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Constitutional Directions in Procedural Environmental Rights

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ABSTRACT

Nearly three-quarters of the nations on the planet have chosen to adopt constitutions with environmental provisions that aim to advance an end. These provisions take various forms. Some confer a substantive right to a quality environment or impose a duty to protect it. Some impose duties on governmental decisions affecting the environment, such as sustainability or the public trust. Still others

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address specific concerns, such as water rights or climate change. The constitutions of some countries reflect several varieties of these provisions. Some constitutional provisions, however, focus more on the means of making decisions in environmental matters than on the ends to be achieved. Over the last two decades, nearly three-dozen countries have chosen to have their constitutions embed procedural rights in environmental matters. This article concludes that these provisions have untapped potential for advancing environmental protection worldwide.

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities . . . and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

*1992 United Nations Conference on Environment
and Development, Principle 10¹*

INTRODUCTION

Participatory rights are an essential ingredient for securing substantive constitutional rights.. In the absence of the means to participate meaningfully, constitutional rights can wither on the vine. Rights to information, participation, and access to justice embody evolving international human and international rights norms, coupled with a dash of the advancing democratization of the planet. Such procedural rights can provide means to an end or ends in themselves. Procedural rights can be a means for achieving human rights, including those to life, property, water, welfare, education, and the environment. Procedural rights are also their own reward, promoting discourse and democratization and concomitant rights to assemble, speak, and participate in governance.

Countries can enforce international protocols reflecting procedural rights or provide procedural rights on their own. Countries can also

¹ United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/ (Vol.1), Annex I (Aug. 12, 1992), available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (also referred to as the “Rio Declaration on Environment and Development”).

develop procedural rights to advance specific normative values, such as a quality environment. This article describes the emerging trend of constitutional instantiation of procedural environmental rights, a product due in part to the vision of the late Dr. Svitlana Kravchenko, to whom this symposium issue is dedicated.

Professor Svitlana Kravchenko inspired generations of students, scholars, policymakers, elected and agency officials, and lawyers to make connections between human rights and the environment in open and inclusive ways. As discussed elsewhere in this symposium issue, primary among these connections is the deployment of procedural rights to advance human rights in environmental matters. Professor Kravchenko was instrumental in negotiating and adopting the landmark Aarhus Convention on Access to Information, Public Participation in Decisionmaking and Access to Justice in Environmental Matters (“Aarhus Convention”).² She also served as the Vice-Chair to the Aarhus Convention, and was the longest serving member of its quasi-adjudicatory Compliance Committee. Professor Kravchenko was a stalwart advocate of speaking up and speaking out, and of advancing procedural rights around the globe in environmental and other socioeconomic and cultural applications.

As Professor Kravchenko recognized, procedural rights can be provided internationally and domestically in various ways. Some international human rights regimes advance ready access to information, participation in decision making, and means to resolve disputes. Most constitutions afford some degree of civil and political rights to speak, assemble, petition, or vote. Most countries also afford some degree of process under governing statutes or administrative regulations. But these provisions standing alone can fall short in advancing environmental protection norms. Thus, there is an emerging conversation about the importance of recognizing procedural rights in environmental matters, which I refer to as ‘procedural environmental rights.’

Underlying procedural environmental rights is a growing appreciation that human and environmental rights are inextricably intertwined.³ Many argue that there is a basic human right to a quality

² Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447 (entered into force Oct. 30, 2001) [hereinafter Aarhus Convention].

³ See generally SVITLANA KRAVCHENKO & JOHN E. BONINE, HUMAN RIGHTS AND THE ENVIRONMENT: POLICY AND CASES (2008); Svitlana Kravchenko & John E. Bonine,

environment.⁴ Accordingly, constitutional rights to a quality environment are now guaranteed by about one-half of the nations on Earth.⁵ Corresponding rights to information, participation, and justice provide ineluctable means for achieving these substantive ends.⁶ Indeed, substantive environmental rights can “include a procedural element aimed at enhancing their positive effect on democratic practice.”⁷ Yet, without adequate ability to participate meaningfully, substantive environmental rights are less effective.

Besides supporting substantive environmental rights, procedural environmental rights are also ends unto themselves: raising awareness and autonomy; fostering public participation and empowerment; and contributing to the legitimacy of governmental action.⁸ Criticisms of procedural rights include that they can result in an inefficient allocation of scarce government resources, hindering problem solving; can be ineffective in producing desired results for an under or

Interpretation of Human Rights for the Protection of the Environment in the European Court of Human Rights, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 245 (2012); Ole W. Pedersen, *European Environmental Human Rights and Environmental Rights: A Long Time Coming?*, 21 GEO. INT’L ENVTL. L. REV. 73 (2008).

⁴ See, e.g., STEPHEN J. TURNER, A SUBSTANTIVE ENVIRONMENTAL RIGHT: AN EXAMINATION OF THE LEGAL OBLIGATIONS OF DECISION-MAKERS TOWARDS THE ENVIRONMENT (2008); TIM HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS 12–13 (2005) (advocating constitutional incorporation of environmental rights); RICHARD P. HISKES, THE HUMAN RIGHT TO A GREEN FUTURE: ENVIRONMENTAL RIGHTS AND INTERGENERATIONAL JUSTICE (2009) (arguing for constitutional consideration of future generations); DAVID R. BOYD, THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT 47–67 (2012).

⁵ See James R. May & Erin Daly, *Global Constitutional Environmental Rights*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 603 (Shawkat Alam, et al. eds., 2012); James R. May & Erin Daly, *Vindicating Fundamental Environmental Rights Worldwide*, 11 OR. REV. INT’L L. 365 (2009); James R. May & Erin Daly, *New Directions in Earth Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide*, IUCN ACADEMY OF ENVIRONMENTAL LAW E-JOURNAL (2011), <http://www.iucnael.org/en/e-journal/previous-issues/157-issue-2011.htm> (last visited Sept. 6, 2013); James R. May & Erin Daly, *Constitutional Environmental Rights Worldwide*, in PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW 329 (James R. May ed., 2011); James R. May, *Constituting Fundamental Environmental Rights Worldwide*, 23 PACE ENVTL. L. REV. 113 (2005–2006).

⁶ See Jona Razzaque, *Information, Public Participation and Access to Justice*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 137 (Shawkat Alam et al. eds., 2012).

⁷ HISKES, *supra* note 4, at 131.

⁸ See GEORGE (ROCK) PRING & CATHERINE (KITTY) PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS (2009) available at <http://www.law.du.edu/documents/ect-study/greening-justice-book.pdf>.

ill-informed public, leading to lowest common denominator decision making; foster decisional paralysis by requiring abject compliance with multivariate administrative demands; and, paradoxically produce outcomes most favored by a few special interest groups and the ruling classes.⁹

The advantages of providing special rights to information, participation, and justice in environmental matters, however, outweigh the disadvantages. Simply, stakeholders who are well-informed are in a better position to allay concerns, mitigate impacts, and make decisions regarding matters affecting the environment. Local communities whose drinking water is at risk, whose forests will be harvested, whose biodiversity will be lost, for example, should have a seat at the table and a ballot to cast when it comes time to decide what to do. Informed stakeholders are also more likely to be able to weigh the environmental costs and benefits that a particular project may have upon future generations.

Underscoring the gravity of process in environmental matters, some nations have adopted corresponding constitutional guarantees to information, participation, and justice. This development has the potential to have a profound impact on the possibilities of constitutional reformation, intergenerational equity, environmental legislation, and the preference for policy decisions in environmental matters to be made through open and inclusive processes.

