

The Democracy Paradox, and Some of Its Moral and Legal Implications

Thesis submitted to the
Institute of Social Sciences
in partial fulfillment of the requirements for the degree of

Master of Arts
in
Philosophy

by
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Boğaziçi University

2002

ACKNOWLEDGEMENTS

For this thesis, I owe thanks to many. First, to my advisor, Zeynep Davran, for her tolerance while reading my drafts; and for her patience! I really do not know how this inquiry would be possible without her help. It is she, more than I, who made it look like a philosophical piece of work. I feel that I owe more than thanks to her. Second, to my jury members, Gürol Irzik and Ferda Keskin, for their comments and criticisms; without which this thesis would not much be improved.

Beyond everyone, I would like to express my gratitude to my dear Proffessor, Arda Denkel, to whom I would like to dedicate the thesis. He had not only been a good instructor, but also, he had been a model for those who loved philosophy, due to his disciplined attitude, hard working, but more than all, due to his wonderful personality. It was impossible to forget him, once one had the opportunity to meet him.

Finally, thanks are due to my family members, who have always supported my decisions in life. If they did not encourage me for graduate education, I would not have been able to write this thesis.

ABSTRACT

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The thesis focuses on showing that it is not a paradox of democratic governments to use sanctions on individuals whose actions are conducive to increasing rebellion and uncivilised behaviour in the society, and on those who aim at destroying democracy, that is, the political and legal basis for the furthering and enjoyment of liberties and rights. It furthermore aims at giving an explanation of the moral foundations of free society by appealing to Kant and Mill. The discussion on whether or not democracy contradicts itself by using sanctions on individuals who abuse their liberties and rights in order to deprive others of theirs will also be a response to historicists, who claimed that democracy has to copy totalitarian methods to fight against its alternatives, and to become totalitarian itself. In the legal implications part, Rawls and Oliver W.Holmes will be used as bases to give criteria for judging how the elected may abuse the executive power on one hand, and, what type of actions go beyond the scope of basic liberties and rights on the other.

KISA ÖZET

Demokrasi Paradoksu, ve Bazı Etik ve Yasal Sonuçları

Hüseyin Fırat Şenol

Bu tez, demokratik yönetimlerin, özgürlük ve hakların korunmasının siyasal ve yasal zemini olduğu varsayılan demokrasiyi yok etme amacı taşıyan, toplumda yasalara isyanı veya diğer suç unsuru davranışları teşvik edecek edimlerde bulunan bireylere yasal yaptırım uygulamasının bir çelişki olmadığını göstermeyi amaçlamaktadır. Bu tartışma içinde özgür bir toplumun ahlâkî temelleri, Immanuel Kant'ın ve John S. Mill'in düşüncelerinden yararlanılarak açıklanacaktır. Ayrıca, başka bireyleri özgürlük ve haklarından mahrum etmeyi amaçlayan edimler üzerinde yasal yaptırım uygulayan yönetimlerin demokrasiyle çelişkiye düşüp düşmedikleri tartışmasının, "Demokrasi alternatifleri ile mücadele edebilmek için totaliter yöntemleri benimsemek, dolayısıyla da totaliter olmak durumundadır" savını öne süren tarihselcilere de bir yanıt niteliği taşıyacağına inanılmaktadır. Yasal sonuçlarla ilgili tartışmada da, John Rawls ve Oliver W.Holmes'un düşüncelerinden, bir yanda seçilmiş bir yönetimin yürütme yetkisini ve/veya gücünü nasıl kötüye kullanabileceği, diğer yanda hangi tür edimlerin temel haklar ve özgürlükler kapsamını aştığı ve yaptırım gerektirdiği konularında bir ölçüt oluşturmak için temel olarak yararlanılacaktır.

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INTRODUCTION

When J.J. Rousseau said: "Man was born free, and he is everywhere in chains"¹, he expressed the paradoxical side of freedom. How does such a paradox arise? The answer can be formulated thus: Every human being who becomes an individual in society desires to be free from the interference of others-whether the 'others' be the other people, or the rules that one has to obey- and to be free to act as he wishes, as a part of his nature. (See Berlin, "Two Concepts of Liberty") However, when human beings decide to live as societies, every individual finds out that his freedom is limited (or 'chained', as Rousseau had put it) by another individual's-that is to say, the interference of 'others' becomes inevitable, though not desired. Therefore, what human beings are after turns out to be a dream which is impossible to be realized.

The solution to the problem seems to be in everyone's interest to give up some part of his freedom in order not to sacrifice it as a whole. But, the paradoxical situation is still seen in the developed countries which are ruled by democracy. It is necessary at this point to state that the term 'democracy' refers to a political system which provides- by virtue of its executive, administrative and legislative functions- the conditions of freedom and equal share of liberties and rights for the maximum number of individuals. The paradox is seen more clearly when democratic governments are to choose between the following two alternatives: (i) Making such laws that while safeguarding the basic rights of citizens, will not at the same time be

¹ See Rousseau, J.J. *The Social Contract*. trans. Maurice Cranston, England: Penguin Bks.Ltd., 1968,

conducive to laying down the foundations for the machinery of destroying democracy, hence the same basic rights; (ii) Making room for all types of organisations-even for the ones that aim at destroying democracy and for those that threaten peace in the society- for the sake of keeping consistent with its essence, but at the expense of the hazard of undermining its future existence.

The purpose of this thesis is to show that alternative (i) is more rational. However, before any further discussion, it should be stated that the problem introduced in this thesis has arisen as a result of the motivation to refute the following criticism of 'historicists'- who had been vehemently attacked by Karl Popper in "The Open Society and Its Enemies"-: "Democracy has to copy totalitarian methods to fight against its alternatives, and to become totalitarian itself"² That is to say, this thesis will argue that the historicist criticism to democracy does not hold. Despite the fact that Popper's criticisms of historicism and of Plato in that Plato prescribed a 'closed'³ society in "The Republic" instead of an 'open' society Popper envisaged- a society in which individuals are confronted with their own personal decisions⁴- are quite important to be considered, Popper's work will only be used as a material to give the reader an opinion about the ideals of this thesis; that is, a free society in which all individual liberties and rights are specified and furthermore safeguarded against administrative and/or legislative invasion; unless that invasion were

² See Popper, K.R. *The Open Society and Its Enemies*(vol.1), 5th edition(revised), London: Routledge Pbl., 1966, p.2

³ See *ibid.*, p.173

necessary for the well-being of the community.⁵ Popper's 'open' society, which would be called by most contemporary thinkers as 'democratic' or 'liberal', and which- in this thesis- could be called 'politically free society'; seems to make more room for judging the worth of the individual and the dignity of the action, in contrast to the 'closed' society, as we shall see later. However, there is more to be done for giving the moral foundations of the free society that this thesis envisages; than simply stating the fundamentals of a(n) 'open'/'liberal' society.

The moral foundations of a democratic society will be established by appealing both to Kant and Mill. First, the Kantian moral philosophy will be summarised and discussed; meanwhile, the importance of 'autonomy'-which guarantees that the action is performed independent of any constraint- 'duty', 'rationality' and 'universalisable maxims' which lead one to the 'right' action will be emphasised. Second, Mill's utilitarian theory and how it works in a political society will be taken up. But, before pointing out the distinctions between Kant and Mill, two claims will follow: 1-There is a connection between 'autonomy' and 'politically free society', 2-Mill could have presupposed autonomy in his moral philosophy, just like Kant did. After these two claims are argued for, and the distinctions between the emphases Kant and Mill put on certain moral concepts are mentioned; the basis on which Kant and Mill could be combined, namely, 'the Universalisability of maxims' shall be discussed: It shall be argued that Mill's utilitarian theory could be universalised,

⁴ See *ibid.*, p.173

⁵ See *The Mind and Faith of Justice Holmes*. ed. Max Lerner, New York: The Modern Library, 1948, pp. 289-90

using the Categorical Imperative-which is original to Kant, and which goes: “Act only according to that maxim whereby you can at the same will that it should become a universal law”⁶- as the fundamental tool. In other words, it is possible for anyone to will that every individual acts according to maxims which promote maximum happiness and pleasure as long as these ‘happiness’ and ‘pleasure’ do not cause any other’s pain or distress.

Now, why is it not a good idea to take Mill’s ethical theory as central and to lessen the significance of Kant’s theory; or the vice versa? Because neither of the theories is alone sufficient to give the moral foundations of a liberal society. So, the best route to take is to combine the merits of both ethical theories. To strengthen this point requires taking into account some criticisms by Sir Isaiah Berlin(1909-1997), who-in his “Two Concepts of Liberty”- raises objections addressing both Kant’s and Mill’s theories. Although Berlin’s criticisms are restricted to how Kant and Mill conceive of ‘liberty’ and how he places Kant’s and Mill’s understanding of liberty within his two domains: ‘negative liberty’/ ‘freedom from’ and ‘positive liberty’/ ‘freedom to’ ; they are important to support the view that a combination of Kant’s and Mill’s theories would do better in constituting the moral foundations of a liberal society than emphasising one of the moral theories and simply skipping over the other. The line of thought which is original to R.M. Hare will help us to show the way in which Kant and Mill could be combined. On Hare’s view, Kant could have been a utilitarian though he was not- because there were utilitarian elements in

⁶ See Kant, I. Grounding the Metaphysics of Morals, In *Classics of Moral and Political Theory*, ed.

his philosophy.⁷ Some of the claims Hare makes are going to be stated as: 1- Kant could have been a rational-will utilitarian, because “...a utilitarian can also prescribe that we should do what will conduce to satisfying people’s rational preferences or wills-for-ends- ends of which happiness is the sum”⁸ 2- Even the version of the Categorical Imperative which goes “Act only on that maxim which you can at the same time will that it should become a universal law” is consistent with utilitarianism, because acting on universalisable maxims has the following meaning: one should be able to will that only acting on the maxim he does will do the best for anyone, and impartially, for all those affected by his action. In other words, acting on universalisable maxims requires equalising one’s ends with other people’s ends, which is just the way a utilitarian would act.⁹ 3- “Utilitarianism is simply the morality which seeks the ends of all insofar as all can seek them consistently in accordance with universalisable maxims.”¹⁰

After the moral foundations are more or less established, the political implications of Kant’s philosophy, including the influences of Rousseau on Kant, shall be taken up. The works that will be used as reference are.: 1-“An Answer to the Question:

⁷ See Hare, R.M. “Could Kant Have Been a Utilitarian?”, In *Sorting out Ethics*, Oxford: Oxford Univ. Press (1997)- downloaded from the website: <http://www.deontology.com> , p.1 [Page numbers for this essay are quoted in accordance with the order that has been downloaded from the worldwide web.]

⁸ See *ibid.*, p.3

⁹ See *ibid.*, p.5

¹⁰ See *ibid.*, p.7

What is Enlightenment?” by Kant, 2-“To Perpetual Peace: A Philosophical Sketch” by Kant, and 3-“The Social Contract” by Rousseau. The subsequent step within the discussion of the political implications of systems will be to give brief explanations of the different models of democracy¹¹ and to decide which model(s) will give the best result.. Within the context of this discussion, and before explaining some models of democracy, the issues we shall consider are: 1- Pettit’s criticism of Berlin’s distinction between ‘negative’ and ‘positive’ liberty; and of the philosophical gap which-Pettit believes- will be filled by his ‘third’ conception,namely, “freedom as non-domination”¹² ; 2-The distinctions Pettit draws our attention to- that is, the distinctions between republicanism and communitarianism¹³, and between liberalism and libertarianism¹⁴ 3- Pettit’s explanations of what he means by ‘domination’ and ‘interference’¹⁵ Considering these three issues will provide us with the possibility of having more or less an idea about the main features of the ‘republican’ understanding; and about why “freedom as non-domination”-which Pettit claims is the republican understanding of freedom- is as fundamental as “freedom as non-interference”-which Pettit thinks is the understanding of freedom adopted by liberalists, one of which is Sir Berlin.

