entire range for the definition of justice and it is too diverse a subject to be covered easily by means of a definition. However, as Robeyns believes, one of the most apt definitions of the term social justice has been given by David Miller: how the good and bad things in life should be distributed among the members of a human society.

When, more concretely, we attack some policy or some state of affairs as (being) socially unjust, we are claiming that a person, or more usually a category of persons, enjoys fewer advantages than that person or group of persons ought to enjoy (or bears more of the burdens than they ought to bear), given how other members of the society in question are faring.

⁸ Ibid 103

There are several different schools explaining the theory of justice. Precisely four (identified by Barry and Matravers) one, conventionalism; two, teleology; three, justice as mutual advantage (Rawls); and four, the egalitarian school of justice. It is the egalitarian school of justice, and justice as mutual advantage theory that identifies the need for an acceptability of various existing definitions of the good life that every just society needs to accept and abide by.

tradition, where justice is understood as the outcome of mutual advantage.’

‘The core idea is that rules of justice are ultimately more beneficial to everyone than if each were to pursue her own advantage on her own, says Robeyns⁹.’ It is Rawls’s theory of justice that is associated (and is generally associated) with the capabilities approach¹⁰. It is the social contract tradition that adheres to the idea of a person, the moral worth of that person and mutual relationship between these persons with moral worth as moral equals¹¹.

The basic structure of justice: Rawls and capabilities approach

The prime aims for Rawls introducing an account of the theory of justice is the idea of a citizens possessing a political conception of the theory of justice¹², which is to serve as a means to the good life. This is the basic structure of justice and also the basic structure of society founded upon the idea of original position, the veil of ignorance and the difference principle. Rawls holds that a person’s advantage should be specified by social primary goods, which are all-purpose means that every person is presumed to want, as they are useful for a sufficiently wide range of ends. The social

⁹ Ibid

¹⁰ This is despite the other three theories on justice too espousing on the relevance of the idea of social justice within these approaches. However all the four theories stand together when they affiliate themselves to the idea that an individual is entitled to think about her good, notion of the good and the plan of action in their respective lives (irrespective of the other differences that surround them, explains Robeyns.

¹¹ Ibid

According to Robeyns, “the social contract tradition and liberal egalitarianism, in contrast, derive their principles of social justice from a fundamental idea of people as moral equals, as beings with equal moral worth.”

¹² Ibid 108

The reason (that Robeyns gives for Rawls placing its people in the original position, within the basic structure, behind the veil of ignorance) for situating people behind the veil of ignorance is that that the citizens are to see themselves as free and being freed from the existing structures and institutions of a society which disable them and put them in the situation they are currently in. Therefore to formulate the principles of justice with the idea of liberty inherent in it, it is important for the citizens to dissociate themselves from existing norms. The aim of introducing the original position and its veil of ignorance is that we will not try to favour a set of socio-political rules and institutions that tend to favour the kind of person that we are in the actual society. In other words, the original position is set up in such a way that the moral conditions for a just society are in fact met: we will not choose principles that are biased in favour of people with the talents, skills and personal characteristics that we have, nor will we prefer social institutions that are in favour of people who share our notion of the good life. As the parties in the original position have no information about their place in society, circumstances or life plans, the agreement that they will reach in the original position regarding the principles of justice will be fair to everyone. Rawls believes that the principles of justice so reached would be stable, since they are (hypothetically) chosen under conditions of freedom and equality, and thus command enduring support by all.

primary goods can be classified into five groups¹³:

- the basic rights and liberties;
- freedom of movement and choice of occupation;
- powers and prerogatives of offices and positions of authority and
- responsibility;
- income and wealth; and
- the social bases of self-respect.

The social basis of self-respect is the most important primary good and the criteria of income and wealth next to it. And the best way to provide a citizen with this for Rawls, according to Robeyns, is providing the citizens with equal rights and liberties¹⁴.

Political Liberalism and the idea of objectivity

The determinate moral person is more or less reflected in Rawls's 'Political Constructivism'. Political Constructivism of justice as fairness concerns itself, in the words of Rawls, with a constructivist conception of political justice. Political constructivism uses a conception of person and society to give a form and structure to a construction based on the principles of justice. It specifies a certain idea of the reasonable and applies this to various subjects including conceptions and principles;

¹³ Ibid

¹⁴ Treating each citizen as an equal is the best way to provide citizens with the most important primary good (social basis of self-respect). Rest assured with the easy availability of the conception of justice (Robeyns) it also becomes possible to bring together the rival concepts of moral views on the good life to come together towards an agreeable agreement on the 'principles of political justice' (Robeyns 109). (There are people, like the disabled, who fall outside the scope of the theory of justice like the disabled. This in spite of despite Rawls claiming and wanting the principles to reach to every single citizen. Yet as Robeyns believes that Rawls through his theory has tried providing solutions to the classical problems that seemed to have occurred and re appeared in the history of political thought). Robeyns says, "Rawls certainly does not want to deny our moral duties towards the people who fall outside the scope of his theory, but he thinks that we should first work on a robust and convincing theory of justice for the normal cases and only then try to extend it to the more extreme cases. The neglect of the needs of the disabled is thus not so much situated in the conceptualization of social primary goods, but rather determined by the limited scope of justice as fairness as a social contract theory between 'normal and fully cooperating members of society.'"

judgments and grounds; persons and institutions¹⁵. This also marks Rawls's theory of justice, or in more concrete terms justice as fairness, as a reasonable comprehensive doctrine.

Rawls's considers it important that political constructivism does not contradict with rational intuitionism. Therefore it is of utmost importance that an objective point of view is ascribed to constructivism for it must express the point of view of persons, individuals, corporate, suitable characterized as reasonable and rational¹⁶. .

With this political liberalism has an account of objectivity that suffices for the purposes of a political conception of justice, concludes Rawls¹⁷. In other words, a political conception of justice yields objective reasons as a result of which there exist reasons specified by a reasonable and mutually recognizable political conception sufficient to convince all reasonable persons that is reasonable¹⁸.

Summing up political constructivism, Rawls's conception of a fully just liberal democratic society, which he calls justice as fairness within the context of political constructivism, analyses the idea of fair social cooperation among individual human beings who are members of the same society, all free citizens of equal political status. Analogously in *Law of Peoples* Rawls argues for certain fundamental, general principles of fair social cooperation among legitimately governed states, which are to guide and constrain the international uses of their coercive powers. These principles spell out some of the logical implications of an abstract idea of social cooperation among states aiming to establish a just and stable system of international law¹⁹.

Rawls's asks a specific question if or not justice as fairness's two principles of justice should count as basic human rights. The answer to this is no unless a set of internationally enforceable basic human rights form part of a basic subset of those citizens' rights.

¹⁵ Rawls, John, *Political Liberalism*, Columbia University Press, (1996). p 94

¹⁶ Ibid 116

¹⁷ Ibid

¹⁸ Ibid 119

¹⁹ Bernstein, Alyssa (2008), Nussbaum versus Rawls: Should Feminist human rights advocates reject the Law of Peoples and endorse the capabilities approach, *Global Feminist Ethics*.

For Rawls, the basic rights of citizens are an important component of a fully just liberal democratic society (elaborated in justice as fairness). As Nussbaum explains that the guiding thought behind her approach is ‘one that lays at the heart of Rawls’s project- the idea of the citizen as a free and dignified human being²⁰.’

Law of peoples²¹ is a 'society of peoples' that follow the ideals and principles of a particular political conception of right and justice created out of a liberal idea of justice or justice as fairness, as in *A Theory of Justice*²².

Two of the main ideas that lie behind the 'Law of peoples': first , one of the great evils of human history- unjust war and oppression, religious persecution, denial of liberty of conscience, etc - follow from political injustice; second, once these forms of gravest political injustice are eliminated by following just social policies and establishing just basic institutions, these evils will eventually disappear²³.

The laws and tendencies have an influence on the relations between peoples and they are to be effectively coordinated under reasonably favourable conditions to form a particular society- a 'reasonably just constitutional democracy'. And what grants this is the fact of reasonable pluralism²⁴. Why? Because, for Rawls, the fact of reasonable pluralism allows a society of greater political justice and liberty²⁵, and this is practically possible when we correlate it to our contemporary political and social condition. To narrate this adequately Rawls has developed a sketch of two cases- one, the domestic case, and the other, that runs parallel to the first, as the former is essentially for a 'reasonably just constitutional democratic society'; the latter, linked to a 'reasonably just society of peoples'.

²⁰ Nussbaum, Martha, *Sex and Social Justice*, Oxford University Press (1999). p 46

²¹ It has been developed out of the idea of political justice

²² The people, says Rawls, have their own internal government which may be constitutional liberal democratic or non-liberal, however a decent government still.

²³ Ibid 6-7

²⁴ Ibid 11

This is in the context of Rawls defining the concept of political philosophy that has a political bearing based on practicability and reconciles easily to the political and social condition.

²⁵ Ibid 12

Capabilities approach and the Social Contract- Nussbaum

“Liberalism is not a single position but a family of positions. When I speak of liberalism, then I shall have in mind, above all, the tradition of Kantian liberalism, represented today in the thought of John Rawls, says Nussbaum²⁶.”

Liberalism aims at equality of capabilities²⁷, the 'capability approach' being the backbone of the defence Nussbaum develops for reinstating liberalism to a favourable position. When speaking about liberalism or classical liberalism, social contract is the distinct contribution made by this school. This theory provides to an individual, in the state of nature, an equal view on justice.

Rawlsian theory of Justice is a perfect representation of the social contract theory. The basic underpinning of this theory that individual as equal beings have a claim on justice, is still intact. Rawls's theory of justice, says Nussbaum, is even today the most sophisticated contribution to our thinking about what justice requires when we begin from the idea of equal persons, their worth and capacities. We presuppose that the better way to analyse this is by revoking the category of individual developed in Rawls's Kantian constructivism. Rawls explains that the task of this philosophy is also practical. With this purpose in place he places the individual in Kantian terms as rational suitable objects of construction. The practical social task is primary for an individual. As a result of this the Kantian moral person is (in Rawlsian terms) a 'determinate moral person' leading towards not a public conception of justice but an effective public conception of justice.

This political reasoning implicit in the people has not been addressed sufficiently to get an answer for the lack of consensus amongst these very people when it comes to formulating the various principles for social institutions. So says Rawls, “The real task is to discover and formulate the deeper bases of agreement which one hopes are embedded in common sense, or even to originate and fashion starting points for common understanding by expressing in a new form the convictions found in the historical tradition by connecting them with a wide range of people's considered

²⁶ Nussbaum, Martha, *Sex and Social Justice*, Oxford University Press (1999). p 57

²⁷ Ibid 68

convictions: those which stand up to critical reflection.” This is the determinate moral person²⁸.

Capabilities approach

The list of basic capabilities is generated by asking a question that from the very start is evaluative: What activities characteristically performed by human beings are so central that they seem definitive of a life that is truly human. The activities enumerated as capabilities (in capabilities approach) consists of a few isolated functions that seem central for the very presence of a human life, absence of which makes a life incommensurate with a good human life.

With the idea of a good human life in view, the list is an enumeration of political goals with a comprehensive concern for flourishing based on an idea of choice, which is independent of material and social conditions. Therefore Nussbaum considers choice to be important for promoting and preserving the equal moral worth of persons. Thus, as Nussbaum says, individuals are not to be seen as passive recipients of social planning but as dignified human beings who possess the capacity of shaping their own lives. Therefore recognition of preferences that have been distorted by habits of hierarchy and subordination, and legacy of injustice would be of great service in choosing directions for future.

The denial of choice and its unequal failure in capability is therefore a problem of justice. Whether or not an individual has been allowed to live well depends on the capability to perform central human functions with a subsequent aim of enabling that very individual to live well and not just survive, or what Nussbaum calls ‘bare humanness’. As a result politics, concurring with Rawls, should focus on getting as many people as possible into a state of capability to function, with respect to interlocking set of capabilities enumerated by that list.

The aim behind the inclusion of the criteria of choice and its role in the idea of justice is clearly to mark out with clarity the definition of an individual in the capabilities

²⁸ Rawls, John (1980), Kantian Constructivism in Moral Theory, *The Journal of Philosophy*, Vol(77)9: p 518-553.

approach, an individual who is much more than a just bare existent entity. This brings Nussbaum's capabilities approach closer to the idea of a Rawlsian individual.

There are many manifestations of liberalism with an equal number of contestations. One of the definition that however precedes all other accounts is the 'liberalism viewed as a doctrine of individuals' whose essence includes the fact that 'individuals are self-creating and that no single good defines successful self-creation, and that taking responsibility for one's own life and making of it what one can is itself part of the good life'²⁹.

One of the forerunners of the above view is Rawls who introduced the conception of social justice within liberal political theory with the argument that individuals have a right to self-development³⁰. "In Rawls's account, we arrive at an understanding of what rights we possess, and how far our liberty extends, by asking ourselves a hypothetical question- what rights would we all demand for ourselves and acknowledge in others if we were to establish a social and political system, knowing nothing about our particular abilities and tastes, and therefore being forced to strike a fair bargain with everyone else?"

What is also true of liberals is the notion that most liberals have been pluralists and 'have thought that autonomous individuals might choose a great variety of very

²⁹ Ryan, Alan, *The Making of Modern Liberalism*, Princeton University Press (2012). p 35

³⁰ Ibid

In light of the above Ryan adds to this the two rights – the right to the most extensive liberty consistent with the same liberty for everyone, and a right to just treatment, enshrined in the thought that inequalities are justified only to the extent that they improve the situation of the least advantaged.

(The above point is more in context of Ryan providing a clear definition of what liberalism stands for. He is doing this here by developing a contrast between libertarianism and liberalism within which, for the latter, we see him using Rawlsian arguments).

With regard to social justice, Ryan explains that for Rawls social justice stands for maximizing the size of the minimum holding of social resources (and as already said above that the conception of social justice so included in the defence of liberal political theory is based on the idea of an individual capable of self-development).

According to Ryan, liberalism is best understood when regarded as a theory of the good life closely related to the social, economic and political arrangements of their surroundings.

However a very interesting point that Ryan raises is that it is up to the society in question if we seek an answer for as to how a society adhering to the liberal principles would look like. 'It might have many churches or none, a multitude of different schooling systems or one, an effective public transport system or not; what would matter would be that the individual liberty or human rights of its members were respected in the process of reaching these outcomes (Ryan)'.

different but equally good lives³¹. Though liberals do not consider the idea of choice to be the absolute good yet for them their autonomous individual can turn into a fully autonomous being only if it gets the option of exercising their powers of choice.

Rawls, similar to Nussbaum's reluctance to accept a humans' bare humanness entity, defined his individual most clearly in the description of basic structure's ideal form wherein he asked what and why of principles that free and equal moral persons accept to agree to the fact that social and economic inequalities are deeply influenced by social fortune and historical and natural happenstance. What is of importance thereby is the fact that the distribution of primary social goods should be equal as well as based on organizational requirements and economic redistribution in order to improve everyone's situation including that of the least advantaged. This also involves intuitive considerations where people who have gained more involve themselves into the improvement of the situation of those who have gained less.

It is for the above reason that Nussbaum says the capabilities approach, in terms of the notion of primary goods, is very close to Rawls's approach. The reason for such affiliation is because capabilities or the list of capabilities is incomplete without the functioning of any kind and Rawls's primary goods, inclusive of natural goods such as health, imagination, intelligence, as its basis supports it.

Rawls's and Nussbaum's approach comes closer further when both make intuition the basis of equal moral worth of an individual. While Rawls's narrates that the individuals as fairly cooperating members of a well ordered society agree to principles of justice not on any comprehensive views but intuitive ideas existing in society; Nussbaum, on the other, asserts that the basic connotation with which the capabilities approach starts is the intuition that basic human capabilities exert a moral claim that they should be developed.

Though both give different definition of intuition yet the idea of deliberation (Rawls) and practical reason (Nussbaum) arises within the very limits of intuition. Thus what we also see is Nussbaum drifting further away from Rawls's theory specifically when

³¹ Ibid 36

the latter adheres to social contract for describing the role of reasonable and rational individuals in deliberation in the circumstances of justice.

The idea of equal moral status of persons with capability to deliberate or reason generates closely the views held by Rawls and Nussbaum on the concept of a liberal democratic structure of society. Assayed as this has been further in Rawls's political constructivism (liberalism), and Nussbaum's liberal position and a critique of the social contract theory, (and its three unsolved problems of justice).

The idea of human functioning is what resurfaces again as one reads Nussbaum further for she believes that politics has an urgent role to play in getting citizens the tools they need, both to choose at all and to have a realistic option of exercising the most valuable functions. As a result of which the liberal political thought tradition has within its ambit a twofold intuition about human beings- one, all human beings by virtue of being humans are of equal moral worth and dignity; second, the primary source of this worth is the power of moral choice³².

One of the major noticeable differences between Rawls and Nussbaum, in their espousal of liberalism, appears when latter refutes the idea of a social contract from which Rawls draws his theory extensively to defend a conception of capabilities that extends to include the non-human species. This also becomes an answer as to why she is critical of the social contract tradition. And essentialism encourages two moral sentiments- compassion and respect. As Nussbaum explains that the capabilities approach has direct obligation to animals moving well beyond the conceptions of compassion by including within it the principles of justice.

Capabilities approach and Human Rights- Nussbaum

Nussbaum's view holds that "the core of rational and moral personhood is something

³² This brings us closer to another important aspect of Nussbaum's theory and that is when she says 'my Aristotelian idea is a form of political liberalism, meaning to say liberalism that recognizes the importance of respecting the diverse ways of life, including reasonable non liberal forms.' Thus the capability for good functioning is accorded a new definition, which Nussbaum describes as the 'Aristotelian essentialist'. The idea of human dignity explicit in Nussbaum's two fold intuition about human beings takes its cue from Aristotle's notion of a human being as a political animal. Aristotle has spoken extensively about human beings who are possessors of practical reason, virtue, and justice.

all human beings share, shaped though it may be in different ways by their differing social circumstances. And it does give this core a special salience in political thought, defining the public realm in terms of it, purposefully refusing the same salience to gender and rank and class and religion³³.”

“At the heart of the liberal political thought tradition is a twofold intuition about human beings: namely, that all, just by virtues of being human, are of equal dignity and worth, no matter where they are situated in society, and that the primary source of this worth is the power of moral choice within them, a power that consists in the ability to plan a life in accordance with one’s own evaluation of ends³⁴.” To these two ideas is linked one more, that ‘the moral equality of persons gives them a fair claim to certain types of treatment at the hands of society and politics. This must do two things- respect and promote the liberty of choice, and respect and promote the equal worth of persons as choosers.’

Therefore for Nussbaum the capabilities approach has a very close relationship to human rights, as understood in contemporary international discussions. In effect they 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 the philosophical underpinning for basic constitutional principles³⁵.

Nussbaum’s De Motu and De Anima

“The psychological activities of living beings, such as perceiving, desiring, and imagining, are realized or constituted in matter, are in fact the activities of some suitable matter; and that the relationship between form and matter is one of constitution or realization, not of either identity or mere correlation³⁶.”

In every psychological process there is a physical realization. Nussbaum depends on, for the current purposes, what she terms as ‘actualisation of potential’ for reaching

³³ Ibid 70

³⁴ Ibid 57

³⁵ Nussbaum, Martha, *Women and Human Development*, Cambridge University Press (2001). p 97

³⁶ Nussbaum, Martha, *Essays on De Motu Animalium*, Princeton University Press (1985). p 35

capabilities approach. Elementary to this actualisation of potential are the activities of perceiving and desire.

Nussbaum has used different categories to explain both the above mentioned capacities to perceive and desire. It can also be assumed that desire precedes perceiving because it is desires that lead to reaching 'actualisation of potential', something which she terms as a transition from the psychological to the physiological. The following example makes it clearer further. In her book *De Motu*, Nussbaum mentions of the importance of 'fully-fledged local movement' to ascribe a practical character to the desire one may have. Since this whole picturisation is in the context of non-human species, the example also relates to the non-human species. As she explains, through this example, that in non-human species that interactive processes between desire for an object and the movement to acquire that object is transition from psychological to physiological or actualisation to potential³⁷.

Perceiving also in the way relates to 'actualisation of potential' inextricably connected to transition from 'potential to actual awareness.'

According to Nussbaum, 'perceiving' is an activity in matter³⁸, that assists in 'actualization of a potential' which is, in other words, also a transition from 'potential to actual awareness'. It is transition because in each psychological process there is physiological realization³⁹, reflected in living being's possession of an external body.

³⁷ This is the psychological account, which for Nussbaum was not satisfactory, in terms of providing causal explanation for animal action. The desire for an object is the 'actualisation of a potential', to be explained in terms of transition from psychological to physiological. And it is the physiological account that leads to fully-fledged local movement. Moving on these lines and foregoing the debate between the psychological and the physiological processes, the matter of utmost concern is the 'actualisation of potential', a theme made possible by the transition from psychological to physiological.

As Putman suggested in book *Essays on De Anima* that this account could never be a satisfactory account because of the missing link between the desire for an object and action, or, in Aristotelian terminology, in the words of Putman, 'it could not be a proper cause of action'.

³⁸ Ibid 40

It is important to take material conditions into account because is these that explain as to why did a particular action occur? These provide genuine causal explanation for actions, for we are now giving the material sufficient conditions for action, belief, desire, perception etc. Materiality, so we can say, lacks the property of generality that is it cannot be applied to varying objects and cases, yet we can study it in the above cases.

³⁹ Ibid 41

We can say physiology of desire or physiology of perception, it is yet important to note that physiology is related to embodied living creatures (because the activity we are dealing with pertains to only living beings and not god or geometrical figures). Perceiving is the clearest and the simplest case of

‘When we say desire imparts movement, there is something, within this movement, which is being moved, and this being moved category foretells, I assume, the account of a living being’s external body. With a living being’s body playing a crucial role in movement, which is structured upon desire based processes- the technical term of which is psychological processes, the definition of physiological (its role in psychology, that makes possible the transition from ‘potential to actual awareness’) seems complete.’

Quoting directly from *De Anima*⁴⁰, the following best represents a more precise analysis of the above (in every psychological process there is physiological realization)

- Puppets and little carts move as wholes, just as the result of a change in a central part; this is the way animals also move. For they are equipped with a functional physiology: their tendons and bones being rather like the strings and wood in the puppets
- But there is a difference. The puppets and carts move simply by a push - pull mechanism that does not involve a (physiological) qualitative change. Animal parts, however, do undergo change of shape and size in the parts resulting from heatings and chillings.
- These changes are brought about by perception and imagining and thinking.

There is an essential connection between the above described process and the capabilities approach. Going by the above established connection between both the psychological and physiological processes, it is evident that for proper functioning of a living being, in simpler terms, there is an essential connection between mind and body. And for Nussbaum there is a potential connection between these kinds of

physiological realization.

⁴⁰ Nussbaum, Martha, *Essays on Aristotle's De Anima*, Clarendon Press (1995). p 42

Psychological processes are realized in physiological transitions, says Nussbaum, that lead us to not movements but fully fledged local movement.

processes and the capabilities approach⁴¹.

Rawls and Nussbaum- the essential difference

Two widely respected contemporary political philosophers have presented different theoretical perceptions of human rights-John Rawls in the 'Law of Peoples' and Martha Nussbaum in 'Frontiers of Justice'. However Nussbaum, as Bernstein says, makes incisive criticisms of Rawls's view and defends a list of human rights that is markedly different from his⁴². Nussbaum develops her open ended list of human rights (or in her terms central human capabilities) as her proposed provisional answer to the following question: What are the central human capabilities implicit in the idea of a life worthy of human dignity, such that every society should aim to raise all of its members above the threshold level of each of these capabilities and establish a constitutionally guaranteed social minimum based on these threshold levels.

Nussbaum's capabilities approach is list of capabilities that is definite in nature and evaluative in content as a result of the explicit ideas of choice and human functioning inherent in it. The former is through an adherence, of the list of capabilities, to Rawls's notion of primary goods while the latter is through an affiliation to Aristotelian essentialism.

Nussbaum herself narrates how critical she is of Rawls's work despite it being also one of the most distinguished theories in western liberal tradition (Nussbaum). Perhaps this is the reason why the former assumes the list to be in conjunction with Rawls's primary goods. However beyond it we see there exist three essential differences, enumerated below, between the two (Rawls and Nussbaum) that also

⁴¹The most elementary case of studying form and matter distinction was animal movement as described in *De Motu*. *De Motu* expressed the movement in animals to be the cause of some interactive processes between desire for an object and the movement to acquire that object. This is the psychological account, which for Nussbaum was not satisfactory, in terms of providing causal explanation for animal action. The desire for an object is the 'actualisation of a potential', to be explained in terms of transition from psychological to physiological. And it is the physiological account that leads to fully-fledged local movement. Moving on these lines and foregoing the debate between the psychological and the physiological processes, the matter of utmost concern is the 'actualisation of potential', a theme made possible by the transition from psychological to physiological.

⁴² Bernstein, Alyssa (2008), Nussbaum versus Rawls: Should Feminist human rights advocates reject the Law of Peoples and endorse the capabilities approach, *Global Feminist Ethics*.

mark the transition to Nussbaum's rights based liberalism and of course her defense of liberalism.

One of the major noticeable differences between Rawls and Nussbaum, in their espousal of liberalism, appears when latter refutes the idea of a social contract, from which Rawls draws his theory extensively, to defend a conception of capabilities that extends to include the non-human species. This also becomes an answer as to why she is critical of the social contract tradition. And Aristotelian essentialism encourages two moral sentiments- compassion and respect. As Nussbaum explains that the capabilities approach has direct obligation to animals moving well beyond the conceptions of compassion by including within it the principles of justice. The second chapter deals with the above.

The following has been studied in chapter three. Rawls defines his individual in the ideal form of a basic structure as the one questioning what and why of principles that free and equal moral persons accept to agree to the fact that social and economic inequalities are deeply influenced by social fortune and historical and natural happenstance. Thus distribution of primary social goods should be equal as well as based on organizational requirements and economic redistribution, in order to improve everyone's situation including that of the least advantaged. It is for this reason that Nussbaum treat the capabilities approach, in terms of the notion of primary goods, as very close to Rawls's approach because the list of capabilities is incomplete without the functioning of any kind and Rawls's primary goods, with natural goods such as health, imagination, intelligence, as its basis supports it

The affiliation to Rawls's theory of justice ends here. Why? Because Rawls believes that the members of the well-ordered society, the free and equal citizens, have various alternatives available to them within the reasonable comprehensive doctrine. These alternatives however exist in a closed society that has no ends or what he calls, 'antecedent social ends'.

In short, Rawls's well-ordered democratic society is a political society where an individual is supposed to lead a complete life with all its advantages and disadvantages, a society where entry is by birth and exit by death. Unlike Rawls,

Nussbaum, on the other, believes that capabilities approach is about basic human entitlements with choice as its core elements, the denial and unequal failure of which in capability becomes a problem of justice. Whether or not an individual has been allowed to live well depends on the capability to perform central human functions with a subsequent aim of enabling that very individual to live well and not just survive, or what Nussbaum calls 'bare humanness'.

Nussbaum considers choice to be important for promoting and preserving the equal moral worth of persons for she believes that individuals are not to be seen as passive recipients of social planning but as dignified human beings who possess the capacity of shaping their own lives. Therefore recognition of preferences that have been distorted by habits of hierarchy and subordination, and legacy of injustice are to be deemed as of great service in choosing directions for future.

The focus of chapter four goes around the issue of disability. Nussbaum says, politics (concurring with Rawls) should focus on getting as many people as possible into a state of capability to function with respect to interlocking set of capabilities enumerated by that list. Rawls has defined politics from the perspective of political justice and its three fundamental ideas: the conception of society as a free system of social cooperation (and its two companion ideas), the conception of a well ordered society and the political conception of a person as free and equal. And this is, according to Rawls, the brief summation of political liberalism, sufficient for a society, which is to be fair and stable between free and equal citizens.

Nussbaum, on the other, has created a more comprehensive capabilities list with three sub-branches (basic, internal and combined capabilities) to acknowledge the possibility of developing a list, which is interlocking in nature yet, is specific with its content. The answer comes in the form of, the above mentioned, three types of capabilities that justifies the specificity of the list alongside a more detailed and developed analysis of it for making the approach more goal oriented.

The uniqueness of the list lies in the fact that, explains Nussbaum, it is not indifferent to the struggles of the people who have to try these in a hostile environment.

Chapter 2

The Justice of Capabilities' for Non-Human Species

Abstract

A Theory of justice considering its volume does introduce categories uniquely expressive of explanations that may otherwise be simple and related to the regular examples of our daily lives. Justice is one such example. Justice as an issue is nothing new and the values it signifies is at the centre of almost every political disquisition, social bearings and further and further. However when books such as *A Theory of Justice* and *Political Liberalism* set the ball rolling, justice as a supposition is not simply an intellection but a conceptualization, as unique as or let us assume as uniquely, to be now described as 'justice as fairness'. This conceptualization further has explicit thoughts such as constructivism and public reason as its brainchild.

Justice as fairness also is one of the easiest routes to understanding justice, as a principle category, in Rawlsian philosophy, in a step by step manner. To begin with there is the idea of constructivism, dealing with both an individual and society, and we assume for a better understanding that the idea of the Original Position is implicit in it. Obviously Rawls mentions explicitly about the original position still, for the sake of better clarity, it would not be false to use original position as an implicit category for it may then be used as a pathfinder, which guides the reader how the reasonable and rational individual is to be placed in order for the theory of justice to begin.

Another way of putting the above can be that original position of the justice as fairness view serves as the pioneer to a political conception of justice. An individual and her role in developing the two principles of justice are not new. Original position provides an answer to how this is done. We can also hypothesize that justice as fairness construes constructivism to assign a kind of political role to citizens more explicitly. The principle of choice aids individuals in the original position to think, to understand, and then formulate the principles of justice for institutions. Constructivism, on the other, while carrying choice, adds to the above by suggesting public reason for this mass of people.

Hence the original position can also be seen as offering a rendition of a political conception of justice. In the sense that first it introduces justice as fairness apart from introducing an objective called choice that by itself is enrooted with another principle called constructivism, which surmises one of public reason

The above is a view that is not without its share of shortcomings more so when we pick one of core principles of the theory on justice- choice. Animals and their lives cannot be equated as resembling just a furniture and Nussbaum importantly mentions that our 'choices' do have a significant role to play in perpetuating further the incidences of violence and the heaps of agony these non-human species have to go through. Rawls also explicitly mentions about choice if we analyze how while people functioning as parties inhabiting the original position of a well-ordered society deliberate through choice in selecting the principles of justice.

