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The fragility of rightness. Adjudication and the primacy of practice

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7 The Fragility of Justice IV. Nussbaum's residues and their bearing on adjudication

1 Introduction

Although Nussbaum's Capabilities Approach can solve some of the Rawlsian residues of justice and as such can also make adjudication more stable, the upshot of this chapter is that Nussbaum's theory does not validate a stabilizing approach to adjudication either. That is, even if society would fully comply with the demands of the Capabilities Approach, it would still lead to residues of justice, that is, to situations that conflict with the substantive goals it has set. Similar to Rawls' theory of justice, when applied to society the Capabilities Approach implies a fragility of justice and this fragility bears on the moral character of adjudication.

The argument of this chapter takes the following route: first, I will briefly discuss to what extent Nussbaum herself acknowledges the practical limits of her theory by examining her view on the role of tragedy in moral and political thought (2). Then I will point out three reasons why Nussbaum's Capabilities Approach will lead to residues of justice. I will present these reasons under the headings 'the conflict of justice argument' (3.1), 'the under-determinacy argument' (3.2) and 'the political legitimacy argument' (3.3). For each of these arguments I will show how the residues concerned bear on the character of adjudication, again, by discussing a range of concrete legal cases. I will end with some concluding remarks (4).

2 A 'tragic stance' towards political morality?

Before developing my argument there is a matter of importance that deserves prior attention. It is that, other than the typology of normative theories of political morality that I offered in chapter three says, Nussbaum's philosophy does show a deep sensitivity for the inherent fragile, messy, unintelligible and tragic aspects of human life and political orders. I shall therefore first elaborate why I hold that the Capabilities Approach is not merely a philosophical account of political morality, but indeed qualifies as a *theory* of political morality.

Nussbaum's sensitivity for the tragic and for the messy and unintelligible aspects of morality particularly surfaces in her highly acclaimed *The Fragility of Goodness*.⁴⁵³ Based on a discussion of the Greek tragedies and the writings of Aristotle, Nussbaum argues that it is an inherent characteristic of human existence that people will suffer moral losses due to a wide variety of contingencies, beyond clear faults of their own or of others. A good life will always and inherently be vulnerable to moral loss because it is dependent and relies on external heterogeneous goods, the realisation of which often depends on contingent facts. As she puts it: "some human values simply open the human being to risk. Caring about children, friends, loved ones; caring about political citizenship and political action; caring, in general about being able to act rather than simply to be -all of these concerns and attachments put the person who cherished them at the mercy of luck in at least some ways."⁴⁵⁴ In Greek tragedies like Aeschylus' *Agamemnon* and Sophocles' *Antigone*, Nussbaum finds support for the idea that due to contingent facts, values may "clash irreconcilably, so that one must be violated."⁴⁵⁵ In these tragedies she sees a kind of moral thought that does not "attempt to seize, hold, trap, and control, in whose values openness, receptivity, and wonder play an important part."⁴⁵⁶ We cannot control the practical world by means of prior principles or rules, as this practical world will surprise us and can never be exhaustively grasped by cognition.

In line with these thoughts she puts the Platonic tradition in a critical perspective because it is based on the idea that reflection can secure stability and self-sufficiency in human life. She criticizes the Platonic idea that the capacity of reason can safeguard a rational agent from moral loss, insecurity and messiness as well as from disturbing emotions such as regret and anxiety.⁴⁵⁷

In view of the argument expounded in *The Fragility of Goodness* one could come to think that the same sensitivity for the limits of theoretical reason in relation to practice would also be fully entrenched in Nussbaum's political philosophy. However, an overall reading of her political philosophy paints a different picture. Nussbaum

⁴⁵³ Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*.

⁴⁵⁴ *Ibid.*, xxix.

⁴⁵⁵ *Ibid.*, 47.

⁴⁵⁶ *Ibid.*, 20.

⁴⁵⁷ *Ibid.*

strongly relies on the potential of political philosophy to either prevent or overcome tragic losses. The function she assigns to the notions of 'tragic' and 'moral loss' is primarily constructive and aspirational: they are presented as heuristic devices to detect situations that are unjust and need to be solved. These heuristic and constructive functions assigned to the tragic are particularly present in Nussbaum's Capabilities Approach.

The concept of the tragic is to be deployed as a useful tool to stimulate delicate designing of political institutions and 'wise' legal reasoning so as to prevent moral wrongs.⁴⁵⁸ As Nussbaum says: "When we see a tragic choice -assuming that the threshold level of each capability has been correctly set- we should think: "This is very bad. People are not being given a life worthy of their human dignity. How might we possibly work toward a future in which the claims of all the capabilities can be fulfilled?"⁴⁵⁹ Nussbaum thus considers tragic losses primarily as invitations for constructive political thinking, aiming to (constitutionally) put in place "a core group of basic entitlements, and then really securing them to all people".⁴⁶⁰ "If the whole list has been wisely crafted and the threshold set at a reasonable level, there usually will be some answer to that question."⁴⁶¹

Hence, according to Nussbaum public officials should always raise the 'tragic question' before taking a decision. They should ask themselves whether as a result of their decisions or of the theories that ground them, citizens will suffer a cost "that no human being ought to have to bear, a cost implicated in the idea of human dignity itself."⁴⁶² Asking the tragic question is of particular relevance for liberal societies, because these are committed to a plurality of values and as a consequence "the spectre of tragedy will rear its head".⁴⁶³

It is also largely for constructive and aspirational reasons that Nussbaum holds that citizens should be sensitive for the tragic predicaments of their fellow citizens. In *Upheavals of Thought* Nussbaum argues for the importance of compassion as an

⁴⁵⁸ ———, 'The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis', 1018.

⁴⁵⁹ ———, *Creating Capabilities: The Human Development Approach*, 38.

⁴⁶⁰ ———, 'Tragedy and Human Capabilities: A Response to Vivian Walsh', 416.

⁴⁶¹ ———, *Creating Capabilities: The Human Development Approach*, 37.

⁴⁶² ———, 'The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis', 1023.

⁴⁶³ *Ibid.*, 1018.

indispensable public emotion. This emotion enables citizens to perceive the sometimes tragic fate of others, which can contribute to their willingness to try to prevent similar situations in the future.⁴⁶⁴ Also, citizens should familiarize themselves with ‘tragic stories’ that “make the depth and significance of suffering, and the losses that inspire it, unmistakably plain.”⁴⁶⁵ This again not so much because of the inherent tragic character of a political order, but rather to prevent such situations to occur in the future.⁴⁶⁶

In Nussbaum’s work we can find two arguments in favour of the focus on the constructive and aspirational function of ‘the tragic’. Firstly, Nussbaum claims as a matter of empirical fact that what at first sight appears to be a tragic situation or a tragic decision, can after due reflection often be dismantled as the outcome of a ‘mistake’, ‘obtuseness’, ‘stupidity’ or ‘maliciousness’.⁴⁶⁷ As she puts it: “[m]uch needless suffering can be surmounted by a just political order”.⁴⁶⁸

Nussbaum thus highly relies on the potential of reflection to ensure that in a fully just

⁴⁶⁴ Nussbaum, Martha C., *Upheavals of Thought: The Intelligence of Emotions* (Cambridge: Cambridge University Press, 2001), 297-350.

⁴⁶⁵ *Ibid.*, 428.

⁴⁶⁶ *Ibid.*

⁴⁶⁷ Nussbaum, 'Tragedy and Human Capabilities: A Response to Vivian Walsh', 415; ———, 'The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis', 1016.

⁴⁶⁸ Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy*, xxxi. See for a well considered and pioneering account of the tragic character of liberalism: Brink, Bert van den, *The Tragedy of Liberalism. An Alternative Defense of a Political Tradition* (Albany: SUNY Press, 2000). He argues for a constructive and heuristic role for the acknowledgment of tragic predicaments of citizens and yet also holds that tragedy is inherent to liberalism. Van den Brink (p.135) for instance says that “It may well be that the possibility of emancipation of both suppressed groups and individuals and our understanding of what liberal public reason demands exists only because of the painful but unavoidable incongruity between the two perspectives. It gives us a first glimpse of an understanding of the tragic that liberalism could actually benefit from.” At the same time he notes (p. 160) that liberal theories can only be genuinely liberal theories “insofar as they acknowledge their tragic predicament.”

society genuine conflicts between the Central Human Capabilities do not occur.⁴⁶⁹ Tragic situations that do occur must be seen as a sign that, as Nussbaum puts it, “society has gone wrong somewhere.”⁴⁷⁰ Society should then make an effort to “focus on long-term planning that will create a world in which all the capabilities can be secured to all citizens.”⁴⁷¹ Secondly, Nussbaum holds that in the end citizens and the social practices on which they depend for leading a flourishing life often are sufficiently flexible to meet new and tough situations.⁴⁷² Citizens have the potential to deal with such obstacles and difficulties, and this potential should be honoured rather than underestimated. Political philosophy and a society that strives to be just should honour the fact that “human ingenuity” and the “dynamics” of social practices can “surmount” tragedy, Nussbaum says.⁴⁷³ Respect for citizens’ dignity therefore also entails holding them responsible and leaving them to deal with such difficult situations.⁴⁷⁴ Nussbaum’s motive for the role she assigns to the tragic is most clearly revealed in

⁴⁶⁹ Nussbaum, *Creating Capabilities: The Human Development Approach*, 38-39. There Nussbaum states, as quoted before: “How might we possibly work toward a future in which the claims of all the capabilities can be fulfilled? If the whole list has been wisely crafted and the thresholds set at a reasonable level, there usually will be an answer to that question.”

⁴⁷⁰ ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 401.

⁴⁷¹ *Ibid.*

⁴⁷² ———, *Women and Human Development. The Capabilities Approach*, 36, 212.

Nussbaum stresses the flexibility of human beings and social practices to adapt to new situations, particularly in relation to religion. Given the fundamental character of religious commitments, this reliance a fortiori seems implied where the flexibilities of citizens and social practices for other areas of life are concerned. If Nussbaum thinks that citizens are able to change their substantive religious practices, it is likely that she also holds that they can change their mind with regard to, for instance, their duty to pay taxes so as to secure good education for all citizens. Obviously, this raises the question of where to draw a line between situations in which it is justified to hold citizens responsible in view of their ability to adapt to new situations and situations where it is not.

⁴⁷³ *Ibid.*, 163.

⁴⁷⁴ Alexander, *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum*, 106.

her critique on Bernard Williams.⁴⁷⁵ Whereas Williams is very critical about the deep tendency of practical philosophy to bring ‘good news’ about the world and to claim that tragedy can be overcome by theoretical reflection, Nussbaum blames Williams for being fatalistic and offering “a recipe for social lassitude”.⁴⁷⁶ For her Williams insufficiently gives voice to the “sense that wrong has been done and that one had better go out and right it.”⁴⁷⁷ His view suggests that “there is nobody to blame and nothing more to do. It implies that we can sit back and resign ourselves to the world as it is, knowing that its horrors lie outside our control.”⁴⁷⁸ If anything, according to Nussbaum this attitude reduces the chances for moral progress.

