FOCUS
PUBLIC PARTICIPATION IN ENVIRONMENTAL PROTECTION

DEVELOPMENT OF ENVIRONMENTAL RIGHTS IN CHINA: SUBSTANTIVE ENVIRONMENTAL RIGHTS OR PROCEDURAL ENVIRONMENTAL RIGHTS

ZHU Xiao*, WANG Shenghang**, Eva-Maria Ehemann***

Abstract The relationship between environmental and human rights is very significant. On this basis, humans shall have the right to claim to live in a healthy environment. In China, the study of environmental rights began in the 1980's. After more than thirty years of discussions on environmental rights, there are a series of environmental rights theories in China. However, scholars have not formed a consensus on some fundamental theories of environmental rights. Moreover, some experts consider that environmental rights include substantive environmental rights and procedural environmental rights, whereas others argue that environmental rights only include substantive environmental rights. Furthermore, the nexus and difference between the right to environment and environmental rights are not clear. “Environmental rights” are treated as a broad concept, its scope includes all rights which are related to the environment. They certainly do not only include substantive, but also procedural environmental rights. Even though the introduction of substantive environmental rights has faced both legislative and practical difficulties, the topic has become a central issue in Chinese academic research.

Keywords environmental right, substantive right, procedural right

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INTRODUCTION

Since the 1970’s there has been a profound discussion on whether substantive environmental rights should be incorporated in international human rights treaties, nevertheless an explicit recognition has not taken place. On the domestic legislative level, many countries and regions have established environmental rights within their Constitutions. Since the 1990’s, many scholars have changed the research mentality, focusing on the study of procedural environmental rights from substantive environmental rights. After critical discussion on the principal theories of environmental rights in China, it can be summarized that environmental rights include both substantive and procedural environmental rights. Furthermore, there is a certain dilemma of the study of environmental rights in China, because the Chinese Constitution does not clearly define the right to environment. While research and legislation of substantive environmental rights show a slow progress, procedural environmental rights legislation has made some achievements.

First, the article analyzes the main theories of environmental rights in China. In this part, the definition of environmental rights and the right to environment, and discrimination of substantive and procedural environment rights are mainly discussed. In the second part, this article analyzes the situation of the US, Japan and the European Union, to find the reasons for the shift in legislation from substantive to procedural environmental rights in developed countries. Part three discusses the dilemma of substantive environmental rights in China and the development of procedural environmental rights in China. The final part provides an introduction of the practice of procedural environmental rights in China, including the system of environmental public participation and environmental information disclosure as well as environmental public interest litigation.

I. OVERVIEW OF ENVIRONMENTAL RIGHTS THEORY

In China, the study of environmental rights began in the 1980’s. “Citizens Should Have Environmental Rights — Discussion on the Environment, Law, and Citizenship Issues,” the first article on environmental rights, was published by Professor LING Xiangquan in 1981. He argued that environmental rights form a necessary precondition for the realization of labor rights and recommended the establishment of specific provisions in the new constitution. Another article relating to that topic, “Discussion on
Environmental Rights,” was written by Professor CAI Shouqiu and published in 1982. Professor CAI gives a comprehensive study of the theory and practice of foreign environmental rights, and pointed out that environmental rights are a central issue of environmental law. According to him, environmental rights should be defined as a fundamental right in national constitutions and environmental law. Additionally, Professor DENG Jianxu published the article “Correctly Handle the Dispute of Citizens’ Environmental Right — From the Analysis of Major Pollution Cases” in 1986, which demonstrated the importance of environmental rights through case analysis. These may have been the beginning of the study of environmental rights in China.

A. Statistics of Research of Environmental Rights in China

According to Professor WU Weixing’s statistics, before 1997, there were thirty-two articles in China concerning the topic of environmental rights. In addition, from 1998 to 2015, there have been 161 articles in CSSCI journals dealing with environmental rights (see Table 1). Moreover, ten books on environmental rights have been published since 2003 (see Table 2).

Table 1 Articles concerning Environmental Rights

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Table 2 Books concerning Environmental Rights

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<td>周训芳</td>
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<td>环境权: 环境法学的基础研究</td>
<td>XU Xiangmin, TIAN Qiyuan et al.</td>
<td>Peking University Press</td>
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<td>沟通与协调之途: 公民环境权的民法保护</td>
<td>LÜ Zhongmei</td>
<td>Renmin University of China Press</td>
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<td>公民环境权的民事法律保护</td>
<td>XU Mingyue</td>
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<td>环境权研究——公法学的视角</td>
<td>WU Weixing</td>
<td>Law Press</td>
<td>2007</td>
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(To be continued)

As seen above, environmental rights have become a current topic within legal research as most environmental law scholars focus on it.

B. The Main Theories of Environmental Rights in China

1. Narrow Environmental Rights Theory. — Narrow environmental rights theories argue that environmental rights are substantive rights of all citizens. They expound that the State should establish environmental rights in the Constitution or the Environmental Protection Law. The main representatives of the theory are Professor ZHANG Zhen and Professor WU Weixing.

Professor ZHANG believes that environmental rights have reached the rank of fundamental rights theoretically, but nevertheless they should be clearly defined by the Constitution. According to him, it is necessary to make changes to the text of the Constitution to clearly define environmental rights. In his view, environmental rights are increasingly becoming a substantive right of citizens, and the increasing maturity of environmental rights theory also provides academic support for an amendment of the Chinese Constitution. In addition, Professor WU Weixing considers that recognition of environmental rights, as a basic constitutional right, would be a positive response of the contemporary constitution to the social reality. Within this scope he defines, environmental rights as rights to a certain environmental quality, which does not include economic rights and procedural rights. The concept developed by Professor ZHANG aims at guaranteeing human dignity and human rights by means of environmental protection.

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2. General Environment Rights Theory. — General environmental rights theory as represented by Professor CAI Shouqiu, Professor LÜ Zhongmei and Professor KE Jian concludes that substantive environmental rights and procedural environmental rights are both important to environmental protection.

These Professors consider public environmental rights as a main component and the right to access environmental information as dependent or ancillary rights to that. Along these lines procedural environmental rights are considered a condition and way to safeguard the implementation of substantive environmental rights.\(^4\) By grasping environmental information, to participating in environmental decision-making, management and supervision, the public is given a chance to enforce their substantive environmental rights. Moreover, Professor KE considers establishing environmental rights within the legal system to be very important. According to him, statutory environmental rights must have a judicial enforceability and justiciability.

This theory considers substantive environmental rights and procedural environmental rights as interacting with each other and working together to promote environmental protection.

3. Negative Environmental Rights Theory. — According to the negative environmental rights theory, environmental rights can only be rights of the whole of mankind, but cannot be implemented as individual citizens’ rights. It is due to the asymmetry of environmental rights and obligations that environmental rights cannot achieve their goals through litigation or relief activities.\(^5\) These are reasons for which Professor XU Xiangmin negates the necessity of creating environmental rights. Essentially, there is a lot of controversy on environmental rights theory in China, but a growing number of scholars have come to identify a procedural environmental rights theory.

C. Understanding of Environmental Rights

Since Professor CAI Shouqiu elaborated on environmental rights theory in China for the first time in the 1980’s, the theory of environmental rights has made great achievements. However, research on environmental rights still faces various misunderstandings and problems, whereby the confusion on the concepts of environmental rights and the right to environment poses the most significant problem.

1. The Definition of the Right to Environment. — According to the analysis of environmental rights theories in China, scholars’ arguments on environmental rights

\(^4\) CAI Shouqiu, 从环境权到国家环境保护义务和环境公益诉讼 (From Environmental Rights to Environmental Protection Obligations of the State and Environmental Public Interest Litigation), 6 现代法律科学 (Modern Law Science), 13 (2013).

\(^5\) XU Xiangmin, 对“公民环境权论”的几点疑问 (Some Questions on the “Citizens’ Environmental Right Theory”), 2 中国法学 (China Legal Science), 114 (2004).
focus mainly on the definition of environmental rights. Different definitions will lead to differences in the content of the environmental rights.

