Constitutional Environmental Rights and Liberal Democracy

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Introduction

This paper examines the case for pursuing ecological ends (including both environmental values and interspecies concerns) by constitutional means. Insofar as ecological values can be assimilated to human interests (and in Hayward (1998) I argue that they can be to a very considerable extent), it is appropriate to incorporate them into a normative theory of the basic institutions of society; this makes it possible to bring them under distributive principles, and, in many cases, to secure their protection by means of rights.

In the first section I examine the case for constitutional environmental rights in particular, and the more general case for entrenching a constitutional recognition of ecological interests as on a par with generalizable interests in the securing and equitable distribution of other social goods. In the second section I highlight some of the questions such a proposal raises for political theory, both normative and explanatory. Among these are concerns about the legitimacy of entrenching a recognition of certain types of interest, concerns which are likely to be heightened when the protection of non-human goods is added in; there are also concerns about the effectualness of relying on constitutional measures in the context of a liberal state when global and regional developments tending already to undermine the state's privileged political position are compounded by the transboundary issues that characterize so many ecological problems. I do not claim to offer comprehensive answers to such questions, but I do want to claim that the questions merit being placed high on the agenda for further research by political theorists, since they go to issues at the core of their discipline, touching not only on the substantive meaning of
social justice and the good life within a polity, but also on the nature of liberal democracy and the state.

Eco logic values and basic institutions

What it means to incorporate ecological values into political theory at the level of basic normative principles, I want to suggest, is, firstly, to treat environmental services and resources as social goods whose distribution is a question of justice, on the grounds that they represent generalizable interests warranting recognition at the level of basic institutions. It also means entrenching a recognition that not all ‘environmental goods’ can or should be treated as resources or services sol that there should therefore be substantive restrictions on the utilization of certain environmental goods – especially, for instance, non-renewable resources and environmental features of special scientific or cultural interest: and this is on the ground that enlightened interests in their protection are as legitimate as the enlightened interests in social justice as more conventionally understood (Hayward, 1998, chapter 5). Furthermore, it means there should be the possibility of placing restrictions on the treatment as environmental goods of those non-human beings who ‘have a good’ of their own: this is on the ground that it is unjustified to disregard their moral claims on us (Hayward, 1998, chapter 6, 1997). Because they cannot directly press these claims themselves, a minimal requirement on the state would be to underwrite the provision of suitable fora and legal norms permitting a fair hearing for those groups who seek to represent them; it is also arguable, though, that at least some animals who are most seriously affected by planned human practices are entitled to constitutional guarantees of more direct protection.

Because these principles warrant incorporation into what Rawls calls the basic institutions of society, it is appropriate that they should receive articulation at the constitutional level. Accordingly I shall briefly flesh out the case for pursuing ecological ends by constitutional means, and indicate how the principles guiding the basic institutions of an ecologically sustainable society may look different from those of a more conventional liberal democracy.

Constitutional environmentalism and the case for rights

Why adopt a constitutional approach to environmentalism? One major reason is that environmental problems today are such that adequate solutions to them will require large-scale cooperation within and between polities: to secure such cooperation it is necessary that there be widely agreed general principles about its basis; for such principles to be binding and legitimate within a polity they need to be set above the vicissitudes of everyday political expediency. Principles established at the constitutional level appear to fit the bill. It is in fact noteworthy that, throughout the world, a growing number of states are writing environmental provisions into their constitutions, and some have also taken the step of entrenching environmental rights.

An advantage of pursuing environmental ends by means of constitutional rights is that in doing so one can draw normative and practical support from an established discourse of fundamental human rights. The humans rights discourse, which enjoys considerable consensus in international law, embodies just the sort of non-negotiable values which seem to be required for environmental legislation. Rights mark the seriousness, the ‘trumping’ status, of environmental concern; they articulate this concern in an established institutionalized discourse (Aiken, 1992), and they link the concern to citizens’ interests rather than to supposedly ‘objective’ criteria (Wynne, 1994) of environmental harm, thereby allowing what count as environmental goods or bads to be seen as questions for political deliberation, and thus as related to other aspects of social justice. Indeed, the view has been advanced, not least influentially by the Brundlandt Report (World Commission on Environment and Development, 1987), that the goals of environmentalism can be presented as essentially an extension of the existing human rights discourse. Certainly there is evidence that governments, as well as social scientists and environmental campaigners, consider this a natural extension of human rights.

