FROM RAWLS TO KANT AND BACK AGAIN: SOME REMARKS ON THE IMPORT OF OFFICES ON RAWLS’S PROCEDURAL DISTINCTION

I. INTRODUCTION

This paper examines the grounds for John Rawls’s (1971; 2001) distinction between pure, perfect and imperfect procedural justice. The argument is that the criterion for the distinction lies by and large in the office position from which one can make use of a given procedure. I call this the office-based interpretation of Rawls’s procedural distinction. Such an interpretation differs from and is, I think, preferable to two other competing interpretations. I call these alternative views the attributive interpretation (Nelson 1980) and the perspectival interpretation (Pogge 1989). The attributive interpretation states that the grounds for the distinction should be expected to reside in a particular attribute or set of attributes that characterize a specific procedure. On this account, the distinction is read in terms of an exclusive disjunction. This is to say that a procedure is either pure or non-pure and, if non-pure, either perfect or imperfect. The perspectival interpretation claims that whether a procedure is pure, perfect or imperfect depends on the viewpoint we take in describing a particular procedure. There is no particular attribute singling out procedures once and for all. Thus, any given procedure can at the same time be interpreted as being pure, perfect and imperfect. On this account, Rawls’s distinction should be construed in terms of a conjunction of viewpoints.

The attributive and the perspectival interpretation fail to make the most of Rawls’s procedural distinction. The attributive interpretation sets the bar too high and eventually concludes that the distinction is flawed because there are no particular attributes that one can explicitly isolate and render a procedure pure, perfect or imperfect. Conversely, the perspectival interpretation sets the bar too low and ends up depriving the distinction of both its conceptual and normative import.

The office-based interpretation tries to pitch the criterion for the distinction at an intermediate level. It is less stringent than the attributive interpretation, in that it does not concentrate on fixed features of the procedures themselves, but on the
position of the office from which that procedure is being applied. The claim here is that a procedure can be construed as pure or non-pure according to the use one makes of it. The use one makes or can make of a procedure is, in turn, constrained by the office that a particular user has come to occupy and exert. Thus, the office-based interpretation does not dissolve into the perspectival interpretation. This is because perspectives differ from office-based uses in that a user holding a specific office cannot so easily move from one perspective to another. More precisely, I argue that pure procedures refer to particular uses of reason as exerted by individuals qua theorists or scholars, whereas non-pure ones – whether perfect or imperfect – refer to uses of reason by individuals qua holders of politically and legally defined offices. On this account, Rawls’s procedural distinction goes back to and borrows from Kant’s distinction between the public and the private use of reason. The public use of reason corresponds to a procedurally pure situation, in that the procedures that structure the public use of reason are basically open-ended. This gives a more concrete construal to Rawls’s claim that pure procedural justice covers cases where justice does not depend on any prior end. The private use of reason corresponds to procedurally non-pure situations, insofar as offices already stipulate an end (or ends) the pursuit of which is independent of the choice and enforcement of particular procedures.

My argument is structured as follows. In Section II, I offer an overview of Rawls’s distinction between pure, perfect and imperfect procedural justice. In Section III, I present the attributive and perspectival interpretations of Rawls’s procedural distinction and pinpoint some of their shortcomings. In Section IV, I give a brief outline of the office-based interpretation of Rawls’s procedural distinction. Moreover, I suggest that this interpretation fits more generally with Rawls’s conception of political philosophy and suggest some of its implications for the relation between political philosophy and politics within liberal democracies.

II. RAWLS’S DISTINCTION: PURE, PERFECT AND IMPERFECT PROCEDURES

Rawls’s distinction between three types of procedural justice is made for the first time in A Theory of Justice, when he discusses the second part of the second principle of justice, i.e., the principle of equality of opportunity (§14: 73ff.). Rawls underlines the fact that the role of equality of opportunity as a principle of justice is not the same as the role played by the principle of efficiency. The principle of equal opportunity is not a tool for obtaining a meritocratic society or for providing more
talented people with better careers. Rather, the role of such a principle is to provide a standard for choosing an institutional arrangement so that any outcome produced by and under it ‘is just whatever it happens to be, at least so long as it is within a certain range’ (73). The idea is that as long as particular outcomes – say, wage differentials – falling under a general system of rules comply with that system, they can be considered as just outcomes as long as the social system of rules can be recognized to be just per se. In other words, the justice of the rules forming the social system translates its “justice-ness” (or fairness) to the outcomes that fall under it. It is at this point that Rawls introduces his analogy between social systems and gambling games:

‘If a number of persons engage in a series of fair bets, the distribution of cash after the last bet is fair, or at least not unfair, whatever the distribution is. I assume here that fair bets are those having a zero expectation of gain, that the bets are made voluntarily, that no one cheats, and so on. The betting procedure is fair and fairly entered into under conditions that are fair. Thus the background circumstances define a fair procedure. Now any distribution of cash summing to the initial stock held by all individuals could result from a series of fair bets. In this sense all of these particular distributions are equally fair. (...) What makes the final outcome of betting fair, or not unfair, is that it is the one which has arisen after a series of fair gambles. A fair procedure translates its fairness to the outcome only when it is actually carried out.’ (75; emphasis added)

