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Christopher Jeffords
University of Connecticut

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The Human Rights Institute
University of Connecticut
Thomas J. Dodd Research Center
405 Babbidge Road, U-1205
Storrs, CT, 06269, USA

Email: humanrights@uconn.edu
Tel: 860-486-8739
Fax: 860-486-6332
<http://www.humanrights.uconn.edu/>

Constitutional Environmental Human Rights in India: Negating a Negating Statement

Christopher Jeffords¹

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¹ Visiting Assistant Professor of Economics, Eastern Connecticut State University (2012-2013). Assistant Professor of Economics, Indiana University of Pennsylvania (On leave, 2012-2013). Email: jeffordsc@easternct.edu

Abstract:

Based on the December 2011 version of the Constitution of India, this article examines 3 potential ways to “interpret” the legal strength of a broadly defined national constitutional environmental human right. Using text from Articles 43, 47, 48A, and 51A, and paying special attention to the negating statement preceding these articles, the 3 ways are summarized as follows: (1) having or not a constitutional environmental human right; (2) interpreting the constitutional environmental human right as enforceable law or directive principles; and (3) linking the language of the constitutional environmental human right to the underlying definition of an environmental human right. The article notes that although India’s constitution contains a constitutional environmental human right that is best described as a directive principle, its language does not correspond highly with that of current definitions of environmental human rights. Furthermore, its legal strength is severely limited by the presence of the negating statement which, at the very least, would need to be repealed or negated to give life to constitutional environmental human rights in India.

Introduction

The detrimental effects of environmental pollution are a great concern for the health of the planet, especially current and future generations of human inhabitants. As countries progress through various stages of social and economic development, so too does pollution disperse throughout the planet. Air and water pollution, for example, do not respect geographic, political, and temporal boundaries, and can have lingering effects on such aspects of daily life as economic and food security. Individuals, families, and governments alike therefore often face both the direct and indirect costs associated with increased economic and food insecurity. In an effort to combat the full spectrum of environmental harm and its continued presence in the modern world, national governments have taken important, constitutional steps toward mitigating this harm for current and future generations.

As of 2010, the national constitutions of 125 developing and developed countries include provisions for protecting the natural environment in general and for the sake of human life (Jeffords, 2012).¹ These provisions, often referred to as constitutional environmental human rights (CEHR), are essentially entitlements to clean air, water, and soil for present and future generations (Hiskes, 2009).² CEHR can be found directly in national constitutions by way of explicitly discussing the role of government in protecting the environment, for example, and/or indirectly by derivation from some other quality of life aspect such as an adequate standard of living. If one considers an adequate amount of safe drinking water as a human right and an important prerequisite for living a safe, healthy life, then the latter, indirect derivation is an integral component of defining and using CEHR to secure a clean or healthy natural environment for all. In fact, the International Bill of Human Rights does not include direct environmental human rights (EHR), but it does include other human rights from which EHR are derived, such as the right to an adequate standard of living.³ Whether found directly or indirectly, the way in which CEHR are interpreted by a nation's legal system is an important component – if not the most important component – in determining how well any one CEHR addresses environmental harm.

Using text from the Constitution of India (dated December 1, 2011), this article examines 3 potential ways to interpret the legal strength of a broadly defined national CEHR.⁴ Covering both objective and subjective approaches, the 3 ways are defined as follows: (1) having or not a

CEHR; (2) interpreting the CEHR as enforceable law or directive principles; and (3) linking the language of the CEHR to the underlying definition of an EHR. Further complicating interpretation of a CEHR is the presence of negating statements either before or after the CEHR. These statements can directly negate the constitutional power of the CEHR, or refer the responsibility of the environment to the domain of law and policy. Before discussing the 3 separate interpretations, the next section outlines India's CEHR followed by a brief section on the negating statement found in The Constitution of India.

