

1 Introduction

Both democratic theorists and democratic activists tend to think of democracy in terms of both who chooses and the processes that determine and structure how choices are made. They avoid confronting a paradox at the heart of democracy: For any democracy to remain democratic, some aspects of democracy must be beyond democracy. That is, some matters must not be allowed to be subject to ordinary democratic collective choice processes (they must remain beyond any democratic choice processes shy of consensus).

Rights can be conceived of as regions of policy space constituting shorthand consensus understandings of what should be, and is, beyond ordinary democracy. Thus, the notion of rights constitutes one boundary of legitimate everyday democratic discourse. Environmental rights are a category of human rights necessarily central to both democracy and global environmental protection and governance (earth system governance democracy).

Yet, consideration of environmental human rights has had minimal impact on thinking about earth system governance. O'Neill (2016, 170) identifies a new focus on how global environmental institutions can “protect and be guided by broader human values, rights and laws” as one of the four key missing ingredients that institutional reform in earth system governance should address. Gupta (2016, 276) argues that the “survival needs of humans should be guaranteed under human rights law” and that this objective can be subsumed under the Earth System Governance Project’s analytical heading of equitable access to subsistence goods. But the literature to date has not grappled with the establishment of rights-claims asserting a universal entitlement to the essential environmental preconditions for effective human agency. Such systems of environmental human rights directly link the policy problems of earth system governance to the capabilities of humans for engaging in democratic self-governance – and, in particular, to two of the research lenses identified in the second Earth System Governance Science Plan, namely, justice and allocation, and democracy and power (Burch et al. 2019).

The necessary body of environmental rights required by earth system governance constitutes an expansive subset of human rights, which as rights must be understood to be categorically different from what are often conceived or imagined by nature writers and moral philosophers as the intrinsic rights of nature, animals, ecosystems, landscape features, or Gaia. Recognized environmental human rights have an essentially relational character; they secure agency for every human – “the necessary conditions of human action” (Gewirth 1983, 3). Moreover, human rights “involve requirements or claims of necessary conduct on the part of other persons or groups,” imposing reciprocal ‘oughts’

addressed to others as ‘musts’ (5–6). A person, therefore, has human rights when he or she can “make morally justified, stringent, effective demands on other persons” that they not interfere with his or her “having the *necessary* goods of action and that they also help him to attain these goods when they cannot be obtained” by his or her own effort (11, emphasis added). This direct connection with the necessary conditions of action, the basic requirements of human agency, is what lends human rights their universality – as against the “more restricted” objectives with which other categories of rights are connected (210).

Environmental rights, like all human rights, have multiple characteristics and vary across any number of continua. Two accounts of how human rights come to be established are the declaratory (which understands rights as being established by definitive declarations in the form of charters, constitutional provisions, or covenants) and the adjudicatory (which understands rights as established by resolution of disputes by widespread recognition of assertions of universal entitlements). If we shift our focus from human rights per se to human rights narratives, two characteristics emerge that are particularly important: the level of abstraction and the degree of reflexivity (descriptive/cognitive/behavioral). Human rights narratives, and environmental rights as a subset of human rights, can be mapped onto the conceptual spaces defined by a normative-analytical frame that incorporates all of these characteristics.

The potential contribution to emerging democratic approaches to earth system governance of both theoretical treatments of environmental rights and the real-world establishment of substantive and procedural environmental rights can be seen in the formation of international regimes and the tradition of legal restatements. Both processes are animated by the same desire to document areas of broad consensus about legitimate and desirable ends of public policy. Such searches for such consensus can be augmented through appropriate social scientific strategies and memorialized through legal processes including processes that already exist and are reasonably well understood. But consensus itself matters, as can be seen in its implications from the perspectives of history, sociology, and political science. In significant ways, reimagined versions of these reasonably well-understood processes can serve the cause of extending environmental human rights in democratic earth system governance – of developing human rights that address environmental concerns.

Unless specifically qualified, all references to rights in this Element are to real, established (workable and working) human rights. Real, established human rights “have never been a gift – not from God, nor from Nature, nor from kings, nor even from wise founders” (Epp 1998, 197) – nor, for that matter, from philosophers, or prophets, judges, or parliaments, or conferences, or

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constitutional conventions. Rather, real rights become established and are maintained only in complex political, sociological, and legal processes. Of course, they always originate in moral arguments, declarations, and judgments, but until they have an existence beyond words and imaginations, they remain merely hypothetical. To be real, rights must be so well-established that they are rarely disputed, and real rights must present socially, politically, and legally accepted bounds on what must, can, and cannot be done in the everyday lives of humans.

