

The Globalization of What? Some Neo-Rawlsian Remarks on the Justificatory Limits for Global Criminal Justice

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Abstract. This article examines whether, given the Rawlsian procedural distinction between pure, perfect and imperfect procedural justice, a purely procedural theory of global criminal justice is conceptually possible. It argues that it is not. It does so against the recently held view – I call this “the strong proceduralist thesis” – that procedural fairness is sufficient to ensure justificatory rightness. The strong proceduralist thesis is found wanting on two accounts. First, it cannot address the specific normative logic of punitive practice. Second, it leads to an unacceptable justice principle for the regulation of societies, whether national or international. Such a principle would amount to justifying the existence and functioning of societies on account of their punishing their own members.

Key words: procedures, global criminal justice, pure proceduralism, justification, normative tracking.

This article is addressed to two possible audiences, although unequally so. First, I mean it to be a lateral contribution to a strand of legal theory that goes against a strong proceduralist justification of global criminal justice¹ (Luban 2010). The idea, at this level, is that criminal law procedures do not provide a sufficient justificatory basis for the institution of international criminal justice. In short, procedures are not sufficient justificatory assets as far as criminal justice is concerned. Second, this paper is an effort to reflect, from a non-ideal political theory perspective², on the procedural nature of criminal justice. I do this by following, elaborating on and defending John Rawls’s (1971; 1993) distinction between pure procedural justice, on the hand and impure (perfect and imperfect) procedural justice, on the other hand.³ The upshot of this latter argument is that, pace some contrary positions (Gustafsson 2004; Morss 2004), (global) criminal justice is a form of imperfect procedural justice.⁴

The proceduralist justification thesis in matters of criminal justice has been recently put forward by David Luban (2010). The thesis states that international criminal justice is justified insofar as it ensures and increases the likelihood of “norm projection” (576) at

1] My understanding of *global* criminal justice is quite broad. I take global (or international) criminal justice to refer to all practices that qualify as non-domestic criminal justice practices. Global justice therefore includes transnational, universal, and international criminal justice practices.

2] For a clear account of non-ideal theorizing, see Sher (1998) and, more recently, Simmons (2010).

3] The implication is that there is no distinction of nature – neither substantive nor procedural – between global and domestic criminal justice.

4] Indeed, I will go further than Fisher (2006) and argue not only that a purely procedural theory is not able to justify in a principled way the existence of international crimes, but that, because of conceptual reasons, it *cannot* do so.

a global level.⁵ This can be interpreted in two ways. In its more reserved understanding – I call this the *special proceduralist thesis* – it states that the emphasis and the visibility of fair procedures justify the internationalization of certain criminal justice trials, that is, the transfer of specific cases to the international level.

In its more radical reading – I call this the *strong proceduralist thesis* – the justification of international criminal justice is taken to reside in the broadcasting of a message about the procedural fairness of the criminal trial. Luban suggests that the punishment of horrendous crimes such as genocide, war crimes or crimes against humanity does not – and, according to him, cannot – rely on the kind of substantive justification practiced at the national level. Retribution, special deterrence or rehabilitation lose their normative force when it comes to international crimes. This is because, as he puts it, the crimes perpetrated by political leaders like Goering, Milosevic or Charles Taylor are so terrible that they *cannot* have an adequate retributive match at the individual level characteristic of criminal punishment. Moreover, the accused is not very likely to engage in similar crimes in the future and thus the idea of rehabilitating him seems morally off the mark. Given the putative absence of a sound substantive justification of international punishment, the only justification available lies in the unfolding of the legal procedures at the international level. To put it in Luban's terms:

[T]he legitimacy of international tribunals comes not from the shaky political authority that creates them, but from the manifested fairness of their procedures and punishments. Tribunals bootstrap themselves into legitimacy by the quality of justice they deliver; their rightness depends on their fairness. During the first Nuremberg trials, prosecutors fretted that acquittals would delegitimize the tribunal; in hindsight, it quickly became apparent that the three acquittals were the best thing that could have happened, because they proved that Nuremberg was no show trial. (2010 579; emphases added)⁶

This passage seems to say that what *distinctly* justifies global criminal justice is, when substantive reasons are insufficient or inadequate, the fact that the criminal law procedure has been properly followed. As long as procedures are applied in an appropriate way, the outcome of the international criminal trial is the right one. International criminal justice, then, is justified on account of the existence and due application of fair procedures. Fair procedures are the criterion for the justification of just punishment. This is the crux of the

5] Following Cassese (2009), other, alternative justifications for the internationalization of criminal justice are the failings of the national courts to deal with certain crimes, the need for spreading human rights doctrine at an international level, the idea according to which certain crimes concern the international community as a whole or the conviction that the international criminal courts are better situated in adjudicating international crimes in a more consistent way.

