

Aspiration and the Capabilities List

For plenary panel at the HDCA Meeting in Washington, D. C., September 2015

Human aspiration plays a twofold role in the capabilities approach. On the one hand – and this is what my fellow panelists emphasize – people strive for a wide range of personal and social goals, and capabilities enable and enrich that striving. They provide a space for the pursuit of human flourishing (understood in many different ways, in keeping with people's different religious and secular comprehensive doctrines), and their presence in a society also motivates people, preventing the formation of pessimistic adaptive preferences and encouraging people to hope in challenging and fulfilling ways.

But there is another place where aspiration enters the capabilities approach. If the approach is used to offer a partial definition of social justice, specifying people's central political entitlements, then we are invited to ask whether that theory of social justice is itself aspirational. I have developed an approach to social justice, using a list of Central Human Capabilities to articulate a set of fundamental entitlements that all citizens can claim (up to a specified threshold level) on the basis of justice. Given my longstanding interest in constitutional and comparative law, I conceive of the list as a blueprint that can be used by nations, in different though related ways, as they work out an account of fundamental constitutional entitlements.¹ Such an account of entitlements, like, and as a basis for, a real-life constitution, not only creates a space for people to aspire, it is itself aspirational.

Typically the process of constitution-making begins in both hope and fear, as people reflect on the bad things that a population has suffered, abuses and failures that must henceforth be prevented, and aspire at the same time toward the good and secure state that has not yet been achieved.² Indeed, in his famous 1882 essay "What is a Nation?", French philosopher Ernst Renan argued that, rightly understood,

¹ I articulate this idea briefly in *Women and Human Development* (CUP, 2000), in *Frontiers of Justice* (Harvard UP, 2006), and in *Creating Capabilities* (Harvard UP 2012), but the most extensive development of this idea is in "Constitutions and Capabilities," *Harvard Law Review* 121 (2007), 4-97.

² See András Sajó, *Constitutional Sentiments* (New Haven: Yale University Press, 2012). Sajó is a judge of the European Court of Human Rights.

a nation itself is not a place, but a “spiritual principle,” a record of past sufferings and future strivings for goals for the sake of which people agree to live together.³

In a similar manner, and inspired by such ideas and examples, I have framed the capabilities list in aspirational terms. Its content is intentionally demanding: it asks nations to set goals that are not at all easy to meet, arguing that respect for human dignity informs us that people have a wide range of entitlements based upon justice. If people are made to do without what they are entitled to in these basic areas (health, bodily integrity, and the rest), they don't just pay a substantial cost, they pay a cost of a very particular sort: they are victims of injustice, denied things that justice demands that they be granted. Of course in this exercise the aspect of avoiding the bad is inseparable, conceptually and pragmatically, from the aspect of pursuing the good. Just as most good philosophical accounts of a virtue ever since Aristotle zero in on what virtue is by reflecting, initially, about vice, so too with the capabilities list: we come to understand why it is important for the bodily integrity of women to be legally protected (for example) by looking at the way lives are blighted by sexual violence and the emotional and physical blight it causes. We come to see why education is a valuable entitlement in part by thinking about its intrinsic and instrumental value, but in part, as well, by thinking, with Adam Smith, about how “human capabilities are mutilated and deformed” in the absence of an adequate free and universal public education.⁴ The demands of my capabilities list, like the demands of a well-written national constitution, are difficult though not impossible to meet. No nation in the world fully meets the demands of my list, and no nation fully meets the demands of its own constitution.

Some constitutions are not aspirational, because they do not really announce a guarantee based in a conception of justice. Thus the constitution of North Korea is full of all sorts of insincere and (in the context) ridiculous guarantees, from free speech to health. Such a document is not aspirational, it is a showpiece that makes a mockery of people's aspirations.⁵ Most constitutions, however, are strongly

³ Ernst Renan, “What is a Nation?” Translated by Martin Thom. In Nation and Narration, ed. Homi Bhabha (New York: Routledge, 1990),

⁴ Smith, The Wealth of Nations, p. 788: “A man, without the proper use of the intellectual faculties of a man,... seems to be mutilated and deformed in a[n]... essential part of the character of human nature. Though the state was to derive no advantage from the instruction of the inferior ranks of people, it would still deserve its attention that they should not be altogether uninstructed.”

