The Deliberative Social Contract
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Social contract theories of justice and deliberative theories of democracy have been prominent elements of the contemporary normative enterprise. Social contract theory in a number of its guises (Barry, 1989, 1995; Gauthier, 1986; Grice, 1967; Harsanyi, 1976; Scanlon, 1982, 1998), but in particular in the form(s) associated with Rawls (1996, 1999), has played a large part in resurrecting political theory from the dead state to which it had been consigned by Peter Laslett (1956: vii). Whatever its specific form, the fundamental idea of any social contract theory is that justifiable principles of social co-operation are derivable from those terms that would form the content of a social contract each individual would have reason to make with all other individuals in their society, all the contracting parties taking due regard to their own prudential interests. In this way, a just society gives each member reason to participate willingly in its practices provided that the terms of the social contract are adhered to.

According to the deliberative conception of democracy, the legitimacy and value of political decision making will be enhanced if citizens and political representatives take advantage of opportunities to engage in dialogue and discussion about matters of public concern. Deliberative democracy sees democratic institutions as dependent upon processes of discussion (e.g., Bohman and Rehg, 1997; D'Entreves, 2002). Political outcomes are legitimate if they are the outcome of deliberative participation by those subject to them (compare Cohen, 1989: 22; Dryzek, 2001: 651). From the point of view of citizens, deliberative democracy has been usefully formulated by Richardson (2002: 62-5) as the claim that the political process should address each citizen as someone capable of joining in a discussion and that each can be a potential agent of political decision. (Compare, as a small sample, Dryzek, 2000; Goodin, 2003; Gutmann and Thompson, 1996; 2004; Habermas, 1996)

A number of virtues are claimed for deliberated political decisions. They are said to be more representative, be more likely to be based on impartial rather than sectional perspectives, have greater legitimacy, reduce the probability of majority rule cycling, express the value of public reason among free and equal citizens and institutionalise the idea that problems of collective choice should be resolved by argument rather than force or manipulation.

Yet, in what relation should we think of social contract theory as standing to deliberative democratic theory? Are they discrete bodies of theory, or do they have deeper intellectual connections, and if so what might these connections be? I treat these questions as logical
ones in the sense that I shall be concerned with the concepts occurring in the two types of
type and the characteristic chains of reasoning that bind those concepts together. In
particular, I shall sketch a theoretical position in which the contractual and deliberative
elements are foundational, using the term ‘foundational’ not to mean ‘truths self-evident to
reason’ but ‘premises in a logical construction on which conclusions are made to rest’.

This lecture fall into a number of sections:

1. I begin by stating a minimal definition of democracy, defined in terms of
   inclusiveness, equality of standing and popular control.
2. I then consider how one might derive a justification for democracy and what this
   implies about democratic deliberation and the need for processes of public reasoning.
3. I then introduce the idea of an empirical social contract, where I identify some
   structural similarities to the idea of deliberative democracy, buttressing this argument
   by noting that even in its hypothetical form, theorists of the social contract have been
   prone to interpret the social contract as an element of democratic understanding.
4. I then outline an account of public reasoning that forms the centrepiece for decision
   making in a democracy.
5. Finally, I locate the discussion in the context of a broader political theory of the
   property-owning democracy.

A Minimal Definition of Democracy

There are many different conceptions of democracy, and much of the literature in democratic
theory is taken up with setting out these competing conceptions. Any general account of
democracy as a system of government, then, is bound to contain more than an element of
stipulative definition. However, since we are examining a general form of argument rather
than a specific claim to be able to justify one particular form of democracy, I hope that the
definition offered will serve the purpose. In particular, I suggest that any form of government
can calls itself democratic must meet at least three conditions.

The first is that citizenship in a democracy is available on an inclusive basis. If we imagined
for example a political regime in which only an elite had access to political power and
influence, then we would not call the system democratic, even if the decision making process
within the elite were open and egalitarian. To call any political system a democracy in a
meaningful way is to require a form of inclusive egalitarianism. It is hard to capture this
sense of inclusive egalitarianism is a simple formula. Many urge the 'all affected' principle, for example, under which all those affected by a system of political authority ought to have some say in the making of relevant decisions, but this is certainly too broad a requirement. For example, it would allow even those who had a minor or transitory stake in political decision making to claim the full rights of citizenship. While there are important questions about the political rights of denizens, questions that touch on how extensive and committed the association with a political society has to be before one can claim rights, it is generally recognised that there are some cases where there is no link from 'affect' to citizenship rights. Conversely, it is equally hard to come up with criteria of exclusion that can be unambiguously and openly applied. Most people would agree that those below a certain age ought to be denied a full share of political power, and there are arguments for requiring a certain period of residence to those newly arrived in a country and seeking citizenship. It is also possible that a criterion of exclusion that works systematically to the disadvantage of a small group in the population is worse than one that more randomly affects a larger group. So, saying in precise terms what is required for a political system to be inclusively egalitarian is not easy, but I shall assume that our intuitive everyday conception of political democracy includes some such principle.

