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A Thundering Silence: Environmental Rights in the Dialogue between the EU Court of Justice and the European Court of Human Rights

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ABSTRACT

The aim of the article is to shed light on the particular issue of absence of judicial dialogue between the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU) in the matter of environmental rights which represents a glaring exception to the generally cooperative disposition exhibited by the two courts in other domains linked to human rights protection. The article draws on this particular absence of judicial dialogue by examining the respective patterns of judicial reasoning employed by the CJEU and the ECtHR in cases before them that involve, or have a bearing on, environmental rights (substantive and procedural). Thus, the singular tendencies discernible in the ECtHR's progressive jurisprudence in the field of environmental rights will be compared to CJEU's jurisprudence relevant to environmental rights with the intention of detecting certain aspects in the CJEU's approach which could further stand to be improved following the example of ECtHR's activist environmental jurisprudence as a viable avenue for initiating the currently missing dialogue between the two courts in the matter of environmental rights.

KEYWORDS: European Court of Human Rights (ECtHR), Court of Justice of the European Union (CJEU), European Convention for the Protection of Human Rights (ECHR), Judicial dialogue, Environmental protection, Environmental rights, Procedural environmental rights, Substantive right to a clean environment

The human rights protection system established under the European Convention of Human Rights (ECHR; hereinafter, the Convention) and the European Union's own human rights protection system have enjoyed a harmonious co-existence over the past decades. The Union's evolving human rights policy has received valuable input from the European Court of Human Rights' (the ECtHR) judicial record in the field of human rights protection, the Court of Justice of the EU (the CJEU) and the

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ECtHR having been involved in a dynamic dialogue which has become 'an increasingly important feature of European integration and governance – symbiotic interaction of fragile complexity',[1] underscored by a frequent practice of referring to each other's jurisprudence and with an overwhelming number of these references having an approving rather than disapproving tone. The judicial dialogue the CJEU and the ECtHR have been involved in belongs to the type of transnational judicial conversations that occur as a manifestation of the broader phenomenon of courts world-wide using each-other's jurisprudence,[2] underpinned by the idea of supranational courts communicating with each other through a judicial dialogue that involves judges citing each other's case law in cases before them.[3] The planned accession of the EU to the ECHR, as foreseen under Article 6(2) Treaty of the European Union (TEU) and the related *Protocol 8 on the Accession of the European Union to the ECHR*, further adds to the significance of the judicial dialogue between the CJEU and the ECtHR. Certainly, in light of recent developments, it cannot be denied that the dialogue between the two courts currently sits in the shadow of CJEU's Opinion 2/13 where the Court ruled the accession of the EU to the ECHR as envisaged by the draft accession agreement to be liable to adversely affect the specific characteristics of EU law and its autonomy, and thus to be incompatible with the Union's primary law.[4] Without pre-judging whether Opinion 2/13 will possibly lead to a stagnation in the dialogue between the CJEU and the ECtHR or the judicial dialogue will indeed remain unaffected, the article bases its analysis upon what has thus far been accomplished through the medium of judicial dialogue between the two courts.

In the face of the dynamic inter-judicial exchange taking place between the CJEU and the ECtHR over the years, there is curiously one aspect—environmental rights[5]—with regard to which this otherwise dynamic dialogue becomes mute. This article aims to shed light on this particular instance of absence of judicial dialogue in the matter of environmental rights, looking at environmental rights in light of the distinction between procedural environmental rights, on the one hand, and substantive environmental rights, on the other.[6] The substantive right to a clean environment denotes a right to a particular or specified environmental quality.[7] The recognition of such right has been covered by a negligible number of international

1 Sionaidh Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) 43 CMLR 629, 630–31.

2 ibid 654.

3 Cian Murphy, 'Human Rights Law and the Challenges of Explicit Judicial Dialogue' (2012) Jean Monnet Working Paper 10, 8.

4 Opinion 2/13 [2014] ECLI:EU:C:2014:2454, [200].

5 Remaining cognizant of the differentiation that exists between the ecocentric and the anthropocentric approach to environmental rights, the term 'environmental rights' used throughout this text shall refer to human rights linked to environmental protection as 'proclamations of a human right to environmental conditions of a specified quality'. See Dinah Shelton, 'Developing Substantive Environmental Rights' (2010) 1 JHRE 89, 89.

6 ibid 90.

7 The notion of a 'right to environment proper' appears in different versions in academic literature: 'right to a particular environmental quality', 'right to a clean environment/healthy environment/decent environment/sound environment', etc., or some variation of the former. For the purposes of this article, the 'right to clean environment' reference will be used throughout the text.

multilateral legal instruments.[8] Procedural environmental rights, on the other hand, have been firmly grounded in various international law instruments, the most prominent of which is the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters,[9] which enshrines three types of procedural environmental rights: the right of access to environmental information, the right to participate in environmental decision-making and the right of access to justice in environmental matters.

The CJEU and the ECtHR have approached the field of environmental rights from their own singular perspective which has nonetheless failed to engender any dialogue between them in the form of, at the very least, an acknowledgement of each other's jurisprudence if not showing open deference thereto. The ensuing discussion will inquire into the distinguishing features of the respective approaches employed by the ECtHR and the CJEU towards environmental rights, exploring whether such variance hails from a different understanding of the concept of environmental rights. In order to address the issue of a missing dialogue between the two courts, firstly, the article will showcase the singular tendencies discernible in ECtHR's jurisprudence in the field of environmental rights juxtaposing the former to the approach applied by the CJEU to cases that involve, or touch upon, environmental rights. Therefore, in order to seek out the possible (policy or other) reasons behind the lack of judicial dialogue, as well as to offer viable options for instituting the currently missing dialogue between the courts, the findings relative to the CJEU's jurisprudence with respect to environmental rights will be measured against the standard crafted by the ECtHR in this domain, providing the background for contemplating ways in which the rights-oriented component of the CJEU's environmental jurisprudence could potentially stand to be reinforced by following the example of the ECtHR.

1. LACK OF DIALOGUE ON ENVIRONMENTAL RIGHTS—A DEPARTURE FROM A WELL-SETTLED PRACTICE OF JUDICIAL EXCHANGE BETWEEN THE CJEU AND THE ECtHR

The long-standing dynamic judicial interaction between the CJEU and the ECtHR is a prominent feature of the relationship between the ECHR's and the Union's human rights protection systems, marking its beginnings even before the Union's primary law formally sanctioned it, back in the 1970s with the *Nold*[10] and

8 For example, the 1981 African Charter of Human Rights and Peoples' Rights adopted under the auspices of the former Organization of African Unity recognizes a substantive human right to the environment, providing that '[a]ll peoples shall have the right to a general satisfactory environment favorable to their development' (art 24, *Banjul Charter on Human and Peoples' Rights* O.A.U. Doc. CAB/LEG/67/3/Rev.5). Furthermore, the 1972 Stockholm Declaration on the Human Environment, although not explicitly introducing a substantive right to clean environment, relays the crucial link between the enjoyment of human rights and the safeguarding of the human environment, stating that '[b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights - even the right to life itself' (Declaration of the UN Conference on the Human Environment, 16 June 1972, 11 I.L.M. 1416).

9 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), UN ECE/CEP/43, 2161 UNTS 447 (1998).

10 C-4/73 *Nold* [1974] ECR 491.

Hauer[11] judgments where the CJEU proclaimed its deferential approach to the human rights protection system established under the ECHR.[12] The Union's primary law codifies the legal avenues through which the judicial dialogue between the two courts is carried out. Pursuant to Articles 6(2) and (3) TEU, a commitment is undertaken for the future accession of the Union to the ECHR whereby such accession should not affect the Union's competences as defined in the Treaties whereas fundamental rights, as they are guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, are accorded the status of general principles of Union law.[13] Article 52(3) of the EU Charter of Fundamental Rights provides that, to the extent that the rights enshrined therein correspond to the rights guaranteed by the ECHR, the meaning and scope of those rights are to be considered the same as those laid down by the Convention. Complementing the Article 6(2) TFEU accession commitment, Protocol (No 8) on the Accession of the European Union to the ECHR foresees that the future accession agreement should respect the specific characteristics of the Union and Union law,[14] the test that the CJEU deemed the EU draft accession agreement to the ECHR had failed to satisfy, according to its recently delivered Opinion 2/13.

