

LIBERAL ARISTOCRACY & THE LIMITS OF DEMOCRACY

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ABSTRACT

I define and defend a non-democratic authority with the power to annul the decisions of democratic branches of government when such decisions infringe upon citizens' basic rights and liberties. I refer to this non-democratic authority as Liberal Aristocracy. The argument for Liberal Aristocracy has two parts: the first part demonstrates that Liberal Aristocracy will arrive at decisions that further the moral end of sustaining citizens' rights; the second part holds that Liberal Aristocracy is a moral means to this end.

First, I discuss two existing arguments for non-democratic authorities – Platonic Aristocracy and Constitutional Court Judges. I claim that Plato's argument is unsuccessful because it relies on controversial metaethical premises that are unlikely to provide a basis for rights. Liberal justifications of the power of Constitutional Courts are argued to be incomplete because they do not designate an authority that is qualified to decide when citizens' rights are infringed by democratic branches of government. Nor do they show that such an authority is in fact required if citizens' rights are to be protected. In order to supplement the liberal argument for the power of Constitutional Courts I develop an account of Liberal Aristocracy, which rests on the idea that Constitutional Court Judges should possess moral expertise. I claim that (i) moral expertise qualifies Judges to decide when citizens' rights are violated by democratic decisions. Furthermore, I argue that (ii) decisions taken democratically will sometimes encroach on citizens' rights. Claims (i) and (ii) are shown to justify the non-democratic authority of Liberal Aristocracy.

The second part of the argument for Liberal Aristocracy examines arguments to the effect that only democratic procedures can be morally legitimate, even if other decision procedures arrive at outcomes that provide greater support for citizens' rights. Three claims are offered in support of this idea. First, democracy is claimed to be necessary to support deliberation. Second, democracy is seen as the only procedure that can uphold the value of autonomy by securing citizens' consent. Third, it is argued that non-democratic procedures will not recognise the equal status of citizens. I hold that these three claims are false and that Liberal Aristocratic procedures can be morally legitimate.

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CHAPTER 1: INTRODUCTION

1.1. Context

“Constitutional democracy” is believed by some to be a tautology; by others it is seen as an oxymoron [Bellamy & Castiglione, 595]. It is taken to be a tautology because democracy must be a rule-governed procedure, and Constitutions can be seen as “codifying the rules of the democratic game, indicating who can vote, how [,]when and why” [*ibid.*]. That is, Constitutions express rights, including those that are necessary for the democratic process.

On the other hand constitutional democracy can be seen as an oxymoron because Constitutional law is usually placed beyond the reach of majoritarian decision-making. Citizens are bound by laws that they did not directly choose, and with which the majority may disagree. The death penalty, and the recent decision to permit homosexual marriage are, I believe, examples in which the will of the majority is thwarted. Instead, decisions regarding the Constitution, such as these, are to a great extent placed in the hands of a minority of Judges. If democracy is taken to mean that people should rule then why should the people or their elected representatives not be free to change the rules as they see fit? Why should a minority be given greater power over the core laws of a society? This dissertation provides an answer as to why democracy should be thus constrained, and shows how Constitutional Courts Judges’ authority to place limitations on democracy could be justified.

1. *Rights & Democracy*

Democratic procedures¹ are usually thought to be justifiable on the basis of liberal values such as equality and autonomy. These values are also thought to justify the existence of individual rights [Hyland, 152], which place limits on the harms and losses that any individual can reasonably be expected to endure [Waldron, 400].

¹ In this dissertation I define democracy in a minimal way as entailing egalitarian procedures, involving political equality in all the moments of decision-making. All sane adults have an equal say in collectively binding decisions, or in the election of representatives who will take collectively binding decisions [Hyland, Ch.3].

Theorists such as Locke and Rawls have claimed that there are some basic rights and liberties that should “no longer be the subject for political decision by majority or other plurality voting” [Rawls (1993), 151]. For instance, the right to life and bodily integrity, and the right to freedom of expression and of religion ought to be inviolable either by individual citizens or by government. Other theorists, such as Dahl, suggest that it is “highly reasonable to argue that *no* interests should be inviolable beyond th[o]se integral and essential to the democratic process” [Dahl, 182]. That is, the only rights that should be beyond the reach of government are those required for the proper operation of democracy.

Although these accounts differ substantially they share the same structure. They hold both that collectively binding decisions ought to be taken democratically, and that some rights – whether they are rights of democratic participation, property rights, or rights to free expression – ought to be inviolable even by democratically taken decisions.

These two related claims – that liberalism entails democracy and that liberalism entails rights – are the foundation of liberal democracy, or the liberal democratic synthesis [Hyland, 148]. There is, however an apparent inconsistency in this synthesis that Hyland demonstrates with the following illustration.

Imagine a political theorist who has just formulated some such theory of rights... and has gone on to specify a set of constitutional provisions grounded in the theory. Leaving her or his study he or she descends into the world of real-life politics in an actual community. Though delighted to find that the procedures of rule perfectly conform with democratic principles, our political theorist is horrified to discover that the scope of power actually claimed by the democratic process pays scant respect to the theorist’s liberal principles. What response can the theorist make? He or she could of course, express disapproval, proclaim the illegitimacy of even democratic government in the areas prescribed by the theory of natural rights, publicly proclaim the constitutional limitations that would respect the schedule of natural rights. But how would our theorist envisage such constitutional limitations being implemented, ratified, interpreted and enforced? By what agency? [*ibid.*, 153].

The question that is raised by this example is how restrictions on the scope of democratic decision-making should be specified. If it is discovered that democratic decision making has exceeded its legitimate scope and encroached upon citizens’ rights, what agency or procedure should implement the proposed rights-based restrictions on democratic decisions?

There are two potential answers to this question. First, an agency subordinate to the democratic process could take decisions about the legitimate scope of democratic decisions. That is, decisions as to what rights citizens should be accorded should be taken democratically. So, for instance, questions regarding the proper scope of democratic decisions could be decided by referenda, or by democratically elected representatives. In this case, however, it is possible that the individual rights in the private sphere could be violated by majorities, thus sacrificing liberal aspects of the liberal democratic synthesis. Democracy could even undermine itself by voting to exclude certain groups from the franchise.

The second solution is to empower an external authority independent of democratic decision-making (such as a Constitutional Court) to regulate the scope of democratic decisions, and prevent citizens' rights from being undermined. In this case the democratic aspect of the liberal democratic synthesis is diluted, since citizens do not participate in the making of *all* collectively binding decisions.

Thus there is a potential conflict between liberal rights and the democratic right to participate in making all collectively binding decisions. This is the inconsistency of the liberal democratic synthesis. Should we favour the first solution, and thus run the risk of sacrificing individual rights, or should the second solution be preferred, to the detriment of democracy? I will argue against the idea that democratic procedures should be used to decide questions regarding rights and propose a version of the second solution. That is, I will specify an authority external to the democratic process that ought to decide questions concerning the basic rights and liberties of citizens. Such decisions ought not to be taken democratically if there is an appropriate external authority.

As will now be shown this claim will involve (i) holding that democracy is unlikely to reach decisions regarding rights that are as acceptable as those that would be reached by a particular alternative authority, and (ii) undermining the idea that democracy is the only moral means of taking collectively binding decisions.

1.2. Outline of the Arguments

The claim that decisions regarding the proper scope of democratic decisions ought to be taken democratically will be referred to as the Moral Superiority of Democratic Procedures thesis (MSDP). Two central claims are offered in support of MSDP.

First, it is claimed that democratic decision procedures are as likely as any external authority to reach the correct decisions about the proper scope of democratic decision-making. That is, democratic procedures are likely to achieve substantive outcomes that uphold citizens' rights. Democratic decision-making is capable of being self-restricting and achieves the *moral end* of sustaining citizens' rights. Thus there is no need for an external authority: democratic procedures are just as compatible with sustaining rights as other procedures. If so the above inconsistency in the liberal democratic synthesis disappears since liberal rights need not be undermined by democracy. That is, if democratic procedures will reach the correct decisions about rights, then the liberal democratic synthesis remains intact because the democratic element and the liberal rights element are consistent with one another. Thus, to argue that an authority external to democratic procedures should make decisions concerning rights, it must be shown that such an authority is more likely to arrive at the correct decisions concerning such rights.

In order to make this claim it is clearly necessary to specify what such an authority would be. To this end, I examine Plato's arguments for decision-making by Philosopher rulers, which I refer to as Platonic Aristocracy. I argue that Platonic Aristocracy is unsuited to the task of providing rights-based restrictions on democratic decisions because it relies on controversial metaethical premises. Further, I claim that, given Plato's antipathy towards democracy and the liberal basis of rights, it is extremely unlikely that Platonic Aristocracy would be a satisfactory candidate for making decisions concerning liberal rights. However, from Plato's account I glean important structural requirements that must be fulfilled if a non-democratic agency is to be justified. These are applied in my discussion of the liberal justifications for the authority of Constitutional Court Judges.

Constitutional Court Judges are an alternative and more generally accepted authority on decisions regarding citizens' rights. They are empowered to make judgments that regulate the decisions of democratically elected governments – judgments which might undermine the wishes of the majority. I discuss existing justifications for the Constitutional Court's power to review and overrule decisions of democratic branches, and argue that the structural requirements gleaned from Plato's account are not fulfilled. This is because it is unclear that Judges are more qualified than democratic branches of government to make decisions that uphold citizens' rights. Liberal justifications of Judicial review are thus flawed because there is

insufficient reason to think that Judges' decisions will be superior to those that would be reached democratically. The idea that Judges will uphold the moral end of sustaining citizens' rights lacks adequate justification. This means that proponents of MSDP can claim that Constitutional Court Judges' power to constrain democratic decision-making arbitrarily undermines democratic sovereignty. How, then, can Judges' role in determining the limits of democracy be justified?

In order to answer this question I introduce and develop an account of Liberal Aristocracy, which rests on an conception of Constitutional Court Judges as requiring moral expertise. I argue that moral experts will arrive at decisions regarding rights that are likely to be more justified than those that would be arrived at democratically. If Constitutional Court Judges possess moral expertise their role is thus justified because they prevent substantive moral losses that would accrue if democracy was given free rein in matters concerning rights. That is, they support the moral end of preventing encroachment on citizens' rights.

The second and strongest claim offered in support of the idea that decisions about rights ought to be taken democratically is that the delimitation of the scope of democratic decisions can only be morally legitimate if it is done democratically. These proceduralist accounts hold that democracy is the only moral *means* of taking collectively binding decisions. As mentioned above, such claims are usually made on the basis of liberal values. Thus external restrictions on the scope of democratic decision-making are seen to be inconsistent with liberal values. In order to argue against MSDP it must therefore be shown that a non-democratic procedure could be a *moral means* of taking collectively binding decisions.

In responding to this claim I argue that Liberal Aristocratic procedures could indeed take collectively binding decisions without contravening moral values such as autonomy. That is, I will argue that traditional liberal arguments for democratic procedures do not justify democracy to any greater extent than they do Liberal Aristocracy. Liberal Aristocracy is a moral means of constraining democracy in matters concerning rights.

Thus both claims are refuted: democracy is neither as likely to achieve the moral end of upholding rights as Liberal Aristocracy, nor is it the only moral means of taking collectively binding decisions about rights. Since this is the case MSDP is shown to

be false. Liberal Aristocratic – not democratic – procedures ought to be used to regulate the scope of democratic decisions. Thus, provided they have moral expertise, the role of Constitutional Court Judges is justified because, in constraining democracy, they uphold citizens' rights without undermining the values that are the basis of such rights.

CHAPTER 2: MORAL ENDS

In this chapter, I develop and defend an account of an extra-democratic authority that will have the power to annul democratic laws when they conflict with the reasonable provisions of the Constitution. To this end I discuss Plato's argument that society ought to be governed not democratically, but rather by Philosopher rulers (§2.1). From this argument I ascertain basic structural considerations that must be taken into account when justifying an external authority. I apply these considerations to liberal attempts to justify the extra-democratic authority of Constitutional Court Judges and claim that such justifications are lacking, since they fail to show that Judges are more qualified than democratic majorities to make decisions regarding rights (§2.2). This finding is significant because without further argument proponents of MSDP could claim that democratic decisions are arbitrarily restricted by an insufficiently qualified minority of Judges. Democratic sovereignty might be unjustifiably undermined.

In order to show that this need not be the case I develop an account of Liberal Aristocracy (§2.3), which rests on a conception of Constitutional Court Judges as moral experts. I argue that moral expertise qualifies Judges to make decisions regarding citizens' rights. However, this alone is insufficient to justify their power to constrain the decisions of democratic branches of government. It must also be shown that democratic procedures are more likely than Judges to reach incorrect decisions with respect to the moral end of protecting citizens' rights, otherwise Judges' qualifications are redundant. I argue that democratic procedures are indeed likely to reach decisions that are less justifiable than the decisions of Judges with moral expertise (§2.4). This shown, the power of Constitutional Court Judges to revoke the decisions of democratic branches is justified because, provided they are moral experts, Judges' decisions will further the moral end of protecting citizens' rights to a greater extent than democratically taken decisions.