Nussbaum’s belief in the aspirations of a theory of political morality is instigated by a deep trust in the power of theoretical reflection. In the end philosophical reflection

⁴⁷⁵ This discussion is particularly interesting because it clearly exemplifies that a philosopher’s stance towards the tragic may express something about his or her own attitude to life. For instance, Nussbaum very lively describes how Bernard Williams expressed his ambivalence about her hopeful stance on whether moral theory can indeed make the world a better place. In a rather personal and moving anecdote she reports: “My do-good engaged attitude irritated him, as if I had become Major Barbara when I might have grown into someone interesting. A strain developed in our friendship, under pressure of my criticisms of his Nietzschean turn and his reaction to those public criticisms.” Cf. Nussbaum, Martha C., ‘Tragedy and Justice: Bernard Williams Remembered’, *Boston Review*, Oct/Nov 2003 (2003). For a similar critique on Bernard Williams’ view on the inherent tragic character of the political see Ronald Dworkin’s essay and his comments in a discussion at the New York Institute for the Humanities in 1998 in: Lilla, Mark, Dworkin, Ronald et al., *The Legacy of Isaiah Berlin* (New York: New York Review of Books, 2001), 73-90, 121-127. A rather personal and hopeful attitude towards life shines through in this critique, for instance where Dworkin argues that inherent conflicts between political values should not be acknowledged because it is a way of buying “failure in advance” (p.190) and of not being willing to do the hard work necessary to show why a particular conception of justice is the right one. As Dworkin (p.90) puts it: “perhaps, after all, the most attractive conceptions of the leading liberal values do hang together in the right way. We haven’t been given reason to abandon that hope.”

⁴⁷⁶ Nussbaum, ‘The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis’, 1026.

⁴⁷⁷ ———, ‘Tragedy and Justice: Bernard Williams Remembered’.

⁴⁷⁸ *Ibid.*

can lead to a fully just society that only leaves room for genuine tragedy by way of incidents. From this trust and hope springs the limiting of the tragic and tragedy to said constructive role. I think it is also this reliance on the practical force of theory and this hope that make Nussbaum's theory of justice fit the typology discussed in chapter three.

3 Nussbaum's residues of justice

3.1 Justice as internally conflicted

First of all Nussbaum's Capabilities Approach leads to residues of justice because the viewpoint of justice it proposes can lead to genuine conflicts of justice when applied to society. The resolution of these conflicts can result in genuine moral loss and possibly also in arbitrary exercises of state-power.

In the previous chapter we saw that within the Capabilities Approach justice is constituted by separate, central and non-negotiable elements, i.e. the Central Human Capabilities. It is therefore that the Capabilities Approach "does not invite and positively forbids, trade-offs and balancing" between them.⁴⁷⁹ Neither does it allow any priority rule between the listed capabilities because this would be at odds with the separateness and the intrinsic value of each capability.⁴⁸⁰ We also saw that in a just society *all* citizens have a right to these Central Human Capabilities, at least up to an adequate threshold level. This is what it means to be treated as ends in themselves. No citizen may be sacrificed for the good of others.

However, we have no reason to a priori assume that the practical world will order itself in a way that is friendly to these aspirations. This is a fortiori the case for the Capabilities Approach because the realisation and protection of the Central Human Capabilities depend on the fulfilment of a wide range of empirical conditions, more so than for instance Rawls' conception of justice. In this sense the Capabilities Approach is more vulnerable to 'luck' and more dependent on contingencies for the realisation of its own substantial goals.

⁴⁷⁹ ———, *Frontiers of Justice: Disability, Nationality, Species Membership*, 83; ———, *Women and Human Development. The Capabilities Approach*, 211.

⁴⁸⁰ Also the interrelatedness of the Central Human Capabilities, that is, their being mutually supportive, is at odds with prioritizing one over the other because in that way the capability that is not 'privileged' will be harmed.

Hence, it is more realistic to accommodate for the possibility that in spite of all kinds of human efforts and reflection, due to the contingencies involved in practice citizens' legitimate claims to the protection of the capabilities may prove impossible. In such situations the legitimate claim of one citizen cannot be secured without violating a legitimate claim of another.⁴⁸¹

Sure, one could argue that such conflicts may prove to be nothing but *prima facie* conflicts that can be prevented or genuinely resolved through reflection and (better) reasoning. Conflicts between the claims of citizens should then be taken as preludes to genuine justice, rather than compromises of justice.

Such an argument dovetails well with the 'specificationist' stance that Nussbaum herself seems to embrace.⁴⁸² Specificationism here amounts to the idea that when applied to practice abstract values can be reconciled through clever practical reasoning, forming one coherent whole. Specifying the Central Human Capabilities, to phrase it in the words of Henry Richardson, boils down to "spelling out the ways or circumstances in which they are pursued, and the like."⁴⁸³ Through the process of specification, a process that takes all kinds of empirical information into account, these capabilities can be tailored to the demands of the situation at hand. Specification can make the at the outset abstract and relatively rigid meaning of the Central Human Capabilities 'fluid' in a way that allows them to be realised conjointly, without genuine compromise.⁴⁸⁴

Indeed, there is much to be said for specificationism. For one thing it is a strong antidote against 'obtuseness', 'laziness' or 'stupidity' in public reasoning regarding citizens' basic claims. In case of a social conflict we want both citizens and public officials to optimally use their reasoning powers so as to answer the challenge to

⁴⁸¹ Cf. Scharffs, 'Adjudication and the Problems of Incommensurability', 1395.

⁴⁸² See for a discussion of specificationism: Wenar, Leif, 'Rights', in *The Stanford Encyclopedia of Philosophy*, ed. Zalta, Edward N. (Stanford: Metaphysics Research Lab, Stanford University, 2011); Wellman, 'On Conflicts between Rights'. See for a specificationist approach to reasoning about values also: Richardson, *Practical Reasoning about Final Ends*.

⁴⁸³ Richardson, Henry S., 'Specifying Norms as a Way to Resolve Concrete Ethical Problems', *Philosophy & Public Affairs* 19, 4 (1990), 29.

⁴⁸⁴ Cf. Richardson, *Practical Reasoning about Final Ends*, 139.

secure all the Central Human Capabilities for all citizens. We do indeed see this salutary work of reason in clever constitutional arrangements, adequate social policies and wise judicial reasoning and as such specificationism does reduce the likelihood and scope of conflicts between citizens' entitlements. In addition, because it presents a conception of public reasoning that is highly empirically informed, specificationism is a more plausible alternative for deduction as an account of justice that claims to be responsive to the experience of concrete situated citizens. It is also better than means-ends reasoning as the Capabilities Approach as a matter of justice aims to secure heterogeneous goods.

This being said, I nonetheless reject the idea that specificationism can make a convincing case for the thought that within the Capabilities Approach -save for negligible incidents- no genuine conflicts between citizens' legitimate claims will occur, i.e. that the viewpoint of justice suffices to rationally and exhaustively solve actual social conflicts as they exist in society. Irrationalities, obtuseness and injustices are not the only sources of conflicts between the Central Human Capabilities. As I also put forth in the discussion of Rawls' theory of justice: due to all kinds of contingent facts even the best institutional arrangements and reasoning cannot prevent that genuine conflicts occur, in this case between the Central Human Capabilities. The reasons that such conflicts occur can for instance lie in human nature, in current technology, in physical aspects of the practical world, in time-constraints and in characteristics of institutions that cannot be simply altered at the moment of choice.⁴⁸⁵ Sure, these are not all by definition 'necessary' or 'inherent' facts about the practical world, but they may nonetheless form genuine obstacles for the realisation of values. If such conflicts occur they must be treated as genuine conflicts rather than as apparent ones or as negligible incidents.

At pains of hollowing out the substantive scope of the Central Human Capabilities -by reducing their content to what we are de facto able to protect in practice-, it seems problematic to a priori push said conflicts to the periphery of society. A specificationist stance to the issue of conflicts of justice seems to underestimate the limits of reason in this regard.

Against this background I hold that it is more reasonable to acknowledge that genuine

⁴⁸⁵ Ibid., 34-35.

conflicts of justice are in fact part and parcel of a ‘just’ society.⁴⁸⁶

What is more, we may question the extent to which specificationism can account for the *rational* resolution of conflicts of justice. This can be clarified by the helpful definition of specification that Henry Richardson offers.⁴⁸⁷ He states that P specifies Q if “(a.) every possible instance of the absolute counterpart of p would count as an instance of an absolute counterpart of q; (b.) p qualifies q substantively by adding clauses describing what the action or end is or where, when, how, by what means, by whom, or to whom the action is to be done or the end is to be pursued; (c.) none of these added clauses is substantively irrelevant.”⁴⁸⁸

In this definition the criteria for what counts as a specification, are the identity of the ‘absolute counterparts’, being ‘substantively qualifying’ and ‘not being substantively irrelevant’.

These rather formal criteria show that what makes something a ‘specification’, particularly in the practical domain, is to a large degree to be determined by the decisions of responsibility bearing agents. But, without further arguments as to the quality of these decisions -why do we have reason to rely on them?-, it is unclear why a ‘specification’ will in fact count as a specification of the normative force of the Central Human Capabilities themselves.

If we apply this to our topic, i.e. the conflict-solving potential of the Capabilities Approach, it means that, at least as it stands, the normative guidance of theory in the process of specification is still hard to conceive. In so far the Capabilities Approach relies on a specificationist conception of public reasoning it is not clear how the rationality of the resolution of conflicts of justice is accounted for.

So, we should not too easily assume that the application of the Central Human Capabilities is a morally harmonious practice, for genuine conflicts of justice may arise on a regular basis. Neither should we rely too easily on the ‘rationality’ of the

⁴⁸⁶ For critical comments on Nussbaum’s attempt to toning down the prevalence of genuine practical conflicts between the Central Human Capabilities see: Hackett, Rosalind I.J., ‘Is Religion Good News or Bad News for Women?: Martha Nussbaum’s Creative Solution to Conflicting Rights’, *Soundings* 83, 3-4 (2001); Claassen and Düwell, ‘The Foundations of Capability Theory: Comparing Nussbaum and Gewirth’.

⁴⁸⁷ Richardson, *Practical Reasoning about Final Ends*, 72-73.

⁴⁸⁸ Ibid.

resolution of such conflicts. At least the rationality of these conflicts cannot be accounted for by the theory itself. A specificationist's conception of public reasoning in any case needs additional arguments where the rationality of its outcomes is concerned.

In the remainder of this section the claim that the Capabilities Approach leads to genuine conflicts of justice will be further corroborated by a discussion of the way justice works out for the regulation of family life. I have opted to discuss these conflicts of justice because in them both of the -what Nussbaum labels- 'architectonical' capabilities are at stake, that is, practical reason and affiliation as the capabilities that pervade all domains of human experience and therefore may not be taken lightly. In addition, if genuine conflicts are acknowledged in this area then they are indeed an endemic phenomenon in a society striving to be just, as family life can hardly be seen as a peripheral area of human experience.