Up until December 2009 when the EU Charter of Fundamental Rights (hereinafter, the EU Charter)—the Union's primary law instrument in the field of human rights protection—took effect, it was customary for the EU Court of Justice, in dealing with cases having a human rights component, to typically defer to the human rights protection system offered under the ECHR, and more particularly, the jurisprudence of the ECtHR.[15] Even today, given that in important respects the scopes of the EU Charter and the ECHR overlap, in interpreting the scope and content of the rights guaranteed under the EU Charter, the CJEU is, more often than not, led to follow the human rights protection standards forged by the Strasbourg court, bolstering its own argumentation through reliance on the relevant provisions of the ECHR and the relevant ECtHR jurisprudence.[16]

11 C-44/79 *Hauer* [1979] ECR 3727.

12 The *Nold* judgment provided the opportunity for the CJEU to designate the sources it draws inspiration from in the safeguarding of fundamental rights—that is, the constitutional traditions common to the Member States and international treaties for the protection of human rights which the Member States have collaborated or of which they are signatories (one of which is the ECHR), which can serve to supply guidelines to be followed within the framework of Community law [13].

13 The part of the text of art 53 of the EU Charter relevant to the relationship with the European Convention of Human Rights repeats *mutatis mutandis* the text of art 6(3) TEU.

14 Art 1 of that Protocol.

15 For an analysis of the specific references to each other's case law, see Douglas-Scott (n 1) 640–52. For more on the human rights discourse in the EU, see Armin Von Bogdandy, 'The European Union as a Human Rights Organization?: Human Rights and the Core of the European Union' (2000) 37 CMLR 1307. For a history of the development of the Union's human rights protection framework, see Sionaidh Douglas-Scott, *Constitutional Law of the European Union* (Longman 2002) Chapter 13.

16 This has been reflected in the text of art 52(3) of the EU Charter of Fundamental Rights which provides that in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the Convention. Some of the more recent cases to this effect include, C-419/14 *WebMindLicences* ECLI:EU:C:2015:332 [70-72], [77-78]; C-34/13 *Kusionova* ECLI:EU:C:2014:2189 [64], C-398/13 P *Inuit Tapiriit Kanatami* ECLI:EU:C:2015:535 [61]; C-562/13 *Abdida* ECLI:EU:C:2014:2453 [47],[52]; C-399/11 *Melloni* ECLI:EU:C:2013:107 [50]; etc.

Placed against the backdrop of the intensive and fertile judicial exchange characterising the relationship between the CJEU and the ECtHR,[17] the particular instance of a lack of dialogue in the matter of environmental rights indeed appears as a peculiarity. The following analysis will look at the manner in which each of these courts' approaches differ in light of the 'procedural environmental rights' versus the 'substantive right to a clean environment' dichotomy. The intrinsic link between these two types of environmental rights has been best captured in the text of the Aarhus Convention by the stipulation that:

> *'[i]n order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being*, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters(. . .)'.[18]

Effectively, the procedural rights in the Aarhus Convention, which have been established with the objective of maintaining an adequate environment for people, equally serve to reinforce and thus facilitate the substantive right to a clean environment.[19] Admittedly, the intrinsic link between the procedural and the substantive environmental rights notwithstanding, the endorsement of the procedural aspect cannot be considered as supplanting the substantive aspect.[20]

Before going into a more detailed analysis of the relevant case law of the two courts, it is important to recall the means the two courts have at their disposal to go into the environmental rights discourse. As concerns the ECtHR, the fact that the ECHR fails to guarantee any environmental rights has not prevented the ECtHR from producing copious jurisprudence relative to the protection of human rights linked to the environment.[21] Quite to the contrary, the ECtHR's judicial activism has proven revolutionary as by broadening the scope of certain rights guaranteed under the ECHR (right to private life and family life, the right to life, right to a fair trial, etc) the Court has been able to extend the scope of the ECHR to the domain of environmental protection, thereby effectively recognising the existence of environmental procedural rights under the ECHR system and, as will be

17 On the concept of cross-fertilization of legal systems accomplished through the medium of judicial dialogue, see Francis Jacobs, 'Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice' (2003) 38 TILJ 547, 550–52.

18 Art 1 of the Convention. Italics mine.

19 Ole Pedersen, 'European Environmental Human Rights and Environmental Rights: A Long Time Coming?' (2008) 21 GIELR 73, 99–100.

20 Roderic O'Gorman, 'The Case for Enshrining a Right to Environment within EU Law' (2013) 19 EPL 583, 601.

21 See, *Fredin v Sweden* App no 18928/91 [1994] ECHR 5; *Lopez Ostra v Spain* App no 16798/90 [1994] ECHR 46; *Guerra v Italy* App no 14967/89 [1998] ECHR 7; *Taşkın v Turkey* App no 46117/99[2004] ECHR 621; *Fadeyeva v Russia* App no 55723/00 [2005] ECHR 376; *Tatar v Roumanie* App No 67021/01 (ECHR, 27 January 2009); *Hardy and Maile v United Kingdom* App No 31965/07 [2012] ECHR 261; *Di Sarno v Italy* App No 30765/08 (ECHR, 10 January 2012); *Bacila v Romania* App No 19234/04 (ECHR, 30 March 2010).

evidenced below, to a certain limited extent, the substantive right to a clean environment.[22]

Conversely, despite the absence of recognition of any of the procedural environmental rights or the substantive right to clean environment under the EU Charter of Fundamental Rights, the Union nevertheless enjoys a comparatively better disposition for the endorsement of these environmental rights. More specifically, the former absence has been significantly offset by the Union's accession to the Aarhus Convention in 2005,[23] which has allowed for the procedural rights enshrined in the Aarhus Convention (ie the right of access to environmental information, right to participate in environmental decision-making and access to justice in environmental matters) to be adequately translated to the Union legal framework via the Union's implementing instruments,[24] as environmental procedural rights guaranteed *by the Union*. Likewise, in spite of the endorsement of the substantive right to clean environment being currently absent from the Union framework, the over-arching objective of achieving a high level of environmental protection figures among the general objectives pursued by the Union[25] and is realised through the mechanisms of the Union's comprehensive environmental policy which covers a broad range of environmental issues (air, biodiversity, chemicals, water, noise, soil, forests and waste, etc).[26] Reflecting the priority attached to the objective of environmental protection are the legal bases provided in the Union Treaties relevant to the Union's environmental policy which, in turn, have been strongly underpinned by the requirement for 'high level of protection and improvement of the quality of the environment'.[27]

Namely, the Union's objective to strive for a 'high level of protection and improvement of the quality of the environment' as enounced in Article 3(3) TEU, appears in a textually slightly varied form in Article 37 of the EU Charter as a requirement for a *high level of protection to be integrated into the Union policies and ensured in accordance* with the principle of sustainable development.[28] Far from qualifying as the Union's proclamation of a rights-based approach to environmental protection, Article 37 of the EU Charter was initially considered as carrying the critical potential to act as basis for

22 See, *Di Sarno v Italy* App No 30765/08 (ECHR, 10 January 2012); *Bacila v Romania* App No 19234/04 (ECHR, 30 March 2010);.