2.1. Platonic Aristocracy

In this section I discuss Plato's contention that society should be governed by Philosopher rulers. My purposes here are twofold. First, I argue that Platonic Aristocracy is unsuited to the task of taking decisions regarding citizens' rights. This is because it relies on controversial metaethical premises that must be abandoned if the claims of moral relativists and moral sceptics are taken into account. Further, Plato's rejection of democracy and liberal values make Platonic Aristocracy an unsuitable candidate for decisions concerning liberal rights and the proper scope of democracy. The second and central aim of this section is to arrive at structural considerations that must be taken into account in justifying extra-democratic authorities.

1. *Ruling & Knowledge of Forms*

Plato argued that there are objective metaphysical Forms, such as the Form of Justice and the Form of the Good, that exist independently of human thought, and which can only be discovered through Reason. Specifically, such Forms can only be known by the just man – the Philosopher whose soul is ruled by Reason [Plato, 441e; 507b]. It is only in the full apprehension of these Forms that knowledge is possible. Those who recognise only particular manifestations of these Forms have only opinion and not knowledge. So for instance if I recognise that a painting is beautiful, I do not necessarily have knowledge of what Beauty 'really is', merely opinion about what is beautiful [*ibid.*, 474c-480]. Knowledge is stable and unshifting, whereas opinion is subject to whim and passing fancy.

Since only ideal Philosophers can attain knowledge of Forms, only they can know how society ought to be in order to be in accordance with Justice and the Good [*ibid.*, 428d]. Thus in order for a society to be truly just it must be ruled by Philosopher kings or queens who will shape it according to the Form of Justice. A democratic society is thus flawed because, by allowing everyone an equal say in government, it treats all opinions as equal, whereas in fact the opinions of Philosophers are superior since they constitute Knowledge. Plato's claim is thus that society should not be ruled democratically by the *demos*, but rather aristocratically by a minority of Philosophers.

Plato uses several metaphors to indicate his antipathy towards democracy and his belief in the superiority of aristocracy. In one such metaphor, the polis is likened

to a ship. The captain of the ship is an expert navigator, whereas the other crew members have no knowledge of navigation.

They have no idea that the true navigator must study the seasons of the year, the sky, the stars the winds... and they think it's quite impossible to acquire the professional skill needed for such control... and that there's no such thing as the art of navigation. [*ibid.*, 488d].

As such when they take control of the ship they turn the voyage into a drunken pleasure cruise, and regard the true navigator as “a word-spinner and a star-gazer, of no use to them at all” [*ibid.*, 488e].

This, Plato implies, is the attitude of people in democracies towards Knowledge, and consequently towards Philosophers. They do not believe that knowledge is even possible and thus treat all opinions equally. Each member thinks they have a right to rule, even though they have no Knowledge of what ruling requires [*ibid.*, 488b].

Thus Plato argues that just as Justice in the soul requires that Reason should assert authority over the Spirited and Appetitive elements of the soul, so should Reason in the shape of the Philosopher Kings rule in society. Only in this way can the *polis* be guarded from the injustice and ignorance of citizens and politicians.

If correct, then, Plato's argument for aristocracy and against democracy might give us reason to prefer the former in decisions concerning rights, assuming of course that rights could be justified on the Platonic schema². Aristocratic procedures will lead to decisions that are justified because they are based on the Knowledge of Forms that only Philosopher rulers can achieve. Democratically taken decisions, on the other hand, are likely to lead to an unjust society because they are based on opinions rather than Knowledge of what citizens' rights should be.

² Admittedly the idea that rights could be justified on the basis of Forms is an extremely unplatonic assumption, which will be discussed shortly. For the moment it is sufficient to note that my aim here is to ascertain the structure of justifications for undemocratic authorities, so the assumption is convenient, though not necessary to my argument.

2. Platonic Aristocracy and Metaphysical Objectivity

As discussed above, Plato argued that Forms such as the Form of Justice exist independently of human thought. Just as he believes that the logical truths of mathematics can be ‘discovered’ through reasoning, so can moral laws about how individuals and societies ought to be.

The concept of independently existing, or metaphysically objective values is relatively unpopular in modern philosophy. It is often regarded as a suspect and mysterious notion [Sayre-McCord, 3-4].

In addition, the advent of “reasonable pluralism” [Rawls (1993), 141] casts doubt on the idea that there is one independently existing conception of the Good that should be accepted. Rather, a plurality of reasonable conceptions of the good should be accommodated.

The prevalence of the relativist and sceptical views contribute to the suspicion with which Plato’s metaphysical objectivity is treated. Moral relativists such as Gilbert Harman argue that

[t]he truth or falsity of moral judgments, or their justification, is not absolute or universal, but is relative to the traditions, convictions, or practices of a group of persons [Gowans, Section 2].

Moral sceptics claim that “nobody is ever justified in holding any substantive moral belief” [Sinnott-Armstrong, Section 1]. Clearly if either of these metaethical theories is accepted then Plato’s claim that the Forms of Justice and Good are independently existing metaphysical entities must be abandoned. If moral relativists are correct, then it is false to claim that there is any universal independently existing morality to which only Philosophers can have access. Similarly, if no-one is justified in holding any moral belief, then it is impossible that Philosophers can possess greater knowledge than anyone else.

Thus if these claims are accepted then severe doubt is cast on the idea that there can be such a thing as a Philosopher in Plato’s sense and the idea that Philosophers should rule becomes a non sequitur. Since this is so, moral relativism and moral scepticism could provide a basis for the objections of proponents of MSDP³.

³ It should be noted that I have not claimed that either of these metaethical theories ought to be accepted, or that they would *in fact* provide a basis for the objections of proponents of MSDP. Nevertheless, these are possibilities that should be taken into account in justifications for non-democratic authorities. I do so when I defend Liberal Aristocracy in §2.3..

3. *Platonic Aristocracy & Rights*

Earlier (§2.1.1) I assumed that rights could be justified on the basis of Plato's theory of Forms. However, given Plato's attitude towards democracy and the liberal basis of rights, this seems extremely doubtful. Plato explicitly rejects the liberal ideas that underlie justifications of rights, and sees them as closely related to the decline of democracy into tyranny [*ibid.*, 562b-d]. Plato claims that the variety of views and characters that liberty makes possible, while 'attractive', lead to a decline of discipline, and an inability to distinguish right from wrong, necessary desires from unnecessary [*ibid.*, 557a-e]. Consequently freedoms, such as the right to express potentially immoral views, are categorically rejected by Plato. Instead, education and the arts are to be strictly controlled [*ibid.*, 376c-411e; 595a-608b]. Plato believed that if they were not, then rampant freedom will corrupt society by exposing citizens to damaging immoral views.

Thus because Plato disparages the liberal basis of rights, the assumption that Platonic Aristocracy will support citizens' rights is almost certainly false. This provides further reason to reject Platonic Aristocracy as a suitable extra-democratic authority in matters concerning liberal rights.

4. *Structural Considerations*

Although Plato's Aristocracy may be undesirable for the above reasons, this section has given an indication of what must be shown if an extra-democratic authority is to be justified. There are, I suggest, three structural considerations that must be taken into account if an extra-democratic authority is to be justified.

First, there must be a justificatory basis according to which rights will be accorded. In the Platonic case, I suggested that the theory of Forms might provide such a basis. However, I argued that it was problematic because it relied on the controversial idea that values exist independently of human thought, and because Plato explicitly rejected the liberal basis upon which rights are thought to be justified.

Second, an authority that will take decisions in accordance with the justificatory basis must be designated. In Plato's argument Philosopher rulers were seen to be ideally suited because they had knowledge of Forms and thus would take the best decisions regarding rights (given the unlikely assumption that rights could be justified on the basis of Forms).

Third, it must be shown that this authority is better qualified than all other citizens combined to make the correct decisions with regard to the justificatory basis. In the Platonic case, it followed directly from the first two aspects above that Philosopher Rulers would be better qualified. This is because their knowledge of Forms is far superior to the opinions of ordinary citizens.

5. Conclusion

In this section I argued that Plato's Aristocracy is an unsatisfactory candidate for making decisions concerning rights. This is because the existence of Philosopher Rulers depends crucially on the acceptance of a controversial metaethical theory that sees morality as existing independently of what people think. I argued, however, that Plato's account yields three structural considerations must be taken into account when justifying an extra-democratic authority. These considerations will be shown to be relevant in the next section in which I discuss the liberal basis for attributing to Constitutional Court judges the power to revoke democratically taken decisions when they conflict with the Constitution.

2.2. Liberal Justification & the Constitutional Court

I now discuss a Rawls's description of the liberal basis for attributing rights, and attempts to show that Constitutional Court Judges are qualified to annul decisions of democratic branches of government when they conflict with the Constitution⁴. I argue that they are not shown to be so qualified, and thus the third requirement above – that the external authority must be more qualified to take decisions than democratic branches – is not met.

1. Rawls: Constitutional Courts & Public Values

According to Rawls the task of the courts is to prevent the higher law exemplified by the Constitution from being eroded by ordinary laws that might otherwise be passed by democratic branches of government [Rawls (1993), 233]. This is done by granting the courts the power to review decisions of democratic branches of government and annul laws that they hold are in conflict with the Constitution or with the Bill of

⁴ I discuss Rawls's account not because I see it as being correct in its entirety. Rather, I assume that this account, or similar to it, could provides an adequate basis for the justification of rights.

Rights⁵. So, for instance, if a democratic branch of government decided to disallow homosexual marriage or to reinstate the death penalty, or to restrict the franchise to a certain group of the population, the external authority could annul these decisions if they decided they conflicted with the Constitution.

In exercising their powers of review, Judges must not appeal to their own non-public comprehensive doctrines. So, for instance they should not appeal to their own religious values, personal morality, or philosophical views.

Rather they must appeal to the political values they think belong to the most reasonable understanding of the public conception and its political values of justice and public reason. These are values that they believe in good faith...that all citizens as reasonable and rational might reasonably be expected to endorse [*ibid.*, 236].

The reason for this is that Rawls believes that Constitutional provisions should be the subject of an “overlapping consensus” that takes into account the inevitable plurality of reasonable comprehensive doctrines. Judges should not appeal to their own religious views because “a continuing shared understanding on one comprehensive religious, philosophical, or moral doctrine can be maintained only by the use of oppressive state power” [*ibid.*, 37]. If, for instance, Judges’ decisions were decided purely in accordance with the Catholic faith, people who accepted other doctrines might reasonably reject their decrees, leading to civil strife and the use of state oppression. A conception of justice in a liberal democratic society must thus accommodate a plurality of reasonable doctrines, rather than enforcing one particular conception.

So instead of appealing to a single comprehensive doctrine, Rawls’s political liberalism aims to create an overlapping consensus which reasonable citizens can affirm from within their own reasonable doctrines. While the idea that everyone will reach agreement on *all* matters is unlikely in the extreme, Rawls believes that by appealing only to what their fellow citizens could reasonably be expected to endorse, Judges will be able to arrive at a public conception of justice.

These conditions do not impose the unrealistic – indeed the utopian – requirement that all citizens will affirm the same comprehensive doctrine, but only, as in political liberalism, the same public conception of justice [*ibid.*, 39].

⁵ It should be noted that Rawls does not directly defend the practice of judicial review. Rather his aim is to provide guidelines that Judges should follow.

That is, people can accept that there will be disagreement as to what comprehensive doctrine to accept, but through appealing to what others can reasonably be expected to endorse, they will affirm a public conception of justice. So, for instance someone who accepts a reasonable Catholic doctrine might disagree with the view that churches should not be publicly funded. However, when she considers what is reasonable for those who hold other reasonable doctrines, she might agree that there are good reasons why churches should not be funded by the taxes of those who do not accept the Catholic faith. Thus by appealing to what all citizens should reasonably accept, those who affirm diverse non-public reasonable doctrines can arrive at an overlapping consensus of public values, even though there is intractable disagreement amongst the non-public reasonable doctrines themselves.

For these reasons, then, in deciding if democratic decisions are legitimate Judges must interpret the Constitution in a way that they believe is in keeping with what rational citizens could reasonably be expected to endorse. If, for example, a democratic government passes a law instating the death penalty, Constitutional Court judges should not base any revocation of the democratically created law on their own personal or religious view that the death penalty is immoral. Rather they must decide whether such a law is, say, consistent with an interpretation of “cruel and unusual punishment” that all citizens should reasonably endorse.

Rawls’s view is attractive because it accommodates “reasonable pluralism” whilst still allowing for some consensus on basic rights and liberties, which “imply limits on the harms and losses that any individual or group may reasonably be expected to put up with” [Waldron, 400]. That is, it assumes that there will always be a plurality of reasonable religious, philosophical, and other non-public views, but holds that because these doctrines are reasonable, there will be some common ground that will form the basis of agreement on rights.

