Valentina Gentile

Modus vivendi liberalism, practice-dependance and political legitimacy[1]

Contemporary political theory is characterised by a realistic critique of liberalism, in which the political realm is more clearly distinguished from the moral. In the literature, two lines of argument are invoked to support realist considerations in politics: first, political realism is seen as an antidote to a somehow idealized and unfeasible version of liberalism; and second, realist theorizing is said to provide the proper *contingent* response to the deep pluralism that characterises contemporary democracies (Horton 2010, Galston 2010). In the first case, political realism is strictly defined as an anti-utopian and feasible theory, while in the second, realist theorizing is seen as avoiding foundational disagreements about justice mutating into second-order disputes concerning the justifiability of legitimate political institutions. In this second sense, the realist critique challenges a key aspect of Rawls' liberal project – that is, its justificatory constituency.

David McCabe (2010, 6) presents an interesting example of realist critique of Rawls' justificatory project. McCabe argues that Rawls' *Political Liberalism*, which relies on a substantive consensus view, asks citizens to commit

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to a demanding version of the justificatory requirement "that expresses political values that others as free and equal also might reasonably be expected to endorse" (Rawls 1996, l). Yet this goal is practically unfeasible and normatively inadequate if the aim of liberal theory is to take the fact of moral diversity seriously. In conditions of deep pluralism, the justificatory requirement should be recast so to include those, illiberal or sceptical, who are in fact excluded by Rawls' justificatory constituency. Following Scanlon, McCabe believes that the argument for liberalism should be one the critic of liberalism cannot reasonably reject (2010, 7).

This paper contributes to this discussion by confronting the *modus vivendi* justificatory project as presented by McCabe with Rawls' liberal project. It suggests that both *Modus Vivendi Liberalism* (hereafter MVL) and *Political Liberalism* (hereafter PL) seem to endorse a practice-dependent account of political justice in which "politics is prior to morality"; yet the ways in which reasons are endorsed to justify the shared conception of political authority are significantly different in these two schemes. McCabe presents a distinctive kind of *contingent* practice-dependent liberalism that might be distinguished from Rawls' *institutional* model. Following Sangiovanni (2008), I recover the notion of 'practice-dependence' to reveal the differences underlying these two liberal projects and the implications that a *contingent* practice-dependent model might have on what McCabe calls the central feature of the liberal project, that is its Justificatory Requirement (JR) (McCabe 2010, 5).

The paper is structured as follows. Starting from Rawls' notion of consensus-based toleration, Section 1 provides a brief reconstruction of the recent literature on *modus vivendi*. A common feature in this body of work is to consider *modus vivendi* as a realist and strictly political response to Rawls' highly moralised conception of political authority. Section 2 focuses on a specific version of *modus vivendi* political theorizing, as suggested by McCabe (2010). McCabe's MVL is here presented as an alternative liberal justificatory project: it insists on a notion of political legitimacy that is crucially linked to the inclusion of a plurality of voices in the justificatory constituency of liberal democratic societies. Section 3 reconsiders both Rawls' and McCabe's versions of justificatory liberalism in the light of Sangiovanni's notion of practice-dependence. It distinguishes two practice-dependent justificatory views: Rawls' *institutional* model and McCabe's *contingent* one. Section 4 focuses on the ideal of political legitimacy implicit in such a *contingent* model, which is guaranteed by what I call the 'Inclusiveness Requirement' (IR). Section 5

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shows that this version of political legitimacy seems to rely on an idea of public justification based on convergence of reasons. This is opposed to Rawls' *institutional* model, which insists on the conditions of shareability and accessibility of reasons as a basis for public justification. This section clarifies the differences between these two models and their implications for such issues as stability and autonomy. Lastly, Section 6 considers McCabe's proposal as a case of practice-independent justificatory liberalism. In this second reading, however, MVL seems to be inconsistent with its realist premises.

1. From *Political Liberalism* to *modus vivendi* theorizing

The tension between moral pluralism and the stability of liberal institutions is central to contemporary liberal thought. In PL, Rawls famously asks, "How is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?" (Rawls 1996, xxv) For Rawls, institutions and, especially, the constitution of a democratic society provide the proper framework of reasons for reaching an 'overlapping consensus' and thus supporting liberal democratic arrangements over time. In this way, he argues, a "stability for the right reasons" is realized (xxxix). This account importantly links the issue of the stability of liberal institutions in plural societies to the principle of liberal legitimacy so that the view of toleration introduces a conception of political authority which is justified to everyone in terms that cannot reasonably be rejected.

Here, Rawls draws an important distinction between two different models of toleration: a view of liberal toleration based on an 'overlapping consensus', and another, more traditional view that he calls '*modus vivendi*' (Rawls 1996, 181). A *modus vivendi* sees people in divided societies endorsing liberal institutions as a matter of balancing opposing forces. In such circumstances, citizens view society as a compromise between what they consider to be the best possible arrangement (namely, a state based solely on their own comprehensive doctrine) and the worst (namely, a state based solely on a comprehensive doctrine opposed to their own). Yet, within a *modus vivendi*, each citizen sees the liberal state as, at most, a second-best political order, and accordingly the relationship between state and citizen is inherently unstable. Rawls clarifies this point using the example of Catholicism and Protestantism in the sixteenth century:

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Both faiths held that it was the duty of the ruler to uphold the true religion and to repress the spread of heresy and false doctrine. In such a case, the acceptance of the principle of toleration would indeed be a mere modus vivendi, because if either faith becomes dominant, the principle of toleration would no longer be followed. Stability with respect to the distribution of power is lacking (Rawls 1996, 148).

