

Ivo Wallimann-Helmer

## 1. Introduction: The *real* tragedy of the commons

The agreements reached at the recent conferences of the UNFCCC<sup>2</sup> give cause for pessimism that the globally co-ordinated long-term agreements needed to drastically reduce greenhouse gas (GHG) production will ever be possible. According to Stephen M. Gardiner, at least part of the unsatisfactory outcomes of international negotiations concerning climate change can be explained if one accepts his description of the case: these negotiations have a decision structure even worse than that in Garret Hardin's tragedy of the commons (Gardiner, 2002). In the following I argue that one cause for this state of affairs in global climate politics which is often not mentioned in climate ethics is the normative framework of liberal democracy. This framework makes it unlikely that all nation-states – especially all democracies – will legitimise an international agreement on mitigating GHG emissions. The reason for this pessimistic conclusion lies in the fact that the liberal framework for democracy tends to reproduce domestically what, on a global level, Stephen Gardiner called the *real* tragedy of the commons.

This chapter is structured as follows. First, I show why Gardiner's analysis of the global tragedy of the commons is too wide-meshed to consider one important aspect of global climate politics, the domestic decision procedures in democracy necessary to legitimate international policy agreements. Second, I argue that it is particularly this area of political practice that renders it very likely that global climate politics is stuck in a tragedy of the commons. The normative framework of liberal democracy shapes a decision structure similar to that required for a tragedy to occur. In consequence, there is high probability that at least

---

<sup>1</sup> I would like to thank Anton Leist, Johan Rochel, Dominic Roser and Fabian Schuppert for very helpful discussion and feedback. I am grateful to the audiences of the MANCEPT Workshop in Political Theory 2011 in Manchester, the kick-off Workshop 'Rights to a green future' in Bucharest and the Colloquium for Political Philosophy at the University of Zurich for the opportunity to present my ideas at an earlier stage of their development.

<sup>2</sup> United Nations Framework Convention on Climate Change.

some democracies do not consent to an international agreement to mitigate GHG emissions. Third, since factual history seems to contradict this claim, I will show why the institution of judicial review is crucial to the institutional structure of liberal democracy to overcome the risk of a tragedy of the commons. However, as the fourth part of this chapter argues, in the case of climate change, a similar mechanism to avoid a tragedy cannot be derived from within the normative framework of liberal democracy itself. Overall, my analysis will make clear why the liberal normative framework for political decision-making cannot provide a suitable roadmap to cope adequately with challenges of sustainability such as climate change.

The argument in this chapter is restricted in three respects. First, it provides no defence of the need for an international agreement on mitigating GHG emissions. It simply presumes that such an agreement is necessary to mitigate the consequences of climate change. Second, it takes Gardiner's analysis of the potentially dilemmatic decision structure concerning climate change for granted. Third, the paper only deals with the liberal ideal of democracy that relies on Locke's contractualist argument for the need of civil society. Discussion of similar problems arising from the normative ideal of republican democracy must be reserved for another occasion.<sup>3</sup>

## 2. International agreements and national legitimisation

According to Gardiner, the decision structure in global climate politics is similar to that proposed by Hardin in his tragedy of the commons (Gardiner 2002, 402f.). A tragedy of the commons occurs in circumstances in which access to a commons is not institutionally or otherwise regulated and all those sharing the commons are rational. In such circumstances, it is, on the one hand, rational for all parties involved to preserve their commons for mutual advantage, but on the other hand, it is in the interest of each individual party to exhaust the commons to maximise its own profits. Preserving the commons is in the interest of all parties involved to maintain a certain level of welfare. It is rational for each individual party to maximise its own profits because, in the absence of mechanisms to avoid maximising behaviour at the cost of the commons, every individual not doing so is at a disadvantage to all other parties potentially maximising their own profits (Hardin 1968, 1244f.). Without

---

<sup>3</sup> See Wallimann-Helmer (2013a) for this purpose.

mechanisms to regulate access to the commons the commons will necessarily be depleted. However, as Elinor Ostrom and colleagues have shown, if an adequate regulatory framework exists or develops, a tragedy of the commons can always become a simple co-ordination problem (Ostrom 1999, 279f.).

The structure of Hardin's tragedy can also be applied to pollution, or more exactly to the atmosphere as a common good. It is rational for all to preserve our atmosphere, but because there is no mechanism to control pollution it is also rational for all individuals to pollute the environment in an effort to maximise their individual profit (Hardin 1968, 1045f.). With regard to climate change, Gardiner believes that the *real* tragedy of the commons should not be understood as consisting of a structural dilemma for those parties living today but as a dilemma occurring between generations (Gardiner 2002, 404ff.). Gardiner argues that the tragedy of climate change should be understood as an intergenerational tragedy because, following Ostrom, a tragedy of the commons among living parties can be overcome if they have the capacity to control their collaborators reciprocally by influencing their behaviour in some way (Gardiner, 2002, 394). Such influence can either be reached by social interaction among the parties involved or through institutional design. In the first case, this would mean that the involved parties' behaviour changes because they are in regular exchange. In the second case, the institutional framework to manage the commons has to be changed so as to ensure the preservation of the commons (Hampton 1987, 263f.).