Capabilities approach extends itself, and it can be classified as a capably wide enough extension, to incorporate those who have been traditionally unheard and included. Traditionally when studied under social contract theory as the pretext such unheard voices come now where into the scene. The non- human species is one of them though today there is an able body of activism and a general awareness on such issues that demand such activism. The prolonged ignorance and comparative silence on issue, as significant as that which involves speaking of the suffering of non-human species, in the course of political debates and social awareness convinces Nussbaum of the significance of circumscribing an all- inclusive sphere reserved for the non-human species. Capability thus speaks of ensuring an inclusion of the non-human species within its range as even Rawls considers them to be as worthy only of charity and compassion rather than justice. And interestingly she offers one, a teleological account (self-maintaining capacity, desire and preferences, and intention); two, compassion, in defense of the above.

Individual Denominated in Original Position

There are significant differences between *A Theory of Justice* and *Political Liberalism* irrespective of the considered and unconsidered many such differences here. Within this range of inevitable differences lies the domain of the original position that remains constant. In the former book the principles of justice are based on persons' considered inner convictions whereas in the latter they are founded upon public political culture of a democratic society.

An introduction on the kind of individual Rawls introduces in *A Theory of Justice* would be an ideal starting point. The persons, and as already mentioned that everything happens within the fold of the original position in a Rawlsian society, are of a higher moral worth in the original position thus also exhibiting a higher moral character something which is also a normal expectation of each member of the original position with the other such member. This is also the strict compliance theory within which the principles of justice so chosen characterise standards to which individual members of the original position comply (in considering each other persons as persons with equal moral worth).

The above individuals also have a rational plan of life, which is right as well as good, selected by the parties in the original position. This is also, as Rawls defines it to be, the thin theory of the good and such acts have been mentioned in *A Theory of Justice* as supererogatory acts. Acts beyond the above require a more comprehensive theory and as result one could see them falling within the purview of full theory of the good.

Summing up one can unequivocally for the moment assume that- a person's good is determined by what is for him the most rational plan of life given reasonably favourable circumstances⁴³. This description of the concept of good, within the context of primary goods, is the thin theory of the good. These primary goods apart from securing the priority of the right over good also assist in arriving at the two

⁴³ Rawls, John, *Political Liberalism*, Columbia University Press (1996). p 396

principles of justice⁴⁴. Once these primary goods are accounted for, we can use these principles of justice for further development of the theory of the good. This developed theory of the good has been termed by Rawls as full theory of the good.

Before turning towards the other tenets characteristic of the theory of justice, a clarification note on how the original position remains of central importance in spite of its hypothetical nature may not be a futile attempt as it would also function as supplement for assaying the kind of transitions, in terms of concepts, the theory goes through. Roberts offers a step by step introduction to the transitions after which one reaches the stage ‘justice as fairness’.

Justice as Fairness

An individual is the highlight of the assumptions Rawls draws for explaining the conduct of principles in the basic structure of society, irrespective of the introductions offered to the theory on justice in both the books. Before reading the step by step justification given by Roberts, it would not be futile to study in one’s own way as to what exactly justice as fairness stands for.

Rawls in book *Political Liberalism*’s initial pages defines political liberalism in terms of political justice which is to be regarded as the most appropriate conception of justice for specifying the fair terms of social cooperation between citizens regarded as free and equal. Till date, as Rawls says, there is no agreement on how to create various arrangements that satisfy the fair terms of cooperation between citizens regarded as free and equal⁴⁵. However the only answer, endorsed by a concept that Rawls assumes to be feasible and capable of ‘adjudicating between the two contending traditions’ (liberty and equality), is the concept of ‘justice as fairness.’

The answer so proposed by justice as fairness consists of the two principles of justice.

⁴⁴As per the deontological perspective, a product or situation is good only when it fits well into the conception of right already established. Rawls has equated this notion of good with human motives in the original position, as a result of which some portion of goodness is required to complement the concept of right. The sole aim of it is to make parties, entering into agreement in the original position, realise that their notion of the good has a certain structure, which also enables them to choose rational plans of life.

⁴⁵Rawls, John, *Political Liberalism*, Columbia University Press (1996).

Thus the two principles express a liberal conception of justice and egalitarian form of liberalism⁴⁶. Both the above are so by virtue of three elements. The former (liberal conception of justice) through-a specification of certain basic rights, liberties and opportunities; an assignment of special priority to those, rights, liberties and opportunities; measures assuring to all citizens adequate all-purpose means to make effective use of their liberties and opportunities⁴⁷. The latter, egalitarian form of liberalism, through an expression of the fair value of the political liberties; fair equality of opportunity; difference principle⁴⁸.

The various convictions (as discussed above) that exist are to be put together as organizing principles of a well ordered society based on a political conception of justice. Justice as fairness, with a conciliatory aim (liberty and equality), rests on the above idea whose very basis is the idea called a well- ordered society, with free and equal persons existing as fully cooperating members of a society operating under a fair system of social cooperation⁴⁹.

The next section is an explication of a political conception of justice implicit as this ideal is in political liberalism based on the concept of justice as fairness.

Political Conception of Justice

A society has to serve certain ends and purposes based on public reason. Public reason is an ideal of a democratic society with ordinary citizens, holding equal citizenship, as its members. The subject of political reason and the democratic people is the good of the public. This is the requirement of a political conception of justice within the

⁴⁶ There is not much change in the argument, says Rawls, the basis of all the arguments is the same as they were in *A Theory of Justice*. The whole discussion is from the perspective of an egalitarian conception of justice. But our concern is political liberalism and its 'component ideas' and thus the discussion is focused ultimately on liberal conceptions.

The two principles together regulate the basic structure of society and the institutions that put these values in operation.

⁴⁷ Ibid 6

Rawls explains that all these three elements require a detailed study and clarification and they can be understood in different ways. However since in these lectures such matters are not our concern, I make only a few comments (Rawls).

⁴⁸ Ibid 7

It means that various inequalities- social and economic- attached to offices and other positions are to be so arranged that they are of the greatest benefit to the least advantaged members of society.

⁴⁹ Ibid 9

framework of a society's basic structure and this is also what makes the whole idea of public reason public in nature. It is reason of the citizens as much as it is reason of the public whose motive is good of the public, a good which is the fundamental matter of justice⁵⁰. The whole idea is based on a society's conception of political justice as the very idea of public reason is according to the ideals and principles established in the very conception. The very core of this is the structure of a political society, with reasonable and rational agents, who have the capacity to take decisions that are based on the order of priorities.

The fundamental questions that a society needs to resolve are a part of the political values of the society. The fundamental questions include the constitutional essentials whereas the political values are the limits imposed by the idea of public reason. And together they fulfil the criteria of basic justice⁵¹.

The citizens agree to abide by a public conception of justice to settle political questions by appealing to the idea of public reason. The idea of political legitimacy intertwined with the idea of an existing political relationship amongst its citizens provides the foundation for public reason that cannot be transcended⁵². This also

⁵⁰ Ibid 213

⁵¹ There are special subjects of public reason concerned as it is with questions of basic justice and constitutional essentials unlike issues that constitute political questions. The examples in the case of the former includes questions like who has the right to vote or hold property, or equal opportunity or what religions are to be tolerated etc. This is also what we may call, using the Rawlsian terminology, the limits imposed by public reason.

As a result of these limits public reason looks into fundamental matters and not matters that are political but not fundamental like tax legislation, statutes related to environment and pollution, establishing national parks or developing museums etc. Though they do some time become fundamental issues yet according to Rawls, these can be taken into only in a fuller account of public reason. For the present, public reason should limit itself to strongest cases that are also fundamental in nature because once they proceed justifiably well here, they will soon gain for themselves a position that will stand its ground in other cases as well. Rawls answers this in response to questions like why public reason cannot extend itself fully to issues where citizens participate actively in formulation of laws or are political participants.

Public reason also does not apply to personal deliberations and reflections of people on political questions or for that matter it also does not take into consideration the viewpoints of churches and universities.

The above is how the ideal of public reason applies to citizens. The ideal also applies to legislator and executives, in their public acts and pronouncements as well as the judiciary (as it has to justify the basis of its decisions and clarify the constitutional procedures and precedents used).

⁵² Ibid 216

The principle of political legitimacy, explains Rawls, is linked to the idea of political relationship of its people in two ways: one, it is a relationship of persons within a basic structure of society where they come together to lead a complete life; second, political power here belongs to the citizens as a collective.

qualifies as being reflective of the free and equal characteristic of the idea of public reason as here the power, such as the right to vote so exercised by citizens, does not trample upon the similar powers of other citizens.

The above remains incomplete without an outline of the tasks to be performed by the citizens. “Understanding how to conduct oneself as a democratic citizen includes understanding an ideal of public reason⁵³.” This means that the citizens, reasonable and rational as they are, with political power as well as their religious and philosophical affiliations and doctrines in the basic structure of society are supposed to be forever ready for explaining the basis of their actions so that other may well endorse them so long as it does not impinge upon their own freedom and equality.

The political conception of justice is liberal as well as political. It is liberal in three ways: one, it specifies certain basic rights, liberties and opportunities; second, it assigns a special place to these rights, liberties and opportunities especially with respect to claims of general good and of perfectionist values; third, it affirms measures assuring all citizens adequate all-purpose means to make effective use of their basic liberties and opportunities.

It is also political in three ways: it is framed to apply solely to the basic structure of society, its main social, political and economic institutions as a unified scheme of social cooperation; it is presented independently of any wider comprehensive religious or philosophical doctrine; it is elaborated in terms of fundamental political ideas viewed as implicit in the public political culture of a democratic society⁵⁴.

A liberal political conception of justice remains incomplete without stating adequately the criteria that guides the principle of public reason. Political justice and public reason in the basic structure of society provide the citizens with basic justice on the

This also involves a willingness on the part of individuals to believe in fair mindedness in order to allow for necessary accommodations to be made in their views by listening to others.

⁵³ Ibid 218

The basis for all this is Rawls purported attempt to dissolve the ‘paradox of public reason’. And ultimately in the end once all the above principles are followed and in place, the well-ordered constitutional regime gets soon endowed with values like public reason and overlapping consensus and such values that cannot be easily overridden. It is all based not on political compromise but the idea of public reason and overlapping consensus of reasonable comprehensive doctrines.

⁵⁴ Ibid 223

basis of public inquiry, which is a part of liberal principle of legitimacy. All constitutional matters and questions of basic justice are to be settled as per truths that are now widely available to the citizens as a result of public reason⁵⁵. It would further go incomplete if one does not mention the principle of toleration, a principle that exists as a form of an agreement to conciliate the conflicting claims of liberty and equality, otherwise such claims stand unfulfilled if the various agreements and disagreements that exist in a society are not aggregated into a coherent form or in Rawlsian terms brought into ‘reflective equilibrium’.

Next we move on to Peri Robert’s specific understanding of the conception discussed above ‘justice as fairness’.

Original positions, as Roberts begins with, might in general reflect an uneasiness pertaining to the kind of explanation Rawls gives for it as the original position is a hypothetical situation or an imaginary situation per se with imaginary people or people who are themselves hypothetical. And thus arises many questions as well out of this. However this particular analysis in general terms is misplaced given that Rawls does give an appropriate explanation of the hypothetical original position and the people who inhabit it⁵⁶. The original position is the ‘main idea of the theory of justice’ and has various motivational assumptions, and presumptions that are also the descriptive points that narrate it. The assumptions include the fact the people in the original position are a mutually disinterested lot that are not motivated by envy, are rational by nature and possess their own conception of the good. While the various presumptions include the fact that the original position is intended to act as the initial position of equality from which the rational parties must make their choice, the principles so chosen are not arbitrary in nature but objective as well as unbiased in

⁵⁵ Liberal political values, according to Rawls, are of two types- values of political justice and values of public reason. The former includes the equal political and civil liberty, equality of opportunity, social equality and economic reciprocity, the common good as well as the conditions necessary for the realization of the common good. The latter is a part of public inquiry that attempts at making the inquiry free and public. Also included here is reasonableness and readiness to accept the duty of civility that further makes possible the ‘reasoned public discussion of political questions’. And justice as fairness is one part of the liberal political conception as a result of which political liberalism also is a form of view where in the guidelines for inquiry and the idea of public reason determine the substantive principles of justice.

⁵⁶ Roberts, Peri, *Political Constructivism*, Routledge (2007).

The various kinds of questions include- how would you like that if it was done to you? How would you react if you were in their shoes? Can we have just any sort of original position and have it play an important role or are there particular limitations that makes one imagined situation better than others.

nature, based never on irrelevant information⁵⁷.

We move on to the second tenet that is a well ordered society. As said the parties in the original position, situated behind a veil of ignorance, decide on a conception of the good for a well ordered society. The whole situation above affirms to the crucial Rawlsian idea that is behind this whole concept- the basic structure of society. What is chosen in the original position is a set of public moral principles for setting conditions on the limited area of political decision making. This is why, although he does not use the term until later works, it makes sense to regard this as political constructivism⁵⁸. (Roberts)

In the words of Roberts “the basic structure is made the primary subject of justice because of the profound and all-pervading influence it exerts on the success or otherwise of the plans of life of citizens. If the basic structure is just, it does not guarantee that people will lead a happy and successful lives, but if it is unjust, their chances of living such a life is likely to be highly diminished. Because this choice is so important, it should also be a unanimous one. This ensures that principles chosen can be freely affirmed on an equal footing as the condition of unanimity effectively gives each party a veto on that choice. Finally, to make the choice manageable, the parties are not asked to discover the best of all possible principles but are instead presented with a short list of traditional conceptions of justice with a few possibilities added. The parties are then asked to rank these conceptions of justice, and their choice is made for the conception of justice that takes top ranking.”

⁵⁷ Ibid 11-16

The description is absolutely incomplete without a mention of the ‘veil of ignorance’. Veil of ignorance in short and simple terms stands for a situation where this particular veil veils from the parties all general information granted to them. Thus as Roberts rightly says the veil of ignorance is once again a way to justify that the principles of justice are based neither on arbitrary considerations nor subjective considerations. Because it is unbiased and not biased towards people with particular attributes, it is objectively justified. Also central to the above argument is the notion of primary goods that is composed of a list of following conditions- rights and liberties, powers and opportunities, income, wealth, self-respect etc. This notion is important for understanding the conception of justice by parties in the original position because despite the presence of a veil of ignorance, the parties however know their preferences in the form of select primary goods. The notion of primary goods becomes all the more important for the given fact that such a conception aids in extracting from the several conceptions of the good, the real conception of the good central to the realization of developing objective conditions of justice.

⁵⁸ Ibid

The third tenet- reflective equilibrium (the term reflective equilibrium is on some ways, a new description of a familiar process, and it is of central importance to Rawls's justification of justice as fairness and to his constructivism in particular)⁵⁹.

Roberts also introduces an important differentiation between *A Theory of Justice* and *Political Liberalism*. In *A Theory of Justice* Rawls developed the citizens' conception of the sense of justice and the role of these citizens in formulating the principles of justice, to regulate the basic structure of society. This was all within the context of original position balanced by reflective equilibrium. The book *Political Liberalism* is an extension of this argument, but within a definitional context. This definitional context is the concept of 'political constructivism'⁶⁰. In the beginning of the chapter, Rawls has explained it as a view defining the structure and content of a political conception.

It is not difficult to hence deduce from the above that the former argument in conjunction with this conception- political constructivism- moves towards specifying justice as an outcome of a certain structure. The importance of political constructivism lies in the fact that, for a democratic society, it secures an overlapping consensus on its fundamental political values⁶¹. This argument persists in unity with conception of society and person, conceptions, which are by themselves ideas of practical reason⁶². Apart from, these citizens, exuberating practical reason in their dealings, they also

⁵⁹ Ibid 21

To say further Rawls is committed to identifying constructive principles of justice that can systematically account for these convictions whilst also drawing out their general implications. Rawls suggests that we can think of our judgments as in reflective equilibrium when, on due reflection, principles of justice accord with our considered convictions about justice. Rawls is confident in claiming that we already accept the constraints on the original position that he has outlined because they are integral to an account that identifies the principles of justice that are in line with our considered judgments after due reflection. Rawls further argues that the particular constraints that inform the original position are commonly shared presumptions that are both widely shared and weak. Because the constraints fulfil these conditions, the conception of justice which results best approximates our considered judgments of justice. Indeed it is crucial to Rawls's project that that he be able to argue that justice as fairness matches our common sense convictions more accurately than its traditional rivals.

⁶⁰ Ibid 84.

⁶¹ Ibid

⁶² The citizens, as free and equal beings, use their practical reason to develop the two principles of justice, taking always into account the public and shared ideas of society as a fair system of cooperation. The argument has come a full circle now, from people in the original position using their practical reason to formulate the principles of justice to political constructivism, embodying an overlapping consensus, for this very shared ideal of the principle of justice. Going back to the argument of the book *A Theory of Justice*, these citizens were called rational individuals.

show themselves to be autonomous.

The precursor, be it the well-ordered society, reflective equilibrium or the original position, in Rawls's theory is the individual. With individual at the center stage constructivism can be a good starting point for defining the precepts that accrue from justice as fairness. Constructivism in a way can be divided into two parts, one, dealing with how an individual person is so defined within the limits prescribed by the former; and two, the trajectories that this concept, as a precept, follows leading finally towards the two principles of justice. In this chapter, in the next section, constructivism will be discussed however within the context of the above mentioned part I (the second part of the section has been dealt with more elaborately in Chapter 3).

To begin with Constructivism can be understood as a procedure that enables parties in the original position to choose principles of justice while at the same time adhering to the criteria of rationality and reasonableness.

An individual person within the conjectures specified by constructivism can also be categorized as an individual falling within the purview of a justificatory process considered essential for reaching the two principles of justice. It may so appear that the justificatory process if we go by the above is based on a form of reflective equilibrium. However there is another line of argument that McKinnon introduces, which elucidates on the kind of justificatory processes an individual has to go through in practical realm of life in order to reach the two principles of justice. Below is an elaboration of the manner in which McKinnon begins her introduction of the justification processes and then moves on to defining Rawls as a constructivist within this justification process, but only after introducing first a brief account as what forms a part of this justification process. And most importantly the individual person and her correlation to the idea of autonomy and in what ways such an inter-link is to be found narrated in constructivism (is also an elaboration that McKinnon mentions in her work).

Rawls's constructivism is founded upon the idea of autonomy evident from the constitutive autonomy argument, which ensures that values that obtain from a

particular political situation or order depend upon the ideal of practical reason and not any kind of in the thin air arguments. According to McKinnon, ‘political justifications’ are a part of everyday life, and beings who claim to be not interested in politics of the day or who governs them cannot still evade the daily processes of political justifications⁶³. In a simple sense political justifications basically arise when one tries convincing the other person whether a certain policy or programme is just and fair and to what extent and if it is not then, why not? For instance, as McKinnon says, one evidently very often come across general discussions amongst people on issues such as Britain adopting the Euro is wrong or right, the state of national health service in, or the war in Afghanistan, or the price of petrol.

However what concerns McKinnon is not these political justifications of everyday life (as she calls them) but the ones that contain within themselves a deeper meaning. They have been termed as ‘philosophical political justifications’, different as these are from the everyday political justifications⁶⁴. What is fundamental for McKinnon is philosophical political justification. ‘Although I believe that there is no difference in kind between the practice of everyday political justification and the practice of philosophical political justification, philosophical political justifications ultimately raise deep questions about the nature of justificatory value in political society that are

⁶³ McKinnon, Catriona, *Liberalism and the Defence of Political Constructivism*, Palgrave Mcmillan (2002).

‘Britain should reject the Euro because it will bring closer integration into Europe, which will threaten sovereignty and national identity. The star war programmes should be avoided because it will fuel another arms race; income tax should be increased to fund improvements in the NHS; the war in Afghanistan is illegal and immoral; government taxes on petrol for haulers should be kept as they are because of the damage their vehicles cause to the environment.

These kinds of statements are not technical tools available only to specially trained political analysts and advocates.

Rather, they are the sorts of considerations that people offer to one another in support of their opinions, in a world in which they cannot avoid forming some opinions on some political issues. When people do this they are engaged in political justification; questions of political justifications are questions for everyone. These kind of statements are not technical tools available only to specially trained political analysts and advocates, rather, they are the sorts of considerations that people offer to one another in support of their opinions, in a world in which they cannot avoid forming some opinions on some political issues. When people do this they are engaged in political justification; questions of political justification are questions for everyone.’ (McKinnon)

⁶⁴ Ibid

Important it is to also note, as McKinnon believes, that it is the political justifications and the philosophical ones that have a bearing on the everyday political life or the world of realpolitik. Though the general mass of people can’t really avoid discussion on such matters and it is in some way or the other a part of their daily lives. Yet is the philosophical group of justifications that interests her and this is what she is going to look at in the subsequent sections.

not- or, at least, not explicitly- raised by everyday political justifications⁶⁵.’

It is the argument or a set of arguments used by a person to convince the addressee about the validity of their standing on a particular issue that persuades the addressee sooner or later of the truthfulness of this person’s claim. And if the addressee is convinced and is able to make sense out of the arguments then the argument is good and “philosophical problems of political justification relate to what constitutes a good argument in this context⁶⁶”.

Another highlight of this whole feature is its ‘action-guiding aspect’⁶⁷. The term stands for the means of persuasion used by a person, without the use of force, for the addressee to modify his or her behaviour as per her argument⁶⁸. There are two conditions that make the action-guiding aspect of political justification complete. One is that the justificatory processes involved must be ‘motivationally adequate’; and second, that they have to above all other reasons that is that the force of this particular justificatory principle need to stand out among the rest of the reasons (offered to justify)⁶⁹. The above is mandatory as then the justificatory process would not be one of the other existing justificatory processes. A justificatory process is unique in nature because it serves as a guiding force for a scattered and unguided number of people thereby laying forth principles that function as rules or principles.

⁶⁵ Ibid

⁶⁶ The definition of ‘argument’, as given by McKinnon, stands for the kind of context and reasoning provided to the person to whom such a justification, for rejecting a particular proposition, political or not, is offered.

⁶⁷ If the person addressed refuses to alter her behavior then it is perfectly legitimate, according to McKinnon, to use force against them. This is the action-guiding aspect of political justification. The other side to this is the theoretical model. An easier way to explain it will be through the notion of ‘intelligibility constraint’ that McKinnon uses to narrate it further. Under this it has to be assumed that once the addressed understands the arguments utilized in political justification (and that the whole justification is also action guiding in nature) then this particular person or the group of persons is intelligent. Intelligent because despite not being very well versed in philosophy or sophistry of any kind, the person still could grasp the whole justificatory process. In addition to this, such arguments that are of theoretical nature must also be sound and supported by evidence wherever they are required.

⁶⁸ Ibid 4

⁶⁹ McKinnon tells us that it is one of the stickiest questions in contemporary political philosophy as to why one principle takes precedence over all other reasoning involved in the justificatory processes. Yet, as McKinnon says further, her task of explaining this further ends here and thereunder she proceeds with the mere fact that one principle of the whole justificatory process stays above the rest of the principle sets of practical reasoning involved.

Next section belongs to the scope of political justification. Broadly, the process scope is limited to two areas- political legitimacy and questions of justice⁷⁰. The basic task the author takes up from now on is to explain to us as to ‘how the questions that are related to the issue of justice specified?’ To answer this it is equally important to answer another level of questions⁷¹. In order to have an answer to all these questions that aim at providing us an answer to the first question (as to how the questions related to justice) McKinnon enters into an arena, which belongs to the ‘tradition of liberalism’⁷², as she calls it. It is noteworthy to note that one of the questions related to the apparent utility of values in the whole justificatory process, one comes across three approaches that are inextricably linked to this whole question of value. The three approaches are- pragmatist, perfectionist and constructivist⁷³. For McKinnon, as she reflects a bit further on the previously said statement, there is a total of three categories, which inform the basis of a political justification: Pragmatist, Perfectionist and Constructivist.

Political justifications should aim at inclusiveness and be considerate of the deep diversity as well. In fact diversity is narrative through which such justifications ought to begin with. And in this regards McKinnon mentions of a justificatory value considerate of the above and still not too overbearing in nature, just ‘critically potent’. The answer is a form of constructivism with self-respect as the foundation at least for the moment and this remains to be the most crucial one especially when compared to other theories on constructivism demonstrating its justificatory values.⁷⁴

⁷⁰ Ibid

While the former stands for the existence, extent and nature of state power apart from its successful attempts at establishing political obligations, the latter, questions of justice, is linked to political principles and procedures. Within the overall theory justice, different subsets of justificatory successes can be applied to the questions of political legitimacy as well as the questions of justice.

However it is not necessary that success through a particular justificatory procedure related to questions of political legitimacy shall apply also to the questions of justice. And hereafter McKinnon makes it clear that she will look into only the question of justice and not the other one.

⁷¹ The questions include- Who is addressed by the political justification? Must justificatory reasons actually be accepted for a political justification to succeed? Or is it enough for the success of a justification that people could accept or would accept its reasons? What does it take for a justificatory reason to be fit to motivate those it addresses? What sorts of values must be expressed by justificatory reasons? How do these values affect the scope and success of justifications, and the motivational adequacy of their reasons? Approaches to the question of value in political justification can be classified as Pragmatist, Perfectionist and Constructivist.

⁷² Ibid

⁷³ Ibid

⁷⁴ Ibid 24

The one thing that is very central to an understanding of the above is the notion of constituency that McKinnon introduces to provide answers for the various questions stated above⁷⁵. Constituency is constituted of people to whom the political justification process is addressed and on whose judgments the success or failure of the justificatory processes is dependent. Who gets included within this whole scheme of things is the most important question here. As a result this notion of constituency is divided into two types- inclusive constituency and exclusive constituency. Inclusive constituency is made up of all the people that make up the constituency excluding children and mentally incompetent. Exclusivist excludes various categories of people⁷⁶.

(The next question McKinnon immediately raises is the kind of constituency that liberal political justification considers for evaluation and addressing. The reply to this is liberal political justification supports inclusive constituency of political justification and this remains its most distinguishing feature. A person with reasoning capacity is not to be excluded from the constituency of justification and even as liberals believe that skin color, religion, region, race etc has nothing to do at all with such a reasoning capacity.⁷⁷ Another distinguishing feature of this is that liberal political justification is

⁷⁵ Ibid

⁷⁶ Such societies are often elitist societies and the success of a political justification is based on view of selected few who take themselves to be worthy of such judgments and excluding those they consider unworthy of taking decisions for judgments. They are more or less unstable societies as the excluded ones are not considered when decisions are reached thus forcing it deeper into the clutches of civil rest or even revolution (the excluded ones are usually groups who have been sidelined for reasons ranging from color of the skin, to property to class to lineage to sex to religion.

As McKinnon explains a constituency with a limited scope may be addressed because there remains an underlying selfish motive of exploiting and oppressing the ones that are not a part of this constituency. There may also be times when an exclusive constituency has constituents that believe that they have been oppressed and exploited and continue to be so because they refuse to abide by the 'justificatory dialog' of others. Still there are those that believe it to be a form of protection against those who seek to dismantle or disrupt the peace of the constituents.

⁷⁷ Ibid

Constructivism is of two types- internal and external. In the same a constructivists are of three types: empirical, non-empirical and political.

"Some Constructivists are deliberative internalists: they claim that justificatory values are those that people would be committed to were they to deliberate soundly from their present commitments. Other Constructivists are externalists: they allow that justificatory values need bear no relation to persons' present motivational commitments. Either way, Constructivists face questions of demandingness with respect to their account of justificatory reasons. Constructivist accounts of justificatory value can be empiricist, non-empiricist or political. Empiricist accounts construe justificatory values in terms of a set of desires which, it is argued, people share in virtue of their shared agency, personhood or practical reason."

"For example, Charles Taylor argues that human agency is characterized by the activity of 'strong evaluation', whereby human beings have second-order desires, expressed in a deep and articulate

well aware of the deep diversity that surrounds these very constituencies⁷⁸. It is a feature of contemporary liberal philosophy and deep diversity is also one issue that differentiates one contemporary liberal political theorist from the other, (although they all agree to and accept the fact of deep diversity, which is their differing views on one question that why deep diversity is ineradicable in nature).

“Deep diversity is the normal result of the exercise of reason in conditions of freedom, and is not to be regretted.”

Rawls's speaks of a conception of diversity within the context of 'burdens of judgment'. This conception, according to McKinnon, makes place for a high degree of diversity, which is also ineradicable in nature, a fact that is not to be regretted⁷⁹. Equally important is the conception of religion where Rawls claims has nothing to do with in what ways a group or a sect preaches or decides to follow a particular preaching.⁸⁰

Constructivism's primal task is creating assumptions and generating value, which the very basic premise of this principle, the people, can follow.

The prerogative to make a 'choice'

Rawls also explicitly mentions about choice if one tries observing this incorporated ideal, while reading Rawls, every time there is an attempt made by a reader to

language, that certain of their first-order desires be satisfied. The capacity for strong evaluation (along with certain other important capacities) can only be developed in certain social contexts (this is Taylor's 'social thesis'). Therefore, in virtue of having the second-order desires constitutive of strong evaluation, all people must value the social contexts in which the capacity for these desires can be exercised, and these contexts deserve political protection.”

“Non-empiricist accounts construe justificatory values in terms of a set of reasons people share in virtue of features they share other than desires, and are on the whole Kantian accounts.”

“For example, Onora O'Neill argues that a political commitment to the avoidance of systematic and gratuitous injury can be constructed from features abstracted from the practical reason shared by all persons. O'Neill's Constructivism avoids empiricism because she does not characterize successful practical reasoning in terms of the satisfaction of desires, or of getting what one wants. Instead, practical reason is characterized by her in terms of certain assumptions which must underlie the behavior of any agent who can be genuinely said to act at all.”

(McKinnon 26-27)

⁷⁸ This is a feature of contemporary liberal philosophy and is often considered a permanent feature. Historical liberal understanding including philosophers like Locke, Rousseau, J S Mill, Kant could not recognize this.

⁷⁹ Ibid 10

⁸⁰ Ibid

understand the original position and well-ordered society subsequently. We observe during this reading's analysis how these people, functioning as parties inhabiting the original position of a well-ordered society, deliberate through the principle of choice in selecting the principles of justice. Roberts provide the most elucidative comprehension to the above when he affirms justice as fairness to be constitutive of a political conception of justice with a two-stage justification process⁸¹.

