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Ideal Justice and Rational Dissent. A Critique of Amartya Sen's *The Idea of Justice**

Abstract: In *The Idea of Justice* Amartya Sen criticises 'transcendental institutionalism' for entertaining notions of 'ideal justice' that are neither necessary nor sufficient for the advancement of justice in the real world. Sen argues in favor of a 'realization-focused' and 'comparative' understanding of justice that he associates with the names of Adam Smith, Marx, and J. S. Mill. Conceptions of ideal justice, Sen believes, are useless since in practice we do not need them to advance justice. And they are 'infeasible' because all conceptions of ideal justice can be reasonably rejected for one reason or other. I shall address both complaints in turn and maintain that Sen's rigid contraposition of ideal and comparative justice is overstated. It will also be discussed how the institutional focus of 'transcendental institutionalism' links up with the need for an ideal conception of justice. Finally, some implications of rational dissent about justice and two common strategies to deal with it will be discussed.

1. Introduction

In his book *The Idea of Justice*¹ Amartya Sen discusses challenging global problems: famines, poverty, the subjugation of women, medical exclusion. He shows considerable impatience with conceptions of ideal justice that do not yield anything practicable to guide political action towards the eradication of these manifestations of serious injustice. Sen's misgivings are directed against what he calls 'transcendental institutionalism', an alleged tradition in political philosophy that he associates with Hobbes, Locke, Rousseau, Kant, and, among our contemporaries, with Rawls, Dworkin, and Nozick (5f.). According to Sen, these authors take justice to be a concept that primarily applies to social institutions, and they see it as the main task of a theory of justice to work out a conception of ideally or perfectly just institutions. Sen does not explain the term 'transcendental'. From what he says in the book, it is clear, however, that the just institutions

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¹ All page references in the text without a further specification to the contrary refer to this book. For the general argument cf. also Sen 2006.

described by transcendental institutionalists are supposed to be ideal or perfect in the sense that they “cannot be transcended in terms of justice” (6). And it goes without saying that in our days ‘transcendental’ conveys a sense of irreality, otherworldliness, and lack of practical meaning.

In opposition to transcendental institutionalism Sen sees a second tradition aiming at a ‘realization-focused’ and ‘comparative’ understanding of justice. The main protagonists of this tradition are Adam Smith, Marquis de Condorcet, Karl Marx, and John Stuart Mill (7). According to Sen, these authors made no attempt to describe ideally just institutions. Comparing existing societies, they thought about ways to effect social change and to eliminate injustice. Moreover, they did not focus narrowly on institutions but had a broader view on social life as a whole (7). Sen sees his own work in this line of thought and in opposition to ‘transcendental institutionalism’; he is critical of the theories of Rawls, Dworkin and Nozick in particular. It is hard not to sympathize with Sen’s attempt to shift attention away from notions of ‘ideal justice’ to the more practical questions of advancing justice by eliminating at least the worst forms of existing injustice. Still, Sen’s somewhat rigid contraposition of ‘ideal justice’ on the one hand and the advancement of justice, justice in a comparative sense, on the other, is overstated. We simply cannot understand the notion of ‘comparative justice’ and what it means to advance justice without at least some understanding of what ‘ideal justice’ requires.

Sen’s critique of transcendental institutionalism proceeds along three lines of argument two of which are directed against the very idea of elaborating a conception of ideal justice. Conceptions of ideal justice, Sen claims, are firstly useless since we do not need them to advance justice in the real world (15–18). Let us call this the *redundancy complaint*. Secondly, these conceptions are said to be ‘infeasible’ because there is no conception of ideal justice that cannot be reasonably rejected for one reason or other (10–15). Let us call this the *infeasibility complaint*. The third line of argument aims at the allegedly narrow focus of transcendental institutionalism. An adequate theory of justice, Sen maintains, must take a broader view and look at the whole of human life as it emerges from institutional arrangements operating under specific social, economic, and cultural conditions (8–18). I shall take up the first two points but not the third. It goes without saying that a practicable theory of justice must take into account the actual functioning of institutions and norms in real world settings. And with regard to Rawls’ and Dworkin’s alleged transcendental institutionalism the charge of ignoring the broader social context in which principles of justice are supposed to operate is clearly out of place.

I shall now firstly address Sen’s redundancy complaint with regard to theories that entertain conceptions of ideal justice (*section 2*). Secondly, I shall discuss Sen’s infeasibility complaint, i.e. his contention that ‘ideal justice’ is infeasible because of all of them are subject to reasonable criticism. I shall also indicate how the institutional focus of a theory explains the need for an ideal conception of justice and also why there is nonetheless good reason to think that ideal theories are feasible after all (*section 3*). Finally, some implications of rational dissent

about justice and two common strategies to deal with dissent, *Minimalism* and *Proceduralism*, will be discussed (*section 4*).