¹¹ See Held, D. *Models of Democracy*, 2nd edition, England: Polity Press, 1997, pp.33-152

¹² See Pettit, P. *Republicanism: A Theory of Freedom and Government*, Oxford: Clarendon Press, 1997, p.21

¹³ See *ibid.*, p.8

¹⁴ See *ibid.*, p.9

¹⁵ See *ibid.*, pp.22-23

Finally, after all that will have been said about the moral and political foundations of a free society, some of the legal implications will be taken into account. Doing so will help us strengthen the argument of the thesis, that is, the claim that using sanctions on individuals who aim at destroying democracy is the attitude to be adopted by democratic governments, while safeguarding basic individual liberties and rights. However, when the democratic governments- who rule in terms of office and are elected- abuse their power and commit injustice, the citizens have the right to express displeasure to the unfair exercise of power and civil disobedience to laws- under the conditions of injustice- is justified, according to John Rawls.(1921-). It would not be wrong- at this point- to state that Rawls successfully explains what 'civil disobedience to laws' means, and gives important clues for when to evaluate disobedience to laws as 'civil', as well as for the interpretation of 'injustice' in "The Justification of Civil Disobedience"¹⁶; as we shall discuss later.

Now, what criteria should apply, for distinguishing actions which express a dsipleasure to the unfair exercise of power by the elected, from those which turn out to be ones that are against the continuation of a democratically constructed political system? The answer is that to specify such criteria requires first to interpret and apply laws in a way that will neither result in the destruction of the governmental institutions, nor in a coercion of any individual of his basic liberties and rights. Concerning the specification of such criteria, several civil liberty cases and their

¹⁶ See Rawls, J. "The Justification of Civil Disobedience". In *Ethics and Public Policy*, ed. Tom L.Beauchamp, New Jersey: Prentice Hall, 1975, pp. 132-145

dissents in which Oliver Wendell Holmes (1841-1935) had been on the supreme Court will be argued helpful: 1- "Clear and Present Danger"¹⁷ 2- "Freedom For the Thought That We Hate"¹⁸ 3- "The Judge and the Editor"¹⁹. Oliver W. Holmes, so called "Justice" Holmes, had been an influential writer-philosopher and lawyer, whose position-on the relation of state power to intellectual freedom- had been the following: Individual expression of thoughts is an inseparable part of basic liberties and rights, but the survival of the state is a condition precedent to the existence and furthering of citizens' liberties and rights; hence-for example- free speech is not to be regarded as embodying any absolute guarantee.²⁰ However, Holmes was willing to safeguard individuals against legislative or administrative invasion, unless that invasion were necessary for the well-being of the whole community.²¹ To summarise what has been said about Holmes, it could be said that the way in which Justice Holmes had interpreted laws –in most cases-is such that the enactment of the particular law(s) neither allows any destruction of the ultimate institutions providing the basis for the well-being of the society, and for the continuation of a democratic legislation, nor does it penalise any of the individuals, whose actions do not dispaly any disobedience and /or rebellion to laws.

¹⁷ See *The Mind and Faith of Justice Holmes*, ed. Max Lerner, New York: The Modern Library, 1948, pp.292-97

¹⁸ See *ibid.*, p.325-328

¹⁹ See *ibid.*, p.332-336

²⁰ See *ibid.*, p.289

²¹ See *ibid.*, pp.289-290

The conclusion which shall follow after all that has been discussed will be that democracy deserves to be protected against being destroyed and/or any arbitrary threat -since it is the best among various political and legislative systems. In other words, democracy does not become totalitarian, hence contradict itself-as the historicists claimed-when it uses sanctions on individuals and organisations whose actions display rebellion to laws and/or whose actions are conducive to laying down the foundations for the machinery of destroying democracy, that is, the political system which prepares the legal basis for the furthering and enjoyment of individual liberties and rights.

THE MORAL FOUNDATIONS OF POLITICAL LIBERTY AND ITS LEGAL IMPLICATIONS

We will now discuss the moral foundations of a politically free society, and consider its legal implications. I intend to show that the moral foundations of a liberal society could best be explained by appealing to two major ethical theorists, Kant and Mill. It will be argued that both Kant's Categorical Imperative and Mill's Utilitarian theory are universalisable, in that both of them could be seen as moral laws dictating individuals to treat everyone—whether in their own person or in the person of another—always as an end, and never as means to ends only.²² Despite the fact that Kant and Mill differ in many respects, they agree on regarding individuals as self-legislating, that is, autonomous beings, which have moral responsibilities. In short, the philosophies of Kant and Mill are sufficient to provide the moral foundations of the desired free society.

To strengthen the argument given for the moral foundations, some of the legal implications will be taken into account. In a liberal and democratic political system, laws should provide the conditions for equal sharing of liberties and rights among individuals. In addition, against any arbitrary invasion and/or abuse of power by the elected, laws should protect the individuals. However, this does not imply any exemption from penalty for those individuals who abuse their liberties and rights in order to deprive others of theirs. In other words, it is the duty of the legislators to

²² See Kant, I. Grounding the Metaphysics of Morals. In *Classics of Moral and Political Theory*, ed. Michael L. Morgan, Cambridge: Hackett Publ. Co., 1992, p. 1024

make and of the governing body to apply laws in a manner that anybody who abuses his liberty and rights and commits any act which threatens others is penalised. For such interpretations of laws, several cases of Oliver W.Holmes can be given as examples: 1- Clear and Present Danger²³, 2- Freedom For the Thought That We Hate²⁴, and 3- The Judge and the Editor²⁵. These cases and the dissents could be used as criteria to evaluate which actions go beyond the scope of basic liberties and rights, and turn out to be ones that aim at destroying democracy, and act as guides to interpret laws in a liberal and democratic political system.

Before any further discussion, however, the dichotomy between Plato's and Popper's political philosophies, which is the starting-point of the thesis, will be taken up. Doing so will provide us with the possibility of clarifying the reasons for writing this thesis and might shed light on why it is argued that Kant's and Mill's theories provide the ideal moral conditions of what is taken to be a politically free society which is ruled by democracy. Furthermore, it is a good idea to consider the opposite view (any position that provides intellectual support for totalitarian objections against a politically free society and/or democratic reform) , while arguing for our position; that is to say, despite the fact that Popper's criticisms against Plato's philosophy are based-in some respects-on shaky grounds, it is possible to see some typical characteristics of what Popper calls a 'closed' society and some totalitarian tendencies in Plato's "The Republic". So, taking up this dichotomy can be

²³ See *The Mind and Faith of Justice Holmes*, ed.Max Lerner, New York: The Modern Library, 1948, pp.292-97

²⁴ See *ibid.*, pp.325-28

considered as a good idea in that it will also help us see clearly what the opposite view is, that is, what type of a society and political order the anti-democratic individuals are after.

The dichotomy will be explained by the following questions: 1-What does Popper charge Plato with? , 2- To what extent could Popper be said to be justified in charging Plato the way he did in “The Open Society and Its Enemies”? The answer to the first question requires some expounding of “The Open Society and Its Enemies-vol.1”, and the answer to the second question is an evaluation of Popper’s mentioned work. The reason for Popper’s interest in the social sciences and political philosophy had been the rise of totalitarianism, and the failure of the various social sciences and social philosophies to make sense of that rise.²⁶ On Popper’s view, the arguments backing up totalitarianism originate from a line of thoughts called ‘historicism’, which Popper describes as “the most powerful social philosophy, responsible for the widespread prejudice against the possibilities of democratic reform”²⁷ Historicism, by claiming to predict the course of history on scientific grounds (which is completely irrational for any natural or social scientist, as Popper had put it²⁸), is after shaking the grounds of democracy as a form of government as well, by the following two criticisms, which are- prima facie- strong: 1- Democracy has to copy totalitarian methods to fight against totalitarianism, and to become

²⁵ See *ibid.*, pp.332-36

²⁶ See Popper, K.R. *The Open Society and Its Enemies (vol.1)*, 5th Edition (revised), London: Routledge Publ., 1965, p.2

²⁷ See *ibid.*, p.2

²⁸ See *ibid.*, pp.2-3

totalitarian itself.²⁹ 2- The industrial system in the democratic capitalist societies can not continue to function without adopting the methods of collectivist planning, and the inevitability of a collectivist economic system will definitely be followed by the adoption of totalitarian forms of social life.³⁰ By analysing the principles of democratic social reconstruction –named ‘piecemeal social engineering’³¹- and showing that the prophetic attitude of historicism has no scientific basis, Popper hopes to convince us that we are the makers of our own future, independent of any historical necessity or any ‘laws of history’(all of which historicists claim can be found.³²)

Popper charges Plato with providing the intellectual basis for historicism and for the enemies of the ‘open society’, and what is more, he holds Plato responsible for the uprise of totalitarianism in the twentieth century. He says that the totalitarian tendency of Plato’s political philosophy is the point at which he starts to criticise and analyse Plato, a tendency which is backed up by his historicism, in his opinion.³³ His critique of Plato will be summarised here in some detail as follows:

First, Popper draws our attention to a claim which he holds true: “..Historicist ideas seem to be prominent in times of great social change”³⁴ On the basis of this

²⁹ This is the paradox of democracy for historicists, but not a real paradox for me; and it is this very point that relates Popper’s work with this thesis.

³⁰ See *ibid.*, p.2

³¹ See *ibid.*, p.1

³² See *ibid.*, p.3

³³ See *ibid.*, p.34

³⁴ See *ibid.*, p.17

claim, Popper easily infers that it was inevitable for Plato to adopt historicism and apply it to his political philosophy, the motto of which was: "All social change is corruption or decay or degeneration, so arrest all political change".³⁵ Such an inference is based on the fact that Plato had lived in an era of long-lasting wars, followed by the re-establishment of the democratic social order, as it had been before the wars.³⁶

Second, Popper summarises Plato's political programme, which he finds totalitarian and as based on a historicist sociology: 1- The ruling class must be strictly separated from the human cattle.³⁷ 2- The fate of the state is identical with the fate of the ruling class; there should be strict rules for breeding and educating the ruling class (the rest can be derived on the basis of these two fundamental aspects, on Popper's view)³⁸ 3- Receiving education of any kind, carrying arms as rights are the monopolies of the ruling class, but the members of this class are in no way allowed to interfere in any kind of economic activity, especially, earning money.³⁹ 4- All innovation in education, legislation and religion must be prevented or suppressed.⁴⁰ 5- The state must be economically self-sufficient; otherwise, the rulers will be dependent on traders or become traders themselves.⁴¹ By giving such an outline,

³⁵ See *ibid.*, p.19

³⁶ See *ibid.*, p.18

³⁷ See *ibid.*, p.86

³⁸ See *ibid.*, p.86

³⁹ See *ibid.*, p.86

⁴⁰ See *ibid.*, pp.86-87

⁴¹ See *ibid.*, p.87

Popper also claims to show more clearly and distinctly that such a political programme can not be morally superior to totalitarianism, since it is fundamentally identical with it⁴², despite the *prima facie* ideals of ‘an absolute good and an absolute justice’, which Plato claims as the ends of his state.⁴³

Third, Popper explains how he interprets ‘justice’ in “The Republic”, and claims that Platonic justice is as totalitarian as his whole political programme. On Popper’s interpretation, justice is ‘that which is in the interest of the best state’⁴⁴; and in Popper’s opinion, “...there is nothing except arresting all change by the maintenance of a rigid class division and class rule, in the ‘interest of the best state’ .”⁴⁵ However, there is no hint that Popper gives for his interpretation in any part of Chapter 6- the chapter concentrating on Plato’s justice and political programme- which makes all his claims on the basis of his interpretation of justice to be insufficiently justified.

Fourth, the fundamental difference between ‘closed’ and ‘open’ societies is explained: The closed society has members who have semi-biological ties with each other such as kinship, living together, sharing common efforts, common joys, common distress.⁴⁶ The open society, on the other hand, is one in which *individuals* are confronted with their own *personal* decisions.⁴⁷ According to Popper, the

⁴² See *ibid.*, p.87

⁴³ See *ibid.*, p.87

⁴⁴ See *ibid.*, p.89

⁴⁵ See *ibid.*, p.89

⁴⁶ See *ibid.*, p.173

⁴⁷ See *ibid.*, p.173

transition from the closed to the open society could be described as one of the deepest revolutions human beings have passed through.⁴⁸ On the basis of what has been said and what he has in mind so far about “The Republic”, it will not be difficult for Popper to point subsequently that Plato prescribed a ‘closed’ society in his social and political philosophy.