(Rawls's scheme of justice and a meaningful life is not only about selecting a conception of the good and then striving for it, something which also pronounces an individual's ability, but also the whole activity of choosing such principle that helps one understand in what ways such conceptions cohere and how much the conception of one person is connected to the other person's. This is so because in the end the whole idea of a conception of the good is about a set of final ends leading us to our striving for a meaningful life. This is, according to Arneson, in the context of society not taking responsibility for the consequences one might suffer due to an individual's choices.⁸² In *A Theory of Justice*, Rawls suggests how to draw a line between the misfortune that is society's responsibility and the misfortune that is not by distinguishing between deep and shallow inequalities⁸³. The main focus of Rawls's theory of justice dwelling upon mainly the structure of basic institutions is organizing liberties and opportunities in such a way that are to the benefit of most destitute

⁸¹ Roberts, Peri, *Political Constructivism*, Routledge (2007). p 47-50

The justification of this two-way justification process leads to a political conception of justice different from comprehensive conception of justice. What differentiates political conception of justice from a comprehensive one is the two stage justification process. During the first stage justice as fairness a set of values are being developed and enunciated based only what is implicit in the considered inner convictions of people inhabiting a particular society. Hence during this stage justice as fairness is a 'free-standing political view'. Even a fair evaluation of the truth or falsity of a particular value, religious, social or philosophical nature, is deliberately avoided. When it enters the second stage, justice as fairness dons a more responsible cap and evaluates such values and principles while also basing them on reflective equilibrium and overlapping consensus. Thus justice of fairness is assumed as following only 'reasonable comprehensive doctrines'. And such doctrines reasonable and comprehensive in nature consistently become capable enough of following a political conception as well.

⁸² Arneson, Richard, Rawls, Responsibility and Distributive Justice, in Marc Fleurbaey, Maurice Salles, and John A. Weymark (ed), *Justice, Political Liberalism and Utilitarianism: Themes from Harsanyi and Rawls*, Cambridge University Press (2008).

⁸³ Ibid

As Arneson says, 'in a nutshell, the Rawlsian idea of justice is that society is obligated to provide for individuals a fair share of opportunities and resources that correct to some extent for the natural lotteries of birth and upbringing so that the expectations of the worst off are as high as they can be made. What individuals make of their opportunities and resources, the goodness or badness of the lives they fashion for themselves guided by their own individual conceptions of the good, is their own business, not in any way the responsibility of society.

members of the society. With priority given to equal liberties and equal opportunities over the goal of advancing the socio-economic status of the poor and in turn giving priority to the principle of equal liberties. Developing further on an equal distribution of primary goods, the theory according to the authors, was developed for a society that shared similar moral values and later providing this theory within the framework of a political conception of justice wherein members or parties to the original position affiliate themselves to the set of principles provided by Rawls's despite differing religious, moral beliefs⁸⁴).

The motivational postulates, which include an individual's rational (and not altruistic) character that exists in partial cooperation as well as partial conflict within original position, characterize the principles of justice⁸⁵. The principles so chosen in the original position have to be continually adjusted and readjusted so that they coincide absolutely with 'our unshakeable common sense convictions of right and wrong⁸⁶.' Barry explains that Rawls is basically employing a deductive method to make people's moral judgments more unprejudiced or their attitude more impartial. What this implies even further is that the notion of 'choice' is completely inherent in this approach leading us towards the notion of primary goods and thin theory of the good⁸⁷. It is the thin theory of the good that inculcates in an individual the sense of justice, which itself has collaboration with the two principles of justice, principles that

⁸⁴ Fleurbaey, Marc, Maurice Salles, and John A. Weymark, *Justice, Political Liberalism and Utilitarianism: Themes from Harsanyi and Rawls*, Cambridge University Press (2008).

'Rawls's focus on the basic structure of society and on primary goods is related to the liberal features of his theory. Specifically, Rawls regards society as having the duty to provide everyone with a fair share of resources and opportunities. However, society does not have the right to interfere with private uses of these resources that result from personal conceptions of what constitutes a good life, which each member of society is free to develop and revise as he wishes.'

⁸⁵ Barry, Brian, *The Liberal Theory of Justice- A Critical Examination of the Principal Doctrines in a Theory of Justice by John Rawls*, Oxford University Press (1973). p 12

There are basically two conditions of original position: one, condition that concerns itself with knowledge; second, a condition concerned with motivation. The former is linked to an individual situated behind a veil of ignorance, the latter explained above. And, according to Barry, the two conditions and the original position and the two principles of justice come together, combine and thereby accurately define Rawls's idea of justice. This is something that also makes the relation between the principles of justice and the original position a deductive one because it is not just the original position that makes the principles of justice. It is the two conditions, 'motivational postulates', and limits on knowledge (veil of ignorance), that makes the whole process a deductive one.

⁸⁶ Ibid

⁸⁷ Ibid 13

Barry clearly says Rawls is yet to speak about choice but it is evident from the fact that given the option of veil of ignorance Rawls is asking the spectator to be impartial as well as choose principles keeping in mind that their own self interests are not at stake.

are ‘want- regarding⁸⁸.’

One can say that to explain the first principle of justice better what Barry does is that he culls out two concepts, developed by Rawls, from the first principle of justice- one, liberty; two, equality⁸⁹. It is important to expand the former because no two types of liberties can be similar in proportion or characteristic and yet Rawls speaks about ‘a total system of equal basic liberties.’

Major answer to realizing this, the ‘total system of equal basic liberties’ as lying in front of us, may lie with one’s assurance accepting that this principle is more or less in conformity with the notion and reality that the liberties are of different kinds and often, one liberty is inconsistent with the other⁹⁰. Therefore the duty of the first principle of justice is to push the envelope and bring together the various different liberties together in a way that their proportion is balanced and that this balanced proportion is capable of getting itself distributed equally amongst the citizens.

⁸⁸ Ibid 23

The actors in the original position situated behind a veil of ignorance agree to principles, which are to conduct their lives when they live together, that are want-regarding in character. Want regarding character of the parties lays down, according to Barry, what the principles so selected (when situated behind veil of ignorance in the original position) are about rather than what principles they will accept. In Barry’s words ‘we are leaving open the question whether they will go for the maximization of the total sum of want satisfaction, regardless of how it is distributed, or for the equalization of want satisfaction, or for maximizing the amount of want- satisfaction of the person with the least, or for any of a hundred others, or any kind of pluralistic cocktail of any combination of them.’

The second type of character is ideal regarding. The basic difference between the two, so explained by Barry, is that that want regarding character emerges when in order to formulate the state of affairs all the wants (whatever type) is clubbed together to formulate the amount of want to be distributed to a want adhering person. Ideal regarding, on the other, is when the various kinds of want are differentiated over to formulate the state of affairs.

Barry discusses soon a dichotomy in Rawls’s notions that leads him to conclude that when Rawls discusses about the want-regarding and ideal-regarding character, he clarifies that his theory is not a want regarding one. To this Barry explains that basically Rawls’s theory is “want regarding at one remove”. He clarifies this further with the help of an example. Rawls’s dislike for the want regarding notion comes to the fore when he narrates the importance of letting a man choose his religion than letting another man his particular goal of stopping this man from following his religion, irrespective of how intense his desire it. Yet, on the other, Rawls wants to put his citizens in original position where they are not allowed to know what they like and dislike. This later situation leads however to choose principles in want regarding terms. Therefore at best Rawls’s theory can be called “want-regarding at one remove”.

⁸⁹ Ibid 34

⁹⁰ Ibid

Barry claims that Rawls gives ‘little usable guidance’ to us further on this and as a result he won’t be developing further on it in this book of his. One more situation he develops on further is when he defines what exactly is included in this ‘total system of equal basic liberties’. There are three notions that are to be considered a part of the total system of equal basic liberties- political liberty, second, rule of law; and three, equal liberty of conscience.

The principle of equality in simple terms, as Rawls also means it according to Barry, suggests that in a place where one situation is higher than the other, than the higher one is to be preferred⁹¹. And, if both the situations seem equal then the situation with higher freedom is to be chosen. “This interpretation would of course be strongly egalitarian. In the cake example it would entail that it is better for each of the three beneficiaries to get an eighth than for one to get a bit more than a third and the other two a bit less. It is not, and this is the crucial point, the interpretation that Rawls gives of the first principle. He is willing allow that there should be unequal rights so long as the liberties of those with less liberty than the rest are as extensive as it is possible for those with the least to have⁹².”

The Capabilities Approach

Liberty rights, is a term that Katzer has used to notify one of the premise that entwines the capabilities approach to universal liberal principles. It is specifically three capabilities enlisted in her approach- practical reason, affiliation and control over one’s environment- that associate these to liberal principles. According to Katzer, the three capabilities namely practical reason, political control, and social affiliation are essential human characteristic⁹³.

⁹¹ Evident as this is from Rawls’s suggestion in justice as fairness that it would be irrational to choose the lesser criteria when there is already a situation with higher equality. It is indeed here that Rawls’s called it the ‘greatest equal freedom principle’ in justice as fairness.

But there is a catch when Barry narrates to the reader how the first principle is in sharp contrast to the first part of the second principle where inequalities are justified if they manage to reach the worst off sections of the society.

The answer is also given by Barry. In his own words ‘it appears to me that his interpretation of equality is such as to commit the first principle to as much of a maximin criterion of distribution (maximizing the minimum) as the one that is explicitly stated in maximin terms.’

According to Barry the first principle (even the second one) is maximin because the parties in the original position to further their good want more of the primary goods. However they lack envy for each other as none have an idea of the others’ also equally wanting these primary goods. Thus one thing that is very clear from this whole situation is that the parties are in no way concerned with the idea of ‘distribution of primary goods’. Hence in practice Rawls treats this principle as maximin.

⁹² Ibid 40

⁹³ Katzer, Mathias, The basis of Universal Liberal Principles in Nussbaum’s Philosophy, *Public Reason* 2 (2) : p 60-75.

Katzer gives an explanation of the three capabilities. Practical reason is a characteristic present almost in every one after they reach a certain age. As a result one can safely assume that people have this capability to make “reasoned choices”. One can take instances such as making a choice of one’s life partner or choosing the kind of vocation that interest us. Such choices may be restrained one, given society’s interference and its norms, but to immediately assume that people lack a capacity to make reasoned choice would be a falsity.

Social affiliation is another such characteristic that is widely reflected in almost in every generation of human kind. There may be exceptions that people give up on believing in human relations and abandon

‘The capabilities approach is therefore a form of political liberalism not a doctrine.’ For Rogers, capability involves both an idea of social cooperation and the benefit of inclusion. Martha Nussbaum’s capabilities approach fits the bill as her theory, in the context of social cooperation, delves into the importance of institutions that are being sustained by the goodwill of its citizens. Even the citizens need to be taught the resources and have to have this knowledge of ideas, which harp on the values required of a good citizen. The latter, inclusion, is reflected in emphasis placed on the ‘dignity’ of an individual, which also makes the capabilities approach political in nature reflective also of the approach’s stress on basic entitlements.

Rawls provides a systematic account of justice for modern liberal democracies, and because he treats economic institutions as part of the ‘basic structure’ of society — and therefore, as subject to evaluation according to his two principles of justice — his theory also makes it possible to bring economic institutions under the lens of justice. Specifically he fails to recognize the relevance of the environment to the basic liberties protected by his first principle of justice, a failure that is especially problematic when addressing environmental impacts that occur at the intersection of economic activities and ecological processes. Furthermore, even if Rawls were to account for functioning of ecological systems as a precondition for the advantages that his principles of justice protect — an extension some defend based on Rawls’s discussion (in his later work) of public health as a primary good — his theory of justice would still lack particular features of Nussbaum’s capabilities approach that make it better for addressing the relationship between the environment and basic conditions of justice⁹⁴.

Capabilities Approach with an equal concern for non-human species

Capabilities approach extends itself, and it can be classified as a capably wide enough

everything as materialistic or whatever be the reason. However this is found almost across entire human race.

Next we have political control. Quoting Katzer ‘with political control the case may be somewhat different. A labour slave in ancient Rome may be supposed to not have had any political control whatsoever, not even in a rudimentary form, but we can clearly recognize him or her as a human being. Maybe the combined capability of political control does not have a clear correlate among the basic capabilities, but rather rests on more general basic capabilities, such as that of practical reason.’

⁹⁴ Holland, Breana (2008), Ecology and the Limits of Justice: Establishing Capability Ceilings in Nussbaum's Capabilities Approach, *Journal of Human Development*.

extension, to incorporate those who have been traditionally unheard and included. Traditionally when studied under social contract theory as the pretext such unheard voices come now where into the scene. The non-human species is one of them though today there is an able body of activism and a general awareness on such issues that demand such activism. The prolonged ignorance and comparative silence on issue, as significant as that which involves speaking of the suffering of non-human species, in the course of political debates and social awareness convinces Nussbaum of the significance of circumscribing an all-inclusive sphere reserved for the non-human species. Capability thus speaks of ensuring an inclusion of the non-human species within its range as even Rawls considers them to be as worthy only of charity and compassion rather than justice.

The lives of animals cannot and should not be equated as resembling a piece of furniture and Nussbaum unequivocally advocates that our choices do have a significant role to play in perpetuating further the incidences of violence and the heaps of agony these non-human species have to go through. Rawls also explicitly mentions about choice if we analyse how while people functioning as parties inhabiting the original position of a well-ordered society deliberate through choice in selecting the principles of justice. Roberts provided the most elucidative comprehension to the above when he affirmed that justice as fairness is constitutive of a political conception of justice with a two-stage justification process⁹⁵.

Veiling also is one of the most contentious issues that brings to the fore the issues surrounding and concerning the sphere of choice. There are those that defend and those that refute such a defense. Lila Abu-Lughod in her book, *Do Muslim Women*

⁹⁵ Roberts, Peri, *Political Constructivism*, Routledge (2007). p 47-50

The justification of this two-way justification process leads to a political conception of justice different from comprehensive conception of justice. What differentiates political conception of justice from a comprehensive one is the two stage justification process. During the first stage justice as fairness a set of values are being developed and enunciated based only what is implicit in the considered inner convictions of people inhabiting a particular society. Hence during this stage justice as fairness is a 'free-standing political view'. Even a fair evaluation of the truth or falsity of a particular value, religious, social or philosophical nature, is deliberately avoided. When it enters the second stage, justice as fairness dons a more responsible cap and evaluates such values and principles while also basing them on reflective equilibrium and overlapping consensus. Thus justice of fairness is assumed as following only 'reasonable comprehensive doctrines'. And such doctrines reasonable and comprehensive in nature consistently become capable enough of following a political conception as well.

*need saving?*⁹⁶, tries to observe the various contentions pertaining to veil alongside stating her own scepticisms about the western world's concern or interest in Afghan women. The politics of war on terror is so much also about politics of veiling that it is difficult to not make an effort to uncover the contentions, lying beneath these concerns for cloaked women, in order to find an answer to the scepticism. Apart from the general disgust that Abu-Lughod has with the western perceptions of the veil, the author has presented for her reader a stimulating defence of the same.

Veil is not to be considered as a restraint upon emancipation first and foremost, and the second, in order of importance (as according to the meaning one gets from reading the book), is understanding the meaning attached to the whole concept of using the veil by Muslim women. And equally crucial is the concept of choice for it seems to be intertwined with the whole meaning, perceived to be so by Abu-Lughod, as to what really stands for veiling. Veiling more a less a voluntary act often followed by women to show their respect for elders⁹⁷. Nothing gets closer to this scenario when women today, professional and working, choose to adopt a more stylish form of veiling but out of their choice⁹⁸.

Veil does not infringe upon a domain as exclusive as choice and these choices, which sometimes out of the ordinary and sometimes as plain as day, are something on which supposedly only the person in question, women in our example, can put a constraint upon as choices, choices whether front rank or not, squire towards a good life or a liveable one⁹⁹. However this is not presumed to be the case in Abu-Lughod's narration

⁹⁶ Abu-Lughod, Lila, *Do Muslim Women Need Saving*, Harvard University Press (2013).

⁹⁷ Women have traditionally used veiling to cover their heads to show respect to elders of the household as well as respectable men in Egypt of the seventies and eighties. They would cover their heads with a black cloth to do the same. In fact this is not much different from women who use wigs to cover their heads because it is in their custom to hide hair, or when women get the neck lines of their dresses altered into high necks or such other designs.

⁹⁸ Ibid 38

Women irrespective of the alterations to the veil will use some or the other form of head covering in their daily lives, believes Abu-Lughod. How crucial veiling is to women is something that seems to be even understood by the western society, according to Abu-Lughod, as she quotes a year 2001 article in *New York Times*, which highlighted the various ways in which one can use the veil with all the various designs and cuts, the latest trends present in the market, which are available to the general public. A street vendor wears the veil because it is safe and men don't tease her perhaps because of the veil, as she narrates to Abu-Lughod. Irrespective of the background the veil is to be understood as a part of the daily lives of Muslim women.

How justified veil is for these Muslim women is limited to not just a lady not so well-earning, it is justified for women who are highly educated and very well-off. An example Abu-Lughod gives is of a

for she also mentions in what ways veiling is associated with piety. The belief the author imparts to her reader that a particular woman will choose some or the other sort of cloak to cover her head, if not the veil or the *burqa* that has its long length as an important characteristic, lack precision when one looks at the other side of the fence.

This other narrative, while deciphering ethical principles such as al-haya meaning modesty or shame, evokes the contrary of the piety perception. The concept of al-haya that is so much a characteristic of Islamic religious perception is nothing but a ‘negative valuation of a woman’s body’, says Saba Mehmood¹⁰⁰. In the name of modesty, a Muslim woman is taught nothing but disgust about her body that needs to be covered with a veil as if the body is an abomination of which someone has to be ashamed. There is no incongruence between a person’s seemliness and the same person’s inner more self and an imposition of al-haya on women in the name of modesty is suppressing selfdom, which is an intrinsic feature of a human being. Such a denial, as Marnia Larzeg¹⁰¹ has pointed out, is denying person her very essence. A woman is a physical being for mostly and denying to her the essence is also forcefully persuading her to accept her body as erroneous and improper and hence the veil to varnish the faulty body.

Going back to non-human species in context of which was introduced the concept of choice, Nussbaum continues with her argument that issues surrounding the suffering of the silenced ones is a problem of justice, more than just an issue of charity or compassion and thereby offers a comprehensive account of the above. Compassion adds to the above and the introduction of a teleological account refurbishes it further. Beginning with an example Nussbaum claims that we may have compassion for a person suffering with disease than a criminal, in a similar way we may have compassion for the suffering animals, which assures us that in clarifying these they are issues related to justice. Another way of understanding this is the distinction

very well-known surgeon, Dr Suheila Sidique, who agreed to return to her medical post in the year 1996 when Taliban begged her to. But the return has to be on her terms and conditions. As Lughod further says, after describing how strong, glamorous and thin this lady surgeon was, Dr Sidique refused to wear the burqa although she had no problem using the veil.

¹⁰⁰ Mehmood, Saba, *Politics of Piety*, Princeton University Press (2005).

¹⁰¹ Larzeg, Marnia, *Questioning the Veil- Open Letters to Muslim, Women*, Princeton University Press (2009).

between an animal that dies of a disease which is nobody's fault, and an animal(s) suffering because of ill treatment meted out to it by humans. Thus the duty of compassion aims also at refraining self-form causing any sort of suffering to the animals¹⁰².

This brings us now towards the argument that animals are beings with an agency, and the capabilities approach does seek to fulfil by granting them a flourishing existence.

A teleological account is an admixture of three variables- self maintenance, beliefs and desires, legitimate goal. And this applies to both an animal and a human being.

The Self-Maintaining Activity

“Logos state is the end state of all adoptive behaviour.” The self-maintaining capacity of a human being is its 'logos-state'. Logos state is a condition which is important for the functional character of a human being, thus leading to other kind of life activities¹⁰³. It is the particular activity of these self-maintaining organisms that promotes and influences their life and behaviour, thus leading to the overall activity of the being. This is the reason why Aristotle attributes high importance to a teleological account¹⁰⁴. With the changing circumstances behaviour changes, but what does not change is the teleological account because this change is only for the flourishing of the being. Nussbaum has tried juxtaposing this teleological account and the flourishing part with the functional account of the being through an example; example being of a plant which changes with the environment in order to grow. This also explains why “logos state is the end state of all adoptive behaviour.”

¹⁰² At this point Nussbaum ascertains that even Rawls would make this point though nowhere he has developed on the duties of compassion. This point however has not been extended further by her.

¹⁰³ In most places the foremost attribute, falling within this capacity to function, is the living being's capacity to respond to the changing environment. Nussbaum gives example of an icicle whose form changes because of climatic changes but there is a lack of variety in this change of structure; in other words it is controlled just by laws of matter alone. In living beings, animals and even plants, on the other, there is plasticity of behaviour or variation which defines the self-maintaining capacity of it.

¹⁰⁴ Aristotle, as Nussbaum says, has given priority to the teleological account over the efficient-causal one because the former shows human processes by integrating it with human behaviour in a wider context, and also explaining how it influences other activities of the being. This is so because the self-maintaining activity has two functions; one, to devise something which very well explains the importance of a function for the overall activity of the living being; second, in what way does a particular organ contribute to the above functioning.

Thus the logos of a being are related to the function of a human being, evident as it is from its activities. First, is the constitutive activity which not only leads to the self-maintenance activity of an organism but also defines the constitutive functional roles. For example, the perceptive capacity of animals that organizes an animal's self-maintaining activity as well as its functional organization. Second, a functional account, for instance that of a desert mouse's water-system, it not only forms part of an analysis of that mouse's nutritive-reproductive activity for the sake of its logos but it also shows us something about the history of this system, and tells us why it is there, why it differs from isofunctional systems in other mice.

Beliefs and Desires

One part of teleology is self-maintaining activity; other is the desire as this kind of activity is also the activity to reach out for an object. Intentionality is what persuades this reaching out for an object, thus making Nussbaum ascribe even to lowest animals beliefs and desires¹⁰⁵. Another variable attached to this is the goal directedness of an activity. An act of window smashing is an illegitimate act lacking desire as well as a goal. Desire imparts motion to a body, for the teleological account prepares the bodily path mediated by appearance and perception. In other words an animal moves whenever it sees or desires an object. Further this body is so constructed that whenever it moves, it also witnesses some internal changes going on within the body. The former is the psychological side of the teleological account, and the latter, the physiological account¹⁰⁶.

(Nussbaum offers an instance of a window smasher whose neither desire nor action is justified. Yet legitimacy is being ascribed to this person because s/he is a part of human cycle. This act however is not justified for two reasons: one, the absence of a significant goal; second, it being just a blind response¹⁰⁷).

¹⁰⁵ Affiliating intentionality to an animal, for Nussbaum, is very central to a definition of human beliefs and desires. In most cases it is the account of human beliefs and desires that takes precedence, ignoring thus the perceptive capacity of an animal. Nussbaum, on the other, explicitly denounces the stereotypical notion because for her anything that moves has beliefs and desires.

¹⁰⁶ The basic purpose in here is to know the exact meaning of existing connection between movement or motion and desire. The reason and logic is still not clear, says Nussbaum.

¹⁰⁷ It is illegitimate because it has no connection at all to self-maintenance. On the contrary, it may be harmful for self-maintenance, self-nutrition and ultimately, life. And this is irrespective of the fact

Legitimate Goal

Nussbaum has tried juxtaposing this teleological account and the flourishing part with the functional account of the being. The following example best explains this: a plant which changes with the environment to grow and flourish. Thus logos of a being are related to the function of a human being evident as this is from the kind of activities that are being performed.

Compassion

Compassion is a painful emotion felt towards the pain or suffering of others, with three cognitive requirements: one, the belief that the suffering is not trivial but serious; second, the belief that the person who is suffering did not cause the suffering by deliberate default; third, that one's own possibilities are similar to those of the person suffering. An absence of compassion to recognize human limits and vulnerabilities will lead to only an 'arrogant hardness'¹⁰⁸. "Without the notion of common human functioning we will have to do without compassion and full bloodied notion of respect¹⁰⁹." We cannot understand the meaning of compassion unless and until we understand the meaning of what it is for a human being to flourish. Compassion requires a clear picture of common humanity¹¹⁰.

Nussbaum begins her "*Beyond Compassion and Humanity- Justice for Non-human Animals*" chapter with the following case: In conclusion, we hold that circus animals...are housed in cramped cages, subjected to fear, hunger, pain, not to mention the undignified way of life they have to live, with no respite and the impugned notification has been issued in conformity with the...values of human life, philosophy of the Constitution... Though not homosapiens, they are also beings entitled to

whether the activity is intentional or unintentional.

¹⁰⁸ Nussbaum, Martha (1993), Social Justice and Universalism: In Defense of Aristotelian Account of Human Functioning, *Modern Philology*, Vol (90): p 70.

¹⁰⁹ Nussbaum, Martha (1992), Human Functioning and Social Justice- In Defense of Aristotelian Essentialism, *Journal Political theory* Vol (20) 2: p 239.

¹¹⁰ There are two schools of thought that adhere to the moral sentiments notion of functioning- one, Aristotelian, which is essentialist in nature; and second, anti-essentialist subjectivists. The latter school of thought relies simply on the importance of sentiments that are narrow, self-regarding in nature, and curious to the situation of others. Even the relativists tend to incorporate it this way. The subjectivist school of thought has moderated itself to the local tradition, but the relativists depend still on the narrow conception, not fully ready to delve into the lives of those in question.

dignified existence and humane treatment sans cruelty and torture... Therefore, it is not only our fundamental duty to show compassion to our animal friends, but also to recognize and protect their rights...If humans are entitled to fundamental rights, why not animals?

—NAIR V. UNION OF INDIA, Kerala High Court, June 2000

Before anything else Nussbaum has tried to study two theoretical approaches that best describe the condition of animals as beings with capabilities equivalent to human functioning, which also makes them creatures with feelings of pleasure and pain. One is Kantian, another is Utilitarianism. Kantian view, for Nussbaum, is very unpromising because he treats the quality of compassion towards animals as performing duty, in an indirect way towards humans. Kant fails to not only see that creatures who fail to respond in just the way humans do, also possess intrinsic worth, or dignity, but also those we have moral duty towards nonhuman animals. John Rawls espouses the duty of ‘compassion and humanity’ towards animals, that we have moral duty towards animals, but these cannot be included within the contract doctrines as an issue of justice. So for both Kant and Rawls¹¹¹, animals lack the quality that moral persons possess, thus not capable of gaining a place in the human circle.

Rawlsian approach fails to treat animal as an agent, the capabilities approach, on the other, successfully treats animal as an agent with capacity to lead a flourishing life (and this also is one of the greatest strengths of the approach). “The idea that a human being should have a chance to flourish in its own way, provided it does no harm to others, is thus very deep in the account the capabilities approach gives of the justification of basic political entitlements¹¹².”

The capabilities approach gives pride of place to dignity which itself leads to further realization of functions that a being possesses, apart from being the possessors of

¹¹¹ Nussbaum, Martha and Cass Sunstein (ed), *Animal Rights: Current Debates and New Directions*, Oxford University Press (2004). p 300

In the beginning of the chapter Nussbaum elucidates on the fact that neither Utilitarian nor the Contractarian approach is efficient enough to deal with these issues. Rawls is also very much influenced by Kantian conception of the human being that places great emphasis on rationality, and the capacity to make choices. He further adds the two moral powers to his conception of the person. Therefore it is her capabilities approach only that has got the capacity to incorporate even the nonhuman animals, as beings with equal moral worth.

¹¹² Ibid 305

‘needs and abilities’. Non-realization of this potential leads to the death of flourishing, flourishing to which a being is entitled to. The capabilities approach ensures that neither the functioning nor dignity of the being is violated in the process. The capabilities approach successfully goes beyond the contractarian approach, by ascribing to all living beings equal worth, and the utilitarian approach, by giving pride of place to all forms of life and ways they lead it without attributing all the values to only pleasure and pain.

The capabilities approach thus has ‘direct obligation to animals’ moving well beyond the conceptions of compassion by including within it (capabilities approach) the principles of justice. The approach makes itself a part of ethical concern, concerned with the flourishing of many forms of life so existent. Central to this concern is also the human-animal relations, derived from the way the capabilities approach juxtaposes core entitlements with human dignity. As a result of this the capabilities approach also looks into the welfare of mentally disabled, thus making it possible to extend this to human animal relations.

The discussion on species starts with a concern for the well-being of existing creatures and ensures that no harm is done to them. Harm here is more in the context of damage done by human species to the environment and its habitat. Therefore also the central focus of the approach is to study the harm or damage so caused to the species by the individual. Before proceeding it is also important to note that the species norm is a benchmark for judging whether a species has a decent standard of life or not. This has been explained through an example, so offered by Nussbaum, between a child with disability and a chimpanzee. The base of this is the widely held claim that there are certain capacities that humans only possess. It is in order to refute this claim that Nussbaum develops an analogy between chimpanzee and a mentally disabled child, both of whom possesses deep set of capacities similar in many forms when looked at from the perspective of human flourishing.

The political culture of the country should make appropriate norms that help in granting people with such disabilities appropriate rights including citizenship rights. Other opportunities include teaching language and other such learning aides. For a chimpanzee, on the other hand, it is more important to flourish in its own ways-for

example, mingling with its own community members, leading thus a life in its own natural habitat- than becoming a part of such state initiatives so provided to the differently abled child.

Chapter 3

Capabilities' Essentialism- A Contrast to Rawlsian Constructivism

Abstract

There are semblances of Rousseau and his social contract situation, as one reads *A Theory of Justice*, in Rawls's principles of justice. Rawls begins his *A Theory of Justice* with several introductory remarks on basic premises of his theory on justice. As his principles of justice are framed for institutions that are to be applied to the basic structure of society, the premises on which such principles have been structured, draws in considerable ways from the social contract theory. A few of terminologies that Rawls suggests to be the edifice of the well-ordered society is based on Rousseau's social contract theory. A society, well-ordered or not in the Rawlsian sense, has several complex and difficult issues that are either resolved or remain unresolved. One can answer complex questions such as these, including questions of a complex case of set theory or arithmetic, by narrating the concepts that are central to these theories. Such an enterprise becomes constructive if it is able to characterize these concepts as per some constructive procedure.

The people need to act as per an undoubting justificatory processes as they are constantly facing the challenge of determining values related to the practical problems of justice, and this is the most important presumption of the constructivist viewpoint. Therefore the task of this viewpoint is to find out the assumption, which one needs to develop with regard to people and the values they are to choose. This whole process, of determining assumptions that lead to assessing the justificatory values make up a constructivist justification (and we may also see that Rawls's constructivism as founded upon the idea of autonomy).

The citizens, in Rawlsian society, are free and equal and the society is positioned upon public and shared ideas. And since the free and equal citizens are also reasonable persons who also have the rationality to follow and pursue reasonable comprehensive doctrines, these citizens also inevitably acquire the quality of autonomy to follow such doctrines (the reasonable and rational individuals stand up with pure procedural

justice as a result of which whatever principles or stipulates they agree to those stipulates are founded upon procedure where nothing is predefined. In other words true to this pure procedural form of justice the principles that reasonable and rational individuals agree to are the agenda of their own brainwork. And hence the rationally autonomous individual is also a fully autonomous one as the rational seeks an individual who is mindful of her deliberations for choosing the principles that are to govern their society or regime while the autonomous individual is solicitous towards the principles so chosen and in turn decides to accomplish the activities of their lives according to these principles so chosen).

