
RESEARCH ARTICLE

The Capability Approach: A Suitable Theoretical Framework to Improve Legal Protection of Domestic Workers in China

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ABSTRACT

Applying the capability approach to analyse the deficiencies in the legal protection for workers in China is in a preliminary stage. Existing research largely uses the fact of whether workers can obtain labour protection as a standard to distinguish whether a worker has adequate legal protection. Although having legal rights is a prerequisite for workers to obtain adequate legal protection, focusing solely on the entitlement of legal rights ignores the enjoyment of legal rights and the diversity of personal preferences. In particular, even if they are given labour protection, domestic workers may be unable to enjoy these legal rights due to the special characteristic of domestic work. The capability approach emphasises not only the entitlement of legal rights but also, more importantly, the enjoyment of those rights. The analysis of legal protection for domestic workers, underpinned by the capability approach, thus reveals not only the inadequate legal rights for domestic workers but also factors that hinder their enjoyment of legal rights. Similarly, developing legal protection for domestic workers based on their capability not only ensures adequate legal rights for them but also contributes to the development of enforceable legal rights. This article argues that the capability approach is a suitable theoretical framework to analyse the inadequate legal protection of workers, particularly that of domestic workers in China. In addition, it analyses the connection between defective legislation and inadequate capabilities of domestic workers regarding obtaining adequate income and rest.

KEYWORDS

The capability approach, domestic workers, legal protection

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1. Introduction

Domestic workers in China are excluded from the Chinese Labour Law, and there is currently no specific law on the protection of domestic workers. Moreover, there are also legal and regulatory factors that hinder their enjoyment of their limited legal rights in practice. Therefore, in order to improve the legal protection of domestic workers, China should not only provide them with adequate legal rights but also ensure their enjoyment of legal rights. This article argues that the perspective of developing domestic workers' capabilities is a suitable way to evaluate legislation on protecting domestic workers in China.

This article is organised into two sections. The first section introduces the capability approach and argues that Nussbaum's central capability list improves the normative power of the capability approach in terms of researching the inadequate capabilities of domestic workers in China. The second section analyses the defects in the legislation on income and the rest of the domestic workers from the perspective of the capability approach. It also reveals that the legislation in China has not guaranteed their most basic capabilities.

2. The capability approach as a tool to improve legal protection of workers in China

The capability approach was first proposed by Sen in a 1979 lecture presented at Stanford University entitled "Equality of What?"ⁱ The core focus of the capability approach is on what individuals are able to do. According to Sen, the capability approach to human

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well-being is a “concentration on the freedom to achieve in general and the capabilities to function in particular”, and the core concepts of this approach are “functionings and capabilities”.ⁱⁱ It is about freedom and the development of an environment suitable for human flourishing.ⁱⁱⁱ Functioning is an achievement, whereas capability is an ability to achieve.^{iv} Sen claims that a person’s well-being must be evaluated in the light of a form of assessment of the functionings achieved by that person.^v This capability to achieve functionings reflects the person’s real opportunities or freedom of choice between possible lifestyles^{vi} – that is, functionings are what people want to be capable of, or should be capable of being and/or do; capabilities represent the alternative combinations of functionings that are feasible for a person to achieve.

2.1 A suitable theoretical framework to analyse the issues faced by domestic workers

The capability approach is a suitable theoretical framework to analyse the issues faced by domestic workers in China for two reasons: Firstly, the capability approach takes into consideration not only the economic development or income of domestic workers but other factors that can improve people’s well-being. A key obstacle to the improvement of the well-being of marginalised workers, such as domestic workers, in China is the government’s perspective on social development. Local economic growth mainly decides the political career of a local official in China.^{vii} Therefore, the primary focus of officials is the annual GDP; other factors, such as the protection of marginalised groups in their administrative region, are largely ignored.^{viii} Because the situation of marginalised workers has limited influence on the GDP, most of their problems are usually ignored by officials.

The emphasis on economic development also reflects in the legislation applicable to domestic workers. Existing Legislation applicable to domestic workers in China emphasises the protection of homeowners and the regulation of domestic service companies. A key objective of protecting homeowners and regulating domestic service companies is promoting the consumption of domestic services. In particular, China gives homeowners legal protection to dispel their worry about the risks of hiring unqualified domestic workers. Similarly, the regulation on domestic service companies is enforced to address their illegal activities, such as using false information to mislead homeowners. The regulation of domestic service companies thus contributes to the increase of homeowners’ trust in domestic services. While the promotion of consumption of domestic services contributes to the income increase of domestic workers, their legal protection, which also connects to their wellbeing, is mostly ignored.