Legal theorists have identified a potential for mobilizing existing human rights, so that in campaigning for effective implementation of existing international instruments, environmental protection will follow automatically. Thus, as Boyle (1996) argues, existing civil and political rights can be mobilized to foster an environmentally friendly political order and go a long way to enabling concerned groups to voice their objections to environmental damage; moreover, serious environmental damage is frequently accompanied by civil and political oppression, and so there is reason to see common cause between struggles against both. Social and economic rights can also be mobilized to contribute to environmental protection through substantive standards of human well-being: rights to health, decent living conditions and decent working conditions may all bear directly upon environmental conditions. As well
as this potential for mobilizing existing human rights, there is also the possibility of reinterpreting them to enhance their environmental implications (Ksentini, 1994). The right to life, for example, could in principle be deemed to be infringed where the state fails to abate the emission of highly toxic products into supplies of drinking water (Anderson, 1996, p. 7). The right to life might be deemed, more generally, to include the right to live in a healthy environment, a pollution-free environment and even an environment in which ecological balance is protected by the state. In the European context, another human right which has been used to set precedents for environmental protection is the right to respect for one’s private and family life and home.6

As well as mobilizing and adapting existing human rights, there is also the suggestion that new, more specifically environmental, rights may constitute part of a ‘new generation’ of human rights.6 Since the Stockholm agreement of 1972, and the further impetus given by the Brundtland Report in 1987, the idea that humans have a fundamental right to an adequate environment has gained growing acceptance. If one accepts the immanent logic that has led from civil and political to social and economic rights, one can perhaps see how its further development can lead in the direction of environmental rights. For if certain social and economic rights are material preconditions for the effective enjoyment of civil and political rights, it seems no less evident that the effective enjoyment of an adequate environment is a precondition for the enjoyment of any of those rights.

Nevertheless, even setting aside worries about the human rights discourse itself,7 with regard more specifically to environmental rights various issues raised by legal theorists command our attention.

To begin with, the idea of a human right to ‘an adequate environment’, understood as a substantive right, raises various problems. For instance, it is notoriously difficult to find legally serviceable definitions of ‘adequate environment’ or the kindred locations to be encountered in contemporary constitutions. There are also associated problems of enforcement and adjudication – often establishing who the right is to be enforced against can be very difficult. Another problem is that of attaining a sufficiently strong and enduring consensus with regard to their inviolability in relation to competing – non-environmental – claims. So while some substantive rights could perhaps gradually be implemented – along with conceptually related rights to health, housing and education – it is realistic to expect greater prospects of success to depend on linking substantive claims to procedural claims.8

Procedural rights relevant to environmental protection include rights to know (i.e. a right to environmental information, including rights to government records and to independent ecological and health research which has a bearing on the ecological welfare, rights to be informed of development proposals); rights to participate in the determination of environmental standards; rights to object to ministerial and agency environmental decisions; and rights to bring action against departments, agencies, firms and individuals that fail to carry out their duties according to law. (Eckersley, 1996, p. 230)

As well as pragmatic considerations, there are also principled arguments favouring procedural rights – in particular, in relation to enhanced democratic participation in environmental decision-making. Environmental protection is never a purely technical affair; it involves political decision-making about what is a problem and how to address it, and the outputs of decisions also have effects raising questions of distributive justice.

It also needs to be noted, though, that while democracy may be enhanced by procedural rights of participation in decision-making processes, effective opportunities to participate may be far from equal for all citizens; in fact, given that these rights are usually exercised most effectively by particular interest groups, there is actually a democratic case for placing constitutional constraints on their rights to influence decisions affecting the wider public. Participation rights are arguably most important for NGOs and other pressure groups. Certainly, NGOs fulfill an important civic function by holding governments and intergovernmental institutions accountable to the public (Bichsel, 1996, p. 252); advocacy groups give a voice to sectors of society not represented by other pressure groups and so these NGOs empower a greater number of citizens to participate in the political process (ibid., p. 253).

Nevertheless, while they help to broaden the political agenda, their own specific agendas can be more particularistic. NGOs are not democratic or even political institutions; their enhanced role needs to be subject to democratic constraints which constitutions can in principle provide (cf. Cameron and Mackenzie, 1996).

Another relevant development, which is potentially in tension with the rights approach, is that environmental security is now increasingly considered – by social scientists and governments alike – to be on a par with military and economic security as a concern touching the very stability of existing states (cf. Eckersley, 1996): hence the question of how states’ security interests relate to citizens’ and groups’ interests in
environmental protection is also one of constitutional significance. An advantage of rights, in relation to this issue, is that it sets down certain markers for where citizens' interests, or citizens' interpretations of threats, should be recognized as legitimate by the state.

