

PPE MA THESIS

Capabilities and human rights: Beitz's feasibility concerns

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Abstract Martha Nussbaum provides with her capabilities approach some interesting ideas that might improve the current human rights doctrine substantially. However, Charles Beitz – who bases his practical conception on the existing human rights practices – questions if the capabilities approach can adequately cope with feasibility constraints. In this thesis, I will examine the relation of capabilities and human rights, and argue that the capabilities approach can account for Beitz’s feasibility-concerns. In addition, I will suggest that Beitz places feasibility constraints too central in his theory, and incorrectly assumes his practice-based method does not need a normative basis.

1. Introduction

*[Human rights are] basic moral guarantees that people in all countries and cultures allegedly have simply because they are people. Calling these guarantees "rights" suggests that they attach to particular individuals who can invoke them, that they are of high priority, and that compliance with them is mandatory rather than discretionary. Human rights are frequently held to be universal in the sense that all people have and should enjoy them, and to be independent in the sense that they exist and are available as standards of justification and criticism whether or not they are recognized and implemented by the legal system or officials of a country.*¹

The above citation is just one of many ways to understand the much contested concept of human rights. The concept of human rights is widely used across (almost) all nations in the world; international organisations, national governments, NGO’s, in courtrooms and the public sphere. Yet there are a great number of different questions and ambiguities surrounding the matter: moral, normative, metaphysical, pragmatic and political ones. Since human rights are such a broad subject, used in numerous fields, it is important to ask ourselves how we *can* approach it, and how we *should*.

Let us start with a historical approach. The idea of human rights is a centuries old concept, going back to well-known philosophers like John Locke and Immanuel Kant. The Declaration of the Rights of Man and Citizen, a milestone document of the French Revolution (1789), as well as the Bill of Rights of England (1689) and the United States (1791), all had elements of what we now know as human rights.² Yet it is fair to say our current conception is primarily based on *The Universal Declaration of Human Rights* (from now on: *UDHR*), formulated by the United Nations and adopted in 1948. This declaration was motivated by the events of World War II. Some claim this war could have been avoided if there were more stringent international commitments to the basic rights and interests of humans.³ Therefore, after the war, the victorious countries believed a new international organisation was needed: an organisation which was able to promote security for the interests of all human beings. As a result, the UN was created in 1945, who in their turn formulated the *UDHR*. After this cornerstone for the doctrine of human rights, the UN went on to formulate more treaties, related to the *UDHR*. Most prominently, they framed in 1966 both *The International Covenant on Civil and Political Rights* and *The International Covenant on Economic, Social and Cultural Rights*.⁴ In the past few decades the UN successfully convinced many nations to include the *UDHR* and the related

¹ Andrew Fagan, "Human Rights," accessed October 23, 2016, <http://www.iep.utm.edu/hum-rts/>, 1.

² James Nickel, "Human Rights," ed. Edward N. Zalta, *The Stanford Encyclopedia of Philosophy*, accessed October 23, 2016, <http://plato.stanford.edu/archives/win2014/entries/rights-human/>.

³ Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), 16.

⁴ Nickel, "Human Rights," 5.2.

treaties into their constitutions or bills of rights. As of today, every nation has ratified at least one, and 80 percent of all nations has ratified four or more of the main human right treaties.⁵ Furthermore, the UN attempt – aside from the heads and rulers of nations – to involve the broader global community into their promotion of human rights. They ask all individuals to respect human rights and have proclaimed the 10th of December (the day the *UDHR* was adopted) as Human Rights Day. As a result, the *UDHR* – together with the related treaties that followed in the next decades – comes closest in displaying people’s general contemporary conception of human rights.⁶

Despite the rapid progression regarding human rights treaties, there still exists a disparity between this and the actual status quo. All around the world human rights treaties have been signed, yet all around the world human rights are violated. Personal security, non-discrimination, political and religious freedom and even protection against unemployment: all are important articles of the *UDHR*.⁷ Some states barely attempt to make these rights a reality, or to offer the opportunity to citizens to make a formal claim to these rights. This peculiar incongruity shows that, other than just signing a treaty, the notion of a human right entails a lot more. In this world full of inequality, scarcity and conflict, it is crucial to effectively secure every individual’s core interests. In order to do that, we need a theory that can clarify the concept of a human right, understand its normative substance and urgency, and translate the content of the theory into political discourse and action; a theory with a sound, philosophical basis that can justify the claims of human rights. Martha Nussbaum may provide just that with her *capabilities approach*.

The capabilities approach was originally designed by economist Amartya Sen, although some main aspects can be traced back to the thoughts of Aristotle, regarding his ideas about human functioning.⁸ According to Nussbaum, everyone is entitled to live a dignified life. This status can be realised by guaranteeing some central capabilities. She regards capabilities as “important human entitlements, inherent in the idea of basic social justice, and can be viewed as one species of a human rights approach.”⁹ She recognizes the ‘language of rights’ falls short on several aspects. It attempts to guarantee basic human rights, yet some crucial human interests – which human rights are meant to protect – are absent in the lives of many individuals, which makes it impossible for them to live a dignified life. Nussbaum thinks her more inclusive ‘language of capabilities’ can help promote human interests substantially. Where there is deep practical and philosophical disagreement about human rights, the capabilities approach takes a clear position in these issues. Unlike a wide range of other human rights approaches, she sees human rights as something pre-political, essential and inherent to people based on their distinctive humanity.¹⁰

Charles Beitz is not at all convinced by Nussbaum’s approach. According to him, Nussbaum is more concerned with the philosophical theory behind human rights than with their actual implementation

⁵ “What Are Human Rights?” accessed October 23, 2016, <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>.

⁶ Nickel, “Human Rights,” 5.1.

⁷ For the full list of human rights of the *UDHR*, see: “Universal Declaration of Human Rights,” accessed November 11, 2016, <http://www.un.org/en/universal-declaration-human-rights/index.html>.

⁸ Aristotle, *Nicomachean Ethics*, trans. Reece (Indianapolis/Cambridge: Hackett Publishing Company, 2014), 217–18.

⁹ Martha Nussbaum, “Capabilities, Entitlements, Rights: Supplementation and Critique,” *Journal of Human Development and Capabilities* 12, no. 1 (2011): 23.

¹⁰ *Ibid.*, 26.

and execution. While she does not take the importance of the current international practice of human rights into account, Beitz thinks it is vital for a human rights theory to do so. Consequently, he claims the capabilities approach cannot cope with the practical infeasibilities surrounding human rights. Therefore, we have no sufficient reason to adopt it as a fruitful human rights approach.¹¹ In order to meet his demands for a human right theory, he offers a more pragmatic, political approach of human rights that mainly focusses on the feasibility constraints on human rights. Beitz refrains from foundationalist reasoning and regards the human rights doctrine as a purely discursive political practice.¹²

The clear contrast between the capabilities approach and Beitz's practice-based method brings us back to the question I stated in the very first paragraph: How should we approach human rights? Considering the past paragraphs, other related questions are ascending to the surface; should a human rights theory be based on a sound philosophical basis (as Nussbaum argues)? Or does this not have priority, and should we take feasibility constraints instead to be leading (as Beitz prefers)?

In order to make a fruitful impact on the world, it is safe to say that a human rights theory should at least take feasibility constraints into account. If Beitz's claim is true, and the capabilities that Nussbaum plans to secure do not turn out to be feasible, the capabilities approach fails to be an adequate theory of human rights. Since Beitz poses this challenge, we should on the other hand ask if Beitz's practice-based method does a better job at securing global human interests. In sum, the main question of my thesis is if Beitz is justified in claiming that his human rights theory is preferable to the capabilities approach on account of feasibility constraints. Following this question, I will also examine if Beitz is right in regarding feasibility constraints as a leading element for a human rights approach, and if his theory can manage without a clear normative foundation.

To this end, the thesis will be structured as follows: First, in Chapter 2, I will present the main aspects of the capabilities approach of Nussbaum, giving special attention to its relationship with human rights. Next, Chapter 3 will give a brief overview of the field of human rights theory and indicate where both Nussbaum and Beitz are situated in these discussions. Ultimately, I will contrast two opposing sides of human rights theory: the naturalistic human rights approach (which includes Nussbaum's capabilities approach) and the political human rights approach (which includes Beitz's practice-based method). After I have put up this framework, Chapter 4 will go deeper into Beitz's theory and explain the concept of political feasibility and its relevance to human rights.

Subsequently, Chapter 5 will focus again on the capabilities approach, and examine if it can cope with Beitz's infeasibility-critique. Although at first glance it seems that capabilities are hardly fit to provide actual protection of human interests, there are some promising ideas regarding their implementation into constitutions and international organisations. This can turn the capabilities approach in the long run into a feasible theory which may secure important human interests quite adequately. In the final Chapter 6, I will argue that Beitz's practice-based theory –in the absence of a normative basis – is not an effective way to promote human interests, since it does not provide clear justifications for international (non-)intervention and assistance in the case of human rights violations. In the end, it seems that Beitz places feasibility constraints a bit too centrally in his theory.

¹¹ Beitz, *The Idea of Human Rights*, 59-68.

¹² Katrin Flikschuh, "On the Cogency of Human Rights," *Jurisprudence* 2, no. 1 (2011): 22-23.

2. The Capabilities Approach and Human Rights

There is much to say about the capabilities approach, the political-philosophical theory developed by both Sen and Nussbaum. Throughout this process, they both have created their own distinctive views and preferences, sometimes disagreeing with each other. To avoid unclearness and ambiguity, I have chosen for a couple of reasons to focus on Nussbaum instead of Sen. Although they both give quite some attention to the human rights subject, Nussbaum's capabilities approach is a bit more concrete; she provides for instance a list of basic human capabilities (its relation with human rights will be clarified in the upcoming sections). Secondly, Beitz and several other main critics of the capabilities approach that I will treat in this thesis address their concerns primarily to Nussbaum. It is best to answer their worries with the help of the findings of the respective author. With these reasons in mind Nussbaum's approach seems to be better suited and more relevant for my project than Sen's approach. Note that I refrain from making any normative judgement about which version of the capabilities approach is philosophically or politically preferable.

The first section of this chapter describes the basic elements of Nussbaum's capabilities. Given the broadness of her approach, this can only be a relatively brief summary. In the second section, I will present and elucidate her list of the ten basic human capabilities. Lastly, I will carefully examine the connection between capabilities and human rights, explaining how best to understand this relation, and the merits of a 'language of capabilities' with respect to a 'language of rights'.

2.1. *Functionings and capabilities*

In order to understand the capabilities approach correctly, it is important to clarify a couple of terms that Nussbaum uses. Most prominently, the distinction and relation between *capabilities* and *functionings*. Functionings are regarded as 'beings and doings'. To connect this to particular persons, the question is asked: In what kind of state is a person and which activities can he do? So beings are the various states a person can find himself in. These can be for instance mental or physical states (like being depressed or well-nourished). Doings entail the diverse activities a person can undertake. Think here – for example – of riding a bicycle or running for a particular presidency. Capabilities on the other hand can be regarded as a type of freedom: a person's actual freedom or opportunity to choose, pursue and realise the functions he values.¹³ So in order to run for a presidency, you need besides the functioning of running for a presidency, the actual combined capability to run for a presidency. A combined capability consists of multiple functionings. The capability of running for a presidency entails the functioning of running for a presidency, together with other functionings like being in good health and having a political framework which allows you to run for a certain presidency. Nussbaum is mostly interested in combined capabilities, although we cannot deny the necessity of basic capabilities. Basic capabilities can generally be expressed in terms of functionings (like the basic capability of hearing). Yet some basic capabilities have to be developed first. A baby has the basic capability of language, but this capability is not directly ready to function.¹⁴

¹³Ingrid Robeyns, "The Capability Approach," ed. Edward N. Zalta, *The Stanford Encyclopedia of Philosophy*, accessed October 26, 2016, <http://plato.stanford.edu/archives/sum2011/entries/capability-approach/>, 2.1.

¹⁴Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2001), 84.

