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A Methodological Dialogue on Justice

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Abstract

This paper analyzes the methodological perspectives of two great theorists, John Rawls and Amartya Sen, on the issue of justice. Rawls's justice as fairness and Sen's capability approach have an important place in contemporary moral and political theory. A fruitful methodological dialogue has developed between them over time in the context of justice. In this paper, we examine relevant arguments of this dialogue on their methodologies in dealing with the issue of justice. By doing this we draw attention to the emphasis of methodological issues in theorizing about justice because the methodological departing points of both Rawls and Sen are extremely critical on the formation of the substance of their distributive justice theories.

Keywords: Justice, Amartya Sen, John Rawls

JEL classification: D30, D63

1. Introduction

Over the last decades, political theorists and philosophers have sought to answer some questions: what is the proper metric of justice? What measure should we use to evaluate whether one state of affairs is more or less just than another? Should we evaluate the distribution and level of happiness or wealth or opportunities or some combination of these factors? Rawls's justice as fairness and Sen's capability approach are two prominent answers to these questions. The aim of this paper is to discuss the methodologies behind these two approaches.

Rawls's justice as fairness and Sen's capability approach have an important place in contemporary moral and political theory. While both are critiques of utilitarianism, they defend different principles that should form the basis of a theory of justice. While justice as fairness is a social contract theory¹ formulated at the level of ideal theory², the capability approach lacks a theoretical basis that prominently constructs principles of justice. Sen's capability approach has rather emerged as a leading alternative to standard economic frameworks for thinking about poverty, inequality and human development. In his studies Sen developed and refined a framework that is directly concerned with human capability and freedom. However Sen, in his recent book *The Idea of Justice* (2009), finally clarified what a theory of justice is for him in a way that significantly diverges from the Rawlsian approach. He developed a comparative approach rather than an ideal theory of justice as in Rawls.

In this study, we explore the methodological dialogue between these two authors' approaches. In this sense, we assess different arguments that have been formulated in the debate between justice as fairness and capability approach. Rawls criticized capability-based conceptions of justice by arguing that they entail a comprehensive view of the good, which is defined as a "total" view that is grounded in the moral, religious and philosophical reasons that are specific to one's own conception of the good and do not have a workable criteria that can be publicly verified and require too much information. On the other hand, Sen raises some crucial objections against the Rawlsian methodology in dealing with the issue of justice. He addresses that the social contractarian nature of Rawlsian methodology creates some prominent problems: having a restricted scope; not being sufficient for comparisons; inflexibility; and not taking account of social realizations.

The present paper also aims to draw attention to the emphasis of methodological issues in theorizing about justice. Methodological departing points are extremely critical on the formation of the substance of a political theory. Sen's observational and comparison-based methodology is fundamentally different from Rawls's abstract and pure theory-based methodology. These

¹ Social contract theory, nearly as old as philosophy itself, is the view that persons' moral and/or political obligations are dependent upon a contract or agreement among them to form the society in which they live.

² Rawls thinks of justice as fairness as a work of ideal theory. Ideal theory assumes strict compliance and works out the principles that characterize a well-ordered society under favorable circumstances. However nonideal theory addresses what the parties are to do when conditions are not as perfect as they are assumed to be in ideal theory. While Rawls points out the importance of issues within nonideal theory (as these are the issues that we confront in the real world), he believes that the work in nonideal theory can only be pursued after the ideal theory has been established.

differences in their methodologies lead them to advance different theoretical arguments on the issue of justice.

In the remainder of the paper, we introduce the main frameworks of the justice as fairness and capability approaches in a nutshell in Section 2 respectively. In Section 3, we discuss these two different methodologies in a comparative manner. Section 4 concludes.

1. Rawlsian and Senian Methodological Perspectives on Justice

2.1 Rawlsian Methodology on Justice in a Nutshell

Rawls developed a conception of justice---he called it justice as fairness---that was committed to both the individual rights associated with classical liberalism (Hayekian), and to an egalitarian ideal of fair distribution associated with socialist traditions (Marxian). Justice as fairness, Rawls said, aims to obtain a "reconciliation of liberty and equality" (Rawls (1999a:179)³.

Rawlsian justice theory belongs to a philosophical tradition called social contract theory. He describes his theory as an attempt "to generalize and carry to a higher order of abstraction the traditional theory of social contract as represented by Locke, Rousseau, and Kant" (1999a: xviii). This tradition uses a model of human nature to argue for a philosophical position on the concept of justice. The model arrives at conclusions about justice by showing that humans would agree to obey and enforce the rules of governance that emerge from the model. However Rawls's theory differs from these traditional theories. This is because Rawls makes it very clear that his model is a hypothetical model used for the purposes of generating conclusions specific to the concept of justice and nothing else.

Justice as fairness tries to present a conception of political justice rooted in the basic intuitive ideas found in a constitutional democracy. These ideas are generally accepted by each of the opposing comprehensive moral doctrines influential in a liberal society. Thus justice as fairness looks for an overlapping consensus, that is, the shared ideas which will be sufficient to construct a just constitutional regime by public reasoning⁴. When justice as fairness is fully realized in a liberal society, the value of full autonomy of the individual is realized⁵. In this way justice as fairness is indeed similar to the liberalism of Kant and Mill; but in contrast with them, the value of full autonomy is specified by a political conception of justice, and not by a comprehensive moral doctrine.

