

Just Procedures with Controversial Outcomes

On the grounds for substantive disputation within a procedural theory of justice*

0. Introductory.

Two people are playing tennis. Both know and have accepted the rules of the game. After several games in compliance with the rules, the match ends with the triumph of the least experienced and skilled player. Does the loser have any ground for complaining and disputing this outcome? I doubt it. The loser may blame his bad luck or lament his poor physical condition. However, provided that the rules of the game have been applied correctly, he will have no other grounds for questioning the acceptability of the outcome.

May such a procedural scheme be applied also to social and political justice? Suppose that, instead of playing tennis, the protagonists were establishing whether a pregnant woman's right to freedom of choice should trump pro-life activists' arguments against abortion. In this case, once a dispute settlement procedure had been established and applied, would everyone concede that no party has *any* grounds for complaining about or disputing the outcome? This seems, to say the least, contentious.

For this reason, procedural theories of justice are often seen as caught up in a dilemma. If they were genuinely open-ended – so one horn of the dilemma goes – they might lead to controversial outcomes which, by definition, could not be disputed, because they had been produced by a just procedure. On the other hand, if they were committed to ruling out some outcomes by virtue of their inherent qualities, their very procedural nature would be jeopardised. This translates into a twofold challenge to proceduralism, according to which it risks (i) fostering an “anything-goes” attitude

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towards justice and (ii) condemning agents to a “deaf and blind” acceptance of any outcome. In order to refute (i), I shall need to show that it is possible to construct a version of proceduralism that combines open-endedness with cogent prescriptions on justice. Addressing (ii), I shall concede that, for proceduralists, the outcomes of a just procedure cannot be disputed as *unjust*. However, this does not imply that a genuine procedural theory of justice may not allow some (admittedly limited, but still significant) space for contesting the substance of outcomes on the ground of *values other than justice*.

The underlying idea should be familiar to supporters of liberalism: although a well-ordered society should be structured on a shared conception of justice (which, according to proceduralism, is to be conceived as a virtue of procedures), it should be verified that this is congruent with citizens’ other ethical and/or religious commitments. It is precisely on such grounds, it will be argued, that exemptions from just laws may be requested and conceded, as a means to increase the congruence between someone’s commitments to justice and her (potentially controversial) “non-public” values.

In support of this qualified defence of proceduralism, a working characterization of what I deem to be a promising model of procedural justice will be developed, building on John Rawls’s (in)famous conceptualisation of perfect, imperfect and pure procedural justice (§2). To overcome the pitfalls of these accounts, I shall sketch an “impure” version of proceduralism, aiming to combine structural cogency with an unchanged commitment to open-endedness (§3). This will provide the starting point for studying the scope for substantive disputation within a procedural theory of justice. In pursuing this aim, I shall concentrate on two forms of political contestation: civil disobedience (§4) and conscientious objection (§5). I shall suggest that, while the former concerns outcomes derived from unjust procedures, the latter has to do with the

incongruence of some inherent quality of a certain outcome with other non-public value commitments held by the agents concerned. Thus, acts of conscientious objection seem to reveal grounds on which procedurally just outcomes could be disputed, thereby contributing to clarifying the sense in which the endorsement of proceduralism may be consistent with the commitment to realising *certain* outcome-oriented values.

1. Preliminary qualifications.

1.1

In order to restrict my area of concern, a couple of qualifications are in order. In the first place, the question I am committed to addressing does not boil down to the familiar question of political compliance (i.e. do I have an obligation to comply with a norm that I deem either unjust or incongruent with my own ethical beliefs?). Although similar, the question in which I am interested does not ask what reasons might be given to a citizen to conform to a controversial outcome. Rather, it considers the grounds on which such a citizen might dispute the substance of a procedurally just outcome, regardless of whether she has, or could be given, reasons to comply with it.

For instance, granted a procedure for deciding whether the duty to defend one's homeland may substantiate an obligation to serve in the military, I am interested in whether, and on what grounds, an affirmative decision (outcome) could be disputed, regardless of whether the contesters have, or could be given, reasons to comply with it nonetheless (i.e. not to desert).¹ Accordingly, I shall not investigate the idea of authority itself, nor will I focus on issues of "justified law-breaking". Rather, I will look at cases of civil disobedience and conscientious objection *qua* sources of information on the different grounds on which the substance of certain outcomes might be disputed.

¹ For a sensible investigation into why people would be morally obligated to consent to the authority of a procedurally legitimate democratic political system see Estlund 2007.

