

# CONTENTS

## Introduction. Procedural Environmental Rights in Theory and Practice

Jerzy JENDROŚKA ..... xvii

## PROCEDURAL ENVIRONMENTAL RIGHTS: STATUS AND DEVELOPMENTS ..... 1

## Developing Standards for Procedural Environmental Rights through Practice – The Changing Character of Rio Principle 10

Stephen STEC. .... 3

1. Principle 10 and the Complexity of Sustainability Transition ..... 3
2. The Okinawa Dugong Cases ..... 9
3. Conclusion ..... 17

## The Evolution of Participatory Rights in the Era of Fiscal Austerity and Reduced Administrative Burden

Jukka SIMILÄ. .... 19

1. Introduction ..... 19
2. Horizontal Policies and Regulation ..... 21
3. Public Participation and Fiscal Austerity ..... 26
4. Public Participation and Reduction of Administrative Burden. .... 29
5. Structural Reform – a Win-win-win Situation? ..... 33
6. Conclusions. .... 36

## Definitions of the Aarhus Convention v. the Proposal for a New Latin America and the Caribbean Instrument – Mapping the Differences in the Material Scope of Procedural Environmental Rights in International Law

Juliana ZULUAGA MADRID ..... 39

1. Introduction ..... 40
2. Precedents and Methodology. .... 41
  - 2.1. The Draft of the Regional Agreement on Access to Information, Participation and Justice in Environmental Matters in Latin America and the Caribbean. .... 42

3.	Mapping the Differences of the Material Scope of Procedural Environmental Rights in International Law .....	44
3.1.	‘Competent Authorities’ v. ‘Public Authorities’ .....	44
3.2.	‘Environmental Information’ .....	48
3.3.	‘Public’ and ‘Public Concerned’ .....	51
3.4.	Other Definitions Affecting the Scope of the Regional Instrument v. the Aarhus Convention .....	53
4.	Conclusions. ....	55

PROCEDURAL ENVIRONMENTAL RIGHTS IN PRACTICE.....	59
--	----

### **Procedural Environmental Rights in the Jurisprudence of the European Court of Human Rights and Their Impact on Criminal Procedure Law**

Robert ESSER.....	61
1. Introduction – Environmental Law Cases and Their Connotation to Criminal Law .....	62
2. Obligation of the State to Protect People’s Life and the Duty to Conduct an Effective Investigation (Article 2 ECHR).....	63
3. Environmental Dangers and the Right to Private Life, Article 8 ECHR...	66
3.1. ECtHR’s jurisdiction on environmental protection.....	66
3.2. Content of the State’s positive duty.....	67
3.3. Interference by a public authority according to Article 8 § 2 ECHR..	68
3.4. Involvement of the public in the decision-making process, margin of appreciation of the State and access to judicial review complying with Article 8 § 2 ECHR. ....	69
4. Do Procedural Requirements Derived from Article 8 ECHR Demand Criminal Investigations in Environmental Cases? .....	71
5. Access of Injured Persons and Relatives to Criminal Investigation .....	72
6. Private Accessory Prosecution in German Criminal Procedure Law ( <i>Nebenklage</i> ) .....	74
7. Conclusion .....	76

### **Ilva: An Environmental Case**

Nicola LUGARESI .....	79
1. Introduction: the Issues .....	79
2. Ilva: History and Data.....	81
3. Ilva, the Law and the Environment.....	85
3.1. Italy.....	85
3.2. Europe .....	88
4. Ilva, (Un)Sustainable Development, Information and Participation ....	91
5. Conclusions.....	95

## The Improvement of Article 37 of the EU Charter of Fundamental Rights – A Choice Between an Empty Shell and a Test Tube?