It is now – especially for my thesis – important to note that Nussbaum developed her capabilities approach with the underlying thought of forming a “conception of the good life, a moral conception selected for political purposes only.”¹⁵ Nussbaum, as an essentialist, aims to find which features of humans are crucial in leading a dignified life. She believes there are certain capabilities that indicate if a person leads a truly human life or not. These are what she calls central human capabilities. These capabilities are universal, in that everybody would have to agree that they are essential to a dignified human life.¹⁶ For example, nobody would deny that having adequate shelter is essential for a dignified life. If we see someone without it who is extremely vulnerable to the cold, hot or wet weather, we would all agree he cannot function in a truly human way. The central question asked by the capabilities approach is therefore: ‘What is a person *X* actually to do and to be?’ Considering the list of central human capabilities (which I will make explicit in the next section), we have to ask if person *X* is able to make use of these capabilities. If not, person *X* is not leading a dignified life.¹⁷

This line of thought partly consists of two important Marxian elements. Like Marx, Nussbaum suggests that there is a close connection between human dignity and material resources.¹⁸ If we want to respect the central functions of humans, we necessarily have to consider the latter. Regarding once more the capability of having adequate shelter; we cannot see this functioning apart from the necessary material support. Secondly, the capabilities approach takes the following principles of Marx (along with Immanuel Kant) to be leading: “It is profoundly wrong to subordinate the ends of some individuals to those of others.”¹⁹ This entails that we should treat every person as an end, and none as means to some others’ end. So contrary to utilitarian approaches, it is considered objectionable to promote just the good of society as a whole. We should instead promote the good of each and every person. With respect to the capabilities approach, we translate this Marxian view into the “principle of each person’s capability”: We have to respect and protect each person’s central capabilities, rather than capabilities of a state or organisation.²⁰

Because of the fact that we should regard each human life as an end, there seems to be an intrinsic value in human life. The central human capabilities are the components which makes this dignified human life possible. Therefore, central human capabilities cannot just be regarded as instrumental values. They have, just like persons, value in themselves, in making the life – which includes them – fully human. Considering the importance of the capabilities on her list, Nussbaum suggests they exert a moral claim to be developed and secured.²¹ Note that this is not the case for all capabilities. Basic capabilities are in itself morally neutral (Being depressed has no normative content *an sich*),²² and although the capability of torturing is a combined capability, it is by no means essential – and rather counter effective – for a human life of dignity.

¹⁵ Ibid., 77.

¹⁶ Ibid., 74.

¹⁷ Ibid., 71.

¹⁸ To read more about this idea of Marx: Karl Marx, *Economic and Philosophical Manuscripts of 1844*, trans. Martin Milligan (New York: Dover Publications, 2007), 115–36.

¹⁹ Nussbaum, *Women and Human Development: The Capabilities Approach*, 73.

²⁰ Ibid., 72.

²¹ Ibid., 83.

²² Robeyns, “The Capability Approach,” 2.1.

2.2 The list of central human capabilities

Before I present the list of central human capabilities, there are first a few remarks about it to be made. The driving force behind this list is Nussbaum's belief that there can be cross-cultural agreement about a set of human functionings which we all find valuable. Nussbaum shares this line of thought with Rawls, who introduced the notion of an *overlapping consensus*. Like Nussbaum, Rawls acknowledged that states are divided in various distinctive moral, political and religious groups. With this in mind, Rawls developed his theory in a way that it could be supported by people with completely different convictions by finding an overlapping consensus between them.²³ Nussbaum aims to do something similar, but broadens the idea to the global level. As I showed in the previous section, she does this by arguing that her central human capabilities are each in their own way essential to human functioning. Yet she also realizes that the value of several central human capabilities is in some cultures more self-evident than in others. The capability to be cultivated by adequate education might be understood and appreciated differently per culture, society or religion. For that reason, Nussbaum presents her list as an open-ended one, and even allows societies to interpret it – to some extent – in accordance with their traditions and circumstances.²⁴

Furthermore, Nussbaum stresses her list is not grounded on any metaphysical claim of human nature. It can be best viewed as a 'freestanding moral idea', developed to be endorsed for political purposes only. She argues that her list can serve as a moral foundation on which states and institutions can justify their claims, rules and principles. Ultimately, she hopes that when constitutions or the structures of political and social institutions are chosen or altered, they secure a threshold level of these central capabilities. This way, in the case they achieve this, we can be assured that every person is leading at least a minimally decent human life.²⁵

The list includes the following ten central human capabilities:

1. *Life*; e.g. being able to live to the end of a human life of normal length.
2. *Bodily Health*; e.g. to be adequately nourished and to have adequate shelter.
3. *Bodily Integrity*; e.g. being able to be secured against (sexual) assault.
4. *Senses, Imagination, and Thought*; e.g. being able to use the senses, imagine, think and reason in a fully human way.
5. *Emotions*; e.g. experience our emotional development in the absence of the thwarting effect of fear or anxiety.
6. *Practical Reason*; e.g. protection for the liberty of conscience.
7. *Affiliation*; e.g. the capability of justice and friendship; the social bases of self-respect.
8. *Other Species*; being able to live with concern for and in relation to animals, plants and the world of nature.
9. *Play*; being able to laugh, play, and enjoy recreational activities.

²³ John Rawls, *Political Liberalism* (New York: Colombia University Press, 1993), 133–50.

²⁴ Nussbaum, *Women and Human Development: The Capabilities Approach*, 77.

²⁵ *Ibid.*, 74–83.

10. *Control over One's Environment*; this capability has a political dimension (e.g. the right of free speech and political participation) and a material dimension (e.g. being able to hold property).²⁶

2.3 Merits of capabilities

Nussbaum believes capabilities have a very close connection to the human rights existing in international practice. She stresses that she appreciates the presence of the contemporary human rights. She recognizes its value in the current world and notices several similarities with capabilities; they both cover the field of the first generational (civil and political) and second generational (social and economic) rights, and aim to provide the underpinnings of basic constitutional principles.²⁷ We therefore may regard the capabilities approach as one species of a human rights theory. In turn, the list of central human capabilities can be viewed as a list of human rights. Since the capabilities approach still differs on many aspects from most human rights theories, capabilities have – according to Nussbaum – a relation of inclusion (i.e. it is a type of human rights), supplementation and critique with human rights.²⁸

A right generally has a corresponding duty attached to it. Without it, the demand of a right claim is far less powerful, for it seems meaningless to assign a right to someone or something without an agent or group of agents to bear the duty to secure the right. Then who is obligated to secure the list of capabilities? At first glance, Nussbaum seems to suggest that every single individual has the duty to secure the central capabilities of all human beings. Since capabilities are inherent in people's humanity, we have to respect and secure them on the basis of human dignity. Human rights are in this sense pre-political: if there were no states at all, they would still be morally binding.²⁹

Assuming we wish for all individuals to live a human life with dignity, the above claim of Nussbaum may seem intuitively convincing: I am willing to accept that I have a duty to refrain from violating the capability of – let us say – bodily health. However, it is in practice hard to imagine that I, or any other individual, have the positive duty to secure adequate shelter for every person in a distant country such as Brazil; placing the responsibility on the global community as a whole would not be an effective way to promote and secure human rights. Nussbaum realizes this. Hence she examines the obligations on the side of the state. She eventually agrees with the founders of the United States Constitution, by claiming that the central goal of the state should be "to secure to people their most fundamental entitlements."³⁰ She argues that governments are established in order to secure things to people which they cannot secure themselves. Correspondingly, a government should be evaluated by the extent to which they are doing this job. In order for it to be minimally just, it should secure and guarantee the list of central capabilities.³¹ With this demand, Nussbaum seems to move the formal duty of securing the central capabilities from individuals to the level of state institutions. In

²⁶ Martha Nussbaum, "Capabilities and Human Rights," *Fordham Law Review* 66, no. 2 (1997): 287–88.

²⁷ Nussbaum, *Women and Human Development: The Capabilities Approach*, 97.

²⁸ Nussbaum, "Capabilities, Entitlements, Rights: Supplementation and Critique," 24.

²⁹ *Ibid.*, 26.

³⁰ *Ibid.*, 25–26.

³¹ *Ibid.*, 26–28.

addition, she also assigns an important role to the richer nations and international organisations in assisting the poorer nations with their obligations. I will elaborate on this in the fifth chapter.

One possible worry could be that Nussbaum's set of capabilities might be too paternalistic to serve as human rights.³² For instance, the capability of *Play* is on the list. But if I, as – let us say – an overly ambitious workaholic, find this central capability not central at all in my life, should I be pushed into functioning the way the list proposes? Rawls has also drawn a list of human rights which is even more basic by including only four minimal rights: to live, liberty, property and formal equality.³³ It is highly unlikely someone would prefer not to make use of these rights.³⁴ One might suggest these rights form a better consensus of what people value in life, and are therefore better suited to function as human rights. Yet according to Nussbaum, the overly ambitious workaholic should have no problems with her list of capabilities, because not functionings but capabilities should be the political goal. The only task the government has is *providing* the capabilities. It is the choice of the individual to make use of them or not.³⁵ In this sense, the capabilities approach is not paternalistic; it only tries to give people the opportunity to choose and pursue the lifestyle they prefer.

In line with this worry, one could also object to some of the central capabilities that they do not represent the most fundamental interests of humans. As I argued in the above paragraph, not everyone views the capability *Play* as central to their way of life. The same can be said for the central capabilities *Emotions* and *Other Species*. It seems arbitrary if these capabilities exert a human right-claim, especially if you compare them with more fundamental central capabilities such as *Life*, *Bodily Health* and *Bodily Integrity*. These capabilities may seem to suggest that Nussbaum, with her endorsement of Aristotelean philosophy, regards human rights more as requirements for a flourishing life. This may conflict with the thoughts of human rights philosophers like Henry Shue, who famously stated that human rights are "the morality of the depths. They specify the line beneath which no one is to be allowed to sink."³⁶ Yet I believe that Nussbaum would agree with this assertion, and that we can regard *all* the capabilities as belonging to a 'morality of the depths' (although she herself characterizes her list of capabilities as a "ground-floor, or minimal, conception of the good"³⁷). The central capabilities all have aspects that are part of any life that we will view as human. This may be – at first glance – especially hard to recognize with the capability *Play*. But, as Nussbaum argues, the inability to laugh or play in a childhood is "a sign of deep disturbance"; if an entire society lacks this ability, we would regard it is "terribly frightening".³⁸ We must realise here that the list of capabilities are about what one *is able* to do and to be, not what one should be constantly doing and being. It would be strange to claim that someone should have the right to constantly having compelling reasons to laugh and play. However, the right to have the ability to laugh and play seems less controversial, since everyone would – at some point in his life – want to make use of this right. Moreover, this right is not as abstract or unorthodox as some might suggest;

³² For more on this worry, see: Séverine Deneulin, "Perfectionism, Paternalism and Liberalism in Sen and Nussbaum's Capability Approach," *Review of Political Economy* 14, no. 4 (2002): 497–518.

³³ Rawls, *Political Liberalism*, 300.

³⁴ Note that it is not impossible, but for the sake of my argument it is best not to enter this discussion.

³⁵ Nussbaum, "Capabilities and Human Rights," 288–89.

³⁶ Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton: Princeton University Press, 1996), 18.

³⁷ Martha Nussbaum, "Human Functioning and Social Justice: In Defense of Aristotelian Essentialism," *Political Theory* 20, no. 2 (1992): 220.

³⁸ *Ibid.*, 219–20.

its primary content is already constituted in the *UDHR*³⁹ and – regarding children – in the Convention on the Rights of the Child.⁴⁰

Nussbaum furthermore notes that the language of capabilities has the advantage of being more down-to-earth than a language of rights. The rights doctrine is often a fuzzy discussion about the normative and philosophical foundation of rights, what people need and should have, and which corresponding rights they deserve. The rights people finally get usually come across as a foreign imposition; as something external to them which fail to reflect their exact needs. The capabilities approach, on the contrary, only confronts people with the simple question: ‘What am I able to do and to be?’ Since this question is asked on a daily basis by people all around the world, the language of capabilities is already used very broadly. Hence it has been much easier to work out which needs people regard as most valuable to them. The list of capabilities – specified by each country according to their beliefs and traditions – will consequently feel more as a natural extension of their needs than something abstract that is imposed on them.⁴¹

Admittedly, some current human rights practices also allow countries to derogate from their list of human rights. The European Court of Human Rights implemented this doctrine in 1956, giving it the phrase ‘margin of appreciation’. It aims to give more freedom to the domestic courts vis-à-vis the European Court of Human Rights to make judicial decisions based on local norms and practices. However, its execution does not go about flawlessly. The European Court finds it hard to determine when the margin of appreciation has been exceeded, and misses the necessary standards for its use.⁴² It is mostly for that reason that the other human rights courts refrain from a margin of appreciation (besides some exceptional cases from the Inter-American Court of Human Rights).⁴³ The capabilities approach has less difficulty with determining the standard for a margin of appreciation, since it is (as I have mentioned in the previous paragraph) more down-to earth: it allows societies to construct the list of central capabilities (i.e., human rights) to some extent differently in accordance with their beliefs and traditions – but always examines if the core of the central capabilities is actually secured to all citizens, by posing the question ‘what am I actually able to do and to be?’ to them.