Constitutional enshrinement of procedural rights in environmental matters is an extension of a polymorphic approach first embodied in the Aarhus Convention. Dr. Kravchenko and others exhorted the importance of the Aarhus Convention in advancing procedural rights in environmental matters.¹⁰ But what may be underappreciated is the

⁹ See *id.*

¹⁰ See Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 1 (2007); Marianne Dellinger, *Ten Years of the Aarhus Convention: How Procedural Democracy Is Paving the Way for Substantive Change in National and International Environmental Law*, 23 COLO. J. INT'L ENVTL. L. & POL'Y 309 (2012); Bende Toth, *Public Participation and Democracy in Practice--Aarhus Convention Principles as Democratic Institution Building in the Developing World*, 30 J. LAND RESOURCES & ENVTL. L. 295 (2010); Benjamin W. Cramer, *The Human Right to Information, the Environment and Information About the Environment: From the Universal Declaration to the Aarhus Convention*, 14 COMM. L. & POL'Y 73 (2009); Sean T. McAllister, *The Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters*, 1998 COLO. J. INT'L ENVTL. L. & POL'Y 187

Aarhus Convention's normative effect, that is, how it has contributed to the domestic constitutionalization of procedural environmental rights around the globe. Prior to the Aarhus Convention, few nations provided constitutional rights to due process in environmental matters. Yet the majority of constitutions amended or adopted since Aarhus guarantee some degree of constitutional procedural rights in environmental matters. About three-dozen nations have adopted constitutional procedural environmental rights, including rights to information, participation, and access to justice.¹¹ Many of these constitutional components were enacted after the Aarhus Convention, suggesting that it played a key prefiguring role. These provisions have the potential to advance environmental human rights worldwide in profound ways.

While constitutional procedural environmental rights have significant potential, they are nonetheless hamstrung in two important ways in expression and enforcement. Part I examines how it is that procedural environmental rights are underrepresented in the canon of constitutionalism and constitutional law around the globe. As listed in the Appendix, only about three-dozen countries guarantee either a right to information, participation, or access to justice in environmental matters, and just a handful guarantee all three rights. Part II explores the inroads constitutional procedural environmental rights have already made in domestic courts around the globe, providing a glimpse of their potential to advance environmental protection interests. The article concludes that constitutional procedural environmental rights have untapped potential for advancing access to information, participation, and justice in environmental matters.

I

EMERGENCE OF CONSTITUTIONAL PROCEDURAL ENVIRONMENTAL RIGHTS

The following sections examine the origins of procedural rights in environmental matters, constitutional codification of such rights, and why so few countries have yet to guarantee procedural environmental rights constitutionally.

(1998); Svitlana Kravchenko, *Citizen Enforcement of Environmental Law in Eastern Europe*, 10 WIDENER L. REV. 475 (2004).

¹¹ See *infra* Appendix; see also BOYD, *supra* note 4, at 46–65.

A. Origins of Procedural Environmental Rights

One need only review a variety of international human rights conventions to see how procedural rights have evolved. These include the 1948 Universal Declaration of Human Rights,¹² the 1966 International Covenant on Civil and Political Rights (which reiterated the importance of procedural rights in governance),¹³ the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms,¹⁴ the 1969 American Convention on Human Rights,¹⁵ and the 1981 African Charter on Human and Peoples' Rights.¹⁶ Indeed, some constitutional systems incorporate and make enforceable international or regional human rights that grant procedural rights, making them domestically enforceable, and thereby decreasing the utility of an express provision granting procedural rights in environmental matters.

In addition, several landmark international environmental agreements advocate public involvement. The 1972 Stockholm Declaration promotes public involvement to “defend and improve the human environment.”¹⁷ The 1992 Rio Declaration on Environment and Development (known as the “Earth Summit”) recognized the paramount importance of procedural rights in environmental matters.¹⁸ As mentioned, the Aarhus Convention sets procedural rights and imposes duties on member states concerning decisions that affect the environment.¹⁹ Indeed, the Aarhus Convention’s most innovative feature is its “compliance mechanism,”²⁰ which permits individuals and non-governmental organizations to petition for

¹² Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. GAOR, 3d Sess., U.N. Doc. A/810, arts. 8, 10, 19, 20 (Dec. 10, 1948).

¹³ International Covenant on Civil and Political Rights, arts. 19, 25, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

¹⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

¹⁵ American Convention on Human Rights, art. 13, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

¹⁶ African Charter on Human and Peoples' Rights, arts. 3, 7, 9(1), 13, 24, June 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986).

¹⁷ Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14/Rev.1, para. 6, (June 16, 1972) (also referred to as the “Stockholm Declaration”).

¹⁸ United Nations Declaration on Environment and Development, *supra* note 1.

¹⁹ Aarhus Convention, *supra* note 2.

²⁰ Kravchenko, *The Aarhus Convention and Innovations in Compliance and Multilateral Environmental Agreements*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 1 (2007).

enforcement of its provisions against member states.²¹ Dozens of countries have signed the Aarhus Convention.

Moreover, many substantive international environmental agreements advance access to information and participation. For example, the 1992 United Nations Framework Convention on Climate Change encourages its parties to “[p]romote and facilitate at the national and, as appropriate, subregional and regional levels, and in accordance with national laws and regulations, and within their respective capacities: [p]ublic access to information . . . [and p]ublic participation.”²²

B. Constitutional Manifestation of Procedural Environmental Rights

What should be the constitutional manifestation of procedural environmental rights? Classic procedural rights consist of three pillars: rights to information, participation, and access to justice. These same features are displayed in the constitutional enshrinement of procedural environmental rights.

How have procedural environmental rights come to be entrenched constitutionally? International developments, such as enactment of the Aarhus Convention, along with mounting pressure from non-governmental organizations to advance public involvement in environmental decision making,²³ hastened the constitutional development of procedural environmental rights. Ukraine appears to be the first country to have implemented procedural environmental rights.²⁴ Almost three-dozen countries have done so in some fashion since then. Following the pattern of the Aarhus Convention,²⁵ most

²¹ See Aarhus Conventions Compliance Committee, Rep. on the Seventh Meeting, Findings and Recommendations, Feb. 18, 2005, U.N. Doc. ECE/MP.PP/C.1/2005/2/Add.1 (Feb. 18, 2005) (finding country out of compliance with Convention’s provisions regarding access to information).

²² United Nations Framework Convention on Climate Change, art. 6, May 9, 1992, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994).

²³ See Barbara Gemmill & Abimbola Bamidele-Izu, *The Role of NGOs and Civil Society in Global Environmental Governance*, in GLOBAL ENVIRONMENTAL GOVERNANCE: OPTIONS & OPPORTUNITIES 77 (Daniel C. Esty & Maria H. Ivanova eds., 2002) (discussing the “critical” role that non-state actors play in reaching sustainable goals and the involvement of non-governmental organizations in the agenda and negotiations leading to the Aarhus Convention).

²⁴ See КОНСТИТУЦІЯ УКРАЇНИ [CONSTITUTION], ch II, art. 50 (Ukr.) translated in <http://zakon2.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>.