In her book *Women and Human Development* Nussbaum envisages the family as a responsibility-bearing institution par excellence where the realisation of the Central Human Capabilities is concerned. The family is "among those institutions that the basic principles of justice are designed to regulate most directly" as it influences citizens' chances "for better or worse" and it does so in the broadest sense.⁴⁸⁹ Within the Capabilities Approach state-interference may be justified if family life is such that the capabilities of its members are seriously threatened.⁴⁹⁰ This is a fortiori the case for the protection of children, "for they are its future citizens, nor are they voluntary members in a family unit."⁴⁹¹ Hence, a state can have a 'compelling state interest' to interfere in family life, for instance in the case of orthodox parents who want to give their children a full-fledged religious upbringing and education.⁴⁹²

⁴⁸⁹ Nussbaum, *Women and Human Development. The Capabilities Approach*, 245.

⁴⁹⁰ *Ibid.*, 79, 275.

⁴⁹¹ *Ibid.*, 230.

⁴⁹² Cf. *Ibid.*, 231. The article "Evaluating Parents in Child Protection Decisions: An Innovative Court-Based Clinic Model" by Karen Budd can be seen as a contribution to making the Capabilities Approach operational for the entitlements of children to have their capabilities developed. Therein she presents a model to assess the competences of parents to rear their children. The indicators she introduces are on the one hand the competences that parents must have to meet the needs of their children and on the other hand independent

Obviously, from the viewpoint of the Central Human Capabilities parents also deserve respect as they are not mere instruments for the upbringing of their children.⁴⁹³ Like all other citizens, parents are entitled to a threshold level of the Central Human Capabilities. This means that they should at least be given “certain limited kinds of deference in making choices regarding their children.”⁴⁹⁴ But, if we take the protection of the threshold level of all capabilities for children and their parents seriously, it seems realistic to acknowledge that genuine conflicts of justice may occur. State-intervention in family life for the protection of children may genuinely conflict with the legitimate claims of parents. Such interventions can lead to a profound capability drawback for parents, in particular for their capability of affiliation, that of emotions and that of practical reason. The mere fact of intervention by and in itself already threatens the intimacy of the child-parent relation because parents are asked, to quote Ferdinand Schoeman, “to think of themselves as primarily

competences that nevertheless affect their parenthood. With regard to the physical needs of children she mentions the following skills: to provide regular, nutritious meals; to protect their home from hazards; to have the child vaccinated regularly. With regard to their cognitive needs she mentions: gets child to and from school regularly; teaches child basic concepts (e.g., colours, self-care); does not fail to seek professional services for a child with special needs; provides toys and activities to foster the child’s cognitive capability and its ability to play. With regard to their social/emotional needs: disciplines child fairly and realistically for its age; shows warmth and affection for the child; is emotionally responsive to the child’s needs. Cf. Budd, K.S., 'Assessing Parenting Competence in Child Protection Cases: A Clinical Practice Model ', *Clinical Child and Family Psychology Review* 4, 1 (2001), 6.

⁴⁹³ Nussbaum explicitly stresses that (also) in the domain of the family the separateness of its members should be honoured: “we focus on each person as bearer of a variety of associative rights and liberties and as a potential enjoyer of affiliative capabilities”. Even where the capabilities of love and care themselves are concerned, the appropriate goal of public policy is the capability to form such relationships, should they choose to do so. Such a focus on people and their choices has clear implications for public policy.” Nussbaum, *Women and Human Development. The Capabilities Approach*, 251.

⁴⁹⁴ *Ibid.*, 279.

serving public ends and as having public duties.⁴⁹⁵ As the aim of such an intervention is “abstract social well-being and not intimacy”, it can actually transform an intimate relation into an instrument for a public good.⁴⁹⁶ In any case parents’ chances to maintain an intimate bond with their children will be seriously reduced.

As it befits specificationism, in this context Nussbaum seems to suggest that reflection can help us to dismantle such conflicts as merely *prima facie* ones. That is, she proposes the abstract principle of ‘moral constraint’ as one way to go about it.

This principle indicates that immoral functioning does not deserve protection: “anything that is cruel or unjust, though it takes place in the family, doesn’t deserve to be included in what we value when we value and protect family life. The abuser puts himself outside the moral community for which ‘family’ rightly stands, insofar as it belongs on our normative list.”⁴⁹⁷ So, if parents intentionally and structurally abuse their children and show indifference towards their predicament, denying them their parental rights does not boil down to an infringement of their legitimate claim, according to Nussbaum. Rather, parents forfeit their claim to parental rights by acting immorally towards their children. In these cases their functioning as parents is not or - if at all- only to a limited degree protected by the Central Human Capabilities.⁴⁹⁸ As a consequence, part of respecting the dignity of parents will then amount to holding them responsible for the consequences of their own failure as parents.

Though this principle can of course be useful to dismantle some of the relevant conflicts as only *prima facie* conflicts, I do not think it suffices for marginalizing them in such a way that it would justify their being conceptualized as ‘negligible incidents’.

⁴⁹⁵ Schoeman, Ferdinand, 'Rights of Children, Rights of Parents, and the Moral Basis of the Family', *Ethics* 91, 1 (1980), 16.

⁴⁹⁶ *Ibid.*, 16-17.

⁴⁹⁷ Nussbaum, *Women and Human Development. The Capabilities Approach*, 275.

⁴⁹⁸ John Alexander points out that for a capability theorist like Nussbaum, there is a difficulty in holding citizens fully responsible for their deeds and letting them bear the loss that is the consequence, “particularly when it concerns individual choices that are deeply tied to institutional failures.” Alexander, *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum*, 111. This difficulty indeed exists for instance when parents who have been abused in the past and have not received any help in their childhood, become domestically violent themselves.

That is, even in cases of ‘clear neglect’ it may be questioned whether the principle of moral constraint categorically applies. Neglectful behaviour is not by definition an equivalent of intentional immorality. Sometimes parents “injure their children or fail to protect them as part of their general inability to cope.”⁴⁹⁹ In these situations of - what can be labelled as- ‘benign’ neglect, the Capabilities Approach also seems to give the state a compelling interest to intervene in family life.

Moreover, even if parents have ‘good intentions’ and do not clearly neglect their children, they can nonetheless (temporarily) be incapable to sufficiently meet their children’s physical, emotional, moral and educational needs, needs that are protected by the Central Human Capabilities.⁵⁰⁰ In these cases the principle of moral constraint does not apply either, simply because the intervention is not called for by clear immoral behaviour.

Can these kinds of conflicts then be prevented through better policies or legislation? Surely one might envision a range of ‘solutions’. For instance, one could think of legislation that (temporarily) forbids parents who lack basic competencies to have (more) children and upholds this prohibition by means of contraceptive injections. In this way certain conflicts will not need to occur. However, in terms of the Capabilities Approach this is no acceptable solution, at least not if ‘solution’ implies real avoidance of genuine moral loss or of infringement on the entitlements of either parents or children. For such a solution would immediately raise the ‘Plato worry’: state-interference in family life, structurally putting the interest of the child first, would strictly speaking leave open “the possibility that it could be legitimate to redistribute children en masse.”⁵⁰¹ Such a resolution would imply that we give up on the Kantian strand of the Capabilities Approach that implies that each citizen, including a citizen who is a parent, is to be treated as an end in himself.

Another category of conflicts of justice that may occur in the domain of the family is that between the capabilities of parents and children in case of divorce. Provided that

⁴⁹⁹ Wald, Michael, 'State Intervention on Behalf of 'Neglected' Children: Standards for Monitoring the Status of Children in Foster Care, and Termination of Parental Rights', *Stanford Law Review* 626 (1976), 674.

⁵⁰⁰ Cf. *Ibid.*, 674-675.

⁵⁰¹ Hannan, Sarah and Vernon, Richard, 'Parental Rights: A Role-Based Approach', *Theory and Research in Education* 6, 2 (2008), 174.

they are both sufficiently competent to offer their children the necessary care, from the viewpoint of the Central Human Capabilities both parents have a legitimate claim to parental authority. This authority allows them to fulfil their parental role and hence also to exercise a range of capabilities. However, if the relationship between parents is such that joint parental authority is seriously harmful for the child, only one of the former spouses can be assigned parental authority. Even if there are two or more children and both parents are assigned authority over at least one of their children, genuine conflicts of justice are likely to arise. In these situations the legitimate claims of both parents are impossible due to an inescapable characteristic of human nature: each child is indivisible and unique. This means that the resolution of such conflicts will come with genuine loss for at least one of the parents involved and for the children. 'Losing' parents will arguably lose a relation that is central for their understanding of whom they are and without which their lives are likely to suffer a considerable loss in meaning.⁵⁰² Not surprisingly, time and again the resolutions of such conflicts are also experienced as a source of frustration by the public officials involved in deciding such matters.⁵⁰³

The domain of the family surely is but one domain in society in which the Central Human Capabilities may prove to genuinely conflict. But precisely because the realisation of the Central Human Capabilities so largely depends on certain empirical conditions being fulfilled, it is realistic to expect that conflicts of justice will arise in other domains as well. These conflicts will then also be sources of residues of justice; their resolution will cause a genuine moral loss that from the viewpoint of the Central Human Capabilities is to be lamented. Also in case of such conflicts the residual character of justice may stem from the fact that their actual resolution is arbitrary, i.e. not determined by a moral viewpoint itself. As said: in such situations the Capabilities Approach by itself does not offer any substantial criteria to solve said conflicts. In so far justice is considered a viewpoint that can exhaustively justify the reasons why citizens should bear a genuine moral loss, it fails to do this justificatory work in case of genuine conflicts.

⁵⁰² Cf. Schoeman, 'Rights of Children, Rights of Parents, and the Moral Basis of the Family', 14.

⁵⁰³ Carolyn, Cox, 'Joint Custody: Dividing the Indivisible', *Utah Law Review* (1986), 577.

3.1.1 Conflicts of justice in adjudication

The conflicts of justice that may arise within the Capabilities Approach influence the moral character of adjudication, at least when this theory is used as a normative background theory of law and adjudication. Being committed to the realisation of the Central Human Capabilities, in applying the law and hence these principles judges will face genuine conflicts between legitimate claims of citizens. In such cases, whatever the judge will decide, the losing citizen will suffer a serious decrease in one or more capabilities. Also, the grounds of these decisions may from a moral point of view be opaque, contingent, or even arbitrary. In any case the reason why the particular citizen ‘loses’ and has to bear the consequences of the judicial choice cannot be reduced to justice itself.

In this section I will show how the conflictual character of justice bears upon adjudication by discussing some legal cases that concern family life, as it was this domain that I discussed above as one in which conflicts of justice arise.

