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# The Politics of Sustainability

## Philosophical Perspectives

**Edited by Dieter Birnbacher and  
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## 2 The liberal tragedy of the commons

### The deficiency of democracy in a changing climate

Ivo Wallimann-Helmer

In this chapter, I argue that the normative framework of liberal democracy is one of the sources of the failure of international climate politics. The liberal framework makes it very likely that at least some democracies will not consent to an international agreement to mitigate greenhouse gas emissions. In this situation, the institution of judicial review might be viewed as crucial to overcome the risk of a tragedy of the commons. However, judicial review cannot serve this purpose in the case of climate change and an institutional change of the kind required cannot be derived from within the normative framework of liberal democracy itself.

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

The recent conferences of the parties of the United Nations Framework Convention on Climate Change (UNFCCC) give cause for pessimism that the binding long-term agreements needed to drastically reduce greenhouse gas (GHG) emissions will ever be possible. Stephen M. Gardiner has observed that these negotiations have a decision structure even worse than that in Garret Hardin's tragedy of the commons (Gardiner 2002). Here I argue that one cause for this state of affairs in global climate politics is the normative framework of liberal democracy. This framework makes it unlikely that all nation-states, especially all democracies, will reach an international agreement mitigating GHG emissions. The reason for this pessimistic conclusion is 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 argue that Gardiner's analysis of the global tragedy of the commons is too wide-meshed to consider the domestic decision procedures in democracies necessary to legitimate international policy agreements. Second, I suggest that the normative framework of liberal democracy creates a decision structure likely to lead to a tragedy of the commons. Third, since history seems to contradict this claim, I show why judicial review is crucial to the institutional structure of liberal democracy. However, as the fourth part of this chapter argues, in the case of climate change, a similar mechanism cannot be derived from within the normative framework of liberal democracy. Overall,

my analysis will make clear why the liberal normative framework for political decision-making cannot cope adequately with challenges of sustainability such as climate change.

The argument in this chapter, however, 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 reduce the adverse effects of climate change. Second, it takes for granted Gardiner's analysis of the potentially dilemmatic decision structure concerning climate change. Third, the paper only deals with the ideal of liberal democracy that relies on John 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>1</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: 402). A tragedy of the commons occurs when access to a commons is not institutionally or otherwise regulated and all those sharing the commons are rational. In such circumstances, it is rational for all parties involved to preserve their commons for mutual advantage. But it is also in the interest of each individual party to exhaust the commons so as to maximise its own profits. Preserving the commons is in the interest of all parties involved in order to maintain a certain level of welfare. However, 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 profits (Hardin 1968: 1244). Without mechanisms to regulate access to the commons, the commons will 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, 279).

The structure of Hardin's tragedy also can be applied to pollution, or more exactly to the atmosphere as a common good. It is rational for all to preserve the atmosphere, but because there is no mechanism to control pollution, it is also rational for all individuals to pollute the environment while maximising their own profit (Hardin 1968: 1045). In the case of climate change, Gardiner believes that the *real* tragedy of the commons should not be understood as a dilemma for parties living today but as a dilemma occurring between generations (Gardiner 2002: 404). Gardiner argues, following Ostrom, that this is because a tragedy of the commons among living parties can be overcome if they have the capacity to influence each other's behaviour reciprocally (Gardiner 2002: 394). Such influence can be reached by either social interaction among the parties involved or through institutional design. In the first case, this means that the behaviour of the involved parties changes because they are in regular exchange. In the second

case, the institutional framework has to be changed so as to ensure the preservation of the commons (Hampton 1987: 263).

Without a regulatory framework, the risk of a tragedy of the commons is not easily avoided. Since such a regulatory framework does not yet exist for GHG emissions, the decision structure in negotiations on global climate agreements is potentially dilemmatic. Although reducing emissions to mitigate the adverse effects of climate change might contribute to a common good, it is in the interest of nation-states 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 other nation-states may not do so either. Moreover, to overcome a tragedy of the commons at the global level, quite a number of additional structural and contextual obstacles must be overcome than in the case of the management of common goods at a more local level (cf. Axelrod and Keohane 1985; Ostrom 1999: 281f).