As long as a regulatory framework does not exist, the risk of a tragedy of the commons is not easily overcome. Since such a regulatory framework does not yet exist for GHG emission reductions, the decision structure in negotiations on global climate agreements is potentially dilemmatic. Although reducing emissions to mitigate the impact of climate change might be understood as contributing to a common good, it is in the interest of nation-states for their economic development not to enter into such agreements. And, in the absence of a regulatory framework, it is easy to argue that one does not do so because there is a risk that others do not do so either. Such behaviour leads to a tragedy of the commons. However, to overcome a tragedy of the commons at the global level, quite a number of structural and contextual obstacles must be absent for such a dilemmatic decision structure not to occur. Unless such obstacles are absent, a tragedy of the commons might be the consequence (Axelrod and Keohane 1985, Ostrom 1999, 281f.).

If, however, a subgroup of all nation-states can mitigate climate change by deciding to mitigate GHG emissions without a binding international agreement, the situation would become a simple co-ordination problem among these states, without dilemmatic structure. In addition, their example may put pressure on at least some other states to adopt such mitigating behaviour too (Gardiner 2002, 408f.). This would change a dilemmatic situation into a co-ordination problem. Whether such a situation occurs depends on whether a proportion of nation-states able to fulfil the task take the necessary measures without an international agreement binding all nation-states globally.

Considering this possibility, Gardiner argues that, although the intragenerational challenge of climate change might merely be a co-ordination problem without dilemmatic structure, it should be treated as if it had such a structure. The reason for this is that the effects of not reaching mitigating goals have catastrophic consequences. In addition to this, a risk of an intergenerational tragedy of the commons exists (Gardiner 2002, 414f.). Climate change is an intergenerational challenge because the most severe consequences of high GHG emissions today will very probably arrive in the (far) future. Given that the tragedy of the commons involves parties of different generations, it is hard to see how as yet inexistent future generations might have an impact on the behaviour of the generation living now. Thus, the empirical circumstances that can turn an intragenerational tragedy into a simple co-ordination problem cannot arise (Gardiner 2002, 414f.).

This explains why results of the conferences of the UNFCCC are so unsatisfactory. Those negotiating international agreements are presently living representatives of nation-states, while those most severely affected by the impacts of climate change will be future generations. As a matter of fact, these generations have no chance to influence the behaviour of those currently negotiating global climate agreements.

However, Gardiner's analysis of the problem suffers from a central weakness. It is too wide-meshed to grasp the deeper problem underlying the global climate tragedy. For international agreements to be legitimate, those negotiating and probably implementing them have to respect national decision procedures for policy making. It is these procedures that increase the likelihood of the global climate tragedy. Although there is no room in this paper to defend nation-states' right to self-determination, its pragmatic importance in global climate politics can be made plausible by introducing David Miller's two-stage model for dealing with the challenge of climate change (Miller 2008, 121f.). In the

first stage, according to Miller, the principles for distributing responsibilities and burdens concerning emission reductions should be applied to nation-states. These principles should be fair, because only a fair distribution of these responsibilities and burdens makes it plausible to expect subscribing states to comply with such an agreement. In the second stage, it should be up to nation-states to implement those policies for distributing the costs of mitigating GHG-emissions that can be legitimised from within. According to Miller, this second stage is necessary because it allows respect for the right to national self-determination and differences in capacities and culture relevant to implementing such an agreement. Again, Miller claims that respecting the right to national self-determination enhances the compliance of subscribing nation-states.

From the perspective of normative democracy theory, Miller's model is deficient in an important point. Although Miller wants to preserve national self-determination in applying an international agreement, he does not consider the conditions to democratically legitimate international agreements as such. As the model is presented, it presumes that agreements at a global level can be reached by representatives of nation-states without being bound to national legitimisation processes. But, at least in democracies, representatives of such states are only legitimised to enter international agreements if they are legitimised through elections or other legitimisation procedures. In addition, before it comes to the realisation of such agreements, ratification is needed to legitimise their implementation. In consequence, international agreements not only have to respect national self-determination when it comes to their realisation. Establishment and ratification of such agreements already relies on legitimisation processes within nation-states.

These processes of legitimisation open up a new space of political agency with a high risk of a tragedy of the commons. The next section shows under what conditions political decisions and the agency of liberal democratic nation-states' representatives in international negotiations are legitimate. I suggest that the normative framework of liberal democracy allows for political behaviour which potentially leads to a tragedy of the commons domestically, especially when it comes to long-term policy decisions as required in the case of climate change.

### 3. The *real* tragedy of the commons in liberal democracy

Following Gardiner's argument, the decision structure concerning international agreements for mitigating GHG emissions must be understood as if it were a tragedy of the commons. However, the intergenerational challenge of climate change constitutes the *real* tragedy of the commons. But Gardiner's analysis does not take into account that the decision structure concerning international agreements not only applies to nation-states and their representatives but also to legitimisation processes necessary to entitle these representatives to negotiate for such agreements and to processes for their ratification. To show under what conditions representatives of liberal democracies are legitimised to enter and realise international agreements, I introduce Locke's arguments for defending democracy and the constraints on legitimate political authority and agency flowing from them.

