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Introduction: The Capability Approach and Human Rights

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Introduction: The Capability Approach and Human Rights

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Our overall motivation in exploring the relationship between the capability approach and human rights is to enhance our understanding of both as theoretical paradigms, and as public policy frameworks. The capability approach and human rights share a common motivation—their direct focus on the dignity and freedom of the individual. As an approach to public policy, the capability approach highlights the critical importance of the substantive freedoms and opportunities of individuals and groups, whilst the human rights approach highlights the importance of values such as freedom, dignity and respect, equality and non-discrimination, participation and autonomy, and the arrangements that are needed to protect and promote these. The notions of accountability and obligation are central to the human rights-based approach. The importance of both negative obligations (to ‘respect’ human rights) and positive obligations (to ‘protect’ and ‘fulfil’ human rights) is increasingly recognized in human rights law and practice at the international, regional and domestic levels. Both frameworks provide a sharp contrast with dominant economic policy approaches that emphasize the expansion of Gross Domestic Product as their principal goals.

This Introduction provides an overview of the central themes that run through the collection. We begin by examining the advantages of a capability-based understanding of human rights. We then discuss the interactions between human rights and capabilities, and how the capability approach provides an applied framework for evaluating the human rights position of individuals and groups. The synergies and correspondences between the capability approach and an expanding body of international human rights law and practice are next explored. One of the key themes of the current collection is then addressed. Internationally, there is increased recognition of the need to integrate human rights standards and principles into applied frameworks for public policy. We review how the existing body of literature that links the

capability approach to international human rights law and practice is contributing to these efforts and is helping to move policy agendas in this area forward. Finally, we provide an overview of the contributions included in the collection, discuss some key unresolved issues and set key themes that, we contend, are priorities for future research.

The contributions we have selected for this collection build on and develop these themes, either by taking forward conceptual understanding of the relationship between the capability approach and human rights, by addressing the relationship between economics and human rights, or by considering the question of how human rights standards and principles can be integrated into applied frameworks for public policy. In bringing them together, we hope to highlight areas of complementarity and demonstrate how the capability approach and human rights can be applied as mutually reinforcing frameworks across traditional disciplinary divides.

The capability approach and ethical debates about human rights

The capability approach can be of help in addressing some of the important controversial and unresolved issues in ethical debates about human rights. The concept of capability provides an important entry-point for defending the validity of a broad class of human rights concerns, covering, for example, economic and social rights, such as the human right to an adequate standard of living, including adequate food and shelter, and the human right to health; as well civil and political rights, such as freedom from arbitrary interference, freedom from torture and cruel and inhuman treatment, and the right to a fair trial. The critical role of the idea of human dignity in ethical thinking about human rights, and the importance of viewing human rights as having legitimacy and validity within the ethical domain (rather than as simply being the 'products' of legal and institutional arrangements) are also important themes. The emergence of a capability-based understanding of human rights also helps to provide stronger foundations for the notion of positive obligation. We highlight in this collection how these ideas correspond to recent developments in international human rights law and practice, which is now marked by greater attention to economic and social rights, to the challenge of poverty, and to positive duties to protect and promote all human rights (civil, political, economic, social and cultural).

The links between the capability approach and human rights are discussed in Sen (2000, 2004b, 2005, 2009). Sen suggests that both 'process-freedoms' and 'opportunity-freedoms' that meet a threshold of 'importance' can be characterized as human rights; and that many (although not *all*) human rights can be captured and characterized in the language of capabilities (Sen, 2004, pp. 330-337; 2005, pp. 152-157; 2009, pp. 367-372). This central argument provides a radical departure from the negative liberty framework and, Sen contends, for defending the 'plausibility' of economic and social rights such as

the 'freedom to be guaranteed some basic medical attention for a serious health problem' (2004b, pp. 328–329; 2009, pp. 367 and 379–385). The notion of *obligation* also plays a critical role in Sen's analysis. Logically speaking, the classic definition of a right of person A is in terms of the reciprocal or correlative duty (or duties) on the part of a duty holder (or duty holders). This logical relationship is reflected in Sen's conceptual framework, with those freedoms that are 'sufficiently important' to be regarded as human rights being linked to a class of counterparty obligations (2004b, pp. 338–342; 2009, pp. 367 and 372–376).¹

Sen departs from libertarian models of Nozick and Hayek by arguing that the obligations that correspond to rights can take the form of positive obligations to defend and support human rights (as well as negative obligations of omission and non-interference). The rejection of the negative liberty paradigm is further underlined by the argument that rights should be viewed in a 'consequence-sensitive' way; that rights should be linked to obligations through a system of 'consequence-sensitive' links; that rights can be viewed as 'goals'; and that rights should be included in the description of 'outcomes' and reflected in social evaluation (Sen, 1984, pp. 311–312; 1985a; 1985b; 2000, pp. 492–494 and 499–501; 2002, pp. 408–456). Sen also makes an important departure from the treatment of positive obligation in the Kantian-liberal tradition. O'Neill (1986, 1996) has argued that 'imperfect obligations' (such as the general ethical obligations to relieve poverty, hunger and famines) lack the 'specificity' that is necessary to establish counterparty human rights. Sen challenges this view and highlights how the concepts of 'imperfect obligation' and human rights can be meaningfully linked. This argument is of central importance in taking forward the characterization of economic and social rights as having moral (i.e. pre-legislative and pre-legislative) standing (Sen, 2000, pp. 494–499; 2004b; 2005; 2009, pp. 355–387).