India's CEHR

The whole of India's CEHR is spread out across multiple articles within Part IV – Directive Principles of State Policy. It is outlined directly within Articles 48A and 51A and indirectly through articles 43 and 47. Article 48A – Protection and improvement of environment and safeguarding of forests and wild life – reads: The State shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country. Rather than imposing a duty on the State, this article provides an objective for the State to protect the natural environment.

Article 51A (Part G) within Part IVA – Fundamental Duties – reads: It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers, and wild life, and to have compassion for living creatures. Though this article imposes a duty to protect and improve the natural environment, the obligation is placed on every citizen of India thereby making it difficult to determine who would be responsible for violations of this fundamental duty.

The indirect definition of India's CEHR starts with Article 43 – Living Wage, Etc., for Workers – which reads:

The State shall endeavor to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavor to promote cottage industries on an individual or co-operative basis in rural areas.

This article indirectly allows for the CEHR by way of providing a living wage to workers to ensure a decent standard of life, where the living wage would presumably afford individuals access to clean, safe water, for example.

The second indirect aspect of India's CEHR is found in Article 47 – Duty of the State to Raise the Level of Nutrition and the Standard of Living and to Improve Public Health – which reads:

The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavor to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

As discussed in the introduction, this article indirectly allows for the CEHR through improving the living standards for the people of India. Again, improving access to clean, safe water is arguably a prerequisite (or a corequisite) for improving standards of living.

Negating Statement

Perhaps unfortunately for India's natural environment, the CEHR is preceded by a succinct negating statement in Article 37 – Application of the Principles Contained in this Part – which reads:

The provisions contained in this Part shall not be enforceable by any court but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

As evidenced by the first line of Article 37, anything that follows within Part IV is not justiciable in the court system. Furthermore, the principles outlined in the remaining articles of Part IV are not relegated directly to the domain of law, but are instead guidelines for making national laws and policies (depending, of course, on how strong the duty is perceived). On top of making it impossible to use the court system to address violations of the remaining articles of Part IV, the language of Article 37 perhaps makes the following interpretations of India's CEHR an exercise in futility (at least for the time being).

Having an EHR (or Not)

India's Constitution certainly has an EHR provision, albeit spread out across a few articles. It is not immediately clear, however, that simply having a provision would be useful for adjudicating disputes over environmental harm or protecting the overall state of the natural environment. In this sense, interpreting the CEHR as either enforceable law or directive principles is perhaps a better approximation of the legal *teeth*.

Directive Principles versus Enforceable Law

As Minkler (2009) notes, directive principles are essentially guidelines for State action. Acting as goals to guide policy-making, directive principles do not bind policy-makers to take any specific action.⁵ It is possible, however, that policy-makers are concerned with their elected status and would face reelection repercussions if they failed to incorporate directive principles into actual policy-making. Enforceable law, on the other hand, provides a legal framework for adjudicating human rights violations. Under enforceable law, policy-makers would be forced to enact policies and devote resources toward meeting the goals and guidelines of the CEHR provision or they would face legal ramifications. Based on the negating statement contained in Article 37, it is obvious that India's CEHR is a matter of directive principles and not enforceable law. Yet another way to consider the legal strength of CEHR is to see how well the language links to the definitions of EHR.

Linking the Language of CEHR Provisions to Definitions of EHR

Using original data through 2010, Jeffords (2012) developed a simple index of the legal strength of CEHR by way of a keyword analysis and categorization based on the definition of EHR outlined by Hiskes (2009) and others, including Sax (1990), Weiss (1992), and Collins-Chobanian (2000).^{6, 7} The index is calculated by analyzing any one CEHR for 7 keyword categories, marking a 1 for the presence of the category (0 otherwise), and summing across each category for one nation. The 7 categories are defined as: (1) State duties to protect the environment; (2) State objectives to protect the environment; (3) every citizen's right to information about the status of the environment; (4) every citizen's right to a healthy, clean, and/or safe environment; (5) the concern for future generations and/or sustainable development; (6) a general duty for everyone to respect and protect the environment; and (7) the human right

