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Environmental Constitutionalism

The Implementation Perspective and the Different Souls of the European Green Deal

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3.1 Introduction

Climate change is increasingly recognized as posing issues related to human rights – ranging from first- and second-generation human rights (civil and political rights) to third-generation rights such as the right to a sustainable environment (within the context of the right to development). In October 2021, the UN Human Rights Council (UNHRC) recognized the 'human right to a safe, healthy, clean and sustainable environment'.[1] The Council also appointed a Special Rapporteur on Promotion and Protection of Human Rights in the Context of Climate Change.[2] In July 2022, the UN General Assembly confirmed the fundamental right to environmental protection.[3]

The UNHRC has generally approached the relationship between climate change and human rights from the perspective of specific human rights.[4] A report published in 2009 acknowledged that climate change affects particular fundamental rights across the spectrum of civil and political rights (first-generation rights under the International Covenant on Civil and Political Rights, or ICCPR) and economic, social, and cultural rights (second-generation rights under the International Covenant on Economic, Social and Cultural Rights, or ICESCR), spanning the rights to life, food, water, and work.[5] The report noted that climate change disproportionately affects specific vulnerable groups, such as women, children, and the elderly.[6] For example, women are particularly affected by climate change because of gender discrimination and inequality, which exacerbate factors such as poverty and access to financial services.[7] The report also highlighted the difficulty of holding States responsible for climate-related human rights violations because of the complexity of establishing a causal link between greenhouse gases emitted in a State and, for instance, a storm's devastating impacts on people living in Kiribati in the Pacific. Given the difficulty

[1] UNHRC, The Human Right to a Safe, Clean, Healthy and Sustainable Environment, Res. A/HRC/48/L.23/Rev.1 (2021).
[2] UNHRC, Mandate of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, Res. A/HRC/48/L.27 (2021).
[3] UN General Assembly, The Human Right to a Clean, Healthy and Sustainable Environment, Res A/76/L.75, 26 July 2022.
[4] OHCHR, OHCHR and Climate Change (2023). www.ohchr.org/en/issues/hrandclimatechange/pages/hrclimatechangeindexbk.aspx.
[5] UNHRC, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, A/HRC/10/61 (2009) at p. 7.
[6] Ibid. at 15. [7] Ibid. at para. 45.

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of attributing responsibility to States, the Council recognized the importance of addressing such problems as first- and second-generation human rights.[8]

The 2009 report established the blueprint of all subsequent studies on climate change and human rights, which have developed via a set of initiatives of the UN. Most notably, various Special Rapporteurs have tackled the problem.[9] For instance, the Rapporteur on Extreme Poverty and Human Rights systemically considered the implications of climate change in a report dedicated to the problem of 'climate change and poverty'.[10] That report underscores that climate change impacts, first and foremost, poorer regions such as sub-Saharan Africa, with developing countries bearing around 75–80% of the cost of global warming.[11] More recently, the Special Rapporteur on the Right to Development explained that climate change increasingly affects a wide range of internationally established human rights, including the right to development, with disproportionate effects on groups such as indigenous peoples, internally displaced persons, persons with disabilities, and vulnerable women.[12]

A recent document adopted by the UNHRC summarizes the relationship between climate change and human rights.[13] The report analyses the impact of climate change on specific human rights, spanning the rights to life, development, health, food, and self-determination.[14] It also illustrates how climate change affects the fundamental rights of specific groups, including indigenous people, women, children, migrants, displaced persons, and people with disabilities.[15] Further, it describes the human rights obligations of States and businesses with respect to climate change, providing underpinning fundamental principles.[16] Finally, the Report discusses issues such as the institutional role of the UN and UNHRC, the impact of the recognition of a human right to a sustainable environment, and prospects for future action.[17]

The relationship between climate change and third-generation human rights, in the form of a human right to a sustainable environment, has received special attention. In adopting Resolutions A/HRC/48/L.18, A/HRC/48/L.23 and A/76/L.75,[18] the UNHRC and General Assembly have respectively declared the 'human right to a safe, clean, healthy and sustainable environment'. Despite understandable enthusiasm raised by the 'historical' declaration of the Council, certain questions must still be considered. Will these declarations be mere rhetoric, or a revolutionary achievement that will prove an essential instrument to fight climate change via fundamental rights? This question involves two other questions – the first substantive, and the second institutional. As we shall see, these questions are two sides of the same coin.

Concerning substance, the human right to a sustainable environment can be of material significance in the fight against climate change. The right to a healthy environment could ensure normative consistency across a wide range of policy issues and facilitates the achievement of better human rights outcomes through improved environmental

[8] Ibid. at para. 96. [9] For a summary, ibid. at 69. [10] UNHRC, Climate Change and Poverty, A/HRC/41/39 (2019).
[11] OHCHR, Frequently Asked Questions on Human Rights and Climate Change, Fact Sheet No. 38 (2021), para. 11.
[12] Special Rapporteur on the Right to Development to the Human Rights Council, Climate Change Is a Global Human Rights Threat Multiplier, 17 September 2021. www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27490&LangID=E.
[13] OHCHR, Frequently Asked Questions on Human Rights and Climate Change, Fact Sheet No. 38 (2021).
[14] Ibid. at pp. 2–17. [15] Ibid. at pp. 19–28. [16] Ibid. at pp. 29–40. [17] Ibid. at p. 41.
[18] UNHRC, The Right to Development, UN Doc. A/HRC/48/L.18 (2021).

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performance, including reduced greenhouse gas emissions and cleaner air.[19] Most significantly, the human right to a sustainable environment might simplify questions of causation. A State could be held responsible under such a right for emitting excessive greenhouse gas emissions without the need to prove a further breach of specific human rights, such as the right to life. In other words, it is not necessary to prove that the United States, Russia, and China emit excessive greenhouse gases under the UN Framework Convention on Climate Change (UNFCCC) and Paris Agreement, and are thus responsible for triggering a storm with devastating effects on human lives in specific island nations. The United States, Russia, and China might be held responsible simply for emitting excessive greenhouse emissions, in breach of the universal human right to a sustainable environment. This would simplify the adoption of human rights remedial procedures when States emit excessive greenhouse gas emissions.

