JURISTIC DEMOCRACY

A Deliberative Common Law Strategy for Earth System Governance

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ABSTRACT

International law is constantly in search of legitimacy, has been relatively ineffective, and, like international environmental governance, is plagued by a democratic deficit. This paper presents juristic democracy as a conceptual framework for accelerated development of a global common law. Juristic democracy is based on a foundation of norms and principles derived from the consideration by innumerable citizen juries of carefully cast hypothetical cases. It offers the prospect of workable, democratic, and environment-friendly rule-governed behavior within a system of global governance that is likely to remain (and probably ought to remain) anarchic in important respects. Because of its inherent democratic legitimacy, this method for creating, interpreting, and translating international environmental norms into law could, in the initial stages, bypass states and could, unlike current international law, be universally recognized as both fact and norm. As such, it would constitute a rule-making system for earth system governance fully complementary of many other governance approaches and strategies.

SERIES FOREWORD

This working paper was written as part of the Earth System Governance Project, a ten-year research initiative launched in October 2008 by the International Human Dimensions Programme on Global Environmental Change under the overall auspices of the Earth System Science Partnership.

Earth system governance is defined in this Project as the system of formal and informal rules, rule-making mechanisms and actor-networks at all levels of human society (from local to global) that are set up to prevent, mitigate and adapt to environmental change and earth system transformation. The science plan of the Project focusses on five analytical problems: the problems of the overall *architecture* of earth system governance, of *agency* of and beyond the state, of the *adaptiveness* of governance mechanisms and processes, of their *accountability* and legitimacy, and of modes of *allocation and access* in earth system governance. In addition, the Project emphasizes four crosscutting research themes that are crucial for the study of each analytical problem: the role of power, of knowledge, of norms, and of scale. Finally, the Earth System Governance Project advances the integrated analysis of case study domains in which researchers combine analysis of the analytical problems and crosscutting themes. The main case study domains are at present the global water system, global food systems, the global climate system, and the global economic system.

The Earth System Governance Project is designed as the nodal point within the global change research programmes to guide, organize and evaluate research on these questions. The Project is implemented through a Global Alliance of Earth System Governance Research Centres, a network of lead faculty members and research fellows, a global conference series, and various research projects undertaken at multiple levels (see www.earthsystemgovernance.org).

Earth System Governance Working Papers are peer-reviewed online publications that broadly address questions raised by the Project's Science and Implementation Plan. The series is open to all colleagues who seek to contribute to this research agenda, and submissions are welcome at any time at workingpapers@earthsystemgovernance.org. While most members of our network publish their research in the English language, we accept also submissions in other major languages. The Earth System Governance Project does not assume the copyright for working papers, and we expect that most working papers will eventually find their way into scientific journals or become chapters in edited volumes compiled by the Project and its members.

Comments on this working paper, as well as on the other activities of the Earth System Governance Project, are highly welcome. We believe that understanding earth system governance is only feasible through joint effort of colleagues from various backgrounds and from all regions of the world. We look forward to your response.

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1. INTRODUCTION

Juristic democracy—-a process of identifying norms from the consideration by multiple citizen (or policy) juries of carefully crafted hypothetical scenarios--can make creation of a global common law a powerful strategy, fully complementary to other strategies, for increasing cumulative capacity for earth system governance.

Like many political concepts, governance is an encompassing term lacking agreement about its core elements. Minimally, it refers to processes of societal collective action (governing) without implying, including, or excluding authoritative institutions (government). Although the concept is highly useful for understanding domestic politics and the contributions made to problem solving by civil society (governance beyond government), it is particularly valuable to the understanding and design of transnational collective action, which occurs in a political environment whose singular characteristic is the absence of an overarching government apparatus. National sovereignty, even if somewhat attenuated by the forces of globalization, treaty commitments, and international institutions such as the United Nations and the European Union, still precludes anything resembling global government. Governance encompasses action and interaction by expert and activist networks, intergovernmental organizations, nongovernmental organizations, state governments, multinational corporations, and transnational regimes, creating and using the rights, rules, practices, procedures, mechanisms, and shared belief systems that at the global level collectively constitute a political system (global governance without global government). A centrally important component of this evolving governance system is international law.