⁵ Consider the following extracts:

aspirational: they aim high, and they are aware that, human beings being what they are, failure is all too likely. Introducing his motion for the draft of the Indian Constitution, a remarkably aspirational document for India in 1948, and at least as aspirational for India today, the great B. R. Ambedkar, Nehru's Law Minister, after insisting that the Constitution was workable and flexible, also expressed an appropriate blend of hope and pessimism, by saying, "[I]f things go wrong under the new Constitution, the reason will not be that we had a bad Constitution. What we will have to say is, that Man was vile."⁶ Ambedkar knew all too well from his own experience as a dalit how vile human beings could be. But he also felt that high hope was warranted, and indeed that a highly aspirational document was the only sort that could focus and energize the strivings of the new nation. People can be vile, but they can also pursue greatness. Usually both are true at the same time. An aspirational document, setting people's sights well above current realities (announcing, for example, a complete end to the practice of untouchability) is the right sort of document, because it creates a morally beautiful reality toward which people can aim, out of the squalor of the daily behavior of vile human conduct. And so Ambedkar's Constitution remains today, a beacon of hope in troubled times.

Why should constitution-makers aim so high, if they know already that failure along at least some dimensions is highly likely, indeed virtually inevitable? First, we don't know what we can do until we try our best to do it. Who would have guessed, even in 1970, that in 2015 same-sex marriage would be legal in the U. S., or that transgender people in India would have new sweeping legal rights and privileges (all

Article 64. The State shall effectively guarantee genuine democratic rights and liberties as well as the material and cultural well-being of all its citizens. In the Democratic People's Republic of Korea the rights and freedom of citizens shall be amplified with the consolidation and development of the socialist system.

Article 65. Citizens enjoy equal rights in all spheres of State and public activity.

Article 66. All citizens who have reached the age of 17 have the right to elect and to be elected, irrespective of sex, race, occupation, length of residence, property status, education, party affiliation, political views or religion. Citizens serving in the armed forces also have the right to elect and to be elected. A person who has been disenfranchised by a Court decision and a person legally certified insane do not have the right to elect or to be elected.

Article 67. Citizens are guaranteed freedom of speech, of the press, of assembly, demonstration and association. The State shall guarantee conditions for the free activity of democratic political parties and social organizations.

⁶ Speech to the Constituent Assembly, November 4, 1948. See my "Ambedkar's Constitution," forthcoming in a volume on constitutional assessment edited by Tom Ginsburg and Aziz Huq (Cambridge University Press), and see also my review of his great work Annihilation of Caste in The New Rambler Review, online.

done by way of constitutional interpretation)?⁷ And second, we are likely to lapse into despair and stop trying if we do not have a bold goal before us to energize our hopes. As Kant put the point in 1793:

However uncertain I may be and may remain as to whether we can hope for anything better for mankind, this uncertainty cannot detract from the maxim I have adopted, or from the necessity of assuming for practical purposes that human progress is possible. This hope for better times to come, without which an earnest desire to do something useful for the common good would never have inspired the human heart, has always influenced the activities of right-thinking people.⁸

So too with my capabilities approach to basic justice, which is deliberately more abstract than any national constitution, in order to allow for a multiplicity of concrete specifications suited to particular histories and circumstances, but which is meant to provide an abstract template for the work that a constitutional assembly would do. It sets its sights high, and a reasonable person could predict ahead of time that human beings will in some ways fall short. But, here too, we don't know until we try. And we need attractive and lofty goals to energize our efforts.

I have so far ignored the notion of a capabilities threshold, which plays a key theoretical role in my approach. What level of free public education is required by minimal justice? What level of health care? What types of protection for free speech and freedom of religion? Here I argue that nations ought to frame threshold levels for themselves, in keeping to some extent with history and circumstance. Nonetheless, the threshold should be strongly aspirational, even when it appears very difficult to fulfill its demands. Thus India moved compulsory primary and secondary education into the enforceable Fundamental Rights section of the Constitution in 2010, well before the guarantee could become a practical reality, given the miserable condition of existing facilities and the corrupt behavior of teachers. The reasoning that led to the move, strongly supported by my account of the threshold, was that some states, by minimizing corruption, adopting flexible multi-session school hours, and a nutritious midday school meal, had come close to full elementary school enrollment, and were rapidly moving toward universal secondary school enrollment as well. These states, particularly Kerala and Tamil Nadu, could serve as models for other states, proving that it can be done. Indeed, the Supreme Court of India, beginning already in 2001, had ordered all schools in the nation to serve the midday meal that was

⁷ See National Legal Services Foundation v. Union of India, 2014.