Beyond its declaration of a human right to a healthy environment, recent UNHRC action has had several other important impacts. Together with Res. A/HRC/48/L.23,[20] the UNHRC appointed a Special Rapporteur on Promotion and Protection of Human Rights in the Context of Climate Change, via Res. A/HRC/48/L.27.[21] That resolution recalls that human rights are 'universal, indivisible and interdependent and interrelated'.[22]

The Special Rapporteur is mandated to 'address the adverse impact of climate change on the enjoyment of human rights, in the light of scientific data and assessments, and in a well-integrated manner', advancing progress towards 'the implementation of the 2030 Agenda for Sustainable Development, the [Paris Agreement] and the [UNFCCC]'.[23] The Rapporteur will consider how the adverse effects of climate change (for instance, sudden- and slow-onset disasters) affect the 'full and effective enjoyment of human rights', aiming to 'strengthen the integration of human rights concerns into policymaking, legislation and plans addressing climate change' so that States can effectively prevent and remedy the effects of climate change.[24]

The resolution also mandates that the Special Rapporteur emphasize 'existing challenges, including financial challenges' for States in their effort to promote and protect human rights when addressing the effects of climate change. The purpose is to formulate recommendations on the respect for, and promotion of, human rights, particularly within the framework of areas such as mitigation and adaptation policies, practices, and investment.[25] Furthermore, the Rapporteur is requested to 'synthesize knowledge, including indigenous and local traditional knowledge', and to 'identify good practices, strategies and policies' regarding 'how human rights are integrated into climate change policies and how these efforts contribute to the promotion and protection of all human rights and poverty alleviation'.[26]

The resolution thus appears to establish a coherent framework for studying the relationship between climate change and human rights, which has thus far been carried out in a fragmented way by different Special Rapporteurs on specific human rights, such as the

[19] OHCHR, Frequently Asked Questions on Human Rights and Climate Change, Fact Sheet No. 38 (2021) at p. 61.
[20] UNHRC, The Human Right to a Safe, Clean, Healthy and Sustainable Environment, Res. A/HRC/48/L.23/Rev.1 (2021).
[21] UNHRC, Mandate of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, Res. A/HRC/48/L.27 (2021).
[22] Ibid., preamble. [23] Ibid., para 1. [24] Ibid., para. 2(a). [25] Ibid., para. 2(b). [26] Ibid., para. 2(c).

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rights to food and water. It is against this backdrop of a growing international mandate for environmental human rights (EHRs) that the EU has introduced its ambitious climate action plan, the Green Deal. The literature on this subject has already attained impressive proportions, too large in fact to cite here. However, the concern of this chapter is not with the specifics of the Green Deal but with the normative challenges to its implementation that may emerge at its intersection with human rights. For this purpose, it is important to develop a coherent implementation perspective that will shed light on the process of harmonizing environmental protection and human rights through law.

3.2 The Implementation Perspective

Seldom is it possible for scholars in any discipline to trace the origin of a field of research with any great precision to any given point in time. Arguably, the study of policy implementation is an exception. Perhaps with excessive intrepidity, I will date the appearance of implementation research in the policy sciences to 1 January 1973. On that date, books with the following subtitles were published – (1) *How to Understand the United States Government and other Bulky Objects*; and (2) *How Great Expectations in Washington are Dashed in Oakland; or Why it's Amazing that Federal Programs Work At All*, *This Being a Saga of the Economic Development Administration as Told by Two Sympathetic Observers Who Seek to Build Morals on a Foundation of Ruined Hopes*. Fortunately, the primary titles are less fatiguing – *The Institutional Imperative* and *Implementation*.[27]

In our present context, mention of Jeffrey Pressman and Aaron Wildavsky's *Implementation* will come as a surprise to few. Its impact as a founding text in implementation studies has reverberated through three editions and many an aspiring policy scholar has had his or her pre-professional ardour cooled by this tale of broken dreams. If a programme designed to create employment while catering to the interests of local businesses and community groups alike can begin life as a widely supported (and reasonably well-funded) federal priority, only to die in ignominy, what chance of success do any of us ever have? One answer, perhaps even darker than the question itself, is suggested by Robert Kharasch's *The Institutional Imperative.* His insight was that implementation per se is rarely the objective of implementers. In a world where institutions can survive both abject failures (think, the 'war' on drugs) and success so spectacular that their *raison d'être* disappears (consider the March of Dimes campaign for a polio vaccine), it may be time for policy scholars to admit that institutional survival is the true objective of all policies once they fall to the tender mercies of actual government.

But before wrapping ourselves in the warm and protective folds of cynicism's cloak, we should recall that governments have actually achieved substantive successes in the past. After all, did the Allies not defeat the Axis (if not fascism *tout court*)? Did the New Deal not put people back to work? Did NASA not put men on the moon? And perhaps a more important question – did not these policies enjoy an identifiable advantage that the

[27] R. N. Kharasch, *The Institutional Imperative* (Charterhouse, 1973); J. Pressman, A. Wildavsky, *Implementation* (University of California Press, 1973).

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programmes of the Economic Development Administration lacked? The obvious answer (but not automatically mistaken for that reason) is that the Axis powers posed an existential threat to the Allies by 1939. Almost as obvious was that the collapse of the world economy 10 years earlier imperilled everything that those in the developed world valued. Less obvious, but still the stuff of fevered worries in high places and low, was that Sputnik foreshadowed Soviet domination in the space above our very heads. The resulting sense of urgency gave war planners, New Dealers, and steely eyed missile-men a significant advantage over mere mortals. It gave them the power that flows from consensus.

Elsewhere, I have discussed the importance of consensus in democratic societies and in international environmental policy at considerable length.[28] Here, it is sufficient to observe that the consensus underlying the Allied war effort in 1939, the New Deal a decade earlier, and the race for the moon a generation later was of a particular variety. It was not a military, economic, or scientific equivalent of the 'American Dream' or the 'Brotherhood of Man'. In each instance, the consensus was sufficiently *concrete* that what counted as success was relatively clear and sufficiently *strong* to provide a level of public support that made a direct path to the goal both justifiable and sustainable. In short, it provided the bureaucrats charged with implementing those policies persuasive (or, at least, plausible) claims to be pursuing the *public* interest rather than their own. Invoking the analytical context established by our sub-discipline's founding scholars, it reduced the volume of democracy's divergent voices to a manageable level and aligned institutional survival with substantive policy success.

So, the first rule of policy implementation would appear to be to 'seize the high ground' that only the claim of political consensus can offer by framing policy objectives in terms of a compelling public interest. Turning our attention to the implementation focus of this volume, seizing the policy high ground is precisely what much climate policy advocacy attempts to do (with only modest and variable evidence of success so far). Its core arguments, emphasizing that the challenges posed by climate change are caused by us all and impact us all, are sufficiently concrete and direct to hope for success. But whether success is likely remains an open question because the problem is so large and the necessary solutions so numerous. There are, in fact, few examples of how that big a problem can be coherently addressed by so many small solutions. To that end, by nearly any measure the EU's Green Deal – the focus of many chapters in this volume – is the most coherent and ambitious attempt yet to activate government bureaucrats to actually pursue the many diverse climate solutions that our current predicament demands. Indeed, its obvious allusion to Franklin Roosevelt's New Deal foreshadows its scope and ambition – aspiring to nothing less than the remaking of Europe as the first climate-neutral continent on Earth.

Early as we are in our experience with so grand an endeavour, how are we to evaluate the prospects for successful implementation of the Green Deal? We can, and should, take a careful policy-analytic approach to each of its constituent elements in an effort to assess both their value as climate solutions and their viability as political initiatives. But another level of evaluation is of equal importance. How likely is it that the Green Deal, as a whole,

[28] W. F. Baber, R. V. Bartlett, *Deliberative Environmental Politics* (MIT Press, 2005); W. F. Baber, R. V. Bartlett, *Global Democracy and Sustainable Jurisprudence* (MIT Press, 2009).

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will actually be implemented and is implementing it likely to advance the plan's *implicit* objective of showing the way for other continents (and their constituent nation-states) to effective climate policy? If what I have argued above is even approximately accurate, the answer to these questions depends significantly on the character of the Green Deal's underlying consensus. Does it (or might it) capture the level of public commitment necessary to bring normative order to democracy's cacophony and focus the attention of relevant governance actors on what policy success requires?