2. The Redundancy Complaint

A practicable theory of justice establishes a conceptual and normative framework for reasoned choices between feasible policies and courses of action. In order to do so, a theory must give reasons for action that apply not only under counterfactually ideal conditions but also in real world settings. Moreover, the point of a theory of justice cannot be that we realize ideal justice instantaneously here and now—or indeed, that we may ever be able to do so. We clearly must not expect that such a theory gives us “the grand revolutionaries ‘one-shot handbook’” for political change (100). Even in the long run it may be impossible to set up perfectly just institutions, and no perfectly just political program may ever be feasible. By itself, however, this does not mean that a theory of ideal justice is useless. It may still serve as a benchmark for how good or bad we actually do in terms of political or social justice, and it may guide us in taking decisions that advance justice even if they fall short of bringing about ideal justice. The question, then, is whether in practice we actually need a theory that describes ideally or perfectly just institutions. Sen denies that we do. Knowing what would be an ideally just alternative, he maintains, is neither necessary nor sufficient to make a decision between two non-ideal courses of action and to advance justice (15ff., 96–105).

There is a small oddity involved here. Sen, it seems, assumes that whatever is useful is so because it is a necessary or sufficient condition for realizing something valuable. Think, however, of cookbooks. Only some people believe that the use of cookbooks is necessary for agreeable cooking and it is clearly not sufficient. In spite of this, most of us would hesitate to call them useless, and this is so irrespective of whether we do or do not believe in objective or agreed upon standards of agreeable cooking. Nevertheless, let us, for the sake of Sen’s argument, ask: Is a theory that describes ideally just institutions or policies *necessary* to make good and justice advancing decisions between non-ideal alternatives? No, says Sen, since we can make good decisions without knowing the best or ideal alternative. If we had to choose between a Picasso and a Dali, we would not need to know that the Mona Lisa is the best painting in the world (16), and we do not need to know that the Mount Everest is the tallest Mountain in the world in order to compare the height of the Kilimanjaro and the Mount McKinley (102).

Now, unlike paintings or mountains ideally just institutions are not the kind of objects that we easily identify by proper names or by pointing to them. Rather we specify the features that make an institutional arrangement a just or, for that matter, a perfectly just arrangement. Indeed, this is what, among other things, we expect a theory of justice to do, viz. to specify a set of criteria that institutions have to satisfy in order to be just. These criteria of justice refer to objective features of alternative institutional settings and we require the same

set of criteria to apply to all alternatives under consideration, ideal and non-ideal. As a consequence, reasoned choices between non-ideal political alternatives are based on criteria that at the same time characterize an ideal institutional arrangement, i.e. an alternative that fully meets the criteria. And the same holds good not only for institutions, but for all objects of rational evaluation or measurement, including the beauty of paintings and the height of mountains. There is a logical tie, then, between our ability to make reasoned decisions between non-ideal alternatives and our ability to identify an ideal setting. We do not have to believe that this best or ideal institutional order can ever be realized in our world in order to appeal to the relevant criteria in any reasoned choice between non-ideal alternatives. Still, what makes an institutional setting better than another is its closer match with the ideal provided by the relevant set of criteria of justice.²

The Mona Lisa example and the Mount Everest example are also misleading because they do not adequately capture the dynamic and instrumental dimension of political choices. In the Mona Lisa example we naturally assume that the Picasso is chosen for the very reason that it is a better painting than the Dali, and we do not conceive of this choice as a first step to obtain an even better painting later—say a Cezanne or perhaps the Mona Lisa—a painting that is not yet on offer but may be later. And, similarly, in the Mount Everest case, we do not assume that reaching the top of the Mount McKinley brings one closer to the top of Mount Everest than to the top of the Kilimanjaro. Mountaineers typically do not climb up the Kilimanjaro on their way first to the Mount McKinley and then to the top of the Mount Everest. Political alternatives and decisions taken ‘to advance justice’, however, are different in this respect. There is an ambiguity in the expression ‘to advance justice’. It may mean ‘making things more just’ which involves an evaluation as to how just a state of affairs is in comparison with other states. It may, however, also be understood instrumentally as ‘being conducive to justice’ by making it more likely, or less burdensome to obtain, or to make it happen sooner. Taken in this sense, the question of whether something is an advancement of justice is an empirical question once we have identified the (ideally) just state of affairs at which we are aiming. In order to make reasonable political choices we have to take into account both senses in which justice can be advanced.³ Think about affirmative action by fixed quota for minorities. Quotas can be seen as violating requirements of procedural justice. Still they may—in the longer run—bring about a state of affairs that is more just than any preceding state (cf. Dworkin 1977). Or take Lenin’s argument against trade-unionism—raising the wage level and improving the situation of the working class would make a revolution less likely and, therefore, should be resisted for the sake of an

² However, this rough picture stands in need of refinement and qualification. Criteria of justice may suffice to make reasoned decisions between non-ideal alternatives in some cases and still not determine the features of an ideal alternative. Often there are, as Sen rightly points out, competing claims or considerations of justice and it may be impossible to consistently reach an unambiguous all-things-considered judgment in all cases (10–15). I shall come back to this point in *section 3*.

