

IS RELIGION GOOD NEWS OR BAD NEWS FOR WOMEN?
MARTHA NUSSBAUM'S CREATIVE SOLUTION TO CONFLICTING RIGHTS

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Martha C. Nussbaum. *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH*. Cambridge: Cambridge University Press, 2000, 312 pp, index.

Martha Nussbaum's recent book, *Women and Human Development*, represents an ambitious project, which is rightly generating keen interest and discussion. As the title suggests the book is about one of the author's principal concerns—the needs and interests of women, notably in the developing world. It is an exercise in how to translate abstract philosophical theory into practical, life-transforming policy applications. Furthermore, it is a statement of her own, more gendered, version of the human capabilities approach, as compared to that of its primary articulator, Amartya Sen. It is also a more contextual approach to the realization of human capabilities than that of John Rawls.

This book occasioned all sorts of imaginings as I read it. I imagined the philosopher being excited by this thought-provoking application of time-honored concepts of justice and equality, the anthropologist being challenged by the appeal to universal values, the development economist being pushed to factor in women's life experiences and hence a much broader approach to human functioning, and the human rights theorist assessing the possibilities of "capabilities" over and against, or, in conjunction with, the concept of "rights." I pictured too the Western feminist reconsidering her parochialism and her priorities, and the Indian social activist being heartened, nay even empowered, by a more multilateral and multidimensional perspective on the everyday problems and inequalities that women face in the world's largest democracy.

As an anthropologically oriented scholar of religion I was particularly intrigued by Martha Nussbaum's efforts to embed universal notions of justice in the concrete lives of poor women. For those, myself included, who are interested in how legal strategies may redress the inequalities in the lives of so many women, this book has much to offer. One learns in the course of the book of the profound way that the author's Indian experience, both ethnographically and phenomenologically, has influenced her thinking. As an Africanist, I could not help but make comparisons and imagine how similar or different her book would have looked had she gone to Africa instead, or, better still, as well.

While there are many aspects of this book that I would have liked to engage, I am going to limit myself to the areas of religion and human rights—more specifically the tensions between religious and cultural self-determination and gender inequality. This is no small part of this influential book since Martha Nussbaum sees her work as both complementing and challenging human rights norms and mechanisms. Religion is one of the two topics chosen by the author (the other being the family) to receive detailed treatment. As she herself justifies this choice: "I argue that any good approach to this problem [i.e. conflicts between religion and sex equality] must balance

recognition of religion's importance in the human search for meaning (including women's search) against a critical scrutiny of religion when it threatens valuable areas of human functioning" (p. 9).

Nussbaum begins her discussion of religion by highlighting the fundamental dilemma of the liberal state—i.e. the support of religious liberty may entail the denial of other liberties and forms of self-definition by religious groups themselves. As she rightly indicates, the abridgement of certain liberties by religious traditions has more serious consequences in those states where religions and legal systems are intertwined. In this very long and complex chapter (pp. 167-240), she is primarily concerned with conflicts between claims of religious free exercise and women's claims to other important rights. As elsewhere in the book, she takes her examples from India and the United States.

Martha Nussbaum is not shy in chiding secular humanist feminists for being too dismissive of religion. Incidentally, this echoes her recent indictment of Susan Okin's *Is Multiculturalism Bad for Women?*¹ and Okin's Western secularist dismissal of religion.² Nussbaum criticizes Western feminists for not recognizing religion's mobilizing properties and not respecting the religious commitments of many women the world over. She finds further problems with the predilections of traditionalist feminists for cultural relativism. These are familiar political and pragmatic critiques. Nussbaum's criticism becomes more interesting and cogent when she turns to three "deeper level" arguments relating to her wider concept of human capabilities. First, she identifies religious capabilities (liberty of religious belief, membership, and activity) as being central human capabilities in that religion is frequently instrumental in pursuing general capability goals, most notably the search for ultimate meaning. Religion is also bound up with other human capabilities such as artistic, ethical, and intellectual expression, and commonly viewed as a locus of moral education and cultural continuity. In addition to these considerations of "intrinsic value," Nussbaum suggests that respect for persons, i.e. that they be allowed to define the ultimate meaning of life in their own way (providing that it does not harm others), should be integral to the type of political liberalism that she espouses. Third, she berates those, both secular humanists and traditionalist feminists, who treat religious traditions as essentially patriarchal, authoritarian, and regressive. While not denying that religions can limit the rights of women, she lists several salient examples of contesting voices and dynamic heterogeneity in these traditions.

