EU ENVIRONMENTAL PRINCIPLES AND SCIENTIFIC UNCERTAINTY BEFORE NATIONAL COURTS: THE CASE OF THE HABITATS DIRECTIVE

Mariolina Eliantonio, Emma Lees and Tiina Paloniitty

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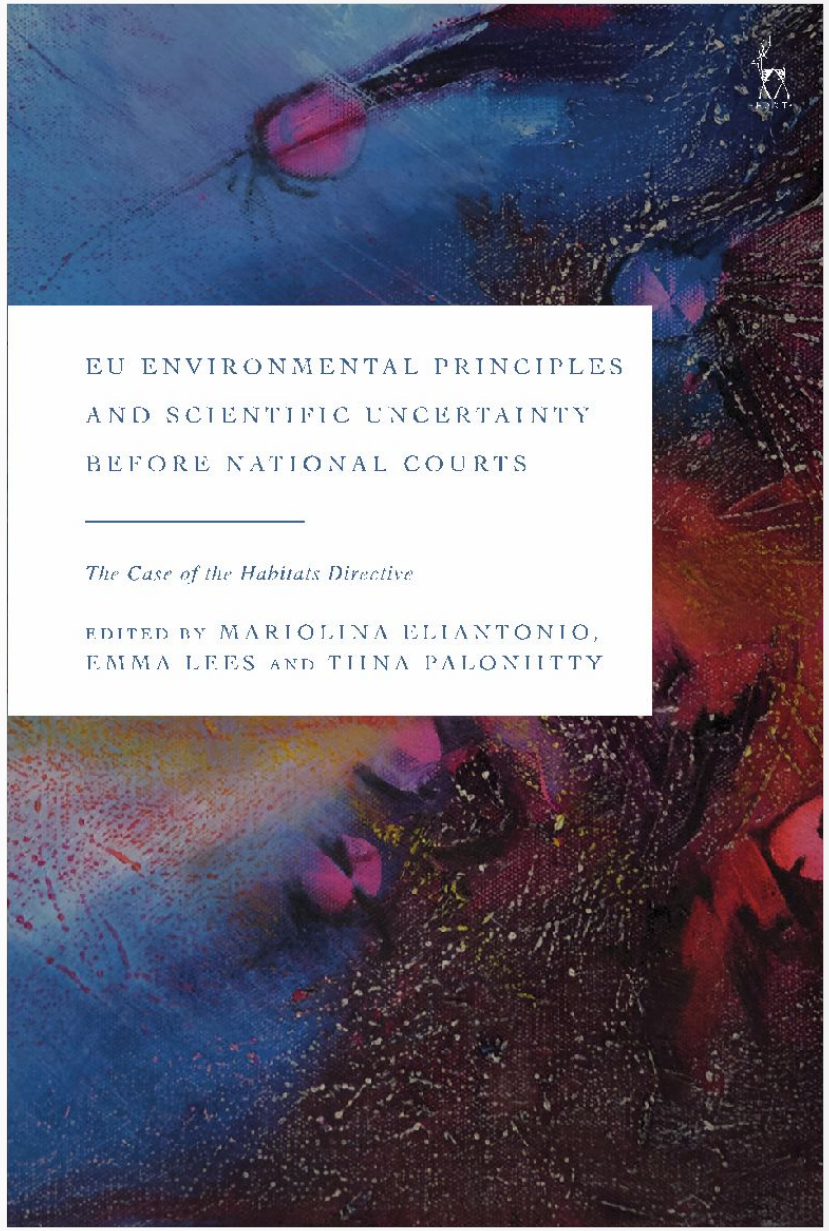
Eds. Mariolina Eliantonio, Emma Lees and Tiina Paloniitty



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- Edited volume (anthology)
- 11 chapters exploring (former and current) Member States' courts