In contrast to this current focus on measuring development solely in terms of economic growth or the income of domestic workers, the capability approach considers not only economic development as a measure of wellbeing but also other metrics, such as human development, which provides a framework for comprehensive research on domestic workers. Sen believes that the focus should be on what people are able to do rather than on what people can buy with their income. Therefore, Sen came to focus on what is of intrinsic value in life rather than on the goods that provide instrumental value or utility.^{ix} The capability approach argues for well-being and quality of life, not only income generation – a person’s well-being is not merely a matter of how rich he or she is. While developing capabilities is undoubtedly correlated with the growth of national GDP and individual income generation, this is seen as a means to expanding human capability “to lead more worthwhile and freer lives”; raising incomes alone will not always increase well-being.^x Therefore, analysing the legislation applicable to domestic workers from the perspective of their capabilities can avoid the ignorance of legal protection, which could result from measuring their current situation in Chinese society solely in terms of their income.

Secondly, the capability approach supports both the goal of providing domestic workers with adequate legal rights and the goal of ensuring their enjoyment of legal rights in practice. The capability approach stresses the importance of both social factors and individual agency.^{xi} The emphasis on social factors means society has the responsibility to ensure its people’s minimum well-being, such as poverty alleviation, elimination of gross economic inequality, the pursuit of social justice, and social security through the provision of public goods.^{xii} In terms of legal protection for domestic workers, the emphasis on social factors means society has the responsibility to develop legislation to ensure the enjoyment of minimum well-being of domestic workers. Therefore, developing legislation from the perspective of improving the capability of domestic workers requires the Chinese government to emphasise the protection of domestic workers.

Moreover, the capability approach meets the requirement of guaranteeing domestic workers’ enjoyment of their legal entitlement in practice. The capability approach values the well-being, freedom and freedom of individual agency.^{xiii} Well-being is the measurement or extent of how well or comfortable an individual is in his or her life.^{xiv} Sen describes well-being freedom as freedom which results from the well-being of an individual.^{xv} Therefore, a person’s capability set represents his or her well-being and freedom.^{xvi} In terms of legal protection for domestic workers, well-being freedom captures the requirement of guaranteeing the enjoyment of their legal rights.

Different from well-being freedom, agency freedom relates to a person’s conception of the good life.^{xvii} Agency freedom thus means people’s freedom to achieve whatever they want to achieve regardless of whether the achievement is beneficial or detrimental to their well-being.^{xviii} In order to guarantee the enforcement of legal rights for domestic workers in practice, legal

protection for domestic workers has to meet the variety of pursuits among domestic workers. The analysis of legislation from the perspective of the capability approach thus can capture the variety of pursuits among domestic workers.

2.2 Nussbaum's list of central capabilities

Nussbaum's list of central capabilities^{xxix} improves the normative power of the capability approach. Nussbaum, as a lawyer and pioneer of the capability approach, focuses on the institutionalisation of characteristics that enhance the capabilities of individuals.^{xx} Nussbaum's goal in her research on the capability approach is thus different from Sen, who focuses on the evaluative and comparative function of this approach.^{xxi} In other words, Sen's theory of development as freedom is based on the evaluation of the social provision effect on the improvement of people's freedom;^{xxii} in contrast, Nussbaum proposes the constitutional incorporation of desired capabilities.^{xxiii}

Nussbaum provides a list of central capabilities, which include the following: life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation; living together and concern for other species; play; and control over one's environment.^{xxiv} In contrast, Sen's approach does not provide a direction for the institutionalisation of the capability approach. He observes that desired capabilities should be decided through democratic deliberation processes.^{xxv}

Although Sen and Nussbaum have not reached a consensus on a list of central capabilities, their fundamental principles in the formation of a capability list are the same. Nussbaum's list is not in conflict with Sen's idea on the formation of a capability list but increases the normative power of the capability approach in legal research.

Sen argues that a pre-determined list of capabilities contradicts the importance of public participation.^{xxvi} He explains:

The problem is not with listing important capabilities but with insisting on the one-determined canonical list of capabilities chosen by theorists without any general social discussion or public reasoning. To have such a fixed list, emanating entirely from pure theory, is to deny the possibility of fruitful public participation on what should be included and why.^{xxvii}

Sen's idea is reasonable. Society is changing, and every society has its own characteristics. Even within a society, different groups may value things differently. Therefore, there is no listing that can suit the context of every society and group. Consequently, it is hard to justify the legitimacy of a capability list without public participation.

Nevertheless, Nussbaum's central capability list is not against Sen's idea in terms of the requirement of public participation in determining desired capabilities. Firstly, Nussbaum does not claim that her list provides full coverage of people's capabilities: instead, she only provides a list of the most basic capabilities, which are required to achieve the minimum requirements of justice.^{xxviii} Secondly, Nussbaum mentions that her list is open-ended and humble: it can always be debated and remade.^{xxix} This means that if her list includes capabilities that are not valued in a given society, the society can modify the list to suit its own social contexts. Therefore, Nussbaum's list of central capabilities is neither universal nor definitive: individual countries can still expand or narrow down the scope and develop concrete standards through public participation.