³ Simmon’s discussion of what he calls ‘transitional justice’ proceeds along the same line (2010, 21–24).

even better and more just future (cf. Lenin 1902). I certainly do not mean to advocate any of these policies. I am at least sceptical about quotas and I am certainly not a proponent of Leninist strategies. Still, a theory of justice that *in principle* rules out policies and instrumental considerations of the proposed kind seems to me to be seriously flawed.⁴

We can think of advancing justice in analogy to hiking in the mountains. The trail to the peak is long and burdensome. Every once in a while, we have to move downwards again and lose height in order to get closer to the peak before the path goes up again. Any move downwards is a loss in vertical height—in our analogy, a loss in comparative justice. Yet, at the same time it is an advancement of justice in terms of a decreased distance to the peak. I take it that any plausible account of justice must, at least in some cases, allow for moves that involve a loss in comparative justice for the sake of coming closer—in some descriptively meaningful sense—to an envisaged peak of ideal justice, a peak that cannot be reached instantaneously but only after a number of additional moves in the future. If we focus solely on comparative justice and never take into account the ‘distance to peak’ dimension of a chosen alternative, we can never choose an alternative inferior in terms of comparative justice, even if it would be conducive to an even more just alternative. We would get stuck, as it were, at the first local peak of justice—the first point at which there is no further progress without a transitory loss of comparative justice—and never reach what we could have reached with a more distant ideal of justice at hand to guide our practical political deliberation.

Sen also maintains that an ideal theory of justice is useless because it does not determine the course of action that in practice would advance justice. Ideal justice, he claims, is not *sufficient* to guide our choices under non-ideal circumstances. To know that the Mona Lisa is the best picture in the world, he says, does not help to make a decision between a Picasso and a Dali (96–101). As it stands, this again is hardly conclusive. An ideal theory that *by itself* does not determine our choices between non-ideal alternatives, may do so when combined with further information and evaluative input. (Remember the cookbooks.

⁴ Note that the instrumental considerations at stake here must aim at a fuller realisation of justice and not just at any kind of moral value like aggregate welfare or perfectionist ideals. Cf. Rawls discussion of conditions under which the equal basic liberties required by his first principle of justice may be transitionally restricted for the sake of a fuller realization of these liberties at a later stage (Rawls 1999, §§39, 82). Firstly, according to Rawls the strict priority of the basic liberties only holds under “reasonably favourable conditions”. The liberties may be restricted, if this should prove necessary in order to create the economic or social conditions under which everybody can make valuable use of his equal basic liberties (Rawls 1993, 297; 1999, 474f.). Secondly, even though slavery is utterly unjust, Rawls maintains, that “there may be transitional cases where enslavement is better than current practice” as it is the case when the current practice is not to take prisoners of war but to put captives to death and equal freedom for all is no feasible option (Rawls 1999, 218, quoted in Simmons 2010, 23). With regard to the demands of social justice Rawls discusses, in a similar vein, Keynes’ observation in *The Economic Consequences of the Peace* (1919, 18–22) that the gross inequalities of wealth in the nineteenth century may have been necessary to gradually improve the general standard of living for subsequent generations (Rawls 1999, 263f.). However, the restriction of basic liberties under the two conditions discussed by Rawls would not seem to qualify as a loss in comparative justice, if under the given conditions no more just alternative is feasible.

Without additional information and evaluation they also do not ‘determine’ what to do in the kitchen.) Still, knowing the features of ideally just arrangements is not the same as knowing whether (or why) one non-ideal arrangement is more just than another. One may believe in strict equality and still be uncertain about the comparative justice of various unequal distributions of goods. Also, ideal justice may require perfection in more than one dimension and alternative 1 may be closer to perfection in one dimension and alternative 2 closer to it in another (16, 101f.). Is it impossible, then, to derive comparative judgments of non-ideal justice from the specification of the features of what is ideally just?

Even an ideal of justice that cannot be applied directly in a gradual fashion to non-ideal alternatives (there is no such thing as more or less *strict* equality) may yield judgments of comparative justice once we are able to set up a ‘metric of approximation’. A moral ideal that is not attainable in practice may still be action-guiding in defining a goal that we can approximate in choosing again and again alternatives that become more and more similar to it. Against this widely held idea Sen argues that similarity or descriptive closeness does not imply valuational proximity. A person who prefers red wine over white wine may not prefer a mixture of red and white wine over white wine even though, Sen says, the mixture is descriptively closer to red wine than the white wine (16). Indeed, there is an abundance of examples that can be used to exemplify an apparent divergence between descriptive and evaluative proximity. Presumably, a very good copy of the Mona Lisa is not of higher value than an original painting of Picasso even though the original Mona Lisa may be more valuable than any painting of Picasso. Also, the second best alternative to crossing the Channel by swimming is not to cross three quarters of it—and then to drown—but to stay out of the water in the first place.⁵