The way Locke's contractualist argument for democracy and legitimate political decision-making will be presented leads to what Held calls protective or legal democracy (Held 2006, Chap. 3 & 201ff.). The main claims defended in these two models of democracy are the following. First, political decision-making is bound by a fixed bundle of (liberty or human) rights protecting the individual from state intervention. Second, policy measures are only legitimate if they are supported by citizens. Therefore, political decisions are only legitimate if they do not impair a specific bundle of rights and can count on citizens' acceptance. Insofar, these models of democracy are protective and their political decision structures are legally bound.

According to Locke, in a state of nature all human beings are equal because they hold a bundle of natural or God-given rights (Locke 1999, II. 6). These rights, conjoint with a natural duty to preserve humanity, would allow humans to live in peace. However, conflict might occur because some humans will affect the individual rights of others or because punishment for such an infringement will be excessive. Therefore, Locke believes, there is a necessity for a civil society which ensures three things: a) respect for natural or God-given rights, b) institutions to judge infringements of these rights and c) the enforcement of laws protecting these rights (Locke 1999, II. 87-88). Thus, entering civil society, humans empower social institutions to secure and enforce the rights given to them in a state of nature. In so doing, they assign to social institutions their natural or God-given right to judge infringements

of rights and to execute their enforcement (Locke 1999, II. 134). All other rights given in a state of nature still belong to the individual and should be protected by civil society and its institutions. Hence, political authority should be bound by these rights and political decision-making should stop where these rights begin. This makes these rights indefeasible constraints for political decision-making.

This argument for the need for civil society provides two arguments for democracy. First, entering civil society includes a hypothetical contract among all involved to confer to social institutions their right to judge infringements of natural or God-given rights and their right to enforce these rights. As the legitimacy of the institutions of civil society is justified by all involved consenting to a transition from a state of nature to civil society, all contracting parties are entitled to control the institutions of civil society (Locke, 1999, II. 128-131). If civil institutions or its assigned representatives break this contract, it is legitimate for citizens to remove the officials concerned. To guarantee this right in peace, political processes are needed that allow the peaceful control and removal of officials, both as members of the legislative assembly and of the executive institutions. Second, such a hypothetical contract establishes a collective body that should be able to decide what directions to take. As such agency needs decision structures to choose among options, Locke believes, majority vote is necessary because this is the only way to steer a collective body effectively. Hence, he believes that the initial contract justifying civil society also binds civil society to follow majority decisions (Locke 1999, II. 95-99).<sup>4</sup> The legitimate coverage of these majority decisions, however, is limited by a bundle of indefeasible rights that still remain with humans after entering civil society.

Though, from a modern perspective, it might be questioned that the bundle of indefeasible rights is natural or God-given, both Lockean arguments justify what is nowadays understood by liberal democracy, as defined by Barry Holden for example: “Liberal democracy is a political system in which (a) the whole people, positively or negatively, make, and are entitled to make the basic determining decisions on important matters of public policy; and (b) they make, and are only entitled to make, such decisions in a restricted sphere since the legitimate sphere of public authority is limited.” (cf. Holden 1988, 12f.)

---

<sup>4</sup> For a very helpful discussion of the difficulties with majority vote as a democratically legitimised procedure of political decision-making see Saunders (2010).

If public or political authority is limited, legitimate political agency must respect these limits. These limits must be respected by political actors because they define what can be understood as the common good of liberal democratic societies. This common good consists of securing limits to state interference. Within the Lockean framework, this means ensuring a bundle of inalienable rights, which includes their effective enforcement and institutions to judge infringement.

In contrast to civil society, in a state of nature humans are entitled to judge infringements of rights and to enforce compliance with them. Therefore, humans enter civil society only on condition that security concerning these rights is ensured. Transition from a state of nature to civil society must provide this advantage lying in the individual interest of all consenting to this transition. This shows why citizens in a liberal civil society are often framed as self-interested beings. They are understood as self-interested because their own interest in security with regard to a bundle of inalienable rights is the basis for defending the transition from the state of nature to civil society (Hampton 1997, 81). Consequently, if civil society is established, self-interested behaviour in political decision-making cannot be legitimately oppressed, since such interests lie at the heart of a normative defence of liberal democracy.

If self-interested behaviour in political agency is legitimate, then although security with regard to a bundle of inalienable rights is understood as the liberal commons, in the absence of mechanisms to control political agency, there is a risk that citizens might abuse this commons for their own profits. Likewise, there is a risk that those political actors who might not initially abuse the commons for their own profits, will eventually do so too, because they must distrust all others who might behave in a self-interested way. Such thinking and behaviour of political actors parallels the situation leading to the tragedy of the commons. Hence, a contractualist defence of liberal democracy by itself cannot provide a framework for avoiding such a potentially tragic structure.