23 See Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters[2005] OJ L 124/1.

24 See Section3.

25 Art 3(3) TEU.

26 <http://ec.europa.eu/environment/index_en.htm> accessed 29 March 2016; For a succinct account of the evolution of the Union's environmental policy see Jan Jans and Hans Vedder, *European Environmental Law* (4th edn, Europa Law Publishing 2012) 3–12.

27 Art 3(3) TEU.

28 Art 37 of the EU Charter practically couples together two principles: an 'enhanced' version of the integration principle which requires that a '*high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union*' and the principle of sustainable development (art 11 TFEU codifies the integration principle of the Union's environmental policy: 'Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development'. For more on the integration principle, see Ludwig Kramer, *EU Environmental Law* (7th edn, Sweet and Maxwell 2011) 20–22; Jans and Vedder (n 27)13 ff.

the gradual contemplation of a substantive right to environment under Union law.[29] However, being that the Explanatory Document for the EU Charter clarifies that Article 37 introduces 'principles'[30] rather than 'rights', it cannot realistically be expected that individual rights can be derived from this provision, especially since Article 52(5) of the EU Charter significantly restricts the scope of application of Article 37 and thus, this provision's legal potential. Article 52(5) stipulates that the provisions of the Charter which contain principles are to be implemented by Union legislative and executive acts and by acts of Member States when they are implementing Union law. Thus provisions like Article 37 are only to be considered judicially cognizable in the interpretation of those acts and in the ruling on their legality.[31]

2. THE ENVIRONMENTAL PROTECTION JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS—THE CASE FOR/ROAD TO BECOMING AN 'ENVIRONMENTAL RIGHTS' COURT

When it comes to forging a rights-oriented approach to the field of environmental protection, the ECtHR is the judicial organ that is to be considered the frontrunner in Europe, its jurisprudence being representative of a regional court pushing the limits of its own jurisdiction in order to respond to the increasing environmental protection concerns of modern society.[32] The progressive disposition of the ECtHR is manifested via the practice of extending the scope of application of the existing Convention rights for the purpose of accommodating the environmental protection considerations, which has helped the ECtHR trail-blaze its own unique tendencies in environmental rights jurisprudence[33] and has granted the Convention the quality of a *'living instrument, to be interpreted in the light of present-day conditions'*.[34] In this

29 See Pedersen (n 20) 103; Lynda Collins, 'Are We There Yet?: The Right to Environment in International and European Law' (2007) 3 JSDLP 119, 143. For a more comprehensive discussion on the status and actual and potential legal consequences of Art 37 of the EU Charter, see Elisa Morgera and Gracia Marin-Duran, 'Article 37' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights* (Hart Publishing 2014); Elisa Morgera and Gracia Marin-Duran, 'Commentary on Article 37 of the EU Charter of Fundamental Rights – Environmental Protection' (2013) University of Edinburgh School of Law Research Paper Series, Europa Working Paper No 2013/2.

30 *Explanations Relating to the Charter of Fundamental Rights* [2007] OJ C 303/02, 17–35; The explanatory document provides that the principles set out in art 37 have been based on art 3(3) TEU and arts 11 and 191 TFEU and that the text of the article draws on the provisions of some national constitutions.

31 For most of the commentators, art 37 represents a missed chance at providing a full-fledged right to environment and an altogether weak provision that adds little in terms of inaugurating a substantive right to environment and merely confirms the objectives of the Community's environmental policy (see Pedersen (n 20) 103; Morgera and Marin-Duran (n 30) 984), while there are also others that view this provision quite affirmatively, as endorsing a notion of an obligation that is consistent with the substantive right to clean environment, as opposed to mere procedural rights in the environmental arena (see Collins (n 30) 143).

32 See, Council of Europe, Steering Committee for Human Rights (CDDH), Final Activity Report – Human Rights and the Environment, CDDH (2005) 016 Addendum II, 7,10.

33 See JG Merrills and AH Robertson, *Human Rights in Europe: A study of the European Convention on Human Rights* (Manchester University Press 2001); David Harris and others *Law of the European Convention on Human Rights* (OUP 2009); Dinah Shelton, 'Human Rights and the Environment: Substantive Rights' in Malgosia Fitzmaurice and others (eds), *Research Handbook on International Environmental Law* (Edward Elgar Publishing 2010) 275-279.

34 See *Airey v. Ireland* App no 6289/73 [1979] ECHR 3[26]; *Loizidou v. Turkey* App no 15318/89 [1995] ECHR 10, [71].

sense, by performing an 'evolutive' interpretation of the Convention, the ECtHR has incrementally raised the level of protection of the rights and freedoms enshrined in the Convention thereby contributing to the development of a 'European public order'.[35]

The following analysis singles out the primary features of the ECtHR's jurisprudence in the domain of environmental protection by looking at the main turning points in its evolutive development. In this context, it is important to indicate that the ECtHR's jurisprudence concerning environmental rights has largely gravitated around reliance on Articles 2 (right to life), 6 (right to a fair trial) and 8 (right to respect for private and family life) of the ECHR,[36] although other articles have also been invoked by applicants (freedom of expression and the right to receive and impart information (Article 10), freedom of assembly and association (Article 11) and the right to protection of property (Article 1 of the Additional Protocol 1).[37] Of the enounced legal bases, Article 8 ECHR has been singled out as the legal basis that bears the most immediate link to environmental human rights and the objective of guaranteeing protection against environmental pollution and nuisances,[38] the ECtHR's progressive jurisprudence in the field being seen as proof of its approval of the 'Article 8 endorsement of the right to a healthy environment'.[39]

The ECtHR's forward-looking stance has been matched by equally progressive policy statements of the Council of Europe's Parliamentary Assembly; eg the Recommendation 1130 (1990) of the Parliamentary Assembly suggested the inclusion of the right to environment in an optional protocol to the Convention[40] while the ambitiously worded Recommendation 1431 (1999) of the Parliamentary Assembly contemplated a possible amendment to the Convention so as to include

35 Dissenting Opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner in *Hatton v the United Kingdom* (App no 36022/97[2003] ECHR 338, point 2.

36 '*Article 2 ECHR: Right to life*: Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law (. . .);' and '*Article 6 ECHR: Right to a fair trial:* In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. (. . .); and '*Article 8 ECHR: Right to respect for private and family life*: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'.

37 Nicolas De Sadeleer, 'Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases' (2012) 81 NJIL 62. Also, Pedersen (n 20) 84.

38 Dissenting Opinion of Judges Costa and others (n 30).

39 ibid; Equally, it is worth noting that the ECtHR approaches environmental rights from the individual person's standpoint, short of extending the scope of this right so as to include general environmental degradation which affects the wider community or the environment *per se*. Hence, only individuals who have been immediately affected and their right(s) under the Convention interfered with can be beneficiaries of the right to clean environment - not the community at large or the environment as such.