The analogy with the betting game should not be over-interpreted. Rawls does not say that the rules forming a social system are exactly like the ones that constitute a game. Societies are like games to the extent that they are governed by rules regulating the interactions between different persons. But societies are not like games, insofar as becoming a member of or leaving a society happens in a way that is different from entering or renouncing a game. So much Rawls concedes when he explicitly states that the system of public rules defining a society, i.e. the basic structure, is something one is born into without having chosen it. As he later states in Political Liberalism, the basic structure is ‘a structure we enter only by birth and exist only by death’ (XLIII). We are not born into games like we are born into societies. To put the analogy in reverse, the basic structure of a game is different from the basic structure of a society, in that the former is something one chooses to abide by and can exit relatively easily, whereas there are significant aspects of the former one has to comply with from the start and can difficultly avoid. One does not choose to be a citizen of the country C with the same ease one chooses to play a game of cricket.
There is another, closely connected and apparently problematic point about this formulation of pure procedural justice. At first blush, Rawls seems to say that the rules forming the basic structure of a society are to be considered as purely procedural just ones. The basic structure is taken to be a ‘public system of rules defining a scheme of activities that leads men to act together so as to produce a greater sum of benefits and assigns to each certain recognized claims to a share in the proceeds’ (74).

Among the institutions that form the basic structure, Rawls enumerates the political constitution, which defines the major institutions and the way they are connected to each other, as well as the basic rights of citizens, the institution (i.e. legally recognized forms) of property, the institution of the market, and the institution of the family. The ‘intuitive idea’ behind pure procedural justice is to ‘design the social system so that the outcome is just whatever it happens to be, at least so long as it is within a certain range’ (74). This seems to imply that, if the basic structure and the social system are one and the same thing (which they most probably are), then any outcome falling under the definition of a certain basic structure deemed to be just is itself just.

The contention would then be that there are no unjust economic outcomes, as long as the market procedure deemed as pure-procedurally just has been applied. Nor can any injustices stem from a pure-procedurally defined family institution, as long as the rules of the institutions have been properly and actually followed. Such a claim would, of course, be hard to swallow. This is because there are no rules of the market, forms of property, family institutional formulae or benchmark constitutional schemes that are able to prevent economic or political injustices from occurring. Saying that Rawls’s theory of justice is about identifying a set of pure-procedurally just institutions so that we need not worry about the injustice of outcomes makes his theory disturbingly complacent. Whatever happens is just, as long as the rules of the game have been followed.

We are then confronted with the following disjunction: either Rawls’s theory of justice is exposed to the complacency critique or the interpretation of the social system as a case of pure procedural justice is a wrong one. I shall argue in favour of

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1 Most likely, these major institutions do not provide an exhaustive list of those institutions forming the basic structure. For a more detailed discussion of the question of the basic structure, as well as for its import as far as issues of global justice are concerned, see Abizadeh, A. 2007. Cooperation, Pervasive Impact, and Coercion: On the Scope (not Site) of Distributive Justice’, *Philosophy & Public Affairs*, 35(4): 318-358.
the latter option. There is sufficient textual evidence that goes against the idea that the social system is itself pure-procedurally just. Rawls explicitly mentions that all political procedures, including the constitutional ones, are cases of imperfect procedural justice.

‘The constitution is regarded as a just but imperfect procedure framed as far as the circumstances permit to insure a just outcome. It is imperfect because there is no feasible political process which guarantees that the laws enacted in accordance with it will be just. In political affairs perfect procedural justice cannot be achieved. Moreover, the constitutional process must rely, to a large degree, on some form of voting. I assume for simplicity that a variant of majority rule suitably circumscribed is a practical necessity. Yet majorities (or coalitions of minorities) are bound to make mistakes, if not from a lack of knowledge and judgment, then as a result of partial and self-interested views.’ (§53: 311; emphasis added) ²

As with political procedures, so with economic ones. Rawls recognizes that markets do function imperfectly: ‘competition is at best imperfect and persons receive less than the value of their contribution, and in this sense they are exploited’ (§47: 272). There is nothing that a procedure can do to prevent injustices from taking place. Correspondingly, we can infer that the ground rules of property or family cannot absolutely stymie certain specific injustices from happening. No matter how well they comply with their ideal blueprints, family rules will eventually be unable to prevent inequality of opportunity at the social level.³ Similarly, property rules will eventually allow some form of exploitation or arbitrary social influence.

Given that institutional rules broadly conceived (whether they be political, social or economic) are taken to be procedurally imperfect, a note is in order concerning the definition of imperfect procedural justice. Unlike pure procedural justice, where the justice of the outcome is guaranteed by the actual application of the

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² Similar statements can be found elsewhere in *TJ*. Take, for example, the assertion that ‘the political process is at best one of imperfect procedural justice’ (§31: 172) or the assertion according to which ‘a just constitution even under favorable conditions is a case of imperfect procedural justice, [in that] the people may still decide wrongly.’ (§45: 261). More generally, Rawls acknowledges that ‘any feasible political procedure may yield an unjust outcome. In fact, there is no scheme of political procedural rules which guarantees that unjust legislation will not be enacted. In the case of a constitutional regime, or indeed of any political form, the ideal of perfect procedural justice cannot be realized. The best attainable scheme is one of imperfect procedural justice. Nevertheless some schemes have a greater tendency than others to result in unjust laws.’ (§31: 173).

procedure, imperfect procedural justice refers to a situation where the application of the procedure cannot guarantee the justice of the outcome. Rawls illustrates this with criminal trial procedures.