1.2

A second qualification is instrumental to clarifying what I deem to be the case for proceduralism. It is frequently thought that the only reason to resort to procedures is the impossibility of reaching an agreement on the qualities of a just outcome. Although outcomes tend by their very nature to be controversial, it is argued that this does not necessarily apply to procedures. This is the account of proceduralism advocated by Stuart Hampshire (1999), among others, as well as that discussed critically by John Rawls (1993) and Joshua Cohen (1994).

However, as I have argued extensively elsewhere (Ceva 2007), once disagreement on values is acknowledged, there seems to be no reason to think that it should not extend to procedures. Accordingly, I have claimed that the case for proceduralism lies not so much in the less controversial nature of procedures, as in their being more suitable for *application* across diverse contexts and issues of substance, thus meeting the aspiration to trans-contextuality inherent in any (liberal) theory of justice. I shall devote the next section to expanding on this admittedly sketchy account.

2. Modelling procedural justice.

2.1

In general, proceduralists about justice hold that a theory of justice should concern itself with proposing a normative account of the properties that qualify a procedure as just. Substantive theories of justice, by contrast, draw on the characterization of the inherent properties of just outcomes. However, such a distinction is oversimplified: neither advocates of substantivism nor defenders of proceduralism can fail to be interested, in *some* meaningful way, in (respectively) procedures or outcomes.

Thus, for example, a substantivist committed to the value of equality of opportunity will not be completely unconcerned with how such a value may be realised, regardless of whether this is via a process of democratic institutional engineering or through coercion. Similarly, as I shall try to argue, it would be little more than caricatural to view a proceduralist as entirely unconcerned with whether a just procedure produces outcomes that turn out to be too burdensome for individuals holding, say, certain religious beliefs. The point of divergence lies, rather, in the *locus* where justice is to be sought. According to substantivists, justice has inherently to do with outcomes, with procedures subservient to the attainment of those outcomes. According to proceduralists, justice has inherently to do with procedures, of which outcomes are mere contingent upshots. On this view, justice is not a *product* of procedures, but lies *in* procedures.

This paper will neither defend the tenability of such a distinction nor make a fully-fledged case for proceduralism (see Ceva 2007). Rather, my aim is to defend proceduralism against the abovementioned twofold challenge: that it risks (i) fostering an “anything-goes” kind of attitude towards justice and (ii) condemning agents to a “deaf and blind” acceptance of any outcome. To rebut this twofold criticism, I need a twofold argument addressing (i) and (ii) in turn. As I have presented the argument against (i) elsewhere (see Ceva 2008), I shall limit myself to revisiting its main points here, in order to build a strong enough basis on which to develop the argument against (ii).

2.2

John Rawls investigated the idea of proceduralism in *A Theory of Justice*, describing the three different forms it may take as perfect, imperfect and pure procedural justice

(Rawls 1971, pp. 85-86). In the cases of *perfect* and *imperfect* proceduralism, the property qualifying an outcome as inherently just is established before – and independently of – the construction and application of the procedures to deliver it. However, imperfect procedural approaches to justice, unlike their perfect counterparts, cannot guarantee that a specific procedure to reach an inherently just outcome can actually be devised.²

I shall not dwell on these accounts, as they are not relevant from the specific perspective on proceduralism adopted in this paper. Following Michael Rosenfeld, I would contend that (im)perfect proceduralism is in fact substantivism in ‘procedural garb’, as it locates justice in outcomes and presents it as an intrinsic property of those outcomes (Rosenfeld 1998). Therefore, (im)perfect accounts of procedural justice do not qualify by the standard of genuine proceduralism offered in §2.1. The twofold challenge becomes significant only in relation to a genuine version of proceduralism, according to which the intrinsic properties of outcomes are irrelevant to justice.

2.3

According to Rawls’s account of *pure* proceduralism, no constraints are placed on the acceptability of a certain outcome except the correct application of the procedure leading to it. In other words, procedures are not merely instrumental to the achievement of a just outcome. They have, rather, a central role in the articulation of a concept of justice.