The links between capabilities, human rights and the notion of obligation are also a central and recurring theme in Nussbaum's work (for example, Nussbaum, 1995; 1997; 2000, pp. 96–101; 2003; 2004; 2006; this collection). In an early discussion of these links, Nussbaum (1995, p. 88) suggests 'thinking of the basic capabilities of human beings as needs for functioning' that are associated with claims to assistance by others. This approach, she suggests, gives rise to notions of correlated duties and provides a basis for many contemporary notions of human rights (Nussbaum, 1995, p. 88). In later work, Nussbaum examines the implications of this thinking for both political and legal arrangements, with capabilities viewed as 'fundamental entitlements' that should be included among the fundamental purposes of social co-operation as objects of collective obligation at both the national and the international levels (Nussbaum, 2004, p. 13). The ways in which capabilities can be protected and promoted through constitutional arrangements, legal enforcement and judicial interpretation is another important theme (for example, Nussbaum, 2003, pp. 36–40; 2009). Nussbaum's list of central human capabilities, developed and refined in a series of contributions, also has close connections with the human rights approach (for example, Nussbaum, 1997, pp. 7–9; 2003, pp. 40–50).

The relationship between capabilities and human rights is examined in more detail in Nussbaum (1997). The idea of capabilities can help to clarify the nature and scope of the idea of human rights, by providing an understanding of what it means to *secure* human rights, as well as a framework for elucidating economic and social rights, and for thinking about the *grounds* of human rights. Nussbaum agrees with Sen's critique of the Nozickian model of individual rights and defends the need for an 'outcome-orientated' approach. At the same time, she suggests that, with a correctly specified list (covering, for example, social and economic rights as well as civil and political rights), it is possible to maintain a characterization of rights as 'side-constraints' (Nussbaum, 1997, pp. 11–15). Capabilities and human rights are then, for Nussbaum, 'close relatives'. A focus on capabilities clarifies that the goal is not merely 'negative liberty' or the absence of state interference, but 'the full ability of people to be and to choose these very important things' (Nussbaum, 2004, p. 13).

The contemporary human rights movement puts central emphasis on the idea of human dignity; and Nussbaum's work also helps to clarify how the idea of human dignity (and what this requires) can provide 'grounds' for a theory of human rights. An emphasis on dignity and capabilities can, Nussbaum contends, avoid important limitations that characterize traditional theories based on 'rationality' and 'reasoning' (e.g. by potentially excluding individuals with poor mental health from the ambit of human rights protection) (1997, pp. 1–2 and 11; this collection). Nussbaum's more recent work on justice highlights the ways in which the idea of human dignity can constitute the focus of an 'overlapping consensus'—providing another important link with the human rights approach. Many of these themes are further developed in Nussbaum's contribution to this collection (discussed below), which clarifies and supplements her earlier work in this area.

The interactions between capabilities and human rights

As well as helping in thinking about the ethical underpinnings of human rights, the capability approach has 'value added' as a practical framework in which the substantive human rights position of individuals and groups can be evaluated and better understood. When applied as an analytical model, the capability framework captures the freedoms and opportunities that are within a 'person's reach' (a person's 'capability set') as well as the underlying variables that explain this set (entitlements, contextual variables, conversion factors, etc.). It is important to recognize that the system of rights—including the system of human rights protections—is one such underlying variable.²

Sen's broader research agenda in economics and development is relevant here. The role of public action in overall processes of capability protection and expansion is a central theme in this broader work. Critically, Sen has helped to build up a body of empirical evidence that establishes that the protection of human rights is a key public policy variable that can have a critical

influence on the capabilities of individuals and groups. Evidence of the *instrumental* role that human rights protections can play in protecting and promoting capabilities is most famously established by Sen in the context of famine prevention. More generally, empirical evidence highlighted by Sen and Drèze establishes that human rights protections can be instrumental in promoting both efficiency and equity in a range of situations and contexts—by providing critical incentives to governments, by ensuring that information is disseminated, by facilitating public scrutiny and debate and the ‘correction’ of systemic ‘errors’, and in helping to precipitate an effective public policy response. Examples cited range from analysis of patterns of development in China, to protection from the ‘downside’ risks of recession and financial crisis, to campaigns to improve take up of girl’s education in India (Sen, 1999a, pp. 147–188; 1999b; Drèze and Sen, 1989, 2002). The instrumental role that human rights, including economic and social rights, can play in strengthening public accountability by increasing ‘voice’ and providing an additional source of ‘counter-veiling power’ is another important theme. The ‘Right to Information Movement’ and the ‘Right to Food’ campaign in India provide examples (Drèze and Sen, 2002; Drèze, 2004, p. 1726).

Capability analysis also supplements traditional human rights analysis by providing an applied framework in which a range of factors that influence the realization of human rights in practice can be more fully investigated and better understood. Consider the human right of person X, who is disabled, to freedom of movement. Evaluating the realization of this human right in the capability framework entails examining not only whether X has ‘immunity from interference’, but also whether she has the substantive freedom and opportunity to move from A to B (cf. Sen, 1984, pp. 313–314). Similarly, in the capability framework, evaluation of the realization of the human right to access to justice requires examining whether, in practice, an individual can afford legal fees and/or find a lawyer who is willing to take a case to Court (Gaertner, 2009), and evaluation of the realization of the human right to education requires examining the factors associated with reduced rates of school attendance or increased rates of school drop-out (e.g. amongst girls in some contexts). These investigations, in turn, require systematic examination of variations in interpersonal needs and of a broad range of other factors that can influence the substantive position of individuals and groups, including ‘adaptive ‘expectations and ‘choice inhibition’, cultural practices and norms’, and ‘complex interactions’ (such as other people’s behaviour and choices) (Sen, 2000, pp. 492–494 and 499–501; 2002, pp. 408–456; Nussbaum, 1995; 2000, pp. 34–106 and 135–147).

