The effects of contracts beyond frontiers: A capabilities perspective on externalities and contract law in Europe

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2. A CAPABILITIES APPROACH TO CONTRACTUAL JUSTICE

This chapter aims to develop a minimum standard of contractual justice on the basis of Martha Nussbaum’s capabilities approach. This standard will function as a normative benchmark for the question as to whether or not the legal systems discussed in Chapter 5 are to be regarded as decent and just if they provide support to and enforce contracts that have foreseeable adverse implications for the basic capabilities of others elsewhere.

The articulation of a standard of contractual justice on the basis of Nussbaum’s partial theory of social justice (i.e. minimum justice) proceeds as follows. This chapter begins with an introduction to the constitutive elements of Nussbaum’s capabilities approach (section 2.1). These constitutive elements form a fruitful starting point to consider the implications of her partial theory of justice within the realm of contract law (section 2.2). The central question is: must contract law, or parts of it, be understood to be part of the ‘responsibility bearing structure’ for supporting, enhancing and protecting individual central capabilities? If so, what are the implications, if any, of the requirements of minimum justice for questions concerning the validity of contracts, or in other words, for the availability of state power for the enforcement of agreements between individuals? And consequently, what does this tell us about the justice of legal systems that do enforce such contracts?

2.1. Nussbaum’s capabilities approach to minimum justice

Nussbaum’s capabilities approach is part of a larger development of capabilities based frameworks that have gained increasing impetus in areas of human development, welfare economics and political philosophy.¹ Initially, Amartya Sen developed the

¹ Notably, since 1990 the United Nations Development Program (UNDP) publishes the Human Development Reports, which are based on a capabilities-inspired index, i.e. the Human Development Index (HDI). On the basis of the HDI, the UN ranks nations in terms of their success regarding the quality of human lives, measured in the areas of education, health, and living standards. For an overview of the developments and applications of capabilities based frameworks see: Robeyns, I., ‘The Capability Approach: a theoretical survey’ (2005) 6 Journal of Human
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capabilities concept for the purpose of evaluating ‘individual advantage’: if we want to know how well people are doing, we have to look at what people are really able to be and do in their lives. Sen coined these abilities, capabilities or substantive individual freedoms with which he countered dominant approaches that focused on what people collectively (e.g. national GDP) or individually (e.g. GDP per capita, primary goods) have. Divergences among human beings, Sen argued, lead to salient differences between what people are able to be and accomplish with the means at their disposal. The basic counter claim of a capabilities approach to justice (against approaches to justice that are based on what people have) is that these divergences matter for questions of justice.

The capabilities concept guides Nussbaum’s minimum or partial theory of justice as a basis for asking what a human society is to do for its members. She argues that a minimally just human

Development 93-114; and for more applied forms see: Deneulin, S. and L. Shahani (eds), An Introduction to the Human Development and Capability Approach (Earthscan, London 2009).


3 For instance, utilitarian approaches that focus on aggregate measures such as GDP, or Rawlsian frameworks that focus on primary goods. See: Sen (1992), chapter 5; Sen (1999), chapter 3.


5 Martha Nussbaum developed her capabilities approach in the area of political philosophy as a partial theory of justice. See for a first synthesis of the approach: Nussbaum (2000a); see her approach to justice extended to issues of disability,
society secures certain central capabilities up to a threshold level for all its members, which is compatible with human dignity (section 2.1.1-2.1.2). There is a central role for the political principles and their supporting (legal) institutions in performing this task. In order to respect the equal dignity of persons, a pluralistic society should commit to political liberalism, endorsing only a political conception of the good life that can be accepted by all who recognize the equal dignity of other human beings (section 2.1.3). This approach to minimum justice is built fundamentally on the idea that living with others on decent and respectful terms is part of one’s conception of the good. The centrality of justice as part of the good also guides a conception of social cooperation away from the exclusive focus on mutual advantage. Nussbaum’s capabilities approach argues that cooperative structures that are not mutually advantageous can be justified by justice reasons, i.e. the concept of justice itself (section 2.1.4).

2.1.1. Central capabilities as fundamental entitlements of all human beings

Nussbaum’s capabilities approach incorporates a minimum standard of justice. It does not put forward principles of justice, which function as a touchstone of how a society should look like if it is to be fully just. Rather, Nussbaum puts forward a basic benchmark for what a decently just society should secure for all its members as a basic social minimum. Nussbaum articulates this basic minimum in terms of ten central capabilities, i.e. spaces of substantive choice or opportunity to function. According to


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Nussbaum, all human beings are entitled to a threshold level of these central capabilities. The threshold level of the central capabilities corresponds to what individuals need in a society in order to live a life that is worthy of human dignity. Nussbaum proposes the following list of central capabilities:

<table>
<thead>
<tr>
<th>Life</th>
<th>Being able to live to the end of a human life of normal length; not dying prematurely, or before one’s life is so reduced as to be not worth living.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bodily health</td>
<td>Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.</td>
</tr>
<tr>
<td>Bodily integrity</td>
<td>Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.</td>
</tr>
<tr>
<td>Senses, imagination and thought</td>
<td>Being able to use the senses, to imagine, think and reason – and to do these things in a “truly human” way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and though in connection with experiencing and producing works and events of one’s own choice, religious, literacy, musical. And so forth. Being able to use one’s mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise.</td>
</tr>
</tbody>
</table>

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9 The list of capabilities is included in full and represents the most recent articulation of Nussbaum (2011), p.33-34, same in Nussbaum (2006), p.76-78.
<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Being able to have pleasurable experience and to avoid nonbeneficial pain.</td>
<td>Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)</td>
</tr>
<tr>
<td>Practical reason</td>
<td>Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for the liberty of conscience and religious observance.)</td>
</tr>
</tbody>
</table>
| Affiliation     | A. Being able to live with and towards others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)  
B. Having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of nondiscrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin. |
| Other species   | Being able to live with concern for and in relation to animals, plants, and the world of nature.                                                                                                                                                           |
| Play           | Being able to laugh, to play, to enjoy recreational activities.                                                                                                                                                                                            |
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| Control over one’s environment | A. Political. Being able to participate effectively in political choices that govern one’s life; having the right of political participation, protections of free speech and association.
| B. Material. Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers. |

The capabilities on the list represent spaces of choice and individuals should remain free regarding their pursuits and achievements.\textsuperscript{10} A capabilities approach to questions of justice does not focus on the actual ‘functionings’ that people have effectuated within the areas articulated on the list, but focuses on the space of substantive freedom, or the ability that people have to choose to function. For Nussbaum then, a capability, i.e. an ability to do or be something, consists of the combined existence of 1) internal ability and 2) the external social, material and political preconditions necessary for the effective exercise of this internal ability.\textsuperscript{11} An unbridgeable gap may exist, for instance, between being able to exercise physical control over property and to be able to do so effectively. For instance, women have been and in some countries often still are excluded from the ability to hold property and exercise control over it on an equal basis with men because of their gender.\textsuperscript{12} Within the context of European legal

\textsuperscript{10} Nussbaum (2000a), p.86 et seq; Nussbaum (2006a), p.79-80; Nussbaum (2011a), p.24-25. However, exceptions pertain, see section 2.1.2.