The Declaration of the United Nations Conference on the Human Environment developed an internationally renowned concept of environmental rights in 1972, stating that “man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”6 Based on that, Professor CAI Shouqui deduced that citizens have the right to enjoy a good environment, including quiet, cleanliness, comfort, and the beauty of the natural surroundings.7 The notion of the right to environment used throughout this article comprehends the right to a healthy environment, clean air, clean water, sunshine, ventilation, and beautiful scenery, which are considered substantive environmental rights.

2. The Definition of Environmental Rights. — Environmental rights are a collective concept containing all rights related to the environment. Professor LÜ Zhongmei argued that firstly, citizens have the right to use the environment. She explained that the right to clean water, the right to clean air, the right to use green spaces, the right to sunshine and the right to landscape are all about the right to use the environment. Secondly, Professor LÜ believes that citizens have the right to information, the right to participate and to file judicial claims.8 Consequently she considers environmental rights to be a broad concept. This article apprehends this notion of environmental rights and deduces that environmental rights can be defined as environment-related rights. They not only contain the right to environment, but also include procedural environmental rights.

3. Discrimination of Substantive Environmental Rights and Procedural Environmental Rights. — Substantive environmental rights refer to the specific environment rights that humans can enjoy, which many scholars describe as a human right. Under usual circumstances, substantive environmental rights contain the right to environment, the right to clean water, the right to clean air, and other rights related to environmental factors. Procedural environmental rights refer to the relevant procedures in order to obtain substantive environmental rights. Based on the concept of three pillars of environmental rights developed in the Rio Declaration and used by the Aarhus Convention, procedural environment rights contain the right of access to environmental information, public participation, and access to justice.

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7 CAI Shouqui, 環境權初探 (Discussion on Environmental Rights), 3 社会科学 (Social Sciences in China), 35–36 (1982).

II. PARADIGM SHIFTS WITHIN HUMAN AND ENVIRONMENTAL RIGHTS IN WESTERN DEVELOPED COUNTRIES

In order to analyze the paradigmatic shifts within human and environmental law in the western developed countries it is necessary to outline the political and historical frame provided by the international legal system developed by the United Nations before explaining the changes which occurred in the national legal systems.

A. The Development of the Nexus between Ecological and Human Rights on the Level of the United Nations

The first relevant cross-border environmental agreements between nation states were concluded in the 1950’s, however these focused on the distribution and protection of certain environmental media, as two of the earliest conventions, the International Convention for the Preservation of Pollution of the Sea by Oil from 1954 and the United Nations Convention on the Law of the Sea and the Convention on the High Seas from 1958, show. The first shift towards more comprehensive environmental regulations occurred in the 1960’s and 1970’s when global awareness of the worldwide ecological effects of pollution arose. This can be traced back not only to the large improvements concerning measurement technologies but also to the scandal caused by environmental catastrophes such as the oil spills in Torrey Canyon, UK, in 1967 and Santa Barbara, United States, in 1969. In 1972 the global think-tank Club of Rome published “The Limits to Growth,” a report outlining the relation between economic growth and the limits of natural resources predicting that, “if present growth trends in world population, industrialization, pollution, food production, and resource depletion continue unchanged, the limits to growth on this planet will be reached sometime within the next one hundred years.” This understanding enhanced both the public and the politicians’ scepticism towards further economic expansion and laid the foundation for a more sustainable approach.

Against this background, the United Nations gathered in 1972 in Stockholm, Sweden, in order to find comprehensive international solutions for the pending environmental issues. During the United Nations Conference on the Human Environment, two non-legally binding texts, the Stockholm Declaration and the Stockholm Action Programme were developed. Since these documents no longer cling to the fragmented, medium-based solutions used in the past, they marked the first step towards the development of a holistic concept for international environmental protection focused on

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environmental, social, and economic aspects. Article 1 of the Stockholm Declaration, which claims that “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being” triggered a global discussion on the question whether a substantial right to a decent environment should be introduced on global and national scale.

Special emphasis has to be put on the nexus between ecological rights and human rights, which was taken up by politicians and scholars in the 1980’s. Besides, from emphasising substantive rights linked to a clean and healthy environment, demands on the establishment of procedural rights created an increasingly anthropocentric approach to ecological positions. This sounded the bell for the “greening” of various human rights treaties such as the ICCPR and the ICESCR based on the idea that environment is a pre-requisite for the enjoyment of human rights such as the right to adequate housing (Article 11 ICCPR), health (Article 12 ICCPR) and life (Article 6 ICESCR). Furthermore, the 1982 World Charta on Nature included the idea that public participation — such as access to information, participation in decision-making, and access to justice in environmental matters — constitute essential preconditions for good environmental decision-making. Within the scope of this development, the question of whether a right to a safe, healthy and ecologically balanced environment should be introduced into the scope of human rights formed a vexing issue. This topic had already been discussed vividly throughout the 1970’s, but has never been successful due to the ideological controversy involved (ecologists criticized that a specific environmental human right would follow a far too anthropocentric approach and emphasized the need for introducing ecological rights in order to protect nature itself), the difficulty of finding a globally suitable definition of what “decent environment” was supposed to mean, and the uncertainty whether such rights could be enforced before international courts.

Throughout the 1980’s the political discussion was shaped by the broadening of problems involved with the development gap between the global north and south (so called north-south-divide). As a reaction to the deepening conflict the concept of sustainable development was introduced in 1987 during a meeting of the United States World Commission on Environment and Development in the associated report “Our Common Future.” Recapturing the environmental limits to economic growth, it called on the nation states to embrace the links between environment and development

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13 E. F. Roberts, The Right to a Decent Environment: A Premature Construct, 1 Environmental Policy and Law, 185 (1976).
mentioned in Principle No. 1 of the Stockholm Declaration and the notion of human environmental rights laid down within it. Taking the discussion one step further, the report proclaimed that progress in environmental matters “will also be facilitated by recognition of, for example, the right of individuals to know and have access to current information on the state of the environment and natural resources, the right to be consulted and to participate in decision making on activities likely to have a significant effect on the environment, and the right to legal remedies and redress for those whose health or environment has been or may be seriously affected.”

With these words the report heralded the start of a more procedural notion of environmental rights, taking into account the importance of public participation in environmental decision-making and thus slightly indicating a paradigmatic change. Realizing that the right to participation also is a human right, it becomes evident that the relevant change made by the 1987 Conference is that the idea of developing substantive rights had just begun to be out-dated by the introduction of procedural human rights.

This concept has been substantially broadened during the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, Brazil: A tree-sphere framework combining economic growth with respect for social and ecological matters was developed in order to establish a “socially inclusive and environmentally sustainable economic growth.”

The elaboration of Sustainable Development as a guiding principle of international environmental law also involved the promotion of public participation issues within the treaties; Principle No. 10 of the Rio Declaration already contained the provision that “environmental issues are best handled with participation of all concerned citizens, at the relevant level.” Furthermore, the Declaration states that each individual should “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” at the national level. Furthermore in the case of a violation of these provisions stated by national law “effective access to judicial and administrative proceedings, including redress and remedy” ought to be provided pursuant to Principle No. 10.

Additionally, the 1994 Draft Declaration on Principles on Human Rights and the Environment, based on the report of United Nations’ Special Rapporteur Fatma Zohra

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Ksentini, called for the states to adopt human rights to an ecologically sound and healthy environment; adequate housing.\(^{21}\) It did not aim at establishing individual rights but was meant as a declaration directed to humanity as a whole. What is especially remarkable is that this document illustrates the shift from the discussion of a singular human right to environment towards a broader conception, which interprets existing human rights in an environmental context and therefore integrates itself in the process of “greening” human rights and aims towards a more integrated approach.\(^{22}\) Another noteworthy feature of the report is its third part, which focuses on public participation. Unlike many other documents in this era, the report does not perceive public information, participation and the access to justice in environmental matters as an isolated procedure but interprets the cooperation between the public, NGOs, and the governments as an integral part of human rights and the environment.\(^{23}\)

This approach was taken up in the 1998 Aarhus Convention in Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Recalling Principle No. 10 of the Rio Declaration the Convention is limited to a procedural notion of environmental rights and, since mostly European countries have ratified it, had significant influence on the Law of the European Union and its member states.