Certainly, one would not expect environmental rights themselves to be a panacea for all ecological and social challenges, but it is also worth noting that they are relevant even in relation to alternative environmentalist strategies. The principles these seek to apply – such as the polluter pays principle, the precautionary principle, environmental impact assessment and sustainable development – themselves raise rights issues. The operation of the precautionary principle and environmental impact assessment (EIA), for instance, rely chiefly on procedural rights to know and to influence proposed environmentally sensitive developments, and where the precautionary principle is accepted as a decision rule, as for instance in Europe, it can be the basis of rights claims; also, there is no reason why claims to EIA procedures could not generate justiciable obligations (Anderson, 1996). As well as justiciable rights, there are also more fundamental rights issues that arise out of tensions within and between these principles. For instance, while the principle that the polluter should pay typically, in practice, issues in the right to buy tradeable permits to pollute, it could be interpreted to imply a right of others to be paid compensation by polluters.10 Most generally, the principle of sustainability itself can be construed – in its essential question of balancing competing rights – of equity, futurity and environment.

This question of balancing competing rights brings us back to the basic issue that environmental interests can conflict with interests protected by traditional human rights, particularly those of economic freedom and cultural development, and that environmental interests themselves are subject to conflicting interpretations. This leads to the question of whether and how different categories of interest – whether or not directly protected as justiciable rights – can be mapped onto other social goods and subject to appropriate distributive principles.

Classifying environmental goods as social goods
On the face of it, while procedural rights could be viewed as a fairly straightforward extension of existing civil and political liberties, substantive rights could seem more akin to social and economic rights. It might therefore be tempting to see their respective objects as assimilable to two distinct types of social goods along the lines of the Rawlsian distinction between liberties (subject to equal distribution) and income/wealth (subject to differential distribution). But this is problematic if the point of substantive environmental rights is to protect everyone equally. An alternative view would be that a substantive right to an adequate environment is a right of non-interference, albeit in the medium of environmental manipulation – and hence to be considered as an extension of liberty.

To preserve the Rawlsian distinction in an environmental context could mean differentiating between the right to an adequate environment, understood as freedom from environmental harms or bads, on the one hand, and a right to resource use, on the other. The significance of this would be that the former comes under the equality principle applied to liberties and the latter under the difference principle, as applied to economic goods (income and wealth). In practice, avoidance of ecological harms and enjoyment of ecological goods are not always easy to distinguish, since an unpolluted environment can be considered a resource, for instance, but conceptually the distinction is important – especially if one assumes that two different distributive principles are applicable to other basic social goods. So while I am not necessarily making a presumption in favour of Rawls's principles of justice, it is helpful to take these as an illustrative benchmark against which to introduce some general considerations about how ecological goods can be fitted into normative political theory.

Liberties
Rawls's first principle of distributive justice states that 'each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all' (Rawls, 1972, p. 250). Under this heading, in addition to standard personal, civil and political liberties, we might therefore also include a right to protection from some kinds of environmental harm. Thus as well as rights of free access to environmental information (civil), rights of fair access to environmental decision-making (political) and a right to a fair hearing when representing interests of non-persons (legal) which this would yield, basic liberties could also include a right of freedom from (personal or collective) environmental harms. This could have far-reaching implications, since it focuses the issue of which environmental bads are to be seen as harms definitively to be avoided, as opposed to costs to be offset against benefits accruing from practices causing them. Part of the point here is to entertain a recognition that some environmental goods and services should not be considered as tradeable commodities at all.
Income and wealth

The principle for the distribution of this type of social good, the 'difference principle', states that 'social and economic inequalities are to be arranged so that they are... to the greatest benefit of the least advantaged...'. (Rawls, 1972, p. 302). If it is appropriate to consider freedom from environmental bads as a kind of liberty, then insofar as environmental goods are considered as resources, they would seem naturally to fall under this heading as part and parcel of an adequate definition of wealth.11