6] Luban does not seem to operate a strong distinction between justification and legitimation. Although I consider this to be conceptually unsound (cf. Rawls 1993, 428-430), this is internally consistent with his position, according to which justification is, in the end, reducible to legitimation, i.e. to the proper following of the formal rules of the "punitive game."

proceduralist thesis, i.e. the idea that procedures can *independently* function as justificatory assets for punishment.

I consider the proceduralist thesis to be essentially defective in both of its versions. The special version is easier to dismiss from the start and will not grab my attention for too long. I am therefore simply satisfied with indicating that it is a *non sequitur*, insofar as the existing international procedures are in no way different from the national ones. International procedures are, if differently combined, the same as the national ones. Saying that the legal procedures justify the internationalization of criminal justice is like saying that national criminal justice systems represent a sufficient reason for international criminal justice. The argument is visibly unsound.

The strong version of the proceduralist thesis, however, deserves closer critical scrutiny. At this level, I argue that international criminal justice, like its national counterpart, cannot be completely divorced from a substantive justification. My argument is structured as follows. In Part I, I take out some of the more legal objections to the strong proceduralist thesis. In Part II, I try to rephrase these objections within a political theory framework. I do this by appealing to John Rawls's (1971; 1993) distinction between three types of procedural justice: pure, perfect and imperfect procedural justice. Rawls's distinction, I think, should be understood typologically, with pure procedures being meta-ethical and meta-institutional and impure ones first-degree moral and institutional. The upshot of this typological interpretation is that criminal justice cannot possibly rest on a purely procedural justification. Finally, in a rather sweeping Part III, I indicate the way in which legal procedures can play a crucial, if limited, role in justifying punishment. I argue that punishment construed as legal punishment is not possible in the absence of established legal procedures. The claim is that procedures can and should fulfill a *normative tracking* function in matters of punishment, whether national or international. More specifically, procedures can help criminal justice decision-makers and students of the system to reconstruct and assess the way in which a particular legal judgment has been reached or enforced. To this extent, procedures might assist one in locating possible judgment errors and rectifying them when possible.

I. THE LEGAL LIMITS OF THE PROCEDURAL JUSTIFICATION

I shall begin with the specifically legal objections to the strong proceduralist thesis. As far as I am aware, there are at least four different such objections that can credibly be put forward. First, as Antony Duff (2010) affirms in his reply to Luban, procedures, however fair they may be, cannot independently exert a justificatory force. In order for criminal law procedures to justify anything at all, the application of the procedures has to be grounded on a previous right of jurisdiction. This means that one of the main aspects of any practice of judging people for their wrongdoings has to rely on a certain justification of the judges' competence in that particular matter. "Suppose," as Duff analogically expresses the issue,

that a group of my neighbours, worried about the decline in marital fidelity, take it upon themselves to bring local adulterers to book, and turn their attention to me, as an alleged adulterer. I might not deny that adultery is wrong, or that I am an adulterer who must answer for his adultery to those whose business it is—to my wife and family, to our mutual friends. But I might reasonably insist that it is not my neighbours' business: they have no right to call me to answer for my adultery; nor can the fairness of their procedure give them that right. (591)

Criminal law procedures, such as the right to counsel, the right to a speedy and public trial, the privilege against self-incrimination, the right to appeal, etc., cannot play a justificatory role at a pre-jurisdictional level. In other words, the *institution* of international criminal justice has to be previously justified so that fair legal procedures can have a justificatory word to say. Procedures do not justify anything by themselves. In particular, this implies that, even if procedures were intrinsically fair, their application could not be justified in the absence of the justification of the competence of particularly defined judges having a right to apply them. This is because the proceduralist justification could just as well be invoked at the national level or, for that matter, at the local or even the individual level. If, in other terms, fair criminal procedures are sufficient justificatory assets, then pretty much anyone owing the required means of enforcement can take it on one's own to ensure that justice is done.⁷ To the extent that this is not the case, the procedural justification is dependent on a preliminary jurisdictional one.

Second, the strong proceduralist justification of criminal justice does not seem to seriously take into account the unstable, hybrid and flexible situation of international criminal law procedures. International criminal procedural law is a normatively and legally unsettled matter. As Richard Vogler cogently puts it, "there appears to be no agreement on what constitutes a satisfactory criminal process" (2005, 1). International criminal justice is, procedurally speaking, a *sui generis* and still undecided mix between the adversarial and the inquisitorial procedural models. Consequently, trying to justify international criminal justice on a strong proceduralist basis is ambiguous at best. This is because, given the fact that international criminal law procedures are constantly changing and that their formulations are quite often being negotiated anew, it is not clear what are *exactly* those procedures that justify international punishment. Even the 'basic procedural rights' Luban is talking about have either been adopted in a too concise, and therefore rather ineffective manner, like in the case of a right to counsel (Tuinstra 2009), or have been reformulated in a radical way, such as the procedure of proving guilt beyond a reasonable doubt, with the onus to establish a defence resting on the accused at the international level (Cryer *et al.* 2007, 434).