40 See O'Gorman (n 21) 598.

the 'right to a healthy and viable environment as a basic human right', as a result of the 'growing recognition of the importance of environmental issues'. Subsequently, Recommendation 1614 (2003) on Environment and Human Rights called upon the governments of the Member States of the Council of Europe to 'recognise a human right to a healthy, viable and decent environment' which would entail the obligation for states to 'protect the environment in national laws, preferably at constitutional level'. The 2003 Recommendation marks a visible retreat in the Parliamentary Assembly's stance, as the responsibility to guarantee the right to environment is shifted to the national level rather than the ECHR level. More recently, however, in Recommendation 1885 (2009) the Parliamentary Assembly called for a right to a healthy environment to be added to the ECHR through the adoption of a new protocol to this effect to which appeal the Committee of Ministers responded by recognising the importance of a healthy environment and its relevance to the protection of human rights, albeit considering that the ECHR system already indirectly contributes to the protection of the environment through existing Convention rights and their interpretation in the evolving case law of the ECtHR so that it did not deem it 'advisable to draw up an additional protocol to the Convention in the environmental domain'.[41]

In order to showcase the ECtHR's both evolutive and purpose-oriented approach in the matter of environmental rights, following is a select line of cases which bear several common features. The first common thread that binds these cases is the fact that they involve industrial accidents or hazardous activities performed by either a private or public operator, in instances where State authorities had been called upon to intervene either by preventing the occurrence of the hazardous activity/accident or, *ex post*, to remedy the devastating effects to human health and the environment using the available national law mechanisms. The second common thread is the prevalent procedural component involving issues of provision of access to information (ie citizens being adequately informed by the national authorities) regarding the level of environmental degradation occurring and the resulting deteriorating effect on the human health, as well as/or issues regarding the opportunity for persons concerned to be involved in and influence the decision-making process preceding the activity that has a potentially devastating impact upon their situation. The third common thread shared by the cases is that they are concerned with various 'rule of law' issues, regarding the failure of States to adequately enforce their national constitutions, national laws or national judicial decisions.[42]

The Court's environmental rights case law has come a long way since the brief reference made in *Fredin v Sweden*[43] regarding the role played by the environment in modern society as an 'increasingly important consideration',[44] recognizing already in *Lopez Ostra v Spain*[45] that '*severe* environmental pollution may affect individuals'

41 Council of Europe Committee of Ministers, *Reply to Parliamentary Assembly Recommendation 1885* (16 June 2010).

42 See Dinah Shelton, 'Legitimate and Necessary: Adjudicating Human Rights Violations Related to Activities Causing Environmental Harm or Risk' (2015) 6 JHRE 139, 145.

43 *Fredin v Sweden* App no 18928/91 [1994] ECHR 5.

44 [48].

45 *Lopez Ostra v Spain* App no 16798/90 [1994] ECHR 46.

well-being and prevent them from enjoying their homes in such a way as to affect their private and family life *adversely*.'[46] Later on, in *Guerra v Italy*,[47] a case related to the failure of Italian authorities to implement national rules and the resulting failure to reduce the risk of accident or pollution at a chemical factory, the Court cemented the formula introduced in *Lopez Ostra*[48] which would become its recurring proviso in the environmental protection cases that ensued. In *Hatton*,[49] a case pertaining to the noise pollution from Heathrow Airport and the national quota system for night flying restrictions, the Court, while conceding that environmental protection should be taken into consideration by States in acting within their margin of appreciation and by the Court in its review of that margin, it did not consider however it appropriate 'to adopt a special approach in this respect by reference to a special status of environmental human rights'.[50] Among other things, the case is known for the Court according a wide margin of appreciation to States in striking a fair balance between an economic interest for the state and the violation of the particular right of the applicant[51] while confirming that being *directly* and *seriously* affected by a certain type of environmental pollution is sufficient to give rise to a violation of Article 8.[52] Additionally, the Court introduced a referential formula to be applied to cases involving State decisions concerning environmental issues whereby the Court is to follow *two tracks of inquiry*: first, it assesses the substantive merits of the decision taken by the national authority (ie ensuring that it is in accordance with Article 8); and second, it scrutinizes the preceding decision-making process to ensure that the interests of the individual had been duly taken into consideration.[53]

The procedural track of the Court's inquiry was further enhanced in *Taskin v Turkey*,[54] concerning the Turkish authorities' decision to issue a permit to use a cyanidation operating process in a gold mine and the related decision-making process which were found to be in violation of both Article 8 and Article 6(1) of the Convention. The Court held that determining the dangerous effects of an activity to which the individuals concerned *are likely* to be exposed, on the basis of an environmental impact assessment procedure, is *sufficient* to establish a close link with the individual's private and family life for the purposes of Article 8, which in turn triggers the positive obligation of the State to take reasonable and appropriate measures to secure the applicant's rights under Article 8(1).[55] In assessing the content and scope of the applicant's rights, the Court made reference to an array of relevant international environmental law instruments, including the Rio Declaration on

46 [51].
47 *Guerra v Italy* App no 14967/89 [1998] ECHR 7.
48 [35].
49 *Hatton* (n 36).
50 [122].
51 [98]; See, for further commentary on the *Hatton* judgment, Harris and others (n 34) 391–92; Merrills and Robertson (n 34) 156.
52 [96].
53 [99].
54 *Taşkın v Turkey* App no 46117/99 [2004] ECHR 621.
55 [113]; To reinforce this argument, the Court reiterates the substantive and procedural aspect formula put forward in *Hatton* (n 36) [115].

Environment and Development[56] and the Aarhus Convention.[57] The far-reaching effects of the *Taskin* ruling are particularly laudable seeing that the Court managed to successfully bring the case within the scope of the Aarhus Convention procedural regime in a 'particularly expansive form'[58] despite the fact that Turkey was not a party to the Aarhus Convention.

Insisting on the requirement that the adverse effects of environmental pollution be *significant* in order to give rise to violation of Article 8, the Court proceeded with crafting the 'de minimis' rule in *Fadeyeva v Russia*,[59] a case involving an applicant's inability to secure through national courts the relocation of her home which was in the vicinity of a steel plant, in spite of existing national environmental laws and expert reports pointing to the exorbitant pollution levels. While affirming that the adverse effects of environmental pollution must attain a certain minimum level in order to be caught under Article 8, the Court clarified that the assessment of that minimum level should take into account all the circumstances of the case 'such as the intensity and duration of the nuisance, and its physical or mental effects'.[60] Further on, acknowledging that in order to fall within the scope of Article 8, complaints relating to environmental nuisances have to primarily show that there was an *actual interference* with the applicant's private sphere, and, secondly, that a *level of severity* was attained,[61] the Court suggested that the assessment of the severity of the environmental conditions is largely dependent on the context and the circumstances of the case and found that the environmental pollution in question inevitably made the applicant more vulnerable to various illnesses and thus posed serious risks to her health, irrespective of the absence of any quantifiable harm to her health.[62] In *Fadeyeva*, despite ruling that the State had failed to strike a fair balance between the interest of the community and that of the applicant,[63] the Court yet again recalled the broad margin of appreciation enjoyed by States and the limited nature of the scope of the Court's scrutiny over whether a fair balance had been accomplished between the private interest of the applicant and the public interest. This consisted of verifying whether national authorities had committed a *manifest error of appreciation* in striking such balance.[64] In a move which can be read as the Court's distancing itself from potentially being given the label of an 'environmental rights' court, the ECtHR evoked the complexity of the issues involved regarding environmental protection which as such rendered its role 'primarily a subsidiary one'.[65]

Heralding a new and improved approach in the ECtHR's environmental jurisprudence, the *Tatar*[66] case marked a veritable turning point in the Court's

56 Rio Declaration on Environment and Development, UN Doc A/CONF.151/26 (vol I); 31 ILM 874 (1992).
57 [98].
58 See Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 EJIL 613, 624.
59 *Fadeyeva v Russia* App no 55723/00 [2005] ECHR 376.
60 [69].
61 [70] emphasis added.
62 [88].
63 [132].
64 [105].
65 ibid.
66 *Tatar v Roumanie* App No 67021/01 (ECHR, 27 January 2009).

responsiveness to the arguments concerning the individual's right to live in a clean environment adequate to his/her needs. The case centred on the failure of the Romanian authorities to stop the harmful activities involved in the extraction process in a gold mine disregarding a series of national impact assessments and studies pointing to thereto. It is a case where the Court relied on the precautionary principle as an environmental law principle, applicable in cases where there was a risk of an adverse effect and where, in the absence of probable causality, the very existence of a serious and substantial risk for the health and well-being of the applicants was considered sufficient to engage the responsibility of the State.[67] In order to substantiate its approach, the Court made reference to the European Commission's Communication on the Precautionary Principle[68] as well as case law of the CJEU relevant to the application of this principle.[69]

Conversely, in *Hardy and Maile*,[70] where the planning permits granted for the operation of two liquefied natural gas terminals were challenged on the grounds that the relevant authorities had failed to properly assess the risks to the marine environment brought by the operation of the terminals, the applicants insisted that Article 8 be applied in a 'precautionary way'—namely, prior to an accident has occurred which would directly affect the applicants' private and family lives.[71] The Court, while accepting that a claim may be brought under Article 8 before actual pollution commences where the nature of the activity carries a potential risk pointing to a sufficiently close link with the applicants' private lives and homes, however did not consider it necessary to examine the applicability of the precautionary principle[72] since it judged the options made available to the public regarding access to information and participation in the decision-making as sufficient for the State to be deemed compliant with its Article 8 obligations.

