Transcendental vs Comparative Approaches to Justice: A Reappraisal of Sen’s Dichotomy

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Abstract: In The Idea of Justice, Sen describes two competing approaches to theorizing about justice: “transcendental institutionalism,” in which he includes Rawls, and “realization-focused comparison,” in which he includes Condorcet and himself. The objective of this paper is to demonstrate that a comparative approach cannot exist without a transcendental dimension. Contrary to Sen, who claims that a transcendental theory is neither necessary nor sufficient in order to frame comparative judgments, it is shown that a transcendental dimension is a necessary, albeit not sufficient, condition of any comparative approach. To illustrate our thesis, we refer to the works of three great authors: Condorcet, Sen himself, and the later Rawls.

Keywords: Sen, Rawls, Condorcet, social justice, reason

Introduction

In The Idea of Justice (2009), Sen sets out what he considers to be two competing traditions in thinking about justice: “transcendental institutionalism” and “realization-focused comparison.” The transcendental institutionalist approach aims to identify an ideal of justice and then, on that basis, to define the nature of just institutions. Based on the social contract model, the transcendental tradition aims to frame a unique set of principles of justice and so make absolutist judgments of the form ‘society Z is just.’ “Realization-focused comparison,” meanwhile, aims to give practical tools to discriminate between real situations, focusing on the outcomes realized by actual social institutions, and not attempting to provide a definition of what a just institution would be. This second – comparative – tradition focuses on the confrontation between individual values and experiences through public discussion and aims to frame judgments of the form ‘society X is more just than society Y.’

According to Sen, the transcendental institutionalist approach – which is currently dominant within political philosophy – fails to attain the fundamental goal of any theory of justice: namely, the creation of tools which allow us to achieve greater social justice in the real world. Sen’s criticism of the transcendental tradition turns on his argument that possessing an overall conception of justice is neither necessary nor sufficient in order to formulate comparative judgments regarding social justice. Hence he advocates a “paradigm shift in theorizing about justice” (Valentini 2011) in favor of the comparative tradition. Social choice theory, which is concerned with the ranking of social states, then emerges as a better framework for reflection on social justice issues than the social contract model. Sen writes that Hobbes, Locke, Rousseau, Kant, and more recently Rawls all belong to this contractarian
or transcendental tradition; while Smith, Condorcet, Wollstonecraft, Bentham, Marx, J. S. Mill, Arrow, and his own thoughts as set out in The Idea of Justice correspond to the comparative, “alternative” tradition (2009, p. xvi).

In this paper we claim that a comparative approach cannot exist by itself, without a transcendental dimension. In other words, we will attempt to demonstrate, on the basis of the works of three great authors, that one cannot frame judgments of the form ‘society X is more just than society Y’ without having any idea of what society Z, i.e., a just society, should be. For instance, it seems to us that one cannot assert that serfdom is more just than slavery without believing that in a just society all individuals should be free.2 Contrary to Sen, who claims that a transcendental theory is neither necessary nor sufficient in order to frame comparative judgments, we believe that affirming a transcendental dimension is a necessary, albeit not sufficient, condition of any comparative approach. To illustrate our thesis, we refer to Condorcet, Sen, and the later Rawls. Regarding Condorcet and Sen, who are both considered by Sen himself to be representatives of the comparative tradition, we will show that, when closely examined, their thoughts reveal a transcendental dimension which is necessary for the consistency of their theories. With regard to Rawls, we follow Sen when he claims that the early Rawls belongs to the transcendental tradition; but, as clearly stated in his The Idea of Justice, Sen does not really consider the evolution of Rawls’s thought.3 In this paper, we focus our analysis on the later Rawls who devotes much space to comparative analyses in connection with pre-existent transcendental concerns. This section devoted to Rawls can thus be seen as a third illustration of our thesis.

It should be emphasized that the thesis of this paper cannot be reduced to the simple demonstration of the “conglomerate” character of Condorcet’s, Sen’s and (the later) Rawls’s thoughts.4 A “conglomerate” theory is defined by Sen as follows: “it is, of course, possible to have a theory that does both comparative assessments between pairs of alternatives, and a transcendental identification […]. That would be a ‘conglomerate’ theory, but neither of the two of different types of judgments follows from each other” (Sen, 2009, p. 16). Our approach is indeed radically different: in our opinion, a pure comparative theory cannot exist.5 A transcendental dimension is the condition of possibility of any comparative theory. The works of Condorcet, Sen and (the later) Rawls are evoked here to support this thesis.

Some papers in the recent literature have addressed the issue of the transcendental and comparative traditions as adumbrated by Sen in his latest works, but in ways that are quite distinct from ours. Gamel (2010) shows that Sen’s concept of capability “would be more fruitful and more valued, if it were left ‘embedded’ in the general and hierarchized framework of John Rawls’s theory of justice” (p. 1). As a consequence, Gamel questions the usefulness of Sen’s recent dichotomy. Valentini (2011) aims to show that Sen’s criticisms of the (mostly