7] Luban explicitly doubts the justificatory importance of a right to jurisdiction: "But it is far from obvious that criminal jurisdiction is something a state can legitimately delegate to whomever it chooses. If it can delegate criminal jurisdiction to the ICC, then why not to the Kansas City dog-catcher, the World Chess Federation, or the Rolling Stones?" (2010, 578). This faces Luban with an additional problem, in that there is nothing specifically legal left about this kind of justice in the absence of a previous justification of the criminal justice institution.

Third, the strong proceduralist justification tends to downsize, if not to considerably ignore, the fact that what represents the primary justification of criminal justice – whether international or not – is not the fact that it makes use of various procedural mechanisms *as such*, but rather that procedures are themselves justified to the extent that they lead to a just, i.e. correct outcome. International criminal law procedure is built on a mix between the inquisitorial (civil law based) and the adversarial (common law based) models. Historically, both of these methods draw their justification from a common aim, which is to identify the truth of the matter in a particular criminal case. Even if the specific procedures vary, what properly justifies a criminal justice decision is that it is a correct one, in that it punishes the guilty instead of the innocent and it ensures proportionality between the offence and the punishment. Thus, in matters of criminal justice, the outcome of applying a legal procedure is not justified by the application of the procedure *per se*. Rather, the justification comes from the fact that the outcome resulting from the application of the procedure is the correct, i.e. the right one. As far as criminal justice goes, it is not so much the procedure that justifies the outcome. It is the pursuit of a generally defined outcome that warrants the use of certain types of procedures.

Fourth, and finally, it is widely accepted in legal practice that current procedures cannot absolutely guarantee the just, i.e. true outcomes. Although oriented toward reaching the correct verdict and establishing the adequate punishment, procedural rights and evidence procedures are unable to always or fully provide us with the needed certainty as to the justice of the judicial decisions or of their subsequent enforcement. This fourth feature of legal procedures, and the second one (persistent flexibility) are all the more present in the case of international criminal law procedures. That this is so, it is enough to compare the procedural safeguards of the Nuremberg trial with the current procedures of the International Criminal Court. As Cryer *et al.* (2007, 427) have noticed, the IMT procedures were considered as essentially fair in the 1940s and probably the 1950s. Retrospectively, however, they seem minimal and basically unfair, as they did not provide, for example, for a right to remain silent or to appeal against a conviction.

II. THE JUSTIFICATORY DEAD-ENDS OF PURE PROCEDURALISM

I shall now try to rephrase these objections by turning to a more conceptual language. I do this because, to put it in Rawlsian jargon, the strong proceduralist thesis comes close to saying that criminal justice can arguably be accounted for as a form of pure procedural justice. Before doing this, a remark is in order as to what exactly is a procedure. As I see it, and drawing from Suppes (1984), I take procedures to mean ways of certifying that and indicating 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. Accounting for correct outcomes can be done in different ways, given the scope of the possible relations

between procedures, on the one hand, and criteria for assessing outcome correctness, on the other hand.

Let me now elaborate on Rawls's procedural distinction, before weighing up its critical force in relation to the strong proceduralist thesis. The main criterion for the procedural distinction lies in the relationship between procedures and the outcome stemming out of the application of those procedures. Thus, pure procedural justice refers to a relationship of identity between the standards for assessing the outcomes of the application of a procedure and the procedure itself. This means that the justice of purely procedural outcomes depends entirely and exclusively on the application of that precise procedure. There is no outside, i.e. no already given criterion for assessing the justice of a particular outcome resulting from the application of a pure procedure. Pure procedures are pure to the extent that they do not mix with or depend on external, previously given justice criteria. Rawls gives the example of betting games as cases of pure procedural justice:

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 this 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 freely 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. (1993, 75)

Pure procedural justice points to a justificatory context whereby there is no independent criterion of justice for assessing the justice or the injustice of the particular outcomes resulting from the application of the (pure) procedure. When it comes to games such as betting, there are no fixed substantive standards concerning the justice of a particular distribution. All distributions are just to the extent that they respect the rules of the game. Saying, for example, that betting procedures should satisfy a specific justice criterion other than the betting procedure itself is simply a way of not understanding what betting games are about. It makes no sense to want to adjust the result of a properly applied betting procedure in order to increase the *justice* of the results of the game. We might prefer, for some personal reason, that one of the contestants win the game. This, however, is irrelevant to the justice of the gaming position. To the extent that every participant to the gaming situation has freely agreed upon the betting procedures prior to their application, the results of the game are to be considered just in their turn.