If, however, law is understood to be nothing more than rules formally promulgated by a unified sovereign authority, then of course international law is an oxymoron. Indeed, it is easy to find scholars who argue that international law is not really "law." But this is based on a mis-appreciation of what actually constitutes domestic (municipal) law within recognizable nation states. Although constitutions and legislation are the most salient sources of municipal law, many other sources can be identified in most societies—among others, for example, administrative edicts, adjudicatory decisions, and long standing traditions. There are no constitutions in international law; the rules most comparable to legislation may be the regionally limited directives and regulations of the European Union. Nevertheless, international law has several other identifiable and acknowledged sources (PEEL 2011, 225; DIMENTO 2003), including: (1) thousands of treaties, conventions, and protocols, traditionally between states but in recent decades sometimes recognizing nonstate actors, (2) the binding acts of international organizations, (3) customary norms and rules accepted as binding, (4) the case law of international courts and tribunals, and (5) nonbinding principles, guidelines, and recommendations adopted by states and international institutions (soft law).

Thus international law is not distinctive in its sources; analogies can be identified in the municipal law of many societies. Particularly in the United Kingdom and in many of its former colonies, perhaps the bulk of what constitutes municipal law is common

law, consisting of binding customary norms and rules derived and codified from the decisions and practices of judicial tribunals over centuries—analogous to customary rules and case law with respect to international law. Common law is not unique to Britain and countries once colonized by it. For example, an earlier system of common law based on Germanic customs and then codified in Latin can be traced back as far as between the sixth and eleventh centuries (LUPOI 2007). The term "common law" is not ordinarily used in the international sphere, although it would not be misleading to do so. There are, however, two especially crucial differences between existing domestic common law and the co-evolution of customary law and international tribunal case law. First, international law, unsupported by formal democratic institutions and processes, has a fundamental legitimacy problem. (Even though its legitimacy may not be more problematic than that of many nation states, it is more obviously problematic.) Second, there are many domestic arbitration cases in any given system but historically there have always been very few international cases (totaling at most a few dozen per year). Consequently, international law can draw upon only limited context or experience, and no compelling legitimizing justification, in identifying norms and elevating them to the status of law. Although municipal common law usually progresses slowly and conservatively, it nevertheless does so with a rapidity and breadth that has not been possible for case-law-based international legal development that continues to be dependent on only about 200 actors (independent nation states) to generate cases. Needed is both the raw material of many more concrete cases and a jurisprudence that justifies the creation and application of law based on democratically legitimated norm articulation. We suggest that a system of "juristic democracy" can provide both.

Juristic democracy is a conceptual framework for accelerated development of a global common law based on a foundation of norms and principles derived from the consideration by innumerable citizen juries of carefully cast hypothetical cases (BABER AND BARTLETT 2009). Juristic democracy offers the prospect of workable, democratic, and environment-friendly rule-governed behavior within a system of global governance that is likely to remain (and probably ought to remain) anarchic in important respects. Because of its inherent democratic legitimacy, this method for creating, interpreting, and translating international environmental norms into law could in the initial stages bypass states and could, unlike current international law, be universally recognized as both fact and norm (HABERMAS 1996). As such, it would constitute a rule-making system for earth system governance fully complementary of many other governance approaches and strategies (BIERMANN ET AL. 2009; DRYZEK 2009).

2. THE PROBLEMATIC CHARACTER OF INTERNATIONAL LAW: LEGITIMACY AND ACCOUNTABILITY

International law is constantly in search of legitimacy. As a general matter, law's legitimacy depends upon the ability of its addressees to regard it as both a fact and a norm (HABERMAS 1996). Law must be seen to establish behavioral requirements backed up by effective compliance mechanisms. Moreover, those requirements must reflect values that are produced by collective will formation that is fundamentally democratic, broadly participatory, and free of any form of coercion. This standard of legitimacy is well understood by students of contemporary democratic theory and it forms the normative basis of deliberative democracy.