Unfortunately, Rawls’s formulation of pure procedural justice is rather vague and may pave the way for serious misunderstandings of his proposal. Literally following Rawls’s indications, one might be led to think that *any* procedure that is contingently

² For a critique of the tenability of the distinction between perfect and imperfect procedural justice see Gustafsson 2004.

recognised as just by its adherents will yield just results. This may seem to suggest that even the inherent properties of a procedure are a matter for context-based contingent decisions.³

In accordance with the possible line of criticism in (i), this approach to proceduralism is too indeterminate and lacks normative prescriptive power, since it leaves too many elements to the contingent evaluation of different circumstances. In particular, pure proceduralism seems to overlook the role of the reference to a trans-contextual criterion of justice for the characterisation of the inherent qualities of a just procedure.

However, as far as I can see, from this last perspective there are no such things as entirely pure procedures. I suggest that it is necessary to refer to a criterion of justice external to the specific procedure, which can qualify it as just across different contexts. As an example, consider parliamentary procedures based on the principle of adversary argumentation. These are good examples of non-perfect procedures, as once it is known that all parties represented in parliament should be heard on any issue, no information is available on the substance of the outcome that will originate from the application of the procedure, until it is actually carried out. Now, or so I believe, such an account of procedural justice holds so long as there is a trans-contextually identifiable characterization of the properties of an adversarial procedure, on the basis of which specific material procedures can be modelled.

To put this another way, although there are several versions of adversarial procedures, which may vary from context to context (e.g. different rules of

³ The interpretation of Rawls's account of pure procedural justice as widely open to contingencies is supported by the following words: '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)

participation), we can nonetheless distinguish some egalitarian properties underlying all of them (e.g. no party may be prevented from speaking on principled grounds; all voices should be considered as having the same weight). Such properties render adversarial procedures recognisable as just in virtue of their adherence to a criterion of justice denoted in egalitarian terms and external to the procedure itself.

2.4

One could continue to refer to this category of procedural justice as pure, always being careful to point out the limited reach of its “purity”. However, this would be unnecessarily misleading and might cause vagueness of interpretation. Therefore, I suggest abandoning the attribute “pure” in favour of a more appropriate characterisation: *impure* proceduralism.⁴ On this account, justice would reside in trans-contextually applicable and justifiable properties of procedures as established by an external criterion independent of contextual contingencies.⁵ This embodies, in my view, the best approximation to the idea of purity that Rawls himself had in mind.

Impure procedural justice offers thus a reply to such questions as: ‘What counts as a good reason for preferring one set of legislative procedures to another?’ (Nelson 1980, p. 502). The response must be found in the extent to which a certain material procedure displays the property of justice, as identified by a procedural trans-contextual criterion external to any material procedure itself. As suggested with regard to the case of parliamentary procedures (§2.3), the choice between different procedures of

⁴ I have only recently discovered that this wording is also employed by Corey Brettschneider to characterise those procedural theories of democracy which allow for procedure-independent standards to evaluate the legitimacy of an outcome. On this view, substantive rights constitute a limit on the range of outcomes that may legitimately originate from a procedure, so as to protect to core values of democracy. As I hope will emerge clearly in what follows, this is a totally distinct use of the attribute “impure”, which reveals only a terminological, rather than conceptual, overlap with the use I make of it in this paper (see Brettschneider 2005).

⁵ A similar spirit animates, or so to me it seems, Michael Rosenfeld’s rebuttal of pure procedural justice (Rosenfeld 1998, p. 318).

consultation will depend on the extent to which the available alternatives approximate to the criterion of adversary argumentation, in which justice is thought to reside. Such prescriptions do not give away any substantive commitment as they concern the quality of the procedural relationships between the parties.⁶

3. Impure procedural justice: a structural characterization.

3.1

From the vantage point of this preliminary account of impure proceduralism, I shall specify further its structural characterization, by means of its articulation into two phases. This will contribute to my response to the first line of criticism presented in §2.1: the allegation that, being “substantively abstemious”, proceduralism may encourage an “anything goes” attitude towards justice.

I submit that this criticism can be rebutted by articulating impure proceduralism in (1) a normative (trans-contextual) and (2) an “interactional” (context-dependent) phase. The proper theoretical work is done in phase (1). Phase (2) is the domain of the contingent interaction of those who are expected to abide by the guidelines given in (1). More precisely, phase (1) contains the normative characterisation of the properties qualifying just procedures. Their characterisation is thus independent of such contingent variables as the partial interests, specific claims and possibly conflicting identities at stake. Rather, it is meant to constitute the basis of adjudication between them. Accordingly, phase (1) aims to grant structural cogency to the model, rendering its prescriptions trans-contextually applicable. However, the commitment to open-endedness requires the theorist to withdraw at the edges of this phase, passing it over to

⁶ For a similar defence of the non-instrumentally just denotation of procedures see Griffin 2003, pp. 117-118.

the agents involved in relevant situations to substantiate such properties. This is done through the construction of material procedures.