Distributive justice considered at the level of the basic structure is, for Rawls, instructively analogical to the gaming position. Like in the case of bets, the purpose of an ideal theory of distributive justice is to identify the procedures that all individuals who are part of a society could agree on, thereby ensuring the justice of the basic institutional

scheme that particular society rests upon. The purpose of Rawlsian theory is to identify the type of procedural arrangement that ensures the justice of a specific institutional scheme of cooperation. More specifically, Rawls argues that, as far as distributive justice is concerned, the “social system is to be designed so that the resulting distribution is just however things turn out” (1993, 243).

Pure procedural justice thereby points to a justificatory context whereby individuals, generally considered, have to agree to general moral principles regulating the functioning of the basic social institutions. The only way for individuals to agree whether particular distributions are just or not is for them to agree to a set of principles in relation to which one can assess the justice of the institutions coordinating those distributions. Pure procedural justice, then, is about the justice of the basic institutions as regulated by principles and not about the justice of particular distributions or particular rules falling under those institutions.

The idea is that agreeing on those principles cannot concern all the individuals forming a society, as long as some of the individuals are already committed to specific moral and political principles. Pure procedural justice is about those principles we can all agree with in the absence of previous moral attachments. Seen from a pure procedural perspective, individuals “do not view themselves as required to apply, or as bound by, any antecedently given principles of right and justice” (Rawls 1993, 73). All that is given in the pure procedural situation is a willingness to deliberate on the acceptable principles of justice through a commonly agreed to procedure.

Pure procedural justice can then adequately be considered to be meta-institutional or, differently put, pre-political: the justice standards that define and regulate particular existing institutions should not, as such, force us to choose or prefer certain moral principles for assessing those institutions over other moral principles. Our particular institutional identity should be irrelevant as to what we *all* can agree as far as moral principles go. Rawls considers that the existing moral theories – identified as theories of justification via moral principles – are linked to specific institutional positions. Moral theories are “accounts of the reasons expected in different offices” (1955, 6). What singles out a pure procedural theory of justice as a moral theory is that, unlike other moral theories, it does not rely on a specific institutional position. A theory of pure procedural justice is supposed to hold unanimously across the institutional board. It is a theory about what we can all agree upon in terms of moral principles, in spite of our differences in terms of institutional positions.

Pure procedures are logically prior to specific institutional arrangements. Their justificatory role is to lead to the formulation of unanimously accepted principles of justice. Principles of justice, in their turn, are used for purposes of just institutional design, i.e. for justifying the choice of particular social institutions. The main example of a pure procedure as articulated by Rawls is that of the original position. The original position, with its inclusion of the device of the veil of ignorance, is supposed to point the way to the

principles that compose a potentially unanimously acceptable theory of justice. “The idea of the original position,” writes Rawls,

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 a 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. (1971, 118; emphasis added)

The original position is a mechanism for setting aside the moral influence that contingent considerations might have on our conception of basic social justice. In addition, the original position is used as a means for weighing the principles presented by some of the explicitly articulated moral philosophies. In short, it functions like “a general analytic method for the comparative study of conceptions of justice” (Rawls 1971, 105). The goal of the original position is, as Thomas Scanlon clearly indicates, to justify the principles of justice by proving that they can be reached in the *right* way, i.e. without imposing a prior conception of justice on any of the individuals that look for a conception of justice taking the basic structure as its subject. This is why the original position is not limited by institutional considerations: its justificatory scope cuts across institutional boundaries. The original position *qua* pure procedure can be appealed to any time a general, extra-institutional kind of justification is needed (Rawls 1971, 17). Pure procedural justice, in other terms, does not presuppose any prior substantive moral commitment. All that is needed in cases of pure procedural justice is that the individuals using it have some general characteristics in terms of rationality and a willingness to agree upon commonly defined principles of justice (Rawls 1971, 103-20; Rawls 1951). From this viewpoint, pure procedures are both meta-institutional, in that they do not allow any particular institutional commitment, and meta-moral, in that they go beyond the details raised by particular moral and practical problems.

Impure procedures do not have any of these two features. Impure procedures can be said to be intra-institutional, in that they are part of an institutional setting that they both constitute and serve. Impure procedure are constitutive of an institution to the extent that an institution is partly defined as a series of procedural mechanisms; they are subordinate in that they are supposed to attain a goal as substantively defined by a particular institution. Impure procedures are, on the other hand, first-degree moral, in that they belong to an institutional history of dealing with and trying to solve particular moral and practical problems.