Recently, the notion of *modus vivendi* has revived. It has increasingly attracted the interest of scholars who criticize the implicit moralism and strict legalism of Rawls' project. First, John Gray has proposed an idea of *modus vivendi* as an antidote to Rawls' "anti-political legalism" (Gray 2000, 16). Gray distinguishes between two incompatible views of liberal toleration: one aimed at establishing universally justified principles that are based on rational consensus, the other instead focusing on the more modest claim of balancing different values and ways of life. He insists on the need to dismiss a liberal universalist project in favour of a view of liberal toleration that is compatible with the historical fact of pluralism (6). According to Gray, Rawls' justificatory framework, reflecting values that are firmly grounded on an 'overlapping consensus', is in fact unable to accommodate the demands of moral pluralism. This approach displaces all fundamental issues, such as basic liberties and social distribution, from the realm of politics (16). Yet, Gray reminds us, disagreement does not cover only the good, but also the right (7). A *modus vivendi*, which does not rely on problematic notions such as truth or right, should inform a feasible political project of liberal toleration. This is based on the idea of compromise and bargain among competing communities who hold different sets of values. Under a *modus vivendi*, toleration is presented as a condition for peace which embraces diversity instead of suppressing it.

Gray's defence of *modus vivendi* liberalism has inspired a vast body of literature focused on the possibilities of reconciling an account of toleration with what Waldron (1999) has called the 'circumstances of politics'. Different views regarding not only the concept of the good but also the content and 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 (Gentile 2017). Matters of justice therefore cannot be isolated from matters of politics, nor, more precisely, from those democratic procedures and practices that can be widely recognised as legitimate. In this literature, it is possible to broadly distinguish two distinct approaches: the

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first insists on an account of comprehensive pluralism (Galston 2002), while the second seeks to recast the problem of political legitimacy in contexts of deep pluralism in less moralised terms (see for instance Horton 2010, 2012; McCabe 2010). To recall Williams (2005, 1-3), I shall call this approach 'political realism'.

This paper focuses on the second version of *modus vivendi* theorizing. For political realism, a *modus vivendi* envisages a "broadly consensual" view of toleration that introduces a procedural interest of the parties in recognizing the legitimacy of a particular political arrangement (Horton 2010, 432). In contrast to Rawls' principle of liberal legitimacy and its justificatory structure, this view invokes a narrower idea of legitimacy understood as a distinctive political concept (Galston 2010, 388). Thus, appropriate standards of evaluation of the legitimate institutional arrangement should arise within politics rather than from external moral standards (Galston 2010, 386).

2. Modus vivendi, political legitimacy and public justification

Within what I have labelled 'political realism' it is possible to distinguish at least two different ways in which political legitimacy has been linked to the notion of *modus vivendi*. For Horton (2012), the problem with Rawls' principle of liberal legitimacy is that it depends on an account of justice that is implicit in its justificatory structure. Against this, Horton argues that political legitimacy should be located in relation to the criteria that are operative in particular social, cultural and conceptual contexts, and which inform people's judgements about the legitimacy of their state (145). In this way, Horton hopes to resist the attitude of several liberal (neo-Kantian) scholars who provide a predetermined justification of the principle of liberal legitimacy irrespective of both contextual circumstances and people's actual beliefs. The notion of political legitimacy related to *modus vivendi* ought not to be extrapolated from consent theory: people consent to a *modus vivendi* because they acknowledge its political legitimacy (Horton 2019, 141-142). A *modus vivendi* is, for Horton, less stable than an 'overlapping consensus', yet such an instability reflects the very political circumstances from which it arises (Horton 2010, 441). Thus, he suggests a *contingent* and relatively unstable idea of political legitimacy linked to actual political institutions and practices, which is aimed at ruling out the liberal commitment to public justification. This

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account, however, can provide only scant resources for a normative defence of *modus vivendi* political legitimacy. By separating the notion of legitimacy from the justificatory requirement, Horton concedes that *modus vivendi* political legitimacy may not be distinctively liberal. He locates his idea of *modus vivendi* outside the realm of liberalism. Thus, the contingent account of political legitimacy could easily be satisfied in hierarchically ordered societies – say, a society whose conception of political authority is defined strictly in religious terms. For normative political theorizing, however, what counts is to provide an argument to explain a widely shared intuition regarding the fact that a liberal political order, in which basic freedoms and rights are protected, is preferable to one in which the principle of freedom of conscience is at risk.

