PART I

Framework of Analysis

CHAPTER 1

Deliberative Democracy in Theory

Introduction

This chapter is an introduction to theories of deliberative democracy. My aim is to identify the importance of deliberation to politics generally, and then of deliberative institutions to democratic politics specifically. In the final chapter, I try to turn this to practical effect with an examination of the institutional properties which the Australian Parliament would require in order to comply with a model of a properly deliberative political institution, or 'deliberative assembly' to use the traditional term which I hope can be revived.

The task of identifying the character of political deliberation and of the characteristics of deliberative institutions has been made easier through the recent international revival of 'civic republicanism' as a broad orientation to modern political theory and practice. This form of republican theory is far broader and deeper than any of the forms of republicanism advocated recently within Australia, and provides a richer and more nourishing medium within which to nurture any Australian agenda of republican constitutional change. I use this opening chapter to examine the place of political deliberation in the wider republican revival in political theory, and to present my own modifications of republican theory to give greater importance to the place of deliberative assemblies as core institutions in regimes of deliberative democracy. In this way, this chapter provides the evaluative framework against which I examine the operational properties of the Australian Parliament in chapters 5 to 8.

Although I support the concept of deliberative democracy, I argue against what I see as a prevailing tendency to imagine that practices and institutions of deliberation might substitute rationality for partisanship in the political processes of liberal democracy. As an alternative to this excessive expectation of the capacity of deliberation to produce a

3

democratic consensus of rational concord, I present a corrective account of political deliberation which draws on Aristotle's classical orientation to political deliberation which provides one of the original treatments of the place of deliberative assemblies in political life. I suggest that Aristotle's account is generally more realistic than that of many contemporary theorists of deliberative democracy. My modified version of deliberative democracy provides the platform for my reinterpretation of the place of representative assemblies in the historical development of the theory of representative government in chapters 2 to 4.

Deliberation in Democratic Theory

The term 'deliberative democracy' is one of recent origin which has been devised to focus attention on the importance to effective democracy of fair and open community deliberation about the merits of competing political arguments. An early name for this was 'government by discussion', in which the elected assembly took its place as one of a number of core political institutions capable of generating public discussion (see, for example, Barker 1945, 32–48). The contemporary concepts of 'discursive democracy' and 'communicative democracy' overlap with and duplicate much of the analytical work of the concept of 'deliberative democracy', and all seek to identify devices available to modern democratic regimes which might enhance the deliberative process upon which open and avowedly representative government should rest (see, for example, Dryzek 1990 and 1995; Young 1990, 1995; Cohen 1989). Although 'deliberative democracy' has proven a useful term to describe democratic ideals in contemporary terms, I contend that the concept has not been accompanied by a very precise or even useful specification of the nature of political deliberation and of the role of a deliberative assembly. I begin by distinguishing a variety of approaches to deliberative democracy, commencing with the two most influential accounts which emphasise the continuing importance of Aristotle's foundational treatment of political deliberation. I hope to show that even further use can be made of Aristotle to clarify the nature of political deliberation and of deliberative institutions.

Rawls and Habermas

The majority of recent work on deliberative politics has been undertaken in the shadow of two impressive peaks of democratic theory, representing the achievements of John Rawls and Jurgen Habermas, both of whom point to the authority of Aristotle as the foundation for analysis of political deliberation. Contemporary accounts of political deliberation are informed by these two influential contributions, of which one can

oversimplify and suggest that Rawls presents a version which focuses on the properties of rational calculation of individual deliberation while Habermas presents a version which focuses on the properties of collective calculation in social deliberation (see, for example, Moon 1995; Bohman 1996, 3–15; Nino 1996, 107–17). To continue the simplification, Rawls can be seen as initiating the philosophical dimension through his investigation of the concept of 'public reason', while Habermas can be seen as responding on the political front with his exploration of the concept of 'procedural democracy'. Although my own orientation is closer to Habermas than to Rawls, I will begin with a brief comment on Rawls, whose *A Theory of Justice* conveys a standard background account of political deliberation (Rawls 1971, especially 416–24).