Marco Túlio REIS MAGALHÃES . . . . . 97

1. Introduction . . . . . 98
2. Development of European Environmental Law . . . . . 99
  - 2.1. Environmental protection at European level . . . . . 99
  - 2.2. A comparison with the development of international  
environmental law . . . . . 101
  - 2.3. Primary and secondary EU legislation. . . . . 103
  - 2.4. Evaluating the European environmental law . . . . . 104
3. EU Charter of Fundamental Rights and Environmental Protection . . . 105
  - 3.1. Concept of a catalogue of fundamental rights . . . . . 105
  - 3.2. EU Charter of Fundamental Rights . . . . . 106
  - 3.3. Environmental protection in the terms of Article 37. . . . . 110
4. Improvement without Reinvention: a Plea Based on Existing Legal  
Tools . . . . . 111
  - 4.1. Does a right to environmental protection encompass the  
scrutiny of fundamental rights? . . . . . 112
  - 4.2. A procedural fundamental right to environmental protection:  
from an empty shell towards a test tube? . . . . . 115
5. Conclusion . . . . . 117

PUBLIC PARTICIPATION . . . . . 119

## The EU and Public Participation in Environmental Decision-Making

Ludwig KRÄMER . . . . . 121

1. Primary EU law . . . . . 122
2. Secondary EU law . . . . . 123
3. Public Participation in Measures at EU Level . . . . . 126
  - 3.1. Public participation in decisions on activities and projects . . . . . 127
  - 3.2. Plans and programmes adopted at EU level . . . . . 129
4. EU Law with Regard to Participation Rights at National Level . . . . . 132
  - 4.1. Participation in projects and activities. . . . . 132
  - 4.2. Trans-European projects . . . . . 134
  - 4.3. Participation in national decisions on plans and programmes . . . 138
5. Resuming remarks. . . . . 140



## **Public Participation in Rulemaking and Decision-Making in Environmental Matters – Legal Framework and Jurisprudence in Spain and the Basque Country**

María del Carmen BOLAÑO PIÑEIRO and Iñaki LASAGABASTER

HERRARTE..... 143

1. Introduction ..... 144
2. Legal Framework regarding Public Participation in Environmental Rulemaking and Decision-making..... 147
3. Jurisprudence ..... 150
  - 3.1. Distinction between administrative regulation and administrative decision..... 150
  - 3.2. ‘Substantive amendment’ as a legal category..... 152
  - 3.3. Imposition of specific obligations to public authorities by courts..... 153
  - 3.4. Nullity ..... 154
4. Conclusions..... 155
5. Bibliography ..... 156
6. Jurisprudence ..... 158

## **Legal Instruments to Protect Indigenous Peoples’ Participation in Europe and in the Arctic Region**

Margherita Paola POTO..... 159

1. Introductory Remarks..... 160
2. Part I ..... 162
  - 2.1. Indigenous Peoples’ Participatory Rights in Europe ..... 162
  - 2.2. International Instruments and Recommended Reforms to Enhance Participation of European Minorities ..... 164
3. Part II..... 167
  - 3.1. Indigenous Peoples in the Arctic Region and Their Participation in Environmental Decisions ..... 167
  - 3.2. Advancements in the Full Recognition of Indigenous Peoples’ Rights in the Arctic ..... 167
4. Concluding Remarks..... 169

## **Notifying the Public as a Part of the Public Participation Procedure in EU, Polish and Ukrainian Law**

Viktorii RACHYNSKA..... 171

- Introduction ..... 171
1. Polish Law ..... 175
  2. Ukrainian Law ..... 176

3.	Personal Scope of Public Notification .....	178
4.	The Notification Made in a Timely Manner .....	180
5.	The Notification Made in an Effective Manner .....	182
6.	Public and Individual Notice .....	184
6.1.	Publication in printed media .....	184
6.2.	Bill posting .....	185
6.3.	Radio, television and social media .....	187
6.4.	Electronic media .....	187
6.5.	Individual notice .....	188
6.6.	General recommendations of the Aarhus Convention Compliance Committee to notification .....	189
7.	Conclusions .....	190

### **Public Participation Rights Enhancement within the Wind Power Plants Location in Poland in the Context of EU Renewable Energy Requirements**

	Kamila SOBIERAJ .....	193
1.	Introduction .....	194
2.	Increasing EU Requirements Regarding Renewable Energy Sources ...	194
3.	The Predicted Leading Position of Wind Energy within EU Requirements Meeting .....	196
4.	Protection of the Public Participation Rights in the Process of Wind Farm Location .....	197
5.	The Impact of the Wind Farm Investments Act on the Increase of the Public Participation Rights .....	203
6.	Conclusions .....	205
	ACCESS TO JUSTICE .....	207