³ I will mainly refer to Rawls's *Theory of Justice*, Revised edition, 1999, rather than the original one which was published in 1971.

⁴ For Rawls, public reason applies to constitutional essentials and basic questions of justice, including the basic structure of a society's main political, economic and social institutions and how they fit together (Rawls, 1993a: 11). Public reason would address these public matters through principles and values that are independent of comprehensive doctrines, and that all citizens can endorse.

⁵ Rawls' s concept of 'full autonomy' is reminiscent of Kant's concept of autonomy, which means submission to the universal law of reason which one imposes on oneself as a reasonable being. However there is a difference. The ideal of autonomy for Rawls is still a political ideal and not an ethical one: it is the autonomy of the individual as a citizen who consciously and freely desires to live in society with others according to principles which everyone can accept as reasonable (Rawls, 1993:77-81; 98-99).

Rawls defines a liberal society as "a society that allows for a plurality of different and even incommensurable conceptions of the good . . ." (Rawls 1982: 160). But he also mentions that a society is also a community of citizens, a place of social cooperation, where everyone depends on everyone else. "Since everyone's well-being depends upon a scheme of cooperation without which no one could have a satisfactory life, the division of advantages should be such as to draw forth the willing cooperation of everyone taking part in it, including those less well situated" (Rawls 1999a: 13). These thoughts are compatible with his aim to reconcile liberty and equality.

One of the most distinctive features of a liberal society is the protection of individuality. Hence Rawls puts his strong emphasis on the importance of the individual: "each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override" (Rawls, 1999b: 131). This point is used against utilitarianism. He expresses that utilitarianism uses a methodology by which "many persons are fused into one" (Rawls, 1999a: 27). Rawls takes the distinction between persons very seriously; therefore he also resists utilitarianism's tendency to reduce all human ends to one homogeneous type of thing (pleasure)⁶. This leads to one of Rawls's most interesting suggestions: that justice ought to be concerned only with the distribution of "primary goods"---goods that are necessary for the pursuit of practically any human end---and should set aside the question of what constitutes the ultimate human good.

The main aim of justice as fairness adopting a contractarian methodology is to derive the general political principles ruling a society. These principles are required to determine the just institutions that constitute the basic structure of the society. The question is how these institutions should be specified and integrated into a social system, which will deeply affect people's characters, desires and plans, and their future prospects⁷. Rawls emphasizes the importance of these institutions as follows:

The basic structure is the primary subject of justice because its effects are so profound and present from the start. The intuitive notion here is that this structure contains various social positions and that men born into different positions have different expectations of life determined, in part, by the political system as well as by economic and social circumstances. In this way the institutions of society favor certain starting places over others. These are especially deep inequalities. Not only are they pervasive, but they affect men's initial chances in life; yet they cannot possibly be justified by an appeal to the notions of merit and desert. It is these inequalities, presumably inevitable in the basic structure of any society, to which the principles of social justice apply. (Rawls, 1999a:25)

The choice of basic principles of justice is the first stage in Rawls's multi-staged process of social justice. This first stage leads to the next stage (constitutional stage) in which actual institutions are selected in line with the chosen principle of justice, taking note of the conditions of each particular society. The working of these institutions, in turn, leads to further social

⁶ Rawls, in particular, writes that utilitarianism is in contradiction to the Kantian principle that men should treat one another as ends in themselves, never as means to an end: ". . . it treats them as means by allowing higher life prospects for some to counterbalance lower life prospects for others who are already less favourably situated" (Rawls 1999a: 157).

⁷ For Rawls, as for Marx, human nature is more a product of society than a determinant of it. The social system will always "affect the wants and preferences that persons come to have," so "one must choose between social systems in part according to the desires and needs which they generate and encourage" (Rawls 1999b: 157).

decisions at later stages in the Rawlsian system, for example through appropriate legislation (the legislative stage).

In order to find out basic principles to construct a fair economic and social structure, Rawls benefits from the concept of original position. The concept of original position, which continues the tradition of social contract, defines the principles upon which free and equal rational persons would themselves agree if they were fairly represented in deciding on these principles. It includes two different procedures. The first is the representation of the parties to the decision as agents who pursue their own rational advantage. The second procedure situates these rational parties such that no one party can take unfair advantage of social and natural contingencies. It does so by means of a veil of ignorance, behind which no one knows anything about their social status and natural abilities. Agents do not know the nature of their particular conception of the good. In this way, the veil situates persons symmetrically such that the outcome can be said to be fair. That is, this epistemic limitation in fact prevents the contracting agents from selecting principles which are designed to their own particular circumstances and forces them to choose rules which would be fair to everyone.

However the veil of ignorance cannot conceal everything. Individuals know everything they need about their society in order to decide upon its principles. They know, first, that their society is subject to particular circumstances of justice -objective and subjective- which make human cooperation both possible and necessary. Objective circumstances are the relevant facts about the object of cooperation, which is based on sense of justice. Individuals live together and there exists moderate scarcity in resources, hence mutually advantageous arrangements are feasible. Subjective circumstances are the relevant facts about the subjects of cooperation: that each has their own sense of the good, which leads them to make conflicting claims on available resources. Everybody regards their own life project as worthy of recognition; each has similar needs and interests; each is concerned about their future, thus there exists a diversity of belief and a conflict of interests in a society (Rawls, 1999a).

