Democratic justice: the priority of politics and the ideal of citizenship[1]

Valentina Gentile

Department of Political Science

Luiss University of Rome, Italy

vgentile@luiss.it

Abstract: In his *Democratic justice and the social contract*, Weale presents a distinctive *contingent* practice-dependent model of 'democratic justice' that relies heavily on a condition of just social and political relations among equals. Several issues arise from this account. Under which conditions might such just social and political relations be realised? What ideal of equality is required for 'democratic justice'? What are its implications for the political ideal of citizenship? This paper focuses on these questions as a way to critically reconsider Weale's model. After presenting Weale's procedural constructivism, I distinguish his model from an *institutional* practice-dependent model, one salient example of which is Rawls's political constructivism. This distinction allows for a formulation of the social and political equality required for justice in each case. The contingent model assumes that an equality of 'status' will generate just social practices, yet it fails to recognise that an equality of 'role' is also important to ensure citizens' compliance. The paper ultimately seeks to show that the contingent model is insufficient to ensure that just social practices will become stable.

Keywords: political constructivism; social and political equality; ideal of citizenship; moral stability

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Weale's *Democratic justice and the social contract* (2013) makes an original contribution to the debate on democratic theory by providing a sophisticated philosophical attempt to reconcile social contract theory and deliberative democracy. The proposal is attractive insofar as it combines an account of procedural constructivism, implicit in the social contract tradition, with contemporary democratic practices. Weale argues that social contract theory 'draws upon the possibility of procedural resolution, displacing first-order conflicts about what is just onto a decision procedure about what people have reason to agree to' (p. 6). This is, in Weale's view, naturally linked to those

democratic practices and procedures that allow for public decision-making in the context of deep pluralism.

By linking two distinct yet related literatures – namely social contract theory and democratic theory – Weale aims to provide a fresh solution to two interconnected problems of contemporary liberal democratic theory: identifying the first principles (of justice) to be applied to those democratic institutions that regulate social cooperation, which must then be reconciled with what Waldron (1999) has called the 'circumstances of politics'. Different views regarding not only the content but also the application of the principles of justice inevitably must confront the issue of political authority and the ways in which it should be constructed in order to be legitimate. This, in turn, is likely to put the very basis of social cooperation at risk. Matters of justice therefore cannot be isolated from matters of politics, nor, more precisely, from those democratic practices and procedures that can be widely recognised as fair.

In this sense, Weale presents what I take to be a distinctive *contingent* practice-dependent model[2] of democratic justice that relies strongly on a condition of just social and political relations among equals (Weale 2013, p. 37). For Weale in conditions in which the power of individuals is equal 'democratic procedures will generate principles of just obligation' (p. 8). By envisaging a society in which 'individuals can be for themselves; but they will never be only for themselves' (p. 244), procedural democracy is, for the author, a guarantor of both feasibility and stability.

Several key questions arise from this account of practice dependency. Under what conditions might these just social and political relations be realised? What ideal of equality is required for this model of 'democratic justice'? What are its implications for the political ideal of citizenship? The following sections of this paper will focus on these issues as points of departure in critically assessing Weale's unique version of social contract theory. Section 1 provides a summary of his procedural constructivism. Section 2 presents a distinction between the *institutional* practice-dependent model, one salient example of which is Rawls's political constructivism (1996) from Weale's *contingent* version. Section 3 focuses on the notion of social and political equality required for justice in each of these models, and questions whether the two central aspects of Weale's theory – the ideal of 'equality of power', and its constructivist premises – are consistent. In section 4, Weale's view of equality is examined in the 'hard case' of a cooperative solution that cannot be associated with individual advantage, revealing some of the difficulties encountered by a contingent practice-dependent model in balancing the empirical premises of the theory with its normative goal of stability through fair terms of cooperation. The final section presents a possible solution to the

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[2] This notion of a practice-dependent model is strongly influenced by Sangiovanni's 'practice-dependence thesis' (2008).

problem of stability provided by the institutional practice-dependent model. This model appears to be less problematic insofar as it presents a distinctive political ideal citizenship which is intended to unite the theory's normative goals with practical feasibility.