A deliberative theory of environmental politics is grounded on the fundamental assumption that no regime of environmental protection can achieve the goal of ecological sustainability if it does not also satisfy these basic requirements of democratic legitimacy (BABER AND BARTLETT 2005; DRYZEK 2009). This assumption further suggests that a consensus[1] criterion for decision-making is essential as a regulative norm of democracy, not just as a practical means for overcoming the network of mutual vetoes that characterizes the relationship in which environmental actors often find themselves.

This general account of environmental democracy, originally developed at the level of the nation-state, poses several challenges for adapting the conceptual demands of deliberative democracy to environmental protection at the international level. But not all of the news is bad. Deliberative democracy's commitment to consensual decision-

[1] Consensus is not a threshold voting requirement of some sort (plurality, majority, super-majority, or unanimous). It is shared normative agreement. Barber distinguishes generic consensus, substantive consensus, and creative consensus (Barber, 2003). Generic consensus refers to matters of consent such as the underlying agreement between the sovereign and the governed that establishes the ground of what he calls thin democracy. Substantive consensus is composed of those commonly held beliefs and values that underlie unitary democracy (and give consensus its authoritarian overtones for some people). Creative consensus is "an agreement that arises out of common talk, common decision, and common work but that is premised on citizens' active and perennial participation in the transformation of conflict through the creations of common consciousness and political judgment" (Barber, 2003, 224). This form of consensus is the foundation of deliberative democracy and what Barber calls strong democracy. The juristic democracy we present here is a strategic way to generate creative consensus. It is a politically potent consensus about basic norms that arises from the concrete problem-solving experiences and shared discourse of average citizens who are isolated by the decision circumstances from considerations of personal stakes and the influences of special interests. Obstructionist tactics by an individual, group, or country are simply irrelevant. In fact, environmental recalcitrants would have more to fear from juristic democracy than anyone.

making fits well in a political framework that contains the idea of sovereignty as a defining characteristic of the parties involved. The challenges are, nevertheless, significant, including problems of democratic deficiency, delegation of implementation, legal jurisdiction, and underdeveloped jurisprudence.

International environmental governance is plagued by a democratic deficit. When international decisions contain any democratic content, it can usually be traced to the existence of democratic processes within the countries that participate in those decisions. Thus, international democracy is derivative rather than direct and participatory. If one has already accepted the premise that democracy is a constitutive element of ecological sustainability, this shortcoming becomes especially troubling.

Moreover, the implementation of international decisions cannot simply be delegated to a regulatory agency as we often do at the domestic level. Because the parties to international environmental agreements are mainly states but the actors ultimately targeted by those agreements are generally private corporations and individuals, enforcement is inherently problematic. International environmental law cannot simply impose its requirements, which might be just as well because that law is not the result of a democratic legislative process to begin with.

International courts lack both the jurisdiction and the jurisprudence necessary to adjudicate the complex disputes that would arise under a system of international environmental law. This problem contributes to the inability of international environmental law to pose a social fact to those actors whose behavior it seeks to regulate. It also contributes to the incapacity of international negotiations to develop the kind of normative commitments that would represent the values held by those whom such agreements seek to protect.

The relative ineffectiveness of international environmental law has undermined the efforts of domestic political leadership to translate general enthusiasm for environmental protection into support for stringent multilateral environmental accords (VANDEVEER 2003). Difficulty in creating political support for environmental accords can also be traced to the inherent elitism of the international political process. As an example, progress toward an agreement on ozone depleting chemicals stalled until a leading role was assumed by the chemical companies who were the source of the problem (FALKNER 2005). Economic and technological power gave those corporations an advantage over other actors in shaping the policy discourse that characterized early development of the ozone regime. As positive as the eventual outcome may have been, it is impossible to argue that the process was particularly democratic.