Another advantage of Nussbaum’s approach is that she views a human right as a *combined* capability.⁴⁴ The right to education, for example, should not only entail the formal right to go to a school. In order for a child to experience a sufficient education, it should have the actual freedom to go to an adequate school. This entails that its family should not be as desperate as to force him into labour; that an affordable way of transportation should be available (if his school is not in walking-distance); and that there should be a school which has the means to offer him qualitative study material. The right to education, as it turns out, includes numerous capabilities. If we turn to Article

³⁹ Article 24 states that “Everyone has the right to rest and leisure.”

⁴⁰ Article 31 states that “ States Parties recognize the right of the child to rest and leisure, to engage in play:” “Convention on the Rights of the Child,” accessed January 23, 2017, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

⁴¹ Nussbaum, “Capabilities, Entitlements, Rights: Supplementation and Critique,” 29–30.

⁴² Rosalyn Higgins, “Derogations Under Human Rights Treaties,” *The British Year Book of International Law* 48, no. 1 (1977): 315.

⁴³ Yuval Shany, “Toward a General Margin of Appreciation Doctrine in International Law?” *The European Journal of International Law* 16, no. 5 (2006): 929.

⁴⁴ Nussbaum, *Women and Human Development: The Capabilities Approach*, 98.

26 of the *UDHR* (the right to education), we see less inclusive demands; although it does insist on education being free, it does not take factors like forced labour or transportation into account. From this Nussbaum concludes that the language of capabilities has a ‘thicker’ conception of human rights than the language of rights; it makes clear that having the formal right is not enough: to actually possess a right you need the extensive measures and freedoms to make use of the right.⁴⁵

This conclusion might be drawn too rapidly. For instance, the right to health is a very inclusive right, demanding food, housing and medical care in order to possess this right.⁴⁶ Moreover, the UN Committee on Economic, Social and Cultural Rights have recently stated that access to medicine is a stringent requirement for the right to health.⁴⁷ The difficulty on this matter is that the right to health, with all its implications, is often just a right on paper. All the 192 members of the United Nations have signed the *UDHR*, proclaiming the right to health to all their citizens. Yet in reality, this right is by almost all of the members substantively violated. We obviously have to take the fact that a lot of states just do not have the means to secure this right for all its citizens into consideration; whatever its intentions, a struggling third world country cannot live up to this requirement. For the sake of argument, it might be more fruitful to consider one of the biggest economic players of the world: The United States of America. Its former First Lady Eleanor Roosevelt headed the committee that wrote the *UDHR*. Strangely enough, until 65 years after this historical moment, over 44 million Americans still did not have any health care (this changed in 2013, when the Affordable Care Act – better known as Obamacare – was signed into law). This case shows that even a large amount of the citizens of a relatively prosperous country like the United States, one of the main inventors and proclaimers of the right to health, do not possess the actual right to health. Nussbaum aims to change this by demanding that states secure various supporting capabilities to their citizens. According to her approach, the United States can no longer proclaim the right to health to their citizens, since they are not respecting the required capabilities. If a state is not able to secure these central capabilities, human rights are absent in the lives of citizens, and the state fails to be just.

In sum, bearing all these features of the capabilities approach in mind, it can be considered as an interesting species of human rights theories; one which defines, promotes and secures the central values of human life. Furthermore, the ‘language of capabilities’ seems to be more down-to-earth, inclusive and culturally-informed than the contemporary human rights doctrine. Nevertheless, some are not compelled by Nussbaum’s theory and provide critical remarks concerning its ability to serve as human rights theory. In this thesis I will mainly focus on the critique of Beitz. In order to understand him correctly, it is helpful to first give a brief overview of the two major disciplines of human rights theory, namely the naturalistic human rights theory and the political human rights theory.

⁴⁵ Nussbaum, “Capabilities, Entitlements, Rights: Supplementation and Critique,” 30.

⁴⁶ “Universal Declaration of Human Rights,” Article 25.

⁴⁷ Polly Vizard, Sakiko Fukuda-Parr, and Diane Elson, “Introduction: The Capability Approach and Human Rights,” *Journal of Human Development and Capabilities* 12, no. 1 (2011): 9.

3. Competing Theories of Human Rights

The discussion within the academic human rights debate can roughly be divided into two camps. On the one hand the naturalistic or traditional theories of human rights, who generally believe that human rights are grounded in our very humanity, and assign a moral foundation to rights. It is fair to regard the capabilities approach as one species of this discipline. Given the vast amount of naturalistic theories I will only discuss three of them, that are most relevant for my thesis: the human rights theory of Alan Gewirth, James Griffin, and – of course – the capabilities approach of Nussbaum. On the other hand we have the political theories of human rights, who believe human rights are something that is construed by political institutions, without having some deeper ontological status. Beitz is one of the main proponents of such a political approach.

3.1 Naturalistic theories of human rights

One way to view human rights is as if they are natural rights. In this sense, even in a pre-institutional era, when a person would find himself in a state of nature, he still possesses human rights. Natural rights are universal, timeless and impossible to lose. We have them due to some particular basic human features of ours, and they are extremely valuable to us since after all, natural rights are essential to our human way of life.⁴⁸

Generally, naturalistic theories of human rights all agree on the above statements. Yet even if one assumes all these assertions, there is still a variety of different positions to take. Most prominently, it still is not clear on the basis of which basic human features we should claim our human rights. In the last few decades, human agency and autonomy were broadly seen as the grounds on which to justify human rights. Gewirth was one of the first and most influential who tried just that. He argues that we all naturally want and value human agency, and thus should have a right to have it. He then goes on to examine which conditions are necessary for successful human agency, and eventually states autonomy and well-being are most essential; without these two, purposive human action (having a reason to perform a certain human action) is not possible. His ‘principle of generic consistency’ states that, given the fact we want others to respect the autonomy and well-being of ourselves, we should respect their autonomy and well-being as well. From this principle he concludes that since autonomy and well-being are tremendously valued, people can claim a right to them. Gewirth regards autonomy and well-being as the most fundamental human rights, and from these we can formulate a list of human rights which secures these crucial human features.⁴⁹

Although Gewirth inspired many, there was also a lot of substantive criticism. Joseph Raz, for once, argued that the importance of autonomy seems a bit arbitrary.⁵⁰ As I have mentioned above, Gewirth regards autonomy as a necessary condition for human purposive action; one cannot act with purpose if it cannot freely endorse a chosen end.⁵¹ This leads to strange results; is everything a slave or even a

⁴⁸ Our human liberty can for instance be viewed as a natural right that is tremendously valuable in all of our lives.

⁴⁹ Alan Gewirth, *Human Rights: Essays on Justification and Applications* (Chicago: University of Chicago Press, 1982).

⁵⁰ Joseph Raz, “Human Rights Without Foundations” (University of Oxford, 2007), 4.

⁵¹ Fagan, “Human Rights,” 4c.

person under compelling pressure does without purpose? If one has (temporarily) lost his autonomy, it does not automatically follow that his actions have lost all meaning or intention. Furthermore, Raz suggests that Gewirth makes the fatal mistake of confusing values with rights.⁵² Bernard Williams addressed the same worry: "Certainly I do not *want* him to interfere with my freedom. But does this, in itself, generate any prescription that leads to obligations or rights?"⁵³ Here Williams suggests that Gewirth seems to neglect a vital step in his argumentation: Gewirth argues that we all tremendously value human agency, and uses the principle of generic consistency to claim a universal right to human agency. Be that as it may, why should the fact that I value something mean that I have a right to it? For instance, some alcoholics are so desperately addicted that they value a constant supply of alcohol more than whatever in the world exists, including minimal resources which supports their autonomy and well-being. Is this a sound reason to give them a right to access to alcohol? Gewirth tries to refute this critique. Although he admits that a rights-claim does not follow from a want as such, he points to the fourth step of his argument, which holds that "I must have freedom and well-being [in order to act successfully]," ensuring that his argument is only restricted to the "truly necessary goods of actions."⁵⁴ With the introduction of 'must' one might think freedom and well-being are then objective values. However, the 'must' is practical prescriptive; it only signifies an agent's endorsement of the conditions he thinks he needs to have in order to act successfully.⁵⁵ Naturally, most agents will regard freedom and well-being as most valuable. But it would be an incorrect generalisation to assume that every agent would be on the same page. Since Gewirth's argument is grounded on mere personal values, it still does not provide conclusive reasons why freedom and well-being are distinctive values that exert a rights-claim.

Currently, Griffin is one of the fiercest proponents of a naturalistic theory of human rights. In his recently published book – *On Human Rights* – he develops a similar approach as Gewirth; he too bases his human rights theory on certain basic human features, including autonomy and human agency. Griffin believes it is for us extremely important to secure our status as human beings, which is distinctively different than the status of animals; the abilities to deliberate, assess and choose are uniquely ascribed to human beings. These qualities are all significant components of human agency, or as Griffin calls it, personhood. He argues that our human status or personhood is necessary in order to form and pursue conceptions of a worthwhile, dignified life. So to be a true human agent, one should: (1) choose one's own path through life (autonomy); (2) one must have the minimal resources and education to act upon this choice (minimum provision); and (3) no one must block you from pursuing your particular conception of a worthwhile life (liberty). If all of these demands are met, one can confirm he possesses the human features of agency and personhood. Considering the outstanding value of these human features, they can and should function as the basis for human rights. Human rights can be regarded as protection of the practice of choosing and pursuing our particular worthwhile life.⁵⁶

⁵² Raz, "Human Rights Without Foundations," 4.

⁵³ Bernard Williams, *Ethics and the Limits of Philosophy* (London/New York: Routledge, 2006), 61.

⁵⁴ Alan Gewirth, *The Community of Rights* (Chicago: The University Of Chicago Press, 1996), 21.

⁵⁵ *Ibid.*, 17.

⁵⁶ James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), 31-33.

3.2 Placing Nussbaum in the framework

By now, it will be apparent that we can rank the capabilities approach as a species of a naturalistic theory of human rights. This is recognized by several authors, including Beitz and Raz. Nussbaum views central capabilities to a large extent as natural rights, and her capabilities approach has striking similarities with – for instance – the theory of Griffin. They both believe human rights are pre-institutional (i.e. they can be possessed independent of any political institution and are morally binding without any state enforcement system). Subsequently, both views hold that one cannot lose her human rights under any circumstances. Yet these are all positions that are taken by almost all naturalistic theories of human rights, and not just by Griffin and Nussbaum in particular. The political approach on the other hand, holds that human rights are construed and held up by political institutions, so it would disagree on the above positions. That being said, we now have at least an indication that the capabilities approach can indeed be viewed as a naturalistic theory of human rights as well.

If we compare the approaches of Griffin and Nussbaum extra carefully we see they have overlaps in more narrow respects as well. Both seem very concerned that people have the ability to choose and pursue a particular life style which they regard as a conception of the good or – as Griffin puts it – ‘worthwhile’ life. The three characteristics of human agency that Griffin proposes are also based on the same convictions as the capabilities approach. Autonomy is close to Nussbaum’s definition of what capabilities are: the real freedoms or opportunities from which one can choose. The point of minimal provisions sides Griffin with Nussbaum’s Marxian conviction that having the actual material resources to pursue your capability is essential for the dignity of a human life. When taken together, material provisions and liberty also point towards an inclusive ‘thick’ conception of rights, just as is the case with Nussbaum’s capabilities approach: Human rights should not just secure the rights *an sich*, but also the freedoms and material support that deliver a vital contribution to the protection and realization of these rights. Ultimately, Beitz recognizes, “both views hold that human rights are protections of interests that belong to human as such.”⁵⁷ To Griffin, these interests are autonomy, minimal provision and liberty. In Nussbaum’s case these interests are the central capabilities that must be provided in order to lead a dignified human life.