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1 On these issues, see also Sen 2006 and 2012.
2 It should be noted that most examples proposed by Sen on this issue do not relate to social justice (see p. 16 for the choice between a Dali and a Picasso and red or white wine; p. 102 for the comparison in terms of peak heights between Mount Kilimanjaro and Mount McKinley).
3 Sen does indeed acknowledge the evolution of Rawls’s thought from a transcendental theory to a more comparative one (see Sen, 2009, pp. 11-12 and p. 58), as we will discuss in section 3.2, but the analyses Sen develops regarding Rawls are unquestionably focused on A Theory of Justice (1971).
4 We wish to thank an anonymous referee for bringing this issue of “conglomerate” theory to our attention.
early) Rawlsian approach miss their target and hence that it “delivers much of what Sen himself wants from a theory of justice” (p. 297). Ege, Igersheim and Le Chapelain (2013) offer two arguments designed to question the distinction between transcendental and comparative approaches: the first is based on the Smithian concept of the “impartial spectator”, while the second focuses on a brief comparison between Sen’s and Nussbaum’s capability approaches. Igersheim (2013) demonstrates that the pairs ‘freedom of the moderns/freedom of the ancients’ and ‘negative freedom/positive freedom’ are present in both Rawls’s and Sen’s thought. Hence, this observation leads to the conclusion that the authors might be closer than is suggested by Sen’s dichotomy. To the best of our knowledge, only two papers attempt to demonstrate explicitly that a transcendental approach is necessary, namely Kandil (2010) and Robeyns (2012), but both use arguments which differ from ours. On the one hand, Kandil (2010) attempts to show the necessity of the transcendental approach by resorting to the theory devoted to the measurement of inequality. Further, the paper pleads in favor of the complementarity of the traditions, which is not the case for us. On the other hand, Robeyns (2012) very briefly develops the issue of the necessity of a transcendental approach by arguing first that in particular situations, such as gender justice in liberal societies, “judgments about the comparison of complex cases of injustice implicitly or explicitly do refer to ideals of justice” (p.160). Second, according to Robeyns, a transcendental approach is also needed in order to have a complete “navigation map” so that the selection of the right path of justice-enhancing actions and the avoidance of suboptimal situations (in terms of justice) in the long run is possible.

The paper is organized as follows. In the first section we discuss Sen’s assertion that Condorcet is a representative of the comparative tradition. Although Condorcet is a well-known forerunner of modern social choice theory, the concept of “collective reason” – which plays a central role in his analysis of public decisions – gives rise to a judgment of a transcendental nature. In the second section we turn to Sen’s thought itself. We claim that transcendental judgments of the form ‘society Z is just’ are present implicitly in Sen’s thought (see especially Sen 1970, 1974, 1976, 1977), as expressed in his “liberal paradox” and the related concept of “metaranking” – the ranking of rankings of preferences. We then emphasize that this concept of metaranking resonates with many passages in Sen’s most recent work. In the third section we examine Rawls’s thought and its evolution from A Theory of Justice (1971) to Political Liberalism (1993). Rawls progressively reduces the sphere to which his two principles of justice apply – from the moral to the political – and, consequently, puts more and more emphasis on the concept of “public reason” and on the growing role of the confrontation of individual values. Note that the status of this third section is different than the two previous ones insofar as we do not reject Sen’s point of view regarding the early Rawls’s belonging to the transcendental tradition. We refer to the thought of the later Rawls as an example of the progressive development of a comparative theory which integrates the preceding transcendental components but in a more restrictive way.

Note that the contrary is not true, even though we will not demonstrate this in the present paper. As Sen himself stresses (2009, pp. 16-17), pure transcendental theories are quite conceivable.
1. Condorcet: from comparative to transcendental

Social choice theory has seen Condorcet as its principal forerunner ever since Guilbaud (1952), Arrow (1951), and Black (1958) rediscovered the Condorcet Paradox or Effet Condorcet, originally set out in the Essai sur l’application de l’analyse à la probabilité des décisions rendues à la pluralité des voix (1785). Arguing that social choice theory is the framework of analysis that is most representative of the comparative tradition in theorizing about social justice, and recalling that its foundations rest on Condorcet’s work, Sen associates Condorcet’s thought with that tradition. The particular attention Condorcet pays to the divergence of views and opinions and his confidence in public decision-making may in fact lead to his being associated with the comparative tradition. However, in this section we show that, to achieve its purpose, public debate as it is deployed in Condorcet’s thought has prerequisites of a transcendental nature.

Modern social choice theories have retained only a small part of Condorcet’s overall project, which is to set up the conditions that guarantee that the process of public decision-making takes its only acceptable form: the collective pursuit of the general interest. In section 2.1 we note that this conception of public decision-making – as a public dialogue devoted to collectively realizing the general interest – may appear at first sight to be close to Sen’s comparative tradition. In section 2.2, however, we go on to argue that these first impressions do not give a fair view of Condorcet’s overall analysis. In fact, to ensure that public debate does not become an arena for power struggles, each citizen has to be endowed with reason, which appears as the condition of possibility of a debate promoting the general interest. According to Condorcet, reason leads first of all to the recognition that every man, as a sensitive and reasonable human being, is endowed with natural rights. This analysis forges the principle of the equality of natural rights and justifies the priority of this principle over every other concern. From this analysis it follows that the transcendental dimension – characterized by the priority of the principle of the equality of natural rights – is a prerequisite of any confrontation of opinions and consequently of any comparative judgment in Condorcet’s thought.

1.1. The vote as a collective quest for justice: Condorcet and the comparative tradition

The Essai – Condorcet’s most fruitful attempt to apply probability theory to the moral and political sciences – asks the question: “under what conditions will the probability that the majority decision of an assembly or tribunal is true be high enough to justify the obligation of the rest of society to accept that decision?” (Baker 1975, p. 228). Given that this is the wider issue of interest to Condorcet, the Paradox, as – in contemporary terms – a logical and mathematical problem of preference aggregation, cannot be seen as representative of the Essai considered as a whole. As Bru and Crépel have noted (1994, p. 376), the discussion of the Paradox, however important, “represents only few pages of the Essay”; Grofman and Feld (1988, p. 569) describe Condorcet’s Paradox as a “by-product” of the Essai, albeit one that

6 Sen (2009, pp. 91–92) also recalls the legacy of Borda’s analysis.
has, through the influence of modern social choice theories, become the most famous part of Condorcet’s reflections on public decision-making.