These people also need to act as per an undoubting justificatory processes as they are constantly facing the challenge of determining values related to the practical problems of justice, and this is the most important presumption of the constructivist viewpoint. Thus the content and structure of the principles of justice is an ensemble of aggregates that constitute an autonomous individual of reasonable comprehensive doctrines. And this complete viewpoint applies to people, structures, reasons, decisions, and ideas. This is Rawlsian political constructivism (the fact of reasonable pluralism in concurrence with overlapping consensus also brings in line the idea of reflective equilibrium and this idea is conducive for narrating principles of justice that now seem to be as proceeding from a definite “construction”. It is the conception of a person, discussed in the previous chapter, and the conception of a well-ordered society, based on implicit ideas- condition of publicity and burdens of judgment, discussed below, that usually set this precedent for now considering the principles of justice as procedure of a construction)

The reasonable and rational individuals have some usual and some unusual characteristics and the latter is significant as it picks up desires (of three types discussed in later section below) as its earmark, and there is a particular conception called as ‘moral psychology of citizens’ that Rawls discusses in this context. The whole purpose behind introducing the moral psychology argument seems to be contained in conceptions, which exist neck and neck with each other, such as citizens proposing fair terms of cooperation that further moves to an individual willingness, to agreeing to set up in practice such terms of cooperation, to accepting the burdens of judgment, to agreeing to reasonable comprehensive doctrines, and to, finally, the

moral psychology.

A further resonance of this particular line of argument is to be found in Nussbaum's book *Hiding from Humanity*. Nussbaum, alluding to two compelling legal cases in the US constitutional history, is trying to set the reader's sight on an important matter in hand, entrenched as it is in the backdrop of a within reason presentiment, or 'reasonable fear', Nussbaum is trying to throw some light, for her readers, on an issue, which was the highlight of consequential and notable legal cases. The term 'reasonable fear' is so often used in legal parlance that it does not make sense to not brush it aside as of being any consequence in any way. And Nussbaum uses reasonable fear as a concomitant of emotions that are neither outlawed nor prosecutable but sit on first, human thought, and, second, an intentional object, third, reasonableness. Interestingly, the capabilities approach predicates highlights that give ascendancy to procedural nature of the approach and the highlights include 'genuine curiosity' 'theoretical flexibility' and educating one's judgment.

Capabilities approach is a contriving of the overlapping consensus and this idea is a further reflection of the resonance (discussed above) between Rawls's and Nussbaum's approach. The capabilities approach in the first instance might appear as a doctrine offering a salient account of values that determine the quality of life. However this is not so as the approach is rather a doctrine about fundamental social entitlements aiming at one, 'minimal social justice'; and two, 'constitutional law'. Once the above two requisites are in place we have in place an overlapping consensus that promulgates capabilities list as an approach which is comprehensive in nature as well as flexible in content.

“Man is born free, and everywhere he is in chains. Here’s one who thinks he is the master of others, yet he is more enslaved than they are. How did this change come about? I don’t know. What can make it legitimate? That’s a question that I think I can answer¹¹³.”

Rousseau’s social contract begins with the above. If we divide these lines into two then the broad contour of the argument we receive is that the first part of the argument sets a precedent for the second. The broad contour is an ‘agreement’ wherein the first part includes the family as a representing social order while the second part, which is foregrounded in the first, is also a repercussion, in the form of a social contract, of the attempt made in the first stage to form a social agreement.

‘First society’, as Rousseau calls it, is the foremost model that provides a replica of a political society. There is a correspondence between the way father looks after his children and the way the ruler rules its subjects in the sense that just like a father, who cares for his kids, gets love and obedience in return, in the same way a ruler, in her attempts at ruling his subjects, feels bliss in ruling her people. It is only till the level of receiving something from kids and the ruled, a father looking after kids and a ruler ruling, that is able to discern the correspondence, or a degree of mutuality between the two. The mutuality is relevant enough to be taken into consideration because it is through an understanding of such a correspondence between the two that one is able to structure her thinking about how an individual, starting from as basic a unit of life as family, perceives of herself as receiving something in return of their services.

A family, similar to a ruler, as the first unit of human existence, always provides something in return to the care giver. So is the case of a ruler who receives patronage from his subjects. Thus one can assume that the correspondence between the two is only till the level of each providing something in return to each other. However beyond both remain contrary to each other because a family is sphered around the notion called love and in the case of a ruler and the ruled the ruler receives a sense of gratification. Further individuals who surrender themselves to a ruler become her subjects whereas the agreement aims at producing citizens who also deliberately give

¹¹³ Rousseau, Jean-Jacques, *The Social Contract*, Jonathan Bennett (2010).

up the liberties they have for putting an end to the state of nature. What happens is, in case individuals decide to give up their liberties absolutely, they transfer to each other advantages as well as disadvantages with a further hope that if they turn out to be beneficiaries then they might as well gain some extra advantages also for themselves. This is how individuals become citizens by agreeing to a social contract.

A social contract by virtue of its character sets up a single political unit where individuals, facing several obstacles, who also once acted as their own judge as a result of whom everyone was her own judge, are saved from the dangerous repercussions of continuing further the state of nature. Obstacles are watered down by such a social contract and individuals also collectively decide to pursue the single unit personified social contract model for their own self-preservation¹¹⁴.

The nature of the contract is such that it is accepted widely without any limitations of place and time and an individual becomes a ‘public person’ with an entity like such that she has a commitment towards the sovereign, on the one hand, and towards rest of the individuals, on the other. Hence the individuals, by agreeing to a social contract, become a collective with moral duties towards each other. In other words the people agreeing to the obligations of a social contract turn into moral individuals, who instead of acting on their impulse and instincts decide to avail themselves of the ‘sense of justice’¹¹⁵.

The moral individuals, the reconstituted state of society through the social contract, and the abstraction that individuals agree to a unit representing single political thrust are all interrelated closely to Rawls’s individual of original position situated in a well-ordered society. Whereas in Rousseau an individual is able to make headway towards a sense of justice through social contract, in Rawls, alternatively, it is the sense of justice that the people have, which they use it to proceed towards a well-ordered

¹¹⁴ Ibid 6

“Find a form of association that will bring the whole common force to bear on defending and protecting each associate’s person and goods, doing this in such a way that each of them, while uniting himself with all, still obeys only himself and remains as free as before.”

¹¹⁵ Ibid 9

As Rousseau mentions, that apart from the social contract solving the basic problems of the society, through this transformation from the state of nature to a civil state, duty replaces physical impulses and right replaces appetite.

conception of society. But it hardly makes any difference because there are semblances of Rousseau and his social contract situation, as one reads *A Theory of Justice*, in Rawls's principles of justice.

Rawls begins his *A Theory of Justice* with several introductory remarks on basic premises of his theory on justice. As his principles of justice are framed for institutions that are to be applied to the basic structure of society the premises on which such principles have been structured draws in considerable ways from the social contract theory. A few of terminologies that Rawls suggests to be the edifice of the well-ordered society are based on Rousseau's social contract theory. To begin, the very basic structure of society in Rawlsian sense is valuable for its own sake and is not to be eliminated if it appears to be inapplicable somewhere else.

Social contract, as basic in nature, is the first parallel between Rousseau's social contract and Rawls's social contractual basic structure of the society. The agreement on principles in the original position is simple and basic, and not convoluted, which is to serve as the starting point of a well-ordered society. An attempt at drawing a comparison between Rousseau and Rawls draws attention towards a prepossessing idea that Rawls introduces to make his original position traverse into reaching the stage of a well-ordered society. The presupposing idea is the introduction of justice as fairness as a result of 'philosophical reflection'¹¹⁶.

But before moving into explaining philosophical reflection, it is crucial to understand the second underlying similarity between Rousseau and Rawls. While Rousseau discusses sense of justice, as described above, Rawls as well links his theory of justice with a theory of moral sentiments¹¹⁷. Moral sentiments, to put it differently, is considered an equivalent of moral capacity of an individual as a result situating the sense of justice as an auxiliary to individual's sense of judgment or mental capacity. And this moral capacity precedes philosophical reflection. Once an individual reaches the stage of moral sensibility, philosophical reflection follows. Philosophical reflection, in theoretical terms defined as "reflective equilibrium", in latter parts of

¹¹⁶ Rawls, John, *A Theory of Justice*, Harvard University Press (1971).

What Rawls does is conceptualize a notion that under a contractual situation fully encapsulates the idea that original position is an exposition of moral relationships and philosophical reflection.

¹¹⁷ Ibid 44

book *A Theory of Justice*, has been referred to in order to explain the process of continuous deliberations that individuals of a well-ordered society engage in.

Pure procedural justice- a rational autonomous individual capable of reason and judgment

The reasonable and rational individuals stand up with pure procedural justice as a result of which whatever principles or stipulates they agree to, such stipulates are founded upon a procedure where nothing is predefined. In other words true to this pure procedural form of justice the principles that reasonable and rational individuals agree to are the agenda of their own brainwork¹¹⁸. Set within the context of burdens of judgment these citizens also have, according to Rawls, a ‘higher order interest’¹¹⁹, The rationally autonomous individual is also a fully autonomous one¹²⁰ as the rational

¹¹⁸ Ibid 73

“Pure procedural justice means that in their deliberations the parties do not view themselves as required to apply, or as bound by, antecedently given principles of right and justice. Put another way, they recognize no standpoint external to their own point of view as rational representatives from which they are constrained by prior and independent principles of justice. This models the idea that when citizens are fairly situated with respect to one another, it is up to them to specify the fair terms of social cooperation in light of what they each regard as to their advantage, or good.” (Rawls)

¹¹⁹ The probable reason being the citizens who lack the reasonableness of character in the very first place cannot possess the virtues that inhibit the burdens of judgment. As a result of which they also lack the values that pure procedural justice enables one to have. Rawls does not explain on this any further.

¹²⁰ There is contrariety between rational autonomy and full autonomy, and in order to understand this it is important to note, as Rawls makes it clear, that full autonomy flows from rational autonomy. The first difference between the two is that rational autonomy is principled upon an artificial person while full autonomy connotes a political person. Secondly, a rational autonomy is based on deliberations between individuals or parties to the original position; a fully autonomous individual is concerned with the structure of the well-ordered society in the original position.

To sum it up the rationally autonomous person embodies a ‘full person’ who has the two ‘moral powers’ and a ‘determinate conception of the good’. The fully autonomous, on the other, true to its political essentiality, knows fully well the principles of justice, the basic rights and liberties she has, and the importance of participation in the political affairs.

This is the overall picture that leads to the ‘public conception of justice’, which is stable, takes cognizance of the fact of reasonable pluralism as well, and is a product of overlapping consensus. Thus a citizen who acts from this public conception of justice, and is also fully autonomous is able to reach this stage only after it is able to accede itself to a rationally autonomous individual because the latter is a consequence of reasonable conditions.

Justice as fairness provides full autonomy. How? The publicity condition also applies to the full autonomy argument as this condition provides the quintessential means to citizens if they desire a why and wherefore of this argument or as Rawls calls it “informed application of principles of justice in their political life.”

Further as discussed above that full autonomy is structural in nature (unlike rational autonomy that is based on deliberation), the original position (alongside the publicity condition) is the bottom line of the whole argument. In other words, the original position has to be structured in a way that publicity acts as its touchstone and it is only then that we will be able to successfully comprehend the structural nature of the fully autonomous individual.

seeks an individual who is mindful of her deliberations for choosing the principles that are to govern their society or regime while the autonomous individual is solicitous towards the principles so chosen and in turn decides to accomplish the activities of their lives according to these principles so chosen.

Reasonable pluralism is to human beings as reasoning beings what free and equal person is to fair terms of social cooperation. These compounded together enforce an idea of a just and stable society as well as ensure that humans retain their capacity as reasonable and rational. Rawls defines reasonable 'as a virtue of persons engaged in social cooperation among equals.'¹²¹ The Rawlsian reasonable individual has important features as its virtues- one, they believe, as free and equal moral persons, in the principle of formulating principles that are to the benefit of all; two, they readily believe in what Rawls terms as 'reciprocity' (that is they agree on certain principles together and are also willing to accept or listen other people's suggestions).¹²² One can also look at what reasonable is from the perspective of who an unreasonable person is. An unreasonable person never agrees to what others have to say or offer as principles and dishonors their agreements as everything has to be in her interest.

Rational person is a unified agent as she has the 'powers of judgment and deliberation,' unlike the reasonable that has a responsibility towards self and also others residing in her unit. A rational person has to deliberate however to decide on the choice of best possible means towards a particular end and prioritize those means accordingly, perhaps means that are more foreseeable.

The reasonable and rational are two different ideas and justice as fairness agrees to assume both to be complementary to each other and not similar. And this idea further implies that a reasonable and rational individual has a 'capacity for a sense of justice'

The above is in Rawls's words 'public recognition and informed application of principles of justice in political life' directed towards achieving full autonomy as free and equal persons. p 77

¹²¹ Rawls, John, *Political Liberalism*, Columbia University Press (1996). p 48

¹²² Ibid

Rawls gives a good example to explain the important difference between reasonable and rational. For instance there is a meeting of a few people from a housing society and they have called for this meeting to discuss the rational bargaining power of people from the other housing society. Now this may be called as rational however it can also be, as Rawls makes it clear, unreasonable or outrageous. As he says, "reasonable persons, we say, are not moved by the general good as such but desire for its own sake a social world in which they, as free and equal, can cooperate with others on terms all can accept. They insist that reciprocity should hold within that world so that each benefits along with others."

and a ‘capacity for a conception of the good¹²³’. The veil of ignorance also proves beneficial here as in the original position, these reasonable and rational people are placed symmetrically and not hierarchically. The most important distinguishing feature between the two is that the reasonable is public while rational is not.

“This is by the reasonable,” according to Rawls, “that we enter as equals the public world of others and stand ready to propose, or to accept, as the case may be, fair terms of cooperation with them. These terms, set out as principles, specify the reasons we are to share and publicly recognize before one another as grounding our social relations. In so far as we are reasonable, we are ready to work out the framework for the public social world, a framework it is reasonable to expect everyone to endorse and act on, provided others can be relied on to do the same...without an established public world, the reasonable may be suspended and we may be left largely with the rational¹²⁴ ...”

Autonomous citizens of reasonable comprehensive doctrines

The fact of reasonable pluralism in concurrence with overlapping consensus also brings in line the idea of reflective equilibrium and this idea is conducive for narrating principles of justice that now seem to be as proceeding from a definite “construction”. It is the conception of a person (as discussed in the previous chapter) and the conception of a well-ordered society (based on implicit ideas- condition of publicity and burdens of judgment- discussed below) that usually set this precedent for now considering the principles of justice as procedure of a construction. The citizens are free and equal and the society is positioned upon, as Rawls terms it, ‘public and shared ideas’. And since the free and equal citizens are also reasonable persons who also have the rationality to follow and pursue reasonable comprehensive doctrines, these citizens in Rawlsian phraseology also inevitably acquire the quality of autonomy to follow such doctrines.

It appears that the ultimate form of justification here is a process, or as Rawls would call it in non-generic terms, the method of reflective equilibrium. As Scanlon says

¹²³ Ibid 52

¹²⁴ Ibid 54

“we look for general principles that unify and explain what seem to us to be the most evident truths about a subject matter, being ready along the way to change our mind about these "evident truths" when we learn more about what general principles would be required to explain them¹²⁵.”

One can answer complex questions, including questions of a complex case of set theory or arithmetic, by narrating the concepts that are central to these theories. This enterprise is constructive if it characterizes these concepts as per some constructive procedure. However sooner or later, such judgments are going to be based upon certain judgments that can be an outcome of a reflective equilibrium¹²⁶.

Rawls's constructivism is founded upon the idea of autonomy made plain as day by Stem from his following argument. “Another and deeper meaning of autonomy says that the order of moral and political values must be made, or itself constituted, by the principles and conceptions of practical reason. Let us refer to this as constitutive autonomy. In contrast with rational intuitionism, constitutive autonomy says that the so-called independent order of values does not constitute itself but is constituted by the activity, actual or ideal, of practical (human) reason itself.”¹²⁷

“The values of a constructivist political justification are ideas of practical reason¹²⁸.”

The people need to act as per an undoubting justificatory processes as they are constantly facing the challenge of determining values related to the practical problems of justice, and this is the most important presumption of the constructivist viewpoint. Therefore the task of this viewpoint is to find out the assumption, which one needs to develop with regard to people and the values they are to choose. This whole process, of determining assumptions that lead to assessing the justificatory values that make up (now called as) constructivist justification is dependent on

¹²⁵ Scanlon, T M, The Appeal and Limits of Constructivism in Lenman, James and Yonatan Shemmer (ed), *Constructivism in Political Philosophy*, Oxford University Press (2012). p 229.

¹²⁶ James and Yonatan Shemmer (ed), *Constructivism in Political Philosophy*, Oxford University Press (2012). p 15

¹²⁷ Stern, Robert, Constructivism and the Argument from Autonomy in James Lenman, and Yonatan Shemmer (ed), *Constructivism in Political Philosophy*, Oxford University Press (2012). p 121

¹²⁸ McKinnon, Catriona, *Liberalism and the Defence of Political Constructivism*, Palgrave Mcmillan (2002).

conception of the person. Rawls starts with the basic question that what the people, with the use of their practical reason, must value in solving the problems of justice.

The Rawlsian route to Constructivism

John Rawls was the first to introduce the term constructivism concerned as it is with justice and its stipulates, which was to be further used for the assessment of basic social institutions. Such institutions would in turn serve as the basis for assessing conflicting claims of citizens about what their institutions should be like¹²⁹. As conflicts will be between individuals from different economic class or between individuals holding different religious views, the principles have to be justified on a foundation, which is non-partisan in nature or a ‘neutral disagreement’¹³⁰.

Constructivism is a procedure where parties in the original position choose principles of justice by adhering themselves to a certain criteria, opportunely termed by Rawls as the rationale and reasonable. ‘Rawls’s political constructivism is a local constructivism concerned with questions of political justice...because the subject matter of these principles is independent of ones choices and judgments without being independent of what human beings are like.’¹³¹

The reasonable persons are reasonable in two ways according to Rawls. One, each is to benefit from each of the principles that have been agreed to on the basis of reciprocity¹³². Second, the reasonable and rational person also has an important responsibility to share and that involves full accountability for the principles chosen¹³³.

¹²⁹ Scanlon, T M, The Appeal and Limits of Constructivism in Lenman, James and Yonatan Shemmer (ed), *Constructivism in Political Philosophy*, Oxford University Press (2012).

¹³⁰ Ibid 232

¹³¹ James and Yonatan Shemmer (ed), *Constructivism in Political Philosophy*, Oxford University Press (2012). p 5

¹³² Rawls, John, *Political Liberalism*, Columbia University Press (1996). p 48

Reciprocity is based on two ideas- impartiality and mutual advantage. The principles for which everyone agrees to are such that they are accepted by everyone and are of equal benefit to all. The whole idea of reciprocity runs on the idea of assurance and this assurance ensures to an individual that, under the fair terms of cooperation, whatever precepts or principles are agreed to, they (the principles) will be accepted by all.

¹³³ Rawls draws here an important distinction between the reasonable and the rational. The rational individual, unlike the reasonable one, is either unitary or banded (made evident when Rawls explains that this person can either be a corporate person or an individual). A Rawlsian rational individual is

Rawls calls original position as a ‘device of representation’ because this apparatus, within the purview of reasonable comprehensive doctrine, acts as an important widget for realizing the ideal of public reason. It is through this ideal of public reason that Rawls defines ‘burdens of judgment’ which acts as a crucial link between reasonable comprehensive doctrines and the public (and its public basis of justification as Rawls would call it)¹³⁴. The reasonable and rational individuals in the original position in order to reach fair terms of cooperation agree to reasonable comprehensive doctrines. In reasonable comprehensive doctrines all are equally represented and all equally realize the important fact that there is a crucial burden that they all share. The burden lies in an important facet of the original position situation that makes it imperative for all those in the original position situation to accept that not all agree to all the doctrines or stipulates at the same time. Thus the burdens of judgment teach the persons that they have an important burden to share and hence their decisions ought to be according to reasonable comprehensive doctrines¹³⁵.

Full publicity condition

As mentioned in the beginning, a well-ordered society is regulated by a public condition of justice. Rawls calls it the condition of “publicity” and it has three levels according to him. First, is the sort of reasonableness the individuals share in burdens of judgment. Second, in a well ordered society, the parties’ field of vision is apparently, according to Rawls, a set of general beliefs that as a part of their common sense understanding includes their views on human nature or the social and economic

most importantly engaged in choosing appropriate means to ends in order to efficiently prioritize them.
¹³⁴ Reasonable comprehensive doctrine is a result of public reasons that Rawls’s reasonable and rational individual shares. It is comprehensive and reasonable suffused as it is with three fundamental integers-theoretical reason, practical reason and the unchanging characteristic of theoretical and practical reason.

¹³⁵ Ibid

Rawls does not elaborate much on the burdens of judgment. These burdens are a loose category and they can be innumerable in number. Agreeing to reasonable comprehensive doctrines and its succeeding burdens of judgment a society, an individual or an association of persons essentially is taking a step beyond just determining the reasonable lineament of reasonable comprehensive doctrines. Most importantly what stems from the condition of publicity is, as Rawls calls it, public understanding, which is essential for the people in the original position to know that the institutions of the basic structure’s hardpan is not any arbitrary power but, as distinguished from this coercive power, it is based on ‘public scrutiny’. (p 68)

Under this people can question each other and answer with relevant claims as to why they believe their beliefs to be relevant as compared to the rest and etc. In short in the words of Rawls’s “it means that in their public life nothing need be hidden.”

institutions etc. Third, involves justifying fully the public conception of justice.

A deontological individual and its self-originating claims

Sandel speaks of a deontological universe where a self is prior to its ends soaked up in a deontological universe that allows an individual to be without ordains of nature, on the one hand, and, societal roles, on the other. This individual knowing the ropes is capable of constructing principles for the society it inhabits and such principles are antecedent to the personal motives of these individuals. The society, which is an ‘act of construction, that comes into being thus is similar to a ‘voluntary scheme’ whose bedrock is pure will¹³⁶. The virtue of justice, irrespective of these persons’ no inclination towards the existing mythos and traditions, is exemplified in whatever principles they agree to. Sandel has termed this as ‘deontology’s liberating project’ with individuals who possess ‘self- originating sources of valid claims¹³⁷.’

Kantian constructivism

The whole indention behind Rawls introducing Kantian constructivism is two-fold. One, as discussed below, Kantian views on constructivism is an important precursor to the whole conception of constructivism; second, irrespective of whether constructivism is political or moral in nature, the ideal of objectivity uniformly applies to both the variants of constructivism. And objectivity, in justice as fairness is elementary for a public conception of justice and political liberalism in turn.

Provenance of constructivism

According to Rawls one of the verifiable chronicles of constructivism is Kant’s apriori description of the principles of arithmetic and geometry¹³⁸. Natural numbers in

¹³⁶ Sandel, Michael J, *Liberalism and its Critics*, New York University Press (1984). p 170

The agents in deciding such principles are free from the prevailing customary practices, traditions, moral rules, heritage, mythos, customary laws and the list is endless. The principles have to be free of prejudices, wrongfulness and the perception of the good that follows hence is infallible. At this juncture Sandel calls such construction, which forwards persons who are motivated by principles than personal motives, as comprising of those who are ‘self-originating sources of valid claims’.

¹³⁷ Ibid

¹³⁸ Rawls, John, *Political Liberalism*, Columbia University Press (1996).

mathematics is an important exemplar that Rawls uses to explain the analogy between his constructivist procedure and Kantian constructivism (as found in the latter's principles of arithmetic and geometry). Natural numbers is a series of separate units that exist prior to each other. Such a consecution of units as separate series is, for Rawls, analogous to constructivism as the constructivist procedure, like the above consecution, lays out a procedure, which acts as an adjuvant to reaching reasonable judgments. In other words the constructivist procedure is based on two conjectures, one, a political conception of a person, and second, a well-ordered society¹³⁹.

Conception of practical reason

The conception of practical reason or the idea of, as Rawls would call it; "right, proper or appropriate conduct" is the practical implication of the whole doctrine of the reasonable and rational persons. Just the way propositions such as logic and judgment that are not mere abstractions but the principles of human existence, the principle of practical reason similarly, as a conception of society and person, is etched in the principium of persons as reasonable and rational. Therefore conceptions of person and society can also be called as the conception of practical reason and the following, described below, facets are an upshot of this analogy.

One facet is the principle of practical reason and judgment; and, second, the persons or a conglomerate of persons that agree to follow these principles. The conception of right and good, and, the two moral powers are the doctrines around which the reasonable and rational persons frame their well-ordered society. However the conception of practical reason is the essential predisposition for persons within the basic structure of society that leads to a constructivist conception of justice as fairness.

The bottom-line of the whole argument is an assumption that reveals to us an important source of constructivism. Constructivism, for Rawls, has its basis in not just moral and political philosophy but in more non-generic disciplines such as mathematics and the forerunner of such a view is Kant's doctrine.

¹³⁹ Ibid

The political conception of a persona and a well-ordered society are the undeniable basis on which the whole structure of a constructivist procedure stands. This basis also provides a starting point to the whole principle of constructivism. They are also the important assumptions of the principle of justice and right, as Rawls explains.

Objectivity

Political constructivism is a five-way justification process and this implies that a constructivist procedure is also about establishing political purposes apart from reaching practical reason, which is also one of its explicit goals. The first stage of the five way justification process is conceptualizing a framework of thought, for reaching correct judgment, which is also open to all for deliberations and discussions. If reasoning and judgments is to be reached according to a constructivist procedure then such a conceptualization has to accord to the idea of practical reason, and the principles of right and justice. This is the second stage. The third stage is about the application of these principles that are public also in nature for individuals, groups etc. The fourth stage is about distinguishing these principles from the particular principles that persons as individuals may have. As Rawls, highlighting this distinction, explains that principles of the particular individuals are not identical with principles identified by political constructivism that are in itself based on the conception of right and justice, and the idea of practical reason. By the fifth stage, the stages are almost complete, and judgments reached are in the form of a contract that contain a particular information that remains the same throughout, and a final result that also does not change.

Kantian moral constructivism

The five-way justification process can also be framed as one of those essential prerequisites that are mandatory to understanding the ways in through which the essential of objectivity provides a ground work to the public conception of justice. Kantian moral constructivism conceding the relevance of reaching reasonable and rational judgments staunchly relies on the strategy of the “categorical imperative”¹⁴⁰. Once the principles propitiously clear the above strategy then we are able to opportunely reach reasonable and rational judgments. Such judgments for Kant, as Rawls says, are not just publicly acceptable but also public in a way that one person can sincerely and easily explain to others the sanctity of such claims. Kantian constructivism, when compounded with five prerequisites prioritizes reasonable and

¹⁴⁰ Ibid

rational persons as members of the “realm of ends”¹⁴¹.

In short, in Kantian moral constructivism the individuals are reasonable and rational and they are so as a result of the injunctions of the “categorical imperative”. In Rawlsian terms, on the other, they are politically represented reasonable and rational individuals within the outline of justice as fairness.

The resonance of Rawls’s Theory in Nussbaum’s capabilities approach

Essentialism

“Liberalism is not a single position but a family of positions. When I speak of liberalism, then I shall have in mind, above all, the tradition of Kantian liberalism, represented today in the thought of John Rawls, says Nussbaum.¹⁴²” Liberalism aims at equality of capabilities,¹⁴³ the capabilities approach being the backbone of the defence, Nussbaum develops for reinstating liberalism to a favourable position. A connection has been developed between Rawlsian and Kantian work because both harp on the need to, first, identify the moral order, through moral worth of an individual, and then, attach this moral ordering with human action, action which comprises of the duty of an individual towards society. While Rawls emphasizes the importance of this duty towards institutions, Kant, acknowledges it for the law of a society. And all these are accountable for equality. It is with this context that Nussbaum develops the capabilities approach and terms it as 'Central Human Functional Capabilities'.

Rawls’s theory of procedural justice is ‘so front-laden, so to speak, has so much moral content packed into the procedure itself¹⁴⁴, that it completely avoids the criticism dedicated to its orientation towards just the procedure. The capabilities approach, on the other, is like the criminal trial, that is, that it starts from the outcome alongside an

¹⁴¹ Ibid 115

¹⁴² Nussbaum, Martha, *Sex and Social Justice*, Oxford University Press (1999). p-57

Nussbaum also places classical utilitarianism within this family of liberal tradition, exemplified in the work of John Stuart Mill.

¹⁴³ Ibid 68

¹⁴⁴ Nussbaum, Martha, *Frontiers of Justice*, Oxford University Press (2006). p 83

‘intuitive grasp of a particular content, as having a necessary connection to a life worthy of human dignity¹⁴⁵’. The moral content, says Nussbaum, goes into construction of a fair procedure than the right result/outcome.

Nussbaum’s theory on Essentialism¹⁴⁶ forms part of an objection to the Rawlsian theory of primary goods as well as an affiliation to Aristotelian conception of ends that individuals strive for human flourishing. The objection, by Nussbaum, is at two levels- Level 1 concerned with ‘the shape of human form of life’; and Level 2 as ‘basic human functional capabilities’. While Level 1 is the ‘minimal conception of the good’, Level 2 is a complete version of the former level, as it prepares a comprehensive list of human capabilities without negating the humanness aspect of it¹⁴⁷. Human reason also forms an important part of Level 2, derived as it from Kantian Constructivism. The term ‘Thick Vague Theory of the Good’ has been coined to mark the importance of human functions in human life. The term is also to contradict the narrow conception of Rawlsian theory on primary goods, neglectful as it is of wide ranging differences, differences which the list developed by Nussbaum tries to encapsulate.

Level 1 is a list that comprises of both limits and capabilities, while in Level 2 human reason and affiliation play an important role. An essentialist adhering to this approach is an ‘Aristotelian Essentialist’, committing herself to the ‘capability for good functioning¹⁴⁸’, which also means bringing each and every person within the approach, irrespective of the various differences that might exist across time and place. The capabilities approach is at two levels- one at the level of a human being; second, at the level of public policy. Thus the task of an Aristotelian Essentialist is

¹⁴⁵ Ibid

¹⁴⁶ Nussbaum, Martha (1992), Human Functioning and Social Justice- In Defense of Aristotelian Essentialism, *Journal Political Theory*, Vol 20 (2).

The article starts with the assumption that the term ‘essentialism’ is today becoming a dirty word in academic circle. There are various charges levelled against it like it neglects differences across cultures, it neglects autonomy but these charges cannot downplay the role of essentialism as it is theory that gives considerable importance to human life. Though Nussbaum calls it Aristotelian Essentialism, yet Aristotle also prejudicially applied this in his discussion on human flourishing.