However, it is at least imaginable that a subgroup of all nation-states decides to reduce their GHG emissions without a binding international agreement, and their example may put pressure on some other states to adopt mitigating behaviour. This would allow a stepwise change of the dilemmatic situation in global climate politics into a simple co-ordination problem (Gardiner 2002: 408). However, Gardiner argues that climate change should still be treated as if it had a dilemmatic structure. This is for two reasons. First, the effects of not reaching mitigating goals will be catastrophic. Second, a risk of an *intergenerational* tragedy of the commons exists (Gardiner 2002: 414). Climate change is an *intergenerational* challenge because the most severe consequences of high GHG emissions today will very probably occur in the (far) future. This means that the parties facing the challenges of climate change probably belong to different generations. Since it is hard to see how future generations might have an impact on the behaviour of the generation living now, the circumstances that can turn an *intragenerational* tragedy into a simple co-ordination problem cannot arise.

Given that the challenge of climate change involves parties of different generations, a tragedy of the commons is very likely. According to Gardiner, this is what explains the unsatisfactory results of the conferences of the UNFCCC. Those negotiating international agreements are living representatives of nation-states, while those most severely affected by climate change will be future generations. Future generations are unable to influence the behaviour of representatives currently negotiating global climate agreements. As a consequence, it is highly probable that representatives of nation-states negotiating currently will not reach a satisfactory international agreement to reduce GHG emissions.

Thus far, I believe Gardiner's analysis is convincing. However, it suffers from a central weakness. It is too wide-meshed to grasp the deeper problem underlying the global climate tragedy. Those negotiating and implementing international agreements are bound by national legitimisation procedures for policy making. It is these procedures that increase the likelihood of the global climate tragedy. Although there is no room in this chapter to defend nation-states' right to self-determination, its pragmatic importance in global climate politics can be demonstrated by introducing David Miller's two-stage model for dealing with the

challenge of climate change (Miller 2008: 121). According to this model, the principles for distributing the burdens of emission reductions should first be applied to nation-states. These principles should be fair, because only a fair distribution of burdens makes it likely that subscribing nation-states comply with such an agreement. It should then be up to nation-states to implement those policies for distributing the costs of mitigating GHG emissions that can be legitimised from within. This second stage is necessary because it allows respect for the right to national self-determination and differences in capacity and culture. Miller claims that respecting the right to national self-determination enhances the compliance of subscribing nation-states.

Although Miller wants to preserve national self-determination in applying an international agreement, he does not consider the conditions to legitimate international agreements as such. As Miller presents his model, it presumes that international agreements can be reached by representatives of nation-states without being bound to national legitimisation processes. But, at least in democracies, representatives of such states must be legitimised to negotiate and enter international agreements. Moreover, ratification is needed to legitimise their realisation. In consequence, it is not only the case that international agreements have to respect national self-determination when it comes to their implementation. Establishment and ratification of international agreements also rely on legitimisation processes within nation-states.

These legitimisation processes raise the risk of a tragedy of the commons. The next section discusses the conditions under which 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 that potentially leads to a tragedy of the commons, especially when it comes to the long-term policy decisions 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 may well lead to a tragedy of the commons. Indeed, the *intergenerational* challenge of climate change constitutes the *real* tragedy of the commons. Although in my view convincing, Gardiner's analysis does not take into account that the decision structure concerning international agreements applies both to nation-states and their representatives and to legitimisation processes that enable international agreements to be negotiated and ratified. To examine these elements, I introduce Locke's contractualist argument for defending democracy.

The way Locke's contractualist argument for democracy and legitimate political decision making is presented, leads to what Held calls protective or legal democracy (Held 2006: ch. 3 and 201). Two main claims are defended in these two models of democracy. First, political decision making is bound by a fixed bundle of (liberty or human) rights protecting individual citizens 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 this bundle of rights and can count on citizens' acceptance. These models of democracy are protective, and their political decision structures are legally bound.

According to Locke, in the 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, together 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. This is why Locke argues that a civil society is needed to ensure 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 (II. 87–88). Thus, entering civil society, humans empower social institutions to secure and enforce the rights given to them in the 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 (II. 134). All other rights given in the state of nature still belong to the individual and should be protected by civil society and its institutions. Political authority should be bound by these rights, and legitimate political decision making should stop where these rights begin. These rights indefeasibly constrain political decision making.

Locke's argument for the necessity of civil society allows democracy to be justified for two reasons. First, civil society constitutes a 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. Since the legitimacy of the institutions of civil society is justified by all involved consenting to the transition from the state of nature to civil society, all contracting parties are entitled to control the institutions of civil society (II. 128–131). If civil institutions or their assigned representatives break this contract, it is legitimate for citizens to remove the officials. To guarantee this right, political processes are needed that allow the 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, an agency needs decision structures to choose between 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 (II. 95–99).<sup>2</sup> The legitimate coverage of these majority decisions, however, should be constrained by the bundle of natural or God-given rights still remaining after entering civil society. It is these kinds of indefeasible rights that limit the sphere of legitimate policy decisions.