When dealing with the issue of public decision-making, Condorcet’s problem is not the accuracy with which the social preference conforms to the multitude of individual preferences, but rather the way in which the social decision-making process is able to lead to a “true” result, that is, a result in compliance with the general interest. From this point of view, public decision-making has nothing to do with the opinion of the majority, and is not concerned with the expression of a balance of competing wills. Rather, the public decision-making process must be nothing less than a collective “quest for truth,” and the problem of the Essai is to identify the forms and compositions of assemblies that may ensure that we can have confidence in democracy as a tool to collectively identify the general interest.

The “probability of truth” of public decisions certainly depends on the form of assemblies and on aggregation issues. However, the emergence of a “true result” also has a prior dependency on the individual decisions themselves, and more specifically, in Condorcet’s words, on the “probability of truth” of each individual vote. The latter, though, turns crucially upon the enlightenment of the voters themselves: “Thus the form of an assembly which decides upon men’s fate is far less important for their happiness than the enlightenment of its members; also the progress of reason will contribute more to the good of the people than the form of political constitutions” (Condorcet 1785, p. lxx; 1994, p. 130).

What emerges from this analysis is the most important outcome of Condorcet’s reflections on public decision: the process of collective choice cannot escape arbitrariness, and thus injustice, if individual choices are not grounded on the exercise of reason. Condorcet hence stresses two fundamental prerequisites of democratic public decisions: first, the need for enlightened citizens to be involved in collective choice, and, second, the role of public debate as a way to collectively promote reason. When associating Condorcet with the comparative tradition, Sen (2009, p. 94) specifically mentions the importance of these two prerequisites and evokes the strong link that unites Condorcet’s reflections on the vote with his defense of a public instruction system. Condorcet’s passionate advocacy of public instruction (see the Cinq Mémoires sur l’instruction publique (1791–92) and the Rapport et Projet de décret sur l’organisation générale de l’instruction publique (1792–93)) must indeed be appreciated as an integral part of his meditations on the emergence of rational public decisions. Insofar as the public instruction system is supposed to spread reason to all citizens, Condorcet considers it to be the most important institution with respect to securing the grounds for a republican regime.

Through the notion of reason, Condorcet lays emphasis on the need for the impartiality of the citizens involved in the public decision-making process. He draws a strict distinction between the reason and the will (Condorcet 1792, pp. 589–590): reason concerns the need that all citizens involved in a public decision should distance themselves from their particular will – i.e., their own personal interest – so as to give priority to the common interest. The collective exercise of reason – sometimes called “collective reason” or “common reason” – appears as the central condition of the emergence of just social arrangements of the form ‘society X is more just than society Y’. Thus, the comparative dimension is in fact an important feature of Condorcet’s analysis of public decisions. But our point here is to stress that collective reason is intrinsically related to the principle of the equality of natural rights
and hence that Condorcet’s reflections on the process of public decision-making make necessary appeal to a transcendental dimension. We tackle this issue in the next section.

1.2. From collective reason to principles of justice

According to Condorcet, collective reason must necessarily lead to a fundamental principle of justice: just social decisions must give primacy to the preservation of the equality of the principle of natural rights. Indeed, in Condorcet’s view, when citizens set aside their own interests they necessarily observe that all members of society, as human beings, share the same moral faculties: in particular, reason and sensitivity. In consequence, they must share the same fundamental rights, which are natural rights. Equality of natural rights hence appears as a fundamental principle which is justified through reflection on the moral nature of humanity. Through this sensualistic justification (see Faccarello 1990, 1992; Rieucau 1997), Condorcet affirms that respect for the equality of natural rights takes priority over every other concern, especially economic ones – although he does not consider these objectives to be antagonistic, in fact quite the contrary (Rieucau 1997, Le Chapelain 2010). That move from collective reason to the priority of the equality of natural rights explains why Condorcet regards laws as “consequences” and “applications” of natural rights (Condorcet 1792, pp. 594–595). The reason why men join in society is precisely the preservation of these rights. The political constitutions and laws that follow from public decisions thus must naturally preserve that principle: “We want a constitution whose principles are only based on the natural rights of the man, before the social institutions” (Condorcet 1787, p. 14).

From that point of view, Condorcet’s and Rawls’s analyses of social justice have a profound commonality. They both move deductively from impartiality – reached through the spread of reason or following from the original position – to an agreement on a unique set of principles of justice and on the lexicographic ordering of these principles. They both set out that impartial public reasoning must necessarily lead to an agreement on a specific contract – characterized here by the same priority of fundamental liberties. From that perspective, Condorcet’s analysis possesses one of the central characteristics of the contractarian tradition. The general interest (i.e., the primacy of the principle of the equality of natural rights) does not have plural forms; it is unique and anterior to public dialogue since it is justified by considerations of the essential moral character of humanity. Collective decisions grounded on collective reason are perceived by Condorcet as a way to bring to light the only pre-existent social contract that could possibly exist, given the moral character of humanity. The parallel drawn by Baker (1975) between Rousseau’s Contra social and the Essai supports the idea of the contractarian nature of Condorcet’s analysis. In the same vein, Grofman and Feld (1988) show the proximity between Rousseau’s concept of the general will and Condorcet’s general interest, and propose that Condorcet’s analysis in the Essai, especially the “jury theorem,” “accurately captures the basic ideas underlying Rousseau’s notion of the general will” (Grofman and Feld 1988, p. 567). Consequently, contrary to Sen’s claim (2009), Condorcet’s thought shares some common ground with the transcendental institutionalism of Rousseau and Rawls.