One might argue that Rawls also recognizes the political legitimacy of some non-liberal hierarchical societies, which he calls decent hierarchical peoples (Rawls 1999, 62 ff).[2] Of course, Rawls' notion of 'decent peoples' has important implications for the idea of international toleration, because the kind of pluralism that characterizes international society will inevitably be reflected in a diversity of political forms, some of which may be non-liberal democracies but still satisfy the conditions that justify the recognition of them as "equal participating members in good standing of the Society of Peoples" (59). Yet, the account of 'institutional decency' represents a central normative constraint. Rawls does not provide a clear definition of decency, but suggests that it might be understood as a kind of weak reasonability (Rawls 67; Beitz 2000, 686). Rawls' notion of decency amplifies the anti-paternalism of the theory. In the international Society of Peoples, some non-liberal decent hierarchical peoples are recognized as members of an enlarged justificatory constituency, the original position of second level. This weak form of legitimacy is based on their capacity as peoples to select and support what Rawls considers to be "certain familiar and traditional principles of justice among free and democratic peoples" (1999, 37). Yet, two elements distinguish Rawls' international legitimacy from the kind of political legitimacy suggested by *modus vivendi* theorists. First, also this weak idea of international legitimacy is grounded on an 'overlapping consensus' among liberal and decent non-liberal peoples; second, the liberal notion of legitimacy, which is satisfied within liberal societies, and the legitimacy of decent non-liberal peoples, which is

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[2] I am grateful to John Horton for raising this point.

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realized at the level of the Society of Peoples, importantly differ. I shall return to this point in Section 6.

However, some supporters of *modus vivendi* theorizing have taken the commitment to liberalism seriously in providing an account of political legitimacy linked to some form of public justification. McCabe (2010) offers an interesting case of a *modus vivendi* justificatory project. Here, a minimal account of political justice that is justified as a *modus vivendi* should be preferred to an idealized version of liberalism. MVL is nonetheless linked to a normative account of political legitimacy as far as it reflects citizens' reasons to consent to it. Thus, MVL provides a more plausible answer to what McCabe calls the liberal project's 'Justificatory Requirement'. In his view, JR is essential to any liberal theory insofar as it captures two main features of liberalism, namely the harm principle and anti-perfectionism. The task of MVL is to reconnect JR to the deep pluralism emerging in contemporary societies. In this model, the political legitimacy of a specific institutional setting must reflect a commitment to JR that is compatible with a fundamental condition of inclusiveness.

MVL is a 'particularist' form of liberalism rooted in two considerations: first, the recognition that many citizens might not endorse a liberal view of political association; and yet second, that these citizens might see the existence of the state either as an unchangeable fact of modern life or as something that is instrumental to the achievement of other important goods (McCabe 2010, 133). Under these conditions, an agreement on the liberal terms might emerge as a compromise among citizens who view the liberal state as a second-best solution (133). As a normative project, MVL asks citizens who accept the liberal terms on a *modus vivendi* basis to commit themselves to a weak proceduralism that is grounded in a presumption that the interests of all persons matter equally (140). Like other scholars who have emphasized the need to make the liberal justificatory constituency more inclusive (see especially Sala 2013; Kelly and McPherson 2001), McCabe believes that it is necessary to recast JR so as to include those citizens who, albeit illiberal, would nonetheless have reasons to accept the liberal state. Under a *modus vivendi*, liberal principles might be endorsed, for contingent reasons, also by those illiberal citizens who are excluded from Rawls' justificatory constituency. Although this sort of compromise might lead to lesser degrees of stability, "it does not fail to meet the ideal of justification", McCabe argues (2010, 156).

To test the implications of McCabe's justificatory project and whether it appropriately addresses the problem at the core of the realist critique of

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Rawls' project, I shall explore Sangiovanni's (2008) definition of a practice-dependent model of political theorizing in the next section and consider Rawls' and McCabe's approaches in the light of it. I then go on to consider the implications that these two liberal justificatory projects have for the idea of legitimacy.

3. Two versions of practice-dependent liberalism

Sangiovanni has distinguished a 'practice-dependent' model of political theorizing – 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 which holds that first principles of justice do not depend on practices or institutions (2008, 2). In general terms, practice-dependence is founded on a relational account of justice 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" (4). Thus, a practice-dependent model of political justice relates a certain notion of equality to extant social institutions. In my view, both Rawls and McCabe could be seen to endorse a practice-dependent model of justice in which 'politics is prior to morality' (Sangiovanni 2008, 5). However, the ways in which the two normative approaches link their justificatory framework to principles and institutions varies significantly.

From Rawls' PL, we derive an *institutional* interpretation of practice-dependency. As I have shown elsewhere (Gentile 2017), Rawls' political constructivism is a procedure that enables the specification of the normative implications of certain moral premises concerning citizens' social and political equality for the political conception of political authority. This procedure assumes institutional conceptions of citizenship and society and a background condition of reasonableness, 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, 93). This account serves to demonstrate the practical aim of Rawls' conception of political authority – 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" (9; on this point see also Klosko 1997). This view

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of practice-dependence tells us that sharing a liberal *institutional* context (I) shapes the framework of reasons (R_i) for endorsing a conception of political authority (P) that better represents certain moral premises concerning citizens understood as socially and politically equal (M_i). The institutional/ public morality (M_i) expressed by the appeal to the shared framework of reasons (R_i) reflects citizens' consensus regarding the liberal terms. For Rawls, the appeal to shared reasons (R_i) is consistent with citizens' capacity to realize political autonomy (Rawls 1996, 77-78). I will come back to this notion of political autonomy in the next section.