Moral arguments underlie all rights, and so moral arguments are also foundational for all environmental human rights. Undoubtedly, discourses about environmental ethics, nonreciprocal responsibility, rights of nature, or ecocentrism will foster values and practices compatible with greater ecological sustainability and will continue to contribute to the emergence and establishment of some types of environmental human rights. As such, those discourses will always be important to understanding the normative basis of certain rights. But claims about intrinsic rights are not a focus of analysis in this Element because real, actionable rights of the environment in general, or of any aspects of nature in particular, will always require humans to establish or abolish rights and for humans to exercise those rights. The rights of anything nonhuman require human representation – ‘rights of nature’ always means the rights of humans to represent nature and to exercise rights on behalf of nature. It may be highly desirable for humans to try to practice virtue ethics or ecological rationality or, in Leopold’s evocative phrase, to ‘think like a mountain’, but ultimately they will be unable to think like anything but human beings. The Arendtian ‘right to have rights’ is just another way to characterize human agency. It is the ability of humans to arrive at a final vocabulary about the most important relations among them (and them only). It is impossible for nonhumans to participate in that choice – and a choice is precisely what it always is. At the same time, human beings can never transcend their humanness, making true ecocentrism on the part of humans impossible. Even if it were possible, true ecocentrism would demand a degree of misanthropism that no democrat of any variety would ever find acceptable. (The most serious advocates of deep ecology have clarified what true ecocentrism would require, and it would bode poorly for eight or more billion human beings.)

How do real, established human rights come to exist and serve as crucial pillars of functioning democratic systems and, in particular, how *do* they – and how *can* they – become meaningful with respect to matters environmental, matters of earth system governance, especially for matters that have import beyond the confines of the modern nation-state? This is the question at the center of this Element.

2 A Human Rights Foundation for Democratic Earth System Governance?

Aspects of what constitutes ‘democracy’ continue to be highly contested, but the term can generally be understood to denote a system of governing activity that involves an equal and near-universal right to participate in choosing leaders or policies or otherwise making collective decisions, active participation on the basis of equal citizenship in politics and civic life, equal protection of the human rights of all people, and the rule of law in which behavioral standards and requirements apply equally to all citizens. ‘Earth system governance democracy’, in turn, denotes a (still only imaginary) system of governing activity that will meet all of these criteria along with the additional demanding expectation that it must functionally, substantively, or procedurally live up to some minimal standard of ecological rationality (Bartlett 1986, Dryzek 1987, Baber and Bartlett 2005). In both popular and theoretical understandings of democracy generally, there is an emphasis and focus, as well as a substantial theoretical and empirical literature, on voting and participation but considerably less attention to rights and the rule of law. Yet, the recognition of a body of human rights that is insulated from popular abridgment by the effective rule of law is absolutely necessary to the continued functioning of any genuine democracy and, therefore by logical extension, to any prospective conception (or any eventual performance) of earth system governance democracy. Development of both robust theories and sustainable practical experiments demands that theorists and reformers (and constructive revolutionaries) attend to the rights and rule of law foundation that democratic earth system governance must have.

It is frequently useful to distinguish substantive rights from procedural rights, and occasionally we do here, yet many procedural rights are really only elaborations, or manifestations, of substantive rights. Few if any other rights distinctions (negative/positive, primary/secondary, distributional rights/rights of distribution, etc.) are conceptually unambiguous, mutually exclusive, or collectively exhaustive either, and all tend to break down in use.