The final step Popper takes is to look for reasons underlying Plato’s ‘anti-humanitarian’-as Popper calls them- political doctrines, by the help of referring to some specific differences between Socratic and Platonic philosophies: Being the student of a philosopher who had devoted his life to give democracy the faith it needed ⁴⁹, and who was one of the first to struggle for the open society, it is surprising how Plato had taken the opposite route, especially by making use of his opponent’s name (Socrates) in his works.⁵⁰ Popper’s view on this issue is that Plato reflects a deep inner conflict, and a struggle within his mind: He had the anxiety of sharing the same destiny with his friend and teacher, if he overtly supported the Socratic philosophy.⁵¹ Popper believes that one of the clearest expression of Plato’s conflict can be found in the ‘Menexenus’⁵², where Plato says: “A feeling of exultation stays with me for more than three days; not until the fourth or the fifth day, and not without an effort, do I come to my senses and realise where I am”⁵³

⁴⁸ See *ibid.*, p.175

⁴⁹ See *ibid.*, p.193

⁵⁰ See *ibid.*, p.194

⁵¹ See *ibid.*, p.197

⁵² See *ibid.*, p.197

⁵³ See *ibid.*, p.197

When interpreted in a way to confirm that the influence of the open society's creed was deep on Plato, this quotation seems to support Popper's view that Plato had to struggle hard to say the opposite of what he felt and write the opposite of what he thought, since he had lived in a society where anyone could have been his enemy, and that the more anti-humanitarian thoughts he advocates in the "The Republic", the deeper his inner conflict.⁵⁴ "...The unforgettable lesson that 'The Republic' teaches is exactly the opposite of what Plato declares and tries to impose upon us"⁵⁵ is how Popper concludes the first volume of "The Open Society and Its Enemies".

Having briefly summarised Popper's charges, it will now be reasonable to evaluate the extent to which Popper could be said to be justified in his charges. Doing so will provide us with the possibility of understanding better why Popper can not be sufficient as the only reference in order to back up a liberal position in the sense that it is argued in this thesis, although his work is quite important to make sense of. The first step in this evaluation process will be to say a few words about the overall structure of "The Open Society and Its Enemies-vol.1": The chapters of the book are written in a way that in every single one of them, the reader is faced with the reasons and circumstances in which certain claims certain historicist philosopher(s) had made, but is covertly led to think that it was quite possible for those philosophers – under the given circumstances- to have thought and written the way they did. If this is not the structure that Popper would adopt, then there remains only the possibility that Popper unintentionally had fallen into the trap of historicism –methodologically

⁵⁴ See *ibid.*, p.197

⁵⁵ See *ibid.*, p.200

-which he attacked throughout his whole book. In other words, Popper-as a political philosopher- had committed himself into something he criticised, namely, the historicist methodology.

The second step is to take into account one of Desmond Lee's criticisms against Popper's charges. In his introduction for the translation of "The Republic"⁵⁶, Sir Lee takes into account the Popperian charges against Plato, one of the most tackling of which-for him- is 'historicism'. Despite the fact that he agrees with many of Popper's thoughts on social and political issues, and that he finds Popper's criticisms rational to some extent, Lee feels obliged to distinguish between charges which have some basis from those due to misunderstanding and/or misinterpretation, or which express contemporary anxieties rather than what Plato said or meant.⁵⁷ As an example, Lee puts forward that Plato's "gennaion pseudos" is mistranslated into English as 'lordly lie/noble lie' by Popper (see Popper, p.118), which turns the necessity of his charge of 'countenancing the unscrupulous use of propaganda' to a contingency⁵⁸. However, it is hard to find any suggestion by Lee, apart from what he called a mistranslation. What is worth highlighting in Lee's commentary is that he draws our attention to a necessary distinction between charges which have some basis from those due to misunderstanding and/or misinterpretation, or which express contemporary anxieties, in order to make less mistakes while criticising Plato. The reason why this point is worth emphasising is that it provides one with the

⁵⁶ See Plato. *The Republic*. 2nd edition, trans. Desmond Lee, England: Penguin Classics, 1987.

⁵⁷ See *ibid*, p.L (introduction)

⁵⁸ See *ibid*, p.LI (introduction)

possibility of making the following claim: Popper seems to have gotten into a polemic with totalitarianism, which is an obstacle for democratic reform and open society, and which had become more or less dominant in the Europe of the 1930's ; rather than philosophically arguing for a new social system, and rather than thinking hard on what Plato really said. Therefore, any misinterpretation of Plato by Popper, in "The Open Society and Its Enemies", is on purpose.

In spite of the challenge against Popper's charges of Plato, it is possible to agree with him fully on the following view: The 'open' society is the society in which an individual has more opportunities to choose his actions and bear its consequences, which, at the end, are all his own responsibilities, that is to say, to exercise his freedom of choice, in contrast with the 'closed' society. The closed society, on the other hand, is one in which an individual either becomes a ruler (just like the 'philosopher king' in Plato's "The Republic") on the basis of his privileges, education, wisdom, etc., or be one of the ruled. Subsequently, the 'open' society, in the sense that Popper adopts, which would be called by most contemporary thinkers as 'democratic' or 'liberal', and which –in this thesis- could be called 'politically free society', seems to make more room for judging the worth of the individual and the dignity of the action done; in comparison to the 'closed' society, which Popper charges Plato with being one of the leading intellectual ancestors. However, there is more to be done for giving the moral foundations of a free society than to simply state the key features of a 'liberal'/'open' society.

The moral foundations of an 'open'/'liberal' society will be explained by appealing to Kant and Mill, as suggested before. Kant argues that what makes human beings belong to the domain of morality is the fact that they are parts of both the noumenal and the phenomenal worlds. The foundations of this argument could be found in his 'Preface to the Second Edition' for "The Critique of Pure Reason":

....if only we are convinced that there is an absolutely necessary use of practical reason (the moral use), in which reason must inevitably go beyond the limits of sensibility, and though not requiring for this purpose the assistance of speculative reason, must at all events be assured against its opposition, unless it is brought in conflict with itself'(Kant, *Critique of Pure Reason*, pp.18-19)⁵⁹

and also, in his following words:

...the distinction between things in themselves (which are parts of the noumenal world) and things as objects of experience (which are parts of the phenomenal world) is necessary, to be able to say that will is free without any contradiction (Kant, *Critique of Pure Reason*, pp.20-21)⁶⁰.

The clash between reason and desire/inclination is what gives rise to duty and obligations, hence, it is what constitutes the foundation of morality according to Kant. On his view, duty is the necessary condition for any action to be considered of any moral dignity and to be evaluated as right, because duty includes the concept of good will in itself.⁶¹ The components of duty are given by Kant in the following three propositions: 1- "To promote one's happiness not from inclination, but from duty-in order for that happiness to have real moral worth- should be considered a

⁵⁹ See Kant, I. Critique of Pure Reason: Preface to the Second Edition. In *Kant Selections*, ed.

Theodore M.Greene, USA: The Modern Student's Library, 1957, pp.18-19

⁶⁰ See *ibid*, pp.20-21

moral law.”⁶², 2- “An action done from duty has its moral worth, not in the purpose that is to be attained by it, but in the maxim according to which the action is determined”⁶³, 3- “Duty is the necessity of an action done out of respect for the law- that is, one can really have an inclination for an object as the effect of his proposed action; but can never have respect for such an object because that object is not, and can not be-by any means- the activity of the will”⁶⁴

Having given some description about how Kant grounds the fundamental significance of duty in his moral philosophy, we will now consider the cases which are in accordance with, or contrary to, duty. The four cases which are in accordance with, or contrary to duty in Kant are⁶⁵: Case 1- This is about the actions which are contrary to duty; such as stealing, telling lies, etc.⁶⁶ Case 2- considers the actions which are in accordance with duty, but for which the agent has-perhaps- no inclination at all; such as treating people well for beneficial purposes-say, to be voted in elections- and not due to liking them.⁶⁷ Case 3- considers the actions according with duty as well, and the actions considered within this case are those for which the agent *has* an immediate inclination, unlike in Case 2; e.g. not committing adultery,

⁶¹ See Kant, I. Grounding the Metaphysics of Morals, *Classics of Moral and Political Theory*, ed.

Michael L.Morgan, Cambridge: Hackett Publ., 1992, p.997

⁶² See *ibid*, p.999

⁶³ See *ibid*, p.1000

⁶⁴ See *ibid*, p.1000

⁶⁵ See *ibid*, p.998

⁶⁶ See *ibid*, p.998

⁶⁷ See *ibid*, p.998

due to considering one's wife as the most desirable person in the world.⁶⁸ Finally, Case 4 is the one which takes into account the actions in accordance with duty but contrary to some immediate inclination of the agent⁶⁹, e.g. not committing suicide, in spite of the fact that one is in dire distress⁷⁰. According to Kant, Case 4 is the crucial one in testing the will's possible goodness⁷¹, but this should not entail that one should lead his life in such a way to encounter as many cases as possible to constantly test his virtue; e.g. deliberately marry a witch, so as to be able to resist the temptation to commit adultery⁷². The actions in accordance with duty and having moral dignity are the ones which are based on reason. The necessary condition for reason, from Kant's point of view, is freedom. The grounding for this view could be found in his 'Preface to the Second Edition' as well:

...morality necessarily presupposed freedom as a property of our will, producing practical principles (as *a priori* data of it), which belong originally to our reason, which in the absence of freedom- would be absolutely impossible (*Kant, Critique of Pure Reason*, p. 21)⁷³

On the basis of reason and free will, we act in accordance with what we are obliged to, that is, in accordance with the moral law which we imposed upon ourselves by virtue of free will. As a result of this, our actions become right, and universalisable. What provides the basis for such a universalisability is formulated by

⁶⁸ See *ibid*, p.998

⁶⁹ See *ibid*, p.998

⁷⁰ See *ibid*, p.998

⁷¹ See *ibid*, p.998

⁷² See *ibid*, p.998

⁷³ See Kant, I. Critique of Pure Reason: Preface to the Second Edition. In *Kant Selections*, ed.

Kant in his Categorical Imperative, which is also known as 'The Formula of Universal Law':

Act only according to that maxim whereby you can at the same time will that it should become a universal law (*Kant, Grounding the Metaphysics of Morals*, p.1013)⁷⁴.

This formula has the following other formulations, as argued in detail by Kant: 1- The Formula of 'The End in Itself', which is a practical imperative, telling us to act in such a way that we treat humanity, whether in our own person or in the person of another, always at the same time as an end, and never simply as a means⁷⁵; 2- The Formula of 'Autonomy', which is claimed to be a practical principle of the will as the supreme condition of the will's conformity with universal practical reason, that is to say, the idea of the will of every rational being as a will that legislates a universal law⁷⁶; 3- The Formula of the 'Kingdom of Ends', which is –only- an ideal kingdom arising as a systematic union of rational beings through common objective laws (and where the Formula of the 'End in Itself' applies), inasmuch as these laws have in view the very relation of such beings to one another as ends and means⁷⁷. One of the very reasons why such implications are that significant to consider within Kant's moral system is that duty necessitates us to take into account 'rights'; because in a society where no claims of right exist, in other words, in a society which is built around the 'virtues' of benevolence and kindness is one which requires not only

⁷⁴ See Kant, I. *Grounding the Metaphysics of Morals*, *Classics of Moral and Political Theory*, ed.

Michael L.Morgan, Cambridge: Hackett Publ., 1992, p.1013

⁷⁵ See *ibid*, p.1018

⁷⁶ See *ibid*, p.1019

⁷⁷ See *ibid*, p.1021

inequality, but also servility, as Kant would suggest.⁷⁸ To avoid such a situation, Kant argues, one should be able to claim that the others have to give him what is his by right.⁷⁹ To consider such a society as an ideal, purely on the basis of the happiness of its members, would be a mistake, since the impossibility to claim for any rights would seriously threaten autonomy.⁸⁰ Another reason to take into account such implications is the connection of these implications to what is considered to be the common aspect of Kant's and Mill's moral theories, that is, Universalisability of maxims. However, before discussing the ways in which Kant and Mill could be combined in order to constitute the moral conditions of a liberal, 'open' society, it is a good idea to expound Mill's Utilitarian theory and how it works in a political society in some detail.