The short answer to this question is, we don't know. But saying that is not the same thing as saying that there is *no way* to know. In fact, a small-bore variation of the question has already been put to the nations of the world and those of the EU have already given a uniquely hopeful answer. In 1976, Portugal became the first nation on Earth to entrench the substantive right to a healthy environment in its constitution.[29] Over the succeeding half-century, many other nations have followed suit, with many of those being EU members. The substantive premise of this essay is that an examination of that experience may shed light on the likelihood that the Green Deal will be implemented in ways that achieve the objectives of climate activists *and* acquit the motivations of EU officialdom. Before taking up that task, I would like to highlight a few of the methodological premises that support this analytical approach.

3.3 Constitutions, Consensus and Policy Implementation: The Tangled Web We Weave

Using the 'natural experiment' of environmental constitutionalism as a proxy for a European nation's commitment to the implementation of the EU's Green Deal is not entirely unproblematic.[30] First of all, the effectiveness of environmental constitutionalism is open to question. David Boyd extols environmental constitutionalism's virtues, providing numerous examples of its good effect. However, environmental constitutionalism can take a variety of forms. Many nations have imposed a generalized obligation on government to maintain a safe and/or healthy environment. Another form of environmental constitutionalism imposes a similar obligation on individual citizens. These two forms of environmental constitutionalism would together present intolerable analytical difficulties in our present context. The meaning and effectiveness of a governmental duty in this setting 'depends on its wording, its location in the constitution, whether it is enforceable by individuals and groups, and a host of factors external to the constitution'.[31] Likewise, the character of individual obligation clauses is rendered doubtful by the fact that constitutions 'are generally enforceable against the state, not individuals'. It is, therefore, 'unclear what legal purpose is served by the constitutionalization of individual environmental duties'.[32] For these reasons, the 'environmental duty' forms of environmental constitutionalism are

[29] D. R. Boyd, *The Environmental Rights Revolution* (University of British Columbia Press, 2012).
[30] For example, the natural experiment to which I refer involves only the decision to entrench a substantive environmental right in a nation's fundamental law. No level of actual implementation is implied.
[31] D. R. Boyd, *The Environmental Rights Revolution*, p. 58. [32] Ibid. at p. 68.

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ill-suited to our present purpose because of their inherently ambiguous meaning and doubtful significance.

The remaining forms of environmental constitutionalism – procedural and substantive environmental rights – are far less problematic (from an analytical perspective) than clauses that purport to impose environmental duties. The rights clauses, however, differ from one another in at least one important respect. Procedural environmental rights clauses are distinctly territorial creatures. They are 'most commonly found in constitutions from Eastern Europe and Latin America', suggesting that they may be responses 'to the historical suppression of environmental information by autocratic regimes',[33] rather than clauses with independent environmental significance. So, while not as inherently problematic as the environmental duty clauses, procedural environmental rights present similar difficulties of interpretation. Luckily, the fact that such procedural clauses are accompanied by substantive environmental rights in all but one instance justifies us in assuming that European procedural clauses are regarded as a complement to substantive rights rather than an independent expression of them.

We will, therefore, include in our roster of environmental constitutionalism 'positive' EU nations only, those whose constitutions contain a substantive environmental right. The natural experiment I introduced above is not an environmental constitutionalism activity generally, but rather the *adoption* of substantive environmental rights clauses. Constitutional entrenchment of an environmental human right, by itself, provides little protection for either humans or the environment. As James R. May has noted, 'courts have yet to engage express environmental rights as often as might be expected'.[34] As a consequence, there are 'surprisingly few judicial decisions implementing constitutionally enshrined environmental rights provisions'.[35] It is difficult to imagine that the problem is lack of either pollution or plaintiffs. Rather, the poor track record of environmental constitutionalism implementation so far can be traced to obstacles such as 'text, meaning, judicial receptivity' failures of 'political will' and the lack of 'standards' and 'enforceability'.[36] However, the vicissitudes of adjudication do not justify the assumption that environmental constitutionalism provisions are intended merely to provide makeweight arguments or, worse, political window dressing for authoritarian or rapacious regimes (especially among EU nations).

Absent evidence of such political duplicity, countries that have taken this step are entitled to the presumption that their commitment to a clean environment has become deeply enough ingrained in the national governing consensus that its provision for all has found expression in their foundational documents. Especially in the case of EU nations, substantive environmental constitutionalism clauses, where they are found, mark off a policy space 'in which there is some considerable congruence between the views of political leaders and those whom it is their duty to serve'.[37] They are generally the product of a conjunction

[33] Ibid. at pp. 66–67.
[34] J. R. May, The case for environmental human rights: recognition, implementation, and outcomes. *Cordozo Law Review* 2021, 42(3): 983–1037.
[35] Ibid. [36] Ibid.
[37] W. F. Baber, R. V. Bartlett, *Environmental Human Rights in Earth System Governance* (Cambridge University Press, 2020), pp. 59–60.

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between two influences, both of which have become common across the EU. The first is a 'concrete political context' within which a constitution is adopted or amended that features the delegitimisation of right-wing political actors.[38] The second is 'a generic and broad consensus about social rights' that combines an 'overall conception of the role of the law and of the state' in the nation's legal tradition, the 'values of Social Catholicism' and an 'international Zeitgeist favorable to social rights'.[39] This level of consensus clearly approaches that which we have already identified as constituting a foundation for successful policy implementation. Its potential efficacy in climate policy debates is enhanced yet further by the fact that this 'special category of rights lies at the intersection of a two-way instrumentality. Environmental human rights can both protect vital environmental interests *and* empower individuals to enjoy other fundamental rights that are not directly environmental in character'.[40] This makes the presence (or absence) of substantive environmental constitutionalism clauses a useful indicator of a nation's environmental consensus. While it by no means guarantees the *implementation* of environmental human rights, it captures both the commitment to environmental protection and the recognition of the ecological prerequisites to the enjoyment of human rights more generally that are essential to that goal. It also offers an opportunity to plug a fairly obvious hole in the EU Green Deal where (for both practical and normative reasons) explicit environmental human rights really ought to be.

Furthermore, substantive environmental constitutionalism clauses more precisely fit our analytical concern than those which impose duties. As a general matter, constitutional law has learned over the course of its history to resolve the dissensus resulting from conflict among comprehensive normative doctrines with 'an exclusively secular overlapping consensus' (Rawls) and with the support of an often homogenized 'constitutional patriotism' (Habermas).[41] In this context, substantive rights clauses function as 'built-in rights-wideners' that allow us to 'bridge the modern chasm between a high-speed cultural evolution and a much slower evolution of our moral psychology'.[42] They do this through a process of negation which 'creates a praxis of giving and accepting reasons which finally causes the emergence of a rationally justifiable egalitarian system of norms and discourses'.[43] In this context, however, the EU is caught on the horns of a unique dilemma. Will the normative power that its progressive development seeks to create and harness be an engine of Kantian cosmopolitanism (as scholars and publicists alike tend to assume), or will it become a force for a Hobbesian logic of normative homogenization (as its harshest critics and bureauphobes everywhere argue)?[44] Put differently, will Green Deal consensus be purchased at the cost of EU pluralism? An examination of this question in the environmental constitutionalism context may shed light on this question and, by extension, tell us whether hidden normative dissensus threatens effective implementation of the Green Deal.