### **Access to Environmental Justice in India: Innovation and Change**

	Gitanjali Nain GILL .....	209
1.	Introduction .....	209
2.	Environmental Courts and Tribunals: Facilitating and Promoting Environmental Justice .....	212
3.	The Indian Judiciary: Public Interest Litigation and the National Green Tribunal .....	216
4.	Conclusion .....	228

**The Scope of the Review in Environment-related Disputes in the Light of the Aarhus Convention and EU Law – Tensions between Effective Judicial Protection and National Procedural Autonomy**

Vasiliki (Vicky) KARAGEORGOU .....	229
1. Introduction .....	229
2. The Regulatory Framework concerning the Scope of the Review in Environment-related Judicial Proceedings at Supranational Level .....	231
2.1. The relevant provisions of the Aarhus Convention .....	231
2.2. The relevant provisions of the EU environmental law and the limits of discretion of the national legislators .....	233
2.2.1. The incorporation of the third pillar of the AC in the EU legal system concerning national review procedures .....	233
2.2.2. The determination of the scope of the review and the limits to the national procedural autonomy .....	236
3. Issues Arising in Different Legal Systems Concerning the Scope of the Review in Environment-related Judicial Proceedings .....	238
3.1. Introductory remarks .....	238
3.2. The scope of the review in systems of subjective judicial review .....	239
3.2.1. The scope of review in the German system of judicial review .....	239
3.2.2. The scope of the review in other systems of subjective judicial review: the Austrian and the Czech system .....	243
3.3. The scope of review in systems of objective judicial review: The case of the Greek system .....	245
3.4. Critical remarks from the comparative overview .....	249
4. The Determination of the Scope of the Review in the Light of the Findings of the ACCC and the Relevant Jurisprudence of the CJEU ...	249
4.1. The relevant findings of the ACCC .....	249
4.2. The relevant jurisprudence of the CJEU .....	251
4.2.1. The ruling in the <i>Trianel</i> case .....	252
4.2.2. The ruling in the <i>Alptrip</i> case .....	253
4.2.3. The ruling in the <i>Commission v. Germany</i> case .....	254
4.2.4. A critical assessment of the three rulings .....	256
5. Concluding Remarks: Responses for Addressing Restrictive Approaches Concerning the Scope of the Review .....	257

**Implementation of the Aarhus Convention through *Actio Popularis* – Article 9(3) of the Aarhus Convention and *Actio Popularis***

Žaneta MIKOSA .....	261
1. Introduction .....	262
2. Legal Standing in the Aarhus Convention and in Its “Enforcement” Provision (Peculiarity of Article 9(3)) .....	264



3.	Legal Standing and “the Most Extensive Approach” in Light of the Principle of Separation of Powers .....	267
4.	Different Approaches to Legal Standing in Europe and <i>Actio Popularis</i> Therein.....	272
5.	The Evolvement of an <i>Actio Popularis</i> through Legislation of Latvia ...	274
6.	<i>Actio Popularis</i> through Court Practice in Latvia .....	277
6.1.	The first cases towards <i>actio popularis</i> .....	277
6.2.	Environmental protection as the “main concern” to apply the “environmental exception clause” .....	278
7.	Concluding Remarks.....	280

## PROCEDURAL ENVIRONMENTAL RIGHTS AND NATURE PROTECTION..... 285

### **Towards a Legally Enforceable Duty to Restore Endangered Species under EU Nature Conservation Law – On Wild Hamsters, the Rule of Law and Species Extinction**

Hendrik SCHOUKENS..... 287

1.	General Introduction .....	288
1.1.	From static preservation management to ecological restoration ..	288
1.2.	From piecemeal lawsuits to more activist types of environmental litigation.....	290
2.	The Plight of the Wild Hamster in Western Europe: An Appropriate Context for Restoration-based Claims? .....	292
2.1.	From agricultural pest to critically endangered species in several EU Member States?.....	293
2.2.	Extinction through inaction?.....	294
3.	Procedural Obstacles: Granting Standing to Environmental NGOs in Order to Allow Them to Act as Guardians of the Wild Hamster? ...	296
3.1.	Different roads to the enforcement of EU environmental law ....	296
3.2.	Article 9(3) of the Aarhus Convention: a new pathway for more progressive standing rules? .....	299
3.2.1.	A high-water mark for procedural obstacles to environmental litigation.....	300
3.2.2.	The relatively wide material scope of Article 9(3) of the Aarhus Convention.....	301
3.2.3.	More liberal standing criteria in environmental cases? ...	302
3.2.4.	Effective legal remedies, also in restoration-based cases?..	304
3.3.	A complementary road to standing: Article 12(1) of the Habitats Directive and effective judicial protection? .....	305
3.3.1.	Direct effect as a gateway to better legal protection? .....	306
3.3.2.	Effective legal protection as an attractive side-route? .....	306

