Impure procedural justice and the management of conflicts about values

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Abstract

The aim of this work is to outline the essential structural traits that a procedural theory of justice for the management of conflicts about values should display, so as to make sense of substantive pluralism. To this purpose, it critically considers Rawls's taxonomy of proceduralism, in terms of perfect, imperfect and pure procedural justice. Given the concessions the two former kinds of proceduralism make to substantive theories, and the dubious characterisation Rawls gives of pure procedural theories of justice, it reformulates the latter category in terms of impure proceduralism. In this case, the theory is required not to pose substantive constraints on the definition of just states of affairs, but is, rather, expected to provide an account of the essential features of a just procedure based on an independent criterion of justice.

1. Introduction

This work is a contribution to the debate about pluralism and questions of justice. In particular, it aims to outline the essential structural features that should characterise a theory of procedural justice for the management of conflicts about values, in circumstances of substantive pluralism. Before proceeding to outline the structure of the work, let me start by clarifying the use I make of such key concepts as pluralism, conflict management and procedural justice. This will be particularly helpful so as to cast some light on a few terms around which much of the contemporary debate in political theory revolves.

The main circumstance of justice on which this work builds is substantive pluralism. This is conceived in terms of the acknowledgement of the presence of a plurality of conceptions of the good, views of the world and related values, which are held by different agents within the same communities[1]. In this I endorse a basic understanding of value as something that gives meaning to a person's life and that one prefers to realise. In this sense, a view of the world that draws on some particular value expresses a normative commitment to the attainment of a state of affairs in which such value is realised. It is precisely in this respect that the kind of pluralism I build on is defined as substantive: it involves different values that qualify certain states of affairs as good and desirable.

However important this idea of pluralism may be, I do not intend engaging with pluralism as such, nor do I aim to concentrate on theories of pluralism and plural values. My focus is, rather, on the conflicts about values that may arise in a context characterised by the presence of a plurality of substantive worldviews. Specifically, if, on the one hand, pluralism as such only implies, in my view, the acknowledgement of the presence of a disagreement among agents holding diverse values, conflicts, on the other hand, may be seen to occur when such different values cannot be simultaneously realised, i.e. when agents hold "incompossible" values. It is my contention that an appropriate normative answer to this kind of situation is the definition of a theory of justice for the management of conflicts which is capable of saying something relevant for a variety of contexts – despite their substantive differences. Let me add that, in my view, managing a conflict means constructively addressing it, preventing it from turning into violence and setting favourable conditions for its resolution. Therefore my aim here is to suggest a characterisation of the structural features that a theory of justice should display in order to provide some guidelines for addressing value conflicts in a constructive and just way. Moreover, it should be noted that I do not intend working on the substantial details that should characterise a theory of this sort, nor am I committed to suggest a specific principle of justice. My intention is, rather, to concentrate on the *structure* and *scope* of such a theory so as to identify the model of justice that better suits the conflict management enterprise.

I contend also that a theory of this sort should be procedural in structure and minimal in its assumptions and in the values it endorses[2]. As it is well-known, a theory is procedural when it does not found its conception of justice on the substantive characterisation of a just state of affairs, but rather bases it on the outline of the features that characterise a procedure of interaction as just. Given the heterogeneity of the situations this work is concerned with, it seems impossible, in my view, that a theory could define what a just state of affairs consists of, abstracting from the specific contexts in which a conflict is situated. However, as far as I can see, this in no way implies that theorists should throw in the towel, and leave all considerations to contextual evaluation. If a theory aspires to be transcontextually applicable (as I think it should do), it needs to leave the task of defining the substance of just states of affairs to the agents involved in conflicts, providing them with a procedural guideline about the way they should interact to constructively address their disputes in a just way. Moreover, given the circumstances of substantive pluralism on which this work builds, I also contend that a theory of procedural justice of this sort should be minimal in its assumptions and in the values it refers to. This last trait is essential, in my opinion, to understand the relevance of pluralism in the definition of a theory. Considering the variety of substantive views

of the world and related values that characterises present-day communities, any theory that wants to be widely acceptable should not draw on specific substantive values, nor should it be the expression of a particular view of the world or conception of the good. Given the controversial status that applies to matters of substance, a theory that draws on them is destined to be controversial and rejected by all those who do not share that specific value – or view – on which the theory builds. Hence, the need to outline a theory that is minimal – i.e. that assumes as little as possible – so as to make it acceptable to a number of different agents.