²⁵ See Gemmill & Bamidele-Izu, *supra* note 23 (discussing negotiations leading to the Aarhus Convention).

focus on three pillars of procedural rights: access to information, participation in decision making, and access to justice. Brazil's constitution, for instance, protects the substantive right "to an ecologically balanced environment" but also imposes obligations on the government to "ensure the effectiveness of this right," including the obligation to demand and make public environmental impact studies.²⁶ The French constitutional block incorporates the 2004 Charter for the Environment, which guarantees that "[e]veryone has the right, in the conditions and to the extent provided for by law, to have access to information pertaining to the environment in the possession of public bodies and to participate in the public decision-making process likely to affect the environment."²⁷ The gold standard of a nation that commits each of these rights to constitutional protection is found in Iceland's new constitution, which provides:

The public authorities shall inform the public on the state of the environment and nature and the impact of construction thereon. The public authorities and others shall provide information on an imminent danger to nature, such as environmental pollution. The law shall secure the right of the public to have the opportunity to participate in the preparation of decisions that have an impact on the environment and nature as well as the possibility to seek independent verdicts thereon. In taking decisions regarding Iceland's nature and environment, the public authorities shall base their decisions on the main principles of environmental law.²⁸

In addition, many countries' judicial systems include environmental tribunals, chambers, or courts that have special procedures designed to facilitate legal actions to promote vindication of environmental rights.²⁹

Of the constitutions that implement procedural environmental rights, only Austria's does not contain a corresponding substantive

²⁶ CONSTITUIÇÃO FEDERAL [CONSTITUTION] Oct. 5, 1988, art. 225 (Braz.), *translated in* UNIVERSITÄT BERN INSTITUT FÜR ÖFFENTLICHES RECHT, http://www.servat.unibe.ch/icl/br00000_.html (last visited June 7, 2013).

²⁷ 1958 CONST. La Charte de l'environnement 2004, art. 7, *translated in* <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/charter-for-the-environment.103658.html>.

²⁸ STJÓRNARSKRÁ LÝÐVELDISINS ÍSLANDS [PROPOSED CONSTITUTION], art. 35, *translated in* http://stjornlagarad.is/other_files/stjornlagarad/Frumvarp-enska.pdf.

²⁹ See generally PRING & PRING, *supra* note 8.

right to a quality environment.³⁰ Thus, substantive and procedural environmental rights appear to use similar means—individually vindicable constitutional rights—in pursuit of the same end of environmental protection. And insofar as they entail similar language, they confront courts with similar challenges.

To the extent they reflect procedural rights in environmental matters, constitutions tend to do so in the classical sense, that is, by granting rights to information, participation, or access to justice, discussed in the subsections below. The most common procedural environmental rights pertain to the first pillar, access to timely information about activities that affect the environment. The ability of the public to receive information from the government in a timely fashion is a cornerstone of good governance, especially in democratic societies.³¹ Access to information about environmental matters “ensures that members of the public can understand what is happening in the environment around them . . . [and] participate in an informed manner.”³² Such transparency “means that the public can clearly follow the path of environmental information, understanding its origin, the criteria that govern its collection, holding and dissemination, and how it can be obtained.”³³

Procedural rights to information internalize a variety of multi- and bi-lateral international treaties expressly promoting rights to information held by governmental authorities.³⁴ An example of the former includes the 1948 Universal Declaration of Human Rights, which promotes the freedom “to seek, receive and impart information and ideas through any media and regardless of frontiers.”³⁵ The International Covenant on Civil and Political Rights reiterated the

³⁰ Boyd concludes that “[t]his suggests that procedural environmental rights are viewed as a complement to, rather than a substitute for, substantive environmental rights.” BOYD *supra* note 4, at 66–77.

³¹ Eric Heyer, *Latin American State Secrecy and Mexico’s Transparency Law*, 38 GEO. WASH. INT’L L. REV. 437, (2006) (“A fundamental building block of democratic societies is unhindered access to government-held information. Access to such information allows the public to critique government actions and make electoral and economic decisions accordingly, thereby underpinning the notion of a democratic government that derives its authority from the consent of the governed.”).

³² Stephen Stec & Susan Casey-Lefkowitz, *The Aarhus Convention: An Implementation Guide*, at 49, U.N. Doc. ECE/CEP/72 (2000), available at <http://www.unece.org/fileadmin/DAM/env/pp/acig.pdf>.

³³ *Id.* at 71.

³⁴ See KRAVCHENKO & BONINE, *supra* note 3, at 219; DONALD K. ANTON & DINAH L. SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS 357 (2011).

³⁵ Universal Declaration of Human Rights, *supra* note 12, at art. 19.

importance of procedural rights in governance.³⁶ Exemplar of the latter includes the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, and the American Convention on Human Rights,³⁷ both of which provide similar language—that “[e]veryone has the right to freedom of expression. This right shall include freedom . . . to receive and impart information and ideas without interference by public authority and regardless of frontiers.”³⁸

Likewise, the 1981 African Charter on Human and Peoples’ Rights declares that “every individual shall have the right to receive information . . . [and] to express and disseminate his opinions within the law.”³⁹

International environmental treaties also promote informational rights. For example, Principle 10 of the Rio Declaration on Environment and Development (“Agenda 21”) promotes free access to information about environmental matters stating:

[Individuals] shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.⁴⁰

The 1992 United Nations Framework Convention on Climate Change mandates that parties “[p]romote and facilitate . . . public access to information on climate change and its effects.”⁴¹

The Aarhus Convention requires parties, “in response to a request for environmental information,” to “make such information available to the public, within the framework of national legislation,” subject to certain conditions.⁴² Environmental information includes the “state of the elements of the environment, factors that affect the environment,

³⁶ International Covenant on Civil and Political Rights, *supra* note 13, at arts. 19, 25.

³⁷ American Convention on Human Rights, *supra* note 15, at art. 13.

³⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 14, at art. 10.

³⁹ African Charter on Human and Peoples’ Rights, *supra* note 16, at art. 9.

⁴⁰ United Nations Declaration on Environment and Development, *supra* note 1, at princ. 10.

⁴¹ United Nations Framework Convention on Climate Change, *supra* note 22, at art. 6.

⁴² Aarhus Convention, *supra* note 2, at art. 4.

decision-making processes, and the state of human health and safety.”⁴³

The right of access to official information is now protected by the constitutions of some sixty countries. At least fifty-two, and arguably fifty-nine, of these countries expressly guarantee a “right” to “information” or “documents,” or else impose an obligation on the government to make information available to the public. The top courts of five of these countries have interpreted their constitution to recognize the right implicitly.⁴⁴ According to a recent survey:

[T]he constitutions of the following 60 countries guarantee a right to information: 12 countries in the Americas (Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, Mexico, Nicaragua, Panama, Paraguay, Peru, and Venezuela); 18 in Europe clearly grant a right to information (Albania, Bulgaria, Czech Republic, Estonia, Finland, Greece, Hungary, Lithuania, Moldova, Montenegro, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Sweden); 7 in Europe arguably guarantee a right to information (Austria, Azerbaijan, Belgium, Georgia, Macedonia, Russia, Ukraine); 6 in Asia and the Pacific (Nepal, New Zealand, Pakistan, Papua New Guinea, Philippines, Thailand); and 17 in Africa (Burkina Faso, Cameroon, Democratic Republic of Congo, Egypt, Eritrea, Ghana, Guinea Bissau, Kenya, Madagascar, Malawi, Morocco, Mozambique, Senegal, Seychelles, South Africa, Tanzania, and Uganda).⁴⁵

These include most recently written constitutions from countries in transition, including most in Latin America, central and eastern Europe, and central and east Asia.⁴⁶ One of the most expansive provisions stems from South Africa, which gives individuals the right to demand information “that is held by another person and that is required for the exercise or protection of any rights.”⁴⁷ In the aftermath of the secrecy surrounding the disaster at the Chernobyl nuclear power plant in the Ukraine, the then newly independent country adopted—as one of its first laws—a constitutional right to

⁴³ *The Aarhus Convention: An Implementation Guide*, *supra* note 32, at 36.