The people in the original position only need what Rawls refers to as primary goods. The primary goods include: "powers and prerogatives of authority, and income and wealth" (Rawls, 1999a: 93). Rawls mentions that these primary goods are over any other conceptions of good, because they permit any other possible conceptions of good that an individual might seek. Justice as fairness requires that they be equally provided to all of society's members, so that each has equal substantive ability to pursue her conception of the good. Rawls contends that without sufficient means, the formal rights and opportunities that people enjoy remain empty promises.

Rawls argues that free and rational individuals would agree on two principles of justice under the epistemic constraint of original position: the liberty principle and the difference principle (also called the maximin principle). Both principles are compatible with Kantian justifications since autonomy of the individual is the foundation for both principles. The liberty principle states "each person is to have an equal right to the most extensive basic liberty compatible with similar scheme of liberties for others" (Rawls, 1999a: 71). The difference principle states "social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage and (b) attached to positions and offices open to all" (Rawls, 1999a:71). These principles demonstrate the desire of individuals to select a course of action which minimizes the negative consequences of any worst possible outcomes. Therefore, behind the veil, the faculty of reason, endowed with selective ignorance coupled with self-interest,

implies that the actors maximize the minimum result of each individual's life chances by providing a "floor" under which no member of their society can fall.

These principles are to be arranged in a serial order with the first principle prior to the second. This lexicographic ordering means that a departure from the institutions of equal liberty required by the first principle cannot be justified by greater social and economic advantages. Thus first of all, the equal system of liberty has to be provided, then it should be turned to questions of distribution of resources- social primary goods which are required for pursuing a wide range of ends.

2.2 Senian Methodology on Justice in a Nutshell

Sen has developed and refined a framework called capability approach that is directly concerned with human capability and freedom. As Sen acknowledges, his approach has deep connections with Adam Smith's analysis of necessities and living conditions and Karl Marx's concern with human freedom and emancipation. Sen later also recognized that his conceptual connections relate to Aristotle's theory of political distribution and his analysis of eudaimonia, thus human flourishing (Nussbaum, 1988).

Sen's aim is to develop a metric of individuals' welfare. He shows profound defects in other commonly used measures. Fabre and Miller expresses Sen's discontentment with other measures in a compact way:

"Income fails to take account of many factors that may affect the ability of different groups and different individual to convert income into well-being; utility is too dependent on psychological features of individuals, such as adaptive preferences; as to Rawlsian primary goods, they are subject to indexing problems and insensitive to factors that may affect the value of particular primary goods to particular persons. In place of these he proposes that we should measure development in terms of substantive freedom, meaning roughly the range of options that are substantively available to a person". (Fabre and Miller, 2003: 6)

Sen especially argues against utilitarianism's measure of well-being, which, to him, concentrates on pleasure and desire-fulfilment. He recognizes that utility does not distinguish between different sources of pleasure and pain or different kinds of desires (Sen, 1984: 308), that is, utility fails to discriminate against 'offensive tastes' (such as taking pleasure in another person's misery). More importantly, Sen points out that utility can capture only one aspect of life: 'Happiness or desire fulfilment represents only one aspect of human existence' (Sen, 1984: 512). There are many other values (notably rights and positive freedoms) that are neglected by the welfare approach (Sen, 1999: 62). This might not be a serious problem in cases where utility levels reflect personal circumstances and deprivations. However, Sen (1999: 62) says that 'utility can be easily swayed by mental conditioning or adaptive expectations'.

In order to overcome shortcomings of these measures of well-being, Sen develops the idea of a functioning- a doing or a state that a person is able to achieve. Functionings might include being adequately nourished, getting sheltered or being employed. A person who is able to achieve a functioning is said to have equivalent capability, whether or not she actually chooses to realize that functioning. Thus, a person who chooses voluntarily to fast, but otherwise has access to suitable food has the capability to be adequately nourished. A person's substantive freedom can be measured by looking at her capability set, thus the entire set of opportunities she has to choose from.

Sen, following the approach of Berlin (1958), distinguishes between negative (to not be interfered with) and positive (to pursue a goal) freedom and he claims the necessity of both and conceives development as a process of expanding the real freedoms (Sen, 1992:41). Hence, Sen criticizes the libertarian theories (e.g. Nozick's) that place a high priority on negative freedoms. These theories emphasize freedom to devise and pursue a life plan without any hindrance by other agents' actions rather than freedom to achieve anything concrete in particular. Therefore, those who fare poorly in pursuit of their goals have no right to exploit the coercive force of government to overcome their own failings. However, in contrast, Sen's substantive freedom reflects the view that the society has a strong obligation to each of its members, to provide them with the means they need to flourish at a level achievable by others as in Rawls.