For the sake of more clarity, I shall consider the distinction between pure and impure procedures from a different, if concurrent, standpoint. The criterion of the distinction, this time, should not be taken to be the relation between the justice criterion and the characteristics of the procedure, but the *object* of procedural justification. There

are, I think, three different objects of justification, although the list is not necessarily exhaustive. The first class of objects of justification is represented by *principles*: when we are trying to justify principles, we are trying to show that there are good and sufficient reasons that allow us to apply these principles over a wide range of cases. The second class of objects of justification consists of *judgments*: justifying judgments is about proving that a particular judgment is both locally reasonable, given some particular circumstances, and potentially applicable to other relevantly similar situations. The extension of the third class of justifiable objects is populated with *persons*: in this case, to be justified means to hold a particular view for reasons that one knowingly considers to be the right and the sufficient ones.⁸

Seen from the perspective of the object criterion, it does not make sense to say that the justification of a judgment or that of a person's action can be done based on a pure procedure, i.e. in the absence of an independently and previously given criterion for justice. When I try to justify a judgment or my acting in a specific way, I do so by appealing to a contextually and previously given criterion of justice. A judgment in a sports competition, for example, is justified to the extent that it relies on the right and sufficient reasons that allow me to realize the objective of the competition, which is that the best contender win the contest. I am, at a different level, justified in acting on a particular judgment to the extent that I really consider that my decision will be based on the right and sufficient reasons. Justifying a judgment or a person's action makes no sense without a previously given goal defined by a particular practice or institution.⁹ Thus, from a justice perspective, there is no justification of a judgment or of a person's convictions *in general*, that is, without a series of normative goals defined by and substantively embedded within a given practice.

Justifying principles, on the other hand, can be seen to play a regulative role *in relation to* institutions and practices. This means that what we are asking from principles is for them to justify institutions and not so much to be subsequently justified *within* those institutions. A justified institution is an institution that is capable to express, uphold and enforce a generally justified principle. The market institution, for example, is justified to the extent that it relies on and is normatively under the control of the principle of liberty for some or the principle of right allocation of material resources for others. The institution of the free press is justified, among others, in that it embodies and sustains the principle of free speech. When asked what justifies our market and press practices, we normally resort to principles as independently justified in relation to that practice. If the principles justifying a practice would have to rely for their justification on specifically intra-institutional reasons, then our justificatory enterprise would quite rapidly become circular.

8] I take the distinction between judgments and persons from Scanlon (2002). I make the additional distinction between judgments and principles.

9] For Rawls, practices and institutions are largely synonymous, unlike for MacIntyre (1981), for example.

The justification of judgments and persons' actions is done from within institutions, relying on a diverse, if institutionally directed, range of reasons. The justification of principles is, to the extent that principles are used to justify institutions, external to the institutions themselves.

If pure procedures are pure insofar as they do not depend on any independently given criterion of justice, then all the procedures that attempt to realize such a justice criterion will have to be considered as impure. Independent criteria of justice are, generally speaking, criteria defined by various institutions and practices. Impure procedures are, from this point of view, to be considered as being both institutional – in that they constitutively belong to an institution – and moral, in that they depend on a distinctively identified moral criterion that needs to be fulfilled if justice is to be done.

An institution, following Rawls, can reasonably be construed as “a public system of rules which defines offices and positions with their rights and duties, powers and immunities, and the like” (1971, 47). A basic institutional scheme, therefore, can be plausibly envisioned as a series of cooperatively connected rules and procedures. What Rawls wants from a theory of distributive justice envisaged as pure procedural justice are procedures that can justify the choice of this general scheme of rules and procedures. This implies that *the pure procedures leading to the formulation of the principles of justice needed to assess the justice of the basic social institutions cannot be the same as the procedures forming the institutional scheme*. To justify the choice of the basic institutional structure by using the procedures that are part of it would be question begging. If the basic institutional structure can be defined as a series of rules and procedures, then one cannot justify its choice by a circular appeal to the rules and procedures that compose it. This would be like justifying an institutional system by invoking its existence as a sufficient reason for its justification. That something exists is not the kind of reason we are looking for when we are trying to justify it.

With this distinction in mind, it should be clear that legal procedures of the kind that characterizes the (international) criminal justice system are neither meta-institutional nor meta-moral ones. Rather, they belong to and are part of the penal institution *qua* constitutive rules. These, then, are not the procedures that *can* justify the workings of international punishment from a pure proceduralist standpoint. Saying this is not, however, sufficient to dismiss the strong proceduralist thesis. The question still persists: are there *any* pure procedures ‘out there’ that can point to the specific principles that should regulate the workings of the *retributive*, as different from the *distributive* justice system? My answer is a negative one.