Now, similarity or descriptive closeness has many dimensions. Two objects of choice may be more or less similar in many distinct ways and great similarity in one respect may come with stunning dissimilarities in others. For this reason, we need a proper understanding of all the relevant features or dimensions (and of their relative weight) with regard to which objects may be seen

⁵ The same point has been made by Brennan 1993, 128f., Goodin 1995, 52–55, and Brennan/Pettit 2007, 260f. with reference to Lipsey’s and Lancaster’s celebrated paper *The General Theory of Second Best* (1956/7). The latter argue (and give a proof) that “it is not true that a situation in which more, but not all, of the optimum conditions are fulfilled is necessarily, or is even likely to be, superior [in terms of Pareto optimality, W. H.] to a situation in which fewer are fulfilled. [...] The general theorem of the second best states that if one of the Pareto optimum conditions cannot be fulfilled a second best optimum situation is achieved only by departing from all other optimum conditions.” (Lipsey/Lancaster 1956, 12) Note, however, that there is an ambiguity in the notion of an ‘optimum condition’ that makes it difficult to extend Lipsey’s and Lancaster’s result to Sen’s argument. With Lipsey and Lancaster an optimum condition is to be understood as a condition (like free trade or a specific scheme of tariffs and taxes) that brings about a (Pareto) optimal state of affairs. In Sen’s argument, as I understand it, the optimum conditions would have to be the features of an object that make it good or just. So we have ‘optimum conditions’ once in the sense of antecedent causal conditions and once in the sense of criteria of goodness and the two senses should clearly not be confounded. It is not clear to me that Brennan, Goodin, and Pettit are aware of the difference between what they say about ‘second best’ solutions and what Lipsey and Lancaster actually have proved.

as more or less similar, to arrive at sound *all-things-considered* similarity judgments. Once this is accepted, the alleged gap between descriptive closeness and valuational proximity disappears, and the air of paradox that goes with the examples above vanishes. The gap apparent in the examples can be explained without giving up the common sense idea that becoming more and more similar to an ideal in a descriptive sense means at the same time to become better, in our case, to become more and more just. We simply have to take into account (and give adequate weight to) all the features of the alternatives that are relevant for our comparative value judgment. Sen's ranking in the Wine-Example seems plausible only when we consider the color of the mixture and, perhaps, also its chemical composition but do not take into account its taste. In appraising the Mona Lisa and its copy we must not only look at the composition, design and color of the paintings but also appreciate the subtle differences in the brushstrokes and in the way the paintings are carried out. Last but not least, in the Channel-Example, we should not ignore that two alternatives share the feature of a surviving protagonist whereas the third does not.⁶ Contrary to what Sen says, *all-things-considered* descriptive similarity implies valuational proximity once the criteria of evaluation and their relative weight are fixed. Let us be aware, however, that existing similarities may be partial and, therefore, misleading.⁷

To conclude: Sen's charge that ideal theories of justice are redundant and do not yield any guidance for the evaluation of non-ideal institutional arrangements is not well founded. At least some understanding of what ideal justice requires is involved in our judgments of comparative justice and we need an ideal of justice in order not to get stuck at the first local peak of justice that we can realize here and now.

⁶ Goodins statement "The second best state of affairs is not necessarily one in which your ideal conditions are realized more rather than less completely" (1995, 52) may still be true, depending on how we conceive of the 'ideal conditions' that are more or less completely realized. If 'ideal conditions' refers to a mere plurality of empirical features relevant for our evaluation of the first best alternative, it is plausible that the second best need not be very close to the first best in terms of realizing these features. And the same is true, if Goodin has in mind causal conditions for the realization of the best alternative. If, however, 'ideal conditions' refers to the criteria of goodness taken together and given appropriate weight an all-things-considered assessment the statement is wrong. Indeed, it would be odd to maintain that the second best alternative does not (on balance) satisfy these criteria 'better' or 'more completely' than the third or any other worse alternative. For an instructive critical discussion of Sen's and Goodin's argument of the second best cf. Swift 2008, 375–378.

⁷ On closer inspection, it could hardly be otherwise. Value judgments have to conform to the principle of universalizability which requires that similar cases are evaluated similarly. To be sure, universalizability is not a matter of logical consistency. We may evaluate without contradiction different objects differently, even if they are exactly alike in all respects. After all, we are evaluating different objects. Still, whenever two relevantly similar objects are evaluated differently, our evaluations are in one way or other independent of the properties of the evaluated objects, and for this reason, they may be properly called unmotivated or arbitrary. It is not clear to me, however, that it is always wrong or irrational to act or to make evaluative judgments in unmotivated or arbitrary ways. Universalisability may still be seen as a requirement of rationality whenever our evaluative judgements are supposed to supervene on the descriptive properties of the objects of evaluation as is the case with moral argument and, arguably, also with aesthetic appraisal. On this understanding descriptive closeness entails valuational proximity.