The risk of a tragedy of the commons becomes worse when taking Locke's claim into account that majority vote is necessary for political decision-making. To gain a majority, political actors need to gather as many citizens as possible to have enough political power to implement those legal regulations which from their point of view seem to best guarantee the common goal of the initial contract. Gathering a majority can under some conditions be more feasible when contradicting the commons of security with regard to a bundle of inalienable



rights (most of the time at the cost of a minority). In the absence of mechanisms to control political agency, it is rational for political actors not only to act in the interest of the liberal commons but also in a self-interested way. And if no mechanisms to control political behaviour exist, it is also rational for political actors to assume that all other players in the political arena will not act to secure the liberal commons either. Consequently, the need to gather a majority increases the risk of a tragedy of the commons. Within a liberal framework, aspiration for profit at the cost of the commons is very likely.

In the light of Gardiner's argument that actors in decision processes can influence each other so as to overcome the risk of tragedy, these observations seem to be too strongly stated. Reciprocal influence among political actors would allow the translation of a tragedy of the commons into a simple co-ordination problem. In contrast to my conclusions, liberal democracies are not under permanent risk of a tragedy of the commons. According to Jean Hampton, this fact can only be explained by the assumption that, historically speaking, liberal societies developed parallel to philosophical reflection, what she calls a governing convention (Hampton 1997, 83f.). A governing convention ensures compliance with political decisions and distribution of powers.<sup>5</sup> Such a convention assigns authorities legitimate power under certain conditions to solve specific social problems (Hampton 1997, 88ff.). Following this view, in a state of nature individuals are not presented with a right for legislative and executive power, which they subsequently assign to social institutions. Instead, it is a factual historical process that leads to certain social institutions and commitments with political decisions and distribution of powers flowing from them.

Although legitimacy in liberal democracies might be defended with regard to an initial contract and somehow given indefeasible rights, for secured compliance with political decisions a historically developed convention concerning legitimate political decision-making must be presumed. Thus, the occurrence of a tragedy of the commons is less likely in liberal democracy if one presumes that legitimate political behaviour is not only shaped by the structure of the normative argument for the defence of liberal democratic institutions. As soon as it is assumed that historical processes lead to the development of social norms necessary to secure the common good of liberal society, a potential tragedy of the commons becomes a simple co-ordination problem.

---

<sup>5</sup> This theoretical claim gains support from factual history. The emergence of stable and working liberal democracies needs specific historical and social conditions (Ware, 1992).

However, this is true only if there is a possibility for actual reciprocal control among political actors. As such control is not possible between generations, the Lockean framework of liberal democracy still allows for the occurrence of what Gardiner called the *real* tragedy of the commons. Although a governing convention might endure over centuries and influence political actors' behaviour, there is no possibility of reciprocal control between political actors living in the (far) future and those deciding on policy matters today. As the normative framework of liberal democracy must allow for political agency and decisions that infringe upon the liberal commons, and because only the currently living political actors can reciprocally influence and control each other, there is a high probability that political actors in charge today will decide on policy matters in a way that leads to the corrosion of the liberal commons in the (far) future.

Concerning international agreements on climate change, the argument in this section has the following consequences. First, such agreements, however fair they might seem from an ethical point of view, can only be adopted by liberal democratic nation-states if they respect the governing convention of a liberal nation-state. Otherwise there would be a risk that liberal democracies either do not subscribe to such a contract or are not able to implement it. Second, in liberal democracies international agreements can only find acceptance if they are not in conflict with the bundle of rights assumed to be indefeasible. Third, those bargaining for such agreements have to be empowered by citizens to negotiate for these agreements and for their implementation. Therefore, in contrast to Miller, although the fairness of international agreements to mitigate GHG emissions might be important for nation-states to comply with them, such agreements have to be in accordance with processes of legitimate democratic decision-making. As these processes allow for Gardiner's *real* tragedy of the commons, it is likely that liberal democracies will either not entitle their representatives to sign international climate agreements or will not ratify them once they are signed.

#### 4. Judicial review to sustain the liberal commons

At this point, many readers will object that factual history speaks against the argument thus far. Liberal democracies tend not to undermine the commons of securing a bundle of

indefeasible rights for all their citizens, whether they are members of the same or different generations. For several centuries, democracies have remained stable and working; they most often do not harm human or other indefeasible rights, and political actors do not behave in a way that undermines the common good of liberal democracy.

In what follows, I argue that these points are correct, but only on condition that in liberal democracies institutional mechanisms have developed to control behaviour in political decision-making. These are the following three institutions: The judiciary or processes of judicial review, established legal regulations, and conditions of reasonableness.

In most modern western nation-states, democratic institutions have developed over a long period of history. If a long period of history was necessary to establish democratic institutions, then it is very plausible that these institutions not only developed because of the influence of philosophical theories but also by the emergence of some kind of governing convention (Hampton 1997, 86). With regard to liberal democracy, this makes it plausible that Locke's theory has been only one impetus among others for liberal democratic institutions to emerge. Indeed, it is uncontested that democratic nation-states have experienced many other influences beyond Locke's theory (Held 2006, Bessette 2011). Following the argument thus far, this is necessary, because liberal democracies would not have been as stable as they are if their development had only relied on the Lockean defence. There would have been a permanent risk of becoming stuck in a tragedy of the commons, which over the centuries would potentially have led to a corrosion of the commons of securing a bundle of indefeasible rights. In consequence, governing conventions of liberal democracies had to develop mechanisms of control preventing democratic procedures of decision-making from the risk of a tragedy in the long run.