1. Procedural constructivism and empirical social contracts

Under which conditions might just social and political relations be realised? In Weale's view, the social contract tradition provides the proper normative terrain for thinking about an account of just social relations (Weale 2013, p. 6). It assumes that self-interested individuals who have to deliberate about the rules that apply to their social organization do so by way of a relational decision-making process, employing a strategy that gives consideration to the point of view of other members in the cooperative scheme. Precisely how this strategy should be constructed is, however, quite controversial.

The social contract literature has developed different approaches in response to this question, and Weale's book covers most of this debate. The common distinction between 'contractarian' and 'contractual' theories is put forward, referring to the motivation of the contracting parties (Darwall 2003; Gauthier 1997). Weale also makes a further clarification regarding the constructivist method, distinguishing between actual and hypothetical contracts. This refers to the ways in which it is possible to construct a coherent account of how different principles are linked both to each other and to a certain shared understanding of political morality (Weale 2013, pp. 12–13). This method, known as constructivism, often reflects an account of contract that is conceived as a 'purely hypothetical device of representation' (p. 12). Starting with Rawls's political constructivism (1996), contemporary social contract theories, whether contactarian or contractualist, share a view of the social contract as hypothetical or *a priori*. This approach enables one to specify the implications of certain moral premises concerning people's moral equality (Rawls 1996; Barry 1989; Gauthier 1997; on this see also Kymlicka 2002, p. 61). Following Matravers, Weale charges these theories with 'faux constructivism' (Matravers 2000) since they adopt constructivism to 'render explicit what is implicit in the ideal of treating people with equal consideration' (Weale 2013, p. 13) and disregard those actual conditions that might create just social relations within existing contracting situations. Thus, although Weale recognises that 'actual' social contracts may not be enough to pursue social justice (Weale 2013, p. 32), he has robust reasons to reject the hypothetical account of social contract (p. 13). The basis for Weale's rejection of this form of constructivism, and especially Rawls's political constructivism, is that 'first order disputes about justice and property are displaced onto second order disputes about how to construct a theoretically defensible model' (pp. 32-33).

Thus, although Weale insists on the 'contractarian' nature of his proposal, what in fact makes his contribution significantly different from contemporary social contract theories is its focus on an empirical rather than hypothetical account of contract. From a theoretical perspective, this empirical account has important repercussions for the idea of procedural constructivism implicit in the social contract tradition, for 'The constraints that make the political agreement one of justice are not to be found in the motives of the agents, but in the circumstances in which they negotiate with potential associates' (Weale 2013, p. 13). Thus, an account of fairness and just social relations can coalesce from existing social contracts that actually reflect the approximate equality of power of the contracting parties; and 'Some empirically realized implicit social contracts emerge in conditions of a balance of power such that their outcome can be interpreted as being just' (p. 33).

Once the theoretical boundaries of his procedural constructivism are clarified, Weale provides an overview of those conditions that characterise such an idea of procedural democracy. These include self-government, full collective self-legislation capacity, equal political standing of members, and a deliberative solution to collective action problems (Weale 2013, pp. 40, 41, 43, 46). To avoid the circularity of 'faux constructivism', however, the empirical account requires examples of communities actually regulated by a contract of this sort. For Weale, common-pool resources regimes, like those observed by Ostrom (1992), represent a straightforward empirical instance of democratic social contracts (Weale 2013, p. 50). In these communities a social contract can be seen as implicitly reconciling 'the existence of separate and competing interests with the need to secure common interests' (Weale 2013, p. xii). The contract is made by members of the community (understood as self-governing), who are well informed about local natural and cultural practices, and who thus recognise the need for monitoring and sanctioning. And most importantly, each individual participates in the negotiations from a roughly equal position of power.

How should this ideal be translated into actual 'great societies'? Weale's empirical approach serves primarily to explicate the logic underlying procedural democracy in actual societies: namely, the logic of a just social cooperation scheme that emerges in situations of rough equality of power (Weale 2013, pp. 53, 62). In this way, the empirical account of procedural constructivism seems to tease out from empirical premises significant conclusions concerning equality that could inform political morality. In addition, the account envisages a society where first-order disputes concerning the principles that should govern social cooperation are solved by a procedural account that reflects such empirical premises.