The second requirement of a democracy is what I shall call egalitarianism of standing. A simple example will illustrate how this is related to the principle of inclusion. Consider how the vote is allocated. It would theoretically be possible to have inclusive egalitarianism if all had at least one vote, thus guaranteeing all a share of political power, but where some had more votes than others. Famously John Stuart Mill (1861: 335) defended plural voting in this sense, arguing that although one would feel insulted by being deprived of the vote and so being thought of no account at all, 'only a fool of a peculiar description' feels offended by the knowledge that they are others whose opinions should weigh more heavily. This is not the place to get into the merits or otherwise of Mill's specific argument. His distinction between inclusion for qualification and equality of standing given a qualification is a good one, and should be acknowledged. Modern democracies – and in my view any viable conception of democracy at all – will acknowledge that there are two tests at issue here, although they will also insist that both tests should be met.

The third element in the general idea of democracy is that the demos has the final say in disposing of significant political and policy decisions. There are of course difficult issues of an essentially practical nature here to do with the extent and range of decision making that can meet this condition in circumstances of economic and environmental inter-dependence. In the time I have available here I can do no more than simply state a conclusion, namely that
although no political community can completely escape some form of inter-dependence and although many small countries with open economies have very restricted room for manoeuvre in terms of their policy choices, there is still a significant difference to be marked between a situation in which there is formal authority to decide on important matters of public policy and situations in which there is not. This is simply a roundabout way of saying that institutions matter.

These three conditions of inclusiveness, equality of standing and final control by the demos seem to be essential if any political system is plausibly to be called a democracy. Some might wish to add as a fourth condition that the system government be participatory, in the sense that citizens themselves decide all the fundamental political decisions of a society. Yet the notion of participatory government itself needs to be unpacked. If participation is understood purely as an opportunity concept, detailing the rights and freedoms that citizens need to have in a democracy, then the requirement of participation is already captured in the conditions of egalitarian inclusiveness, capacity for contestation and fair aggregation. However, if the view is that a system can only be democratic provided that the bulk of important political decisions are taken by the mass of the people, as would be true if referendums were used extensively, then there is no reason to insist that this is definitive of democracy, as distinct from a form of democracy that may or may not have its merits. On this account, representative democracies are just as much democracies as democracies in which decisions are made by the mass of the people. Designing good democratic representation brings its own problems, of course, but that should not mean that representative political systems are denied the title of democracy.

So far I have merely stated the bare minimum of qualifying conditions for us to be able to call any political system a democracy and thereby I have left many questions unanswered. Two in particular require answering in any account of a well-functioning democracy. What is the required orientation of citizens in respect of the common problems that they face and how are we to conceive of collective choice within a democracy? To answer these questions, we need an account of the role of deliberation within a democracy as well as the circumstances underlying the requirement for there being a legislative capacity in government. To that task I now turn.

**The Derivation of Deliberation**

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1 This section relies heavily, word for word in some places, on Weale (2007: chapter 3).
To understand the requirements of collective choice and the orientation of citizens within a democracy, we need to consider how we go about justifying democratic government by comparison with other forms of government. Why might we think that a democratic form of government was justified by comparison with other forms of government? To answer this question we need to consider how we can justify different forms of government by comparison with one another. Here I rely upon a form of argument that I have used elsewhere (Weale, 2007) and which I have called the method of derivation, although I now think it better to use the term 'comparative evaluation'.

If we are to secure an adequate justification for democratic government, we need to compare it not to its most likely alternative but to the most ideally feasible alternative. Since all existing conceptions of democracy have in common the idea that decisions should be made by legislators who depend upon the views of citizens (including the case where citizens are the legislators) about collective choices, one obvious way of finding a theoretically plausible alternative to democracy is to consider a form of government that reduces or dispenses with the function of legislation. One such form would be a judicialised form of government resting upon a body of rules governing social relations, in which the rules evolved incrementally over time on the model of the English common law. Sidgwick described such a possibility with his usual clarity:

... a great part of the rules enforced by Government in our own society have not had their origin in express legislation; they have been gradually brought to the degree of precision and elaborateness which they have now attained, by a series of judicial decisions which ostensibly declared and applied rules and principles handed down from time immemorial. And it might be held that this judicial quasi-legislation is, even in a highly civilised society, the best machinery for introducing such improvements as may be required in the definition of the fundamental rights and duties that constitute the 'individualistic minimum'. (Sidgwick, 1891, p. 324).