[38] P. C. Magalharaes, Explaining the constitutionalization of social rights: Portuguese hypotheses and a cross-national test, in D. J. Galligan, M. Versteeg (eds.), *Social and Political Foundations of Constitutions* (Cambridge University Press), pp. 432–468, at p. 449.
[39] Ibid. at p. 449. [40] W. F. Baber, R. V. Bartlett, *Environmental Human Rights in Earth System Governance*, p. 60.
[41] H. Brunkhorst, Sociological constitutionalism: an evolutionary approach, in P. Blokker, C. Thornhill (eds.), *Sociological Constitutionalism* (Cambridge University Press), pp. 95–133, at p. 114.
[42] Ibid at p. 116. [43] Ibid at p. 119.
[44] K. Kobayashi, Is normative power cosmopolitan: rethinking European unity, norm diffusion, and international political theory. *Cooperation and Conflict* 2021, 56(2): 181–203.

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3.4 The European Union as an Arena of Climate Policy Implementation

Having established substantive environmental rights constitutionalism as our indicator of the normative climate for successful implementation of the EU Green Deal, we may now approach that topic directly. The first observation we can make is that the EU has been fertile ground for the adoption of substantive environmental rights. Of the 27 current members, 16 have substantive environmental rights clauses in their constitutions. While the presence of 11 'dissenters' may give pause, that should not (by itself) be a cause of despair. Three dissenting EU members (Cyprus, the Republic of Ireland, and Malta) are common law nations.[45] And while there is some controversy regarding the continuing relevance of legal traditions,[46] their importance in this context is difficult to dispute. Of fully common law countries worldwide, only one (Jamaica) has adopted a substantive environmental rights clause. In the light of the apparent power of this cross-cutting influence on substantive environmental rights decisions, it seems entirely reasonable to eliminate the three common-law EU members from our analysis (as both unremarkable and nearly unavoidable).

Two of the remaining eight EU members without such clauses differ from their colleagues in a different yet pertinent way. Denmark and Sweden, while nominally civil law nations, have legal codes that stretch much further back in time than their continental counterparts and owe virtually nothing to them by way of legal borrowing. For its part, Denmark is the oldest State in Europe and its legal system is 'essentially national in character', having 'evolved independently of Roman law'.[47] Likewise, early Swedish law 'grew up in undisturbed isolation . . . exhibiting a unique instance of law almost solely self-developed'.[48] The oldest Swedish written law was that of Västergötland, which was written down, copied, and revised during the early 1200s, duly becoming Sweden's first book in 1280. In form and content it tracked Sweden's even older law, which was 'similar in its principles to that among other northern and Teutonic peoples and was made familiar through the Icelandic sagas'.[49]

In fact, given the early shared history of Denmark and Sweden, it would have been remarkable if either country had found time to so much as wonder how law might be developing beyond Scandinavia. They were far too busy glaring at each other across the Øresund to pursue such pastimes. Be that as it may, each of these 'dissenting' members of the EU earns a pass when it comes to substantive environmental rights constitutionalization. Countries whose legal history is Scandinavian are habitually counted among the world's most progressive societies, particularly as regards human rights. Moreover, both Denmark and Sweden are regular top 10 members of the World Population Review's most environmentally friendly countries list.[50] If either Green Plan truculence or environmental rights abuses born of legal tradition come from anywhere, it is unlikely to be the EU's far north.

[45] Membership in legal traditions is determined by reference to JuriGlobe, the most discriminating such roster. See: www.juriglobe.ca/index-en.html.

[46] For a valuable overview, see J. Husa, The Future of Legal Families (2016) at www.doi.org/10.1093/oxfordhb/9780199935352.013.26.

[47] L. B. Orfield, *The Growth of Scandinavian Law* (University of Pennsylvania Press, 2018), p. 14.

[48] Ibid. at p. 252.

[49] F. D. Scott, *Sweden: The Nation's History* (Southern Illinois University Press, 1988), p. 61.

[50] World Population Review, Most Environmentally Friendly Countries (2023). https://worldpopulationreview.com/country-rankings/most-environmentally-friendly-countries.

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We can, therefore, safely eliminate two more substantive environmental rights dissenters from our analysis.

We are now left with six civil law members of the EU whose reluctance to adopt a substantive environmental rights clause cannot be banished from our analytical field of vision by historical hand-waving. Austria, Estonia, Germany, Italy, Lithuania, and Luxembourg are near neighbours of the 16 substantive environmental rights-adopting EU members and have legal histories that are intimately intertwined with them. So, if there is something systemic in their particular manifestations of civil law that differs significantly from that of their 16 substantive environmental rights EU partners, we need to know what it is. As with our first invocation of the concept of legal traditions, a preliminary answer lies ready to hand. A fundamental difference among civil law nations has long been recognized between those whose systems are primarily German in origin and those whose systems more generally follow the *Code Napoléon*. All six of our remaining non-substantive environmental rights members of the EU have legal systems that are widely regarded as having Germanic law origins. What, precisely, are we to make of this fact?

3.5 *Vive la Diffèrence*?

With 22 EU members still in our analytical field of view, it is unlikely that we will be able to tease apart the factors that explain the Germanic and French 'flavours' of civil law in each of those cases. However, given the stark difference between them that environmental constitutionalism has revealed, it is difficult to believe that the explanation for *deutscher dissens* is as trivial as the preference for chocolate over vanilla. The obvious solution is to concentrate our attention on what appear to be the 'source codes' of European legal development – the *Code Napoléon* of 1804 and the *Bürgerliches Gesetzbuch* (*BGB*) of 1900. The literature on the history and development of civil law is voluminous almost beyond reckoning. However, in the remainder of this section I will call upon only those parts of that literature necessary to discuss distinctions between the *Code* and the *BGB* that might reasonably explain their differential impact on environmental constitutionalism *and* which might be expected to present obstacles to the successful implementation of at least some elements of the Green Deal.

Having focused our attention on the *Code* and the *BGB*, it is almost inevitable that we should notice that they are (so to speak) the legal bookends of that momentous period in history often called the long nineteenth century. It is natural, then, to wonder how much further back in history we should look for a better understanding of those legal milestones. One answer can be found in the magisterial work of Harold Berman on the development of the Western legal tradition,[51] and the impact on that development of the Protestant Reformation.[52] The first volume of Berman's magnum opus is significant for its demolition of the long-standing social scientific conceit that law is a secondary influence upon history because it is part of society's ideological superstructure rather than its material base.

[51] H. J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983).
[52] H. J. Berman, *Law and Revolution II: The Impact of the Protestant Reformation on the Western Legal Tradition* (Harvard University Press, 2003).

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As Berman succinctly puts it, 'the fact that Hegel was wrong in supposing that consciousness determines being does not mean that Marx was right in saying that being determines consciousness'.[53] Moreover, in spite of the fact that he had escaped the grasp of economic determinism, its crippling sociological assumptions left a legal theorist of Max Weber's stature unable to explain some of the unique features of Western society – that it was not the Western State that emerged first, but the Church in the form of a State; that the first principal stage of Western development was the product of a dialectical tension between theology, science, and law; and that those social institutions were held together by a unique sense of time, of evolution, and of revolutions both past and yet to come.[54] All of these are matters of single importance to Berman's analysis.