‘Imperfect procedural justice is exemplified by a criminal trial. The desired outcome is that the defendant should be declared guilty if and only if he has committed the offense with which he is charged. The trial procedure is framed to search for and to establish the truth in this regard. But it seems impossible to design the legal rules so that they always lead to the correct result. (…). An innocent man may be found guilty, a guilty man may be set free. In such cases we speak of a miscarriage of justice: the injustice springs from no human fault but from a fortuitous combination of circumstances which defeats the purpose of the legal rules. The characteristic mark of imperfect procedural justice is that while there is an independent criterion for the correct outcome, there is no feasible procedure which is sure to lead to it.’ (§14: 75)

Notice that, upon closer inspection, the distinction between imperfect procedural justice and pure procedural justice does not reside in the guaranteeing of just outcomes. Rather, the basis of the distinction lies in the fact that pure procedures do not track any previously defined goals or institutional objectives. They are, as it were, end-less or, better put, open-ended. The purity of pure procedures is given by the fact that they can be justly applied the absence of procedure-independent ends. Not so with imperfect procedural justice. Imperfect procedural justice is not pure, in that it makes no sense in the absence of previously defined ends. Criminal procedures are but one example of procedures the application of which loses meaning in the absence of an independently given end. Take two other examples: pedagogical procedures and inheritance procedures. These procedures are valuable and lead to just outcomes only insofar as we have a relatively clear institutional end that is independently defined – say, the flourishing of an individual’s knowledge or the preservation of a certain level of wellbeing of one’s descendants. Imperfect procedural justice can only function within the medium of prior ends. This makes it a case of non-pure procedural justice. The non-purity of non-pure procedures is given by the fact that they cannot be justly applied in the absence of procedure-independent ends. Non-pure procedures are non-pure insofar as they are, as it were, end-bound or, better put, close-ended.

Characterizing imperfect procedural justice as a type of non-pure procedural justice raises the question as to the existence of other, non-imperfect types of non-pure
procedural justice. Rawls points to the case of perfect procedural justice. Like imperfect procedural justice, perfect procedural justice is about procedures the application of which is supposed to track an independently defined end. Unlike imperfect procedural justice, perfect procedural justice rests on procedures the application of which guarantees attaining those ends.

'To illustrate [perfect procedural justice], consider the simplest case of a fair division. A number of men are to divide a cake: assuming that the fair division is an equal one, which procedure, if any, will give this outcome? Technicalities aside, the obvious solution is to have one man divide the cake and get the last piece, the others being allowed their pick before him. He will divide the cake equally, since in this way he assures for himself the largest share possible. This example illustrates the two characteristic features of perfect procedural justice. First, there is an independent criterion for what is a fair division, a criterion defined separately from and prior to the procedure which is to be followed. And second, it is possible to devise a procedure that is sure to give the desired outcome. (...) Pretty clearly, perfect procedural justice is rare, if not impossible, in cases of much practical interest.' (§14: 74)

We are now able to generalize. Rawls presents the three types of procedural justice in an enumerative form. He begins with imperfect procedural justice, then moves to perfect procedural justice and ends with pure procedural justice. I have alternatively presented the three types of procedural justice in the order of their grounds of division. Thus, a first division occurs between pure and non-pure procedural justice, on account of the presence or absence of an independently defined criterion of justice. A second division between perfect and imperfect procedural justice is introduced by the possibility for certain procedures (of the perfect kind) to guarantee the obtaining of just outcomes, which is not the case for other procedures (of the imperfect kind).

On the basis of the prior presentation, it becomes relatively clear that imperfect procedures permeate the domain of politics, society, law and economics. It is less clear, however, what we are to make of pure procedures. We know that imperfect procedures are constituent parts of markets, trials, constitutions, families, and so on. We also know that perfect procedures can be found in those rare cases where justice can be reached in small groups and in the absence of disagreement or conflict over the distribution of goods. We are, however, much less sure where to look for pure procedures. All we know, for now, is that pure procedures belong to the
domain of background justice. This term, however, provides us at best with an ambiguous indication and therefore stands in need of clarification.

III. THE JUSTICE OF PROCEDURES: BETWEEN ATTRIBUTES AND PERSPECTIVES

Up until now, there have been two main approaches to identifying the nature and domain of pure, perfect and imperfect procedural justice. One approach has been to look for the attributes of particular procedures and, on the basis of those specific attributes or set of attributes, to single out different kinds of procedural justice. I call this the attributive interpretation, the main supporter of which is William Nelson (1980). Another approach has been to look at the same procedural setting from different perspectives and see to what extent one might consider it pure, perfect or imperfect. I call this the perspectival interpretation and I take it to be the most adequately presented by Thomas Pogge (1989). In what follows, I shall address each of these two interpretations in turn and point to some of their pitfalls. I then move on to an alternative interpretation that both avoids these problems and provides a better fit with Rawls’s overall view of political philosophy and politics.

(1). I begin with the attributive interpretation. More than three decades ago, William Nelson has tried to identify the characteristics that single out the ‘very idea of pure procedural justice’. His conclusion has been a negative one: pure procedural justice, he claims, is merely a classificatory concept, the content of which is always reducible to other, more basic concepts. On this account, pure procedural justice has no conceptual or normative import of its own. This is to say that pure procedural justice does not point to any particular principle of justice other than the principles we can already accept in the absence of a pure procedural formulation. Pure procedural justice is then, at best, a mere rhetorical construct for presenting the principles of justice that have been already recognized as such. This is what Nelson calls the weak interpretation of pure procedural justice. The weak interpreter sees procedural justice merely as a manner of displaying the justice of particular situations. Pure procedural justice is but a name for situations that are just on account of the fact that they have been entered into voluntarily by parties who are entitled to do so. Such situations might be games, like in Rawls’s example. Closer to the institutional domain, such situations are contracts, the adequate application of which is bound to be just.