As the reference to the individualistic minimum suggests at the end of this passage, the conception of government that most naturally fits with such an institutional structure is that contained in the idea of the minimal or night-watchman state (not an alternative that Sidgwick was advocating incidentally). In this conception, the function of government is to define a framework of rights and obligations that enables individuals to interact with one another to their mutual advantage, but without prescribing some common course of action upon those individuals that they would not themselves choose when exercising their rights.
If this close association between the idea of a judicialised, non-democratic, form of government and the idea of the individualistic minimum is correct, then we should expect to find in libertarian writers a theory of government in which the opportunities for democratic choice and deliberation were attenuated or reduced and in which control of social relations was conceived primarily in terms of adjudication among individuals by reference to a customary or otherwise implicit body of rules, akin to the English common law. And indeed, if we turn to libertarian writers like Nozick or Hayek, or even Oakeshott in his libertarian moods, this is exactly what we do find.

Consider, for example, Oakeshott's discussion of the 'civil condition' (Oakeshott, 1975, pp. 108-84). According to Oakeshott, the distinguishing feature of the civil condition is the way in which its members, whom he calls *cives*, are related to one another. In particular, the members of the civil condition are not related to one another as partners in an enterprise, but in terms of their subscription to a common practice. At the centre of this common practice is a system of rules, the chief characteristic of which is not to tell *cives* what to do but to prescribe the obligations of *cives* in respect of one another in the pursuit of their self-chosen purposes. As Oakeshott clearly puts it, '... it belongs to the character of *cives* (as it does not belong to the character of agents joined in an enterprise association) to be related as suitors to a judicial court.' (Oakeshott, 1975, p. 131).

According to Oakeshott, legislation does take place within a civil association, but the most striking thing about Oakeshott's own discussion of this function is how little he has to say about its basis and character. He does speak about what the basis of law in civil association is not. Thus, for him, it is not the expression of preference, the exhibition of a will, it cannot be deduced from reason, it is not the pursuit of common purposes or interests, it is not 'managerial', and there is no ready and indisputable criterion for determining the desirability of a legislative proposal (Oakeshott, 1975, pp. 139-40). But the list does not end in anything positive, and though he later specifies three conditions on legislative deliberation (Oakeshott, 1975, p. 178), these are largely formal conditions that many rules could satisfy, since what is required is that the rules be enforceable, be related to harm and be accommodatable to the particular political system for which they are proposed. Most importantly, there is no account of how those undertaking the legislation are supposed to be chosen and to whom they are accountable. Indeed, the 'glimpses', to borrow his metaphor, of civil association that Oakeshott sees in the work of political theorists make it clear that democratic responsibility is not an essential element of the civil condition (Oakeshott, 1975, p. 181). Sidgwick's non-democratic judicial form of government is clearly then represented in Oakeshott's account of civil association.
What are the distinctive features of this judicialised form of government? The first distinguishing characteristic is that the principles of adjudication that the judges are supposed to be using are derived either from a pre-existing notion of rights or from customary, traditional codes, the basis of both of which are beyond the scope of discussion and deliberation of a legislative assembly. The second distinguishing characteristic is also one that Oakeshott and others, including Hayek (1973, chapter 2), have found attractive, namely that it rests upon a conception of society as being made up of a collection of individuals with their own, typically divergent, purposes, rather than a conception of society in which individuals are conceived to share purposes in common. On this conception of the social order, the principles that judges apply impose limits on the freedom of action of individuals, rather than prescribing a substantive purpose. Thus, the law will forbid theft, force and fraud, but within the limits implied by these proscriptions individuals are allowed the freedom to pursue their own individual purposes. The third distinguishing feature of this conception of government is that those with responsibility for formulating principles for the regulation of public affairs are not to be made accountable to or dependent upon an elected assembly or the opinions of citizens at large. This absence of democratic dependence makes a great deal of sense within the overall conception of government, not least because judges are conceived of as developing a customary or otherwise pre-legislative code of principles, rather than implementing the decisions of a legislative assembly or popular referendum. Since the source of their authority is to be found in custom, not the resolutions of a legislature, it would simply be otiose to make judges accountable to an elected body. Indeed, since the chief means that a legislature has for controlling governments is to dismiss them once they have lost the confidence of legislators, the prospect of dismissal is thought to be the best way to control democratic governments, whereas the traditional means for securing judicial independence is to ensure that judges cannot be removed from office by politicians.