⁸ Kant, Theory and Practice.

pioneered in Tamil Nadu and adopted by Kerala, as a way of giving parents incentives to send their children to school rather than to use them for wage labor. That order contains specific guidelines for calories and grams of protein that are periodically updated to reflect both medical knowledge and current possibilities. So the school threshold was aspirational in a good sense: high, but demonstrably not impossible.

What about the role of foreign aid? In principle, I argue, richer nations have a moral obligation to poorer nations to help them meet their capabilities threshold.⁹ Thus, we should ultimately not tolerate a situation in which some nations can afford only elementary education, while others provide university education to most qualified candidates; and the same goes with health and other expensive capabilities. So in some respects a truly global threshold is what we ought to aspire to, in the sense that no nation should be prevented from setting its threshold as high as some other nation on account of lack of resources, if those resources can be found in richer nations. However, I now qualify that point in several ways.

First, even if it were possible to eliminate capability gaps quickly by redistribution, we should not do so in a way that bypasses national democratic processes and national choice.¹⁰ Many well-intentioned international redistributive efforts are paternalistic in an objectionable way.¹¹ Second, there are many reasons to think that such efforts are not in fact successful, in part precisely because they bypass democracy, failing to build, or even eroding, a public will to support public health and education stably over time.¹² The effects of foreign aid are so far not fully understood, and there are raging debates about whether aid is good, indifferent, or even, as Angus Deaton powerfully argues, in most cases counterproductive. So we may say in abstract and general terms that the threshold ought to be global rather than local, without being at all sure how uniformity can be practically achieved. And we should

⁹ I discuss this issue already in Frontiers of Justice (Cambridge: Harvard University Press, 2006), ch. 5, and repeat this in Creating Capabilities. I expand on this issue in my “Responses to the Papers,” special issue on my Creating Capabilities, International Journal of Social Economics 40, issue 7 (2013), in particular the section responding to Peri Roberts, “Nussbaum’s Political Liberalism: Justice and the Capability Threshold.”

¹⁰ See response to Roberts, above.

¹¹ See Angus Deaton, The Great Escape: Health, Wealth, and the Origins of Inequality (Princeton: Princeton University Press, 2013), see my review in The New Republic, October 13, 2014, 42-47; William Easterly, The Tyranny of Experts (New York: Basic Books, 2014).

¹² See Deaton again.

insist that it must not be achieved in ways that short-circuit national democratic processes. Here we arrive at a new dimension of aspiration: for when we aspire to a global health threshold we are aspiring to a goal concerning whose practical realization there is considerable obscurity.

But should the threshold be global in content at all? Don't cultural and circumstantial differences have a role to play in articulating the precise shape of what an entitlement looks like? Certainly, up to a point, and I have long insisted that the list ought to be put forward in a highly abstract and general way precisely in order to leave room for what I call "local specification." History and circumstances do make a difference. Although we may say in a general way what an adequate education is, the threshold will rightly be sensitive to both place and time. Let's take education. The need for temporal sensitivity is obvious. Some elements of education – those that Adam Smith discussed, the ones that enable a person to participate in political debate and to enjoy the pursuit of understanding – don't change a lot with time, and in all times they require basic literacy and numeracy, critical thinking, and the cultivation of the imagination. But changes in the labor market change the specifics of the threshold. Today a person with only the free elementary education that Smith admired in Scotland would fare badly, being deprived of most employment opportunities. So a system needs to prepare its pupils for the world that exists.

Content may also vary with place and the specific history and culture of a place. Each nation needs to focus on teaching its own history and the struggles of its various groups – while also preparing students for a larger global culture. Literary education must obviously perform the same twofold task, focusing on the national and on the learning of national languages, while not forgetting the world and the major languages of the world. Health is a bit less various, given that the human body is not all that different from place to place, but there are indeed pertinent variations – as for example when one nation decides to support both Western and Ayurvedic medicine, while another nation does not, in keeping with cultural variations that have not been shown to be unreasonable.