Mill says that he regards utility as the ultimate appeal on all ethical questions; as long as it is utility in the largest sense, grounded on the permanent interests of man as a progressive being.⁸¹ So, the principle according to which an action is done, the truth and/or the rationality of that principle, the rightness of the action, and the consequences promoted by the particular action, are all parts of its *utility*. As stated before, Mill and Kant agree on the fact that individuals-who are members of a political society- should be considered as self-legislating, that is, autonomous beings;

⁷⁸ See Schneewind, J.B. "Autonomy, Obligation, and Virtue: An Overview of Kant's Moral Philosophy". In *The Cambridge Companion to Kant*, ed. Paul Guyer, Cambridge: Cambridge Univ. Press, 1992, p.311

⁷⁹ See *ibid*, p.311

⁸⁰ See *ibid*, p.311

⁸¹ See Mill, J.S. On Liberty, *The World's Classics 170*, London: Oxford Univ.Press, 1912, p.16

but the path they follow to reach this conclusion is where they diverge. However, before pointing out the distinctions between Kant and Mill, it is a good idea to answer two questions: 1- Is there any connection between autonomy and politically free society? 2- Could it be claimed that Mill also presupposed autonomy? Both of the questions have an affirmative answer: First, political freedom requires moral freedom; that is, the freedom of will, which is independent from any constraint, as long as it leads the agent to act in accordance with universalisable maxims. In other words, each member of a politically free society is to be presumed autonomous in the sense that he legislates himself a universal moral law, which is consistent among every rational will. The only condition that power can be exercised over the autonomy of the will is when it leads one to act on a principle which would promote consequences and/or 'ends' that would not be shared by others' will; hence, would not promote their utility. So, it would not be wrong to state that autonomy has to be presumed in a politically free society. Second, Mill thinks, in agreement with Kant, that freedom is a necessary property of will as is presupposed in morality, and that the practical principles which belong to our reason would be impossible in the absence of freedom.⁸² The three necessary conditions for human liberty given by Mill provide support for the claim that Mill took autonomy as seriously as Kant did. In addition to this, Mill's giving "harming our fellow creatures" as the only basis on which power could be exercised against one's will would be agreed by Kant; which subsequently leads to saying that what Kant and Mill conceived of human liberty

⁸² See Kant, I. Critique of Pure Reason: Preface to the Second Edition. In *Kant Selections*, ed.

were consistent in many respects. As a result, it is possible to state that Mill presupposed autonomy, although it is not possible to prove the statement.

Now, Kant puts emphasis on the maxims based on reason, and praises those actions that are in accordance with moral laws, which we impose upon ourselves by virtue of free will; in short, he assigns the principles and laws guiding our actions and the rightness of those actions a primary importance, and thinks that acting on those laws will guarantee the promotion of the utility of the consequences and/or ends. Mill, on the other hand, emphasises the utility of actions, while he concentrates on explaining individual liberty and the conditions providing the basis for individual liberty in a democratic political system he envisages. According to Mill, "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others."⁸³ Otherwise, neither the laws, nor the society have any right to force an individual to do anything for which he has no inclination at all, since over himself, over his own body and mind, the only sovereign is the individual.⁸⁴

Mill thinks there are three necessary conditions for human liberty:

"...first the inward domain of consciousness, demanding liberty of conscience in the most comprehensive sense; liberty of thought and feeling, subsequently, liberty of expressing and publishing opinions... Secondly, liberty of tastes and pursuits, of framing the plan of our life to suit our own character; of doing as we like,...so long as what we do does not harm our fellow creatures, even though they should think our conduct foolish, perverse, or wrong...Thirdly follows the liberty of combination among individuals, freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived."(*See Mill, On Liberty, p.18*)

⁸³ See Mill, J.S. *On Liberty*. In *The World's Classics 170*, London: Oxford Univ.Press, 1912, p.15

⁸⁴ See *ibid*, p.15

Regardless of its form of government, Mill claims, no society in which these liberties are not on the whole respected, is to be considered as free.⁸⁵ The reason for his emphasising liberty is that he sees the free development of individuality as one of the significant requirements of human well-being, hence, of the promotion of maximum happiness.⁸⁶ From his point of view, the faculties of human perception, judgment, discriminative feeling, mental activity, and even moral preference are exercised only in making a choice⁸⁷, which is the necessary condition to make sense of freedom and morality, hence individuality. However, acts preventing improvement of others and injuring happiness, hence, threatening utility are to be prohibited by laws and the society ought to organise a powerful police against those kinds of acts.⁸⁸ In short, what Mill says is that

“...Whenever there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality and law” (*See Mill, On Liberty, p.18*)

To summarise what Mill has in mind, right actions are those which do not cause any harm for others, and which do not threaten others' pleasures, tastes, freedom of thought and expression, free development of individuality, freedom to unite for attaining a harmless goal, that is, freedom for the ways that lead to promotion of

⁸⁵ See *ibid*, p.18

⁸⁶ See *ibid*, p.70

⁸⁷ See *ibid*, p.72

⁸⁸ See *ibid*, p.99

maximum happiness; all of which can be expressed in a word 'utility'. Kant, on the other hand, argues that happiness should be distributed in accordance with virtue⁸⁹, and that happiness is good only if it results from the satisfaction of desires permitted by the moral law⁹⁰. In other words, one should be able to universalise the immediate inclination, which motivates him to act in a certain way, in order to be able to claim any right to happiness; and without any doubt, to be considered of any moral worth.⁹¹

After all these, a significant question still begs an answer: Can Mill's utilitarian theory be universalised, using The Categorical Imperative as the fundamental tool? That is to say, is it possible for anyone to will that every individual acts according to maxims which promote maximum happiness and pleasure, as long as this 'happiness' and 'pleasure' do not cause any other's pain, or distress? The answer is affirmative, since any action in accordance with a universalisable maxim does also accord with duty, is rational, is chosen by free will, hence, is to be considered of moral dignity. Such an action is also virtuous, so long as the inclination of the agent who performed the action harmonises with what the moral law prescribes; and as a result, the agent's happiness has moral worth. In short, the consequence promoted by a particular action according to a universalisable maxim cannot be other than happiness; so, happiness and/or utility are also universalisable. Perhaps this is the point on which Kant and Mill would agree fully, despite the different emphases they

⁸⁹ See Schneewind, J.B. "Autonomy, Obligation, and Virtue: An Overview of Kant's Moral Philosophy". In *The Cambridge Companion to Kant*, ed. Paul Guyer, Cambridge: Cambridge Univ. Press, 1992, pp.332-333

⁹⁰ See *ibid*, p.333

⁹¹ See *ibid*, p.333

put on certain moral concepts. Moreover, such a basis will provide us with the possibility of explaining why Kant's and Mill's theories are of substantial importance for the moral foundations of a free society.

Now, why is it not a good idea to take one of the theories as central and to lessen the significance of the other? Because, both theories have flaws, as well as merits. So, the best route to take is to combine the merits of both ethical theories. In addition, neither Kant's, nor Mill's theories alone are sufficient to give the moral foundations of a liberal society. To strengthen this point requires taking into account some criticisms by Isaiah Berlin, who, in his "Two Concepts of Liberty", raises objections addressing both philosophers' ethical theories in some respects.

After posing the question: "In the name of what can I ever be justified in forcing men to do what they have not willed or consented to?"⁹², and answering the question: "Only in the name of some value higher than themselves"⁹³, Berlin claims that Kant's whole argument favoured the hypothesis that there is no value higher than the individual.⁹⁴ Hence, he continues, to force somebody to do what he has no will to do threatens autonomy, and is no better than degrading his worth as an individual, or to deny his nature on the whole; which shows the contradiction of what men are

⁹² See Berlin, I. "Two Concepts of Liberty". In *Four Essays on Liberty*, Oxford: Oxford Univ.Press, 1958, p.137

⁹³ See *ibid*, p.137

known to be, namely, ends in themselves.⁹⁵ According to Berlin, Kant's free individual is 'free from'⁹⁶; that is to say, 'free from the interference of others, whether the 'others' be the people around him, or the rules that he has to obey'⁹⁷ The reasons which -Berlin thinks- will back up his claim concerning Kant's free individual can be stated as: 1- Autonomy- not heteronomy- is to act and not to be acted upon.⁹⁸ In this interpretation, not to rid oneself of fear, or love, or the desire to conform is slavery to something which one can not control.⁹⁹ 2- To identify oneself with his critical and rational moments, and not caring about the consequences of his actions on the basis of the reason that they are not in his control, but only considering the motives, principles, and maxims underlying one's actions, is the attitude of a typical solitary thinker who has withdrawn himself from the world or has broken the chains with men and other things.¹⁰⁰ In general, however, Kant's moral system is too strong to be refuted by such charges. Moreover, I think that Berlin's second reason is not well- justified; due to the following: 1- To claim that to act according to a moral law that we prescribed for ourselves is freedom, and that to act on a universalisable maxim is to act rightly and rationally, does not necessarily imply that one needs not care about the consequences promoted by his action. 2- Not to have control over the consequences of one's action does not justify anyone who acts in a wrong way,

⁹⁴ See *ibid*, p.137

⁹⁵ See *ibid*, p.137

⁹⁶ See *ibid*, p.139

⁹⁷ See *ibid*, p.123

⁹⁸ See *ibid*, p.138

⁹⁹ See *ibid*, p.138

¹⁰⁰ See *ibid*, p.138

and/or who acts immorally; because to think of the others always as ends in themselves requires to take into account others' dispositions and choices under similar circumstances which gives rise to the particular action, therefore, to respect others' individuality and rights. In other words, whoever acts on a universalisable maxim also takes into account the possible consequences of his action-both in his own person and in the person of others-; so, any problem arising due to not being able to have control over the consequences of our actions is only a contingency. It could be that Berlin has missed this important distinction; despite the fact that his challenges, especially those concerning the general understanding of freedom within the enlightenment period, are worth considering.

In the emergence of preserving a minimum area of freedom not to degrade or deny human nature, Berlin and many liberal thinkers agree¹⁰¹; but concerning the specification of this 'minimum', Berlin claims that he is more strict compared to Mill, because he thinks that whatever the principle in terms of which the area of non-interference is to be drawn, liberty in such a sense is 'liberty from', in other words, 'negative' notion of liberty.¹⁰² He classifies Mill's theory of liberty under the domain of his 'liberty from', since he thinks that Mill's defence consists in the goal of warding off interference.¹⁰³ According to Mill, Berlin argues, the whole function of law was preventing the collision of individual liberties; so the state is reduced to the

¹⁰¹ See *ibid*, p.126

¹⁰² See *ibid*, p.127

¹⁰³ See *ibid*, p.127

functions of a nightwatchman or a traffic policeman.¹⁰⁴ The rest of Berlin's views critical of Mill are going to be summarised as follows: 1- Mill confuses two distinct views. One is that coercion-even though it might in some cases be necessary to apply, for preventing greater evils- is bad, since it crushes human desires; and non-interference, the opposite of coercion, is good, but not the only good.¹⁰⁵ This is 'negative' liberty (i.e., freedom from) in its classical form.¹⁰⁶ The other is that men should seek to discover the truth, or to develop a certain type of character that Mill would approve- critical, original, imaginative, etc.- and that truth can be found and such characters can be bred only in conditions of freedom.¹⁰⁷ Both of these views are liberal, but to grant them as identical is mistaken¹⁰⁸; no necessary connection exists between those two views.¹⁰⁹ 2- After referring to Rousseau's words on freedom: "He is truly free, who desires what he can perform, and does what he desires"; Berlin points out that in a world where a man seeks happiness, or justice, or freedom (no matter in which sense) cannot do much, since he is faced with many limitations; as a result of this, he cannot help withdrawing into himself.¹¹⁰ The doctrine maintaining that what I cannot have, I must teach myself not to desire; and that eliminating or resisting a desire is as good as the satisfaction of it, is no different than the doctrine

¹⁰⁴ See *ibid*, p.127

¹⁰⁵ See *ibid*, p.128

¹⁰⁶ See *ibid*, p.128

¹⁰⁷ See *ibid*, p.128

¹⁰⁸ See *ibid*, p.128

¹⁰⁹ See *ibid*, p.128

¹¹⁰ See *ibid*, p.139

of sour grapes, on Berlin's view; what I cannot be sure of, I cannot truly want.¹¹¹ From these two premises, Berlin draws the conclusion that the definition of 'negative' liberty as the ability *to* do what one wishes-which he thinks that Mill had adopted- fails.¹¹² Because, on the basis of such a definition-Berlin would argue- if a tyrant, for example, manages to condition his subjects into losing their original wishes and 'internalise' the form of life he has invented for them, then he will be claimed to *liberate* them.¹¹³ That is, to make people feel free but actually creating something against political freedom cannot be called 'enlargement of liberty'.¹¹⁴ 3- The Enlightenment thinkers' (one of whom is Kant) understanding of freedom-which is one that looks upon society as a design constructed according to the rational laws of the wise lawgiver, or of nature, or of history, or of the Supreme Being¹¹⁵-turn liberty into something identical with authority, rather than something apart from it, according to Berlin.¹¹⁶ Furthermore, another Utilitarian, Bentham-who wanted to see utilitarian influences in British laws to take place in the British legislation- kept saying that the business of laws is to restrain, rather than to liberate.¹¹⁷

Although Berlin's criticisms concerning Mill and Kant are restricted with their understanding of freedom, they are quite important to support the view that a

¹¹¹ See *ibid*, p.139

¹¹² See *ibid*, p.139

¹¹³ See *ibid*, p.139

¹¹⁴ See *ibid*, pp.139-140

¹¹⁵ See *ibid*, p.148

¹¹⁶ See *ibid*, p.148

¹¹⁷ See *ibid*, p.148

combination of Kant's and Mill's theories would do better in constituting the moral foundations of a liberal society, than emphasising one of the theories, and simply skipping over the other. Because, to ground the moral and political freedom of the individual who is a member of society is a fundamentally important task in this thesis, in order to strengthen the view that it is not a paradox of democratic governments to protect individual liberties and rights against any totalitarian attack and/or abuse of liberties and rights by some members of society.