To show why this is so, I appeal to one of Rawls's brief, but quite helpful remark on the relation between distributive justice and criminal justice. He writes the following:

The question of criminal justice belongs for the most part to partial compliance theory, whereas the account of distributive shares belongs to strict compliance theory and so to the consideration of the ideal scheme. *To think of distributive and retributive justice*

as converses of one another is completely misleading and suggests a different justification for distributive shares than the one they in fact have. (1971, 277; emphasis added)

The claim Rawls advances here sounds like a logical distinction. What Rawls actually suggests is that questions of distributive and, respectively, retributive justice, are not to be raised at the same level of conceptual generality. Why not? As I see it, there are at least three reasons for this. The first one is related to what might be called the morphology of Rawls's theory of justice. More clearly, it has to do with the fact that Rawls is theorizing distributive justice at the level of the basic structure. His theory concerns only "the political constitution and the principal economic and social arrangements" (1971, 6-7), but it does so for the *whole* scheme of these major institutions and not for each of these institutions considered in isolation. From this perspective, the assertion that his theory of distributive justice is not to be thought of as the converse of retributive justice implies that the theoretical claims that are valid for the whole are not automatically valid – or, at least, not in the same way or to the same extent – for the part. There are characteristics of the whole that cannot be imputed to the part. In order to better grasp this distinction, one can always go back to the distinction between the kind of justification that goes on at the basic structure level and the one that goes on at the institutional or rule-level. Rawlsian distributive justice deals with the former, criminal justice characterizes the latter.

Second, I think that what Rawls has in mind when he says that criminal and social justice are not converses of one another is that theorizing distributive justice can address only a very specific dimension of punishment, that is, punishment as relevant from a distributive and cooperative viewpoint. When it comes to considering the penal institution, Rawls is somehow closer to the sociologist than to the moral philosopher: punishment is justified insofar as it deters from crime, thus improving the prospects of social cooperation. All that is needed from the point of view of a conception of justice that tries to pin down the principles of social cooperation and distribution is the possibility of justifying punishment as a cooperation-enhancing device. To put it in Rawls's own terms:

[W]e need an account of penal sanctions however limited even for ideal theory. Given the *normal conditions of human life*, some such arrangements are necessary. [...] the principles justifying these sanctions can be derived from the principle of liberty. The ideal conception shows in this case anyway how the nonideal scheme is to be set up; and this confirms the conjecture that it is ideal theory which is fundamental. We also see that the principle of responsibility is not founded on the idea that punishment is *primarily* retributive or denunciatory. Instead it is acknowledged for the sake of liberty itself. Unless citizens are able to know what the law is and are given a fair opportunity to take its directives into account, penal sanctions should not apply to them. This principle is merely the consequence of regarding a legal system *as an order of public rules addressed to rational persons in order to regulate their cooperation, and of giving appropriate weight to liberty*. [...] [I]deal theory [*m.n.* like his] requires an account of penal sanctions as a *stabilizing device* and indicates the manner in which this part of partial compliance theory should be worked out. (1971, 212; emphases added)

While the above consideration deserves extensive discussion, I think that it is enough to underline that Rawls is interested in a particular aspect of punishment, i.e. the possibility of punishment working in the direction of social cooperation. If the penal institution were unable to perform its deterrent, cooperation-enhancing function, then there would be no possible justification for it from the standpoint of a theory of distributive justice. But this does not seem right from the point of view of a theory of criminal justice proper: if punishment is to be justified in the eyes of the judge, the penal administrator, the victim, the offender, and, to a larger extent, to the public, social cooperation does not appear to be the appropriate sort of reason for its justification. One cannot say to the offender: "You are being punished for the sake of social cooperation." The very idea of punishment would then lose its specificity. A theory of *distributive* justice is not, however, concerned with the specifics of punishment. It only addresses punishment from an external, distributive perspective.

These two considerations concerning the relation between the concepts of retributive and distributive justice are preliminary to a more central point I would like to make in relation to the strong proceduralist thesis. The main idea here is that pure procedures – to the extent that they can be embraced by anyone in the absence of any previous institutional commitment – are required to fulfill a specific justificatory role. They are supposed to point the way toward finding the *principles of justice* that should regulate a society as a whole, that is, a society as viewed from the basic structure standpoint. In other words, the *raison d'être* of a pure proceduralist conception of justice is "to establish a suitable connection between a particular conception of the person and first principles of justice, by means of a procedure of construction" (Rawls 1980, 516). Pure proceduralism looks for the principles that are logically prior to any institutional engagement. It asks: what are the principles that a rational, morally competent individual should commit to without having yet committed to anything else? Pure procedures in general – and the original position in particular – are mechanisms that are meant to lead to a consensual answer to this question. This implies that, when a pure procedure is applied, there are no already given moral or political principles that might guide its application. To quote Rawls, once again:

Pure procedural justice in the original position allows that in their deliberations the parties are not required to apply, nor are they bound by, any antecedently given principles of right and justice. Or, put another way, there exists no standpoint external to the parties' own perspective from which they are constrained by prior and independent principles in questions of justice that arise among them as members of one society. (523-24)

This assertion can be interpreted in two possible ways when it comes to theorizing procedures that are pertinent to criminal justice. First, if one agrees that it makes no sense to say that there are pure procedures when a criterion of justice has already been posited, then one would also have to accept that the principles that are the result of the application of the pure procedures are sufficient for the regulation of the criminal justice institutions.