Bearing in mind the circumstances of substantive pluralism brought to light above, together with the case for a theory of justice for the management of conflicts about values that is both procedural and minimal, my aim in what follows is to make a case for what I shall call an "impure" approach to procedural justice. To this purpose, I start by critically assessing John Rawls's characterisation of different kinds of proceduralism, in terms of perfect, imperfect and pure procedural justice (§2, see Rawls 1971). In so doing, following a well-known line of criticism[3], I contend that perfect and imperfect models of proceduralism concede too much to substantive approaches in their envisaging what a just state of affairs consists of before the definition of a just procedure. Accordingly, the analysis is shifted to pure procedures of justice. Through reference to pure proceduralism, Rawls presents us with a genuine case of procedural justice. However, before unconditionally adopting this model, I contend that in fact there are no such things as entirely pure procedures, since the reference to a criterion of justice is necessary if not to define what a *just state of affairs is*, at least to define what a *just procedure is*. Accordingly, I reformulate such a category of justice in terms of impure proceduralism. The choice of the adjective "impure" here underlines that procedures are not self-sufficient, but rather need to be based on some ideas and criteria that qualify them as just.

2. Perfect, Imperfect and Pure Procedural Justice

As anticipated above, in *A Theory of Justice* (Rawls 1971), John Rawls investigates the idea of procedural justice providing a description of three different forms it may take in terms of perfect, imperfect and pure procedural justice[4]. In what follows, I take these versions of proceduralism in turn so as to single out the most suitable model to follow for the development of a structural definition of a theory of procedural justice that serves my interest in the management of conflicts about values. Let me now begin with the presentation of Rawls's taxonomy[5].

2.1

In the case of (a) *perfect* proceduralism, a criterion to define the just outcome of a dispute is given before – and independently of – the definition and application of the procedures that will lead to it. Accordingly, procedures are devised to attain a particular state of affairs that is already envisaged and pursued as just. To illustrate this conception of justice, Rawls provides this example:

> "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 himself the largest share possible" (Rawls 1971, p. 85).

According to (b) an *imperfect* conception of procedural justice, an independent criterion to define what a just state of affairs consists of is similarly endorsed before the actual beginning of the interaction among the parties to a dispute, but there are no guarantees that a specific procedure to reach this can actually be devised. Rawls exemplifies this conception of justice through reference to a criminal trial:

> "The desired outcome is that the defendant should be declared guilty if and only if he has committed the offence 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" (Rawls 1971, p. 85).

Within (c) a *pure* procedural conception of justice, instead, there are neither substantive constraints nor an independent criterion to define *a priori* what is a just state of affairs. Just procedures must actually be carried out before any trait of the substance of a just state of affairs becomes knowable. Such a conception of pure proceduralism is illustrated by Rawls by means of a situation of gambling[6]:

> "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" (Rawls 1971, p. 86)