2. Contingent versus institutional practice-dependent models

Weale's procedural constructivism presents a distinctive *contingent* practice-dependent account of justice that might be distinguished from what I see as the *institutional* practice-dependent model of Rawls's political constructivism. Sangiovanni has differentiated a 'practice-dependence' model of justice, in which 'the content, scope and justification of justice depends on the structure and form of the practices that the conception is intended to govern', from a more general practice-independent view of morality that holds that first principles of justice do not depend on practices or institutions (Sangiovanni 2008, p. 2). In general terms, practice-dependence is founded on a relational account since it assumes that institutions and social practices 'put people in a special relationship, and it is this special relationship that gives rise to first principles of justice' (p. 4). Thus, a practice-dependent model, whether contingent or institutional, relates a certain notion of equality to extant social practices.

Undeniably, Rawls and Weale both endorse a practice-dependent model in which 'politics is prior to morality' (Sangiovanni 2008, p. 5). However, the ways in which first principles are linked to social practices and institutions vary significantly in the two normative approaches. For Weale the justice of democratic procedures is to be drawn from criteria implicit in empirical circumstances that reflect the community members' approximate equality of power. The model is practice-dependent since it is intended to recast in normative terms those principles (let us call them p_1, p_2, p_3, etc.) that reflect a set of practices that characterise a situation of actual social equality (a context C^*), which are, in turn, consistent with our moral intuitions (let us call it M).

From Rawls, however, we derive a different understanding of the practice-dependent model. Political constructivism, as Rawls puts it, is a procedure that enables us to specify the normative implications of the political conception of certain moral premises concerning people's social and political equality. This procedure assumes a particular institutional conception of citizenship and society and a background condition of reasonability, so that 'rational agents, as representative of citizens and subject to reasonable conditions, select the public principles of justice to regulate the basic structure of society' (Rawls 1996, p. 93). In this sense, political constructivism serves to demonstrate the practical aim of Rawls's conception of political justice – namely, justice as fairness: 'it presents itself as a conception of justice that might be shared by citizens as a basis of reasoned, shared and informed and willing political agreement. It expresses their shared and public political reason' (Rawls 1996, p. 9; on this point see also Klosko 1997). This view of practice-dependence tells us that sharing a particular institutional context (C_m) shapes the reasons (R_m) for endorsing those principles of political justice (the set of principles P_m) that better represent certain moral premises concerning citizens who are understood to be socially and politically equal (M).

3. On the idea of 'equality of power'

Section 2 argued that Weale's procedural constructivism introduces a *contingent* practice-dependent model of justice, for the condition which allows for social justice is an actual equality of power existing between contract members. Crucial to test the coherence and the feasibility of this is whether the notion of actual social equality is in fact consistent with such a procedural constructivist method. To the question 'What would make for a just social contract?' Weale, drawing on Mill's idea of the ancient republic, suggests that justice arises 'where the common rules that protect the public interest of a society reflect the approximate equality of power of its members' (Weale 2013, p. 23; Mill 1991). He argues that 'Equality of democratic status is the power to help shape the social contract through the political relations of the institutions of governance in a society' (Weale 2013, p. 24).

Weale alludes to the debate triggered by Anderson's (1999) delineation and critique of the 'luck egalitarian' view which argued for equality to be understood as 'an expression of equality of status or standing within the political system, rather than an entitlement to any particular share on the part of individuals to available goods' (Weale 2013, p. 23). What, however, is the precise meaning of 'equality of standing' and in what sense is this view distinct from a distributive account of equality?

Scheffler's contribution to this discussion is worth recalling here. He provides an illuminating definition of what we might call an ideal of 'relational equality' which encompasses moral, social and political features (Scheffler 2003, pp. 22–23). As a moral ideal, equality means that each individual is of equal worth by virtue of their status as a person. As a social ideal, it entails a notion of society understood as a cooperative system whose members retain the same social standing. Finally, as a political ideal, equality defines those claims that political agents 'are entitled to make one another by virtue of their status *as* citizens' (Scheffler 2003, p. 23). This has, in Scheffler's view, some obvious distributive implications, since an unfair economic distribution might affect the condition of social and political equality. However, since the core of the value of equality is a normative conception of human relations, social, political and economic arrangements should be made in accordance with that (Scheffler 2003, p. 29).

