

The Role of Constitutionally Instantiated Procedural Environmental Rights

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Parts

- I. Pillars of Procedural Environmental Rights
- II. Justifications and Criticisms of Procedural Environmental Rights
- III. Advancing Procedural Rights Internationally and Regionally
- IV. Procedural Constitutional Environmental Rights Worldwide
- V. Constitutional Manifestations of Procedural Constitutional Rights (PERs)

I. Pillars of Procedural Environmental Rights

- Informational: Timely information about activities that affect the environment.
- Participatory: Shape environmental decisionmaking via comments and other measures.
- Access to Justice: Access to the courts, open standing, viable remedy and ability to enforce environmental rights.

II.A. Justifications for Procedural Environmental Rights

- Raise awareness
- Provides opportunity to participate
- Foster empowerment
- Strengthen local communities
- Facilitate government accountability
- Increase public acceptance of decisions
- Contribute legitimacy

II.B. Criticisms of PERs

- Public is emotional and incompetent
- Reallocation of scarce gov' t resources
- Lowest common denominator decision
- Hinder agency problem solving
- Too much information is paralyzing
- Control by special interests groups
- Participatory elitism and distrust

III.A Advancing Procedural Rights Internationally, E.g.'s

- Generally: Universal Declaration of Human Rights: [advancing] “freedom to seek, receive and impart information and ideas through any media and regardless of frontiers.”
- In Environmental Matters: Aarhus Convention
 - Access to Information (Arts. 4 & 5)
 - Participation (Arts. 3 & 6-8)
 - Compliance Committee

III.B Advancing Procedural Rights Regionally, E.g.'s, co.

- European Convention for Protection of Human Rights and Fundamental Freedoms: “Everyone has the right to freedom of expression.”
- American Convention on Human Rights (Art. 13)(similar)
- African Charter of Human and Peoples’ Rights (Art. 9)(similar)

IV. Advancing PERs in National Constitutions:

Background

- Substantive (about 75): “Everyone has a right to a quality environment” (about 75)
- Policy Directives (about 150), e.g.’s:
 - “Environmental impacts shall be considered”
 - “Every citizen has a duty to protect the environment”
- Procedural Rights (about 35)
(“Constitutionally Embedded Procedural Environmental Rights, or CPERs”)

Taxonomy of CPERs

- Rights to Information (about 15)
- Rights to Participate (about 12)
- Rights to Access to Justice (about 12)
 - Standing
 - Compliance
 - Remedy
 - Enforcement

A. Constitutional Rights to Information About Environmental Matters

- **Albania:** “Everyone has the right to be informed about the status of the environment and its protection.”
- **Argentina:** “The authorities shall provide for environmental information and education.”
- **Azerbaijan Republic:** “Everyone has the right to collect information on the environmental situation ...”

CPER to Information, co.

- **Chechnya:** "Everyone has the right to a decent environment, reliable information about its condition ... ”
- **Eritrea:** "The State shall ... use all available means to enable all citizens to improve their livelihood in a sustainable manner, through their participation."
- **France:** “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.”

CPERs to Information, co.

- **Georgia:** "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:** "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:** "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."

CPEs to Information, co.

- **Norway:** “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:** “Everyone has the right to be informed of the condition and protection of the environment.”
- **Russian Federation:** "Everyone shall have the right to a favorable environment, and reliable information about its condition ..."

CPERs to Information, co.

- **Serbia:** “Everyone shall have the right to healthy environment and the right to timely and full information about the state of environment.”
- **Ukraine:** “Everyone is guaranteed the right of free access to information about the environmental situation ... and also the right to disseminate such information.”
- **Zambia:** “the people shall have access to environmental information to enable them preserve, protect and conserve the environment.”

B. Constitutional Right to Participation In Environmental Matters

- **Brazil:** 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.”
- **Colombia:** “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:** Article 71: “All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature.”

CPER to Participate, co.

- **Eritrea:** "[T]he State shall be responsible ... for creating the right conditions to secure the participation of the people in safeguarding the environment."
- **Ethiopia:** "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:** "The public authorities shall endeavor to guarantee ... for everyone the possibility to influence the decisions that concern their own living environment."

CPER to Participate, co.

- **France:** “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:** “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:** “Public authorities shall support the activities of citizens to protect and improve the quality of the environment.”
- **Zambia:** “the people shall be involved and participate in the development of relevant policies, plans and programmes.”

C. Constitutional Right to Have Access to Judicial System About Environmental Matters: Compliance

- **Angola:** “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 ...”

CPERs to Justice: Compliance, co.

- **Chile:** “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]”
- **Costa Rica:** “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.”

CPERs to Justice: Compliance, co.

- **Kazakhstan:** “Officials are held accountable...for the concealment of facts and circumstances endangering the life and health of the people.”
- **Kenya:** “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]
- **Madagascar:** "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.”

CPERs to Justice: Standing

- **Brazil:** "[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"
- **Bolivia:** "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:** "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."

CPERs to Justice, Standing, CO.

- **Mozambique:** “All citizens shall have the right to ... advocate the prevention, termination or judicial prosecution of offences against ... environmental conservation.”
- **Portugal:** “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.”

CPERs and Access to Justice: Remedies

- **Azerbaijan Republic:** "Everyone has the right ... to get compensation for damage rendered to the health and property due to the violation of ecological rights."
- **Chechnya:** "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."
- **Russian Federation:** "Everyone shall have the right to ... compensation for the damage caused to his or her health or property by ecological violations"

CPERs in the United States?

- Federal
 - Constitution: No (but 1st Amd.)
 - Statutory:
 - NEPA
 - APA
 - FOIA

In U.S.: State Level CPERs

- **Hawaii**: “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.”
- **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.”

Gold Standard?

- **Iceland:** “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.”

For More on the Subject

- James R. May, *Constitutional Directions in Procedural Environmental Rights*, 28 Ore. Jrnl. L. & Lit. (2013, forthcoming)
- James R. May & Erin Daly, *Environmental Constitutionalism: Implications for Present and Future Generations* (Cambridge, forthcoming)
- James R. May, *Constituting Fundamental Environmental Rights Worldwide*, 23 Pace Env'tl. L. Rev. 113 (2006).
- See, James R. May & Erin Daly, *Vindicating Fundamental Environmental Rights Worldwide*, 11 Ore. Rev. Intl. L. 365-440 (2010)
- & Daly, *Constitutional Environmental Rights Worldwide*
PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW
(James R. May ed., ABA Publishing, Env'tl. L. Inst. 2011).

More on the Subject, co.

- & 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, vol. 1, 2011, posted Feb. 22, 2011.
- & Daly, *Global Constitutional Environmental Rights*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (Shawkat Alam, Jahid Hossain Bhuiyan, Tareq M.R. Chowdhury and Erika J. Techera, Eds., Oxford, 2012).

Questions?

