

Interactive Justice, the Boundary Problem, and Proportionality

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Abstract: In *Interactive Justice*, Emanuela Ceva argues that the parties to an intractable value conflict should each be given an equal substantive right to a hearing. I suggest that Ceva's account gives insufficient attention to the question of *who* counts as a party to a value conflict. Once more attention to this question is given, her defence of an *equal* right to a hearing may be put into question.

Keywords: justice, value conflict, all-affected-interests principle, equality vs proportionality

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I. Introduction

Emanuela Ceva's book, *Interactive Justice*, is a refreshing contribution to contemporary political theory, exploring an important but neglected area in theorizing about justice: what she calls "interactive justice" (Ceva 2016).¹ This term refers to justice as a property of people's interactions when they face intractable and persistent value conflicts. Ceva convincingly argues that, when people come into conflict over matters of public concern—as people undeniably do in contemporary democratic societies—the demands of justice are *twofold*. One set of demands concerns the *outcomes* of those interactions, which should themselves be just. Another set of demands, which is understudied in the existing literature, concerns the *procedures* through which the relevant conflicts are managed (81). These should also be *just*, treating parties to the conflict in a way that appropriately reflects their status as dignity-bearers, capable of making claims (17).

Outcome and procedural considerations are two independent dimensions of justice, which need not always align with one another. Achieving a just outcome may at times require sacrificing the justice of conflict-management procedures; conversely, ensuring that conflicts are managed justly may eventually lead to somewhat unjust outcomes. For Ceva, there is no a priori answer to the question of how such tensions should be resolved. What matters is that both dimensions of justice be kept firmly in view (19).²

¹ Numbers in parentheses in the main text refer to page numbers in this book.

² This is somewhat reminiscent of the "balancing" approach adopted in Brett Schneider (2005), in connection with judicial review specifically.

The first of Ceva's contributions, then, consists in placing emphasis on the *concept* of interactive justice. But the second, and equally important contribution, consists in her advancing a particular *conception* of interactive justice, articulating what it takes for people to be treated with dignity when intractable value conflicts occur. Here, Ceva invokes what I would call an *equal substantive right* to a hearing.³ The idea is that, during value conflicts, all parties involved ought to (i) be given the same chance to speak and (ii) be equally listened to (133). Only then will the procedure for managing the conflict be properly respectful of each participant's fundamental standing. To see this, consider a simple example: a departmental meeting in which several decisions have to be made, yet colleagues fiercely clash over the values that should guide those decisions. Imagine that, during the deliberation phase, only male colleagues are given a right to speak. This would of course be an *unjust procedure*, irrespective of its outcome. But there would be something almost as problematic if female colleagues were allowed to speak, and yet nobody listened to them. In both cases, we would be faced with what Ceva calls interactive injustice.

The notion of an equal substantive right to a hearing may seem excessively vague and abstract. But as Ceva points out, this is a virtue, not a vice of her account. Different contexts may, in fact, call for different instantiations of her general principle. A one-size-fits-all set of recommendations for how to achieve interactive justice is simply unavailable. What to do should be determined on a case-by-case basis, under the guidance of her equal substantive right to a hearing principle (102-3).

I agree with Ceva that interactive justice is an important and neglected dimension of justice theorizing. By identifying its conceptual contours and providing a sustained discussion of it, her book does a real service to justice theorists. In what follows, I wish to put some pressure on a couple of aspects of Ceva's favoured *conception* of interactive justice. That conception strikes me as incomplete in one important respect. In particular, it lacks an account of *who* exactly count as *parties* to an intractable value conflict whose voices should be heard. And once we try to fill this lacuna, it becomes no longer obvious that interactive justice always requires an *equal* right to a hearing.

II. Who are the parties to a conflict?

To motivate my discussion, let me offer a stylized scenario. The scenario is far simpler than the complex cases of value conflicts Ceva discusses in her book, but it still exhibits the defining features of such conflicts. (I should mention that the example is made up and deliberately exaggerated.)

Team-teaching: At an international university, a new, two-semester module is introduced, focusing on contemporary political theory. The first semester is to be devoted to general theories and concepts (part A); the second semester to particular applications of those theories to real-world problems (part B). Each

³ This is my gloss on Ceva's own label—in particular, Ceva refers to an equal right to a hearing. The addition of "substantive" is meant to capture the idea that speakers should also be actively *listened to*.

part of the course is team-taught by three academics. Team A meets just before the start of the academic year to decide how to design their portion of the course. Unfortunately, the three academics involved have very different visions. Professor Smith is convinced that analytic philosophy and conceptual analysis are all there is to political theory, and would like the first semester to be entirely devoted to them, with particular emphasis on the concepts of freedom and equality. Professor Beauchamp disagrees. He finds analytic philosophy problematically a-critical and status-quo-biased. He insists that the first semester should be devoted to post-structuralist and post-colonial work. Finally, Professor Schultz is a nihilist about political theory in general, and is convinced that the first semester should be devoted to German literature instead.