Both Griffin and Nussbaum are quite convinced that people – in general – value autonomy. Griffin thinks it is one of the things we can value even more than happiness,⁵⁸ while fieldwork in India convinced Nussbaum that capabilities which entail autonomy and (political) choice are the most valued ones.⁵⁹ One may suggest that both theories are susceptible for the critique that Williams addressed to Gewirth: it does not automatically follow from the fact that people tremendously value something, that they have a (human) right to it. However, Griffin and Nussbaum avoid this problem because of the important difference with Gewirth that they do not ground their theory on the fact that people value something, but on the fact of its *being* valuable. To illustrate, remember the example of the alcoholic who values the object of his addiction incredibly high. Nussbaum still would not argue the capability to drink alcohol is a *central* capability (i.e. human right), since this capability is not essential to a dignified life; one would still call the life of a person who is deprived of any

⁵⁷ Beitz, *The Idea of Human Rights*, 64.

⁵⁸ Griffin, *On Human Rights*, 32.

⁵⁹ Nussbaum, “Capabilities and Human Rights,” 286–88.

alcoholic liquid ‘a human one’ (probably even more human than one who is constantly making use of the functioning of drinking alcoholic liquid). Accordingly, Griffin would by no means argue that this capability is a crucial component of the notion of personhood (contrary to ‘autonomy’, ‘minimal provision’ and ‘liberty’). Both Griffin’s and Nussbaum’s approach thus hold that an appraised feature like autonomy evokes a right because it is intrinsically valuable; i.e. it has value in itself. Here a human right is not based on the contingent fact of what people regard as valuable, but on the universal fact of what is actually valuable for a human life (although Wolff and de-Shalit suggest that investigating what people from various societies find valuable help us to determine what should be on the central human capabilities-list).⁶⁰ Gewirth might also agree that autonomy is not just valued by people, but that autonomy is valuable in itself. Yet the cornerstone of his theory, his principle of generic consistency, is applied to the subjective judgement of valuing human agency and autonomy. Gewirth is therefore far more susceptible to Williams’ criticism than Nussbaum and Griffin are.⁶¹

Hopefully by now it is clear what the most common features of naturalistic human rights theory are. It may have come across as a praise-worthy and straightforward species of human rights theory. However, there are – besides the criticism of Raz and Williams – some substantive worries about the approaches of Gewirth, Griffin and Nussbaum. These worries are mostly articulated by political human rights theorists. I will therefore direct my attention to this field, with special attention to the theory of Beitz. As we have seen, the theories of Nussbaum and Griffin in particular have some striking similarities, and Beitz directs his critique on naturalistic human rights theories mostly to them. Considering this, and the difficulties that are already surrounding Gewirth’s human rights theory, I will regard in the subsequent parts of my thesis the approaches of Nussbaum and Griffin as the relevant representors of the naturalistic human rights theories.

3.3 Political theories of human rights

Those who embrace a political conception of human rights are generally less concerned about which human interests or capabilities should be human rights (and why they should be), and more about which role human rights have and should have in the national and international practices. Due to this dependence on political institutions, most political theories do not regard human rights as natural rights, contrary to the naturalistic theories. In other words, the political conception is sceptical about the universal, timeless, independent, inalienable and innate character of human rights.

There are various advocates of a political human rights theory, each taking a slightly different position within the framework.⁶² An interesting point of discussion is if political human rights have a moral grounding. Where Beitz denies this (I will elaborate on Beitz position in the next chapter), Karin Flikschuh (along with Raz) stresses that politics *is* located in the sphere of morality. She argues that

⁶⁰ Jonathan Wolff and Avner de-Shalit, *Disadvantage* (New York: Oxford University Press, 2007).

⁶¹ One could still argue that a right to X does not logically follow from “X is of central value”. As mentioned in Section 2.2, Nussbaum treats this as a ‘freestanding moral idea’. For the sake of my argument, I will do the same.

⁶² Apart from Beitz, prominent examples are Joshua Cohen, “Minimalism about Human Rights,” *Journal of Political Philosophy* 12 (2004): 190–213; Karin Flikschuh, “On the Cogency of Human Rights”; John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999); and Joseph Raz, “Human Rights Without Foundations.”

human rights are determined by the moral relations one has with political authority, and are therefore far from amoral. For her, the most important political relation concerning human rights is the one between citizen and President. This relation is characterised by moral equality: each private person is equal to one another. In a republic, both President and citizen could – in principle – occupy the position of President. Inherent to a republic, they both have to acknowledge that there has to be a (coercive) political authority. Since both parties are morally equal, they will also accept that with political superiority comes political responsibility: “It is because of the political authority which the public office holder exerts over the citizen who is in principle his moral equal that the public office holder owes the citizen human rights obligations.”⁶³ In sum, human rights, although dependent on and sustained by political institutions, derive from the philosophical foundation of moral equality.

Although this potentially could serve as a justification for human rights, she stands aloof from the exact content of human rights. It is unclear which human interests the political authority of the public office holder requires him to secure. Flikschuh notes that this depends on the different functional relations of political authority that each society has. In addition, persons can be morally equal on only some, and not all, political aspects.⁶⁴ For instance, it is possible that persons are morally equal in their freedom of political participation, but not in their freedom of religion (granted that this combination often leads to conflicting situations). We have to admit that these political relations determine the range of human rights in a society. But they do not determine which specific human rights a public office holder should promote and secure. A naturalistic theory of human rights, like the approaches of Gewirth, Griffin or Nussbaum, is better capable of doing this job.

Although Flikschuh does not recognize this, she does argue that her political conception has the advantage – with respect to the “ethical account” of Nussbaum and others – that it appreciates “the distinctiveness of political morality as pertaining to relations of authority and obedience.” In other words, she continues, her political conception of human rights takes – contrary to naturalistic theories of human rights – a morality of states into account.⁶⁵ Leaving the charge against Nussbaum – for now – aside, I doubt if her theory adequately grasps a morality of states. It is at least fairly limited. Flikschuh’s political conception of human rights embraces the underlying principle of moral equality of citizen and President, and this indeed might be a sound justification for human rights in a modern, western democracy. However, considering this principle, it does not take the forms of government into account, like an autocracy or a dictatorship, where moral equality in politics is absent. Flikschuh admits that her fundamentals for human rights are not applicable to political systems where political presumptions are hierarchical (i.e. unequal political relations). Subsequently, this suggests that every state that does not endorse Flikschuh’s principle of moral equality has no moral foundation to ascribe human rights to its citizens. If that is indeed correct, a huge part of the global community cannot claim to have human rights. This conclusion is beyond doubt undesirable and – as many would argue – untrue. In sum, Flikschuh’s moral grounds for political human rights are too narrow to cover nondemocratic states as well.

Flikschuh provides an interesting political conception of human rights, without being able or willing to challenge the naturalistic approach of Nussbaum substantively. Beitz in turn *is* aiming for this.

⁶³ Flikschuh, “On the Cogency of Human Rights,” 21.

⁶⁴ *Ibid.*, 22.

⁶⁵ *Ibid.*, 24.

Before moving to his political theory of human rights, it is – in order to understand him correctly – important to discuss the political theory of his main inspirer first: John Rawls. Rawls is not – like Flikschuh – interested in finding a moral foundation as a means to justify human rights. Instead, Rawls thinks we can justify human rights and understand what they are by determining the role they have in international practice. He speaks of a ‘society of peoples’, consisting of liberal and ‘decent’ peoples. Although these peoples have different political ideals, they both are characterized as having a sound conception of justice which includes an idea of the common good. Through public reasoning, which refers to shared principles and norms, they set up a ‘Law of Peoples’. This law provides a ground for justification for international political action. One of its subjects is human rights. Human rights are therefore a product of public reasoning, and he regards them as a special class of urgent rights in his ‘Law of Peoples’.⁶⁶

As I have mentioned earlier, the list of human rights that Rawls proposes are the rights to life, liberty, property and equal treatment under the law. He argues (in line with Nussbaum) that these rights are a necessity for the decency of a state’s political and social institutions. Contrary to Flikschuh, Rawls believes human rights are universal, binding on all peoples and societies, including what he calls the ‘outlaw states’ (neither liberal nor decent). If these states are securing human rights to their people, nobody is in any way justified to subvert their sovereignty. On the other hand, the violation of any human rights by outlaw states is to be condemned by the ‘society of peoples’, which must be expressed by forceful intervention. Such an intervention can be a diplomatic or economic sanction, but also military action might be optional.⁶⁷ Human rights thus have two roles in international practice: “they restrict the justifying reasons for war and its conduct, and they specify limits to a regime’s internal autonomy.”⁶⁸

Since human rights are determined by public reasoning between various states and peoples, they are not – as Rawls emphasises – based on a “philosophical or moral conception of the nature of the human person,”⁶⁹ something the naturalistic approach of Nussbaum does aim to do. The most important consequence of this view of Rawls for human rights is that their content and nature is not *given* by some basic human features, but depends substantively on the discursive role they play in international practice. I will discuss the merits and weaknesses of human rights as a discursive practice not just yet, since this idea is also one of the cornerstones of Beitz’s approach. Beitz does not seem to side with Rawls when it comes to the practical role of human rights, which is a bit too limited in Rawls’ ‘Law of Peoples’. Beitz rightly notes that it is arbitrary why human rights should only be committed to the two roles that I have mentioned in the previous paragraph. Rawls gives no role to international practices like international monitoring, reporting and censure, which can also be very helpful to promote and secure human rights on a global level.⁷⁰ Moreover, I find it remarkable that Rawls considers only international practices, while leaving national practices aside. For instance, Rawls does not take the role human rights can play in national courts and constitutions into account. Nussbaum has shown that possessing a human right should be more than just having a right on paper; on the basis of a human right, one should be able to demand multiple capabilities. This is a dense project, generally best handled and depicted by national and local practices, such as regional

⁶⁶ Rawls, *The Law of Peoples*, 78–81.

⁶⁷ *Ibid.*, 80–81.

⁶⁸ *Ibid.*, 79.

⁶⁹ *Ibid.*, 81.

⁷⁰ Beitz, *The Idea of Human Rights*, 100–101.

human rights courts. These practices have at least as much significant value as the international practices of intervention. Since Rawls believes the content of human rights is determined by its discursive practice, it is surprising he is just concerned with some narrow international practices of human rights, and not the national or local practices.

4. Beitz's Practical Conception and the Infeasibility Critique

As we have seen, Beitz is not completely on the same page with Rawls. However, his basic ideas of human rights are heavily inspired by Rawls; he even regards his approach as implicit in the Rawlsian view of human rights.⁷¹ Most prominently, they both view human rights as a product of public reasoning between states. Or, to put it in other words; human rights can be characterized as a discursive (international) practice. Because of this, the nature and content of human rights are determined by the relevant processes, and not by any normative foundation. The human rights theories of Beitz and Rawls depart most fundamentally in their methodological character; where Rawls tries to develop a human right account on ideal-theory principles (with its idealized 'society of peoples'), Beitz endorses a non-ideal human rights approach. Beitz admits that if we want a human rights theory for "an idealized global order of liberal and decent peoples," the theory of Rawls (with its limited roles in international practices) will suffice.⁷² Beitz however, wants to implement the vast existing practices into his human rights account. Ideal theory, as Flikschuh notes, is merely interested in forming action-guiding principles of political reform, by means of reflective equilibrium, and ignores the 'inappropriate' status quo.⁷³ This method is undoubtedly embraced in Rawls' 'Law of Peoples', with its aim for a *realistic utopia*.⁷⁴ Beitz, in turn, presents a practice-based method; it takes the functional roles of human rights in international practice as we find them as the source materials for constructing a conception of human rights. This practical view does not make any philosophical claims about the nature or basis of human rights, but it "constrains our conception of a human right from the start."⁷⁵

4.1 Challenges for naturalistic theories

Throughout the remainder of my thesis I will elaborate further on the content of Beitz's theory. I will first consider his critique on the naturalistic theories of human rights of Griffin and Nussbaum to clarify the contrast and open the discussion. He offers four points of critique. I can refute one of these points right away; the others are (in part) concerned with the problem of feasibility. To confront these points I have to examine the view of Nussbaum more extensively, which I will do in the next chapter. The problem of feasibility holds that – as Henning Hahn comprehensively explains – it is "unreasonable to demand something which is, under the given political and economic circumstances, unachievable."⁷⁶

Beitz derives his critique from a common feature of Griffin's and Nussbaum's theory: Both theories do not consider the current role of human rights in global political life, when constructing the nature and content of human rights (something most political theories of human rights – like the one of Beitz – are doing). Considering this feature, Beitz argues that (1) it is misguided to neglect the existing practice of human rights, since human rights should be suitable to function as justification of

⁷¹ Ibid., 96.