Building upon this general perspective, environmental rights can be conceived of as regions in policy spaces – opportunities, channels, and interactions with potential for policy transformation (McGee 2004, 16) – where the well-known democratic deficit in governance has not resulted in elite processes going ‘off track’ – spaces where political leaders and those they serve have not parted normative company on the subject of the environment. As a result of the existence of at least some congruence of elite and mass attitudes (Baber and Bartlett 2015), it is increasingly plausible to adopt the term ‘rights’ as a shorthand label for these areas of policy consensus about claims asserting a universal entitlement. An emerging triologue

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between democratic theory, human rights, and environmental protection has yet to transform either humanity or nature in any obvious way – perhaps because it consists largely of three relatively independent dialogues. But the development of a normative consensus on some basic environmental rights has progressed to the point that the case for environmental procedural rights is all but unanswerable and the moral argument for substantive environmental rights as essential preconditions for democratic decision-making is increasingly unimpeachable (Hayward 2000, 2016). After all, some level of consensus is necessary for the development of any ‘demos’ whatsoever (Risse 2014). As Eckersley (2004, 137) points out, the putative tension between environmentalism and democracy can readily be dispensed with in light of the fact that environmental rights (both procedural and substantive) are “designed to enhance rather than foreclose democratic debate.” The point is to “create an environmental due process that minimizes judicial involvement and broadens democratic participation.” This developing cluster of rights functions to “improve the conditions and inclusiveness” of the environmental debate by “redressing major power imbalances in political communication and representation.”

The dialogic emphasis brought to bear on environmental rights by Eckersley is particularly useful. It allows us to observe that, in this sense, environmental rights function as a sort of “final vocabulary” (Rorty 1989). These rights give us both a terminology that we no longer feel the need to define or defend and a collection of discourses in which that language allows us (sensibly and plausibly) to engage – in this case, on environmental topics (Hajer 1995, Fischer 2003). So, discussed in the literature on environmental liberalism (but not so much yet in the deliberative democratic literature) is the notion of rights as constituting the bounds of legitimate democratic discourse. Meyer (2015), for example, suggests that, although liberalism generally prioritizes the right over the good, it has not been necessary for liberalism to be neutral with respect to different goods or differing conceptions of the good. This partially explains a turn toward liberal environmentalism in the last couple of decades – a turn that Meyer argues has involved efforts to identify how a particular good such as environmental sustainability is consistent with, and likely to be fostered by, liberalism. It also suggests a pathway between environmental liberalism and the green republicanism that some of liberalism’s critics think offers the best chance “to achieve the triple bottom line of sustainable development and deal with the connected problems of economic and political inequality and ecological unsustainability” (Barry 2008, 10). Along that pathway, concepts of justice originally held by individuals become institutionalized as societal rules, some of which eventually become global norms – with the most influential ultimately finding their way into international law (Risse, Ropp, and Sikkink 1999, Sikkink 2017).

This potential for liberalism to reconcile itself to both environmental and political critics through a more robust regime of environmental rights may be the primary reason that the right to a healthy environment has gone from an idea merely articulated by Rachel Carson to a concept that is legally recognized (in either constitutional or statutory form) by most nations in the world. This development is not only a “hopeful sign for the future” (Boyd 2012, 290); it also establishes a clear and compelling agenda for the completion of the unfinished foundation of global environmental governance (Boyd 2015). On the one hand, the “good” of a healthy environment has “found its footing” as a human right because it is a necessary precondition to other “fundamental and widely recognized rights.” On the other hand, human rights are increasingly understood to be “important tools of environmental protection” in a world where poverty and dispossession force ecologically unsustainable lives on much of the world’s population in pursuit of the goods needed for survival (Conca 2015, 146).

What does it mean to conceptualize the environment as a (at least small) bundle of rights, rather than as a good? Doing so obviously moves environmental sustainability (or at least some aspects of environmental sustainability) beyond the category of a good. If one conceives of rights as the basic tools through which a society pursues justice, democracy would seem to be their constant companion in as much as no ‘undemocratic’ agent of justice could ever be worthy of the name (Dryzek 2016).

So, it would appear that if human rights are to answer the call to environmental protection, that answer will be couched (at least initially) in the familiar language of political liberalism. The irony here is hard to miss. If it is the concepts and terminology of free enterprise and the Washington Consensus that we hope to use to reverse the ecological damage of breakneck industrialization and to avoid the worst environmental outcomes of globalization, perhaps we have given up the game (and many potential spectators) before play has even begun. Yet, the modern discourse over human rights has as one of its central narratives the battle between liberalism (often identified more closely with neoliberalism than is warranted) and those who believe that modern liberalism imposes a culturally and socially specific conception of rights. By privileging individual rights over collective and cultural rights (for example), it is said that current international regimes allow multinational corporations to overlook both the human and ecological consequences of their endless pursuit of wealth and power (Westra 2011).