Adequate coverage in international environmental agreements can fall victim to state sovereignty and its status as the primary organizing principle in international politics. As natural and inevitable as it may seem today, the modern nation-state is an historically contingent development (BROOKS 2005). Nation-states are not especially well adapted to the challenges of environmental protection in the age of globalization. Scientific advancement, economic integration, and population growth demand the

universalizing of basic ecological responsibilities without respect for national boundaries (CALDWELL 1999).

Taken together, these challenges can cause multilateral environmental agreements to fail to protect the environment adequately because the terms of the agreements often contain weak obligations to begin with (CROSSEN 2004).

International regulatory structures must be more than mere compromises among environmental stakeholders. They must be transnational efforts to develop forms of governance tailored to specific markets or policy arenas (ANDREE 2005). To be fully effective in protecting the environment, governments, international organizations, and non-governmental organizations need to focus on particular ecological issues but do so with a greater regard for their broader contexts and implications.

International law based entirely upon interstate relations is unable effectively to address global and transborder issues. State interest, state sovereignty, state equality, and state responsibility are concepts largely irrelevant to resolving problems such as global warming. Addressing such issues requires that we attend not only to interstate and interpersonal justice, but also to intergenerational justice (YOKOTA 1999). Even when international norms can be identified, they are difficult to express in the form of effective law in which the only legal principals are states. This helps explain a pattern of multilateral environmental agreements that achieve high levels of compliance because they require only low levels of cooperation (CROSSEN 2004). It also explains a situation in which norms of international behavior fail to develop into an effective system of prevention and remediation of international harms (GARRETT 2005).

Different problems are presented by nations that would comply with international environmental norms if they could. Developing states often can argue persuasively that if they were held to high environmental standards their economic development would be severely curtailed. Imposing such standards would work a serious injustice upon sectors of the world's population that are least able to assert themselves in international political debates (NAJAM 2011). Long-term, non-state alternatives that might be appropriate to such circumstances require global governance institutions that are much stronger than those that currently exist (PARK, CONCA, AND FINGER 2008).

Ultimately, institutional change depends on political will, which can be sustained only with popular political support. Failure of international agreements among states undermines support for further agreements (SOROOS 2011). State-based transnational environmental protection requires nations to agree to international inspection, performance audits and public reporting, and a common adjudicatory authority. Standards of conduct and methods to facilitate compliance, captured in legal principles recognized and observed as law, are necessary elements of global environmental governance (PEEL 2011). Of course, coercion would be less necessary if environmental values were more universal. This brings us to another failing of international environmental law--its failure to develop normative consensus through a genuinely democratic global politics.

3. NORMATIVE CONSENSUS

Law is shaped both by tradition and change. Law is inherently conservative. Its continuity and predictability contribute to the stability and survival of the polity. But today legal traditions are being challenged by social change of such magnitude that the conservative function of law requires that it adapt to meet new and evolving circumstances (CALDWELL 1999). The challenge is more pressing still when we add the idea that law should reflect a normative consensus resulting from the agreement of those who it seeks to govern. Here we confront the central political challenge to international law--the democratic deficit.

The democratic deficit is not unique to international law. All assessments of the state of democracy around the world find a majority of countries to be not free or only partly free. Transnational corporations typically have control structures that subvert any exercise of democratic control by employees, customers, the public, or even stockholders. Transnational environmental NGOs subject themselves to few democratic processes. And the European Union—the most fully developed example of international cooperation consisting entirely of democratic states—faces a significant democratic deficit of its own. Many international regimes, conferences, and treaties have experimented with ways of including actors from civil society. But without mechanisms to insure the democratic character of that participation and its impact on policy outcomes, the potential of those efforts is limited. Only a small number of innovations allowing direct citizen participation, such as the citizen submission process of the North American Agreement on Environmental Cooperation, disturb this discouraging pattern (DORN 2007; DIMENTO 2003).