In the literature on the capability approach, recognition of the importance of *legal codification* of individual rights is often most closely associated with Nussbaum—who has put central emphasis on the instrumental role of positive law and the ways in which capabilities can be safeguarded and supported through constitutions, jurisprudence and legal action (for example, Nussbaum, 2009). In contrast, Sen is sometimes thought of as putting more emphasis on *moral* rights than on *legal* rights—and a number of Sen’s

contributions do indeed highlight the particular role and importance of human rights ‘beyond the legislative route’ (for example, Sen, 2009, pp. 364–366). Yet the ways in which the ethical idea of human rights can provide a foundation for legal initiatives and codification are also important themes (for example, Sen, 2009, pp. 363–364). Legal codification also comes into Sen and Drèze’s discussions of the instrumental role of human rights in processes of capability expansion. However, these discussions also suggest a range of other mechanisms through which human rights can have an impact—including processes of ethical recognition and political campaigning, integration into public policy, and broader processes of social transformation that affect expectations, behaviour and choices. Many of the contributions in this collection take this analysis forward, pointing to the need not only for legal protection but also to integrate human rights standards and principles into broader public action strategies.

The capability approach and international human rights law and practice

An important objective of this collection is to highlight the correspondences between the capability approach and a substantive, positive understanding of human rights that is increasingly reflected in the international human rights framework and in an expanding body of regional and domestic human rights case law. Fredman (2006a, 2006b, 2008) suggests that the articulation and development of the principle of positive obligation in international, regional and domestic human rights law and jurisprudence amounts to a ‘transformation’ of the concept of human rights—away from a paradigm based on non-interference and non-intervention, to a substantive understanding of human rights based on the notions of human flourishing and positive duty. She has called for a radical revision of the way human rights are viewed in the light of this ‘transformation’. This evolution of international human rights law and practice has not arisen in a vacuum. This evolution of international human rights law and practice has not arisen in a vacuum. Civil society campaigns (including, for example, campaigns for women’s rights), have arguably been instrumental to this ‘transformation’, by contesting pre-existing views, and by treating international human rights law and practice as an arena for contestation and struggle (Elson, 2006a).

We are not arguing that the positive, substantive view of human rights is uncontested. However, in highlighting the synergies between the capability approach and evolving international human rights law and practice, we hope to illustrate how the capability approach and human rights can be complementary and mutually reinforcing. The correspondences between a capability based understanding of human rights and international human rights law and practice include: recognition of a broad class of human rights (covering economic and social rights and women’s rights); recognition of positive obligations to defend and support human rights (as well as negative

obligations of non-violation); and emphasis on international obligations of *result* as well international obligations of *conduct* and the *de facto* (as well as the *de jure*) human rights position of individuals and groups.

Human rights are codified in the Universal Declaration on Human Rights and in legally binding international treaties.³ These recognize the human rights of all individuals (as 'rights holders') and corresponding obligations on states to uphold these human rights (as 'duty bearers'). The human rights recognized in these documents cover different areas of human living, and include civil and political rights such as access to justice, free speech, association, and economic and social rights such as an adequate standard of living, education, health, and so on. Some human rights, such as the right to non-discrimination and equality, can be described as 'free-standing' procedural rights in the sense that they are intended to be read in conjunction with other human rights, providing for, for example, free speech, and an adequate standard of living, on the basis of non-discrimination. Coverage of a broad class of human rights is established in numerous declarations, legally binding treaties such as the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child, as well as being reflected in processes of international standard-setting. The understanding of what it will take to realize the Convention on the Elimination of All Forms of Discrimination Against Women has been expanded through, for example, Convention on the Elimination of All Forms of Discrimination against Women Committee General Recommendations, Concluding Comments on periodic reports and General Assembly Declarations, to include concerns such as, wartime rape, female genital mutilation, mother-to-child transmission of HIV-AIDS, and domestic violence.

Key international human rights treaties also explicitly recognize positive obligations to defend and support human rights (as well as negative obligations of non-violation). The UN Human Rights Committee interprets Article 6 of the International Convention on Civil and Rights (the right to life) as implying not only the obligation to refrain from the intentional and unlawful taking of life, but also the obligation to take appropriate steps to safeguard the lives of those within their jurisdiction (including, for example, by taking steps to reduce infant mortality). The International Covenant on Economic, Social and Cultural Rights requires states to achieve the progressive realization of the rights set out in the Covenant to the 'maximum of available resources' (Article 2.1). The normative framework developed by the UN Committee on Economic, Social and Cultural Rights distinguishes three types of international human rights obligation: the obligation *to respect* human rights by refraining from depriving a person of his/her rights; the obligation *to protect human rights* by taking measures to prevent others from depriving people of their rights; and the obligation *to fulfil* human rights by actively putting in place social arrangements including social, economic and governance policies and organizations that ensure enjoyment of rights. Key interpretative standards and principles for evaluating the fulfilment of international human rights obligations (such as the principle of the 'minimum core' and the

principle of 'non-retrogression') are set out in authoritative international standards such as the General Comments of UN Human Rights Treaty Monitoring Committees, the work of Special Rapporteurs and other authoritative documents such as the *Limburg* and *Maastricht Principles*.⁴

The need to go beyond legal monitoring by evaluating the *de jure* and the *de facto* position of individuals and groups is central to the normative framework developed by the UN Committee on Economic, Social and Cultural Rights. This emphasis in turn reflects a paradigm shift in legal thinking that puts weight on the evaluation of the *results achieved* as well as the evaluation of the *conduct* of states in the evaluation of international obligations. The need to evaluate state conduct in the context of outcomes (or results) constitutes an important extension in the evidential base for evaluating human rights and makes analytical space for the use of socio-economic indicators, as well as legal and policy measures, as an informational base for examining the compliance of states with their international human rights obligations.⁵ This thinking is reflected in the growing emphasis on the use of socio-economic indicators as a key element of international human rights monitoring. A number of recent initiatives (such as the OHCHR Human Rights Indicators Framework; United Nations, 2006, 2008) build on this approach and highlight the need to combine analysis of legal measures and policies with the use of socio-economic indicators. In this collection, Fukuda-Parr takes this thinking forward, and discusses a new index for monitoring the fulfilment of the international obligations of states in the area of economic and social rights.