As well as limiting the incidence of contingencies, the distinction between a normative and an interactional phase is crucial to avoid referring to principles defined through those processes they are meant to secure.⁷ To avoid the risk of a regress *ad infinitum* (how do we decide how to decide?), the presence of an initial normative phase constitutes a solid starting point for any interaction. The procedural principle of justice formulated there is thus meant to structure and regulate normatively the interactions between flesh and blood agents. Such a principle (whose adoption must, needless to say, be justified to the parties – and different strategies of justification may undoubtedly be available)⁸ is not open for re-discussion between them. It is rather meant to guide their interaction, without constraining the substance of its outcome. What such a principle prescribes and how it is justified varies in accordance with the specific conception of justice advocated. However, I am not committed here to defending any specific denotation that such a model of proceduralism might, let alone should, take. Rather, I aim to make a more general point about the nature of procedural justice so as to defend it against some common critiques. To put this in Rawls-inspired language, the considerations I offer apply to the *concept* of procedural justice, regardless of the specific *conceptions* into which it may be translated.⁹

3.2

To confer more precision to this formal account, I propose to refine it further by dividing each phase into two levels. Phase (1) includes a first level (L-1) in which the

⁷ I borrow this argument from Thomas McCarthy (1992, p. 72).

⁸ The justification offered for the principle of justice may in fact range from rather “thin” pragmatic strategies *à la* Hampshire (1999) to “thicker” fact-independent accounts such as that advocated by G. A. Cohen (2003). The choice of justificatory strategy rests with specific conceptions of justice.

⁹ For a distinction between one concept and several conceptions of justice see Rawls 1971, p. 5.

criterion of justice is made explicit. A second level (L1) contains the formulation of the principle of justice, which is meant to prescribe how the properties identified by the criterion in L-1 are to be realised. Such a principle provides flesh and blood agents with a procedural guideline for the development of material procedures. This marks the start of the second interactional phase. The agents are to substantiate such guidelines through the construction of specific material procedures embodying the property established in L-1, in the way prescribed by the principle in L1. This constitutes level L2. The application of the material procedures constructed in L2 represents the fourth and last level, L3. This presentation is summarised in Table 1 below.

Structural phase	Level
Phase 1 (trans-contextual normative prescriptions)	
	L -1 (criterion of justice identifying the properties of just procedures)
	L 1 (principle of justice, prescribing how the properties in L-1 should be realised)
Phase 2 (context-based interaction)	
	L 2 (material procedures devised in accordance with the prescriptions given in L -1 and L 1)
	L 3 (material procedures applied and outcomes produced)

Table 1: Structure of a theory of impure procedural justice

It is now possible to revisit with increased precision the case of parliamentary procedures of consultation. Assume that procedures of this sort should be adversarial, in order to allow the parties to engage in open argumentation. A criterion of justice (L-1) might qualify as just some such procedures when they incorporate a property of procedural equality. But what should such procedures look like? To answer this question, a principle of justice is to be placed at L1. Such a principle might, accordingly, require that just procedures grant every party an equal chance to have a say and be heard. In accordance with such a guideline, material procedures of consultation are to be developed (L2) and applied (L3). Material procedures of this kind must, for

instance, set up a rota for each party to make its case, establishing the duration of interventions, rules for taking or giving the floor and so on.

Not all material procedures which happen to be accepted by the parties will qualify as just. Only those consistent with the trans-contextual criterion of justice do so. This condition seems capable of rescuing impure proceduralism from the accusation of fostering an “anything goes” approach to matters of justice. Moreover, it provides a preliminary answer to the accusation of condemning agents to put up with morally dubious outcomes. Although impure proceduralism does not allow for any substantive constraint to qualify the properties of acceptable outcomes, these outcomes are subject to *formal* constraints qualifying the properties of the procedures through which they have been reached. Therefore, if a just procedure is one that, say, embodies a commitment to impartiality, considering all voices to have the same weight, it could hardly lead to outcomes that are blatantly discriminatory against one of them. Such a formal constraint seems strong enough to rule out, on procedural grounds, some classes of outcomes that may be thought to be morally dubious independently of the issue at stake.