3.4.	Separation of powers versus mandatory injunction: beyond the traditional approach towards the <i>trias politica</i> .....	309
3.4.1.	Towards a more liberal approach of the separation of powers doctrine? .....	310
3.4.2.	The re-emergence of Article 9(4) of the Aarhus Convention: effective judicial protection vs the traditionalist approach to the separation of powers theory?.....	313
3.4.3.	The principle effective protection of Article 19(1) of the TEU .....	314
4.	Substantive Elements: Towards a Clear-Cut Restoration Duty under EU Nature Conservation Law for Strictly Protected Species? .....	317
4.1.	Towards a duty to restore endangered species: going beyond the status quo? .....	317
4.1.1.	A brief contextualisation of Article 12(1) of the Habitats Directive: going beyond 'paper' protection? .....	317
4.1.2.	Beyond conservation, towards recovery: restoring species to a thriving condition?.....	319
4.2.	The favourable conservation status as baseline: a reviewable standard for restoration-based litigation? .....	322
4.2.1.	At what territorial level is the favourable conservation status to be achieved? .....	323
4.2.2.	How to establish a precise and easily reviewable baseline: uncertain science vs discoverable standards?....	324
4.2.3.	Additional ways to operationalize the recovery rationale: favourable reference range and population targets?.....	328
4.3.	An alternate route for restoration claims: remedying past non-compliance and unlawful damage to species? .....	331
4.4.	Which concrete measures are obligatory to foster recovery for endangered species?.....	334
4.5.	Economic considerations as additional obstacles to judicial review?.....	337
5.	Conclusion .....	338

## Recognition of Rights of Nature, as a Subject of Law, in the International Environmental Law Framework

	Santiago VALLEJO GALÁRRAGA .....	341
1.	Introduction .....	341
2.	Christopher Stone and Other Promoters of Legal Standing of Nature..	344
2.1.	Is the legal representation of nature possible?.....	346
2.2.	Is there an alternative view to the economic sense of environmental rights?.....	348



3.	Thomas Berry and the Theory of Earth Jurisprudence .....	351
4.	The Rights of Mother Earth .....	354
4.1.	Humans are members of the Earth's community .....	354
4.2.	Nature is a system of interdependence .....	355
4.3.	Organisms as teleological centers of life .....	355
4.4.	Denial of human superiority .....	355
5.	Rights of Nature in the International Law Framework .....	356
5.1.	Legitimacy and independence of States .....	356
5.2.	Nature as a new actor on the international scene .....	358
5.3.	Nature, from a commodity to a bearer of rights .....	359
6.	Conclusions .....	360

### **Strengthening Conservation through Participation: Procedural Environmental Rights of Local Communities in Transboundary Protected Areas**

Emma Mitrotta .....	363
---------------------	-----

1.	Introduction .....	364
2.	The Extraterritorial Dimension of Public Participation .....	365
3.	Participation of Local Communities as 'Public Concerned' in Protected Areas .....	371
4.	Community Participation in Transboundary Protected Areas .....	378
5.	Conclusions .....	383

PROCEDURAL ENVIRONMENTAL RIGHTS AND EIA .....	387
---	-----

### **Public Participation and EIA in the Multi-Stage Decision-Making Process: The Czech example**

Petra HUMLÍČKOVÁ and Vojtěch VOMÁČKA .....	389
--	-----

1.	Introduction .....	389
2.	Quest for Compliance .....	390
2.1.	Historical development .....	390
2.2.	Chain of procedures .....	393
2.3.	The specific regime and the specific-to-specific regime .....	394
2.4.	Too many variables .....	396
2.5.	Many steps to stumble over .....	398
3.	Case Studies .....	398
3.1.	EIA statement with no consequent permits .....	399
3.2.	Outdated facts in environmental impact assessment .....	401
3.3.	Implementation of a different project than has been considered in the EIA .....	404
3.4.	(Ab)use of data from EIA .....	405
4.	Conclusions .....	407

