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Environmental Rights in the Dialogue between the EU Court of Justice and the European Court of Human Rights

by

Ilina Cenevska*

Abstract

The paper draws on the 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 paper 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 by following the example of ECtHR's activist environmental jurisprudence as a viable avenue for instituting 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 human rights, Procedural environmental rights, Substantive right to clean environment

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Introduction

Over the course of the past decades, the Union's human rights policy has been heavily influenced by 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 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) 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 to be thus 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 paper bases its analysis upon what has thus far been accomplished through the medium of judicial dialogue between the two courts.

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[1] DOUGLAS-SCOTT Sionaidh, "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis", CMLRev 2006, pp.629-665, p.630-631.
[2] Ibid 654.
[3] MURPHY Cian, "Human Rights Law and the Challenges of Explicit Judicial Dialogue" (2012) Jean Monnet Working Paper 10/12, p.8.
[4] Opinion 2/13 [2014] ECLI:EU:C:2014:2454, para 200.

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. The paper aims to shed light on this particular instance of absence of judicial dialogue in the matter of environmental rights, looking at the problematic of 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] whereby the recognition of such right has been covered by a negligible number of international 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: right of access to environmental information, right to participate in environmental decision-making and access to justice in environmental matters.

While both the CJEU and the ECtHR have approached the field of environmental rights from their own singular perspective, this 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 conceptually different understanding of environmental rights or is rather a matter of a different perception thereof. In order to address the issue of a missing dialogue between the two courts, firstly, the paper 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 offer viable options for instituting the currently missing dialogue between the

[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 SHELTON Dinah, "Developing Substantive Environmental Rights", Journal of Human Rights and the Environment 2010, pp.89-120, p.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 paper, the 'right to clean environment' reference will be used throughout the text.

[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). Further, 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 U.N. Conference on the Human Environment, June 16, 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.

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.

I. Lack of dialogue between the two courts in the matter of environmental rights

The observed lack of dialogue on the issue of environmental human rights represents an exception to an otherwise constructive judicial dialogue occurring between the CJEU and the ECtHR which is not only deeply rooted in the nature and scope of the two courts' respective jurisdictions, but it is also the Union's primary law which has provided the legal avenue for such dialogue to unfold. More specifically, the legal bases that sanction the nature and scope of the constitutional relationship between the two respective judicial orders are Article 6(2) and (3) TEU, and Articles 52(3) and 53 of the EU Charter. Pursuant to the former two paragraphs of Article 6 TEU, alongside to undertaking a commitment on the future accession of the Union to the ECHR, the Treaty gives fundamental rights, as they are guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, the status of general principles of Union law (the part of the text of Article 53 of the EU Charter of Fundamental Rights which concerns the European Convention of Human Rights, repeats *mutatis mutandis* the text of Article 6(3) TEU). Furthermore, pursuant to Article 52(3) of the Charter, to the extent the rights enshrined in the EU Charter correspond to the rights guaranteed by the ECHR, the meaning and scope of those rights are considered to be the same as those laid down by the Convention.

Even prior to the insertion of the foregoing provisions into Union's primary law, the tone for the Union's a deferential approach toward the ECHR system had already been set by the Court of Justice in the 1970s, with the judgments in *Nold*[10] and *Hauer*.[11] The *Nold* judgment is significant since it 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

[10] ECJ, case C-4/73 *Nold* [1974] ECR p.00491; See TRIDIMAS Takis, *The General Principles of EU Law*, Oxford, Oxford University Press, 2006, 2nd ed., p.341.
[11] ECJ, case C-44/79 *Hauer* [1979] ECR p.03727.

the framework of Community law.[12] The formula set forth by the CJEU in *Nold* was subsequently raised to the level of Union primary law and included in Article 6 TEU, referred to *supra*.

The observed lack of dialogue in the matter of environmental human rights appears as a peculiarity in the relationship between the two otherwise cooperative courts. As will be evidenced below, the fact that the ECHR fails to foresee a right to a clean environment has nevertheless not prevented the ECtHR from producing copious jurisprudence relative to the protection of human rights in the sphere of environmental protection. Moreover, the ECtHR's contribution has proven revolutionary in that by broadening the scope of certain rights guaranteed under the Convention (right to private life and family life, the right to life, right to a fair trial, freedom of expression, etc.), the Court has been able to extend the scope of the Convention to the sphere of environmental protection by approaching the matter from a rights-based perspective, thereby practically endorsing a right to clean environment *via facti*. By the same token, while the EU Charter equally fails to prescribe a human right to a clean environment, the CJEU however has not followed the ECtHR model by performing an analogous extension exercise under the Union's purview. There is, undeniably, a certain reticence exhibited by the CJEU towards approaching the environmental protection field from a rights-based perspective, which stands in sharp contrast with the ECtHR's approach which, albeit not an environmental court per se, has managed to trail-blaze its own singular tendencies in the environmental rights jurisprudence.