3.3

Is this last consideration enough to respond to the second line of criticism introduced in §2.1 above? Unfortunately, this does not seem to be the case. Not all substantive problems may be prevented by imposing formal constraints on the procedure. Only those that are general enough for it to be predictably believed that they would affect any outcome seem to be sensitive to such a strategy. This is certainly the case when it comes to not wanting people to be arbitrarily discriminated against by a partial procedure, whatever the issue at stake. However, once all parties have made it sure that the

procedures have been correctly devised and applied, something could still “go wrong”: the outcomes thus produced might reveal themselves to be too burdensome in the long run for agents holding, say, certain religious or ethical beliefs.

Consider the following. An assembly is gathered to establish the articles of the national Constitution. Using a procedurally egalitarian procedure of consultation, it is agreed that one article should establish that the state should not treat any citizen differently on the grounds of ethical or religion-based beliefs. At some later point in time, in response to an international threatening scenario, it is decided that all citizens past the age of 18 should serve in the military if the professional army should be in need of an exceptional support. Although all parties had originally expressed consent to the article on non-discrimination through a just procedure, pacifists now realise that such a general provision risks being too burdensome for them as it prevents them from requesting to be waived from the obligation to serve in the military on the basis of their ethical convictions. Do pacifists have any grounds for disputing the non-discrimination article, as it prevents them from taking action to fulfil some moral obligation of theirs?

This question identifies a genuine puzzle. However, I think – and shall try to argue – that, on the qualified version of impure proceduralism offered, a sound answer may be given to it. In order to meet this challenge, I shall devote the remainder of the paper to analysing two channels of disputation of outcomes: civil disobedience (CD) and conscientious objection (CO). Analysis of the claims typically put forward by those involved in these acts of contestation will contribute to unpacking the possible sources of dissatisfaction agents may have with the outcomes of the procedure through which they have interacted, thus contributing to identifying the grounds on which substantive disputation may be allowed within a procedural theory of justice.

4. Disputing outcomes (1): civil disobedience and the arguments from justice.

4.1

In accordance with a rather standard definition in liberal political philosophy, acts of CD are public and generally non-violent breaches of a norm, on moral and political grounds, with the aim of obtaining a change either in the contested norm itself (direct CD) or in another somehow connected to it (indirect CD). In particular, following Rawls, it has been argued that acts of CD are justified when they target nearly-just institutions (the legitimacy of which is acknowledged) which fail to operate in accordance with the principles of justice endorsed by the whole society (Rawls 1971, pp. 333–391).¹⁰ Acts of CD are thus meant to restore a situation of disrupted justice by appeal to the sense of justice of the society. In Rawls's own words, 'civil disobedience is a political act [...] because it is an act guided and justified by political principles, that is, by the principles of justice which regulate the constitution and social institutions generally' (Rawls 1971, p. 365).

This succinct account of CD seems enough to show that a norm is disputed in such cases on the basis of its breaching some principle of justice. How could such an account of "the grounds of disputation" be translated into the procedural terms employed by this article? On the present account, justice is a property of procedures through which the basic structure of a society is articulated. In compliance with the two-phased theoretical structure outlined in §3, for material procedures to be just, they should be devised (at what I have called level L2) and applied (L3) in accordance with a principle of justice (L1) qualifying what properties a just procedure should display (L-1). Accordingly, injustice may occur – at a procedural level alone – when material procedures do not display the properties outlined in L-1 in accordance with the prescriptions given in L1.

¹⁰ See also Smith 2008.

Disruptions in articulating a conception of justice may therefore occur either at L2, when procedural guidelines are translated into material procedures, or at L3, if a just procedure turns out to be applied in a wrong way. Any outcome reached in this way might be disputed on the grounds of justice, not in virtue of some of its inherent qualities but rather in view of the way it was produced. Any such outcome will thus have to be renegotiated in the light of revised procedures, which – to be just – should be developed and applied in compliance with L-1 and L1. Building on Table 1, this may be summarised in the following way:

Structural phase	Level	Checkpoints	Ground for disputation
Phase 1			
	L -1 (criterion of justice)		
	L 1 (principle of justice)		
Phase 2			
	L 2 (material procedures devised)	Checkpoint A: has the material procedure been devised in accordance with L-1 and L1?	Justice
	L 3 (material procedures applied)	Checkpoint B: has the material procedure been correctly applied?	Justice

Table 2: Justice-based disputation of outcomes

To clarify this account, consider the scenario evoked in §3.3 above, in which an assembly was gathered to establish the articles of the national Constitution. After consultation, consensus gathers on an article requiring that the state not treat any citizen differently on the grounds of their ethical or religious beliefs. The following question thus emerged: do pacifists have any grounds for disputing such an article if it prevents them requesting that their obligation to serve in the military be waived? The answer may be summarised as: “*Provided that the consultation procedure was justly devised and correctly applied, the decision cannot be disputed on the ground of justice*”.