3. The Infeasibility Complaint

In the light of our discussion in the last section, Sen's critique of transcendental institutionalism hinges on the alleged infeasibility of the transcendental theory, i.e. on his claim that it is impossible to specify the requirements of ideal institutional justice in an incontrovertible way (15). In the presence of incompatible claims and considerations of justice (e.g. need, desert, or equality), Sen maintains, no perfectly or ideally just solutions can be identified, because any solution will have to strike a balance between competing claims or set priorities in a way that can be reasonably challenged (12–15).

Sen illustrates the problem of incompatible claims with an example in which a flute is to be given to one of three children, Anne, Bob, and Carla (12–15). Each of the children has a good reason to claim the instrument. Unlike Bob and Carla, Anne knows how to play the flute. Aristotelians may be expected to support her claim. Used by Anne the flute would presumably contribute most to the further development and exercise of higher human faculties. Utilitarians would perhaps take sides with Aristotelians in this case, expecting that Anne's beautiful play will increase overall happiness. Unfortunately, Bob and Carla do not agree. Bob is the only one in the group who has no toy of his own yet. This raises a claim of need and it also speaks to our egalitarian or prioritarian intuitions. Carla, however, is the one who has produced the flute in a day and night long session of woodcutting. She may claim the flute either as a just desert or else in the name of a libertarian conception of just acquisition and possession.

Sen maintains that the existing conflict between competing individual claims of justice cannot be resolved by any account of ideal justice (13ff.). And, indeed, each of the respective claims—development of human capacities, happiness, need, equality, desert or just acquisition—seems well founded. Moreover, it is hard to see how the conflict could be resolved in an incontrovertible manner by assigning relative weights to the respective considerations or by invoking priority rules. As a consequence, every feasible resolution of the conflict would let two of the children go empty-handed. After all, this could be exactly what justice requires. It would also be a resolution against which well-founded considerations of justice could be advanced, and which, therefore, could hardly be called an ideal solution (14).

Without going into the details of the flute example one may wonder why Sen's conclusion is not more radical. If the competing claims in a given distributive conflict are really irreconcilable, they would seem to be so not only in terms of 'ideal' solutions, but with regard to all possible solutions, ideal or non-ideal, that can be contested because of contrary considerations of justice. We might still have a factual consensus on what would be a just solution in a particular case, but this would be a consensus based on contingent shared feelings or intuitions and not on shared criteria of adjudication. In this case we would have neither an ideal nor a non-ideal *theory* of justice but merely a coincidence of common subjective attitudes. If, on the other hand, we have a criteria-based consensual solution to a distribution problem, the agreement would seem to carry over to other cases, once the criteria are employed in a uniform manner. Indeed, if

we employ the same criteria with constant relative weights in all similar cases, our ranking of alternatives in terms of comparative justice can be expected to identify a set of ideally just solutions, if we put aside problems of incompleteness that derive from lack of information. Hence, again we may expect a specification of ideal justice to emerge from our criteria based exercises in comparative justice.

Who should get the flute, then? I shall not try to answer this question. Given the way the example is set up, I guess, there simply is no non-arbitrary answer.⁸ Does that mean that Sen is, after all, right? Not necessarily. The flute example has a number of features that do not apply to questions of basic *institutional* justice. Anne, Bob, and Carla know their initial endowments with goods, they know their capacities, and preferences, and other personal characteristics and they are able to identify individual productive contributions. The initial endowment is taken as a given constellation of circumstances in the light of which any solution to the distribution problem has to be judged. Moreover, Anne, Bob, and Carla face a singular distribution problem with one indivisible good to be distributed, a good that has been produced by one person, Carla, apparently without any kind of social cooperation.⁹ Under these conditions it may indeed be impossible to find an unambiguously just solution, given the competing and *prima vista* reasonable claims of Anne, Bob, and Carla and given the scarce information we have. The question is how much of a problem this is for transcendental *institutionalism* as Sen describes it and as it is exemplified in Rawls' theory of justice, given that its primary subject is the basic structure of society.

The basic structure comprises the main institutions of society (prominently the constitution and legal order, the economic and the education system, the structure of the family), and the way these institutions generate a specific distribution of rights, entitlements, duties and responsibilities (Rawls 1999, 6). Obviously, the basic structure has a deep and lasting influence on all members of society and also on a society's overall distribution of goods and resources. It shapes the needs, ambitions, and productive capacities of individuals as much as it informs their personal desires and social opportunities. It is worth noting, that a society's basic structure—unlike the flute in Sen's example—has not been 'produced' by anyone, and no differential claims of desert arise with regard to the basic structure itself. Rather, the basic structure constitutes an institutional framework within which productivity based claims of desert arise and can be adjudicated in conformity with the basic structure's rules. A conception of justice for the basic structure cannot take specific personal capacities, productive contributions, preferences, or particular endowments with goods or resources as given, precisely because of its character as a comprehensive institutional background of all on-going individual and social activity. Such a conception has to be set up on the basis of more abstract considerations and interests—like the idea of free and equal citizens or a general interest in certain types of basic goods that are of

⁸ There still may be a uniquely right answer once the institutional context of the conflict, the distribution of property rights, and perhaps additional circumstantial information is taken into account.