Furthermore, from a substantive environmental rights perspective, the *Tatar* judgment is significant in that the Court managed to underscore the positive obligation for the State to take steps to protect the right to respect for the homes and the private life of the people concerned and, more generally, their *right to live in a safe and healthy environment.*[73] Although the fact that the Romanian Constitution guarantees the right to a healthy environment[74] may have played a role in the Court's readiness to make a bold statement of this kind, the former nevertheless represents a discernible shift in the language of the Court which opens the way for the concept of a 'right

67 See part II.B(f) of judgment.

68 European Commission, Communication of 2 February 2000 on the Precautionary Principle, COM(2000) 1 final.

69 ibid; The Court referred the cases C-180/96 *UK v Commission* [1996] ECR I-3903 and C-157/96 *National Farmers' Union*[1998] ECR I-2211. More generally, in part II.B 'Relevant international law and practice', the Court noted the standards and principles enshrined in the Stockholm Declaration, the Rio Declaration and the Aarhus Convention.

70 *Hardy and Maile v United Kingdom* App No 31965/07 [2012] ECHR 261

71 [186].

72 [191-2].

73 [107].

74 See Part II.A(a) of judgment.

to a safe and healthy environment' to influence the ECtHR's reasoning in future cases. Subsequently, the Court returned to its former pronouncement in the *Di Sarno* and the *Bacila* cases. *Di Sarno*[75] pertained to a waste collection crisis which the Italian government poorly tackled by enforcing inadequate policies and were unsuccessful in ensuring the proper functioning of the waste disposal system in the Campania region, resulting in the Court finding a violation of only the substantive aspect of Article 8.[76] In this context, the Court reiterated its statement concerning the people's *right to live in a safe and healthy environment*,[77] only this time in the absence of any supporting reference to the Italian Constitution or other relevant provisions of Italian law to this effect, which is proof of the Court's preparedness to go beyond strictly the national regime as its point of reference thus framing the concept of the right to a clean environment in terms which transcend the national scope. Likewise, in *Bacila*,[78] a case concerning a Romanian factory releasing enormously high quantities of heavy metals and sulphur dioxide where the national measures did not succeed in effectively reducing the pollution to levels compatible with the well-being of the local population, the Court, while recognizing the interest of the national authorities to preserve the economic wellbeing of the town, nonetheless held that pursuing such interest cannot have the effect of impinging upon the 'right of the persons concerned to enjoy a balanced and healthy environment',[79] and found that the government failed to strike a fair balance between the economic wellbeing of the town and the applicant's right to respect of her home and private and family life.[80]

From the above analysis the currently valid standard devised by the ECtHR for environmental protection cases, specifically those triggering the application of Article 8 ECHR, can be discerned. This standard involves, first and foremost, the Court establishing a sufficiently close link between the environmental pollution in question and the applicant's private and family life,[81] so as to determine the actual effects upon the applicant's health and living situation or sufficiently serious risks thereof. Secondly, the Court proceeds by performing a double-track inquiry regarding the State's alleged (in)action—assessment of the substantive merits of the national authorities decisions followed by scrutinising the relevant decision-making process for the purpose of ensuring that adequate weight has been given to the applicant's interests.[82] Finally, the Court verifies whether the State's obligation to secure the applicant's right to respect for his/her private life and home has been fulfilled by inquiring whether or not the national authorities have made a manifest error in striking a fair balance between the State's (public) and the applicant's (private) interest.[83]

75 *Di Sarno v Italy* App No 30765/08 (ECHR, 10 January 2012).
76 [112].
77 [110].
78 *Bacila v Romania* App No 19234/04 (ECHR, 30 March 2010).
79 [71].
80 [72].
81 *Hardy and Maile* (n 65) [191].
82 [217].
83 [232].

It can be inferred from the previous line of cases that the ECtHR has succeeded in gradually broadening the scope of Article 8 by making it applicable not only to instances concerning the right of access to certain environmental information, but also those dealing with limited participation in decision-making in environmental matters and subsequent judicial redress.[84] Thus, compliance with Article 8 is conditioned on adequately taking into account the interests of the individuals affected during the decision-making process[85] and providing effective access to information to the concerned individuals in matters pertaining to the environment. In this sense, the Court's activist jurisprudence can be seen as managing to translate into European human rights law the procedural requirements enshrined in Principle 10 of the Rio Declaration and their legal expression in the Aarhus Convention as enforceable procedural rights.[86] Equally, as concerns the right to a clean environment as a substantive right, it is worth pointing out that while prior to the *Tatar/Bacila/Di Sarno* line of jurisprudence the ECtHR treated the former right as predominantly a matter of national constitutional law, by having brought the 'right to safe and healthy environment' within the context of Article 8, and thus the ECHR system, the Court has abandoned the purely procedural outlook on environmental rights and prompted an evolution in its approach which may prospectively lead to a more elaborate and more expansive recognition of the fully-fledged right to a clean environment.

3. THE ROLE OF THE EU COURT OF JUSTICE IN FORGING AN EU-SPECIFIC RIGHTS-ORIENTED APPROACH TO ENVIRONMENTAL PROTECTION

The discussion will now draw on the status accorded to environmental rights in the CJEU's jurisprudence and thus under the Union legal framework, starting with the legal scope and effect enjoyed by procedural environmental rights in the CJEU's jurisprudence, followed by an examination of the potential for a future recognition of the substantive right to a clean environment under the Union framework.

3.1 *The Procedural Aspect*

As was mentioned above, the EU's accession to Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters as the leading international charter for environmental procedural rights has played an invaluable role in the Union's, and thus the CJEU's, acquiescence to the concept of procedural environmental rights. In the following, the status and scope accorded to the procedural environmental rights under the Union framework will be appraised in accordance with the three-pillar categorisation of procedural environmental rights established under the Aarhus Convention. From the outset, it is worth recalling that a number of Union secondary law instruments have

84 See Pedersen (n 20) 88.

85 See Alan Boyle, 'Human Rights or Environmental Rights?: A Reassessment' (2006–2007) 18 Fordham Envtl L Rev 471, 496. Boyle suggests that the ECtHR espouses these environmental procedural rights guided mainly by the risk to life, health, private life or property involved therein, rather than as a result of a more general concern for environmental governance and transparency in the decision-making process (ibid 491).

86 ibid 498.

been adopted or amended in order to transpose the three-pillar obligations set forth in the Aarhus Convention: Directive 2003/4/EC on public access to environmental information;[87] Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice;[88] Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment—codified by Directive 2011/92/EU[89] which, in turn, has been subsequently amended by Directive 2014/52/EU;[90] Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment Directive;[91] and, Regulation 1367/2006/EC on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies.[92] Moreover, it is important to note that the access to justice pillar of the Aarhus Convention has not yet been fully transposed into Union law. The Union legislators failed to reach a consensus as to the final text of the proposed access to justice directive, as it fell through at the proposal stage,[93] leaving the Member States to align their legal systems with the Aarhus Convention's provisions independently and to the extent achievable.[94] The former setback has only marginally been redeemed through the insertion of access to justice provisions in the Union transposing instruments that cover the first and the second pillar of the Aarhus Convention.[95]

By virtue of the Aarhus Convention's status as source of Union law, the procedural rights established therein stand a better chance at having an adequate expression in the CJEU's jurisprudence in instances where the Court interprets and/or applies the Aarhus Convention or the Union transposing secondary law instruments. In keeping with the objective set out in the Aarhus Convention which is to facilitate that each Party guarantees the rights of access to information, public participation in decision-making, and access to justice in environmental matters,[96] the Union's

87 Parliament and Council Directive 2003/4/EC of 28 January 2003 on public access to environmental information [2003] OJ L 41/26.