¹⁴⁷ Nussbaum herself calls it a vague list, though in a good sense. It is so because the list’s defining feature, which is essentialism, bases itself on a non-biased conception of the person, a base without which the conception would be incomplete or would even mean an end to human form of life. Moreover, as she believes, a thick vague conception of the good is a good defence of not only the list of basic capabilities but also of the essentialist proposal.

¹⁴⁸ Ibid 231

twofold- first, to refute the criticism levelled against essentialism, through Aristotelian notion of plurality; second, at the level of public policy, to critique the utilitarian stance of treating individuals as only instruments of pleasure and pain.

The notion of dignity with its roots in Aristotelian human being, we need to remember that the capabilities approach is a political doctrine about basic entitlements and not a comprehensive moral doctrine¹⁴⁹. The above argument has two parts- one, political; second, moral. The former is Nussbaum's capabilities approach exemplified through dissociation with the social contract, a dissociation which also explains the latter. It is at this crucial departing point that Nussbaum has tried to expound on Aristotelian human being and its relation with the idea of dignity

One of the most impressive achievements of Hellenistic philosophy is to have shown how the specific conditions shape these¹⁵⁰. Applying this in context of the definition of ethics (described above), we discover the task of theory whose task is to find a general account that fits the data¹⁵¹. The above played a major role in ancient moral education¹⁵². According to Nussbaum, there have been many versions of this idea, in one form it has been ascribed to Aristotle. Reverting back to the task or the definition of theory, by Aristotle¹⁵³, philosophy (or theory) is an activity that secures the flourishing life by arguments and reasonings¹⁵⁴. Logical rigor, precise reasoning, definitional precision are the tools that never cease to operate in this model of philosophy. Once one has discovered that philosophy's task is like the doctor's task, one can rely on that general understanding to find out how to proceed in different circumstances¹⁵⁵. Its arguments are to the soul as the doctor's remedies are to the body¹⁵⁶. Therefore one can say that the motivation for philosophizing is the urgency of human suffering, as a result of which the task of philosophy is to promote human

¹⁴⁹ Ibid 155

¹⁵⁰ Nussbaum, Martha, *Therapy of Desire*, Princeton University Press (1994). p 11

¹⁵¹ If we define this task of theory in context of the definition of ethics, which is about studying ordinary thoughts and preferences, then the task of medical conception of ethics will be to study and collate the social health practices of a local group, community or a wider group.

¹⁵² This has been elaborately written in book *Clouds* written by Aristophanes.

¹⁵³ Ibid 1

¹⁵⁴ This is the Epicurean definition of philosophy, accepted by all three schools of Hellenistic philosophy.

¹⁵⁵ Philosophy is thus for all three schools the art of life, attached with a motive- to promote good living for all; without this as its task, philosophy's existence is vain and empty.

¹⁵⁶ Ibid

flourishing. The Hellenistic therapeutic arguments deal with all above stated and Nussbaum terms this as 'ethical philosophizing'.

Aristotle's *Nicomachean Ethics* confronts its reader with the following question: what is virtue and subsequently the place of knowledge in it. There are, pertaining to knowledge of different kinds, different subjects of inquiry to, which can all be studied, and pursued through action; fine and good actions that also aim at some good.. However there is one subject named political science, which is worthy of pursuit for itself, unlike others which are worthy of pursuit for something else. Political science as a master art is imbued with the element of human action with an eye on an ultimate end. The ultimate end, worthy of pursuit for itself, also aims at things good in itself than good because of some other reason. Therefore knowledge is what students of political science should aim for, as this knowledge seeking would apparently assist in realizing virtue, virtue which is also the good of a human being. "It legislates as to what we are to do and what we are to abstain from, the end of this science must include those of the others, so that this end must be the good for man¹⁵⁷."

Knowledge (of any kind) aims at some good and political science aims at that which is the highest of all goods, achievable through action. Thus good and action together constitute the good human life, wherein action plays the role of a mediator. Knowledge has many branches and sub-branches, in a similar vein, good also may be of many types. The distinctive element that distinguishes the chief good from its variables is virtues.

There are three kinds of lives based on virtue: happy, political, contemplative. The first kind of life is what explains the chief good as well as the end of action. "Happiness, then, is something final and self-sufficient, and is the end of action¹⁵⁸." Happiness also has a number of variations, very much similar to knowledge and virtues.

¹⁵⁷ Aristotle, *Nicomachean Ethics*, [Online: Web] URL: classics.mit.edu/Aristotle/nicomachaen.html
Nicomachean Ethics (from now on addressed as NE) Book I(II)

¹⁵⁸ NE Book I(VII)

The concept of ‘happiness as being’ is what marginalizes the various other definitions of happiness. The concept is in the backdrop of two elements: human function, as in *Nicomachean Ethics* & practical wisdom, as in *Politics*. “Happiness is an activity of soul in accordance with perfect virtue¹⁵⁹. We must consider the nature of virtue; for perhaps we shall thus see better the nature of happiness.” It is necessary to consider this ‘for no function of man has so much permanence as virtuous activities and of these themselves the most valuable are more durable because those who are happy spend their life most readily and most continuously in these; for this seems to be the reason why we do not forget them¹⁶⁰.’

Virtue is a state of character dependent primarily on choice in the following explained way. Human virtue and happiness are both concerned not with body but soul. Says Aristotle, ‘the student of politics, then must study the soul, and must study it with these objects in view, and do so just to the extent which is sufficient for the questions we are discussing¹⁶¹.’ Breaking the above argument into two- conditioned object and extent- for simplicity sake, we reach an altogether different level of understanding on virtue. The object to be studied by soul, subject to three conditions: knowledge, choice to perform an act, state of character¹⁶². The extent, on the other, to be determined by one of the following- passions, faculties or states of character¹⁶³, which in this case is states of character.

“We must examine the nature of actions, namely how we ought to do them; for these determine also the nature of states of character that are produced¹⁶⁴,” says Aristotle. The chief determinant for the nature of state of character is thus nature of action, based as it is on choice.

An analysis of Aristotelian virtue would be incomplete without a consideration of the specific nature of virtue. The specific nature of virtue places it between excess and defect categorically stated in *Book II(VI)*. As laid down by Aristotle himself- “Virtue

¹⁵⁹ NE Book I (XIII). p11

¹⁶⁰ NE Book I(X). p 9.

¹⁶¹ NE Book I(XIII). p11

¹⁶² NE Book II (IV). p15

¹⁶³ NE Book II (V). p16

¹⁶⁴ NE Book II(II). p13

is more exact and better than any art, and must have the quality of aiming at the intermediate, that is excess, defect and the intermediate. For instance both fear and confidence and appetite and anger and pity and in general pleasure and pain may be felt too much and too little, and in both cases not well; but to feel them at the right times, with reference to the right objects, towards the right people, with the right motive and in the right way, is what is both intermediate and best, and this is characteristic of virtue. Now both excess and defect is treated as a failure while intermediate is praised and is a form of success; and being praised and successful are both characteristic of virtue. Therefore virtue is a kind of mean, since, as we have seen, it aims at what is intermediate¹⁶⁵”.

Virtue is a state of character, based on choice lying thus in a mean. Important also is to note that the mean does not apply to every action, but to conduct. Within a conduct there are three kinds of disposition: two vice- excess, deficiency, and one virtue- which is the mean. Mean acting as the base for virtue is closer to things drawn from the thing itself than drawn from ourselves. The following three examples may clarify it further¹⁶⁶.

Pleasure and Pain- Mean is Temperance

Excess- Self-indulgence

Deficient- name not yet found

Giving and Taking- Mean is Liberality

Excess- Prodigality

Deficient- Meanness

Honor and Dishonor- Mean is ‘Proper Pride’

Excess- Empty vanity

Deficient- Undue Humility

To round off the above argument, virtue is an intermediate between two extremes, an intermediate¹⁶⁷ between excess and defect. Consequent of this is the association

¹⁶⁵ Book II(VI). p17

¹⁶⁶ Book II(VII), p18

¹⁶⁷ An example being courage, which is a mean between fear and confidence, for who exceeds in

developed between virtue and action, as book II, which may lead us to sometimes incline to the excess, sometimes to the defect, and at some point hit the mean. This assists in revealing another characteristic of action- voluntary and involuntary acts, based on the spur of the moment¹⁶⁸. Acting by reason of ignorance composes the involuntary act and acting in ignorance is what defines the voluntary act. What thus follows this distinction is the mode of choice because it is choice¹⁶⁹, which helps in discriminating characters better than actions do.

With this we move into the domain of practical wisdom or deliberation. Choice involves rational principle and thought therefore it is closely bound up with deliberation. Similar to choice, deliberation is also concerned with things that happen in a certain way. It deals with what Aristotle calls, 'possible things', things that might be brought about with our own efforts or by the efforts of our friends and acquaintances. Ends and means relationship also crops in here, for we choose and deliberate about means and wish for ends¹⁷⁰.

The end of every activity, as said, is conformity to the corresponding state of character. A virtuous human would try to harmonize the appetitive element with the rational principle. Thus virtue, voluntary act, deliberate choice constitutes the means for pursuing virtuous activity, there is yet another means primordial to this. Education, or art, as Aristotle would call it, is concerned with every action and pursuit, and is thought to aim at some good. "Where there are ends apart from the actions, it is the nature of the products to be better than the activities, says Aristotle¹⁷¹." While equating this art with activities, Aristotle has tried to evolve a master art which would deal with activities under a single capacity, an art which promotes something other than the aim. This new activity is "knowledge", which can be truly promoted by a master-art, the master art being political science¹⁷².

fearlessness has no name and who exceeds in confidence is rash, while the one who exceeds in fear and falls short of confidence is coward.

¹⁶⁸ NE Book III (I).

¹⁶⁹ Choice is voluntary, but is slightly different from the voluntary act, for the latter extends to include within it animals and children. Moreover, acts done on the spur of the moment can be described as voluntary but not chosen.

¹⁷⁰ An example can be of a doctor or an orator, who does not deliberate on whether it should heal (doctor) or persuade (orator).

¹⁷¹ NE book I (I)

¹⁷² The most highly esteemed capacities, according to Aristotle, fall under this subject, example

There are two kinds of virtues- moral and intellectual. While we owe the former to both birth and teaching, the latter relies on habits. As Aristotle explains that all those things that come to us by nature, we must first acquire the potentiality and later exhibit the activity. Thus virtue is a state of character on which depends the nature of action¹⁷³. A just human, according to Aristotle, by doing just acts becomes just and thus gains the highest prospects of becoming good. In a similar manner, a law abiding human is just and so is her/his act lawful¹⁷⁴. This falls within the ambit of complete virtue, wherein this just human, who is also good tempered¹⁷⁵, performs its best to form a harmonious and just political society.

We now have justice as not part of virtue but virtue proper or entire virtue. There are two kinds of justice- proportional and rectificatory. In the former, there is a distribution of common resources in proportion, in the latter; it is a transaction between individuals, thus garnering within themselves an additional quality of equality¹⁷⁶. Further it is important to note that a person who indulges in just and unjust acts voluntarily, on the other, the person who does neither just nor unjust acts, acts involuntarily¹⁷⁷.

With the above description, the discussion on of practical wisdom/deliberation moves to a new and different level, elaborated in the book Politics. Wisdom is the result of a deliberate choice; choice which is itself product of human reasoning and intellect. Practical wisdom aims to treat human as a political animal with an overt role to play in firm establishment of a political society. This is what Aristotle has termed as 'productive intellect' or 'practical wisdom'. Practical wisdom is a virtue as well as a

economics, strategy, rhetoric etc. Politics apart from utilizing the other sciences, also legislates on what we are to do and what not, it in this way aims at the highest good of human.

¹⁷³ Since virtue is related to action and passion, and every action and passion is concerned with pleasure and pain, virtue is therefore also related to pleasure and pain. This pleasure and pain aspect has been discussed more elaborately in the second chapter, since it's related deeply to human's preferences and passions.

¹⁷⁴ NE Book V (I).

¹⁷⁵ Good tempered nature of human being has been discussed more clearly in chapter two, since this chapter deals exclusively with Aristotle's concept of human being.

¹⁷⁶ Aristotle has linked this latter form of justice with arithmetic proportion. This has been described as one resulting to injustice, giving a certain distinctive injury to the sufferer. Perhaps this is also the reason why Aristotle has tried to link this form of justice (rectificatory) with equality, for in these situations the judges try to rectify the wrong by equalizing the ill effects through penalty, in order to reclaim justice. No further explanation of this link between arithmetic equation and equality has been provided by Aristotle in book *Ethics*.

¹⁷⁷ NE Book V (VIII).

reasoned capacity to act, it is the most finished forms of human knowledge. Practical wisdom is concerned with things human and things about which it is possible to deliberate, it is so as a result of this concern with human action¹⁷⁸. It is important to distinguish between practical and political wisdom, for the former deals with matters that relate to individuals, the latter pertains to the relationship that exists between the universals and the particulars, the best example of it can be affairs of a city, wherein the individual decisions are being taken up for collective good¹⁷⁹.

The Book Politics deals with human as a political being with inherent potential for political activity, leading in the direction of practical reason and justice. Polis as the most authoritative human community is something which the book Politics begins with, while rejecting alongside the claim that politics is all about ruling others. On the contrary, it stands for the ‘purpose served by such a rule’.

In NE, political science, as a master art had to distinguish itself from other various forms of knowledge as well as the variables of life based on virtue (happy life, political life, contemplative life) in order to evolve complete life based on chief good, the chief good being happiness. Similarly Politics also invokes the same argument that politics needs to be distinguished from various forms of mastery that resemble political life. “The reason for this is that the regime, the particular aspirations and institutions that define the actuality of any polis, as Aristotle understands it, embodies an answer to the question apparently inseparable from human life. What is the best life for a human being? Thus Aristotle’s claim about the priority of politics to individual life is not an assertion of the superiority of the collective to the individual interest, and it certainly does not mean that we should take our identity from our role as citizen of a particular regime. Instead, it is an assertion of the priority of living well to living, of the form of a human life to its matter, and of the centrality of the question of the best life¹⁸⁰.” For the author participating in political life leads towards two sets of human goods: the instrumental goods directed toward security and self-

¹⁷⁸ Practical wisdom's concern with human affairs makes it differ extensively from philosophic wisdom, evident as it is from the work of philosophers like Thales, Anaxagoras etc, who were possessed with intense philosophic wisdom but were ignorant of practical human problems.

¹⁷⁹ NE Book VI (VIII).

¹⁸⁰ Salkever, Stephen, *The Cambridge Companion to Ancient Greek Political Thought*, Cambridge University Press (2009). p 226

preservation, and the intrinsic goods associated with human virtue and flourishing.

The list of capabilities is like a ‘long list of opportunities for functioning such that it is always rational to want them whatever else one wants’.¹⁸¹ The first step towards truly human functioning is to accept the challenge to counter our deeply held moral intuitions in order to elevate to a favorable position the various conceptions that govern the list of human functioning in capabilities approach.

The focus is only on the notion of human dignity which takes its cue from Aristotle’s notion of human being as a political animal. As Nussbaum explains that the capabilities are not understood as instrumental to a life with human dignity: they are understood instead as ways of realizing a life with human dignity, in the different areas of life with which human beings typically engage.

Moral psychology of the citizens

The reasonable and rational individuals have some usual and some unusual characteristics¹⁸² and the latter is significant as it picks up desires (of three types) as its earmark. The three types of desire include ‘object-dependent desires’, ‘principle-dependent desires’ and ‘conception dependent desires’¹⁸³. The whole purpose behind

¹⁸¹ Nussbaum, Martha, *Women and Human Development*, Cambridge University Press (2000). p 88
The argument proceeds from respect for persons and therefore also choice. A capabilities approach with functioning as its major goal has to have the appropriate space for choice. Choice is important in one more respect, that a function becomes ineffective if a person has to perform an act out of requirement.

¹⁸² The usual qualities include having the two moral powers, having a determinate conception of the good, powers of judgment and thought, and also the capacity to be fully cooperating members of society. The unusual ones include one, their availability and accessibility when it comes to proposing the fair terms of cooperation; second, the ability to share the burdens of judgment; third, the desire to be recognized as members of a society; fourth, the “moral psychology.”

¹⁸³ Rawls, John, *Political Liberalism*, Columbia University Press (1996). p 82

Object dependent desires are the simple desires that comprise of personal, bodily and social desires such as status or acquiring more wealth, property etc. Principle-dependent desires, unlike the former ones, have a reason or rationale behind them and cannot exist without such a rationale. These types of desires are also of two kinds based on what moves or motivates a particular desire. One, when a desire has a rational basis and such types move in a four-stage sequence (from choosing the most effective means to selecting the most realistic alternative to one that offers the greater good to finally, the one chosen on a priority basis). Second, if a particular desire has reason as its basis. These kinds of desires regulate the relations between individuals then be it an association, or a community or a group.

After object-dependent and principle-dependent, the third category of desires is conception-dependent desires. These kind of desires, according to Rawls, are the most important kinds as in these one acts from a particular principle (as in the case of principle-dependent desires) and such initiation of an action is based on the situation in question. For example, deciding our future. Such a decision, if to be taken properly, has to weigh not just your present but also past accomplishments and is, in a way,

introducing “moral psychology” argument seems to be contained in conceptions (that Rawls has introduced), which exist neck and neck with each other such as citizens proposing fair terms of cooperation that further moves to willingness, to agreeing to set up in practice such terms of cooperation, to accepting the burdens of judgment, to agreeing to reasonable comprehensive doctrines, and to finally, the “moral psychology”.

Nussbaum, alluding to two compelling legal cases in the US constitutional history, is trying to set the reader’s sight on an important matter in hand, entrenched as it is in the backdrop of a within reason presentiment, or ‘reasonable fear’¹⁸⁴, Nussbaum is trying to throw some light, for her readers, on an issue, which was the highlight of consequential and notable legal cases. The term “reasonable fear” is so often used in legal parlance that it does not make sense to not brush it aside as of being any consequence in any way. And Nussbaum uses reasonable fear as a concomitant of emotions that are neither outlawed nor prosecutable but sit on first, human thought, and, second, an intentional object, third, reasonableness. And as a result it becomes indispensable to scrutinize not only the conception or a motor response called emotions, but also assay how a liberal society is to evaluate this conception. This is equally crucial for the project of political liberalism.

A person’s inclination towards ‘beliefs’ is an aspect that customarily runs through all three tendencies of emotions. Looking at one of the two important cases, it is apparent

similar to taking a leap from the past to the future.

¹⁸⁴ Nussbaum, Martha, *Hiding from Humanity- disgust, shame and the law*, Princeton University Press (2004). p 22-23

The first case: Judy Norman’s case

Judy Norman, a house wife, has been abused, mentally and physically by her husband for years. As Nussbaum says, it is still difficult to imagine the kind of fear Norman may have been living with and the type of fear she may have had the day she murdered her husband. The case was brought up in court and court decided to quote reasonable fear and grant release to Norman. The reasons were fear, unlike the kind you and I can imagine, and she explained the constant fear she lived with and fear that she will be doomed if she does not kill him. An alternate life with her husband is a very distant possibility, felt Norman.

The second case: Frank Small’s case

Frank Small had a heated argument with another person, C R Jacoby, at a saloon nearby. While Jacoby walked away with his wife once the argument was over, Small, on the other, rushed to get his pistol and shot Jacoby immediately in the head. Jacoby died on the spot. Small was prosecuted. Small argued that he be not given a severe punishment as it was anger because of the quarrel that pushed him, and some people take longer to calm down, after a quarrel, compared to others. The jury denied his argument and explained that Small’s attitude lacked self-discipline and self-culture and such an act cannot be excused or pardoned.

that it was the fact of belief, which led the accused to kill her husband. In this case, for Nussbaum, beliefs have an obvious role to play and they are inextricably linked to emotions. But if we try to think through our daily life examples, for instance picking up a vegetable that just fell from my hands, we obtain a different picture. The inference one can draw from this exercise is that these daily activities have got nothing to do with our beliefs and are simple motor responses.

Reasonableness of emotions

Emotions have been identified as appraisal mechanisms for individual actions, distinct as these are from motor response driven daily activities. As in Norman's case (discussed above) there is an antecedent factor that existed much before she could take the final step and murder her husband. This antecedent factor is also the appraisal mechanism, which prevails independent of the vague or non-object driven emotions. Nussbaum terms it as "reasonable fear" in an attempt to make emotions as commensurate with reasonable/reasonableness/reason¹⁸⁵.

'The law of self-defense is a law of necessity,' says Nussbaum¹⁸⁶. Perhaps this is what exactly happened in Judy Norman's case. Unlike Frank Small's case, which was unreasonable beyond permitted limits, where his emotion called anger was not given a similar kind of consideration, cases like Norman's hearing sign off on an important note that it is important to take into consideration the larger picture. This larger picture is provided by reason as well as by another methodological principle tabbed as "reasonable beliefs"

¹⁸⁵ The term "reasonable fear" has very often been revoked in US constitutional history and it is neither used vaguely nor in a more non-generic manner. Further the constitution has upheld that reasonable fear ought to be given an upper hand in cases like Judy Norman. Moreover it is not easy to outlaw reasonable fear as felonious or unconstitutional.

When talking about fear, there is a stereotype that runs in American society that African-American males are people who would not mind murdering people and that this runs in their race and is hereditary and etc. So people in general in America fear African-American men. The fear is baseless, according to Nussbaum and she is, whenever possible, making an attempt to tell people of the baselessness of their thinking and it is "unreasonable" to fear every African-American male they happen to come across. There is fear but an unreasonable one.

¹⁸⁶ Ibid 41

"Self-defense is different. Here we feel that people do not act wrongly when they kill, because a threat to life (or a threat of serious bodily injury) gives people a right to kill. Thus self-defense provides complete exculpation. But the doctrine, once again, defines carefully the limits of the circumstances in which a reasonable person will fear for his life or safety."

Evaluative reasonable beliefs

The propositions that lead a person towards a particular activity are based on certain beliefs and these beliefs, even when they are biased, can be grouped under two categories- the reasonable and, two, the unreasonable.

As Nussbaum calls it reasonable beliefs, these beliefs in their very initial interpretation are assumed to be equipped with the capability of judging the reasonableness of a particular belief. For example as in the case of a mother grieving the death of her son as soon as she receives a call informing her about it, the reasonable beliefs are endowed with the ability to question the reasonableness of this mother's grieving. In the sense that is she reasonable in grieving just because someone called her? Does she trust the person who just called her? Is she right in trusting the person who just called her? Is the evidence correct? Nussbaum's answer is based on what Stoics believed to be justified that is that grieving in such situations is a sign of weakness and therefore there should be no such display of emotions for situations that are beyond our reach and understanding.

In other words reasonable beliefs are created to act as responsible agents of evaluation or appraising the reasonableness of varied display of individual's reciprocation to contradistinctive circumstances¹⁸⁷.

Reasonable beliefs are important not only because of the appraisal mechanism, which they provide but also because they play a crucial role in distinct social situations. To put it differently, beliefs that often color our judgments intermittently and aptly set

¹⁸⁷ Ibid 31

Nussbaum gives another example and this example questions the justifiability of anger Athenians carry within themselves against the Persians. In the backdrop of such a situation, the reasonable beliefs entrust itself with the task of questioning the relevance of their anger. It may ask: how well qualified the Athenians' anger is? Did the Persians really do such a grave wrong? What did they do? Did they destroy their crops or took away their land?

Answering within the circumspect of reasonable beliefs the answer to it is interesting. One of the Athenian leaders noted which reasonable person would not be angry if such and such a thing had happened to them. The reasonable people will be angry at it, take it to their heart and carry the bitterness for the rest of their lives, or even go to war with this enemy.

"We can point out that someone's emotion rests on beliefs that are true or false, and (a separate point) reasonable or unreasonable. Furthermore, what we can now see is that such judgments can be made not only about the factual component of the emotion-beliefs, but about their evaluative or appraisal component as well."

precedents for decisions that have ramifications, not so affirmative in nature, for the entire society¹⁸⁸. Beliefs of this nature are weighty issues, which need to be taken in all seriousness for they have far reaching impact on a society.

Capabilities approach procedural in nature

The capabilities approach predicated highlights that give ascendancy to procedural nature of the approach and the highlights include ‘genuine curiosity’ ‘theoretical flexibility’ (mentioned in footnote 33) and educating one’s judgment or ‘educate my judgment’ (as she calls it). This is perhaps the second reflection of the resonance between Rawls’s and Nussbaum’s theory.

Genuine curiosity

Nussbaum entertains the idea of a decent society, as relevant for creating capabilities, which is set up on a sensitivity towards not only those who lay on the margins but also such people and groups that are to be at the receiving end of the policies of a decent society. It is important that the policy-framers, decision-makers, and observers etc. be not averse to the standpoint of those affected. They should, on the contrary, circumspect the positions and situations of such people.

Educate one’s judgment

As Nussbaum in her well-formed argument narrates how and in what ways, through an examination and survey of SEWA women in Gujarat she has been able to “educate her judgment¹⁸⁹”. Perhaps it is through such endeavors that those in important positions get to realize how crucial it is to perpetually overhaul and revamp the

¹⁸⁸ An example can be fear which is also one of our beliefs. It is not a heavy duty process to ignore and take lightly someone’s fear of mice. However such a fear becomes a pressing concern the moment it gets translated into action-oriented beliefs. An example, also discussed above, is the stereotyping of African-American men that they all are murderers by instinct. Such an assumption that runs across the entire American society is irrespective of these false and unreasonable belief holders lived experiences and is oftentimes based on hearsay. Such presumptions are baseless, confused, unreasonable and irrational and as Nussbaum notes ‘misplaced fear is socially significant.’ (p33)

It is equally important to distinguish true from the reasonable as, if we look at the racial issue mentioned in the above lines, certain beliefs may be reasonable but false or irrational.

¹⁸⁹ Nussbaum, Martha, *Creating Capabilities: The Human Development Approach*, Harvard University Press (2011). p15

decision making as well as observation processes¹⁹⁰. When we say that an approach needs to be considerate of the experiences of those affected and in turn sensitive to the condition of such people, we are connoting a special meaning to the policy processes in general, and capabilities approach in particular. The capabilities approach in its very essence has been thus formulated to capture this very special meaning. The special meaning insinuates an approach that puzzles out the opportunities, necessary for leading a life with dignity, available to people and enlists them to define what an individual is able to do and to be.

This is perhaps the third similarity between the injunctions introduced by the two authors. The capabilities approach in the first instance might appear as a doctrine offering a salient account of values that determine the quality of life. However this is not so and this is something which the capabilities list deliberately avoids. The approach is rather a doctrine about fundamental social entitlements aiming at one, ‘minimal social justice’; and two, ‘constitutional law¹⁹¹.’

Minimal social justice is contingent upon the reasonableness of a political conception and a reasonable political conception reckons itself with certain aims that promote equal moral worth of basic liberties. Nussbaum gives an example of policies that aim themselves at improving the living standard of the poor. Now a conception, which defines such an aim, if to be a reasonable one then the conception has to have the ability to differentiate the important freedoms from the unimportant ones, or perhaps be also capable of calculating some social entitlements as more important than the

¹⁹⁰ *Theoretical flexibility*

The context for specifying the above standpoint for Nussbaum is based on her field analysis of SEWA women in Gujarat. Apart from giving some crucial observations regarding the importance of education, health and such other barometers for these women, Nussbaum also lays out clearly how much important it is to understand the situation of such people from the standpoint of these very people. Indicators like GDP or the high economic growth have in no ways affected positively the status of these women and capabilities approach, which she develops, is sensitive and considerate of the situations and conditions of such people (SEWA women in particular here).

The GDP approach is an inappropriate approach if used for measuring quality of life of people of its country because the approach neither takes into account relevant social indicators like health, education nor does it measure or observe the pattern of distribution or the way resources are distributed amongst its citizens. Moreover it is highly inappropriate as well as not possible to correlate GDP with income of the people.

Nussbaum also mentions that two eminent and contemporary philosophers, Jonathan Wolff and Avner de Shalit, find the capabilities list, due to its conspicuous nature, as the most encapsulating of the issues of immigrant communities in Israel and Great Britain

¹⁹¹ Ibid

other entitlements.

The next argument in line is the constitutional law or a written constitution. The reasonable political conception with its aims properly defined is also about freedom to deliberate. The citizens, for Nussbaum, as per the capabilities list have been ascribed the potentiality to deliberate. And this potential is essential if the people are to live life with full human dignity. Therefore the capacity to deliberate seems crucial as they lead to differentiating fundamental from the non-fundamental (let's say freedoms) as well as reduce the possibility of imposition of the majority will (through a written constitution in whose deliberations the persons take a part in).

Once the above two requisites are in place we have in place an overlapping consensus that promulgates capabilities list as an approach which is comprehensive in nature as well as flexible in content. The flexible nature of the approach makes it malleable enough to be adopted according to the particular situations of different groups and nations.

Nussbaum Capabilities Approach

Nussbaum provides a detailed account and a deep justification of her conception of the good and this is also, for Richardson one of the main attractions of her approach because by linking capabilities' foundation principle- an individual's ability to be and to do- with a theory of justice, Nussbaum's capabilities approach also surmises us of the role of governments in promoting these capabilities¹⁹². Hence, in the words of Richardson, the following two can be interpreted as tasks of the government in the context of Nussbaum's capabilities approach- one, enabling citizens to achieve satisfactory or even excellent levels of functioning in some or all of the basic areas; two, insuring that citizens achieve satisfactory or even excellent levels of functioning in some or all of the basic areas¹⁹³.

¹⁹² Richardson, Henry S (2000), Some Limitations of Nussbaum's capabilities Approach, *Quinnipiac Law Review*: p 309-332.

¹⁹³ Ibid 315

Citizen's conception of justice

A just and stable society, legitimate in nature is pedalled by the ideal of public reason, which itself is based on the notion of overlapping consensus. The conception of shared political ideas of persons and society makes possible the development of a conception of justice that is grounded on three key liberal features. First, a list of certain basic rights, liberties, and opportunities; second, assigning priority to these rights, liberties, and opportunities, and third, ensure citizens the means to achieve the above.¹⁹⁴

However the idea of reciprocity and rational advantage is, according to Badano, flawed because it allows for a distribution of goods in such a way that an individual is better off in such a situation than under a regime of equal distribution of goods¹⁹⁵. This apart from the major criticism levelled against Rawls that the theory altogether excludes a class of persons- persons with disabilities¹⁹⁶.