In fact both Rawls and Sen agree that resources are means to functionings, nevertheless there is discussion between two sides. Sen claims that we should focus on the extent of freedom that a person actually has, which he calls her capabilities. In other words, what matters is the 'positive freedom' individuals get by having primary goods which they have. Hence, Sen mentions that Rawls uses an impoverished metric of well-being that focuses only on the "means to freedom", when we need to look beyond to the "extent of freedom" (Sen 1992: 36-38). For this reason, Sen accuses Rawls of 'goods fetishism' (Sen 1979: 216). However, Rawls claims that the primary goods can tell us about a person's effective freedom. He distinguishes between the basic liberties and the worth of these liberties as follows: these liberties are the same for all citizens. But the worth, that is, the usefulness of these liberties, which is estimated by the index of primary goods, is not the same for all (Rawls 2001: 149). Hence, primary goods are meant to tell us how much power a person has to make effective use of her basic liberties, which is the same as Sen's notion of a person's extent of freedom. Therefore, in fact Rawls and Sen agree that advantage should be understood in terms of positive freedom.

3. Methodological Dialogue on Justice between Rawls and Sen

3.1 Rawls's Methodological Critiques on Sen

Rawls criticizes Sen's capability approach from two main perspectives. First is that capability-based conception of justice entails a comprehensive view of the good. Second, it is not based on workable criteria that can be publicly verified and requires too much information. We now discuss them in turn.

(i) The capability approach has a comprehensive notion of the good

According to Rawls: "A conception is said to be general when it applies to a wide range of subjects; it is comprehensive when it includes conceptions of what is of value in human life, ideals of personal virtue and character, and the like, that are to inform much of our non-political conduct. There is a tendency for religious and philosophical conceptions to be general and fully comprehensive" (Rawls, 1993a: 175). In order to not fall to such a trap, Rawls aims to develop a theory that allows every kind of conception of the good to be expressed. Hence, his political liberalism (as he called his theory) tries to form general principles compatible with every kind of conception of the good and base his theory not on a comprehensive conception of the good.

Rawls claims that Sen's theory fails to be a liberal theory; in other words, Sen's approach is based on a particular kind of conception of the good and, therefore, does not respect the diverse comprehensive views of the good life that citizens of a plural society might endorse. The political liberalism, in contrast, suggests to be fair between different comprehensive conceptions of the good, and only endorses principles of justice that citizens with diverse and conflicting comprehensive notions of the good can recognize as the result of an overlapping consensus.

However Sen opposes the claim that the capability approach would have one unique view of the good. He argues that the capability approach focuses on the combination of capabilities that a person can access. Hence a capability set "stands for the actual freedom of choice a person has over alternative lives that he or she can lead" (Sen, 1992: 114). For this reason, the evaluation of capability sets does not need any unique moral theory underlying the judgement. He mentions that "Capability reflects a person's freedom to choose between alternative lives ..., and its valuation need not presuppose unanimity regarding some one specific set of objectives (or, as Rawls calls it, 'a particular comprehensive doctrine')" (Sen, 1992: 83). This implies that different comprehensive doctrines can rank differently same capability sets.

Although Sen does not define one particular list of capabilities, he is not against lists. He affirms: "there can be substantial debates on the particular functionings that should be included in the list of important achievements and the corresponding capabilities. This valuational issue is inescapable" (Sen, 1999: 75). More recently he has affirmed that "the problem is not with listing important capabilities, but with insisting on one predetermined 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" (Sen, 2004: 77).

Nevertheless Nussbaum (1988), a proponent of capability-based approach, has elaborated a list of those capabilities that a capability-based theory of social justice should promote. Thus, it seems that the objection that the selection of capabilities can mean the recognition of a comprehensive notion of the good life, is only relevant for Nussbaum's assessment on the capability approach, and not for Sen's approach. Nevertheless, Nussbaum believes that this list can be obtained as part of an overlapping consensus of people as citizens who have diverse views of the good life. Thus, although Nussbaum proposes lists of central human capabilities, she considers "the list as open-ended and subject to ongoing revision and rethinking" (Nussbaum, 2003: 42).

(ii) The capability approach requires too much information

The second major Rawlsian critique on the capability approach is that it does not meet the information criterion. Both Rawls (1999a) and Pogge (2002) argue that a theory of social justice should be a workable and public criterion, that is, inequalities and injustices should be assessed by the public and their determination should not need to rely on impossible amounts of information. Thus the claim is that as capabilities are very hard to measure or assess in such a public fashion, and as they would need too much information, the capability approach is not operational as a theory of social justice. As Rawls expresses it more compactly, "What is crucial is always to recognize the limits of the political and the practicable ... we must respect the constraints of simplicity and availability of information to which any practicable political conception (as opposed to a comprehensive moral doctrine) is subject" (1993a: 182).

In this context, there emerges a debate on the usefulness of the capability approach for making inter-personal comparisons of well-being in the presence of potential disagreements about the valuation of capabilities (Beitz, 1986). That is, the problem with capabilities is that there are too many of them. At any given time any individual will have the real freedom to achieve many functionings. Hence the issue is how to harmonize and rank qualitatively heterogeneous capabilities which are peoples' ends. This is the problem of the incommensurability of capabilities, as expressed by Alkire:

“The capability approach conceives of poverty reduction as multidimensional. That is, it recognizes that more than one human end (enjoyment, knowledge, health, work participation) has intrinsic value in a society, and that the set of valued ends and their relative weights will vary with the diversity of individuals and cultures. But if human ends are diverse in kind and cannot be adequately represented by a common measure such as income or utility, this creates a problem. It becomes impossible to choose ‘rationally’ between options that pursue different set of ends”. (Alkire, 2002: 85-6)

These problems lead to skepticism about the capability approach. Sugden (1993: 1953) mentions that "it is natural to ask how far Sen's framework is operational". Rawls supports these claims by saying that a theory of justice needs a public standard of interpersonal comparisons, otherwise the obtained principles of justice between citizens with diverse views on the good life will not prove stable (Rawls, 1999b: 359-387). In this sense, Nassbaum (1988: 176) accepts that "Sen needs to be more radical than he has been so far in his criticism of the utilitarian accounts of well-being, by introducing an objective normative account of human functioning and by describing a procedure of objective evaluation by which functionings can be assessed for their contribution to the good human life".