88 Parliament and Council Directive 2003/35/EC of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice [2003] OJ L 156/17.

89 Parliament and Council Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification) [2011] OJ L 26/1.

90 Parliament and Council Directive 2014/52/EU of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L 124/1.

91 Parliament and Council Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L 197/ 30.

92 Parliament and Council Regulation 1367/2006/EU of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L 264/13.

93 Commission, 'Commission Proposal for a Directive of the European Parliament and the Council on Access to Justice in Environmental Matters' COM (2003) 624 final.

94 See, Declaration by the European Community in accordance with Art 19 of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, Annex to Council Decision 2005/370/EC.

95 See Jeremy Wates, 'The Aarhus Convention: A Driving Force for Environmental Democracy' (2005) 1 JEEPL 2, 9.

96 Art 1 of Aarhus Convention (n 10).

transposing instruments adhere to the identical language of 'rights' in the environmental domain espoused by the Convention. For instance, the 2003 Environmental Information Directive sets out the objective to guarantee the *right of access to environmental information* held by or for public authorities and to lay down the basic terms and conditions of practical arrangements for its exercise;[97] Directive 2003/35/EC puts the Member States under an obligation to ensure that public authorities inform the public adequately of the *rights* they enjoy as a result of the Directive and (to an appropriate extent) provide information, guidance and advice to this end.[98] In a similar vein, the 2006 Aarhus Regulation covers the *right of public access to environmental information* received or produced by the Union institutions or bodies and held by them, setting out the basic terms and conditions of and practical arrangements for the exercise of that right.[99]

The rights based approach displayed in the foregoing instruments has been accordingly mirrored in the CJEU's case law, in a number of judgments where the Court affirmed the EU citizens' entitlement to avail themselves of any of the environmental procedural rights—access to information, participation in decision-making or access to courts. In *Flachglas Torgau*[100] the CJEU referred to the Union's obligation to align with the Aarhus Convention by 'providing for a general scheme to ensure that any natural or legal person in a Member State has a *right of access to environmental information* held by or on behalf of the public authorities, without that person having to show an interest'.[101] In *Stichting Natuur and Mileu*,[102] concerning the challenging of the decision of a national organ refusing to disclose certain environmental studies and reports, the Court considered that the facts at issue in the main proceedings had to be assessed by reference to the *right of access to environmental information* as defined by Directive 2003/4/EC,[103] while in *Marie Noelle Solvay*[104] it dealt with the *right to effective judicial review* regarding the lawfulness of the reasons for a challenged decision in relation to the decision-making process concerning the issuance of development consents, stressing that in order to secure the effective protection of *a right conferred by European Union law*, interested parties must also be able to defend that right under the best possible conditions.[105] In *Križan*,[106] the Court dealt with the *right to bring an action* pursuant to Article 15a of Directive 96/61/EC concerning Integrated Pollution Prevention and Control (IPPC)[107] which provided that members of the public concerned should have the *right to ask the court*

97 Art 1(a) of Directive 2003/4/EC (n 88).

98 Concluding paragraph of art 3 of Directive 2003/4/EC (n 88).

99 Art 1(a) 'Objectives'; Further, see the reference to 'maintaining the impairment of a right' provided in art 11 of Directive 2011/92/EU (n 90).

100 Case C204/09 *Flachglas Torgau GmbH* [2012] ECLI:EU:C:2012:71.

101 [31]; The CJEU made the identical statement in C-279/12 *Fish Legal and Emily Shirley v Information Commissioner and Others*[2013] ECLI:EU:C:2013:853, [36].

102 Case C-266/09 *Stichting Natuur en Milieu and Others v College voor de toelating van gewasbeschermingsmiddelen en biociden* ECR [2010] ECR I-13119.

103 [36].

104 C182/10 *Marie Noelle Solvay and Others* [2012] ECLI:EU:C:2012:82.

105 [59].

106 C-416/10 *Križan and Others*, [2013] ECLI:EU:C:2013:8.

107 This article was inserted through Directive 2003/35/EC. In addition, Directive 96/61/EC has now been replaced with the Industrial Emissions Directive 2010/75/EU [2010] OJ L334/17.

or competent independent and impartial body to order interim measures so as to prevent pollution, including, where necessary, the executing of a temporary suspension of an operation permit.[108] In *Gruber,*[109] the Court dealt with the *right of the members of the public concerned to contest decisions, acts or omissions* (as envisaged by Article 11 of Directive 2011/92/EU (EIA Directive))[110] applicable in relation to an administrative decision that had declared a particular project exempt from the requirement of conducting an environmental impact assessment,[111] while *Commission v UK*[112] drew on the duty of national courts to ensure the full effectiveness of a judgment in the case of existence of *rights claimed under European Union law, including in the area of environmental law*[113] (the rights concerned being of a procedural nature).

While the foregoing cases revolved around the CJEU's interpretation and/or application of the Union acts pertinent to issues concerning procedural environmental rights, there has equally been one specific instance where the CJEU, or more particularly, its case law regarding environmental rights had been placed under scrutiny. In its *Findings and Recommendations with regard to communication ACCC/C/2008/32 concerning compliance by the European Union* adopted following a communication received from the non-governmental organization ClientEarth, the Aarhus Convention Compliance Committee addressed EU's failure to comply with Article 9(2) of the Aarhus Convention concerning the access to justice available to the members of the public concerned.[114] The Communication challenged the Union's restrictive rules regarding legal standing in matters related to the environment as preventing non-governmental organizations as well as individuals from having full access to challenging the decisions of the Union institutions. Reporting a general failure on the part of the Union to comply with the access to justice provisions of the Aarhus Convention,[115] the communicant maintained that the jurisprudence of the EU courts needed to be altered in order for the Union to be considered compliant with Article 9(2)-(5) of the Aarhus Convention. In response to the communication, the Compliance Committee expressed the need for a new direction in the jurisprudence of the EU Courts to be effected in order to ensure compliance with the Aarhus Convention, recommending that:

> . . . all relevant EU institutions within their competences take the steps to overcome the shortcomings reflected in the jurisprudence of the EU Courts in providing the public concerned with access to justice in environmental matters.[116]

In light of these strongly worded observations, it is clear that the Compliance Committee has called on the Union legislators to amend the Union's existent access

108 [109].
109 C570/13 *Karoline Gruber*[2015]ECLI:EU:C:2015:231.
110 This article was inserted through Directive 2003/35/EC.
111 [40].
112 C-530/11 *Commission v UK* [2014] ECLI:EU:C:2014:67.
113 The Court made reference to the *Križan* judgment, [107], [109].
114 Findings and Recommendations with regard to Communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union [2011] ECE/MP.PP/C.1/2011/4/Add.1.
115 [3].
116 [97-8].

to justice regime for environmental matters in order to enable a veritable shift in the Union Courts' jurisprudence in this regard.