Some capability thresholds are likely to be more invariant with place and even time than others. I used to think and say that free speech was something with respect to which a nation might take its specific history and circumstances into account in setting the threshold, and I offered the example of post-war Germany's ban on all anti-Semitic speech and publication. I said this was justified in and for

Germany, given its history, but would not be justified in the U. S. The recent bans on books about Hinduism in India, particularly the struggle over Wendy Doniger's The Hindus, have led me to a different view. They show me that any weakening of a very high aspirational threshold of free speech by reference to a history are likely to be abused, and used to suppress challenging and controversial speech.¹³ It was inevitable that the ideologues of the Hindu Right would seize on this point in my prior writings, saying, in vitriolic emails sent to my dean and my colleagues that I was intellectually dishonest because I expressed a different view in 2014 from the view I expressed in 2012 and earlier. The ideologues of the Hindu Right do not seem to possess the concept of changing one's mind in response to learning and critical argument. Well, I hereby announce that I have changed my mind. And I now would defend a high and pretty invariant threshold for free speech, freedom of religion, and freedom of association as appropriate for any and all nations. But of course it is open to anyone to argue the other side.

That's approximately where I stand on the aspirational shape and content of my theory. But in concluding I must now ask where I stand toward Amartya Sen's The Idea of Justice, with its rejection of one conception of ideal theorizing. My project might seem to be at odds with a simple reading of Sen. I believe that it is not really at odds with Sen's views, and now I'll try to sketch, very briefly, the reasons why I think as I do.

Let's begin with some reasons why a reader of The Idea of Justice might think that my view of justice is profoundly at odds with Sen's. First, in its aspirational quality it is fairly clear that my view is a type of ideal theory: it sets goals that are not immediately realizable, and does not focus simply on making incremental improvements, which might seem to the reader to be all that Sen thinks defensible. Second, it is a pretty comprehensive vision of an integrated set of political goals – not a comprehensive doctrine, because of my defense of the idea of “political liberalism,” but an integrated vision with plural elements that are seen as both qualitatively distinct and mutually supportive. Sen at times appears resistant to that idea of an integrated goal set, in the passages where he stresses the mutually irreconcilable sources of claims of justice (the flute example), and in passages where he suggests that

¹³ See my “Law for Bad Behaviour,” The Indian Express, Saturday February 22, 2014, at <http://indianexpress.com/article/opinion/columns/law-for-bad-behaviour/>.

progress is best made by focusing on a concrete evil and thinking of how to take steps away from that.

Third, I plainly view what I am doing as closely related to what John Rawls is doing, and Sen's central aim is to criticize and reject the Rawlsian enterprise.

I shall not say very much about Rawls here, because I don't have time. I think the difference between me and Sen here is one of interpretation: I take Rawls to be doing something more practicable and realistic than what Sen thinks he is doing. I note that a sign of a possible misreading may lie in the fact that Sen's most frequent and indeed oft-repeated words to characterize the rejected enterprise, "transcendental" and "perfect," are words that Rawls simply doesn't use. But there would be a lot more argument needed to show that Rawls doesn't in fact offer a theory of transcendental perfection. So I leave that for another day, only commenting that in my view Rawls is like Ambedkar: he proposes a good blueprint, and then says if it does not work that is because "man is vile". (Think of his resonant final sentence, "Purity of heart, if one could attain it, would be to see clearly and to act with grace and self-command from that point of view.") That is, the theory is constructed so as to sideline the most pervasive sources of human bad behavior, and thus to represent our aspirations without our grossest defects, just as Ambedkar designed the Indian Constitution as a model of inclusion and minority rights (inter alia), while knowing full well that people would not immediately be transformed into rights-respecters or dalit-includers. But Rawls has a further contribution here: he proposes a scheme of education that would, if implemented, help real people come much closer to realizing aspirational goals. Ambedkar left that job to self-cultivation and to reconstructed religion – holding that Buddhism would promote respect for human equality if generally practiced.¹⁴

So I really don't think that Rawls is seeking the perfect or the transcendental, but let me now return to my view, and to my first two issues.