⁷² Ibid., 102.

⁷³ Flikschuh, "On the Cogency of Human Rights," 25.

⁷⁴ Rawls, *The Law of Peoples*, 11–23.

⁷⁵ Beitz, *The Idea of Human Rights*, 103.

⁷⁶ Henning Hahn, "Justifying Feasibility Constraints on Human Rights," *Ethical Theory and Moral Practice* 15 (2012): 144.

particular actions and institutions. The existing international practice therefore certainly influences the content and nature of human rights substantively.⁷⁷ Beitz suggests here that if a theory does not regard this as relevant, its conception of human rights is unsound, and its aims and proposals infeasible (for how can you realise your demands if you ignore the current practices?). Second, Beitz thinks that Griffin and Nussbaum cannot cope with the ‘problem of contribution’ (2). Since their theories have a beneficiary-perspective regarding human rights, they tend to deflect from “the more difficult questions.”⁷⁸ For instance: Which actions should which outside agents undertake when a state violates its citizens’ human rights? And on which basis can we assign responsibilities and obligations to act to these outside agents? This is also a feasibility-concern, for how can you secure human rights if you cannot assign the appropriate agents to secure them? Considering challenges (1) and (2), it becomes very much the question why we should regard the suggestions of naturalistic human rights theories as authoritative (3). If Nussbaum and Griffin cannot cope with feasibility constraints, why should we still derive from their proposed normative foundations of human rights their actual content?⁷⁹ Beitz therefore argues that the existing human rights practices have the greater authority with respect to normative human rights theorising: “We must avoid coming to human rights practice with pre-conceived notions about their true nature and must instead take human rights as we find them in current international practice.”⁸⁰ To refute (1), we have to show that, although Nussbaum’s approach is not *primarily* focussed on the existing practices, her capabilities are suitable to function as justification of particular actions and institutions. In other words, that she can cope with feasibility constraints. In order to refute (2), we have to examine Nussbaum’s account of outside agents-agency. And although the rebuttal of (3) is heavily dependent on the ultimate outcome of (1) and (2), we also have to consider if Beitz – on his side – can justify the authority of the existing international human rights practices.

I will put this discussion aside for now. Beitz fourth point of critique is that the normative content of the naturalistic theories of Griffin and Nussbaum is probably too narrow to incorporate the extensive list of protections that exist in international human rights doctrine. This challenge is, contrary to the other challenges, not concerned with the feasibility of a theory of human rights, but of its ability to account for the complete range of human rights. Considering Griffin, Beitz doubts if his human rights theory can live up to these expectations. His ‘agency-foundation’ of human rights might be too narrow to secure all the crucial interests of a human being.⁸¹ Griffin’s reaction to this critique would most likely be to point to his second ground of human rights: practicalities. Practicalities are universal features of the nature of humans and human societies that help to signify the content of human rights.⁸² Together, these two grounds of human rights (i.e., personhood and practicalities) may account for a broader range of human rights than Beitz suggests. It is still unlikely that these grounds will incorporate the complete list of current human rights. However, Griffin is actually not aiming for such a great number of rights. This moves the discussion to the question which human interests need to be promoted and secured (which I have treated – although not conclusively – in Section 2.3).

⁷⁷ Beitz, *The Idea of Human Rights*, 65.

⁷⁸ *Ibid.*, 65–66.

⁷⁹ *Ibid.*, 67.

⁸⁰ Flikschuh, “On the Cogency of Human Rights,” 25.

⁸¹ Beitz, *The Idea of Human Rights*, 66–67.

⁸² Griffin, *On Human Rights*, 37–39.

It seems that Nussbaum would also be able to reply satisfactorily to Beitz's concern. The capabilities approach is constructed to provide a threshold level of capabilities (the list of the ten central capabilities) that should secure all the human interests that are crucial for the dignity of a human life.⁸³ In addition, as mentioned in section 2.3, the capabilities approach has a thick or inclusive conception of human rights; the promotion of a central capability requires the satisfaction of various combined capabilities. This explains why the list of central capabilities is relatively restricted in number, considering that just the *UDHR* alone has as many as thirty articles of human rights (moreover, a lot of these articles include multiple human rights). In sum, the capabilities approach seems to have an even broader foundation than Griffin's theory, which should be able to account for the complete range of human rights found in international doctrine.

4.2 Political feasibility

The fact that Beitz takes "the doctrine and practice of human rights as we find them in international political life as the source materials for construing a conception of human rights"⁸⁴ indicates that feasibility considerations play in Beitz's human right theory a major role. Hahn recognizes that Beitz applies feasibility constraints on two important levels of his theory: on the (first) level of the state, where candidate human rights are constrained by their political *protectability*. In other words, important human interests will only qualify as human rights if it is practically feasible that they can be protected by state institutions. The second level where feasibility constraints are of major concern is the international level. Here human rights are constrained by the extent of how well external political agent can hold governments responsible, and the political *correctability* of violations on behalf of these external political agents; justifiable costs and sufficient political authority are here of crucial concern.⁸⁵

One might ask why Beitz (along with Hahn) have such a high regard for political feasibility in his human rights theory. Holly Lawford-Smith claims that political feasibility is crucial for any political theory; the goal of political theory is to figure out –through deliberation – "what, ultimately, we ought politically to do."⁸⁶ Feasibility constraints function in this political decision-making process as a key consideration, since it determines to what extent a theory takes certain facts about how the world is seriously, and puts limits upon what we realistically can accomplish. According to Lawford-Smith, the three most prominent kinds of feasibility constraints are economic, institutional, and cultural.⁸⁷ Beitz, considering his focus on the practices of international organisms, is highly concerned with the second kind of constraints.

It thus seems most reasonable for Beitz (as for any political theorist) to build feasibility constraints into his theory of human rights from the start. Nussbaum, given that she grounds her political theory on a moral conception of human rights (i.e. central capabilities), chooses to follow a different path. While this path might give her other advantages with respect to Beitz's theory (I will be arguing for

⁸³ Nussbaum, *Women and Human Development: The Capabilities Approach*, 74–75.

⁸⁴ Beitz, *The Idea of Human Rights*, 102.

⁸⁵ Hahn, "Justifying Feasibility Constraints on Human Rights," 153–54.

⁸⁶ Holly Lawford-Smith, "Understanding Political Feasibility," *The Journal of Political Philosophy* 21, no. 3 (2013): 244.

⁸⁷ *Ibid.*, 255.

this in Chapter 6) it seems crucial for the relevance of Nussbaum's political theory to cope with the feasibility constraints. Hahn seems sceptical about this possibility:

What about theories, for instance, which conceive human rights as universal moral claims, grounded in a substantial idea of human dignity? Once more, the answer to this question depends on what we want from a theory of human rights. If we intend to spell out universal moral claims under the banner of human rights, I see no reason to argue against a two-step model which separates justification from application. But if we want a theory of human rights that does justice to both the legal practice of human rights as constituents of international law and the political practice of criticizing illegitimate forms of domination, then we would do better, I think, to build justified feasibility constraints directly into our account of human rights.⁸⁸

In order to refute his – and Beitz's – scepticism, we have to examine if the capabilities approach can do both: satisfy the requirements to serve not only as (normative) justification but also as *application* for human rights. I hope to show in the upcoming chapter that the capabilities approach is able to meet this challenge.

⁸⁸ Hahn, "Justifying Feasibility Constraints on Human Rights," 156.

5. The Capabilities Approach and Feasibility Constraints

In this chapter I will take a closer look to several of the writings of Nussbaum that are concerned with the application of the capabilities approach. With the help of these writings, I am hopeful to answer both Beitz's and other objections satisfactorily, and – consequently – determine that the capabilities can meet the feasibility challenges. I will argue against challenges (1) and (2), show how the capabilities can serve as normative guidelines for human rights practices, and ultimately settle on the feasibility of the central capabilities and its required principles and institutional reforms.

5.1 Ignoring the existing human rights practices

Beitz's main argument of (1) was that the capabilities approach does not incorporate considerations about international human rights practices as we find them. They ought to do that, since this influences the nature and content of human rights. Considering the naturalistic character of the capabilities approach, it is clear that the theory grounds the nature of human rights not on the existing human rights practice. Moreover, Nussbaum derives her list of central capabilities (i.e. the content of human rights) from what is essential for a dignified human life, mainly by asking the question "What am I able to do and to be?" In other words, also the content of human right seems rather grounded on a philosophical foundation than on the existing practices of human rights. So far, Beitz's critique is correct. Yet the fact that the capabilities approach is philosophically grounded does not mean that it entirely neglects the international human right practices altogether.

According to Nussbaum, "The structure of social and political institutions should be chosen, at least in part, with a view to promote at least a threshold of these central capabilities."⁸⁹ This highlights one of the most crucial differences between Beitz and Nussbaum; where Beitz examines which roles *are* assigned to certain institutions in human rights practice, Nussbaum argues which roles *ought* to be assigned to which institutions in human rights practice. At first glance, this may depict Nussbaum as some unrealistic revolutionary, neglecting institutional and economic feasibility constraints. Yet this assertion is definitely too crude. In the project of assigning human rights securement to institutions, she occasionally keeps an eye on the current institutions. A few examples are the world criminal court (she values its current role and argues it should always be included in the 'global public sphere' to deal with grave human rights violations) and global institutions like the World Health Organisation.⁹⁰ Nevertheless it has to be said that in many other cases she makes no reference to contemporary human rights practices whatsoever.

I believe the reason for Nussbaum's 'ought-approach' – and her subsequent disinterest in the current human right practices – is that she does not approve the current set of institutions that are designed to protect human rights at all. She argues it is "oddly assorted" and "the result of a combination of historical factors, rather than of deliberate normative reflections."⁹¹ Considering the apparent refusal or failure of nations and global institutions to secure human rights adequately, it is not surprising her primary attention is not on the 'failing' existing human rights practices. Yet to avert

⁸⁹ Nussbaum, *Women and Human Development: The Capabilities Approach*, 75.

⁹⁰ Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge: The Belknap Press of Harvard University Press, 2006), 319–20.

⁹¹ *Ibid.*, 315.

Beitz's critique completely, Nussbaum has to prove that her alternative human rights theory can still be feasible without relying on the existing human rights practices.

Up till now, we can argue that Beitz is – besides a few exceptions – correct in pointing out Nussbaum's disinterest in the existing human rights practice. Yet it does not necessarily follow from this finding that her theory is infeasible. If we are still able to show that the capabilities approach can cope with feasibility constraints, (1) would not be a difficulty for the capabilities approach but just a given fact about the theory. In order to determine the feasibility of the theory conclusively, I will now consider Beitz's second point of critique.

5.2 The 'problem of contribution'

As I have explained in Section 4.1, remark (2) holds that Nussbaum's theory does not confront the 'problem of contribution', which is concerned with the role of outside agents; which of them should act in the case of failure to secure human rights at the domestic level; how should they act; and on what grounds? If a theory of human rights does not address these issues, it assumingly fails to give an account about how to protect global human interests. Beitz in particular, with his emphasis on international human right practices, regards this as an important indicator for the soundness of a human rights theory.

Considering Nussbaum's findings in (most prominently) *Frontiers of Justice: Disability, Nationality, Species Membership*, I believe Beitz's criticism is – on the whole – misguided. Nussbaum identifies three groups of external agents who ought to act when human rights are violated at the domestic level. First and foremost, the governments of 'richer nations'. According to Nussbaum, the duty to secure the list of central capabilities (i.e. human rights) for citizens of a certain poor nation is in the first place assigned to the relevant nation itself; in the second place, this duty is assigned to the governments of richer nations.⁹² Remarkably, this idea is similar to the two-level model of Beitz, based on the existing international practice of human rights.⁹³ These two ideas part from one another when it comes to *the way* the governments of external richer nations should protect human rights. Beitz sets lower requirements to regard military, political and economic interventions as an effective and justified method than Nussbaum. For him, external agents are allowed to interfere if a state lacks the will to protect all human rights.⁹⁴ In an earlier work, Beitz even suggests that intervention is morally permissible if the interfered state forfeits its autonomy by failing in its duties to secure human rights to their citizens.⁹⁵ Considering the amount of human rights violations around the world, state intervention would then be permissible in many cases.