3.2 Sen's Methodological Critiques on Rawls

Sen (1979) claims that contemporary political theory about justice searches for the answer of the following question of *what is a just society?* Several political scientists, including Rawls, put this question at the heart of political philosophy. Sen calls this methodology transcendental institutionalism. This methodology is transcendental because it aims to identify an ideal of a perfectly just society. It is institutionalist because it attempts to establish what perfect institutional arrangements would be like. Shortly, Sen means that the transcendental institutionalism sets out principles for a perfectly just society, transcending the limits of human existence.

However, it seems that even though Rawls aims to define principles for a fully just society, those principles diverge from being transcendental. On the contrary, Rawls's principles are consistent with human moderate scarcity and limited altruism prevailing in the world, which show that we are far away from the ideal society. One might argue whether Rawls's principles are beyond the limits of human practical possibility. But this would not make Rawls's methodology transcendental. Hence, it can be said that Rawls's theory is ideal, but it would be unfair to say that it is transcendental in any way.

Conversely Rawls is an institutionalist, but not in the sense that Sen says. Rawls can be regarded as an institutionalist due to the fact that his principles of justice are meant to apply to the basic structure of society defined above, rather than to individual behavior. Yet his principles are

not concerned with one set of perfect institutions. Rather, Rawls concentrates on the institutional arrangements which make a society just vary depending on the nature of the relevant society in question.

In fact, the importance of institutions is not denied by Sen, but to him their role is only instrumental: (1) they can directly contribute to develop people's capability to do and to be according to what they have reasons to value; (2) they can facilitate our capacity to examine values and priorities in creating opportunities for public debate. Nevertheless Sen mentions that:

In no case, institutions alone -- or institutions combined with "corresponding ideal behavior" as in "Rawls' attempt at getting to a perfectly just society" -- can be the only thing to look at in the pursuit of justice. What is important is the impact of arrangements on actual individual behaviors and capabilities, on the lives people can lead. (Sen, 2009: 412)

In his recent study, Sen (2009) puts forward four main critiques against the methodology of transcendental institutionalism: (i) it is not sufficient to make comparative judgments of justice; (ii) it has a restricted scope; (iii) it is inflexible; and (iv) it is not taking note of social realizations. Now we will explain each point below.

(i) Rawlsian Justice is not sufficient to make comparative judgments of justice

Sen (2009: 98-106) argues that Rawlsian perfect justice is not enough for justice-comparisons. Conceptualization of a perfectly just society does not directly lead us to make comparative judgements of justice. For this, we need a measure to assess which social conditions are far away from the ideal society and what improvements can be done to bring them closer to it. Transcendental institutionalism is only necessary for making judgements about what we might call absolute justice. This approach can only judge whether a society is either fully just or unjust. But Sen mentions that these are not the judgements we are really concerned with; what is important is comparative judgements of justice and injustice. In Sen's words:

The possibility of having an identifiably perfect alternative does not indicate that it is necessary, or indeed useful, to refer to it in judging the relative merits of two other alternatives; for example, we may indeed be willing to accept, with great certainty, that Mount Everest is the tallest mountain in the world, but that understanding is neither needed, nor particularly helpful, in comparing the peak heights of, say, Mount Kilimanjaro and Mount McKinley. There would be something deeply odd in a general belief that a comparison of any two alternatives cannot be sensibly made without a prior identification of a supreme alternative. There is no analytical connection there at all. (Sen, 2009: 102)

Perhaps the most important contribution of the social choice approach (of which Sen contributes significantly) to the theory of justice is its concern with comparative assessments. This relational, rather than transcendental, approach focuses on the practical reason behind what is to be chosen and which decisions should be taken, rather than thinking on what a perfectly just society would look like. Hence, Sen (2009: 106) says that "a theory of justice must have something to say about the choices that are actually on offer, and not just keep us engrossed in an imagined and implausible world of unbeatable magnificence".

In one respect, the claim that Rawlsian perfect justice is unnecessary for justice-comparisons is correct. However, this claim is rather inconsequential. Most people accept that it is unjust to torture children or arbitrarily to arrest political opponents or the introduction of social policies that abolish slavery, or eliminate widespread hunger, or remove rampant illiteracy, can be

shown to lead to an advancement of justice. But the implementation of such policies could still leave the societies involved far away from the requirements of a just society since there can be other demands regarding equal liberties, distributional equity, and so on. Thus, we require a theory that can guide us when there are the scarce resources we all need to have a decent life. From this perspective, designing an overall conception of what justice requires is necessary to develop a general account of justice to become clear about our priorities (Valentini, 2011).