The ensuing discussion will examine the difference in approach between the CJEU and the ECtHR regarding environmental human rights in function to the dichotomy of the *substantive* and the *procedural* aspect of the right to clean environment which will be further used as the litmus test for determining the nature of the muted dialogue between the two courts and the underlying reasons for it. The major distinguishing characteristic between the two aspects is that while procedural environmental rights have been firmly grounded in various hard and soft law instruments[13], the substantive right to clean environment emerges as a principle of customary international law.[14] Environmental law as it presently stands has struggled with defining the exact scope and content of the substantive right to clean environment[15], given that guaranteeing such right still remains largely a matter of national constitutional law, with a negligible number of international multilateral legal instruments in

[12] Para.13 of the *Nold* judgment.

[13] The most significant of which is the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted under the auspices of the United Nations Economic Commission for Europe, is the governing international legal instrument adopted in the field of environmental democracy which introduces procedural rights in the environmental domain.

[14] COLLINS Lynda, "Are We There Yet?: The Right to Environment in International and European Law", McGill International Journal of Sustainable Development Law and Policy 2007, pp.119-153, p.147.

[15] Macrory argues that formulating an individual right to the environment in any legally meaningful sense and in general terms, would be conceptually impossible (see MACRORY Richard, "Environmental Citizenship And The Law: Repairing the European Road", Journal of Environmental Law 1996, pp.219-235, p.221); Shelton equally reminds of the uncertainty related to the justiciability of the former right

existence expressly foreseeing this right in a meaningful, legally enforceable way (most of which regional in character).[16] The procedural and the substantive aspect of the right to clean environment are intrinsically linked, not only in theory but all the more so in practice, making it difficult to separate one aspect from the other in any cut-and-dried manner, with the procedural environmental rights serving to facilitate the guaranteeing of a substantive right to environment. The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters[17] validates this claim by capturing the inextricable link between procedural environmental rights and the substantive right to a clean environment in the following terms: "In 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 established by the Aarhus Convention with the objective of maintaining an adequate environment for people equally serve to reinforce the substantive aspect of the right to clean and healthy environment.[19] The intrinsic link between the two aspects of the right notwithstanding, the endorsement of the procedural aspect clearly cannot be considered as supplanting the substantive aspect[20] seeing that the absence of one aspect cannot be redeemed by an 'enhanced' presence of the other.

II. The environmental protection jurisprudence of the European Court of Human Rights

Once on the issue of employing a rights-oriented approach to the field of environmental protection, the ECtHR is the judicial organ that is to be considered the frontrunner in

(SHELTON Dinah, "Environmental Rights in the European Community", Hastings International and Comparative Law Review 1992-1993, pp.557-598,p.567.

[16] 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 of the Charter) (*BanjulCharter on Human and Peoples' Rights* O.A.U. Doc. CAB/LEG/67/3/Rev.5); 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 U.N. Conference on the Human Environment, June 16, 1972, 11 I.L.M. 1416).

[17] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), UN ECE/CEP/43.

[18] Art. 1 of the Convention; In this respect the Aarhus Convention builds up from the foundations previously laid down by the 1972 Stockholm Declaration (Declaration of the U.N. Conference on the Human Environment, June 16 1972, 11 I.L.M. 1416) and the 1992 Rio Declaration (Rio Declaration on Environment and Development, June 14 1992, U.N. Doc. A/CONF.151/5/Rev.I) as international environmental soft law instruments that have majorly contributed to developing and reinforcing the right of humans to a clean and decent environment:
Principle 1 of the Rio Declaration: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature (…)";
Principle 10 of the Stockholm Declaration: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.".

[19] See PEDERSEN Ole W., "European Environmental Human Rights and Environmental Rights: A Long Time Coming?", *Georgetown International Environmental Law Review* 2008, pp.73-111, p.99.

[20] O'GORMAN Roderic, "The Case for Enshrining a Right to Environment within EU Law", European Public Law 2013, pp.583-604, p.601.

Europe, its jurisprudence being representative of a regional court pushing the limits of its own jurisdiction in order to accommodate the increasing environmental concerns of modern society. Thus, with respect to the right to a clean environment, it is by the standard set by the ECtHR that the CJEU's jurisprudence and, further down the line, the jurisprudence of national courts, should be measured against. The progressive disposition of the ECtHR jurisprudence of extending the scope of application of the existing Convention rights in order to effectively accommodate environmental protection considerations demonstrates that the Convention is a "*living instrument, to be interpreted in the light of present-day conditions*"[21], having equally received wide support in academic literature.[22] In this 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".[23]

The discussion now turns to the main features of the ECtHR's jurisprudence in the field of environmental protection and the ways in which it has evolved to the present day. The ECtHR's jurisprudence concerning environmental human rights has largely gravitated around the use of Articles 2 (right to life), 6 (right to a fair trial) and 8 (right to respect for private and family life) of the ECHR[24], 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)).[25] Of the enounced legal bases, Article 8 figures as the legal main avenue for addressing environmental protection claims under the ECHR framework which arise from environmental degradation and poor environmental conditions[26] - most frequently, concerning nuisance-related claims involving hazardous waste,

[21] See *Airey v. Ireland* App no 6289/73 (ECHR, 9 October 1979), para 26; *Loizidou v. Turkey* App no 15318/89 (ECHR, 18 December 1996), para 71.