⁹ In the terminology of Rawls the flute example is a case of 'allocative' and not a case of 'distributive justice'. Cf. Rawls 1999, 56, 77; Rawls 2001, §14.

(roughly) similar importance for all members of society. This taken into account, it is at least not obvious that we run into the same problems with incompatible individual claims when we try to work out a theory of ideal institutional justice as we do in cases like the flute example.¹⁰

The two elements of ‘transcendental institutionalism’ which Sen discusses separately—the ideal justice element and the basic structure element—are closely connected. It may only be possible to work out a reasonably specific and unambiguous conception of justice at a pretty high level of abstraction and idealization, and only if we confine ourselves to basic institutions and norms. This is not to say that there can be no disagreement about ideal justice for the basic structure. There is rational dissent at all levels of reflection and with regard to all topics. I shall come back to this in the next section. Still, the flute example does not show that reasonable disagreement about ideal justice at the level of basic institutions is unavoidable.

At this point, we have to be cautious not to conflate two senses in which a theory of justice may be characterized as an ‘ideal theory’. In the first sense a theory is an ideal theory, because it makes use of theoretical idealizations and abstractions in order to put into sharper focus certain questions and problems at the expense of others. In the second sense a theory is an ‘ideal theory’ because it articulates a possibly controversial moral ideal that we should aim at (Hirsch 1997, 15ff.; cf. O’Neill 1997, 38–65; Robeyns 2008, 352–355). Rawls’ idea of a *well-ordered society* exemplifies both senses. According to Rawls, a well-ordered society is a society of *strict compliance*: Its institutions, norms, and all individual actions effectively conform to principles of justice that are (on the basis of shared reasons) accepted by all members of society, and all this is publicly known (Rawls 1999, 4, 8). Within the conception of justice as fairness the idea of a well-ordered society plays two roles. The first role is that of a theoretical idealization or abstraction that helps to identify principles of justice for the basic structure of society. In this role the idea of a well-ordered society works as a practical device that facilitates the step-by-step construction of a theory of justice. The assumption of strict compliance means that, at the beginning, we set aside the various practical problems that arise because in real life institutional arrangements and individual actions never perfectly conform to generally accepted principles of justice (Rawls 1999, 8f.).

Assuming strict compliance importantly also helps to identify a specific problem of stability that does not arise because people often do not act justly: the problem of eroding background justice (cf. Rawls 1977, §4; 2001, §§14, 15). Even under conditions of strict compliance—when nobody acts unjustly and all institutions conform to generally recognized principles—the justice of a society’s basic structure may be undermined. The cumulative effects of just individual

¹⁰ One may also argue, as William Talbott suggested to me, that once a sufficiently just basic structure has been established, the conflict of claims in cases like the flute example can be settled. The legal system will specify classes of individual entitlements and procedures of conflict regulation that together determine who is justly entitled to receive a contested good. I agree that a sufficiently elaborated basic structure will typically do this. Nonetheless, in practice there will always be ‘hard cases’ in which neither entitlements nor legal procedures produce incontrovertibly just results.

transactions within the basic structure, e.g., can lead to an accumulation and concentration of wealth and power that is no longer compatible with the requirements of distributive justice or political equality. Institutional mechanisms that preserve background justice (like progressive taxation or inheritance taxes) and their underlying principles (like Rawls' fair equality of opportunity and the Difference Principle), therefore, need separate treatment. In applying directly to institutions and social structures rather than to individuals they are substantially different from norms (like the law of contracts or the penal law) that are meant to regulate individual conduct, to assign individual responsibilities, and to work against the ubiquitous tendency to self-serving and unjust behavior.¹¹

The second role of the idea of a well-ordered society is that of a moral ideal that most likely will not be attainable in real life but may nevertheless guide human behavior in matters of institutional design and political action. Unlike the merely technical idea of a well-ordered society—which may be used with different principles of justice to see how these principles would work under the idealized conditions of a well-ordered society—the moral ideal of a well-ordered society has to be an ideal with a specific normative content. So we have the well-ordered society of justice as fairness, or the well-ordered society of utilitarianism or libertarianism, depending on which conception of justice we actually affirm. It is this ideal of a well-ordered society, fleshed out by a specific conception of justice, that informs our practical deliberations about social justice in the real, non-ideal world, in at least three ways: It sets a goal for political reform; it specifies the content of our natural duty to act justly and to support and maintain just institutions; and it specifies the ideally just background conditions for individual transactions (cf. Scheffler 2006).