McCabe seems to offer a different version of practice-dependence. The political legitimacy of JR based on a *modus vivendi* is to be drawn from actual citizens' acceptance of the liberal terms which reflect society members' actual equality of status, understood here as a 'presupposition of minimal universalism' (McCabe 2010, 140). This model seems to adhere to the practice-dependence desiderata since it assumes that institutions and practices put people in a special relationship and this gives rise to principles of political justice. In this case, however, the liberal order is justifiable by citizens who endorse a set of different reasons, e.g. instrumental, prudential, and so on (let us call them r_1, r_2, r_3, ...), all reflecting a contingent condition of actual social equality (C^*) that is, in turn, implicit in that institutional setting (I_c). McCabe distinguishes between JR understood as a moral ideal, namely Rawls' R_i, from the set of reasonings r_1, r_2, r_3, ... that motivate the endorsement of a liberal institutional arrangement to which JR applies (159). Under a *modus vivendi*, citizens show their commitment to JR, albeit for different reasons, and this achieves morally acceptable outcomes. JR is therefore here understood as a procedural commitment which 'serves as a constraint on acceptable outcomes' (160) without entailing any specific one.

4. Political legitimacy, inclusivism and public justification

In the previous section, I argued that McCabe's project can be seen as an attempt to recast an idea of practice-dependency in terms of a weak form of proceduralism that is genuinely political. According to the author, this rules out problematic notions such as reasonableness and reasonable pluralism in favour of a contingent understanding of compromise among competing sets of reasons. Under such a contingency, however, the liberal state is just one

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possible outcome of the justificatory scheme. McCabe concedes that the case for *modus vivendi* liberalism depends upon conditions that are neither universal nor guaranteed (2010, 160).

Yet, what are the implications of this justificatory project for the notion of political legitimacy? While the *institutional* account importantly connects a notion of stability 'for the right reasons' to the principle of liberal legitimacy, MVL, understood as a practice-dependent model of political theorizing, entails a trade-off between the stability of the consensus and the notion of political legitimacy. In rejecting the idea of a shared framework of reasons, MVL appeals to a notion of political legitimacy that is grounded in an account of inclusiveness. Let us call it the Inclusiveness Requirement (IR). Given the deep pluralism of contemporary societies, the political legitimacy of liberal institutions can only be contingent: it is realized when citizens' reasons converge in endorsing this institutional arrangement.

For Rawls, the converse is true. Acknowledging the fact of reasonable pluralism is precisely why an idea of stability 'for the right reasons' should be supported. As Weithman (2011; 2016, 98 ff) has shown, the reason behind Rawls' political turn was his recognition that the idea of stability presented in *A Theory of Justice* was unrealistic. That book laid out how a liberal institutional setting would encourage members' views of the good to 'converge' – that there would be a 'congruence' between the right and the good. But Rawls came to realize that this conclusion was not only improbable but also conflicted with the fact that liberal institutions encourage pluralism about the good. Now, the principle of liberal legitimacy that is expressed in JR is a guarantee of this new idea of stability. The appeal to R_i, which reflects the values expressed by liberal institutions, is not aimed at preventing moral disagreement; rather, it encourages reasonable pluralism by showing some degree of 'compatibility' between a private and public morality. The idea of compatibility between the good and the right, however, suggests that state laws or decisions should not necessarily have to be regarded as 'good' from the perspective of one citizen's comprehensive doctrine in order to be seen as legitimate. The legitimacy refers rather to the justificatory process that reflects such a compatibility. Quong's (2005) distinction between foundational and justificatory disagreement might be useful here to grasp the sense in which liberal legitimacy is linked to Rawls' JR. As Quong rightly points out, Rawls' standard for liberal legitimacy asserts that the state should not act on grounds that citizens cannot "reasonably expect to endorse" (2005, 316).

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Yet, McCabe believes that Rawls' notion of liberal legitimacy is problematic precisely because it assumes a background condition of reasonable pluralism. In contrast, MVL suggests a justification for liberalism that cannot be rejected by those who are unreasonable. Some gradations of instability are the price to be paid to ensure such a broader justificatory constituency: the inclusiveness of reasons, in turn, seems here to be the crucial factor to realize political legitimacy. Thus, while Rawls' principle of liberal legitimacy derives from a symmetry between the framework of reasons (R_i) for endorsing a particular liberal institutional setting and certain moral premises regarding the normative ideal of citizens understood as free and equal (M_i), MVL relies on an account of political legitimacy that is satisfied when different citizens, on grounds of their own different reasons (r_1, r_2, r_3, …), actually and voluntarily support a *contingent* liberal arrangement (I_c).

It is precisely this nexus of political legitimacy, IR and JR that I find problematic in MVL, however. Under a *modus vivendi*, it might be the case that citizens endorsing different reasons, both liberal and illiberal, come voluntarily to support the same liberal institutional arrangement. Yet, as Rawls maintains, when liberal institutions are accepted as a *modus vivendi*, they will be easily abandoned when the balance of forces among citizens' competing views changes in favour of one specific doctrine. For McCabe, this possibility would not detract from what is appealing in MVL: that under a *modus vivendi* the liberal state could be endorsed and justified by all citizens on the basis of their own reasons. Such a congruence between the conception of political justice (the right) and citizens' varying comprehensive doctrine (the good) would be the guarantee for citizens' autonomy. Yet, even conceding that such a consensus is both *contingent* and *unstable*, it is not clear how those who are not committed to liberalism, and especially citizens who endorse illiberal doctrines, would nevertheless freely and voluntarily support the liberal state.