Regarding the absence of a coherent Union access to justice regime, the CJEU has, on its own part, attempted to offset the resulting lacuna. In *Lesoochranárskezoskupenie*,[117] a case that concerned the direct applicability of Article 9(3) of the Aarhus Convention before national courts, more precisely, the issue of the access to courts available to national non-governmental organisations in instances of violation of national environmental laws, the CJEU sanctioned the possibility for the Aarhus Convention provisions to produce direct effect in the domestic legal orders of Member States, contingent on the fulfilment of the criteria applicable to examining the direct effect of international agreements concluded by the Union.[118] Irrespective of the fact that the provisions of Article 9(3) of the Aarhus Convention had not yet been subject to Union regulation, the Court brought the issue within the scope of Union law by considering it as a matter of Union law which had been regulated in an international agreement concluded by the EU and Member States and concerned a field to a large extent covered by Union law.[119] While concluding that the particular provisions of Article 9(3) of the Aarhus Convention failed to satisfy the criteria for producing direct effect, the Court considered that the former provisions, although drafted in broad terms, were nonetheless intended to ensure effective environmental protection.[120] Underlining the importance of ensuring effective judicial protection in the fields covered by Union environmental law,[121] the CJEU instructed the referring national court to interpret the national procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings, to the fullest extent possible, in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the *rights conferred by EU law*.[122] In this way, to the extent possible, the Court opened the possibility for national environmental protection organisations to challenge before national courts decisions taken following administrative proceedings liable to be contrary to EU environmental law,[123] thus safeguarding the right of access to justice as recognised under the Aarhus Convention by sanctioning its

117 C-240/09 *Lesoochranárskezoskupenie VLK v MinisterstvoživotnéhoprostrediaSlovenskejrepubliky* [2011] ECRI-1255.

118 [44]; The criteria to be applied in the appraisal of the direct effect are the following: '([A] provision in an agreement concluded by the European Union with a non-member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (. . .)' [44].

119 [40-2].

120 [45-6].

121 [50].

122 [51]; In the absence of EU rules governing the matter, the Court considered that it was for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding *rights* which individuals derive from EU law, in the instant case the Habitats Directive, since the Member States are responsible for ensuring that those *rights* are effectively protected in each case [47].

123 [52].

optimal effect in Union law and superseding restrictive national rules on legal standing.[124]

3.2 *The Substantive Aspect*

As a final segment of the analysis of EU law, a brief look will be had at the potential for recognising the substantive right to clean environment under the Union framework which, although not expressly recognized at the Union law or policy level, has been intimated at in several important pronouncements of the CJEU bearing on the potential to evolve into EU's own unique conceptualisation of the substantive right to a clean environment. Specifically, the contemplation of a substantive rights-oriented approach to environmental protection is not completely foreign to the Union discourse—the Conclusions of the 1990 Dublin European Council Summit had urged for more effective action by the (then) European Community and its Member States to protect the environment, where the objective of such action was conceived to be centred on guaranteeing:

> citizens *the right to a clean and healthy environment*, particularly in regard to - the quality of air, rivers, lakes, coastal and marine waters, the quality of food and drinking water, protection against noise, protection against contamination of soil, soil erosion and desertification, preservation of habitats, flora and fauna, landscapes and other elements of the natural heritage . . . .[125]

Unfortunately, this statement was never followed up on nor was the concept of a right to a clean and healthy environment further elaborated by the Union institutions. The only exception in this regard is the 1994 Report of the European Parliament's Committee on Institutional Affairs which proposed a model constitution for the European Union which, under the title 'Human Rights guaranteed by the Union' would foresee that '*Everyone shall have the right to the protection and preservation of his natural environment*'.[126]

The CJEU has intimated at the possibility for individuals to rely before national courts on substantive rights in the environmental domain which they derive from the Union environmental law, in two judgments dating from 1991. In C-361/88 *Commission v Germany*,[127] the issue related to Germany's failure to adopt all the necessary measures to ensure the complete transposition into national law of Directive 80/779/EEC on air quality limit values and guide values for sulphur dioxide and

124 See Martin Hedemann-Robinson, 'EU Implementation of the Aarhus Convention's Third Pillar: Back to the Future over Access to Environmental Justice? (Part 1)' (2014) 23 EELR 102, 113; As a follow-up to the CJEU ruling, the Slovak referring court admitted the appellant non-governmental organisation as party to the proceedings (see Mariolina Eliantonio, 'Collective Redress in Environmental Matters in the EU: A Role Model or a "Problem Child"?' (2014) 41 LIEI 257, 269).

125 Declaration by the European Council, "The Environmental Imperative" [1990] SN 60/1/90 Annex I, 24.

126 DOC EN/RR/244/244403 of 27 January 1994; Also, see Richard Macrory, 'Environmental Citizenship and the Law: Repairing the European Road' (1996) 8 JEL 219, 221.

127 Case C-361/88 *Commission v Germany* [1991] ECR I-2567.

suspended particulates.[128] The Directive lay down limit values for the concentrations of sulphur dioxide and of suspended particulates which, 'in order to protect human health in particular', must not to be exceeded within specified periods and in specified circumstances throughout the territory of the Member States.[129] The Court concluded that the former obligation had not been implemented with unquestionable binding force by Germany, or with the specificity, precision and clarity required by its case-law in order to satisfy the requirement of legal certainty[130] so that individuals can be in a position to ascertain the full extent of their rights in order to rely on them before the national courts or that those whose activities are liable to give rise to nuisances are adequately informed of the extent of their obligations.[131] Furthermore, the Court considered that where a directive is intended to create rights for individuals, the persons concerned can ascertain *the full extent of their rights and, as appropriate, rely on them before the national courts*,[132] thus suggesting that the fact that the Directive was adopted, in particular, for the purpose of protecting human health, implied that whenever the exceeding of the limit values could endanger human health, the persons concerned *must be in a position to rely on mandatory rules in order to be able to assert their rights*.[133] The former statement was subsequently replicated by the Court in C-59/89 *Commission v Germany*,[134] this time with respect to the application of the Directive 82/884/EEC setting limit value for lead in the air.[135]

Although the Court's *dicta* provided in the two previous cases could be construed as owning the potential to lead to a future recognition of the substantive right to environment under Union law[136]—or at least provide a solid basis for it—it remains questionable whether in reality they could indeed produce such far-reaching effect. It has been argued by some that the Court's pronouncements could plausibly be interpreted as empowering the citizens to ensure before their national courts that the air quality standards set out in the directives concerned are respected as an expression of the right to clean air belonging to the individuals affected by polluted air.[137] Unfortunately, the potential and the limits of this jurisprudence have hardly ever been tested by environmental organizations and individual citizens in subsequent cases.[138]

128 Council Directive 80/779/EEC of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates [1980] OJL 229/30.

129 [3].

130 [21].

131 [20]

132 [15].

133 [16].

134 *Case* C-59/89 *Commission v Germany* [1991] ECR I-02607, [18-9].

135 Council Directive 82/884/EEC of 3 December 1982 setting limit value for lead in the air [1982] OJ L 378/15.

136 Several authors have underlined the potential of those pronouncements to create individual rights of a substantive nature (see Macrory (n 127) 221; Kramer (n 29) 134); Kramer contends that one could plausibly interpret the Court's pronouncements as empowering the citizens to ensure before their national courts that the air-quality standards set out in the directives concerned are respected, as an expression of the right to clean air to the individuals affected by polluted air.

137 See Kramer (n 29) 134.

138 ibid.