As anticipated above, (a) and (b) offer a definition of justice that draws on the reference to a certain state of affairs that is considered just. In this case, principles of justice command the adoption of a certain procedure precisely in light of the possibility to achieve the just outcome, which is previously defined and is independent of the procedure itself. Moreover, in the case of *perfect* proceduralism, the definition of a procedure to achieve a given outcome is accompanied by the guarantee of its actual realisation; this means that once agents are given a perfect procedure of justice, they are aware of the fact that through its application they will certainly reach the just outcome, which is already known to be just in light of the conception of justice proposed by a certain theory. Despite the similarity in structure, such guarantee cannot be given in the case of

imperfect proceduralism, where procedures cannot give any assurance about their actually leading to the just outcome. In order to have a clearer picture of this characterisation in relation to a context of conflict management – which is what I am concerned with – let me introduce an example. Within a school, the teachers sitting on the school board are supposed to decide what subject-area needs to be reinforced through the allocation of the yearly budget. They disagree on the decision to be made since they endorse different values which cause them to support different views. In particular, in the face of the allocation of resources, the realisation of their values is incompossible, since only one subject area can be chosen, and, accordingly, only one value can be realised. According to perfect and imperfect approaches to procedural justice, the teachers should be given a procedure to follow in order to deal with their dispute, aiming at the realisation of a state of affairs that is already known to be just. A just state of affairs – i.e. a state of affairs in which the conflict is justly managed – may be seen, for instance, to be one that is consistent with, and accords a particular relevance to the tradition of the school. Once a criterion of this kind is given, a procedure can be defined to realise it, for example by allowing the point of view of the oldest member of the school to have a special relevance, assuming that according to his/her view a special significance is the best way to respect the tradition of the school itself. A procedure of this kind may be one that accords one vote to every teacher, whereas the oldest member's vote is worth the double than the others', or – say – one that establishes that the oldest teacher always has a right to speak and make his/her case, whilst the others can do so only according to a well-defined rota. The teachers in this way are given a procedure that is capable of leading them to the achievement of an outcome that will be judged just in the light of the definition of a just state of affairs that is provided by the theory (i.e. one that is consistent with the tradition of the school)[7]. Here, it is evident that procedures only play a marginal and instrumental role. The definition of justice is indeed built on substantive terms in light of the realisation of a state of affairs that is recognised as just, independently of the procedure that will lead to its realisation. Such a procedure is followed not because it is thought to be just as such, but as an instrument to reach an outcome that is thought to be just in itself. Now, as it is well known, the main problem with these theories of procedural justice resides in the concessions they make to substantialism[8]. In accordance with the definition of proceduralism I proposed at the beginning of the paper, a theory of justice is procedural when it proposes principles that do not define what is a just state of affairs, but rather that canvass what is a just procedure. In the case of perfect and imperfect procedural justice it is certainly possible to find a definition of a just procedure, however such definition is built in view of the achievement of a particular state of affairs. In proposing a definition of justice that draws on the characterisation of just states of affairs, perfect and imperfect procedural theories accordingly become vulnerable to

the same criticism that can be moved against substantive theories of justice, as regards the impossibility for a theory to predict what is a just state of affairs in transcontextual terms, given the heterogeneity of the situations we are looking at. In our example, there seems to be no transcontextually applicable reason in support of the claim according to which a procedure that accords a special relevance to the viewpoint of the oldest member of the school is just. This seems to impose a significant limit on the applicability and the relevance of this conception of justice to a different context (e.g. a context where the considered school is a new one and where it makes no sense to turn to tradition). This appears to be a sufficient grounding to make perfect and imperfect proceduralism unsuitable as models for the structural definition of a theory of justice of the kind I am interested in. Hence the need to abandon these accounts of justice in favour of one that concentrates on procedures alone in terms that are general enough to be adoptable by different agents within different contexts.