In responding to this objection, McCabe concedes that MVL needs to explain why liberal institutions are the best option not only for citizens who support liberalism, but also for those who see it as a second-best solution. He insists that citizens who endorse illiberal views will be still committed to an ideal of the equal moral status of all persons, so that liberal institutions are a suitable option not only for fully liberal citizens, but for all citizens who are committed to such a view of equality (2010, 159). This move is bizarre. Although McCabe asserts that the mere acceptance of the liberal terms might emerge as a compromise among competing forces, he also argues that under

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a *modus vivendi*, citizens, either liberal or illiberal, endorse liberal institutions on the basis of their own reasons given their shared commitment to equality. A distinctive feature of MVL is therefore "its commitment to minimal moral universalism grounded in the presumption that the interests of all persons matter equally" (138). In other words, McCabe seems to share some of the Rawlsian concerns regarding the stability of liberal institutions precisely in connection with such a commitment to the IR.

If I understand McCabe's argument correctly, however, it seems that from the theory we can derive two different interpretations of the notion of political morality that, in turn, entail two different views of the political legitimacy-IR-JR nexus. At some point in his argument, McCabe seems to derive an equality of moral status from the *contingent* liberal institutions (2010, 133). Yet, it seems that this view of equality, which is consistent with a *contingent* practice-dependent justificatory model, reflects a de facto situation of equality that is the product of the historical development of modernity. This model, however, can provide only a weak normative defence of the liberal state. In other sections of McCabe's book, though, a thicker moral understanding of equality seems to transcend such a contingent institutional situation: McCabe relates "the presumption that the interests of all persons matter equally" to what he calls a "moral minimal universalism" (2010, 138). This notion of *thin* morality seems to trump practice-dependency: in this way, however, this proposal fails to meet the main realist desiderata of the theory, that is the "priority of politics to morality".

In the next two sections, I consider McCabe's project in light of the two interpretations suggested above. In the first case, MVL is presented as a distinctive practice-dependent model of justification, one that entails an idea of a convergence of reasons that ought to be introduced with the aim of public justification. This view contrasts with Rawls' consensus view, which bases public deliberation on shared and accessible reasons. For Rawls, the appeal to a shared framework of reasons is crucial to support the ideal of political autonomy, which is linked in turn to the principle of liberal legitimacy. In the *contingent* model, instead, the appeal to different reasons is committed to an idea of *threshold* autonomy (McCabe 2010, 51-53) linked to political legitimacy. According to MVL, the liberal state is a legitimate one as long as all citizens, even illiberal ones, have reasons to accept and endorse that political order. Section 6 instead considers the case of MVL as a practice-independent model of public justification.

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5. MVL as a practice-dependent justificatory model of political theorizing

How should the political legitimacy of liberal institutions be understood in the outlined practice-dependent interpretation of MVL? Crucial to practice-dependency is the priority of politics to morality. Rawls' *institutional* version of practice-dependency connects politics to morality in a specific way: it ensures that the conception of political authority, which is justifiable to all citizens, is committed to a view of institutional morality that sees citizens as free and equal. McCabe's *contingent* version of practice-dependency seems to reproduce a similar structure insofar as it suggests that, by sharing the same institutional settings in which they are recognized as equals, all citizens might endorse a liberal state S for their own reasons that, albeit different in nature (e.g. instrumental, prudential, self-interested and so on), all reflect a widely shared intuition regarding equality (M) which is implicit in that *contingent* liberal institutional setting. Let us call this set of private reasons r^m_1, r^m_2, r^m_3, etc. In this sense, the argument supported by contingent and institutional practice-dependent scholars is similar. The difference is rather related to the content of political morality: a notion of equality of moral status which is reflected in a plurality of private reasons is here opposed to an institutional understanding of political morality in which citizens are understood as free and equal.

However, if this is the case for *modus vivendi* JR, this model seems to provide a version of the convergence view of the kind defended by Stout (2009) and Gaus and Vallier (2009). The difference between convergence and consensus is specified by the variable R in JR. Following D'Agostino (1996), the distinction between consensus and convergence views can be described as follows:

> If both A and B share a reason R that make the regime reasonable for them, then the justification of the regime is grounded on the consensus with respect to R. If A has a reason R_a that makes that regime reasonable for him and B has a reason R_b that makes that regime reasonable for her, then the justification of the regime is based on convergence on it from separate points of view (D'Agostino 1996, 30).

Thus, the dispute here is about the framework of reasons that serves the justificatory desiderata. For Vallier, the acknowledgement of the fact of rea-

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sonable pluralism in the liberal JR should imply "that there is a presumption in favour of less restrictive conceptions of reasons" (2011, 4-5). Similarly, in McCabe's view, a convergence of reasons reflects the possibility that illiberal citizens might nonetheless endorse liberal institutions as a second-best arrangement on the basis of their own reasons. Differently from Gaus and Vallier, however, McCabe's idea of convergence is committed to a realist form of political theorizing: he hopes to rule out thick moral notions such as reasonability and reasonable pluralism that he finds problematic in the institutional model. While the *institutional* version of practice-dependence envisages a consensus in the model of public justification where the reason R must be either shared or at least accessible to all citizens – for it appeals to reasons we all expect to be endorsed (see on this also Boettcher 2015, 192) – the *contingent* version of practice-dependence suggests that a convergence of different sets of reasons would be sufficient to guarantee the realization of a weak version of autonomy, which McCabe calls *threshold* autonomy (2010, 51-3). In this way, McCabe hopes to show that as far as all citizens have reasons to endorse the liberal order, that order is legitimate to them. Thus, while the political legitimacy of liberal order is guaranteed by its commitment to the IR – based on the inclusion of citizens' reasons – its political stability can only be weak. For McCabe, this is a necessary outcome if we take seriously the form of deep pluralism that characterizes contemporary democracies. Although MVL provides only a weak defence of the liberal order, this is one that could be accepted also by critics of liberalism.