[22] See MERRILLS J.G. and ROBERTSON A.H., *Human Rights in Europe: A study of the European Convention on Human Rights,* Manchester University Press, 2001; HARRIS David J., O'BOYLE Michael, BATES Edward P. and BUCKLEY Carla M., *Law of the European Convention on Human Rights,* Oxford University Press, 2009; On how the protection of the right to privacy and home life has evolved in ECtHR's case law, see SHELTON Dinah, "Human Rights and the Environment: Substantive Rights", *in* FITZMAURICE Malgosia, ONG David M. and MERKOURIS Panos (eds.), *Research Handbook on International Environmental Law*, Edward Elgar Publishing, 2010, pp.275-279.

[23] Dissenting Opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner in *Hatton and Others v the United Kingdom* (App no 36022/97 (ECHR, 8 July 2003), point 2.

[24] "*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 (…)
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. (…)
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."

[25] DE SADELEER Nicolas, "Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases", Nordic Journal of International Law 2012, pp.39-74, p.62 et seq; See, also, PEDERSEN, *supra* n.20, p.84 et seq.

[26] See, European Network of Environmental Law Organizations, Human Rights and Environment: The Case Law of the European Court of Human Rights in Environmental Cases (Legal Analysis), November 2011, p.29.

airborne pollutants, noise pollution etc.[27] In addition, Article 8 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[28], the Court's progressive jurisprudence in the field being viewed as proof of the former's approval of the Article 8 endorsement of the right to a healthy environment.[29] Nevertheless, it is to be reminded that the ECtHR approaches the right to clean environment 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.[30]

The Court's progressive stance has been matched by equally progressive policy statements made by the Council of Europe's Parliamentary Assembly, which have in a certain manner paved the way for the ECtHR forward-looking jurisprudence. Thus, Recommendation 1130 (1990) of the Parliamentary Assembly suggested the inclusion of the right to environment in an optional protocol to the Convention[31] while the ambitiously worded Recommendation 1431 (1999) of the Parliamentary Assembly contemplated a possible amendment to the Convention so as to include the "right to a healthy and viable environment as a basic human right", following the "growing recognition of the importance of environmental issues". Several years later, 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 recognizing 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

[27] Ibid.
[28] Dissenting Opinion of Judges Costa and Others, *supra* n.24, point 2.
[29] Ibid.
[30] The Court made this clear already in *Kyrtatos v. Greece* (App. no. 41666/98 § 52, ECHR 2003-VI) (see BOYLE Alan, Human Rights or Environmental Rights?: A Reassessment, Fordham Environmental Law Review 2006-2007, pp.471-511, p.489. O'Gorman observes that this narrow approach reveals a lacuna in the ECHR system which fails to provide comprehensive protection from environmental degradation being that it is only preoccupied with the environmental impact upon individual/s rather than with environmental degradation occurring in and affecting the public domain i.e. the wider community (See, O'GORMAN, *supra* n.21, p.600).
[31] See O'GORMAN, *supra* n.21, p.598.

so that it did not deem it "advisable to draw up an additional protocol to the Convention in the environmental domain".32

In order to showcase the evolutionary approach of the ECtHR, following is a select line of environmental protection cases which are representative of the standard crafted by the Court with respect to environmental human rights. The common thread that binds these cases together is that they relate to industrial accidents or hazardous activities performed by either a private or public operator, 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 (failure to act on the part of the State). Another common thread that binds these cases is the prevalent procedural component which is concerned with the provision of access to information (i.e. citizens being adequately informed by the national authorities) regarding the level of environmental degradation occurring and the negative impact on the human health and/or the immediate living environment; as well as/or the right to be involved in and influence the decision-making process preceding the activity that has a potentially devastating impact upon the applicants' situation.

The Court's case law has come a long way since the brief reference made in *Fredin v Sweden*[33] regarding the role played by the environment in modern society as an "increasingly important consideration[34], recognizing already in *Lopez Ostra v Spain*[35] that "*severe* environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life *adversely*".[36] Later on, in *Guerra v Italy*[37] the Court reiterated this formula[38] which will become the Court's recurring proviso in the subsequent environmental protection cases. Furthermore, in a majority of the cases, in examining the alleged breach of Article 8 the Court routinely turns to examining whether, pursuant to the second paragraph of Article 8, a fair balance has been struck between the interests of the wider community and the applicant's effective enjoyment of the right to respect for private and family life.[39] In *Hatton*[40], the Court reminded of there being no explicit right in the Convention to a clean and quiet environment which is why it was not considered appropriate for the Court to apply a special approach to the matter at issue "*by reference to a special status of environmental human rights*".[41] This case is known for the Court's according a wide margin of appreciation to States when striking a fair balance between an