\textsuperscript{11} For a more elaborate discussion on the distinction between basic capabilities (also: “rudimentary abilities”), internal capabilities and combined capabilities (also: “central capabilities) see Nussbaum (2000a), p.83-86.

systems, the exclusion of married women from the ability to exercise property rights in past times provides a salient example.\textsuperscript{33}

The relevant distinctions that a capabilities perspective pushes forward are often illustrated in capabilities literature with introductory examples with the following structure. We imagine two women, living on opposite sides of the globe, neither of them holds property and their lives are characterised by equal levels of dependence on others around them to provide for their material needs. Dawa has renounced all claims to property when she joined an association of faith. If she would choose to do so, Dawa could easily become a holder of property and property rights: the political principles that shape her society would recognize such rights on an equal basis with others. On the other side of the world Nima is dependent on the community in which she lives for her material needs. Her dependence is however shaped by the fact that she lives on the street and is sustained by the charity of passersby. Previously she lived in a small home with her husband, but after his death she was expelled from that home, because the society she lives in does not recognize her as someone who is able to be the holder of a property right. Although both Dawa and Nima may have equal levels of functioning in relation to their exercise of control over their material environments, their capabilities levels differ vastly due to the external social and political preconditions that shape their lives. Dawa has chosen her level of functioning and is able to take leave of the dependence that shapes her current life, whereas Nima lacks this support and the ability to change her dependence. From a capabilities perspective, Nima’s situation would be cause for concern in terms of minimum justice, whereas Dawa’s situation would not.

The example illustrates what Nussbaum’s conceptualization of minimum justice requires: the social bases for all the central capabilities must be put into place for each individual to be able to function effectively. The focus thus lies in creating and securing an enabling environment for each individual. The question arises where the responsibility for minimum justice is located. Who or what is responsible for creating and securing an enabling environment in the central areas listed by Nussbaum? Before turning to this question, however, something more needs

\textsuperscript{33} Hesselink (2005), p.496.
to be said about the status of Nussbaum’s list, its relation to choice and the notion of respect, and their links to Nussbaum’s endorsement of political liberalism.

2.1.2. *Moral content of the list: some freedoms are bad*  
Nussbaum’s list developed on the basis of the question of how a life that is worthy of human dignity would look like: which functionings are required to make a life truly human, or, asked differently, which abilities exert a moral claim towards development, because they are evaluated as valuable?⁴⁴ In the first place, Nussbaum develops an answer to this question by elaborating on the activities considered of central importance for the recognition of a human life. At which benchmark do people deny that a human being still exists?⁴⁵ In the second place, Nussbaum raises this benchmark towards a morally rich standard: asking when the engagement in such activities is fully human. For the latter, Nussbaum’ conception of humanity focuses centrally on the value of having control over the shaping of one’s own life (rational) and doing so in relation with and to others (social).⁴⁶ In this context, two capabilities on Nussbaum’s list enjoy a special status: the capability of practical reason and the capability of affiliation. Nussbaum calls these two capabilities “architectonic”; they are the architectural pillars of Nussbaum’s ethical conception of humanity performing the central role of making any activity become a human activity, and are thus engaged in all other central capabilities.⁴⁷ For instance, the question of whether or not someone is able “to work as a human being”,⁴⁸ asks whether a person is able to work in accordance with their own life plan and conception of the good (practical reason); and whether or not one is able to enter into meaningful relationships of mutual recognition with other workers (affiliation). Thus, Nussbaum’s list has

⁴⁸ See: List “Control over one’s environment” under B, section 2.1.1, p.29.
significant substantive moral content, providing a basis for making claims about the circumstances under which human lives are deprived of full human functioning and therefore deprived of human dignity.¹⁹

Nussbaum’s minimum standard of justice focuses on creating, maintaining and protecting an enabling environment in which individuals enjoy substantive freedom to choose the beings and doings that are in accordance with their own life plans and conceptions of the good. However, the beings and doings for which minimum justice requires a social basis are qualified. Not all freedoms are protected under the banner of basic justice. Nussbaum’s minimum standard of justice has nothing to say with regard to many activities and freedoms.²⁰ But, as a matter of minimum justice, certain freedoms should also be repudiated, and excluded from people’s pallets of choice.²¹

Certain freedoms are considered as bad on the basis of Nussbaum’s list as they undermine the basic capabilities of others. A clear example provided by Nussbaum is men’s freedom to have intercourse with their wives, regardless of whether they consent.²² The slaveholders’ freedom to own other human beings would fall within the same category. Indeed, there is broad consensus, not only in denying that people are entitled to such freedoms, but also in deeming such freedoms as bad. Other examples include freedoms, although not categorically unjust if available in a society, can be used in such a manner that is to be curtailed, for instance a situation in which a person pollutes to the degree that the natural environment of others is destroyed along with the opportunities to provide for their basic needs.²³

¹⁹ Nussbaum refers to it, as a “thick vague” conception of the good. The label is used to contrast with Rawls’ primary goods, which he coined a ‘thin conception of the good’. See: Nussbaum (1992), p. 214-215. The paper, however, reflects an early articulation of a part of Nussbaum’s capabilities approach, which she has later revised and developed towards political conception of the good, a proposed overlapping conception between otherwise competing conceptions of the good, which serves the political purpose of creating a decently just society.

²⁰ Certain freedoms might be subject to demands of full justice, but most are probably not subject to the demands of justice at all.


²³ Ibid., p.44-45.
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Similarly, the list also provides a basis for making claims about the types of freedoms that should be excluded in light of a person's own basic capabilities. Namely, the approach is not neutral regarding a person's freedom to be excluded from the central abilities to function. In order to be regarded as a human being with dignity, central choices should remain open, even if one voluntarily agrees to be excluded from such freedom.24 Closing central abilities to function upon one's request, is deeply problematic for Nussbaum's capabilities approach, as it would require that a society stops treating that person with equal respect (section 2.1.3.).