The *contingent* model presents a justificatory defence of liberal institutions that is committed to a weak version of autonomy. Here, political legitimacy is linked to the absence of coercion. In his treatment of JR, McCabe distinguishes between in-practice and in-theory justifiability. A's claim is justifiable *in practice* to B if, by acknowledging the fact of pluralism, it is supported by a line of reasoning that is seen by B as "warranted by good reasons" (McCabe 2010, 81). In contrast, A's claim is justifiable *in theory* to B if "it is grounded on reasons that would persuade an appropriately competent interlocutor" (*ibidem*). McCabe argues that Rawls moves from the first, in-practice justifiability, to the second, in-theory justifiability (82). By committing the principle of liberal legitimacy to an idea of 'stability for the right reasons', Rawls' justificatory model shifts foundational disagreements about justice to a dispute concerning the framework of reasons that reasonable citizens should be expected to endorse. This move, McCabe believes, is unfeasible: it restricts

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the justificatory constituency only to those (reasonable citizens) who already endorse the moral premises implicit in that justificatory construction. It is also normatively inadequate: it is morally arbitrary and disregards the form of pluralism that characterizes contemporary liberal societies.

My impression, however, is that McCabe fails to acknowledge some important aspects of Rawls' institutional model. In his recent work, Weithman has argued that an important difference between convergence and consensus is related to the way in which different notions of political autonomy are connected to the idea of political legitimacy (2016, 168). Weithman's reasoning is extremely useful in illuminating the real difference between the contingent and institutional models. As noted above, both institutional views and contingent views are consistent with a practice-dependent model of political theorizing. In both cases, the form of justifiability is constrained by a certain notion of political morality. Both justificatory schemes are concerned with the realization of a certain notion of political autonomy distinct from a comprehensive view of autonomy. However, against Rawls' institutional understanding of political morality, McCabe proposes a 'weak' idea of equality of moral status which is reflected in a plurality of private reasons. While Rawls' idea of political autonomy is realized if a liberal state is justified in light of an *institutional* conception of political morality, in which citizens are understood free and equal, McCabe believes that a kind of *threshold* autonomy is realized when citizens voluntarily accept the liberal order on the basis of their own reasons.

This difference in the two theorists' understanding of political autonomy has important implications for their accounts of legitimacy. For McCabe, the liberal order is legitimate when its justificatory structure expresses its uncoercive character: we should not expect all citizens to assign the same value to or justify in the same way, say, the constitutional principle of freedom of conscience; it is sufficient to acknowledge that, given certain historical and contingent conditions, all citizens are *in-practice* ready to accept it. For Rawls, however, the uncoercive character of liberal institutions is not what counts in JR. The principle of liberal legitimacy asks that the justification for the coercion of liberal institutions should reflect an ideal of political autonomy in which citizens are understood as free and equal. Rawls in fact believes that it is not enough to acknowledge that certain historical or contingent conditions might bring about the same conclusions regarding the liberal regime S. The justifiability of S should rest on some moral premises that people share by

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virtue of their status as citizens. Thus, given the fact of reasonable pluralism, the form of justifiability should be stable for the right reasons. The idea of stability 'for the right reasons', linked to the principle of liberal legitimacy, is not meant to rule out coercion; rather, it aims at providing a justification for coercion which reflects an institutional understanding of political morality while transcending the contingency of certain historical or particular facts of a given society (see on this also Weithman 2016). Therefore, citizens are expected to endorse the constitutional principle of freedom of conscience in terms that reflect not their comprehensive or contingent reasons, but their moral and political status as citizens.

Imagine that A supports a certain illiberal view x – say, the caste system. Imagine that x is also shared by the majority of citizens of the state S where A lives. Now, suppose that in S there is only a small minority that does not support x, but that these citizens have prudential or self-interested reasons to support x as a second-best solution (they believe that if they support a different view this would endanger their status, or they think that by supporting x they will be granted a special status within S). In this situation, the caste regime of S would be uncoercive to both the majority that fully supports x and the minority that supports x as a second-best solution. However, this regime cannot be said to be legitimate from a liberal point of view. For liberal legitimacy, we need to justify why a specific form of coexistence, namely the liberal one, is something citizens should give value to, albeit disagreeing deeply in terms of their comprehensive views.

6. MVL as a practice-independent model of political theorizing

McCabe would probably be resistant to this conclusion. He would perhaps argue that such a case could not arise under modern conditions, simply because too many citizens would resist it. As already mentioned, McCabe maintains that his particularistic defence of liberalism rests on the conjunction of two facts: contemporary societies are characterized by a form of pluralism that is not necessarily reasonable, but these citizens do nonetheless regard liberal institutions either as an unchangeable fact of modern life or as something that is instrumental to the achievement of other ends (2010, 133). Even conceding that this case is too unrealistic to be taken seriously, a conceptual problem with this idea of political legitimacy remains: if this is

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the right interpretation of MVL as a justificatory project, this model of theorizing hardly helps to provide an adequate justification for the liberal political order when a large majority of the population endorses an illiberal doctrine, such as the caste system.