⁴⁴ Open Society Justice Initiative, Constitutional Rights of the Right to Information, RIGHT 2 INFO, *available at* <http://right2info.org/constitutional-protections-of-the-right-to> (last modified Jan. 9, 2012) (internal citation omitted).

⁴⁵ *Id.*

⁴⁶ See DAVID BANISAR, FREEDOM OF INFORMATION AROUND THE WORLD 2006 17, *available at* http://www.freedominfo.org/documents/global_survey2006.pdf.

⁴⁷ S. AFR. CONST., 1996, ch. 2, sec. 32(1)(b). *translated in* <http://www.info.gov.za/documents/constitution/1996/a108-96.pdf>.

information.⁴⁸ It provides a “guaranteed [] right of free access to information about the environmental situation,” and that “[n]o one shall make such information secret.”⁴⁹ Moreover, the highest courts in a number of countries have held that informational rights are implicit in first-order political rights, including freedom of expression and the press.⁵⁰

Moreover, many countries have enacted legislation that gives the public some degree of access to information held by governing bodies. Among the more comprehensive measures include India’s Right to Information Act.⁵¹ It establishes a commission that can order disclosure and impose financial penalties and attorney fees for noncompliance.⁵² And in the United States, the federal Freedom of Information Act has permitted citizens to request federal agencies to disclose governmental records since 1967.⁵³ Furthermore, all fifty states in the United States have enacted laws that permit access to governmental records.⁵⁴

Some legislative freedom of information laws enjoy explicit constitutional protection. Sweden’s Freedom of Press Act is incorporated into the Swedish Constitution.⁵⁵ Freedom of information laws in some countries are viewed as “quasi-constitutional,” including those of Canada and New Zealand.⁵⁶ Such provisions can be used to promote more effective public participation in environmental governance.

However, these international treaties and general domestic constitutional measures can come up short in providing access to information in environmental matters. With the exception of the Aarhus Convention, provisions promoting access to information found in international agreements are hortatory. And even the Aarhus Convention has limitations. It applies only to member states. It is not

⁴⁸ КОНСТИТУЦІЯ УКРАЇНИ [CONSTITUTION] (Ukr.) *supra* note 24.

⁴⁹ *Id.*

⁵⁰ BANISAR, *supra* note 46, at 17.

⁵¹ Right to Information Act, 2005, The Gazette of India, Extraordinary, Part II (i) (June 21, 2005), *available at* http://legalservices.mahara.shta.gov.in/links/rti_act.pdf.

⁵² *See, e.g.,* Satyapal v. CPIO, TCIL, (2006) ICPB/A-1/CIC/2006 (Cent. Info. Comm.) (India).

⁵³ Freedom of Information Act, 5 U.S.C. § 552 (2006).

⁵⁴ BANISAR, *supra* note 46, at 162.

⁵⁵ *Id.* at 17.

⁵⁶ *Id.*

enforceable domestically even in member states, for the most part. Also, filing a petition to the Commission can be expensive and time-consuming. Enforcing domestic constitutional provisions respecting access to information can be limited by standing and justiciability doctrines.⁵⁷

Access to information under national freedom of information laws can also be severely curtailed by exemptions, for example, for national security, internal agency rules, information protected by other statutes, business information, inter and intra-agency memoranda, personal privacy, law enforcement records, financial data, business records, records that would reveal trade secrets, and records about such environmentally destructive activities as oil and gas wells data.⁵⁸

To compensate for these shortcomings, a handful of countries specifically provide for procedural rights to information in environmental matters, as listed in the Appendix. For example, Article 50 of Ukraine's constitution declares: "Everyone is guaranteed the right of free access to information about the environmental situation . . . and also the right to disseminate such information."⁵⁹ Other countries that have constituted rights to information about environmental matters include Albania,⁶⁰ Argentina,⁶¹ Azerbaijan Republic,⁶² Chechnya,⁶³ Eritrea,⁶⁴ France,⁶⁵ Georgia,⁶⁶

⁵⁷ See Elizabeth Barrett Ristoph & Ilya Fedyaev, *Obstacles to Environmental Litigation in Russia and the Potential for Private Actions*, 29 ENVIRONS 221 (2006) (procedural obstacles to litigating environmental claims in Russia).

⁵⁸ See Freedom of Information Act, 5 U.S.C. § 552(b) (listing statutory exemptions).

⁵⁹ See *infra* Appendix Ukraine, p. 53.

⁶⁰ See *infra* Appendix Albania, p. 51 ("Everyone has the right to be informed about the status of the environment and its protection.").

⁶¹ See *infra* Appendix Argentina, p. 51 ("The authorities shall provide for environmental information and education.").

⁶² See *infra* Appendix Azerbaijan Republic, p. 51 ("Everyone has the right to collect information on the environmental situation . . .").

⁶³ See *infra* Appendix Chechnya, p. 51 ("Everyone has the right to a decent environment, reliable information about its condition . . .").

⁶⁴ See *infra* Appendix Eritrea, p. 51 ("The State shall . . . use all available means to enable all citizens to improve their livelihood in a sustainable manner, through their participation.").

⁶⁵ See *infra* Appendix France, p. 51–52 ("Everyone has the right, subject to the conditions and within the limits defined by the law, to have access to the information relating to the environment held by the public authorities.").

⁶⁶ See *infra* Appendix Georgia, p. 52 ("A person shall have the right to receive complete, objective and timely information on the state of his or her working and living environment.").

Moldova,⁶⁷ Montenegro,⁶⁸ Norway,⁶⁹ Poland,⁷⁰ the Russian Federation,⁷¹ Serbia,⁷² and Zambia.⁷³

The second pillar of procedural rights provides for participation in environmental matters. Participatory rights allow the public to shape environmental decision making through comments and other means. As listed in the Appendix, countries with constitutions that embed rights to participate in environmental governance include Brazil,⁷⁴ Colombia,⁷⁵ Ecuador,⁷⁶ Eritrea,⁷⁷ Ethiopia,⁷⁸ Finland,⁷⁹ France,⁸⁰

⁶⁷ See *infra* Appendix Moldova, p. 52 (“The State guarantees every person the right of free access to truthful information regarding the state of the natural environment, the living and working conditions and the quality of food products and household goods.”).

⁶⁸ See *infra* Appendix Montenegro, p. 52 (“Everyone shall have the right to receive timely and full information about the status of the environment, to influence the decision-making regarding the issues of importance for the environment, and to legal protection of these rights.”).

⁶⁹ See *infra* Appendix Norway, p. 52 (“In order to safeguard their right [to a healthy environment citizens are] to be informed of the state of the natural environment and of the effects of any encroachments on nature that are planned or commenced.”).

⁷⁰ See *infra* Appendix Poland, p. 53 (“Everyone has the right to be informed of the condition and protection of the environment.”).

⁷¹ See *infra* Appendix Russian Federation, p. 53 (“Everyone shall have the right to a favorable environment, and reliable information about its condition . . .”).

⁷² See *infra* Appendix Serbia, p. 53 (“Everyone shall have the right to healthy environment and the right to timely and full information about the state of environment.”).

