Comments on Ceva: Just Procedures with Controversial Outcomes

Ceva's main aim in her paper is to defend an entirely procedural theory of justice against the allegation that it encounters a problematic dilemma: either controversial outcomes cannot be disputed because they have been produced by a just procedure, or if certain outcomes are ruled out by virtue of their "inherent qualities" the theory of justice is not entirely procedural. She translates this dilemma into the need to meet two challenges: first, that an entirely procedural conception of justice entails an "anything-goes" attitude towards justice, and second, that it condemns agents to a "deaf and blind" acceptance of any outcome. [I'm not exactly clear on whether these two challenges are meant to coincide with the two horns of the dilemma with which Ceva begins. The first challenge clearly maps on to the first horn of the dilemma, but I'm not sure whether the second challenge is also meant to map on to the first horn of the dilemma, or whether it is meant to be a restatement or entailment of the second horn.]

Ceva begins her response to these challenges with a defense of what she calls impure proceduralism, according to which "justice would reside in trans-contextually applicable and justifiable properties of procedures as established by an external criterion independent of contextual contingencies" (8). So for example, someone might defend an egalitarian impure proceduralism, according to which certain egalitarian properties provide a criterion for a procedural principle of justice. Ceva gives as examples of such properties no party being prevented from speaking on principled grounds, and all voices that should be considered having the same weight. These properties (and perhaps others as well) and the criterion they constitute are external to the procedure. Hence the procedure is impure (in contrast to one plausible reading of Rawls' characterization of pure procedural justice). Since these criteria constrain the form that a procedural principle of justice may take and still qualify as an egalitarian principle of justice, it is not the case that in defending an entirely procedural conception of justice Ceva is committed to an "anything goes" approach to what counts as justice.

One important upshot of Ceva's impure proceduralism is that it provides the basis for an account of how agents might challenge the outcome or result produced by a given institution without having to appeal to an account of justice that includes substantive claims – claims that, as an advocate for an entirely procedural conception of justice, Ceva wants to rule out. Specifically, agents might challenge the degree to which the institution in question realizes an impure procedural principle of justice – for instance, an egalitarian principle – or they might challenge the institution's application of the egalitarian principle it does realize to a particular case. Presumably in cases where the first type of challenge is justified, every matter to which the institution speaks will be tainted, i.e. unjust, to some extent. In cases where the second type of challenge is justified, the injustice may be the result of the institution's blindness to some contingent factual matter that arises only with respect to some but not all of the matters to which the institution speaks, and in light of which the institution fails to realize egalitarian procedural justice. Ceva gives a fascinating example of such a case involving the Italian state's treatment of non-Catholic religious groups. The procedure set out for establishing the terms on which such religious groups and the Italian government are to relate to one another seem

impartial but in practice they favor hierarchically organized and institutionally structured religions over those that lack these properties.

Note that outcomes are not irrelevant to Ceva's account of challenging the justice of a political institution. Their relevance, however, does not consist in a mismatch between them and some conception of justice that includes specific substantive outcomes. Rather, it consists in their serving as evidence of a political institution's failure to realize an entirely procedural conception of justice. Presumably they also serve to motivate certain agents to examine more closely the institutions (implicit) claim to realize procedural justice, and to make an effort to correct the institution's deviation from it.

Ceva presents her account of how agents might employ an entirely procedural conception of justice to challenge a particular institution's (implicit) claim to realize it in the context of the practice of civil disobedience. Civil disobedience, she points out, is commonly thought to consist in an illegal act intended to serve as part of an effort to change some existing law or policy which the civil disobedient believes to be unjust. Moreover, that effort involves essentially an appeal to the government's and/or citizenry's sense of justice – in contrast, for example, to an effort to bring about such a change through coercion or the threat thereof. But the key point is not the means by which agents challenge the justice of institutions in general or their handling of certain matters in particular – later in the paper Ceva explicitly states that she does not mean to endorse the practice of civil disobedience as a normal means for contesting the justice of political institutions. Rather, her key point concerns the grounds on which agents may advance such a challenge.

