

Schriften zum Internationalen Recht

Band 205

**Participatory Rights in
the Environmental Decision-Making
Process and the Implementation
of the Aarhus Convention:
a Comparative Perspective**

Edited by

Eva Julia Lohse and Margherita Poto

In Cooperation with Giulia Parola



Duncker & Humblot · Berlin

EVA JULIA LOHSE / MARGHERITA POTO (Eds.)

Participatory Rights in the Environmental Decision-Making
Process and the Implementation of the Aarhus Convention:
a Comparative Perspective

Schriften zum Internationalen Recht

Band 205

Participatory Rights in the Environmental Decision-Making Process and the Implementation of the Aarhus Convention: a Comparative Perspective

Edited by

Eva Julia Lohse and Margherita Poto

In Cooperation with Giulia Parola



Duncker & Humblot · Berlin

Diese Publikation wurde gefördert vom DAAD aus Mitteln
des Bundesministeriums für Bildung und Forschung (BMBF)

GEFÖRDERT VOM



Bundesministerium
für Bildung
und Forschung

Bibliographic information of the German national library

The German national library registers this publication in
the German national bibliography; specified bibliographic data
are retrievable on the Internet about <http://dnb.d-nb.de>.

All rights reserved. No part of this book may be reproduced, translated,
or utilized in any form or by any means, electronic or mechanical,
without the expressed written consent of the publisher.

© 2015 Duncker & Humblot GmbH, Berlin
Typesetting: Konrad Triltsch GmbH, Ochsenfurt
Printing: buchbücher.de gmbh, Birkach
Printed in Germany

ISSN 0720-7646
ISBN 978-3-428-14613-0 (Print)
ISBN 978-3-428-54613-8 (E-Book)
ISBN 978-3-428-84613-9 (Print & E-Book)

Printed on no aging resistant (non-acid) paper
according to ISO 9706 ☼

Internet: <http://www.duncker-humblot.de>

*To Our Daughters and the Children
of the World*

Table of Contents

<i>Eva Julia Lohse, Giulia Parola and Margherita Poto</i> Introductory Remarks on the Idea and the Purpose of a German-Italian Dialogue on Participation in Environmental Decision-Making	9
---	---

Part I

Perspectives on Participation – Rationales, Protected Interests, Democracy

<i>Giulia Parola</i> Ecological Interest as a Leading Rationale for Participation: Ecological Duties of the Citizens and of the Authorities	15
<i>Cristina Fraenkel-Haeberle</i> Participatory Democracy and the Global Approach in Environmental Legislation	33
<i>Claudia Sartoretti</i> The Aarhus Convention Between Protection of Human Rights and Protection of the Environment	45
<i>Paolo Turrini</i> Participatory Rights and the Notion of Interest in Environmental Decision-ma- king: a Theoretical Sketch and Some International Legal Considerations	59
<i>Federica Cittadino</i> Public Interest to Environmental Protection and Indigenous Peoples' Rights: Procedural Rights to Participation and Substantive Guarantees	75

Part II

Participation in Administrative Decision-making: Prerequisites and Principles in National and Supranational Law

<i>Margherita Poto</i> Strengths and Weaknesses of Environmental Participation Under the Aarhus Convention: What Lies Beyond Rhetorical Proceduralisation?	93
--	----

<i>Viviana Molaschi</i>	
The Implementation of the Aarhus Convention in Italy: a Strong ‘Vision’ and a Weak ‘Voice’	105
<i>Julian Zwicker and Franziska Sperfeld</i>	
Participation of Environmental Associations in the Context of Nature Conservation Law in Germany	121
<i>Nicola Below</i>	
Participation Under REACH – Stakeholder Interests and Implementation of EU Secondary Law	135
Part III	
Participation Through Access to Justice – Conditions and Concepts of Judiciary Participation	
<i>Eva Julia Lohse</i>	
Access to Justice – the Main Challenge for Implementing the Aarhus Convention	159
<i>Angela Schwerdtfeger</i>	
Implementation and the Separation of Powers	173
<i>Elena Fasoli</i>	
The German Criteria for Access to Justice Under the Scrutiny of the Aarhus Convention Compliance Committee and of the Court of Justice of the European Union: Is There Room for Similar Proceedings Against Italy?	189
<i>Bilun Müller</i>	
The Effect of the Aarhus Convention’s Right of Access to the Courts in Germany	203
<i>Ulrike Giera</i>	
Attorneys for the Environment – an Effective Implementation of Art. 9 (3) Aarhus Convention?	219
Part IV	
An Example for Best Practises in Environmental Participation	
<i>Stefano Duglio, Maria Beatrice Pairotti and Riccardo Beltramo</i>	
Environmental Management: the Environmentally Equipped Industrial Area Model	239
<i>Eva Julia Lohse</i>	
Comparative Conclusions from a German–Italian Dialogue on Participation ...	251
List of Authors	261