The case of *Mary Jones*⁵⁰⁴

A woman in her early forties, Mary Jones has been addicted to drugs for quite some years. This was a serious threat to the physical and emotional safety of her children. With the help of psychological and medical treatment Mary succeeded in getting over her addiction. In therapy she particularly coped with the abuse she suffered in childhood. It was during this period of treatment that Mary’s children were placed under court custody for two years and with Mary’s permission her children lived with their grandparents. From then on the children functioned better at school and Mary’s daughter suffered less from anxiety attacks.

After the two-year term has passed, the Youth Protection Office goes to court and petitions for the permanent termination of Jones’ parental rights because both children had grown attached to their grandparents and because they really started to do better. In court it argued that insecurity for the children would recommence if Jones regained her parental authority.

Jones argues to the contrary. She puts it that with professional help she will be capable to give her children the necessary care and that therefore she at least should be granted the right to

⁵⁰⁴ For this case I have drawn on the following cases: Rechtbank Den Bosch, June 6 2006, ECLI:NL:GHSHE:2006:AY6904; Gerechtshof Arnhem, February 28 2006, ECLI:NL:GHARN:2006:AV3288; Gerechtshof Den Haag, June 9 2010, ECLI:NL:GHSGR:2010:BN2572; Rechtbank Haarlem, January 19 2010, ECLI:NL:RBHAA:2010:BL0980; Gerechtshof Den Haag, August 18 2010, ECLI:NL:GHSGR:2010:BV0519.

reclaim her parental authority at a later stage. Jones tells the judge that she is willing to do all that is necessary to prove that she is a good mother. She also asserts that it is impossible to know in advance what will eventually be in the best interest of the children, particularly where the matter of permanently terminating her parental authority is concerned. Each time she speaks to her children they tell her how much they miss her.

From the viewpoint of the Central Human Capabilities, this case confronts a judge with a genuine conflict of justice. On the one hand the judge is duty-bound to interpret settled law in a way that honours the legitimate claim of the children: to grow up in a context where they can develop their (internal) capabilities. This means that the judge should decide in way that secures continuity and stability for the children, that facilitates an unimpeded bonding with their 'foster parents' and that provides them clarity as to their future 'home'. If Jones would retain the legal right to regain parental authority later on, this could have a negative effect on the bond that has developed between the children and their grandparents. Drawing on international law, national precedents and national settled family law⁵⁰⁵ the judge has a reason of justice to permanently end Mary's parental authority.

On the other hand, the judge must also honour Jones' right to a threshold level of the Central Human Capabilities. If he decides to permanently end her parental rights, this right is violated. That is, against her wish Jones will then not be able to live and experience the intimate bond with her children. She might have the internal capability for affiliation, love and self-esteem, but due to the termination of her parental authority she would not be able to genuinely develop and use them. This severe interference with her private life may cause substantial and long-term emotional pain and trauma.⁵⁰⁶ She will be condemned to experience her motherhood through missing her children with detrimental consequences for her feelings of self-worth and self-respect.⁵⁰⁷

One could of course hold that this capability downfall is due to Jones' own fault because she has violated the principle of moral constraint and that therefore she is to be held responsible for her misbehaviour. But this comes at the price of ignoring the very facts for which the Capabilities Approach claims to be sensitive. That is, Mary Jones' inability to offer her

⁵⁰⁵ The relevant national legal rules are 1:266 and 1:268 of the Civil Code of The Netherlands. The relevant international rules are: article 3 and article 20 of the Convention on the Rights of the Child and article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁵⁰⁶ Wald, 'State Intervention on Behalf of 'Neglected' Children: Standards for Monitoring the Status of Children in Foster Care, and Termination of Parental Rights', 675.

⁵⁰⁷ Seemingly there is little research available on the social-emotional consequences for parents whose parental rights have been denied permanently. As we shall see in the chapter on the concept of a tragic legal choice, monitoring these consequences may be part of the responsibility of a legal order.

children the necessary care was caused by her addiction and that in turn was intimately linked to her being abused as a child. Jones did not intentionally commit unjust acts regarding her children. Such an interpretation also falsely ignores that Jones really loves her children and is willing to do everything that is needed to get on the right track and become sufficiently able and competent.

So, in this case a judge faces a genuine conflict of justice and justice by implication does not offer a measure for resolving it. The resulting judicial decision may therefore not only be the result of 'arbitrary' factors such as the subjectivity of the judge, it will in any case also result in a genuine moral loss. Justice cannot prevent this arbitrariness and moral loss to occur.

The case of *Clarissa and Peter Stock*⁵⁰⁸

Already from the beginning of their marriage Clarissa and Peter Stock had continuous and rather nasty fights. The couple wanted nonetheless to stay together for their son Tom and they tried counselling. However, things slowly got worse. At one point Clarissa fell in love with a man who lived in another country. After a period of serious reflection on all the pros and cons, Clarissa decided to divorce Peter and to move with her son to this country so as to live with her new found love. Peter was shocked by these plans. He strongly protested, but to no avail. As a last resort he went to court and filed a petition, claiming that his son Tom should have his domicile with him and that he should have sole parental authority. Subsidiary Peter requested arrangements for visits.

The judge now faces a genuine conflict of justice. The legitimate rights to an adequate threshold level of the Central Human Capabilities of both parents and of Tom prove in this case to be impossible. This impossibility is due to a deep fact of human nature: Tom cannot be 'divided' in two and this fact is particularly urgent now that both parents will live in different countries.

The judge may make an effort and reflect on a specification of these rights through which all the legitimate interests at stake can be reconciled, for instance by granting both parents parental rights and by imposing regular visiting arrangements for Peter and his son. However, the judge may conclude that such visiting arrangements would lead to too much insecurity for

⁵⁰⁸ For the discussion of these cases I took inspiration from the following cases: Rechtbank Den Haag, May 4 2010, ECLI:NL:RBSGR:2009:BL6139; Gerechtshof Den Haag, March 5 2003, ECLI:NL:GHSGR:2003:AG1643; Gerechtshof Amsterdam, February 23 2010, ECLI:NL:GHAMS:2010:BL9055BL9055. See for a brief and critical discussion of Dutch case law regarding whether a parent is entitled to move after a divorce: Schrama, W.M., 'Verhuizen na Scheiding: geen Winnaars, veel Verliezers', *Tijdschrift voor Familie- en Jeugdrecht* 88 (2010). Schrama notes that the outcomes of said proceedings are difficult to predict and identifies a potential tension between the idea of equal parenthood and the moving (to another country) of one of the parents.

Tom as both parents lack the financial means to accompany the child on travels between the two countries and Tom is too young to travel alone. To prevent Tom from entertaining unwarranted expectations about his parents' role, the judge may hold that their parental rights should indeed fit the actual circumstances and hence that sole custody should be granted to one of the parents and that the visiting arrangements will be limited. Hence, as it will be impossible to find an arrangement through which both parents can develop and maintain intensive relations with Tom, the judicial decision will at least put the threshold level of the capability of affiliation and practical reason of one of the parents in peril.

The judge can of course also decide that both parents must make an effort to ensure that there will be regular contact by telephone. But, this is not to take away the fact that the threshold level of said capabilities is harmed. Such a capability downfall cannot be compensated by telephonic contact.

Due to the particularities of the case justice is itself internally conflicted. Hence, not being guided by any final normative source in the interpretation of settled law it may well be that the subjective views of the judge, for instance his traditional view as to parental responsibilities, will be decisive for his decision. In such a case justice cannot prevent that the decision is arbitrary and neither does it prevent that it comes with a genuine moral loss.

In brief, by these cases I have aimed to illustrate how the conflictual character of justice influences the character of adjudication. Judges will be faced with genuine conflicts of citizens' rights to a threshold level of the Central Human Capabilities and the resolution of these conflicts may result in a genuine moral loss. What is more, in such cases it remains to be seen what reason the losing citizen has to accept the decision, as this resolution can in no way be reduced to justice itself.

3.2 Justice as under-determinate

Another reason why the Capabilities Approach's justice is rather fragile, e.g. leads to residues of justice, is the under-determinacy of justice. This not so much because of the thinness of its concepts –indeed, in the previous chapter we saw that Nussbaum's conception of justice is more determinate than Rawls's. Rather, this under-determinacy is due to the discretion that Nussbaum assigns to the responsibility bearing institutions to determine what justice minimally requires. What justice concretely requires will therefore depend on an amalgam of factors that are not guided by theory.

In the previous chapter we saw that within the Capabilities Approach justice requires that the Central Human Capabilities are secured to an 'adequate' threshold level for

all citizens.⁵⁰⁹ In a just society all responsibility-bearing institutions are duty bound to do everything within their power to ensure that citizens do not fall below this line.

At first sight this is a rather clear-cut public task, but the problem of under-determinacy surfaces because of the strong discretion that Nussbaum assigns to the responsibility bearing institutions to determine this threshold level. “Each nation, of course, makes its own list of core entitlements and sets a threshold to establish an adequate level of support. Nations make different decisions about which capabilities will get constitutional protection and which will be left to the majoritarian democratic process. What judges must interpret is the list validated by their own nation, together with the tradition of precedent that interprets it,” Nussbaum says.⁵¹⁰

Of course this is not to say that ‘anything goes’ within the Capabilities Approach: Nussbaum stresses that the level of social conditions that must be guaranteed as a minimal requirement of justice should be a matter of “wise practical reasoning”, that the discretion is curtailed by “parameters”⁵¹¹ and that differences between different societies may exist “at the margins.”⁵¹² Nonetheless, because of the discretion the concrete determinations of the ‘claims of justice’ can be the outcome of contingent institutional and political facts. It allows the institutions themselves to establish what justice minimally requires and -other things equal- there is no reason to expect that the substantive goals of the Capabilities Approach will be realized and that citizens will be able to lead a life in accord with their dignity. In any case, the range of outcomes that will qualify as an adequate threshold level cannot sensibly be reduced to the viewpoint of justice itself.

One could argue that the discretion Nussbaum assigns to institutions is unproblematic because we can rely on their good intentions and competence to use it in a way that indeed secures a life in accord with dignity for all citizens.⁵¹³ And one may of course

⁵⁰⁹ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 79;———, *Creating Capabilities: The Human Development Approach*, 41.

⁵¹⁰ Nussbaum, 'The Supreme Court, 2006 Term. Foreword: Constitutions and Capabilities: 'Perception' against Lofty Formalism', 60.

⁵¹¹ ——, *Frontiers of Justice: Disability, Nationality, Species Membership*, 79.

⁵¹² *Ibid.*, 79, 180.

⁵¹³ *Ibid.* If this assumption would be valid, the very range of ‘threshold levels’ that the Capabilities Approach accommodates could be considered a point of strength, rather than

be right. But, an argument pointing to the actual quality of ‘threshold determining practices’ in any case needs supportive arguments. Without such arguments, the danger of justifying each and every (institutional) status quo looms over the Capabilities Approach.