2. Problems in Liberal Justifications

Having outlined this prominent liberal account of the role of Constitutional Court Judges, I now discuss the extent to which liberal justifications fulfil the structural criteria gleaned from the discussion of Plato’s account (§2.1.4.).

Rawls’s description furnishes two of the three requirements for justifying extra-democratic authorities. First a justificatory basis is provided for decisions

concerning rights – decisions must be such that they would be endorsed by citizens as reasonable and rational.

Second, an authority is specified that will take decisions regarding rights. In Constitutional democracies the Court decides when decisions of democratic branches conflict with the Constitution and is granted the power to revoke such decisions accordingly.

However, when it comes to the third requirement there is a substantial gap, since it is unclear that the designated authority – Constitutional Court Judges – are especially qualified to take Constitutional decisions that accord with the liberal justificatory basis. That is, it is unclear that judges are more likely than democratic branches to make decisions with which reasonable and rational citizens should agree. Why should it be assumed that judges will arrive at decisions that are in concomitance with this principle, and why should it be assumed that democratic branches will not?

Ronald Dworkin, a fierce proponent of Judges' power of judicial review, appears not to notice that these questions require answers. Indeed, at times he seems to be advancing the more negative claim that there is no reason *not* to rely on Judges decisions. So, for instance, he claims “there is no a priori reason to think [Judges] less competent political theorists than state legislators or attorneys general” [Dworkin, 375]. That is, there is no reason to think the decisions of Judges are *inferior* with respect to public values than those of democratic branches of government.

At other times, however, Dworkin seems to suggest that democratic procedures are indeed likely to reach worse results than Constitutional Court Judges. He claims for instance that the “United States is a more just society than it would have been had its constitutional rights been left to the conscience of majoritarian institutions” [*ibid.*, 356]. However, he admits that he offers “no argument for this flat claim”, suggesting that a further book would be necessary to do so [*ibid.*, 449]. As I have claimed, though, without such an argument it is difficult to see why Constitutional Court Judges should be seen as qualified to revoke the decisions of democratic branches of government.

3. Conclusion

Clearly further argument is required in order to justify Constitutional Courts Judges' power to undermine the decisions of democratic branches of government. It must be shown that Constitutional Court Judges could be sufficiently qualified to make

decisions with which reasonable citizens should agree. If they cannot then the danger of incorrect decisions as to citizens' rights is not shown to be less pronounced than it would be if democratic decisions were unconstrained by the extra-democratic authority of the Courts. Furthermore, it must be shown that democratic procedures are less likely to arrive at such decisions, because if democratic and Judicial procedures are equally likely to arrive at the right decisions, then there is no *substantive* reason to prefer either. The absence of these claims in liberal justifications is extremely significant. Unless their truth is demonstrated, the third requirement of justifying extra-democratic authorities is not met and it remains possible that in Constitutional democracies democratic decisions will arbitrarily be held hostage by the decisions of an unqualified minority.

In order to show that Constitutional Court Judges could be qualified to make decisions that reasonable citizens should endorse, I advance what I will refer to as Liberal Aristocracy. Liberal Aristocracy rests on a conception of ideal judges as being 'moral experts', in a sense to be defended in the next section. I argue that moral experts will make the best justified decisions with regard to citizens' rights and duties, and that such decisions should secure the agreement of reasonable citizens in society. In this way the third requirement above is partially fulfilled because the designated extra-democratic authority is indeed qualified to take decisions with regard to the liberal justificatory basis. I say partially fulfilled because a further argument is required to the effect that democratic procedures are less likely than Liberal Aristocracy to reach decisions with which all reasonable citizens should agree. Without this further claim the extra-democratic authority, though qualified, might still be unnecessary because rights could be adequately protected by democratic voting

2.3. Liberal Aristocracy

The term 'aristocracy' – meaning rule by the virtuous – is usually not well-received. Unfortunately it has often been used as an epithet for unjust systems of rule such as monarchic dictatorship based on the 'divine right of kings'. More recently, it has been applied satirically in describing Constitutional Courts. 'Judicial Aristocracy', it is claimed, illegitimately and unjustifiably undermines democratic sovereignty [North, 168]. The usage of the term 'aristocracy' may thus immediately be seen as counseling against the solution I propose to the problem facing justifications of Judges' extra-democratic authority.

However, I think the negative connotations of this term, combined with the almost universal acclamation of democracy, are partly to blame for the lack of satisfactory justifications for the power of Constitutional Court Judges. Theorists seem to be prevented from completing their justification of the power of Constitutional Courts by the apprehension that this would invite an unwelcome comparison with much maligned aristocratic systems of rule. More precisely, theorists seem unwilling to suggest that a minority of Judges could have a capacity that qualifies them to make collectively binding decisions – a capacity that the demos in general does not possess. This, at least, is one way to explain the incompleteness of justifications for the extra-democratic authority of the Courts discussed in §2.2.2..

Liberal Aristocracy acknowledges that if the authority of an extra-democratic minority is to be justified, then it must be shown that this authority possesses a skill or qualification that most citizens do not possess. I claim that ‘moral expertise’ is such a qualification.

I define Liberal Aristocracy as entailing procedures in which Judges possessing moral expertise make collectively binding decisions. In relation to constitutional democracy, then, moral experts can decide that a democratically created law is in breach of the Constitution and thus revoke it.

In this section I present a definition of ideal Constitutional Judges as possessing moral expertise, and claim that the possession of this expertise qualifies Judges to make decisions that accord with Rawls’s justificatory basis. However, I will suggest that, as in Plato’s account, the possibility of possessing the required qualification could be challenged by the claims of moral relativists and moral sceptics. However, I argue that the claims of moral relativists can be accommodated, and that those of moral sceptics would be self-defeating for advocates of MSDP.

Having shown this, I discuss an objection to the effect that it would be impossible to tell whether a Judge was a moral expert without being an expert oneself. I claim that this is not the case, since one could identify a moral expert on the basis of their past achievements.

Thus the first problem is surmounted, since Constitutional Court Judges with moral expertise are shown to be qualified to make decisions with which reasonable citizens should agree.

1. *Moral Expertise*

Hooker defines a moral expert as one who

might be expected to provide arguments which, if examined carefully, would persuade reasonable people and produce convergence in their moral views [Hooker, 510].

A person with moral expertise, then, is one who has the best justification for her moral views⁶. This definition coincides to an extent with Rawls's conception of what Constitutional Judges should do. That is, they should make judgements that all reasonable citizens would endorse. A Judge who possessed moral expertise would thus be in an ideal position to make decisions with which reasonable citizens should agree.

Earlier (§2.1.2) the idea that Philosophers were qualified to rule was seen to rely on the independent existence of metaphysical Forms. I argued that the objections of moral relativists and moral sceptics, if correct, undermined Platonic Aristocracy. I now claim that Liberal Aristocracy could stand up to these objections if they were raised by a proponent of MSDP.

2. *Liberal Aristocracy & Relativism*

Moral relativism can be defined as the view that

[t]he truth or falsity of moral judgments, or their justification, is not absolute or universal, but is relative to the traditions, convictions, or practices of a group of persons. [Gowans, Section 2].

Harman, for instance, holds that “the relevant motivating reasons are not universal and so probably arose from an agreement that some but not all persons have made” [*ibid.*]. That is, some groups might have in some sense ‘agreed’ to be motivated by certain reasons or types of reason that other groups or societies have not agreed to. As such, groups that have not ‘agreed’ to be motivated by these reasons will not accept moral experts’ justification on the basis of these reasons. Since different reasons might be agreed to be acceptable in different societies, claims that are justified in one society might not be justified in another.

So for instance one society might ‘agree’ that for something to be considered cruel it must be done to a human. People in such a society might thus not frown upon torturing animals, whereas people in a society that believed the term ‘cruel’ could

⁶ I will expand on this definition when I discuss the problem of identifying moral experts in §2.3.4..

apply to the treatment of animals might be repulsed by the idea that torturing animals could be acceptable.

Moral relativist claims such as Harman's provide opponents of MSDP with an objection to Hooker's definition of a moral expert as one whose arguments would produce convergence in the moral views of all reasonable people. This is because, according to moral relativists, it is reasonable for some groups to disagree with arguments that would be accepted by all reasonable members of another group. A moral claim can be true in one society and false in another. On this view, then, it is impossible for anyone to have moral expertise, since no matter how strong the argument offered is, it might be reasonable for some groups or societies to reject it. Thus, if Hooker's definition is accepted and if moral relativism is correct, moral expertise is indeed impossible.

Rather than discussing the tenability of moral relativist claims, I argue that Hooker's definition of moral expertise can be revised such that expertise is possible, even if moral relativism is accepted.

Importantly, unlike many moral sceptics, moral relativists generally do not deny that particular moral claims can be more or less justified. That is, although they claim that moral judgements cannot be *universally* justified, they do not deny that moral judgments can be justified within a particular society or group. Moral views can still have better or worse justification, although that justification will be relative to a particular group or society. I thus propose the following revised definition of a moral expert.

A moral expert is one who might be expected to provide arguments that, if examined carefully, would persuade reasonable people *within a particular society* and produce convergence in their moral views.

According to this definition, it is possible that a person can be a moral expert in a particular society if her arguments, once carefully scrutinised, would produce convergence in the moral views of the reasonable people of that society⁷. For instance, in a society that accepted liberal values, moral experts would provide

⁷ This revised definition of moral expertise is more in keeping with Rawls's idea that the decisions regarding basic rights and liberties should accord with *public* values, rather than with one's own view of the whole truth [*ibid.*, 216].

arguments that consistently accorded with liberal morality⁸. Thus moral expertise is possible even if the claims of moral relativists are correct.

However, it could be objected that the acceptance of moral relativism might mean that a particular society does not accept justification at all, and in such a society the possibility of expertise would be ruled out altogether. However, insofar as this possibility arises, my next argument holds that such a claim would also refute the idea that matters concerning rights should be decided democratically. The proponent of MSDP cannot raise this possibility as an objection to Liberal Aristocracy, since to do so would be self-defeating.

3. Liberal Aristocracy, Scepticism, & MSDP

Epistemological moral sceptics hold that “nobody is ever justified in holding any substantive moral belief” [Sinnott-Armstrong, Section 1]. Since no moral belief is justified, no moral view can be considered to be more correct than any other. Clearly this presents a problem for the possibility of moral expertise, since if no moral claim is more justified than any other, then it is not the case that reasonable people should be convinced by any moral argument. One person’s moral beliefs are just as good as anyone else’s. On this view then, there can be no moral experts because there is no reason to believe that the claims of some people are any more justified than the claims of anyone else.

Rather than arguing directly that some views can be more justified than others, I claim that the proponent of MSDP must accept that there are differential levels of justification because to suggest otherwise would be self-defeating. To illustrate this point I examine an argument for MSDP on the basis that there are no justified moral claims, and show that it, and arguments like it must necessarily be self-refuting. Proponents of the idea that democratic procedures ought to be used to decide in all matters concerning rights must thus accept that we can be more or less justified in accepting moral claims.

The argument from a lack of accessible moral truth to the value of democracy can be briefly put as follows. If there are no accessible values, then any person’s

⁸ In the next chapter this will be shown to require that Judges make decisions that enable and facilitate deliberation (§3.1 & §3.3.2), and which protect or maximise citizens’ autonomy in the private sphere (§3.2.3).

opinion is as good or as bad as the opinion of any other person. Since all opinions are equally valid, then we should tolerate the opinions of all people equally. We should thus allow each individual an equal say in government. Thus democracy is a better form of government, since it gives everyone an equal say in what decisions are made [Harrison, 149].

As Harrison notes, however, the move from scepticism about moral truth and justification to the rightness of democracy is illicit. One moves from a denial that we can have knowledge of the truth or falsity of moral claims to an acknowledgement of the truth of a particular moral claim. If one accepts moral scepticism one denies that we can have knowledge of moral value. One cannot on this basis suggest that we ought to tolerate one another's opinions because to do so is to accept a moral claim⁹. The moral principle of tolerance is both denied and accepted by the argument, which is clearly inconsistent. Thus the democrat cannot consistently hold both that there are no justifiable moral beliefs and that democratic procedures are morally justifiable, since to do so is self-defeating [*ibid.*; 150-1]. The possibility of moral justification is a shared premise in moral arguments for democratic procedures and in arguments for aristocratic ones¹⁰.

Similarly, if, as the sceptic holds, no-one can be shown to be right or wrong, justified or unjustified, then one could not be said to be mistaken if one held views that would obviously be rejected by democrats [*ibid.*]. A sceptical democrat could not, for instance, have any grounds for disagreeing with one who believes that the weak should be enslaved, or that opinions in opposition to their own should be suppressed. On the sceptical account such claims are as (un)justified as MSDP itself. Thus the proponent of MSDP cannot defeat the possibility of moral expertise by resorting to scepticism and claiming that there are no accessible or justifiable moral truths, since to do so is self-defeating.