Introductory Remarks on the Idea and the Purpose of a German-Italian Dialogue on Participation in Environmental Decision-Making

By *Eva Julia Lohse, Giulia Parola and Margherita Poto*

Earth Democracy is a shift from anthropocentrism to ecocentrism. And since we all depend on the Earth, Earth Democracy translates into human rights to food and water, to freedom from hunger and thirst.

Vandana Shiva, Earth Democracy

I. Scientific Background of the Project

Our project on *Participatory rights in the environmental decision-making process and the implementation of the Aarhus Convention* aimed to provide a comparative overview of the implementation of the Aarhus Convention (AC) on participatory rights in the environmental decision-making processes. The core idea was to explore the legal cultures of various EU member states, where the AC principles have been implemented in national law with a special focus on the participatory rights in German and Italian environmental law.

The AC can be seen as the litmus test of economic and political revolutions, having triggered shifts in mentality in the administrative decision-making process in environmental law. These changes have a twofold impact on the legal systems at stake: firstly, they certainly contributed to the expansion of public participation in all phases of the decision-making process (mainly in Italy); secondly, they ran the risk of restricting the procedural autonomy of the Member States (mainly in Germany) on the basis of an excessively interpreted principle of effectiveness (art. 4 (3) Treaty establishing the European Union).

The project has scrutinised a few of these interrelations, in line with the following structure:

- (1) First, a comparative study on the differences and similarities in the German and Italian administrative procedures and court proceedings (especially regarding the access to courts, subjective/individual rights, third parties in administrative proceedings);
- (2) Second, a scrutiny of the connection between the participatory achievements and the awareness of a common ecological interest;

(3) Third, the intricacies of participatory democracy and multi-level entities such as an international Convention, a supra-national organisation as a signatory and its Member States as co-signatories.

As regards participatory rights, the analysis of the compliance of the Italian and the German legal systems has followed a matrix of questions.

- Are there differences in the application of the rules on public participation applicable respectively to specific activities (art. 6 AC), to plans, programs and policies (art. 7 AC), and to normative instruments (art. 8 AC)?
- Is participation going beyond defence and consultation, and leading up to negotiation or co-decision?
- Are participatory rights given to NGOs in the same manner as to individuals (also considering art. 7 AC – “public which may participate” – and art. 9 AC)?
- What is considered a reasonable timeframe for the different phases (art. (3) AC)?
- Are the requirements for participation in the AC considered the same as with the Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA) introduced by the European Union (EU) directives or existent in national law? If not, how are differences dealt with?
- In connection with access to justice, what is meant by “due account is taken of the outcome of public participation” (art. 6 (8) AC) and what are considered to be sufficient “reasons and considerations” (art. 6 (9) AC)?

As a starting point for the comparison, the situation 1) pre-, and 2) post-implementation of the AC was considered.

The difficulty in effectively implementing the participatory rights derives from the absence of a clear definition of substantive environmental rights. This Achilles’ heel of the AC has been pointed out by legal research. The lack of substantive environmental rights has been defined as a practical obstacle impinging on its commitment to human rights, as it arguably reduces the scope for public deliberation on the appropriateness of environmental decision-making according to competing social values. It is therefore important to define characteristics or elements of substantive environmental rights. Their established connection to fundamental rights of the human being as endorsed in national and international codifications of human rights should be a starting point. Yet, clearly environmental rights have to encompass further elements, such as sustainability and care for future generations but also collective rights and the protection of common goods that can hardly be expressed by individual human rights.