In addition, it seems a matter of uncontroversial fact that differences between the kinds of institutional arrangements that are current in Western constitutional democracies do in fact seriously influence the extent to which citizens’ capabilities will be secured.⁵¹⁴ For instance, it makes no small difference whether or not the Central Human Capabilities receive constitutional protection combined with judicial review.⁵¹⁵ It also matters a lot to what extent and with regard to which kinds of decision-making discretion is assigned to administrative agencies to decide what resources should minimally be granted to citizens.⁵¹⁶

We can illustrate how under-determinacy can in practice lead to residues of justice by the position of disabled citizens. For this group the Capabilities Approach emphatically claims to do a better job than does Rawlsian justice.⁵¹⁷ According to

troublesome. Because of this very latitude justice need not to be forcefully ‘imposed’, but rather can be ‘found’ in each society and concrete claims of justice can be established in a way that is fully sensitive to their histories and special circumstances.

⁵¹⁴ The idea that actual characteristics of institutions are significant for the determination of the threshold level is also indicated by Nussbaum’s critical discussion of the formalist style of legal reasoning employed by the Supreme Court of the United States during its 2007 term. See: ———, ‘The Supreme Court, 2006 Term. Foreword: Constitutions and Capabilities: ‘Perception’ against Lofty Formalism’.

⁵¹⁵ Likewise, if certain capabilities do receive constitutional protection, but merely in the rather vague terms of aspirations, the criteria for the assessment of their realization are also vague and the corresponding ‘rights’ will not easily be susceptible for enforcement through judicial decisions.

⁵¹⁶ Control over policy-choices by the judiciary is often criticized by reference to the pejorative phrase ‘judges taking over from the government’, or by referring to an ‘activist’ or ‘undemocratic’ judiciary.

⁵¹⁷ See for Nussbaum’s discussion of the implications of the Capabilities Approach for the position of disabled citizens in society: Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 155-216; Nussbaum, Martha C., ‘The Capabilities of People with Cognitive Disabilities’, *Metaphilosophy* 40, 3-4 (2009). See for a discussion of

Nussbaum Rawls wrongly holds that disabled citizens are such a special group, that they do not fall “within the normal range” and therefore the question how to deal with them should be answered by legislation, policies and adjudication, rather than by principles of justice. She asserts, by contrast, that their position must be determined by the viewpoint of justice, precisely because it is not categorically different from that of other citizens.⁵¹⁸ Within the Capabilities Approach all citizens are both capable and needy and hence they are situated on the same but gradual scale where their neediness is concerned.

However, because of the rather strong discretion that the Capabilities Approach leaves to authoritative institutions to establish the level of protection for disabled citizens, this level will depend on contingent institutional circumstances, similar to what is the case in Rawls’ theory. It may for instance well be that the constitution does not explicitly protect the position of citizens with a handicap.⁵¹⁹ The legislature

Nussbaum’s position in this regard also: Wasserman, David, 'Disability, Capability, and Thresholds for Distributive Justice', in *Capability Equality: Basic Issues and Problems*, ed. Kaufman, Alexander (Routledge, 2006); Kittay, Eva Federer, 'Equality, Dignity and Disability', in *Perspectives on Equality: The Second Seamus Heaney Lectures*, ed. Lyons, Mary Ann and Waldron, Fionnuala (Dublin: The Liffey Press, 2005). Kittay’s article addresses the questions whether and on what grounds dignity is assigned to persons with cognitive disabilities. She thereby praises (p. 108) Nussbaum as one of the rare philosophers “who has taken to heart the fact that those with cognitive disabilities should be squarely included within the human moral domain -who, while recognizing the importance of reason, maintains that there is so much more to a human life worthy of dignity”. She criticizes Nussbaum’s Capabilities Approach because in the end, due to the normative status of the Central Human Capabilities, it cannot accommodate the idea that persons with severe cognitive disabilities can indeed lead a ‘richly human life’ rather than a ‘tragic life’. Kittay proposes a care-based theory so as to better be able to understand the moral relation with persons with mental disabilities. See for Nussbaum’s response to Kittay on this point: Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 217-223.

⁵¹⁸ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 203.

⁵¹⁹ For instance, under the regime of the Act for Provisions for Disabled Persons (Wet Voorzieningen Gehandicaptten), which was operative until 2006 in the Netherlands, it was delegated to the local authorities to flesh out the concrete extent of the governments’ duty of care towards disabled citizens.

may then grant local authorities discretion to provide ‘provisions’ with regard to housing, transportation, wheelchairs and other devices necessary to enable these citizens to develop and exercise their capacities and to participate in the social life of their community. The local authorities will then be relatively free to for instance decide whether the (extra costs of) transportation necessary for disabled citizens to visit friends or family fall under their duty of care and whether it is also part of this duty of care to compensate the costs of the disabled partaking in recreational activities.

From the viewpoint of the Central Human Capabilities these outcomes are obviously not indifferent, outcome oriented as the theory is. Whether citizens with disabilities will have the opportunity to recreate, work, and visit relatives and friends directly affects their level of capabilities, including that “to love those who love and care for us”⁵²⁰ and the capabilities of practical reason, of self-respect and of play. If the responsibility bearing authorities do not provide disabled citizens the means to overcome their specific obstacles, these citizens may find themselves below a threshold level with regard to one or (because they are intensely interrelated) more of the capabilities. Due to this discretion citizens may not only suffer from a genuine moral loss, but they it is also an urgent question why they in their status as equal citizen have a reason to accept a normative order that does not provide them with the opportunity to lead a life in accord with their dignity.

True, Nussbaum herself is rather clear about the concrete implications of justice for the claims of disabled citizens. A just society should “organise public space, public education and other relevant areas of public policy” to support the capabilities of disabled citizens, as many of them, and as fully, as possible.”⁵²¹ However, the argument is not to deny that Nussbaum’s view on the task of government to secure certain social conditions for disabled people is demanding, particularly if compared to that of Rawls. The argument is that because of the strong discretion it grants to the responsibility bearing institutions, the Capabilities Approach cannot secure substantial outcomes in this regard.

⁵²⁰ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 76.

⁵²¹ *Ibid.*, 222.

3.2.1 Under-determinacy in adjudication

In this section we shall see how the under-determinacy of justice and the resulting residues work out for the moral character of adjudication. Because of said under-determinacy judges who are committed to settled law and the Central Human Capabilities, will first of all largely depend on what the responsibility bearing institutions -such as parliament, policymakers- establish as an adequate threshold level for each of the Central Human Capabilities. This may lead to residues of justice, because the decisions made by for instance majority vote may conflict with the substantive level of protection that the Capabilities Approach had envisaged to secure that citizens will be *really* able to lead a life in accord with their dignity.

What is more, if these responsibility bearing institutions have not determined the threshold level clearly and settled law does not give an answer in this regard, from the viewpoint of the Capabilities Approach judges will have strong discretion to determine what this threshold level is. Hence, justice as the Capabilities Approach sees it cannot prevent that judicial decisions will lead to moral loss and that equal citizens will bear the consequences of judicial decisions that cannot, at least not sensibly, be accounted for in terms of justice, but only in terms of matters of empirical fact.

The case of *Andrew Hinz*

Andrew Hinz is condemned to a wheelchair because of his physical handicap.⁵²² Andrew's most prominent social activities are going fishing with his father and visiting other relatives. Thereto he is fully dependent on his father. Twice a week his father picks up Andrew with a specially adapted car.

However, one day the car breaks down and is beyond repair. Neither Andrew nor his father has the financial means to buy another car suited to transport a wheelchair. In an administrative procedure Hinz therefore requests financial support from the local municipality to buy a second-hand specially adapted car. The request is based on a law that aims to provide disabled citizens special support. The local municipality rejects the request arguing that Hinz can make use of a collective wheelchair taxi and all kinds of other means of transport.

Hinz goes to court arguing that the decision of the municipality is contrary to law because it gives a wrong interpretation of some of the applicable open norms, such as 'social isolation',

⁵²² For the discussion of this case I draw on the following legal cases: Rechtbank Almelo, June 13 2001, ECLI:NL:RBALM:2001:AE3953; Centrale Raad van Beroep, December 3 2002, ECLI:NL:CRVB:2002:AF5074; Centrale Raad van Beroep, May 3 2006, ECLI:NL:CRVB:2006:AX9519.

‘everyday life’ and ‘essential contacts’. Hinz argues that not having a car precludes him from maintaining the very ‘essential contacts’ that the applicable law sees to. Without the fishing and family visits he will definitely end up in social isolation as he does not have any relatives or friends in the vicinity of his home. Neither can he move to the village where his father lives because the care that he needs is located in his own village, nor can his father move to his residence because of his work.

From the viewpoint of the Capabilities Approach the judge has to decide whether the local municipality in its interpretation of settled law has violated the threshold level of the Central Human Capabilities. The law itself does not offer a clear substantive benchmark in this regard except for said relatively open norms.

Now, exercising the strong discretion that the Capabilities Approach allows for, the judge is justified to set the threshold level himself. In so doing he can decide that visits to relatives outside one’s municipality and fishing are not the kinds of ‘daily activities’ that local municipalities should be obliged to support. He can assert that Hinz’s opportunities to maintain ‘essential contacts’ are not in peril because his father and other relatives still have the opportunity to visit him. Without being able to make the excursions, Hinz will not necessarily end up in ‘social isolation’.

The judge can conclude that the threshold levels of the capabilities of affiliation and of practical reason do not imply that citizens themselves must be able to visit others and hence that the decision of the local municipality stays within the limits of the law.⁵²³

At the same time it is a serious question whether the judge’s interpretation of the threshold level of the capabilities of practical reason and of affiliation does not jeopardize one of the aims of the Capabilities Approach: to ‘really’ bring the capabilities of disabled citizens up to the same threshold level as that of ‘normal’ citizens, “even where that entails changes that may be expensive.”⁵²⁴ From this perspective it could be argued that Andrew Hinz should be

⁵²³ Note that the Dutch act that protects the disabled (Wet Maatschappelijke Ondersteuning) leaves administrative agencies discretion regarding how to balance between the interest of the disabled citizen and general interests. Administrative review in these cases is ‘marginal’ due to what in Dutch administrative legal doctrine is qualified as its ‘constitutional position’. See for this point in the Dutch context: Vermaat, Matthijs, Rooij, Hans van et al., ‘Compensatie in de Wmo: De Rechter als Plaatsvervangend Bestuurder?’, *Tijdschrift voor Gezondheidsrecht* 6 (2010).

⁵²⁴ Cf. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 76. Moreover, in answering the question whether the entitlements of disabled citizens are guaranteed, Nussbaum -at least explicitly for citizens with cognitive disabilities- lays the burden of proof on the state. In order to be just a state must motivate why the social conditions necessary for disabled citizens to have the capabilities on the list are not (yet) realized. The only legitimate excuse for this would be that to not provide these conditions is

able to choose whom to visit and when, just like any other citizen. As a mature man in his thirties who is fully dependent on the willingness of others to visit him, Hinz cannot be said to genuinely have the chance to maintain social contacts, at least not if we also want there to be agency involved. The judge's interpretation is in any case at odds with the fact that practical reason is an architectonical capability and as such is a necessary condition for all other capabilities, including that of affiliation. Hence, the decision itself, although justified because of the discretion the Capabilities Approach assigns to the responsibility bearing institutions, may nonetheless come with a genuine moral loss. This is even more troublesome because by the same token another judge could have determined the threshold differently. The burden of the decision that Hinz now has to bear may thus well be due to arbitrary factors rather than to reasons that Mister Hinz has to accept as a matter of justice.