Another line of thoughts, which is original to R.M. Hare, and which will help to strengthen the view that a combination of Kant's and Mill's moral theories would do the best, will now be discussed. What Hare defends is that there are utilitarian elements in Kant's philosophy, in other words, that Kant could have been a utilitarian, though he was not.¹¹⁸ To this extent, argues Hare, what John S. Mill says about the consistency of his own views with Kant's Categorical Imperative is well-founded.¹¹⁹

The following words of Kant should mean -on Hare's interpretation- that one should treat other people's ends as his own ends; so the ends should be shared: "...the ends of a subject who is an end in himself must be, as far as possible, my

¹¹⁸ See Hare, R.M. "Could Kant Have Been a Utilitarian?", *Sorting out Ethics*. Oxford : Oxford

Univ. Press (1997)- downloaded from the website: <http://www.deontology.com> , p.1

¹¹⁹ See *ibid.*, p.1

ends”¹²⁰ If this is an other version of the Categorical Imperative as Hare suggests, it is quite possible that Hare’s interpretation is shared by anyone who argues for the view that Kant and Mill could be combined, to give the moral foundations of a free society(which is an objective of this thesis as well), provided that Mill shares this interpretation. From Hare’s point of view, Kant could have been a rational-will utilitarian.¹²¹ The reason Hare gives for this statement is that “..a utilitarian can also prescribe that we should do what will conduce to satisfying people’s rational preferences or wills-for-ends- ends of which happiness is the sum”¹²² Furthermore, Hare thinks that even the version of the Categorical Imperative which goes “Act only on that maxim which you can at the same time will that it should become a universal law” is consistent with utilitarianism.¹²³ Hare holds this view because he thinks that acting on universalisable maxims has the following meaning: one should be able to will that only acting on the maxim he does will do the best for anyone, and impartially, for all those affected by his action. In other words, acting on universalisable maxims requires equalising one’s ends with other people’s ends, which is just the way a utilitarian would act.¹²⁴ In the Kingdom of Ends, where each one with a good will is seen as a legislator of a universal law, the moralities of all rational beings are presumed to be consistent with one another according to Kant, on Hare’s view.¹²⁵ What comes out of this, says Hare, is that the ends of others are only

¹²⁰ See *ibid.*, p.3

¹²¹ See *ibid.*, p.3

¹²² See *ibid.*, p.3

¹²³ See *ibid.*, p.5

¹²⁴ See *ibid.*, p.5

¹²⁵ See *ibid.*, p.7

those which are moral.¹²⁶ To ground what he has said, Hare puts forward the claim that:

Utilitarianism is simply the morality which seeks the ends of all insofar as all can seek them consistently in accordance with universalisable maxims. (*Hare, Could Kant Have Been a Utilitarian?*, p.7)

Finally, Hare objects to those who claim that Kant could not have been a utilitarian, for utilitarians appeal to desires or preferences which are empirical, but Kant excludes all that is empirical¹²⁷. He argues that such a claim will not hold, due to two reasons: 1- Empirical aspects are excluded only from the *formal* part of Kant's enquiry, but have to be admitted into any application to concrete situations of the form of moral reasoning which the enquiry generates,¹²⁸ 2- A utilitarian could also divide his enquiry like Kant did; and he should do so, in order to be clear in his position; because a certain concept, for instance, the concept of moral choice, is to be explained through the logical properties of that concept, though what people prefer is an empirical matter.¹²⁹

To sum up, Hare's purpose is to show that Kant's "Grounding the Metaphysics of Morals" has to be read more carefully, in order to see that Kant's moral philosophy contains some utilitarian elements and that it is not fundamentally against utilitarianism, as most deontologists and contractualists claim.¹³⁰ In short, what I

¹²⁶ See *ibid.*, p.7

¹²⁷ See *ibid.*, p.9

¹²⁸ See *ibid.*, p.9

¹²⁹ See *ibid.*, p.9

¹³⁰ See *ibid.*, p.12

have in mind is that the arguments Hare gives about the moral foundations of a free society are quite consistent with the view that Kant plus Mill provide sufficient background for such a society.

Since the moral foundations are more or less established, we will take up the political implications of Kant's philosophy, including Rousseau's influence on him. Then, the relationship between Rousseau and the republican tradition will be discussed. The republican understanding of freedom, namely 'freedom as non-domination', will be considered in this discussion as well, in order to strengthen the view that both 'freedom as non-domination' and 'freedom as non-interference' are equally important for constituting the political foundations of the desired free society. The subsequent step will be to give brief explanations of the different models of democracy and to decide which model(s) among all is/are the best; while arguing that democracy is the best of all political systems, and thus deserves to be protected against any arbitrary threat.

The summary of Kant's political philosophy will start with his thoughts on freedom of speech and discussion, and the public use of reason. On Kant's view, one must have courage to use his own understanding; if one does not have this courage, then he has a self-imposed immaturity, which he has to overcome through being 'enlightened'.¹³¹ The least harmful of all types of freedom, argues Kant, is the

¹³¹ See Kant, I. "An Answer to the Question: What is Enlightenment?". In *Perpetual Peace and other Essays*, trans. Ted Humphrey, Indianapolis: Hackett Publ.Co., 1992, p.41

freedom to use reason publicly in all matters.¹³² To have pervasive restrictions on such freedom of men will stop enlightenment, according to Kant.¹³³ The following statement in Kant's text (What is Enlightenment?) is quite important to make sense of, since it will help us make a distinction between public and private spheres: "Argue as much as you want and about what you want, but obey!"¹³⁴ Why is it necessary to make a distinction between public sphere and private sphere? The answer to the question is that individuals can not, and should not be able to exercise liberties equally in both domains. There are certain principles and/or rules which everyone acts in accordance with, in his private life and in his relations with others; but those principles sometimes differ when public affairs, that is to say, the relations of citizens to the governing body and/or the legislative body are the case. For instance, if one is a military officer, and the regulations of the army require that every officer wears a uniform, he must; no matter how much he hates uniforms, and no matter how his style is. Otherwise, he should resign from his duty. Again, one might—as a scholar—use his reason publicly, through writing, expressing and/or publishing his opinions, and might—for example—question the utility of a particular law, or the maxim according to which that law is prescribed. However, he must obey the law, even when he criticises it, until it is altered by the legislative body. This example applies to the answer given to the ultimate question of this thesis, too: One might argue against democracy as a political system as much as one wants, and may furthermore have the right to free association; but the democratic government-by

¹³² See *ibid.*, p.42

¹³³ See *ibid.*, p.42

¹³⁴ See *ibid.*, p.42 and p.46

virtue of exercising its executive power- might prevent him and the organisation established by him from destroying democracy. As a result, just like other political systems, democracy-through its execution of laws- has the right to prohibit individuals and organisations, whose actions constitute disobedience of the laws, in order to destroy peace and/or to deprive other individuals of their liberties and rights.

The summary of Kant's political philosophy will continue with considering his views on liberties and rights, and on the forms of government. From Kant's point of view, by entering into civil society, each person gives every other- by virtue of the sovereignty that has power over them both- the requisite security.¹³⁵ Every just constitution, claims Kant, as far as the persons who accept it are concerned, has to fulfill the following standards¹³⁶:

- “1- conforming to the civil rights of men in a nation,
- 2- conforming to the rights of nations in relation to one another,
- 3- conforming to the rights of world citizenship, sofar as man and nations stand in mutually influential relations as citizens of a universal nation of men.” (*Kant, Perpetual Peace, p.112*)

Any nation/society having physical influence on another, or violating even one of these principles is to be considered in a state of nature.¹³⁷ The two points made by Kant remind of Rousseau, who wrote in “The Social Contract”:

¹³⁵ See Kant, I. “To Perpetual Peace: A Philosophical Sketch”. In *Perpetual Peace and other Essays*, trans. Ted Humphrey, Indianapolis: Hackett Publ.Co., 1992, p.112

¹³⁶ See *ibid.*, p.112

¹³⁷ See *ibid.*, p.112

"Each one of us puts into the community his person and all his powers under the supreme direction of the general will; and as a body, we incorporate every member as an indivisible part of the whole" (*Rousseau, The Social Contract*, p.61)¹³⁸

In other words, Rousseau would agree with Kant on the points he has so far made. Furthermore, Kant argues that a republican constitution is to be in compliance with the following: (i) every member of society-as an individual- is free¹³⁹, (ii) everyone depends on a single, common (source of) legislation¹⁴⁰, (iii) everyone is considered 'equal' in terms of liberties and rights.¹⁴¹ These three features, in a different expression, could also be seen in "The Social Contract":

"...the advantages to be benefited after the social contract are; (i) an absolute giving of self and rights to a community where conditions are the same for everybody, and no single person can change them on behalf of others; (ii) rights being equal for all, and not left to individuals, since the association resulted by the social contract turns out to be meaningless in case that they were; and (iii) each one balancing his loss by what he gains, and even gains more power than he gives up, in terms of freedom and rights..." (*Rousseau, The Social Contract*, pp.60-61)

So, it could be stated that Kant shares Rousseau's understanding of 'republic' or 'body politic'.

Now, the terms in which Kant thinks a nation is examined will be outlined. According to Kant, nation is examined in terms of: A) Forms of Sovereignty: When only one person possesses the sovereign power, the form of government is called

¹³⁸ See Rousseau, J.J. "The Social Contract", trans. Maurice Cranston, England: Penguin Classics, 1968, p.61

¹³⁹ See Kant, I. "To Perpetual Peace: A Philosophical Sketch". In *Perpetual Peace and other Essays*, trans. Ted Humphrey, Indianapolis: Hackett Publ.Co., 1992, p.112

¹⁴⁰ See *ibid*, p.112

¹⁴¹ See *ibid*, p.112

autocracy/monarchy. When several in association possess the sovereign power, it is aristocracy. Finally, when all members/individuals making up the civil society possess the sovereign power, it is democracy.¹⁴² B) Form of Government: In a Republican government, political and legislative powers are separated. In a despotic government, however, it is possible to take hold of public will and use it as one's own, private will, which might end up in an independent execution of laws.¹⁴³ On the basis of these distinctions, Kant argues that democracy is necessarily despotic, since it sets up an executive power in which all citizens make decisions about and against one another, hence the general will contradicts both itself and freedom.¹⁴⁴ This seems to be a critique of Rousseau's view, but Kant agrees with him on the fundamentals of what constitutes a republic or democracy. The republican constitution, on Kant's view, is the only one wholly compatible with the rights of men, but it is also the most difficult to establish, and still harder to maintain.¹⁴⁵ What Kant has argued so far seems –in some respects– consistent with Rousseau's conception of the different forms of government; a detailed analysis of which could be seen in BOOK III of “The Social Contract”¹⁴⁶.