First, then, does Sen actually reject the aspirational, in favor of goals that are close to home and readily realizable? Clearly he does not. Chapter 17 of the book contains a resonant defense of the international human rights regime, including its aspirational elements. Sen rejects the positivist view that

¹⁴ See Ambedkar, The Buddha and his Dhamma, posthumous publication (Nagpur: Buddha Bhoomi Publications, 1997), also online on Columbia University website.

human rights are only established legal rights (p. 358). He holds that they are ethical claims that make demands on us for political and legal change (358-9), and he appeals to Herbert Hart for further articulation of this view (363-4). Underlying rights claims, he then argues, is a normative evaluation of certain freedoms. "For a freedom to be included as part of a human right, it clearly must be important enough to provide reasons for others to pay serious attention to it" (367). He insists that the analysis of thresholds, therefore, is an important part of the further articulation of a human right (370). So far so good: his view of human rights dovetails more or less completely with my view about the underlying political principles that support constitutional legal rights.

But doesn't Sen reject entitlements that are aspirational in the sense of not being immediately feasible? Not in the least. After offering a ringing defense of social and economic rights, despite the evident difficulty of realizing them, he adds the following crucial observation:

Indeed, if feasibility were a necessary condition for people to have any rights, then not just social and economic rights, but all rights – even the right to liberty – would be nonsensical, given the infeasibility of ensuring the life and liberty of all against transgression....Non-realization does not, in itself, make a claimed right a non-right. Rather, it motivates further social action. (384)

It seems to me that in this chapter of the book Sen gives me everything I want in order to defend the normative relevance of my strongly aspirational view of Central Human Capabilities. How to read other apparently dissonant passages earlier in the book so that they cohere with Sen's vision of human rights is an exercise that I plainly cannot take on here. Neither of us believes that the only useful view is one of little-by-little incremental progress. It makes sense to set up some high goals, in order to motivate weak human beings to get working to achieve them.

What, however, about the fact that I defend a coherent set of goals, while Sen in some passages seems to defend a piece-by-piece approach? I cannot address all aspects of this issue, but here are a few observations. First, the human rights regime that Sen defends and likes is itself an integrated goal set. In its best instantiations, human rights are seen not as laundry lists but as integrated pictures of what it is to respect human dignity. (The Universal Declaration is an obvious instance of a document that makes this relatedness clear.) And that is my idea: the goals are plural and incommensurable, but they are also part of a set that needs to be realized as a whole.

If Sen does think that we do best politically when we proceed piecemeal, thinking only of some particular evil we want to address, then he is mistaken. But he is not mistaken (or so I think), so, by modus tollens, he does not hold the view to which I object! Why do I object to it? Because the capabilities bear on one another in manifold ways, and we need to be alert to these relationships of mutual support. If there are two ways of promoting a given capability, we rightly give the nod to the one that also promotes other capabilities. Indeed, when people identify a single evil and move to eradicate it, without considering a whole set of goals, this myopia often leads to disaster. In The Logic of Failure, Dietrich Dörner describes an experiment in which well-intentioned people consider a model of a developing society and are asked to start improving it.¹⁵ Typically they make a move to eradicate some big evil, say malaria. But it then turns out that they haven't thought about how insecticides affect agricultural productivity and environmental quality, how the sudden drop in mortality affects population and consequently resources, and so forth. Over a few hypothetical generations, the society is worse off than it was before. Dörner believes that this type of myopia is a common source of failure in human planning, and that it can be avoided only by bearing in mind in a comprehensive way all the pertinent goals. That's my view too, in a nutshell. We need to think about how our political interventions affect not one goal only, but the entire goal set. I see no reason at all to think Sen disagrees with this sensible position, and many reasons (in his frequent references to capability sets throughout his work) to think that he agrees with me. It should not surprise us that one of his most justly famous achievements is his compelling argument that avoiding famine is a matter not just of focusing on food handouts, but requires supporting a free press and free public debate. That's exactly the type of connectedness we should be alert for everywhere.

Sen's view of justice, then, is best interpreted as supporting the modest and yet extremely exigent view of aspiration that I have defended here.

¹⁵ Dietrich Dörner, The Logic of Failure: Recognizing and Avoiding Error in Complex Situations (New York: Basic Books, 1997). The comprehensive view need not be formally laid out, though this can be helpful: in many cases, systems of local knowledge embed awareness of such interrelationships, another reason why paternalistic expert intervention is usually unwise.