This rules out any possibility of pacifists having the article re-discussed and revised unless they show that it has been reached by means of unjust procedures. As anticipated, injustice may creep in at two different stages: should material procedures either (A) be designed in breach of the principle(s) of justice or (B) be applied in a wrong way. (By “wrong” I mean in contradiction to the spirit of the principle.) So, for instance, a procedural rule establishing a general veto power only for certain parties would not qualify as just on (A), as it would contradict the principle of procedural equality according to which all parties should have an *equal* chance to have a say. Moreover, on (B), a justly devised procedure might be applied incorrectly. It might be claimed, for example, that one of the parties has happened several times to exceed the time limit for presenting its case, thus enjoying an opportunity to make its case in a fuller way than other parties. Although the material procedure was devised in accordance with the principle of justice (requiring, for example, that each party be allocated the same amount of time to make their case), its actual application violated the spirit of the principle. In either case, whatever outcome is reached (and whatever properties of substance it might display), it may be contested on the grounds of justice, as it can be shown to have been produced by an unjust procedure. Any such outcome will therefore have to be re-negotiated in the light of revised justice-compliant procedures.

In this way, observation of the properties of outcomes may function as an “alarm bell” for the potential injustice of some material procedure. An example may help to clarify this point. Imagine we are rolling dices and after a few goes I realise that only the number one is being rolled. Although I had no precise expectation as to what number should come out on top each time, nor on the frequency of any particular result, the fact that one is the only number to be rolled may look suspicious and lead me to

question the justice of the procedure that produced it. If, after some controls, the procedure of dice rolling looks just (in conformity with accepted principles) and correctly applied, then I will have to accept this strange coincidence.

In the same way, one might consider, for instance, the procedure followed in Italy for stipulating bilateral agreements between the state and non-Catholic religious groups. In a nutshell, those religious groups interested in stipulating an agreement should first obtain recognition of their legal status, upon receiving the favourable opinion of the State Council. Then the religious communities should address the Prime Minister, who allocates the task of negotiating with their representatives to the undersecretary of the Council of Ministers. After negotiation, the agreement is signed by the Prime Minister and the person in charge of the relevant religious community, and is passed on to Parliament for translation into law. In line with the constitutional commitment to equal freedom for all religions, this procedure is open to all religious communities. However, its inherent features seem to favour *de facto* those communities who are organised in a hierarchical and institutionalised manner (with a single head of the Church and official ministers of faith).

Although one might not have any expectations regarding the inherent qualities of desirable outcomes of the agreement procedure (what communities should be officially recognised by the State), the fact that religious communities external to the Jewish-Christian tradition, such as Buddhism, Hinduism and Islamism, have not yet been recognised (although several draft agreements have been presented, for instance, by a number of Muslim associations) might be an “alarm bell”, signalling a potential injustice in the procedure itself (in violation of the principle of equal freedom for all

religions).¹¹ Such a procedure-based argument offers a justice-based reason to dispute a contingent outcome *qua* product of an unjust procedure.

5. Disputing outcomes (2): conscientious objection and the arguments from “non-public” values.

5.1

Conscientious objection may be defined as an act of contestation of a generally applicable norm on the grounds of incongruence between the norm and a citizen’s ethical or religious commitments. Thus, 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. Agents engaged in acts of CD ask for the revision and re-negotiation 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. Although not directly referred to as acts of CO, such an ethics-based ground for contestation of just norms is identified and characterized by Brian Barry in the following way:

a cultural or religious minority that failed to gain a concession from the political process could not properly claim that it had suffered an injustice. This argument, if successful, tells equally against a demand *based on justice* for relief in any form, be it exemption, modification or repeal of the law in question. By the same token, it leaves it open that any of these three modes of relief might, in most instances, be acceptable *if a good case could be made out on other grounds* (Barry 2002, pp. 213–4, emphasis added).