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4 I am not saying that other interpretations may not have been provided, but these are the only two interpretations that I have been able to find so far.
‘(...). all apparent cases of pure PJ (m.n. procedural justice) can be understood in terms of an ordinary notion of entitlement and its free exercise. Some will be ordinary transactions, others will be (…) “permissible games”. Apparent cases not falling into one of these two categories will turn out to be cases of perfect PJ (...). In offering this conjecture, I assume that there are rights – that people do have entitlements. (...).

If we accept the idea of pure PJ, we are committed to the existence of situations in which justice follows from following procedures. However, we are not committed to any new or original explanation for this phenomenon if it can be explained in terms of an ordinary notion of entitlement. (...). Consider the case of spinning a racket to decide who serves first in a tennis match. Here we have a fair procedure, and we believe that the outcome will be fair no matter what it is. Can this be explained in terms of entitlement and its free exercise? Notice, first, that people can and do use other procedures. Sometimes they just decide, say, that the weaker player should serve first. Each has a right to play or not to play; and, within the limit of their rights, they can set up whatever ground rules they wish. Usually they use a random procedure to decide who serves. When they do so, the result is just, but simply because they are willing to use this procedure and because they have the authority to do as they wish. (...). The justice of the outcome stems from their joint acquiescence together with their rights to acquiesce in the procedure.’ (505)

On this account, the value of pure procedural justice in relation to entitlement and voluntary interaction is, to put it analogically, like the value of the baba au rhum in relation to the combination of whipped cream and liquor-saturated brioche. It adds nothing to the culinary combination; it merely provides a fancier name for it. Procedural justice is, then, a merely classificatory concept for regrouping situations that are already intrinsically just, such as just contracts or ‘permissible games’.

Nelson opposes this weak reading of pure procedural justice to what he calls the strong interpretation. The strong interpretation states that pure procedural justice refers to an attribute of specific procedures that makes them intrinsically just and guarantees the justice of their outcomes. He takes Rawls to be a supporter of the strong interpretation, even if he agrees that this arguably remains a contentious point. Seeing pure procedural justice as dependent on an attribute or set of attributes of specific procedures might then be interpreted in either of the following two ways. On the first account, Rawls could ‘define a sense of the term “just” so that, by definition, 5

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5 Indeed, a game can be seen as a contract of sorts: one agrees to play a game, as long as the other player abides by the previously and commonly agreed rules, much like one agrees to enter a contract on the premise of all procedural obligations being equally followed by the other contractor.
an outcome of a procedure is just if the procedure has certain properties, like intrinsic fairness’ (506). On the second account, Rawls might ‘have in mind some substantive principle according to which procedures with property F, when followed in circumstances C, produce just results’ (506). The first account is obviously a non-starter, insofar as one cannot stipulate one’s way into justice. Moreover, this contradicts Rawls’s intention of articulating a theory of justice that should be compatible with a particular historical and political culture.

The second account presents some problems of its own. One of the problems is that such a principle is hard to find in the real institutional world. Another problem is that, supposing that such a principle has been identified, it cannot by itself exhaust the justice of a particular situation. Worse still, such a principle risks condoning certain injustices by making them less visible. To put it in Nelson’s terms, reliance on pure procedural justice understood as the sum of ‘intrinsic features of the game or process’ increases the ‘danger that we will ignore crucial questions, such as whether the players play voluntarily, whether they are entitled to play, and whether they are entitled to risk or alienate the goods they might give us. No matter how fair the game, the winners would not be entitled to their winnings if the losers had stolen them!’ (507).

Notice that the weak and the strong interpretation operate from a common position. The weak interpreter, it could be said, is a disappointed strong interpreter. Absent an attribute or a set of attributes that can isolate the idea of pure procedural justice, this latter one becomes a ‘theoretically dispensable’ (508) concept. In both cases, the idea of pure procedural justice is rejected. In the case of the weak interpretation, the rejection is, as it were, a civil one and the classificatory function comes as a consolation prize. In the case of the strong interpretation, the idea of pure procedural justice is more radically rejected because of the failure to identify any attribute that can make a procedure purely just.

Nelson’s argument, in short, is the following one. The idea of pure procedural justice makes theoretical sense if and only if there exists an attribute \( a \) or a set of attributes \( A \) so that any procedure owing that attribute \( a \) or verifying the set of attributes \( A \) is intrinsically just. Such a requirement, however, is not only too stringent; it is also an unwarranted one. Looking for the justice of a procedure in its intrinsic properties is the wrong strategy, at least insofar as concrete institutional procedures are concerned. Procedures are not natural entities with more or less fixed features.
Rather, they are ways of indicating if and how a proof of correctness can be given within a specific domain of activity. Procedures, in other words, are more or less standardized methods of arriving at particular outcomes considered to be correct within particular contexts. Procedures do not make sense in the absence of quite specific contexts, whereas natural entities do. The basic attributes of a rock do not change: a rock remains hard whether it is displayed in a museum or lies by the side of a river. Not so with procedures. The procedure of equal treatment can be just in some contexts, i.e. where the persons being treated equally are really equal in the relevant respects. The same procedure can be unjust in other contexts, if people are not relevantly equal or if the application of that procedure is not called for in the first place. The justice of a procedure does not belong to it in the same way in which hardness belongs to a stone; rather, justice is something that is being revealed through the application of a procedure in a specific context.