⁷³ See *infra* Appendix Zambia, p. 53 (“The people shall have access to environmental information to enable them to preserve, protect and conserve the environment.”).

⁷⁴ See *infra* Appendix Brazil, p. 53 (The constitution “requires, as provided by law, a prior environmental impact study, which shall be made public, for installation of works or activities that may cause significant degradation of the environment.”).

⁷⁵ See *infra* Appendix Colombia, p. 53 (“Every individual has the right to enjoy a healthy environment. The law will guarantee the community’s participation in the decisions that may affect it.”).

⁷⁶ See *infra* Appendix Ecuador, p. 53 (“All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature.”).

⁷⁷ See *infra* Appendix Eritrea, p. 54 (“[T]he State shall be responsible . . . for creating the right conditions to secure the participation of the people in safeguarding the environment.”).

⁷⁸ See *infra* Appendix Ethiopia, p. 54 (“People have the right to full consultation and to the expression of views in the planning and implementations of environmental policies and projects that affect them directly.”).

⁷⁹ See *infra* Appendix Finland, p. 54 (“The public authorities shall endeavor to guarantee . . . for everyone the possibility to influence the decisions that concern their own living environment.”).

⁸⁰ See *infra* Appendix France, p. 54 (“Everyone has the right, subject to the conditions and within the limits defined by the law . . . to participate in the making of public decisions which have an impact on the environment.”).

Kosovo,⁸¹ Poland,⁸² and Zambia.⁸³ Most of these provisions are of very recent vintage.

The third pillar of procedural rights, access to justice, involves standing and remedies. First, some constitutions expressly provide for expansive or open standing to the judicial process to pursue environmental rights. A leading example is Brazil, whose constitution declares that: “[A]ny citizen has standing to bring a popular action to annul an act injurious to the public patrimony or the patrimony of an entity in which the State participates . . . to the environment”⁸⁴ Other countries that expressly recognize standing in environmental matters include Bolivia,⁸⁵ Burkina Faso,⁸⁶ Mozambique,⁸⁷ and Portugal.⁸⁸ The constitutions of several countries provide an express right to file lawsuits to vindicate substantive environmental rights. A leading example is Angola’s, which provides: “Every citizen, either individually or through associations representing specific interests, shall have the right to take legal action in the cases and under the terms established by law, with the aim of annulling acts which are harmful to . . . the environment”⁸⁹ Other countries to recognize

⁸¹ See *infra* Appendix Kosovo, p. 54 (“Everyone should be provided an opportunity to be heard by public institutions and have their opinions considered on issues that impact the environment in which they live. The impact on the environment shall be considered by public institutions in their decision making processes.”).

⁸² See *infra* Appendix Poland, p. 55 (“Public authorities shall support the activities of citizens to protect and improve the quality of the environment.”).

⁸³ See *infra* Appendix Zambia, p. 55 (“the people shall be involved and participate in the development of relevant policies, plans and programmes.”).

⁸⁴ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 3, sec. 73 (Braz.).

⁸⁵ See *infra* Appendix Boliva, p. 56 (“Any person, in his own right or on behalf of a collective, is authorized to take legal actions in defense of environmental rights, without prejudice to the obligation of public institutions to act on their own in the face of attacks on the environment.”).

⁸⁶ See *infra* Appendix Burkina Faso, p. 56 (“Every citizen has the right to initiate an action or to join a collective action under the form of a petition against the acts . . . affecting the environment or the cultural or historic patrimony.”).

⁸⁷ See *infra* Appendix Mozambique, p. 57 (“All citizens shall have the right to . . . advocate the prevention, termination or judicial prosecution of offences against . . . environmental conservation.”).

⁸⁸ See *infra* Appendix Portugal, p. 57 (“To all is conferred-personally or through associations that purport to defend the interests in issue-the right of popular action in the cases and under the conditions specified by law, including the right to advocate on behalf of the aggrieved party or parties . . . to promote the prevention, the suppression and the prosecution of offenses against . . . the preservation of the environment.”).

⁸⁹ See *infra* Appendix Angola, p. 55.

such rights include Chile,⁹⁰ Costa Rica,⁹¹ Kazakhstan,⁹² Kenya,⁹³ and Madagascar.⁹⁴ Some countries expressly provide for constitutional remedies in the face of violations of substantive environmental rights. An exemplar is Chechnya, whose constitution states that “[e]veryone has the right to a decent environment . . . and compensation for damage caused to their health or property as a result of violation of ecological violations of the law.”⁹⁵ Other countries that do so include the Azerbaijan Republic⁹⁶ and the Russian Federation.⁹⁷

Some constitutions at the subnational level in the United States provide similar rights to enforcement remedies, including Hawai‘i (“Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.”)⁹⁸ and Illinois (“Each person has the right to a healthful environment. Each person may enforce this right against any party . . . through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.”).⁹⁹

⁹⁰ See *infra* Appendix Chile, p. 56 (“Anybody who, due to arbitrary or illegal actions or omissions, suffers privation, disturbance or threats in the legitimate exercise of . . . the right to live in an environment free from contamination [may seek redress].”).

⁹¹ See *infra* Appendix Costa Rica, p. 56 (“Every person has the right to a healthy and ecologically balanced environment. Due to this, the person is justified to denounce those acts which infringe this right and to claim reparation for harm caused.”).

⁹² See *infra* Appendix Kazakhstan, p. 57 (“Officials are held accountable for the concealment of facts and circumstances endangering the life and health of the people.”).

⁹³ See *infra* Appendix Kenya, p. 57 (“Every person has the right to a clean and healthy environment, which includes the right [to apply to a court for redress of damage to the environment].”).

⁹⁴ See *infra* Appendix Madagascar, Republic of, p. 57 (“The Fokonolona can take the appropriate measures tending to oppose acts susceptible to destroy their environment . . . unless these measures may undermine the general interest or public order.”).

⁹⁵ See *infra* Appendix Chechnya, p. 56.

⁹⁶ See *infra* Appendix Azerbaijan Republic, p. 55 (“Everyone has the right . . . to get compensation for damage rendered to the health and property due to the violation of ecological rights.”).

⁹⁷ See *infra* Appendix Russian Federation, p. 58 (“Everyone shall have the right to . . . compensation for the damage caused to his or her health or property by ecological violations.”).

⁹⁸ HAW. CONST. art. XI, § 9.

⁹⁹ ILL. CONST. art. XI, § 2.

C. Constitutional Underrepresentation of Procedural Environmental Rights

Given their importance, why do relatively few countries elect to constitutionally instantiate procedural environmental rights? Why have some countries embedded procedural environmental rights, while others have not? Less than one-half of the countries with constitutions that recognize substantive environmental rights constitutionally do the same for procedural environmental rights. Indeed, less than twenty percent of nations constitutionally instantiate procedural environmental rights, making them underrepresented in national constitutions worldwide.

A threshold question arises as to the propriety of adopting procedural environmental rights constitutionally in the first place. Constituting procedural rights in general, and environmental rights in particular, is a fairly recent innovation in constitutionalism. Countries with older constitutions, or those that are inherently resistant to amendment, are less likely to contain such a provision. While the evidence is circumstantial, there are at least five reasons that many constitutions do not instantiate procedural rights in environmental matters.

First, inertia explains why many countries have not constitutionalized procedural environmental rights. Procedural environmental rights have only recently entered the human (and environmental) rights lexicon; they are more likely to appear in countries that have recently undergone constitutional change. Indeed, they are a constitutional innovation most prevalent in countries that have amended or enacted constitutions since the Aarhus Convention. On the other hand, some countries that have undergone constitutional reformation since the Aarhus Convention have not made the choice constitutionally to instantiate procedural environmental rights.