The world of political theory as Rawls presents it turns on the novel constructs of 'the original position' and 'the veil of ignorance', which are two powerful attempts to identify the requirements of democratic justice. Rawls asks us to imagine that we are refounding civil society on a basis of fairness, and he posits these two analytical constructs to divest us of our inherited position of social power and of our knowledge of what types of goods are most likely to serve our interests. Imagining ourselves on the threshold of a new order of civil society, we confront the lesson that we tend to take a closer interest in justice for others when we are separated from our knowledge of our own identity and interests, and so have no alternative but to rewrite the rules for society so that they respect the equal opportunity of all to pursue their legitimate interests. In this imaginative way, Rawls presents a strengthened version of the liberal principle of equality of opportunity with an emphasis on additional protections for the prospects of those least able to summon social and political resources in their own defence (Rawls 1971, 11–22, 118–42).

But as Rawls appreciates, we cannot really divest ourselves of our interests and remake the world anew. Everyday politics depends on a network of individual deliberations about appropriate sorting mechanisms through which society can manage the process of political justice. Just as the imaginative reconstruction of the social contract gets Rawls' project of rethinking justice under way, so too what he acknowledges as his 'unhappily too brief' account of 'full deliberative rationality' addresses the real-life conflicts of interests among different individuals with their chosen 'plans of life' (Rawls 1971, 411). For Rawls, an individual's plan of life 'establishes the basic point of view from which all judgments of value relating to a particular person are made and finally rendered consistent', and such plans are rational only to the extent that they are chosen 'with full deliberative rationality'. Rawls' preferred model of deliberation is one of 'rational choice' in which effective deliberation adjusts the individual's 'hierarchy of desires' to the concrete

social circumstances. Thus understood, the 'aim of deliberation' is to manage an integrated life-plan as 'one scheme of conduct' with minimal distraction from one's subordinate plans in the hope of securing 'the more permanent aims and interests' (Rawls 1971, 408–16).

The link to Aristotle emerges in Rawls' examination of 'deliberative rationality' and 'the Aristotelian principle' (Rawls 1971, 416–33). Deliberative reflection is the process of determining a 'rational plan' for one's life which overcomes the defects of 'hasty and fallacious inferences' and the 'misadventures' so often associated with the limitations of knowledge of means and the uncertainties about desires over ends. Rawls addresses the problem of choice facing 'a rational person' who engages in personal deliberation along lines of rational calculation and armed with 'the devices of deliberation' as identified by Rawls. The primary device is 'full deliberative rationality' which allows for choices made as 'if the future were accurately foreseen and adequately realised in the imagination'. This individualist orientation is reinforced by Rawls' insistence that the integrity of personal choice is governed by 'the principle of responsibility to self' as the author of one's life-plan. The importation of the authority of Aristotle serves Rawls' purpose of defining the formal qualities of a rational life-plan, which is a choice about nested preferences in which the primary consideration is 'the principle of inclusiveness' understood as a rational preference for a set of more complex activities which can include sub-sets of less complex activities (Rawls 1971, 421, 424–33).

The more recent work of Rawls has focused on the specific domain of deliberation characteristic of each political regime, and on the qualities of the 'overlapping consensus' common to liberal democratic regimes. For Rawls, public reasoning by a free and open citizenry is a central feature of the good polity. Public deliberation is the political activity of shared – and in the best of worlds – consensual reasoning under conditions where law and policy can be formulated through principles which attract agreement on the basis of 'values that the others can reasonably be expected to endorse' or the values 'that all citizens as reasonable and rational might reasonably be expected to endorse' (Rawls 1993, 212–54, at 226 and 236; cf. Bohman 1996, 10, 72–4). Public reason is one species of non-private reason and it differs from other examples, such as domestic reason which holds sway in the domestic sphere, and social reason which governs the social sphere. Public reasoning goes beyond 'the values of political justice' by reaching to 'presently accepted general beliefs and forms of reasoning found in common sense' or 'the plain truths now widely accepted'. Although a free and open community can expect that 'legislators when they speak on the floor of parliament' will comply with the requirements of public reason, it is usually more

characteristic of a supreme court that 'makes it the exemplar of public reasoning' (Rawls 1993, 216, 220–5, 231–40; Nino 1996, 12, 86–92). This surprising respect for judicial review is a theme to which I will return in the final chapter. From my perspective, this justification of judicial review of legislative action in terms of a procedural care for the structures of legislative deliberation cuts across my own strategy of reinforcing the deliberative capacity of the legislature. I will suggest that many conventional accounts of deliberative democracy serve to bolster the power of the courts possibly at the expense of the legislature, although that expense is never explicitly acknowledged.