Scheffler believes that this notion of social and political equality is the best way to understand Rawls's overall constructivist project, here identified as an *institutional* practice-dependent model (Scheffler 2003, pp. 28–29). Weale's interpretation of equality of power, linked to his *contingent* practice-dependent view, differs however from this ideal of social and political equality in several important respects. First, Weale's theory rejects any strongly moralised premise regarding moral equality, human dignity or equal worth (Weale 2013, p. 46). Second, while

embracing an ideal of social equality (p. 23), he derives his notion of political equality directly from the condition of actual equality of power (which characterises his procedural constructivism). He argues that, 'if we are hoping to use the construction of the democratic contract to capture the sense of justice, we need instead to relate the idea of political equality to the practice of democracy understood as a set of procedures' (p. 46). As a matter of fact, he does not provide any clear account of the political role of citizenship.[3] Rather, he suggests that 'the fundamental conception of society that lies behind social contract theory is one in which members not only share certain common interests and equality of status, but in which they also have competing and sometimes incompatible interests' (p. 24).

If I understand Weale's notion of social equality correctly, it is not clear to what extent this account of equality can satisfy the tension between the normative goal of the theory, that is social justice, and its empirical constraints. By seeking to avoid what he takes to be a circularity typical of political constructivism, he faces the problem of finding a new strategy that can ensure the fairness of the terms of social cooperation. To my view, there are two distinct ways to make the institutional situation of actual social equality (a context C^*) and its related principles ($p_1, p_2, p_3..$) consistent with our moral intuitions regarding social justice in this case: either the ideal of social equality must rely on a collectivist account of 'moral community' that confers an intrinsic moral value on local social practices;[4] or it should rest upon a strong account of individualism. Weale seems to follow the second strategy, entailing a somewhat 'thick' view of the democratic social contract's members' deliberative rationality (that is, in his words, enlightened, self-interested, prudential, bounded and defeasible). It would in his view be plausible to hold that individual agents can achieve, for prudential reasons, the moral desiderata of theory. Weale argues 'that a strong individualism also requires collective provision for common interests. [...] Liberal and individualist freedoms of trade and movement combined with the protection of civil liberties may be married to collectivist protection against economic and social insecurity where that is necessary. Although such a set of institutional implications cannot be established deductively, their justifiability is a plausible implication of a prudent social contract' (Weale 2013, p. 30).

4. The state of the problem: realising a fair social cooperation

The previous section demonstrated that the *contingent* practice-dependent model relies on two conditions – a thick account of individual rationality, and conditions of equality of power – the conjunction of which ensures the fairness of the system of social cooperation and its stability. I shall

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[3] A point to which I will return in the final section.
[4] I have in mind a kind of communitarian account of social equality, such as the one presented by Walzer (1983).

now put the model to the test in what I consider to be a 'hard case' for the theory. In doing so, I draw influence from 'Is there something for everyone?', a Swiss social experiment examining the public's understanding of and reaction to the scarcity of food resources, which featured at the recent Expo 2015 in Milan. In order to reconstruct this experiment in terms more expedient to Weale's theory, let us assume that the government of an ideal Expoland enacts a policy that allows all members of its society to appropriate certain goods. Expoland is a typical example of a contemporary post-industrial society, so its economy does not strictly depend on the production or consumption of these goods, yet we shall assume that they are involved in a level of rivalry such that overconsumption by a few persons might deplete the goods' availability to others. The open access condition therefore serves to balance a principle of non-excludability with the possibility of rivalry in terms of the use and consumption of goods (Weale 2013, p. 48). Now let us consider that the government of Expoland introduces a limitation to the open access condition: it will be permissible to access goods only for a determinate period of time. Individuals are on equal footing with one another insofar as they have equal power to get the goods and are regulated by a principle of access which applies equally to all. They are allowed to take as much as they want, provided they take into account that one person's overconsumption might deplete the availability to others.

In this kind of situation, which is not strictly mutually advantageous, what should be done to force individuals towards cooperative behaviour? Weale's approach would suggest that rationally prudent (bounded and defeasible) individuals would tend to act as if they had internalised cooperative behaviour for its own sake. However, a merely prudent rationality might be insufficient to guarantee a cooperative solution. Thus, if we take 'equality of power' to be the sole constraint for the context C* (that is, without relying on any moral premise regarding equality), the dilemma can be resolved only by way of an external system of incentives and sanctioning to monitor fair access to goods. However, as Weale recognises, this is not enough to ensure cooperation and stability; 'to secure stability', he writes, 'just practices need not only to be externally enforced but to be recognised from an inner point of view' (Weale 2013, p. 226).