Referring back to the problem that arose when I considered the possibility that a particular society rejected justification altogether (§2.3.2.), it is now clear that members of such a society could not advocate MSDP on this basis. Again, without any justification, MSDP would be no more or less justifiable than any other moral claim.

⁹ One could presumably make some sort of pragmatic argument that tolerance leads to a more stable society or some such. However, this would not be a defense of MSDP since MSDP holds that democratic procedures are morally superior to aristocratic procedures.

¹⁰ This also means that a democrat could not object to Plato's account on sceptical grounds.

I have argued that once the definition of a moral expert is modified, moral expertise is possible even if we accept the claims of moral relativists. What moral relativism entails is that an expert's expertise might be limited to a particular group or society. To the extent that a society does have justified moral beliefs, then, there can indeed be moral experts whose arguments are the most justified in that society. Thereafter, I argued that for the proponent of MSDP to object that no moral beliefs are more or less justified than any other would be self-defeating, since MSDP would be as unjustified as any other moral claim.

Thus the metaethical problems that were shown to cast dispersions on Plato's account do not pose similar problems for Liberal Aristocracy. Unlike Plato's Philosopher kings, moral experts do not require access to an independently existing realm of Forms. All that is required is that they can construct arguments that would produce moral convergence if the reasonable people of a particular society considered such arguments carefully¹¹.

4. An Objection: Identifying Experts

One objection to the claim that Liberal Aristocracy is possible is that although, as I have argued, Judges could have moral expertise, it would be impossible to know whether they were experts without already knowing what they know. That is, it is impossible to be an expert without being an expert oneself. I explain this objection and the problem that it raises for Liberal Aristocracy. In response I claim that it is possible to identify experts based on their track record of providing arguments that should bring about convergence in the moral views of reasonable people.

A problem that is often raised in relation to moral expertise is that it is difficult or impossible to be sure who the experts are. It might be claimed that someone could prove their moral expertise by producing convergence in all the moral views of all reasonable people that carefully considered their arguments.

However, there is an immediate objection to this idea because if moral experts produced arguments which reasonable people understood and agreed to, then the people who understood and agreed with the arguments would presumably be able to reproduce the arguments themselves. In this case they would be moral experts, since

¹¹ Note that this does not require that all reasonable people actually do agree with the arguments, just that they would agree if they gave sufficient consideration to the arguments.

they have the capacity to produce moral arguments that secure convergence in people's views [Hooker, 510].

Here there appears to be a regress of justification, since only those who already possess moral expertise are able to identify moral experts. That is, the only way anyone could know who the moral experts were would be to possess their expertise [Harrison, 153]. If it is only possible to identify a moral expert by becoming an expert, then it is unjustified for anyone who is not a moral expert to accept that anyone else *is* an expert. If so, there would be no reason for non-moral experts to accept that Judges who claimed to be moral experts should have the power to revoke the decisions of democratic branches of government.

A potential solution might be for those who recognise themselves as moral experts to make a self-validating move, and claim that those who do not recognise their expertise are unreasonable and should not be a hindrance to aristocratic decision-making. That is, those who recognise that their moral views should be accepted might simply proclaim themselves to be moral experts and demand the power to make collectively binding decisions. However, as Dahl notes,

[b]acked up by the force of the state, this move can effectively put down critics. Backed up only by the force of reason... a move of this kind fails to win credibility [Dahl, 349].

Such a strategy is common in totalitarian regimes: ideologues will proclaim to have the 'true' theory of justice, and use the state's power to suppress 'unreasonable' and 'false' opinions in opposition to their own. As a justification for authority this strategy is hopelessly circular. It amounts to saying "you're wrong because I'm right". Clearly an alternative solution must be found.

Perhaps the above problem can be drawn out with an example of another type of expertise. I want to plan a new house for myself, but I want to be sure that the architect I hire is an expert. Say the definition of an architectural expert is one who can produce great architecture on a regular basis. In order to be sure that he is an expert I go to all the buildings he has built. They look good to me, but how can I be sure that they are *great* architecture? Perhaps I can consult another expert, but this leads to a regress: how am I to find out if other purported experts are indeed experts? The only way I can find out if these people are experts seems to be to become an

expert architect myself. Then when I see another architect's building I will be able to tell whether or not it is *great* architecture.

The same seems to be the case with moral expertise. In order to know that a person is a moral expert, I must understand the arguments that they understand, in which case it seems I have moral expertise.

Returning again to the architectural analogy, let us say that in order to recognise great architecture I must know the precise details of how a particular structure was designed. I must be able to understand the placement of each doorway and staircase. Having understood all this I am able to perfectly reproduce the building and know how all the pieces fit together. Given these skills I might be able to recognise other pieces of great architecture, and see how the elements of design fit perfectly together. But this surely does not entail that I would be able to produce great architecture myself. I might be able to reproduce the great architecture that I have studied carefully, but it would be a mistake to think that this automatically makes me an architectural expert who can produce new architectural structures on a regular basis.

Similarly, in order to identify a moral expert I need to recognise when an argument is reasonable. Since the ability to understand reasons is a basic capacity of persons (unlike the capacity to recognise great architecture) if citizens carefully consider arguments we will be able to recognise those arguments with which we should reasonably agree. This does not, however, mean that we will be able to produce such arguments on a regular basis. This points to a further capacity that is required in order to be a moral expert. One must have

a capacity or disposition to ... form true answers to new questions that may be posed in the domain. An expert has the (cognitive) know-how, when presented with a new question in the domain, to go to the right sectors of [her] information-bank and perform appropriate operations on this information; or to deploy some external apparatus or data-banks to disclose relevant material [Goldman, 145].

Put in less jargonistic terms, Judges' moral expertise consists in their being able to apply their expertise when new problems arise. While reasonable people are able to understand their arguments, they are not necessarily able to produce arguments themselves. Such a capacity may require much training, knowledge of judicial precedent, and an ability to put one's own private opinions to one side (as discussed in

§2.2.1.). While the end result might be an argument with which reasonable people should agree, this is a far cry from saying that those who understand the arguments can produce such arguments whenever a new problem arises.

The above objection, then, relies on a confusion between the ability to reproduce arguments already provided as solutions to previous problems, and the ability to provide arguments when new situations or problems require it. It is the latter capacity that makes it possible to identify moral experts.

This consideration paves the way for a solution to the problem of identifying experts. Given the definition of expertise above, I argue that we can know who moral experts are without knowing *everything* that they know. The definition states that a moral expert can be “expected to provide arguments which, if examined carefully, would persuade reasonable people within a particular society and produce convergence in their moral views.” To recognise such a person it is not necessary that one knows *all* the arguments she has made or ever will make.

We can recognise an expert architect on the basis of her track record. The more great architecture she creates, the greater the extent that we can say with confidence that she has expertise. Similarly, we can identify a moral expert without possessing her expertise. The greater the regularity with which a person has produced arguments upon which all reasonable people should agree, the greater the extent to which we can be confident of her moral expertise. Just as we do not have to know of all the buildings that an architect has designed or ever will design in order to be confident that she is an expert architect, neither do we need to be aware of the entire contents of an expert’s knowledge in order to be confident of her moral expertise¹².

One further example may clarify this point. Say Socrates spends his life walking about Athens and discussing various moral claims with many reasonable people. All of these reasonable people – Thrasymachus, Glaucon, Meno, and many more people of all ages and financial brackets – come away saying that Socrates has convinced them about various moral claims. It seems clear that we would not be unjustified in claiming that Socrates is a moral expert, even though we would shy away from attributing this title to people like Glaucon, Thasymachus, and Meno¹³. It

¹² Similar arguments are offered by A. O. Rorty [Rorty, 169].

¹³ I am not claiming that Socrates is a moral expert. In fact it is apparent that many people in his society did not agree with his moral arguments, since he was found guilty of corrupting the youth.

would thus be justified for non-moral experts to accept that an individual is indeed a moral expert on the basis of that individual's track record of producing convergence in people's moral views.

Thus the regress of justification described above can be avoided, since it is possible to identify experts on the basis of their track record of producing arguments that should secure reasonable agreement. This said, it is clear that Judges are in an excellent position to be identified as moral experts because throughout their career they are required to justify their decisions, providing reasons as to why a particular decision was taken. By examining the reasons that they give it is possible to say whether such reasons and the judgements that result should be endorsed by people in a particular society, or whether the judge is deciding in accordance with non-public doctrines that other citizens need not endorse. If their judgements are consistently of the former type, one can say with confidence that a judge has moral expertise, and instate her as a Constitutional Court Judge on this basis¹⁴.

5. Conclusion

To conclude this section, then, the gap that was shown to exist in liberal justifications of the role of Constitutional Court Judges is partially filled. Judges who possess moral expertise are indeed qualified to make decisions that all citizens as reasonable and rational might be expected to endorse¹⁵. Thus if the decisions of democratic branches conflict with the reasonable principles of the Constitution, Judges with moral expertise are well-situated to review and revoke such decisions.

However, if Judges' moral expertise is not to be redundant it must be shown that democratic procedures are less likely to achieve the moral end of securing citizens' rights. If not, then the role of Constitutional Courts is unnecessary. In the next section I claim that Constitutional Court Judges could play a valuable part in securing citizens' rights because without this external authority the decisions of democratic branches will sometimes lead to violation of citizens' rights.

¹⁴ It is unnecessary to go into details as to how the selection of Constitutional Court Judges' would occur. Presumably, though, the selection committees would be made up of reasonable people with sufficient time and training to carefully examine judges' careers.

¹⁵ Note that I have not argued that existing Constitutional Court Judges are moral experts. If they are not, then their authority is not necessarily justified by the argument for Liberal Aristocracy. However, I think it is likely that they possess moral expertise to a large degree. As such, the argument of the next section – that democratic procedures will infringe upon citizens' rights – would still lend some justification to the authority of existing Constitutional Court Judges.

2.4. Liberal Aristocracy, Democracy, & Moral Ends

In this section I examine arguments to the effect that democratic procedures are more likely than Liberal Aristocratic procedures to arrive at decisions that infringe on citizens' rights. That is, I claim that Constitutional Court Judges with moral expertise will protect citizens' rights to a greater extent than democratic procedures would.

Generally, such claims rely on a Benthamite conception of democracy and argue that interest-based voting is likely to lead to the infringement of citizens' rights. Following Waldron, I claim that this is a somewhat pessimistic view of democracy. Democratic procedures can be viewed more optimistically when they are considered in a Rousseauian way, such that citizens vote towards the common good, and not purely on the basis of narrow self-interest. Furthermore, the equations of Condorcet suggest that, given certain assumptions, citizens are likely to be right about the common good. However, I argue that these assumptions are implausible. Since this is the case, even the more flattering Rousseauian picture of democracy cannot justify the claim that democratic procedures are likely to be correct about what rights should be afforded to citizens. I thus conclude that democratic decisions are more likely to violate citizens' rights than justified decisions of moral experts.

1. *Utilitarian Democracy*

Rawls suggests that part of the role of Constitutional Courts "is to prevent [the] law from being eroded by the legislation of transient majorities" [Rawls (1993), 233]. But why should we think that the law and in particular the Constitution should be *protected* from democracy? This question is easily answered if democracy is viewed in a Benthamite way. As a psychological egoist, Bentham argued that when people go to the polls they necessarily vote in a self-interested fashion. If people vote for a representative, they will vote for the person most likely to pass laws that are in their interest. Thus, when votes are counted, the decision that is taken will be the one that maximises utility. In this way democracy will produce the greatest happiness for the greatest number.

This view of democracy naturally opens itself up to the objection that democracy will lead to a 'tyranny of the majority'. This is because it could be in the majority's interests to enslave or tyrannise minority groups. Mill, for instance suggests that one of the greatest dangers of democracy

lies in the sinister interest of the holders of power: it is the danger of class legislation; of government intended for... the immediate benefit of the dominant class, to the lasting detriment of the whole [Mill, 245].

So for instance, when the poor are in the majority it might be in their interests to reallocate the wealth of the rich and leave the formerly wealthy class with insufficient means for survival. Or, again, it might be in the interests of the majority to torture suspected terrorists, in which case the rights of individuals suspected of terrorism will be severely undermined. For Mill, then, a system of representative democracy ought not to be constituted such that one sectional interest comes to dominate over “truth and justice and other sectional interests combined” [ibid., 246]¹⁶. Without such a constitution it is easy to see that if voting takes place on purely self-interested lines there is a high chance that individual rights will be undermined.

2. *Democracy & the Common Good*

In “Rights and Majorities: Rousseau Revisited”, Waldron contrasts this utilitarian conception of democracy with the Rousseauian democratic ideal. He claims that the Rousseauian schema offers a more attractive competitor to the Interest Satisfaction model of democracy. Rousseau argued that citizens should vote according to their belief in the common good, and not according to their own interests [Waldron, 398]¹⁷. Thus if liberal theorists are correct and respecting individual rights is seen as being an important component of a good society, then citizens will vote having already taken the rights and interests of others into account. So, for instance, if we were to vote on whether suspected terrorists should be detained and tortured, we should vote considering the rights of terrorists, rather than merely voting for the policy that is in our interest. Thus

[p]rovided that the opinion that is acted on takes my interests, along with everyone else’s, properly into account, the fact that the opinion is not mine is not itself a threat to my freedom or well-being [ibid., 413].