However, if one accepts Rawls's difference principle as appropriate to the distribution of income and wealth, one nevertheless needs to recognize that what this means, when ecological conditions are taken into account, is quite different from what it would be assumed to mean on typical liberal capitalist assumptions, and, indeed, on Rawls's own explicit assumption of moderate material scarcity (ibid., pp. 127-8). The difference principle specifies that inequalities are unjustified unless the (relatively) worse off members of society are (absolutely) better off with them than they would be without them: the standard implication of this, on the assumption of moderate scarcity, is that economic incentives to increase production are thereby allowed, since all can eventually benefit from it. This is because the more economic goods that are generated, the more there are available for distribution, but if ecological costs are factored fully into costs of production the situation may look quite different. Thus if there are serious ecological constraints on economic growth, and therefore on what might 'trickle down', then relative improvements of the requisite sort might not be possible, and there may arise rather a need to provide an absolute baseline safety net.12 The effect of this could be to provide for much greater socioeconomic equity than would be expected on unecological liberal assumptions about the circumstances of justice (Benton, 1997).13

Environmental goods that do not fall under either of Rawls's headings

These are, chiefly, the goods which do not directly or tangibly accrue to an individual in such a way that asserting an interest or right in them could in principle be a clear-cut matter and which therefore currently receive little recognition. These are: (a) the kind of good represented as 'existence' or 'aesthetic' value; and (b) goods of non-human beings.

Goods of type (a) could come in for indirect protection as afforded by discursive decision-making fora, and hence indirectly under the liberty principle; they could also be conceived under the heading of cultural values. In either case, however, the protection would not be direct or substantive, since there is the possibility that participants in the discourse may not agree to endorse the values in question. But this leaves the same situation as applies to cultural values more generally: these can be contested within and between cultures, and certainly the value attached to the physical environment has varied significantly over history and across societies. Appeals to cultural values, therefore, are unlikely to afford the guarantees of the strong (and non-relativistic) sort of protection envisaged by those theorists (e.g. O'Neill, 1997; Sagoff, 1988) who presuppose a strong connection between determinate environmental norms and cultural values in general. Nevertheless, it would arguably produce protection as strong as could be politically warranted. The key point, perhaps, is simply that mechanisms for democratic decisions should be in place to ensure that decisions are taken at the appropriate level – i.e. by those most clearly affected.

The situation regarding goods of type (b), however, is different. Here it is not simply a matter of conflicting human interests in relation to their environment, for it raises the issue of non-human interest bearers, and thus the question of whether it is possible or desirable to expand the range of bearers of rights to include non-humans. Whereas constitutional rights have hitherto been restricted to humans, claims that certain primates should also enjoy such rights are currently gaining support (Cavalli-Sforza and Singer, 1993), and claims for animal rights more generally are also being advanced – even rights for natural entities other than animals have been canvassed (Stone, 1997). However, the more the range of bearers is expanded, the more problematic the rights discourse becomes both in principle and in practice: on the one hand, the less the new bearers resemble humans, the more tenuous appears – to many14 – the connection with the reasons which give human rights their moral force in the first place; on the other, this expansion of rights may tend to dilute their force as rights, since there is likely to be so many competing claims that not all can adequately be redeemed, something which downgrades the discourse of rights as such. Certainly, there are many difficulties in drawing up and implementing legal rights for non-humans, but this does not mean that other measures for the protection of non-human interests are not possible. The (probably insuperable) difficulties in the way of justiciable rights for (at least most) other creatures do not prevent some degree of constitutional level provision for their protection.15

It might nevertheless be objected that there appears to be no direct or immediately effective human interest in the pursuit of non-human goods, and so the claimed advantage of linking ecological values to
human interests would not seem to apply here. My response to this problem is in part guided by the thought that the same point could be made in relation to many human goods too. Empirical individuals and groups often have no immediate interest in relation to other humans either, but this does not prevent them recognizing a more general or indirect interest in the provision of social and public goods. For theories accepting the assumption of such an interest, it does not need to be empirically proven whether individuals actually care about other humans in order for the equitable distribution of social goods to be justified. So on the basis of the argument that there is no sustainable argument for pure human preference and that self-respect entails respect for non-humans (Hayward, 1998, chapter 6), I would claim that it is not appropriate to demand a higher standard of proof in relation to non-humans. So, without denying that there are considerably more difficulties dealing with non-human interests, I nevertheless maintain the claim that political theorists have to recognize that relations with non-humans can in principle, and should, be normatively regulated. In practice this is only likely to happen by being harnessed to and picked up by (human) interest groups. But what can be done is to allow such groups particular rights: to alter the burden of proof and rules of standing in relation to animal rights cases, for instance, and, more generally, to favour and promote institutions aimed at inculcating ‘care’ for non-humans.

Ecological democracy

I am aware that such proposals, when considered for their political implications, raise many questions. I shall not attempt definitive answers to them, but I shall suggest how they might in principle be answered in a manner consistent with the broad normative principles I have proposed.