While some countries introduced environmental rights in their constitutions in the course of this international development, an internationally acknowledged right to a decent environment has not been established. Especially since the passing of the Aarhus Convention, not only political decisions but also the focus of researchers shifted towards a more procedural perspective since the late 1990’s and early 2000’s. This article attempts to analyze these changes on the basis of examining the legal systems of the US, Japan, and the European Union.

**B. Environmental Rights Legislation in the United States**

While the US Constitution itself does not contain a specific environmental right, many of the states including Illinois, Pennsylvania, Montana, and Massachusetts adopted environmental Bills of Rights during the 1970’s.\(^{24}\)

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Throughout the 1970’s — the heyday of the US-American environmental movement — environmentalists repeatedly tried to have the Federal Courts address the question of whether the Constitution implicitly contained substantial environmental rights. This approach followed the penumbra theory, which implies that certain rights, which are not guaranteed within the text of the Constitution, can be derived from other, explicitly protected, constitutional rights. Hoping that the Federal Courts would derive a fundamental right to the environment from other constitutional provisions, they argued that basic fundamental rights to live a healthy life and enjoy the environmental surroundings were implicitly contained in the Constitution. None of these attempts turned were successful. In *Tanner v. Armco Steel Corp* (1972) the Federal District Court stated that the Ninth Amendment does not embody a legal right to a healthful environment. In *Environmental Defence Fund v. Hoerner Walforf*, a Federal Judge made clear that both health and environmental health do not seem to enjoy legal protection according to the Fifth and Fourteenth Amendments. Consequently, litigation proved to be unsuccessful to introduce environmental rights into the text of the Constitution.

Due to these developments, the first substantial attempts to introduce a right to a decent environment into the state-level Constitution were made by the Senator G. Nelson (D-WI). In 1968, he proposed an environmental quality amendment, which stated, “Every person has the inalienable right to a decent environment. The United States and every State shall guarantee this right.” After this initial attempt failed due to the lack of interest his fellow congressmen attributed to the issue — during the climax of 1960’s counterculture, the Vietnam War, and the civil rights movement, other topics seemed more pressing — he launched a second attempt in 1970, which also failed. In the same year, New York Representative R. Ottinger (D-NY) proposed another constitutional amendment, which would guarantee that the “right to clean air, pure water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and aesthetic qualities of their environment” should not be abridged. Although all three proposals were unsuccessful regarding their aim of changing the US Constitution, they ultimately raised public awareness of environmental matters.

Even though a right to a decent environment could not be implemented on the state-level, environmental groups grew to be influential political forces and environmental regulation was pushed forwards on many different levels. On January 1, 1970, President R. Nixon signed the National Environmental Policy Act (NEPA), which aimed to establish a national environmental policy by overseeing all environmental impacts of federal actions. The first draft of the NEPA contained a proposal for amending

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27 Id. at 121.
the Constitution by a substantive right to a healthy environment; Congress did not accept this regulation. Instead of establishing new substantive rights, the NEPA focused on procedural aspects by obliging all executive federal agencies to conduct Environmental Assessments and Environmental Impact Statements in order to weigh environmental factors equally with other, especially economic aspects, throughout the decision making process. The legislation was passed following the provisions of the NEPA, which included the banning of numerous chemicals in order to limit the pollution of air, water, and soil.

During the mid-1980’s and the 1990’s, innovative environmental legislation was opposed by the growing influence of corporate interests, which turned against the high costs and administrative expenses caused by the regulations. Emphasizing the constitutional right to property, the so called property rights movement saw environmental regulations as an infringement of their right to use their property as they desired. All in all, environmental regulations were severely restricted in favor of economic interests during the Reagan and Bush Sr. administrations. When President Clinton came into office in 1993, the atmosphere changed towards a (slightly) more eco-friendly policymaking, but since the traditionally more eco-sceptic Republican Party dominated Congress, the control of business over environmental issues remained. Within this period, thirty-seven state legislators introduced yet another proposal on environmental rights to Congress in 1997, which, again, was not adopted.

These developments prove that there is little need for a constitutional provision of substantial environmental rights in the US Constitution, since it is not needed in order to protect individual rights. This is not only because the existing laws provide far-reaching protection. Harvard Law School Professor Richard Stewart argues that, “the definition and implementation of a constitutional right to environmental quality would pose grave difficulties for the courts.” Particularly, the problem of defining environmental

30 WANG Xi & XIE Haibo, 论环境权法定化在美国的冷遇及其原因 (Cold Reception Faced by Proposals on Legalization of Environmental Rights in U.S. and the Reasons Behind), 4 上海交通大学学报 (Journal of Shanghai Jiaotong University), 23 (2014).
33 See Eagle, fn. 31 at 23.
standards that fit all situations would impose problems on the administration and the courts. Since there is “no apparent principled basis for judicial resolution of […] often conflicting societal considerations involved in environmental resource allocation that would command widespread allegiance,” Stewart does not see chances for introducing such a right into US federal law.36 These arguments have also been used when the introduction to a right to decent environment was discussed at a global level in the 1990’s, which shows again that international environmental law has been influenced by US discussions for a long period of time.

C. The Dilemma of Substantive Environmental Rights Legislation in Japan

Japan experienced rapid economic growth in the 1960’s following a strict deregulation policy, a development that also involved massive environmental problems due to industrial pollution. On a large scale, an environmental citizens movement began to form demanding higher legal standards of environmental protection in order to prevent pollution-related health effects and limit the destruction of natural habitats.37

The question whether substantial environmental rights should be added to Japanese law was vigorously discussed in the 1970’s. While some supporters advocated that the right to a decent environment should be explicitly enshrined in the Japanese Constitution, others argued that environmental rights were implicitly included in the Right to Live, Freedom, and Happiness guaranteed in Article 13 of the Japanese Constitution. Still others regarded it as sufficient to promote environmental rights within national policies without amending or interpreting the text of the Constitution.38 Opponents of these environmentalist approaches argued that the responsibilities and obligations resulting from a specific environmental right would not be easy to define and even harder to legally invoke, and that greater importance should be ascribed to other human rights instead.39

Japanese courts have also been refusing to acknowledge a constitutional environmental right. Apart from the problem of defining the subjects of an environmental right and its exact contents, many considered the amendment of existing laws as superfluous due to the continuous development of new environmental legislation on federal and state levels.40 Since the early 1960’s, a process of political recognition of environmental issues had begun in the aftermath of several lawsuits filed against polluting firms, especially in the industrial towns of Minamata City and Yokkaichi, where

38 XU Xiangmin & SONG Ninger, 日本环境权说的困境及其原因 (The Dilemma and Reason of Environmental Rights Theory in Japan), 3 法学论坛 (Legal Forum), 87 (2013).
39 Id. at 88.
40 Id. at 89–90.
several thousand inhabitants suffered severe health damage due to the release of chemicals and air pollution. Due to the rising public interest in environmental policy developments, environmental legislation was tightened in the following years. In 1967, the Basic Law for Environmental Pollution Control was introduced, followed by the Law for the Compensation of Pollution-Related Health Injuries. The biggest step towards implementing the concept of sustainable development into the Japanese legal system was the passing of the Basic Environmental Law in 1993. Even though it paved the way for the introduction of far-reaching Environmental Impact Assessments (the Japanese Environmental Impact Assessment Law was finally passed four years later in 1997), it contained neither a substantive right to a decent environment nor procedural rights; in order to inform the public about projects where environmental impacts were included. This was substantially changed when the Environmental Impact Law was revised in 2012 — one of its main amendments was the obligation to hold public sessions during the assessment of method determination (so called scoping), publish the documents prepared during the assessment online, and consider the public opinion of them during the drafting of the EIA.