Take, for example, the procedure of majority voting. There is no property this procedure presents intrinsically that could guarantee the justice of the outcomes resulting from its application. The majority procedure is just only insofar as it tends to produce outcomes that are deemed to be just by most, if not all, of the citizens. But this is justice as a tendency, not as an intrinsic property. Procedures are processes, not entities. Entities own properties, processes present tendencies toward certain outcomes. As such, their import for justice depends on the way they connect with specific contexts, not on their invariable and intrinsic attributes. Looking for procedural purity in attributes, then, is the wrong place to look for the content of pure procedural justice.

(2). The second way of interpreting Rawls’s procedural distinction provides us with a more relaxed view. It does not target attributes; it works with perspectives. This perspectival interpretation has, as far as I know, been for the first time put forward by Thomas Pogge (1989). Pogge argues that we could fruitfully interpret the Rawlsian distinction as pointing toward different perspectives on one and the same procedural context. More precisely, Pogge argues that pure, perfect and imperfect procedural justice should not be construed as distinguishable kinds of procedures but as ‘(...)’

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7 For an account on how the value of procedure depends on context, see Brettschneider, C. 2005. ‘Balancing Procedures and Outcomes within Democratic Theory: Core Values and Judicial Review’, *Political Studies*, 53: 423-441.
elements that in actual procedures are often combined’ (151). The pure, the perfect and the imperfect are not the names of different types of procedures, but the names of different types of perspectives from which we can consider one and the same procedure. Pogge takes the example of the criminal trial in order to illustrate this perspectival reading. A perspectival interpretation of the criminal trial, he argues, allows us to concurrently consider it as a case of pure, perfect and imperfect procedural justice. A criminal trial can firstly be envisaged as a case of pure procedural justice. This is because there is no way to tell, within a considered decisional range and at a certain level of abstraction, if a particular decision is the just one or not.

‘Suppose it is agreed that the punishment of anyone found guilty should fit the gravity and circumstances of his or her deeds, record, character, and so on. However elaborately specified, these factors will underdetermine the punishment – and that not only for a fallible human judge. Even Hercules, who would assess all relevant factors with precise knowledge and human understanding (...) would presumably find that these considerations cannot determine the outcome with perfect precision (e.g. the precise length of time, to the second, that various robbers should spend in jail). Within certain limits, the correct punishment is whatever the judge says it is.’ (152)

A criminal justice decision is purely just insofar as there is no rationally or legally available argument that could compel us into viewing it as an unjust decision. Accordingly, procedural purity should be seen as a way of interpreting what is a soft version of legal underdetermination: a sentence is purely just to the extent that there are no compelling legal or moral reasons to adjust it further on. Everything that counts as just within certain specified boundaries could be adequately read as a case of pure procedural justice.

Second, a criminal trial can be construed as a case of perfect procedural justice, insofar as it doesn’t allow for certain kinds of results to happen. A criminal trial sentence is perfectly just in that ‘it firmly excludes outcomes excludes outcomes that are universally agreed to be unacceptable’ (ibid). This means that perfect procedural justice obtains to the extent that criminal justice decisions guarantee, for example, that situations of vicarious punishments or the maiming of convicts are excluded. Perfect procedural justice is about what a justice system manages to avoid in terms of morally unacceptable decisions.

Third, a criminal trial can be understood as a case of imperfect procedural
justice. This is to say that, beyond a definitional agreement that the aim of a criminal trial is to punish the guilty and acquit the innocent, there is a possibility, and, in some cases, a non-negligible probability, that there would be disagreement over whether the aim of the criminal trial has been reached. Put simply, the actors participating to the criminal trial might diverge as to whether a given criminal procedure has been properly applied or as to whether the proper criminal procedure has been applied. A criminal trial is imperfectly just to the extent that the sentence resulting from it is not unanimously accepted as the just one.

Pogge is right in acknowledging that there is no fixed class of pure procedures, as opposed to impure ones, whether perfect or imperfect. It is impossible to indicate the boundaries, i.e., the totality of conceptual and practical features that separate and distinguish pure from impure procedures. More generally, Pogge's perspectival attitude is philosophically more interesting than a steady preoccupation with intrinsic attributes. For all of these advantages, I think that the perspectival interpretation faces some problems of its own. Let me briefly explore them in turn.

First, saying that the criminal trial can be considered as a case of pure procedural justice is conceptually superfluous at best and morally pernicious at worst. It might, on the hand, be argued that it is conceptually superfluous, to the extent that, as Pogge indicates, pure procedural justice is simply another name for legal underdeterminacy. Why talk about pure procedural justice when the extension of this latter concept is already available and, to a large extent, theoretically covered by the idea of underdeterminacy? Sure enough, pure procedural justice can work as a different perspective on criminal procedure; it is nonetheless less clear whether we actually need it in order to uncover new aspects about the way procedure works. Perspectives are useful to the extent that they point to potentially new, previously neglected characteristics of a specific social phenomenon or moral reality. We need novel perspectives every time we want to find something more – or something different – about one and the same fact or complex of facts. To the extent that pure procedural justice is, as Pogge himself appears to believe, another name for legal underdeterminacy, its additional perspectival input is simply lost. We thus eventually fall back on Nelson's theoretical dispensability critique.