In fact, Sen may confirm general and abstract principles of justice that are required to make systematic and action-guiding judgements of justice. However, he certainly argues that the real problem with Rawls's theory is its abstract principles that are formulated in absolute, rather than comparative terms. Rawls accepts this claim; however, he mentions that "the work of abstraction ... is not gratuitous: not abstraction for abstraction's sake. Rather, it is a way of continuing public discussion when shared understandings of lesser generality have broken down" (Rawls, 1999a: 45).

Although Rawls's theory is recognized to be formulated in absolute terms, important comparisons can still be derived from it. For example, he applies lexicographic priority of the basic liberties vis-à-vis fair equality of opportunity: a society in which citizens' fundamental liberties are violated is more unjust than one in which such liberties are respected, no matter how unequal its distribution of income and wealth is. Moreover, Rawls's difference principle has also a comparative content: it allows us to assess alternative basic structures by reference to their impact on the position of the worst off. In fact, Sen is aware of the comparative nature of the difference principle: "Rawls's formulation of the difference principle... gives us ground enough to rank other alternatives in terms of the respective advantages of the worst-off" (Sen, 2009: 97).

(ii) Rawlsian Justice has a restricted scope

According to Sen, transcendental institutionalist character of Rawlsian methodology also limits its scope of justice. Its having an ideal structure can lead justice to be realized as long as state-like institutions exist. Only institutions such as those of the modern state can engage in the comprehensive redistributive policies advocated by most contemporary theories of justice. This has two implications. First, it makes justice inapplicable to the global arena. Second, it restricts the scope of public reasoning by which principles of justice are arrived at. Sen expresses this as follows:

The use of the social contract in the Rawlsian form inescapably limits the involvement of participants in the pursuit of justice to the members of a given polity, or 'people' (as Rawls has called that collectivity, broadly similar to that of a nation-state in standard political theory). The device of the original position leaves one with little option here, short of seeking a gigantic global social contract, as Thomas Pogge and others have done in a 'cosmopolitan' extension of the Rawlsian original position. The possibility of proceeding, in this case, through the Rawlsian sequence of setting up just institutions for the global society, i.e. demanding a world government, is, however, deeply problematic. (Sen, 2009: 71)

Sen's claim that there are no institutions that can realize Rawls's egalitarian distributive principles on a global scale does not abolish their global moral validity. If it were possible to construct the institutions needed to realize them, then such institutions should be constructed. What Sen seems to disregard the fact that Rawls denies the applicability of justice globally is that Rawls is

concerned not with the issue of feasibility, but rather, with issues of moral validity on justice at global scale. Rawlsian principles of justice apply only when certain kinds of social relations are valid. As Valentini expresses this more compactly:

“Rawlsians disagree on what such relevant relations are: some believe they are coercive relations, others think they concern reciprocity in the production and distribution of primary goods and so forth. However, what justifies the domain-restriction for principles of justice is not a commitment to what Sen calls transcendental institutionalism, but rather, a commitment to the claim that justice only applies in the presence of certain relations and the conviction that such relations do not exist at the global level”.
(Valentini, 2011)

Although Rawls, in *The Law of Peoples* (1999c), attempted to extend his reflections on justice to the global level -to an international society composed of different peoples with distinct values, traditions, and ideas of justice-, he is aware that the principles that ought to govern the society of peoples are not uniform and definite.

Consequently we can say that Rawls's institutionalist approach's domain restriction is based on the notion that Rawlsian justice only applies in the presence of certain types of social relations. If the scope of principles of justice were indeed global due to the relevant relations that existed globally, then it would seem entirely arbitrary to restrict the scope of justice to a particular society. If we believe in the moral equality of persons, it means that we have already significantly narrowed the scope of public reasoning to those views which are consistent with that belief. In this sense, Sen's view is not that far from Rawls's since certain fundamental commitments- such as commitments to liberty and equality- must be non-negotiable.

(iii) Rawlsian Justice is inflexible

Another critique that Sen directs against Rawlsian methodology is its lack of flexibility. He says that since Rawlsian theory aims to be complete to establish what perfect justice requires, its principles are not open to revision. This makes Rawls's theory of justice unable to offer a basis for a productive public discussion and weakens its theoretical and practical aspect. It is not even allowing the possibility that different individuals in the original position can have different principles for justice, because of the plurality of their political norms and values. Sen (2009: 150) mentions this: "the formal procedure of the original position proposed by Rawls seems to be geared to allowing little exposure to fresh wind from outside".

Sen extensively discusses Rawlsian theory's not being open to revision, by using the concept of impartiality. Sen claims that the concept of impartiality is central to understanding of justice. According to him, there are two different ways of invoking impartiality. Sen calls them 'open' and 'closed' impartiality. With 'closed impartiality', the procedure of making impartial judgements invokes only the members of a given society for whom the judgements are being made. By 'open impartiality' Sen means "impartial spectator" (a concept borrowed from Adam Smith), who thinks about his own sentiments and actions' motives by removing himself from his own natural state and viewing them as at a certain distance from oneself. Sen associates Rawls to a notion of "closed impartiality":

“While Rawls's primary focus seems to be on variations of personal interests and personal priorities, Adam Smith was also concerned with the need to broaden the discussion to avoid local parochialism of

values, which might have the effect of ignoring some pertinent arguments, unfamiliar in a particular culture". (Sen, 2009: 44-45)