[32] Council of Europe Committee of Ministers, *Reply to Parliamentary Assembly Recommendation 1885* (16 June 2010).
[33] *Fredin v Sweden* App no 18928/91 (ECHR, 23 February 1994).
[34] Para.48 of the judgment.
[35] *Lopez Ostra v Spain* App no 16798/90 (ECHR, 9 December 1994).
[36] Para.51 of the judgment.
[37] *Guerra v Italy* App no 14967/89 (ECHR, 19 February 1998).
[38] Para.35 of the judgment.
[39] See *Lopez Ostra*, para.58.
[40] *Hatton and Others v. the United Kingdom* App no 36022/97 (ECHR, 8 July 2003).
[41] Para.122 of the judgment.

economic interest for the state and the violation of the particular right of the applicant[42], all the while asserting that an individual being *directly* and *seriously* affected by a certain type of environmental pollution is sufficient to give rise to a violation of Article 8.[43] On a different note however, the Court introduced a referential formula to be applied to cases involving State decisions concerning environmental issues where the Court has *two modalities of inquiry* at its disposal: first, the Court can assess the substantive merits of the decision taken by the national authority (i.e. ensuring that it is in accordance with Article 8); and second, the Court may scrutinize the preceding decision-making process to ensure that the interests of the individual had been duly taken into consideration.[44]

The procedural vein of the Court's inquiry was further reinforced in *Taskin v Turkey*[45], where the Turkish authorities' decision to issue a permit to use a cyanidation operating process in a gold mine and the related decision-making process were found to be in violation of both Article 8 and Article 6(1) of the Convention. The Court declared that determining the dangerous effects of an activity to which the individuals concerned are likely to be exposed pursuant to an environmental impact assessment procedure is *sufficient* for establishing a close link with the individual's private and family life for the purposes of Article 8, thus triggering the positive obligation of the State to take reasonable and appropriate measures to secure the applicant's rights under Article 8(1).[46] In assessing the content and scope of the applicant's rights, the Court made reference to an array of relevant international documents concerning the right to a healthy environment, among which the Rio Declaration on Environment and Development and the Aarhus Convention.[47]

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 in *Fadeyeva v Russia*[48] proceeded with crafting a 'de minimis' rule by clarifying that the adverse effects of environmental pollution must attain a certain minimum level in order to be caught under Article 8 whereas 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".[49] While acknowledging that in order to fall within the scope of Article 8, complaints relating to environmental nuisances have to show, firstly, that there was an *actual interference* with the applicant's private sphere, and, secondly, that a *level of severity* was attained[50], the Court nevertheless maintained that the assessment of the severity of the environmental conditions

[42] Para.98; See, for further commentary on the *Hatton* judgment, HARRIS, O'BOYLE, BATES and BUCKLEY *supra* n.23, p.391,392; MERRILLS and ROBERTSON, *supra* n.23, p.156 et seq.;
[43] Para.96.
[44] Para.99.
[45] *Taşkın and Others v. Turkey* App no 46117/99 (ECHR, 10 November 2004).
[46] Para.113 of the judgment; To reinforce this argument, the Court reiterates the substantive and procedural aspect formula enounced in Hatton (para.115)
[47] Para.98 et seq.
[48] *Fadeyeva v. Russia* App no 55723/00 (ECHR, 9 June 2005).
[49] Para.69 of the judgment.
[50] Para.70 (Emphasis added).

depended on the context and the circumstances of the case, concluding that although the pollution in question did not cause any quantifiable harm to her health it inevitably made the applicant more vulnerable to various illnesses and thus posed serious risks to her health.[51]

In *Fadeyeva*, the Court made a curious departure from its habitual order of scrutiny applied to cases involving environmental protection by stating that in order to establish whether a fair balance between the competing interests has been accomplished the Court must first examine whether the decision-making process was fair and afforded due respect to the interests safeguarded under Article 8[52], thus inverting the order of the inquiry as introduced in *Hatton* where the examination of the substantive aspect was followed by that of the procedural aspect.[53] Furthermore, it was recognized that the scope of the Court's scrutiny over whether the State has accomplished a fair balance between the private interest of the applicant and the public interest consisted of verifying whether national authorities had committed a *manifest error of appreciation* in striking a fair balance between the competing interests.[54] In spite of finding that in the instant case the State had failed to strike a fair balance between the interests of the community and those of the applicant[55], the Court yet again deferred to the broad margin of appreciation enjoyed by States, reminding that the complexity of the issues involved regarding environmental protection "renders the Court's role primarily a subsidiary one".[56]