Certainly it would be misleading to claim that Condorcet wasn’t concerned with diversity, or with the conflict of individual values. As shown by Rothschild (2001, p. 207), a main issue for Condorcet “was to believe in the universality of at least some political truths,
and at the same time to esteem the different, conflicting beliefs of others.” But Condorcet’s universalism builds the foundations of Condorcet’s conception of justice. From that point of view, his approach is no longer comparative. The recognition of the principle of the equality of natural rights that follows from the exercise of reason is both the condition of possibility of any acceptable public decision-making and the consequence of the public reasoning process. If grounded on reason, it necessarily leads to the priority of the respect of natural rights. Thus, even though Condorcet’s analysis manifests a profound concern for diversity, and hence reflects a comparative dimension, the possibility of such comparative judgments entails transcendental foundations in which they are necessarily rooted.

Finally, with his conception of the nature of the public decision-making process, Condorcet is faced with a paradox he will resolve through public instruction. Political constitutions and laws are consequences of natural rights and must hence guarantee their preservation. Jointly, the principle of the equality of natural rights requires that all men enjoy the right of political participation. But, without enlightened citizens – that is, without the implementation of an ambitious system of public instruction spreading reason and knowledge – popular sovereignty leads to tyranny and injustice. Hence democratic public decisions, in Condorcet’s view, crucially depend on the prior establishment of just social institutions, and the conception of justice as grounded on equal liberty provides him with the guidelines to lay the foundations of that central social institution (Le Chapelain 2010). Assimilating Condorcet to the comparative tradition only leads, in our opinion, to an unfair minimization of the role of institutions in his overall reflections on the process of public decision-making, and to a downplaying of his concern with defining what just institutions would be.

This problem for Sen’s dichotomy, which our discussion of Condorcet’s work has revealed, can be deepened through a consideration of the works of a second author: Sen himself.

2. Sen: the indispensability of the transcendental

We stressed in the preceding section that Condorcet does not properly belong to the comparative tradition defined by Sen in The Idea of Justice. More precisely, we tried to show that, through the role given to the concept of “collective reason”, Condorcet’s thought gives rise to both transcendental and comparative judgments. In this section we pursue a rather similar line of analysis with respect to the work of Sen himself. In section 2.1, we show that in the seventies Sen defined a concept which appears to be capable of giving an account of the way some judgments of the form ‘Z is just’ may emerge in society: this is the concept of metaranking, to which he appeals in resolving his famous liberal paradox. In section 2.2, we argue that many passages of Sen’s Idea of Justice echo the concept of metaranking, and thus that some transcendental elements are implicit in it. Therefore, it can be claimed that certain

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7 It should be stressed that a consideration of the work developed by Sen in the seventies is of particular interest as it leads to a better understanding of some of the concepts used in The Idea of Justice. Of course, we do not deny that Sen’s thought might have undergone some evolution, just as for instance did Rawls’s (see section 3.2 on the evolution of Rawlsian thought). But we claim that some aspects of The Idea of Justice implicitly appeal to transcendental elements developed earlier by Sen, irrespective of the evolution of his thought regarding issues such as the original position or the notion of impartiality (on these subjects, see Gilardone, 2015).
transcendental aspects are operative in ensuring the coherence of the ideas developed in his most recent book.

### 2.1. The liberal paradox and the metaranking of preferences

Strikingly, the concept that enables us to tackle the issue of the transcendental aspects of Sen’s last book was in fact developed by Sen himself in the seventies, partially in order to resolve his famous paradox of the Paretian liberal. Let us now remind ourselves of this impossibility result and the related concept of metaranking.

In 1970, Sen introduced individual liberties and rights into the framework of social choice theory via a condition of liberalism and the notion of decisiveness: individuals must be decisive – their preferences must be acknowledged by society – over some pairs of social states which belong to their private sphere. Sen shows that this condition of liberalism coupled with a weak Pareto principle leads to the impossibility of social choice: this is the impossibility of the Paretian liberal. Sen provides a famous example in order to illustrate the paradox: whether or not to read *Lady Chatterley’s Lover*, the book by D. H. Lawrence which was the subject of a 1960 obscenity trial in the UK.

Let a society comprise two individuals: A who is a prude and B who is lewd. Three social states are available: (a) individual A reads the book, (b) individual B reads it, or (c) nobody reads it. A, who is a prude, wants to protect individual B from perverse texts, and so prefers c to a and a to b. B, who is lewd and prefers that A be shocked rather than that he should read the book himself, prefers a to b and b to c. As a consequence, according to the weak Pareto principle (which states that any unanimous preference must be acknowledged by society as a whole) we must prefer a to b, since A and B (the totality of society in this example) share this preference. Further, since social states a (respectively b) and c only differ in that individual A (respectively B) reads the book, a (respectively b) and c must belong to the private sphere of individual A (respectively B), and so society must prefer c to a (respectively b to c). Thus a is preferred to b, b to c, and c to a.

Sen (1976) goes on to propose a solution to his paradox. He begins by reiterating that it is obvious that weakening the condition of liberalism and thus choosing social state a is not the best solution, since it leads to the selection of personal features that both individuals dislike. Social state b, which respects individual rights, seems therefore preferable, except that it conflicts with the weak Pareto principle; weakening this principle is hard to justify, for it represents the preference for unanimity. Sen thus proceeds carefully: according to him, for individual i there is a distinction between *i preferring x to y*, and *i wanting his/her preference to count* in determining the outcome of the social decision-making process, particularly if this preference is not exclusively individual i’s concern. But Sen does not stop here. If individual A does not wish, for instance, that her preference for c over b should count at the collective level, she still continues to prefer c to a and a to b. Then, because of the transitivity of individual preferences, the conflict still occurs. Sen notes that: “extending this reasoning, I may decide, for the sake of consistency, not to insist that my preferences be taken into account even in choices over some pairs that are not exclusively your concern” (Sen 1976, p. 236, emphasis added). That is to say that, for the sake of consistency, A also renounces her preference for a over b. According to Sen’s solution, the social state finally chosen will thus be b.
But Sen himself criticizes the drawbacks of a systematic weakening of one or the other conditions invoked in the paradox: “to discuss whether a person’s preference should count or not we may need to know more than what the preferences happen to be, e.g. the reasons for holding these preferences” (Sen 1976, p. 237). Only an examination of the motivations and values of a person enables one to determine which solution should be proposed. In “Choice, Orderings and Morality” (1974) and “Rational Fools” (1977), he thus proposes to use the concept of metaranking – the “ordering of the preference orderings” – to cope with the liberal paradox. Let us develop Sen’s ideas as related to this proposal.8