Because of its morally rich content in defining a limited pluralistic account of valuable capabilities, Nussbaum's list has invoked the criticism that it is insufficiently 'objective' (i.e. illiberal) and illegitimate with regard to its claim of universal application.25 These points are not discussed in full here; what matters is whether or not these criticisms affect the place of Nussbaum's capabilities approach in the context of this book.26 Is the morally rich content of the approach problematic as a basis for a standard of contractual justice in the European context? Any question regarding social justice must provide to some extent an account of the good. In asking questions about the political function of contract law, the question is whether or not the moral content of the capabilities approach is so far from what could be acceptable as a political account of the good as to render a proposal based on Nussbaum's capabilities approach irrelevant to the debate. On this point, one should note that the capabilities on Nussbaum's list enjoy support in the world; indeed, as Nussbaum argues, there is a broad endorsement with respect to the importance of articulated fundamental rights in internationally endorsed documents with

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26 For an elaborate defense of universal application see Nussbaum (2000a), chapter 1; also, Nussbaum (2006a), p.79-80; Nussbaum (2011a), p.36-37.
which her list corresponds.\textsuperscript{27} To the extent that the content of Nussbaum’s capabilities list overlaps with internationally recognized fundamental rights, criticism directed at the underlying procedure through which the list evolved diminishes in force.\textsuperscript{28} The latter is especially relevant with relation to the recognition of fundamental rights (overlapping with the capabilities on the list), in a European context.\textsuperscript{29} The consensus within this area is sufficient to answer to a potential controversy regarding the moral content of Nussbaum’s capabilities approach in relation to its place in this book. As a more general point it should also be emphasized that Nussbaum’s proposed list is a tentative proposal, and a proposal of a particular kind: namely, only as a political conception of the good: i.e. a conception that has the function to ensure a decently just society under the circumstance of plurality (see section 2.1.3). The anchoring idea of Nussbaum’s approach is that members of the human species are entitled to certain central capabilities in a decently just world, whereas the articulation of their specific content is tentative and proposed as a point of departure for further debate. The former provides the basis for evaluative judgments that extend beyond national borders.

2.1.3. \textit{Equal respect in a pluralistic society}

Nussbaum is concerned with articulating a minimum standard of justice for a society that shows equal respect to individuals who hold different values, and who are characterized (internally and through their external circumstances) by individual differences.\textsuperscript{30} Its moral content must be understood in this context, i.e. serving the political purpose of creating a decently just society.\textsuperscript{31} By putting forth the moral content of the capabilities approach as a

\textsuperscript{27} The capabilities approach in this form is understood as a species of a human rights approach. See: Nussbaum (2006a), p. 78 and 284 et seq; also Nussbaum, M., ‘Capabilities and Human Rights’ (1997) 66 Fordham Law Review 273·300.

\textsuperscript{28} Provided that the list is offered as one that can form the object of consensus, broad endorsement supports that claim.

\textsuperscript{29} The legally binding status of the Charter of Fundamental Rights of the European Union is equal to that of the founding treaties.

\textsuperscript{30} Nussbaum (2000a), p.31-32.

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political conception of the good, Nussbaum illustrates her explicit endorsement of political liberalism. Political liberalism refers to the idea that in a pluralistic society (i.e. a society in which plural comprehensive conceptions of the good compete), the state is to show equal respect to all its members by refraining from the endorsement of a particular comprehensive conception. Instead, the state is to adhere to a set of political principles that serve basic justice.

In Nussbaum’s view, a society is to show equal respect to all its members by ensuring that each individual has the ability to formulate, hold and pursue reasonable conceptions of the good on equal grounds with others. Nussbaum describes respect as “(...) a way of regarding and treating persons, closely related to the Kantian idea of treating humanity as an end and never as a mere means. Respect is thus closely linked to the idea of dignity, to the idea that humanity has worth and not merely a price. Equal respect would then be respect that appropriately acknowledges the equal dignity and worth that persons have as ends.” This means that the political institutions, which bind those whom they govern, are not to grant privileges to some over others by adhering to a particular comprehensive conception of the good, as it may support the life plans of some individuals, while barring those of others. The result of such a structure would be, as Nussbaum shows, one in which some individuals would be denigrated continuously: “When the institutions that pervasively govern your life are built on a view that in all conscience you cannot endorse, that means that you are, in effect, in a position of second-class citizenship. Even if you are tolerated (...), government will state, every day, that a different view, incompatible with yours, is the correct view, and that yours is wrong.”

In Nussbaum’s conception of political liberalism, the qualification of equal respect to individuals who hold reasonable conceptions of the good is informed by the idea of equal respect

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32 For critical views on Nussbaum’s liberalism references in footnote 25 in this chapter.
35 Ibid., p. 35.
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A reasonable individual is, according to Nussbaum, one who accepts equal respect as a political value, and who holds a conception of the good that is compatible with equal respect in the political realm. Conversely, unreasonable individuals are those who hold unreasonable conceptions of the good, i.e. conceptions that are incompatible with respecting others as equals for political purposes. An example of an unreasonable conception of the good is, for example, one which considers unproblematic the use of individuals of a darker skin colour as a means for the ends of people with lighter skin colour; the use of women as a means for the ends of men; or the use of individuals of certain nationalities as a means for the ends of individuals with other nationalities. Reasonable conceptions of the good thus share an overlap ('overlapping consensus') defined as the idea of equal respect as a political value. Nussbaum presents her capabilities approach as an expression of this overlap, i.e. as a substantive proposal of an overlapping consensus that can be acceptable to reasonable citizens for the political purpose of creating a decently just society. The question addressed in this book is whether or not contract law is, or parts of it are, subject to the demands of Nussbaum’s minimum standard of justice. This question is central in section 2.2. First, however, the following section discusses the normative principle underlying Nussbaum’s capabilities approach in a global context.

2.1.4. A capabilities approach to issues of global injustice

As mentioned above, Nussbaum refers to the central capabilities on the list as fundamental entitlements of each human being. Their existence is thus independent of institutional recognition and as fundamental human entitlements the central capabilities have normative force even in the absence of political structures that could secure them coercively. On a moral basis then, Nussbaum states that everyone has moral duties to secure these capabilities. In order to protect individual lives from this overwhelming and capabilities undermining task, Nussbaum

36 Ibid., p. 20.
37 Ibid., p. 33.
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however, assigns these duties, derivatively, to institutional structures.39

Nussbaum states, with a direct reference to Rawls’ basic structure, that the responsibility for securing basic capabilities is located within the basic structure of society, i.e. “that set of institutions that determines people’s life chances pervasively and from the start of a human life.”40 For Nussbaum, the concept of the basic structure of a society coincides with the state. The central capabilities as fundamental entitlements are, in the first place, significant as constitutional entitlements of citizens towards their own states, i.e. the basic structures of the society in which they live.41 Nussbaum focuses on the way in which the capabilities approach forms a basis for the articulation and interpretation of constitutions.42 This focus is not accidental. For Nussbaum, the correlation between the basic structure of the state and the fundamental political entitlements of its members is of derivative moral importance, because of the democratic connection that exists between the two.43 In the overall structure of Nussbaum’s capabilities approach, her focus on (nation) states is however first and foremost a concern of implementation.44 The central capabilities should not be imposed on others; rather, individuals should have control over their articulations and specification in the societies in which they live.45