According to the capabilities approach, military, political and economic interventions can only be used in exceptional situations, e.g. when we can speak of extremely gross human rights violations. Nussbaum refrains from proposing widespread intervention which aims to secure central capabilities, because with this action one frustrates its goal even more; it violates the central capability of political autonomy (part of capability 10: Control over One's environment). This capability entails "the ability

⁹² Nussbaum, "Capabilities, Entitlements, Rights: Supplementation and Critique," 27.

⁹³ Beitz, *The Idea of Human Rights*, 106–17.

⁹⁴ *Ibid.*, 109.

⁹⁵ Charles Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979), 91.

to join with others to give another laws,” which is “part of having the chance to live a fully human life.”⁹⁶ The essential unit through which people can exercise this capability is the nation-state; this unit has the only real chance of being accountable for its people. Other academics in the field of human rights stress the importance of this aspect of the nation-state too; Joshua Cohen argues that collective self-determination is crucial in providing, through the political process, other fundamental interests like protections of personal security, political accountability and economic security. By interfering in the collective self-determination of a society, one puts these interests at risk.⁹⁷ As Nussbaum stresses (derived from Rawls), “the basic structure of a nation influences people’s life chances pervasively from the start.”⁹⁸ For external governments or international bodies like the United Nations it is therefore impossible to possess the same accountability as the indigenous nation-state. In conclusion, through state intervention one deprives a nation-state from its sovereignty, and with that its accountability *for* its citizens, and the political autonomy and collective self-determination *of* the citizens. One might object that there are cases where the leaders of a nation-state are tremendously corrupt and detached from its citizens, that there is no accountability or political autonomy to deprive to begin with. Of course, we do not want to benefit these extreme authoritarian leaders, by allowing them to keep their citizens in complete suppression. In such radical cases, where the nation has lost all its legitimacy,⁹⁹ state intervention can – according to Nussbaum – be allowed.¹⁰⁰ In line with the thoughts of Nussbaum, I would suggest that restoring the legitimacy, sovereignty and accountability (in order to secure and promote citizens’ human rights) of the nation-state should be a top priority when a state is intervened.

Since military interventions and economic or political sanctions are rather exceptional in Nussbaum’s proposed human rights practice, what then is the role of governments of the richer nations in securing global human rights? Nussbaum characterizes this role as “obligations to *assist* the poor.”¹⁰¹ Although this role might be less coercive and disruptive for the governments of the poorer nations than Beitz envisions, it is certainly not less demanding for the governments of the richer nations. Nussbaum suggests that the obligations of the prosperous nations are mostly concerned with economic aid; they have the responsibility to donate a substantial amount of their GDP – Nussbaum has two percent in mind – to the poorer nations. This should serve the purpose of promoting central capabilities (note that this can be interchangeably used for ‘human rights’) up to some reasonable threshold level.¹⁰² Some political-philosophers question if this is an effective way to promote central human interests. These interests are mostly threatened in non-democratic, corrupt nations. Thomas Pogge argues that for governments it can be quite difficult to redistribute their wealth to these nations in a way that the worst-off citizens will profit most. It is more likely that the economic aid will be used by the corrupt governments for deplorable purposes, which might even only strengthen their unjust regime. In some cases it thus may be hard to see how wealth redistribution will effectively secure central capabilities up to a certain threshold level. Hence Pogge argues that it is of tremendous importance to get rid of non-democratic or corrupt governments, by means of economic

⁹⁶ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 257.

⁹⁷ Joshua Cohen, “Is There a Human Right to Democracy?” In *The Egalitarian Conscience: Essays in Honour of G. A. Cohen*, ed. Christine Sypnowich (Oxford/New York: Oxford University Press, 2006), 234.

⁹⁸ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 257.

⁹⁹ To read more about Nussbaum’s notion of state legitimacy: *Ibid.*, chap. 4.4.

¹⁰⁰ *Ibid.*, 258–59.

¹⁰¹ Nussbaum, “Capabilities, Entitlements, Rights: Supplementation and Critique,” 27.

¹⁰² Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 315–17.

and political sanctions and boycotts, the total refusal of any loans by international banks, and giving generous loans to struggling new democratic regimes.¹⁰³ Since the capabilities approach is designed to guarantee a threshold of central capabilities, it should take this worry seriously. Yet I do not favour Pogge's ambitious plan outlined above. It has a highly imperialistic character, with regard to its assumption that our specific Western democratic values should be implemented in every nation across the world, despite the wide variety of distinct cultures and traditions. The use of coercive sanctions and the like underlines this character even more. I must admit that, with its endorsement of the capabilities of political autonomy and participation, the capabilities approach has also incorporated some democratic values. But considering its notion of *multiple realizability* (the list of central capabilities can – to some extent – be differently constructed by different societies),¹⁰⁴ and its carefulness about state intervention, its character is far less imperialistic with respect to Pogge's theory.

Fortunately, Nussbaum seems to be able to avoid the problem noted by Pogge in her own way. She recognizes that the unaccountability of governments can frustrate the intention of promoting human rights through economic aid. More specifically, Nussbaum is – in contrast with Pogge – mostly concerned with the governments that are dealing unfairly with deprived minorities. For instance, governments that want to fund education in India are not advised to give aid to the Indian governments, since they will rather support Hindu-education than education capabilities for all.¹⁰⁵ How then can the aiding two percent of the GDP of prosperous nations be helping the worse-off in nondemocratic, corrupt states? In such cases, it would be more effective to give the economic aid to NGO's and global institutions – the second group of external agents. They can (in most cases) bypass the unjust government and analyse objectively whose capabilities are in deepest distress. Nussbaum names the UN Development Programme, UNICEF, UNESCO and OXFAM as prominent examples that are or could be fulfilling this role.¹⁰⁶ In addition, she notes that global institutions can also be of crucial importance in the structural change of the global economic order by setting up fair global trade regulations, designed to encourage human development, or enforcing global taxation.¹⁰⁷ With the latter she refers to the 'global resources dividend' developed by Pogge, which gains more attention every day. This dividend entails that nations and organisations who make disproportional use of the world's natural resources, should give some of their profit back to the worse-off in the countries who – involuntarily – use little of these resources (this implies a new obligation for external governments).¹⁰⁸ The last group of external agents who have a responsibility to act is the multinational corporations, for it is important to recognize that "part of doing business decently is to devote a substantial amount of one's profits to the promotion of education and good environmental conditions in the regions in which the corporation does business."¹⁰⁹

In sum, external governments, NGO's and global institutions, and multinational corporations are the outside agents that – according to the capabilities approach – have the responsibility to protect

¹⁰³ Thomas Pogge, *World Poverty and Human Rights* (Cambridge/Oxford/Malden: Polity Press, 2002), 152–66.

¹⁰⁴ Nussbaum, *Women and Human Development: The Capabilities Approach*, 77.

¹⁰⁵ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 317.

¹⁰⁶ *Ibid.*, 315–20.

¹⁰⁷ Thomas Pogge, "Eradicating Systemic Poverty: Brief for a Global Resources Dividend," *Journal of Human Development and Capabilities* 2 (2001): 66–69.

¹⁰⁸ Note that the duties of governments and global institutions are very dependent on one another.

¹⁰⁹ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 318.

human rights in the case of failure at the domestic level. The other part of the ‘problem of contribution’ was that it is unclear what the nature and demandingness of the reasons for the actions of the outside agents are; why is it not enough for a prosperous nation to secure the central capabilities of merely its own citizens? The capabilities approach has an answer to this worry as well. Although it holds that nations have the responsibility to secure the central capabilities in the first place to its own citizens, the universality of central capabilities (derived from our respect for human dignity) implies that we also ought to promote these capabilities on a global scale. The firm philosophical foundation of the capabilities approach (i.e., that every central capability exerts a moral claim to be secured and developed; elucidated in Section 2.1) serves as a sound justification for this claim. In addition, considering the numerous violations of central capabilities, the demandingness of action does not need elaboration. External governments can also have more prudential reasons to assist in the development of central capabilities. For instance, education, as Nussbaum argues, can be construed as a provider of “effective political action across national boundaries.”¹¹⁰ It empowers people in various crucial aspects, fosters democracy, stabilizes a country and – ultimately – provides for beneficial political and economic collaborations between nations.

5.3 Capabilities as basis for institutions and constitutions

Since the capabilities approach is able to assign the outside agents that have responsibilities to protect human rights, and can also account for the nature and demandingness of the reasons for the actions of these agents, it seems the capabilities approach is able to refute (2). ‘Solving’ the problem of contribution is surely a step towards establishing the feasibility of the theory, since it makes it more likely that its objectives are in fact achievable. Yet this is not the final step. Frustratingly, Nussbaum intentionally refrains from answering some pressing questions that arise when we implement her principles and capabilities, since these are often –as she states – “not in the province of my inquiry.”¹¹¹ For instance, the specific appropriate role of (external) governments vis-à-vis private actors (e.g. NGO’s) in the promotion and securement of human rights remains unclear. There are two justifications for Nussbaum’s reluctance.

First, in the process of explicating and assigning actions, some decisions cannot be based on mere principles but ask for contextual determination; in order to determine if an external government ought to assist directly by itself or should give its resources to a NGO, it requires a lot of dense data about the situation of the *assisting* actor and the *assisted* state. It would not be fair to ask of any theory of human rights an account in advance for every decision or implementation that might happen in human rights practice. What we *can* ask of a theory of human rights (and this is the second remark) is to offer clear and stringent guidelines on which other disciplines (e.g. politics and economics) can base their practices on in the human rights doctrine. Nussbaum argues that her capabilities approach can offer this function: “It [the capabilities approach] can become the basis for international treaties and other documents that must be adopted by nations and incorporated in that way into national, as well as international, law.”¹¹²

¹¹⁰ Ibid., 322.

¹¹¹ Nussbaum, *Women and Human Development: The Capabilities Approach*, 75.

¹¹² Ibid., 103.

To illustrate this assertion, let us consider how capabilities can offer foundations for the United States Constitution, and how this can be useful in its implementation. It is first important to mention that we can identify key aspects of the capabilities approach throughout the history of the United States Constitution, in its view on what it means to secure fundamental rights for all.¹¹³ However, this view is often threatened by an unsound perception which Nussbaum calls ‘lofty formalism’. Let us turn to the court case *Ledbetter v. Goodyear Tire and Rubber Company* in order to explicate this threat. Lily Ledbetter, a female supervisor at Goodyear, noticed that over time, her salary was declining with respect to the men who were doing the same job. She eventually sued the company for pay discrimination. Although her complaint seemed to be fully justified, the fatal obstacle was that – according to the court – one can prosecute only for pay discrimination made within a 180-day period; much of her evidence comes from outside this period.¹¹⁴ However, since her respective salary-decline was very gradational, there was too little evidence of pay discrimination within a mere 180-day period. This case clearly exemplifies what Nussbaum means with ‘lofty formalism’: while there are non-discrimination rights written in both the United States Constitution and the *UDHR*, women are still unable to sue for pay discrimination. Here I am not suggesting that the current human rights practices or other human rights approaches favour lofty formalism. I am rather pointing out how the capabilities approach can offer useful guidelines for constitutions: it can, due to its inclusive and direct character, remind judges and legislators what it truly means to secure fundamental entitlements for all, and – more specifically – would argue for more focus on the actual capabilities of Ledbetter. Therefore, a language of capabilities seems better able to avoid cases of lofty formalism (such as the Ledbetter-case) than a more rigid language of rights. Other court cases also suggest that the capabilities approach could add useful principles to national and international human rights practices (for instance, *Opuz v. Turkey*¹¹⁵).