Such an ethics-based account of the grounds on which a norm may be disputed is particularly interesting when it is denoted in procedural terms. As seen in §4 above, any

¹¹ For a detailed analysis of this case see Povino and Faitini 2008.

outcome, whatever its intrinsic properties, should be revised if it is shown to have been produced by an unjustly designed or wrongly applied procedure. Acts of CO bring a more substantive element into the picture. In particular, they seem to reveal a ground *other than justice* on which outcomes of just procedures may be disputed should their inherent properties be incongruent with values otherwise held by those to whom the norm in question applies. A further “checkpoint” is thus triggered at level L3, when an outcome is reached after a (just) procedure has been devised (L2) and (correctly) applied (L3). Accordingly, Table 2 may be completed as follows:

Structural phase	Level	Checkpoints	Ground for disputation
Phase 1			
	L -1 (criterion of justice)		
	L 1 (principle of justice)		
Phase 2			
	L 2 (material procedures devised)	Checkpoint A: has the material procedure been devised in accordance with the guidelines posed in L-1 and L1?	Justice
	L 3 (material procedures applied and outcomes produced)	Checkpoint B: has the material procedure been correctly applied?	Justice
		Checkpoint C: are the properties of the outcome reached through a just procedure congruent with the values otherwise held by the agents?	“Non-public” values (other than justice)

Table 3: Summary of grounds of outcome disputation within impure proceduralism

I submit that a commitment to impure proceduralism, as it emerges from the tabular reconstruction, does not entail a “blind and deaf” acceptance of all outcomes, regardless of their inherent features (see criticism (ii) in §2.1). Rather, a triple control should be

exercised to verify whether: (A) the material procedure followed had in fact been devised in accordance with the guidelines posed in L-1 and L1 (first checkpoint at L2); (B) it was correctly applied, in accordance with the spirit of the principle of justice (second checkpoint at L3); and (C) the properties of the outcome are congruent with the values otherwise held by the agents (third checkpoint at L3). While A and B, being procedural in kind, offer justice-based arguments for contesting an outcome, C brings in an element of substance and makes space for outcome contestation by appeal to values other than justice.

Reverting to the scenario of the assembly establishing a Constitution, recall that the parties had agreed on a non-discrimination article according to which the state should not treat any citizen differently on the grounds of their ethical or religious beliefs. The following question emerged: do pacifists then have any ground to dispute this article if it prevents them from requesting that their obligation to serve in the military be waived? As shown in §4, provided that the material procedure of consultation passes checkpoints A and B, pacifists may not appeal to *justice* to dispute the article. However, they may be accorded some room for disputing it on grounds *other than justice*, such as their moral obligation not to use weapons. Non-public values are certainly not a strong enough basis for requesting a *general revision* of the disputed article but there seems no reason to exclude them as acceptable grounds on which to seek *exemptions* from it.¹²

Thus, the analysis in this paper reveals two separate grounds on which political outcomes may be disputed: justice and other values derived from someone's ethical/religious commitments. More generally, the former includes those "public"

¹² Note that the request for an exemption from a generally applicable norm does not necessarily entail that the disputants are not under an obligation to comply with the disputed norm until the exemption is granted. This is in line with the qualification in §1.1, according to which the considerations I offer do not necessarily have any bearings on a general theory of compliance with either ethically disputable or unjust norms.

values which should inform a society's basic structure: justice as well as other public values that justice is meant to secure. These should be defined in accordance with a specific conception of justice and may include such values as liberty, equality or fairness. The latter includes those "non-public" values – usually derived from someone's ethical and/or religious convictions – which may be the subject of controversy and disagreement in a well-ordered society which nonetheless shares a conception of justice.

It is helpful, in clarifying this distinction, to conceive it as parallel to that between the two moral powers attributed to citizens by Rawls. These are (a) the capacity for a sense of justice and (b) the capacity to form, revise, and rationally pursue a conception of the good (Rawls 1993, p. 19). According to the proceduralist account laid out here, while (a) should be procedurally secured, (b) could constitute grounds for disputing procedurally just provisions and seeking exemptions. Following Rawls's account, a well-ordered society is one 'in which everyone accepts, and knows that everyone else accepts, the very same principles of justice'; whose 'basic structure [...] is publicly known, or with good reason believed, to satisfy these principles'; and whose 'citizens have a normally effective sense of justice and so they generally comply with society's basic institutions, which they regard as just' (Rawls 1993, p. 35). Accordingly, the fulfilment of (a) should be the primary concern of the design of the basic structure of a society. Nonetheless, it also seems essential to leave space for securing (b). I submit that this space may be located in the permissibility of requesting and being granted exemptions from generally just norms when these are incongruent with one's own convictions on ethics and the good.