The case of *Lory Mehdau*⁵²⁵

Lory Mehdau is a young woman who is severely mentally disabled. From childhood on she lived in a special care-centre. Lory's mother, who lives relatively far away from the care-centre, is unable to visit her daughter by public transport due to her own physical disability. Lory's guardian therefore requests financial support from the local municipality to pay for a specially adapted taxi at least twice a year so as to enable Lory to occasionally visit her mother.

On the basis of standing policy the local municipality decides that Lory Mehdau can do without the opportunity to visit her mother. It argues that because of her severe mental disability, Mehdau does not have the kind of independent pattern of desires that would render these visits indeed 'necessary'.

Lory's guardian appeals this decision in court. In support he submits a declaration of Lory's mentor at the care-centre stating that Lory's visits to her mother substantially add to the quality of her life. Compared to her normal state, Lory is always much more cheerful before, during and right after the visit to her mother.

The judge must now assess whether the administrative agency has used its discretionary power within the constraints of the law and hence also within the constraints of the threshold level of the Central Human Capabilities. If settled law does not give substantive guidance, the Capabilities Approach allows the judge strong discretion to set the threshold level himself. The judge will then not be guided by theory, so to say.⁵²⁶ On the basis of his own personal

required as a matter of "compelling state interest", Nussbaum says. ———, 'The Capabilities of People with Cognitive Disabilities', 338.

⁵²⁵ For this case I have taken inspiration from: Rechtbank Den Haag, November 30 2006, ECLI:NL:RBSGR:2006:AZ5731.

⁵²⁶ Of course it is a serious question whether the decision complies with Nussbaum's views on how judges should reason and the attitudes they should have. However, it remains to be seen

views he will be free to decide that the decision of the local municipality is indeed within the constraints of law, because he thinks Lory's cognitive capacities are too limited to claim the provisions that are requested.⁵²⁷ At the same time, we may hold that the decision of the judge does violate the threshold level of the Central Human Capabilities. By such a decision the judge will structurally impede Lory to -albeit imperfectly- experience an affective, intimate bond with another person, an aspect of human life that is crucial according to the Capabilities Approach. Again, the discretion that the Capabilities Approach allows for may result not only in an arbitrary judicial decision but also in a decision that causes a genuine moral loss.

To conclude, the Capabilities Approach attributes rather strong discretion to responsibility bearing institutions to set the threshold level of justice. The under-determinacy that results bears on the moral character of adjudication. Due this under-determinacy the actual threshold level that will be protected in a concrete legal case will depend on contingent or arbitrary facts rather than on reasons of justice and the effectuation of this threshold level may also come with a genuine moral loss.

3.3 Justice at odds with political legitimacy

Finally, there is the 'political legitimacy-argument'. The crux of this argument is that when applied to society the Capabilities Approach leads to residues of justice because of its commitment to a (specific) principle of political legitimacy. Drawing on Rawls' 'political liberal' interpretation of political legitimacy, Nussbaum holds that it is a requirement of respect that exercises of state power can be defended to each and every citizen. Indeed, as it befits a normative theory of political morality, Nussbaum claims that the Central Human Capabilities can comply with this particular demand of political legitimacy.⁵²⁸ According to Nussbaum these principles offer -albeit on the most abstract and general level- the reasons why citizens must accept the exercise of

whether indeed these views are to qualify the discretion that she assigns to the responsibility bearing institutions to set the threshold level of the Central Human Capabilities.

⁵²⁷ If one thinks that this case is not really about the threshold level of the Central Human Capabilities, but more about *which* citizens must receive protection within the Capabilities Approach, there are a range of other examples that illustrate the same point. Think for instance of a request for financial support for the purchase a tandem for a blind citizen, or for that of a special saddle for a citizen missing one leg who nonetheless wanted to ride horseback. Cf. Social Security Tribunal, March 3 2004, ECLI:NL:CRVB:2004:AO5674.

⁵²⁸ Cf. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 1.

state power. By offering the underlying principles of justice, all practices in which state-power is exercised can be exhaustively justified, or so is the idea.

In grasping what the principle of political legitimacy precisely entails and thus demands of philosophy, Nussbaum's interpretation of the notion of 'overlapping consensus' is leading. Again, drawing on Rawls' 'political liberalism', Nussbaum holds that state power is only legitimate if it can be construed as the result of principles that are the object of an 'overlapping consensus' between reasonable citizens.⁵²⁹

Nussbaum is of two minds in her interpretation of this 'overlapping consensus'. On the one hand 'overlapping consensus' as Nussbaum understands it clearly has a normative dimension.⁵³⁰ That is, the Central Human Capabilities are clearly presented as a *philosophical* list that is to function as a set of normative principles underpinning a constitutional democracy. As such Nussbaum's theory aims to offer "some definite content" of political morality, rather than leaving the determination of these values for grabs to the forces in society.⁵³¹ This is also why the Capabilities Approach is characterized as a content-based approach to justice.⁵³² With regard to political

⁵²⁹ Ibid., 16; ———, *Women and Human Development. The Capabilities Approach*, 76. See for an argument that the Capabilities Approach is not 'really' committed to a political liberal principle of political legitimacy: Barclay, Linda, 'What kind of liberal is Martha Nussbaum', *Sats-Nordic Journal of Philosophy* 4, 2 (2003). See for Nussbaum's response: Nussbaum, Martha C., 'Political Liberalism and Respect: A Response to Linda Barclay', *Sats-Nordic Journal of Philosophy* 4, 2 (2003), 26.

⁵³⁰ Nussbaum, Martha C., 'Political Objectivity', *New Literary History* 32, 4 (2001), 890.

⁵³¹ Ibid. This normative interpretation is also implied by Nussbaum's critique on Sen and his view that the relevant kinds of capabilities that should be guaranteed in a particular society are the ones that are established through political processes and public deliberation.

Nussbaum thinks this would leave too much leeway to "whim and caprice, or even to the dictates of a cultural tradition." Nussbaum, 'Capabilities as Fundamental Entitlements: Sen and Social Justice', 47.

⁵³² John Alexander describes a content-based approach of public reasoning within a capability theory as one in which "a set of basic capabilities is chosen beforehand from a particular world-view or comprehensive conception of the good life." According to Alexander Nussbaum's Capabilities Approach is content-based insofar as "the universal list of (ten) basic capabilities serves as a set of political goals based on which legislators, policy makers

legitimacy this indicates that theory itself delineates which views fall within the domain of ‘overlapping consensus’ and hence which views in society can be ignored as being unreasonable.

This normative interpretation of ‘overlapping consensus’ and hence of ‘reasonableness’ is also indicated by the outcome-orientedness of the Capabilities Approach. The relevant criterion for assessing the workings of actual institutions and procedures -including that of democracy- is the extent to which they serve the realisation of the Central Human Capabilities. In order for the notion of ‘outcome-orientedness’ to have any substantive bearing these institutions and procedures will by themselves not be decisive for the determination of what falls within the ‘overlapping consensus’.

So conceived, Nussbaum’s interpretation of ‘overlapping consensus’ points to a consensus between the reasonable -i.e. philosophically defensible- view of citizens. In determining the legitimacy of state-power philosophical arguments will be given special weight and unreasonable views -philosophically untenable views- will be denied all weight. In this interpretation the principle of political legitimacy does boil down to a requirement of ‘moral justification’. Once principles of political morality can be morally justified they can also form the legitimate grounds for the exercise of state-power. This interpretation unmistakably points to the model of the ‘philosopher King’.

But on the other hand, and here lays the ambivalence, Nussbaum’s ‘overlapping consensus’ also clearly refers to a consensus in the empirical sense, i.e. an empirically identifiable state of affairs.⁵³³ Throughout her work we can find several places where

and citizens can conduct their public discussions and deliberations.” Cf. Alexander, *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum*, 160.

⁵³³ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 163, 388. The weight assigned to consensus in the empirical sense is also exhibited by the fact that in some of her writings Nussbaum thought it premature to include in the list of Central Human Capabilities the right to non-discrimination on the basis of orientation, because “there was little consensus on this item”. Cf. ———, *Women and Human Development. The Capabilities Approach*, 79-80. Consensus obviously need not exist simultaneously with the exercise of state-power. At the same time, at pains of losing all substantive meaning, it must be

Nussbaum emphasizes that ideally the grounds for the exercise of political power must be derived from ‘common sense’, from shared ideas and from non-controversial scientific facts, even if some of these views are ‘really’ wrong or untrue.⁵³⁴ In a similar vein, Nussbaum holds that the (epistemic) guidelines for inquiry as to what justice entails in practice, should as a matter of respect stem from widely accepted ‘epistemologies’ so as to avoid “indulging” in a conception of objectivity of a “divisive sort.”⁵³⁵

Actual or expected factual acceptance is the key to answering the question whether a particular view or reason may be politically effectuated.⁵³⁶ Consequently, the specifications of the Central Human Capabilities, i.e. their normative implication for a concrete case, must not be determined by referring to ‘knowledge’, at least not if this knowledge is likely to give rise to controversy. If we take this empirical dimension of ‘overlapping consensus’ seriously and also its demand of epistemic abstinence, it will even be difficult to privilege the views of ‘reasonable citizens’ above ‘unreasonable views’ in the construction of the ‘overlapping consensus’. That is, at least if these qualifications are to keep their substantive meaning. The distinction can in any case not hinge on a controversial epistemology - regardless of its truth.⁵³⁷

Not surprisingly, it is this latter dimension of ‘overlapping consensus’ that may

reasonable to expect the consensus to come about in the near future. This substantive meaning is in peril where Nussbaum states that overlapping consensus means that “[w]e require only that there be a plausible path to that endorsement, such that, over time, it is not unreasonable to suppose that society could arrive at that consensus. Cf. ———, *Creating Capabilities: The Human Development Approach*, 91.

⁵³⁴ Nussbaum, ‘Political Objectivity’, 887. It is debatable whether Nussbaum excludes from the overlapping consensus only metaphysical and comprehensive conceptions of objectivity, or whether she rejects all conceptions of objectivity “of a divisive sort”, including the ones that from a philosophical point of view are most convincing. In her article ‘Political Objectivity’ Nussbaum chooses the second option; she dismisses convincing moral epistemologies such as those of Putnam and Cohen. Cf. ———, ‘Political Objectivity’, 897.

⁵³⁵ Nussbaum, ‘Political Objectivity’, 897.

⁵³⁶ Cf. Barclay, ‘What kind of liberal is Martha Nussbaum’, 12.