Why introduce the practice of civil disobedience, then? The answer is that it provides a useful contrast to the practice of conscientious objection. Ceva identifies two essential differences between civil disobedience (CD) and conscientious objection (CO). First, "the main difference between acts of CD and acts of CO lies in their justificatory basis. In the former case, appeal is made to shared principles of justice; in the latter, possibly controversial ethical (including religious) convictions are called upon" (18). Second, "agents engaged in acts of CD ask for the revision and renegotiation of *unjust* norms. Conversely, acts of CO are not, standardly, intended to secure a general revision of a norm. Rather, they call for exemptions from a generally valid and just norm, for certain individuals or a certain class of individuals, in light of specific ethical considerations" (18). The practice of conscientious objection suggests that even if agents have no basis in justice for challenging the outcomes of an institution (meaning that the institution fully realizes justice understood entirely in procedural terms), they may still have a basis in some other ethical value. To use Ceva's example, we can imagine a just constitution that prohibits the state from discriminating against any of its subjects on the basis of their ethical or religious beliefs. Suppose that the need arises for a universal military draft, and suppose that the implementation of such a draft is just, at least under this constitution. It follows, Ceva maintains, that a pacifist may not contest the state's demand that she serve in the military on grounds that such a demand is unjust. However, she may do so on the basis of her moral belief that killing is never morally permissible. Because this belief is not shared by her compatriots, it is "certainly not a strong enough basis for requesting a

general revision of the disputed article but there seems to be no reason to exclude them as acceptable grounds on which to seek *exemptions* from it" (20).

Ceva's conclusion, then, is that justice understood entirely in procedural terms entails neither an anything goes attitude towards justice nor a deaf and blind acceptance of any outcome. Rather, only certain procedures – namely ones consistent with particular external criteria that have trans-contextual applications – qualify as entirely procedural conceptions of justice. And the outcomes of institutions that realize some entirely procedural conception of justice may still be challenged, either on grounds that they depart to some extent from the entirely procedural principle of justice they (implicitly) claim to realize, or on the basis of some non-public ethical value other than justice.

Now to some concerns I have with Ceva's argument, starting with the claim (taken from Rawls) that civil disobedience necessarily involves an appeal to a shared conception of justice. Granted, some instances of civil disobedience are understood by those who engage in them as part of an effort to improve the congruence between the polity's public conception of justice, as (partly) represented in its constitution, and some of its laws or policies. Many of those who participated in the civil rights movement in the United States during the 1960s explicitly characterized their civil disobedience in just those terms. But it is not clear to me that every act of civil disobedience must be so characterized. For example, it seems to me that an anti-abortion protestor who engages in an act of civil disobedience (e.g. trespassing on the grounds of a clinic where abortions are performed) may be contesting what justice consists in, and not (only) the congruence between a law permitting abortion and some allegedly shared conception of justice. So while it may be that civil disobedience consists essentially in an effort to contest matters of justice, it need not invoke a *shared* conception of justice.

Second, suppose that having repeatedly engaged in legal efforts and acts of civil disobedience aimed at bringing about a change in some law or policy, all to no avail, I petition the state to grant me the status of a conscientious objector. My objection to the law is grounded in justice, not some non-public moral reason. For example, I believe that properly understood the constitutional prohibition on discrimination requires that the state ensure that the law places no greater burden on any individual's practice of his or her religion than it does for every other member of the state. A law requiring military service clearly imposes a greater burden on members of peace churches such as the Quakers than it does on members of other churches. Justice requires that the state offer Quakers (such as, let us suppose, me) alternative service – but the state has refused to do so. Having failed to convince the state or enough of my fellow citizens that the draft law is unjust and should be changed, I seek at least to be sheltered from this injustice. Am I now offering a non-public reason for my exemption? If not – if my claim is not 'God told me I may not kill, but I won't presume to say what he requires of you' – then it seems the only essential difference between civil disobedience and conscientious objection is the end sought by the agent – a change to law or policy in the case of civil disobedience, versus an exemption from law or policy in the case of conscientious objection.

Though they are at odds with claims Ceva makes in her paper, these first two concerns do not threaten Ceva's main contention since both are consistent with her primary thesis that entirely procedural conceptions of justice allow for contestation of outcomes on either grounds of justice or on other, non-public, ethical and religious grounds. My last concern may pose a challenge to part of this thesis, however.

Suppose that a conscientious objector does contest a law on grounds other than justice. How should the state respond? By hypothesis, the state is not treating the objector unjustly, and so the state cannot have any duty grounded in justice to grant the objector's appeal for an exemption from whatever law or policy she finds problematic. The state may have prudential reasons to exempt the conscientious objector – after all, who wants to go to war with a pacifist at his or her side? And, as I argue elsewhere, it may be that the state ought to be disposed to treat conscientious objectors mercifully, to the extent that it can without treating others unjustly, not because mercy is morally required but because it is a virtue that we (should) want states or state officials to display. But some might claim that since prudence and mercy leave it to the state's discretion to exempt a conscientious objector, the possibility of challenging a political institution on non-public, non-justice, grounds does little to assuage the worry that, in practice and for action-guiding purposes, agents will be condemned to a deaf and blind acceptance of any outcome produced by a procedurally just political institution. I should note, however, that I am not sure that this concern – if it is one – applies any less to at least partly substantive conceptions of justice than it does to entirely procedural ones.