  Germany by **Wolfgang Köck and Till Markus** France by **François-Vivien Guiot**
  The UK (England and Wales) by **Catherine A Caine and Richard Broadbent**
  The Netherlands by **Floor Fleurke** Ireland by **Áine Ryall** Italy by **Roberto Caranta**
  Greece by **Konstantinos Gogos** Hungary by **Katalin Sulyok**
  Romania by **Dacian Dragoș and Bogdana Neamțu**
  Lithuania by **Jurgita Pauzaite-Kulvinskiene** and **Indrė Žvaigždinienė**
  Finland by **Tiina Paloniitty** and **Hanna Nieminen-Finne**

THE VOLUME
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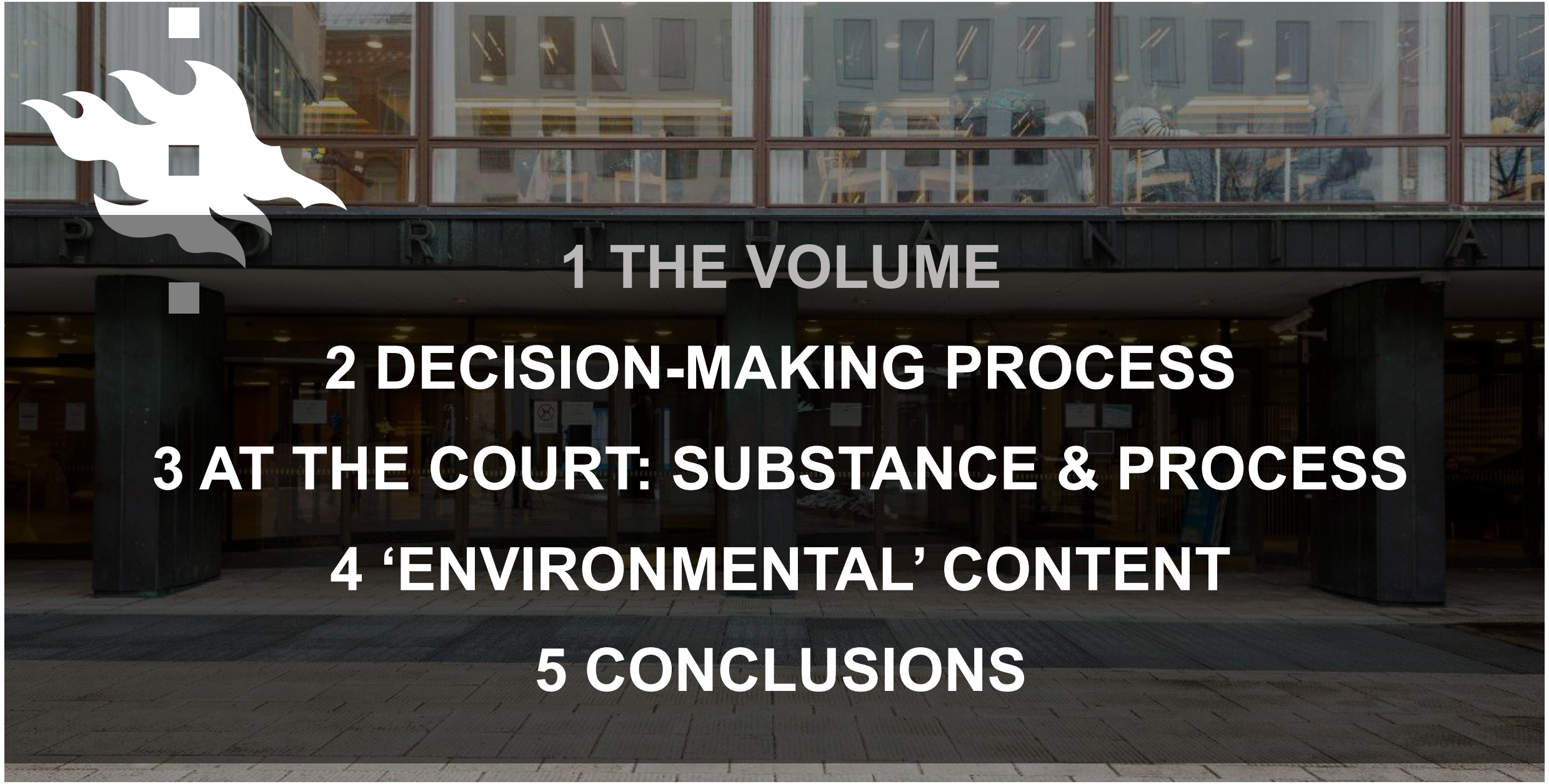
- Two chapters discussing the EU level
  - ‘The European Court of Justice’s Approach to Scientific and Factual Matters in the Habitats Directive - Between Uncertainty and Precaution’ by Agustín García-Ureta
  - ‘Scientific Uncertainty before the Court of Justice and the General Court: Is the Judicial Toolbox Sufficient?’ by Mariolina Eliantonio & Michał Krajewski
- One chapter outside of Europe: Australia by NSWLEC Chief Justice Brian J. Preston
- Introduction and conclusions by the editors