One question area concerns the potential conflict between constitutional and democratic principles. Well-known concerns about the ‘democratic deficit’ of constitutionally entrenched rights and norms – in particular, their immunity to ‘democratic’ revision, and the ‘undue’ influence that can accrue to the judiciary – would seem to be fuelled with added reasons for consternation when even animals are seen as a virtual part of the polity! Against this it can be pointed out, though, that the standard line of reply – that there are certain principles and rights that merit immunity from the pure majority will of the populace at any given moment, and good democratic reasons for the judicial checking of legislative and executive power – would hold in relation to the protection of ecological interests if it holds for generalizable interests at all. This view is broadly consistent with what appears to be an emerging consensus about the relation between democracy and ecological values, namely that accepting the traditional value of democracy in allowing the reasoned articulation of competing views, it will favour the recognition of ecological values just to the extent that these are reasonably attended to; if these are insufficiently recognized at present, this is because actual democratic conditions fall short of what is required for the discursive practices they advocate. Certainly, constitutional provisions will not be sufficient to guarantee the development of an appropriate democratic culture, but they can nevertheless provide necessary conditions for it, such as rights to access to resources, education, information and political participation. Hence, in principle, there would appear to be complementarity between constitutional environmentalism and a commitment to discursive and – what for some it entails – ecological democracy. For the constitutional approach can be geared to underwriting the requisite conditions for enlightened will-formation whose purpose it is discursive democracy’s to attain.

Nevertheless, the question of what ecological democratization can or should mean in practice is much more complicated. When constitutional proposals are advanced in the context of a liberal state they can always expect a mixed reception and in some ways unpredictable outcomes. What makes a liberal democracy potentially responsive to normative innovations also makes it responsive to the interests of those who would oppose them; so constitutional proposals aimed at shifting the effective balance of power are liable to meet resistance. The appropriate attitude to the institutions of liberal democracy, I would therefore suggest, is one of immanent criticism. Hence we might appreciate that the normative ideal of a sustainable society is in some respects already implicit in modern constitutional democracies. Instituted and evolved to govern, by accommodation, plural and shifting constellations of interests that develop with the growth of a dynamic economy and the accelerating social changes brought with it, the political stability of a modern constitutional democracy is not premised on static social relations or productive forces. Liberal democracy is in many ways a flexible and resilient political form: its constitutional arrangements are typically such as to allow a range of freedoms to citizens and economic agents, with political regulation of them kept to that minimum necessary to favour an equilibrium of social and economic forces. This enhances its feedback capacities, that is its responsiveness to signals of ecological disruption emanating from various sectors of society.
Nevertheless, the sustainability of liberal democracies with capitalist economies is premised on an assumption of the indefinite sustainability of economic growth, an assumption which appears seriously questionable from an ecological perspective. Moreover, the emphasis on growth, as opposed to what it is for, combined with the domination of market values, means there can also be certain important interests people have whose effective expression is systematically blocked. Within liberal democracies, policy problems tend to be defined and disaggregated largely in response to the dominant pattern of interest representation (Dryzek, 1996, p. 113). Liberal democratic states have little disincentive to externalize ecological costs both spatially and temporally; they also provide very limited opportunities for vicarious representation of non-citizens' interests – or, indeed, for the ecological interests of their own citizens (Eckersley, 1996, p. 215). Longer-term and more generalizable interests tend to mobilize less effectively in the cut and thrust of normal politics than short-term partisan interests. Moreover, even those public interests taken up and advocated by non-state associations, such as environmental organizations, are vulnerable to liberal democratic ‘framing devices’ (ibid.).

The question of the extent to which reliance on institutions of the liberal state is appropriate involves not only normative but also empirical considerations. Ecological imperatives are arising within, and in some respects bringing about, a changing political context, both nationally and globally, that calls into question previous assumptions about the nature and role of the nation-state. While the state remains the main source of constitutional and environmental law, and while international environmental politics is still strongly shaped by national interests, including those expressed in terms of ‘environmental security’, the pressures (governmental and non-governmental) towards globalization on the one hand and the principle of subsidiarity on the other are bringing about noticeable changes. Indeed, it is argued that the traditional conception of the nation-state as the bearer of a monopoly of legitimate force within a territory is gradually being undermined in each aspect of its definition: states no longer always have a de facto monopoly of force both because of the growing power and influence of transnational economic agencies and because of the increase in transnational legal agreements and legislation; states’ legitimacy is increasingly called into question, among other reasons, because of their perceived inability adequately to respond to environmental crises (Beck, 1995a); states are increasingly difficult to identify uniquely with a territory, not only because of competing claims of ethnic groups, within and across their borders, to collective rights of self-development, but also, and more especially, because when transboundary ecological processes are taken into view, the very notion of a bounded territory is undermined (Kuehl, 1996). With the emergence of new sources of legislative authority, of new political actors and rights-bearers, there is increasing conceptual, as well as normative, complexity involved in balancing the interests of individual citizens against both states and non-state collective agencies, and then again against environmental considerations. An adequate grasp of the import of empirically shifting power relations in this complex context therefore requires a sound theoretical basis.