The emergence of a positive, substantive understanding of human rights is not only reflected at the international level, but is also increasingly embedded and reflected in expanding body of case law and jurisprudence at the regional and country levels.⁶ In India, the Supreme Court has interpreted the right to life under Article 21 of the Constitution, read in conjunction with directive principles of state policy, as giving rise to positive obligations on the state to protect and promote basic needs such as life-saving medical treatment,⁷ the means of livelihood⁸ and the prevention of malnutrition and starvation deaths during periods of drought and famine.⁹ In South Africa, landmark cases clarifying the nature and scope of positive human rights obligations have included cases relating to housing¹⁰ and health.¹¹ In Argentina, the Courts ruled that the government had a positive duty to manufacture a vaccine to prevent deaths from a virulent life-threatening disease,¹² whilst the Inter-American Court has ruled that states are required to take positive measures to protect the human right to life of street children living in poverty.¹³ In the developed country context, the European Court of Human Rights has reasoned that the objective of the European Convention on Human Rights is to 'secure' rights that are 'practical and effective', and that this can require that states to undertake positive actions to ensure, for example, access to justice,¹⁴ 'effective respect for private or family life',¹⁵ and 'genuine' and 'effective' freedom of 'peaceful assembly'.¹⁶ The British Courts have interpreted the right to life interpreted as requiring positive measures

to protect the lives of individuals in custody in prisons and mentally ill people detained in hospitals (including protection from suicide).¹⁷ The scope of this positive, substantive understanding of human rights is increasingly being extended to cover positive duties on the part of the state to protect individuals from violations by third parties—including by private companies and within the so-called private/domestic realm. For example, the African Commission of Human and People's Rights has reasoned that states are under a positive duty to protect individuals from violations attributable to private oil companies.¹⁸ In a recent landmark ruling, the European Court held that the human rights to life and freedom from torture, together with non-discrimination, require positive measures to protect women from domestic violence.¹⁹

This development of human rights principles and standards has potentially far-reaching applications. Salomon (2007) discusses the implications of the development of international human rights law for establishing global responsibility in relation to poverty. Pogge (2008, pp. 222–256) highlights the relevance of arrangements in the pharmaceutical industry for essential medicines. The right-to-health framework developed by the UN Committee on Economic, Social and Cultural Rights, and the analysis set out in the reports of the Special Rapporteur on the Human Right to Health, suggest that medical care and access to medicines are vital features of the right to health, and that the right to health requires not only that existing medicines are accessible but also that much-needed new medicines and their formulations are developed and become available to those who need them. The responsibilities of pharmaceutical companies, including innovator, generic and biotechnology companies, with regard to the right to health in relation to access to medicines are examined in this context (Hunt, 2009, pp. 4–10). In this collection, Balakrishnan *et al.* discuss the obligation of the US government to regulate banks and other private sector financial institutions protect the right to housing, particularly of ethnic minorities and women in the context of the financial crisis in the USA.

Applying human rights standards and principles in public policy

A key objective in this collection is to explore how it is possible to integrate internationally recognized human rights standards and principles into applied policy frameworks for development, poverty alleviation and other areas of public policy. In 2000, the *Human Development Report* focused attention on the 'common motivation and basic compatibility' of human development and human rights, highlighting the ways in which the human rights perspective can supplement thinking about human development, including by consensus-building around common goals and by 'bringing in' the notions of obligations and accountability. The Report also identified the need for new approaches that aim to integrate international human rights

standards and principles into applied policy frameworks for development, poverty alleviation and in other areas of public policy. It raised the need for a new research agenda focusing on the development of new robust methodologies for evaluating both the human rights position of individuals and groups, and the compliance of states with their international human rights obligations, including though the use of socio-economic indicators (United Nations Development Programme, 2000).²⁰ Following on from the 2000 *Human Development Report*, there have a number of efforts to integrate internationally recognized human rights standards and principles into frameworks for development and into anti-poverty strategies. The relationship between the capability approach, human rights and poverty is further considered in Osmani (2005).

The right to development

In his capacity as the UN Independent Expert on the Right to Development, Sengupta set out proposals for moving beyond the 'human development paradigm' to a 'human rights-based development paradigm' by linking the idea of 'capability expansion' to the international human rights framework. Sengupta's model of the Right to Development characterizes the ultimate objectives of development in terms of the expansion of substantive freedoms (rather than other informational focuses such as utility or growth), but went beyond the 'human development paradigm' by using internationally recognized human rights standards to apportion duties to multiple duty-holders including national governments, other governments, international organizations, and so forth. This model is based on a complex system of 'interdependent and indivisible' international obligations comprising: the 'primary obligations' of national governments to adopt appropriately formulated development programmes that secure the progressive realization of human rights; and the 'contingent obligations' of other actors (including other states and international organizations) to support this process by eliminating 'obstacles' and cooperating in trade, debt, finance, technology transfer and development assistance. Sengupta's proposals for 'Development Compacts' build on this thinking. These address the need for international cooperation in multiparty situations where the complete achievement of internationally recognized human rights cannot be guaranteed by individual duty-holders acting alone and where international cooperation is required (Sengupta, 2002).²¹