In modern nation-states, I suggest, the most important working mechanism of control is established by the institution of judicial review. As a third main branch of political power in addition to the legislative and executive powers, this institution allows judgement on all political decisions. Judicial review can decide whether political decisions are in line with the constitution and especially whether they infringe upon the bundle of indefeasible rights. In so doing, the judiciary is a political institution controlling political agency. If political decisions impair the bundle of indefeasible rights then they are judged to be illegitimate and can no longer be legitimately brought to the political arena. In this way, judicial review serves as a

mechanism of control for legitimate political agency in democratic decision-making and can avoid the risk of a tragedy of the commons in liberal democracies.<sup>6</sup>

The legitimacy of judicial review can be questioned because the legitimisation of members of these institutions is in conflict with the procedural conditions of legitimate political representation. Judges are often assigned by some member(s) of the elected executive or the legislative assembly but are not elected by citizens themselves (Waldron, 2006, 1391). However, according to the argument presented here, although this institution might be in conflict with the Lockean defence of liberal democracy, it is a necessary part of its institutional realisation. If it is accepted that the risk of a tragedy corroding the liberal commons inherent in a liberal democracy's procedures of legitimate political decision-making is likely to occur, then judicial review is a very plausible way to ensure the sustenance of this common good, either for the citizens of one generation or, more importantly, for citizens of different generations. Once established, judicial review serves as a trustee that secures the inalienable bundle of rights lying at the heart of liberal democracy. It allows citizens to claim their rights and to contest political decisions on a legal basis (Lever 2009, 813).<sup>7</sup>

Another mechanism of control for political decision-making in liberal democracies is legal regulation going beyond the respective constitution. Whenever a governing convention emerges, it is not only enforced through the constitution but also through further legal regulation. If there is a risk that political programs or political agency are in conflict with such regulations, then these can be judged as illegitimate by institutions upholding legal regulation.<sup>8</sup> In this sense, legal regulations serve as a mechanism of control allowing to circumvent the risk of a tragedy. However, this mechanism of control is much weaker than the institution of judicial review, because legitimate political action in democracies has as a central aim to establish law following democratic procedures. Thus, before judging political

---

<sup>6</sup> In this paper I try to remain indifferent to the question of whether a strong or weak form of judicial review is necessary to avoid a tragedy of the commons in liberal democracy. According to Waldron, whilst in a system of strong judicial review the court has the right to decline political decisions, in a system of weak judicial review it is only entitled to scrutinize the compatibility of decisions with the constitution (Waldron 2006, 1354f.).

<sup>7</sup> In addition, Lever shows that although processes of legitimization and accountability for judges are quite different of those for political actors in the legislative and the executive, there are processes which allow the institution of judicial review to be seen as a fundamental democratic institution (Lever 2009, 811f.).

<sup>8</sup> In Switzerland, for example, it is possible to bring politicians to court if they voice racist beliefs (Schweizerisches Strafrechtsgesetzbuch, Art. 261).

agency and decisions to be in conflict with established legal regulation, it has always to be asked whether these might be appropriate proposals for establishing new legal regulation.

A further mechanism of control for political agency has been defended by deliberative democracy theorists (e. g. Habermas 1999, Cohen 2009). They claim that, in political deliberation, citizens should respect certain conditions of reasonableness, which include among others the acceptance of the non-coercive enforcement of the best argument and respecting equality among participants in deliberation. Political actors who comply with these conditions of reasonableness will not risk falling into a tragedy of the commons because they will try to abandon self-interested behaviour and aim at advocating the liberal commons to secure a bundle of infeasible rights. Indeed, the argument thus far underpins the idea that such behaviour of political actors is preferable. In liberal democracies, however, it cannot be legitimately enforced.

Enforcing the conditions of reasonableness would go against the contractualist argument in defence of liberal democracy. It would illegitimately oppress the self-interested behaviour implied by the argument for the necessity to establish civil society. In consequence, deliberative democracy theorists cannot defend institutions to enforce reasonable behaviour of political actors. The only legitimate way to enforce reasonableness in liberal democracies is by elections or by reciprocal social control among political actors. As these mechanisms of control are part of the process of democratic decision-making, they cannot have the same power as the judiciary to prevent the risk of a tragedy of the commons.

In consequence, in liberal democracies the main instrument to control political agency and decisions in the interest of preserving the liberal commons over generations is judicial review. Since judicial review is not part of the process of democratic decision-making, it does not bear the same risk of a tragedy with regard to the liberal commons. In contrast, legal regulation and the conditions of reasonableness are much weaker mechanisms for controlling political behaviour. They work only as part of the processes of legitimate political decision-making. However, as argued, liberal democratic institutions develop through a long historical process and, consequently, depend on a governing convention. This makes it plausible that political actors will reciprocally influence each other so that they will most often comply with the constitution or in other words with the commons of securing a bundle of infeasible rights even without institutional control.