From a modern perspective, it might be questioned whether the bundle of rights constraining legitimate policy decisions is natural or God-given. However, 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.

(1988: 12)

If public or political authority is limited, legitimate political agency must respect these constraints. These constraints 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 constraints to state interference. Within the Lockean framework, this means ensuring a bundle of indefeasible rights, which includes their effective enforcement and institutions to judge infringement.

However, humans enter civil society only on condition that the bundle of indefeasible rights is secured. Transition from the state of nature to civil society must provide this advantage. This shows why citizens in a liberal framework are often framed as self-interested rational beings. They are understood as self-interested and rational because their own interest in the security of their bundle of indefeasible 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 and rational behaviour in political decision making cannot be legitimately oppressed, since such interests lie at the heart of a normative justification of liberal democracy.

Since self-interested and rational behaviour in political agency is legitimate in civil society, then the absence of mechanisms to control political agency poses 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. They must distrust all others who might behave in a self-interested and rational way. Such thinking and behaviour of political actors parallels the situation leading to the tragedy of the commons. Hence, a Lockean-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 increases further 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 implement those legal regulations that seem to best guarantee the common goal of the initial contract. In some circumstances, gathering a majority can be more feasible when contradicting the security of a bundle of indefeasible 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 and rational way. And if no mechanisms to control political behaviour exist, it is also rational for political actors to assume that not all other players in the political arena will 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.

Both these arguments can be challenged. In the light of Gardiner's argument that actors in decision processes can influence each other so as to avert the risk of tragedy, these observations seem to be too strongly stated. Reciprocal influence between political actors would allow the transition of a tragedy of the commons into a simple co-ordination problem. Furthermore, and in contrast to my conclusions, actual liberal democracies are not permanently at risk of a tragedy of the commons. According to Jean Hampton, this is because, historically speaking, liberal societies developed parallel to philosophical reflection, what she calls a governing convention (Hampton 1997: 83). A governing convention ensures compliance with political decisions and distribution of powers.<sup>3</sup> Such a convention assigns authorities legitimate power to solve specific social problems (Hampton 1997: 88). Following this view, in the state of nature individuals are not presented with a right to legislative and executive power, which they subsequently assign to civil institutions. Instead, it is a lengthy historical process that leads to civil institutions and commitments with political decisions and distribution of powers flowing from them.

Thus, although legitimate political decision making in liberal democracy might be defended by reference to an initial contract and infeasible rights, for secure compliance with political decisions, a historically developed governing convention of legitimate political decision-making must be presumed. Given such a convention, the occurrence of a tragedy of the commons is less likely in liberal democracy. If 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.

However, this is true only if reciprocal control can actually occur between political actors. 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 influence reciprocally and control each other, it is highly likely that political actors today will decide on policy matters in a way that corrodes the liberal commons in the (far) future. In consequence, the Lockean-contractarian framework of liberal democracy still allows for the occurrence of what Gardiner called the *real* tragedy of the commons.

Concerning international agreements on climate change, this argument has three consequences. First, international agreements can only find acceptance in liberal democracies if they are not in conflict with the bundle of rights believed to be infeasible. Second, 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 their governing convention. Otherwise liberal democracies may either not subscribe to such a contract or not be able to implement it. Third,

those bargaining for such agreements have to be empowered by citizens to negotiate and implement these agreements. Therefore, in contrast to Miller's two-stage model, although the fairness of international agreements to mitigate GHG emissions might be important in enhancing the compliance of nation-states, such agreements also 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 negotiate and sign international climate agreements or will not ratify these agreements once they are signed.

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

At this point, many readers will object that factual history tells against the argument thus far. Liberal democracies tend not to undermine the bundle of infeasible rights of their citizens, whether they are members of the same or different generations. For several centuries, democracies have remained stable and functioning; they most often do not harm human or other infeasible rights, and political actors do not behave in a way that undermines this common good of liberal democracy. In what follows, I argue that these points are correct, but only in liberal democracies have institutional mechanisms been developed to control behaviour in political decision making.