The development of a global public sphere is in its infancy. But the introduction of elements of direct democracy in specific environmental policy arenas is a promising beginning (FELD 2005). Opportunities for direct participation are important both as a source of democratic legitimacy and as a matter of political acceptability (GIORGI AND POHORYLES 2005). The development of a global civil society based on contestation and communication within and across mini-public spheres is both good for environmental democracy and more consistent with imaginable political scenarios than more comprehensive (and utopian) proposals (HUNOLD 2005; FRIEDMAN, HOCHSTETLER, AND CLARK 2005). In this context, the practice of what we have described as juristic democracy offers a way of introducing workable, legitimate, and effective law making into a larger system of global environmental governance (BABER AND BARTLETT 2009).

4. JURISTIC DEMOCRACY

Juristic democracy is the marriage of two previously unrelated ideas--citizen (or policy) juries and hypothetical administrative rule-making.

Citizen juries represent an attempt to realize in practice some of the advantages claimed for deliberative democracy in theory. Groups of citizens are brought together in sessions that allow them to receive well-balanced information about a policy issue, exchange competing points of view, and come to considered judgments as a group. Citizen jurors work to arrive at consensus through a collective, interactive discourse. This process is easily distinguished from the kind of reasoning typical of traditional moral philosophy. It is an effort to find a workable definition of a problem that yields a solution that can command the unforced assent of average citizens. These concrete problems are characterized by what Hilary Putnam has called the "interpenetration" of fact, value, and theory (PUTNAM 1995). Experience with citizen juries in the United States, Britain, and Australia suggest that the approach enjoys a number of significant advantages over other deliberative processes.

First, service on a citizen jury is no more intrusive than ordinary jury duty and yet it allows for a higher level of democratic participation and is far more educative than ordinary political campaigns (GUTMANN AND THOMPSON 2004). Second, citizen juries tend to produce consensus rather than polarization (FISHKIN AND LUSKIN 1999). This is because citizen juries begin their deliberations with discussion rather than with votes. The risk of polarization is further reduced by the fact that the plenary groups within which citizen juries operate are large enough to contain representative samples of public opinion and are led by moderators who ensure that all perspectives are heard, that experts are available to clarify questions of fact, and that participants receive extensive and balanced information on the subject in advance (GUTMANN AND THOMPSON 2004). Third, unlike representative institutions that are closely identified with the particular experiences of national populations, the citizen jury is a broadly deployable approach that can resonate in a wide variety of cultures. In fact, the use of citizen juries is one of the few techniques that allows us to imagine a form of world assembly in which citizens could deliberate as members of the whole order of humanity rather than as representatives of nation-states (LASLETT 2003). Finally, the deliberative form of rationality that citizen juries promote is more than just talk. It is an intrinsically valuable achievement, forged by the direct efforts of citizens to take responsibility for concrete, practical problems and produce judgments that transcend the interest aggregation that is typical of liberal politics (BABER AND BARTLETT 2005). For these reasons, the deliberative process of citizen juries is an especially appropriate response to the environmental problematique.

But using deliberative democratic procedures like the citizen jury to address problems of environmental protection at the international level is not without difficulty. It is hard to imagine a more challenging set of policy issues, more entangled with special interests, than those involved in earth system governance. When one compares this policy arena with most others, it is easy to become discouraged by its complexities. To

date, international environmental negotiation has produced a body of generally unenforceable law with which the parties comply because it requires little of them that they were not already willing to do. In a sense, international environmental law is more a collection of contracts than a body of law. Yet even in a world governed largely by contracts, there must be a background of law that is obligatory. After all, the law "does not enforce every promise which a man may make" (HOLMES 1991 (1881)). In the common law tradition, it is the collective genius of generations that allows us to decide, on the basis of many thousands of practical judgments, which promises should be enforced and which should not. Although most of those rulings were arrived at by judges rather than juries, the work of trial juries suggests that the effectiveness of judges can be approximated by the rest of us if we possess sufficient information and act within a properly structured decision environment (VIDMAR AND HANS 2007).

The common law of contracts is similar to all other areas of common law in that it is simply a series of limited responses to concrete problems encountered by the parties to actual legal disputes. The coherence and legitimacy of the common law did not result from tackling big issues with big ideas. The common law is a bottom-up enterprise, much as empirical science tends to be. It involves repeated "observations" of what our senses (particularly our sense of justice) tell us about particular sets of circumstances (BABER AND BARTLETT 2009). The practical impossibility of grappling with problems of environmental policy in all their imponderable complexity suggests just such a modest approach. Our challenge is to create transnational environmental law grounded in our shared understanding of reality but comprehensive enough to actually protect the global environment.