Nussbaum’s approach to the concept of the basic structure also has a non-political, ethical counterpart within the global context. Nussbaum’s capabilities approach is first and foremost fully universal.46 Although threshold levels of capabilities are to be specified on state levels, Nussbaum asserts the importance of all the central capabilities, for all human beings, regardless of their membership within a particular society. In much

44 Ibid., p. 255-262.
46 Ibid., chapter 5; Nussbaum (2000a), chapter 1; Nussbaum (2011a), chapter 6.
of her work she addresses the disproportionate distribution of advantage and disadvantage from global cooperation that shapes the lives of individuals in different nations in the world.\textsuperscript{47} In this context Nussbaum discusses how the power of more prosperous states has been and currently is used in favour of those states, creating unfair conditions of global competition, thereby contributing to the existence and continued existence of global inequality in the capabilities of individuals.\textsuperscript{48}

In light of global inequality, Nussbaum also articulates an allocation of responsibility for global justice.\textsuperscript{49} The allocation of responsibility for minimum global justice corresponds structurally to the state and its institutional structure. However, in the absence of a political coercive global structure, Nussbaum refrains from referring to the responsibility for global justice in political terms, but deems the allocation of responsibility ethical, and the requirements of minimum justice moral.\textsuperscript{50}

The responsibility to address global injustice is placed within the structure that influences, globally, the life chances that people have. In light of fluid positions of power and influence, Nussbaum only makes a provisional and informal suggestion for the responsibilities of parts of the global structure.\textsuperscript{51} For example, she refers to the responsibility of ‘prosperous nations’ to commit to the redistribution of economic resources, the responsibility of multinational corporations to enhance the capabilities of those who are located in the areas of their operations; and to international institutions, such as the World Bank and the IMF to work towards just global trade agreements.\textsuperscript{52} Nussbaum also makes reference to the responsibility of consumers to “bring pressure to bear on a corporation to perform better than is has been performing.”\textsuperscript{53} The latter reflects the recognition, urgently needed in today’s world, that individual positions of advantage and disadvantage are causally connected. A denial of that connection “(…) cannot possibly be made about distant people in today’s world.

\textsuperscript{47} Ibid.
\textsuperscript{49} Nussbaum (2006a), p.306-324.
\textsuperscript{50} Ibid., p. 315 and Nussbaum (2006b), p.1317.
\textsuperscript{51} Nussbaum (2006a), p.315.
\textsuperscript{52} Ibid., p.315-323.
\textsuperscript{53} Ibid., p.318.
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Even were the global economy not unfair to poorer nations, it engages us with them and gives use reason to think responsibly about how those engagements should continue."\(^54\)

Although, the specific responsibilities and institutions proposed by Nussbaum are not definitive, the general structure behind their identification is. The responsibility for supporting and enhancing global equality lies with those institutions and institutional structures that influence the central capabilities of individuals, regardless of their state membership. In asking what people across the world are able to be and do (i.e. which capabilities they have) and which preconditions for capabilities are lacking in their worlds, attention is focussed on the basic structures that underlie cooperation extending across national borders. There is no principled reason why domestic basic structures are exempt from scrutiny in this context if they shape or maintain the cooperative structures with others elsewhere, in ways that are detrimental to their abilities to live decent lives. Thus, although it cannot be politically coerced, moral responsibility exists for the enhancement of the capabilities of those across borders. State membership (i.e. nationality) is morally irrelevant to the question of whether or not an individual has a fundamental entitlement grounded in Nussbaum’s articulation of minimum justice, and, for the question of whether or not others have a moral duty to support and protect them.\(^55\)

The constitutive elements of the capabilities approach to minimum justice and notably the basic claim that reasonable conceptions of the good embrace the idea that justice itself is good and valuable also contributes to a conception of social cooperation. From a capabilities perspective, reasons based in justice can justify independently cooperative global structures that do not necessarily create mutual economic advantage. The basic (political) conception of the good entailed in Nussbaum’s capabilities approach presupposes that individuals can accept that each human being has basic entitlements founded on justice. The underlying purpose of cooperating and living with and towards others is found, Nussbaum emphasizes, not exclusively in mutual advantage, but in the creation of a decently just world in which

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each person enjoys the central capabilities. The approach to minimum justice and its demands on the basic structure thus enforces deeply this conception of the good. The latter carries moral judgements beyond national borders and a critical reflection on the way in which domestic engagements sustain or contribute to global injustice. The global interconnectedness and interdependence that is characteristic of today’s world brings forward claims founded on justice, highlighted in a context of global inequality. These claims also resonate when we consider the ways in which the domestic basic structures of prosperous societies contribute to shaping social cooperation that extends national borders.

2.2. A capabilities approach to minimum contractual justice in Europe

This section examines the questions as to whether or not contract law in Europe, and specifically the rules concerning contractual immorality and invalidity, should be understood as part of the responsibility bearing structure that is subject to the requirements of minimum justice. That is to say, whether contract law, or parts of it, should be constructed in conjunction with the entire structure so as to enhance and secure minimum justice. How can we identify ‘responsibility bearing’ (basic) structure from ‘non-responsibility bearing’ (non-basic) structure in Nussbaum’s conception thereof (sections 2.2.1-2.2.3)? In order to consider contract law in light of minimum justice, we must consider its function as a political institution and the role that it, or parts of it, plays in human lives (sections 2.2.4-2.2.5). If rules on contractual immorality are basic structure, as is argued here, this entails that they must be constructed, in conjunction with the entire basic structure, in ways that are compatible with minimum justice. The concluding section discusses the basic structure of minimally just contractual relationships by considering whether or not there are conceptions of contract law that are incompatible with minimum justice (section 2.2.6).

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57 Ibid., p.158.
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2.2.1. Nussbaum’s conception of the basic structure of society

Nussbaum’s institutional focus concerns the basic structure of society, with which she directly refers to Rawls’ concept: “The responsibility-bearing structure [for securing basic capabilities: added by the author] is what John Rawls has called a nation’s “basic structure”, that set of institutions that determines people’s life chances pervasively and from the start of a human life.”58 The question is whether or not contract law, more specifically the rules on contractual immorality, is part of the basic structure of a society.59 If the rules on contractual immorality are part of the basic structure, i.e. part of ‘the responsibility-bearing structure’, they are subject to the requirements of minimum justice, as articulated by Nussbaum in terms of the central human capabilities. The question whether or not (parts of) contract law are part of the basic structure has also been raised and debated in relation to Rawls’ theory of justice. A brief consideration of this debate yields a fruitful point of departure for discussing the question in the context of Nussbaum’s capabilities approach.