¹⁴² See *ibid.*, pp.113-114

¹⁴³ See *ibid.*, p.114

¹⁴⁴ See *ibid.*, p.114

¹⁴⁵ See *ibid.*, p.124

¹⁴⁶ See Rousseau, J.J. *The Social Contract*, trans. Maurice Cranston, England: Penguin Classics, 1968, pp.101-48

Having mentioned Kant's understanding of the forms of government, it is now time to discuss the relations of morality to politics and "public right"¹⁴⁷. A moral politician, claims Kant, is the one who interprets the principles of political prudence that they can be coherent with morality¹⁴⁸, and the one who behaves- in problems of practical reason- in accordance with the Categorical Imperative, regardless of what its end may be.¹⁴⁹ When interpreted as "...the imperative that there should be no sectional associations in the state, and that every citizen should make up his own mind for himself"¹⁵⁰, the 'General Will', which Rousseau thinks is the necessary condition for the continuation of the social contract¹⁵¹, might be said to influence Kant's self-legislating (autonomous) individual; and his conception of a moral politician, too.

The summary of Kant's political philosophy will end after the two principles, under which morality and politics are claimed to agree, are given. Being an ethical and juridical principle, since it both belongs to the domain of virtue and pertains to the rights of men¹⁵², The Transcendental Formula of Public Right goes: "All actions

¹⁴⁷ See Kant, I. "To Perpetual Peace: A Philosophical Sketch" _ In *Perpetual Peace and other Essays*, trans. Ted Humphrey, Indianapolis: Hackett Publ.Co., 1992, pp.135-39

¹⁴⁸ See *ibid*, p.128

¹⁴⁹ See *ibid*, p.132

¹⁵⁰ See Rousseau, J.J. *The Social Contract*, trans. Maurice Cranston, England: Penguin Classics, 1968, p.73

¹⁵¹ See *ibid.*, p.61

¹⁵² See Kant, I. "To Perpetual Peace: A Philosophical Sketch" _ In *Perpetual Peace and other Essays*, trans. Ted Humphrey, Indianapolis: Hackett Publ.Co., 1992, p.135

that affect the rights of other men are wrong if their maxim is not consistent with publicity”¹⁵³ The other principle, known as The Transcendental(and Affirmative) Principle of Public Right, dictates the following: “All maxims that require publicity- in order not to fail of their end- agree with both politics and morality”¹⁵⁴

Now, what is ‘public right’, and how is it related with our discussion? To answer the question requires us to take up Kant’s ‘Doctrine of Right’. The Doctrine of Right is about the rights which would be compatible with the moral law, in other words, would be universalisable: any right one claims for oneself must be possible as a right granted to all.¹⁵⁵ Although there is only one basic right for Kant-which is freedom- the principle of universalisability has a further implication, that is, equality of freedom under the law is guaranteed, since any law must apply to all.¹⁵⁶ Apart from compatibility of rights with the moral law, the Doctrine of Right focuses on social contracts as well.¹⁵⁷ According to Kant, a state is legitimate if people would freely participate in a social contract as equal citizens (which is also in agreement with his idea of autonomy). Moreover, the social contract for a state is necessary on Kant’s view, because the rights of individuals as free, equal, and independent persons are recognised only when they sign up/ freely enter into the contract.¹⁵⁸ So, public right

¹⁵³ See *ibid.*, p.135

¹⁵⁴ See *ibid.*, p.139

¹⁵⁵ See Kitcher, P. “Immanuel Kant”. In *The Blackwell Guide to the Modern Philosophers: From Descartes to Nietzsche*, ed.Steven M.Emannuel, Oxford: Blackwell Pbl.Ltd., 2001, p.250

¹⁵⁶ See *ibid.*, p.251

¹⁵⁷ See *ibid.*, p.251

¹⁵⁸ See *ibid.*, p.251

should be compatible with both the moral law and politics. In other words, public right can be claimed by any free citizen who is a part of the new constitution resulted by the social contract. It would, under these conditions, be reasonable to state that Kant's 'public right' is influenced by Social Contract doctrines, as well as most of his political philosophy.

Since Kant's political philosophy is more or less summarised, including some of Rousseau's influences; it is a good idea to focus on the republican tradition-of which Rousseau is an important part- but more than that, on the republican concept of freedom, that is, freedom as non-domination.

What is the 'republican tradition'? The 'republican tradition' refers to a tradition which had its origins in Classical Rome, and which provided a language dominating the politics of the modern West, while it also had a particular salience during the English Civil War, or in the period leading up to the French and American Revolutions.¹⁵⁹ However, I intend to focus on Rousseau's influences on republican thought. The 'General Will' doctrine, which Rousseau thought was the public interest of the citizens acting as a legislative sovereign assembly. According to Rousseau, moral and civil liberty could only be promoted within states whose members obeyed the laws they prescribed for themselves. In other words, for liberty to exist, sovereignty should not be of the form of a rigid/authoritarian mastery; on the

¹⁵⁹ See Pettit, P. *Republicanism: A Theory of Freedom and Government*. Oxford: Clarendon Press,

contrary, not being ruled by and/or subject to a rigid/authoritarian master is a necessary condition for liberty as 'non-domination'.

Pettit, a contemporary political philosopher who has important reflections on republican thought, thinks the motto of republicanism could be the following: "...Being unfree does not consist in being restrained; on the contrary, the restraint of a fair system of law- a non-arbitrary regime- does not make one unfree."¹⁶⁰ That is to say, freedom requires the capacity to stand eye-to-eye with your fellow citizens, in a shared awareness that nobody-in the society- has a power of arbitrary interference over another.¹⁶¹ However, adds Pettit, while defending republican freedom-which is, in some respects, a communitarian ideal- should not be confused with communitarianism, since it is compatible with pluralistic forms of society.¹⁶² The reason why Pettit warns us is that in communitarianism, the communal *belonging* to society is considered more important than individual freedom.¹⁶³

In addition, Pettit criticises Berlin's distinction of negative and positive liberty. After summarising Berlin's 'freedom from'-which he calls 'freedom as non-interference'-and 'freedom to', and mentions Berlin's classification of Mill, Bentham, Constant, De Tocqueville under 'freedom from' and Kant, Rousseau, Hegel under 'freedom to', Pettit points out that this distinction has not served us well in

¹⁶⁰ See *ibid.*, p.5

¹⁶¹ See *ibid.*, p.5

¹⁶² See *ibid.*, p.8

political thinking.¹⁶⁴ What fills the philosophical gap, on Pettit's view, is a third conception of freedom, which is the republican conception, namely, 'freedom as non-domination'.¹⁶⁵ Within the republican context, democratic participation may be essential to the republic, but that is because it is necessary for promoting the enjoyment of freedom as non-domination, not because of its independent attractions, as Pettit argues: not because freedom, as a positive conception would suggest (he refers to Berlin's 'freedom to'), is nothing more or less than the right of democratic participation.¹⁶⁶ What is more, direct democracy, as we shall see later, is often bad in a republican constitution, since it may ensure the tyranny of the majority according to Pettit.¹⁶⁷

Despite the fact that Pettit finds it difficult to grasp how and why 'freedom as non-interference', that is, the conception of freedom adopted by liberals, replaced 'freedom as non-domination', the republican freedom; since Pettit holds that the latter conception is more fundamental than the former, he realises that republican tradition and liberalism share the following presumption: it is possible to organise a viable state and civil society on a basis that transcends many religious and related divides.¹⁶⁸ Liberals, who conceive liberty as 'non-interference', are analysed in two

¹⁶³ See *ibid.*, p.8

¹⁶⁴ See *ibid.*, p.18

¹⁶⁵ See *ibid.*, p.21

¹⁶⁶ See *ibid.*, p.8

¹⁶⁷ See *ibid.*, p.8

¹⁶⁸ See *ibid.*, p.8

groups by Pettit, as left-of-centre liberals and right-of-centre liberals.¹⁶⁹ Left-of-centre liberals defend that non-interference should not only be a formal value, but also an effective one; and that equality and elimination of poverty should be granted.¹⁷⁰ Right-of-centre liberals, on the other hand, hold that non-interference as a formal and legal reality, once it is established, is sufficient.¹⁷¹

However, Pettit warns us not to confuse liberalism with libertarianism, since libertarianism is a view that reduces people to an aggregate of atomised individuals who have no collective identity,¹⁷² and reduces the state to an apparatus for accommodating individuals in the pursuit of their atomised concerns.¹⁷³ The model libertarianism suggests is an aggregate of individuals and apparatus for ensuring their individual satisfaction.¹⁷⁴ In some respects, this model might remind one of Mill, but it would be unfair to simply charge Mill with libertarianism. The political model for an ideal free society-within the context of this thesis- is not a reductionist one like libertarianism, so it is a good idea to state, at this point, that to defend the right of democracy to protect itself does not necessitate adopting a libertarian model of society.

¹⁶⁹ See *ibid.*, p.9

¹⁷⁰ See *ibid.*, p.9

¹⁷¹ See *ibid.*, p.9

¹⁷² See *ibid.*, p.9

¹⁷³ See *ibid.*, p.9

¹⁷⁴ See *ibid.*, pp.9-10

After all these, a significant question still begs an answer: What is the difference between freedom as non-domination and freedom as non-interference? To answer the question, the concepts 'domination' and 'interference' should be explained: One suffers domination to the extent that one has a master.¹⁷⁵ Non-interference is enjoyed when the master fails to interfere.¹⁷⁶ Domination can occur without interference, and vice versa; but the capacity to arbitrarily interfere is enough for the violation of individual freedom.¹⁷⁷ From my point of view, these two conceptions of freedom should be equally treated, although freedom as non-domination is argued to be more fundamental by Pettit. The arguments Pettit gives for this view are plausible, and necessary to take into account, but the liberal society desired in this thesis requires that both non-domination and non-interference are to be granted. In other words, a social and political model-in which none of the individuals are dominated by a master, and no individual has the right to interfere or threaten others' liberties and rights- is the ideal that this thesis tries to attain. Such a society would also be democratic, a society in which democracy would be enjoyed as a means of furthering liberty¹⁷⁸ - both liberty as non-domination and liberty as non-interference.

Now that the main features of the republican understanding is briefly explained, it is time to give the outlines of some models of republicanism and democracy, and also some models, which Popper thinks, would lead to totalitarianism. The models will be outlined in terms of their principles of justification, key features, and their

¹⁷⁵ See *ibid.*, p.22

¹⁷⁶ See *ibid.*, pp.22-23

¹⁷⁷ See *ibid.*, p.23

general conditions. The first model is 'Classical Democracy'. In Classical Democracy, citizens should enjoy political equality in order that they are free to rule and to be ruled in turn.¹⁷⁹ The key features of Classical Democracy are the following: 1- Citizens participate directly in legislative and judicial functions, 2- There are no distinctions of privilege to differentiate ordinary citizens and public officials, 3- Terms of office are short for all, 4- Assembly of citizens possess the sovereign power.¹⁸⁰ The general conditions of this model are: 1- Small city-state with agricultural background, 2- Slaves exist, and this creates free time for citizens, 3- Citizenship is restricted to relatively small numbers, 4- The domestic service and labour of women free men for public duties.¹⁸¹ This model had been seen in Ancient Greek city-states, and was criticised deeply in Plato's "The Republic".