A useful approach can be found in an idea intended to assist administrative law judges in their efforts to deal with the complexities of regulation through rule-making. Kenneth Davis suggested that administrative law judges could bring the practicality of the common law to the complexities of regulatory policy by using hypothetical cases in administrative rule-making (DAVIS 1969) These cases would pose important, but limited, problems of regulatory policy. They would allow administrative law judges to rule on narrow and carefully crafted questions. Most importantly, these rulings would provide the precedents that regulators could rely on in exercising their rule-making discretion. This approach to rule-making would neither leave regulated parties wondering what specific obligations they faced nor require decision makers to deal with questions they felt unprepared to address.

Rule making through hypothetical adjudication can be adapted to the use of citizen juries. Instead of asking citizen juries to choose between competing solutions to actual entangled policy problems (like global climate change), they can be presented with hypothetical disputes that would arise under a variety of regulatory approaches and then can be asked to apply the same common sense of justice that many of them already use when serving jury duty. Citizens would enjoy both the educative and expressive advantages associated with direct political participation. With a sufficient number of properly selected juries ruling on the same case around the world, the global community would engage in a process of collective will formation unmediated by any elite. Once citizen juries have adjudicated concrete (but hypothetical) cases of international environmental disputes, that collection of decisions can be aggregated to

form a system of legal doctrine in the same way that the results of actual cases are first restated and then later codified in systems of common law.

Developing a transnational form of common law would require, of course, improving upon the haphazard pattern of development that characterizes historical systems of law if we are to produce useful results over a reasonable period of time. Policy specialists working in existing transnational networks could develop and administer such adjudicatory proceedings. In the area of environmental protection, the United Nations Environment Programme has the technical capacity to prepare hypothetical cases touching on any aspect of major environmental issues and the Commission on Sustainable Development could oversee deliberation in any of the hundred countries where it supports local organizations. Aggregating citizen jury decisions into a coherent body of legal doctrine would be a natural extension of the United Nations International Law Commission's ongoing responsibility for the codification and progressive development of international law. In fact, this new avenue for restatement and codification might redeem the ILC from the accusation that it has become an outdated institution (TOMUSCHAT 2006).

The question, then, is not whether juristic democracy is feasible for developing a global common law for earth system governance. The question is whether states can be persuaded to allow their prerogatives to be usurped by their own citizens?

5. JURISTIC ENVIRONMENTAL DEMOCRACY IN A WORLD OF SOVEREIGNS

Any critique of juristic democracy would likely begin with defenders of state sovereignty claiming that the "legalization" of international politics can never be effective. In this view, law without enforcement cannot really *be* law because it is never recognized *as* law. Critics of international law generally argue that "international law scholars exaggerate its power and significance" (GOLDSMITH AND POSNER 2005, 225). They claim, for example, to "know of no global democracy approach that spells out how or why states, especially powerful states like the United States (or, for that matter the EU), would submit to a broader form of genuine global governance" (223).

Thinking of law only as rules backed by coercive force is a habit of long standing and one of which some international relations theorists are no more or less guilty than journalists, politicians, and the lay public. But why *must* the entity that pronounces legal judgments also be responsible for the enforcement of judgments? A number of societies that we would not call stateless, including those of ancient Greece and Rome and Anglo-Saxon England, left prosecution of criminal cases to private individuals, and in yet other societies all judicial decrees were enforced, if at all, privately (POSNER 1995). In fact, all that any form of enforcement ever does is raise the costs of non-