Rawls' account of political deliberation is the chief source of the contemporary debate over the nature of 'public reason'. My purpose here is not to evaluate this concept but to sketch its lineaments, noting its apparent derivation from Aristotle and its influence over the various schools of deliberative democracy. There is a growing literature investigating the qualities of public reason as Rawls understands it. Many contributors are supportive (see, for example, Copp, Hampton and Roemer 1993, 245–345); others are unconvinced (see, for example, Brower 1994). One of those who appreciates its strengths as well as its limitations is Jurgen Habermas, to whom I turn for an analysis of the wider social process of political deliberation. The basis of Habermas' interest is discernible in his early philosophical work on 'communicative action' and is prominent in the most recent work on constitutionalism and deliberative democracy (White 1995, 3–13; Bohman 1996, 172–81; Habermas 1996a and 1996b).

The starting point is Habermas' exploration of what he terms 'discursive democracy' or the 'discourse theory' of democracy. The central thrust is conveyed by another term associated with Habermas' project, known as 'a proceduralist view of democracy' which focuses on a 'process model' of law-making and policy-making. The model of the good polity is one with a wide variety of points of access and argument which makes for a 'decentered society' in which many competing social interests engage on an equal footing in open political exchanges (Habermas 1996a, 169–76). Habermas' preferred model falls between the liberal model of individualist market exchanges and what he sees as emerging republican models of communitarian consensus. In the next section of this chapter I will present a detailed example of one such republican account to show the basis for Habermas' concerns about the excessive expectations for rational political consensus to which democratic deliberation can give rise.

In contrast to Rawls, whose project is about enhancing the rules of liberal justice to better acknowledge the rights of all individuals regardless of social circumstances, Habermas sets his sights on correcting the resurgent republican orientation by restraining its ambitious pursuit of

deliberative consensus. Habermas contrasts his view of effective social interaction which depends on 'procedures and conditions of com-munication' with a republican ideal of a consensual 'collectively acting citizenry' (Habermas 1996b, 27). This model of deliberative politics focuses on the basic set of structures for 'legally institutionalised pro-cedures of democratic deliberation and decision-making', in which 'the parliamentary bodies' play a vital role. But this important parliamentary role is but one 'component of a complex society' and it would be wrong to expect too much of the legislature as the sole or even primary site for deliberation, given the importance for self-government of vibrant 'associations of a civil society' with their 'culturally mobilised publics' (Habermas 1996a, 29–30, 184–6, 274–9).

It is true that at the level of political ideal, Habermas presents his model of deliberative politics as a model of consensual democracy. The 'discourse principle' holds that valid social norms are distinguished by one special property – that all 'possibly affected persons could agree as participants in rational discourses', where the scope of rational discourse is intended to cover 'conditions of communication that enable the free processing of topics . . . in the public space constituted by illocutionary obligations' (Habermas 1996a, 107–9). Starting from a democratic premise that the 'interests of each person be given equal consideration', Habermas develops the conditions for 'fair bargaining conditions' for political exchange and effective compromise among competing value positions. This is where Habermas presents his strongest case for consensus as a test of effective deliberation, which I take to be more of an ideal type than a guide to concrete practice. This consensus test requires that decisions 'must be acceptable in principle to all parties, even if on the basis of respectively different reasons'. That is, the consensus exists in relation to 'only those reasons count that all the participating parties *together* find acceptable'. This commitment to democratic equality of access explains the need for 'participation in all deliberative and decisional procedures relevant to legislation' (Habermas 1996a, 119, 127).

But Habermas pulls back from this supposedly republican vision of deliberative consensus which requires democratic agreement on the sub-stantive social morality of the good life in the ideal polity. True enough, for Habermas the parliamentary treatment of legislation requires going beyond 'pragmatic discourses' to 'discourses that push beyond contested interests and values': routinely this is short-circuited through political bargaining leading to pragmatic compromises. Habermas contrasts the acceptable world of 'negotiated agreement' with the distant ideal of the world of 'rationally-motivated consensus', with the result that attention shifts to ways in which bargaining procedures can be regulated 'from the standpoint of fairness' to generate 'an uncoerced consensus' (Habermas

1996a, 166, cf. 282–4). Although Habermas places great store in what he calls 'the parliamentary principle' to justify the work of representative institutions established 'for deliberation and decision making', his model of deliberative democracy locates elective representative institutions as institutional links in a wider social dialogue in which informed public opinion has a basic role 'in feeding and monitoring parliament' (Habermas 1996a, 170–1).