THE VOLUME
3/3

- Abstractions our analysis disentangles
  - Law / facts / policy
  - Legality / expediency or opportunite / merits review
  - Procedural / substantive legality
- Themes covered
  - Consitutional balance between the administrative authorities and the judiciary
  - Fundamental principles of each legal system
  - Role of scientific expertise in the judicial process – and before it
- Relations between EIA and appropriate assessment à la HD
- Variation a motif thorough our volume – in quality and in quantity



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4 ‘ENVIRONMENTAL’ CONTENT

5 CONCLUSIONS

DECISION-MAKING PROCESS
1/3

- Key conclusion: The idiosyncratic ways in which MSs have integrated HD decision-making in their pre-existing administrative setting influences profoundly the ways agency decisions are reviewed in court
- Cases emerge when administrative decisions are challenged
  - administrative variation influences outcomes & sets the foundation of judicial review
  - Relations between the developer, the admin authority, and the interested parties the backdrop
- Sources of evidence in administration
  - the developer can be the main source of factual considerations (UK, RO, FI)
  - sometimes the administration itself carries out the appropriate assessment (IE, LT)

DECISION-MAKING PROCESS
2/3

- Constitution and role of administrative agencies
  - the make-up and expertise in the agency
  - IE the body is between judicial and administrative authority
  - RO and LT single specialist agencies make decisions regarding protected sites
  - GR permitting centralised, species protection decentralised
  - HU shift from Inspectorates working as independent experts to being advisers of centralised (and politicised) regional agencies
  - the variation impacts ways in which scientific information is analysed; who controls the information; and how that is framed in the outcome (decision)
  - *trials politica* according to the tradition of each MS

DECISION-MAKING PROCESS
3/3

- Administrative decision-making and the precautionary principle (PP)
  - authorities have rejected authorisations on the basis of the PP for three *similar but not identical* reasons
  - in the HD context, factual evidence must be convincing, comprehensive and the unwanted consequences must be 'likely'
  - as on outcome, PP is three-fold and can be used to

1) assess the *quality* of the evidence (evidential role)
2) create rebuttable presumptions of fact (substantive role); and
3) interpret meaning of a legal standard (interpretative role)

  - if challenged, these choices impact the ways courts can deal with the PP

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AT THE COURT
1/5

- The procedural eco-system varies as does the scope and the depth of review
- Traditional concepts rather semantics than concepts capturing the reality of intricacies of practices at courts
- E.g. *legality review* commonly construed as cornerstone of rule of law and merits review admitted only with clear limitations
- However, in practice legality review can mean that the court:
  - UK IE conducts only the narrow review of irrationality / unreasonableness
  - GR is ‘disinclined’ to proceed to a full review
  - HU reviews the matter in full, factual considerations included
  - FI reviews the matter in full, factual considerations included, with in-house expertise

AT THE COURT
2/5

- The closer content of seemingly pan-European notions – duty to give reasons, proportionality – may differ greatly
  - FR and DE ‘proportionality’ does not mean that the intensity of review would be similar
  - NL, LT, IT, IE duty to give reasons powerfully used to look at the substance of the case
- Epistemological possibilities vary in courts
- Importantly,
  - broader possibilities to understand the scientific underpinnings of administrative decisions *do not per se* lead to a more thorough control of these decisions
  - outcomes in MSs do not always comply with the international and supranational obligations