Up until *Fadeyeva*, the Court employed a more neutral and nuanced approach, carefully balancing the legitimate demands of the individual applicants against those of the State, with the *Tatar*[57] case marking a veritable turning point where the Court was more inclined to side with the arguments that concerned the individual's right to live in a clean environment adequate to his/her needs than it did before. In addition, the Court embraced the precautionary approach for 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 put the State under a positive obligation 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*.[58] The former pronouncement represents a discernible shift in the language of the Court which now starts to increasingly revolve around the concept of a 'right to a safe and

[51] Para.88.
[52] Para.105.
[53] See Para.99 in *Hatton* and Para.115 in *Taskin* judgment. In a more recent case however the Court has returned to its original *Hatton* formula (see *Udovicic v Croatia* App No 27310/09 (ECHR, 24 April 2014), paras.150 and 151);
[54] Para.105 of the *Fadeyeva* judgment.
[55] Para.132 et seq.
[56] Para.105 of the *Fadeyeva* judgment.
[57] *Tatar c. Roumanie* App No 67021/01 (ECHR, 27 January 2009).
[58] Para.107 of the judgment; In Part II.B "Relevant international law and practice", the Court refers to the standards and principles enshrined in the Stockholm Declaration, the Rio Declaration and the Aarhus Convention.

healthy environment', a reference that the Court returned to subsequently in the *Di Sarno*[59] case.[60] An alternate version of this reference was used in the *Bacila*[61] judgment where the Court was preoccupied with whether the "right of the people (…) to enjoy a balanced and healthy environment" had been affected.[62]

What seems to currently be the norm in dealing with environmental protection cases before the ECtHR is that first and foremost, the Court ventures on establishing a sufficiently close link between the environmental pollution and the applicant's private and family life[63] (in terms of actual effects upon the applicant's health and living situation or sufficiently serious risks thereto). Secondly, the Court carries out two aspects of the inquiry involving the State's (in)action concerning environmental issues: an assessment of the substantive merits of the national authorities decisions followed by a scrutinisation of the decision-making process in order to ensure that adequate weight has been given to the applicant's interests.[64] Lastly, the Court verifies that the State has fulfilled its obligation to secure the applicant's right to respect for his/her private life and home by examining whether the national authorities have made a manifest error of appreciation in striking a fair balance between the competing interests in the case.[65]

The foregoing line of cases have demonstrated that the ECtHR fully guarantees the procedural rights in the environmental protection domain, centering, more particularly, on the right of access to information and the right of participation in the decision-making process in environmental matters. In this way, it can be inferred that the scope of Article 8 has been gradually broadened so as to comprise not only the right of access to certain environmental information but also limited participation in decision-making and subsequent redress before judicial organs.[66] Thus, compliance with Article 8 is made contingent on adequately taking into account the interests of the individuals affected during the decision-making process[67] as well as provision of information to the concerned individual in matters pertaining to the environment. It has been noted that the Court's progressive jurisprudence in this sense has managed to translate into European human rights law the procedural requirements enshrined in Principle 10 of the Rio Declaration which through the Aarhus Convention were subsequently transformed into legally enforceable procedural rights.[68] Equally, it is to be noted that while prior to the *Tatar/Bacila/Di Sarno* line of jurisprudence the ECtHR treated the substantive right to environment as a matter of national constitutional law, by

[59] *Di Sarno v. Italy* App No 30765/08 (ECHR, 10 January 2012).
[60] Para.110 of the judgment.
[61] *Bacila v. Romania* App No 19234/04 (ECHR, 30 March 2010).
[62] Para.71 of the judgment.
[63] See *Hardy and Maile v United Kingdom* App No 31965/07 (ECHR, 14 February 2012), para.191.
[64] Para.217.
[65] Para.232.
[66] See PEDERSEN, *supra* n.20, p.88.
[67] See BOYLE, *supra* n.31, p.496; Arguably, the Court 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, p.491).
[68] Ibid, p.498.

bringing the 'right to safe and healthy environment' within the context of Article 8, the Court has managed to abandon the purely procedural perspective on its environmental rights jurisdiction and prompt an evolution in its approach which may prospectively lead to - to the extent achievable – the recognition of a full-fledged right to environment (comprising both its substantive and its procedural component).

III. The role of the EU Court of Justice in forging an EU-specific rights-oriented approach to environmental protection

The following discussion will draw on the CJEU's endorsement of procedural environmental human rights as well as the potential and the possibility for the future recognition of the substantive right to a clean environment on the part of the CJEU, for the purpose of contrasting the previously elaborated ECtHR standard for the protection of individual rights in the environmental domain to the CJEU's own unique approach to this delicate issue.