Certainly, there are many political questions which obviously cannot and should not be dealt with at the constitutional level. Much debate about solutions to ecological problems concerns the area of social life that they come under: thus there is debate for instance about whether or when economic, fiscal, legal, legislative or some other type of measure is appropriate. Within each area, there is then also room for debate about the normative basis of the measures to be taken: for instance, whether they are to be preventative, punitive, compensatory, redistributive or incentive-providing. Given this range of uncertainties, combined with all the uncertainties regarding the nature, extent, impact and distribution of ecological problems, there is a strong case for enhancing the democratic capacities of state institutions to respond to new ecological imperatives formulated ‘from below’. In particular, this could mean allowing more feedback and input from the associations of civil society.

Insofar as political theory is concerned with associations of civil society a major concern is to understand not only the formal policy processes of the state, but also the opportunities that are or should be available for other political actors to influence policy-making. A rough definition of civil society, as this term is understood by NGOs (cf. Jacobs, 1996) and theorists of discursive democracy (Dryzek, 1996, p. 117), is that it is composed of all social life not encompassed by the state on one hand, or the economy on the other. It is the site for the articulation and representation of those interests which are disadvantaged within the existing political system – including various new social movements and representatives of other environmental and animal rights constituencies. In its political aspects, civil society ‘can be defined in functional terms as public action in response to failure of state and/or economy’ (ibid.); it ‘can also be a source of pressure on state and economic actors, through protests, boycotts, campaigns, and
so forth' (ibid.). Given the desirability, for both ecological and democratic reasons, for greater discursive democracy (cf. Dryzek, 1987), there is a need to support and assess the ongoing research into the appropriate design of deliberative institutions on which many theoretical questions bear (cf. Lafferty and Meadowcroft, 1996): examples here include public hearings (especially in association with impact assessment), right-to-know laws, alternative dispute resolution techniques, public inquiries, interest group access and so on (Dryzek, 1996, p. 111).

Nevertheless, while civil society is undoubtedly an important site for the introduction into the political system of ecological values, there is also need for a degree of caution, as I have already noted, about the normative status of its actors and their claims. It is often assumed that discourses emerging from deliberative fora or public spheres in 'civil society' articulate interests that are necessarily more environmental and more legitimate than those protected or promoted by the state. But these interests are still particularistic, in relation not only to fundamental interests, but also to other legitimate interests and discourses. If discursive democracy is to maintain its distinctiveness from political horse-trading, it must aim to secure the conditions for conduct in accordance with the Habermasian regulatory ideal of a discourse so transparent as to articulate fundamental norms. Of course, in practice, conditions approximating the ideal seldom if ever prevail. Hence there is reason in practice to be cautious about what exactly to expect. It is to be remembered that if participants are to ascertain what their interests really are, this is not straightforwardly a case of discovering them, but is always also likely to involve some degree of transformation of them. So to embark on a process of interest transformation can only be legitimate if it does not undermine the protection of legitimate interests as initially perceived (including the 'mere preferences' Sagoff excludes from deliberation proper). This point cuts quite deeply into the argument for deliberative democracy: if it depends on a right of citizens to participate in deliberative fora, then the terms and conditions of participation need to be established; the terms of participation must themselves make reference to interests – interests that need to be established prior to any process of interest clarification.

Of course, the problem cuts both ways: interests not recognized as legitimate can in practice get excluded merely because they do not fit the dominant view (cf. Lukes, 1974). It seems clear, therefore, that there is a need both for constitutional guarantees and limits regarding rights of participation etc. and for maximum opportunities for dissident views to have a hearing. In particular, while there are strong arguments for strengthening the scope for action of associations of civil society, there must be safeguards against these undermining adequate recognition of other individual, including economic, interests. It has also to be acknowledged that economic imperatives, while seriously qualified, are not entirely obviated by ecological considerations. For the time being, it certainly seems that some of the most effective measures for environmental protection – such as ecological taxes – presuppose the continuance of property rights and economic freedoms; moreover, ethical concerns about the alleviation of poverty, as well as realism about the effective force of conventional economic interests, combine as reasons for caution about too sweeping or utopian a critique of economic development which neglects the co-requisite of global social justice.