Effectively, the reasons for the lack of a substantive right to a decent environment in Japan are interconnected: Firstly, there is a close net of environmental laws providing a certain level of protection against environmental harm. For this reason, most victims of pollution choose to find legal remedies within civil proceedings, and adding an explicit right would not presumably increase the victims’ chances to receive compensation and would thus be unnecessary. Secondly, public participation measures are gradually implemented into the Japanese legal system providing opportunities for public involvement during planning processes, and entitle the public to take part in environmental decision-making.

D. Environmental Rights in the European Union and European Countries

When studying environmental law in Europe one has to differentiate carefully between the legal frame given by the European Union and the laws of its member states. Even though the European Union has been a trade union from the start, the signing of the Single European Act in 1985 lead to a more balanced footing between economic and environmental objectives within the treaties. One important factor for development of

European environmental law was a series of environmental disasters, which occurred due to regulatory failings in the late 1980’s.\textsuperscript{45} Incidents like the nuclear accident at Chernobyl and the Sandoz chemical spill, which both occurred in 1986, raised public and political awareness causing a rise in support for stricter environmental regulation, especially in the northern member states. Today the European Union and its member states share competence in the environmental law field according to Article 192 TFEU and Article 4(2) TEU. Since then, the European Union developed extensive environmental policies, which vastly influenced the environment law of its member states.\textsuperscript{46}

Article 3(3) TEU establishes the objectives of European environmental law, while Article 191 TFEU outlines the principles and objectives of European environmental policies. According to these norms the European Union, “shall work for the sustainable development of Europe based on balanced economic growth [...] and a high level of protection and improvement of the quality of the environment.” In order to accomplish this, the Union policy on the environment shall “contribute to the pursuit of the objectives outlined in Article 191(1) TFEU such as, preserving, protecting, and improving the quality of the environment, protecting human health, prudent and rational utilization of natural resources, and promoting measures at the international level to deal with regional or worldwide environmental problems, and in particular combating climate change.” Despite these far-reaching goals, an explicit right to a decent environment has never been established within the framework of the European Union’s primary law.

1. Environmental Implications within the European Charta of Human Rights and the European Charter of Fundamental Rights. — Additionally, neither the European Charta of Human Rights nor the European Charter of Fundamental Rights contains specific substantive rights to a clean or healthy environment. Nevertheless, the global tendency to “green” existing human rights treaties also emerged in the European Union in the late 1990’s. Since then, the jurisdiction of the European Court of Human Rights and the European Court of Justice emphasize the environmentally relevant positions contained in several non-environmental legal positions, and thus paved the way for the recognition of a Europe-wide standard for the protection of environmental human rights.\textsuperscript{47} In addition to Article 2 ECHR, which guarantees the right to life, Article 8 ECHR, which provides the right to respect for one’s “private and family life, home and correspondence,” implicitly contains legal positions related to a healthy environment. In the case \textit{Moreno-Gómez v. Spain}, the European Court of Human Rights declared that, even though the article does


not include a right to nature preservation or environmental protection, Article 8 ECHR can be violated when environmental factors directly and seriously affect private and family life, e.g. by casually causing physical or mental effects.⁴⁸ To a certain degree, and in some cases, it may also imply an obligation on public authorities to adopt positive measures designed to secure the rights enshrined.⁴⁹ Additionally, Article 2 ECHR and Article 8 ECHR impose a positive obligation on public authorities to “ensure a right of access to information in relation to environmental issues in certain circumstances.”⁵⁰

Article 37 of the European Charter of Fundamental Rights states that “a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and assured in accordance with the principle of sustainable development.” Even though this seems like a far-reaching proclamation, it only constitutes a “principle” of European law, which outlines the duties of European authorities in relation to environmental policy-making and does not guarantee substantive or procedural rights whatsoever.⁵¹


Eventually, an individually enforceable right concerning environmental positions was solemnly recognized in the Aarhus Convention to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, which entered into force in 2001. The Convention traces back to the 1990’s when international environmental law emphasized the importance of public involvement for the first time: The World Charter for Nature from 1982 called for the states to improve the legal means of information and public participation, and Principle No. 10 if the Rio Declaration 1992 underlined the importance of this topic.⁵² Both the European Union and all its member states are amongst the now forty-seven signatory states of the multilateral environmental agreement, which emphasizes the importance of giving the public an opportunity to access environmental information in order to increase the transparency of procedures, to

participate in decision-making, to improve the quality of the decision, and guarantee procedural legitimacy.\textsuperscript{53}

As its title already suggests, the Convention contains three pillars: Access to information, public participation, and access to justice. The first pillar is established in Article 4 of the Convention and refers to both the reactive and the active aspect of access to information. It obliges the states’ public authorities to respond to public requests for information, and to actively provide environmental information. The second pillar finds its legal basis in Article 6 of the Convention, which establishes the requirements for public participation in certain fields of environmental decision-making. Provisions concerning the access to justice in environmental matters, the Convention’s third pillar, are established in Article 9. According to this, access to justice has to be provided in order to review: (1) procedures with respect to information requests; (2) procedures concerning specific decisions which are subject to public participation requirements as well as; and (3) challenge breaches of environmental law in general. Linking environmental and human rights, the Convention focuses on creating government accountability in the field of environmental protection by integrating civil society into the process of decision-making.\textsuperscript{54}

3. Substantive Environmental Rights Guaranteed in European Nation States. —
Within Europe some countries’ constitutions guarantee a substantive right to environmental protection and a decent quality of environment whereas others only contain programmatic provisions and objectives directed to the state and the administration.

The very first European constitution to protect environmental rights was the Portuguese Constitution of 1976. According to its Article 66, “everyone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it.” It goes on to “charge the state” with fulfilling the obligation in eight specific ways. The Spanish Constitution of 1978 closely resembles this with its Article 45(1), stating, “everyone has the right to enjoy an environment suitable for the development of the person as well as the duty to preserve it.” Nevertheless, it is notable that both Spain and Portugal have been considered to be lagging behind when it comes to the implementation of environmental rights, which proves that enshrining certain rights within the text of a constitution alone is not sufficient. The Norwegian Constitution provides a positive model, which reaches even further and declares that “every person has the right to an environment that is conducive to health and to a natural environment


whose productivity and diversity are maintained” and that “natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.”

In France, the Charter for the Environment was introduced to the Fifth Republic Constitution in 2005, and its provisions became the legal basis for the recognition of environmental rights as human rights. According to Paragraph 1, “everyone has the right to live in a balanced environment which shows due respect for health.” The Charter not only establishes substantive rights but also refers to procedural duties in Article 2, according to which, “everyone is under a duty to participate in preserving and enhancing the environment.” After the introduction of the Charter, a French scholar declared that “for some, and France in particular, environmental protection is best accomplished by declaring it a constitutionally protected human right.”

Not all countries follow this approach to introduce a substantive right to a certain environmental standard into their constitutions. For instance, environmental protection has been also enshrined in the German Basic Law since 1994. In Article 20a protection of the environment is referred to as an objective of the state requiring all state bodies to be “mindful also of their responsibility toward future generations” and to protect the environment.” Nevertheless, the German Basic Law does not contain a substantive right to a decent environment, which is often attributed to the fact that Germany is a country with a “civil law tradition,” thus putting an emphasis on litigation. The Constitution of Finland closely resembles this with its section 20 providing that, “the public authorities shall endeavour to guarantee for everyone the right to a healthy environment and for everyone the possibility to influence the decisions that concern their own living environment.” Like Germany, the constitution requires the state bodies take actions necessary to protect the environment and to promote a healthy environment for the country’s citizens without creating a substantive environmental right.