A longer historical view paints a different picture. Although charges of cultural bias have long been made against the campaign for human rights, particularly as it was instantiated in the Universal Declaration of Human Rights adopted by the United Nations (UN) in 1948, neither that document

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nor the movement it advanced are creatures of Western hegemony. Each traces its origins to protagonists from the Global South, activists who were “not motivated by a single liberal philosophy.” Moreover, these activists “came from different religious and political traditions. Some were secular, many were not” (Sikkink 2017, 92). One way of thinking about their framing of human rights is that it has been a search for the overlapping consensus between comprehensive world views that Rawls assures us does not need to be politically “indifferent or skeptical” (1993, 150). Even this formulation is not beyond criticism, of course. It is not unreasonable to assume that, under some circumstances, the search for culturally nonspecific consensus (even one based in an interest so clearly shared as environmental protection) will result in a politics so thin that it fails to elicit the level of engagement enjoyed by the thick moralities for which it is a political substitute (Gregg 2003). To the extent that this is true, there is nothing to be said about human rights that can be genuinely global – much less recognizably universal.

But before surrendering to the quietism that this account of the situation might seem to counsel, it may be worthwhile to consider a different conception of human rights – one that has philosophical grounding in Western thought, but is inherently open to redeployment beyond its historical confines. In an observation that was as much anthropological as philosophical, Rorty argues that all human beings “carry about a set of words they employ to justify their actions, beliefs, and their lives.” Using these words, we “praise our friends” and show “contempt for our enemies.” These are also the terms that we use to explain (to ourselves and to others) our “long-term plans, our deepest self-doubts and our highest hopes.” In sum, we use these words to tell, “sometimes prospectively, sometimes retrospectively,” the stories of our lives. These words are each person’s “final vocabulary” (Rorty 1989, 73).

For Rorty, a vocabulary is final if casting that vocabulary into doubt leaves its user with “no noncircular argumentative recourse” (Rorty 1989, 73). In other words, vocabulary is final for individuals when they reach the limit of their willingness to explain or justify their assertions. Rendered into a form that fits more usefully into a democratic superstructure, a vocabulary is final for a population if it is agreed (as part of a broader political consensus) to refrain from pressing the justificatory regress beyond (or behind) that terminology. Rights, in this sense, are a form of final vocabulary. They can be either a label for a concrete outcome in a specific circumstance that almost no one is willing to criticize *or* the formulation of a normative principle that carries such positive appeal and is stated at such a level of generality that almost no one is willing to dissent from it. The task of the human rights activist or scholar is, then, to proceed inductively (in the first case) or deductively (in the second) to arrive at an interpretation of what a ‘right’ means to

the pragmatic issue at hand. This way of understanding ‘human rights work’ does not privilege the individual over the collective, the financial over the spiritual, or the Western over the non-Western. It requires only: (1) a willingness to generalize from morally thick judgments about concrete disputes in the direction of thinner covering rules for resolving classes of disputes, and (2) a commitment to search for interpretations of thin but consensual decision rules that move toward an understanding of those rules that can accommodate morally thicker decisions about a broader range of real-world outcomes.

Human environmental rights, so conceived, challenge local knowledge and commitment to seek broader understanding on conceptually higher ground and require cosmopolitan and humanistic insight to strive for wider acceptance within the lived experience of human communities of fate.

Emergent Environmental Rights Consensuses

The potential for this understanding of human rights can be tested by exploring some of the areas in which a level of deliberative consensus sufficient to support environmental rights discourses is being developed, and evidence of that emergent consensus can be found. Policy spaces in which persuasive environmental rights discourses are most likely to emerge from the existing or foreseeable congruence of elite and popular environmental norms include: (1) involving access to information and decision-making processes; (2) ensuring access to food and water; and (3) providing environmental security to all. Even a brief superficial analysis of current and necessary future trajectories of these environmental rights discourses suggests how regions of emerging consensus extend the reach of environmental protection norms without either diluting a consensus into meaninglessness or depriving democratic politics of its critical capacity. The ultimate task, of course, will be to suggest how those discourses might be reconciled with the socially and culturally diverse legal traditions in which environmental rights would have to be acquitted.