In characterising what a plausible theoretical alternative to a democratic system of government might be, I have of course only provided a sketch, rather than given the full picture, but it is, I think, suggestive even at that level. For if the *most plausible* alternative to a democratic form of government we can find has the characteristics identified, then it is already possible to see how it is implausible as a conception of government.

The first problem with this conception of government is one that Sidgwick himself recognised in his own discussion. In any system of government in which there is no legislative body, and consequently in which there are no explicitly formulated legislative rules, there is a large penumbra of uncertainty surrounding individual legal obligations. Courts proceed by making
decisions on individual cases that are brought before them, and although their decisions are binding as precedents within a common law system, they do not seek to anticipate the future judgments of courts on related matters by making rules that clearly demarcate the class of cases that are covered. Thus, for example, in matters of product liability, a court may well decide that widget manufacturers are liable for defects in their widgets, but it will not be clear if consumers are able to claim reparations for purchases of goods that are like widgets in some respects but unlike them in others. In other words, in quite ordinary transactions, there will be uncertainty where the borders of liability are to be drawn, and there will be no general principles governing exchange and transactions. This uncertainty may make it difficult, perhaps impossible, for individuals to coordinate their activities with one another for mutual advantage.

This problem of uncertainty is related to the second problem with our hypothetical form of judicialised government, which is its inability to anticipate, rather than merely react, to problems. Consider the problems associated with environmental protection. Experience in industrialising countries with the growth of pollution in the nineteenth and twentieth centuries shows that the control of pollution through the legal remedies of actions under the tort of nuisance must always wait until the damage has been done before a rule is formulated. If we now think about emerging technologies with environmental implications, most notably biotechnology and genetic manipulation, it is clear that an anticipatory capacity is needed to deal with the problems that might arise, since.

In the third place, a judicialised conception of government has no way of dealing with the cumulatively undesirable consequences of individual interactions. Social problems such as environmental pollution, traffic congestion and urban sprawl arise as the cumulative effect of a series of individual actions each one of which is entirely legitimate taken on its own. In the absence of any governmental capacity to take stock of the whole series of actions, and not simply particular instances, individuals in a society will find themselves worse off than they otherwise need be. In effect, each individual is locked in an n-person prisoners’ dilemma with every other individual, where the only rational action is not to cooperate with others in producing some social good, because it is rational to free ride on the efforts of others. In Fred Hirsch’s (1977, p. 49) evocative image, when all stand on tiptoe, no one sees any better. They simply get tired legs.

Yet this, in turn, raises another function for which a legislative capacity is needed. When individuals interact with one another, they do so under the terms and conditions that are already established. Thus, traders bring to a market the produce they own and and its value is
largely determined by circumstances beyond their individual control, including the material and human capital they control as well as the demand for their products or services prevailing at the time. Even when individuals successfully bargain to mutual advantage within these background circumstances, there is no way in which the structure and form of these background circumstances can be adequately addressed within the process of interactive bargaining itself. The only way in which that can be done is through legislative action that changes those terms and conditions. This is particularly important in labour markets where, for obvious reasons, employers usually have no incentive to pay regard, for example, to the family circumstances of their workers so that wage-rates will not normally compensate workers for the number of dependents that they have.

The argument so far has been that there are matters of common concern that need to be resolved if successful cooperation is to take place, but which cannot be resolved by individuals in the conduct of their own business. These common matters include the institutional preconditions for economic and social life, including the system of property rights and civil liability prevailing in the community, as well as the provision that it to be made for dealing with the cumulative consequences of individual interactions, of which environmental protection is the most conspicuous. Although we can imagine a form of polity which dispensed with a legislative function in respect of the resolutions of disputes between individuals, it would by its nature be incapable of satisfactorily resolving the collective problems to which any system of interactive choice gives rise.