¹⁶ This requirement coincides roughly with Rawls’s idea that public policy should not be created on the basis of particular reasonable doctrines (§2.2.3).

¹⁷ Waldron notes that the common good is a rather vague concept in Rousseau’s theory [Waldron, 399]. Rawls, however, believes that the requirement that decisions should conform to the common good shares similarities with his idea that decisions must be made on the basis that they should be endorsed by all reasonable citizens [Rawls (1993), 219-220]. I assume Rawls’s definition approximates the requirements of the common good and use the term ‘common good’ as an abbreviation.

Thus fears of majority tyranny and the subversion of individual rights need not arise on the Rousseauian view of democracy, provided it can be shown that citizens are likely to be correct about the rights of minorities. If, however, democratic voting is not as likely to reach the most justified decisions about citizens' rights, then even if democracy is viewed in a Rousseauian way, Liberal Aristocratic procedures are necessary so as to prevent encroachments on citizens' rights.

3. Condorcet & the Epistemic Conception of Democracy

I will refer to the idea that democracy will arrive at the correct decisions with regard to citizens' rights as the 'epistemic conception of democracy'. Why should we think that the most popular opinion is likely to be the right one? Waldron suggests that the only convincing argument to this effect is based on Condorcet's equations. Condorcet argued that, given certain assumptions, the decisions of all citizens taken together are most likely to be right [Wolff (1996), 82]. I will briefly explain this argument and the assumptions on which it is based.

Condorcet demonstrated that if there is a voting body of 1000, and each member of a community is likely to be right 51% of the time, a 51% majority is likely to be right 69% of the time. That is, if citizens are on average more likely to be right than not, a majority is extremely likely to be right. Further, as the number of voters increases, so does the probability of the outcome being correct [Quinton, 122]. So if most people are more likely to be right than wrong it is better to have more voters, rather than fewer. With a large number of voters who are more than half likely to be correct about whether citizens should have particular right, democratic procedures are extremely likely to reach the correct decisions. Thus if citizens vote on which policy best promotes the common good, the decision they arrive at is extremely likely to be the correct one.

The implication of this is that there should be more decision-makers rather than fewer, and thus that a fully inclusive democratic procedure is just as likely to reach the correct answers as Judges with moral expertise.

4. Objections to the Epistemic Conception

There are, however, two central assumptions in the above argument that will often be false. The first is that (i) each member of the community is likely to be right about moral matters more than half the time. The second assumption is that (ii) the body of

voters will cast their vote according to what they think is morally right. Condorcet himself was of the opinion that as the size of the electorate increases the average individual competence will drop below 50%. If so, then even if everyone is voting towards the common good the equations will work the other way. That is, if people are only 49% likely to be right, a majority of 51% is 69% likely to be wrong. Further, as the majority of incorrect voters increases, so does the likelihood that they will undermine citizens' rights. This means that if either (i) or (ii) is false, the chances that democratic voting will reach the correct decisions decreases drastically and Condorcet's equations act as an argument against democracy. I will discuss these claims in turn, providing reasons as to why each is unlikely to be true in many cases.

There are good reasons to doubt that the idea that citizens are likely to be right on moral issues will be true in all or most cases. One such reason is the phenomenon of false consciousness. False consciousness occurs where truth is concealed by appearances or circumstances [Mill, 512]. So for instance Mill argued that the fact that there were few women authors was actually due to the fact that women are denied access to education, and not, as was widely thought at the time, due to women's innate intellectual inferiority [*ibid.*, 512-520]. Similarly the opinion that black people are innately prone to criminal behaviour could be inferred from statistics, whereas in fact such statistics should be attributed to the fact that blacks often have lower income levels due to a history of oppression. Clearly in these cases false claims about reality are inferred from appearances. Because this is so, when citizens vote on a particular issue, false consciousness could negatively impact on their decisions. For instance, false consciousness undoubtedly played a role in the election of Adolf Hitler in 1933. Citizens inferred from the fact that many Jews were wealthy that Jews had capitalised from the German defeat in the First World War. On this basis many German citizens voted for the anti-Semitic National Socialists. Obviously there were additional factors involved here, such as manipulative propaganda campaigns. However, the point is that false consciousness clearly contributed to Hitler's election and its disastrous consequences. False consciousness is thus one reason to doubt that citizens are likely to be correct about citizens' rights and the common good.

A further consideration is that the likelihood that each citizen is likely to be correct about the common good decreases as the number and complexity of competing options increases [Christiano, 165]. When it comes to considering

problems such as the death penalty or abortion, numerous complex and conflicting arguments are offered. How, for instance should the foetus's 'right to life' be weighed against a woman's right to choose? Should the same 'right to life' be accorded to a person who has shown disrespect for another's life by committing murder? In such cases it seems highly improbable that each citizen is more than likely to come to a decision that gives adequate weight to the best arguments, especially when one considers that often people do not have the time, the training, or the desire to do so.

Thus the first assumption above – that citizens are more than half likely to be right – will not be true in many instances. As noted, where citizens' odds of being right are less than half, democratic voting is extremely likely to lead to results that infringe on citizens' rights.

The second assumption of the epistemic conception of democracy – that citizens will vote according to what they believe is for the common good – is equally questionable. In his criticism of Benthamite democracy Waldron notes that

if large numbers of the community are voting [on the basis of what they think the aggregate happiness demands] and some are voting selfishly, adding those votes together is like adding chalk and cheese. And if all are voting selflessly on the basis of their personal perceptions of the general welfare, we have no aggregative reason for thinking the majority decision tells us anything new at all [Waldron, 397].

That is, if voting is 'mixed', such that some people vote their interests and others vote on moral grounds, it gives no indication of what decision would maximise utility.

However, Waldron appears not to notice that the problem of mixed voting applies to the Rousseauian model he advocates. Once again, if some people vote their interests and others vote for the common good, there is little reason to think that the result of voting will be the decision that best approximates the common good. The odds that the decision will be the moral one are decreased. The proponents of both Interest Satisfaction and Rousseauian models must thus hold that votes will not be mixed in the sense described. Clearly this is an implausible assumption. It is unlikely in the extreme that all citizens will vote according to their idea of the common good. People will often vote on self-interested grounds.

Say, for instance, that the Constitution stipulates a fair distribution of resources. If citizens were to vote on what such a fair distribution would be, it is likely that voting would be mixed. If I am rich I am less likely to accept a scheme that is

going to redistribute my amassed wealth. If I am poor I might vote for a redistribution scheme that will benefit me.

In addition many people are likely to vote on emotional grounds, without having considered whether or not a particular decision would violate individual rights. For instance, a commonly given justification for advocating the death penalty is ‘if someone killed someone in my family I’d want them to die’. Such emotional justification seems unsuited to making decisions with regard to basic rights and liberties.

In some cases at least, then, it is implausible that all, or even most people will vote according to their beliefs about what it is reasonable for other citizens to accept. Where this is so, the odds that democratic procedures will protect citizens’ rights are even further reduced. This consideration provides another reason to reject the claim that democratic procedures will arrive at decisions that are as justifiable as the justified decisions of Judges with moral expertise.

5. Conclusion

I have not argued that democratic voting necessarily leads to decisions that would undermine citizens’ rights. Such a claim is itself implausible. The argument above does not dispute the idea that democratic decisions will often be right. Rather, it holds that two assumptions at the heart of the epistemic conception of democracy will be false in some cases. In some cases people are likely to be wrong about what rights citizens should have, and in some cases citizens will vote without considering what rights others should have. In such eventualities democratic voting potentially leads to decisions that undermine citizens’ rights.

This claim is sufficient for my purposes since it demonstrates that, even if democratic decisions are often for the common good, sometimes they will conflict with the reasonable provisions of the Constitution and undermine the rights of citizens. By contrast the decisions of Liberal Aristocratic procedures will conform to public principles and values, and be based on arguments that should secure reasonable agreement if they are carefully considered. They will thus support the end of sustaining citizens’ rights to a greater extent than democratic procedures.

2.5. Moral Ends - Conclusion

In §2.1 and §2.2 I claimed that existing arguments for extra-democratic authorities are flawed. Platonic Aristocracy was seen to rest on a metaethical theory that is controversial and which is likely to undermine liberal rights. Liberal justifications for the power of Constitutional Court Judges were shown to be incomplete because they did not postulate a sufficiently qualified extra-democratic authority, or show that democratic authorities were so unqualified as to warrant external restrictions.

In §2.3 I attempted to supplement the liberal justification of the Constitutional Court's authority by claiming that moral expertise qualifies Judges to make decisions that protect citizens' rights. This is because they will provide judgements that all citizens should reasonably endorse, and which could be the focus of an overlapping consensus. §2.4 completed the justification for extra-democratic authority of Constitutional Court Judges because it was argued that without Liberal Aristocratic intervention democratic decisions are likely to undermine the moral end of preserving citizens' rights.

CHAPTER 3: MORAL MEANS

In the previous chapter, I claimed that Liberal Aristocracy would lead to decisions that are the most justified in a particular society. I now turn to the question of whether Liberal Aristocracy can be a morally legitimate means of making collectively binding decisions. Waldron notes that to “ask whether a political decision is legitimate is to ask a more procedural question; it is to ask whether it was taken in the way that such decisions ought to be taken” [Waldron, 393].

Democratic procedures are usually argued to be legitimate on the basis of liberal values such as equality and autonomy. Furthermore, it is usually held that they are the only procedures that are legitimate on this basis. Thus non-democratic procedures in which some or most of the *demos* are excluded from participation in collectively binding decisions are thought to be morally unconscionable. This is not because democratic procedures arrive at the best decisions as to how liberal ends such as autonomy should be furthered¹⁸. Rather, it is because democratic procedures are argued to be the only *means* whereby such values can be supported. Say for instance I have to make a decision whether or not to give generously to the poor. If I am coerced into making a particular decision then the means whereby I make that decision is morally inferior, regardless of whether or not the decision I make is the morally correct one.

Similarly, proponents of MSDP argue that in focussing on the end of reaching the correct moral decisions we may neglect the possibility that the means we use to achieve that end might itself be immoral, or contravene moral values. As Walzer suggests, “it is not at all obvious that a policy’s rightness is the right reason for implementing it” [Walzer, 386]. Put another way, if we introduce an inegalitarian decision-making procedure that aims solely at reaching the most justified moral decisions, this means might undermine the values the procedure is aimed at promoting

¹⁸ Although, as was seen in the previous chapter, some do make the claim that democratic procedures are likely to arrive at decisions that support citizens’ rights.

[Harrison, 153; Wolff (1996), 79]. For example, if the best way of achieving the correct decisions about what society ought to do involves undermining autonomy, and we value autonomy more than reaching the correct decisions, then the *means* we employ is incompatible with the *ends* we desire.

In the context of this paper then, it may be the case that Liberal Aristocracy undermines the very rights and values it is supposed to secure. Even if such a procedure could arrive at the correct decisions regarding rights it might be an unconscionably immoral means to a moral end. It may, for instance be a violation of citizens' autonomy if they are not allowed to vote on all decisions that bind everyone equally.

In this section I argue against this idea. I claim that Liberal Aristocracy, in addition to arriving at the most justified decisions about citizens' moral rights and duties, could be as moral a means as an egalitarian democratic procedure. That is, I claim that Liberal Aristocratic procedures could make collectively binding decisions about citizens' moral rights without such rights being undermined in the process.

Three central claims are offered in support of the idea that democratic procedures are the only, or the most, moral means of arriving at collectively binding decisions¹⁹. First, democracy is argued to support *deliberation*, which gives rise to morally relevant effects. Second, democratic procedures are required in order to attain the *autonomous consent* of citizens, which is necessary if decisions are to be legitimately binding on subjects. Third, democratic procedures are seen to express *recognition of citizens' equal status* in a way that inegalitarian procedures could not. I examine arguments for these three claims and hold that where democratic procedures are shown to be moral means of social decision-making, a Liberal Aristocratic means could be at least as moral.

¹⁹ Obviously it is impossible to examine all the arguments to the effect that democracy is a moral means. I take the following claims and the arguments for them to be a fair representation of existing justifications for democracy.

3.1. Deliberation

Fair deliberation is often argued to be the cornerstone of democracy. Citizens must have the right to the maximum available information through free and open debate, and such debate must recognise each individual's right to express their opinions in a public forum. No opinion should be suppressed or ignored without strong justification.

At least three claims have been offered in support of the idea that deliberation must be accommodated in order for any procedure to be a moral means of reaching collectively binding decisions. First, participation has *educative effects* on participants, such as moral and intellectual development. Second, fair deliberation can contribute to *moral progress* in society in general. Finally, deliberation leads to a spirit of critical opposition and *transparency*. I will not dispute these claims. Rather, I will briefly discuss why these effects are considered valuable and how deliberation can produce these effects. Thereafter I claim that fair deliberation and the values it supports can be accommodated by Liberal Aristocracy and thus hold that the moral importance of deliberation is no reason to prefer democracy when deciding on matters concerning rights.