compliance. Coercive law simply overlays normative expectations with threats of sanctions in such a way that "addressees may restrict themselves to the prudential calculation of consequences" (HABERMAS 1996, 116). Likewise, the "enforcement" mechanisms of international law (such as those of the World Trade Commission) combine dispute settlement processes with the existence of provisions allowing aggrieved states to pursue private enforcement under color of official adjudication. Thus coercive enforcement does not necessarily equate to compliance or effectiveness (FAURE AND LEFEVERE 2011). Similarly, in well functioning states municipal law depends relatively little on coercive enforcement, relying first and mainly on social and psychological controls—providing information about social norms and natural consequences and increasing the benefits of compliance. Thus, recent developments in international treaty law have emphasized noncompliance procedures intended to facilitate compliance, rather than acting on the adversarial assumption that noncompliance is "the result of a willful desire to violate" (FAURE AND LEFEVERE 2011, 185). So it might be fair to say that if advocates of sovereignty have erred in any respect it is not in underestimating the robustness of international law but, rather, in exaggerating the essential differences between international and municipal law.

A second sovereignty based argument is that sovereign states protect important individual rights in ways that international regimes cannot. Therefore, democrats should not actually want to develop such regimes. In this view, democracy is a function of constitutional government and any drift toward global governance is a threat to that one true foundation of democracy. Absent a sovereign to enforce the law, the citizen's obligation to obey evaporates and the remaining choice is between anarchy and arbitrary coercion (RABKIN 2005). But this argument also exaggerates the difference between international and municipal systems of law by emphasizing coercion rather than the more subtle effects of law as a cumulative system of behavioral incentives. A useful exploration of this contrast is the analysis of law in "primitive" societies advanced by Posner (1981).

Posner's discussion of "primitive" legal systems is helpful for our purposes because these systems develop in the absence of a sovereign state or any of the formal institutions normally associated with them. Posner's description of the legal traditions of the Yurok tribe of California is especially interesting. When a dispute arose among the Yurok, each of the principals would retain the services of two to four disinterested men who would pass back and forth between the parties collecting accounts of the dispute. These private "jurors" would then render a judgment. A losing party who refused to abide by the judgment would be condemned to be the wage slave of the prevailing party. Continued resistance rendered the recalcitrant an outlaw (POSNER 1981). Throughout the history of our species, informal institutions of this sort have allowed stateless societies to develop sophisticated systems of individual rights. Moreover, because criminal law is no more effective (generally speaking) than primitive systems of private law in protecting individuals, protecting individual rights would appear not to be part of the original bargain between sovereign and subject. Posner's explanation for the development of criminal law is that the sovereign "owned" an interest in his subjects that was impaired by acts that reduced their productive capacity. This economic interest was not accounted for in the private system of compensation, so the sovereign established criminal sanctions that served as "a

method of internalizing this externality" (204). This view suggests that an abrogation of sovereignty is not a necessary corollary of global environmental governance. Efforts to regulate the trans-boundary relationships between individuals can be considered an evolving system of quasi-private law meant to acquit limited and specific rights through mechanisms of collective action intended to preempt environmental harms.

A final point regarding the impact of juristic democracy on sovereignty is that the primary advantages of introducing forms of participatory democracy into international law making would likely accrue to states that operate at a political disadvantage under the current system of nationalist power politics. Weaker states wishing to impose a regime of environmental protection to their advantage would reap significant public relations benefits from deliberative democratic experiments that lend scope and substance to general public sentiments in favor of environmental protection. They might be even able to introduce new environmental norms into existing agreements that currently govern disputes in other areas such as trade and human rights. But why would powerful states, particularly environmental recalcitrants, subject themselves to such processes? The admittedly hopeful answer is that even nations with something to lose in a thoroughly democratized global politics have still more to gain. Those potential gains can be summarized in one word--reciprocity.

The concept of reciprocity knows no logical limit. It "extends to all individuals, not just to citizens of a single society" (GUTMANN 1999, 309). And it reaches across the full range of policy arenas. But it carries special weight in environmental governance. Environmental problems depend for their resolution on far more "cross-national deliberation" than can be accomplished within any single set of domestic political institutions (GUTMANN AND THOMPSON 2004, 61). This casts doubt on the ability of individual states to achieve even their own domestic environmental objectives. Environmental goods can be provided to a national population only if its government "negotiates and consistently maintains agreements with other governments for the purpose" (LASLETT 2003, 217).