In most modern western nation-states, democratic institutions have developed over a long period. Such a lengthy development makes it very plausible that these institutions not only developed because of the influence of philosophical theories but also through the emergence of some kind of governing convention (Hampton 1997: 86). This makes it plausible that Locke's theory has been only one impetus among others for liberal democratic institutions to emerge. Indeed, liberal democratic nation-states have experienced many other influences beyond Locke's theory (Held 2006; Bessette 2011). Liberal democracies would not be as stable as they are if their development had only relied on the Lockean justification of their institutions. There would have been a permanent risk of a tragedy of the commons, which over the centuries potentially would have led to a corrosion of the bundle of infeasible rights. Governing conventions of liberal democracies must have developed mechanisms of control preventing democratic procedures of decision making from the risk of a tragedy in the long run. In my view, these are three institutions: the judiciary or the institution of judicial review, established legal regulations, and conditions of reasonableness.

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

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>4</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 members of the elected executive or the legislative assembly but are not elected by citizens themselves (Waldron 2006: 1391). However, although judicial review might be in conflict with the Lockean defence of liberal democracy, it is a necessary part of its institutional realisation and stability. If the risk of a tragedy of the liberal commons is accepted in a liberal democratic framework, then judicial review is a very plausible way to ensure the sustenance of the 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 infeasible bundle of rights. It allows citizens to claim their rights and to contest political decisions on a legal basis (Lever 2009: 813).<sup>5</sup>

Another mechanism of control for political decision making in liberal democracies is legal regulation going beyond constitutional rights. Whenever a governing convention emerges, it is not only enforced through the constitution but also through further legal regulation. If political programs or political agency are in conflict with such regulations, then these can be judged as illegitimate by institutions upholding legal regulation.<sup>6</sup> In this sense, legal regulations serve as a mechanism of control which can avert 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 the central aim of establishing law following democratic procedures. Thus, before judging political agency and decisions to be in conflict with established legal regulation, it has always to be clarified whether these might be appropriate proposals for 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 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 a tragedy of the commons because they will try to abandon self-interested behaviour and aim at advocating the liberal commons to secure the 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 and rational behaviour presupposed by the Lockean-contractarian argument for why the establishment of civil society is necessary. In consequence, deliberative democracy theorists cannot defend institutions to enforce the 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, the main instrument to control political agency and policy 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 of the 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 influence each other reciprocally so that they most often comply with the constitution, or in other words with the liberal commons, even without institutional control.

But 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 of the 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 avert 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, for two reasons. First, it is not at all clear that mitigating GHG emissions is a liberal commons similar to ensuring the security of the bundle of infeasible rights. Second, mitigating GHG emissions can be in conflict with at least some rights of the bundle of infeasible liberal rights. This explains why there is always a risk in liberal democracy of a *real* tragedy of the commons when decisions involving members of different generations are necessary, such as those needed in the case of climate change.

In the previous 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 of the commons. In the case of climate change, judicial review cannot serve as such a mechanism. To serve as such a mechanism, it would have to be shown that mitigating GHG emissions is part of the bundle of infeasible rights

lying at the core of the liberal normative framework of democracy. Simon Caney has argued that climate change leads to infringements of part of the bundle of infeasible rights of liberal democracy (Caney 2005: 767). 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. 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; it is not a liberal right in itself. Although there is wide scientific agreement that mitigating GHG emissions is necessary to combat the adverse effects of climate change, it is also reasonable to argue for technical development that allows for adaptation to such change and reduces its adverse effects. Both mitigating and adapting measures could secure the bundle of infeasible rights, but the second would put into question the need for an international agreement to reduce GHG emissions.

In liberal democracy, it must be accepted as legitimate for political actors to advance those legal regulations that in their view best serve to secure the bundle of infeasible rights. This also applies to the question of how to combat the adverse effects of climate change. Since in liberal democracy self-interested and rational political behaviour cannot be judged illegitimate, a tragedy of the commons with regard to climate change is likely. It is likely because, if some political actors opt for policy measures that do not demand reduction of GHG emissions, other political actors might follow suit. Liberal democratic nation-states in such a situation 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 or adequately implemented.

Even worse, enforcing a (drastic) reduction of GHG emissions might call in to question the commons of liberal democracies. Mitigating GHG emissions might lead to an infringement of infeasible liberty rights because such a policy measure demands a (drastic) change of lifestyle. Thus, scientifically adequate means to combat the adverse effects of climate change might call in to question the bundle of infeasible rights. This makes it rational for political actors to choose political positions and programmes that result in less harm to individual liberty. Confronted with this challenge, it might be better for political actors to put forward political positions and programmes that are less in conflict with the commons of liberal democracies. This becomes even more rational politically if there is no guarantee that other political actors will not behave similarly. A tragedy of the commons with regard to the need to reduce GHG emissions might be the result.