When it comes to what Gardiner called the *real* tragedy of the commons, institutional regulation that is not part of the political decision process becomes necessary. Members of different generations are not able to control each other's behaviour reciprocally. Future political actors cannot ensure that decisions taken today will secure the liberal commons in the (far) future. Therefore, to avoid a tragedy with regard to the liberal commons intergenerationally, institutional regulation is needed that cannot be legitimately altered through processes of political decision-making. This institutional regulation is provided by judicial review as part of the governing convention of liberal democratic nation-states.

##### 5. The challenge of climate change: A climate judiciary?

The conclusion reached in the last section might provide optimism with regard to the challenge of climate change. If it is possible to abandon the *real* tragedy of the commons in liberal democracies by the institution of judicial review it seems plausible that the same applies when it comes to decisions concerning climate change. However, the argument regarding climate change cannot follow the same line as that in the previous section, for two reasons. First, it is not at all clear that mitigating the consequences of climate change is a liberal commons similar to ensuring security with regard to a bundle of indefeasible rights. Second, if there were a consensus about combating the consequences of climate change being a commons, mitigating GHG emissions can be in conflict with at least some of the rights that are part of the bundle of indefeasible liberal rights. This explains why there is always a risk in liberal democracy of a *real* tragedy of the commons when decisions are necessary to mitigate the consequences of climate change.

In the last section I argued that the institution of judicial review can be defended in a Lockean framework because it is a mechanism necessary to prevent a tragedy with regard to the liberal commons of securing a bundle of indefeasible rights. With regard to climate change, judicial review cannot serve as such a mechanism. For serving as such a mechanism, it would have to be shown that mitigating the consequences of climate change is part of the bundle of indefeasible rights lying at the core of the liberal normative framework of democracy. In fact, Simon Caney has argued that climate change leads to infringements of rights that are part of the bundle of indefeasible rights of liberal democracy (Caney 2005a, 767f.). But such an

argument does not go far enough. It only makes clear why liberal democracies have good reasons to do something to combat climate change (Wallimann-Helmer 2013c). It does not show that the reduction of GHG emissions is an enforceable right. Reducing GHG emissions is only a means of avoiding an infringement of rights but not a liberal right in itself. Although there is wide scientific agreement that mitigating GHG emissions is necessary to mitigate the consequences of climate change, it is also reasonable to argue for technical development that allows for adaptation to such change and mitigates its consequences. Both mitigating and adapting measures could secure the bundle of infeasible liberal rights, but the second would put into question the need for an international agreement to reduce GHG emissions.

As argued, in liberal democracy it must be accepted as legitimate for political actors to advance those legal regulations that on their view best serve to secure the commons of security with regard to the bundle of infeasible rights. This also applies to the question of how to combat the consequences of climate change. Since in liberal democracy self-interested political agency as such cannot be judged illegitimate, a tragedy of the commons with regard to climate change is likely, also because if some political actors opt for policy measures that do not demand reduction of GHG emissions, other political actors might follow suit. Corrosion of the commons of mitigating the consequences of climate change may be the result. Such liberal democratic nation-states will either not consent to international agreements to reduce GHG emissions or, if their representatives sign such an agreement, it is still possible that it will not be ratified and not be (adequately) implemented.

Even worse, enforcing a (drastic) reduction of GHG emissions might put into question the commons of liberal democracies itself. Mitigating GHG emissions might lead to an infringement of infeasible liberal liberty rights because such a policy strategy needs a (drastic) change of lifestyle. Thus, scientifically adequate means to mitigate the consequences of climate change might put into question the liberal commons of security with regard to at least some of the bundle of infeasible rights. This makes it rational for political actors to choose political positions and programmes with less harm to individual liberty. Confronted with this challenge, it might be better for political actors to put forward political positions and programmes that conflict less with the common goal of liberal democracies. This becomes even more rational politically if there is no guarantee that other political actors will not do so either. A tragedy of the commons with regard to the need to reduce GHG emissions might be the result.

As Gardiner pointed out, such situation can be modified into a pure co-ordination problem without dilemmatic decision structures. If there are enough political actors to reach decisions about an agreement on the necessity to mitigate GHG emissions, then they might also influence the behaviour and opinions of other, initially sceptical, political actors. Thus, the arguments provided depend on empirical matters that cannot be decided from a purely theoretical perspective. However, as these arguments should have made clear, although such decisions are possible, there is a risk that liberal democracies will be stuck in a tragedy of the commons with regard to the challenges of climate change. This is especially true because climate change is an intergenerational challenge and involves Gardiner's *real* tragedy of the commons. Future generations cannot influence the political agency of those in charge today. And those in charge today, for the reasons given, might opt for political decisions and programmes in conflict with the long-term policy decisions needed to effectively reduce GHG emissions.

Such a tragedy either allows no political decisions to be reached with regard to international agreements to reduce GHG emissions or leads to situations in which, on the assumption that mitigating GHG emissions is a necessary means to secure liberal rights, the liberal commons to secure a bundle of infeasible rights is itself subverted by the political parties involved. Thus, it seems that liberal democracy cannot adequately deal with challenges such as climate change. This situation makes it necessary to explore further how, without putting into question the governing conventions developed in liberal democratic nation-states, democratic institutions could be adapted to be able to take such challenges more seriously.