2.2

Pure proceduralism (c) offers, instead, a very open-ended model of justice. No substantive constraints are placed on the acceptability of the outcome apart from the correct application of the procedure that led to it. In other words, principles of pure procedural justice do not offer any characterisation of the features a just state of affairs should display, but rather only focus on just procedures. Any state of affairs deriving from their application will accordingly be viewed as just, independently of the substantive features it may happen to display. Accordingly, the reference to procedures is not instrumental to the achievement of a just outcome. Procedures have instead gained a central function in the articulation of a definition of justice. At a first glance, this characterisation of pure procedural justice – as a genuine model of proceduralism – seems to make it a good candidate for the development of a theory of procedural justice for the management of conflicts about values, of the kind I am interested in. Unfortunately, in my view, Rawls's formulation of pure procedural justice in the gambling situation is somewhat vague. Literally, following the indications given by Rawls, we would be led to think that *any* procedure that is recognised as just will yield just results. Such a characterisation is certainly successful in highlighting one of the essential aspects a theory of procedural justice should display, that is the absence of all substantive commitments defining what counts as a just outcome. However, I repeat, if followed to the letter, it seems rather unsatisfactory since it may be seen to suggest that the way the procedure is defined is utterly contingent and relative to the context that is considered. This line of reasoning does not even seem to be invalidated by Rawls's specification according to which the attribute fair is assumed to imply that "fair bets are those having a zero expectation of gain, that the

bets are made voluntarily, that no one cheats and so on" (Rawls 1971, p. 86). Despite this explanation, Rawls immediately adds that in any case "the background circumstances define a fair procedure" (Rawls 1971, p. 86), thus reinforcing the supposition that agents can hardly be given guidelines to define how a just procedure should look like outside specific contexts. If we follow this line of thought to its farthest consequences, theory here seems to be left with a very modest role. The agents appear to be left without any general indication either as to what is just, in substantive terms, or what represents a just procedure outside specific contexts. The supposition that Rawls's account of pure procedural justice, as he seems to phrase it, is in fact widely open to contingencies is also supported by such words as these:

> "Pure procedural justice means that in their rational deliberations the parties do not view themselves as required to apply, or as bound by, any antecedently given principles of right and justice. Put another way, they recognise no standpoint external to their own point of view as rational representatives from which they are constrained by prior and independent principles of justice" (Rawls 1993, p. 73).

This passage seems to convey the idea that just procedures of deliberation are fully independent of any external criterion and are left to the parties and their contingent interaction. In my view, this approach to proceduralism – as long as it is couched in these terms – is too vague, since it leaves too many elements to the contingent evaluation of different particular cases and circumstances. However, such a characterisation of pure proceduralism seems to be the only one that is capable of properly expressing the essence of the *purity* of procedures, in virtue of the total absence of a normatively supported criterion, in light of which to define both the substantive features of a just outcome and the essential traits of the procedure itself.

In stressing the absence of an independent criterion for the definition of what counts as a *just outcome*, pure proceduralism seems to overlook the role of the reference to an independent criterion of justice for the definition of what counts as a *just procedure*. However, as far as I can see, from this last perspective there are no such things as *entirely* pure procedures. What I am trying to suggest here is the inevitable need to make reference to a criterion of justice, which is external to the specific procedure, and that can ground it, support its adoption and qualify it as just. A procedure lacking reference to such an external criterion would be utterly exposed to contingency. In a nutshell, this means that any procedure that might be contingently recognised as just, within a given context, would consequently be thought of as capable of leading to just results: the example of a Nazi-inspired procedure of "preservation" of the integrity of the Arian race – which was certainly recognised as just by its proponents – is the first case that comes to mind here as an