However, this might prove to be normatively deficient in two ways. On the one hand, although the principles that are reasonably agreed to by means of pure procedures concern the penal institution, they only do so from the limited perspective of social cooperation. But, as already indicated, this seems to miss the particular normative logic of punishment. On the other hand, the legal procedures Luban and others like him might have in mind when advancing a strong proceduralist thesis are not procedures oriented toward the consensual identification of potential principles of justice. If anything, the contrary: they are devised according to a series of already-existing moral and political principles. The right not to incriminate oneself or the beyond any reasonable doubt standard are rather expressions of principles than ways to lead to the identification of such principles. More specifically, legal procedures are oriented toward forming judgments and not toward locating generally valid, pre-institutional principles.

The second way to interpret Rawls's assertion in conjunction with the strong proceduralist stance is, to a certain extent, a thought experiment. Let us suppose, for the sake of the argument, that criminal justice *could* be considered as all there is to the basic structure of a society. This is the only logically possible way, to my mind, in which one could apply pure proceduralism in order to justify criminal justice. If pure proceduralism depends on the absence of previous institutional or moral commitments, then the only way to justify criminal justice from a pure proceduralist perspective is to narrow down the basic institutional structure to the institution of punishment, thus rendering impossible the existence of *distinct* institutional commitments. This implies that there would be a single component of the basic structure, i.e. the practice of punishment.¹⁰ This would be morally appalling, to the extent that it implies that the main justification for the existence of a society is the punishment of its individuals. To the question "What justifies the existence of a society?" from a justice standpoint, the pure proceduralist's answer available from a criminal justice perspective would have to be "The punishment of the members of that society."¹¹ This, however, hardly sounds like a moral principle that would meet the consensus of the representative parties engaged in the application of pure procedures. Pure proceduralism in matters of criminal justice carries, therefore, either conceptual confusions, like in the first interpretation of the strong thesis, or strongly objectionable moral consequences, like in its the second interpretation.

III. PROCEDURES AS NORMATIVE GUIDING DEVICES

The upshot of the above discussion is that the justification of criminal justice and criminal trial decisions cannot be completely made in proceduralist terms. Procedures are

10] Note how this contradicts the very logic of the basic structure, i.e. its *systematic* character.

11] This hypothesis is alluded to by Rawls himself: "for a society to organize itself with the aim of rewarding moral desert as its first principle would be like having the institution of property in order to punish thieves." (1971, 275)

not sufficient justificatory devices as far as criminal justice is concerned. Proceduralism, therefore, is not a tenable theoretical option for approaching criminal justice. This does not mean, however, that procedures have *no* justificatory role to play. What criminal law procedures can provide us with in matter of justification are two things. First, they allow us to recognize particular decisions as being distinct criminal justice decisions, as opposed to arbitrary or purely intuitive ones. Second, juridical procedures offer the infrastructure of subsequent legal and moral justificatory talk.

This sends me back to Rawls's distinction (1955) between the summary view and the practice view of rules. In the summary view of rules, says Rawls, rules are seen as way of capturing and condensing past experience in the form of general, rule-like statements. Rules are, on this account, considered to be useful, to the extent that they represent decisional shortcuts: based on past experience, they are means of increasing the likelihood of reaching the correct decision in a shorter amount of time.

Conversely, in the practice view of rules, rules are not past experience precipitates; rather, they are what constitute and *define* a practice, generally speaking. Unlike the summary view conceptions, rules are, in the practice perspective, logically prior to any particular case. Thus,

given any rule which specifies a form of action (a move), a particular action which would be taken as falling under this rule given that there is the practice would not be described as that sort of action unless there was the practice. In the case of actions specified by practices it is logically impossible to perform them outside the stage-setting provided by those practices, *for unless there is the practice, and unless the requisite proprieties are fulfilled, whatever one does, whatever movements one makes, will fail to count as a form of action which the practice specifies.* What one does will be described in some other way. (1995 25; emphasis added)

Rules, on this second approach, are what enable us to recognize specific actions as part of more general practices. Legal procedures in general and criminal law procedures in particular are rules that can be fruitfully interpreted from the practice view as rules constitutive of criminal justice practices. They are rules that allow us to recognize, in particular cases, whether we find ourselves or assist to the practice of justice. An action that does not follow the procedures of criminal law is harder to qualify as belonging to criminal justice. Take the example of reaching a verdict by inspecting the liver of a sacrificed sheep *instead* of applying the beyond a reasonable doubt standard. Certainly, we would have trouble in identifying this particular action as belonging to the criminal justice practice as we currently understand it. Legal procedures, therefore, are what allow us, at any given time, to recognize, by their application, the fact that a particular action belongs to a specific practice. They play, at a certain level, the same role as the Hartian rules of recognition (Hart 1961).¹² The existence and the application of criminal law procedures

[2] What I want to suggest here is that, much like law is impossible in the absence of the secondary-order rules of recognition, the practice of criminal justice is not possible in the absence of legally defined procedural standards.

thus play an identification and guiding function: they tell us whether X or Y is a criminal justice decision or not. They do not, however, guarantee that X or Y is a successful, that is, right criminal justice decision.