2.2.2. Basic structure & contract law

Rawls’ concept of the basic structure has been subject to diverging interpretations and consequent discussion concerning the question of whether or not (parts of) contract law should be understood as included in it.60 For instance, in Rawls and Contract Law, Kordana and Tabachnik discuss this question reviewing several conceptions of the basic structure with relation to contract law.61 They distinguish between: the narrow conception, which excludes contract law as a whole, including only the constitutional liberties and the system of tax and transfer; the medium and

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59 The question of whether or not contract law is drawn into the basic structure as a whole, if some parts are to be considered basic structure need not be answered conclusively here, good arguments for that position are made by Kordana, K.A. and D.H. Tabachnik, ‘Rawls and Contract Law’ (2005) 73 The George Washington Law Review 598-632, p.617-619.
61 Kordana and Tabachnick (2005).
coercive conceptions, which include only parts of contract law that have distributive effects, or only parts, which are legally coercive, respectively; and the broad conception, which includes any aspect of social life that affects an individual’s life chances pervasively and from the start. Notably, they argue against what they call “the conventional narrow conception”, which holds that Rawls’ theory of justice is neutral regarding the way in which contract law is constructed in relation to questions of just distribution. Instead, Kordana and Tabachnik assert that contract law should be understood as part of Rawls’ basic structure, because a broad conception, which includes “(...) all aspects of social living that affect citizen’s life prospects (...)”, holds true.62 As such, contract law should be constructed in conjunction with the basic structure as a whole in a way that aims to maximize the position of the least well-off.63

The discussion on Rawls’ conception of the basic structure, and the ambiguity associated with its relation to contract law arise allegedly from Rawls’ own writings.64 In particular, in passages where Rawls refers in different places to: 1) the distinction between “the basic structure and the rules applying directly to individuals and associations and to be followed by them in particular transactions”65, 2) both coercive and non coercive institutions66; and 3) the inclusive idea that basic structure institutions are identified by their pervasive influence on life chances.67 These allegedly diverging conceptions of the basic structure have been subject to debate concerning similarly diverging implications for the question of whether or not contract law should be properly understood as being subject to Rawlsian political philosophy.

The relation between Nussbaum’s capabilities approach and contract law is not similarly ambiguous. Although it has been argued from a Rawlsian perspective that contract law is to be

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62Ibid., p.606.
63Ibid., p. 621-622.
64 As identified in ibid., different scholars elaborate on their interpretation of Rawls’ basic structure on the basis of different passages of his work.
66 Notably, his inclusion of the family in the basic structure, see discussion in Nussbaum (2000a), chapter 4.
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excluded entirely from the basic structure, a similar argument is difficult to produce in the context of Nussbaum’s capabilities approach.

2.2.3. The “responsibility-bearing” basic structure
Nussbaum’s capabilities approach is oriented towards the creation of a right outcome, i.e. securing the ten central capabilities up to the threshold level to all individuals. The ten capabilities function as an independent criterion for determining whether or not the procedure through which they have been achieved is good. Namely, minimum justice pertains if, and only if, the ten capabilities are secured up to an appropriate threshold level to members of a society. This orientation towards a just substantive outcome guides the type of argument that needs to be made in order to distinguish between ‘responsibility bearing’ (basic) structure and ‘non-responsibility bearing’ (non-basic) structure.

The outcome-oriented nature of Nussbaum’s approach is important throughout. For example, the importance of securing a threshold level of basic capabilities to all provides grounds for the institutional focus of Nussbaum’s approach. The ten capabilities, similarly, provide guidance for thinking about what is and is not part of the basic structure and, for the allocation of responsibility to institutions. The identification of the responsible institutions for securing and enhancing individual capabilities is not removed from the orientation towards human lives: what matters is the role an institution plays in relation to the basic capabilities of individuals. Similarly, in Nussbaum’s work, specific references to particular institutional structures follow directly from the influence they have on the basic human capabilities of individuals.

68 Nussbaum identifies this as the “deepest difference" between her partial theory of justice and Rawls' theory of justice. Nussbaum (2006a), p. 81 et eq.
69 Ibid., p.82-83, starts with a justice outcome, contrary to Rawls, see Rawls (1971), p. 74-75.
70 Nussbaum (2006a), chapter 5, §vii-viii. Although people are responsible for securing the central capabilities to all, the burden of the pursuit of minimum justice is not to fall on individuals, as this would undermine individual capabilities and would therefore be counterproductive.
71 Even in the global context, Nussbaum identifies elements of a basic structure on the basis of this reverse procedure, identifying for instance, multinational corporations as subjects of principles of justice for the global order. See: ibid., p. 315-323.; Nussbaum (2006b), p.1323. More generally on criteria for identifying a
not make ambiguous claims regarding the basic structure, but refers clearly to all institutions that pervasively influence the lives that people are able to live.

2.2.4. A minimum standard for contractual conduct

Thus, we must first ask what role contractual immorality plays in legal systems in Europe. For the discussion of this question, it is convenient to start with the observation that all of the legal systems under discussion contain rules that impose on contractual relations substantive standards of morality without exception. These rules determine, together with other requirements on contractual validity, which agreements between private parties will be legally recognized and may be enforced by means of state power.

Contractual immorality functions as a minimum standard for the content and implications of an agreement, i.e. it is a substantive benchmark for the agreement itself. The category of substantive standards also applies to contracts that are not strictly labelled ‘immoral’, but illegal or otherwise contrary to public policy or ordre public. Other rules on contractual validity pertain to the qualities of the contracting parties, for example their age as a proxy for the ability to make independent judgments (legal capacity) and the circumstances surrounding the formation of parties’ consent and intention (defects of consent).

Jointly, the rules on contractual validity set out the basic or defining structure of a contract, i.e. an agreement that is legally binding between private parties. Although people may wish to refer to all types of agreements as ‘contracts’, what is legally recognized in a society, and supported as a contract depends on these legal standards. Parties cannot deviate from the standards

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72 See chapter 5.

73 Taken as a whole, the category of substantive standards on contractual behavior is commonly dealt with under headings of immorality or illegality in comparative legal studies. For instance: Basedow, J. et al. (eds), The Max Planck Encyclopedia of European Private Law Volume I (Oxford University Press, Oxford 2012), Kötz and Flessner (1997), chapter 9; and treated in national legal systems under various headings including those of good morals and public policy. See chapter 5.