In “Rational Fools,” Sen strongly criticizes the neo-classical theory according to which an individual will have only one preference ordering – one which “is supposed to reflect his interests, represent his welfare, summarize his idea of what should be done, and describe his actual choices and behavior” (Sen 1977, p. 99). Sen proposes another structure to tackle this issue: a ranking of rankings of preferences – that is, a metaranking of preferences. The proposal is that an individual can rank her rankings of preferences according to some moral consideration pertaining to what “the person concerned would have morally preferred” (Sen 1974, p. 62). The appeal to metarankings makes it possible to solve both the Prisoner’s Dilemma and Sen’s liberal paradox, by invoking “moral rankings of preference orderings” (Sen, 1974, p. 56). For the Prisoner’s Dilemma, Pareto Optimality is favored: “social inoptimality might be avoidable only by a moral code of behavior that drives a wedge between preferences and welfare” (Sen 1974, p. 62, emphasis added). In the present case, this moral code of behavior means that individuals renounce the option to play rationally (i.e., to confess) in order to reach a Pareto-optimal social state: “sacrificing some individual gain for the sake of a rule of good behavior by all which ultimately makes everyone better off is indeed one of the most talked-of aspects of morality” (Sen 1974, p. 59, emphasis added). In terms of metaranking, if an individual wants to follow this moral code, he will choose a preference ordering which is ranked higher in his metaranking. On the contrary, for the resolution of the liberal paradox, Sen claims that morality in this case requires weakening the Pareto condition and respecting individual rights. One can obtain this kind of result if individuals are “liberal enough”: “And I am liberal enough to believe that if he does not want to then he should not. So given his preference, I should not really prefer that he should read the book” (Sen 1974, p. 65). Again, this kind of reasoning can be taken into account thanks to the appeal to metarankings. And Sen then concludes that the difference between both situations does not lie in the ordering of preferences but “in the ordering of the preferences ordering” (Sen 1974, p. 66).

However, Sen’s plea that we take into account individual motivations and values via the concept of metaranking stands in need of closer examination: How can we understand the fact that individuals are able to elaborate their metaranking at all? Under what conditions does such an elaboration become possible? Although Sen does not expand on this point, certain terms that he uses are highly suggestive: individuals agree to abandon a part of their preferences “for the sake of consistency,” “for the sake of a rule of good behavior by all,” or in order to respect “a moral code of behavior.” All the terms listed above ("rule," “by all,” “moral code”) seem to point to the fact that introspection is not a sufficient basis on which

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8 For a quick survey of the issue of metaranking, see, for instance, Ege and Igersheim 2011, pp. 4–6.
individuals may elaborate their metaranking. We may indeed wonder whether an individual would agree to observe a moral code of behavior if she were the only person to do so. In the specific context of social choice, is it credible that there should be respect for a given moral code of behavior without any deliberation, without any public dialogue or, in a word, without the other members of society? For instance, with his concept of “laundering preferences,” Goodin stresses that in a given social context individuals will be ready to correct their preferences by themselves: “they will express only their public-oriented, ethical preferences, while suppressing their private-oriented, egoistic ones” (Goodin 1986, p. 88). Strikingly, this brings us back to Sen’s 1976 resolution of the liberal paradox in which he maintains that there is a difference between an individual preferring one social state to another and an individual wanting that his preference be taken into account in the process of social choice. We thus claim that the emergence of such a “moral code of behavior” plainly presupposes the existence of a deliberative process.

In a brief, then, we have seen, first, that in the Prisoner’s Dilemma, according to Sen, ‘not confessing’ is more just than ‘confessing’. Conversely, in the case of the liberal paradox, Sen stresses that ‘respecting individual rights’ is more just than ‘not respecting individual rights’. Second, both judgments are seen by Sen as “moral codes of behavior” or “rules of good behavior” and he claims that individuals are able to achieve them through their metarankings. Third, we showed that the development of individual metarankings and the subsequent emergence of “moral codes of behavior” necessarily imply the existence of public discussion, which allows individuals to modify their initial preferences or values accordingly. As a consequence, and absent closer analysis of the text itself, one could claim in good faith that the concept of metaranking – which encompasses the formation of judgments of the form ‘X is more just than Y’ and the appeal to public discussion – concerns the comparative tradition alone.

But such a stance would be tantamount to ignoring the metaphysical status of “a moral code of behavior” or “a rule of good behavior,” as well as Sen’s ongoing references to the concept of morality. On this issue, Sen’s double explicit reference to both “Kant’s dictum” and “Rawls’s concepts of fairness and justice” cannot but put us on the right track. For instance, with respect to the claim that ‘not confessing’ is more just than ‘confessing’, Sen (1974, pp. 57–58) states that: “we would seem to get a lead from Kant’s dictum: ‘Act always on such a maxim as thou canst at the same time will to be a universal law.’ Certainly neither prisoner would like that confessing becomes a universal practice, and the only universal law that each prisoner would like is that everyone should refuse to confess […]. Thus non-confessing would seem to satisfy Kant’s ‘moral law.’ […] What about Rawls’s concepts of fairness and justice? In the primordial equality of the ‘original position’, each would have clearly preferred that neither should confess. It certainly improves that position of the worst-off person since it improves the position of each” (Sen 1974, pp. 57–58).