A second reason for not constitutionalizing procedural environmental rights is that existing international human rights conventions and norms already advance basic rights to information, participation, and access to justice. Moreover, many countries have committed to human rights or environmental conventions that promote access to information, participation, and justice, allowing for complaints to be pursued before international or regional tribunals.¹⁰⁰

¹⁰⁰ See generally ANTON & SHELTON, *supra* note 34; Alexandre Kiss, *An Introductory Note on a Human Right to Environment*, in ENVIRONMENTAL CHANGE AND

It stands to reason that countries in these circumstances are less likely to feel impelled to instantiate procedural environmental rights constitutionally.

Third, many countries already recognize robust individual constitutional civil and political rights that can protect some environmental interests, such as rights of expression and participation. Many constitutional systems already allow for broad rights to information, participation, and justice, irrespective of the subject matter. An example is the First Amendment to the U.S. Constitution, which provides for freedom of speech and assembly, and the right to petition the government.¹⁰¹ At the esoteric level, such provisions conceivably provide process rights for protecting substantive environmental rights.

Fourth, many countries have legislation that allow public access to information, participation, and access to justice that can potentially be enlisted in the service of substantive environmental rights and may diminish the appetite for a specific constitutional grant to procedural environmental rights. Examples from the United States include the federal Freedom of Information Act,¹⁰² which permits the public to request government records, the federal Sunshine Act,¹⁰³ which permits public access to governmental meetings, the federal Administrative Procedure Act,¹⁰⁴ which invites public input in certain actions by federal agencies and permits judicial review of final agency action, and the federal Equal Access to Justice Act,¹⁰⁵ which allows prevailing citizens to recover attorney fees for successfully challenging substantially unjustified federal agency action. Of course, agencies often provide avenues for public involvement beyond what is constitutionally or statutorily required.¹⁰⁶ Any of these features can help implement constitutionally guaranteed substantive environmental rights and may militate against the need for a specific constitutional

INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 199 (Edith Brown Weiss ed., 1992).

¹⁰¹ U.S. CONST. amend. I.

¹⁰² Freedom of Information Act, 5 U.S.C. § 552 (2011).

¹⁰³ Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (amending scattered sections of Title V of the U.S. Code).

¹⁰⁴ Administrative Procedure Act, 5 U.S.C. § 500 (2012).

¹⁰⁵ Equal Access to Justice Act, 5 U.S.C. § 504 (2012).

¹⁰⁶ See National Environmental Policy Act, 42 U.S.C. § 4332(C).

grant of access to information and participation in environmental matters.

Last, many countries have enacted environmental laws that specifically either provide for or promote public participation in environmental governance. For example, the U.S. National Environmental Policy Act of 1969 requires federal agencies to prepare an “environmental impact statement” (EIS) for any “major federal action significantly affecting the quality of the human environment.”¹⁰⁷ The EIS is subject to public disclosure, review, and public comment. In addition, the U.S. Clean Water Act promotes public participation generally, and the U.S. Environmental Protection Agency requires public notice and comment prior to issuing permits or setting standards.¹⁰⁸

Nonetheless, international, constitutional, statutory, and regulatory protections may not be sufficient in ensuring meaningful public participation about environmental governance. Other than under the Aarhus Convention, procedural norms reflected in international accords are not enforceable. Constitutionally protected speech does not impose a corresponding duty to listen. Governmental information in the hands of entrenched bureaucracies can be lost, hidden, or withheld. Public comments can be overlooked. Access to justice can be thwarted by obdurate obstacles concerning standing, justiciability, remedies, and enforcement.¹⁰⁹ These obstacles can be particularly vexing in environmental governance, where individual rights can be overwhelmed, collective rights underappreciated, and future generational rights ignored.

II

JUDICIAL ENGAGEMENT OF CONSTITUTIONAL PROCEDURAL ENVIRONMENTAL RIGHTS

The jurisprudence surrounding procedural environmental rights is sparse but growing, most commonly around informational rights. Constitutional and other “apex” courts in some countries have upheld express constitutional rights to information in environmental matters. For example, in *Van Huyssteen v. Minister of Environmental Affairs and Tourism*, the High Court of Africa held that the South African Constitution grants citizens a constitutional right to information held

¹⁰⁷ *Id.*

¹⁰⁸ Administrative Procedure Act, 5 U.S.C. §§ 553–54 (2012).

¹⁰⁹ *Id.*

by governmental agencies respecting the environmental effects of constructing a new steel mill near the West Coast National Park.¹¹⁰ In *Sociedad Peruana de Derecho Ambiental contra Ministerio de Energia y Minas*, the Peru Constitutional Division held that the Peruvian Constitution protected an environmental law society's access to information about the environmental effects of mining.¹¹¹ In the *Forest Survey Inspection Request Case*, the Constitutional Court of South Korea upheld a constitutional right to inspect and copy forest title records, private forest use surveys, land surveys, and land tax ledgers kept by governmental authorities: "a person who is denied information could rely on the constitutional provision and sue in Constitutional Court without following procedures required by the country's access to information legislation."¹¹²

Courts in other countries have found informational rights in environmental matters as an extension of a long line of judicial recognition of constitutional rights to information in general. The Supreme Court of India recognized constitutional rights to information thirty years ago. In *S.P. Gupta v. President of India*, the Supreme Court of India found that the public has a constitutional right to correspondence regarding judicial appointments between the Law Minister, the Chief Justice of Delhi, and the Chief Justice of India: "open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a)."¹¹³

The Indian Supreme Court has extended this reasoning to recognize constitutional entitlement to information in cases that happen to involve the environment. For example, in *Reliance Petrochemicals v. Proprietors of Indian Express Newspapers, Bombay*, in ordering the disclosure of information regarding development of oil reserves, the Court observed that "the right to know is a basic right which citizens of a free country aspire the

¹¹⁰ Van Huyssteen v. Minister of Env'tl. Affairs and Tourism 1996 (1) SA 283 (CC) (S. Afr).

¹¹¹ *Sociedad Peruana de Derecho Ambiental c. Ministerio de Energia y Minas* (Habeas Data), Expediente No. 1658-95, Dictamen Fiscal No 122-96 (Sala de Derecho Constitucional y Social) (June 19, 1996).

¹¹² Constitutional Court [CONST. CT.] 88HUNMA22, Nov. 4, 1989 (S. Kor.), available at http://www.court.go.kr/home/english/decisions/mgr_decision_view.jsp?seq=374&code=1&pg=1&sch_code=&sch_sel=&sch_txt=&nScale=15.