Integrating human rights standards and principles into poverty alleviation plans

The Office of the High Commissioner of Human Rights has spearheaded efforts to mainstream and integrate human rights standards and principles into the 'Poverty Reduction Strategy Papers' that accompany agreements between national states and international development organizations (including the World Bank). OHCHR (2004) provides a conceptual framework for

this endeavour that brings together the capability approach and human rights. This work was extended in Fukuda-Parr (2007, 2008) in relation to poverty reduction strategies in Liberia, Nepal and Haiti. Fukuda-Parr suggests that human rights perspectives contribute to the normative and analytical dimensions of poverty reduction strategies by bringing in the normative framework of international human rights law and by introducing new analyses of causes (e.g. failure to protect civil and political rights). The instrumental role of human rights protections in poverty reduction strategies is also important, with the human rights protections (including both legal codification and broader public policy measures) being viewed as a key variable that influences the poverty outcomes of individuals and groups.

Economic analysis and economic policy from the human rights perspective

The past decade has seen the growth of analysis of government budgets from a human rights perspective with contributions from non-governmental organizations (for example, Fundar, International Budget Project, International Human Rights Internship Program, 2004); academics (for example, Elson, 2006b; QUB Budget Analysis Project, 2010) and UN agencies (for example, Food and Agricultural Organization, 2009). Most of this analysis has concentrated on public expenditure and the realization of specific economic and social rights, such as food and housing. Elson (2006b) has a wider scope, including revenue as well as expenditure, and the issue of fiscal policy at the macroeconomic level, including budget deficits/surpluses. Balakrishnan and Elson (2008) extend the analysis, discussing how established international human rights standards and principles can be applied as a basis for evaluating not only fiscal policy but also monetary policy and trade policy. The standards and principles on which they draw include 'progressive realization', 'maximum of available resources', non-retrogression, minimum essential levels/minimum core obligations, non-discrimination and equality, and accountability, participation and transparency. They argue that indicators of both the conduct of states and of the results (or outcomes) achieved for the realization of specific rights need to be used. This framework has been applied to the USA and Mexico (Balakrishnan and Elson, 2011)

Contributions to this collection

The essays in this collection take forward and build on this analysis of the relationship between the capability approach and human rights. Nussbaum and Drydyk are both concerned with the ethical underpinnings of capabilities and human rights. Reddy focuses on the conceptual gulf between mainstream economics and human rights. Two contributions focus on human rights monitoring: Fukuda-Parr discusses how the empirical methodologies used in the literature on the capability approach can be further developed and

applied in the context of human rights monitoring; while Burchardt and Vizard show how the capability approach is being 'operationalized' for the purposes of equality and human rights monitoring in Britain. Two further essays address how internationally recognized human rights standards and principles are being integrated into public policy (Cecchini and Notti) and the role of legal codification in securing the right to information (Anand). The final paper explores financial policy in the USA through a human rights lens (Balakrishnan *et al.*).

Nussbaum develops many of the themes that she raised in her earlier essays and articulates a more complete elaboration of the relationship between human rights and capabilities, particularly the way capabilities contributes to human rights theory. She considers capabilities to be one species of a human rights approach. Capabilities are fundamental entitlements just as rights are. But capabilities provide a theory of the basis of rights claims, a major question in human rights theory that has divided philosophers. Capabilities also help clarify the nature of obligations; that they require positive action, and action by the state. She stresses the importance of state action, especially the enforcement of domestic law, disagreeing with Sen who takes a more nuanced position where legal enforcement may not be the most appropriate mechanism for securing rights and expanding capabilities (Nussbaum, this collection). Nussbaum also challenges Sen's position on the question of whether process-freedoms, as well as opportunity-freedoms, can be captured in the language of capabilities.

The paper also addresses what 'the language of rights' adds to the 'language of capabilities'. First, rights as a word speaks directly to urgent and non-negotiable entitlements grounded in the idea of justice in the way that the word 'capabilities' does not. She explains:

the idea that capabilities are not just optional needs to be hammered home in any way we can, since people are all too inclined to think that we may deny people this or that important thing in order to pursue aggregate wealth. (Nussbaum, this collection)

Dominant objectives of economic policy continue to be guided by economic growth as the objective and by Gross Domestic Product per capita as a measure of quality of life. Second, human rights treaties have listed central human entitlements based on international consensus. These documents mobilize political action both nationally and internationally.

Drydyk draws on the capability approach to address one of the key unresolved debates in the theory of human rights, namely universality in the context of a culturally diverse world. He points out that human rights require pluralistic justification in order to be legitimate in diverse cultures. He argues that the capabilities approach can contribute to this in two ways, by abstracting from goods to valuable functionings and capabilities and by focusing on equal human dignity. But, in doing so, he also proposes an approach, 'responsible pluralism', that would support diverse moral discourses. This reflects a

commitment to pluralism that recognizes there are moral reasonings that you may not agree with but nonetheless arrive at reasonable normative political judgements. This must be combined with a second commitment to pluralism that is responsible; that requires screening out conclusions that lead to avoidably unequal harm or neglect. In order to achieve political consensus in which beliefs and culture would not be relegated to the background but in which:

as a group, we begin with a plurality of reasons, possibly none of which is accepted by everyone; then, each adopting the constraints of good judgement, we see how far we can work from these diverse premises towards agreement on conclusions. We have here the means of resolving the pluralistic dilemma. What is needed, for justifying human rights publicly and effectively, is to introduce and insist upon responsible pluralism. (Drydyk, this collection)

Reddy addresses the reasons for the gulf between mainstream economics and human rights approaches. He argues that there is a deep-seated incompatibility between the consequentialist reasoning of mainstream economic analysis that is primarily concerned with outcomes, and human rights that is focused on procedures as well as consequences. Another tension arises from 'monism' in economic analysis that depends on analysis of aggregates, and the insistence in human rights on the importance of each individual and each right, leading to a 'hostility' to aggregation and prioritization. The paper sheds light on the constraints that must be addressed if there is to be a more productive dialogue between economic analysis and human rights advocacy.