But if critique has to take its cue from actually existing conditions, this does not mean it cannot draw its inspiration from a more utopian vision. A basic premise of any normative political theory, I believe, should be the desirability of finding institutions, processes and policies that favour the articulation of the most enlightened interests of the day – interests on the basis of which the very meaning of economic development would be transformed to take account of the quality of life of all. For the most enlightened interests of the day to become the most effectual interests there is a long way to go – enlightenment, as a social process, does not come all at once. I do not wish to claim that it would be a straightforward matter to bring empirical interests to coincide with ecological goods. But I have assumed that it is only if they are linked to interests that ecological goods will be promoted at all.

Notes

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3. On the general advantages of using existing human rights rather than introducing new ones see Merrills (1996). While in a European context, for instance, there have been very few cases of applying existing civil and political rights directly to environmental complaints, and even these have met with mixed success (Churchill, 1996; Douglas-Scott, 1996), elsewhere, especially where civil rights are less well-protected, this linkage is much more important: see, for example, the chapters by Anderson, Fabra, Lau and Harding in Boyle and Anderson (1996).

5. Article 8 of the European Convention provides that 'every individual has the right to respect for his private and family life [and] his home'. This provision has been used to set precedents for environmental protection, most significantly in the case of López-Ostra v. Spain. Here, for the first time, the organs of the European Convention found a breach of the Convention as a consequence of environmental harm. The applicant suffered serious health problems from the fumes from a tannery waste treatment plant... Her attempt to obtain compensation from the Spanish courts was completely unsuccessful. The European Court of Human Rights held that there had been a breach of Article 8 (Churchill, 1996, p. 94). Desagné sees this as a development in the case law of the European Commission which reflects a growing awareness of the links between protection of human rights and protection of the environment (Desagné, 1995, p. 263).

6. Third generation or solidarity rights – usually [include] peace, development and a good environment – generally inhere in groups rather than individuals... (Boyle, 1996, p. 46).

7. Scepticism about fundamental rights has been renewed at each stage of their development, but the common theme of objections – from the misgivings voiced by Burke and Bentham concerning the French Declaration, and Marxist critiques of their class base, through various mutations of legal positivism to contemporary postmodernist objections to imperialism – is that the rights discourse (at each stage of its development) presents as universal a set of norms that are in fact particular. Today, this scepticism most often attaches to claims about their cultural relativity. But given the existence of an African Charter, European and American Conventions as well as International Covenants binding all member states of the United Nations, such generalized scepticism would seem to be moot (although for a more principled response, see Vincent, R., 1986). A similar point would apply to criticisms of the rights discourse as an ethical discourse, to be contrasted with other ethical vocabularies, although I have elsewhere tried to accommodate some of the concerns about its limitations (Hayward, 1995, chapter 4; Hayward, 1998, chapter 6). Where serious and legitimate disagreement remains, in my view, is over issues within the discourse concerning the content and weight of certain specific rights (especially, for example, in areas like property and family life) and related questions (as signalled in an earlier note) of whether rights attach to individuals only or also to collectivities. Such issues would obviously need to be addressed within the overall research programme here proposed.

8. Robyn Eckersley suggests that 'the effectiveness of any substantive environmental rights presupposes the establishment of a wide range of environmental procedural rights' (Eckersley, 1996, p. 230). She also illustrates how they can blend together: 'Instead of an abstract, ambiguous “right to clean air and water”, an environmental bill of rights... might declare, say, that citizens have a right to ensure that environmental quality is maintained in accordance with the standards set by current environmental laws (standards which would undergo regular public review)' (Eckersley, 1996, p. 230).


10. A different but conceptually related issue which has attained particular significance in the USA is whether environmental protection is a public good so that individual property owners obliged to contribute to it have a right to compensation or a matter for competing rights of affected individuals (entailing no compensation) has involved constitutional interpretation. This issue – turning on the distinction between ‘takings’, which require compensation, and ‘regulation’, which does not – has provoked dispute at the constitutional level. It has been argued that despite enshrinement of individual property rights in the Constitution, their constitutional inviolability has already been all but eroded in practice: ‘the Supreme Court has virtually abandoned all of the means it had established for preventing legislative interference with property rights’ (Nedelsky, 1990, p. 247). Nedelsky argues that ‘Either some other concept or value will have to replace it as a symbol of limited government, as the core of constitutionalism, or we may be facing a change in constitutionalism itself’ (p. 253).