It may here be helpful to recall that, according to Sen, Kant and Rawls belong to the transcendental tradition, and that their analyses allow the framing of judgments of the form ‘society Z is just’. Note also that in the previous quotation Sen says explicitly that not confessing satisfies both Kant’s moral law and Rawls’s principle of difference, and thus that ‘not confessing is just’. In the face of this, could one continue to maintain that judgments framed through the concept of metaranking only concern the comparative approach? Could
one continue to maintain that a non-transcendental interpretation of the concept of metaranking is possible? Obviously, such claims no longer sound plausible. Rather, it should be maintained, on the basis of the text analysis just conducted, that the concept of metaranking, associated with public discussion, enables the emergence of judgments of the form ‘society Z is just’. Sen’s explicit objective at that time was to develop a “model of morality” and to make a clear distinction between rational and moral preferences: “morality would seem to require a judgment among preferences whereas rationality would not” (Sen, 1974, p. 57).

2.2. Sen’s Idea of Justice: not only comparative

Although Sen no longer mentions the concept of metaranking after the seventies, it is implicit in many passages of his *Idea of Justice*, as we will attempt to show in this section. Although for Sen the deliberative process is not explicitly associated with the “quest for truth” in the manner of Condorcet, it unquestionably allows the progressive formation of a set of common values or judgments which allow individuals to revise their first preferences/values. Let us consider, for instance, the fundamental role which Sen assigns to the freedom of the press: “one of the central issues to consider for the advancement of public reasoning in the world is support for a free and independent press” (Sen 2009, p. 335). He explicitly asserts that freedom of the press enhances public deliberation and hence the formation of common values: “informed and unregimented formation of values requires openness of communication and argument. The freedom of the press is crucial to this process. Indeed, reasoned value formation is an interactive process, and the press has a major role in making these interactions possible. New standards and priorities (such as the norm of smaller families with less frequent child bearing, or greater recognition of the need for gender equity) emerge through public discourse, and it is public discussion, again, that spreads the new norms across different regions” (Sen 2009, p. 336).

This extract sheds light on Sen’s very specific conception of public deliberation: it must favor the emergence of new social norms and priorities understood here as common social values. A close link between the latter and the concept of metaranking is not hard to find: according to the new norms and priorities brought about by public deliberation, individuals are able to construct their own metaranking, i.e., to modify their first individual preferences or values according to the common values which stem from public discourse.

As well as this, Sen makes special reference to the liberal paradox, seen as stressing the importance of a specific kind of individual preference: “one of the lessons drawn from the social choice result of ‘the impossibility of the Paretian liberal’ […] is the crucial relevance of mutually tolerant preferences and choice” (Sen 2009, p. 337). Note that in his 1974 paper, Sen said much the same thing and stressed his preference for respecting individual rights or having mutually tolerant preferences and choice. Let us add, further, that in 1974 the latter was set in relation with Kant’s moral law and Rawls’s principles of justice. Therefore, is it plausible to consider – as Sen indeed seems to pretend – that the emergence of such judgments has nothing in common with the transcendental tradition; or that the progressive

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9 But note that this does not mean that the model of morality proposed by Sen leads to a “zero-one contrast between the actual ordering and the one moral (or ‘ethical’) ordering” (Sen, 1974, p. 63). As Sen himself states, there can be “gradations of morality”. This is precisely the interest of the concept of metaranking.
development of a common set of values – such as liberal values – has no connection at all with transcendental points of view according to which one should respect individual rights and freedoms? It should be conceded that such a position seems difficult to maintain. Rather, one should acknowledge with Valentini (2011, pp. 311–312, emphasis added) that Sen’s “ideal of public and open reasoning about justice either is so inclusive as to become almost empty (given that public reasoning will contain completely irreconcilable views) or it surreptitiously implies certain substantive moral commitments which automatically exclude perspectives that are distant enough from the liberal one. The latter alternative is probably most likely to be correct […]. Certain fundamental commitments – such as commitments to liberty and equality – must be non-negotiable. To the extent that Sen does not wish to abandon those commitments, his view cannot boast much greater inclusiveness that Rawls’s.”

Nussbaum (2003, p. 43) points out more or less the same “non-negotiable” aspect of Sen’s thought: “[Sen] speaks as if certain specific capabilities are absolutely central and nonnegotiable. One cannot read his discussions of health, education, political and civil liberties, and the free choice of occupation without feeling that he agrees totally with my view that these human capabilities should enjoy a strong priority and should be make central by states the world over, as fundamental entitlements of each and every citizen […]. In the case of liberty, he actually endorses giving liberty a considerable priority”.

These two long quotations correspond in every respect to our claim, stressing that even though Sen does not acknowledge it, his reasoning is nevertheless based on certain “non-negotiable” judgments which should be valid “the world over”. The concept of metaranking, coupled with public discussion, allows these judgments to emerge and so be disseminated across society. How, then, can Sen’s unquestionable and “non-negotiable” commitment to freedom and equality for all human beings be interpreted in any other way than as a judgment of the form ‘society Z is just’, where ‘society Z’ means something like ‘a society which gives priority to freedom and equality’? It seems to us that this judgment, whose transcendental nature seems beyond doubt, is necessary precisely in order to frame Sen’s recent conception of justice. If this fundamental value is not shared by all members of a society, no collective agreement is possible on any issue (gender justice, respecting freedom of the press, and so on). In our opinion, the transcendental aspect we have stressed remains unspoken in Sen’s last book. For us, the important thing is what Sen’s reasoning really involves and logically entails. And the very fact that this transcendental aspect remains unspoken in Sen’s work further strengthens our stance regarding the necessity of appealing to a transcendental dimension in order to ensure the consistency of Sen’s comparative approach – if not indeed its very possibility.