Overall there is a tendency showing that the implementation of substantive environmental laws as human rights becomes less important compared to procedural

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rights. While many European countries have a constitutionally protected right to a decent environment, these often fulfil a symbolic purpose. Especially in the wake of the Aarhus Convention and its acts of transposition into the law of the European Union’s member states, procedural rights in environmental matters, like the access to information and the opportunity to participate in the process of decision-making, become more relevant.

III. TRANSFORMATION OF DISCUSSION ON SUBSTANTIVE AND PROCEDURAL ENVIRONMENTAL RIGHTS IN CHINA

A. The Dilemma of Substantive Environmental Rights in China

1. The Dilemma of Substantive Environmental Rights Legislation.
   — The Chinese Constitution does not clearly define environmental rights. Rather, it just reflects the legal protection of environmental rights indirectly. Although some elements of the current constitution are, to some extent, related to environmental rights, it does not enshrine a substantive right to a decent environment.\(^{60}\) This affects other legal provisions on environmental rights leading to insufficient protection of the environment.

   Nevertheless, China’s environmental protection legislation has made outstanding achievements. There are nine environmental protection laws, ten natural resource management laws, more than forty administrative regulations on environmental protection and resource management, more than one hundred administrative regulations, at least four hundred environmental standards, and at least 1,000 local environmental regulations.\(^{61}\) However, these laws and regulations do not clearly define substantive environmental rights.

   Professor ZHOU Xunfang believes that substantive environmental rights cannot be acknowledged through the Constitution for four reasons. Firstly, the subject’s scope is uncertain and judicial enforcement of environmental rights would prove to be difficult.\(^{62}\) Secondly, the confusion of substantive and procedural environmental rights could pose an obstacle to legislation, as some scholars believe that procedural environmental rights do not belong to the category of environmental rights. Thirdly, the object of environmental rights and, fourthly, its contents, cannot be defined conclusively.

2. The Dilemma of Execution of Substantive Environmental Rights.
   — Substantive environmental rights are difficult to implement in judicial practice. The rights, which typically include the right to clean air, the right to clean water, the right to lighting, the right to ventilation, the right to peace and the right to landscape, tend to be quite abstract...

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\(^{60}\) ZHANG Ligang & SHEN Xiaolei, 公民环境权的宪法学考察 (The Constitutional Investigation on Citizens’ Environmental Rights), 1 政治与法律 (Political Science and Law), 33 (2002).


\(^{62}\) ZHOU Xunfang, 环境权立法的困境与出路 (Straits and Outlet to Environmental Rights Legislation), 2 时代法学 (Present day Law Science), 56 (2004).
and directed to the public in a declaratory sense. Since these rights do not attribute a
certain legal position to individuals, Professor XU Xiangmin considers environmental
effects to be contradictitory. Unlike property rights, which allow the individual to do as
he wishes with the property assigned to him, legal positions relating to the environment,
such as the right to clean air, cannot easily be attributed to a single individual because
clear differentiations between legal spheres are hard to establish.

Additionally, some scholars believe that substantive environmental justiciability of
environmental rights is limited. Professor ZHU Qian states that courts frequently refuse to
apply environmental rights since they are not considered substantive rights. Therefore,
citizens have trouble filing lawsuits based on these legal positions.

3. The Dilemma of Research of Substantive Environmental Rights. — The challenge
research on substantive environmental rights is facing is marked by two main aspects.

The first aspect is that scholars are divided over concept of substantive environmental
rights. For instance, Professor CHEN Quansheng argues that environmental rights include
substantive environmental rights, which he labels “ecological environmental rights,” like
the rights to clean air, clean water, lighting, and economic environmental rights such as
the right to access resources and the right to environment. In addition, Professor LÜ
Zhongmei states that environmental rights include the right to use the environment, the
right to environmental access information, and the right to participate in and gain access
to justice in environmental matters. In her opinion, the right to use the environment
includes the rights to clean air and clean water, which are commonly considered
substantive environmental rights. However, she additionally refers to procedural
environmental rights.

The second aspect is that some scholars consider environmental rights to be
substantive environmental rights, which only refer to the right to enjoy a favourable
environment. According to this opinion, environmental rights do not include the right to
access to environmental information, the right to participate in environmental
decision-making, or any other procedural rights. In Dr. YANG Zhaoxia’s opinion,
procedural rights can only be derived from environmental rights when they serve to
promote the realization of substantive environmental rights, but do not form a category of
environmental rights of their own. Altogether, the lack of awareness concerning the
meaning and importance of substantive environmental rights amongst domestic scholars
to some extent hindered the development of substantive environmental rights.

63 XU Xiangmin & ZHANG Feng, 质疑公民环境权 (Question on the Citizen’s Environmental Rights), 2
64 ZHU Qian, 环境权问题: 一种新的探讨路径 (Environmental Rights Issue: A New Approach), 5 法律科
学 (Science of Law), 99 (2004).
65 See LÜ, fn. 8.
66 YANG Zhaoxia, 环境权的理论辨析 (Theoretical Analysis of Environmental Rights), 23 环境保护
(Environmental Protection), 50 (2015).
B. The Development of Procedural Environmental Rights in China

1. Improvement of Procedural Environmental Rights Legislation. — In China, procedural environmental rights legislation has made some progress, especially in the fields of public participation, information disclosure system, and access to justice.

Although the Chinese Environmental Protection Law contains special provisions on public participation, these are not specific enough in many instances. Hence, the exact procedural steps of the system of public participation should be further specified through future legislation to safeguard procedural rights at all levels of public participation. In addition, the scope of public participation should be expanded to the effect that “public” does not only include individual citizens or environmental groups, but also industry organizations, commercial interests’ groups, and academic research institutions.

The legal provisions of environmental information disclosure also need to be improved by expanding their scope. Firstly, foreigners and stateless persons should also be granted the right to access information in order to warrant the international principle of national treatment. Secondly, the range of parties obliged to make disclosures should be expanded to all administrative departments involved in matters concerning environmental protection such as agriculture, forestry, tourism, and the weather department. By disclosing all information except for the listed one, the legal liability of the government and corporate organizations can be improved.

Through the tireless efforts of many environmentalists, environmental public interest litigation was established in the Environmental Protection Law. This is not only considered a historic legal breakthrough, but also marks a milestone in environmental public interest litigation. However, environmental public interest litigation is still a new system, which faces many problems since the prosecution is limited, the conditions for prosecution are too strict, and because litigation is limited to certain types. In order to create a comprehensive system for litigation in environmental manners these challenges need to be solved.

2. Theoretical Study of Procedural Environmental Rights Increased. — The question whether all citizens should be attributed an individual environmental right is subject to vigorous discussion amongst Chinese legal scholars. Some endorse the implementation and strengthening of environmental rights, while other scholars oppose this idea. Since many of these scholars do not share a common concept on environmental rights, a consensus as to the exact notion and content of this legal term needs to be determined. Firstly, one must realize that the generic term of “environmental rights” comprises both substantive and procedural environmental rights.

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67 LUO Junjie & CHENG Fengming, 论我国环境保护公众参与法律机制的完善 (On Perfecting the Legal Mechanisms of Public Participation in Environmental Protection in China), 5 湘潭大学学报 (Journal of Xiangtan University), 53 (2015).
Even though environmentalists have campaigned on the issue for several years, substantive environmental rights have never been recognized in the text of the Constitution and in environmental laws. Instead of developing subjective legal positions, the new Environmental Protection Law focuses on providing procedural environmental rights, since these are more tangible and the concept behind them easier to define. This development also matches the pattern seen on the international level, where studies on substantive environmental rights have also gained much of their importance. Therefore, scholars should focus on improving procedural environmental rights by developing the system of information disclosure, by promoting public participation in environmental decision-making and environmental legislation, and by improving the means of environmental public interest litigation.