Therefore, the project has scrutinised where and to what extent the implementation measures establish the legal protection of such rights and interests, especially by the introduction of participatory rights for the common good. In conclusion, there have been ups and downs in implementation of the AC over time. So far, however, the resulting legislation does not seem to have led to structural changes, which could

have a significant impact on environmental policies and, most of all, which could give substance to environmental rights. Placing the Earth as the core object of the investigation, a shift to *ecocentrism* is needed, where the 'ecological interest' has to stand out as a fundamental right of the individuals. Our project, with the debate followed by the present publication, aims to contribute to the knowledge of whether the European Union is on the right way to establish such an approach.

II. Success and Outcome of the Project

The success of this project lies in the wish that a research group led by young (mostly female) legal researchers can trigger a shift in mentality on environmental participation. The research group was formed by legal scholars, young in age or in spirit, practitioners, economists, philosophers and a theologian from different countries of the EU. Our idea was generously supported by the *Deutsche Akademische Austauschdienst* (DAAD), that believed in our potential to build up a network of scholars and practitioners willing to explore the environmental consciousness flourishing after the AC entered into force, and therefore to contribute to its programme of *Deutsch-Italienische Dialoge*. And a dialogue it was indeed.

The importance of a participatory approach was dual, since it found its own dimension both as main objective of the project (environmental participation) and as the methodology applied to reach the objective itself (a German-Italian dialogue open to third interlocutors). The importance of environmental participation is grounded on some key aspects:

- (1) The dialoguing parties all agree upon the core idea that deep reflections on the importance to grant a wide environmental participation are of great benefit for the Earth.
- (2) A serious commitment to constitute a task force of young researchers on environmental protection is urgently needed.
- (3) All the efforts undertaken toward an effective shift to ecocentrism in the global scenario shall be strengthened and encouraged.

Alongside our commitment to environmental legal studies, we wish that this project, with a conference and a collection of proceedings, is only the starting point of a long-term cooperation between academic institutions, free thinkers, scholars and third parties.

Our heartfelt gratitude goes to all the people who believed in our idea and decided to be part of the dialogue, as supporters and interlocutors.

Part I

**Perspectives on Participation – Rationales,
Protected Interests, Democracy**

Ecological Interest as a Leading Rationale for Participation: Ecological Duties of the Citizens and of the Authorities

By *Giulia Parola*

Abstract

Our age is characterised by a global ecological crisis and humanity is both the cause and the victim of environmental degradation. The following contribution suggests the introduction of Ecological Duties at international and local level to modifying human behaviour towards environmentally benign practices. Law can be an important tool since it can create legal frameworks not just for environmental rights but also for ecological duties, which lead each individual as a citizen of social and ecological communities to become aware of the incredibly powerful role they can have in this crisis.

I. Introduction

States seem to progressively realise that they cannot create green societies on their own, but that they have to recognise a role for civil society in the process of achieving environmental objectives. Hence, achieving ecological aims requires a process of democratisation through participation, taking into account that economic transformations, scientific-technological progress and daily life changes will not be enough.

In most green political theories, citizens' participation in the environmental decision-making process is essential. In particular, stress is placed on the rights of access to information, participation and access to justice, as well as on democratic models.¹ Moreover, obligations *vis-à-vis* the planet and future generations are also emphasised.²

From this perspective, almost all the contributions in this volume deal mainly with the environmental citizen and her/his corresponding substantive and procedural environmental rights. My study will rather focus on the ecological duties that have not fully developed yet from a legal perspective.

¹ The starting point of all green political theories, in all their organisational and ideological diversity, concerns proposals of an alternative to the liberal-democratic representative system. Much work has explored the relationship between democracy and ecology: *Eckersley*, *The Green State*; *Mason*; *Howard*, p. 34; *Eckersley* *Ecofeminism*, p. 52; *Jananoff*, p. 2; *Parola*.

² *Melo-Escrihueta*, p. 113.

In fact, duties are easily conceptualised in ethical terms based upon arguments of political philosophy rather than upon legal terms. Nevertheless, the purpose of this article is to try to move on from this construction of duty towards a legal approach and for this reason it is useful to introduce the concept of the Ecological Interest.