AT THE COURT
3/5

- Access to scientific knowledge
  - FI scientific and technical expertise in-house - but only in certain case types
  - NL an independent expert body working on behalf of courts
  - DE ’environmental senates’ within generalist admin courts
  - UK specialist judges too but no difference to how the evidence is scrutinised
  - IE plans for specialist judges
  - recourse to experts possibility – but in practice, a large lacuna in the actual occurrence

AT THE COURT
4/5

- Intensity of review
  - IE *O'Keeffe* and the UK *Wednesbury* doctrines – however, in IE has not prevented the courts from engaging a fairly close analysis of the factual side
  - IT, FR, LT and RO all beyond manifest error threshold – however, in practice questionable whether actual impact
  - courts remain wary of entering into the examination of how the conclusions the authorities drew from the existent material
- FI 'reformatory' process within the limits of the claim – not only annulling but also modifying
  - also HU at lower level courts and to certain extent DE too

AT THE COURT
5/5

- Compliance with EU law and Aarhus Convention?
  - Charter of Fundamental Rights of the European Union (Art 47)
  - ‘procedural and substantive review’ of decisions under environmental law (the Aarhus Convention Art. 9)

- Certain concerns regarding LT and the UK
  - the Wednesbury test under the ACCC scrutiny
  - re IE, the test is so vague and flexible it could be adapted to become compliant


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‘ENVIRONMENTAL’ CONTENT

- Key conclusion: level of environmental protection achieved **does not follow in a straightforward fashion** from these administrative and procedural variations
- Substantive focus: the courts’ focus in matters complex in science, technology, and law
- UK, IE allocation of power (whether appropriate assessment has been conducted)
- The spectrum of being fact-intrusive
  - FI, HU substantive focus, also on the quality of the evidence
  - NL – but a recent move from qualitative to quantitative
  - FR proportionality test used to allow more intrusive review
  - DE the risk the facts may cause

‘ENVIRONMENTAL’ CONTENT

- Precautionary principle (PP) at the court
  - UK – a minimal role mediating the question of reasonableness
  - IE, IT, LT, GR, RO – PP not used as means to consider scientific evidence
  - HU uncertainty assessment is treated as a matter of evidence on the balance of probabilities – no further need to add a layer of precaution
  - NL, PP not mentioned (thought being fact-intrusive!)
  - FI also PP included
  - mainly interpretative role – not evidential or substantive
    - courts do **not** treat the principle as a principle of evidential *quality* or *quantity* per se

‘ENVIRONMENTAL’ CONTENT

- Consequences to environmental protection
- The CJEU: certainty in evidence is required if the tests in the Directive (interpreted in a broad, purposive manner) are to be met
  - MS courts pull back from the full consequences of this approach
  - Risks to the pre-existing balance of power between the state organs
- FR and IR traditionally (very) deferential and IT having weak scrutiny too
  - but re HD, willing to do more to ensure environmental protection *however* staying within their constitutional mandate
  - working purposively within the wider legal culture

‘ENVIRONMENTAL’ CONTENT

- DE a long history of risk assessment – but do not go beyond manifest error level
- LT and RO, standard of review does not secure effective protection
- Tweaking procedure to hamper protection
  - HU limited access to justice by moulding procedural norms
  - NL followed DE solution of narrowing the standing rights
- FI, IE fragmentation an issue with substantial consequences

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CONCLUSIONS

- The idiosyncratic ways in which MSs have integrated HD decision-making in their pre-existing administrative setting influences profoundly the ways agency decisions are reviewed in court
- Broader possibilities to understand the scientific underpinnings of administrative decisions **do not** *per se* lead to a more thorough control of the decisions
- Level of environmental protection achieved **does not follow in a straightforward fashion** from any administrative and procedural variation
- Variation not only of process but also of substance
- There **are reasons to be concerned** over the uniform application of EU conservation law and its effectiveness
- There is a gap in harmonisation, a deliberate gap into which legal culture steps


KIITOS!
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