¹¹³ *S.P. Gupta v. President of India*, A.I.R. 1982 S.C. 149 (India).

broader horizon of the right to live in this age in our land under Article 21 of our Constitution.”¹¹⁴ And in *Bombay Environmental Action Group v. Pune Cantonment Board*, the Court held that the Indian Constitution required a governmental land use planning agency to disclose applications for building permits, stating that “[p]eople’s participation in the movement for the protection of the environment cannot be over-emphasized. It is wrong to think that by trying to protect the environment they are opposing the various development projects.”¹¹⁵

Next, there is a growing body of judicial decisions concerning constitutional rights to participate in environmental matters. Some courts have enforced specific constitutional provisions that grant a right to participate in environmental matters. For example, in *Federación Independiente del Pueblo Shuar del Ecuador (FIPSE) c. Arco Oriente s/ Amparo*, the Ecuador Constitutional Tribunal found that government license to permit hydrocarbon exploration violated citizens’ constitutional right to be “consulted and . . . participate in the design, implementation and evaluation of national and regional development plans and programs potentially affecting them directly.”¹¹⁶ In *The Director: Mineral Development v. Save the Vaal Environment*, the Supreme Court of Appeal of South Africa decided that a decision to allow mining operations had violated constitutional rights of notification and participation: “Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication, requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.”¹¹⁷ And in *Decision U-I-416/98-38*, the Constitutional Court of Slovenia upheld villagers’ constitutional rights to participate in decision making in environmental matters.¹¹⁸

¹¹⁴ *Reliance Petrochemicals v. Proprietors of Indian Express Newspapers*, Bombay, A.I.R. 1989 S.C. 190 (India).

¹¹⁵ *Bombay Env'tl. Action Grp. v. Pune Cantonment Bd.*, Bombay High Court. A.S. (WP No. 2733 of 1986).

¹¹⁶ *Federación Independiente del Pueblo Shuar del Ecuador (FIPSE) c. Arco Oriente s/ Amparo* (Tribunal Constitucional de Ecuador) 1999.

¹¹⁷ *The Dir.: Mineral Dev. v. Save the Vaal Env't*, 1999 (2) SA 709 (SCA) (S. Afr.).

¹¹⁸ Case No. U-I-416/98-38, Constitutional Ct. of Slov'n., Mar. 22, 2001.

Constitutional rights to access justice include issues of standing, enforceability, and remedy, and serve as a capstone to enforce rights to information and participation, as the European Court of Human Rights has remarked:

Where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake The importance of public access to the conclusions of such studies and to information which would enable members of the public to assess the danger to which they are exposed is beyond question Lastly, the individuals concerned must also be able to appeal to the courts against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process¹¹⁹

In some constitutional systems, courts assume that a grant of a substantive right to a healthy environment implicitly provides parties with standing, including the Constitutional Court of Slovenia.¹²⁰ Likewise, in *Christopher Mtikila v. Attorney General*, the High Court in Tanzania ruled that parties have standing to vindicate constitutional rights:

A person who sues because he desires to be an independent parliamentary candidate where the system does not so allow necessarily shoulders the burden for the public. It is also important to note that under this provision action lies where a person's right has been, is being or is likely to be contravened. Standing is therefore available under the Constitution even where contravention of a basic right is reasonably apprehended.¹²¹

These decisions show a glimpse of the potential for constitutionally instantiated procedural environmental rights in achieving human rights and environmental protection goals.

¹¹⁹ Taskin v. Turkey, 42 Eur. Ct. H.R. 50, ¶ 119 (2005).

¹²⁰ Drustvo Ekologox Slovenije, Case No. U-I-30/95-26 Constitutional Ct. of Slovn., Jan. 15, 1996.

¹²¹ Mtikila v. Attorney General, Civil Case No. 5 of 1993 (High Court of Tanzania).

CONCLUSION

Professor Kravchenko stressed the importance of access to information, participation, and justice in environmental matters. The Aarhus Convention is the signature demonstration of her commitment to these issues. Propelled by these ideals, many countries have adopted constitutions that guarantee procedural rights in environmental matters. Yet only about three-dozen countries have adopted them, and constitutional and other apex courts in few nations have engaged them significantly. These shortcomings can contribute to less than optimal vindication of substantive environmental rights, including to a quality environment. Therefore, constitutional procedural environmental rights have unrealized potential for advancing environmental policies worldwide.

APPENDIX

Representative Constitutional Procedural Environmental Rights in Domestic Constitutions Globally Regarding Information, Participation, and Access to Justice

Information

Albania

KUSHTETUTA E REPUBLIKËS SË SHQIPËRISË [CONSTITUTION], art. 56: “Everyone has the right to be informed about the status of the environment and its protection.”

Argentina

Ch. 2, § 41, CONSTITUCIÓN NACIONAL [CONST. NAT.]: “The authorities shall provide for . . . environmental information and education.”

Azerbaijan Republic

AZƏRBAYCAN KONSTITUSIYASI [CONSTITUTION], sec. II, ch. III, art. 39(2): “Everyone has the right to collect information on the environmental situation”

Belarus, Republic of

КАНСТЫТУЦЫЯ РЭСПУБЛІКІ БЕЛАРУСЬ [CONSTITUTION], BELARUS CONST. sec. II, art. 34: “Citizens are guaranteed the right to receive, store and disseminate complete, reliable, and timely information . . . on the state of the environment.”

Chechnya

CHECHNYA CONSTITUTION sec. 1, ch. 2, art. 39: “Everyone has the right to a decent environment, reliable information about its condition”

Eritrea

CONSTITUTION OF ERITREA, ch. II, art. 8(2): “The State shall work to bring about a balanced and sustainable development throughout the country, and shall use all available means to enable all citizens to improve their livelihood in a sustainable manner, through their participation.”

France

1958 CONST. La Charte de l’environnement 2005, art. 7: “Everyone has the right, subject to the conditions and within the

limits defined by the law, to have access to the information relating to the environment held by the public authorities.”

Georgia

CONSTITUTION OF GEORGIA ch. 2, art. 37(5): “A person shall have the right to receive complete, objective and timely information on the state of his or her working and living environment.”

Iceland

STJÓRNARSKRÁ LÝÐVELDISINS ÍSLANDS [PROPOSED CONSTITUTION] art. 35, “The public authorities shall inform the public on the state of the environment and nature and the impact of construction thereon. The public authorities and others shall provide information on an imminent danger to nature, such as environmental pollution. The law shall secure the right of the public to have the opportunity to participate in the preparation of decisions that have an impact on the environment and nature as well as the possibility to seek independent verdicts thereon. In taking decisions regarding Iceland’s nature and environment, the public authorities shall base their decisions on the main principles of environmental law.”

Moldova

CONSTITUȚIA REPUBLICII MOLDOVA [CONSTITUTION] art. 37(2): “The State guarantees every person the right of free access to truthful information regarding the state of the natural environment, the living and working conditions, and the quality of food products and household goods.”

Montenegro

CONSTITUTION OF MONTENEGRO, art. 23: “Everyone shall have the right to a sound environment. Everyone shall have the right to receive timely and full information about the status of the environment, to influence the decision making regarding the issues of importance for the environment, and to legal protection of these rights.”

Norway, Kingdom of

KONGERIGET NORGES GRUNDLOV [CONSTITUTION]. § E, art. 110b: “In order to safeguard their right [to a healthy environment]” [citizens are to be] “to be informed of the state of the natural environment and of the effects of any encroachments on nature that are planned or commenced.”

Poland, Republic of

KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] ch. II, art. 74: “3. Everyone has the right to be informed of the condition and protection of the environment.”

Russian Federation

KONSTITUTSIJA ROSSIJSKOI FEDERATSII [KONST. RF] [CONSTITUTION], art. 42: “Everyone shall have the right to a favorable environment, reliable information about its condition”

Serbia

USTAVA REPUBLIKE SRBIJE [CONSTITUTION], art. 74: “Everyone shall have the right to healthy environment and the right to timely and full information about the state of environment.”

Ukraine

KONSTITUCIJA UKRAINI [CONSTITUTION], ch II, art. 50: “Everyone is guaranteed the right of free access to information about the environmental situation . . . and also the right to disseminate such information.”