The second model is 'Protective Republicanism', a model in which political participation is an essential condition of personal liberty, and in which citizens will be dominated by others unless they rule themselves.¹⁸² The key features of Protective Republicanism are as follows: 1- There is a balance of power between the people, aristocracy and the monarchy linked to a mixed government, with provision for all leading political forces to play an active role in public life, 2- Rule of law is essential, 3- Competing social groups exist, promoting and defending their interests,

¹⁷⁸ See *ibid.*, p.30

¹⁷⁹ See Held, D. *Models of Democracy*. 2nd edition, England: Polity Press&Blackwell Pbl.Ltd., 1997, p.33

¹⁸⁰ See *ibid.*, p.33

¹⁸¹ See *ibid.*, p.33

¹⁸² See *ibid.*, p.55

4- Liberties of speech, expression and association.¹⁸³ The general conditions in Protective Republicanism are: 1- A small city community is envisaged, 2-An intensive conflict among rival political associations, 3- A society of independent artisans and traders, 4-Women, labourers, and 'dependents' are excluded from politics.¹⁸⁴

The third model is 'Developmental Republicanism', in which citizens must enjoy political and economic equality in order that nobody can be the master of another and all can enjoy equal freedom and development in the process of self-determination for the common good.¹⁸⁵ The key features of Developmental Republicanism are: 1- The division of execution and legislative functions, 2-Citizens participate directly in public meetings to constitute the legislature, 3- The executive is appointed either by lot or by direct election.¹⁸⁶ The general conditions of this model are: 1-A small, non-industrial community, 2-Citizenship depends on holding property, which entails a society of independent producers, 3-Women are in domestic service for freeing men to participate in public duties and politics.¹⁸⁷

The fourth model to outline is 'Protective Democracy', in which citizens require protection from the governors, as well as from each other, in order to ensure that those who govern pursue policies that are commensurate with citizens' interests as a

¹⁸³ See *ibid.*, p.55

¹⁸⁴ See *ibid.*, p.55

¹⁸⁵ See *ibid.*, p.61

¹⁸⁶ See *ibid.*, p.61

¹⁸⁷ See *ibid.*, p.61

whole.¹⁸⁸ The key features of this model are: 1- Sovereignty rests in the people, and the representatives-through elections- exercise state functions legitimately, 2- State powers must be impersonal (that is, legally circumscribed), and divided among the executive, the legislative and the judiciary, 3- Constitutionalism is central to guarantee freedom from arbitrary treatment and equality before the law, in the form of political and civil liberties or rights, for example, free speech and expression, freedom of belief, voting, association, etc., 4- The state and the society are separated: the scope of state action is to be tightly restricted to the creation of a framework which allows citizens to pursue their lives free from any risk of interference.¹⁸⁹ The general conditions of Protective Democracy are the following: 1-The development of a politically autonomous civil society, 2- The means of production may be owned on a private basis, 3-Competitive market economy, 4- Extended territorial reach of the nation-state, 5- Patriarchal family.¹⁹⁰ Especially on the basis of its key features, I think Berlin would favour this model, parallel to his view that negative liberty-that is, liberty as non-interference- is a more realistic ideal, which makes more room for plurality in the society. However, I am reluctant to favour this model as a whole, despite the fact that pluralism is an ideal I share with Sir Berlin. The reason for my unwillingness is that this model presupposes a patriarchal family, but the free society desired in this thesis is one in which men and women have equal powers, as well as equal liberties and rights.

¹⁸⁸ See *ibid.*, p.99

¹⁸⁹ See *ibid.*, p.99

¹⁹⁰ See *ibid.*, p.99

The fifth model, Developmental Democracy has the following principles: 1- Participation in political life is necessary not only for the protection of individual interests, but also for the creation of an informed, committed and developing citizenry, 2- Political involvement is essential to the 'highest and harmonious' expansion of individual capacities.¹⁹¹ The second principle reminds both of Mill and Berlin- Mill, in the sense that he emphasised the free development of individuality in his work "On Liberty", and Berlin, because this principle seems to imply his 'positive liberty', that is, 'freedom to'. The key features of Developmental Democracy are: 1- The Government is representative, either through elected leadership or regular elections, 2- Constitutional checks exist, in order to secure limitations on and divisions in state power and to ensure the promotion of individual rights, 3- Public assembly is clearly demarcated from public bureaucracy, that is to say, the functions of the elected are separated from those of the specialist administrator, 4- Citizens involve in different branches of government through the vote, extensive participation in local government, public debates and jury service.¹⁹² What follow are the general conditions of Developmental Democracy: 1- Independent civil society with minimum state interference, 2- Competitive market economy, 3- Women have political emancipation, but in general, the traditional domestic division of labour is preserved, 4- System of nation-states with developed relations among states, 5- Private possession and control of the means of production alongside experiments with 'community' or cooperative forms of ownership.¹⁹³

¹⁹¹ See *ibid.*, p.116

¹⁹² See *ibid.*, p.116

¹⁹³ See *ibid.*, p.116

Despite the fact that this model is quite close to the desired model in this thesis, the third general condition seems tackling, since the free society desired is one in which domestic and public affairs among men and women are shared equally, as formerly expressed in different words.

Now, the outlines of the sixth and seventh models, 'Socialism' and 'Communism', within the context of 'direct democracy', will be given. The principles of justification for 'Socialism' and for 'Communism' are in common: 1- The 'free development of all' can only be achieved with 'the free development of each', 2- Freedom requires the end of exploitation and ultimately complete political and economic fairness; only equality can secure the conditions for the realisation of the potentiality of all human beings so that 'each can give' according to his ability and 'receive what they need'¹⁹⁴ The key features of 'Socialism', different from those of 'Communism', will be stated in the following way: 1- Public affairs are to be regulated by Commune(s) or council(s) organised in a pyramid structure, 2- Government personnel, law officers, administrators are subject to frequent elections, 3- Public officers should not be paid more than the workers' wages, 4- People have militia to sustain the new political order subject to community control.¹⁹⁵ The key features of 'Socialism' are: 1- Working classes are united, and bourgeoisie is defeated, 2-Class privileges end, 3- The forces of production are substantially developed, so that all basic needs are met and people have sufficient time to pursue non-work activities, 4- State and society are integrated in a progressive way (seems

¹⁹⁴ See *ibid.*, p.152

¹⁹⁵ See *ibid.*, p.152

to entail a unification of executive, legislative and the judicial functions of the government).¹⁹⁶

The key features of 'Communism', on the other hand, are as follows: 1- 'Government' and 'politics' in all forms give way to self-regulation, 2- All public affairs are governed collectively, 3- Consensus is a decision principle on all public questions (this might lead to the 'tyranny of the majority'), 4- The remaining administrative tasks are distributed by rotation or election, 5- All armed and coercive forces are replaced by self-monitoring.¹⁹⁷ And finally, the general conditions of Communism: 1- All remnants of classes disappear, 2- Scarcity and private possession of the means of production are abolished (leads to crushing the individual right to hold property), 3- Markets, exchange and money are eliminated (this is a 'closed' society- in the sense Popper had used the term- with less well-developed international relations with other nations), 4- The traditional social division of labour ends.¹⁹⁸

After all these outlines of different models for social and political order, it is possible to say- from a Popperian perspective- that 'Socialism' and 'Communism'- as models- can not be politically superior to totalitarianism; because both of these models have characteristics, which could be claimed, interpret democracy as 'the tyranny of the majority'. What is more, both models presuppose a 'closed' society-

¹⁹⁶ See *ibid.*, p.152

¹⁹⁷ See *ibid.*, p.152

as mentioned- since all relations of production and division of labour are to be based on a collective form of social life; hence, a society in which each individual shares the responsibility of, and the consequences promoted by his choices and actions with others in most cases. In other words, individuality is not specified well in any of the two models. So, it is difficult to grasp how the individual and/or individuality is freely developed; which was said to be the precondition of 'free development of all'. It is quite possible, too, to end up in a tyranny-regardless of whether or not it is tyranny of majority- in both 'Socialism' and 'Communism', given their key features. However, as mentioned above, these are all Popper's views; and his claims of 'closed' society and totalitarianism do not necessarily follow from a collectivist economical model. Besides, Popper's conceptions of both 'open' and 'closed' society are too narrow.

However, a combination of Developmental Republicanism, Protective Democracy and Developmental Democracy-the third, fourth and the fifth models- would promote the best political result, in terms of the enjoyment and furthering of freedom, once freedom from domination and freedom from interference are secured under laws. In other words, taking the best characters of the three classical models mentioned will add up to a political system in which neither any discrimination on the basis of sex, race, religious belief, etc., nor any arbitrary treatment by a ruler(or social class) is permitted; as long as no individual crushes any others' liberties and rights.

¹⁹⁸ See *ibid.*, p.152

Now that we have argued for democracy as the best political system and democratic construction of the society as the best model to be adopted, the legal implications of democracy will be discussed. The reason for this discussion is that taking some of the legal implications of democracy will help us strengthen the main argument of this thesis. As mentioned before, in a liberal and democratic political system, laws provide the conditions for equal sharing of liberties and rights among individuals. What is more, legislation is a fundamentally important part of democratic rule. Therefore, it will not be wrong to say that taking into account the interpretation of laws and their applications will provide the opportunity to clarify what is meant by the following: Democracy does not contradict itself, when it uses sanctions on individuals who associate for a purpose that will be conducive to laying the foundations for breaking down the machinery of democracy, that is, the legal basis for individual liberties and rights. However, this does not entail that laws should uphold the benefit of those who arbitrarily interfere with individual liberties and rights and/or abuse the power gained by election; on the contrary, laws should protect individuals, in such cases. In other words, it is the duty of the legislators to make and of the governing body to apply laws in a manner that anybody who abuses his liberties and rights and commits any act which threatens others is penalised; as mentioned at the beginning. Despite the fact that democracy has the right to use sanctions on individuals who threaten peace or act in a way that will be conducive to depriving other individuals of their liberties and rights, this does not entail that the legislative-or the executive-body may commit injustice while making or applying laws. Hence, when the elected abuses his power and crushes individual liberties and rights without any sufficient reason-for instance, due to threatening other individuals'

lives, or peace in the society, etc.- the citizens can express displeasure to the unfair exercise of power, without any violence or any other uncivilised behaviour. This is the situation which Rawls would call 'civil disobedience'. Rawls, in "The Justification of Civil Disobedience", successfully explains what 'civil disobedience to laws' means, and what is more, he gives us important clues for when to evaluate disobedience of the citizens as 'civil', as well as clues for the interpretation of 'injustice'. Therefore, it will be a good idea to consider first Rawls' arguments concerning 'civil disobedience', which Rawls thinks could be justified within democratic regimes as well. In "The Justification of Civil Disobedience", Rawls argues that civil disobedience to laws could be justified, when the principles of justice are violated by the institutions which govern.¹⁹⁹ On his view, questions of justice-if preferred- could be discussed directly by reference to the following two principles, which should be agreed on, for assigning rights and duties and for regulating distributive shares²⁰⁰: 1- Each person/individual is to have an equal right to the most extensive liberty compatible with a like liberty for all²⁰¹; 2- Social and economic inequalities are to be arranged so that they are both to everyone's advantage and attached to positions and offices open to all-which expresses the equality of opportunity.²⁰² Rawls claims that

¹⁹⁹ See Rawls, J. "The Justification of Civil Disobedience". In *Ethics and Public Policy*, ed. Tom L. Beauchamp, New Jersey: Prentice Hall, 1975, p.132

²⁰⁰ See *ibid.*, p.135

²⁰¹ See *ibid.*, p.135

²⁰² See *ibid.*, p.135

Once these principles of justice are agreed upon, men are to move to a constitutional convention in which they choose a constitution that satisfies the principles of justice. These principles should be guides for legislative body, while enacting laws. (Rawls, *The Justification of Civil Disobedience*, p.135)

However, he also emphasises that the right to make law does not necessarily imply that the decision underlying the law(s) is made rightly; and that while the citizen submits in his conduct to the judgment of democratic authority, he does not submit his judgment to it.²⁰³ The presumptions of Rawls, while thinking on civil disobedience and how it could be justified, and the conclusions he reaches, are to be summarised as follows: 1-Civil disobedience is a political act justified by moral principles, which sets the ground for a conception of civil society and the public good²⁰⁴; 2-Civil disobedience expresses disobedience to law within the limits of fidelity to law, and being a non-violent political act within a democratic society, is best understood as an appeal to the principles of justice-which are the fundamental conditions of willing social cooperation among free men²⁰⁵. 3-In general, civil disobedience should be undertaken as the last resort when all the 'standard' democratic processes fail²⁰⁶;

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"...civil disobedience should be limited to substantial and clear violations of the principles of justice, and preferably, to those which will establish a basis for doing away with remaining injustices.." (Rawls, *The Justification of Civil Disobedience*, p.140)

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The justification of civil disobedience rests on the priority of justice and the equal liberties which it guarantees (Rawls, *The Justification of Civil Disobedience*, p.143)

²⁰³ See *ibid.*, p.137

²⁰⁴ See *ibid.*, p.137

²⁰⁵ See *ibid.*, pp.138-39

²⁰⁶ See *ibid.*, p.139

6-

“..There is no danger of anarchy as long as there is a sufficient working agreement in men’s conceptions of political justice and what it requires. That men can achieve such an understanding when the essential political liberties are maintained, is the assumption implicit in democratic institutions” (Rawls, *The Justification of Civil Disobedience*, pp.144-45)

The reason for summarising the arguments that Rawls gives is that his arguments help us to make a distinction between civil disobedience as a result of injustice of the executive or the legislative body-within a democratic political system- and rebellion against an established order. They are also significant to mention, for the emphasis Rawls puts on justice, which every legislative system-by virtue of its enactment of laws- claims to promote. Since this thesis argues for the right of democratic institutions to use sanctions on those who threaten the peace in the society-via associating and acting for the destruction of democracy, hence the political and legal basis for the furthering of individual liberties and rights; the criteria must be specified, for distinguishing actions which express a displeasure to the unfair exercise of power by the elected, from those which turn out to be ones that are against the continuation of a democratically constructed political system. However, the justification given by Rawls-in favour of civil disobedience- is to be questioned, before going any further in our discussion: 1- Who is the judge of any ‘violation’ of justice within the democratic society- justice being the first value of institutions in a reasonably just democracy²⁰⁷? 2- Does Rawls’ justification of civil disobedience to laws presuppose that anyone on his right mind is capable of evaluating whether or not the institutions representing the democratic legislative power are committing into abuse of their power via their injustice while enacting law(s)? 3- Supposed that the

²⁰⁷ See *ibid.*, p.142

answer to the previous question is affirmative, does not this assign human reason a universally authoritative function? 4- Does Rawls share the view that justice could be roughly said to be: 'the fair distribution and sharing of resources and goods, as well as of liberties and rights, among the members of the civil society'? Although Rawls does not answer questions in a satisfactory way, it will not be wrong to say that he would agree with the following view: In a 'just' democratic regime, the individuals who intend to undermine the democratic legislation via abusing the liberties and rights preserved for all individuals of the society-through free association or expressing their thoughts- have no point in acting so, unless they are insane or wicked.