1. *Educative Effects*

Deliberation is argued to lead to moral and intellectual development in participants. The worth of such development is often argued to reside in its close relation to the value of liberty. Liberal theorists emphasise the importance of self-development [Pennock, 28; Christiano, 153], which is deeply rooted in an Aristotelian activist conception of the good. Aristotle envisaged humans as the 'political animal' – a "set of distinctive potentialities oriented towards development and actualisation whose well-being will consist precisely in that development and realisation" [Hyland, 187].

Participation in political deliberation is seen to provide important opportunities for self-development of one's moral and intellectual capacities. These capacities are instrumentally valuable for obvious reasons, and, on an Aristotelian schema, intrinsically valuable since they contribute to the flourishing of citizens, and the development of a virtuous character [Aristotle, 1141b].

Citizens' moral development stems from the necessity of justifying one's views to others. This is seen to contribute to the development of a capacity for empathy, and the ability to regard and treat fellow citizens as rational agents who are

worthy of moral concern and support. Intellectual abilities are similarly developed by the need to be open-minded and to participate in rational discussion. Moral and intellectual learning are thus seen as essentially tied to political deliberation [Christiano, 156].

2. Moral Progress

In addition to leading to moral development in individual participants, many theorists have advanced the idea that deliberation could contribute to moral progress in society in general. This is due to the fact that fair deliberation allows for the expression of alternative moral views and ensures that such views will be given due recognition and consideration. Mill, for instance, claims that

the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived the opportunity of exchanging the error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error [Mill, 24].

Thus, a dominant immoral view can be challenged and shown to be morally unacceptable, or a dominant moral view can be challenged and its truth clarified. In this way deliberation could give rise to moral progress in society as a whole.

3. Transparent Government

By allowing the free expression of conflicting ideas, deliberation ensures that all opinions are taken into account. Furthermore, the rationale behind collectively binding decisions is open to scrutiny by all members of society [Hyland, 186]. Thus such decisions are not seen merely as divine dictates, or the whim of incompetent rulers. In this way the openness of deliberative structures can contribute to the legitimacy of collectively binding decisions [*ibid.*, 187].

For these reasons (1., 2., & 3.), deliberation should be regarded as valuable. What is unclear is that democracy is necessary to support deliberation. Of course most theorists regard deliberation as a necessary component of democracy, which is to democracy's credit if the above observations are correct. However, if it can be shown that Liberal Aristocracy can also support extensive rights of deliberation, there is no

reason to think that democracy should be preferred on this basis. I now argue that Liberal Aristocracy is indeed compatible with deliberation.

4. *Democracy, Liberal Aristocracy, & Deliberation*

While it can be accepted that deliberative participation does in many cases lead to the beneficial effects described, nothing is shown to be contributed by participating in the making of the final decision. That is, although the deliberative process may indeed produce valuable consequences for individuals and for society in general, it is unclear that such consequences are related to democratic procedures themselves²⁰. Many democratic theorists concede this point. Pennock for instance suggests that regimes other than democracy might “protect the freedoms of expression, assembly, and association” [Pennock, 150]. Thus there appears to be no reason why educative effects, moral progress, and transparency could not be achieved in a deliberative system in which the demos did not have direct control over collectively binding decisions.

A potential objection to this claim is that one cannot deliberate about the impossible. In this case perhaps it is incorrect to suggest that there could be deliberation without the possibility of directly influencing the outcome of such deliberation. In discussing the conditions for deliberation Aristotle holds that “if people meet with an impossibility, they give up... But if it seems possible they will try to do it. What is possible is what can be accomplished by our own efforts; what can be brought about through our friends is in a sense accomplished by our own efforts” [Aristotle, 1112b].

So, for instance if I believed that a certain law was morally wrong, it would have to be at least possible for me to bring about the change of a particular law. Otherwise there would be nothing to deliberate about, for people do not deliberate about ends themselves, but what is conducive to their ends [*ibid.*]. If nothing conduces to bring about the desired end, then there is nothing about which I can deliberate.

In order to show that deliberation is possible in a society with Liberal Aristocratic procedures, it must therefore be shown that it is possible to influence collectively binding decisions through one’s own effort and without directly

²⁰ Hyland claims otherwise, suggesting that “capacities can only be developed and exercised through practice, and democracy is the only system of rule that provides the opportunities for such practice in an egalitarian way” [Hyland, 189]. Unfortunately he provides no argument for this claim.

participating in taking the decision. I will now argue that Liberal Aristocracy does indeed provide such opportunities.

As has been suggested, deliberation brings new information, values, and arguments to light, and produces new considerations that decision-makers should take into account in their decisions. Consider, for instance, a courtroom scenario. Parties deliberate, providing arguments for their case. At the end of proceedings judges will consider the arguments and deliver a verdict, usually providing further argument as to why that particular decision has been made. In this way judicial deliberation is open to scrutiny, and participants have – through their arguments – an opportunity to contribute to the final outcome without being directly involved in decision-making.

Liberal Aristocracy could operate on similar lines. Citizens participate in free and open deliberation, and moral experts take into account their opinions and arguments in their justifications, which are open to deliberative scrutiny²¹. In this way the beneficial effects of participation could be felt, without resorting to democratic procedures that (as I argued in the previous chapter) are likely to lead to morally inferior decisions regarding rights.

5. Conclusion

Deliberation and its beneficial effects can thus be accommodated in a society in which collectively binding decisions regarding rights are taken undemocratically²². Since this is the case democracy's claim to support deliberation is not an argument against Liberal Aristocracy. The beneficial effects of deliberation described above thus do not give reason to think that Liberal Aristocratic procedures are a morally deficient means of taking collectively binding decisions.

Nevertheless these considerations furnish us with an initial requirement that must be taken into account if Liberal Aristocracy is to be legitimate. It must support rights of participation in fair deliberation, and Judicial decisions must be open to deliberative scrutiny, otherwise morally significant factors such as educative effects, moral progress, and transparency are likely to be undermined.

²¹ Deliberation would thus also keep Judges' in touch with public values, contributing to the quality of their judgments.

²² This conclusion should be unsurprising when one considers that most modern democracies have inequalitarian structures, such as Constitutional or Supreme Courts. Far from undermining deliberation these structures are usually thought to support extensive rights of free expression.

3.2. Autonomy & Consent

One of the most important arguments offered in support of MSDP is that democracy is required if collectively binding decisions are to secure the consent of citizens. Consent is closely related to the fundamental value of autonomy, or self-rule. For Kantians in particular self-rule is the “the fundamental form of moral obligation for any moral agent” [Hyland, 142]. Perhaps the most powerful expression of the requirements of autonomy is that of Thoreau: “The only obligation which I have a right to assume, is to do at any time what I think right” [*ibid.*].

So for instance if a law is passed against wearing a crucifix in public, such a law ought not to obligate the compliance of those who did not freely consent to be bound by the law. Being autonomous requires that I must freely endorse the laws that bind me. I ought not to subordinate my own judgement to that of another, and thus I should not be subject to laws I reject [*ibid.*]. If this is so then the only way I can be obligated to abide by a collectively binding decision is if I have consented to that decision. Only in this way can a law be legitimately binding upon those subject to it.

Three types of argument are offered in support of the claim that democratic procedures are required to secure the autonomous consent of citizens. The first is that democratic procedures allow citizens to be self-ruling because every individual *directly* contributes to the creation of collectively binding laws. The second is that democratic procedures *indirectly* secure consent because through their participation citizens autonomously accept an obligation to comply. That is, by voting citizens incur an obligation to accept the outcome of the democratic process even if it differs from the one they would have chosen. Finally, some theorists claim that we should sacrifice the idea that autonomy ought to be inviolable, and instead regard self-rule as a goal to be *maximised*. In this case democracy is regarded as the best system, since the maximum number of autonomous choices is actualised.

I will argue that none of these arguments succeeds. Since this is the case no reason is provided to prefer democracy on the basis of the value of autonomy.

1. *Direct consent*

It might be suggested that democracy supports the value of autonomy because in a democracy all citizens participate in the taking of collectively binding decisions. Since every citizen has an opportunity to participate in the taking of collectively binding decisions by voting for representatives or particular laws, citizens are subject

only to laws that they create. They directly consent to the law that is created, and thus incur an obligation to comply.

This argument rapidly unravels upon closer inspection. This can be seen when we ask what voting contributes to the realisation of an autonomous choice. The answer in the democratic case is that the contribution of voting to self-rule is negligible. This is because one's choices are only actualised as a social product insofar as they have the assent of many others [Christiano, 158]. That is, my capacity to make my autonomous choice collectively binding is made insignificant by the extent to which I rely on others.

For example, five friends and I have a choice between going to a public swimming pool and going to play bowls. We cannot do both because we only have one car, and the bowling green is far away from the swimming pool. We decide to vote, and the two of us who want to play bowls are outnumbered. My vote has in no way contributed to the outcome that I desire, and my autonomous choice is impeded.

The point is that if the social decision is not entirely my decision, then the collectively binding decision that I must obey is not determined by me. I can be bound and influenced by laws and institutions that I did not agree to, and which are more the product of others' participation than of my own. This is, as Christiano notes, a "paradigmatic case of unfreedom" [*ibid.*] because my obligation to do only that which I think is right is undermined by the fact that I must obey rules that I did not create. Thus I may as well be bossed about by a dictator as by a majority, because in neither case can I be said to have autonomously chosen the rule which I obey.

This argument thus fails to show that participation in democratic procedures contributes anything to individual citizens being *self*-ruling. Since this is so, the argument for democracy on the basis of direct consent fails to show that democratic procedures are preferable to Liberal Aristocracy.

2. *Indirect Consent*

Some theorists argue that democratic procedures generate an obligation to comply, even when the decision that is reached differs from the preferred outcome. That is, I endorse the collectively binding decision even when it differs from the outcome I would have chosen.

I will discuss two arguments to this effect. First I will examine Rousseau's claim that citizens are obligated to accept the results of voting by their commitment to

the common good. I claim that this argument relies on the premise that democratic procedures will reach the correct decisions, which was argued to be incorrect in §2.4. Second, I discuss Singer's argument that by voting I lead others to reasonably believe that I will comply, and thus incur an obligation to do so. I claim that Singer's argument also fails because causing others to reasonably believe that I will comply is insufficient to generate an obligation to do so.

Rousseau's stated aim was to identify a form of political association whereby "each one, while uniting with all" for defence and protection, "nevertheless obeys only himself and remains as free as before" [Rousseau, Bk IV]. That is, citizens obey the same laws but remain autonomous. Rousseau's argument can be briefly put as follows:

1. In order to be autonomous citizens must promote the common good [*ibid.*]
2. Promoting the common good requires not only that citizens act in accordance with the rule that is for the common good, but also that they participate in determining what that rule is.
3. Therefore, in order for citizens to be free, they must participate in the creation of rules that promote the common good.

Rousseau's argument invokes a more substantive notion of autonomy as consisting in the promotion of the common good. In this way it is thought that by promoting the common good through collective decision-making, citizens will be bound to the results of voting. Let us look more closely at this argument.

Premise 1 above derives from Rousseau's contention that in order to regard myself as a person I require the esteem and recognition of others who are at least my equals in their moral and intellectual capacities [*ibid.*, Bk I]. Because this recognition is of such importance to me, I cannot act without reference to the needs of others. My personhood requires that I must promote the good of others so that I can be recognised. Since the promotion of the good of others is a requirement of my personhood, it is also a requirement of my being free. Thus I must promote the common good in order to be autonomous.

Premise 2 is the most important step for advocates of democracy because it attempts to provide a link between participation in democratic procedures and the promotion of the common good. Why can I not merely act in accordance with the rule that is for the common good? Why must I also participate in the creation of that rule?

Rousseau's argument is that the common good can only be achieved through a process of deliberation and voting. Citizens meet together and discuss laws and policies that could be adopted. Such deliberation has a transformative effect on citizens' interest in and opinions of the common good. These effects of deliberation have already been described (§3.1) so I will not go into further detail here. The point is that when citizens finally come to vote on the laws and policies that will be adopted, the likelihood that they will come to the correct decisions as to the common good is greatly increased. In this way it is thought that a democratic decision will realise everyone's interest in achieving the common good. Even if the decision is not the one that I would have taken I will accept it, because accepting the rule that is for the common good is necessary for me to be autonomous.