⁵³⁷ For this point I took inspiration from David Estlund’s fine article on Rawls’ political liberalism: Estlund, David, ‘The Insularity of the Reasonable: Why Political Liberalism Must Admit the Truth’, *Ethics* 108, 2 (1998), 265.

conflict with the substantive goals the Capabilities Approach has set: to *really* secure to each and every citizen an adequate threshold level of each of the Central Human Capabilities.⁵³⁸ There is no a priori reason to assume that the majority of citizens will be disposed to for instance protect the interests of minorities and appreciate them in the way the theory suggests, that is as citizens with equal dignity. Some of the implications of the Central Human Capabilities can in practice be highly controversial. For this reason Ingrid Robeyns refuted the idea of an ‘overlapping consensus’ as a ‘rhetorical trick’ where the political legitimacy of justice is concerned. She puts it that it falsely suggests that justice as a set of normative principles of political morality provided by philosophy will harmonize with the idea that state-power must be defensible to each and every citizen.⁵³⁹

In case some of the Central Human Capabilities are controversial it may thus be that what is philosophically right cannot be politically effectuated. In such situations residues of justice may occur. These residues can then not be ‘solved’ or prevented by the normative dimension of an ‘overlapping consensus’ because Nussbaum does not grant *privileged* knowledge any special status where it concerns the grounds for the exercise of state power. Again, state power should respect the “views of many people about what truth is and where it lies”, regardless of the plausibility of these views.⁵⁴⁰ That the commitment of the Capabilities Approach to the principle of political legitimacy can lead to a violation of its own substantive goals, i.e. to residues of justice, can be illustrated by the position of a minority group, for instance that of Muslims. It may well be that a dominant group or culture in society considers the Islam and Muslims a threat to liberal values such as autonomy, tolerance and the

⁵³⁸ It should be noted that this conflict between political legitimacy and the realisation of substantial values is not unique for the Capabilities Approach; it is an urgent question which all conceptions of justice that belong to the family of ‘political liberalism’ face. Clearly, the urgency of this potential conflict particularly surfaces in times when the public support for the basic rights of particular minorities weakens.

⁵³⁹ Robeyns, Ingrid, 'Nussbaum over Capabilities en Rechtvaardigheid', *Filosofie & Praktijk* 4 (2006), 10.

⁵⁴⁰ Nussbaum, 'Political Objectivity', 888.

emancipation of women and homosexuals.⁵⁴¹ If this is the case it goes without saying that such views and the corresponding attitudes will influence Muslims' opportunities to obtain an adequate threshold level of the Central Human Capabilities. A relatively offensive⁵⁴² dominant group or culture will influence their educational and job opportunities, their chances to participate in the public domain and in public debate, their sense of self-respect and the development of their children because of how they are treated at primary and secondary schools.⁵⁴³ Of course these risks increase if the

⁵⁴¹ See for an analysis of such a development in the Netherlands: Shadid, Wasif, 'Moslims in de Media: de Mythe van de Registrerende Journalistiek', in *Mist in de Polder: Zicht op Ontwikkelingen omtrent de Islam in Nederland*, ed. Vellenga, S. (Amsterdam: Aksant, 2009), 173. See for a general discussion of the position of Muslims in the Netherlands: Forum, 'Factbook 2010. The Position of Muslims in the Netherlands', (Utrecht: Forum. The Institute for Multicultural Development, 2010). Moreover, in its third report (2007) on the Netherlands the European Commission against Racism and Intolerance stated that: "the Netherlands witnessed a sharp rise in racist violence and other racist crimes, essentially targeted at its Muslim population. This comprises violence directed against individuals, but also violence directed against property, including arson attacks on mosques and Islamic schools and violence against shops owned by Muslim persons. Racist graffiti also often appeared on these establishments. Reports of racist insults in the streets, on public transport and during sports events rose dramatically around that time and leaflets expressing anti-Muslim sentiment appeared in many places in the Netherlands." See: Intolerance, European Commission Against Racism and, 'Third Report on the Netherlands', (Strasbourg: Council of Europe, 2008).

⁵⁴² See for the views of proponents of an offensive approach in the Netherlands: Ali, Ayaan Hirsi and Geert Wilders, ' in NRC Handelsblad, 'Het is Tijd voor een liberale Jihad [The Time has Come for a Liberal Jihad]', *NRC Handelsblad*, April 4 2003. For similar views on Islam see also: Boekstijn, Arend Jan, 'Over Waarheid en Wijsheid', in *Hoe nu Verder: 42 Visies op de Toekomst van Nederland na de Moord op Theo van Gogh*, ed. Luin, Ton van (Utrecht: Spectrum, 2005); Rooy, Wim van and Rooy, Sam van, *Islam: Kritische Essays over een Politieke Religie* (Aspekt, 2010). See for a clear explication of an accommodationist approach in the Netherlands: Breedveld, Willem, 'Geen Polarisatie, maar Debat', in *Hoe nu Verder: 42 Visies op de Toekomst van Nederland na de Moord op Theo van Gogh*, ed. Luin, Ton van (Utrecht: Spectrum, 2005).

⁵⁴³ Where they are for instance (unconsciously) treated as less clever and capable than other children. As to job opportunities: an empirical study on labour market discrimination in the

dismissive views find expression in the political domain and are effectuated through political power, for instance through laws or policies that ban the building of mosques, that prohibit Islamic schools and the wearing of niqabs, burqas or headscarves in public, or through discriminatory subsidy policies regarding social organisations and schools based on religious and secular views of life.

From the viewpoint of the Capabilities Approach all this is of course wrong because it would boil down to the violation of the Central Human Capabilities of Muslims.⁵⁴⁴

This group, just as any other religious minority, has a legitimate claim to have all their capabilities protected up to the threshold level. Nussbaum is very clear about the importance of protecting religious minorities: “even if a certain group of religious beliefs (or even all beliefs) were nothing more than retrograde superstition, we would not respect the autonomy of our fellow citizens if we would not allow them these avenues of inquiry and self-determination.”⁵⁴⁵ Nussbaum has been very clear about the discriminatory character of policies and laws aiming to curtail the liberties of Muslims, such as forbidding niqabs and burqas in the public domain. She considers such laws and policies as flagrantly unjust. “The opponents of the burqa are utterly inconsistent, betraying a fear of the different that is discriminatory and unworthy of a liberal democracy,” she says.⁵⁴⁶ Moreover, according to Nussbaum citizens who criticize the Islam “typically don’t know much about Islam and would have a hard time saying what symbolizes what in that religion.”⁵⁴⁷ She also says that criticizing the headscarf in name of the rights of women is rather hypocrite, as Western culture itself is “suffused with symbols of male supremacy that treat women as objects.”⁵⁴⁸

Netherlands concludes that “job applicants of non-Western origins have a significantly lower chance of being invited to attend a job interview”. Cf. Andriessen, Iris, Nievers, Eline et al., 'Liever Mark dan Mohammed? [Do employers prefer Mark over Mohammed?] Onderzoek naar Arbeidsmarktdiscriminatie van niet-Westerse Migranten via Praktijktests', (Den Haag: Sociaal en Cultureel Planbureau, 2010).

⁵⁴⁴ See for a discussion of potential discrimination in local subsidizing policies: Forum, 'Factsheet Subsidiëring Levensbeschouwelijke Organisaties', (Utrecht: Forum. The Institute for Multicultural Development, 2010).

⁵⁴⁵ Nussbaum, *Women and Human Development. The Capabilities Approach*, 180.

⁵⁴⁶ Nussbaum, Martha C., 'Veiled Threats', *The New York Times*, July 11 2010, 38.

⁵⁴⁷ Ibid.

⁵⁴⁸ Ibid.

Yet, against the background of its principle of political legitimacy it is a serious question how the Capabilities Approach can protect Muslims against said attitudes, laws, policies and the resulting capabilities downfalls. If the dominant culture in a political order generally sees Islam and Muslims as genuinely unreasonable, then their capabilities downfall is the consequence of their being held responsible for their unreasonableness. The concrete specifications of the Central Human Capabilities will then be drenched in the views of dominant culture regarding Muslims as unreasonable citizens.

In addressing the issue of 'reasonableness' the Capabilities Approach can in any case not erase or 'counterbalance' generally shared but 'wrong' views by referring to specific kinds of knowledge or to the 'philosophical stance'. This would violate the principle of political legitimacy and the related epistemic abstinence. If we press this further then what kind of treatment is to be considered discriminatory, i.e. what kind of treatment violates the right to the capability of self-respect, will depend on the widely shared views about what are to be considered equal situations and positions.⁵⁴⁹ Hence, as it stands, being committed to the principle of political legitimacy, the Capabilities Approach cannot prevent that its own substantial goals will be seriously compromised.

3.3.1 Political legitimacy in adjudication

The principle of political legitimacy to which the Capabilities Approach is committed also bears on the character of adjudication. Particularly when 'watershed issues' of political morality are at stake, it implies that part of the professional responsibility of judges is that they should base their decisions on widely shared views and common sense ideas, even if these are wrong from the viewpoint of the substantive goals of justice.⁵⁵⁰ Judges are not allowed to use their political power to enforce views that are

⁵⁴⁹ This notwithstanding the fact that Western constitutional democracies have constitutional guarantees for the protection of minorities. These guarantees need to be specified for application and the principle of political legitimacy says that this will be done depending on common sense views and democratic procedures, rather than on 'privileged knowledge' or the views of 'philosopher-judges'.

⁵⁵⁰ Sometimes the principle of political legitimacy is also used as ground to reject the institution of 'strong' judicial review. By strong judicial review is meant that judges are

philosophically correct, but discordant with a dominant public culture. This of course has influence on the extent to which judges can protect minority groups, such as Muslims. I will illustrate this by discussion of two legal cases.

The case of Aisha Baykara

Aisha Baykara is a Muslim girl who lives in a predominantly Catholic village with only two schools, one Catholic and one public school. Aisha is a bright girl and wants to go to university to become a veterinarian. She and her parents think it would be best for her to go to the catholic school, as it is widely acknowledged as outstanding. The public school conversely has a rather bad reputation and scores poorly in the national ranking as to exam success rates. During the application procedure for the Catholic school Aisha has to declare that she will respect the Catholic principles of the school.

Once admitted, Aisha performs very well. She enjoys the courses on Catholicism -albeit from a 'detached' point of view- and she gets along very well with her teachers and her classmates. At one point when Aisha Baykara has reached the age of thirteen she starts wearing a headscarf. For her this is an expression of her Muslim identity. However, Aisha's teachers in a rather straightforward way make clear to her that they disapprove of her new style of clothing. The director of the school gives Aisha a warning: if she does not stop wearing a headscarf she will be expelled from school. Aisha and her parents are furious about this threat and they file a claim against the school.

In court Aisha argues that the decision of the school is discriminatory. It violates the principle of anti-discrimination as expressed in international treaties, in the national constitution and in more specific national laws. The school does not have any justificatory objective reason to forbid her to wear a headscarf. The mere fact of her wearing a headscarf by no means forms a genuine threat to the Catholic principles on which the school is based. Not in the least because, as the school itself acknowledges, Aisha has been very respectful towards the Catholic character of the school, attending all religious ceremonies. She has also proven to be

authorized to protect the constitutional entitlements of citizens against majority decisions that may be laid down in legislation. Jeremy Waldron in his article 'The Core of the Case Against Judicial Review' strongly opposes such judicial review on this ground. He argues (p. 1360) that "allowing decisions by courts to override legislative decisions on these matters fails to satisfy important criteria of political legitimacy".