This simple scenario presents an intractable value conflict over a matter of “public concern,” where the relevant public is not a polity at large, but the academics in charge of the course. Moreover, the scenario includes two parties to the conflict whose views are *arguably* reasonable (Smith and Beauchamp), and one whose views are arguably *unreasonable* (Schultz).⁴ Ceva believes that interactive justice—unlike Rawlsian public justification—is owed to *both* the reasonable *and* the unreasonable (123). This means that, on her account, Smith, Beauchamp and Schultz should each have an equal substantive say, and each be equally disposed to listen to each other. Of course, if Schultz were to get “out of control,” there may be reasons for limiting his right to a hearing. But this, Ceva’s discussion suggests, would have to be acknowledged as a regrettable curtailment of interactive justice for the sake of outcome justice (19).

So far, so good. The question I want to raise, and which strikes me as neglected in Ceva’s discussion, is: *Who* should have been invited to the teaching “negotiating table” in the first place? In her discussion, Ceva tends to assume a given value conflict, and takes the parties involved as exogenously given. She considers the question of who should count as a party only in passing, suggesting that being the holder “of a value claim concerning what ends collective action should pursue” is a necessary but not sufficient condition for qualifying as a participant in a conflict (117). The final determination of who should be heard, she suggests, is to be outsourced to the relevant institutions (typically state institutions).

This brief treatment of the issue is not fully satisfactory, especially since the aim of a theory of interactive justice is to provide guidance to the institutions in charge of granting rights to be heard. In particular, these rights may well have to be granted to individuals who are currently making no value claims and are oblivious to the existence of a conflict in the first place.

To illustrate, the scenario I have offered is framed so as to immediately draw the reader’s attention to members of team A, but it is far from clear that they are the only ones who should be heard when it comes to the issue of how to construct the

⁴ I am here relying on an intuitive sense of “reasonableness,” which, I acknowledge, is not fully parallel to Ceva’s more Rawls-inspired understanding.

relevant syllabus. Members of team B, it seems to me, should take part in that discussion too, even though, *de facto*, they are not “involved” in the conflict: Smith’s, Beauchamp’s and Schultz’s argument is happening unbeknownst to them. Furthermore, they should be part of the discussion because how they themselves set up part B of the course partly depends on what Team A decides. This is a matter that concerns them too: they are part of the relevant “public.”

Some will have noticed that the question I am asking raises concerns that are structurally identical to those characterizing the so-called “boundary problem” in democratic theory (see, e.g., Whelan 1983; Arrhenius 2005; List and Koenig-Archibugi 2010). For any given decision, the democratic theorist must ask who should be entitled to a say in it. That is, she must determine the “boundaries” of the demos. In the case of interactive justice, the “boundary problem” can be reformulated as follows:

The interactive-justice boundary problem: For a given intractable value conflict, *whose* voices should be given a hearing?

It may be argued that the parallel I am drawing between democratic decision-making and conflict management doesn’t quite work, because conflict management is not about “reaching a decision” (53-4). Yet it is not clear why this difference in aim should invalidate the suggestion that, in both cases, the question of “whose voice should be heard” must be answered. The burden of proof falls on the objector.

Alternatively, it may be suggested that, with conflict-management, what we are interested in is simply making sure that those *actually* involved in a conflict be treated with the respect they are owed. In particular, only those who actively make a claim to being heard should count as “parties” to the conflict.

This response, I think, is not one Ceva would (or should) endorse. This is because there appears to be a distinct *interactive injustice*—in her sense—in being excluded from a decision-making process that affects one’s interests. Once again, how part A of the course is organized is a matter of public concern, where the public includes not only members of Team A but also members of Team B. By not being notified about the meeting, and not being invited to the discussion, members of Team B are the victims of a (mild) interactive injustice. They are *marginalized*, if not altogether oppressed—the latter, in case the semester progresses, Team A’s plan (whatever this may be) is put into place, and at that point members of Team B must simply adapt to their colleague’s course-design.