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of contractual validity. Moreover, the content of what is considered immoral as contractual behaviour is determined exogenously to what private parties may have held and articulated. Agents of the state determine that contracts can be immoral and invalid (e.g. the legislator through a civil code) and determine which contracts are immoral and invalid (the courts). The question of whether or not an agreement is legally binding is thus, in important ways, dependent on normative standards exogenous to standards that the parties may hold between them.

In descriptions of contract law, the binding nature of contract and freedom of contract are often referred to in the same sentence, as expressions of party autonomy. The principle of freedom of contract reflects the idea that private parties are free to choose whether or not to enter into a contract, with whom and on which terms. Freedom of contract is described both in negative terms, as freedom from state control or intervention, and in positive terms, as the ability to engage in contractual relationships as a form of individual self realization. Depending on one's conception of contract law (see Section 2.2.6), one may think of the relation between the involvement of the state in determining the defining structure of contracts and the freedom of private parties to shape their own contractual relationships, to be one of tension.

One purpose of contractual immorality in contract law is to avert the negative externalities that private agreements may have on third parties or society as a whole. All agreements have external effects simply because they exclude others from engaging in the relationship which parties seek to form. On the basis of contractual immorality, a distinction is made between those effects that are considered acceptable, and those that are not. As a whole contract law conveys to those who are governed by it,

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74 They are mandatory rules of law. Loth (2009)
how they are to behave towards each other, and towards others, when engaging in contractual relations. Contractual immorality reveals when self-interested pursuits are devoid of recognition and support, due to unacceptable effects on others. Contractual immorality sets a minimum standard for contractual conduct in a society, i.e. for economic and social cooperative structures between private persons.

2.2.5. Human capabilities and market exchanges
Thus, the rules on contractual immorality are part of the defining structure of contractual relations and they reveal when self-interested pursuits are devoid of recognition and support, due to unacceptable effects on others. This however, does not divulge much about the way these rules relate to human lives, unless we know in how contractual relations are important for human lives. When we think about contracts as market exchanges, we are in a better position to consider the significance of contractual relations, and contractual immorality, for human capabilities.

In modern societies, market participation is not akin to participating in a game one happens to enjoy and is able to afford. Rather, the ability to engage in market exchanges is important for the pursuit of one’s life plan, whatever it may be. Although people can, in principle, exchange whatever they wish, and markets form wherever supply and demand meet, ‘the market’ is characterized by state involvement.77 The market is governed by legal structures, notably by contract law, which makes available legal enforcement of transactions for exchange. The power of the state is available to coerce people into behaving in accordance with what they have agreed upon with others. There are thus great advantages and disadvantages attached to the recognition of a transaction as a contract. As discussed above, the state is selective in making state power available for this purpose. Not all transactions are recognized and enforced, but only those that comply with the standards articulated in the rules of contract law. Contract law reflects the norms about how people are to behave towards each other, and others more broadly, when engaging in market

77 ‘The market’ refers to the manner of exchange that is legally recognized and has a formal and official character, as opposed to ‘black’ markets, which function underground or outside structures established as legitimate.
transactions.

The market plays a prominent role in people’s lives in modern societies. This role is most evident when we directly ask how people function in the areas of the central capabilities, i.e. abilities to achieve valuable functionings, Nussbaum has deemed central for a human dignified life. For instance, how do people obtain adequate nourishment or adequate shelter, how do people obtain a decent education and execute control over their material environment? The answers to these questions share the commonality that people participate in market exchanges, at least primarily, to achieve valuable functionings.

The ability to participate in the market has been constructed in light of Sen’s capability concept in the Capacitas project. Deakin, for instance, describes individual capability in terms of “the substantive freedom to realize, through participation in the market, a range of desired end-states and activities.” Deakin shows how thinking about legal (contractual) capacity in terms of capability, contributes to the explanation of the existence of modern rules of contract law. Namely, contract law can be understood as an area of law that aims to enhance substantive contractual capacity from a capability perspective. And Hesselink, raises the normative question of whether or not one of the central aims of the internal market in Europe should be to enhance European citizens’ capability, i.e. the ability to choose the lives they have reason to value.

The conceptualization of market exchange in light of Sen’s capability theory does not show straightforwardly that contractual capability would be important in the same way for minimum justice in the context of Nussbaum’s capabilities approach. Indeed, Nussbaum’s capabilities list, does not

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81 Deakin argues that contractual capacity can be understood as contractual capability, on the basis of Sen’s capability approach. See also: Deakin, S., ‘Contracts and capabilities: an evolutionary perspective on the autonomy-paternalism debate’ (2010) 3 Erasmus Law Review 141-153.
82 Hesselink (2005).
83 Compare: Sen (1999), p.25-26 and Nussbaum (2003), p.44-46; Nussbaum (2011a), p. 71. By contrast, Sen seems to adhere to the idea that the ability to transact with
articulate explicitly the ability to participate in market exchange as a central human capability. As a matter of minimum justice, contractual capability might not be a necessary item on the list. We can imagine a human society in which the absence of the ability to contract is not problematic for human dignity, like the absence of the ability to be adequately nourished would be. In other words, a person’s inability to participate in market exchange is not reflective of a lack of human dignity per se.84 However, for modern societies, we can think of the ways in which the ability to contract is of crucial importance to human lives, that is, important for the central capabilities on Nussbaum’s list. Such a line of thought follows closely the construction of freedom of contract in light of Sen’s capability concept, but must pay special attention to the moral content of Nussbaum’s approach.

For Nussbaum, the importance of the individuals’ abilities to do and be valuable things as a matter of minimum justice is qualified with reference to the list of central capabilities. Only insofar as market exchange is entailed in those capabilities can its construction be deemed salient for minimum justice. It is clear that where market exchange is the primary mechanism through which individuals fulfil some of their basic needs, such as obtaining food, the ability to exchange deserves serious consideration. The construction of contractual relations is of importance for minimum justice to the extent that market exchanges are important in order to function in valuable ways.

In a direct sense, the ability to have control over one’s material environment (capability 10B, see section 2.1.1 above) cannot be understood in modern societies without recognizing the prominent role of economic exchange.85 To be able to hold property and have property rights on an equal basis with others simply excludes that the ability to exercise those rights would be constructed unequally. Moreover, the ability to hold property and

84 See section 2.1.2.
85 Although Nussbaum does not discuss this explicitly, it must be entailed in her discussion about property rights in Nussbaum (2000a), e.g. p. 156 and further chapter 4, p. 282.
property rights seems devoid of real meaning, if these do not include, centrally, the possibility to exchange. In other words, if the capability to exercise control over one's material environment is to be constructed on an equal basis for each individual, the ability to engage with others in economic exchanges should be constructed in the same way.