IV. PRACTICE OF PROCEDURAL ENVIRONMENTAL RIGHTS IN CHINA

A. Emergence and Content of Procedural Environmental Rights in China

Environmental rights include substantive and procedural environmental rights. Since the Declaration of United Nations Conference on Human Environment first proposed the concept of environmental rights in 1997, a series of international environmental legal documents and some national laws have established substantive environmental rights in different ways. However, the question of how to implement and enforce substantive environmental rights has proved to be a problem, such that the international community and some countries have gradually turned to emphasizing the protection of procedural environmental rights. In recent years, China has also continued to strengthen legislation of procedural environmental rights, and administrative departments have been advancing on adopting measures to promote the realization of procedural environmental rights.

1. Emergence of Procedural Environmental Rights in China. — The first examination of the concept of environmental rights in China dates back to 1982, when Professor CAI Shouqiu outlined that citizens had the right to a comfortable environment, including quietness, cleanliness, comfort, and beauty of environment.68 Although the article did not differentiate between the two pillars of substantive and procedural environmental rights, and is characterized by a strictly subjective notion of environmental law, Professor CAI’s article marked the beginning of the academic discussion on environmental rights in China.

In the 1990’s, Professor LÜ Zhongmei argued that citizens not only have the right to a healthy environment, but should also have the right to participate in environmental decisions. She further posited that the scope of environmental litigation should be expanded.69 Throughout her work Professor LÜ helped differentiate the notion of

68 See CAI, fn. 7 at 35.
environmental rights by describing environmental rights as civil rights when considering both the right to participate in environmental decision-making and national environmental management, and the right to receive damage compensation as an important procedural guarantee.\textsuperscript{70} The concept of environmental rights established by Professor LÜ includes the rights to use environmental resources, to know environmental conditions, to participate in environmental affairs, and to receive compensation. After the presentation of these ideas the discussion on procedural environmental rights started to evolve in China.

2. Content of Procedural Environmental Rights in China. — While Professor LÜ states that procedural environmental rights include four aspects, the Aarhus Convention is based on three pillars of procedural environmental rights, which include the rights of access to information, public participation in decision-making, and access to justice in environmental matters.\textsuperscript{71}

The pillar of access to environmental information includes the following provision. Firstly, “public authorities, in response to a request for environmental information, must make such information available to the public within the framework of the national legislation.”\textsuperscript{72} The second pillar contains provisions on public participation in some cases of environmental decision-making, such as for the activities listed in Annex I and for all activities that could have a significant impact on the environment. The third pillar deals with access to courts and the enforcement of environmental legislation. Firstly, the public concerned has the right to access courts and other independent and impartial bodies when the rights laid down in the first two pillars — the right to access to environmental information and public participation — have been impaired. Secondly, members of the public should be given the opportunity to file lawsuits in order to contravene national actions intervening with national environmental law.

In China, the description of procedural environmental rights in the Environmental Protection Law is different from the notion used in the Aarhus Convention. According to the Environmental Protection Law of China Chapter V on Information Disclosure and Public Participation, citizens, legal persons, and other organizations have the right to obtain environmental information, to participate in and to supervise the activities of environmental protection in accordance with the law. Article 58 also provides that, “for activities that cause environmental pollution, ecological damage and public interest harm,

\textsuperscript{70} LÜ Zhongmei, \textit{超越与保守——可持续发展视野下的环境法创新} (\textit{Transcend and Conservative — Environmental Law Innovation in Perspective of Sustainability}), Law Press (Beijing), at 258 (2003).

\textsuperscript{71} In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention. See UNECE, \textit{Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters}, United Nations, available at http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf (last visited May 6, 2016).

\textsuperscript{72} Id. art. 4.
social organizations” that meet certain conditions may file litigation to the People’s Courts. Thus, procedural environmental rights in China arguably include disclosure of environmental information, public participation in environmental protection, and the right to access to justice.

B. Practice of Disclosure of Environmental Information in China

— Information disclosure legislation in China does not have a far-reaching history, but has always been dealt with together with Environmental Protection Law.

The second paragraph of Article 11 of the Environmental Protection Law (1989) provides that,

The competent departments of environmental protection administration under the State Council and governments of provinces, autonomous regions and municipalities directly under the Central Government shall regularly issue bulletins on environmental situations. 73

The first paragraph of Article 31 of that Law outlines that,

Any unit that, as a result of an accident or any other exigency, has caused or threatens to cause an accident of pollution, must promptly take measures to prevent and control the pollution hazards, make the situation known to such units and inhabitants as are likely to be endangered by such hazards, report the case to the competent department of environmental protection administration of the locality and the departments concerned and accept their investigation and decision. 74

These two provisions constitute the framework for disclosure of environmental information by governments or enterprises in China.

The Law on Promoting Clean Production, formulated in 2002, also contains provisions about the disclosure of environmental information.

The former State Administration of Environmental Protection formulated the Interim Measures on Public Participation in Environmental Impact Assessment to improve the implementation of the provisions on public participation in the EIA Law, which entered into force on March 18, 2006. The title of the first section of the second chapter, “General Requirements for Public Participation,” is “Disclosure of Information on the Environment.” It consists of five articles.

The Measures for the Disclosure of Environmental Information (for Trial Implementation) were formulated in 2007 in accordance with the Regulation on the Disclosure of Government Information and the Law on Promoting Clean Production for the purpose of: promoting and regulating the disclosure of environmental information by environmental protection departments and enterprises; maintaining the rights and interests

73 Environmental Protection Law of the People’s Republic of China 1989, art. 11.
74 Id. art 31.
of citizens, legal persons, and other organizations to access environmental information, and promoting the participation in environmental protection by the general public. These measures provide detailed rules on the disclosure of both governmental environmental information and environmental information by enterprises, thus establishing a disclosure regime. The aforementioned Regulation on the Disclosure of Government Information and Measures for the Disclosure of Environmental Information (for Trial Implementation) came into force on 1 May 2008.

2. Disclosure of Governmental Environmental Information. — According to the definition in the existing laws and regulations in China, the expression “environmental information” includes both government and enterprises’ environmental information.

The expression “governmental environmental information” refers to the information produced or obtained by administrative departments or agencies in their performance of environmental protection responsibilities, and recorded and kept in a prescribed form.

The Regulation on the Disclosure of Government Information was formulated by the State Council in 2007 and is a comprehensive and separate legal regime for the disclosure of government information.

Furthermore, the Provisions of the Supreme People’s Court on Several Issues Concerning the Trial of Administrative Cases about Open Government Information was adopted at the 1505th session of the Judicial Committee of the Supreme People’s Court on 13 December 2010, and came into force on 13 August 2011. According to this latest judicial interpretation, Chinese citizens can lodge administrative lawsuits against government institutions if they fail to disclose environmental information.

The Ministry of Environmental Protection is responsible for promoting, guiding, coordinating, and supervising the work on the disclosure of environmental information throughout the country. Each environmental administrative bureau at the level of local people’s governments at or above the county level is responsible for organizing, coordinating, and supervising the work on the disclosure of environmental information in their own administrative area.

Government information disclosure includes the following methods:

The first is disclosure under duty. Disclosure under duty refers to the disclosure of information on the environment by an environmental administration in line with a duty imposed by the law. The second is disclosure by application. In addition to disclosure of information on the environment by an environmental administrative department or agency within the scope of its legal duties, citizens, legal persons, and other organizations may apply to these bodies for access to governmental environmental information. The third method is the annual report on government information disclosure. Departments and agencies must publish their annual report on governmental environmental information disclosure work before March 31 every year.
In addition, environmental administrations shall guarantee enough personnel and funds to disclose governmental environmental information. An administrative department or agency must voluntarily disclose the governmental environmental information via government websites, gazettes, press conferences, newspapers, radio, television, or any other means without charging any fees.

3. Disclosure of Enterprise Environmental Information. — The expression “enterprise environmental information” refers to the information that is recorded by an enterprise, kept in a prescribed form, which relates to environmental effects arising from the business activities of the enterprises or to the environmental activities of the enterprise. According to the Measures for the Disclosure of Environmental Information by Enterprises and Public Institutions, enterprises and institutions shall disclose their environmental information in a timely and truthful manner in accordance with the principles of mandatory and voluntary disclosure.