As Gardiner pointed out, however, such a situation can be modified into a coordination problem without a dilemmatic decision structure. 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 of other, initially sceptical, political actors. Thus, the situation depends on empirical matters that cannot be decided from a purely theoretical perspective. But, although such decisions are possible, there is a risk that in liberal democracies a tragedy of the commons will occur 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 might opt for political decisions and programmes in conflict with the long-term policy decisions needed to effectively reduce GHG emissions.

In consequence, it seems that liberal democracy is at risk of not dealing adequately with challenges such as climate change. This situation makes it necessary to explore further how democratic institutions could be changed to be able to take such challenges more seriously without calling in to question the normative underpinnings and the governing conventions developed in liberal democratic nation-states.

One possible institutional change in liberal democracy among others can be installing mechanisms of control that are not part of the process of legitimate political decision making.<sup>7</sup> These mechanisms would be similar to 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 sustainability more generally. Members of these institutions would be appointed by the legislative or executive institutions as is done for the members of the judiciary. 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 a legal education. Such an education is insufficient to decide whether or not policy decisions conform to demands stemming from the challenges of climate change or more generally, to demands of sustainability. Adequate judgement of these questions, requires some knowledge in the relevant science or some engagement with the interests lying behind these demands.

Inspired by other proposals in green political theory, for the moment I can imagine three possible criteria to qualify as a member of a climate judiciary:<sup>8</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 sustainability.
2. Perhaps it is enough that potential candidates for 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 or parties, they show the required engagement with the challenges of climate change or more generally, with the demands of sustainability.
3. Another way to qualify as a candidate could simply be being young. Those who are young today will have to bear the adverse effects of climate change and unsustainable policy decisions. Since they have a special interest in policy decisions with regard to climate change and the demands of sustainability, they 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 these groups

of potential candidates is legitimised to take such a role by liberal democratic decision procedures. Scientists are qualified because they have been judged as such by members of the scientific community but not the citizen body. Members of interest groups are only qualified as potential candidates because they vouch for specific political decisions and not because they can be said to be especially competent 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 relevant for special power with regard to the political decision 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. It should be all parties contracting to establish civil society who have a say in political decision making. As those consenting to this contract do so 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 to demands stemming from climate change or sustainability, it is highly questionable how membership in such an institution should be assigned.

To be sure, this objection also applies to the members of the 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 regulation. But such qualification is justified as part of the ideal of liberal democracy itself. To secure the bundle of indefeasible rights, it is necessary that those who judge policy decisions understand their matter. Otherwise the judiciary could not serve its purpose. By contrast, scientific qualification as such is not necessary to secure the bundle of indefeasible rights. Vouching for specific policy decisions as a qualification for a climate judiciary contradicts the initial Lockean justification for democracy. Age is neither necessary nor legitimate to justify a special role to secure the bundle of indefeasible rights.

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

According to the argument in this chapter, there is a risk that at least some liberal democracies will not be able to reach the decisions necessary to mitigate GHG emissions. 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 or adequately implemented. If some nation-states 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 in 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 liberal democracies cannot provide any guarantee that a tragedy of the commons and especially 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 bears the risk of not being able to deal adequately with challenges needing long-term policy decisions. The nature of legitimate political decision making stemming from such a vindication of democracy incorporates the risk of a tragedy, or what Gardiner called the *real* tragedy of the commons. Such a tragedy makes it likely that a binding international agreement to reduce GHG emissions will not be reached. This might lead some readers to argue that liberal democracy is a political regime that should be overturned, 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 an argument proceeds 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 and to Hampton's idea of a governing convention. Otherwise, acceptance and implementation of an international agreement to mitigate GHG emissions is even less likely.

## Notes

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- 1 See Wallimann-Helmer (2013) for this purpose.
- 2 For a very helpful discussion of the difficulties with majority decisions as a democratically legitimised procedure of political decision making see Saunders (2010).
- 3 This theoretical claim gains support from actual history. The emergence of stable and working liberal democracies needs specific historical and social conditions (Ware 1992).
- 4 In this chapter 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 scrutinise the compatibility of decisions with the constitution (Waldron 2006: 1354).
- 5 In addition, Lever shows that although processes of legitimisation and accountability for judges are quite different from those for political actors in the legislative and the executive institutions, there are processes which allow judicial review to be seen as a fundamental democratic institution (Lever 2009: 811).
- 6 In Switzerland, for example, it is possible to bring politicians to court if they voice racist beliefs (Schweizerisches Strafrechtsgesetzbuch, Art. 261).



- 7 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 proposes that scientists or 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 category of proposals 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 analysis of youth quotas, see Wallimann-Helmer (forthcoming).
- 8 See the proposals introduced in preceding note.

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