10 Of course, we do not advance the absurd view that what an author has to say regarding his own approach should not be taken into consideration. But we believe that a close examination of an author’s reasoning is indeed necessary in order to bring out the internal logic which governs this reasoning (on this issue, see Ege, 2012).
3. Rawls: from transcendental to comparative

As stressed in the introduction, Sen considers the early Rawls to be the last great representative of the contractarian and transcendental tradition, and says that his own comparative approach is systematically defined and developed in opposition to Rawls’s theory of justice.¹¹ The status of this third section differs from our previous ones, for we do not here call into question Sen’s position regarding the early Rawls. Indeed, there is no doubt that the early Rawls belongs to the transcendental tradition, even if a strong concern for realism – i.e., how to actually implement his theory – can be seen from the outset (section 3.1). Then we focus on the evolution of Rawls’s thought, from *A Theory of Justice* to *Political Liberalism*, as an illustration of the necessity of the transcendental dimension for a comparative theory (section 3.2).

3.1. The early Rawls as a representative of the transcendental tradition

The transcendental character of the project of *A Theory of Justice* is set out by Rawls in unambiguous terms: his theory, he says, aims “to generalize and carry to a higher order of abstraction the traditional theory of the social contract as represented by Locke, Rousseau and Kant” (Rawls 1971, p. xviii). According to the contractarian tradition, the *just* has priority over the *good*. This feature brings the Rawlsian enterprise close to the Kantian ethical vision. Indeed, Rawls’s description of the original position makes direct reference to Kant’s theory: “the original position [is] in important ways similar to the point of view from which noumenal selves see the world […]. Thus men exhibit their freedom, their independence from the contingencies of nature and society, by acting in ways they would acknowledge in the original position” (Rawls, 1971, p. 225). According to Rawls, “the principles of justice are also analogous to categorical imperatives” (Rawls 1971, p. 222), and the concept of the “sense of justice,” which is one of the main conditions of the “original position,” has the same status in Rawls’s theory as the concept of reason (*Vernunft*) in Kant’s *Metaphysics of Morals* (1785). In both cases, the moral subject is able to escape his experiences and particular values and to act behind the “veil of ignorance” – for Rawls – or in the “intelligible world” – for Kant.

In a nutshell, the theory developed by the early Rawls belongs unquestionably to the transcendental tradition both through its strong relationship with Kant’s theory and through its clear conviction that a just society must be endowed with a set of principles of justice which apply to the basic structure of society, i.e., the main institutions. Indeed, based on the two famous principles of justice, judgments of the form ‘society Z is just’ can indisputably be framed.

But even as regards this first stage in the development of Rawls’s thought, it is possible to nuance these statements slightly. Indeed, Rawls also aims to devise a realistic and empirical theory, and, according to him, that is not really Kant’s objective: “justice as fairness is a theory of human justice and among its premises are the elementary facts about persons and their place in nature. The freedom of pure intelligences not subject to these constraints (God and the angels) are outside the range of the theory. Kant may have meant his doctrine to apply to all rational beings as such and therefore that men’s social situation in the world is to have

¹¹ For a recent analysis of the relationship between Rawls’s and Sen’s thoughts, see Gilardone (2015).
no role in determining the first principles of justice” (Rawls, 1971, p. 226). On this matter, Rawls goes further than his great contractarian predecessors. Indeed, Rawls’s second principle of justice, which deals with the issue of inequalities between citizens – and especially his claim in *A Theory of Justice* that “the theory of justice is a part, perhaps the most significant part, of the theory of rational choice” (Rawls, 1971, p. 15) – testifies that one of his main concerns is the realism of his theory. Even though he will later recognize the inconsistency of such an assertion (see, for instance, Rawls 1985, n. 20), this does not mean that the later Rawls abandons his inquiry into this kind of issue in favour of a purely Kantian position, as we will see in the next section.

Along the same line of reasoning, the following observation of Höffe (1988, p. 79, emphasis added) is very significant: “the Rawlsian theory occupies an *intermediary* place between a purely inductive process of generalization of experiences (the specific or other opinions on justice) and an abstract pattern of principles beyond the experience. Nevertheless *it is not a question of a compromise* because there is here a methodological element, which exists neither in the induction nor in the abstract pattern: the process of action in return [*action en retour*] suggests that the initial judgments are themselves able to evolve through learning and to transform.” Rawls described this process of revising the initial judgments through the concept of “reflective equilibrium”: “by going back and forth, sometimes altering the conditions of the contractual circumstances, at others withdrawing our judgments 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 judgments duly pruned and adjusted. This state of affairs I refer to as reflective equilibrium” (Rawls 1971, p. 18). Hence, in the notion of “reflective equilibrium” one can observe, with Höffe, that both transcendental (principles) and comparative (“considered judgments”) aspects appear.12

In spite of all these developments, it remains obvious that the theory developed by the early Rawls remains essentially a transcendental one, even if the philosopher displays a noticeable concern for realism. But this aim will take shape especially in the later Rawls.

### 3.2. The later Rawls: towards a more comparative approach

As stressed previously, Sen points out the intellectual evolution in Rawls’s thought,13 saying that “Rawls’s basic claim of the emergence of a unique set of principles of justice in the original position (discussed and defended in his *A Theory of Justice*) is considerably softened and qualified in his later writings” (Sen 2009, p. 58). But he further claims that this evolution presents a major difficulty for the consistency of Rawls’s theory: “there is a real tension here within Rawls’s own reasoning over the years. He does not abandon, at least explicitly, his theory of justice as fairness, and yet he seems to accept that there are incurable problems in getting a unanimous agreement on one set of principles of justice in the original position, which cannot but have devastating implications for his theory of ‘justice as

12 Again, it should be noted that these statements do not entail that *A Theory of Justice* must be seen as a “conglomerate” theory. On the one hand, as stressed in the beginning of this section, it is primarily and unquestionably transcendental. Second, the idea of “reflective equilibrium” clearly implies a connection between the principles and the “considered judgments”: this does not match Sen’s definition of a “conglomerate” theory, since it is stated that neither the transcendental or comparative judgment “follows from each other”.