extreme example of a procedure that, despite its being contingently *recognised* as just, can hardly be thought to be such in transcontextual terms. Hence the necessity of a change of route for a procedural theory of justice that wants to have something significant to say about the definition of just procedures at a transcontextual level. I suggest that a procedural theory of this sort should certainly maintain its purity as to the absence of an independent criterion for the definition of just outcomes. But it should also assume a commitment to an idea, which is to be normatively singled out by theory, for the definition of what counts as a just procedure in transcontextual terms. Carefully looking back at Rawls's proposal, I consider this is indeed what Rawls himself may have had in mind in his characterisation of pure proceduralism. This is clearly visible in his proposal of justice as fairness (a part from the arguable fact that Rawls has actually been successful in the definition of a genuinely procedural proposal) where the details of a fair procedure are carefully spelled out through the device of the original position, and are by no means left to contingency. But this is also evident in the fair gambling situation; the example seems to work only if we think that agents are given a definition of what counts as a fair bet – possibly in terms of rational choice, or in view of a procedure whereby all the parties are entitled to expect an equal probability at being the winner[9]. Anyhow, such a definition would be independent of the procedure and constitute the basis for the definition and defence of the procedure itself. Consistently, if we accept the need of reference to an external criterion to define the essential traits of a just procedure, the characterisation of a procedural theory of justice of this sort as *pure* seems incorrect and misleading. If procedures can be pure in relation to the definition of a just outcome (thus parting company with perfect and imperfect proceduralism), they cannot be equally pure in relation to the definition and support of their essential traits, which are always dependent on some criterion that qualifies their being just.

Now, we could certainly go on referring to this category of procedural justice as 'pure', always being careful to point out the limited scope of its purity. However, I contend that this would be unnecessarily misleading and possibly lead to a certain degree of vagueness of interpretation. Therefore, I suggest the need to enhance Rawls's model through a redefinition of pure proceduralism, thus abandoning the attribute 'pure' in favour of a more appropriate characterisation in terms of *impure* proceduralism. This latter embodies, in my view, the best approximation to the idea of purity that I suspect Rawls himself had in his mind. If we want to remain faithful to the purity of the procedure, as far as the absence of an external criterion that defines what counts as a *just state of affairs*, this does not have to imply that we may not make reference, instead, to a fundamental idea on the basis of which we can provide a transcontextual definition of what makes a

procedure just, independently of the contingent outcomes to which its application may lead. Reference to the outcome is in this case utterly redundant to the definition of what is just. Specific outcomes only represent contingent upshots in the face of specific issues. Here justice is to be found in the way specific procedures were devised. To illustrate this idea, our school-board meeting example can be called to mind. In view of the characterisation presented above, let me recall that the teachers are gathered to decide which subject-area needs to be strengthened by means of the allocation of limited resources. They disagree on the decision to make since they endorse different values that lead them to support different views. Facing this situation, according to an impure account of procedural justice, the teachers can be given some normative indications on the way they should proceed in order to constructively address their conflict. Such procedural indications are not suggested in view of the possible realisation of a state of affairs that is viewed as just (as in the case of perfect and imperfect procedural justice), nor are the teachers left to themselves to define what a just procedure may be in their particular circumstances (as an entirely pure procedural approach may suggest). The teachers are, rather, given procedural guidelines that are thought to be just in view of a criterion that is transcontextually applicable. Just procedural guidelines of this sort can, for instance, draw on a certain understanding of equality, endorsed not as a feature of a just state of affairs (e.g. the outcome of a procedure of this kind needs to reflect equally the views of every teacher), but as a requirement that a just material procedure should display (e.g. a procedure of discussion that allows all the teachers an equal amount of time to make their case). Once a specific procedure is devised on the basis of such general indications, whatever outcome emerges from their application will be just because it derives from the application of procedures that are just. Here, the difference between an impure procedure of justice and a perfect/imperfect procedure of justice emerges quite clearly. It is the difference between a procedure that is just since it displays a certain feature (e.g. it is equal), and a procedure that is just since it leads to a just state of affairs (e.g. one that is consistent with the tradition of the school).

4. Conclusion

Through analysis of John Rawls's characterisation of perfect, imperfect and pure procedural theories of justice, I have tried to make a case for a re-reading of Rawls's characterisation of the latter model of justice in terms of impure proceduralism. In doing this, what I have offered is not, accordingly, a new category of justice to be added to Rawls's, but rather a reformulation of Rawls's pure conception of proceduralism. Since – as I have argued – there cannot be *entirely* pure procedures, I suggest it is less misleading to abandon this unclear formulation and to clearly reveal the impure nature of a commitment to a grounding value. According to an impure understanding of

procedural justice, no external criterion is given to define what is a just state of affairs – as was the case with perfect and imperfect procedural theories of justice – but there is a criterion that is introduced as the basis for the definition and support of the procedure itself.