## Use of the Bounding Conditions Envelope Concept in the Polish System of Environmental Impact Assessments

Mariusz WÓJCIK, Paweł GRABOWSKI, Maciej STRYJECKI and

Dominik GAJEWSKI ..... 409

1. Introduction ..... 410
2. Conditions and Procedural Safeguards in the Application of the Bounding Conditions Envelope in EIA of Projects ..... 411
  - 2.1. Rationale for using BCE under the Polish system of EIA of projects ..... 411
  - 2.2. Flexibility in the Polish system of EIA ..... 415
  - 2.3. Public participation and procedural safeguards in BCE approach .. 415
  - 2.4. Supplementary EIA and BCE. .... 417
3. Methodological Principles of EIAs Using BCE. .... 418
  - 3.1. Identification of potential options. .... 418
  - 3.2. Identification of key impacts of the project on the environment. . 418
  - 3.3. Identification of project parameters affecting the scale of impacts (e.g. height, power output, noise emission). .... 419
  - 3.4. Establishing the initial BCE. .... 419
  - 3.5. Performing EIA for BCE and establishing the final BCE ..... 420
  - 3.6. Issuing of the environmental decision ..... 420
  - 3.7. Verification of BCE ..... 421
  - 3.8. Challenges in using BCE. .... 421
4. Conclusions. .... 422

## Special Provisions on the Issuance of Environmental Decisions in Sectoral Legislation in Poland

Sergiusz URBAN ..... 425

1. Introduction ..... 425
2. The Exemptions from the General Rules Applicable to the Environmental Decisions ..... 426
  - 2.1. Restrictions imposed on the proceedings of the issuance of the environmental decisions ..... 428
  - 2.2. Automatic assignment of the immediate enforceability to the environmental decisions and the consequences for the challenging of these decisions ..... 429
  - 2.3. Special rules of challenging the environmental decisions ..... 430
  - 2.4. Prohibition of the quashing of the administrative decisions issued at the last stage of the development process in the context of the (complementary) Environmental Impact Assessment conducted as a part thereof. .... 431
3. Conclusions. .... 432



## PROCEDURAL ENVIRONMENTAL RIGHTS AND CLIMATE CHANGE ..... 435

### (Un)comfortably Numb: The Role of National Courts for Access to Justice in Climate Matters

Esmeralda COLOMBO.....	437
1. Introduction .....	438
2. A Normative Framework. Reloading Principle 10 of the Rio Declaration .....	440
3. Enforcement, Legitimacy and Limitations .....	447
4. A New Strand of Climate Change Litigation.....	450
5. Access to Justice at Play within the Paris Agreement .....	459
6. Conclusions.....	463

### Access to Information, the Hidden Human Rights Touch of the Paris Agreement?

Delphine MISONNE .....	465
Introduction .....	465
1. The Paris Agreement on Climate Change .....	468
1.1. A treaty .....	468
1.2. Not a treaty for all .....	469
1.3. A long-awaited treaty .....	469
1.4. A brand new type of treaty.....	470
2. Access to Information in International Agreements on Climate Change.....	472
2.1. Previous agreements on climate change .....	472
2.2. Aarhus' impact.....	474
2.3. A special place in the Paris Agreement .....	475
3. The Content of Nationally Determined Contributions .....	476
4. The Follow-Up of Article 12.....	477
4.1. Beyond capacity-building: an integration clause .....	477
4.2. Towards a cooperation on creating new rights .....	478
4.3. A necessary part of future nationally determined contributions... ..	479
5. Conclusion .....	480

### Access to Justice in Climate Change Litigation from a Transnational Perspective: Private Party Standing in Recent Climate Cases

Samvel VARVAŠTIAN .....	481
1. Introduction .....	482
2. Standing in the US.....	483
2.1. Cases concerning climate change impact assessment .....	485



2.2.	Cases concerning the regulation of GHG emissions and air quality .....	489
2.3.	Common law cases .....	492
3.	Standing in Australia .....	495
4.	Standing in Europe: the Dutch Urgenda Case .....	498
5.	Concluding Remarks.....	501