5.4 The feasibility of institutional reform

Considering the relatively minor changes in daily law-practice, a more capabilities-centred protection against pay discrimination would not have major problems with feasibility constraints. But Nussbaum has more ambitious plans: with her proposals for highly demanding global trade regulations, global taxation (like the global recourses dividend) and a two percent GDP-donation by the more prosperous nations, institutional reform is required. It is highly likely these plans have difficulties dealing with economic and institutional feasibility constraints. According to economist Paul Segal, a resource dividend – and particularly the global resources dividend of Pogge – faces major administrative and political challenges (most importantly, the challenge of persuading countries to give up their ownership rights of natural resources; rights that are rooted in

¹¹³ Martha Nussbaum, “Capabilities and Constitutional Law: ‘Perception’ against Lofty Formalism,” *Journal of Human Development and Capabilities* 10, no. 3 (2009): 348.

¹¹⁴ *Ledbetter v. Goodyear Tire and Rubber Company*, 550 U.S. 618, 127 S. Ct. 2162 (2007).

¹¹⁵ Here Turkish authorities dropped proceedings against the dangerous husband, afraid of inferring a ‘family matter’. Eventually, he shot and killed his wife who was at that instance helping their child flee their home: European Courts of Human Rights (ECtHR), *Opuz v. Turkey*, June 9 2009, Application No: 33401/02). The capabilities approach gives us a benchmark in thinking about which rights are really secured for someone, both in the public and private sphere.

international human rights treaties).¹¹⁶ Some see such challenges as catastrophic for a human rights theory. For Hahn for instance, practical infeasibilities (deficits in the industrial, technological, or institutional development which makes certain claims impossible or unlikely at a certain stage) constrain what we can count as human rights.¹¹⁷ Since the proposals of the capabilities approach are not possible in this institutional order, it may be wrong to regard the central capabilities as legitimate human rights.

Nussbaum realizes that her human rights theory requires – eventually – a different institutional order than we currently have. Where Beitz adjusts the content of human rights with respect to the current institutions that play a role in human rights practice, Nussbaum – on the contrary – aims to adjust the relevant *institutions* with respect to the content of human rights (this is related to Nussbaum’s ‘ought-approach’ that I formulated in Section 5.1). This has consequences for both national and international human rights practice. With respect to the latter, we should “work out international treaties protecting the human rights that we believe we can justify and then work to get the nations of the world to adopt and implement them.”¹¹⁸ Domestic institutions – in turn – should be flexible and open to rethinking, in order to adopt and implement the practices that will promote and secure central capabilities most effectively.¹¹⁹

Can Nussbaum’s proposed central capabilities and *principles for the global structure*¹²⁰ cope with feasibility constraints? First off, she stresses that her capabilities should be set in neither a utopian nor unrealistic way, nor one that “would require a whole transformation of the world in order to permit realization.”¹²¹ Yet she does not confront the question to what extent these institutional reforms are susceptible to the feasibility-critique of Hahn and Beitz. Nevertheless, we may still come to a satisfying answer if we use an account of feasibility derived from Lawford-Smith’s concept of *scalar feasibility*. Lawford-Smith argues that what matters for scalar feasibility concerns is “the extent to which the action in her option set is likely to produce the relevant outcome. The more likely the outcome given the action, the more feasible the imperative issued by the theory; the less likely, the less feasible.”¹²² Now what do human rights practices consider as the desired outcome (i.e., the objective) of their work? As Beitz states, these practices “seek to protect important human interests” (although Nussbaum would presumably replace ‘interests’ with ‘capabilities’).¹²³ For the sake of this objective, we should not examine to what extent the ultimate ambitions of a human rights theory are feasible; we should rather examine if the theory, with its particular proposals, does a good job in producing the main objective of human rights practices: protecting important human interests.

This concept of feasibility thus stresses the close relation between feasibility and the eventual outcome of an action. If a person has to choose between action *a*, of which its success is very feasible, or action *b*, which has a lot more difficulty with confronting feasibility constraints, the person should not choose *a* on the grounds of its feasibility, without first comparing the quality of

¹¹⁶ Paul Segal, “Resource Rents, Redistribution, and Halving Global Poverty: The Resource Dividend” (Oxford Institute for Energy Studies, 2009), 7–8.

¹¹⁷ Hahn, “Justifying Feasibility Constraints on Human Rights,” 147–48.

¹¹⁸ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 260–61.

¹¹⁹ *Ibid.*, 323.

¹²⁰ *Ibid.*, chap. 5.9, e.g. a resources dividend.

¹²¹ Nussbaum, “Capabilities, Entitlements, Rights: Supplementation and Critique,” 27.

¹²² Lawford-Smith, “Understanding Political Feasibility,” 255.

¹²³ Beitz, *The Idea of Human Rights*, 11.

the end result of both options. If *b* can only be brought about with lots of effort and resources, but will be highly rewarding in the long run, we can be justified (maybe even obliged) to choose this action over the more feasible one. Regarding the capabilities approach; let us consider the proposal of all individuals having the central capability of bodily health. Beitz and Hahn might argue that it is not feasible to provide health care for the entire human population, and would therefore reject this project. It is indeed true that this proposal of Nussbaum is *at this moment* infeasible. However, in the long run it might still contribute more to the feasibility of the objective of human rights practices – protecting important human interests – than the current human rights doctrine is doing. In addition, Hahn might be correct in insisting that Beitz’s theory is better able to cope with feasibility constraints, since these restrict the content of human rights from the start of his theory.¹²⁴ But, as Lawford-Smith stresses, we should identify the economic, institutional and cultural constraints as *soft* feasibility constraints; limits on which we can work around.¹²⁵ Of course some claims are also *strictly infeasible*: where some claims are impossible or unlikely *at a certain stage* (due to soft feasibility constraints), strict infeasibility means “that something is impossible *at any given time*.”¹²⁶ For instance: stating that the right to education requires that everyone is capable of having free one-on-one education is practically unachievable at any given time, since it is impossible to provide the teachers and resources to meet this demand. Yet stating that the right to education requires that everyone is capable of having free public education *is* practically achievable at some point in the future, although there are several soft feasibility constraints frustrating this ambition now.

This account of feasibility can give us a new, hopeful answer to the infeasibility-challenge set up against the capabilities approach. We may admit that the capabilities approach does not rely or put its focus on the existing, international human rights practices; and yes, its answer to the ‘problem of contribution’ is highly demanding, and will have to work around several – *soft* – economic and institutional feasibility constraints. But what about the prospected end result? At this moment, despite (or thanks to) the global institutions and governments that ought to secure human rights, urgent human interests are violated in both the poor and (most of the) prosperous nations. Adopting and implementing the alternative human rights doctrine (i.e., the list of central capabilities, together with its requirements and principles) would ask a lot of our effort and resources. But if we are willing, it can be reasonable expected that due to the inclusive, normative, culturally-informed character of the capabilities approach (explicated throughout this thesis), the most essential human interests for every individual are – in the long run – far better protected than now is the case.

This argument is in line with Sen’s thoughts. He argues against the view that certain human rights should not be endorsed or promoted just because they are under present circumstances not fully realizable (like the central capability of bodily health under the existing global institutional order¹²⁷); “Rather, that understanding [that some rights are not fully realized] suggests the need to work towards changing the prevailing circumstances to make the unrealized rights realizable, and ultimately, realized.”¹²⁸ Here Sen seems to underline my suggestion that the current infeasibility of central capabilities or institutional principles is no definitive reason to reject them, as long as we can

¹²⁴ Hahn, “Justifying Feasibility Constraints on Human Rights,” 153–55.

¹²⁵ Lawford-Smith, “Understanding Political Feasibility,” 255–56.

¹²⁶ Hahn, “Justifying Feasibility Constraints on Human Rights,” 148.

¹²⁷ At this moment, we are unable to give everyone the opportunity of being in good health, adequately nourished and having adequate shelter.

¹²⁸ Amartya Sen, “Elements of a Theory of Human Rights,” *Philosophy & Public Affairs* 32, no. 4 (2004): 348.

expand their feasibility by working around or diminishing the relevant feasibility constraints. As Lawford-Smith emphasises: “We shouldn’t confuse easy and hard with feasible and infeasible.”¹²⁹ In any political action, you *should* consider the soft feasibility constraints; just as you should consider if it is principally achievable; and just as you should consider which action would be likely to produce in the long run the highest quality of the objective.

If, according to my line of thought, we have to accept that some human rights (derived from the capabilities approach) will not be realised at this moment, but still should favour the proposals of the capabilities approach considering the eventual end-result, ‘human rights inflation’ arises as a possible threat for both theory and practice. If it is permissible that some human rights cannot be guaranteed to human beings, what is left of the essential value of human rights? It might lead to a more reluctant attitude in the fight to secure human rights for all, if human rights do not exert an urgent claim anymore. In order to reduce this threat of human rights inflation, it is therefore imperative to stick close to the philosophical foundations of the capabilities approach in the process of determining the specific content of human rights. In other words, when we formulate or alter the exact list of central capabilities – with all its corresponding, supporting combined capabilities – it is crucial to examine if each capability is truly essential for a human life with dignity. If it is, we can at least acknowledge that it is in fact impermissible when the capability is not secured for human beings, even if it is not feasible to secure it to all human beings at this moment. Hopefully, the difficulties in securing essential capabilities of humans will make us realise even more that institutional reform is highly urgent. The threat of human rights inflation is by the way not only relevant for the capabilities approach; it is also for the contemporary human rights doctrine a pressing issue. In the past decades, there are – on top of the *UDHR* – 64 human rights conventions formulated by either the Council of Europe or United Nations, and an extra 50 human rights by the European Union Charter of Human Rights. In these conventions, some doubtful human rights have been added, including for instance the human right to affordable internet access.¹³⁰ It is highly arbitrary if this represents an essential interest for human beings and thereby contributes to the inherent value of human rights.

5.5 The capabilities approach as application for human rights

In the run-up to this chapter, I posed the challenge – derived from Beitz’s and Hahn’s arguments – if the capabilities approach can not only satisfy the requirements to serve as (normative) justification, but also as application for human rights. This challenge entailed the crucial question if the capabilities approach was a feasible alternative for the current human rights doctrine. Up till now, I have tried to argue for this, mainly by addressing two of the three feasibility concerns that Beitz has with respect to the capabilities approach.

In sum, I can state that Nussbaum is able to tackle the ‘problem of contribution’, by identifying three types of outside agents who have a duty to act in the case of a domestic failure of securing human rights: external governments, NGO’s and global institutions, and multinational corporations. These agents all have specific duties, in most cases to assist the poor nations in order to promote central

¹²⁹ Lawford-Smith, “Understanding Political Feasibility,” 258.

¹³⁰ Marianne Franklin, Robert Bodle, and Dixie Hawtin, “The Charter of Human Rights and Principles for the Internet,” 2014, 7.

capabilities globally. These proposals generally require international institutional reform. In addition, the moral value of central capabilities affirms the demandingness of the duty to act.

I have made two feasibility-concerned remarks against Nussbaum's view. First, Nussbaum does not seem to indicate how the exact implementation of her central capabilities and the corresponding principles will proceed. She would rather leave this job to other disciplines. I have justified this decision by noting that a lot of cases require delicate contextual determination (and cannot be predetermined by theoretical principles) and that the capabilities approach can provide an excellent guideline on which the other disciplines and institutions can base their specific human rights practices on. The second remark holds that Nussbaum barely makes a reference to the existing human rights practices in her human rights theory, which would make it infeasible. Yet I have argued that since the current human right practices fail to secure human interests adequately, her disinterest in these existing practices is reasonable. Of course she needs to cope with various economic and institutional feasibility constraints. But these are only soft constraints, which can – in time – be diminished or worked around. Since the notion of political feasibility is, certainly in the case of human rights theories, closely connected with the eventual outcome (i.e., the protection of important human interests), and the more demanding capabilities approach provides excellent principles to make this outcome more feasible, this theory should not be rejected merely on the grounds of feasibility constraints.

6. Beitz's Lack of a Normative Foundation

In the previous chapter I have not addressed Beitz's third point of critique, which questions the authority of normatively-grounded human rights theories like the capabilities approach. For Beitz, a human rights theory does not need to have an account of the moral justification of human rights, but rather of its role in international human rights practices (the practice-based method). The facts that Nussbaum –contrary to Beitz's belief – provides an account of the role of human rights in international practices, and that the central capabilities are (at least in the binary sense¹³¹) feasible, slightly weakens Beitz's critique. But it still remains the question how much this affects the human rights theory of Beitz. In his project, he incorporated feasibility considerations from the start, giving high authority to the current human rights practices; the ones who are in fact protecting human rights. We might wonder why we should, for the sake of human rights, give this authority away to some philosophical concerns. In order to explain this, I will examine if Beitz is right in treating the existing human right practices as authoritative, to what extent Beitz's practical conception provides an effective way to promote and secure human interests, and if the absence of a normative foundation is problematic or not.