Specific legislation of enterprise environment information disclosure has been underway since 2003. The original purpose of relevant regulations is to meet the “Cleaner Production Promotion Law.” In addition, the Ministry of Environmental Protection promulgated the Measures for the Disclosure of Environmental Information by Enterprises and Public Institutions in 2014, and implemented it in 2015 (see Table 3).

<table>
<thead>
<tr>
<th>Year</th>
<th>Name of regulations and legal documents</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>宁家环境保护总局关于企业环境信息公开的公告 (Announcement of the State Environmental Protection Administration on Enterprise Environmental Information Disclosure)</td>
</tr>
<tr>
<td>2007</td>
<td>环境信息公开办法(试行) (Measures for the Disclosure of Environmental Information (for Trial Implementation))</td>
</tr>
<tr>
<td>2010</td>
<td>环境保护部关于实行强制性环境信息公开的企业范围有关问题的复函 (Ministry of Environmental Protection reply on Scope of Enterprises on Mandatory Disclosure of Environmental Information)</td>
</tr>
<tr>
<td>2013</td>
<td>环境保护部办公厅关于当前环境信息公开重点工作安排的通知 (Ministry of Environmental Protection General Office Notice on Key Work Arrangements of the Current Environmental Information Disclosure)</td>
</tr>
<tr>
<td>2014</td>
<td>企业事业单位环境信息公开办法 (Measures for the Disclosure of Environmental Information by Enterprises and Public Institutions)</td>
</tr>
</tbody>
</table>

The regime for the disclosure of enterprise environmental information includes compulsory and voluntary disclosure.

(1) Compulsory Disclosure

An enterprise that discharges pollutants in an amount that exceeds national or regional discharging standards, or whose total amount of discharge (as verified by the administrative department) surpasses the relevant guidelines appraised and fixed by the local people’s government, is obliged to disclose its environmental information in local mass media and report the disclosed environmental information to the local environmental administration for archival purposes within thirty days from being
included on an administrative list of offending enterprises.

(2) Voluntary Disclosure

The state encourages enterprises to voluntarily disclose the following enterprise environmental information: (a) environmental protection guidelines and annual environmental protection targets and achievements; (b) annual assumed gross resource volumes; (c) environmental protection investments and environmental technological developments; (d) types, quantity, density, and whereabouts of pollutants discharged by the enterprise; (e) construction and operation of environmental protection facilities; (f) treatment of wastes produced during the production process, and recycling and comprehensive utilization of waste products; (g) agreements on voluntary environmental improvement concluded with the environmental protection department; (h) fulfillment of social responsibilities by the enterprise; and (i) other environmental information to be voluntarily disclosed by the enterprise.

An enterprise that voluntarily discloses its environmental information may publish its environmental information for the general public to access through mass media, the Internet, or through publication of annual environmental reports.

Although China has formed a relatively perfect legal system of environmental information disclosure, it also faces some challenges. For example, the traditional concept of administration and information disclosure requirements of the law is incompatible.75 Environmental protection administrative departments cannot be a profound understanding of the importance of environmental information disclosure. Environmental protection departments do not want to put more environmental information available to the public.

C. Practice of Public Participation in Environmental Protection in China

1. Development of Public Participation in Legislation in Environmental Protection.
— Since the beginning of the 1970’s, China gradually began to focus on environmental protection, and has issued a series of relevant national policies and regulations to promote public participation in environmental protection. In August 1973, the State Council convened the first National Environmental Protection Conference. During the meeting, the working principle to, “[…] rely on the people, universal participation [and] environmental protection […]” was adopted. This can be seen as the starting point of public participation in the field of Chinese environmental protection. Concerning this, Article 4 of the 1979 Environmental Protection Law (for Trial Implementation) has enacted the same provisions. The 1989 Environmental Protection Law provides in Article 6 that, “all units and individuals shall have the obligation to protect the environment and shall have the right to report on or file charges against units or individuals that cause pollution or damage to the environment.”

75 WANG Canfa, 我国环境信息公开立法及面临的挑战 (Legislation on Environmental Information Disclosure in China and the Challenges), 11 环境保护 (Environmental Protection), 23 (2011).
The 2015 Environment Protection Law classifies public participation as a principle and contains special provisions on this topic in its fifth chapter. Also in 2015, the Measures for Public Participation in Environmental Protection stipulate that the public can participate in public environmental protection such as the formulation of policies and regulations, the implementation of administrative licensing and the imposition of administrative penalties, the supervision over illegal acts, and the implementation of publicity and education. According to Article 4, the administrative departments of environmental protection may solicit the public’s opinion through opinion solicitation, questionnaire surveys, symposiums, expert demonstration meetings, or hearings. The public may put forward opinions and suggestions by telephone, letter, fax, Internet, or any other means.

In addition, other environmental protection laws also provide public participation provisions (see Table 4). Currently, public participation is a basic principle of Chinese environmental law and is being recognized by more and more scholars.

Table 4  Laws, Regulations, and Legal Documents of Public Participation

<table>
<thead>
<tr>
<th>Year</th>
<th>Name of laws, regulations, and legal documents</th>
</tr>
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<tbody>
<tr>
<td>1984</td>
<td>水污染防治法 (Water Pollution Prevention and Control Law)</td>
</tr>
<tr>
<td>1996</td>
<td>水污染防治法 (Water Pollution Prevention and Control Law)</td>
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<tr>
<td>2000</td>
<td>立法法</td>
</tr>
<tr>
<td>2001</td>
<td>行政法规制定程序条例 (Ordinance concerning the Procedures for the Formulation of Administrative Regulations)</td>
</tr>
<tr>
<td>2001</td>
<td>行政许可法 (Administrative License Law)</td>
</tr>
<tr>
<td>2001</td>
<td>环境保护行政许可听证暂行办法 (Interim Measures for Hearing the Administrative License in Respect to Environmental Protection)</td>
</tr>
<tr>
<td>2002</td>
<td>中华人民共和国环境影响评价法 (Law of the People’s Republic of China on Appraising of Environment Impacts)</td>
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<tr>
<td>2005</td>
<td>环境保护法规制定程序办法 (Measures for the Procedure for Formulating Regulations on Environmental Protection)</td>
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<tr>
<td>2009</td>
<td>规划环境影响评价条例 (Regulation on Environmental Impact Assessment of Planning)</td>
</tr>
<tr>
<td>2015</td>
<td>环境保护公众参与办法 (Measures for Public Participation in Environmental Protection)</td>
</tr>
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2. Public Participation Approaches in Environmental Protection. — (1) Public Participation in Environmental Impact Assessment.

Article 5 of the 2002 Environmental Impact Assessment Law states that, “the state encourages relevant entities, experts and the public in an appropriate manner participate in environmental impact assessment.” The law establishes specific rules for public participation in Environmental Impact Assessment and Environmental Impact Assessment. Furthermore, specific forms of the right to participate in the environmental impact assessment of certain construction projects such as demonstration meetings, hearings, and
expert seminars have been established in the relevant case law. The Regulation on Environmental Impact Assessment of Planning from 2009 provides specific provisions for public participation during the process of Environmental Impact Assessment in the planning stages.

(2) Public participation in Environmental Administrative License Hearing System.

The Administrative License Hearing system has been established pursuant to Article 46, Article 47, and Article 48 of the 2004 Administrative License Law. The former State Environmental Protection Administration formulated the “Interim Measures for Hearing the Administrative License in Respect of Environmental Protection” on June 17, 2004, and thereby formally established an Administrative License Hearing System within Chinese law. There are three kinds of procedures that can trigger the environmental protection Administrative License Hearing System: The statutory hold, the administrative department of environmental protection decided to hold and apply for hold by litigant.

(3) Public participation in environmental administrative legislation.