Nussbaum's list of central capabilities improves the normative power of the capability approach. The list provides a way forward for countries to develop institutions to improve people's capabilities. Although the list does not cover the capabilities set for every individual, it contains people's basic capabilities, such as life, bodily health and bodily integrity, which are necessary for people to have a dignified life.^{xxx} Such a list thus is especially beneficial to the development of institutions for people, such as domestic workers in China, whose most basic legal rights are not guaranteed. Their lack of legal protection means that they are more likely to have deficiencies in basic capabilities than those who are well protected by legislation. As will be revealed in the next section, the legislation in China has not ensured the basic capabilities of domestic workers. Adopting the list of central capabilities to examine the legislation applicable to domestic workers can identify the most basic and urgent problems that need to be resolved. Unpacking the problems of the current legislation constitutes a stepping-stone toward establishing a solution towards reducing the legal precariat of domestic workers.

3. Inadequate capability of domestic workers to obtain income and rest

Income and rest are connected to the central capabilities closely; however, the legislation applicable to domestic workers does not guarantee a stable and sufficient income for domestic workers to afford the most basic living expenses for themselves and their family members and enough rest to stay healthy.

3.1 The capability of domestic workers to obtain an adequate and stable income is not secured by legislation

An adequate and stable income is important to ensure domestic workers' central capabilities. Although income is not an evaluative standard of well-being according to the capability approach, it is an important means to enlarge people's choices.^{xxxix} It is important to the purposes of all individuals to achieve their projects or goals.^{xxxix} For example, adequate income is linked to adequate food and decent shelter, which is essential to the bodily and mental health of people and their family members. However, domestic workers have low wages and are vulnerable to illegal deductions and defaults by homeowners. As a result, they may be unable to obtain a stable and sufficient income that covers even the most basic expenses for themselves and their families.

Defective legislation for the protection of the wages of domestic workers contributes to an inadequate capability to obtain adequate and duly income. On the national level, the only legislation that stipulates wage protection for domestic workers is the Provisional Regulation on the Domestic Service Industry.^{xxxix} While it stipulates that consumers of domestic services shall not withhold or deduct from domestic workers' wages,^{xxxix} it has not provided specific standards regarding the payment of wages. Local regulations also have not provided effective legal protection for the wages of domestic workers. For example, the Regulations on the Domestic Service Industry of Jiangsu Province^{xxxv} stipulates that homeowners shall protect the legal rights of domestic workers,^{xxxvi} but it does not clarify what legal rights they have concerning income. Therefore, all terms regarding the payment of the wages of domestic workers can be decided through negotiation. In other words, all the rules regarding the protection of wages under the labour protection law, such as the minimum wage, do not apply to domestic workers. Although domestic workers can theoretically conclude an agreement that gives them a decent income through negotiation, the low bargaining power of domestic workers contributes to their low wages and unfavourable terms regarding the payment of wages to them.^{xxxvii}

The legislation applicable to domestic workers does, moreover, not provide remedies and punishments to deter homeowners from illegally deducting or defaulting on the wages of domestic workers. While both national and local legislation stipulates that homeowners shall not default on or deduct from the wages (or service fees) of domestic workers illegally,^{xxxviii} these regulations do not provide any legal liability for homeowners when they fail to pay domestic workers fully and duly. It means that homeowners only need to assume the legal liabilities that are stipulated in civil law when they do withhold or deduct the wages of domestic workers. These liabilities include paying out the illegally deducted and defaulted wages and when damage for breach of contract is agreed, paying the damages to domestic workers.^{xxxix} However, a large proportion of domestic workers have not even signed a written contract with homeowners, not to mention establishing damages for breach of contract. Consequently, when domestic workers take legal action to claim their rights and obtain a decision in their favour, domestic workers only need to pay off illegally deducted or defaulted wages. Homeowners may even be able to evade the liability of paying wages to domestic workers due to the insufficient access of the latter to justice.

By contrast, employers not only need to pay compensation to their employees, but they may also need to pay financial penalties to the labour authorities or even assume criminal responsibility when they fail to pay their employees sufficiently and duly. In other words, while domestic workers are as vulnerable to illegal wage deductions and defaults as other workers are, the legislation does not protect them at the same level as it does to other workers.