As mentioned above, criteria must be specified, for distinguishing actions which express a displeasure to the unfair exercise of power by the elected, from those which turn out to be ones that are against the continuation of a democratically constructed political system. To specify such criteria requires first to interpret and enact laws in a way that will neither result in the destruction of the government institutions, nor in a coercion of any individual of his basic liberties and rights. However, for the well-being of the community on the whole, and under extraordinary conditions such as war, natural disaster, etc, those 'basic' liberties and rights can be postponed for a limited period of time, even in democracies. I believe that giving some of the specific cases, in which Oliver Wendell Holmes (1841-1935) had been on the Supreme Court, will help in specifying the criteria for judging what kind of actions go beyond the scope of basic human rights, and which actions turn out to be the ones that are against the continuation of democracy. Now, who is Oliver W. Holmes; and why do

his dissents help us in specifying the criteria to distinguish actions which display rebellion to an established order from those which do not at all go beyond the scope of individual liberties and rights? Oliver W. Holmes, that is, "Justice" Holmes, had been an influential writer-philosopher, and lawyer, by his opinions and dissents in the civil liberties cases in the United States.²⁰⁸ In the relation of state power to intellectual freedom, his position was clearly the following: Individual expression of thoughts is an inseparable part of basic liberties and rights, but the survival of the state is a condition precedent to the existence and furthering of citizens' liberties and rights; hence-for example- free speech is not to be regarded as embodying any absolute guarantee.²⁰⁹ However, Holmes was willing to safeguard individuals against legislative or administrative invasion, unless that invasion were necessary for the well-being of the whole community.²¹⁰ What is more, Holmes is claimed to be in a sequence of tradition from Mill's "On Liberty". Such a claim, I think, results from the belief that Holmes' dissents-in general-are backed up by Mill's following words:

"...Whenever there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality and law" (*See Mill, On Liberty, p.18*)

Since this thesis tries to attain the ideal of a free society in which every individual's liberties and rights are safeguarded, mentioning Holmes' dissents will be helpful to

²⁰⁸ See *The Mind and Faith of Justice Holmes*. ed. Max Lerner, New York: The Modern Library, 1948, p.289

²⁰⁹ See *ibid.*, p.289

²¹⁰ See *ibid.*, pp.289-90

see when the protection of the state is necessary-against any threat- and when individuals are to be protected against administrative or legislative invasion.

The first case- the one between the U.S. and Schenk, 1919- so titled as 'Clear and Present Danger',²¹¹ addresses to a fundamentally important issue, which is freedom to speak. Holmes' doctrine of 'clear and present danger' asserts that speech is not to be banned merely because the words are considered objectionable or because they may have some secondary consequences which are not at all desirable.²¹² The criteria for words- which create a clear and present danger- has the following three elements, on Holmes' view:

First, the words themselves must have a direct relation to the substantive evil; second, the evil itself must be on which Congress has power to legislate; third, the context or situation must be such that the speech results in a clear and immediate danger, which frustrates the purposes of the Congress. (*"The Mind and Faith of Justice Holmes"*, p.293)

In a very clear expression, what Holmes means is that free speech is not an absolute value, to be guaranteed under every circumstance and at any social cost.²¹³ One simply is not free to shout "Fire!" in a crowded theatre, and there are such cases and situations in which words can be evaluated as dangerous as the acts, within the contexts created by those situations.²¹⁴ So, freedom of speech is to be considered in different ways in different circumstances; and the legislative body should uphold the benefit of the whole community, in judging acts.

²¹¹ See *ibid.*, p.292

²¹² See *ibid.*, p.292

²¹³ See *ibid.*, p.293

²¹⁴ See *ibid.*, p.293

Although Holmes held the 'Clear and Present Danger' doctrine, this does not necessarily entail that he was against any kind of civil liberty. On the contrary, in most cases concerning civil liberties, and with regard to privacy and freedom of the person, Holmes was willing to safeguard individuals against legislative and/or administrative invasion, unless that invasion were necessary for the well-being of the whole society.²¹⁵ The case between the United States and Rosika Schwimmer (1928), known as "Freedom For The Thought That We Hate",²¹⁶ will be a good example to give, in order to support this claim: In this case, Holmes defended the right of a pacifist-Rosika Schwimmer-to become naturalised as an American citizen; though he himself had been an anti-pacifist.²¹⁷ He considered the decision of the federal district court-which denied Schwimmer's application for citizenship on the ground that she refused to bear arms and fight for the U.S.- as an attempt to use the national power over naturalisation as a punitive measure against unpopular opinion²¹⁸; and he had written his dissent, urging

"...not free thought for those who agree with us but freedom for the thought that we hate.." (*"The Mind and Faith of Justice Holmes"*, pp.325-26),

a dissent which qualified Schwimmer for citizenship.²¹⁹

²¹⁵ See *ibid.*, pp.289-90

²¹⁶ See *ibid.*, p.325

²¹⁷ See *ibid.*, p.325

²¹⁸ See *ibid.*, p.325

²¹⁹ See *ibid.*, p.326

The next, and the last case to consider is the one between the U.S. and Toledo Newspaper Company (1918), known as “The Judge and The Editor”²²⁰ Despite the fact that

“...freedom of the press does not imply the right to frustrate and defeat the discharge of those governmental duties, upon the performance of which the freedom of all, including that of the press, depends” (*“The Mind and Faith of Justice Holmes”*, pp.332),

and that Holmes did not like newspapers and detested the style adopted by the reporters; the dissent was on the side of Toledo Newspaper Company, the editor of which was accused of violating the principle mentioned. Having believed in the importance of the function that newspapers had in community²²¹, Holmes does not find anything violating the procedure, or the ongoing of the legislative system. A part of his dissent goes:

“....I confess that I can not find in all this or in the evidence in the case anything that would have affected a mind of reasonable fortitude, and still less can I find there anything that obstructed the administration of justice in any sense that I possibly can give to those words...” (*“The Mind and Faith of Justice Holmes”*, pp.336)

,where ‘those words’ refers to what the editor of Toledo Newspaper Company had written and published.

The way in which Justice Holmes had interpreted positive laws –in most cases-is such that the enactment of the particular law(s) neither allows any destruction of the ultimate institutions providing the basis for the well-being of the society, and for the continuation of a democratic legislation, nor does it penalise any of the individuals, whose actions do not dispay any disobedience and /or rebellion to laws. This is the

²²⁰ See *ibid.*, p.332

²²¹ See *ibid.*, p.332; see also pp.333-34, for urther details of the case.

interpretation of laws with which I agree fully, due to the belief that democratic legislation is the best among all legislative systems, since it safeguards the legal-as well as the civil and political-basis for the well-being of maximum number of individuals who are members of society.

CONCLUSION

Now that the moral foundations of the best political system, democracy, is more or less established, and some of its legal implications are considered, it is hoped that the ideal of free society and pluralism are attained: A society in which (i) every individual is held responsible for his actions, (ii) every individual's liberty and rights are specified, and secured by laws, (iii) no discrimination on the basis of sex, race, or any other difference among the members of the society is allowed, nor any inequality in the division of labour and distribution of power.

Nevertheless, the following three issues could have been discussed in more detail:

1-The dichotomy between Popper and Plato, arising as a result of Popper's attacks on historicism and on Plato's social and political philosophy, 2- Berlin's criticism of Kant, and my own criticism of Berlin, 3-The claim that Kant could have been a utilitarian since there were utilitarian elements in Kant's philosophy. First, Popper-in his "The Open Society and Its Enemies"- is believed to apply his "falsificationist" method on social philosophy; and to express that he is against offering social and political models as could be seen in Plato's "The Republic". As mentioned before, his 'piecemeal social engineering' does not go beyond analysing the principles of democratic social reconstruction. What Popper thinks is that adopting a prophetic attitude about the course of history has no scientific basis, and will not do us much in human progress. In spite of my agreement with Popper on his liberal views, and on his thought that historicism has no scientific grounds-due to its prophetic attitude and its claims to have found the 'laws of history'- I think that he could at least have given

some clues about the model and/or the conditions under which the 'open' society he envisaged would be realized. In other words, Popper would not fall into a conflict with his views if he had given a "falsifiable" outline of the 'ideal' conditions under which he thought his 'open' society would flourish. However, introducing these issues into the explanation of the dichotomy between Popper and Plato would lead us to go beyond the scope of our original discussion, which would not-at all- serve our purpose in showing that democracy does not become totalitarian when it uses sanctions on individuals who abuse their liberties and rights in a way to deprive others of theirs.

Second, one of Berlin's criticisms of Kant has been claimed not to be well justified. Although the reasons that have been given for criticising Berlin might be seen plausible, they could also be pointless, once it is proven that they are based on misunderstanding Berlin. Nevertheless, it is still possible to think that Berlin's classifying Kant under his 'negative liberty' domain, and his criticism of Kant's free individual are not proper, because Berlin bases his explanations and criticisms on the small pieces he picks out of Kant's ethical theory; rather than evaluating those pieces within the context of Kant's philosophy as a whole.

Third, the claim that Kant could have been a utilitarian since his philosophy contains utilitarian elements is one that has been quite helpful through my inquiry, in showing that combining Kant's and Mill's theories would give the best result in constituting the moral foundations of the politically free society that has been

desired. What have not been emphasised sufficiently could be the following: 1-The utilitarian elements in Kant's philosophy were not specified as clearly and distinctly as they could have been, hence, were not discussed in detail; 2- R.M. Hare is not the only reference to apply to, concerning the claim that Kant could have been a utilitarian, although-I think- his work is *necessary* to consider; because "Could Kant Have Been a Utilitarian?"²²² is quite an important material which helps us show that the claim "Kant's and Mill's ethical theories are not as much in opposition to one another as some contractualists pretend to be"²²³ is not original to this thesis. In other words, this thesis is not the first written work in which an argument in favour of combining Kant and Mill on moral grounds is given.

After all, it is hoped that this thesis has been successful in arguing that since democracy is the political system which provides the conditions for an ideal free society, and which provides the basis for the furthering and enjoyment of liberties and rights, as well as for opinion formation and free deliberation, it is worth being protected against arbitrary threat. Therefore, democratic governments, as discussed before, have the right to use sanctions on individuals whose actions display rebellion to laws, and/or whose actions are conducive to threatening peace and the civil society. In short, exercising executive and/or legislative power on the individuals who abuse their liberties and rights in order to deprive others of theirs-even during the struggle between different political ideals- should not be seen as "the democracy paradox".

²²² See Hare, R.M. "Could Kant Have Been a Utilitarian?". In *Sorting out Ethics*. Oxford: Oxford Univ. Press, 1997- downloaded from the website: <http://www.deontology.com>

²²³ See *ibid.*, p.12

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