Taking the criminal trial to be a matter of pure procedural justice can, on the other hand, prove to be morally pernicious. Pogge is aware of this and explicitly warns as to the limits of the pure proceduralist reading. The proper position from which one
can consider the criminal trial as a case of pure procedural justice is, as Pogge specifies, the general perspective of an impartial observer. It is only from a general point of view – and, as it were, from outside the actual proceedings of the criminal trial – that one can come to consider the criminal procedure as a form of pure procedure. When one is actually a part of the criminal trial, the pure proceduralist perspective is no longer morally available. This is because for an actor who would take criminal proceedings to be a matter of pure procedure only, any result coming out of the application of the procedure would count as the just one. Ignoring that there is an independently given criterion of justice as far as justice is concerned – that is, that the guilty should be punished and the innocent be acquitted – might thus undesirably lead to some form of moral sloppiness.

The same kind of critique can be raised in relation to the perfect procedural perspective. Magistrates and jurors do not take legal procedures to be perfect merely because they exclude morally unacceptable actions or outcomes. The fact that we are not subjecting people to an ordeal practice does not say anything about what actually happens throughout the criminal proceedings. Current criminal procedures also include, among others, the exclusion of opera choirs singing inside the court during the interrogation of the witnesses. Does this particular fact make a criminal trial a case of perfect procedural justice? Granted that it does, saying that a criminal trial is an example of perfect procedural justice does not say anything about the procedures as such, but about what might happen if this procedure did not exist. And, as a matter of fact, almost anything else might happen if this particular procedure – say, the right to remain silent – did not exist. Procedural perfection is about the way in which a procedure realizes and guarantees the realization of an independently given criterion of justice; it is not about the non-realization of outcomes that go against that criterion of justice. Saying that a criminal trial is procedurally perfect because of the kinds of outcomes it excludes is like saying that any given medical treatment is flawless to the extent that it is not poisonous. The perfect procedural perspective is thus theoretically trivial.

More generally, the inadequacy of the pure and the perfect proceduralist perspectives in relation to criminal procedures persists in the case of other (political, social or economic) procedures. The reasons are roughly the same. On the one hand, pure and perfect proceduralist readings fail to capture the perspectives of the actors in charge of enforcing those procedures. Like their legal counterparts, entrepreneurs and
legislators do know that the procedures they are working with track a specific independently given end. One is investing with a particular goal in mind and legislating in view of a specific policy. On this account, they are not working with pure procedures. Also, actors are aware of the fact that the procedures they are applying can backfire at some point in time. In this respect, their perspective remains inescapably imperfect.

IV. PROCEDURES: THE OFFICE-VIEW

To recapitulate, the problem with the attributive reading is that it sets the bar too high in trying to look for an intrinsic property that would serve as the fundamentum divisionis for Rawls’s procedural distinction. Conversely, the problem with the perspectival reading is that it sets the interpretive bar too low, thus passing too easily from one perspective to another. More importantly still, it fails to capture the actors’ experience of applying concrete institutional procedure.

In what follows, I shall try to suggest that there is another way of grasping Rawls’s procedural distinction. I call this the office-based interpretation. The idea here is that whether a procedure qualifies as pure or not depends on the office one is occupying in relation to a specific given practice. An office refers to a particular role belonging to a morally or politically defined practice, including non-political roles such as the one of the game-player, promisor or common citizen.

This understanding of what an office consists of is compatible with Rawls’s understanding of it. An office, on his account, can be described as an elementary part of a practice, which in turn denotes ‘any form of activity specified by a system of rules which defines offices, roles, moves, penalties, defenses, and so on, and which gives the activity its structure’ (1958: 164). More clearly, and less circularly, an office might be construed as the series of kinds of actions one can justifiably perform within a practice, given the general logic and specific requirements of that practice. Occupying an office is thus being justified in (i.e. allowed to or required to) performing any action defined by that office. Thus, for example, a judge or a juror are justified in condemning or acquitting a person that is being accused of an offense in virtue of their occupying an office.

8 The problem with Rawls’s procedural distinction is not one of distinguishing between the imperfect and the perfect. Here, matters are relatively straightforward, insofar as it is quite clear that there are a lot of imperfect procedures and some (very rare) perfect ones. The problem is to find a criterion between pure and non-pure procedures.
Holding an office is, in this case, the same thing as exerting a jurisdiction. An office defines what the person holding that office can do as office-holder. Offices are ways of delineating spaces of permissible action.

The starting point for the office-based interpretation can be found in Rawls’s earlier work on the problem of rules and, most notably, in his article on *Two Concepts of Rules* (1955). Rawls looks at the justification one might give of the practice of state punishment. In doing this, he comes to notice that there is a fundamental difference between the ways in which a legislator and a judge might find a justification for state punishment. The former will justify punishment from the point of view of society as a whole. The office of the legislator is that of designing laws that uphold the general welfare of a given society. The justification of punishment that is available from the standpoint of the legislator’s office is the utilitarian, deterrence-based one. Punishment, on this account, is justified only insofar as it promotes social welfare by preventing criminal conduct. The judge, on the other hand, looks at punishment differently. This is because the office he is holding sets different obligations and, more generally, different justification requirements, as compared to the one of the legislator. The office of the judge is not that of designing laws that promote social welfare, it is that of ensuring that justice is done, i.e. that a correct verdict is being reached, in a particular case. Reaching a correct verdict means that the guilty wrongdoer will be punished, whereas the innocent person will be acquitted.