Cf. Waldron, Jeremy, 'The Core of the Case Against Judicial Review', *The Yale Law Journal* 115 (2006). See for a similar critique on judicial review Kramer, Larry D., *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004); Tushnet, Mark, *Taking the Constitution away from the Courts* (Princeton: Princeton University Press, 1999).

a committed student of Catholicism as she scored very high notes for the course on religion. In addition Aisha is a pupil, not a teacher who is to function as a role model for pupils.

The board of the school argues to the contrary: it holds that the Catholic principles of the school cannot be honoured and effectuated if other religious expressions are tolerated. The forbidding of headscarves is necessary to uphold the Catholic principles of the school. To corroborate this claim the school submits a letter from both the employees and the students declaring that they indeed feel affronted by Aisha wearing a headscarf. The board in addition refers to the 'in-house' rules that prohibit the wearing of all kinds of face covering clothes, including the headscarf.

The judge now has to determine whether the school has used its room for discretion unreasonably when balancing Aisha's interest of wearing a headscarf against the interests of the school. Being bound to the principle of political legitimacy, in interpreting the applicable law and the Central Human Capabilities the judge must take the connotations of the headscarf and views about the Islam as they exist in society into account. If it is in line with widely shared views that wearing a headscarf is a sign of Muslim orthodoxy and an offense to Catholic principles, then the judge should assign legal weight to these views. Following these views he must conclude that the school has an objective justification for prohibiting headscarves.

At the same time if the judge would effectuate such views and interpret or specify the Central Human Capabilities in a way that accommodates these views, it is obvious that some of Aisha's capabilities are threatened, at least if we take the Capabilities Approach's objective character and outcome-orientedness serious. A negative decision will demand of Aisha to make a choice between not wearing a headscarf and leaving the school and will seriously reduce her chances to develop the capability of practical reason, that of thought and that of self-respect. If the judge effectuates said widely shared views through his interpretation of settled law, Aisha's opportunities to both develop her talents and be able to develop and maintain her religious identity is seriously threatened and thence such a decision may come with a moral loss, a loss that is due to arbitrary facts rather than to reason.

The case of *Samir Boularouz*⁵⁵¹

For some years already Samir Boularouz, a Muslim in his late thirties, is very preoccupied with the fact that the social climate in society has become rather hostile and dismissive towards Muslims. He sees this tendency everywhere: in the political arena, in the media, on the streets, at birthday parties and also at his work. Samir is particularly upset by the rise of a

⁵⁵¹ For the description of this case I took inspiration from the following cases: *Rechtbank Den Haag*, April 7 2008, ECLI:NL:RBSGR:2008:BC8732; *Hoge Raad*, March 14 1978, ECLI:NL:HR:1976: NJ 1976, 551; *Rechtbank Amsterdam*, November 18 1998, ECLI:NL:RBAMS:1998: NJ 1998/118; *Rechtbank Amsterdam* June 23 2011, ECLI:NL:RBAMS:2011:BQ9001.

political party with the ambition to counterbalance what it calls the ‘Islamisation’ of society. The political leader of this party with considerable rhetorical talent and in rather provocative words ‘voices’ an outright negative attitude towards Muslims. In a brief period he has managed to gain the support of more than twenty percent of the electorate.

Not wanting to be a powerless bystander of this tendency, together with some other concerned Muslims Samir Boularouz decides to set up a foundation that aims to put a stop to discrimination against Muslims. His foundation organises several public debates to discuss the alleged danger of Islam and Muslims. It also invites the members of the anti-Islam party, but they categorically refuse to come.

The foundation also sends a public letter to the political leader of said party, requesting him to stop his discriminatory speech and to speak about Muslims as equal citizens. Therein it refers to the special responsibility that politicians have as to the protection of the value of equal dignity. The political leader in question, however, ignores the letter. His political speeches become even more offensive and the measures he proposes in parliament are increasingly discriminatory against Muslims.

Boularouz’ foundation then decides to seek recourse in the law. It files a claim against the politician for tort because his utterances amount to a violation of the rights of Muslims.⁵⁵²

Referring to international and national law the foundation argues that the freedom of speech is not absolute and that it should be constrained if the rights of other citizens are jeopardized. In court Boularouz rather emotionally cites some of the politician’s utterances that he sees as violations of the rights of Muslims: “the Islam is a threatening danger that must be combated”, “we should fight against an Islamic invasion, an invasion of Berber Apes”, “we must protect ourselves against the Islam, because we Western people are considered unbelieving pigs that should be slaughtered”, “in the end nothing but disaster for our society can come out of Islam” and “the Koran is a fascist book, it is the Islamic mein Kampf”. This speech, Boularouz

⁵⁵² The relevant provisions of valid criminal law against racism and racial discrimination in the Netherlands are particularly article 137c of the Criminal Code (racist insults); article 137d (incitement to racial hatred, discrimination and violence); article 137e (dissemination of racist material); article 137f (participation in, or support of racist activities) and articles 137g and 429quater (racial discrimination in the exercise of a public service, profession or trade). These legal prohibitions that include the prohibition of particular kinds of speech can be traced back to 1934, when these articles were introduced to put a stop to slander against the Jewish population. Later on, in 1971, these provisions were extended as an implementation of the International Convention Against Racial Discrimination which was itself a response to the outpour of anti-Semitism in West Germany in the beginning of the sixties, as well as to the Apartheidsregime in South-Africa and to the segregation laws in the South of the United States. Cf. Nieuwenhuis, A. J., *Over de Grens van de Vrijheid van Meningsuiting* (Nijmegen: Ars Aequi, 2006), 242-243.

argues, is an affront to Muslims' standing as equal members of society. To support this claim the foundation submits a declaration of Islam experts who qualify the utterances at issue as indeed unfounded forms of stereotyping, stigmatizing and racism and who state that contrary to what the politician suggests, there is nothing inherently illiberal to Muslims and the Islam.⁵⁵³ The foundation also puts afore an article of a renowned legal scholar. On the basis of a study of case law this scholar asserts that compared to their decisions concerning negative utterances against other minority groups and religions, judges appear to set the limits of the freedom of speech less strict when utterances against Islam and Muslims are concerned. The scholar supports this conclusion by showing that political parties have been criminalized or even dissolved as criminal organisations because of using such phrases and terms as "Away with the Surinam and Antillean people who are parasitizing on our welfare and employment", "illegal immigrants", and "asylum fraud", all utterances that suggest a correlation between immigrants on the one hand and criminality and actual problems in society on the other.⁵⁵⁴ Based on these arguments the foundation requests the judge to forbid the politician to qualify the Koran as a fascist book or as the 'Islamic mein Kampf' and to speak publicly about Islam in terms of a 'cancerous tumour' or an inherent threat to liberal society. It also asks the judge to order the politician to rectify his discriminatory and aggressive speech in national newspapers, stating that his speech about Muslims and Islam violates the rights of Muslims and that he regrets having done so.

From the viewpoint of the Capabilities Approach the judge has to decide on the basis of settled law, the Central Human Capabilities included, whether the utterances indeed boil down to a violation of the rights of Muslims. In such a watershed issue of rights the judge must be sensitive to the common sense views of citizens and at least assign weight to them if he takes the principle of political legitimacy to which the Capabilities Approach is committed to heart. His interpretation of the threshold level of the Central Human Capabilities should be influenced by these views. In any case this principle does not allow a judge to give special weight to *privileged* knowledge -for instance that of the Islam experts- when determining what criticism of Muslims and Islam to legally allow and what to legally prohibit.

Being responsive to these views the judge can in addition decide that in case of Muslims the utterances of the politician are contributions to a political debate, given the fact that the position of Muslims is experienced as troublesome by the majority in society. So conceived,

⁵⁵³ This point refers to the 'open letter' sent by Islam experts to a Dutch court that had to decide about the criminality of the utterances of the politician Geert Wilders about the Islam. In this letter they discussed the presumed violent character of the Islam. Cf.

<http://marliesterborg.blogspot.com/2010/02/persbericht-wilders-manipuleert.html>.

⁵⁵⁴ See for cases in which these kinds of utterances were indeed criminalized:

Hoge Raad, March 14 1978, NJ 1978/385; Rechtbank Amsterdam, November 18 1998, NJ 1999/377.

the principle of political legitimacy can in fact justify the inequality and inconsistency between 'similar cases' that the expert signalled. That is, the difference can be accounted for by the widely shared views as to the 'unreasonableness' of Muslims and Islam.

On the other hand, a judge who honours the principle of political legitimacy and hence ignores privileged knowledge in establishing the specifications of the Central Human Capabilities may cause a genuine moral loss. In this case by honouring this principle the judge will at the same time legally authorize practices that seriously harm the level of the Central Human Capabilities for Muslims, most prominently the capability of self-respect.⁵⁵⁵ Thus adjudication will not be an instrument for the protection of (the rights of) members of a minority group, but it will rather be a way of legally effectuating dominant views in society, even if these endanger the capability of self-respect of this minority group. Although justified by justice, such an outcome will constitute a genuine moral loss.

To summarize, in this section I aimed to show how the (political liberal) principle of political legitimacy to which the Capabilities Approach is committed bears on the moral character of adjudication. We have seen that by honouring common sense views judges can violate substantive values that Nussbaum's Capabilities Approach aims to protect -on their own accord or by effectuating policies or laws. In these cases the one ideal of this Approach, i.e. its substantial ideal of justice, clashes with another of its ideals, that of political legitimacy.

Losing citizens will suffer from genuine moral loss and the burden that they must face cannot be accounted for in terms of the principles of justice. Adjudication will for this reason also be less transparent, less morally reassuring and less legitimate towards the 'losing' citizen than a stabilizing approach to adjudication and connected to this a normative theory of political morality would suggest.

4 Conclusion

This chapter has established that similar to Rawls' theory of justice, Nussbaum's Capabilities Approach is rather fragile in that it cannot prevent that it leads to residues of justice. This is at odds with its aspirations as a normative theory of political morality.

More specifically I argued that these residues of justice and hence this fragility of the Capabilities Approach are due to conflicts of justice, due to the under-determinacy of justice and due to the principle of political legitimacy to which this approach is

⁵⁵⁵ Nussbaum, 'Veiled Threats'.

committed. Through a discussion of a range of legal cases I also showed how this fragility affects the moral character of adjudication. That is, the Capabilities Approach justifies or authorizes judicial decisions that are less transparent and morally reassuring than a stabilizing approach to adjudication would indicate. In spite of the Capabilities Approach's justificatory aspirations as a theory of political morality, under this theory the practice of adjudication is not simply reassuring and at least in part morally troublesome.