Therefore as part of his project of revising political liberalism, Badano considers it better to take Nussbaum's capabilities approach as the starting point as it is always better to know that people believe in more of less than believing that less is more¹⁹⁷. What further paves the way providing one with another fork in the road is the understanding that not an overlapping consensus but idea of person, and not the idea of social cooperation, as in overlapping consensus, is the basis of a society. And it is this idea of the persons that is well entrenched in Nussbaum's theory, unlike Rawlsian theory.¹⁹⁸

¹⁹⁴ Badano, Gabriele (2014), Political liberalism and justice claims of the disabled: reconciliation, *Critical Review of International Social and Political Philosophy*, Vol 17 (4): p 410-422.

The ideas involving use of public reason and the legitimacy of the principle of overlapping consensus are fruitful for realizing the ideals of a just and stable society because the principle of political liberalism with the inherent idea of a citizen's conception of justice leads to formulation of principle despite the presence of various comprehensive doctrines. Therefore the principle of public reason proves beneficial when the fundamental values are at stake and a consensus has to be reached in such a way that it is acceptable to each citizen. While the principle of overlapping consensus lets one know of the fact that there are certain principles to which all citizens agree to, there are some basic ideas like ideas of citizens as free and equal, idea of a society as a fair system of cooperation, idea of a well ordered society that are regulated by a conception of justice.

¹⁹⁵ Ibid 405

¹⁹⁶ Ibid

¹⁹⁷ Ibid 410

¹⁹⁸ Ibid 414

Nussbaum, according to Watene, considers benevolence grounded on compassion to be the starting point of her capabilities approach. The notion of a shared public conception of a person, introduced by Nussbaum, includes the values of a shared life and shared ends, beneficial as these all are, when clubbed together, for fulfilling the requirements of capabilities approach, which in turn provides answers to questions of justice¹⁹⁹.

The capabilities approach is an account providing for basic constitutional principles that are to be ‘implemented by the governments of all nations as a bare minimum of what respect for human dignity requires.’ It stands for providing human beings with basic social minimum so that people have human capabilities to be and to do. The capabilities enlisted in the approach are set within the context of political liberalism, which is an object of overlapping consensus. Nussbaum adopts the principle of each person’s capability that is the capabilities have to be pursued for each person and each person is to be treated as an end. Therefore the framework chosen, universal or plural has to be considerate of its own flexibility so as to be capable of doing justice to the variety of human life.²⁰⁰ ‘If we agree that citizens are all worthy of concern and respect, and grant that they live separate lives in the sense just characterized, then we ought to conclude that politics should not treat people as agents or supporters of other people, whose mission in the world is to execute other people’s plan of life. It should treat each of them as ends, as sources of agency and worth in their own right, with their own plans to make and their own lives to live, therefore as deserving of all necessary support for their equal opportunity to be such agents²⁰¹.’

¹⁹⁹ Watene, Krushil (2013), Nussbaum’s Capabilities Approach and Future Generations, *Journal of Human Development and Capabilities: A Multi-Disciplinary Journal for People Centered Development*: p 27.

²⁰⁰ Nussbaum, Martha *Women and Human Development- The Capabilities Approach*, Cambridge University Press (2001). p 42

The capabilities approach is instrumental in providing a theoretical perspective to claims that otherwise lie undefined in the political and social realm. For example, during her field work on traditions and lifestyle of women in a village in Kerala, Nussbaum reveals the illiterate women of the village have followed their lives without choices for years. So to this if one adds the notion of human functioning, choice (as one of the capabilities) becomes possible for such women as they have economic and political opportunities now, irrespective of whether or not they choose to lead their traditional lives.

²⁰¹ Ibid 58

Liberties of choice and human flourishing- threshold level of each capability

Liberty is not about rights on paper but having actual resources for exercising these and the state is to make available these, something which Rawls calls fair value of the various liberties²⁰². If one denies people their right to freely exercise their rights to choose that which involves the very dignity of a human being then we will be treating them like children. Therefore the role of actual preferences in the choice of basic political principles is very important²⁰³.

However Rawls's theory is also at the helm of neglecting the primal fact of human life and this is something, which according to Nussbaum, is one of the shortcomings of Rawls's theory. It fails to respect person's struggle for human flourishing, a struggle where an individual is the source and inspiration for her autonomy, her valuation in her own ways²⁰⁴. Therefore the approach that Nussbaum here propounds is not ignorant of the social and material settings a person lives in, which enables one to function in a fully human way. And this is what Nussbaum calls as reaching the threshold level of each capability.

²⁰² The state needs to take a stand on distribution of wealth and income, distribution of property rights, access to the legal system etc.

²⁰³ Ibid 51

As per Nussbaum, Rawls's approach is considerate of the importance of basic liberties and opportunities for the citizens and the importance of the notion of choice. 'In all these respects, Rawls's model seems to provide an excellent basis for further thought about quality of life in the international arena.'

²⁰⁴ Ibid 69

"But Rawls's approach, even though more promising as a basis for international thinking than Rawls himself is willing to suggest, nonetheless has some serious difficulties. By measuring who is better off and who worse off in terms of resources, the Rawlsian model neglects a salient fact of life: individuals vary greatly in their needs for resources and in their abilities to convert resources into valuable functionings. Some of these differences are straightforwardly physical. Nutritional needs vary with age, occupation, and sex. A pregnant or lactating woman needs more nutrients than a non-pregnant woman. A child needs more protein than an adult. A person whose limbs work well needs few resources to be mobile, whereas a person with paralyzed limbs needs many more resources to achieve the same level of mobility. Many such variations can escape our notice if we live in a prosperous nation that can afford to bring all individuals to a high level of physical attainment; in the developing world we must be highly alert to these variations in need. Again, some of the pertinent variations are social, associated with traditional hierarchies. If we wish to bring all citizens of a nation to a given basic level of educational attainment, we will need to devote more resources to those who encounter obstacles from traditional hierarchy or prejudice: thus women's literacy will prove more expensive than men's literacy in many parts of the world."

Principle of each person's capability

In a public political arrangement it is necessary for the conception of justice to deliver its citizens a certain basic level of capability. These are necessary to enable citizens function in not only human way but also to adhere to the fact that presence of a certain capability is the mark of human life thereby leading to the proposition that an absence of such capabilities is nothing but a reflection of an absence of human life²⁰⁵.

To summarize the whole argument Nussbaum herself tells her reader how the list of capabilities is not a complete theory of justice. The list yet converges with its determination for providing its citizens with a basic and decent social minimum in different areas of life. And this is what the concept of threshold level of each capability is grounded upon with the idea of principle of each person's capability providing the basic underpinning for the above²⁰⁶.

²⁰⁵ Ibid 71

²⁰⁶ Nussbaum stated in the beginning that the list does not provide a complete theory of justice. She clarifies further that even more needs to be said about the role of public institutions and more needs to be stated about the additional requirements of justice. But there is a need for formulating, accepting and implementing the requirements of a basic social minimum in this area of human capabilities.

Chapter 4

Introducing Capabilities into the Social Contract's Failed Disability Project

Abstract

The two principles of justice and a well-ordered society based on the axioms of mutual advantage and reciprocity can be seen as representing the finest annotation to the theory of justice. A summary description of Rawls and his two principles of justice necessarily will be incomplete without a description of the kind of prevailing dependence between the theory of justice and the social contract. If the idea of the person and the moral worth of the person is the quintessence of social contract theory then the conception of a sense of justice, as in Rawls, happens to be the quintessential exposition to the kind of credence Rawls's theory gives to social contract theory.

The conceptualization of this word in Rawls's theory may be the most advanced and sophisticated yet this very conceptualization fails to rake up, similar to social contract theory, pivotal issues of human as well as non-human life. A reference thus made to another social contract theorist Gauthier to elaborate further on the same.

Gauthier, another social contract theorist, like other social contract theories, affirms contract to be an agreement between parties coming together to participate in the enactment of this compact arrangement. Similar to Rawls, Gauthier assumes such an agreement to be hypothetical in nature as well as composed of rationally contracting parties. However Gauthier from the very beginning mentions categorically that this contractual agreement is not only to be settled by individuals who are rational but also that such a contract, under the precept 'mutual advantage', is to benefit only such rational members.

The 'logic of the social contract' (as Nussbaum defines it to be), mutual advantage, entrusts this agreement with the grim reality that in spite of people coming together to share with each other the terms social cooperation, the contract still deliberately holds together only those group of people who stand to gain from each other through such

an agreement. As a result so many others, in this case the disabled, get excluded automatically from the social contract. Hence any attempt to defend the social contract, when looked at from the perspective of a society creating conditions for those with impairments and disabilities, on issues such as these is going to fail because the created and nurtured situations and conditions will arguably only enhance the potentiality of such people and give them the potentiality or the capability to participate in political as well as other processes.

Nussbaum arguing further on the above lines envisages a just society in contrariety to a society based on social contract narrating interestingly the continuity that exists between theoretical accounts on disability and such accounts as in real life.

For all the reasons specified above Nussbaum introduces capabilities approach as ‘a non-contractarian account of care’. They are a list of fundamental entitlements necessary to leading a life with decency and full human dignity.

Consensus on a political conception as well as clarity on such a doctrine that make up this consensus is crucial for promoting unity and establishing stability in a well ordered society. Crucial to the whole exercise is recognizing the domain of political relationship that foretells of the important role assigned to an individual citizen encapsulated as this has been in the concept of political power and political society²⁰⁷.

According to Daniels, the free and equal moral agent, in the original position, with two moral powers- a capacity to form a conception of the good and a sense of justice- is an essential prerequisites, also functioning as a motivation, for the construction of a well ordered society in justice as fairness view²⁰⁸. The same was affirmed when Rawls described of the existing congruence between justice and good of the people²⁰⁹. The philosophical task an individual has been entrusted with is what underlies the deep theory showcased in reflective equilibrium and overlapping consensus²¹⁰. Daniels defines justice as fairness as a module due to the fact of reflective equilibrium and overlapping consensus and its efficacy at engaging people's motivations²¹¹.

Nickel elaborates further on the two moral powers, which he says is found to be developed in his idea political conception of a person. While Rawls offers a fully

²⁰⁷ Rawls, John, *Political Liberalism*, Columbia University Press (1996).

The above was a note on political relationship in a constitutional regime.

According to Rawls, a political society is a closed society where entry is by one oneself but exit point does not exist.

Political power, on the other, is always coercive power yet it is power of the public, power of 'free and equal citizens as a collective body.'

²⁰⁸ Daniels, Norman, Reflective Equilibrium and Justice as Political, in Victoria Davion (ed), *The Idea of a Political Liberal*, Rowman and Littlefield Publishers (2000).

²⁰⁹ Ibid 130

²¹⁰ Ibid

Theory, for Daniels, concerns itself not with citizens but individuals and they work together for developing institutions based on principles, which appear as fair and just to them. However beyond this the task of these individuals is an isolated one because it is in such an isolation that an individual is able to reflect, think, rethink on certain principles and judgments.

²¹¹ Central to this motivation is, as per Daniels, as Rawls calls it, 'a pro tanto justification'. 'To say it is pro tanto justified is not to say it is fully justified belief for a particular person. We simply build on people's agreement with the basic ideas and restrict their reasonings about matters of justice to the kinds of considerations internal to the political conception of justice. We restrict them to public reason'. Both the books, *Theory of Justice and Political Liberalism*, maintain the criteria of feasibility of a theory of justice where the basic postulate of a theory providing for a stable, well ordered society is intact (Daniels). While a pro tanto justification is reflective equilibrium, the domain of overlapping consensus is to be seen as presented in book *Political Liberalism*, which is also the essential difference between the two books by Rawls, where justice as fairness, as a freestanding view opts for institutions that have an educative role to play. The institutions inform people about the values inherent in a political conception of justice and pressure individual with reasonable comprehensive views to clarify and elaborate further and further on them, in order to accommodate them to a political conception of justice thus providing for an overlapping consensus in return.

adequate scheme of basic liberties, it is equally important for us to understand the transition that occurs from the realization of the two moral powers to primary goods. The transition is facilitated by a third higher order interest, which he calls as ‘intellectual powers of judgment, thought and inference’²¹².

It is important for a well ordered society to be unified and stable and this remains the fundamental question that political liberalism needs to resolve. As a result another idea is introduced called ‘overlapping consensus’ that is also in tandem with the idea of a political conception of justice²¹³.

The term justice as a virtue of social institutions as well as a virtue of individuals has been ascribed by philosophers to be an, according to Robeyns, important feature of the theory of justice²¹⁴. The most important work in this direction has been Rawlsian theory of justice that attaches itself to: first, a commitment towards some form of

²¹² Nickel, James W, Economic Liberties in Victoria Davion (ed), *The Idea of a Political Liberalism*, Rowman and Littlefield Publishers (2000). p 166

The liberties that include freedom of thought, liberty and conscience, the political liberties and freedoms of association, the freedoms specified by the liberty and integrity of the person, the rights and liberties covered by the rule of law, are important parts of the whole scheme of basic structure of society as they have been, according to Nickel, pursued by Rawls to move from an abstract idea of fairness to specific principles of justice promoted by the ideal of rational choice and the fact of veil of ignorance.

Primary goods that include basic rights and liberties, freedom of movement and free choice of occupation, offices and positions of responsibility etc have been developed by Rawls in such a way that they are thin and non-controversial in nature.

In the words of Nickel, ‘these may be also called as fundamental interests (though Rawls never uses this term). People have higher order interests in- one, developing and exercising a capacity for the sense of justice; two, developing and exercising the capacity to form, revise and pursue a conception of the good; three’ protecting and advancing one’s determinate conception of the good (allowing for changes of mind) over a complete life.’

²¹³ Rawls, John, *Political Liberalism*, Columbia University Press (1996). p 134

This is the idea of an overlapping consensus of reasonable comprehensive doctrines and they are, in Rawls’s words, ‘affirmed by society’s politically active citizens and the requirements of justice are not too much in conflict with citizens’ essential interests as formed and encouraged by their social arrangements.’

²¹⁴ Robeyns, Ingrid, Equality and Justice, in Deneuline, Severine and Lila Shahani (ed), *An Introduction to Human Development and Capability Approach*, Earthscan (2009).

Justice taken to be a virtue of individuals is often considered to be part of the theory on ethics than a part of political philosophy. There are theorists who however diverge from this and propose a theory of justice for social institutions that encapsulates the entire range of social institutions sometimes even including family, the system of class/caste, social institutions etc.

There is an entire range of the definition of justice and it is too diverse a subject to be covered easily by means of a definition. However, as Robeyns believes, one of the most apt definitions of the term social justice has been given by David Miller: how the good and bad things in life should be distributed among the members of a human society. When, more concretely, we attack some policy or some state of affairs as (being) socially unjust, we are claiming that a person, or more usually a category of persons, enjoys fewer advantages than that person or group of persons ought to enjoy (or bears more of the burdens than they ought to bear), given how other members of the society in question are faring.

liberalism; second, shows willingness towards accepting various definitions of the good life²¹⁵. For the purpose, Rawls is seen as moving towards the social contract tradition, where justice is understood as the outcome of mutual advantage.

The core idea is that rules of justice are ultimately more beneficial to everyone than if each were to pursue her own advantage on her own, says Robeyns²¹⁶. It is Rawls's theory of justice that is associated (and is generally associated) with the capabilities approach²¹⁷. It is the social contract tradition, which adheres to the idea of a person, the moral worth of that person and mutual relationship between these persons with moral worth as moral equals²¹⁸.

If a particular political theory essentially propagates principles that in a way covers an entire range of crucially beneficial issues benefiting the advantaged and the not so advantaged alike, then it is not an impossible a task to bring within its fold the advantaged sections of the society. Such an advance, as has been assumed to be all encompassing of all the people situated in a society, leads to the creation of a political society whose terms from the beginning have been laid out to be fair (perhaps also the most important reason why even the advantaged lot of the society agree to as they are ensured a fair bargaining process).

The above is the starting point of social contract theory and as and when a people or a group of people agree to such an agreement then they also agree to the principles of mutual advantage and reciprocity, assumptions that are the preminent foundations of social contract theory. These principles are the bedrock of Rawls's well-ordered

²¹⁵ Ibid 103

There are several different schools explaining the theory of justice. Precisely four (identified by Barry and Matravers) – one, conventionalism; two, teleology; three, justice as mutual advantage (Rawls); and four, the egalitarian school of justice. It is the egalitarian school of justice, and justice as mutual advantage theory that identifies the need for an acceptability of various existing definitions of the good life that every just society needs to accept and abide by.

²¹⁶ Ibid.

²¹⁷ This is despite the other three theories on justice too espousing on the relevance of the idea of social justice within these approaches. However all the four theories stand together when they affiliate themselves to the idea that an individual is entitled to think about her good, notion of the good and the plan of action in their respective lives (irrespective of the other differences that surround them, explains Robeyns).

²¹⁸ Ibid

According to Robeyns, “the social contract tradition and liberal egalitarianism, in contrast, derive their principles of social justice from a fundamental idea of people as moral equals, as beings with equal moral worth.”

society founded further upon the social contract situation. And Nussbaum considers the enunciation, by Rawls of the two principles of justice in his well-ordered society based on the axioms of mutual advantage and reciprocity (apart from other axioms such as equal concern and respect, reasonable and rational individuals etc.), as representing the finest annotation on the theory of justice.

Since the conception here is the term justice, which is being spoken of in the background of social contract, therefore one can bring in again the very term justice however this time with some of its very important missing preoccupations. In other words, the conceptualization of this word, in Rawls's theory, may be the most advanced and sophisticated yet this very conceptualization fails to rake up, similar to social contract theory, pivotal issues of human as well as non-human life. The three issues so introduced by Nussbaum in her book *Frontiers of Justice* include the issue of impairment and disability, nationality and species membership²¹⁹. The focus however in this chapter will be on the issue of disability only.

The capabilities approach can be classified as extending the overlapping consensus of Rawls, as Rawls while moving from *A Theory of Justice* to *Political Liberalism* compromises on values that may otherwise function as the essential prerequisite for an approach, which aims at delivering justice to its people. Social contract theory, to which Rawls has deep reverence for, could not avail itself an opportunity to introduce capacities for the disabled. Nussbaum, on the other, to undo the lack of opportunities available to the disabled in terms of even voice, introduces her reader with an account of "care."

Impairment and disability in humans, according to Nussbaum, have not just been not covered by the social contract theory, there have been no movements as such as well to bring them within the decision making fold, political or not. The reason behind exclusion of people with impairments is considered a social or otherwise but never political. Further such exclusion is so biased that the non-involvement persists still even if their ability, capability and potential is assessed and proved. Most necessarily the whole exercise of introducing the defects of social contract would be discernably

²¹⁹ Nussbaum, Martha, *Frontiers of Justice- Disability, Nationality, Species Membership*, Harvard University Press (2006). p 22

incomplete unless one mentions an equally disheartening, let's say, a precondition of social contract that social contract frames principles only for those people who by and large frame the principles outlining the agreement of a social contract²²⁰. These 'primary subjects of justice' are the choosers of the terms of agreement as well as the recipients of the benefits and advantages of such an agreement²²¹.

Contractarian theories, to make possible reaching a social contract for the society, set down fundamentals for obligations for the people to follow. Rawls also ensures that the well-ordered society explicitly lays down principles concordant with the social contract. David Gauthier²²², another social contract theorist, also explicitly stated principles confirming to the principles of social contract. For the current purpose, a focus on similarities is important to undim the foundations of the agreement as the theories of both social contract philosophers are reflective of several crucial similarities and dissimilarities.

Gauthier, like Rawls²²³, also pursues Archimedean point by channeling an individual's rationality, along with the structure of society, towards narrating a benchmark for

²²⁰ "The social contract tradition conflates two questions that are in principle distinct: By whom are society's basic principles designed and for whom are society's basic principles designed? The contracting parties are imagined to be one and the same as the citizens who will live together and whose lives will be regulated by the principles that are chosen. The core moral idea in the tradition is that of mutual advantage and reciprocity among people who need to make such a contract. The chosen principles regulate, in the first instance, their dealings with one another." p 16

²²¹ Ibid

²²² Gauthier, David, *Morals by Agreement*, Oxford University Press (1986). p 233-37

Gauthier considers society to be a structure based on human interactions amongst a collective of moral individuals riveted with a common interest in protocols, social conduct and established ways of society. This also involves the general mass of people perception of a morality, which is indifferent towards the interests of others'.

Very interestingly Gauthier calls this 'equal rationality of all persons'. p 234

These persons with 'equal rationality' are Gauthier's 'ideal actor' characterizing also an ideal picture apart from its characteristic attributes such as impartiality, morality and rationality. Similar to Rawls's veil of ignorance, there is Gauthier's "mutual unconcern" wherein these ideal individuals also live in complete ignorance of their particular situation. Such an ideal actor, in other words, is unaware of their particular circumstances and situations.

The above is Gauthier's Archimedean point with a sagacious individual at its center-stage. As he says 'morality is concerned with actors, persons considered as doing and choosing, and as implicated in the consequences of their deeds and choices.' p 237

²²³ Rawls, John, *A Theory of Justice*, Harvard University Press (1971). p 232-240

Justice as fairness applies to the basic structure of society. Within it fundamental decisions are made and they also shape the wants and aspirations of its citizens. As he says 'it determines in part the sort of persons they want to be and the sort of persons they are.' Therefore they not only satisfy wants and aspirations but also create them. Perhaps the foremost reason Rawls prioritizes the principles of justice. This prioritizing also prioritizes such principles of justice over efficiency and the reason Rawls gives for such a characterization is that such an arrangement considers illegitimate unjust and illegitimate wants and aspirations.

principles of justice. This Archimedean point follows a preference and capacities based human endowments approach as the quintessential touchstone of conception of justice. It is important to note that the preferences and capacities mentioned here are not those of an individual but of human beings in general, which also makes it notably peculiar because interestingly Gauthier's explication on the Archimedean point brings together simultaneously both the rationality of the parties and a moral ordering. In Rawls, as well, a sense of justice is Archimedean point's arm sling which is in concordance with individual's rationality and moral sense.

Just as for Gauthier Archimedean point is the 'moral force' required as the principle factor substantiating 'norms of justice', even for Rawls, priority of justice is the sole prerogative of the Archimedean point. Implicitly recognizing stability as ensuring a sense of justice, it is not only Gauthier who assumes Archimedean point as reflecting the preferences and capacities of individuals, but also Rawls who considers the priority of justice as recognizing the wants and aspirations of individuals. These wants and aspirations are to be legitimate and in accordance with principles of justice, according to the general good and not any individual motives.

Gauthier, like social contract theories, affirms contract to be an agreement between parties coming together to participate in the enactment of this compact arrangement. Similar to Rawls, Gauthier assumes such an agreement to be hypothetical in nature as well as composed of rationally contracting parties. However Gauthier from the very beginning mentions categorically that this contractual agreement is not only to be settled by individuals who are rational but also that such a contract, under the precept 'mutual advantage' is to benefit only such rational members. As a result animals, disabled, children and even members of the future generations, says Vallentyne²²⁴, are to be excluded from receiving the advantages of the contact (and also debarred from the decision making processes that are required for formulating the terms of the agreement).

Rawls, on the other, does include one important difference between his theory and the social contract wherein he mentions of his original position as composing only of

²²⁴ Vallentyne, Peter, *Contractarianism and Rational Choice- Essays on David Gauthier's Morals by Agreement*, Cambridge University Press (1991).

those individuals who are situated behind a veil of ignorance. Yet this is the only important difference between his and social contract theories and is of no significance to those with impairments and other disabilities, explains Nussbaum.

The very 'logic of the social contract'²²⁵, mutual advantage, entrusts this agreement with the grim reality that in spite of people coming together to share with each other the terms social cooperation, the contract still deliberately holds together only those group of people who stand to gain from each other through such an agreement. As a result so many others, in this case the disabled, get excluded automatically from the social contract. Hence any attempt to defend the social contract, when looked at from the perspective of a society creating conditions for those with impairments and disabilities, on issues such as these is going to fail because the created and nurtured situations and conditions will arguably only enhance the potentiality of such people and give them the potentiality and the capability to participate in political as well as other processes.

Nussbaum arguing further on the above lines envisages a just society in contrariety to a society based on social contract narrating interestingly the continuity that exists between theoretical accounts on disability and such accounts as in real life. There are, says Nussbaum, varied accounts on disability and impairments today more specifically in context of the old who need caring, and infants. However there is this entire line of argument that focuses on genuine continuity between such theoretical accounts (as just discussed) and the real life examples. The latter means, in shorts and simple words, that it is not just the old and infants that suffer with paralyzing disabilities and roadblocks to living a fully nurturing life and thus in need of care but also the young and middle aged and not so old also as they may also suffer many paralyzing disabilities, shorter duration or longer one at that, let's say post-surgery, post-accident or even mental illnesses²²⁶.

²²⁵ Nussbaum, Martha, *Frontiers of Justice- Disability, Nationality, Species Membership*, Harvard University Press (2006). p 104

²²⁶ Nussbaum gives this unique example of a father looking after an impaired child. She argues that a father would with utmost care and duty look after his differently abled child as long as the child is too young to look after herself and may as well soon join school. The case would be entirely different if a child is suffering from more severe form of disability, which may even make it impossible for that child to attend schooling. The former example has in place long hours of work but a shorter duration, and this may not be so in the latter case as it not just involves long hours of work but also a very long term

For all the reasons specified above, Nussbaum introduces capabilities approach as ‘a non-contractarian account of care²²⁷’. They are a list of fundamental entitlements necessary to leading a life with decency and full human dignity. There is one compellingly essential precondition that stacks up the whole meaning of capabilities approach- “care”. The list is an arrangement of entitlements with an outline indexing essential prerequisites of leading a fully human life as Nussbaum herself repeatedly mentions that the list is not a final catalogue and ‘care’ is the central manifestation that sums up the entire argument. Sometimes it is examples that set the precedents for exemplifying a precept so much so that they not only explain a theory or a notion better but also give credence to the entire theory or notion in question. In this case it is “care” that serves as an important exemplar to the capabilities approach. In fact one can also say that the term ‘care’ is the brain wave of capabilities approach.

Care is so crucial because it takes into consideration, according to Nussbaum, both the cared for and the caregiver, which also makes possible utilizing it for a ‘wide range of capabilities²²⁸.’ For example, care for dependents, covers from the list of capabilities the capabilities of life, health, and bodily integrity. Not just these three but it also provides “stimulation for senses, imagination, and thought, supports emotional attachments. Good care also supports the capacity of the cared-for for practical reason and choice; it encourages affiliations of many other sorts, including social and political affiliations where appropriate. It protects the crucial good of self-respect. It supports the capacity to play and enjoy life. It supports control over one’s material and political environment: rather than being regarded as mere property themselves, people with impairments and disabilities need to be regarded as dignified citizens who have the claim to property, employment, and so forth. Citizens with impairments often have diminished opportunities to enjoy nature; good care supports this capability as well. In short, given the intimate and foundational role that care plays in the lives of the cared-for, we have to say that it addresses, or should address, the entire range of the central human capabilities²²⁹.”

commitment. Nussbaum provide her reader with this example to explain the continuity between theoretical analysis and real life examples and the above is a very difficult and complicated example. The issue becomes more pressing when, in the same situation, a mother decides to take up this lifelong responsibility perhaps without any support from friends and extended family.

²²⁷ Ibid

²²⁸ Ibid 168

²²⁹ Ibid

The capabilities approach, mentions Nussbaum, is an ‘outcome-oriented approach’²³⁰, and it demands a lot from its human beings. If on the one hand, there is Rawls’s presupposition for his well-ordered society the principles of benevolence, lack of envy, impartiality, all features characterizing his veil of ignorance, there is on the other, Nussbaum’s introductory remark on ‘moral sentiment’²³¹. Capabilities list is to be recognized not as an unrealistic argument on various expectation of a society it is, on the contrary, which believes that moral sentiments are also social in nature that is they are shaped not just by family and familial ties but also by political rhetoric, public education, and social environment.

Capabilities list is not a final list and therefore a lot a can be added to the list as per the situation and circumstances. Most importantly, in order to make the list more malleable as per the existing conditions, it is necessary to keep in mind, while formulating the list, that the list is not magnanimous, highly virtuous, or altruistic. Mandatory notions, care, moral sentiment, as a result, serve as the bottom line of the whole approach thus. Equal respect is the third foundational principle of the capabilities approach because now we have a list that is not only in its way all-encompassing but also educative enough to motivate people to follow it²³². The whole argument is in the context of people with disabilities as Nussbaum mentions “supporting the case of people with disabilities on the basis of equal respect²³³.”

People with mental impairments, severe or not, are the most dependent on this central category called “care”. In fact this terminology is very context-dependent yet the capabilities list’s humane consideration lies in the concept of care. For example, a child with severe development impairment, named Sessa. Sessa loves music and is fond of dancing. She also loves hugging her parents and all her loved ones. Therefore care for Sessa would involve providing her an environment that helps her cognitive faculties. Equally important is a loving and supportive environment with utmost care in her home so that all that which she enjoys like a normal human like hugging and dancing. Care is the basis for the kind of care and attention she gets as it helps develop her cognitive capacities as well as other human capacities.

There is another kid, Arthur, with Asperger’s syndrome. Arthur mentions Nussbaum has large cognitive capacities so for him care is extremely important so much so that he does not suffer any kind of emotional trauma. One can also take up playing with animals and taking active interest in nature and its fruits can be one such step for development of Arthur’s faculties. Very interestingly Nussbaum mentions how at the young age of twelve Arthur had a very refined understanding of politics. In one of the phone conversations with Nussbaum, he mentioned the disputed 2000 elections in America as projecting not a president but ‘the resident’. With proper care and attention we may soon see Arthur holding a good job in near future.

²³⁰ Ibid 274

²³¹ Ibid 411

²³² Nussbaum, Martha, *Creating Capabilities- The Human Development Approach*, Harvard University Press (2011).

²³³ Ibid 151

As has been mentioned before capabilities list the list of capabilities is to be considerate of not only

Capability approach is to be approached in terms of the criteria of evaluation it hires to look into various question of evaluation and the apparent significance of the approach. The significance is calculated as per the capacity of the approach to decide on the fair and just distribution of resources while still affiliating itself to the basic definition of the approach (that is capabilities as opportunities or freedoms to achieve what a person considers valuable to her life). While the criteria of evaluation is its central tenet, individual as an end that is individuals capable enough and with capabilities enough that they are able to not only take decisions but also work towards taking such decisions irrespective of the impediments and difficulties.²³⁴

Indispensable to the capabilities approach is the set of functionings while also making it important for us to understand the importance of criteria of evaluation for the capabilities approach to take full effect. The capabilities approach with the above inherent ideas inclines towards a theory of justice with the explicit ideas of freedom and choice. The journey establishing the dynamic between justice and capabilities starts with, according to me, a three stage- evaluating capabilities, then moving on further to differentiating between capabilities and functionings; and finally, to freedom, the very base of the first stage (freedom the base of the whole evaluation procedure).