For all this, and as important as Berman's historical and methodological insights are, of primary concern to our inquiry is his contribution to our understanding of the fractures that appeared in the Western legal tradition centuries after its birth in the High Middle Ages. The bifurcated contours of Continental European law as we see them today were established, on Berman's telling, by the Protestant Revolutions in Germany (1517–1555) and England (1640–1689). But before we are carried away with the theological particulars of those revolutions, it is worth remembering that one of the EU dissenters (Italy) has a Protestant population of under 1%. So, Protestantism per se will not meet our dual criteria. While it might or might not present Green Deal implementation issues, it cannot be part of an explanation of environmental constitutionalism outcomes. But perhaps the Protestant revolutions placed more issues in doubt than just theocratic orthodoxy. Here, again, Berman is a helpful guide.

Far from portraying the German Protestant revolution as 'a story of "Luther and the princes" against "papacy and empire"', Berman argues that 'it was not only, and not primarily the combination of religious prophets and a secular high magistracy that was responsible for the great transformation of church and State but rather the actions of large segments of the German people as a whole, and especially of the merchant and artisan classes within German cities'.[55] Berman also saves a place in his analysis for the peasantry and the urban poor, whom the high magistracy had crushed in an earlier massive revolt. And, while Berman's continental focus is on Germany, he argues that 'the German Revolution was a European Revolution' – having profound impacts throughout Central and Eastern Europe and seizing the Scandinavian imagination even more firmly than it did the Germanic.[56]

While Berman's first volume and its emphasis on the High Middle Ages generally tracks the viewpoint of other scholars of civil law history,[57] his account of the Protestant revolutions has been met with somewhat more dissent. Much of it is methodological and need not detain us because there is little dispute about Berman's central claim that the Lutheran revolutionaries had a distinctive legal philosophy. Contrary to the scholastics, for whom reason was the superior cognitive facility, Luther preached that reason should be

[53] H. J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983), p. 44.
[54] Ibid., especially pp. 545–556. [55] H. J. Berman, *Law and Revolution II*, pp. 3–54. [56] Ibid. at p. 57.
[57] See R. David, J. E. C. Brierley, *Major Legal Systems in the World Today* (Stevens & Sons, 1985); J. H. Merryman, R. Perez-Perdomo, *The Civil Law Tradition* (Stanford University Press, 2007); O. F. Robinson, T. D. Fergus, W. M. Gordon, *European Legal History* (Butterworths, 1994); A. Watson, *The Making of the Civil Law* (Harvard University Press, 1981).

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subordinated to conscience. Conscience was 'the bearer of man's relationship with God . . . that shapes and governs all of the activities of his life, including both his apprehension and his application of natural law'.[58] Further, Luther 'considered it to be the duty of the prince to oversee reform' because the extensive changes that were needed in legislation and the courts were not appropriate work for the masses.[59] The corollary principle, that 'orthodoxy was to be laid down by the ruler of each state',[60] became one of Protestantism's early political selling points.

Of greater importance to our concerns, however, was that home-field advantage was congenial to a parallel development in the Lutheran take on natural law. Far from a universalistic counterforce, natural law thinking provided a legal methodology that reinforced Protestant localism (and historicism). With law increasingly 'associated with the legislative sovereignty of each nation' in the person of their princes,[61] a new trajectory was established in legal thinking. 'Instead of trying to discover true principles of law from assumptions about human nature, as the French did under the influence of secular natural law, the Germans sought to find fundamental principles of German law by scientific study of the data of German law: the existing German legal system in historical context'.[62] Thus, we see that 'in old Germanic law and even in the nineteenth century, custom was of great importance'.[63] This pattern of legal science within the context of a local 'database' was appealing because it was infinitely replicable and its results contributed to wide variations in the reception of the *Code* as Napoleon attempted to export it to the rest of Germanic Europe.[64] When we consider how the fortunes of continental law might have differed if the French Code had been received throughout the Germanic States as it was elsewhere in Napoleon's domain, we might well conclude that 'the dramatic event in European legal history was not codification itself, but the German rejection of French codification'.[65] But how are we to determine which aspects of this Germanic dissent are relevant to the environmental constitutionalism outcomes that we have documented and which factors among those might complicate the implementation of the Green Deal? It is to that complex question that I now turn.

3.6 What Makes the Difference?

As a general matter, the social forces of justice and state authority present themselves to us wearing many faces.[66] As a matter of typological construction, we can distinguish between States that take *activist* approaches to the administration of justice, emphasizing the achievement of preferred policy outcomes. Conversely, a State's approach to questions of justice may be *reactive*, concentrating on resolving discrete disputes arising from naturally occurring social contexts. Moreover, in crafting its judicial institutions and processes,

[58] H. J. Berman, *Law and Revolution II*, p. 75. [59] Robinson et al., *European Legal History*, p. 178. [60] Ibid. at p. 167.
[61] David and Brierley, *Major Legal Systems in the World Today*, p. 67.
[62] Merryman and Perez-Perdomo, *The Civil Law*, p. 33. [63] Watson, *The Making of the Civil Law*, p. 169.
[64] See R. C. Van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* (Cambridge University Press, 1987), especially pp. 50–51.
[65] David and Brierley, *Major Legal Systems in the World Today*, pp. 66–67.
[66] For this insight I am indebted to M. R. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, 1986).

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a State may create a *hierarchical* officialdom which subjects the work of every judicial actor to direct review. Alternatively, judicial institutions may rely on multiple sources of authority with the expectation that they will *coordinate* their efforts in order to achieve justice. Assigning either France or Germany to any of these categories with certainty is inherently difficult. However, their respective codes do betray certain tendencies that bear on the questions at hand.

For example, the *Code Napoléon* is a distinctively post-revolutionary document. When the French Revolution swept away the *ancien régime*, whose central government had been too weak to unify French law, the way was open to a wave of reformers who drafted a code that was 'very brief and sketchy; deliberately so' as its authors 'professed a contempt for both Roman law and customary laws, aiming to make the law simple, direct and available to every citizen'.[67] The hope was the French Code would become 'a kind of popular book that could be put on the shelf next to the family Bible or, perhaps, in place of it', and that its clarity would 'allow citizens to determine their rights and obligations by themselves',[68] thus fulfilling the utopian object of making lawyers unnecessary. And it is important to observe that the dominant rationalism of the time is reflected in the Code's pretention to sweep away all prior law. After all, only 'an exaggerated rationalism can explain the belief that history could be abolished by repealing a statute'.[69] In all of these ways, the ideology of French codification 'accurately reflects the ideology of the French Revolution'.[70] The fact that Napoleon himself was more charmed by the brevity and ambiguity that made the Code more 'portable' and thus more useful to his ambitions does nothing to diminish its essentially revolutionary character.