From the outset, it is important to recall the priority attached to the objective of environmental protection which figures among the general objectives the Union sets out to pursue (Article 3(3) TEU) and is dedicated a separate chapter in the TFEU pursuant to which a comprehensive Union environmental policy comprising a broad range of environmental issues (air, biodiversity, chemicals, water, noise, soil, forests and waste) has been devised.[69] Under the heading of the Union's environmental policy, an extensive body of law consisting of secondary law instruments (directives and regulations) as well as relevant soft law instruments have been adopted, representing a comprehensive regulatory framework complemented by an equally elaborate framework devised to monitor Member States' activities in the field of the implementation and enforcement of the Union environmental protection rules. Furthermore, the Union's objective to strive for a 'high level of protection and improvement of the quality of the environment' as declared 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. Albeit far from qualifying as the Union's proclamation of a rights-based approach to environmental protection, Article 37 was initially considered as carrying the critical potential to act as basis for the gradual contemplation of a substantive right to environment under Union law.[70] For most of the commentators, Article

[69] http://ec.europa.eu/environment/index_en.htm; For a succinct account of the evolution of the Union's environmental policy see, JANS Jan H. and VEDDER Hans H. B., *European Environmental Law*, Europa Law Publishing, 2008, pp.3-9.

[70] See, PEDERSEN *supra* n.20, p.103; COLLINS *supra* n.15, p.143.
For a more comprehensive discussion on the status and actual and potential legal consequences of Art. 37 of the EU Charter, see MORGERA Elisa and MARIN-DURAN Gracia, "Article 37", *in* PEERS Steve and OTHERS (eds.), *The EU Charter of Fundamental Rights*, Hart Publishing, 2014, p.984; See, also, MORGERA Elisa and MARIN-DURAN Gracia, "Commentary on Article 37 of the EU Charter of Fundamental Rights – Environmental Protection", University of Edinburgh School of Law Research Paper Series, Europa Working Paper No 2013/2.

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[71], 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.[72] However, seeing as the Explanatory Document for the EU Charter clarifies that Article 37 introduces 'principles'[73] rather than rights, it cannot realistically be expected that this provision can serve to derive individual rights from - Article 37 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*"[74], and the principle of sustainable development. Furthermore, Article 52(5) of the EU Charter significantly limits the scope of application of Article 37 and thus, this provision's legal potential, by stipulating 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 whereas these provisions are only to be considered judicially cognizable in the interpretation of those acts and in the ruling on their legality.[75]

Admittedly, the foregoing does not in any way prejudice the recognition of procedural environmental rights under the Union framework on account of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) being part of EU law. In following, the status and scope of procedural environmental rights under the Union framework will be examined through the spectrum of the three main types of environmental procedural rights (entitlements) as these have been foreseen in the Aarhus Convention which is the leading international environmental procedural rights document that has been signed and ratified by the EU and all the Member States and thus forms part of the Union legal order.[76] In order for

[71] PEDERSEN, *supra* n.20, p.103; See, also, MORGERA and MARIN-DURAN (2014), *supra*, p.984.
[72] See COLLINS, *supra* n.15, p.143.
[73] "Explanations Relating to the Charter of Fundamental Rights", OJ 2007/C 303/02 p.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.
[74] 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 KRAMER Ludwig, *EU Environmental Law*, Sweet and Maxwell, 2011, 7th ed., pp.20-22; JANS and VEDDER *supra* n.70, pp.16-23.
[75] Advocate General Colomber attempted suggesting to the EU Court of Justice that Art. 37 could be relied on against national measures that fail to satisfy the criteria provided therein (Opinion of AG Ruiz-Jarabo Colomer delivered on 8 January 2004, case C-87/02 *Commission of the European Communities v Italian Republic* [2004], ECLI:EU:C:2004:13, para. 36); See, also, Opinion of AG Ruiz-Jarabo Colomer, delivered on 26 may 2005, C-176/03 *Commission v Council* [2005], ECLI:EU:C:2005:311, para.69; This argument would apply *a fortiori* in light of the present day status of the Charter as Union's primary law instrument; it would however be challenging to use the provision as sole legal grounds for the CJEU or national courts to base their decision on in a way that is not contrary to the wording of Art. 52(5) of the Charter which prescribes a rather narrow scope of application for the principles set out in the Charter.
[76] The EU acceded to the Aarhus Convention in 2005 through the adoption of Council Decision 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 OJ L 124, 17/5/2005, p. 1–3.

the Aarhus Convention rules to be adequately implemented at Union level, several secondary Union law instruments have been adopted/amended: Directive 2003/4/EC on public access to environmental information[77]; 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[78]; 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[79]; Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment Directive[80]; and, Regulation (EC) No. 1367/2006 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.[81]

By virtue of the status of the Aarhus Convention 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 or applies the Aarhus Convention or the Union transposing secondary law instruments. Moreover, in accordance with the objective set out in the 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[82], the Union's transposing instruments adhere to the identical language of 'procedural rights' in the environmental domain as espoused by the Aarhus Convention. By way of example, the 2003 Access-to-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, and practical arrangements for, its exercise[83]; the 2003 Public Participation Directive 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[84]; 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