In the context of Nussbaum’s capabilities approach, it is important to emphasize that the ability to engage in market exchange is only valuable in relation to the central capabilities on the list. This means that the ability to engage in market exchange is not valuable per se, but only insofar as other valuable pursuits entail it. In this context, the interdependence between all the capabilities on the list is of special significance. Deprivation in one area can undermine valuable functioning in other areas. For instance, the inability to be adequately nourished quickly erodes not only the ability to live a life of normal length, but also the architectonic capabilities of practical reason and affiliation. Pervasive need can push people into activities—including exchanges with others—that have detrimental effects on their abilities to function in valuable ways. Market exchanges can be sources or facilitating factors of capability deprivations and therefore infringements of fundamental entitlements. Moreover, in a similar sense, market exchanges and the structure of the market overall can have adverse affects on the capabilities of others. For the minimum justice as defined in Nussbaum’s capabilities approach, market exchanges, i.e. private contractual relations, are not to be disregarded as potential sources of capability deprivation. As such, private contractual relations represent sights of human interaction where questions of justice pertain.

The market and market exchanges can thus be considered of significance for the central capabilities on

\[86\] See different Sen, footnote 83.
\[88\] From a capabilities viewpoint on minimum justice, the central capabilities should be effectively achieved in a decently just society, it follows that the state has reasons based in justice to intervene where the market or private parties represent an impediment to individuals’ real abilities to function in valueable ways. Ibid., p. 286-287.
Nussbaum’s list in two ways. First, the ability to engage in market exchange is implied within a meaningful understanding of the ability to have control over one’s material environment and stands in an interdependent relation with the other central capabilities on Nussbaum’s list. Secondly, the market and market exchanges can be properly understood as potential sources or facilitating factors of capability deprivation. Since contract law governs the relations between private actors who engage in market exchange, contract law must be considered in conjunction with the other institutions, as part of the basic structure.

2.2.6. **Nussbaum’s minimum standard of justice and contractual justice**

Can Nussbaum’s capabilities approach be neutral towards the way in which contractual immorality is constructed given 1) the fact that contractual immorality imposes on market-based exchanges substantive moral requirements, and 2) the importance of markets and market-based exchanges in people’s lives? It should be emphasized that the question is not whether or not Nussbaum’s capabilities approach requires the existence of rules pertaining to contractual immorality, or even rules of contract law altogether in an abstract sense, i.e. for every imaginable type of human society. Rather, the question is raised in a contextual setting, and asks whether or not Nussbaum’s capabilities approach can be indifferent to diverging conceptions of contract law in modern societies, specifically in Europe given the fact that ‘contract law’ exists. Thus, the question takes for granted the availability of state power for the enforcement of agreements between persons.

2.2.6.1. **Conceptions of contract law**

There are various conceptions of contract law that diverge significantly in their understanding of the appropriate relation between this area of law and the involvement of the state. These diverging conceptions correspond to different normative ideas about how contract law should be constructed, specifically, in relation to aims of social justice. The main differences come to the fore, particularly, in the debate about the distinction between private and public law. This debate does not concern the positive distinction between private law, as governing the (horizontal)
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relations between private persons, and public law, as governing the (vertical) relation between the state (acting as a state) and its citizens. Rather, the debate concerns a distinction in a more ideological sense, regarding the underlying ideas and assumptions about the principal differences between private and public law.\(^\text{89}\) This debate has gained renewed impetus particularly in the course of the development of new transnational European instruments of contract law.

On the one hand, contract law is understood as an area of law that is autonomous and independent from public or political goals and aims.\(^\text{90}\) Contract law’s rules are to be understood in terms of expressions of contracting parties’ will, as if they were their own legislatures through contract. In the classic view that renders contract law principally distinct from public law, private law is said to deal with the restoration, or correction, of a wrong that has occurred between interacting parties.\(^\text{91}\) The underlying structure of contract law aims to achieve corrective justice between contracting parties. In a normative sense, this area of law should be free from political considerations because they would interfere with the autonomy of persons. Contract law is to remain politically neutral, in order to assure that individuals are able to express their autonomous choices without being burdened by public goals. According to this view, contract law is distinctly not to be concerned with social (distributive) justice.\(^\text{92}\) In other words, contractual justice is separate, as a matter of principle, from the requirements of social justice. In a classic conception of contract law, the contractual immorality and invalidity of mutually beneficial contracts cannot be identified as anything other than an infringement of party autonomy, i.e. freedom of contract.

The ideological distinction between private and public law that is maintained in the classic view of contract law has been deconstructed by legal realism, in particular, by critical legal


\(^{90}\) See notably the conception of private law as argued by Weinrib in Weinrib (1995) and Weinrib (2012).

\(^{91}\) Weinrib (1995), chapter 3.

\(^{92}\) Ibid., p. 61-63.
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studies.\textsuperscript{93} The basic viewpoint follows the logic that every legal rule is in essence a form of state regulation. Contract law cannot be considered as anything other than an allocated form of public state power. Namely, the state determines the boundaries of the realm of life that is governed by its rules, enacts the rules as law, and exercises state power in the enforcement of contractual rights and obligations. This view emphasizes that the state shapes social life through contract law and does so, in accordance with normative ideas about how this should be structured.\textsuperscript{94} According to this conception, labelling contract law as ‘private law’ indicates that it governs the relations between private persons (in the positive sense). It does not connote that it is or should be divorced from public or political considerations. In the absence of a principled distinction between private and public law, it is not illegitimate for the state to pursue social justice aims through contract law. In other words, contractual justice cannot be separated from social justice on principle. As such, the contractual immorality and invalidity of mutually beneficial contracts are not necessarily explained in terms of infringements of party autonomy, i.e. freedom of contract. Indeed, the contractual immorality and invalidity of mutually beneficial contracts may be justified directly on a notion of contractual justice that reflects a notion of social justice.

The denial of a principled distinction between private and public law, has led to the claim that social justice is not only legitimately pursued through contract law, but that, as a matter of fact, contract law necessarily reflects an idea of social justice adhered to by the state.\textsuperscript{95} This point is made in reference to contract law’s role in regulating market transactions. The market is described as the primary mechanism through which wealth and power is allocated in modern societies, i.e. in Europe. By regulating market relations, contract law determines the relevant sources of power, and importantly the relevant sources of


\textsuperscript{94} Singer (2008 ), p.141-142.