For its part, the *BGB* is just as bold about its larger objectives as was the *Code Napoléon.* It declares its character at the very outset by including a heretofore unheard of feature – a 'general part' that was 'dominated by the dogmatic teaching of German universities in the nineteenth century which . . . had completely changed (while purporting merely to systematise) the German *ius commune*'.[71] Again, we see the pretension to overturn all that had gone before. But this time the motivation was not revolutionary but, rather, counter-revolutionary – an expression of the Pandectist commitment to remake German law by reaching back beyond the European experience to apply the Pandects of Justinian directly to German legal custom and to their immediate concerns. Their philosophy was one of pure legal science, but also a bold expression of German nationalism. While the Pandectists' claims to purity of purpose and political neutrality were belied by their embrace of the values of 'the dominant middle class which believed in the theory of laissez-faire . . . freedom of contract and the protection of private property',[72] their apparent activism was actually more reactive in character. After all, the German *ius commune* that the Pandectists swept away was by that time far from a pure-bred beast – being neither truly 'common' nor fully German. The primary culprit, as in so many other things European, was Napoleon.

[67] G. Golding, 'A Critical Comparison of the Schemes of the French and German Codes', *Irish Jurist* 1971, 6(2): 305–322, at p. 311.
[68] J. H. Merryman, R. Perez-Perdomo, *The Civil Law Tradition* (Stanford University Press, 2007), p. 29. [69] Ibid. at p. 29.
[70] Ibid. at p. 28. [71] David and Brierley, *Major Legal Systems in the World Today*, p. 92.
[72] Robinson et al., *European Legal History*, p. 268.

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Napoleon found his Code to be a handy tool for standardizing legal practice in the areas he had come to dominate. Its 'emphasis on legal equality and property rights' made it attractive to the emerging middle-classes, as a consequence of which it 'was translated into a number of languages and introduced into various subject States along with the jury system, a uniform court hierarchy, and judicial due process'.[73] However, in Germany, reception of the Code was (perhaps predictably) rather chaotic. Some German States had the Code forced upon them through annexation (chiefly the Rhine departments and Hanseatic cities). Others adopted it more or less as it was urged upon them (Westphalia, Berg, Frankfurt, Ahremberg, and Anhalt-Köthen) or after making significant changes to it (Baden). A sly few adopted it but never brought it into effect (Nassau and Würzburg), or began the process of adoption and then slow-walked it (Hesse-Darmstadt and Bavaria). The rest dithered until it eventually became evident that Napoleon was not going to press hard for its adoption – which they ultimately (and often quietly) declined to do.[74] However, the damage was already done. The French bacillus had entered the German body-politic, a foreign presence that festered in Baden, Berg and the Rhineland, where 'the Code Civil remained on their statute books until the [*BGB*] came into force'.[75]

Having established the activist quality of the legal culture which produced the Code and reactive character of the *BGB*, the forms of French and German structures of authority can be described with relative ease. The activism and hierarchy of French law is evident in its historical commitment to the 'investigating judge' as well as in its propensity to multiply 'official units – panels of low-level officials – in order to permit mutual supervision in implementing centrally imposed policy'.[76] In Germany, on the other hand, the principle that the sources of law are limited to only custom and statute, taken together with the history of German law as a 'patchwork of localized and diverse bodies of custom, uncoordinated by any judicial hierarchy'[77] mark German legal officialdom clearly as 'coordinate' rather than hierarchical and its approach as reactive. So here we have one explanation for the fact that 'modern scholars profess to see two different "families" among civil law systems or two branches of the civil law "family", one deriving from the Germanic sphere of influence, the other from the Latin or, more particularly, the French'.[78] The question remains, however, why should civil law nations with activist and hierarchical legal systems be so much more receptive to environmental constitutionalism than those with reactive and coordinate systems? And, ultimately, what can we learn from that data point about the likely challenges to the implementation of the EU Green Deal? To answer these questions, we need a more detailed perspective on environmental constitutionalism and the role it plays in environmentalism more generally. To gain that perspective, we shall begin by returning to the concept of consensus.

[73] A. Grab, *Napoleon and the Transformation of Europe* (Palgrave, 2003), p. 21.
[74] See T. T. Arvind, L. Stirton, Explaining the reception of the Code Napoleon in Germany: a fuzzy set qualitative analysis. *Legal Studies* 2010, 30(1): 1–29.
[75] Ibid. at p. 5. [76] Damaska, *The Faces of Justice and State Authority*, p. 183.
[77] Robinson et al., *European Legal History*, p. 165. [78] Watson, *The Making of the Civil Law*, p. 104.

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3.7 What Difference Does the Difference Make?

Elsewhere, I have discussed two contrasting (although not contradictory) approaches to the formation of governance consensus.[79] The approach that I have called 'declaratory' begins with the pronouncement of abstract principles, followed by an exegetical process of determining what sort of policies those principles suggest, and is concluded by a deductive exercise which establishes the rules that are needed to guide a target population that is (implicitly) assumed to wish to comply with the declared principles. This simple model captures the essence of rational management (with its mission statements, organizational goals, and individual objectives), of activist/hierarchical state authority, and of the broad characteristics of international regime formation. All of these familiar processes move from the general to the specific, using abstract declarations to (ultimately) resolve concrete problems.

On the other hand, the 'adjudicatory' form of consensus development begins with the resolution of many instances of what ultimately is recognized to be a more general problem. The archetypal example is the common law process of resolving individual disputes which (eventually) provides a large enough 'database' of resolutions that the successful ones can be identified and their common properties isolated. Legal treatises then follow, often restatements of the judge-made law, and finally (when the cases capture a problem of sufficient import) the development of model codes in anticipation of eventual codification. The adjudicatory model captures, admittedly in idealized form, the process of consensus formation in common law countries – including their development of human rights through reactive legislative solutions to emergent social problems within the framework of only sparse (and largely procedural) systems of constitutional rights.[80]

In comparing the legal cultures of France and Germany, what should we expect in this context? The Code, which we have characterized as abstract and even vague, has succeeded historically for precisely that reason. Its scope was universal – 'all Frenchman became citizens, without differentiation of status . . . all feudal burdens on land were abolished, as were all feudal privileges'.[81] While it purported to cover all subjects that the nation's judiciary might confront, it purchased that universality at the cost of generality. Indeed, a primary reason for the breadth of its influence and adoption is that 'it expressed more generally, and therefore more attractively than its rivals, the ideals of the codification movement which continued in civil law countries throughout the nineteenth century'.[82]

The authors of the *BGB*, on the other hand, would not have seen their project as part of a transnational movement. Their aspiration was to provide so complete and historically grounded an account of its area of coverage (limited by the confines of historically identifiable German legal custom) that judges would find the answer to any conceivable problem within its four corners. A companion goal was to derive those answers, to the greatest possible degree, from uniquely German customs and practices. A word that might fairly be applied to the *BGB* is 'accommodationist'. It was 'not intended to construct an

[79] Baber and Bartlett, *Environmental Human Rights in Earth System Governance*.
[80] See C. R. Epp, *The Rights Revolution: Lawyers, Activists and the Supreme Court in Comparative Perspective* (University of Chicago Press, 1998).
[81] Robinson et al., *European Legal History*, p. 257. [82] Ibid. at p. 260.