Capabilities is also a lot about opportunities that an individual may have access to

those who receive care but also those who give care. Caregivers also turn out to be a differentiated lot for there is dissimilarity between men and women who opt to offer short term or long term care. Women are primary caregivers, most probably without any support emotional or financial, who dedicate themselves to taking up on themselves long term care work, unlike men who opt as caregivers but only for short-term care.

It is thus very necessary that the capabilities also function on the lines of reciprocity between both women and men, apart from developing and sharing equal respect.

Caring for dependents is a bit easier when a working parent or individual has a flexible work schedule. University and such teaching jobs offer such flexible availability of options, which may not be the case with other jobs and services. Therefore flexible timings is also one of the important preconditions of a capabilities list.

²³⁴ Walker, Melanie and Elaine Unterhalter, *Amartya Sen's Capability Approach and Social Justice in Education*, Palgrave Macmillan (2007). p 2

The book begins with a definition of the word capabilities (Amartya Sen) as a person's ability to do valuable acts or reach valuable states of being thus also representing the alternative combinations of things a person is able to do or be." This definition has been presented by the authors as in complete contrast to other approaches. Walker and Unterhalter explain this with an example in the context of education. The criteria used to determine the best outcomes in schools and colleges are sometimes the curriculum or the syllabus or school management or even learning resources. Sometimes it's an outsider that decides on the policies and the outcomes. The emphasis is on the kind of inputs used that will lead to the targeted results. Therefore what sets the capability approach apart from the other approaches is the 'criteria of evaluation' it employs to set a certain standard or meet a particular target.

decide what she considers as valuable to the course of her life. A social action, be it of any kind entails this and the idea of freedom form the most inextricable part of this process of choice.

In the words of Walker and Unterhalter- ‘thus the expansion of human capability involves the freedoms people actually enjoy to choose the lives that they have reason to value. People should be able to make choices that matter to them for a valuable life. The notion of capability is essentially one of freedom—the range of options a person has in deciding what kind of life to lead. Capabilities might then also be explained as actions one values doing or approaches to living one’s values²³⁵.’

Capabilities and Functionings

Evaluating capabilities is all about evaluating choices that one is offered with thereby establishing an effectual relationship between capabilities and functionings. Also defined as relationship between an outcome and opportunity, functioning is an achieved outcome whereas capabilities is the potential to achieve these functionings.

‘The difference between a capability and functioning is one between an opportunity to achieve and the actual achievement, between potential and outcome. This distinction is very important because evaluating only functionings or outcomes can give too little information about how well people are doing. Some cases may look as though the same functionings have been achieved but behind these equal outcomes may lie very different stories, and it is the difference that is germane to thinking about justice and equality²³⁶.’ (Walker and Unterhalter)

It is relevant to approach the capabilities as a list of functionings. Equally relevant it is to take cognizance of the fact that a certain kind of functionings may produce an absolutely different set of capabilities. Therefore it is imperative to not just calculate the set of functionings available to citizens but evaluate the set of freedoms or opportunities available to citizens²³⁷.

²³⁵ Ibid 3

²³⁶ Ibid 4

²³⁷ The author explains this with an example. There are two girls studying in the same college but from

The approach's most important task is not simply to evaluate the functionings but evaluate as well the real opportunities available to each and every student to make choices and make progress towards achieving their targeted goal. Thus an evaluation of equality needs to take into account the opportunities, freedoms and choices available. The capability approach, therefore, offers a method to evaluate 'real educational advantage, and equally to identify disadvantage, marginalization, and exclusion'²³⁸.

Legitimation Pool

Rawls specifically excludes people with certain severe disabilities from the construct of the original position as he says 'person is someone who can be a citizen, that is, a fully cooperating member of society over a complete life ... for our purposes... I leave aside permanent disabilities or mental disorders so severe as to prevent persons from being normal and fully cooperating members of society in the usual sense.' As according to Friedman²³⁹ the notion of reasonable and rational persons compose, as she calls it, the legitimation pool for securing legitimacy to political liberalism and in the process citizens also in turn get the opportunity to exercise their autonomy. Rawls further contends that if a citizen refuses to accept such a conception then the doctrine should be seriously revised. However the important question that Friedman raises is what might happen, if unlike this reasonable person, an unreasonable person refuses to abide by the principles of his comprehensive doctrine. Rawls does not take into account the propping up of such a situation. It may occur that the agreement, to which reasonable and rational persons agree, is rejected by unreasonable people. Their viewpoint is not just not unimportant but also implies a high possibility that the state might use its coercive hand to suppress the dissenting voices of the unreasonable.

different schools. While one is smart confident young woman with a good educational background that is a good schooling, the other girl comes from not so an affluent background and not good schooling. The latter girl finds it difficult often to make new friends given her economic status and is thus under confident, finding it increasingly difficult to adjust with the new surroundings or even ask her teachers for help in her daily homework problems. However at the end what happens is both the girls in spite of the differences, secure second class marks and pass college.

It is at this particular point that the author says that 'similar functionings mask very different capability sets.'

²³⁸ Ibid 6

²³⁹ Friedman, Marilyn, John Rawls and the Political Coercion of Unreasonable People, in Victoria Davion and Clark Wolf, *The Idea of a Political Liberalism: Essays on John Rawls*, Rowman & Littlefield, (2000).

Rawls attempts to explain or justify the exclusion of certain people with certain mental disabilities in *Political Liberalism* when he mentions that people who associate to form an agreement are not just active and full participants but also have psychological capacities at least up to some normal level mark. Hence the issue of special health care and the importance of treating the mentally challenged down the drain. Initially it is important that those within the normal range be considered for current purposes, as later on we can work for the remaining of the lot. And Rawls after this does not offer any explicit advice on disability within his theory of justice as fairness²⁴⁰.

The core of capabilities approach as a political doctrine with its grounding on the notion of human entitlements has the notion of human dignity at its core. Such a society, according to Nussbaum, can never be unstable because of the citizens' love for justice and 'a moralized compassion for those who have less'²⁴¹. The crucial aspect of this whole exercise is another important idea linked to a conception of the person. Nussbaum addresses it as a political conception of the person, where the individual as a political as well as a social animal has certain ends that may be complex in nature and such ends are shared by all individuals of this society alike. This political conception of the person is also a public conception as the ends of others and their motivation to pursue such ends and good of theirs is not a constraint. It is rather a part of their own good hence the criteria of 'public conception of the good'²⁴².

²⁴⁰ Pendo, Elizabeth (2003), *Substantially Limited Justice?: The Possibilities and Limits of a New Rawlsian Analysis of Disability Based Discrimination*, *St John's Law Review*, Vol 77 (2): p 243-244.

²⁴¹ Nussbaum, Martha, *Frontiers of Justice- Disability, Nationality and Species Membership*, Harvard University Press (2007).

Human dignity as an entitlement does not lay somewhere separate from human capabilities. It is intertwined with the whole list of capabilities. "In the capabilities approach, the account of the benefits and aims of social cooperation is moralized, and socialized, from the very start. Although the approach does not employ a hypothetical initial situation (being an outcome oriented rather than a procedural approach), it envisages human beings as cooperating out of a wide range of motives, including the love of justice itself, and prominently including a moralized compassion for those who have less than they need to lead decent and dignified lives. There is no reason to think that such a society would be unstable; indeed, I have argued that it can meet acceptable conditions of political stability over time."

p157

²⁴² Ibid

Nussbaum calls it 'benevolent motivations' and they are based on the idea of a social minimum. As she says 'living with and toward others, with both benevolence and justice, is part of the shared public conception of the person that all affirm for political purposes.'

Capabilities as nonfungible

The capabilities approach is of course a list of human capabilities with an idea enshrined, basic as this is to it, idea of central human endowments. The list is open-ended, developed absolutely on the precept of a ‘decent and dignified’ life of a human being²⁴³. It defines, in words of Nussbaum, ‘minimum conditions for a life with human dignity²⁴⁴.’ It is this peculiar characteristic feature that leads to capabilities approach’s nature being nonfungible in character- that is an absence or lack of one capability is not to be compensated with a provision providing for an extra amount of another capability. For she mentions how citizens have to have access to all entitlements of the capabilities list based on justice up to a certain threshold level. An absence of even one means denial of even basic justice irrespective of how accessible other entitlements are for them²⁴⁵.

Foremost to the above is the conception of care that Nussbaum introduces as fundamental to the list of capabilities for it is this very conception that provides the basis to the capabilities of life, bodily health and imagination. This fundamental conception that provides an assurance for care to the cared-for inevitably evokes in the cared-for the capacity to choose and reason, or as she lists them in the list- practical reason and choice.

Care provides the cared-for practical reason and choice, provides a dignified existence with self-respect as its core. It accentuates an individual to rise above a vegetative state and allows her to learn to enjoy nature, enjoy life. A sense of developing capabilities for the excluded enjoins also the capabilities approach with the task of providing consideration to the disabled as having right to employment, share in property and overall a right to dignified existence²⁴⁶.

²⁴³ Ibid

To explain further the concept of human dignity Nussbaum gives an instance that specifies itself on the requirement of designing and redesigning public spaces. Like, for a person on wheel chair, it is not just important to give her money. Or even if u give that person a lot of money and make her extremely rich, this money is still of no use to her. Because there are no friendly public spaces, no wheel chair access on buses and sidewalks, no ramps in buildings etc,

²⁴⁴ Ibid 166

²⁴⁵ Ibid 167

²⁴⁶ Ibid

The care concept is crucial for realizing a decently just society. The recognition of this sphere is not be

The above conception so introduced is within the context of the disabled that Nussbaum talks about. It is important to realize that at a significant level the list of capabilities is also for people with special needs including people with mental impairments. The care that is important for the disabled or in this case the one with certain mental imbalance would lead to cognitive stimulation²⁴⁷.

assumed as the only extra capability that enhances the list but as one of the capacities providing both the ideal of practical reason and choice to not just the cared for but also the care giver. Nussbaum talks about the importance of capabilities for the care giver which in a way does not put pressure or what she calls emotional equanimity on the care giver. For instance caring for an elderly should not be a source of anxiety to her. A threshold level of capability is equally important for the caregiver because even if one cannot provide for them happy lives then a decent public culture definitely has a role to play however in making their lives easier. This also involves easing the burden on family members where they are relieved of guilt of having someone else to look after their elderly members. Thus comes to the fore practical reason and choice where the choice is free of burden for both the family and the caregiver; the practical reason aspect to be fulfilled by the way public policies are being formulated.

“It seems clear that in many instances many of these people cannot make choices about their health care, or consent to sexual relations, or make an assessment of the riskiness of a job or occupation. So there will be many areas, for many of these people, in which functioning, rather than capability, will be an appropriate goal.”

From the above evidently an important distinction arises between capability and functioning despite Nussbaum time and again reminding the readers that capability and functioning though is the foremost goal (functioning being an essential part of it). For children as well as people with severe mental impairments compulsory functioning needs to be the goal because of cognitive immaturity in the former and cognitive disability in the latter. Self-respect and dignity is what that is to be promoted by compulsory functioning and public policy as well as political principles ought to take cognizance of it. As she gives a very interesting example- ‘only in the area of self-respect and dignity itself do I think that actual functioning is the appropriate aim of public policy. Suppose a state were to say, “We give you the option of being treated with dignity. Here is a penny. If you give it back to us, we will treat you respectfully, but if you prefer, you may keep the penny, and we will humiliate you. This would be a bizarre and unfortunate nation, hardly compatible, it seems, with basic justice.” p 172

²⁴⁷ Ibid 170

Good care will only nourish and nurture the abilities, cognitive and non-cognitive, in her case it involves her fondness for music, curiosity and definitely not wanting to remain confined to just one place but rather prefer moving around and exploring new places. All the above needs to be considerate of her capacities. She getting employment, getting politically active or deciding her future course of life involving choices such as marriage prove irrelevant in her case.

Arthur is altogether different: his large cognitive abilities need to be nurtured in an atmosphere that does not cause him emotional trauma through bullying or his general fear of groups. He needs constant and concerted support for his relational capacities; care that would be fine for most children will be inadequate for him in this area. Relationships with animals and nature play a very valuable role in this development. With good support and luck, he will be capable of holding a job and participating in the larger social world. Indeed, at the age of twelve he already has a highly sophisticated understanding of politics, which combines oddly with his affective rigidity. For example, he decided that a good way to express his disgust about the disputed election of 2000 was to refer to Bush as “The Resident” rather than “The President.”

Arthur also is a very sensitive in fact extremely sensitive given the kind of sadness he expressed if there was any other way Bush was addressed, especially by his teachers and school mates, and he may not be knowing about it. Therefore there has to be a very involved kind of sensitivity and concern towards Arthur that also has to be considerate towards such disparities.

Nussbaum defines the above as involving “individualized care”.

Considering the case of people with disability

Care as a primary social entitlement while considering the case of disability is an essential prerequisite of the criteria of social minimum that Nussbaum discusses time and again. Equally fundamental to this whole process is the idea of respect and dignity. The list of ten capabilities is plural and heterogeneous. Comparing her list with Rawls's theory of justice, she says there is an important difference in the way Rawls proposes his theory of justice underlined most specifically in the two principles of justice and the initial choice situation and way she enlists the list as meeting the requirements of justice. This is despite the equally important similarity wherein Rawls proposes the plausibility of political principles role in determining the shape of the ideas of respect and dignity²⁴⁸. However the important difference that Nussbaum begins with to expound on the dissimilarity between the two approaches on the issue of justice is Rawls's stand, as in the Theory of Justice, explicating as to how a heterogeneous list is incompatible for issues pertaining to justice. It is so because the task of balancing the list deems impossible a 'definite ordering'²⁴⁹ of the same.

It is to the above charge that Nussbaum answers by calling her theory to be considerate of providing something as important as a social minimum to its people and such entitlements are to be guaranteed by the constitutional structure at least up to a threshold level. Each person is to be treated as an end and it might so happen that one capability is in conflict with the other.

Therefore rather than taking it to the level of trade-offs, it is important to once in for all assume and understand the list of capabilities as a set of a coherent whole, which is to be delivered as a coherent whole.

²⁴⁸ Ibid 178

“Starting from a different vantage point, the capabilities approach has come up with principles that converge strikingly, in many ways, with Rawls's two principles. The philosophical motivation is profoundly similar, since in both cases the principles are attempts to capture and render politically concrete the idea of a life in accordance with human dignity. Beyond this point the comparison cannot be precise, because my theory speaks only of a social minimum and does not address inequalities above that (very ample) social floor.”

²⁴⁹ Ibid 173

Thus going by the above it is elemental for a liberal society aspiring for justice to be conscious of the ongoing processes that subdue the sentiments and requirements of the disabled and the elderly, mentally impaired and even children. Supportive views are to be inculcated in child development, public education, public rhetoric and the arts. In order for the capabilities approach to be fully realized the ideals of mutual advantage, benevolence, moral sentiments and their cultivation, a careful attention to language and public imagery that some call as ‘political correctness²⁵⁰’ are to be considered as essential components of a not only a conception of the person (and human relations) but also have a public purpose to serve.

²⁵⁰ Ibid 412

Chapter 5

Conclusion

Abstract

Where there is theory, there is also its criticism. Rawls's and Nussbaum's theories that in their own unique way provide a categorization in terms of solutions to human contingencies, in dire need of a more perceptive alternative, nonetheless are also a subject of several criticisms. Part I below deals with such criticisms levelled against both the theories while Part II is an attempt at singling out the uniqueness of these theories.

Dworkin and Sandel perhaps are one of those that offer criticisms targeting the most basic premises of Rawls's theory. Dworkin rejects the original position while Sandel does not agree with the individual, as defined by Rawls, and the basic structure within which such an individual is situated.

Nussbaum's capabilities approach, on the other, has criticisms levelled against the nature of the list as well as somewhat excluded characteristics of variables, though introduced by Nussbaum, yet not encapsulating enough to capture the central features relevant to it.

Part II is an attempt at reaching principles, which one can still consider as distinct contributions of theories of Rawls and Nussbaum.

Part I

Critique

(John Rawls)

Rawls essentially, unlike Utilitarianism that commingles several persons into one individual, stipulates the important role desires play in the formation of a conception of rational choice for parties in the original position. Rawls denominates this as 'system of desires' and this system is, according to Sandel, elusive in nature because neither does Rawls mention that what exactly this system consists of nor elaborates on why Utilitarianism is not justified in commingling people into one.

“Where for Hume, we need justice because we do not *love* each other well enough, for Rawls we need justice because we cannot *know* each other well enough for even love to serve alone²⁵¹.”

This section is an enumeration of the whale of difference that exists, according to Sandel, between Humean circumstances of justice and Rawlsian account of circumstances of justice that draws heavily from Humean account. For Hume, justice is a result of 'moderate scarcity' and 'limited generosity'²⁵². These are difficult and unavoidable circumstances that cannot be ignored and as a result justice becomes a necessity. It is all the more important to understand that if there is everyone is equally generous and kind, motivated and understanding, and the reserves and belongings were not so scarce then justice would not have existed in the first place. Why? As then people would not have known the difference between justice and injustice²⁵³. For Rawls's, on the other, justice has a more directorial role as Rawls time and again has

²⁵¹ Sandel, Michael J, *Liberalism and its Critics*, New York University Press (1984).

²⁵² Ibid 162-163

²⁵³ Ibid

'If every man had a tender regard for another, or if nature supplied abundantly all our wants and desires...the jealousy of interest, which justice supposes, could no longer have place'; nor, says Hume, would there be any occasion for distinctions of property and possession. Increase to a sufficient degree the benevolence of men, or the bounty of nature, and you render justice useless, by supplying its place with much nobler virtues, and more valuable blessings. If material scarcity were replaced with abundance, or if everyone had the same affection and tender regard for everyone as for himself; justice and injustice would be equally unknown among mankind...tis only from the scanty provision nature has made for his wants, that justice derives its origin.'

explained that justice is above such sentiments. In short, in Sandel's words, justice is a 'regulative framework'²⁵⁴ that constraints the above specificities of a society.

It is not possible for an individual to be an unencumbered person and it is equally important to fathom what Sandel implies when he says this. An individual, even if that individual is a Rawlsian one with shared final ends, is not free from most important attributes that denominate an individual that resides in a society- first, 'a common vocabulary of discourse'; two, 'implicit practices and understandings'²⁵⁵. In the words of Sandel "in so far as justice depends for its pre-eminence on the separateness or boundedness of persons in the cognitive sense, its priority would diminish as that opacity faded and this community deepened"²⁵⁶." Sandel delegates the term 'community in a constitutive sense'²⁵⁷, to this whole perception of a non-unencumbered person.

A Rawlsian just society considers the 'basic structure' as its most important attribute and 'justice as fairness' soon follows this. However of foremost importance is the basic structure. According to Sandel the groundwork for a sense of justice, which is to prevail in a just society, is intrinsic to its very conception itself (not any other frame of reference for instance the individual's plan of life that Rawls, for Sandel, so often talks about). This is crucial, according to Sandel, for a determinate conception of justice. In a similar vein, a community is not formed when individuals come together with communitarian aims and aspirations though this is also important. It is to be arranged in such a way that the community is part of the basic structure.

The community, as part of the basic structure, is soon revamped into a 'community in the constitutive sense' when we affix to it the opacity of the individual (discussed above). Now Rawls may raise objections to the above for such a society is hierarchically high placed when compared to the individual who inhabit such a

²⁵⁴ Ibid 164

²⁵⁵ Ibid 166

²⁵⁶ Ibid

One can determine in a loose way that an individual in Sandel's sense is like a translucent window glass as that individual is not just not clear (or transparent in Sandel's words) but also foggy to others (opaque in Sandel's words again). As a result the need of the hour is a self-reflective individual who is also not unencumbered. Sandel says it is important that we have a 'deeper self-introspection' that reaches beyond this whole ideal of individual's wishes.

²⁵⁷ Ibid

society. Or maybe even object calling this whole conception as an unclear one. Yet, as Sandel interestingly explains, this conception is not much different from the Rawlsian conception of justice as fairness, which itself places the individual below this whole concept of justice as fairness²⁵⁸.

We discussed in chapter three that Rawlsian theory is a deontological in nature. According to Sandel this view is inherently flawed. Even though the deontological view has justice as embodied in it yet the ‘difference principle’ quashes its whole purpose. The principle’s inherent assumption that whatever I have, even more of it, is mine but accidentally mine therefore it belongs to everyone is flawed. It is flawed in two ways. One is either at the mercy of institutions that have an unopposed claim to one’s entire belongings or one has to affiliate oneself to such institutions that propose such principles. Such outlook also denies an individual self-knowledge and character²⁵⁹. In Sandel’s words “we cannot be persons for whom justice is primary and also be persons for whom the difference principle is a principle of justice...on the deontological view, deliberation about ends can only be an exercise in arbitrariness²⁶⁰.”

It is not only the philosophical underpinnings that the concept of liberty provides but also the fortification that its rhetoric provides to campaigns, social movements, international wars etc. though not considered as the only existing right and political one at that yet every time a social issue arises, big or small, there is talk of right to liberty. Dworkin takes up the task of clarifying to his reader that this stance is a ‘misguided step’²⁶¹ and he begins his explanation with an analysis of the existing conflict between liberty and equality. For example the demand for equality for the poor, homeless, blacks, unskilled etc. need to be equally considerate and respectful of

²⁵⁸ Ibid 168

²⁵⁹ The deontological self is an independent self who is unallied with all or any sort of attachment or affiliation. Yet the absence of such attachments is not only taking the identity of an individual away from her but it is equally preposterous for at any given time to say that a person remains the same independent self even if such attachments get transitioned from one pattern to another type. Moreover to say that an individual is so self-reliant that she is to be even spared of attachment to one’s state or nation is further fallacious. Such an identity is indispensable, according to Sandel, for understanding the particular persons we are.

Such a person, if does exist, is without any character or “moral depth” and thus also without self-knowledge. This person lacks the capacity for self-reflection. This “unencumbered self” is denied a history, a character, the capacity to interpret things.

²⁶⁰ Ibid 171-172

²⁶¹ Ibid 266-67

the liberty of the rich, skilled, prosperous, whites etc. as a matter of fact it is the racial issues that bring this conflict to the forefront. “Every piece of important social legislation”, says Dworkin, “from tax policy to integration plans, is shaped by this supposed tension between these two goals²⁶².”

A very important remark that Dworkin makes in the further section is when he asks his reader to be careful while distinguishing ‘wanting freedoms’ from ‘what we are entitled to’. For instance, as he makes it clear through an example, freedom of choice, whether for school or offices etc, is different altogether from asking for air conditioners or lobsters²⁶³.

It is important, in order to understand the notion of liberty properly, according to Dworkin, to know exactly what the term basic liberties stands for every time we hear that there is this right to basic liberties that are so they are the only liberties that stand

²⁶² Ibid

²⁶³ Dworkin picks an example of an important amendment made in the US constitution that provided every child the legal right to get admission into a neighborhood school and also ban segregation in buses. However this is in complete contrast with the general perception that people in America have, which believes all this to be an infringement of their liberty every time they have to travel in a bus with the colored and blacks. This is similar to, narrates Dworkin, a denial of equality every time a black child is denied admission in a neighborhood school.

Dworkin, on the contrary believes that people don’t need liberty, all they need is equality. He is in complete disagreement with the kind of liberty that the tradition definition of liberty provides. The main reason behind this is the ‘neutral sense’ of the tradition definition of liberty, which says ‘for a true liberal, any constraint upon freedom is something that a decent government must regret, and keep to the minimum necessary to accommodate the other rights of its constituents.’ (p 268)

(A ‘neutral sense of liberty’ or the traditional definition of liberty asks its people to only see what have they lost, and nothing else, in order to achieve a particular goal. It is only the necessary restrictions on freedom that liberals as well as Dworkin find acceptable. It is delineating from the essence of liberal philosophy every time a restriction on a particular freedom is counted as an attack on liberty. This is so because if such is the case then even totalitarian governments can disguise itself as liberal under the false pretence that it is only trying to stop its people from doing what is wrong. Therefore the essence needs to be understood and people have to count on what have they lost)

The above definition becomes difficult to understand once we add it to the popular idea ‘the right to liberty’. It is of utmost importance to describe properly what right is. In his words “if someone has a right to do something then it is wrong for the government to deny it to him even though in the general interest to do so. This sense of a right seems to me to be very close to the sense of right principally used in political and legal writing and argument in recent years. It marks the distinctive concept of an individual right against the state which is in the heart, for example, of constitutional theory in the US.” A concept of right in the right to liberty has to be very strong else it would fail. Dworkin gives an example again. There is a particular road and the general public commutes through this street every day. Suddenly one day the government, for valid reasons or with valid justifications, allows only one way traffic. May be the reasons for stopping the traffic flow was very important. However according to Dworkin if we do not have a strong concept of right to liberty then what so ever may be the justification, everything goes down the drain. This is so because government does not need very strong justifications, all it needs is justification. Therefore in order to undo this problem it is important to have a strong concept of right to liberty and any restrictions on this should be accepted only as long as they do not contravene with strong rights like right to equality.

in the way of right to equality (for example right to attend a school of one's choice) or when we hear there is after all a general right to liberty as such, provided that that right is restricted to important liberties or serious deprivations.²⁶⁴ Dworkin believes that the most important explanation for basic liberties is the two kind of theories that highlight to us why right to liberty is limited to basic liberties. Dworkin again begins with two examples. One, where right too free speech is restricted by the government; two, a citizen is only allowed to use a particular to reach a place and not to use the same road while coming back. Now Dworkin explains this with his two theories on tight to basic liberties.

The first theory purports to explain the degree of liberty involved. It is the first example that spells a greater loss of liberty than the second. Now one can account this loss, according to Dworkin, in two ways. One by calculating the amount of frustration such restriction involves; two, by imagining the impact a particular liberty might have on future choices. Both of them however prove irrelevant as in the former, if we look into cases such as theft or traffic rules, we see there is more frustration, and in the latter example, it is worth discovering that codes like ordinary criminal code impede liberty than a restriction on right to speech.

The second theory leans on the 'character of liberty' enmeshed in this concept of right. What character means here is that the character of liberty that has been affected due to restrictions is entirely different between the cases. Without harping much into the detailing of this aspect, Dworkin summarizes that liberty is not a commodity; it is in fact a notion that remains unfilled every time we look at it this way. Such restrictions do not affect liberty per se but human choice and confidence. In his words 'if we have a right to basic liberties not because they are cases in which the commodity of liberty is somehow specially at stake, but because an assault on basic liberties injures us or demeans us, in some way that goes beyond its impact on liberty, then what we have a right to is not liberty at all, but to the values or interests or standing that this particular constraint defeats²⁶⁵.'

In context of the above inadequacy of the notion of liberty Dworkin's presumption on

²⁶⁴ Ibid 270

²⁶⁵ Ibid

right to liberties thus involves approaching this notion from the concept of equality. One may call it the ‘liberal conception of equality’, which is not a conception of liberty but a conception of equality²⁶⁶. Within this conception a government ought to treat its citizens not with concern and respect but equal concern and respect²⁶⁷. The hitch however is that this conception of equal concern and respect is an abstract right and we as yet do not know the limitations on the liberties, resources and opportunities within a state governed by this liberal conception of equality. Dworkin has divided the answer into two parts and according to this it is first important to define what an abstract right is. An abstract can be understood in two ways: one, ‘right to equal treatment’; two, ‘right to treatment as an equal’. The former is concerned with a similar distribution of resources and opportunities. For example, Dworkin cites Reapportionment cases in the US where a citizen is allowed one vote per person or in not so generic terms ‘citizens have a right to equal treatment in the distribution of voting power²⁶⁸’.

The latter, unlike the former, is a right that is concerned with treating its citizens with equal concern and respect in the decision making processes as to how these need to be distributed. For instance, as per this right, a citizen is to be allowed a right in decision making processes, long term bondholders here in this case, if a particular economic policy, inflation in this case, is to affect the general interest (but this is not that is right to treatment as an equal, a citizen to ban this particular policy once the general interest has been taken into account)²⁶⁹.

Dworkin believes it is the latter right that is instrumental in achieving for a state not just ‘distinct liberties’²⁷⁰ but is also way different from the first right (right to equal treatment) that holds sway only in special cases. It is preferable to favor these distinct liberties over individual rights as these individual rights are to be deemed beneficial only when right to equal treatment is affected. And Dworkin unequivocally believes

²⁶⁶ Ibid

²⁶⁷ Ibid

“It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen’s conception of the good life of one group is nobler or superior to another’s.”

²⁶⁸ Ibid

²⁶⁹ Ibid

²⁷⁰ Ibid

that the second right, right to treatment as an equal, does not confront rather coincides with right to equality and right to equality is what Dworkin believes to be the meat and potatoes of the whole doctrine of rights. If this is correct, then the right to distinct liberties does not conflict with any supposed competing right to equality, but on the contrary follows from a conception of equality conceded to be more fundamental.”²⁷¹

Familiar rights to distinct liberties provide a more comprehensive account of the second type of liberty, according to Dworkin, discussed above. Therefore below are the following two arguments that are considered essential to the whole concept of ‘right to treatment as an equal’. The arguments are a form of political justification that are, for Dworkin, crucial for a state that aim at providing to the whole structure and its citizens a liberal conception of equality. How it does this is by limiting the arguments, it has at its disposal, for enforcing a limit on liberties. (The following are the two arguments that a government may use for the above purpose).

First, ‘arguments of principle’ is based on not allowing the exercise of a particular liberty, as it might harm or injure the distinct liberty of another person. The second, ‘arguments of policy’ focuses on a limit, which is a prerequisite for a particular goal that is further considered beneficial for the community as a whole, and not just individuals. The latter has further been divided into- ‘Utilitarian arguments of policy’ and ‘Ideal arguments of policy’²⁷². Roughly, as Dworkin makes it clear, utilitarian arguments find people to be leading a better life if a higher number of people have all that they want though some will still have less. Ideal, on the other, imagines an ideal community and not more citizens will have higher amount of goods or that these citizens demand improvement in their condition.

Dworkin does not agree with the ideal theory. As far as utilitarian theory is concerned, he presents analysis to make it clear how the theory, which that appears believable, is not so in the first place. Utilitarians do believe that a limit on liberty is essential for the collective good or goal of the whole community. However this claim is based on the mere evaluation that this particular goal is more widely acceptable or more intensely believed by the people, that is it. “Utilitarian arguments fix on the fact that a

²⁷¹ Ibid 274

²⁷² Ibid

particular constraint on liberty will make more people happier, or satisfy more of their preferences, depending upon whether psychological or preference utilitarianism is in play. But people's overall preference for one policy rather than another may be seen to include, on further analysis, both preferences that are personal, because they state a preference for the assignment of one set of goods or opportunities to him and preferences that are external, because they state a preference for one assignment of goods or opportunities to others. But a utilitarian argument that provides critical weight to the external preferences of members of the community will not be egalitarian in the sense under consideration. It will not respect the right of everyone to be treated with equal concern and respect²⁷³.”