One possible institutional adaptation in liberal democracy among others can be installing mechanisms of control that are not part of the process of legitimate political decision-making.<sup>9</sup> These mechanisms would have to be similar but not identical with the institution of judicial review and could be called a climate judiciary. Like the institution of judicial review a climate judiciary would judge political decisions with regard to how well they conform to demands stemming from the challenges of climate change or to demands of

---

<sup>9</sup> Further institutional mechanisms would have to be discussed at another occasion: In green political theory, for example, it is often proposed that non-human nature should have proxy representation in political decision-making (e. g. Eckersley 2011). A very long tradition has the proposal that scientists or the wise citizens should have more power than others in political decision-making. Most recently, Shearman and Smith made such a proposal because of their analyses of liberal democracy going in a similar direction as mine (Shearman and Smith 2007). A third proposal to be discussed would be to introduce Quotas for young political actors or, better, for representatives of future generations to ensure that political decisions take more seriously the interests of future generations (Ekeli 2005, Thompson 2010). For a more fine-grained argument on the illegitimacy of institutions to represent future generations, see Wallimann-Helmer 2013b.



sustainability more generally. Members of these institutions would be appointed by the legislative or executive institutions as it is done for the members of the judiciary as well. The main question with regard to membership in such an institution is which qualifications should be deemed relevant for becoming a member of a climate judiciary since they cannot simply be individuals with juristic education. For deciding whether or not policy decisions conform to demands stemming from the challenges of climate change or whether or not they conform to demands of sustainability juristic education is not enough. To judge these questions adequately at least some knowledge in the relevant science or some identification with the interests lying behind these demands is needed.

Inspired by other proposals in green political theory, for the moment I can imagine the following three possible categories of criteria as being relevant to qualify as a member of a climate judiciary:<sup>10</sup> 1.) Scientists, especially natural scientists, could qualify for such a position because due to their education they are well equipped to understand and judge policy decisions with regard to their quality of sustainability. 2.) Maybe it is already enough that potential members of a climate judiciary belong to relevant interest groups (e. g. Greenpeace or WWF) or parties acting in the interest of future generations. As members of such groups they showed the required identification with the challenges of climate change or sustainability more generally. 3.) Another way to qualify as a candidate could simply be being young. Those who are young today will have to bear the impacts of climate change and unsustainable policy decisions. Since they have a special interest in adequate policy decisions with regard to climate change and demands of sustainability they already qualify as potential candidates for a climate judiciary.

Within the Lockean framework of liberal democracy, the central problem with these proposals for membership in a climate judiciary is that none of the groups of potential candidates mentioned is qualified to take such a role by democratically justifiable decision procedures. Scientists are qualified because they have been judged as such by members of the scientific community. Members of interest groups are only qualified as potential candidates because they vouch for specific political decisions and not because they can be necessarily said to be especially competent for taking the role as members of a climate judiciary. Seeing young political actors as potential candidates for the climate judiciary violates democratic legitimacy because age is envisaged as a criterion for a special role in the political decision-

---

<sup>10</sup> See the proposals introduced in Fn **Fehler! Textmarke nicht definiert.**

making process. All these proposals conflict with claims about democratic legitimacy because they advance criteria for a special role in political decision-making outside the scope of legitimate power distribution within liberal democracy.

To be sure, this objection also applies to the members of judiciary. Judges are assigned to their post because they qualify for this role by judicial education or at least some minimal knowledge about the constitution and legal regulations. But in contrast to the above proposals such qualification is justified as part of the ideal of liberal democracy itself. To secure a bundle of inalienable rights against a tragedy of the commons it is necessary that those who judge policy decisions understand their matter. Otherwise the judiciary could not serve the function defended as necessary for liberal democracy defended above. By contrast, scientific qualification as such is not necessary to secure the bundle of inalienable liberal rights. Vouching for specific policy decisions as a qualification contradicts the initial Lockean justification for democracy. It should be all consenting parties contracting to establish civil institutions who have a say in political decision making. As those consenting to this contract do this irrespective of age, the same applies to age as a criterion of qualification. **In consequence, although a climate judiciary might be the solution to overcome a potential tragedy in liberal democracy with regard demands stemming from climate change or sustainability, it is highly questionable how membership in such an institution should be assigned.**

## 6. Conclusion: Liberal democracy – a deficient ideal in times of climate change

Following the argument in this paper, there is a risk that at least some liberal democracies following a governing convention that uses a Lockean framework to defend democracy will not be able to reach the decisions necessary to mitigate the consequences of climate change. Such democratic nation-states will either not authorise their leaders to negotiate for international agreements on mitigating GHG emissions or, if these political actors sign such an agreement, there is no guarantee that it will be ratified. Hence, analysing legitimacy and political decision procedures in liberal democracy shows why there is a risk that at least some of them will either not be prepared to subscribe to an international agreement to mitigate GHG emissions or will not (adequately) implement it once it is signed. If there are some

nation-states which do not support such an agreement, it is likely that others will not do so either. This may, but need not, lead to a tragedy of the commons concerning international agreements on binding reductions of GHG emissions. Hence, Gardiner is right: The challenge of climate change should be treated as if it were a tragedy of the commons because at least liberal democracies cannot provide any guarantee that a *real* tragedy of the commons will not occur.