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of fairness” (Sen, 2009, p. 58). Of course, according to Sen, the most appealing way to resolve these so-called problems would consist in “abandoning the transcendental institutionalism of [Rawls’s] earlier work (particularly of A Theory of Justice)” (Sen, 2009, p. 12). We do not share this interpretation of the evolution of Rawls’s thought. Contrary to Sen who asserts that countenancing a transcendental dimension is fatal for the consistency of a comparative approach, we believe that a comparative approach is not even possible without appeal to a transcendental dimension. The example of the later Rawls is particularly persuasive in support of our thesis: Rawls progressively reduces the place devoted to transcendental aspects – while maintaining its main concepts – in order to include comparative elements.

From the outset, Political Liberalism denounces the metaphysical character of the reasoning which governs the 1971 theory of justice. What Rawls describes as “metaphysical” is the fact that his earlier theory supposes the existence of pure reasonable actors, inspired by their “sense of justice,” and subordinated to the Kantian “categorical imperatives” – that is, the principles of justice. At the same time, the correlative problem of the plurality of the conceptions of the good – that is, the comparative – becomes ever more important for him. His 1993 inquiry now focuses on the conditions for the peaceful coexistence of multiple conceptions of the good. This question transforms the nature of the Rawlsian project from now on: his theory is no longer a pure moral theory of justice, and evolves instead towards a political one: “justice as fairness is a political conception of justice for the special case of the basic structure of a modern democratic society. In this respect it is much narrower in scope than comprehensive philosophical moral doctrines […]. It focuses on the political (in the form of the basic structure), which is a part of the domain of the moral” (Rawls 2001, p. 14). In this context, the later Rawls’s theoretical position can no longer lay claim to universality; its teaching is valid only within the limits of modern occidental societies, or, in Rawls’s terms, within the limits of “well-ordered constitutional societ[ies]” (Rawls 1993, p. 448).

The later Rawls aims to construct a political theory in which the scope of application of the principles of justice is reduced to the political sphere, allowing individuals – outside that sphere – to develop diverse conceptions of the good. What is at stake here is the fact that these diverse, even “incompatible”, conceptions of the good are able to coexist. The condition of possibility of these different conceptions of the good is indeed the fact that all individuals, as citizens, share the principles of justice which constitute the common transcendental basis. To explain the emergence of this transcendental basis, the later Rawls develops a new concept, i.e. the concept of “public reason” (on this issue, see in particular Ege and Igersheim 2010). The progressive rise of public reason in society necessitates the existence of a democratic cultural accumulation, in the sense that, through specific historical experiences, individuals are supposed to progressively integrate an ethic of deliberation. Thanks to a long process of confrontation and discussion, democratic culture emerged and has developed in our modern societies. It should be stressed that with the concept of public reason the later Rawls attempts to substitute the metaphysical approach of A Theory of Justice – i.e. a comprehensive moral theory of justice – with a more realistic one, i.e. a political theory of justice which allows the development of diverse conceptions of the good. More precisely, the citizens who embody the public reason have the same role as the parties which deliberate under the veil of

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13 On the evolution of Rawls’s thought, see among others Audard (1988) and Ege and Igersheim (2008).
ignorance in *A Theory of Justice*: namely, to progressively define the principles of justice. Indeed, Rawls says that: “in a democratic culture we expect, and indeed want, citizens to care about their basic liberties and opportunities in order to develop and exercise their moral powers and to pursue their conceptions of the good […]. All this presupposes that the fundamental ideas of justice as fairness are present in the public culture, or at least implicit in the history of its main institutions and the tradition of their interpretation” (Rawls, 1993, pp. 77–78).

Thus what Sen calls the transcendental character of Rawls’s *A Theory of Justice* is indeed carried over to *Political Liberalism*, but its scope is greatly limited in order to make room for the comparative dimension, which consists in the peaceful coexistence of opposite conceptions of the good. The condition of possibility of the latter is indeed the principles of justice which apply to the political sphere. *Political Liberalism* is thus oriented towards providing a comparative theory of justice, maintaining a transcendental aspect as its condition of possibility.

### 4. Concluding remarks

In this paper we have claimed that a transcendental dimension is the condition of possibility of any comparative theory of justice. In opposition to Sen’s claim in *The Idea of Justice*, we attempted to show that a transcendental dimension is a necessary condition for the consistency of any comparative approach. It should be stressed that our conception of the articulation between the transcendental and the comparative is fundamentally different from Sen’s definition of a “conglomerate” theory.

To support our claim, we have referred to three great authors: Condorcet, Sen himself, and the later Rawls. In Condorcet’s and Sen’s cases, the concepts of “equality of natural rights” and “metaranking” are deployed to play down the idea that their analyses are purely comparative. Neither Condorcet nor Sen can avoid appealing to transcendental concerns so as to make progress in matters of justice. Regarding the later Rawls – who develops a more comparative theory, as Sen himself acknowledges – his increasing concern with the issue of the coexistence of diverse conceptions of the good leads him to place considerable limits on the transcendental dimension of his analysis, confining it to the political sphere, while firmly maintaining it as a necessary condition.

In conclusion, we note that our paper can be seen as calling into question Sen’s dichotomy between transcendental and comparative approaches, showing in particular that Condorcet and Sen himself do not belong exclusively to the tradition within which Sen locates them. Further, we have shown that the later Rawls’s position is consistent, contrary to Sen’s evaluation of it. One simply must acknowledge that some transcendental basis is necessary in order that any comparative approach can emerge; and we have thus demonstrated that, explicitly or implicitly, Condorcet, Sen and the later Rawls do indeed share this point of view.
References


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