There may be a variety of versions of impure proceduralism, since *any* theory that provides a definition of what counts as a just procedure in light of some value, without any determination of what counts as a just state of affairs, can certainly be viewed as a theory of this sort. However, the version of impure proceduralism I believe is needed in order to fulfil the conflict management enterprise should be characterised, in particular, by its seeking to be as inclusive as possible, and sensitive to substantive pluralism, as the main circumstance of justice where significant conflicts about values may arise. Put another way, a theory of justice for the management of conflicts about values is to be characterised in *impure procedural* and *minimal* terms. In brief, it has to be a theory that assumes as little as possible, and that considers what it nonetheless assumes to be of use for the definition of just procedures, preserving an open-ended nature in the development of specific material procedures and states of affairs. However, the development of a theory of this sort will be the task for another more extensive work.

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[1] On this basis, I refuse all normative implications related to the notion of pluralism as a theory on the plural nature of the sources of values (see Berlin 1991). I, rather, endorse what Glenn Newey has defined as "actual pluralism" (see Newey 1997), emphasising the descriptive nature of the acknowledgement of the presence of a plurality of conceptions of the good and values, 'regardless of whether there is in fact a single homogeneous good, or whether the conceptions form a hierarchy'' (Newey 1997, p.307).

[2] I have made an extensive case in favour of adopting a procedural structure for theory of justice for the management of conflicts about values elsewhere, see Ceva 2004.

[3] On this see, among others, Rosenfeld 1998.

[4] Rawls also hints to a quasi-pure conception of justice. In this case, what is just is derived from a set of principles that are defined by a constitution whose scope identifies the range of legitimate variations of the very idea of justice. In Rawls's words, 'laws and policies are just provided that they lie within the allowed range' (Rawls 1971, p.201) authorised by the constitution. However, I will not directly address this model since its consideration would not add anything significant to the point I try to make in this work.

[5] For a presentation of Rawls's characterisation of perfect/imperfect and pure procedure justice see also Rosenfeld (Rosenfeld 1998) where these two families of theories of procedural justice are labelled respectively in terms of 'derivative proceduralism' and 'primary proceduralism', in accordance with the presence or absence of a criterion external to the procedure that defines what is a just state of affairs.

[6] To simplify the exposition, I shall consider here as a case of pure procedural justice only Rawls's example of the gambling situation. In fact Rawls goes on suggesting that his theory of justice as fairness is a case of pure proceduralism. In this work, I am not interested in trying to establish whether Rawls's theory is actually meant to be a

pure procedural case of justice as he claims. It will suffice here to suggest that the theory of justice as fairness looks more like a case of perfect procedural justice, since its definition of a just procedure (in terms of the original position) is in fact a device to justify *a posteriori* two substantive principles that are proposed and endorsed by the theorist independently of any procedural justification (see on this Veca 2002, pp. 55-57). But, as I said, it is not my concern here to go into the details of such an issue. I focus instead on the example Rawls provides when introducing his ideas (i.e. the gambling situation) since it captures the spirit of Rawls's characterisation of pure procedural justice well enough.

[7] I make use here of the same example for both perfect and imperfect cases of procedural justice, since what is relevant to the point I am trying to make is not the presence or the absence of a guarantee to achieve the desired outcome but rather the presence of a definition of what is a just state of affairs before the development of a procedure.

[8] As Rosenfeld writes, perfect and imperfect proceduralism 'is not genuine proceduralism but rather substantive theory in procedural garb' (Rosenfeld 1998, p.300).

[9] See on this Rosenfeld 1998, p.297.