Drawing on the judge/legislator distinction, Rawls then offers a quick generalization in footnote 5 of the same article. There, he invites us to

‘Note the fact that different sorts of arguments are suited to different offices. One way of taking the differences between ethical theories is to regard them as accounts of the reasons expected in different offices.’ (6; emphasis added)9

This is an interesting affirmation the full implications of which are yet to be developed. I will not dwell on these general implications here. Instead, I want to suggest that this affirmation is central to understanding the logic of Rawls’s later procedural distinction. This impact should be weighed from the standpoint of Rawls’s overall theoretical goals, i.e. coming up with a theory of justice articulated at a certain

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level of generality. On a retrospective reading\textsuperscript{10}, this means that theories of justice can be formulated in different ways. Thus, a theory of penal justice could be formulated either in terms of a magistrate’s office (this would come close to a retributive justice theory of punishment) or, alternatively, in terms of the legislator’s office (this would come close to a utilitarian theory of punishment). These are theories of justice that closely match the domain of specific institutional offices.

Closer to our procedural concerns, it could be said that one of the main tasks of these theories is to identify new procedures that ensure that the rationale of these offices is being adequately pursued.\textsuperscript{11} Conversely, they should criticize those procedures that go against the rationale of a particular office. Take the rationale of the office of a judge, which is to punish the guilty and acquit the innocent. The task of a theory of penal justice seen at this level is to justify those procedures that lead to fulfilling this rationale and criticize those that might conflict with it. Seen in this way, office-based theories are, to a significant extent, bound to be theorizations of imperfect procedural justice. This is because, as Rawls puts it, in matters of practical concerns such as politics, law and economics, all procedures are bound to be imperfect. Their imperfection becomes transparent at two levels of understanding. First, they are imperfect in that they are non-pure: the theorisation of these procedures must take into account an important pre-theoretical datum, which is the rationale of the office. Second, they are imperfect in that they cannot guarantee that that specific rationale will be fulfilled through their application.

Rawls’s intention in \textit{A Theory of Justice} (1971), however, is not to provide a theoretical systematization of the rationale of a specific office. Rather, he wants to identify the way in which the members of a particular society could agree upon the principles that are to govern the \textit{whole} institutional framework of that society. His theory does not look at those institutional procedures that are most likely to fulfil the aims of specific offices. Instead, he wants to identify a procedure that can cut across office boundaries and can be more generally applied to the whole of the basic institutional structure. This project goes all the way back to his article on an \textit{Outline of a

\textsuperscript{10} This means that we already bear in mind Rawls’s theoretical objective in his later work, and, most notably, in \textit{A Theory of Justice} (1971).

\textsuperscript{11} This is a contention Rawls would be comfortable with. Remember that, when he talks about the criminal trial as a case of imperfect procedural justice in \textit{TJ}, he insists on the fact that ‘the theory of trials examines which procedures and rules of evidence, and the like, are best calculated to advance this purpose consistent with the other ends of the law.’ (§14: 75).
Decision Procedure for Ethics (1951). Here, Rawls’s purpose is to identify and theorize ‘a reasonable decision procedure which is sufficiently strong (...) to determine the manner in which competing interests should be adjudicated and, in instance of conflict, one interest given preference over another’ (177). In pushing for principles of justice that should be acceptable to all the members of a given society, Rawls tries to devise a theoretical procedure such that, by applying this procedure, all of those members can agree on certain common principles.

Notice that the rationale of this theoretical procedure is in no way dependent on any specific office. There is a difference in kind between a theoretical procedure oriented toward agreeing on a number of common principles at the level of the basic structure of a society and a procedure that is applied by an office-holder in order to obtain a specific institutional result. The difference between this theoretical procedure and the institutional ones is not, however, one that depends on the properties of the procedures. It is a difference that depends on the office one holds in relation to given practices.

The difference between theoretical (or pure) procedures and institutional ones gains more weight if we take a quick look at the Kantian background of Rawls’s political philosophy.12 More specifically, I think that Rawls’s procedural distinction becomes clearer if we measure it against Kant’s distinction between the private and the public use of reason. In ‘What Is Enlightenment’ (1784), Kant writes that there are two positions from which a person can make use of one’s reason.