Although, as declared, it is not my primary concern in this article, I would like to point in closing to a possible issue that should be addressed when translating a concept such as that of procedural justice into a specific conception. As argued, on an impure account of proceduralism, although outcomes of a just procedure may not be disputed in virtue of their inherent qualities on the grounds of justice, they may be appropriate objects of disputation on the grounds of values other than justice held by the agents affected by a certain norm. This might leave one wondering whether *any* value, however “non-public” and “anti-social”, could be conceived as an appropriate basis for disputing procedurally just outcomes or seeking exemptions from a generally applicable norm. The issue is complex. If constraints were imposed on the values constituting appropriate grounds for disputation, one might risk ending up with a dangerously illiberal and conservative view. On the other hand, “opening the floodgates” to an unrestricted range of values as grounds for requesting exemptions could seriously threaten social and political stability.

As a possible indication of a way out of this complex issue, I venture that it may be promising to operate a distinction between: (x) the grounds on which an outcome *may be* disputed; (y) the grounds on which a case *should be* made publicly for an exemption from a disputed norm; and (z) the grounds on which an exemption *should be* granted by institutions. As far as (x) is concerned, the grounds for disputation will inevitably be non-public (the pacifist disputes the non-discrimination norm as it hinders the fulfilment of his peace-oriented commitment when it prevents him from asking to be excused from serving in the military).

Nevertheless, given the fact of disagreement on values, once the scope for dissent is established, a case for the exemption should be made (y) which invokes principles and ideals accessible to a wider audience. Thus, although the pacifist disputes

the non-discrimination article on non-public grounds, he might be expected to make his claim publicly accessible through reference to such ideals as respect, on the ground of which – it is possible to conjecture – the concession of the exemption would be granted or refused by the institutions (z).

On this account, institutions should concern themselves primarily with making sure that the basic structure of a society is articulated through just procedures. With those in place, it seems desirable that such a commitment be made compatible with a number of diverse substantive loyalties that may render a procedurally just outcome too burdensome for some class of individuals. It is in this gap between what is procedurally just and the non-public loyalties of individual citizens that the instrument of exemptions from generally applicable norms enters the picture. It may indeed be a promising way to combine the pursuit of justice and social stability with respect for a number of varied citizens' substantive commitments.

Although crucial, the specification of the public values and principles on the ground of which “non-publicly-motivated” exemptions may be sought is a matter for a specific conception of justice to spell out. However, the lack of such specification does not seem to undermine the general account of a cogent and “substance-responsive” concept of procedural justice which I have been committed to developing.

6. Conclusion

The main line of argument presented in this paper pointed towards a cogent formulation of proceduralism about justice, which is capable of rebutting some of the most common charges pressed against it. Such a formulation is an alternative to pure proceduralism in that (α), although it conceives of justice in procedural terms, a criterion qualifying the properties of just procedures is positively justified and not, in turn, procedurally

produced, and (β), although it conceives of justice as a virtue of procedures, it allows for non-procedural evaluation of outcomes, provided that this is carried out on grounds other than justice. Pursuing (α), I have tried to offer a cogent account of proceduralism, equipped to rebut the “anything goes” allegation (see §2 and §3). Defending (β), I have tried to provide the basis for a fallibilistic account of proceduralism which allows agents who took part in a just procedure to dispute outcomes in virtue of some of their inherent qualities and request exemptions from their prescriptions (see §4 and §5).

The grounds on which outcomes may be disputed have been illustrated through an investigation of acts of civil disobedience and conscientious objection. In order to prevent insidious misunderstandings from entering the picture, let me emphasise that I have not intended to suggest, by any means, a resort to either CD or CO as ordinary channels to deal with dissent, or through which – in the language of this article – outcomes of a procedure may be ordinarily disputed. The institutional response to the possibility of disputation will have to consist, of necessity, in the provision of official and legal channels through which outcomes may be revised (if unjust) and exemptions (possibly) sought. I trust political and legal practitioners to develop such channels in a sustainable and efficient way.

What I have aimed to do here is to make use of cases of CD and CO to unpack the possible sources of dissatisfaction with an outcome so as to rebut, at a theoretical level, what is commonly presented as a conclusive argument against the plausibility of procedural justice. In so doing, I hope I have succeeded in pointing to a qualified model of proceduralism that may well maintain its procedural nature as regards justice, while giving way to substantivism when it comes to evaluating outcomes by reference to other values.

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