In an age of increasing global interdependence, deliberative democracy's emphasis on justifying collective decisions to the people who must live with the consequences of those choices argues for extending the requirements of democratic deliberation to the international arena. Conventional aggregation of interests across boundaries is hard to conceptualize, but “deliberation across boundaries is relatively straightforward and deliberative theory would seem to be more useful in the international system precisely because it lacks "alternative sources of order" that are provided by sovereign authority (DRYZEK 2000, 116).

There are abundant examples of deliberative democracy's various institutional elements that can be identified on the international environmental stage (MEIDINGER 2008). Much of the recent progress in international environmental governance, children rights, population control, and social development have been due to the involvement in collective decision-making of global civil society (FRIEDMAN, HOCHSTETLER, AND CLARK 2005). These activities have evolved from their earlier reactive forms to seize the policy initiative in a number of areas (SNIDAL AND THOMPSON 2003).

So experience does not show that deliberative participation in international civil society is futile. Rather, it suggests that deliberative practices must penetrate international governance more deeply and be less mediated by elite-dominated nongovernmental organizations, to be fully effective (MCCORMICK 2011). Dryzek proposes the development of a networked deliberative system, based on exactly the existing institutional models we have been discussing (DRYZEK 2009). A fully developed system of juristic democracy would constitute one such network that could contribute significantly to better earth system governance through the identification, clarification, and eventual formalization of transnational environmental norms.

6. REALISTIC OPTIMISM

How can any continuity in the outcomes of juristic democracy experiments across national and cultural boundaries be explained? Why might people in different parts of the world see environmental protection the same way? How can that continuity be useful in protecting the international environment?

First, environmental problems, complex as they are, enjoy one distinct advantage over many other problems of collective will formation. To the extent that protecting the environment is a scientific question, some responses will be objectively better than others. Given the prevalence of environmental challenges and the growth of global communications technology, there is every reason to expect that the successes and failures of various responses will become part of the wider public consciousness.

Second, all societies share a common heritage of chthonic legal tradition. Regardless of their relative level of development or the specifics of their current legal regimes, modern human societies can trace their origins to a form of life that was tribal and a view of the universe that was mythical. People saw themselves as living lives integrated with those of their fellows and situated in a natural environment of which they were an integral part. The informal and oral rules of behavior that evolved from that world-view form the backdrop against which modern legal traditions ultimately developed (LUPOI 2007). So to find commonalities among those legal traditions today should not be particularly surprising. They may be nothing more (or less) than the "artifacts" of our shared history.

Third, to the extent that elements of our chthonic legal heritage survive in modern legal traditions, we should not be surprised to find them expressed in the area of environmental protection. Chthonic law is conspicuously thin in areas like contract and tort. People living close to the land and to each other had little use for such concepts. But environmental claims of a chthonic character have been advanced by tribal populations in modern judicial institutions. For example, the Supreme Court of Canada has incorporated the civil law concept of 'usufruct' (a limited property right arising from intermittent use) into the common law tradition in upholding the traditional rights of indigenous peoples (GLENN 2010). Elements of chthonic law have thus earned their survival by proving their adaptive ability. Chthonic law is

environmentally friendly in a way that later legal traditions often are not. “It is not just green; it is dark green” (73).

Since at least the time of John Locke, Western legal thought has shown a pronounced aversion to custom. Replacing fealty to tradition with rational legislation has been its brief. Over the centuries, this process has very nearly demolished the credibility of custom as a source of normativity in the law (TULLY 1995). The emergence of legal positivism can be interpreted in this light. But international law is, perhaps, more “primitive”--and healthier for it. International law explicitly recognizes custom as a source of valid law. Custom, in this context, is understood to be the customary behavior of states toward one another. But if certain basic normative principles are found to recur across national and cultural boundaries, there is nothing to prevent international tribunals and legal bureaucracies from taking note of those general principles and incorporating them into their analysis of what is customary within the whole order of humankind.

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