\textsuperscript{95} Collins (2003), chapter 1; Study Group on Social Justice in European Private Law (2004).
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weakness, which determine market outcomes.\textsuperscript{96} As such, a predictable pattern of advantage and disadvantage in an important social area of life is endorsed and shaped through contract law. In other words, by enacting a particular set of rules through contract law, a state establishes a particular market order, which is attached to a predictable pattern of advantage and disadvantage, i.e. a predictable distributive outcome.\textsuperscript{97} Thus, according to this view, a notion of contractual justice necessarily reflects a notion of social justice.

Both views regarding the distinction between private and public law, and consequently, the nature of contract law in relation to social justice, find articulation in current debates on this topic.\textsuperscript{98} The classic view is however hard pressed to explain the existence of modern rules of contract law, which are purposely used to achieve or prevent substantive outcomes that correspond to public aims.\textsuperscript{99} Mandatory rules of contract law, which, for instance, aim to protect consumers, are the leading examples in this context.

2.2.6.2. Nussbaum’s minimum standard of justice and contractual immorality

If the market is important to the central capabilities of persons, the capabilities standard of minimum justice cannot be neutral in relation to the way in which freedom of contract is constructed. Indeed, market exchanges form important means through which to pursue valuable ends, but they can also undermine the central capabilities, both of contracting parties and of others. Nussbaum’s capabilities approach of course says nothing directly about such exchanges, or their terms, considered individually. The requirements of minimum justice apply to the basic structure as a whole, not to individual or specific transactions on the market. However, as stated previously, the construction of freedom of contract reflects a defining structure for market exchanges in general. That is to say, it reveals the types of market relations

\textsuperscript{99} For instance as they correspond to notions of social justice, but also to efficiency in terms of enhanced market functioning.
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considered acceptable in a society, i.e. those recognized as contracts and enforceable by means of state power.

Contractual immorality functions as the basis for determining the selective availability of state power for the enforcement of agreements between persons. For instance, norms of good morals construct certain contracting options and outcomes as closed. Contract law could be alternatively constructed if selective enforcement on the basis of substantive standards would be excluded from its rules. In this case, state power for the enforcement of mutually beneficial agreements would be available independently of the substantive content or outcomes of agreements for the parties. Such a construction would not necessarily be problematic under the classic view of contract law. Namely, provided that an agreement is mutually beneficial, party autonomy deserves respect regardless of what persons may define as beneficial for themselves. Imposing on their choice an assessment that is based on normative standards exogenous to what they have agreed to in the absence of defects of consent represents, necessarily an infringement of their autonomy.100

To exclude contracting options from the availability of state enforcement is only justified on the basis of a denial that an agreement is mutually beneficial (i.e. without defects of consent) according to this view. In order to justify that mutually beneficial contract options are excluded from recognition and enforcement something external to party autonomy must be considered of overriding importance. In other words, the justification must be found external to contract law, i.e. the state must find a justification for imposing external constraints on contractual relations. In refusing to recognize and enforce a mutually beneficial agreement, the state must say: even though your freedom to contract is valuable by its very nature, something other of value has priority over its exercise in this particular case. Or in other words, the state must say that it will impede on one’s party autonomy in light of a normative standard that takes priority.

However, in the context of Nussbaum’s capabilities approach, there is no reason to maintain that substantive norms must be understood as external constraints on contractual

100 See Kordana and Tabachnick (2005), p. 599; 626-629.
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behaviour, nor that freedom of contract must be recognized as a valuable freedom per se. Instead freedom of contract and contractual relations must be read in a different light. Namely, what is recognized as a contractual relation is in a direct sense constructed by the state, i.e. the rules of contract law. Indeed, although people may wish to refer to all types of agreements as contracts between themselves, what is recognized in a society as truly being a contract depends on the question whether or not it complies with the substantive standards set by the state. In other words, there is nothing external about the substantive norms that shape freedom of contract. That is to say, they do not impose constraints on existing contractual relations (as if they were phenomena of nature), but they construct in what contractual relations really are in a defining way. The line of argument presented here follows Nussbaum’s arguments concerning the relation between the family and the state. In this context she argues: “For there is really no entity, “the family”, into which the state either does or does not intervene. People associate in many different ways, live together, love each other, have children. Which of these will be given the name “family” is a legal and political matter, never one to be decided simply by the parties themselves.”

Although the institution of the family may be more appealing and accessible as an institution central in a human life, the institution of contract is of undeniable importance to the lives people are able to live in modern societies. Although both may invoke the idea that they are somehow ‘private’ and should be separate or free from state intervention, this should not obscure the importance of their underlying political legal structure for questions of justice.

If contract law is responsible for constructing, in conjunction with other institutions, the defining structure of contractual relations (state supported exchange between market actors), it must do so in a way that is compatible with the requirements of minimum justice. In the first place we can say that freedom of contract must be constructed as to create an enabling environment in which persons have the ability to pursue valuable functionings through market exchange on an equal basis with others. In this view, the state only impedes one’s freedom of contract, if it fails to secure the ability for persons to engage in


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valuable functionings through contractual relations. This is an important qualification that reflects the moral content of Nussbaum's capabilities approach. Namely, in the second place, the political conception of the good as enshrined in the capabilities approach to minimum justice also provides a basis for identifying contracting options that should not be constructed as open, because they are incompatible with the standard of minimum justice to which a society adheres. By excluding those contracting options from the support of state power for recognition as legitimate market transactions, society safeguards itself from involvement in activities that are not only not considered valuable, but which may be considered patently bad.

As such, Nussbaum’s capabilities approach provides a basis for a standard of minimum contractual justice. Namely, the recognition and enforcement of agreements is to be compatible with the requirements of minimum social justice as it applies to the basic structure as a whole. A capabilities approach to contractual justice identifies those agreements that are incompatible with securing and protection the threshold level of central capabilities (those entailed by Nussbaum’s list) and which should not be recognized consequently as contracts.

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102 As a minimum standard of justice, there are many activities on which Nussbaum’s capabilities approach is neutral. That is not to say that those activities would not be relevant to justice in a fuller sense, i.e. a complete theory of justice may demand more than securing a threshold level of capabilities. However, such demands are outside the scope of discussion for the purpose of this book.

103 A similar justification is provided by Shiffrin, S.V., ‘Paternalism, unconscionability, and accommodation’ (2000) 29 Philosophy and Public Affairs 205-250 in relation to the unconscionability doctrine where she states: “But Self-Regarding Refusal is propelled by C’s self-regarding reasons, namely her refusal to lend herself to an unfair or exploitive project on grounds that it would implicate her and use her energies in a way she disapproves of. By analogy, it seems then that a state’s refusal to enforce an unconscionable contract could reflect an unwillingness to lend its support and its force to assist an exploitive contract because it is an unworthy endeavor to support.” P.227-228.