Access to Environmental Information and Decision-Making

Success in the areas of environmental and human rights litigation (as in any other) begins with an understanding of legal procedure and how to use it. In a plural society there may be more widespread support for procedural rights than substantive ones when it comes to potentially divisive issues. Moreover, a sound procedural footing is useful insurance against falling into the absolutist view of environmental rights in a futile attempt to “take them out of the hurly-burly of politics and give them a higher status” than judges are ever likely to confer upon them (Bodansky 2010, 61).

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A second and more specific reason for beginning with the procedural rights of information and access to decision-making is that our objective is to find productive ways of relating the emerging field of international environmental rights to the principles and practices of democracy, in particular deliberative democracy. The relationship between deliberative democracy and environmental protection more generally has been explored at both the national and global levels (Baber and Bartlett 2005, 2009). A prominent feature of this relationship has been a tension between two values that deliberative democrats hold dear – a commitment to rational discourse in search for consensus and a dedication to diversity and inclusion. This tension is persistent, and the fact that it can be resolved (Baber and Bartlett 2015, 57–82) does not mean that it will eventually go away on its own. Affirmative and authoritative actions to satisfy people’s needs for information (in support of discursive rationality) and access (of a universal character) will obviously be part of any strategy for developing politically sustainable resolutions of that recurring tension that might ultimately safeguard environmental rights.

Information and access as an area of inquiry has an additional advantage – the availability of a fully developed and formally adopted international agreement on the subject. The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) was signed in 1998 in the Danish city of Aarhus and entered into force in 2001. Currently, it has forty-seven parties – forty-six states and the European Union on behalf of all of its twenty-eight member states. The Aarhus Convention recognizes public rights regarding access to information, public participation, and access to justice in governmental decision-making processes on matters concerning the local, national, and transboundary environment. It focuses on interactions between the citizens and public authorities.

More specifically, the convention requires that every citizen should have the right to wide and easy access to environmental information, that public authorities must collect and disseminate information in a timely and transparent manner, that the public must be informed regarding all environmentally relevant projects and must have the chance to participate during decision-making and legislative processes, and that the public has the right to judicial or administrative recourse procedures in case of violations of existing environmental law or the principles of the convention itself (Duyck 2015). Although compliance with the convention by government actors is not untested, as one might imagine, finding evidence of serious dissent from the convention’s purposes and provisions in mass public opinion is nearly impossible. But that does not mean that the convention’s underlying policy theory enjoys the level of support – either by states or a global public – that its full effectiveness requires.

As with other ‘transparency’ policies (Gupta and Mason 2014), the Aarhus Convention assumes that with adequate information, access to decision-making, and effective legal recourse, an enlightened public can exercise the control over its elected and appointed officials that democracy and protection of the environment require. Few would argue with the objective, but there is considerable evidence that each connection of that predictive discourse is subject to being undermined by public attitudes. For instance, receiving full information regarding public issues (particularly where the information is persistently negative) has the potential to discourage public participation in the policy process (Bauhr and Grimes 2015).

Citizens are often willing to defer to public officials rather than hold them accountable. This pattern persists even in the presence of policy outcomes that are regarded as significantly negative and can be traced to the popular assumption that government officials are possessed of a level of expertise that justifies an attitude of deference rather than strict accountability (Gerber et al. 2011). It is even possible to convince majorities in developed democracies (as a result of campaigns promoting judicial retrenchment in defense of existing power and privilege) that free and equal access to the halls of justice is a policy problem rather than a solution (Staszak 2015). So, in spite of its attractiveness in principle, Aarhus harbors within its normative foundation a number of potentially serious lacunae. The existing level of consensus that supports the convention leaves it vulnerable in nation-states whose elites are reluctant to bring their domestic procedures into alignment with the principles that Aarhus espouses (Getliffe 2002).

Eat, Drink, and Be Human: Rights to Food and Water

As a general matter, thinking about rights tends to run strongly in the direction of procedures. But when substantive rights are asserted, they tend to fall into the categories of political rights and property rights – with social and economic rights receiving less recognition, if they are granted any position at all. This relatively simple and widely recognized fact goes some way toward explaining the confusing state in which the right to food and water is found. There is a patchwork quilt of global, regional, and national documents related in more or less direct and explicit ways to these two fundamental human needs – often without invoking the concept of rights at all. Yet, together these two emerging human rights discourses have significant potential as grounds for legal advocacy in the cause of environmental protection.

Access to food as a matter of being a fundamental human right is the product of a cluster of international and regional norm-building efforts. The normative