The author then shifts gear to consider some further guiding principles. The first is the "principle of each person as end." She insists that, like all the central capabilities she has adumbrated earlier in her book, religious capabilities are tied to individuals in the first instance, and not to groups. She recognizes, as do the basic international human rights instruments, that religion is often practiced in community. Her way of dealing with this thorny area of group rights is to say that

¹Eds. J. Cohen, M. Howard, and M. Nussbaum (Princeton University Press, 1999).

²See also her "Religion and Women's Human Rights," in *Religion and Contemporary Liberalism*, ed. Paul Weithman (Notre Dame: University of Notre Dame Press, 1997), 93-137, and a revised version in her *Sex and Social Justice* (New York; Oxford University Press, 1999).

“an organic good for the group is unacceptable if it does not do good for the members taken one by one” (p. 188). To clarify her position she emphasizes that she is not saying that all religious functioning to be acceptable has to be individualistic, nor that people may not search for the good by subordinating themselves to authority or hierarchy. Realizing that this may not persuade all her readers Nussbaum launches into the principle of moral constraint. She is here speaking of the moral role of religions. She then qualifies this slightly by distinguishing between the “major” religious tradition that embodies some notion of justice and the “cult or so-called religion that diverges too far from the shared moral understanding that is embodied in the core of the political conception” and therefore “does not deserve the honorific name of religion” (p. 190). This is where it starts to get tricky. Here is where she seems more bothered by the non-recognition of comprehensive ethical or political views as religion under U.S. law rather than by the fate of non-traditional minority religions (whereas she will later claim that the latter are her primary concern). Incidentally her reference to “satanist cults and other related groups” (p. 190) as being refused religious status is somewhat problematic and vague since most of the time these groups have no clear identity or existence. One which does, but which would dissociate itself from the popular, pejorative label, is the Church of Satan which, moreover, has denominational recognition in the U.S..

The principle of moral constraint may work reasonably well in ascertaining that a religion does not deserve state deference when its practices are harmful, but Nussbaum realizes that political liberalism (which she subscribes to over a more comprehensive liberalism) does not take a stand on matters internal to the religion itself. So she introduces a social version of this principle which allows one to ask whether an element of a religion which appears cruel and unjust is really central to that religion and whether is it really religious (and not political, economic, or cultural, etc.). She effectively draws inspiration in this regard from the Emperor Ashoka and President Lincoln who both said that we must be skeptical of religious acts that are unjust. She also cites Hindu and Muslim debates about women’s issues in India, such as pertaining to *sati*, child marriage, seclusion, and polygamy where reformers questioned their non-necessity for moral conduct.

Then Nussbaum turns to honing her approach even further. This last part of the chapter is not for the fainthearted as the author works her way through U.S. and Indian law pertaining to free exercise, non-establishment, and equality. She is essentially exploring whether religion deserves special protection (as it did in the United States Religious Freedom Act of 1993 [RFRA] but which was later declared unconstitutional in 1997). She sees the twin-pronged approach of U.S. constitutional law as providing the necessary balance—religion is given special deference under free exercise claims but is somewhat more curtailed than nonreligion with respect to establishment issues. However she admits that in practice it is problematic to try and treat religious and nonreligious conceptions equally since the latter do not lend themselves as do religious systems to having claims by individuals assessed about how a given law may offend against his or her worldview. Inspired by RFRA’s goal to protect minority religions, she comes down on the side of giving religion a larger measure of deference.³ She feels that disadvantages that might be incurred

³Cf. (Sullivan 1999), who is critical of making religious freedom a special case.

by the nonreligious can be partially remedied by adopting strong protections for expressive speech and practice. She does add that this is contextual—since in Scandinavian states the established Lutheran churches may in fact be more effective in protecting religious pluralism than a secular regime. She proposes that the type of limited plural establishment in India may be more suitable all round, especially for the Muslim community.

Importantly, Nussbaum contends that the protection of general capabilities (e.g. equal property rights, mobility, compulsory education) does not generally involve an unacceptable level of damage to a religious way of life. In other words compelling state interest does not generally impose a substantial burden on religion, especially if it is grounded in the notion of central capabilities which she suggests legally resemble fundamental constitutional or international human rights. She also attributes this lack of conflict to the “dynamic character of religious traditions, which have a way of evolving to meet the challenges of new situations” (p. 212). She does admit that her approach does require more balancing and judgement than a Rawlsian approach.⁴