3.2 The legislation does not guarantee adequate rest periods for domestic workers

The capability to obtain adequate rest is related to the central capabilities of workers. Excessive working hours are detrimental to the physical and mental health of workers.^{xl} Long working hours increase workers' risk of contracting disorders such as heart disease, type two diabetes, and depression.^{xli} Such negative effects are especially high among rural migrant workers who are often poorly educated, female, informally employed, or self-employed.^{xlii} In addition, inadequate regular rest, such as lack of regular daily rest or paid annual leave, contributes to workers' inadequate discretionary time, which is important to the enhancement of their other central capabilities. As another all-purpose means, along with income, for people to achieve their goals,^{xliii} adequate discretionary time enables people to think, play and build relationships with others. For example, workers may be unable to attend recreational activities or spend time with their families due to insufficient discretionary time.

While adequate rest is of interest to workers' central capabilities, the legislation applicable to domestic workers does not limit the daily working hours of domestic workers and does not give domestic workers any rights with respect to weekly rest, holiday and leave. Moreover, although the informality of domestic work gives domestic workers the freedom to choose the hours and intensity of their work, the inadequate income resulting from legal and regulatory factors, such as defective legislation on wages and social insurance, forces them to work long hours.

The Provisional Regulation on Domestic Service Industry is the only legislation that has mentioned the work hour of domestic workers. It stipulates that consumers shall ensure domestic workers' basic daily sleeping hours and monthly rest.^{xliii} However, the regulation has not explained what basic daily sleeping hours and monthly rest are. Consequently, domestic workers cannot use this regulation to claim their daily or weekly rest from homeowners. Moreover, the legislation has not given domestic workers any

right concerning holidays and leave, such as the right to take days off on public holidays or the right to have annual leave. Consequently, all terms regarding the work hours, holidays and leave of domestic workers are determined through negotiation between domestic workers and homeowners.

However, free negotiation between domestic workers and homeowners does not ensure domestic workers the capability of obtaining sufficient rest. While domestic workers may be able to conclude an agreement that gives them equal working conditions and legal protection from other workers, in practice, the working hours and holidays of domestic workers are usually decided unilaterally by householders.^{xlv} Refusing the decision of a homeowner can lead to the loss of a job, so domestic workers have to accept householders' arrangements if they still need the job.^{xlvi}

The lack of legal protection for the rest time of domestic workers also negatively affects people's attitudes towards the necessity of providing domestic workers with adequate rest. Legislation has the function of directing the behaviours of people.^{xlvii} It guides people by influencing their values and their concept of right and wrong.^{xlviii} The lack of protection regarding working hours, regular daily rest, holidays and leave of domestic workers leads people to think that it is reasonable to require domestic workers to work long hours or to be on call around the clock as long as they have paid them corresponding remuneration. For instance, some householders think their live-in domestic workers should be on-call around the clock as they have paid them a higher wage than live-out domestic workers and provided them with free food and accommodation.^{xlix}

In addition to the lack of legal protection on working hours and holidays of domestic workers, the inadequate legal protection on income and social insurance of domestic workers undermines their capability to obtain adequate rest. While low-income workers can have enough rest if they do not work for long hours, their pressure to earn enough income to afford their families' living expenses usually means that they have to work long hours to compensate for their low wages.^l Such a phenomenon is especially obvious among migrant domestic workers in China.^{li} Insufficient legal protection on the wages of domestic workers contributes to their low or unstable income. Moreover, the lack of social insurance not only contributes to their loss of income when they are injured or retired but also increases their expenditure when they fall ill. Consequently, in order to compensate for their low income and to secure their source of income, they usually need to accept homeowners' requirements such as working long hours, being on-call around the clock, and working without holidays.^{lii} For the same reason, even when domestic workers have agreements with households regarding working hours, many of them work longer than the agreed hours.^{liii}

4. Conclusion

The capability approach provides a suitable theoretical framework to analyse the deficiencies in the legislation applicable to domestic workers in China. It emphasises the provision of legal rights to domestic workers and, more importantly, domestic workers' enjoyment of legal rights. The capability approach also captures the requirement of considering plurality among domestic workers.

Sen's theory of development as freedom is based on the evaluation of the effect of the social provision on the improvement of people's freedom. By contrast, Nussbaum proposes the constitutional incorporation of desired capabilities. Nussbaum thus proposed a list of 10 central capabilities. Such a list improves the normative power of the capability approach, and adopting the list of central capabilities to examine and develop institutions for domestic workers contributes to the improvement of their capabilities in China.

In addition, this article examines the current legislation applicable to domestic workers and analyses how it has resulted in their inadequate central capabilities. In particular, it illustrates that, while income and rest are linked to their central capabilities, legislation in China does not guarantee a stable and sufficient income for domestic workers to afford the most basic living expenses for themselves and their family members, nor enough rest to stay healthy.

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