Specific laws on public participation which provide the opportunity to take part in environmental administrative legislative hearings do not exist in China, but relevant legislation is currently being drafted. For example, Article 58 of the 2000 Legislation Law provides that “in the process of drafting an administrative regulation, the drafting body shall gather opinions from a wide circle of constituents such as the relevant agencies, organizations and citizens. The gathering of opinions may be in various forms such as panel discussion, feasibility study meetings, hearings, etc.” Article 19 of the Administrative License Law provides: “Where, When drafting laws or regulations or when drafting rules of the people’s governments of provinces, autonomous regions, and municipalities directly under the central Government, the drafting unit plans to institute the procedure for administrative permission, it shall solicit opinions by holding hearings or evaluation meetings or by other means, and shall explain to the formulating departments about the necessity for instituting the same, the impact it may possibly make on the economy and society as well as the opinions it has solicited and adopted.” According to Article 39 of the Interim Measures for Hearing the Administrative License in Respect of Environmental Protection, the administrative department responsible for environmental protection is authorized to draft environmental laws and regulations, or in accordance with authority, to draft environmental regulations which are directly related to the vital interests of citizens, legal persons, and other organizations or relevant agencies. In case organizations and citizens voice major disagreement regarding the draft, the administrative department is supposed to conduct hearings in order to listen to the public opinion.

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Transparency and accountability of public participation in environmental protection are better practiced within the now existing legal framework. Nevertheless, the legislation on procedural provisions for environmental protection and public participation needs to be further refined and rationalized.

**D. Practice of the Right of Access to Justice in China**

According to Article 58 of the Environmental Protection Law, social organizations may file litigation to the People’s Courts when certain activities that cause pollution, ecological damage, or harm the public interest. In addition, Article 64 provides that those who cause environmental pollution damages and ecological destruction shall bear tort liability in accordance with the provisions of Tort Liability Law of the People’s Republic of China. Moreover, Article 66 declares that prosecution with respect to compensation for environmental pollution damage can be conducted for a period of up to three years after the affected became aware of the damage. Due to these standards, the right to access to justice in China includes litigation with respect to the compensation for environmental pollution damage and environmental public interest litigation.

1. **Litigation with Respect to Compensation for Environmental Pollution Damage.** — China’s environmental legislation does not attach too much importance to its connection with civil law, and since there are no specific laws to address environmental disputes and damage compensation in China, the judicial settlement of environmental disputes proves to be quite difficult. Nevertheless, other fields of law take up the issue of environmental damage compensation.

   Article 124 of the General Principles of Civil Law provides that any person who pollutes the environment and causes damage to others in violation of state provisions for environmental protection and the prevention of pollution shall bear civil liability in accordance with the law.

   In addition, Article 125 of the Atmospheric Pollution Prevention and Control Law, Article 85 to Article 88 of the Water Pollution Prevention and Control Law, Article 84 to Article 87 of the Law of the People’s Republic of China on the Prevention and Control of Environment Pollution Caused by Solid Wastes, Article 61 of the Law of the People’s Republic of China on Prevention and Control of Pollution from Environmental Noise, and Article 90 of the Marine Environment Protection Law contain provisions on environmental damage compensation litigation.

   In early December 2015, the General Office of the CPC Central Committee and State Council issued the Pilot Program on Environmental Damages Compensation System Reform, which provides that local provincial governments which have been classified as the rights holders of ecological environment damage compensation by the State Council can specify the relevant departments or agencies responsible in the field of environmental damage compensation.
2. Environmental Public Interest Litigation. — Environmental public interest litigation has been vigorously discussed among environmental law experts and environmental practitioners in recent years. Many scholars and environmentalists have made tremendous efforts to establish environmental public interest litigation. Pursuant to these efforts, the Environmental Protection Law and the Civil Procedure Law have been amended with provisions concerning environmental public interest litigation.78

According to Article 55 of the Civil Procedure Law, an authority or relevant organization as prescribed by law may initiate an action before a people’s court concerning conduct that pollutes the environment, infringes upon the lawful rights and interests of vast consumers, or otherwise damages the public interest. Article 58 of the Environmental Protection Law comprises the right of social organizations to file complaints to the People’s Courts when they become aware of activities which cause environmental pollution, ecological damage, and harm to the public interest.

China has established a system of environmental, civil public interest litigation and public interest litigation filed by procuratorial organs (see Table 5), but uncertainties still remain concerning environmental public interest litigation. For instance, Professor WANG Mingyuan argued that environmental civil public interest litigation could ensure the accountability of the defendant and reduce the risk of procedure. However, this institutional framework tends to make judicial power work in environmental public affairs, which beyond the power of execution, thereby leaving the judicial and administrative powers unbalanced.79

<table>
<thead>
<tr>
<th>Year</th>
<th>Name of laws, regulations and documents</th>
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<tr>
<td>2014</td>
<td>高人民法院、民政部、环境保护部关于贯彻实施环境民事公益诉讼制度的通知 (Notice of the Supreme People’s Court, the Ministry of Civil Affairs, and the Ministry of Environmental Protection on Implementing the Environmental Civil Public Interest Litigation System)</td>
</tr>
<tr>
<td>2015</td>
<td>人民检察院提起公益诉讼试点工作实施办法 (Measure on Pilot Implementation of People’s Procuratorial Organs Filed Public Interest Litigation)</td>
</tr>
<tr>
<td>2015</td>
<td>检察机关提起公益诉讼改革试点方案 (Plan for the Pilot Project of Reform of Instituting Public Interest Litigation by the Procuratorial Organs)</td>
</tr>
<tr>
<td>2015</td>
<td>最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释 (Interpretation of the Supreme People’s Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations)</td>
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Overall, legislation of procedural environmental rights in China has made many improvements and built a relatively complete system, even though some questions on the...

78 LÜ Zhongmei, 环境公益诉讼辨析 (Analysis of Environmental Public Interest Litigation), 6 法商研究 (Studies in Law and Business), 131 (2008).

79 WANG Mingyuan, 论我国环境公益诉讼的发展方向：基于行政权与司法权关系理论的分析 (Development Direction of China’s Environmental Public Interest Litigation: An Analysis Based on the Theory of the Relationship between Administrative Power and Judicial Power), 1 中国法学 (China Legal Science), 49 (2016).
scope and importance of procedural environmental rights remain.

**CONCLUSION**

With the increase in the severity of environmental problems, the discussion on environmental rights has concurrently increased. Discussions on environmental rights not only focus on its concept and exact content, but also address the future development of environmental rights.

Because some scholars are uncertain about the concept of environmental rights, this article tries to outline the content of environmental rights. The notion of environmental rights used throughout this article is based on a broad concept, which includes all environment-related rights. In general, environmental rights have two aspects: substantive and procedural environmental rights. The right to environment, which is mainly discussed amongst Chinese scholars, is part of substantive environmental rights. At the same time, procedural rights are commonly referred to as the right to access information, to publicly participate in and be given the chance to access justice.

The future development of environmental rights is a much-debated issue. Some countries and scholars attempted to find the nexus between environmental and human rights. Even though they have made some major achievements in the past few decades, the connection between these legal fields has not lead to explicit amendments within the scope of international agreements and domestic legislation. Nevertheless many scholars and environmental movements alike welcome the on-going tendency of “greening” other human rights such as the Right to Live and the Right to Health. Even though a substantive environmental right has not been added to the main documents of international environmental law, the awareness of the institutions like the United Nations or the European Union and its respective Courts is rising. Unlike in the case of substantial environmental rights, procedural rights have advanced over the last few years. This development has been marked by the ratification of the Aarhus Convention, which contains deep-rooted rights concerning the access to information, public participation, and access to justice. Following this trend, many domestic Constitutions and Environmental Laws tend to implement procedural rights to safeguard the state’s compliance with existing legal positions related to the environment.

Just like many other nations like the United States, Germany, and Japan, China’s Constitution does not contain the right to environment, but the Environmental Protection Law contains procedural environmental rights including the right to access to information, public participation, and environmental public interest litigation. The various systems of procedural environmental rights are gradually improving in China such that it is reasonable to assume that procedural environmental rights will be the future focus for the discussion on environmental rights.