‘The public use of one’s reason must always be free, and it alone can bring about enlightenment among human beings; the private use of one’s reason may, however, often be very narrowly restricted without this particularly hindering the progress of enlightenment. But by the public use of one’s reason I understand the use someone makes of it as a scholar before the entire public of the world of readers. What I call the private use of reason is that which one may make of it in a certain civil post or office with which he is entrusted. Now, for many affairs conducted in the interest of a commonwealth a certain mechanism is necessary, by means of which some members of the commonwealth must behave merely passively, so as to be directed by the government, through an artful unanimity, to public ends (or at least preventing from destroying such ends). (...) But insofar as this part of the machine also regards himself as a member of a whole commonwealth, even of the society of the citizens of the

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12 Such a rapprochement can, I think, be meaningfully connected, although it is analytically orthogonal to Rawls’s emphasis on the fact that the ‘original position can be given a Kantian interpretation’ and that ‘the theory of justice (...) tries to present a natural procedural rendering of Kant’s conception of the kingdom of ends, and of the notions of autonomy and of the categorical imperative.’ (§41: 233).
world, and so in his capacity of a scholar who by his writings addresses a public in the proper sense of the word, he can certainly argue without thereby harming the affairs assigned to him in part as a passive member. (…). But the same citizen does not act against the duty of a citizen when, as a scholar, he publicly expresses his thoughts (…).’ (18-19)

I think something similar is at stake in the case of Rawls’s distinction between the pure and non-pure procedural justice. Rawls’s theory of justice takes Kant’s notion of the public use of reason to a greater level of abstraction, by applying it to the basic structure of a whole society. In devising his theory of justice, Rawls wants to abstract from the inner rationality of institutional offices and aims at identifying those principles of justice that should be acceptable to all, in spite of any other office obligations or previous attachments. In order to do this, he seeks to identify a procedure that could be accepted by all the members of a society such that, through its application, these members become aware of the cogency of certain principles of justice.

The problem such an undertaking faces is that the procedure used to derive those principles cannot be applied from the standpoint of any previously defined office. Such an undertaking would expose itself to the charge of partiality. What Rawls wants from his theory of justice conceived as pure procedural justice is to come up with a procedure that is not being applied by an office-holder. This is, I think, what he has in mind, when he says that, in the case of pure procedural justice there is no independently given criterion of justice. Such a criterion would have to be part of an already existing office, which would defeat the purpose of pure procedural justice in the first place. What Rawls is looking for is not a specific attribute a procedure has that could guarantee its purity. The procedures used for deriving the Rawlsian principles of justice do not have a different nature from the ones used by office-holders. The users of pure procedures deliberate, judge and evaluate, as do office-holders. What is different in the case of pure procedures is that they are deployed independently of the requirements and inner logic of particular institutions. Pure procedures are open-ended in this respect. More particularly, pure procedures are oriented toward identifying those principles against which the justice of particular

13 this is clear in the idea of the public reason revisited
institutions – and, most notably, those forming the basic structure – can be measured against.

What Rawls understands, then, by a pure procedure, is a procedure that can be meaningfully applied by someone who is not, for the purposes of identifying the most general principles of justice, already part of the institutional scheme. The normative work of pure procedures is done in relation to the basic institutional structure, not from within it. The role pure procedures have is to lead to the formulation of unanimously acceptable principles of justice. Principles of justice, in turn, are used for purposes of just institutional choice. The main example of a pure procedure as articulated by Rawls is that of the original position. As he puts it in A Theory of Justice (1971):

‘The idea of the original position is to set up a fair procedure so that any principles agreed to will be just. The aim is to use the notion of pure procedural justice as basis of theory. (…). Somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage. (…) [I]n order to do this I assume that the parties are situated behind a veil of ignorance. They do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations.’ (118; emphases added)

Notice that the parties that apply the procedure of the original position are not doing anything essentially different from, say, judges in charge of deciding a case. The operations of reasoning are not different. Like the judges, the parties to the original position deliberate, argue, judge, evaluate and weigh different kinds of reasons. Unlike the judges, however, they are not bound by a previously defined office the rationale of which their procedures should reach. Procedures are pure insofar as they are freed from the charge of offices.

VI. CONCLUSION

Let me end this paper with two brief remarks. The first remark is that an understanding of pure procedures as office-independent provides a nice fit with Rawls’s more general conception two of the basic roles of political philosophy. The first of these roles is that of providing a basis for reasoned agreement between members of a society threatened by sharp divisions and deep conflicts. The second of these roles is reconciliatory. This is to say that philosophy should aim at ‘calm[ing] our frustration and rage against our society and its history by showing us the way in
which its institutions (…) are rational’ (Rawls 2001: 3). Pure procedures help further
these two aims of political philosophy by providing imaginative ways for escaping the
partiality of conflicts and enlarging the short-sighted views that lie at the basis of our
practical frustrations. The original position is but an example of such a procedure.
Others can be found, either in Rawls’s own work (the idea of an overlapping
consensus, the idea of public reason or that of a reflective equilibrium) or in the work
of other political philosophers (Dworkin’s desert island, Ackerman’s spaceship,
Nozick’s experience machine, etc.). The freedom of imagining such new procedures is,
by all means, closely connected to their independence from specific office obligations.

The second remark is that the work such pure procedures do for us can only
hold a significant normative important in democratic regimes. This is because
democratic regimes foster and encourage the creation of forums where the use of such
pure reasoning procedure is possible, either by mobilising reasoning procedures
devised by philosophers themselves or by allowing the designing of new similar
procedures. A good democratic citizen is one that is ready to renounce her narrow,
office-bound standpoint when reasoning about the kind of justifications that she thinks
should be accepted by the other citizens. Alternative regimes, like monarchies or
theocracies, are too respectful of the logic of offices to allow such office-independent
spaces to thrive. In this respect, democracy is, to follow Kant’s terminology, the one
regime where the duty of the citizen and that of the scholar come as close to one
another as it is politically possible.

SELECTED REFERENCES

Kant, I. 1999 (1999). Practical Philosophy, translated by Mary J. Gregor. Cambridge:
Cambridge University Press


of Harvard University Press