However, a further claim is required in order to show that deliberation and participation in collective decision-making are necessary to secure the common good. It must be shown that democratic procedures are likely to lead to decisions that promote the common good. This, at least, is what seems to be implied by the following oft-quoted passage from Rousseau:

The constant will of all the members of the state is the general will; through it they are citizens and free. When a law is proposed in the people's assembly, what is asked of them is not precisely whether they approve or reject, but whether it conforms to the general will that is theirs. Each man, in giving his vote, states his opinion on this matter, and the declaration of the general will is drawn from the counting of votes. When, therefore, the opinion contrary to mine prevails, this proves merely that I was in error, and that what I took to be the general will was not so. If my private opinion has prevailed, I would have done something other than what I had wanted [Rousseau, Bk 4, Ch. 2].

I consent to the decision that is taken because it is the decision that I really wanted. That is, it is the decision that promotes the common good. Therefore my consent to the decision that is ultimately taken relies on the confidence I have that democratic procedures will arrive at decisions that are for the common good. Without this confidence I need not accept that my private opinion is mistaken.

Thus in order to show that democratic decisions do legitimately bind citizens, it must be argued that democratic procedures are likely to arrive at decisions that are for the common good. In this case the consent of citizens should be assured because the general will achieved through democratic voting promotes common good.

If, however, an alternative procedure is likely to make better decisions, then according to Rousseau's model that procedure should secure the consent of citizens. In this case the alternative procedure is more likely to satisfy each citizen's interest in achieving the common good.

In §2.4 I argued that democratic voting was likely to lead to worse decisions regarding the common good than Liberal Aristocracy. Thus it follows that the decisions of Judges should secure the consent of citizens to a greater extent than democratic procedures. Because we are bound to follow rules that are for the common good in order to be autonomous, self-rule requires that we obey the justified decisions of Constitutional Court Judges who are moral experts. Thus, if we accept Rousseau's requirements for autonomy this appears to provide further reason to prefer Liberal Aristocratic procedures.

The second type of indirect consent argument relies on a purported similarity between voting and promising. By voting I make a promise to others and they make similar promises to me, thus generating obligations. Without such obligations I could be substantially less free. Say for instance a friend promises to play backgammon with me. If they break their obligation then my autonomous choice to play backgammon is thwarted. Thus the practice of promise-keeping actually contributes to my autonomy, rather than undermining it. Similarly some theorists claim that a vote is similar to a promise and entails an obligation to comply. Clearly though for this argument to go through it has to be shown that voting is relevantly similar to promising.

One argument that attempts to do so is that of Singer. In Democracy and Disobedience, Singer claims that when I vote (as when I promise) I lead others to have a *reasonable belief* that I will comply, and that this generates an *obligation* to comply. His argument can be summarised thus:

1. By voting I lead others to reasonably believe that I will comply with the results of voting.
2. If my behaviour leads others to reasonably believe that I will do X, then I am obligated to do X
3. Therefore, if I vote then I am obligated to comply with the results of voting [Singer, 50].

If this is correct then the fact that I vote generates an obligation. I indirectly consent to the outcome, even when the decision differs from my private opinion. I discuss this argument and claim that it fails because premise 2 is incorrect. That is, I claim that another's reasonable belief that I will do X is insufficient to generate an obligation to do X.

Singer claims that the fact that I vote makes it reasonable for others to believe that I will comply (premise 1). This is because if no one obeyed the vote, then there would be no point in voting at all [*ibid.*]. Everyone who agreed with the vote would do as they please, and those who did not would do what *they* pleased. Voting when I will not comply with the results is as pointless as the practise of promising would be if no one did as they promised. Thus if I vote it is reasonable for others to expect me to comply, simply because of what voting is [*ibid.*, 51], just as it is reasonable for others to believe that I will do as I promised because of what promising is.

Premise two is seen to be justified because “[t]here are circumstances in which behaviour may give rise to an obligation to act as if there is consent, even when there is no actual consent” [*ibid.*, 49]. For instance, if I buy a round of drinks for James and Gareth, and James buys a round of drinks for Gareth and I, Gareth has incurred an obligation by accepting the drinks that we bought for him. If he refused we would rightly say that he has done wrong. The obligation is not generated by any actual consent, because Gareth may never have intended to buy a round. If Gareth does not give some positive expression of non-consent, then he leads James and I to reasonably believe that he will buy us a round [*ibid.*]. Singer suggests that the fact that Gareth leads us to have this *reasonable belief* is what creates the obligation to buy a round.

The same is true of voting because when I vote others are reasonably led to believe that I will comply – because of what voting is. Since this is the case voting obligates my consent, just as Gareth's acceptance of the drinks obligates him to buy a round.

However, I argue that others' reasonable beliefs do not generate obligations. This can be seen in the following examples. Michel Schumacher has won the last fifteen Grand Prix. My neighbour waters her garden every day. Michael Schumacher's behaviour – consistently winning – leads me quite reasonably to believe that he will win the next Grand Prix. My neighbour's behaviour – regularly watering her garden – leads me to reasonably believe that she will water her garden tomorrow. In both cases some behaviour leads me to form a reasonable belief, but in

neither case would it be correct to say that an obligation is generated. Michael Schumacher is certainly not *obligated* to win the next Grand Prix, and neither is my neighbour *obligated* to water her garden. It is clear therefore that my leading others to have a reasonable belief that I will do X is insufficient to impose an obligation to do X²³.

Thus although promising and voting may both lead to a reasonable belief, Singer's argument fails to show that this is a relevant similarity. That is, the fact that both lead to a reasonable belief does not generate an obligation. Premise 2 is false. Since this is so Singer's argument fails to show that by voting I consent to the outcome of voting. Democratic procedures do not legitimately bind participants in the way that a promise would.

Arguments for MSDP on the basis of indirect consent are as unsuccessful as the argument on the basis of direct consent. Perhaps, however, there is more hope for the claim that democratic procedures maximise autonomy.

3. *Maximum Autonomy*

Graham argues that people's autonomous choices will often conflict. So for instance my desire to play garden bowls might conflict with my brother's desire to play garden cricket with his friends. We cannot do both, and thus one of our autonomous choices will necessarily be disappointed. The situation in any system of social co-operation is necessarily analogous: sometimes some citizens' autonomous choices will have to be disappointed so that the autonomous choices of others can be realised. That is, the Kantian obligation to do that which one thinks is right is not universalisable because my opinion of what is right is likely to conflict with the opinions of others [Graham, 131].

Thus, rather than treating autonomy as an inviolable right, we should think of it as a goal to be maximised. For Graham, democratic majority rule is the best way to achieve this maximisation. Each citizen votes and the position that has the greatest number of votes becomes collectively binding law. Thus the autonomous choice of the maximum number is realised.

²³ There is something troubling about this quick move. Although I think this argument does target an important premise for the claim that voting secures consent, I must admit that I do not feel I have fully come to grips with Singer's argument.

The first problem that this argument raises is that it is not clear that democratic participation contributes anything to the supposed maximisation of autonomy. If the outcome that is chosen coincides with that which the majority would have chosen, what difference does it make that citizens actually participated in democratic procedures? The emphasis moves from having a moral procedural means that secures the autonomy of citizens to arriving at moral outcomes that maximise autonomy. Thus even if it is accepted that maximising autonomy requires making decisions that coincide with what the majority thinks is right, this does not provide a reason to prefer democratic procedures.

Furthermore it is far from clear that Graham is correct in claiming that maximising autonomy entails making collectively binding decisions that coincide with the choices of the majority. That is, Graham's argument conflates maximum autonomy with autonomy for the maximum number, and these may well be different [Christiano, 160]. Say for instance a minority wishes that the right of freedom of religion should be extended to all, while the majority wants to enforce Catholicism and ban all other religions. In this case the minority wants a decision that will increase a particular type of autonomy, whereas the majority wants a decision that will decrease citizens' ability to do what they think is right. The claim that the outcome desired by the majority would maximise autonomy is exceptionally dubious. Indeed, considerations of this kind could provide support for the claim that Liberal Aristocracy should be used to decide matters concerning rights. Since the maximisation of autonomy is now a matter of outcomes and because a minority of Constitutional Court Judges will make better decisions concerning how to protect and maximise citizens' scope for autonomous choice, then the moral end of maximising autonomy will be furthered if that minority's decisions are made collectively binding.

Thus Graham's argument fails to provide support for MSDP for at least two reasons. First, it does not show that participation in democratic procedures is necessary for the realisation of the maximum number of autonomous choices. Second, it unjustifiably assumes that autonomy is maximised by a collective decision that satisfies the maximum number of autonomous choices. The idea that autonomy is a goal to be maximised thus provides no support for MSDP as democratic procedures are not shown to maximise autonomy.

4. *Conclusion*

In this section I have argued that three types of argument for MSDP are unsuccessful in showing that democracy is a preferable moral means on the basis of its capacity to secure consent. The first type of argument claimed that democracy secures consent directly because citizens create the rules by which they are bound. I argued that voting does not contribute to citizens being self-ruling because the rules that are chosen, and by which one must abide, are more the product of others' choices than of one's own autonomous choice. The contribution made by my vote to the realisation of my autonomous choice is negligible, and thus cannot be seen as contributing to my consent to the outcome.

The second type of argument claimed that citizens indirectly consent to the outcome of democratic procedures, even when that outcome is other than that which they would have chosen. I looked at two arguments to this effect – that of Rousseau and that of Singer. I argued that Rousseau's claim depended on the assumption that democratic procedures are likely to arrive at decisions that promote the common good. Thus I claimed that because Liberal Aristocracy will promote the common good to a greater extent than democratic procedures it should be preferable on Rousseau's model.

Singer's argument attempted to show that voting is relevantly similar to making a promise because both lead to reasonable beliefs. In this way voting was seen to generate an obligation to comply. Voters indirectly consent to accept the outcome of voting even when it is not the outcome they desired. I claimed that the fact that both promising and voting lead to reasonable beliefs was not a relevant similarity, since the fact that I lead someone to have a reasonable belief is insufficient to generate an obligation. Singer's argument thus fails to show that participants in democratic procedures indirectly consent to the outcome.

Finally I discussed Graham's argument to the effect that maximisation of autonomy requires democratic procedures. I argued that it failed: firstly because an inegalitarian procedure could make decisions that coincide with the decisions that would be taken by the maximum number, and second because the decision taken by the maximum number does not necessarily maximise autonomy.

Since all these types of argument fail, it remains possible that an inegalitarian means could support the value of autonomy to the same extent as, or to a greater extent than, a democratic means.

3.3. Public Recognition & Respect

Pennock and Hyland suggest that the strongest argument for democracy is that it expresses public recognition of citizens' status as equals [Pennock, 153; Hyland, 189]. Such recognition is argued to be valuable on the basis of Hegel's well-known Master-Slave dialectic. Without the recognition of others, humans cannot recognise their worth, and thus are deprived of the dignity that should be accorded to conscious persons. However, as Hyland notes, we

do not need Hegelian dialectic to convince ourselves of the importance of such recognition of worth to us; all we need is to imagine the contrary situation, imagine ourselves, that is, as publicly proclaimed inferiors [*ibid.*, 189].

Similarly, Pennock writes

[t]o legally brand some individuals as unequal, to deprive them of that badge of democratic citizenship, the franchise, an equal franchise, would not only be a denial of a core principle of democracy, it would at the same time be an affront to the human dignity, the self-respect of those who were thus discriminated against [Pennock, 154].

It is clear, then, that recognition of equal status is of profound moral importance. What is less clear is what is actually meant by "recognition of equal status", and why such recognition is seen to require democracy. Neither Hyland nor Pennock elaborate on this point.

I think this vagueness derives from a conflation of two similar but distinct claims. The first claim is that democratic procedures recognise citizens as having equal status, and the second is that inegalitarian procedures necessarily fail to recognise the equal status of citizens. Clearly both claims are required if democratic procedures are to be preferred to inegalitarian procedures on the basis of recognition. If democratic procedures do not recognise the equal status of citizens then the argument fails and cannot be used as a defence of MSDP, even if inegalitarian procedures also fail to recognise equal status. If inegalitarian procedures do not of necessity fail to recognise citizens' status then even if democracy does recognise citizens' equal status, an alternative procedure might still be preferable if further reasons can be provided in its favour. In this section I attempt to clarify what is meant by "recognition of equal status". I argue that democracy does support recognition because it accommodates deliberation. However, I argue that since Liberal Aristocracy can promote extensive fair deliberation, this does not give us reason to prefer democratic procedures.

1. *The Meaning of “Recognition”*

The first question is how to understand the phrase “recognition of equal status”. Hyland uses it interchangeably with the phrase “recognition of worth” [Hyland, 189], but this is equally as equivocal. Beitz gives a clearer interpretation: perhaps the idea is that

fair institutions should express public recognition of the equal worth of persons conceived as autonomous centers of deliberation and action: such institutions should avoid interfering with, and when possible should contribute to, their members’ respect for themselves and one another as equally capable of making deliberate choices about their own situations and of carrying out those choices in action [Beitz, 93].

This seems like a sensible interpretation, and, in the absence of any clearer statement of the requirements of recognition, I will make use of this one. The question now is how this conception of recognition is seen to provide an argument for democracy.