Legal procedures are, second, more than recognition devices. As far as recognition function goes, Rawls gives the example of games:

If one wants to play a game, one doesn't treat the rules of the game as guides as to what is best in particular cases. In a game of baseball if a batter were to ask "Can I have four strikes?" it would be assumed that he was asking what the rule was; and if, when told what the rule was, he were to say that he meant that on this occasion he thought it would be best on the whole for him to have four strikes rather than three, this would be most kindly taken as a joke. One might contend that baseball would be a better game if four strikes were allowed instead of three; but one cannot picture the rules as guides to what is best on the whole in particular cases, and question their applicability to particular cases as particular cases. (1995, 26)

Sure enough, some of the criminal law procedures work like the three-strike rule in baseball. This is particularly the case of procedural rights like the Miranda rights and the right to appeal. Not all criminal law procedures, however, are procedural rights.¹³ Furthermore, procedural rights can be reformulated, amended or replaced by more fair ones.

The practice of punishment and the role of legal procedures within it do not entirely match a baseball game from a justificatory perspective. In a game, procedures are more clear-cut than in a criminal trial. The three-strike rule is both easier to apply and more straightforward than the right to remain silent rule. Furthermore, when asked to justify a particular judicial decision, we do not justify it on account of a particular procedure *only*. We do not punish an accused individual in the same way we eliminate a baseball player from the field. A particular judicial verdict is not justified *because* a procedure has been applied. Rather, it is not unjustified to the extent that the existing procedures have been properly applied. When justifying a verdict, we need something more than procedural reasons. As Stanley Cavell aptly argues,

If it is ever competent to raise a question to whether a given person, or any person, ought to be punished [...] then *it cannot be morally answered by referring to the rules of an institution*. [...]. One may, of course, refer to the rules of an institution in one's defence; the effect of that is to refuse to allow a moral question to be raised. And that is *itself* a moral position; the effect of that is to refuse to allow a moral question to be raised. (1979, 303)

Legal procedures, then, could be construed as appropriate starting points for normative talk and not as devices for closing – and allegedly solving – the justificatory debate. Unlike pure procedures, they offer us with the initial normative platform for theoretical and moral discussion.

[13] One good example of criminal law procedures that are not *completely* captured by the concept of procedural right is evidence procedures, especially in their scientific and technical dimension.

Rawls himself seems to concede that the rules and procedures that form an institution can be used as starting points for theorizing about future possible rules. He distinguishes between the constitutive rules of a practice and “strategies and maxims for how best to take advantage of the institution for particular purposes” (1971, 49). These latter ones form the stuff of non-ideal theorizing about institutional practice.

Thus, when it comes to non-ideal theory, the starting point is given by existing institutional procedures and the goal is a normative analysis in terms of morally, politically and epistemically more suitable alternatives to them. Conversely, in ideal theory, we start with meta-ethical and meta-institutional procedures, such as the original position device, and end with principles for *definitively* regulating existing institutional practices.

What is needed, as far as the non-ideal theory of criminal justice procedure is concerned, is an empirically rich basis that would allow us to theorize about procedure in terms of optimizing policy strategies and refining moral standards. This is the point where a Rawlsian-like perspective rejoins the non-proceduralist lawyer in thinking about criminal law procedure, in that they both require a thick comparative basis to criminal justice procedures.

IV. CONCLUSION

My intention here was to parallel the legal objections to the strong proceduralist thesis with a more detailed theoretical account of the latter’s conceptual and normative pitfalls. I did so by criticizing the logical impossibility and moral unacceptability of a pure procedural theory of criminal justice and of global/international criminal justice in particular. Two corollaries stem out of this double critique. First, since criminal justice cannot be analyzed other than a form of imperfect procedural justice, there is a need for reflecting upon and designing some sort of meta-procedure able to manage and assess the inevitable procedural imperfections contained within the current criminal justice systems. Second, political theorists will have to stand up from the armchair of ideal theory and immerse themselves into a series of comparative normative examinations of the existing procedures and try to imagine and think inventively about the possibility of new ones. When it comes to criminal justice, what is needed is not a theory of the procedurally pure, but rather an account of the procedurally imaginative.

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