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ideal system on the basis of universal natural law; its object was to maintain (as far as this was compatible with the necessities of unification) the connexion of the present with the past, but without neglecting the change in the conditions of life brought about by modern social and economical developments'.[83] The adoption and subsequent durability of the *BGB* is the product of a consensus that 'rested (and rests) on several foundations. These include the Germanic nature of the Code and the historical and cultural values that the new law embodied'.[84] In contrast to the declaratory character of the *Code Napoléon* and its exegetical and deductive methodology, the *BGB* is seen (at least by its adherents) as the inductive product of concrete problem-solving through any number of customs and practices that have allowed the German people to 'adjudicate' their differences over the centuries. It is almost as if the German Pandectists had been in close correspondence with the American most widely remembered for having written that 'the life of the law has not been logic: it has been experience'.[85]

3.8 Some Conclusions (Tentative, of Course)

If the parallel suggested by the immediately preceding sentence sends a shiver down the spines of civil law scholars, perhaps it should. Common law countries reject the concept of environmental human rights almost unanimously, with only Jamaica significantly breaking ranks. Moreover, the leading common law countries are well known for their sparse collections of basic rights – tending towards political and civil rights thought to be 'constitutive' of their polities in the most fundamental sense. So, while the point is a quite general one at this juncture, we have a wider and entirely plausible context for the dissent by EU countries with legal systems inspired by the Germanic/Romanist civil law tradition rather than that of the French.

Moreover, respecting our primary question concerning the implementation of the EU Green Deal, we have found that the 'natural experiment' of environmental constitutionalism has potential lessons to teach. If Berman is correct in treating the German and English elements of the Protestant Reformation as revolutionary siblings, perhaps the shared (and largely secular) conservatism of those revolutions is something we should attend to. The departure of the UK may turn out to have been an unexpected boon to the implementation of the Green Deal. But Germany and the Germanic legal culture are still alive, well, and fully present at the heart of the continent and its politics. And, as the various provisions of the Green Plan mature into programmes and mandates, that legal culture may assert itself.

For example, reactive legal institutions deploying coordinate political authority are more comfortable resolving concrete disputes than they are promulgating regulatory policy.[86] So when it comes to the style of environmental policy that appeals to various countries, Germany may prove to be more like the United States than anyone might have

[83] S. L. Goren (transl.), *The German Civil Code: (as amended to January 1, 1992): And the Introductory Act to the Civil Code of August 15, 1896 (including amendments to January 1, 1992): And the Act on the Liability for Defective Products of December 15, 1989*, revised edition (Fred B. Rothman & Co., 1994).
[84] P. R. Senn, Why has the German civil code proven so durable? *European Journal of Law and Economics* 1999, 7(1): 65–91.
[85] O. W. Holmes Jr., *The Common Law* (Dover, 1991), p. 1.
[86] See Damaska, *The Faces of Justice and State Authority*, especially chapter 6.

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expected – which is not necessarily all bad. As one early indication of its positive potential, the environmental justice movement in Germany appears to be significantly more prominent than it is in France, of which it was said as recently as 2014 that it simply had no environmental justice movement.[87] This has a number of implications.

First, environmental justice is a product of the civil rights movement rather than the broader human rights movement. In comparison to environmental human rights, environmental justice is far more concerned with environmental manifestations of racial, ethnic, and class discrimination. Although environmental justice activists recognize environmental human rights activists as kindred spirits on the global stage, their interests generally lie closer to home – often manifesting a concentric circle perspective in which those closest to us are the subjects of our strongest obligations.[88] As compared with environmental human rights, therefore, environmental justice is typically characterized by a significant degree of *localism.*

Second, environmental justice has generally been concerned with the reasons for *injustice* rather than the rationale for greater *justice*. In part because of its localism, but also because of its frequent need to situate its concerns in certain legal categories of protected persons, the movement struggles to reach beyond issues affecting discrete and insular minority populations.[89] A broader environmental human rights perspective is often resisted as the product of classical liberalism that is largely blind to the environmental plight of women and the people of the developing world.[90] This can express itself as a preoccupation with remedial measures as opposed to regulatory policy. As an ironic consequence, ecofeminists,[91] and those whose concerns involve the global south,[92] often look elsewhere for theoretical and political allies. In this way environmental justice's local and *particularistic* success tends to isolate it from the more *universal* narratives (and advocates) that characterize the broader environmental human rights movement – sources of support that might help environmental justice reach beyond its localism to achieve greater *global* influence. Fissures of this sort within the environmental movement offer gaps into which reactionary forces can drive wedge issues.

Third, and finally, environmental justice's primary focus is on the imposition of environmental disadvantage on those who have been rendered helpless to resist by a history of persecution – of the denial of what we generally consider their civil rights. In large part, this is a function of the statutory frameworks within which environmental justice actions must be situated (particularly in the United States). The result is that environmental justice issues are commonly associated with environmental racism involving the exposure of minority communities to disproportionate health risks as a consequence of their political disenfranchisement. The primary narrative is one of individual conscience rather than universal reason. Important as this focus is, it often overlooks the systemic issues of the 'reduced

[87] C. Gramaglia, Why is there no environmental justice movement in France? *Analyze und Kritik* 2014, 2: 287–313.
[88] P. Wenz, *Environmental Justice* (SUNY Press, 1988).
[89] E. L. Rhodes, *Environmental Justice in America: A New Paradigm* (Indiana University Press, 2003).
[90] See Wenz, *Environmental Justice*, at chapter 6.
[91] V. Plumwood, Ecosocial feminism as a general theory of oppression, in C. Merchant (ed.), *Key Concepts in Critical Theory: Ecology* (Amherst, NY: Humanity Books, 1999).
[92] R. Guha, radical environmentalism: a third-world critique, in C. Merchant (ed.), *Key Concepts in Critical Theory: Ecology*, p. 71.

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environmental quality of life … lack of participation … in environmental policy- and decision making … asymmetry of governmental and private-sector responses' to environmental demands of minorities and 'the much larger but related international problems of environmental justice'.[93] Thus, the vital strengths that the environmental justice movement has realized from its *remedial* focus on local and particular injustices driven by an individualism of conscience have been bought at the cost of the advantages that a more global, universal and *prospective* approach might offer.

To a significant extent, the environmental human rights movement still carries environmental justice strands in its genetic makeup. However, those genes do not manifest themselves everywhere and the unfortunate consequences of that run in more than one direction. For example, the EU Green Deal is regrettably silent on the issue of environmental human rights. That, I suggest, is no coincidence. Without the powerful and pressing issues of 'environmental racism' that roil politics in the United States, there was less likelihood that an influential environmental justice movement would emerge in Europe. As a consequence, 'a Eurolegalism relying on rights frames has been a relative latecomer to the environmental policy arena. And the rights that have been evident are – in the case of legislative rights – procedural rather than substantive in nature and in that respect, offer a somewhat less powerful Eurolegalism' than would otherwise be the case.[94]