Two papers, one by Fukuda-Parr and the other by Vizard and Burchardt, discuss measurement tools for monitoring development from capabilities and human rights perspectives. While both papers depart from the common goals of human rights and capabilities approaches in public policy, Fukuda-Parr focuses on measurement tools that bring out the distinct features of human rights while Vizard and Burchardt combine human rights norms and standards with capabilities to derive a measurement framework for equality and human rights in Britain.

Fukuda-Parr argues that as normative frameworks for social evaluation, human rights and capabilities approaches would define goals based on overlapping priorities. They are both distinct from the utilitarian framework yet they are not identical and each has value addition to contribute in social assessments. But international human rights norms and standards focus directly on the accountability of the duty bearers, primarily the state, in complying with its defined legal obligations, and on core cross-cutting principles of equality and non-discrimination, and participation. These require measurement tools that are not part of conventional measurement tools that are used in human development evaluation. The paper shows different assessment frameworks and indicators are being developed to monitor human rights. She argues that the methodology of human development analysis can

be useful in human rights as well. The use of comparative frameworks using composite indices using statistical data can provide a more rigorous and objective assessment of state performance in fulfilling its obligations for the progressive realization of economic and social rights.

Vizard and Burchardt examine a new capability-based measurement framework that has been developed as a basis for equality and human rights monitoring in twenty-first-century Britain. They explore the conceptual foundations of the framework and demonstrate its practical application for the purposes of monitoring equality (in terms of the distribution of substantive freedoms and opportunities among individuals and groups) and human rights (in terms of the achievement of substantive freedoms and opportunities below a minimum threshold) in England, Scotland and Wales. The essay challenges the sceptical position by suggesting that 'operationalizing' the capability approach is both 'feasible' and 'workable'. A new two-stage procedure for deriving a capability list is proposed. This combines human rights and deliberative consultation and strikes a balance, the authors contend, between internationally recognized human rights standards and principles on the one hand, and direct deliberation/participation on the other, in the development and agreement of capability lists.

Cecchini and Notti demonstrate how the monitoring of Millennium Development Goals (MDGs) can be—and are being—adapted to incorporate human rights obligations (although they prefer to use the term 'approaches'). They argue that this can be instrumental to the pursuit of human rights objectives but also the implementation of MDGs. From the human rights perspective, MDGs are criticized for their neglect of equality, participation, accountability and other core dimensions of the human rights approach to development. Cecchini and Notti examine four specific approaches to addressing these gaps in MDG monitoring. First, human rights standards and norms such as affordability, accessibility and quality of public services such as health services can be used in adapting MDGs to national priorities. Second, the human rights insistence on disaggregating data can monitor whether the MDGs are being realized equitably and for the most vulnerable. Third, the principle of participation can be used to develop a process that is broad-based and involves a wide range of actors in the monitoring process. Finally, human rights standards can be used to link MDG implementation policy to national law, and to processes of accountability.

Examining the MDG monitoring processes and reports of the 22 countries of Latin America and Caribbean, Cecchini and Notti show all but five of them adapting goals, targets and indicators to national conditions, all but six of the countries making reference to human rights instruments, while one-half of the countries use data disaggregated by ethnicity. These adaptations are also central to the capability approach to development. As a development model, the capability and human development approach also emphasize national ownership, equity, and participation.

Anand explores the instrumentality of law in securing the right to information, and its effective impact on empowering citizens to demand

accountability of authorities in the context of local governance. Right to information legislation has been characterized as a 'grass-roots' empowerment approach, juxtaposed against decentralization characterized as a 'state-led' approach. He examines the recent experience of India, Uganda, Indonesia and Nicaragua that have recently passed right to information acts. He finds while the impact of these laws vary considerably from one country to another, a common theme is that legislation by itself is not adequate. He shows the mechanisms by which the combination of institutional reforms and right to information legislation that can empower citizens and strengthen local governance. He argues that this 'rights-based' approach, centred around the right to information law, is juxtaposed against another approach that uses state-led mechanisms such as public expenditure tracking, but the two are not mutually exclusive and are complementary.

Balakrishnan, Elson and Heinz analyse financial regulation and its consequences for capabilities and human rights, focusing on housing in the context of the financial crisis in the USA. The paper highlights two neglected areas in the literature on capabilities as well as on human rights; the role of finance and financial regulation, in shaping both capabilities, and the realization of human rights. They point to ways in which changes in the regulation of the financial sector in the USA led to the development of the 'sub-prime' mortgage market, which provided home loans in ways that did not accord equal treatment to women and ethnic minorities; and, in addition, paved the way for the 2008 financial crisis, which resulted in many thousands suffering severe capability deprivation. They argue that framing the discussion of appropriate policy response in terms of human rights adds an urgency that the language of capabilities lacks; and discuss the way that human rights has been used to advocate for action to reform the regulation of finance, with a particular focus on housing. Their approach is consistent with argument put forward by Nussbaum, on the way in which human rights can assist in the protection and expansion of capabilities.

Unresolved issues and future research agenda

As explained at the beginning of this Introduction, our motivation is to further the understanding of the relationship between human rights and capabilities. We aim to strengthen approaches to public policy and development that pursue ends that are common to the two approaches. We think that there are a number of questions that need further research.