In the final section of the chapter on religion Nussbaum explores the applicability of her approach to her Indian cases. I shall not attempt to evaluate her work in this regard, given the limits of my knowledge of the Indian context. However, I still want to highlight her key observations with regard to her general arguments and concerns. She notes that India’s brand of secularism is extremely generous to the various religious traditions as compared to how they would be treated in North American or European democracies. However, the bewildering variety of codes entails practical difficulties, with individuals being unable to change from one system to another even though there are clear inequalities between the religions in their approach to basic human capabilities. So this creates what the author calls a “huge free exercise dilemma” (p. 216). In this plural, decentralized system it is particularly difficult, she observes, to achieve capability equality for women as widespread legal reform is a virtual impossibility and internal changes in specific traditions may be perceived as unfair—notably in the current climate of Hindu-Muslim mistrust. She ends up by suggesting that the more productive approach for today’s India may be to maintain the separate codes but try to solve the problems of lack of parity and free exercise “through a vigilant set of legislative and judicial constraints” (p. 217).

Nussbaum rightly states that one valuable strategy for solving the problems discussed above is through the promotion of “more public dialogue over norms of sex equality within the religious codes” (p. 217). Interestingly, she avers that this might be most usefully done by looking at the international human rights documents that India has ratified and also inviting religious legal systems to come up with their own plans for reform and conformity with the Indian Constitution, and with international treaty norms. The importance of this type of internal dialogue has been long been emphasized by international human rights scholar and advocate, Abdullahi An-Na’im (An-Na’im 1992). Nussbaum raises the key question of who should take the initiative in promoting this dialogue—the current national government is excluded because of its religious bias,

⁴See (An-Na’im 1994) for a legal perspective on the conflict between women’s rights and religious freedom.

and likewise the Supreme Court given the controversy of the Shah Bano case. She suggests instead the role that could be played by NGO's, women's groups, and political parties interested in pluralism. Surely she could have mentioned the potential of the mass media here. With the expansion of the informational and communications media both globally and locally there is growing attention being paid to the ways in which they may shape political and cultural attitudes of tolerance/intolerance.⁵

To summarize thus far: Martha Nussbaum's approach supports laws of general applicability against religious practices. Most areas of traditional women's inequality under personal laws involve central capabilities. However, there are certain religious practices which the government does not have a compelling interest to reform. Her proviso is that individuals should have the freedom to change their religion. Hence, sex-segregated norms of dress and decoration, as well as places of worship would be protected. In this regard, she states, the French government would be required to permit Muslim girls to wear scarves in school (what would she make, though, of the current controversy at American University in Cairo where the university authorities have banned a student from wearing the full black veil or *niqab* for educational and security reasons—which even the Egyptian government will not do?). In endorsing the U.S. government's decision to withdraw Bon Jones University's tax-exempt status because of its racial discrimination, she rightly highlights the failure of the government to take the same action on sex inequality. She cites the example of Notre Dame University, whose president is required to be a priest, ergo male, but which has not lost its tax exemption. Polygamy is an especially challenging practice which has been closely connected with a history of sex discrimination, and variable in its centrality. The author revealingly claims that: "There is nothing in polygamy in the abstract that is oppressive to women, especially if the practice is available to both sexes" (p. 229) (and we all know that there are few places in the world where that sort of equality is enjoyed). Religious education is another sensitive area as numerous conflicts have arisen between parents' interest in religious schooling for their children and the state's interest in its future citizens.

Nussbaum ends her complex chapter on religion by asking: what gets lost by employing her principle of moral constraint? She considers that there is "considerable latitude for the preservation of tradition in cases that do not involve grave harms to others" (p. 235) but recognizes that "there are some valuable ways of life that will become difficult to sustain in a climate of choice" (ibid.). She admits of the "potential for tragedy" (p. 238) in her capability-based approach to religious freedom but also expresses hope in how resourceful religious men and women can be in adapting to changing realities. She does not hide the difficulty of courts,

⁵See, for example, Jamie Frederic Metzl, "Rwandan Genocide and the International Law of Radio Jamming." *American Journal of International Law*, 91,4 (October 1997): 628-651; Anne Husarska, "'Conscience Trigger': the Press and Human Rights." In *Realizing Human Rights: From Inspiration to Impact*, eds. Samantha Power and Graham Allison (New York: St. Martin's Press, 2000), 337-352; Rosalind I. J. Hackett, "Managing or Manipulating Religious Conflict in the Nigerian Media." In: *Studies in Media, Religion and Culture*, Jolyon Mitchell and Sophia Marriage, eds. (Edinburgh: T & T Clark, forthcoming).

politicians, and academics being in a position to assess claims and influence reform yet also respect traditions. Yet this very concern should serve to mobilize greater dialogue on these issues at local, national, and international levels.