The hole in EU environmentalism that I am describing is also evident in the absence of judicial dialogue between the European Court of Human Rights and the Court of Justice of the EU regarding environmental rights. That pattern is a glaring exception to the generally cooperative disposition exhibited by the two courts in other domains of human rights protection.[95] This fact, when combined with relative absence of environmental human rights framings in Eurolegalism is almost enough to make one believe that those in the know are avoiding this corner of the environmental policy space because they know it to contain old unexploded ordinances. In any event, European environmentalism has thus been (and continues to be) deprived of the advantages of environmental justice activist energy and public attention that have benefited American environmentalism as a result of its informal partnership with the American civil rights movement. Perhaps that is the cost of ignoring the fact that localism and the exercise of individual conscience are still actively contested values. Consider that in the most recent wave of the World Values Survey, two items separated France and Germany in a way that few others do. In response to the item that asked how close respondents felt to the rest of the world, nearly 30% of French said 'very close' while only 15.5% of Germans gave that response.[96] And when asked whether a long list of personal traits were important qualities in a child, only 36% of French respondents thought the 'independence' was important, whereas nearly 70% of Germans thought so.[97]

Finally, with respect to climate issues in particular, the abstract quality of environmental rights that lack environmental justice lineage contributes to the Janus-faced form that

[93] Rhodes, *Environmental Justice in America*, p. 9.
[94] C. Hilson, The visibility of environmental rights in the EU legal order; eurolegalism in action? *Journal of European Public Policy* 2018, 25(11): 1589–1609, at p. 1609.
[95] See I. Cenevska, A thundering silence: environmental rights in the dialogue between the EU Court of Justice and the European Court of Human Rights. *Journal of Environmental Law* 2016, 28: 301–324.
[96] www.worldvaluessurvey.org/WVSContents.jsp, retrieved 10/22/2021. [97] Ibid.

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climate change narratives take. On the one hand, the climate change narrative 'is a discourse of judgment, pathology, and catastrophe'. It is 'a hostile "other" in collective consciousness, condemning us to suffer for our excesses, threatening us with environmental conditions' we have long associated with ill-health while holding over our heads 'the prospect of a radical dispossession' of the things we value most. On the other hand, an analysis of climate discourses by the World Trade Organisation, International Monetary Fund, World Bank, and Organisation for Economic Cooperation and Development suggests that 'the global governmentality of climate protection is built on four discursive pillars – globalism, scientism, efficiency, and an ethics of growth – that make climate protection function as a powerful but meaningless rhetorical tool'.[98] The technocratic elitism that results has proven quite resilient in the face of conventional environmental arguments, but seems forever vulnerable to environmental justice assaults – which draw their power from our nagging awareness that 'the very notion of the domination of nature by man stems from the very real domination of human by human'.[99]

Having now discussed some of the normative differences that cohere with the distinction between activist and hierarchical forms of legal authority and legal institutions with a more reactive character that relies on coordinate authority structures, we can now speculate briefly about what implementation obstacles to the Green Deal will look like in general. In the light of the German preference for an inductive approach to the formation of political consensus, the generalized conservatism that is sometimes attributed to the Germanic strain of civil law now begins to appear to be more a form of experimentalism – a preference for solutions that have been field-tested on a small scale before being introduced as a regulation of general application. So too that individualism which expressed itself in the English revolution as a founding principle of liberalism appears on the continent less an intrusion into the German body politic than a venerable expression of personal independence grounded in personal conscience. The nationalism that equally attended the development of German civil law is less a rejection of the world than it is a suspicion about deductive reasoning from abstract universals and a preference for empiricist induction. Finally, these three elements taken together suggest that the Germanic form of civil law has a pronounced tilt towards normative decentralization – a form of governance that embraces the concept of subsidiarity as *both* a legal and moral principle. Accommodating that perspective while transforming the entire European way of life will be an endless challenge, increasing in difficulty as the need (and demand for) collective 'transformation' grows and our responses more closely impinge upon our normative cores. So, that process may well force the scholars and jurists of the EU onto the environmental rights minefield some of them appear to have been avoiding. I suspect that ground is where the most daunting challenges to Green Plan implementation will be encountered. But there is at least one bright spot.

While my discussion to this point of the declaratory and adjudicatory models might suggest that these are competing approaches to the formation of rights, it is not necessarily the case. These approaches are both models, potentially complementary ones, of how

[98] W. F. Baber, R. V. Bartlett, Democracy and climate justice: the unfolding tragedy, in K .K. Bhavnani, J. Foran, P. A. Kurian, D. Munshi (eds.), *Climate Futures: Reimaging Global Climate Justice* (ZED Publishing, 2019), pp. 143–151.
[99] M. Bookchin, *The Ecology of Freedom: The Emergence and Dissolution of Hierarchy* (AK Press, 2005), p. 65.

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governing consensus can be built. And whatever else a right may be, it necessarily involves the assertion of a particular kind of consensus. In order to become functioning elements of a governance structure, 'rights must be so well-established that they are rarely disputed, and real rights must present socially, politically, and legally accepted bounds on what must, can, and cannot be done in the everyday lives of humans'.[100] The adjudicatory and declaratory models describe at a general level alternate methods for developing such legally accepted boundaries by harnessing both the remedial and regulatory potential of law.[101] I am convinced that deploying these models in tandem, as a pincer attack on the obstacles to climate change policy implementation, is the strategy we will all finally be forced to adopt.

The need for this two-pronged approach is evident in European views on the pursuit of non-trade policy objectives through trade policy decisions. Views among EU institutional actors on the importance of environmental and human rights objectives align well with those of the European public generally, with both diverging from business community opinions. However, on the more practical matter of whether non-trade objectives should be addressed through trade policy, EU actors share the opinions of the business community rather than those of their citizenry.[102] This disjuncture clearly suggests a normative gap between EU citizens and EU institutional actors – *both* public and private. Indeed, if elite attitudes are the shoals upon which environmental human rights are destined to founder, then broader public participation is likely to be the key mechanism through which environmental rights will eventually become effective. The implementation of environmental human rights will likely be propelled by a combination of confrontational and institutional modes of participation.[103]

Such an 'outside/inside' pattern of rights creation and development is very much the norm in common law countries.[104] It is also entirely consistent with the adjudicatory model of consensus formation as I have described it. And, if the account that I have provided of Germanic civil law is generally accurate, it suggests that EU nations that have followed that tradition are not so much normative holdouts as they are devotees of local experimentation. Even if this is accepted, it does not necessarily bode ill for the long-term development of an EU normative consensus on climate rights. It means only that much of the heavy lifting will likely have to be accomplished through intensive interpretation of the entire domain of environmental rights by the European Court of Human Rights, consistent with its long-standing view of the European Convention as a living instrument of governance.[105] However, this will require time that a changing climate may not permit us.

[100] Baber and Bartlett, *Environmental Human Rights in Earth System Governance*, p. 3.
[101] See Baber and Bartlett, *Global Democracy and Sustainable Jurisprudence*.
[102] A. Yildirim, R. Basedow, M. Fiorini, B. Hoekman, EU trade and non-trade objectives: new survey evidence on policy design and effectiveness. *Journal of Common Market Studies* 2021, 59(3): 556–568.
[103] L. Christel and R. Gutierrez, Making rights come alive. *Journal of Environment & Development* 2017, 26(3): 322–347.
[104] C. Epp, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State* (University of Chicago Press, 2009).
[105] L. Zilic, Procedural human rights in environmental cases: principles established in the practice of the European Court of Human Rights. *Anali Pravong Fakulteta Univerziteta u Zenici* 2019, 12(23): 53–67.

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