This account of the comparative evaluation of democracy gives us the rudiments of a theory of collective choice. A collective choice on this account is one in which citizens face conditions that affect them all in various ways – the control of pollution being an obvious example – where the problem is liable to amelioration through planned action contained in legislation. A problem of collective choice exists when citizens face an issue affecting their common interests where some course of policy action is required. Since the problem is a practical one, such citizens are dependent upon their practical rationality in dealing with it. Practical rationality in this context involves the need to formulate and act upon decision premisses and so to carry an intention into effect. That is to say, it is a form of deliberative rationality. (I shall have more to say on this later.) A democratic systems of government, on this analysis is picked up by the conjunction of three conditions: public action in respect of policy issues of common interest; political equality; and public practical rationality in the attempt to deal with the issues of common interest.
We can highlight the distinctive features of democracy by considering each of these three defining characteristics in turn. Using the notation of 1 if the characteristic in present and 0 otherwise, we have the patterns found in Table 1.

Table 1
Patterns of Political Authority

<table>
<thead>
<tr>
<th>Deliberative Rationality</th>
<th>Common Interests</th>
<th>Equality</th>
<th>Form of Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1</td>
<td>1</td>
<td>Well-functioning Democracy</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
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<tr>
<td>1</td>
<td>1</td>
<td>0</td>
<td>Mandarinate</td>
</tr>
<tr>
<td>0</td>
<td>1</td>
<td>1</td>
<td>Rousseau-esque democracy</td>
</tr>
<tr>
<td>1</td>
<td>0</td>
<td>1</td>
<td>Partisan/Divided Democracy</td>
</tr>
</tbody>
</table>

We can bring out the elements of this conception by contrasting a well-functioning democracy with other forms of political authority in which one of the relevant conditions is absent. For example, it is perfectly possible to have a system in which there is deliberative rationality and an orientation towards common interests in which what can call a 'mandinarinate' that is to say a relatively uncorrupt public service recruited on merit and conducting vigorous internal debate about policy choices but closed to outside criticism and analysis. By contrast, we can imagine a system orientated towards common interests on the basis of a strong equality of standing, but without much attention to deliberation. Thus, when Rousseau (1762: 247) says about democratic assemblies that the first persons to speak merely says what all have felt when arriving at the general will, he is articulating an account of democracy in which common interests and equality are central but in which there is no deliberation. Finally, it is possible to imagine forms of politics – indeed these are probably in the vast majority – in which there is some form of equality and deliberative rationality, but in which an orientation to the common interest is absent.

The Empirical Social Contract Approach

So far I have not referred to ideas of the social contract, though I hope that defining democracy as a political system in which individuals reason practically together as equals to
solve common problems suggests echoes of a contractual approach. I now wish to set out that approach more formally.

The social contract approach that I shall adopt contrasts with the dominant one in the literature. Modern social contract theory, by which I mean theories that have been developed and elaborated since 1950, are overwhelmingly hypothetical in form. When we consider the main variants of social contract theory (Barry, 1989, 1995; Gauthier, 1986; Grice, 1967; Harsanyi, 1976; Rawls, 1996, 1999; Scanlon, 1982, 1998), the approach has been to think of the social contract as a hypothetical thought-experiment, rather than as a functioning set of social and political institutions. Rawls presents this position clearly, saying that the original position is purely hypothetical:

‘In justice as fairness the original position of equality corresponds to the state of nature in the traditional theory of the social contract. This original position is not, of course, thought of as an actual historical state of affairs, much less a primitive condition of culture. It is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice.’ (Rawls, 1999: 11).

A few pages later, the point is reiterated in relation to the nature of the contractual agreement:

‘In particular, the content of the relevant agreement is not to enter a given society or to adopt a given form of government, but to accept certain moral principles. Moreover, the undertakings referred to are purely hypothetical: a contract view holds that certain principles would be accepted in a well-defined initial situation.’ (Rawls, 1999: 14).

The position seems plain. The contract is a device of representation rather than a process in history.

Yet, despite this official position, there are elements in some traditions of political thinking in which the social contract is not purely hypothetical. For example, J.S. Mill, contrasting the law of force in politics with a political system in which persons are free, writes as follows about the ancient republics which he clearly sees as embodiments of political freedom:

‘The ancient republics, being mostly grounded from the first upon some kind of mutual compact, or at any rather formed by a union of persons not very unequal in strength, afforded, in consequence, the first portion of human relations fenced around,
and placed under the dominion of another law other than that of force.’ (Mill, 1869: 478).

Hannah Arendt saw the founding of the American republic as the establishment of a new political order and frames that understanding in terms of a social contract. To be sure, it is necessary for Arendt to preserve her account of political freedom as involving innovation also to assert that American contractarianism did not arise as a discovery not of a theory of the social contract but rather of the ‘few elementary truths on which this theory rests’ (Arendt: 1965: 174). Nonetheless, her account is one in which a new political order with a distinctive claim to legitimacy is founded at a particular point of time – about as clear a case of an original contract involving an explicit contract as one is likely to get.