In consequence, facing a pressing challenge like climate change, liberal democracy has to be judged deficient. It is unable to adequately deal with challenges needing long-term policy decisions. The nature of legitimate political decision-making stemming from such a defence of democracy incorporates the risk of a tragedy, or more likely what Gardiner called with regard to climate change the *real* tragedy of the commons. Such a tragedy makes it likely that a binding international agreement to reduce GHG emissions as a means of mitigating consequences of climate change will not be reached. This might lead some readers to argue for liberal democracy to be a political regime to be overcome, a position well known in green political theory. However, if it is correct that historically developed governing conventions of liberal democracies have to be respected to reach and to implement international agreements, such arguments proceed too quickly. Ethical argument concerning climate change has to take seriously the problems of political decision procedures in liberal democratic nation-states, which have here been discussed with regard to a Lockean framework in defence of democracy. Otherwise, acceptance and implementation of an international agreement to mitigate GHG emissions is even less likely.

## References

- Axelrod, R., Keohane, R. (1985), "Achieving Cooperation under Anarchy: Strategies and Institutions", *World Politics*, Vol. 38 No. 1, 226–254.
- Bessette, Murray S. Y. (2011), "On the Genesis and Nature of Judicial Power", *eidos*, Vol. 15, 206–232.
- Caney, S. (2005), "Cosmopolitan Justice, Responsibility, and Global Climate Change", *Leiden Journal of International Law*, Vol. 18 No. 04, 747–775.

- Cohen, J. (2009), *Philosophy, Politics, Democracy: Selected Essays*, Harvard University Press, Cambridge Mass.
- Eckersley, R. (2011), “Representing Nature”, in Alonso, S., Keane, J. and Merkel, W. (Eds.), *The Future of Representative Democracy*, Cambridge University Press, Cambridge, 236–257.
- Ekeli, K. S. (2005), “Giving a Voice to Posterity – Deliberative Democracy and Representation of Future People”, *Journal of Agricultural and Environmental Ethics*, Vol. 18 No. 5, 429–450.
- Gardiner, S. M. (2002), “The Real Tragedy of the Commons”, *Philosophy and Public Affairs*, Vol. 30 No. 4, 387–416.
- Habermas, J. (1999), *The Inclusion of the other: Studies in political theory*, MIT Press, Cambridge [i.a.].
- Hampton, J. (1987), “Free-Rider Problems in the Production of Collective Goods”, *Economics and Philosophy*, Vol. 3 No. 02, 245–273.
- Hampton, J. (1997), *Political Philosophy, Dimensions of Philosophy Series*, Westview Press, Boulder, Colorado.
- Hardin, G. (1968), “The Tragedy of the Commons. The Population Problem Has No Technical Solution: It Requires a Fundamental Extension in Morality”, *Science*, Vol. 162, 1243–1248.
- Held, D. (2006), *Models of Democracy*, 3rd ed., Stanford University Press, Stanford Calif.
- Holden, B. (1988), *Understanding Liberal Democracy*, Philip Allan, Oxford.
- Lever, A. (2009), “Democracy and Judicial Review: Are They Really Incompatible?”, *Perspectives on Politics*, Vol. 7 No. 04, 805-822.
- Locke, J. (1999), *Two treatises of government*, Cambridge University Press, Cambridge.
- Miller, D. (2008), “Global Justice and Climate Change: How Should Responsibilities Be Distributed? Parts I and II”, *The Tanner Lectures on Human Values*, Vol. 28, 117–156.
- Ostrom, E. (1999), “Revisiting the Commons: Local Lessons, Global Challenges”, *Science*, Vol. 284 No. 5412, 78–282.
- Saunders, B. (2010), “Why Majority Rule Cannot Be Based only on Procedural Equality”, *Ratio Juris*, Vol. 23 No. 1, 113–122.

Shearman, D. and Wyne Smith, J. (2007), *The Climate Change Challenge and the Failure of Democracy*, Praeger Publishers, Westport, London.

Thompson, D. F. (2010), “Representing Future Generations: Political Presentism and Democratic Trusteeship”, *Critical Review of International Social and Political Philosophy*, Vol. 13 No. 1, 17–37.

Waldron, J. (2006), “The Core of the Case against Judicial Review”, *The Yale Law Journal*, Vol. 115 No. 6, 1346–1406.

Wallimann-Helmer, I. (2013a), “The Republican Tragedy of the Commons: The Inefficiency of Democracy in the Light of Climate Change”, *Ancilla Iuris*, 1–14.

Wallimann-Helmer, I. (2013b), “How (Not) to Justify Democratic Institutions to Ensure Sustainable Policy-Making”, *under review*.

Wallimann-Helmer, I. (2013c), “Climate Justice or Democracy - Does Democracy Require Climate Justice?”, *under review*.

Ware, A. (1992), “Liberal Democracy: One Form or Many?”, *Political Studies*, XL Special Issue, 130–145.