However, McCabe could also respond that my reading of MVL's justificatory project as a practice-dependent model is in fact incorrect. If MVL does not provide a practice-dependent view of justice, the opposite should be true. Following Sangiovanni, a practice-independent view of morality holds that first principles of justice do not depend on practices or institutions (2008: 2). Accordingly, the justification for a *modus vivendi* should not be derived from extant institutions, but rather should be committed to a transcendent view of morality. Thus, the set of reasons (r_1, r_2, r_3 …) that citizens can endorse to justify the liberal state, albeit different in nature, must all reflect a view of morality that McCabe calls 'minimal moral universalism'. Thus, MVL JR is committed to a view of moral universalism that is implicit in the international human rights standards (McCabe 2010, 138).

The caste-system-supporting state S would of course be ruled out as a possibility by this account of MVL JR. But not on the grounds of political legitimacy: this sort of regime would be impossible because the illiberal view x on which it stands is in opposition to such a 'minimal moral universalism'. According to this interpretation, however, it seems that a kind of constraint on the *permissible* set of reasons is necessary to realize the idea of threshold autonomy defended by McCabe. Thus, much of what was appealing in the MVL project seems to be lost in the practice-independent interpretation. By selectively intervening in the sets of citizens' private reasons, this view is inconsistent with its anti-perfectionist premises.

Thus, this second interpretation of the *modus vivendi* justificatory project is also unsatisfactory. By relying on a view of morality which is context-independent, the justificatory structure of MVL is at odds with the main goal of the theory, which is to provide a less idealized and somehow anti-utopian defence of the liberal state. It is neither anti-utopian, since it relies on an external view of morality that applies to JR, nor is it able to provide a defence of the liberal state that is strong, only one that is contingent and very limited.

McCabe might still object that MVL is not anti-utopian or committed to a radical realist rejection of moral or ideal theorizing, but should rather be understood as a model of ideal theorizing aimed at ensuring more inclusivity than Rawls' public reason liberalism. Yet, I wonder whether the appeal to a

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moral minimum is enough to defend the liberal order. MVL ideal theorizing seems to provide a version of toleration similar to Rawls' international model. As mentioned above, Rawls' institutional decency is the requirement for the inclusion of some non-liberal societies in the Society of Peoples. A decent hierarchical society is presented as peaceful, respectful of basic human rights and supportive of some form of equality. Yet, the form of political autonomy required by the liberal principle of legitimacy is realized only within well-functioning liberal democratic regimes. It seems that MVL JR crucially disregards the discontinuities between these two accounts of legitimacy.

To understand this last point, it might be useful to consider the case of an existing state. Take for example the case of Venezuela, a constitutional republic committed to basic human rights and a certain degree of political pluralism.[3] Yet, this regime is founded on an illiberal doctrine of popular sovereignty over national resources that entails the weakening of property rights.[4] The restrictions on firms' and individuals' property rights is perhaps the most problematic aspect of *chavismo* from a liberal democratic perspective. Nonetheless, Venezuela's political regime – at least under Chávez – could fall within the category of a decent society and liberal peoples ought to tolerate it in the Society of Peoples (see on this point also Gentile 2018).

Concluding remarks

Contemporary normative theory is marked by a realist turn. In this paper I have linked a main realist concern, where the political is defined as being distinct from morality, to Sangiovanni's idea of a practice-dependence model of political theorizing. I have suggested that McCabe's defence of the liberal

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[3] In the elections of 2013, President Maduro defeated his more moderate opponent, Capriles, by a slim margin (only 1.5 per cent), a result that was deeply contested by the opposition and which has put into question the legitimacy of the whole process (see McCarthy and McCoy 2013). This stands in contrast with a pattern that, from 2006 to 2012, saw President Chávez build a system of cooperative relationships with his moderate opponents and demonstrate openness to political pluralism. This strengthened Chávez's political legitimacy and popular support.

[4] *Chavismo* is based on the idea that national resources belong to the population and the government has the right to revoke the ownership of private firms or individuals in the name of the Venezuelan people.

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order on the grounds of a *modus vivendi* could be understood as a *contingent* model of practice-dependent political theorizing. This has been contrasted with Rawls' *institutional* model. The contingent practice-dependent version of JR suggests a weaker form of proceduralism that is genuinely political. This view is meant to rule out problematic notions such as reasonableness and reasonable pluralism in favour of a *contingent* understanding of compromise among competing sets of reasons.

A contingent justification of the liberal order is, however, a weak one. For McCabe, a loss in terms of stability is the price to be paid if we want to take seriously the fact of moral diversity that characterizes contemporary societies. MVL is meant to provide a justification of liberal institutions that the critics of liberalism cannot reject. Such an attempt to expand the justificatory constituency of JR is reflected in the account of political legitimacy, realized when citizens voluntarily accept the liberal arrangements. The idea of in-practice justifiability is therefore preferred to Rawls' in-theory model.