According to Sen (2009: 139), "closed impartiality is devised to eliminate partiality towards the vested interests or personal objectives of individuals in the focal group, but it is not designed to address the limitations of partiality towards the shared prejudices or biases of the focal group itself". Sen argues that while the Rawlsian 'veil of ignorance' addresses the need to remove the influence of the vested interests of the diverse individuals within the focal group, it evades from observations of 'the eyes of the rest of mankind'. Thus, something more than an 'identity blackout' within the boundaries of the local focal group would be needed to address this problem. In this sense, closed impartiality in 'justice as fairness' can be reduced to the narrow boundaries of local perspectives of a group or a region. Even though Sen admits the non-parochial intentions of the general Rawlsian approach, he expresses his concern with the fact that the use of closed impartiality involved in the original position does not guarantee any procedural immunity against possible domination of local group prejudices.

Although these plausible critiques pointed out by Sen, it is here necessary to remind that Rawls's entire system of justice is based on the concept of reflective equilibrium. The method of reflective equilibrium is a process employed to find out what our most strongly held moral beliefs are, then try to construct theoretical principles which are compatible with and justify them, and then refine our moral judgements on the basis of those principles. This means that within this method, no assumptions, principles or claims are taken as given. Everything, including original position, is open to revision. When trying to reach the reflective equilibrium, we have to go back-and-forth between general principles and considered judgements to define and draw the boundaries of the relevant concept. Within this process, we are always faced precisely with those decisions about what to revise, which Sen sees as never arising within a transcendental approach to justice. Rawls mentions this as follows:

"From the standpoint of moral philosophy, the best account of a person's sense of justice is not the one which fits his judgements prior to his examining any conception of justice, but rather the one which matches his judgements in reflective equilibrium. As we have seen, this state is one reached after a person has weighed various proposed conceptions and he has either revised his judgements to accord with one of them or held fast to his initial convictions (and the corresponding conception)". (Rawls, 1999a:48)

As it appears that Rawls is quite explicit in his openness to revising not only his principles of justice in light of opposing intuitive judgements, but also the very conditions that are built into the original position. In his words:

"In searching for the most favoured description of this situation (i.e., the original position) we work from both ends. ... By going back and forth, sometimes altering the conditions of the contractual circumstances, at others withdrawing our judgements and conforming them to principle, I assume that eventually we shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgements". (Rawls, 1999a:18)

Therefore, Sen's complaint that Rawls's methodology is aimed at delivering only one set of principles appears unfair. For Rawls, the process of theorizing about justice is inherently dynamic,

and open-ended. He insists that the closed nature of the original position must be, at least in principle, strongly fortified:

“I assume that the basic structure is that of a closed society: that is, we are to regard it as self-contained and as having no relations with other societies . . . That a society is closed is a considerable abstraction, justified only because it enables us to focus on certain main questions free from distracting details”. (Rawls, 1993a: 12)

Nevertheless, there is clearly an important issue in the neglect of the interests and perspectives of those who are not parties to the social contract of a political community but who are affected by results of decisions particular polity. On this subject, open impartiality has something to say. Relations between different countries always exist in an interdependent world. Rawls himself has debated this question in the context of justice across borders through his proposal of ‘the law of peoples’, which invokes a second original position between representatives of different political communities. The two ‘original positions’ can be seen as being respectively intranational (between individuals in a nation) and international (between representatives of different nations). Each case is one of closed impartiality, but the two together cover the entire world population (Sen, 2009: 140).

Sen accepts that despite the limitation of the Rawlsian approach to impartiality, there exists a very fundamental perspective in terms of place of impartiality in the idea of justice. He endorses that Rawls develops a powerful reasoning about why judgements of justice cannot be an entirely private affair that is alien to others, and the Rawlsian methodology of ‘a public framework of thought’ is critically important. This is further consolidated by Rawls’s argument, particularly in Political Liberalism. Rawls (1993b: 223-227) himself acknowledged that there is a plurality of reasonable liberal conceptions of justice, which may be less distributively egalitarian than his own theory of social justice.

(iv) Rawlsian Justice does not take note of social realizations

Finally, Sen claims that justice as fairness does not take into account the specifications of non-institutional structure and conduct of people of diverse societies. He expresses this:

“In searching for perfection, transcendental institutionalism concentrates primarily on getting the institutions right, and it is not directly focused on the actual societies that would ultimately emerge. The nature of the society that would result from any given set of institutions must depend also on non-institutional features, such as actual behaviours of people and their social interactions. In elaborating the likely consequences of the institutions, when a transcendental institutionalist theory goes into commenting on them, some specific behavioural assumptions are made that help the working of institutions”. (Sen, 2009: 6)

In this context, Sen benefits from two concepts from Indian intellectual tradition: *niti* and *nyaya*. The former concept relates to organizational propriety as well as behavioural correctness (law in books), whereas the latter concept is concerned with what emerges and how the lives that people are actually able to lead (law in action). That is, in contrast with *niti*, the term *nyaya* stands for a comprehensive concept of realized justice. In this sense, the roles of institutions, rules and

organization have to be assessed in the broader and more inclusive perspective of nyaya, which is linked with the world that actually emerges, not just the institutions or rules we happen to have⁸. Thus, a nyaya approach takes into account processes, duties and responsibilities. This is the reason Sen insists on the concept of 'comprehensive outcome' which includes the processes involved, and which has to be distinguished from just the 'culmination outcome' (Sen, 2009:22).