For instance, a growing body of literature in philosophy is beginning to treat the question of the foundations of human rights more seriously (for example, Griffin, 2008; Beitz, 2009) and the question of how this literature relates to the approaches discussed by Sen and Nussbaum, as raised by Tasioulas (2010), is an important one. Sen's treatment of 'imperfect obligation' raises important questions about the nature and scope of positive obligation that require further attention and research. Pogge (2008) has

developed a framework for thinking about poverty as a human rights issue—apparently *without* recourse to the notion of positive obligation. Again, further research is required to examine how this proposal relates to the capability approach.

Van Hees (2010) has raised the need for further clarification of the nature and scope of duties that correspond to human rights and capabilities. The formal analysis of the types of duties that correspond to rights can be traced back to Hohfeld, who emphasized the distinctions between types of rights (liberties, powers, immunities and claims, etc.) in terms of different types of duties. Although some progress has been made in applying these categories in the context of ‘capability-rights’ (for example, Vizard, 2006, chapter 12), there is a need, Van Hees contends, for discussions about capabilities and rights to give greater attention to these distinctions.

Other important questions about the conceptual relationship between capabilities and human rights also remain unresolved. The question of whether all (or a subset) of capabilities should be viewed as human rights, and whether ‘process freedoms’ (as well as ‘opportunity freedoms’) can be captured in the language of capabilities, are particularly pressing. Vizard (2007) and Burchardt and Vizard (this collection) propose that human rights, a list that is a product of international consultation and social contestation, provides a basis for deriving a ‘minimum core’ list of capabilities. More research and debate is needed to explore this proposal and its implications, and the interconnections between lists of capabilities, and lists of human rights.

Further empirical research is required on the interactions between capabilities and human rights, and the ways in which human rights protections can be important in processes of capability expansion. Legal codification is one such mechanism and can have an impact both through legal action and judicial interpretation and through consensus-building on goals. Other mechanisms include popular mobilization and contestation and integrating human rights standards into broader public policy and regulatory frameworks. Empirical research is required to examine these mechanisms and to establish the conditions under which different types of human rights-based interventions are likely to be successful.

The need for further clarification of key international standards, such as ‘progressive realization’, ‘the maximum of available resources’ and the concept of the ‘minimum core’, are well recognized in the human rights literature. In the past, difficulties of in interpreting these obligations have in the past led some human rights activists to refrain from for advocating economic and social rights,²² and some scholars engaged in developing human rights monitoring methods to steer away from developing international quantitative standards for economic and social rights.²³ As Fukuda-Parr (this collection) argues, the human development and capabilities literature is a rich resource that can be drawn upon in future research in clarifying these international obligations and in evaluating the extent to which they are being fulfilled.

Further research is also required to take forward the analysis and identification of duty holders in the context of internationally recognized human rights. As discussed above, new and emerging research agendas highlight the development of international legal responsibility (including collective responsibility) in areas such as global poverty and health, identifying duty holders and apportioning obligations at the national and international levels. Cross-disciplinary research is required to address the need for enforcement and to identify the types of national and international public policy interventions that are necessary to protect, promote and fulfil human rights.

The integration of internationally recognized human rights standards and principles into public policy frameworks is a particularly pressing area where further research is required. The new and emerging body of literature in this area has been highlighted in this Introduction and is further discussed within this collection. The human rights approach can also help to take forward the multidimensional definition and measurement of poverty in a number of respects. As well as providing a framework for establishing accountability, internationally recognized human rights standards and principles can provide a guide to the 'dimensions' that are to count for the purposes of multidimensional poverty analysis, and assist in the development of thresholds and cut-offs.

Finally, further work is needed on the relation between human rights and economics. Among the important issues to consider in future work are new ways of defining the 'ends' of growth and development, new ways of thinking about 'efficiency', and new ways of understanding the relationship between property rights and human rights.

The perceived conflicts and trade-offs between human rights, efficiency and growth are often emphasized, and in some cases the dilemmas and tensions are both pressing and real, as discussed, in the context of the implementation of child labour standards in India, by Basu (2010). Nevertheless, taking forward a dialogue between human rights and economics will be a key research challenge in the coming years. As Fukuda-Parr (2008) notes, whilst human rights has come to frame the advocacy of many non-governmental organizations, few economists conduct their analytical work paying attention to human rights.

Vizard (2005; 2006, pp. 97-139; 2010) suggests that the capability approach already provides the basis of an interdisciplinary dialogue between human rights, development and economics in three key ways. First, the focus on substantive freedoms and opportunities provides an alternative specification of the 'ends' of economics and development and provides a basis for new theoretical paradigms and empirical work that focuses on these concerns. Second, Sen's empirical work in explicitly challenges the proposition that there is an inevitable *conflict* between development and human rights, especially civil and political rights—drawing on empirical evidence from a range of contexts and regions including India, China and Asia (for example, Sen, 1999a, pp. 147-188; 1999b; Drèze and Sen, 1989, 2002; Drèze, 2004, p. 1727). Third, as discussed above, Sen's work provides an empirical

evidence base on the *instrumental* role that human rights can play in protection and expansion of capabilities. More research is required to take these lines of inquiry forward.

There may also be scope for interdisciplinary dialogue between human rights and more traditional welfare economics. Vizard (2010) suggests that that rights-based interventions, including human rights protections, are relevant not only to the theory of public goods but also to a whole range of market failure situations discussed in welfare economics (including monopoly power, asymmetric information and principal-agent problems). Further research is required to analyse the impact of human rights protections in terms of their possible efficiency and equity effects, building on new lines of inquiry within welfare economics.