McCabe's model seems to miss a crucial point of Rawls' institutional practice-dependence and the idea of liberal legitimacy related to it. As I have shown in this paper, the most problematic aspect of the contingent model is that it disconnects the idea of legitimacy from a conception of liberal political morality: an idea of political legitimacy that reflects the uncoercive character of extant institutions seems to be sufficient to meet the MVL JR. Yet, from a normative point of view, this might be not enough. As the example of the caste system shows, and McCabe would perhaps agree, normative political theory need not show that the system is *in-practice* uncoercive; rather it needs to provide an argument that explains why a specific form of coexistence, namely the liberal one, is something citizens should give value to, albeit disagreeing deeply in terms of their comprehensive views.

In conclusion, I have considered McCabe's model as a version of 'practice-independent' moral theorizing. A transcendent view of threshold morality is meant to ensure certain acceptable outcomes in terms of rights and freedoms. This move, however, comes at the cost of sacrificing the theory's premises of anti-perfectionism and realism. Furthermore, the appeal to a threshold morality, implicit in the international human rights standards, seems to be inadequate to distinguish between the legitimacy of a liberal order, in which all democratic freedoms are secured, and that of a decent, yet not fully liberal, institutional order.

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Beitz C. (2000), "Rawls' Law of Peoples", *Ethics*, vol. 110, n. 4, pp. 669-696

Boettcher J.W. (2015), "Against the asymmetric convergence model of public justi-fication", *Ethical Theory & Moral Practice*, n. 18, pp. 191-208

D'Agostino F. (1996), *Free Public Reason: Making It Up as We Go*, New York, Oxford University Press

Galston W.A. (2002), *Liberal Pluralism. The Implications of Value Pluralism for Poli-tical Theory and Practice*, Cambridge, Cambridge University Press

– (2010), "Realism in political theory", *European Journal of Political Theory*, vol. 9, n. 4, pp. 385-411

Gaus G. and Vallier K. (2009), "The role of religious conviction in a publicly ju-stified polity: The implications of convergence, asymmetry and political institu-tions", *Philosophy and Social Criticism*, vol, 35, nn. 1-2, pp. 51-76

Gentile V. (2017), "Democratic justice: The priority of politics and the ideal of citi-zenship", *Philosophy and Social Criticism*, vol. 20, n. 2, pp. 211-221

– (2018), "Clean trade, anti-paternalism and resources' entitlement", *Philosophy and Public Issues* (New Series), vol. 7, n. 1, pp. 79-94

Gray J. (2000), *Two Faces of Liberalism*, New York, The New Press

Horton J. (2010), "Realism, liberal moralism and a political theory of modus viven-di", *European Journal of Political Theory*, vol. 9, n. 4, pp. 431-448

– (2012), "Political legitimacy, justice and consent", *Critical Review of International Social and Political Philosophy*, vol. 15, n. 2, pp. 129-148

– (2019), "Modus Vivendi and Political Legitimacy", in J. Horton, M. Westphal and U. Willem (eds), *The Political Theory of Modus Vivendi*, Cham, Springer, pp. 131-148

Kelly E. and McPherson L. (2001), "On tolerating the unreasonable", *Journal of Political Philosophy*, n. 9, pp. 38-55

Klosko G. (1997), "Political constructivism in Rawls' Political Liberalism*", Ameri-can Political Science Review*, vol. 91, n. 3, pp. 635-646

McCabe D. (2010), *Modus Vivendi Liberalism: Theory and Practice*, Cambridge, Cambridge University Press

McCarthy M. and McCoy J. (2013), "The limits of legacy: The post-Chávez chal-lenge and electoral legitimacy", in *Americas Quarterly. Politics Business and Culture in the Americas*, http://www.americasquarterly.org/the-limits-of-legacy-post-cha-vez-challenge (accessed 18 July 2018).

Quong J. (2005), "Disagreement, asymmetry, and liberal legitimacy", *Politics, Phi-losophy and Economics*, vol. 4, n. 3, pp. 301-330

Rawls J. (1996), *Political Liberalism*, New York, Columbia University Press

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Modus vivendi liberalism,
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– (1999), *The Law of Peoples*, Cambridge (MA), Harvard University Press

Sala R. (2013), "The Place of Unreasonable People Beyond Rawls", *European Journal of Political Theory*, vol. 12, n. 3, pp. 253-270

Sangiovanni A. (2008), "Justice and the Priority of Politics to Morality", *Journal of Political Philosophy*, vol. 16, n. 2, pp. 137-164

Stout J. (2009), "Religious reasons in political argument", in C.J. Stanton (ed.), *The Ethics of Citizenship: Liberal Democracy and Religious Convictions*, Waco, Baylor University Press, 261-292

Vallier K. (2011), "Convergence and consensus in public reason", *Public Affairs Quarterly*, vol. 25, n. 4, pp. 1-21

Waldron J. (1999), *Law and Disagreement*, Oxford, Oxford University Press

Weithman P. (2011), "Convergence and political autonomy", *Public Affairs Quarterly*, vol. 25, n. 4, pp. 327-348

– (2016), *Rawls, Political Liberalism and Reasonable Faith*, Cambridge, Cambridge University Press

Williams B. (2005), *In the Beginning Was the Deed: Realism and Moralism in Political Argument*, Princeton, Princeton University Press