In sum, an important dimension of interactive justice involves identifying the parties to a conflict, by which I don’t mean the *de facto* parties but the *de jure* ones, namely those that ought to be “offered a seat at the negotiating table.” Although Ceva gives little attention to this important question, I shall try to offer a candidate answer. This is in line with much current literature on democracy, and can account for our intuitions about the *Team teaching* scenario: the “all affected interests” principle (Goodin 2007). As I shall suggest in the next section, *if* affectedness is what determines who is a party to a conflict in the relevant sense, then it is no longer

obvious that interactive justice requires each of those involved to be given an *equal* substantive say. I remain agnostic, however, about whether the antecedent of this conditional is satisfied.⁵

III. Equal or Proportional Say?

To proceed with my argument, I need to say a little more about the theoretical background against which discussions concerning the all-affected-interests principle typically take place. To be sure, this principle is not without problems and challenges, but on a non-technical interpretation, it roughly involves giving *a say* in a decision to anyone who has a stake in it. Now, it is a core tenet of democracy that members of the demos should have an *equal say* in decision-making, and this in recognition of their fundamental equal status. Yet, as Harry Brighouse and Marc Fleurbaey (2010) have pointed out, a commitment to equal respect for persons—which ultimately underpins the democratic ideal—need not translate into an equal say. It is instead plausible to believe that how much of a say one should have in a given decision depends on how small or large one's stake in the decision is. The larger the stakes, the greater the say, and vice versa.

This “proportionality principle” is highly intuitive (notwithstanding the fact that its operationalization is known to present considerable challenges). To see this, let me offer an example, which makes use of a famous scenario depicted by Brian Barry (1989). Imagine four people on a train carriage where there are no signs concerning the permissibility of smoking. Three of the passengers want to smoke, one does not. As it happens, however, the non-smoker suffers from asthma, and his health would be seriously endangered if the smoking policy was implemented. In these circumstances, it seems to me, the non-smoker's stake in the decision is much greater than the three smokers'. For the latter, it is a matter of either enduring a longer wait for a cigarette, or immediately enjoying the pleasure of smoking. The asthmatic passenger, however, risks going to the hospital. In the circumstances, it seems clear that the non-smoker should be given a greater say in the decision, perhaps even a decisive one, given the magnitude of his stake compared to others'.

The same rationale could be applied, *mutatis mutandis*, to the principle of a fair hearing in the context of intractable conflicts. Here, the idea is that how much of a hearing the relevant parties should be granted should be proportional to their stakes in the conflict. If we apply this principle to our two teaching teams, then it looks like, although Team B ought to be given a chance to express their views about Team A's part of the course, their say shouldn't be as great as Team A's, since their stakes in part A of the course are arguably lower than Team A's. For example, we may think that while parts A and B should be internally well-integrated, the integration between them can be somewhat looser.

To give a more realistic example, it seems completely fair that, whenever a new appointment has to be made in a given academic department, *every* department

⁵ In recent work, I have expressed some reservations about the all-affected-interests principle as “the” response to the democratic boundary problem. See Laura Valentini, “Who Should Decide? Beyond the Democratic Boundary Problem,” manuscript.

member be given a say or a hearing concerning the candidates. But if the department in question is, say, political science, and the candidate being scrutinized a political economist, then it seems procedurally fairer to still give the political economists a great say—e.g., more “air time”—during the deliberation phase. To be sure, there may be instrumental reasons for doing so—i.e., political economists have the greatest expertise in the area and are better placed to select the top candidate—but there also seem to be “intrinsic justice reasons” for adopting such a procedure. Political economists in the department are going to be the ones who will work most closely with the new hire, so they are the most affected: a lot more than everyone else. In recognition of this, justice requires that they be given a greater substantive hearing than their colleagues.

If this is right, then taking into account the boundary problem in relation to value conflicts leads us to question the tenability of the substantive conception of interactive justice Ceva puts forward. At least on an “affectedness approach” to identifying the demos, an equal substantive hearing only seems justified in cases where the stakes of those involved in the relevant conflicts are *equal* (cf. Christiano 2006). Otherwise, the hearing should be unequal, and proportional to the stakes of the parties involved.

Conclusion

In this short discussion piece, I have highlighted a gap in Ceva’s account of interactive justice. To be sure, the solution I have suggested is itself susceptible to criticism. The all affected interests and proportionality principles have been variously disputed in the literature. My aim, however, has not been so much to defend a positive answer to the “boundary question” and propose an alternative account of interactive justice. Rather, my aim has been to highlight how the boundary question is integral to interactive justice, and how answers to that question may, in turn, have an impact on what we think interactive justice substantively requires.

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