Zambia

DRAFT CONST. OF ZAMBIA of 2010, art. 302(o): “[T]he people shall have access to environmental information to enable them preserve, protect and conserve the environment.”

Participation

Brazil

CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION], art. 225: “require, as provided by law, a prior environmental impact study, which shall be made public, for installation of works or activities that may cause significant degradation of the environment.”

Colombia

CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P] art. 79: “Every individual has the right to enjoy a healthy environment. The law will guarantee the community’s participation in the decisions that may affect it.”

Ecuador

CONSTITUCIÓN POLÍTICA DE ECUADOR. art. 71: “All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature.”

Eritrea

CONSTITUTION OF ERITREA, ch. II, art. 8(3): “[T]he State shall be responsible . . . for creating the right conditions to secure the participation of the people in safeguarding the environment.”

Ethiopia

CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA ch. X, art. 92(3): “People have the right to full consultation and to the expression of views in the planning and implementations of environmental policies and projects that affect them directly.”

Finland

SUOMEN PERUSTUSLAKI [CONSTITUTION] ch. 2, sec. 20: “The public authorities shall endeavor to guarantee . . . for everyone the possibility to influence the decisions that concern their own living environment.”

France

1958 CONST. La Charte de l’environnement 2005, art. 7: “Everyone has the right, subject to the conditions and within the limits defined by the law . . . to participate in the making of public decisions which have an impact on the environment.”

Iceland

STJÓRNARSKRÁ LÝÐVELDISINS ÍSLANDS [PROPOSED CONSTITUTION] art. 35: “The law shall secure the right of the public to have the opportunity to participate in the preparation of decisions that have an impact on the environment and nature as well as the possibility to seek independent verdicts thereon. In taking decisions regarding Iceland’s nature and environment, the public authorities shall base their decisions on the main principles of environmental law.”

Kosovo

KUSHTETUTA E REPUBLIKËS SË KOSOVËS [CONSTITUTION] art. 52(2), (3): “2. Everyone should be provided an opportunity to be heard by public institutions and have their opinions considered on issues that impact the environment in which they live. 3. The impact on the environment shall be considered by public institutions in their decision-making processes.”

Poland, Republic of

KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] ch. II, art. 74: “4. Public authorities shall support the activities of citizens to protect and improve the quality of the environment.”

Thailand (Revoked)

RA TTA'TAMMA NOON HA'ENG RAATCHA ANAAJA'K TAI [CONSTITUTION] pt. 12, § 67:

“Any project or activity which may seriously affect the quality of the environment, natural resources and biological diversity shall not be permitted, unless its impacts on the quality of the environment and on health of the people in the communities have been studied and evaluated and consultation with the public and interested parties have been organized, and opinions of an independent organization, consisting of representatives from private environmental and health organizations and from higher education institutions providing studies in the field of environment, natural resources or health, have been obtained prior to the operation of such project or activity.”

Zambia

DRAFT CONST. OF ZAMBIA of 2010, art. 302(n): “the people shall be involved and participate in the development of relevant policies, plans and programmes.”

Justice

Angola

CONSTITUIÇÃO DA REPÚBLICA DE ANGOLA [CONSTITUTION] art. 74: “Every citizen, either individually or through associations representing specific interests, shall have the right to take legal action in the cases and under the terms established by law, with the aim of annulling acts which are harmful to . . . the environment . . . the legality of administrative acts and any other collective interests.”

Azerbaijan Republic

AZƏRBAYCAN KONSTITUSIYASI [CONSTITUTION] sec. II, ch.III, art. 39(2): “Everyone has the right . . . to get compensation for damage rendered to the health and property due to the violation of ecological rights.”

Brazil

CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION], art. 5: “[A]ny citizen has standing to bring a popular action to annul an act injurious

to the public patrimony or the patrimony of an entity in which the State participates . . . to the environment False.”

Bolivia

CONSTITUCIÓN POLÍTICA DEL ESTADO [CONSTITUTION] art. 34: “Any person, in his own right or on behalf of a collective, is authorized to take legal actions in defense of environmental rights, without prejudice to the obligation of public institutions to act on their own in the face of attacks on the environment.”

Burkina Faso

CONSTITUTION DU BURKINA FASO tit. I, ch. IV, art. 30: “Every citizen has the right to initiate an action or to join a collective action under the form of a petition against the acts . . . affecting the environment or the cultural or historic patrimony.”

Chechnya

CHECHNYA CONSTITUTION sec. 1, ch. 2, art. 39: “Everyone has the right to a decent environment . . . and compensation for damage caused to their health or property as a result of violation of ecological violations of the law.”

Chile

CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE art. 20: “Anybody who, due to arbitrary or illegal actions or omissions, suffers privation, disturbance or threats in the legitimate exercise of the rights and guarantees established in Article 19 . . . (24) . . . may . . . approach the respective Court of Appeal which shall immediately adopt the measures that it deems necessary to re-establish the rule of law and to ensure the due protection of the affected person without prejudice to other rights which he/she might invoke before the competent authorities or courts. The action of for the protection of fundamental rights (*recurso de proteccion*) shall always lie in the case of numeral 8 of Article 19, when the right to live in an environment free from contamination has been affected by an illegal act or omission imputable to an authority or specific person.”

Costa Rica

CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA CONST. tit. V, art. 50: “Every person has the right to a healthy and ecologically balanced environment. Due to this, the person is justified to denounce those acts which infringe this right and to claim reparation for harm caused. The state shall guarantee, defend and

preserve this right. The law will determine the corresponding responsibilities and sanctions.”

Kazakhstan

CONSTITUTION OF THE REPUBLIC OF KAZAKHSTAN sec. II, art. 31(2): “Officials are held accountable . . . for the concealment of facts and circumstances endangering the life and health of the people.”

Kenya

CONSTITUTION, art. 42 (1992): “Every person has the right to a clean and healthy environment, which includes the right . . . (b) to have obligations relating to the environment fulfilled under Article 70 (Article 70 provides that any person may apply to a court for redress of damage to the environment).

Madagascar, Republic of

CONSTITUTION DE LA IVE RÉPUBLIQUE tit. II, sec. II, art. 35: “The Fokonolona can take the appropriate measures tending to oppose acts susceptible to destroy their environment, dispossess them of their land, claim the traditional spaces allocated to their herds of cattle or claim their ceremonial heritage, unless these measures may undermine the general interest or public order.”

Mozambique

CONSTITUIÇÃO DA REPÚBLICA DE MOÇAMBIQUE art. 81: “1. All citizens shall have the right to popular action in accordance with the law, either personally or through associations for defending the interests in question. 2. The right of popular action shall consist of: (a) the right to claim for the injured party or parties such compensation as they are entitled to; (b) The right to advocate the prevention, termination or judicial prosecution of offences against the public health, consumer rights, environmental conservation and cultural heritage.”

Portugal (Portuguese Republic)

CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA pt. I, sec. II, ch. II, art. 52(3): “To all is conferred—personally or through associations that purport to defend the interests in issue—the right of popular action in the cases and under the conditions specified by law, including the right to advocate on behalf of the aggrieved party or parties . . . to promote the prevention, the suppression and the prosecution of offenses against . . . the preservation of the environment.”

Russian Federation

KONSTITUTSIYA ROSSIYSKOI FEDERATSII [KONST. RF]
[CONSTITUTION], art. 42: "Everyone shall have the right to . . .
compensation for the damage caused to his or her health or property
by ecological violations."