11. Russ Manning notes that health, which ought to be considered a primary social good, is conspicuously missing from Rawls’s list – rather, he lists it as a natural primary good (along with visible, intelligence and imagination (Rawls, 1972, p. 62)). He assumes health is not so directly under social control. Environmental issues (and not only these) lead us to challenge this assumption (Manning, 1981, p. 159).

12. Note, though, that the general conception of justice would support this: see Rawls (1972), p. 303.

13. It will be noted that I am not including the question of concern for future generations under this heading, my reason being that theirs would not be a different type of good, and while, because not yet existent, they are a different
type of 'bearer', the issues are of a different kind. Indeed, it is arguable that
distribution in relation to future generations can be dealt with in a
Rawlsian paradigm, as, to some extent, they already are, via his 'just sav-
ings' principle. There remains, of course, much to be said on this topic.

14. Although see Hayward (1998), chapter 6 for critical discussion of their rea-
sons. It is a different matter, though, to grant that in the nature of the case
there are some sorts of rights that simply cannot apply to animals — e.g.,
rights to political participation; see Benton (1993) for a fuller discussion.

15. Hence in Europe, for instance, Directorate General XI (DG XI), which is
responsible for implementing the European Union's Environmental Policy,
has so far issued the 'Birds Directive' and 'Habitats Directive'. For up-to-date
information see the DG XI website.

16. For recent statements of these concerns see Bellamy (1995) and Waldron
(1993): the view I would wish to support, by contrast, is set out by

17. This, at any rate, is my estimate of how the argument has gone, but there
are of course a variety of other views: for a sense of the terms of the debate
see the three collections edited, respectively, by Doherty and de Deus

18. Cf. Hayward (1995) passim. It is noteworthy that even (eco-)Marxists now
advocate 'democratizing' the state, not overthrowing it (cf. O'Connor, 1988).
For a dissenting view, from an anarchist perspective, see Carter (1993).

19. For more on the general pros and cons of liberal democracy in relation to
environmental decision-making see Dryzek (1987, 1992).

20. For more on the significance of this, see Hayward (1995), chapter 3.

21. There is also the question of how far deliberative democracy can be general-
ized for society as a whole: in particular, there is the problem of coordina-
tion between 'deliberative communities', and also the issue of how abstract
norms of free and impartial public discussion can provide a check against
the power and interests of elites. Hence it is pertinent to ask, with Ekersley:
'Should not green institutional design start from the premise of power dis-
parities rather than from a regulative idea that is unlikely ever to obtain in

8

Privatizing Genetic Resources:
Biodiversity, Communities and
Intellectual Property Rights

Markku Oksanen

Introduction

It is undeniable that by definition a sustainable economic system sup-
ports biodiversity. Likewise, when biodiversity is on the decline due to
human behaviour, it is explainable in part with reference to institutions,
particularly to the lack of well-defined and stringently enforced property
right regimes with regard to natural resources (Hanna et al., 1995; Sedjo,
1992; Anderson and Leal, 1991; Swanson, 1991, 1992, 1995). As a solu-
tion to the problem, following from this account, exclusive rights to natu-
ral resources should be created and allocated. Specifically, the standard
answer of (economic) liberals points to the need to launch a process of
privatization where resources are still common and to reinforce the exis-
ting private property regimes. However, it turns out to be anything but
clear what it means to privatize and to whom property rights should be
ascribed; the use of the notion 'privatization' is as equivocal as that of
'commons' (see Aguilera-Klink, 1994). In this paper, I shall explore the
idea of privatization of genetic resources in the context of biodiversity
preservation. Of particular interest here is the political nature of the idea
of ascribing intellectual property rights (IPRs) to indigenous and tradi-
tional communities. This idea, however, is problematic for liberal theory
and the related economic view, because liberals tend to claim that com-
munal ownership is by necessity unsustainable. Instead I attempt to
emphasize the non-reducible nature of communal ownership and its
equal legitimacy compared with other forms of ownership.

Biodiversity, IPRs and ownership

Traditionally the protection of biodiversity has occurred by forbidding
the use of species and establishing uninhabited protection areas. Due