to water. Despite the timing difference of the data and the date of India's constitution, India's CEHR scores a 2 on the index by summation across Categories 2 (Article 48A) and 6 (Article 51A). Depending on whether or not the full index includes Category 7, the average score across the 125 countries are 2.248 (Categories 1-6) and 2.328 (Categories 1-7). If a higher score indicates a stronger (in a legal sense) CEHR, then the language of India's CEHR is a bit weak. The index counts each keyword category at equal weight, however, and so it is possible that certain categories are more important than others – which may or may not help the legal interpretation of India's current CEHR.

Conclusion

This article described India's CEHR and offered three ways to view or interpret its legal meaning. The first method, though not exactly an interpretation, merely notes that India has a broadly defined CEHR. The second method demonstrated that India's CEHR is a directive principle and not enforceable law. The final method showed that India's CEHR falls slightly below average compared to other developing and developed countries on the simple index of legal strength. With a weighted index, however, this position could change. Regardless, the legal strength of India's CEHR is severely diminished by the presence of the negating statement in Article 37.

Considering that the present CEHR is a directive principle and also scores relatively low on the simple index of legal strength, the negating statement acts to further shrink the avenues through which the citizens of India can seek recourse for EHR violations. Taken as a whole, it seems that the current legal framework based in part on the constitutional structure is not entirely sympathetic towards respecting, protecting, and fulfilling EHR. At the very least, if the government of India is to take EHR seriously at the national level, the negating statement would likely have to be repealed. From there, the relative limitations and inadequacies of India's CEHR can be formally addressed through the various socioeconomic processes which can lead to widespread respect for, and protection and fulfillment of, EHR.

The 3 interpretations of CEHR offered above rely on the underlying definition of EHR, which is built on and derived from a long history of the theory and practice of human rights. So as our understanding of EHR evolves over time, so too will our interpretation of CEHR. Coupled with

the role of case law, perhaps this evolution will translate into a justiciable CEHR for the people of India or, at the very least, some stronger language in India's Constitution. Of course all of this hinges on the preferences of India's people and its government. Do they want a legally enforceable CEHR?

Notes:

1. Christopher Jeffords, 'Constitutional Environmental Human Rights: A Descriptive Analysis of 142 National Constitutions' in *The State of Economic and Social Human Rights: A Global Overview*, Lanse Minkler ed., Cambridge University Press, Cambridge, MA, USA, December 2012, Chapter 13.
2. Richard Hiskes, *The Human Right to a Green Future*, Cambridge University Press, Cambridge, MA, USA, 2009.
3. The International Bill of Human Rights consists of the following 3 binding articles of international law: (1) the Universal Declaration of Human Rights; (2) the International Covenant on Economic, Social, and Cultural Rights; and (3) the International Covenant on Civil and Political Rights. The right to an adequate standard of living is outlined in Article 25 of the Universal Declaration of Human Rights.
4. The Constitution of India, Government of India, Ministry of Law and Justice, December 1, 2011.
5. Lanse Minkler: 'Economic Rights and Political Decision Making' *Human Rights Quarterly*, Vol. 31, No. 2, 2009, pp. 368-393.
6. Ibid. notes 2 and 3. Joseph Sax: 'The Search for Environmental Rights' *Journal of Land Use and Environmental Law*, Vol 6., 1990-1991, pp. 93-105.; Edith Brown Weiss: 'In Fairness to Future Generations and Sustainable Development' *American University Journal of International Law and Policy*, Vol. 8, No. 19, 1992-1993.; Shari Collins-Chobanian: 'Beyond Sax and Welfare Interests' *Environmental Ethics*, Vol. 22, 2000, pp. 133-148.;

7. In this sense, the index fails to capture the indirect derivations of EHR as discussed above. See the paper cited above for a more detailed explanation of the strengths and weaknesses of this index, as well as for the full data set.