[77] Directive 2003/4/EC on public access to environmental information OJ L 41 14/2/2003, p. 26–32.
[78] 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 OJ L 156 25/06/2003 p. 17–25.
[79] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification) OJ L 26 13/12/2011, p. 1-21.
[80] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment OJ L 197, 21/7/2001, p. 30–37.
[81] Regulation (EC) No. 1367/2006 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 OJ L 264 25/9/2006, p.13.
[82] Art. 1 of the Convention.
[83] Art. 1(a) of Directive 2003/4/EC of on public access to environmental information and repealing Council Directive 90/313/EEC (OJ L 41, 14/2/2003, p. 26–32).
[84] Concluding paragraph of Art. 3 of Directive 2003/4/EC.

bodies and held by them, setting out the basic terms and conditions of, and practical arrangements for, the exercise of that right.[85]

The rights-based approach displayed in the foregoing instruments has been accordingly replicated in the CJEU's case law, in a series of judgments where the Court has confirmed the EU citizens' entitlement to a particular procedural right in the environmental domain – be it right of access to information, participation in decision-making or access to courts. *Exempli gratia*, in *Flachglas Torgau*[86] 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".[87] In *Stichting Natuur and Mileu*[88] the Court referred to the *right of access to environmental information* as defined by Directive 2003/4[89], while in *Marie Noelle Solvay*[90] it examined 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, where it was emphasized 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.[91] In *Križan*[92], 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) which provided that members of the public concerned should have the *right to ask the court* or competent independent and impartial body to order interim measures so as to prevent pollution, including, where necessary, by the temporary suspension of the operation permit at dispute.[93] In *Gruber*[94], the Court discussed the *right of the members of the public concerned to contest decisions, acts or omissions* (provided in Article 11 of Directive 2011/92) applicable in relation to an administrative decision which had declared that a particular project did not require an environmental impact assessment[95], while *C-530/11 Commission v. UK*[96] 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*[97] (the rights concerned being of a procedural nature).

[85] Art. 1(a) "Objectives"; Also, see the reference to "maintaining the impairment of a right" in Art. 11 of Directive 2011/92/EU.
[86] ECJ, case C-204/09 *Flachglas Torgau GmbH* [2012], ECLI:EU:C:2012:71.
[87] Para.31 of the judgment; The CJEU makes the identical statement in C-279/12 *Fish Legal and Emily Shirley v Information Commissioner and Others* ([2013] ECLI:EU:C:2013:853), para 36.
[88] ECJ, Joined Cases C-165/09 to C-167/09 Stichting Natuur en Milieu and Others [2011], ECR I-4599.
[89] Para.35 of the judgment.
[90] ECJ, case C-182/10 *Marie Noelle Solvay and Others* [2012], ECLI:EU:C:2012:82.
[91] Para.59 of the judgment.
[92] ECJ, case C-416/10 *Križan and Others* [2013], ECLI:EU:C:2013:8.
[93] Para.109 of the judgment.
[94] ECJ, case C-570/13 *Karoline Gruber* [2015], ECLI:EU:C:2015:231
[95] Para 40 et seq. of the judgment.
[96] ECJ, case C-530/11 *Commission v UK* [2014], ECLI:EU:C:2014:67.
[97] The Court here refers to paras.107 and 109 of the *Križan* judgment.

The previous analysis of the CJEU's case law yields the conclusion that the CJEU has exhibited a clear disposition toward endorsing the procedural environmental rights.[98] However, arguably, the Court's express endorsement of the language of procedural rights in the environmental domain is not to be regarded as a form of judicial activism - if anything, it comes as a logical consequence to the rights-based approach embedded in the Union's transposing legislation and the Aarhus Convention as the primary instrument. Hence, the Court sanctions the language of procedural environmental rights as a matter which falls within the purview of Union law and therefore within the boundaries of its jurisdiction, the Court simply responding to its obligation as the Union's judicial organ to apply the rules and principles of the Aarhus Convention which have become part of Union law. By comparing the CJEU's unequivocal endorsement of procedural environmental rights as a matter of EU law to the previously discussed ECtHR approach of embracing procedural environmental rights in the absence of an expressly prescribed (procedural or substantive) right to environment in the ECHR - and thus, express mandate for the ECtHR to adjudicate on the matter – it can be deduced that while the ECtHR has undoubtedly exhibited strong judicial activism and foresight, what the CJEU has accomplished is largely apply what has already been expressly prescribed in the Union's *lex lata*.