For a long time, the primary task of the State has been to achieve and maintain the *common interest*. Hereunder fall the welfare of one State's population and the State's economic development. But since the humanity have to face the ecological crisis, it can be argued that a reference to *common interest* is as well comprising the survival of Earth and consequently of humankind as such. Thus, the Ecological interest is the interest of the survival of the Planet.

Moreover, the Ecological Interest includes two fundamental aspects: Ecological duties of the citizens towards the Planet as a continuum of responsible actions towards all forms of life, including non-human life and include not only the obligation to comply with environmental laws but also to participate; and Ecological duties of the Authorities (supra-national, national, regional or local) towards the Planet as a set of obligations to establish a new regulatory model for protecting all forms of life, including non-human life.

The legal doctrine has recently started to take into account this duty approach. An example is the article published by Boutonnet in June 2014³ on "*La consécration du concept d'obligation environnementale*". She introduces the concept of "*l'obligation environnementale*" that can be easily compared to the concept of 'Ecological Interest'. This concept "*désigne l'ensemble des devoirs destinés à intégrer la données environnementale soit dans une finalité de gestion du risque environnemental dans l'intérêt des parties ou du marché soit ans une finalité de protection de l'environnement dans l'intérêt collectif*".⁴

The following contribution has been divided into three parts: firstly it will be explained how participation in environmental matters can bring a new ecological awareness and responsibility; secondly it will be studied what the ecological duty is and a definition on the two principal ecological duties will be provided; finally, the contribution will be focused on the implementations of the ecological duties in the Aarhus Convention (AC)⁵ and in the Members States.

³ See also *Maljean-Dubois; Parance*, p. 647; *Jégouzo*, p. 1164.

⁴ Moreover, she divides the obligations in two categories, firstly there is "obligations environnementale subjectives [...] [qui] intègrent la donnée environnementale dans un souci premier de préservation des intérêts des sujets de droit", in other words when the environment is not directly protected, for instance the duty of the Authorities to give information to the public in environmental matters. On the other side there is "obligations environnementales objectives" that protect directly the environment, an example is the duty to protect the Nature.

⁵ Fully titled "The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters".

II. Environmental Participation to an Ecological Responsibility

The most important role played by citizens and recognised by laws in environmental protection is participation in the decision-making process, which may be both political and administrative. The origin of public participation is “the right of those who may be affected, including foreign citizens and residents, to have a say in the determination of their environmental future”.⁶ Public participation processes have been emerging in the policies and environmental regulations of some States since the late 1960s and 1970s.⁷ This phenomenon coincided with political disturbances around the world when civil society started to ask for more democratic governance and environmental protection. From the period of the 1970s to the early 1980s, doctrine and critics have highlighted the importance of citizens to achieve economic development in an environmental manner.⁸ Consequently, during the 1990s, consultation and participation turned into the buzzwords of environmental decision-making, feeding into broader discourses on “good governance”⁹ “environmental justice” and “environmental citizenship”.¹⁰

Today the involvement of citizens in environmental decision-making processes has been realised in different regulations at international and local level. For instance, at international level the AC has recognised procedural environmental rights to the citizens.

An example at European level has been described by Nicola Below¹¹ in his article on European Regulation concerning the Registration, Evaluation, Authorization and Restriction of Chemicals¹² (REACH), where he explains the very diverse and elaborate participatory system based on REACH to show the efforts done in this sector of environmental legislation.

⁶ *Shelton*, Human rights and the environment, p. 26.

⁷ E.g., in UK, in its planning legislation of the 1960s. The creation of the Royal Commission on environmental Pollution, 1969, and the Department of the Environment, 1970, was the governmental response to these public pressures: *McCormick*, 1995.

⁸ *Spyke*, p. 263.

⁹ *Steffek/Nanz*.

¹⁰ *Richardson/Razzaque*, p. 168.

¹¹ *Participation under REACH – Stakeholder Interests and Implementation of EU Secondary Law (Nicola Below)*, in this volume, p. 131.

¹² Regulation (EC) no. 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) no. 793/93 and Commission Regulation (EC) no. 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (Text with EEA relevance) (OJ L 396, 30.12.2006, p. 1 et seq.).