My purpose here has simply been to introduce the main conceptual framework for the topic of political deliberation as presented by the two leading authorities of 'public reason', Rawls and Habermas. Rawls is relevant in mapping out the domain of 'reason', and Habermas is relevant for his account of 'the public'. Not surprisingly, most practical research on deliberative democracy stays much closer to the ground and to the everyday world of political institutions. The next task is to lay out the variety of more specific approaches to the detailed operation of democratic institutions of deliberation.

Diversity of Deliberation

A useful starting point is the complaint that traditional theories of democracy pay insufficient attention to deliberation as an organising theme of political life in modern regimes of representative government (Gutman 1993, 411–21; Phillips 1995, 145–65). Traditional terms such as 'liberal democracy' define the regime in terms of the formal structure of government which is based on a specific and limited concept of the political order derived from liberal theories of individual rights, consent-based political representation and limited government operating through the rule of law. 'Liberal democracy' has proven itself a useful term when distinguishing modern liberal polities from many of their alternatives, such as the Marxist 'people's democracies' of the former eastern Europe, or even the 'social democracies' of socialist western Europe. But 'liberal democracy' still covers a wide range of structural variations among regime types, with many different forms of liberal constitutionalism and many competing types of representative assembly. Given this broad-brush background, it is not surprising that the term 'deliberative democracy' has attracted attention, since it provides a fresh way of analysing the operational qualities of forms of governance, with a primary interest in their impact on processes of open community deliberation which might help explain some of the variations in performance between effective and less effective democracies (Gutman 1993, 417–18; Warren 1996, 46–60).

Although there is some dispute over the historical origins of the term, a credible case has been made which suggests that 'deliberative democracy' was coined to describe the distinctive features of modern

republican government, taking the United States form of government as
an illustration of the novel scope for open deliberation permitted under
the republican commitment to representative government (Bessette
1980 and 1994, 1–39; cf. Cohen 1989, 32; Mansbridge 1983, 1992;
Sunstein 1993a, 241–52). The United States form of government
illustrates only one of a number of modern republican regimes, and
advocates of deliberative democracy rightly argue that there is no need
for this new term to be confined to the American model of represen-
tative government (Sunstein 1988a, 1558–64; Sunstein 1993b, 134–41;
Gautier 1993, 328–31). I note that 'deliberative democracy' is already in
use as a term to assess the democratic credentials of European parlia-
mentary government modelled along the liberal constitutional lines of
modern representative government (Habermas 1996a, 287–328; Baynes
1995, 201–32). Yet even here the American origins of the term remain
evident in the way in which many theorists of deliberative democracy
identify the devices of deliberation as essentially 'republican' rather than
democratic – even to the point of arguing that modern republicanism is
fundamentally concerned with the promotion of open community
deliberation about law and policy, in which all groups have equal
opportunity to have their say under conditions which require that
political decisions proceed on a basis of considered debate, in which
majority views are legitimated by their power to generate consent
through the force of open argument and sustained public justification, as
distinct from the tyranny of numbers (see, for example, Cohen 1989,
21–3; Habermas 1996a, 284–6, 296–302; Warren 1996, 50–5).

    Deliberative democracy thus emerges as a qualification of pure and
simple democracy, and as a check against what has been termed
'majoritarian democracy' in which law and policy are formed on the basis
of the preferences of the majority, with few protections for the rights of
minorities, either to be heard in the central councils of political debate or
even to be left alone on the margins of the polity. Parliamentary
governments provide many of the classic types of majoritarianism, since
parliamentary majorities, especially those formed on the basis of British-
styled electoral processes of plurality-voting in single-member electorates,
have such a demonstrated tendency to exaggerate the parliamentary
representation of the majority political party and to reduce the parlia-
mentary representation of minority parties well below their proportion of
the popular vote (Reeve and Ware 1992, 62–8, 83–7; Wright 1980, 33–42;
Butler 1981, 11–22). Against this background of scepticism about the
representative credentials of parliamentary government, one can align
the concept of deliberative democracy with the older concept of
'consensualism', which investigates ways in which minority groups might
be enlisted into the decision-making process through checks and balances