To conclude: Our discussion has shown that Sen's flute example and his argument from incompatible claims do not apply in any direct or obvious way to the problem of ideal institutional background justice. Moreover, we have seen how the quest for an ideal theory of justice links up with the need to work out a theory of justice for the institutional basic structure of society.

4. Justice and Rational Dissent

Sen's discussion of the flute example does not show that disagreement is unavoidable even in ideal theory. Still, there is a lot of disagreement about what justice (ideal or non-ideal) requires and there is little reason to expect this situation to change in the foreseeable future. Any viable theory of justice has to accommodate this elementary truth. Among the many strategies to cope with disagreement there are two that have received special attention in modern political philosophy: *Minimalism* and *Proceduralism*. Both strategies are employed in various specifications and combinations by most contemporary authors, including Sen and Rawls.

¹¹ Cf. also Stemplowska 2008, 332f., and Simmons 2010, 8f., on the strict compliance assumption and its value for understanding ideal and non-ideal justice.

Minimalism says: If you find it hard to reach a consensus in a contested area of social life, and if an agreement to disagree would not be enough, do not claim more than the minimum necessary to settle the disputed issue. Also try to justify your claims in terms of interests, values, or principles that are shared by all those involved. Rabbis have taught and employed Minimalism early on when they worked out the Noachidic Law, a list of seven laws that are a subset of all the imperatives of the Jewish faith.¹² The Noachidic laws were considered to be binding for all human beings, not just for Jews. They were seen as a normative minimum the acceptance of which is, irrespective of differences in faith, necessary for an orderly social life (cf. Plaut 2008, 125ff.). In the spirit of minimalism, John Rawls has pursued a ‘method of avoidance’ firstly in constraining the focus of his work to the basic structure of society and secondly in justifying his conception of justice as fairness only on the basis of ‘fundamental ideas’ that he believes are generally accepted in contemporary liberal democracies (Rawls 1985, 231, 240 n. 22; 1993, 29 n. 31, 150). Sen also endorses a version of Minimalism. Incompatible considerations of justice, he maintains, may be less of a problem than many of us believe. All we actually need in political practice is a consensus on particular cases of injustice and a shared understanding of the comparative justice of the feasible alternatives at hand. Sen is optimistic that in the case of ‘gross injustices’ such a consensus can be obtained in spite of our disagreements about ideal notions of justice (103ff.).

Minimalism is reasonable, only brawlers and zealots will reject it outright. Unfortunately, it has two limitations that make it a less effective strategy than its proponents seem to believe. The first limitation is that *Minimalism* cannot rule out disagreement about the alleged minimum. Historically, there has always been disagreement about the norms deemed absolutely necessary for peace and social cooperation. Keep in mind that the Noachidic laws did not only ban murder, theft and adultery but also blasphemy and idolatry. There is also disagreement about what constitutes a ‘gross injustice’ in our days. Is the chronic underrepresentation of women in politics part of the “persistently grotesque subjugation of women” that we must never accept, as Sen would seem to hold (103). Or is it merely a shortfall from an ideal of gender equality about which reasonable people may disagree? The attempt to remove everything that can be reasonably disputed from a theory of justice would make us look like Herr Keuner in Berthold Brecht’s Parable. Herr Keuner was asked by a gardener to cut back a bay laurel so as to bring it into the form of a globe. Again and again Herr Keuner had to cut away little branches and leafs because they would not fit the aspired form. As Keuner eventually finished his work, the gardner commented with disappointment: Well, I see the globe but where is the bay tree?

A second limitation of *Minimalism* results from the hermeneutics of norm application. Two persons who recognize a norm as a valid principle of conduct, may nevertheless give different interpretations of it in contested cases depending on how they understand the intentions and reasons behind the norm in the

¹² The seven Noachidic Laws are: Prohibitions of idolatry, murder, theft, adultery, blasphemy, the prohibition to eat the meat of animals that are still alive and the demand to establish courts of law.

light of their more comprehensive normative beliefs. Let's assume that a stable consensus on principles of justice is a consensus that can be extended to non-paradigm cases of norm application which allow for contrary interpretations. A stable consensus on justice, then, presupposes more than an agreement about isolated principles that—in order to secure an agreeable minimum—have been removed from their contested religious or philosophical background and did not yet face the difficulties of practical political application.

Proceduralism is another well-established strategy to socially cope with disagreement. It also has an honorable pedigree and a plausible rationale. Proceduralism can be traced back to antiquity (cf. Nippel 2002) even though in philosophy it always had difficulties to find genuine proponents. At the beginning of the last century Hans Kelsen proposed a somewhat crude form of proceduralism in his theory of democracy (Kelsen 1920) and recently Jürgen Habermas (1992) and Jeremy Waldron (1999), among others, developed proceduralist approaches to social order and justice.