However, and surprisingly in view of his general insistence that social contract theory is hypothetical, Rawls goes beyond this position to posit the existence of explicit contracts formulated at particular historical times. In his theory we find that view that the US Supreme Court could be seen as an exemplar of public reason but in a form that respected the ‘political ideal of a people to govern itself in a certain way’ (Rawls, 1996: 231-40). The way in which Rawls makes sense of this claim, whilst still seeking to keep his theory within the framework of constitutional democracy, is to rely upon notions that involve an original constitutional moment in the history of a democratic people.

Relying upon Locke’s distinction between the constituent power of a body of citizens to establish a new regime and the ordinary powers of citizens and officers of government, Rawls identifies a difference between ‘higher’ and ‘ordinary’ law, with higher law stemming from the people’s constituent power and ordinary law stemming from the powers given under that higher law. A democratic constitution is the expression in higher law of the ideal of popular self-government and the ‘aim of public reason is to articulate this ideal’ (Rawls, 1996: 232). Within this account, the constitutional basics are the outcome of particular constitutional moments in the development of democracy, in which the citizen body by a democratically ratified constitution ‘fixes once and for all certain constitutional essentials’ (Rawls, 1996: 232), especially equal civil and political rights and the rule of law. The task of the Supreme Court is to apply and extend the relevant constitutional principles to matters of public policy and concern. Thus, for Rawls, the US Supreme Court is the body responsible for that aspect of public reasoning issuing from the constituent power of the body of citizens within a democracy.
Thus, the idea that a form of social contract might have an historical instantiation under certain conditions is to be found in writers like Rawls, whose official position is to treat the contract as purely hypothetical, or like Mill, who general utilitarianism would generally be taken to be hostile to a utilitarian approach. In Arendt, the claim to republican legitimacy from an original founding moment is the strongest statement one could have of the idea that not all social contracts are ideas of reason. That theorists make such arguments is not of course to say that the arguments have validity. However, if we can find empirical examples of political practices that can be interpreted as contractualist in character, we have an alternative opportunity to develop a distinct method of social and political ethics.

Consider communities of the sort studied by Elinor Ostrom (1990) in which common pool resources have to be managed. Common pool resources are a species of public good. Pure public goods (in the economist’s sense) are characterised by non-rivalness and non-excludability. In the case of common pool resources, there is some rivalness, since, with a common pool resource, use by others, in particular use by a sufficient number of others, will deplete the value of the resource for any particular individual. Examples of common pool resources of this type cited by Ostrom include fishing grounds, groundwater basis, grazing areas, irrigation canals, bridges, parking garages, mainframe computers and streams, lakes, oceans and other bodies of water. These common pool resources are typically large enough to make it difficult, if not impossible, to exclude potential beneficiaries from use, but they also have the feature that the actions of these potential beneficiaries can spill over onto the use by others, as the example of over-fishing illustrates only too well, or as can be experienced by anybody who has tried to park their car at a busy time of the day in a public car park.

There problems of common pool resources are often treated by social scientists as instances of the prisoners’ dilemma, the classic example being Hardin’s discussion of the ‘tragedy of the commons’. Ostrom’s approach, however, is not to look at these issues in an a priori way, but instead to examine empirically cases in which such common pool problems have been successfully managed (sometimes over centuries) by contrast with those cases in which they have not been managed successfully. One of Ostrom’s examples will give the flavour of what successful management involves (see Ostrom, 1990: 18-21). In Alanya in southern Turkey coastal waters were being over-fished as a result of the over-capitalisation of the fleet and the competition for increased yields. In the early 1970s the local co-operative in Alanya began experimenting with allocating fish sites to local fishers, which consisted of the following system:
1. Each September a list of eligible fishers was prepared.
2. Within the area normally used, all fishers and all usable fishing locations were named and listed. The sites were so spaced that the nets in one site would not block the fish in an adjacent site.
3. These named locations were in effect from September to May.
4. In September the named fishers drew lots and were assigned to the named fishing locations.
5. From September to January each day each fisher moved east to the next location; after January each fisher moved west one place.

Note that we have here an example of what Young called an institution: '... identifiable practices consisting of recognised roles linked by clusters of rules or conventions governing relations among the occupants of those roles.' (Young, 1989: 5). One of the ways that such institutions operate is by providing norms that govern actions, thus enabling coordinated human activity to take place.