North suggests that democracy could be justified because “an individual’s autonomy and moral personality are given public expression and acknowledgement” [North, 174-5]. I think this idea can be readily accepted, and thus the first claim above – that democratic procedures support recognition of equal status – is vindicated. However, while this provides an argument for democracy, I now claim that democracy recognises citizens’ equal status because it supports deliberation, which, as I have suggested, can be supported by Liberal Aristocracy.

2. *Democracy, Deliberation, & Recognition*

Democracy is argued to be a procedure that expresses recognition of people’s status as autonomous persons with moral personality. How does it do this? Since I have already argued that egalitarian voting does not uphold autonomy to any greater extent than inegalitarian procedures could, it is clear that *participation in democratic voting* is not what contributes to the public recognition of autonomy. Voting does not contribute to the realisation of people’s autonomous wishes, and the final outcome may totally ignore or even undermine citizens’ autonomy because democracy may reach decisions that undermine citizens’ rights.

Rather, public recognition is supported by the fact that fair deliberation provides an outlet for the expression of citizens’ moral opinions. That is, deliberation supports and recognises citizens’ capacity to form and express opinions, and in

addition can contribute to people's recognition of one another as rational beings whose opinions deserve respect [Beitz, 93].

As Beitz correctly notes, and as I argued previously (§3.1.4), these considerations can be accommodated in a variety of ways. "In particular, they do not establish that we should have egalitarian procedures" [*ibid.*]. Indeed, a Liberal Aristocratic procedure could arrive at decisions that improve the quality of deliberation by protecting citizens' rights of freedom of expression. Thus Liberal Aristocracy could be preferable on the basis of equal respect.

3. *Respect, Fairness & Degrading Reasons*

I think the force of arguments for democracy of the basis of respect and recognition derives from the empirical fact that many undemocratic regimes have affronted human dignity by regarding certain individuals and groups as morally and intellectually inferior. The exclusion of women and blacks from the franchise is one example of this tendency. However, it seems that in these cases insult is felt at least partly because the deprivation of the franchise is unfair. That is, citizens are deprived of the franchise on the basis of considerations – such as race or sex – that are not relevant to the ability to make collectively binding decisions. Thus there is one obvious consideration that must be taken into account. Any deprivation of the franchise must be justified by reasons that are relevant.

I said that matters of fairness are *part* of what leads to feelings of insult. Could it be the case that an institution is fair, and yet that institution still justifiably causes insult? I think that that it could. Say, for instance some person has consistently made bad decisions in the past. In this case it might be fair to deprive her of the franchise. There is a relevant reason for excluding her from the franchise – she consistently makes bad decisions. Yet such a deprivation could be degrading. That person could feel excluded and worthless, *especially* if she believes the reasons for her exclusion are correct.

In this case the deprivation of the franchise might be reasonable, but it is still degrading because it is based on reasons that are hurtful, and which undermine an individual's self-respect. If we value recognition and self-respect perhaps it is better to ignore reasons that are insulting, even if they are true. I do not wish to defend this claim, although it seems plausible enough given the moral importance of self-respect. Rather, I suggest that it furnishes a further consideration that must be taken into

account when justifying Liberal Aristocracy. If it is justified on the basis of premises that are degrading, a procedure that is not so justified, such as democracy, might be preferable.

4. Conclusion

In this section I claimed that there is no essential incompatibility between having inegalitarian decision procedures and institutionalising respect and recognition of citizens. This claim alone is relatively uninformative, so I discussed other considerations that procedures must take into account. What would an inegalitarian procedure have to be like in order to support the values of recognition and respect? First, it would have to support fair deliberation. Second, it should not discriminate against citizens on the basis of irrelevant reasons, such as race or sex. Further, the justification for such a procedure should not itself be insulting. It should not, for instance, be based on the supposition that individuals are too stupid to take care of themselves, or that God has blessed some people with a greater moral worth than others. If an inegalitarian procedure can support these criteria, then there is no reason why it should not be preferred to democracy on the basis of the value of equal recognition and respect.

Liberal Aristocracy does fulfil these criteria. It is based on the premises that democracy will sometimes undermine citizens' rights, and that Constitutional Court Judges with moral expertise will protect such rights. Clearly these are relevant reasons to place limits on the extent of democratic decision-making.

Further the argument for Liberal Aristocracy did not claim that people who aren't moral experts are stupid or worthless. Rather, it holds that people will sometimes be wrong about what rights citizens should have, or that when they cast their vote they will not consider what it is reasonable for others to endorse (§2.4.4). Most people would, I believe, accept these claims without any feelings of insult.

In conclusion, then, Liberal Aristocracy is based on relevant reasons that should not be degrading to citizens. Furthermore, since Liberal Aristocracy is more likely to secure rights of deliberation than democracy unaided is, the value of recognition is likely to be supported to a greater extent than it would be if Constitutional limits were not placed on democracy and protected by a qualified external authority.

3.4. Moral Means: Conclusion

I argued that three central claims offered in support of democratic procedures are unsuccessful. First, I argued that democracy is a moral means because it supports deliberation (§3.1). Thus, because an inegalitarian procedure is compatible with extensive rights of participation in fair deliberation, I argued that democracy should not be preferred to Liberal Aristocracy on this basis. Thereafter, I examined three types of argument to the effect that democracy is a moral means because it secures the autonomous consent of citizens (§3.2). I claimed that none of these arguments showed that democratic means are morally superior to inegalitarian means. Indeed, the last argument based on maximisation of autonomy was seen to provide support for the claim that an inegalitarian procedure might be preferable if it arrived at decisions that increased the scope of citizens' autonomous activities. Finally I discussed arguments to the effect that democracy was required if citizens were not to feel degraded by a lack of public recognition and respect (§3.3). I argued that although democracy does support the value of recognition, democratic procedures are not necessary do so. This is because recognition of equal rights in deliberation is the central contributor to public recognition and respect. Since deliberation can be accommodated in a society that uses a Liberal Aristocratic procedures, there is no incompatibility between this inegalitarian procedure and public recognition of citizens' equal status. Thus none of these arguments provide reason to believe that Liberal Aristocracy could not be a moral means of arriving at collectively binding decisions.

CHAPTER 4: CONCLUSION

I began this dissertation by discussing a purported inconsistency in the liberal democratic synthesis. On the one hand democracy is justified on the basis of liberal values. On the other hand democracy can conflict with the liberal basis from which it is derived. Where it does, the liberal democratic synthesis is undermined because the democratic element is inconsistent with its liberal counterpart.

This inconsistency is highlighted by posing the question of how rights-based limits on democracy should be implemented. How, for instance, should a citizen who discovers that a certain democratically created law violates her or others' rights go about changing that law? One method would be to form or join a political party, and attempt to gain sufficient support so that the law could be changed democratically. This would be most consistent with the democratic aspect of the liberal democratic synthesis.

However, I argued in §2.4 that this method, though possibly successful, may well fail. The moral end of sustaining citizens' rights will not always be supported by the demos, and thus democratic procedures will sometimes undermine citizens' rights. In such cases the democratic part of the liberal democratic synthesis is privileged at the expense of liberal rights.

A further way of challenging a law that violates citizens' rights is to appeal to an extra-democratic authority with the power to constrain democratic decision-making. This solution was shown to raise further problems: Would the postulated authority be sufficiently qualified as to warrant the power to place limitations on the express will of the demos? Can a non-democratic means of taking collectively binding decisions be morally legitimate? If these questions are answered in the negative, then the extra-democratic authority is neither justified nor legitimate. The purpose of this dissertation has been to describe a procedure in which the above questions can be answered in the affirmative. That is, I have described a non-democratic procedure – Liberal Aristocracy – and claimed that i) it was better qualified than democracy to

support the moral end of sustaining citizens' rights and that ii) it would be a morally legitimate means of doing so.

In Liberal Aristocracy extra-democratic authority rests in the judgments of Constitutional Court Judges with moral expertise. Such judgments must be based on Judges' understanding of public values, rather than on their own particular religious or philosophical views. Moral expertise was argued to be especially conducive to the end of arriving at decisions that accord with public values because it postulates a skill for providing arguments that are couched in terms that *all* reasonable and rational agents in a particular society would endorse, should they give the arguments sufficient consideration. For this reason Constitutional Court Judges' with moral expertise were argued to be ideally situated to adjudge when decisions taken democratically by citizens or their representatives undermined the reasonable provisions of the Constitution. Liberal Aristocracy thus provides an ideal buttress against democratic encroachments on citizens' rights.

However, I suggested that designating a qualified authority is insufficient for the authority of Constitutional Court Judges to be legitimate. It was also necessary to claim that the very idea of a minority deciding against the majority is not a violation of citizens' rights. That is, it was necessary to show that the liberal basis for attributing rights is compatible with an undemocratic authority. I claimed that arguments to the effect that collectively binding decisions ought only to be taken through democratic procedures were unsuccessful. To the extent that democratic means are morally legitimate, so are Liberal Aristocratic means.

This provides an answer to the question raised at the beginning of this dissertation. If a citizen discovers that a democratically created law is in violation of her rights then she can attain legal representation and appeal to the Constitutional Court. Provided her case is sufficiently motivated by public values, and assuming that Constitutional Court Judges are moral experts, Judges will use their extra-democratic authority to revoke the unjust democratically created law²⁴. The decision to do so will be justified because it will be dictated by reasons that no citizen could reasonably reject. It will thus further the moral end of protecting citizens' rights. Furthermore, the Liberal Aristocratic procedure used will also be a morally legitimate means, since it will not undermine the moral basis of justifications for democracy. In the remainder

²⁴ This is obviously a somewhat simplistic interpretation of legal proceedings, but it encapsulates the elements that are relevant to my argument

of this dissertation I will attempt to draw out some of the implications of this conclusion.

4.1. Liberal Democracy & Liberal Aristocracy

Although my aim in this dissertation has been to justify an authority with the power to constrain democracy, it is worth saying a few words about the fate of the liberal democratic synthesis. Is it necessarily undermined by the existence of a justified non-democratic authority?

In the first place it should be noted that I have not argued against the liberal democratic synthesis. I have not, for instance claimed that democratic means are necessarily incompatible with sustaining citizens' rights. Instead I argued that democratic means are not compatible with liberal values *to a greater extent* than Liberal Aristocracy, and that where democracy infringes upon rights, Liberal Aristocracy is more suited to sustaining liberal values. Democracy should thus be seen as *prima facie* compatible with those rights. That is, democracy is compatible with liberalism on the condition that rights are not infringed upon [Hyland, 160]. Where democracy does undermine rights the inconsistency in the liberal democratic synthesis recurs, because although the means may be as legitimate as Liberal Aristocratic means, democratically reached ends may be morally unjustifiable.

Thus I see no a priori reason why the arguments of this dissertation necessarily weaken the liberal democratic synthesis. Rather, Liberal Aristocracy should be seen as complementing the liberal democratic synthesis by designating a qualified authority that intervenes when democracy fails to sustain citizens' rights. Without such intervention the liberal democratic synthesis will sometimes be undermined because citizens' rights will be neglected.

4.2. The Scope of Liberal Aristocracy

It might be claimed that a consequence of the argument for Liberal Aristocratic procedures is that democratic procedures are redundant and serve no moral purpose. In this case perhaps we should scrap the liberal democratic synthesis and opt for a pure Liberal Aristocracy. The fear of this type of society underlies the following passage from Walzer's "Philosophy and Democracy".

Imagine a... judicially recognised right to welfare... A defensible right surely... yet... the judicial enforcement of welfare rights would radically

reduce the reach of democratic decisions. Henceforth the judges would decide, and as cases accumulated they would decide in increasing detail, what the scope and character of the welfare system should be and what sorts of distribution it required [Walzer, 391].

The possibility of an extended scope of Liberal Aristocratic decision-making must be acknowledged. However, Walzer's fear that Judges' extra-democratic authority will result in a slippery slope towards drastic limitation of the scope of democratic decision-making does not follow from the arguments I have offered in favour of Liberal Aristocracy. Again I stress that I have not argued that democracy serves no moral purpose. All I have claimed is that in one *particular* area – the protection of existing Constitutional rights – the authority of Constitutional Court Judges is justified, provided they have moral expertise. Democracy may, for instance be far more likely than Liberal Aristocracy to reach the correct decisions with respect to *other* moral ends, such as maximising preference satisfaction. Indeed, it seems highly unlikely that Judges with moral expertise would be likely to know citizens preferences to a greater extent than citizens themselves.

The point is that further arguments must be provided if the scope of Liberal Aristocracy is to be justifiably extended. Such extensions do not obviously follow from my arguments for Liberal Aristocracy.

On the other hand, although the arguments offered in this dissertation do not *entail* that decisions other than those regarding rights should be beyond the scope of democracy, they may *facilitate* other arguments that seek to justify such limitations on democratic procedures.

In this case it is the task of democratic theorists to show why an increased scope of Liberal Aristocratic decision-making should be seen as undesirable, given that Liberal Aristocracy is a morally legitimate means that, in at least some matters, is more likely than democracy to arrive at moral decisions that all reasonable citizens should endorse.

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