Another solution might emerge if we take Weale's notion of strong individualism seriously. Although just practices originate circumstantially, the stability of the *contingent* practice-dependent model is meant to rest upon an ideal of a rational individual agent, a member of a democratic social contract, who has internalised a sense of justice, which allows her/him to pursue cooperative solutions in the absence of possible advantages. Such a view, however, introduces robust moral assumptions about procedures which seem to be at odds with the strictly empirical conditions of the theory, an issue to which I will return in the final section.

5. On the stability of justice: citizenship and compliance

At the core of this discussion is an attempt to balance the goal of the normatively stable theory with the context of deep disagreement within society. An important part of the justification of practice-dependence is in fact the recognition that politics is prior to morality' (Sangiovanni 2008, pp. 4, 20–22). For Weale, the fact of political disagreement and the priority of politics to morality are major motivations for modelling a *contingent* practice-dependent theory. However, the case presented in the previous section suggests that individuals' compliance with the principles of justice might be threatened when the conditions are not mutually advantageous. In this case, a 'circumstantial' notion of justice might be insufficient to ensure that just social practices will become stable. Weale's strategy is thus to rely on a certain idea of individuals' internalised sense of justice, which in turn seems to be inconsistent with the main empirical assumptions of the theory.

The problem of stability is central also to the *institutional* practice-dependent model. However, this theory provides, in my view, a less problematic solution to the issue of compliance. To understand Rawls's view, it is necessary to return to the idea of citizenship and the related notion of political and social equality discussed in the previous sections. For the *institutional* practice-dependent model the political conception of justice is constructed from institutionally framed ideals of the citizen (understood as politically and socially free) and society (understood as a fair system of social cooperation) and a background condition of reasonability. For its political constructivist purposes, this theory assumes that the conception of justice can be justified if it is publicly recognisable not just from an abstract or highly moralised ideal of individual, person or human being but from all the political agents, namely citizens, of a constitutional democracy (Sangiovanni 2008, p. 15). The normative ideal of social and political equality underlying this conception of citizenship is intended to shape the basis of the relations among citizens of a democratic society, in a way that ensures reciprocity and mutual respect.

In this model, compliance with the principles of justice depends not only on whether citizens are able to regard the political principles regulating the society as just and fair, but also on whether they are able to support and act in accordance with those principles. Thus, citizenship is not simply regarded as a 'status'; it entails something more, which might be termed a 'role', and by which I mean that citizenship implies a set of political activities and obligations that are necessary to fulfil and secure the content of the conception of political justice (on this point see also Weithman 2015, pp. 77–79). It is therefore the ideal of political and social equality implicit in the *institutional* practice-dependent model that captures both aspects of citizenship as 'status' and 'role'. This double function of citizenship is intended to solve the assurance problem and support what Rawls calls the 'stability for the right reasons' of the political conception of political authority.

Conclusion

Weale's *Democratic justice and the social contract* is a sophisticated and erudite philosophical work. The author provides an innovative solution to the problem of identifying fair principles (of justice) for social cooperation in conditions of deep and persisting moral and political disagreement, via an account of procedural constructivism. This scheme is meant to avoid the circularity of 'faux constructivisms' by teasing out conclusions regarding political morality from empirical premises.

In this model, however, the issue of the political 'role' of citizens remains somehow implicit. The theory in fact does not provide a clear account of the political conception of citizenship, while it relies on an empirical condition of equality of status. To my mind, this is primarily due to the contrast between an idealised political conception of citizenship and the empirical premises of the theory. However, the tension between such empirical constraints and the normative goals of the theory does not seem to be fully resolved, especially regarding stability.

The characterization of stability as presented in the *contingent* version of practice-dependence, however, seems to place an unrealistic expectation on individual members of the democratic social contract to be self-governors, which goes far beyond what we should expect from good citizens. Instead of characterising a reasonable initial situation by construction – as Rawls does– the *contingent* practice-dependent model pretends to achieve significant conclusions in terms of social justice via a highly moralised trajectory: according to that model, rational individuals, members of the democratic contract, would acquire a sense of justice via democratic procedures. Yet, this seems at odds with the main assumption underlying the *contingent* practice-dependent model, namely a realist account of human relations based on the priority of individuals' mutual interest over moral premises regarding equality.

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