Ostrom argues that the evolution of institutions, of the sort of which Alanya provides an example, solve the collective action problems associated with the management of common-pool resources. In essence, what is happening is that the institution is providing a norm of behaviour for individuals, and action in accordance with that norm is sufficient to prevent the free-riding that undermines collective action. Ostrom (1990: 90) herself offers an account of the conditions that enable successful common-pool resources to survive a long time, some time over centuries, and they include:

(1) Clearly defined boundaries: those entitled to use the resource must be identifiable.
(2) A fit between appropriation rules and local conditions.
(3) Individuals affected can participate in changing or modifying the rules.
(4) There is an ability to monitor compliance.
(5) There is a system of graduated sanctions in place.
(6) There are conflict resolution mechanisms.
(7) External authorities do not challenge the right to organise.

We can interpret such institutions as models for deliberative democratic social contracts. They represent an enforceable agreement (5) among identified parties (1) that allows for continuing participation (3) and (4) in which feasible solutions to common problems have to be identified through deliberation (e.g., the scheme for sharing out the use of the waters in Alanya) and in which conflicts about the application of the rules can be discussed (6) and
which represents a form of self-government (7). Of course, such institutions do not have the scope of authority that social contracts in the full sense would enjoy, but that would not of itself prevent their being models for such contracts. In particular, there are three reasons why we can take the institutions of common pool resource management as models for a social contract.

First, the communities are relatively small scale in which the number of individuals involved is anywhere between 50 and 15,000 persons (Ostrom, 1990: 26). Thus, the individuals who have to find the terms of agreement reasonable are themselves directly involved in negotiating institutional arrangements so that any reasons for participation must apply to them. In this respect, common pool resource regimes resemble the conditions of hypothetical contract theory in which the members of society have to agree the terms of their co-operation among themselves.2

Secondly, the communities over which resource regime rules are being negotiated are communities of producers as well as consumers. Social contract theories of justice have been criticised for ignoring the conditions under which goods are produced as well as distributed (Nozick, 1974: chapter 7). There is some substance in this criticism, particularly in those versions of social contract theory in which the problem is seen as one of distributing according to some optimal rule an already produced economic surplus. However, there is a strong strand in Rawlsian social contract theory which sees the fundamental idea of reciprocity instantiated in the practices of a property-owning democracy the institutions of which ‘put into the hands of citizens generally, and not only of a few, sufficient productive means for them to be fully cooperating members of society on a footing of equality’ (Rawls, 2001: 140). When we are considering common pool resource regimes, we are considering communities the bulk of whose members participate in productive activity on a similar footing either for the purpose of direct consumption or for commodity agriculture. From this point of view, common pool resource regimes embody the conception of a community of producers engaged in reciprocally beneficial co-operation as well as any other example.

Thirdly, the common pool resource regimes under consideration have the capacity for self-government. Indeed, it is integral to Ostrom’s account of how successful regimes of common pool resource management arise that communities have some autonomy over their use of

2 A question put to me by Peter Jones in the Newcastle seminar is whether such small scale contractualist negotiation can form a model for justice and deliberation in a large society. My answer to this question is ‘yes’ provided that we have an account of political representation in which a primary function of representation is that representatives be able to make credible commitments on behalf of their constituents.
resources. If external political authorities were able to set the rules of the game, as they have come to do in a number of cases, then we would have no idea of the principles upon which the members of a political community could determine principles that it was reasonable for each of them to follow. For Ostrom’s purposes, the key element in regime autonomy is the knowledge of local circumstances contained within a community which it is impossible or highly costly for an external authority to replicate (Ostrom: 1990: 33). Where rules meeting a condition of common acceptability have to be crafted, local autonomy is a necessary condition of success. However, from the point of view of a normative theory of social contract, this condition is also an important one, since it guarantees that the results of collective deliberation will emerge from a contractual, rather than imposed, process.

If we consider successful common pool resource regimes as historically observable models of a social contract, then we shall see that among their characteristics are features that would define them as democracies. Most importantly in this connection, participants affected by a set of rules are able to participate in setting and modifying those rules. However, these regimes are also ones in which no external authority challenges the rights of appropriators to organise their own affairs and in which there is a clear demarcation between those who have the right to appropriate under the regime and those who do not. Putting these three conditions together gives us both a sense of how a community could be said to be self-governing, since only its members decide matters of common concern, and participatory, since all of its members are able to exercise some control over the communal decision. In this way, democratic self-government is the form that the social contract takes. Democratic governance is not something that we derive from the reasoning of the parties in an original position that is abstracted from political relations. Rather, democratic governance describes the conditions under which the contracting parties reason.