I now want to consider Nussbaum's treatment of human rights. The interconnections between her capabilities approach as opposed to a more rights-based strategy for dealing with the inequalities of women need more discussion and critique than I can attempt here. At very least, however, I would like to summarize her responses to this question when it came up at the Women Waging Peace Conference, held at Harvard University's Kennedy School of Government in October 2000, in conjunction with her comparison of capabilities and human rights in the book (pp. 96-101). She sees rights as protection from something, whereas the capabilities approach is about how "to secure a right to someone" (p. 98). So she wants to think about rights as "combined capabilities," and as "capacities to function" (ibid.), and wants to ask—understandably, given her feminist leanings—what measures are in place to ensure a particular right in practice and not just on paper? She does complicate the issue, however, by saying that some rights, such as religious freedom, could be seen more as "basic capabilities" which people are due by virtue of being human.

In Nussbaum's opinion, the capabilities approach demonstrates more clearly the interdependencies between rights rather than the more conventional human rights emphasis on political freedoms. She believes also that the capabilities approach captures more deeply the material conditions required to ensure human dignity, and with a way of ensuring equality at many levels. She argues that the capabilities approach is more international (despite the dominance of rights language in the international development world) and more grounded than the rights approach—which is associated with demonstrably Western human values. She helpfully qualifies this by saying that the notion of rights which indeed coalesced in the European Enlightenment also grew out of ideas of justice in the older traditions of China and India. She also affirms that the idea of human rights is inherently ambiguous and that the account of central capabilities is more able to take "clear positions on these disputed issues, while stating clearly what the motivating concerns are and what the goal is" (p. 97). Nussbaum also suggests that the capabilities approach opens up a wider range of problems (and solutions) yet one of the ongoing criticisms of the rights movement is precisely its pluralization of rights.⁶

There is no doubt that the attention to economic, social, and cultural rights—in balance with traditional political rights and liberties—afforded by Nussbaum's approach will indeed be welcomed by many in the human rights movement. Yet I cannot help remembering the forceful intervention at the above-mentioned conference from an Indian woman participant. She said that she found Martha Nussbaum's capabilities approach to be relevant and promising for situations of peacetime but when there was war or conflict she would want to resort to human rights. Nussbaum agreed that we still need rights language for the rhetorical sense of urgency and "moral resonance" it may provide, i.e. "these are fundamental rights" rather than "here's a list of things

⁶Cf. (Kennedy 1997), chapters 12, 13.

that people ought to be able to do and to be” (p. 100).⁷ She also feels that rights language has value because it gives additional emphasis to people’s choice and autonomy—an aspect which she has been at pains to underscore throughout her work. It also “preserves a sense of the terrain of agreement” while deliberations about the claims of utility, resources, and capabilities are still being worked out.

There is an ever-growing critical mass of people interested in the relationship between religion and human rights. I cannot imagine that such scholars and activists will not be engaged and enriched by this book, notably its gendered dimension. I do wonder, however, how its message will get translated and transmitted to those who most need it. Martha Nussbaum herself is a most passionate and cogent advocate but I worry about those who will find her “balancing approach” too heady and complex. This was indeed what one of the Burundian women delegates (an experienced journalist) communicated to me at the “Women Waging Peace” conference mentioned above. Nussbaum’s use of U.S. legal precedents and political liberalism is creative but again I wonder how her resorting to the U.S. rather than the U.N. in this regard may be misperceived by more radical feminists. Similarly, the centrality of her metaphysically neutral political liberalism may indeed ensure cross-cultural appeal for some, while alienating others who require questions of human dignity and the quality of life to be predicated on religious ideas.

The book is rich in stories of Indian women, yet the work itself is a fascinating narrative of a Western philosopher converting to a more international, feminist, and grounded social philosophy. I was struck by the image of “interweaving” used by another reviewer of this book (Uma Narayan on Amazon.com). Martha Nussbaum has indeed woven together many important strands of thought and action for our consideration. But the real questions are whether the women in question find Nussbaum’s creation wearable and whether policy makers will market and mass-produce the proto-typical garment she has so carefully and skillfully woven together? Such acceptance would go far toward defeminizing poverty and revamping a number of disciplines. As I said at the outset, this is a very ambitious project. For my part, I will never look on philosophy in the same way again, and eagerly await my own induction into the challenges of the Indian context.

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⁷For a fuller statement of this, see her “Capabilities and Human Rights,” *Fordham Law Review* 66 (November 1997): 273-300.

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