According to Dworkin original position cannot be used as an argument to justify fairness of principles. Dworkin cites the game of poker as an example to clarify his point. Suppose, as he explains, in the game it is suddenly seen that one card is missing and one of the players is already winning. The other player persuades this winning player to throw the hands in to which the latter disagrees. Now in such an instance it is unfair to coax the winning player to agree to the condition yet it is also a situation which is not to be considered unfair. It is on the contrary a “bad argument” to convince the winning player to agree under the pretext that he would have agreed had such an agreement (throw the card in when one is missing) been made in the beginning of the game²⁷⁴.

In the same way the original position argument is a bad argument as the argument cannot be used to show how the two principles of justice are fair just by using the hypothetical agreement situation, an agreement very similar to the argumentative context of the poker game.

Dworkin further says that reasonable and rational persons come together to consent together for a hypothetical contract to further agree to the two principles of justice. How much so ever Rawls may deny by calling it only a hypothetical agreement, it is still a contract signed by the consenting parties. “If a group consented in advance that disputes amongst them would be settled in a particular way, the fact of that contract

²⁷³ Ibid

²⁷⁴ Dworkin, Ronald, *Taking Rights Seriously*, Harvard University Press (1978). p152-153

would be a powerful argument that such disputes should be settled in that way when they do arise. The contract would be an argument in itself, independent of the force of reasons that might have led different people to enter the contract²⁷⁵.”

The argument from the original position is in everyone’s interests as Rawls repeatedly says; Dworkin therefore distinguishes between two kinds of interests- antecedent and actual²⁷⁶. And original position is based on antecedent and not actual interests. Antecedent interests are circumstantial in nature because an option which appears valid in the first instance may not be so the next moment²⁷⁷. Original position’s viewpoint is also the same where an agreement is considered worthwhile for every situation and circumstance²⁷⁸.

Clarifying his stance further on the condition of uncertainty so associated with original position Dworkin explains that parties in the original position as a result of veil of ignorance are unaware of their special interests because they have not been allowed the possibility of bargaining for principles that are unfair. Therefore what the original position and antecedent interest do together is impose a limit on the self-interests of individuals. The limited self-interests help eliminate the unfair principles from the original position²⁷⁹. And when one looks at this combine together- original

²⁷⁵ Ibid 151

People sign the contract hypothetical in nature with the understanding, according to Dworkin, that it is in their own self-interest. And this contract serves as a binding principle when the same people or an individual suddenly realize that the contract is not in his self-interest and they are supposed to withdraw now.

“Rawls does not suppose that any group ever entered into a social contract of the sort he describes. He argues only that if a group of rational men did find themselves in the predicament of the original position, they would contract for the two principles. His contract is hypothetical, and hypothetical contracts do not supply an independent argument for the fairness of enforcing their terms. A hypothetical contract is not simply a pale form of an actual contract; it is no contract at all.”

²⁷⁶ Ibid

Dworkin differentiates between the two with the help of following example. An interest is antecedent in nature when one bets on a horse, after weighing all options, which might not win but still offers best odds. Actual interest, on the other, is all about betting on a horse that will win even if at that particular moment the choice appears to be a foolish one.

And original position cannot be based on actual interests because once the veil of ignorance is lifted people may soon realize that the principle(s) so chosen is actually not in their best interest just like the principle of average utility.

²⁷⁷ As in betting on a horse it is in one’s antecedent interest to bet on a horse that offers the best odds but not so once it loses its balance after the first lap.

²⁷⁸ Dworkin gives another example ‘if I have bought a ticket on a longshot it might be in my antecedent interest, before the race, to sell the ticket to you for twice what I paid; it does not follow that it is fair for you to take it from me for that sum when the longshot is about to win.’

²⁷⁹ Rawlsian individual operating from behind the veil of ignorance only has its self-interests affected and there is no ceiling on these very interests. (This is contrary to what Dworkin feels essential for the

position, antecedent interests, and limited self-interests- it becomes appropriate to structure our contemporary societies on this very original position because apart from the above combine, the contemporary society also has people that possess knowledge (unlike people of the original position)²⁸⁰.

According to Daniels, the free and equal moral agent, in the original position, with two moral powers- a capacity to form a conception of the good and a sense of justice- are essential prerequisites also working as a motivation for the construction of a well ordered society in justice as fairness view²⁸¹. The same was affirmed when Rawls stated the existing congruence between the justice and good of the people²⁸². The philosophical task an individual has been entrusted with is what underlies this deep theory, showcased in reflective equilibrium and overlapping consensus²⁸³. Daniels defines justice as fairness as a module due to the fact of reflective equilibrium and overlapping consensus and its efficacy at engaging people's motivations.

Both the books, *Theory of Justice and Political Liberalism*, maintain the criteria of feasibility of a theory of justice where the basic postulate of a theory providing for a stable, well ordered society is intact (Daniels). While a pro tanto justification is reflective equilibrium, the domain of overlapping consensus is to be seen as presented in book *Political Liberalism*, which is also the essential difference between the two books by Rawls, where justice as fairness, as a freestanding view opts for institutions that have an educative role to play. The institutions inform people about the values

contracting people). In his words "The ignorance in which his men must choose affects their calculations of self-interest, and cannot be described merely as setting boundaries within which these calculations must be applied. Rawls supposes, for example, that his men would inevitably choose conservative principles because this would be the only rational choice, in their ignorance, for self-interested men to make. But some actual men, aware of their own talents, might well prefer less conservative principles that would allow them to take advantage of the resources they have."

²⁸⁰ Ibid 154

In fact, as Dworkin says, there would not be any need for distinguishing between people situated in original position and those in contemporary societies had Rawls in any way convinced his readers of a situation where not only the people were not situated behind veil of ignorance but also the possibility of inclusion of unfair interests was ruled out.

²⁸¹ Daniels, Norman, Reflective Equilibrium and Justice as Political, in Victoria Davion (ed), *The Idea of a Political Liberal*, Rowman and Littlefield Publishers (2000).

²⁸² Ibid 130

²⁸³ Ibid

'Theory does not address persons as citizens but rather as individuals trying to work out their own conception of justice as it applies to the basic political and social institutions of a democratic society. For the most part their task is solitary as they reflect on their own considered judgments with their fixed points and the several first principles and intermediate concepts and the ideals they affirm.'

inherent in a political conception of justice and pressure individual with reasonable comprehensive views to clarify and elaborate further and further on them, in order to accommodate them to a political conception of justice thus providing for an overlapping consensus in return.

Dworkin in later pages of the book *Taking Rights Seriously* confronts Rawls with an important question. Why does he call the two principles, the principles of justice? And to explain it he delves deeper further into three important realms of Rawlsian theory- reflective equilibrium, the social contract and the original position. Dworkin also makes it clear that sometimes the argument on the above three realms might take a reader away from the text but not from its very spirit²⁸⁴.

Equilibrium

Equilibrium that Rawls suggests in his book *Theory of Justice* is near equivalent of intuitions that are so repeatedly used by people in general every time they discuss with each other the issues of justice. Thus follow two models, according to Dworkin, based on this- natural model and constructive model²⁸⁵.

Natural model “Philosophy is a process of reconstructing the fundamental principles by assembling concrete judgments in the right order, as a natural historian reconstructs the shape of the whole animal from the fragments of its bones it has found²⁸⁶.” As per the natural model theories as well as principles of justice are not created. They are, on the contrary, discovered, very similar to the laws of physics. And this whole creation is a product of morality whose most crucial element is intuition²⁸⁷.

Constructive model A theory on justice has to be created then intuitions form just a part of the whole theory, unlike the natural model where intuitions act as independent and the only source for a theory on justice. It can be better explained with the help of

²⁸⁴ Ibid 159

²⁸⁵ Ibid

²⁸⁶ Ibid 160

²⁸⁷ In the words of Dworkin “The main instrument of this discovery is a moral faculty possessed by at least some men, which produces concrete intuitions of political morality in particular situations, like the intuition that slavery is wrong.”

this example. There is this case where a judge has to decide on the damages claimed within the ambit of legal right to privacy. Moreover no judgment has so far been given on such a case. Thus a judge in order to take a decision has to set intuitions as precedents plus decide on a further set of principles to settle the case. This also includes taking decision in such a format that it encompasses not just this particular case but all future cases and orders²⁸⁸.

Constructive model based on 'Principle'

“The natural model insists on consistency with conviction, on the assumption that moral intuitions are accurate observations...the constructive model insists on consistency with conviction as an independent requirement, flowing not from the assumption that these convictions are accurate reports, but from the different assumption that it is unfair for officials to act except on the basis of a general public theory that will constrain them to consistency, provide a public standard for testing or debating or predicting what they do, and not allow appeals to unique intuitions that might mask prejudice or self-interest in particular cases.”²⁸⁹

The natural model clearly establishes a link between ‘observational data’ and ‘moral intuitions’.²⁹⁰ The decision maker’s or the official’s role here is similar to that of an astronomer whose decisions are not only final but also based on faith or observational data. Unlike the constructive model wherein the official has to act responsible as well as be held accountable for every action or a decision of hers. The official has to act here on principle and not faith. A theory of justice is to be based on responsibility, principles, and a consistent program that can be followed accurately for every case that arises.

Further a theory of justice based on the constructive model can also be called as a

²⁸⁸Dworkin gives an example of a sculptor who first collects a pile of bones and then decides accordingly, as per the content and numbers of the bones, which animal to structure. Constructive model is similar to this structuring. p160

Dworkin also adds the element of responsibility to this model. Within this both women and men or those in position of power have to take full responsibility for the judgments that are taken because they all agree to make the judgment a ‘coherent program’. p160

²⁸⁹ Ibid 162

²⁹⁰ Ibid

theory of justice for the community because here everything is from a public standpoint whereas in natural model it is from a personal standpoint²⁹¹. Even the people who take part in settling the convictions within the former model have to act responsibly and be held accountable for every action taken within the decision making process. As said earlier Dworkin considers intuitions as precedents within the constructive model and they form just a part of the whole process, such precedents can be easily for accommodation purposes stretched or curtailed in order to include the ones that are more readily agreed to (and exclude the ones to which people agree less)²⁹².

The reflective equilibrium is a reflection of the constructive model because just like the back and forth, to and fro, processes involved in reaching a decision about a judgment within this very model, reflective equilibrium is a two-way process between theory and conviction for the successful achievement of the best possible adjustment²⁹³.

The main task with which Dworkin takes up the contract is to show theoretically that what drives the theory of justice is the idea of a contract and nothing else. The contract for a deeper understanding has to be, as part of the deep theory discussed above, seen as presenting to us the two principles of justice, within a constructive model, that reach us ‘through the contract and not from the contract’²⁹⁴.

²⁹¹ Ibid 163

²⁹² Such a process is harmful within the natural model because a person might believe either false observations were taken into account or the important ones excluded or etc. thus theory of justice based on natural model is moral like a theory of justice for a particular individual according to Dworkin. “This process would be self-destructive on the natural model, because every individual would believe that either false observations were being taken into account or accurate observations disregarded, and hence that the inference to objective morality was invalid. But on the constructive model that objection would be unavailable; the model, so applied, would be appropriate to identify the program of justice that best accommodates the community’s common convictions, for example, with no claim to a description of an objective moral universe.” (Dworkin)

²⁹³ Ibid

According to Dworkin the natural model includes intuitions as part of a theory of justice but does not provide a solution to agreeing on the most important principles out of these intuitions that can well be accommodated within a theory of justice. Dworkin calls this ‘the best fit’ for the achievement of which the natural model does not give an answer. The constructive model because of its back and forth process on the contrary does provide a way for getting ‘the best fit’.

The two way technique of the equilibrium model produces not only the best theory of justice out of several other options but also aimed at bringing together people who disagree with certain principles on a common ground.

²⁹⁴ Ibid 169

Firstly, Dworkin discusses the contract theory to give a general understanding more accurately in order

Particular political decisions- The three concepts

The whole idea behind equating the particular political decisions with three concepts is providing a basis of justification for accepting the listed three concepts- right, duty or goal. A state sets itself a goal when it favours a particular political act. A decision is a goal when within political theory the political act impacts positively a 'state of affairs.'²⁹⁵ In the same way within a political theory, an individual has a right 'to a particular act' even if it involves doing a disservice to the goals of the state authority²⁹⁶. Similarly an individual has a duty towards a particular act even if it does not fulfil any of the required state goals. Example proclaiming that every citizen has a duty to worship god even though this does not fulfil any of the required state goals, explains Dworkin the concept 'duty' through this example²⁹⁷.

It is important to note that all three- goal, duty and rights- remain embedded in political decisions. Dworkin also says that rights and duties may fulfil certain goals and sometimes some goals may fulfil rights and duties. "A particular goal, for example, might be justified as contributing to a more basic goal; thus full employment might be justified as contributing to greater average welfare. Or a goal might be justified as serving a more basic right or duty; a theory might argue, for example that improving the gross national product, which is a goal, is necessary to enable the state to respect the rights of individuals to decent minimum standard of living, or that improving the efficiency of the police process is necessary to enforce various individual duties not to sin. On the other hand, rights and duties may be justified on

to understand the larger picture completely. The contract is not the whole framework it is rather a part of the entire framework.

And second, there are, as Dworkin further says, two kinds of theories- deontological and teleological. The contract is a deontological theory given the importance it attaches to rights. It is the deontological nature of the contract that gives it the prominence as prominent as Rawls's hypothetical social contract. In his words "I shall argue that any deeper theory that would justify Rawls's use of the contract must be a particular form of deontological theory, a theory that takes the idea of rights so seriously as to make them fundamental in political morality. I shall try to show how such a theory would be distinguished, as a type, from other type of political theories, and why only such a theory could give the contract the role and prominence Rawls does."

²⁹⁵ Ibid

Dworkin has given examples also where a goal can either be 'relatively specific' like full employment or respect for the authority or 'relatively abstract' like improving the general welfare or improving the power of a particular nation.

²⁹⁶ Dworkin here gives an example of right in the US which is not absolute that is right to free speech on political matters or right to a certain minimum standard of living.

²⁹⁷ Ibid 170

the ground that, by acting as a complete justification on particular occasions, they in fact serve more fundamental goals; the duty of individuals to drive carefully may be justified, for example, as serving the more basic goal of improving the general welfare²⁹⁸.”

The three concepts of political theory for political decisions, within the constructive model, can be now classified into goal-based, duty-based and rights-based. All the three theories have an individual at the centre-stage yet each theory is different from the other based on this very common thread that runs through these. In goal based theory, an individual is primal but only as long as fulfills diligently a ‘state of affairs.’ In duty based also the individual is important but the essence is her moral conduct and morality or as Dworkin terms it as ‘essence’ of duty based theory. Like duty based and goal based, individual is of utmost importance in rights based theory and just like duty based morality is also important. However the essence of duty based theory is not the essence of rights based theory. As Dworkin says, “Rights-based theories, however, treat codes of conduct as instrumental, perhaps necessary to protect the rights of others, but having no essential value in themselves. The man at their center is the man who benefits from others’ compliance, not the man who leads the life of virtue by complying himself²⁹⁹.”

Irrespective of the classification it is important to understand that the contract is a rights-based one.

Critique

(Martha Nussbaum)

Emotions have a bearing on cognitive activities, and actions that display high emotive bearings are usually over-simplified in nature as most of the times the role of cognition is simply underplayed under such circumstances. Cognition is crucial for performing daily life activities, an absence of which might lead to severe imbalanced interpretations, by different individuals, of a particular individual’s action.

²⁹⁸ Ibid

²⁹⁹ Ibid

Contemplation as an intelligent activity has its sway, as a result, in as early as Greek philosophy with Aristotle introducing, says Stocker³⁰⁰, ‘complete happiness as a contemplative activity’, hypothesis. Aristotle equated contemplative activity with thinking thus as entailing complete human activity. Though Aristotelian contemplative activity had nothing to do with emotions or even human actions per se yet it would not be an exaggeration if one decides to perceive emotions as also implying an intelligent activity.

‘Intellectual activities’, to denote the above kind of activity, interestingly introduced by Stocker, is the conceptual category, which is wrapped up in its attempt at introducing emotions as an intelligent activity. Nussbaum’s inception into the account of emotions, intelligent thought and action as descriptive that qualify them to function as ‘evaluative judgments’, is also preoccupied with a similar kind of concern, which Stocker introduces. Roberts, reiterating Nussbaum’s introduction to emotions as representing ‘evaluative judgments’, presents emotions as ‘concern-based construals³⁰¹, that stand for impression of a particular situation, which individuals create in their mind during a particular situation.

The role of emotions as evaluative judgments is not difficult to understand when one sees through emotions, as part of cognitive behavior, as involving human thoughts. Deigh characterizes emotions as cognitive in nature with the help of a differentiated account on the kinds of uneasiness and discomposure we feel in distinct situations. He says the kind of revulsion we feel at the sight of a polluted site is different from the kind of pain we feel when soap gets in our eyes. Nussbaum characterization of emotions as evaluative judgments is part of the whole picture. Deigh completes the whole scenario when he explains that Nussbaum’s version of emotions is further an understanding on criminal law³⁰².

³⁰⁰ Stocker, Michael, Intellectual and Nonstandard Emotions in John Deigh, *On Emotions-Philosophical Essays*, Oxford University Press (2013).

³⁰¹ Roberts, C Robert, Justice as an Emotion Disposition in John Deigh, *On Emotions- Philosophical Essays*, Oxford University Press (2013).

According to Roberts emotions as based on concern and representing evaluative judgment notify us about situations that we truly care about, things that matter to us, which may, for instance, include things such as good prospects, threat, honour, offense, bad prospects etc. p 15

³⁰² Deigh, John, *Emotions, Values and the Law*, Oxford University Press (2008). p 104

It is not difficult to understand that emotions such as fear and shame, embodied in processes associated with criminal law, are of relative importance to a cognitivist account of emotions in general. Disgust, believes Nussbaum, has full potentiality as an emotion for perpetuating practices that are sub-human. Shame does, on the other, implies a positive emotion in practices of law, it is still, similar to disgust, equally derogatory when used in the context of practices that are anti-human. Deigh corresponds to this latter remark as only specifying instances that are general, and according to him Nussbaum fails in giving particular instances of disgust that humans may feel against members of their own species. Disgust is a particular kind of emotion, which we feel only towards definitive categories. For instance the kind of disgust we feel towards stale food given the kind of facial expressions we give based as it is on our sensory responses involving our facial expressions as well. Secondly, disgust is a kind of emotion that we strongly feel towards immoral acts such as corrupt politicians.

The above forming part of Deigh's critique of Nussbaum's version, the specific instances of disgust, which Nussbaum fails to cover, are still, according to Deigh, are not very defined and structured ones.

The lucidity of the connection between emotions and cognition runs down to an account of the human. Nussbaum provides an understanding on human and the humanness when she mentions how people with disability and mental impairments are not considered human at all. But such a description of a human as an entity to be included in the list of capabilities is an incomplete account. McReynolds describes the absence of an 'organic account of human nature' in Nussbaum as the most important shortcoming to the list of capabilities³⁰³. It is so because when she mentions the capabilities- intelligence and sociability- she fails to mention about what does it really mean to be human. The reason behind such exclusion, to mentioning about what ideally describes a human, is because of Nussbaum's reliance on empirical studies to provide a universalistic account of human nature. Such an account fails to capture the crucial experiences of individuals with different backgrounds and separate spaces. Perhaps the distinction between functioning and capabilities further mitigates the

³⁰³ McReynolds, Phillip (2002), Nussbaum's Capabilities Approach: A Pragmatist Critique, *Journal of Speculative Philosophy*, Vol 16 (2).

importance of an explanation on human nature. Functionings provide a narrative for experiences that are context dependent and place specific.

Nussbaum's cognitivist position that characterizes emotions as evaluative judgments concerned with a good life is a not very persuasive argument, according to Hunt³⁰⁴. Even though they are not concerned with self-interested ends of an individual yet the mentioning of such emotions as passive, because they are based on urgency of the situation and not active in nature is not a very brief argument. When Nussbaum considers the differentiation between going through an emotional turmoil and getting hit on the head, on the other, as demanding of a certain degree of passivity from emotions is not very convincing for Hunt. It is unconvincing because passiveness imposes on individuals a sense of powerlessness. Nussbaum considers emotions as making individuals weak and without power, which is something that is not considerate of the kind of strength that emotions as a human capacity can offer. Emotions involve human 'efficacy as its objects,' says Hunt, and thus involves our own 'power and efficacy.' For example the kind of power and efficiency we feel when we accomplish a targeted task.

On the other, critiques like Alison Jaggar³⁰⁵, criticize Nussbaum for failing to provide a direct correlation between humans and their environment. Environment is crucial for human flourishing, something that Nussbaum mentions explicitly, yet such a correlation seems to be missing and even if introduced, which it as eighth capability- other species with a concern for animals and nature- it is very low in the list of priorities.

Rawls's two principles of justice are lexically ordered whereas the list of capabilities is open-ended. Such an affiliation to open-endedness, according to Nelson³⁰⁶, is faulty and lacks coherence because if, on the one hand, Nussbaum mentions of the list as not enumerated on the basis of priority, it is still, on the other, as she herself says, fixed. Fixed by itself implies a sense that certain capabilities like the right to bodily

³⁰⁴ Hunt, Lester (2006), Martha Nussbaum on the Emotions, *Ethics*, Vol 116 (3): p 552-577.

³⁰⁵ Jaggar, Alison (2006), Reasoning about Well-Being: Nussbaum's method of Justifying the Capabilities, *The Journal of Political Philosophy*, Vol 14 (3).

³⁰⁶ Nelson, Eric (2008), From Primary Goods to Capabilities: Distributive Justice and the Problem of Neutrality, *Political Theory*, Vol 36 (1): p 93-122.

integrity are crucial, and hence not to be excluded from inclusion into the list. However capability such as those covering other species is debatable. Further the last capability, to be able to own property, is not less incoherent because shelter is neither functioning, according to Nelson, nor a capability. Even if Nussbaum mentions shelter as important for self-enriching activities such as being able to study, operate small businesses, and other activities, such a view still remains unacceptable as it all by itself limits the very organizing principle of the capabilities approach- functioning.

Spring calls the approach as ‘doggedly fixed and paternalistic’. Paternalistic because, as Spring believes it to be, the approach seems to be more commanding than convincing in nature. The list is further doggedly fixed for it is unilateral in content³⁰⁷.

³⁰⁷ Spring, Jonathan P (2008), An analysis of Martha Nussbaum’s Capabilities Approach with attention to her use of the term “threshold”, *BPhil*, University of Pittsburgh.

Part II

The uniqueness in Rawlsian theory lies, according to Carr, in the introduction of reasonableness within reasonable comprehensive doctrines, with Carr also praising Rawls for developing on pluralism in his work *Political Liberalism*.

For Williams, the first question of political thought is the securing, protection, safety of political cooperation. This still is not a question but an insight as to how the above is to be realized. It is this particular issue that inspires a theoretical inquiry into the logic of civil association in the sense that it calls for making order, security and stability as the essential pre-conditions for a social enterprise as without this there would be no social life³⁰⁸. “If this is right, and if one values social life, one must also value the goods of order, security and stability regardless of the social unit at issue- be it the family, a tribal relationship, or a larger more eclectic society. On this view, social life, as Aristotle recognised, is essentially a political endeavor, says Carr³⁰⁹.” In a larger social setting, an organizational structure is important for creating any sort of civil association as conflicts do arise in even the ordinary course of life. This however is still not the complete solution as the processes to provide peace and order may result in something that is exactly the opposite. The solution that Carr offers to give is, as in the very words of Williams, the government offers to give justification of its power to each subject³¹⁰.

Consent is the essential precondition for securing the legitimacy of the government. It thus becomes obvious that consent cannot be based on normative or ideological convictions of one particular group. This also brings in the point that a political theory motivated by moral precepts is bound to fail as whatever may be the convictions, they will be viewed as being oppressing when viewed from the vantage point of the group that does not seem to hold similar normative or ideological convictions. “The mistake, moreover, introduces a tension within a morally inspired political theory that leads

³⁰⁸ Ibid 19

³⁰⁹ Ibid

³¹⁰ Ibid 20

According to Williams, a legitimate government requires consent of the governed for it is impossible to bring social order, domestic tranquillity and social stability if the government is not accepted as legitimate and people refuse to give consent to its authority.

ultimately to its fundamental incoherence as a theoretical venture and its failure as a practical political doctrine, says Carr³¹¹.” However there are liberals that adhere to the above and argue that individuals are autonomous beings and they ought to be allowed to control their lives and follow their particular visions of the good as they see fit³¹².

“This seems like a simple extrapolation from the basic normative premise of moral liberalism, and it looks like this should mean that the government must justify its power to each person who is to be subject to it. If this view gives impetus to the belief that our sense of the political belongs to the realm of the moral, it also rests upon an unfortunate abstraction that is its undoing. Moral liberals who endorse this view emphasize an abstract individualism that diminishes the awareness of persons as group-centered beings whose ontological worldviews and normative theories of the human good are largely, if not entirely, derived from their primary and formative group associations and identifications. If it happened that all such groups (and hence all individuals) shared a relevantly similar (and liberal) moral vision, this would hardly be a significant oversight. But theorists working in social settings typified by an exceptional amount of ontological and normative diversity and difference have increasingly recognized this fact of pluralism (as I shall call it) and noticed the problem it raises for any attempt to build a case for political legitimacy on contentious moral grounds³¹³.”

³¹¹ Carr, Craig L, *Liberalism and Pluralism- The Politics of E pluribus unum*, Palgrave Macmillan (2010).

Carr here is talking about the two models developed by Bernard Williams in his posthumously published work; *In the Beginning was the Deed*.

A civil arrangement was to be arranged in a moral order to maintain peace, thereby creating a vision of political order which is stable and lasting at the same time. According to Carr this was the particular ideal entrenched within classical liberalism as he says 'political thinking, according to this standard liberal view, belonged to, and for many continues to belong to, to the realm of moral philosophy.'

As Bernard notes, in the words of Carr, political theory is applied morality. It means that a study of civil association is a process of moral inquiry, thus making political a practical subset of the moral. The reason Carr gives for such an understanding where political has to be understood in moral terms is the initial concern where 'theorizing of politics' was concerned with laying rules and procedures within which people were to be organized, more so how these individuals have to treat each other.

However Williams wanted to separate the two- political from the moral. Carr, on the other, thinks that some aspects of morality fall within the purview of the political. And in order to explain this he first delves into the reasons as to why one would like to draw a distinction between the two.

Perhaps this also explains partly Carr's (one of the reasons) for approaching Rawls's theory here. Because much like the Enlightenment liberals, who based their theory on twin principles of liberty and equality, Rawls (in a similar vein) espoused the co-existence of disparate and different religious groups often in conflict with each other, wherein the might of the state would not be used to impose the dominant version of faith on others.

³¹² Ibid

³¹³ Ibid 21

Thereby recognition of the multiplicity of religious, moral, and ideological views exhibits a plurality that implies normative, ideological and other differences. The fact that one part of a particular state with legitimacy is up against the other part of the same system highlights a difference not so aptly narrated by a system recognizing the importance of legitimacy, yet ignoring the plurality of the existence within the same system.

Hence one can say that one of the reasons, for Williams, separating moral from the political is this very reality where plurality does induce reason which is reasonable enough to the doubt the premise of moral underpinning of a political thought or reality. To narrate it further exactly in the words of Carr- so it seems that the fact of pluralism introduces reason to doubt that the consent requirement can be satisfied if our concept of the political remains embedded in the realm of the moral, and this introduces the reason why Williams thought it necessary to divorce political theory from moral philosophy³¹⁴.

According to Carr, it is not possible to address the problem of social justice without tending to the issue of political legitimacy. Contemporary moral liberals seem to be not so concerned with the issue of political legitimacy, unlike their predecessors³¹⁵. And it is not possible to address the issue of social justice without looking into political legitimacy.

³¹⁴ Ibid

³¹⁵ As Carr explains how nascent liberals understood the principle of political legitimacy as the foremost issue to be considered. Locke's defence of Glorious Revolutions in the Second Treatise is perhaps a presenting to us of the discourse of political legitimacy. The particular defence of natural rights in the book is aimed at highlighting the moral purpose of the state, as only a state that protects the natural rights of its people has only right to rule, and the government that fails to assure the above loses its political legitimacy. This introduces the concept of moral certainty and moral homogeneity, and the fact of pluralism helps in doing away with the 'retical confidence' in the existence of moral homogeneity within the polity.

From here on there emerges a constant need for establishing a political conflict resolution mechanism because as a result of the fact of pluralism, the 'moral certainties' (Carr), or in other words the different theories of moral good, come to the fore that bring to the fore the various normative and ideological conflicts (the differences as discussed above).

However a reason for concern that remains still for Carr undressed is the probe on non-recognition, by contemporary liberals, of the fact of diversity within pluralism (or modern pluralistic societies). Given the growing awareness of the normative diversity in modern pluralist states, one might think that moral liberals would have seen the need to return to the problem of political legitimacy, but this has not been the response to pluralism that characterizes contemporary theories belonging to the tradition of moral liberalism.

Rawls however was clearly into this, says Carr. His moral liberalism based on comprehensive doctrine looked into the matter of political legitimacy through the lens of ‘reasonableness’ wherein the legitimacy of the government would be established if people within their moral scheme successfully manage to seek through, as part of their effort to recognize the constitutional essentials, the comprehensive doctrines’ reasonableness³¹⁶. Unlike contemporary liberals for whom (in the words of Carr) legitimacy has dropped from view because liberal thinkers are no longer in search of principled grounds capable of receiving assent from all elements of the polity; they prefer instead to consider who should be tolerated according to liberal morality and who should not be tolerated³¹⁷.

Just the way criticisms remain more or less indefinite, so is, to an extent, extracting uniqueness out of a particular theory. Similar to Rawls’s, the capabilities approach’s uniqueness lies in providing its reader with an account of justice for non-human species. And even more unique is the physiological and processes account Nussbaum introduces to let the whole issue move into a more philosophical terrain and from there to a more realistic and practical one. For instance, and a very interesting account that she provides, when Nussbaum theorises desires in terms of psychological processes, which moves on further into the realm of the physiological remains one of the most interesting one. As she mentions ‘desire produces bodily movements as a result of which there exists functions that are common to body and soul; all this further making it possible to study the relationship between physiology and psychology.’

The actualization of potential at which the whole theory aimed at was an attempt at formulating a deeper argument aiming at reaching a higher level of consciousness. To sum it up the actualization of potential is another way of explaining the transition from psychological to the physiological. In general terms the psychological presents to us a case of raised consciousness aware about things of which it was earlier ignorant. While the physiological, has got more to do with bodily manifestation of this raised consciousness.

³¹⁶ Ibid 22

³¹⁷ Ibid 23

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