I shall express this claim by saying that in the empirical social contract democratic practices are constitutive of the social contract and not merely derived from it. This is not to deny that social contract arguments can be used to support arguments for democratic design of a particular sort. Understanding the rules and practices that participants can support in a social contract is important and gives sense to the idea of a constitutional contract. However, the specific task to understand what role the idea of deliberation might play in such a constitutional contract.

Democratic Practical Deliberation
What account of democratic practical can we give in the empirical social contract?

In answering this question, I submit that the rationality of the empirical contract had to be a deliberative rationality rather than the formal rationality of choice rankings that we find in much modern social choice and social contract theory. The principal reasons for this were that individuals have to be capable of appreciating the situation that they are in and responding to that situation either through the construction of innovative sets of rules embodied in social agreements and in committing themselves to the terms of those agreements. One key element in this account of rationality is the idea that action is the result of deliberation from a set of premisses. The key insight here is an ancient one and goes back to Aristotle’s (*Nichomachean Ethics*, 1112a, 16-17) account of practical reasoning, and in particular to his definition of choice as ‘voluntary action (*hekousion*) preceded by deliberation (*proaireton*)’. On this analysis we do not start with the notion of choice that is then axiomatised by reference to requirements of consistency, as is the model with modern utility theory. Rather we think of choice as emerging from processes of practical deliberation. One reason for adopting this approach is that it enables us to understand how communities are not trapped in collective action dilemmas through an iron law of strategically dominant choice but rather how they can appraise their situation and devise institutions in which participants are bound to common courses of action in ways that display reciprocal obligation. Another reason for taking this approach is that the neo-Aristotelian account of choice and practical rationality is the best account we have of such rationality, and as von Wright (1978: 46) pointed out some years ago, the logic of Aristotelian practical inference plays the same role in the human sciences as the deductive-nomological model in the natural sciences.

In what ways can we apply this account of rationality to public reasoning and how might the rationality of public reasoning be linked to other elements of democratic practice? In raising this problem, I use the term ‘public reasoning’ rather than ‘public reason’ because the latter has come to acquire a great deal of theoretical baggage. By contrast with a heavily theorised account, I intend to demarcate by the term ‘public reasoning’ a process by which citizens and their representatives explain and justify their proposals for common agreement in propositional form in such a way that others can understand what is at issue. For example, within common pool resource regimes, proposals to alter rules in the interests of greater efficiency or fairness may take the form of citing an agreed common end and explaining why a change in the rules would better conduce to the achievement of that end. The important thing in terms of practical rationality is that there is a link between the decision premisses and the action proposed, in the sense that the premisses should not be inconsistent with the action.
But the functions of deliberative rationality go beyond this requirement for explanation and justification and include at least the following elements:

1. To formulate an understanding of the collective dilemma confronting members of the community.
2. To craft responses to collective problems.
3. To provide reasons for participants to act individually in playing their part in contributing to the solution of those common problems.
4. To do so in such a way that the constraints of fairness are satisfied.
5. To allow for dissent and disagreement where this exists.

Each of these elements of practical public reasoning are worth a paper to itself and this lecture has already taken too long as it is. However, I hope I have done enough to show the parallels and logical affinities between a particular deliberative conception of democracy and the idea of an empirical social contract. In conclusion, I simply note the conception of society with which these conceptions of society are associated.

**Conclusion**

Rawls saw a social contract theory of justice is one formulated for a certain conception of society. In particular, that conception was that a society was 'a more or less self-sufficient association of persons who in their relations to one another recognize certain principles as binding' with rules that 'specify a system of cooperation designed to advance the good of those taking part in it' (Rawls, 1999: 4; compare Rawls, 2001: 5). Rawls (1999: xiv-xvi) made it clear in the Preface to the Revised Edition of *Theory* that there was a link between the conception of society as 'a fair system of co-operation over time among citizens as free and equal persons' and the idea of a property-owning democracy. In my experience those people who think about property and democracy fall into two classes: those who being concerned about the property are less concerned with the democracy and those who being concerned about the democracy are less concerned with the property. Empirical social contract, I submit, show how fairness about property can coincide with a strong account of democracy and public reasoning that it requires. I began by saying that social contract theory and theories of deliberative democracy have been dominant elements of the normative enterprise for some time. I hope I have done something to convince you that these two streams of thinking have a great deal in common.
References