Sen argues that we have good reasons for recognizing that the pursuit of justice is partly a matter of the gradual formation of behaviour patterns, thus there is no immediate jump from the acceptance of some principles of justice and a total redesign of everyone's actual behaviour in line with that political conception of justice. In general, the institutions have to be chosen not only in line with the nature of the society in question, but also dependently on the actual behaviour patterns (Sen 2009: 68-69). Sen maintains that in the Rawlsian system, the choice of the principles of justice aims to ensure both the right choice of institutions as well as the emergence of appropriate actual behaviour, requiring individual and social psychology based on a specific kind of political ethics. Thus, once the social contract has been arrived at, people would abandon any narrow pursuit of self-interest and follow the rules of behaviour that would be needed to make the social contract work. Rawls's idea of reasonable behaviour extends to the actual conduct once those institutions chosen in the original position (Sen, 2009: 79).

Hence, according to Sen, there are quite demanding assumptions in the Rawlsian methodology on the nature of post-contract behaviour. By assuming that actual behaviour in the post-social contract world would be in compatible with the demands of reasonable behaviour in the contract, we are told what to expect in the behaviour of individuals once the institutions are set in place. Hence it does not give any room to the possibility that some people may not always behave as defined in the hypothetical social contract. In a similar vein, within legal philosophy, Dworkin (2004) is reacting strongly against theorising in this way and calls for a legal theory that is engaged with real-life, practical issues, cases and parties.

However, Sen's claims against Rawls seem unfair in some respect. Rawls is in fact aware that behaviour patterns vary between different societies. Rawls's principles for just institutions do not specify particular institutions, but identify rules that should govern the choice of actual institutions. Hence, the choice of actual institutions can take into account the actual parameters of standard social behaviour. In the original position, the persons only decide on the principles of justice, and not on the concrete institutional design and policies that will give these principles content in the actual world. As Robeyns mentions:

"That is done in later stages, whereby the veil of ignorance is gradually lifted and more and more information about their own position becomes available to the parties when they decide about the design of

⁸ Sen gives an example to make the distinction between niti and nyaya clearer: "Ferdinand I, the Holy Roman emperor, famously claimed in the sixteenth century: 'Fiat justitia, et pereat mundus', which can be translated as 'Let justice be done, though the world perish'. This severe maxim could figure as a niti -- a very austere niti -- that is advocated by some (indeed, Emperor Ferdinand did just that), but it would be hard to accommodate a total catastrophe as an example of a just world, when we understand justice in the broader form of nyaya. If indeed the world does perish, there would be nothing much to celebrate in that accomplishment, even though the stern and severe niti leading to this extreme result could conceivably be defended with very sophisticated arguments of different kinds" (Sen, 2009: 21).

institutions, laws, and actual policies. The representative parties will choose from a list of possible principles of justice, those principles that it is rational for them to choose given the information that they have and have not". (Robeyns, 2003: 5)

4. Conclusion

Over the last decades, unrest has grown in contemporary political theory about its lack of connection to the political issues that determine our contemporary reality. The spectacular success of John Rawls's justice theory has changed the discipline. But the analytical political theory developed by Rawls has had its costs: a high degree of abstraction and an emphasis on conceptual precision and rigor at the expense of closeness to the real political issues are among these. This has given rise to many criticisms of Rawlsian justice theory and a new interest in realist political theory.

Amartya Sen is one of those. Bringing together his theoretical work on social choice theory and the capabilities approach to welfare economics, Sen criticizes the social contract tradition, and Rawls's work, in particular. Sen suggests that the Rawls's pursuit of the question 'What is a just society?' involves a pretension to extremely demanding theoretical comprehensiveness concerning its object. Sen sees the contractarian tradition as a kind of theoretical perfection that inhibits comparative judgments of relative justice and injustice. It seems clear that making such comparative judgments is a necessary condition for developing social reform that improves the social and economic conditions of the society.

However, as mentioned by Rawls, one of our aims should be to elucidate the fundamental principles of justice that should govern the basic institutions of society. In Rawls's view, ideal theory has to have a certain priority over nonideal theory: without a conception of the ideal of a just society, our practical efforts to work towards justice in nonideal circumstances would lack any fundamental orientation. Hence, a comparative approach cannot exist by itself, without a transcendental dimension. One cannot assert that serfdom is more just than slavery without believing that in a just society where all individuals are free. Contrary to Sen, who claims that a transcendental theory is neither necessary nor sufficient to frame comparative judgments, it appears that affirming a transcendental dimension is a necessary, albeit not sufficient, condition of any comparative approach.

As it seems that the methodologies of Rawls and Sen mainly differ from each other, but they are closely related in some respects. Both approaches rely on reasoning and invoking of the demands of public discussion. Furthermore, both emphasize positive liberty and impartiality in evaluating justice.

Consequently, bringing these critiques and common points together allows us reconsidering the relationship between justice as fairness and the capability approach, and may open up a path to understand both approaches as complementary and converging, rather than purely rival theories of justice.

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