6.1 The authority of current human rights practices

At first glance, Beitz seems correct in assuming that we have good reason to give the existing human practices an authoritative status. It is only natural to look at an object's (i.e., human rights) current role in public practices, in order to understand and conceptualize it. Secondly, as Beitz points out, "we have *prima facie* reason to regard the practice of human rights as valuable."¹³² A 'human right' is a powerful term. Many actions are done, and many regulations established, in the name of human rights. Even Nussbaum does not deny this. She recognizes the important role the language of rights plays in public discourse, mainly due to the rhetorical force it has established.¹³³ After all, "I am entitled to this fundamental human right" will to most people come across as pronouncing a more demanding claim than "I am entitled to this central capability."

A significant difference between the capabilities approach and the existing human rights practices is that where the latter has shown it had some (modest) successes in the securement of human rights, the capabilities approach is a relatively new, untested political theory. This might be regarded as a challenging holdback of implementing aspects of the capabilities approach into the existing practices of human rights. Although Nussbaum has delivered with her theory important contributions to the United Nations Development Programme by providing the basic principles for the Human Development Index; a composite statistic which is used to measure the quality of human lives by indexing a couple of their central capabilities (e.g., life expectancy and education).¹³⁴ Moreover, some proposals of Nussbaum are already being pursued on a limited scale. Sweden, for instance, devotes a – relatively – very high percentage of their GDP to foreign aid (although this still does not

¹³¹ Meaning that it is not principally infeasible.

¹³² Beitz, *The Idea of Human Rights*, 11.

¹³³ Nussbaum, *Women and Human Development: The Capabilities Approach*, 100–101.

¹³⁴ "Human Development Index (HDI)", <http://hdr.undp.org/en/content/human-development-index-hdi>, accessed 27 December 2016.

meet Nussbaum's two percent-demand).¹³⁵ Yet these practices give no significant indication about to what extent the institutional reforms that are required for the securement of the central capabilities are feasible. Therefore, the capabilities approach is for now required to bear a certain burden of proof: we cannot be certain if it protects human interests better than the current human rights doctrine does. We can only *state* that the proposed human rights of the capabilities approach are principally achievable, and *reasonably estimate* that we can work around or diminish the feasibility constraints.

However, this uncertainty is no real reason to assign authority to Beitz's theory of human rights, grounded on the existing international human rights practices, rather than to the capabilities approach. In history, many crucial events were accompanied by a variable degree of uncertainty (e.g., the overthrow of the apartheid regime in South Africa or the abolition of slavery) but in the end generally understood as a big step in the 'right' direction. Regarding current social practices, it would be unsound to grant them an authoritative status *without* any normative justification as well. According to Mark Navin, this would evoke a status quo bias. He illustrates this with another social practice: the traditional family. Like the human rights practices, the traditional family promotes and provides important human interests, such as trust and affiliation. If we take a Beitzian (practical) approach, we must treat the valuable, established practice of the traditional family as authoritative. Moreover, criticism or proposals for alterations are allowed, but at the same time restricted to the structure and aim of the social practice. As a result, more substantial critique from feminist or egalitarian accounts cannot be considered, since these contradict the basic structure of the social practice that is the traditional family. Essential moral ideas (e.g. moral autonomy) that are absent in this practice are then excluded from the inquiry of the practice.¹³⁶ It thus seems that the idea of treating the existing practice as authoritative, solely based on its existence and value, is misconceived. The current human rights doctrine can always be *more* valuable. The demanding, inclusive, moral ideas of the capabilities approach can contribute to this, and should not be rejected due to a status quo bias.

Although Beitz is mistaken in assuming the current human right practices to be authoritative, this would not be problematic if his practical conception of human rights, derived from these practices, was an effective way to secure and promote human rights. In that case, he is still justified to reject the philosophical concerns of the capabilities approach, and in lacking a normative foundation for his practice-based method. In the next section, I will examine if this is the case.

6.2 'Pro tanto' reasons

For Beitz, human rights are primarily an international concern. If a state fails to secure its citizens' human rights – due to a lack of resources or will – external state and non-state agents have reasons to (a) hold the relevant state accountable for its failure to secure human rights; (b) assist the state in securing these capabilities if it lacks the resources to do so; and (c) interfere in the state (with political, economic or military intervention) in order to protect human rights, if the state lacks a will

¹³⁵ "Countries That Give The Most In Foreign Aid Statistics," <http://www.statisticbrain.com/countries-that-give-the-most-in-foreign-aid-statistics/>, accessed 28 December 2016.

¹³⁶ Mark Navin, "The Authority of Human Rights Practice," *Jurisprudence* 2, no. 1 (2011): 245–46.

to do so. These reasons for action that outside agents have are classified by Beitz as *pro tanto* reasons; although these are genuine reasons for action, they do not necessarily override other reasons. If a state fails to secure a particular set of human rights, an outside agent is not *required* to act (i.e., has no conclusory reasons to assist or interfere), but *pro tanto* reasons; reasons to act unless other reasons *not* to act are considered as more pressing.¹³⁷

On the face of it, this does not seem a wrong suggestion. For instance, when state (*x*) is not protecting a human right adequately, an external state (*y*) may reasonably decide *not* to assist or interfere if it thinks this problem will be resolved internally within a given time, or if (*y*) already has pressing human rights-challenges in its own territory, which require all its resources. However, Beitz is not able to identify which human rights violations present us with very strong *pro tanto* reasons to interfere.¹³⁸ Due to this reluctance, there are two possible dangers for human rights practices. First, his model might make state-interference by external agents rather a routine than an exception. In Section 5.2, I have argued that interference is damaging to a society's collective self-determination, and therefore only permissible in extreme circumstances. Admittedly, element (*c*) of Beitz's model holds that interference is only permissible if the state has a lack of will to secure particular human rights. However, this is in many states the case, and not without sensible reasons. Since the adoption of the *UDHR*, the number of states has more than doubled. The societies living in these new states have their own particular interests and values, which are – in part – not taken into consideration when formulating the *UDHR*.¹³⁹ These fledgling states may choose to promote some human rights far less than others. The capabilities approach, with its normative framework, is able to determine when state institutions are unwilling to promote human rights that are *essential* for a decent human life, and therefore when outside agents have a stringent reason to interfere or assist (Nussbaum would probably – in almost all cases – favour the latter). On the contrary, Beitz gives us no indication which human rights violations make it permissible or impermissible to interfere, which suggests that external agents can – according to Beitz's model – easily justify having strong *pro tanto* reasons to interfere in a great number of states. As James Nickel points out, a low threshold for the permissibility of state-intervention evokes interventions that have more dubious motivations than merely human rights-protection.¹⁴⁰

The other possible danger with Beitz's model is also derived from his idea of *pro tanto* reasons. John Tasioulas notes that, if (almost) any human rights violation can only generate *pro tanto* reasons to act, it is hard to see how we can give an external state ever any binding duty to assist or interfere in a human rights-crisis.¹⁴¹ Admittedly, Beitz dares to formulate a "consideration of strong beneficence":

¹³⁷ Beitz, *The Idea of Human Rights*, 109–17.

¹³⁸ Except for genocide and torture, which he regards as almost conclusive reasons to act: *Ibid.*, 117.

¹³⁹ Two remarks are here to be made. First, other important human rights documents such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (both 1966) were developed well after the *UDHR*. Second, although these new states were not involved in the formulation of the *UDHR*, almost all of them still signed this human rights treaty in a later stage. However, this does not give us conclusive reasons to suggest that these states all agreed on all of the content of the *UDHR*, since they may also have signed it partly because of the political or economic repercussions if they would have done otherwise.

¹⁴⁰ A still much debated intervention of this kind is the United States' intervention in Iraq: Nickel, "Human Rights," 5.6.

¹⁴¹ John Tasioulas, "Are Human Rights Essentially Triggers for Intervention?" *Philosophy Compass* 4, no. 6 (2009): 948.

agents are responsible to act if the threatened interest is urgent, “in the sense that the realization of the threat would be devastating to the life of anyone exposed to it.” However, he must add to this that this duty is only legitimate if the costs of actions for these agents are slight or moderate, since he grounds the duty merely on a principle of beneficence.¹⁴² Unfortunately, given the status quo, the costs might be higher than moderate – in some cases – to protect urgent interests on a global scale. If such financial factors can have for Beitz enough weight to defeat a *pro tanto* reason for interfering in or assisting a state which fails to protect important human rights, it begs the question how his notion of *pro tanto* reasons can provide us with a sound justification or guideline on how or why this protection should go about.

Beitz bases his project on the belief that – as he argues – one can give an account of the purposes and modes of action of international human rights, without referring to the content or normative foundation of human rights.¹⁴³ As it turns out, this belief is misconceived; if one cannot indicate which human rights give reasons to interfere, it is unfounded and in some cases even dangerous for international peace to propose *pro tanto* reasons for interference. In addition, if one does not provide a normative foundation for human rights, it is hard to assign duties to outside agents for protecting these rights. These difficulties of Beitz’s practical conception expose that he is in need of a normative foundation for human rights after all, in order to guide us to an effective way of protecting human rights.

Here I am not suggesting that the capabilities approach – contrary to Beitz’s practical conception – provides an exact guideline of the best way to protect human rights in international practice; this is infeasible for any theory of human rights. However, since Nussbaum offers a normative foundation for her theory, she is far better able to regulate which human rights should be adopted by different societies. Moreover, where Beitz seems unable to identify which duties should be distributed in the case of which human rights violations, Nussbaum can justify how particular human rights exert duties to be promoted and protected on both national and international level. Although these principles of the capabilities approach set far higher demands for the protection of human rights, and has consequently more difficulty coping with soft feasibility constraints than Beitz’s practice-based method, I have shown (primarily in Section 5.4) this is no strong reason to reject the capabilities approach, if it is – in the long run – better able to protect important human interests. Considering Beitz’s lack of a normative foundation, and therefore his inability to provide clear justifications for international (non-)intervention and assistance, it is safe to conclude that this is the case.

¹⁴² Beitz, *The Idea of Human Rights*, 166–67.

¹⁴³ *Ibid.*, 103–4.

7. Conclusion

In the introduction of my thesis, I posed as my main question if Beitz is justified in claiming that his human rights theory is preferable to the capabilities approach on account of feasibility concerns. I can now conclude that he is not. Through examining the relation between capabilities and human rights, I have shown that capabilities have a more normative, inclusive, and culturally-informed character than our current human rights. In addition, I have contrasted naturalistic and political theories of human rights, and elucidated how political feasibility can be regarded as a problematic issue for the former. However, Nussbaum's theory seems to be able to cope with feasibility constraints adequately. Although she does not constrain her conception of human rights by the current human rights practices, she *can* meet Beitz's 'problem of contribution'-challenge by; identifying outside governments, global institutions and NGO's, and multinational corporations as the external agents who have duties to act in case of domestic human rights violations; and suggesting what these actions should entail. To secure Nussbaum's demanding central capabilities adequately, progressive plans like a global resource dividend or fair global trade regulations – and therefore institutional reform – are required. It takes time and effort to develop and implement these plans, which means that it is indeed not feasible to secure all central capabilities for everyone *at this moment*. However, I have suggested to interpret the concept of feasibility differently – derived from Lawford-Smith's notion of *scalar feasibility* – and consider that for a human rights theory it is primarily important that it makes the objective of a human rights theory (i.e., protecting important human interests) more feasible. Bearing the merits of capabilities and the progressive proposals of Nussbaum in mind, it then seems Nussbaum meets the feasibility challenges for human rights theories, by making their objective (certainly in the long run) more feasible. Therefore, I believe there is no reason to reject the capabilities approach based on feasibility concerns. Moreover, Beitz – who builds feasibility considerations in his theory from the start – seems to put feasibility constraints too central in his practice-based theory. He incorrectly grants the existing human rights practices an almost untouchable authoritative status, and therefore assumes he does not need a normative foundation for his theory. This assumption is misconceived; his account does not provide an effective way to secure human rights, and lacks a normative foundation to rectify these apparent shortcomings.

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