As a final segment of the analysis, a brief look will be had at the potential for recognizing a the substantive right to clean environment under the Union framework which, although not expressly recognized by the EU institutions, has been intimated at in several important pronouncements of the CJEU that have the potential to grow into EU's own unique approach to the substantive right to clean environment. More particularly, the CJEU has come close to granting the existence of particular substantive rights to individuals in the environmental domain which are to be exercised before national courts, in two judgments dating from 1991 - *C-361/88 Commission v Germany and C-59/89 Commission v Germany.*[99] In *C-361/88 Commission v Germany*[100]*, at issue was Germany's alleged failure to adopt all the necessary measures to ensure the complete transposition into national law of the Directive 80/779/EEC on air quality limit values and guide values for sulphur dioxide and suspended particulates*[101]*, the Court considering that* where the 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.*[102] The fact that the Directive in question was concerned with limit values not to be exceeded within specified periods and in specified circumstances, imposed "in order to protect human health in particular", implied that whenever the exceeding of the limit values

[98] See O'GORMAN, *supra* n.21, p.601; PEDERSEN, *supra* n.20, p.108.
[99] See, KRAMER *supra* n.75, p.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. Likewise, the author deplores the fact that the potential and the limits of this jurisprudence have hardly ever been tested by environmental organizations and individual citizens in subsequent cases.
[100] ECJ, case *C-361/88 Commission v Germany* [1991], ECR I-02567.
[101] OJ *1980 L 229, p. 30.*
[102] Para.15 of the judgment.

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.*[103] The former statement was subsequently replicated by the Court in *C-59/89 Commission v Germany*[104]*, this time with respect to Council Directive 82/884/EEC setting limit value for lead in the air.*[105]

Although the Court's *dicta* provided in the two previous cases own the potential to lead to the future recognition of a substantive right to environment under EU law - or at least provide a solid basis for it - it remains questionable whether in reality they would indeed produce any far-reaching effect. The ambiguity surrounding the issue whether environmental protection directives should indeed be seen as creating rights for individuals may account for why the CJEU in *Janecek*[106], a more recent case, returned to its previous statements in a somewhat diluted form. The case concerned the issue of the possibility for an individual to require the competent national authorities to draw up an action plan pursuant to Article 7(3) of Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management[107] in instances of risk for the limit values or alert thresholds to be exceeded. In spite of citing the two judgments of 1991, the Court nevertheless did not refer to the *rights* of the persons concerned, carefully steering away from the language of rights[108] and holding instead that in case of 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.[109] The newly adopted language by the Court indicates that the future possibility for an express recognition of the substantive right to a clean environment by the Union institutions remains an issue of *lege ferenda*, as a development which is presently too early to contemplate on.[110]

IV. The possibility for instituting a future dialogue between the CJEU and the ECtHR

The paper 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),

[103] Para.16; Further, the fixing of limit values in a provision whose binding nature is undeniable is necessary for the purpose of precisely the obligations deriving from all the activities liable to give rise to nuisances (para.16).
[104] ECJ, case *C-59/89 Commission v Germany* [1991], ECR Page I-02607.
[105] *OJ 1982 L 378, p. 15; See* paras.18 and 19 of the judgment.
[106] ECJ, case C-237/07 *Dieter Janecek v Freistaat Bayern* [2008], ECR I-6221.
[107] OJ 1996 L 296, p. 55.
[108] Conversely, in the observations submitted to the Court, the Commission has relied on the language of rights previously endorsed by the CJEU in the two cases 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." (Para.31 of the judgment).
[109] Para.38.
[110] For a comparison with jurisprudential developments in other regions of the world, see the jurisprudence of the African and the American regional judicial bodies and their endorsement of the right to clean environment: before the African Commission on Human and People's Rights - *Rights, Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria* No.155/96 (Judgment of May 27, 2002); before the Court of Justice of the Economic Community of West African States - *Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria*, Judgment No ECW/CCJ/JUD/18/12, December 14, 2012; before the Inter-American Commission on Human Rights - *San Mateo de Huanchor v. Peru*, Report No.69/04 (Oct. 15, 2004); *Maya Indigenous Communities of the Toledo District v. Belize*, Report No.40/04 (2004), etc.

for the purpose of shedding light on the issue of absence of judicial dialogue between these two courts in the matter of environmental rights as something 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, circumscribing for these rights the identical scope and content as provided under the Aarhus Convention. However, despite this virtual alignment of stances, a conspicuous muteness in the judicial exchange between the CJEU and the ECtHR is evident, 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[111], 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. One possible reason for the absence of a dialogue regarding procedural environmental rights could be that the ECtHR fails to view the CJEU as an 'environmental rights court', conceivably, considering the CJEU's approach to environmental human rights to be still rather scarcely developed. Assuredly, the analysis has shown that the CJEU's mindset in applying environmental procedural rights is predominantly centered on reliance of 'rules' and 'standards' in the environmental domain, without being sufficiently grounded on the concept of 'rights' in the environmental context.

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 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.

[111] Regarding the application of the precautionary principle under the Union framework, see paras 71-75 in *Di Sarno* and part II.B(f) in *Tatar*.

From the present standpoint, it would seem 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 initiating 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 i.e. 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))[112]; 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 be set about by way of CJEU's acknowledgment of the ECtHR's jurisprudence involving environmental rights, without necessarily having to follow ECtHR's exercise of extending the scope of existent human rights to ensure that the requirements of environmental protection have been satisfied.

* * *

[112] It is pertinent here to remind 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).

List of abbreviations

CJEU	Court of Justice of the European Union
ECHR	European Convention for the Protection of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

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