In *Janecek*,[139] a case from 2008, the CJEU returned to its previous statements in a somewhat diluted form. The case related to the possibility for individuals to require of the competent national authorities to draw up an action plan pursuant to Article 7(3) of Directive 96/62/EC on ambient air quality assessment and management,[140] in instances of risk for the limit values or alert thresholds to be exceeded. Even though the Commission's written observations had relied on the language of 'rights' acquiesced to by the Court in the two judgments of 1991,[141] the Court however did not fully return to its previous statement—it carefully steered away from the reference to the 'rights belonging to the persons concerned' and opined that in the event of a Member State's failure to observe the measures required by the directives designed to protect public health, the persons concerned must be in a position *to rely on the mandatory rules* provided in those directives.[142] Seemingly a slight textual difference, the shift from a language of 'rights' to a language of 'rules' decidedly points to the fact that the CJEU is currently unwilling (or, indeed unprepared) to further explore the issue of environmental substantive rights within the Union framework. Conceivably, this shift may signal abandoning of the tendency to interpret specific provisions in environmental protection directives as conferring rights on individuals, in the face of the ambiguity that surrounds the possibility for directives to produce direct effect and that, by consequence, the CJEU's focus has turned away from the notion of individual rights towards one of effectiveness.[143]

While the previous analysis of the CJEU's case law has undisputedly confirmed CJEU's recognition of the procedural rights in the environmental domain, arguably, the Court's endorsement of the language of 'rights' in this respect cannot fully be regarded as a form of judicial activism since in a majority of the cases the former comes as a logical consequence to the rights based approach already embedded in the Union's legislation implementing the Aarhus Convention. The prevailing impression is that when the CJEU employs the language of procedural 'rights' in the environmental context, it does so in a rather matter-of-fact way, doing away with any in-depth elaboration or further reflection as to the legal nature and scope of these rights, which effectively stems from the Court's perception of procedural

139 Case C-237/07 *Dieter Janecek v Freistaat Bayern* [2008] ECR I-6221.

140 Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management [1996] OJ L 296/55.

141 In the observations submitted to the Court, the Commission relied on the language of rights previously endorsed by the CJEU in the two judments of 1991: '. . . whenever the exceeding of limit values was capable of endangering human health, the persons concerned were in a position to rely on those rules in order to assert their rights'[31].

142 [38].

143 See Pedersen (n 20) 102. Regarding the capability of environmental directives to produce direct effect, the chief obstacle obviously lies in the scope of the discretion enjoyed by Member States in choosing the means to achieve the objectives prescribed by the directives (see Christopher Miller, 'Environmental Rights: European Fact of English Fiction?' (1995) 22 JLS 374, 382); Considering that in order to be 'directly effective' the provision of a directive has to be precise and unconditional and must confer rights on individuals, Kramer lists examples of environmental directives that would presumably satisfy these criteria—namely, provisions laying down maximum values, maximum concentrations and limit values, prohibitions, and obligations to act (see Ludwig Kramer, 'The Implementation of Community Environmental Directives within Member States: Some Implications of the Direct Effect Doctrine' (1991) 3 JEL 39, 39 ff.).

environmental rights as a matter clearly falling within the scope of Union law and therefore, a matter that is forcibly 'unproblematic'. By juxtaposing the CJEU's endorsement of procedural environmental rights as something expressly granted under the Union's positive law to the previously elaborated ECtHR progressive approach of embracing the existence of procedural environmental rights in the absence of an expressly prescribed obligation (or mandate) to this effect under the ECHR system, what comes to the fore is the comparatively more powerful and far-reaching judicial activism exhibited by the ECtHR as a court which has, in a certain way, pushed the boundaries of its jurisdiction in order to forge a firm rights-oriented approach to environmental protection.

4. DRAWING THE CONTOURS OF A FUTURE DIALOGUE BETWEEN THE CJEU AND THE ECtHR

This article set out to examine the respective patterns of the judicial reasoning that the European Court of Human Rights and the Court of Justice of the EU employ in cases before them that involve or have a bearing on environmental rights (substantive and procedural). Its purpose was to shed light on the issue of the absence of judicial dialogue between these two courts in the matter of environmental rights, an absence that represents a departure from an otherwise cooperative disposition exhibited by these two courts in other domains linked to human rights protection.

As regards procedural environmental rights, both the ECtHR and the CJEU have been forthcoming about guaranteeing the right to environmental information, the right to participate in decision-making on environmental matters and the right of access to courts concerning environmental matters. However, in spite of this, a conspicuous muteness in the judicial exchange between the CJEU and the ECtHR persists, with both of the courts routinely deferring to the rules and principles established by the Aarhus Convention, absent of any reference to each other's jurisprudence. Albeit, while the ECtHR has indeed made certain limited references to Union legal acts and policy documents in the field of environmental protection as well as relevant case-law of the CJEU[144], the former however does not amount to a dialogue on *rights* since in these instances the ECtHR has referenced particular Union *rules* and *principles* in the field of environmental protection rather than environmental *rights* endorsed under the Union framework. Further on, an important point of divergence between the CJEU and the ECtHR remains the substantive right to a clean environment, the two courts having tackled the absence of express reference to the right to a clean environment in their respective human rights catalogues in a different manner. Namely, the ECtHR has exhibited certain readiness to follow a progressive and dynamic trend in its jurisprudence which could in the future amount to an express recognition of the substantive right to a clean environment—albeit from a present day perspective it is not yet certain whether this overall affirmative disposition will materialize into something more. In contrast, thus far the CJEU has avoided

144 Regarding the application of the precautionary principle under the Union framework, see *Di Sarno* (n 76) [71-2] and part II.B(f) in *Tatar* (n 67).

making any *explicit* statements, positive or negative, with respect to recognizing the substantive right to a clean environment which shows that the CJEU is more comfortable with the language of procedural rights in the environmental domain as opposed to substantive environmental rights. Furthermore, as the analysis has shown, the CJEU's mindset in applying environmental procedural rights is predominantly centred on reliance of 'rules' and 'standards' in the environmental domain, without being sufficiently grounded on the concept of 'rights' in the environmental context.

One possible reason for the absence of a dialogue could be that the ECtHR still fails to view the CJEU as a genuinely 'environmental rights' court and therefore considers the CJEU's approach to environmental human rights to still be rather scarcely developed. Thus, from this standpoint, it seems logical that the prospective start of a judicial dialogue (should there be one) between the CJEU and ECtHR regarding environmental human rights would mainly depend on the CJEU. In the event that the CJEU concedes to initiate a dialogue with the ECtHR, the dialogue could presumably start with the CJEU performing an extension exercise analogous to the one performed by the ECtHR ie by recognizing the environmental dimension of certain human rights guaranteed under the EU Charter (right to life (Article 2 of the EU Charter); right to respect for private and family life (Article 7); right of access to documents of the institutions, bodies, offices and agencies of the Union (Article 42); right to an effective remedy and to a fair trial (Article 47));[145] followed by a broadening of the scope of the EU Charter rights so as to accommodate environmental protection requirements. The CJEU's aforementioned shift in approach can be accomplished either formally, by express deference to the ECtHR's environmental jurisprudence, or through a factual, implied endorsement of the ECtHR's approach. Certainly, as an alternative, such dialogue could also occur by way of CJEU's acknowledgment of the ECtHR's jurisprudence involving environmental rights, without necessarily having to follow the ECtHR's approach of extending the scope of existent human rights to ensure that the requirements of environmental protection have been satisfied.

All aspects considered, the general observation to be made regarding the CJEU's case law relevant to environmental rights, especially in comparison to the ECtHR devised standard for the protection of environmental rights, is that it is presently difficult to claim that the CJEU exhibits a truly comprehensive and profound understanding of the concept of 'environmental rights', taken in its entirety, and the modalities in which this concept plays out both in theory and in practice. Undoubtedly, by forging a gradual alignment with some or with all of the aspects of the ECtHR's approach to environmental rights, the CJEU's own approach stands to be ameliorated thus allowing for the Court to further improve its understanding of the concept of 'environmental rights' with the aim of fully 'internalizing' the concept

145 It is pertinent here to be reminded of the inherent limitations of the legal scope of the EU Charter of Fundamental Rights which is that the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States *only when they are implementing Union law* (art 51(1) of the Charter).

and becoming more comfortable with employing the language of 'rights', alongside the language of 'rules' and 'standards', in the environmental context.

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