Balakrishnan *et al.* (2009) have argued for the value of a more sustained dialogue between progressive economists, who are committed to goals such as human development, and human rights advocates, suggesting that together they can work to identify which economic policies are likely to be compatible with the realization of human rights, including the progressive realization of economic and social rights. Again, more research is required to take this line of inquiry forward. Elson (2010) calls for more dialogue between macroeconomists, human rights and capability researchers, with especial attention to recognizing the value of non-conformist macroeconomic thinking in addressing the realization of the right to work in the context of economic recession.

We hope that economists and other social scientists in the human development and capabilities community will respond positively to Nussbaum's challenge:

the capabilities theorist or practitioner should not be skeptical of the language of rights, but should employ it in close connection to the language of capabilities, thus making clear what analysis of rights is being offered ... The human rights tradition is a heroic struggle for basic justice. It would be foolhardy to turn away from that tradition (Nussbaum, this collection)

Notes

- 1 Sen's treatment of human rights reflects the ideas set out in the Dewey Lectures, which highlighted the ways in which '[m]inimal demands of well-being (in the form of basic functionings, e.g. not to be hungry), and of well-being freedom (in the form of minimal capabilities, e.g. having the means of avoiding hunger)' can be viewed as rights that 'command attention and call for support' (1985a, 217). Other earlier contributions included the concept of metarights (1985b).
- 2 See Sen (1985c) for the distinction between entitlements, capabilities, conversion factors, and contextual variables. For a fuller elucidation of Sen's notion of entitlement, see Sen (1981).
- 3 In particular: Universal Declaration of Human Rights (10 December 1948), U.N.G.A. Res. 217 A (III) (1948); International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966) 993 U.N.T.S. 3, *entered into force* 3 January 1976; International

- Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966) 660 U.N.T.S. 195, 5 I.L.M. 352 (1966), *entered into force* 4 January 1969; International Covenant on Civil and Political Rights (New York, 16 December 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, *entered into force* 23 March 1976 [the provisions of article 41 (Human Rights Committee) entered into force 28 March 1979]; Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979) 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980), *entered into force* 3 September 1981; Convention on the Rights of the Child (New York, 20 November 1989) 1577 U.N.T.S. 3, 28 I.L.M. 1448 (1989), *entered into force* 2 September 1990.
- 4 The General Comments of the UN Committee on Economic, Social and Cultural Rights are available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm>.
- 5 See General Comments 12, 13, 14 and 15 of the UN Committee on Economic, Social and Cultural Rights.
- 6 The examination of case law in this paragraph draws on the analyses in Vizard (2006, pp. 140–194) and Fredman (2006a, 2006b, 2008).
- 7 *Paschim Banga Khet Mazdoor Samity and others v State of West Bengal and another*, AIR 1996 Case summary available at http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=401236, accessed 24 October 2010.
- 8 *Olga Tellis and Ors v Bombay Municipality Corporation and Ors. Etc.*, July 10, 1985. Case summary available at http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=401006, accessed 24 October 2010.
- 9 Supreme Court of India, 2001, unreported, 2 May 2003; order of the Supreme Court as summarized in Centre on Housing Rights and Evictions (2003, p. 24).
- 10 *Government of the Republic of South Africa, the Premier of the Province of the Western Cape, Cape Metropolitan Council, Oostenberg Municipality v Grootboom and others*, decided on 4 October 2000, Case CCT 1100 Constitutional Court of South Africa.
- 11 *Minister of Health and others v Treatment Action Campaign and others*, decided on 5 July 2002, Case CCT 8/02.
- 12 *Viceconte, Mariela Cecilia v. Argentinian Ministry of Health and Social Welfare*, Poder Judicial de la Nación, Causa no 31.777/96, 2 June 1998. Case summary available at http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=419811, accessed 24 October 2010.
- 13 Inter-American Court Of Human Rights, Villagran Morales *Et Al*. Case Judgment Of November 19, 1999. Case summary available at http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=417163, accessed 24 October 2010.
- 14 *Airey v Ireland* 6289/73 ECHR 1979, [<http://echr.coe.int/echr/en/hudoc>], accessed 24 October 2010.
- 15 *Marckx v Belgium* 6833/74 ECHR 1979, [<http://echr.coe.int/echr/en/hudoc>], accessed 24 October 2010.
- 16 *Plattform ‘Ärzte für das Leben’ v Austria* 10126/82 ECHR 1988, [<http://echr.coe.int/echr/en/hudoc>], accessed 24 October 2010.
- 17 *Savage v South Essex Partnership NHS Foundation Trust*, House of Lords 2008–09 UKHL 74, [<http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd081210/savage-1.htm>], accessed 24 October 2010.
- 18 *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples’ Rights, Comm. No. 155/96, (2001), available at University of Minnesota Human Rights Library, [<http://www1.umn.edu/humanrts/africa/comcases/155-96b.html>], accessed 24 October 2010.
- 19 *Opuz v Turkey*, ECHR 33401/02 2009, [<http://echr.coe.int/echr/en/hudoc>], accessed 24 October 2010.
- 20 This report built on the contribution of Sen who authored Chapter One on the conceptual relationship between human rights and human development/capabilities.
- 21 This point is further developed in Fukuda-Parr (2006), which examines commitments of Goal 8 of the MDGs in line with the international obligations for development, and suggests a number of issues beyond the MDG8 targets.

- 22 For example, Kenneth Roth (2004) argues that international human rights non-governmental organizations like Human Rights Watch, of which he is president, are not well equipped to advocate economic and social rights since this requires technical expertise of fields that human rights specialists do not possess.
- 23 For example, Chapman (1996) argues that the need for technical knowledge of diverse fields to assess possibilities of achieving realization of economic and social rights is overwhelming. She therefore advocates focusing on 'violations' in monitoring economic and social rights.

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