The basic idea of Proceduralism is straightforward. The ubiquitous character of rational dissent in matters of ideal and non-ideal justice makes a consensus based on substantive normative reasons look utopian. Hence, we need a non-argumentative or procedural way of collective decision-making to specify our understanding of social justice and to justify generally binding social regulations (cf. Hinsch 2010). Having reached this point, it is only one more step to propose democratic decision-making and the majority rule as such a procedure. Questions about social justice would then be finally settled not by the substantive arguments of moral and political philosophy—even though these arguments may be needed in advance to identify the relevant alternatives—but by democratic majorities that decide which way to go. The majority rule has two important advantages: it is—unlike the unanimity rule for instance—neutral against all possible alternatives, and it gives equal weight to the votes of all those involved. In the language of modern decision theory, the majority rule combines the advantages of *neutrality* and *anonymity*: it is biased neither in favor of any alternative nor in favor of any person.¹³

Nonetheless, Proceduralism and majority voting cannot be the last word. Not every majority vote produces results that we consider to be just. Think about democratic majorities grossly infringing the right to free political speech or religious liberty. Moreover, it is a question of substantive justice to specify the conditions under which voting procedures do result in just collective decisions. It is also, for that matter, a question of substantive justice, why we should prefer a democratic procedure over others. If literally all contested questions of justice had to be decided by voting, we would be caught in an infinite regress. We had to have a vote, about how to have a vote, about how to have a vote ... about whether a particular institution, norm, or action is just or not. If there is to be such a thing as a just voting procedure, not all controversial questions of justice and, in particular, not those questions concerning the justice of collective decision making can be decided by voting. Every procedure presupposes a

¹³ This is not to say that only the majority rule has these two attractive features. Unbiased lotteries, e.g., also meet the requirements of neutrality and anonymity.

substantive understanding of its procedural adequacy, if we want to understand it as a procedure that generates just or legitimate results.

Sufficiently complete theories of justice for the institutional basic structure of a society, therefore, have a part dealing with political justice that specifies the conditions under which collective decision-making may generate just or legitimate norms and policies. In liberal democracies these conditions will fall under either of two headings which correspond to the familiar distinction between basic political and liberal rights. The first type of conditions specifies the procedural requirements of just decision-making in a democracy (freedom of speech and association, equal voting rights). The second type of conditions defines a sphere of individual liberty that even procedurally correct democratic decisions cannot violate without losing their legitimacy (religious liberty, rule of law, privacy rights). In this way, any sufficiently complete theory of justice for the basic structure contains the normative and procedural means to deal with disagreement, be it disagreement about justice or about other issues of social relevance.

Still, there remains a problem for which neither 'transcendental institutionalism', nor Sen's idea of 'comparative justice', nor any other view I know of has an answer. Consider the following sketch of a rational dissent: There is a disagreement about the moral permissibility of abortions after say the third month of pregnancy. Each of the parties involved is in a position to support its own (contested) view on the matter with rationally acceptable reasons. None of the parties, however, has arguments which are sufficiently strong to refute all other views. This would be, then, not just a disagreement but a rational dissent that, at the time being, cannot be resolved by substantive moral or empirical argument. Following the strategy of proceduralism one may now have a democratic vote to reach a just and legitimate decision. As long as all parties share a conception of political justice and interpret the two types of conditions for just collective decisions in the same way, there is no problem. A vote is taken, all parties accept the result as just, and the problem of late abortions is handled in the way favored by the majority.

Alas, in our case, this scenario is rather unlikely. The issue of abortion raises questions of life and death which again raise moral and constitutional questions concerning the protective function of basic rights. Do human beings after the third month of pregnancy have a right not to be killed in an abortion? So let us assume that there is not only a rational dissent at the substantive level concerning the question of abortion but also at the level of ideal procedural justice concerning the moral requirements for democratic decision making. On the assumption that the basic right to life extends to embryos after the third month of pregnancy, even a formally correct democratic decision to legalize abortions after the third month of pregnancy would seem to be illegitimate. On the contrary assumption that the constitutional right to life does not extend to embryos after the third month, such a decision would seem to be just and legitimate.

Again there are only two possibilities. Either, in spite of the dissent about the proper extension of the right to life, the parties agree to accept the results of a democratic vote—maybe those who are against late abortions believe that

the values of democratic decision making *all-things-considered* outweigh the disvalue of the controversial extension of the right to life. In this case, democratic proceduralism eventually succeeded. Or there is no such agreement, in which case at least one party, because of its contested interpretation of the right to life, might not accept the vote as just and proceduralism failed. There is, it seems, no way to resolve the remaining conflict by means of moral philosophy or any other kind of argument or institutional device. This, however, has nothing to do with the distinction between ideal and non-ideal justice or between ‘transcendental’ and ‘comparative’ theories, and we must by no means take it as an argument in support of the latter. It is simply the consequence of the always-limited capacity of rational arguments and procedures to give unambiguously correct or just answers to all questions about what is good and right.

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