

Human Rights Litigation before Indian Courts as an Example and Resource for other Asian States

By Devasheesh Bais and Vinamra Kopariha
FICHL Policy Brief Series No. 64 (2016)

1. Introduction

In the past seven decades, Asian States have undergone significant economic development while organising themselves politically at the end of colonial occupations and in the aftermath of the Second World War. Even though many States in Asia have adopted multiple-party democratic systems and matched the economic development of their Western counterparts, their interpretation and application of human rights principles differ significantly from Western liberal democracies.¹ The debates on cultural relativism (such as that on ‘Asian values’) have impeded the realisation of international human rights in Asia.²

A notable exception to this is India which stands out in Asia as a major contributor to the theory and practice of human rights.³ While a progressive constitution and an independent and active judiciary have led to India’s rich human rights practice, India has had a long tradition of freedom and tolerance dating back to the rule of Ashoka in the third century B.C.⁴

India’s comprehensive human rights practice was essential given the cultural, ethnical, lingual, and religious diversity of India, so that rights of all Indians and even non-Indians present on Indian soil are well protected. India’s vast range of issues has produced a massive human rights jurisprudence that can provide other Asian States

with good precedence. Unsurprisingly, Indian case law has been used by other Asian States to develop their own human rights jurisprudence.⁵

This policy brief highlights the salient features of human rights litigation in India and the conditions and actors which were instrumental in developing it. While this brief will largely note the positive aspects of human rights litigation in India; some shortcomings are also noted.

2. Indian Constitution and Access to Justice

The Constitution of India (‘Constitution’) guarantees Fundamental Rights which include, amongst others, right to equality,⁶ right to freedom⁷ (encompassing freedom of speech and expression, right to assemble peaceably, freedom of movement and residence, freedom to form associations, freedom to practise any profession, or to carry on any occupation, trade or business), and protection of life and liberty.⁸ The Constitution also provides non-justiciable Directive Principles of State Policy⁹ (‘DPs’), which contain important social, economic, and cultural rights.

In a state of emergency, enforcement of Fundamental Rights can be suspended except the right to protection of life and personal liberty and rights of those accused of a criminal offence, such as non-retroactivity of criminal laws, *ne bis in idem*, and safeguards against self-incrimination.¹⁰

An empowered judiciary protects not only the Fundamental Rights but also the sanctity of the Constitution. While the Constitution is amendable, and it has been amended frequently, certain features, which have been adjudged by the Supreme Court to form the basic structure

1 Randall Peerenboom, “An empirical overview of rights performance in Asia, France, and the USA”, in Randall Peerenboom, Carole J. Petersen, and Albert H.Y. Chen (eds.), *Human Rights in Asia*, Routledge, 2006, p. 1.

2 Nghia Van Hoang, “Transcendent Values of Universal Human Rights”, in *Korea University Law Review*, 2015, vol. 18, no. 15, p. 34.

3 Albert C.Y. Chen, “Comparative reflections on human rights in Asia”, in Peerenboom *et al.* (eds), 2006, *supra* note 1, p. 500; Brian Galligan, “Human rights in Asia: comparative reflections”, in Thomas W.D. Davis and Brian Galligan (eds.), *Human Rights in Asia*, Edward Elgar, 2011, p. 221.

4 Amartya Sen, “Human Rights and Asian Values”, in Sixteenth Annual Morgenthau Memorial Lecture on Ethics and Foreign Policy, 25 May 1997.

5 Iain Byrne and Sara Hossain, “South Asia”, in Malcolm Langford (ed.), *Social Rights Jurisprudence*, CUP, 2009, p. 126.

6 Article 14, Indian Constitution (<http://www.legal-tools.org/doc/7a26ed/>).

7 *Ibid.*, Article 19.

8 *Ibid.*, Article 21.

9 *Ibid.*, Part IV.

10 *Ibid.*, Article 359(1).

re of the Constitution, cannot be amended.¹¹

The cornerstone of Indian human rights litigation is the unassailable right to a constitutional remedy for violations of Fundamental Rights. The judiciary is empowered by the Constitution to be an independent enforcer of this right.¹² The Supreme Court and High Courts may pass any direction, order or writ for the enforcement of Fundamental Rights.¹³

A right is merely symbolic if the right bearer is not aware of it or cannot enforce it effectively. The large social and economic disparities of India have given rise to communities which are not aware of their rights much less have the means to enforce them. The harbinger of human rights litigation in India was the dilution of *locus standi* in the late 1970s by the Supreme Court.¹⁴ The Supreme Court relaxed the strict rule of *locus standi* which allowed only a person who suffered a specific legal injury to maintain an action for judicial redress.¹⁵ The Court ruled:

where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right . . . [who] by reasons of poverty, helplessness, or disability or socially or economically disadvantaged position, unable to approach the Court for any relief, any member of the public can maintain an application for an appropriate direction, order or writ.¹⁶

This broad rule of *locus standi* gave standing to any member of the public acting *bona fide* and having sufficient interest to maintain an action for redressal of a public wrong or public injury caused by an act or omission of the State or a public authority which is contrary to the Constitution.¹⁷

The Court, recognising that victims of rights violations may not have easy access to justice, relaxed the procedural requirement of filling writ petitions before it and decided to treat letters addressed to it by victims or public-minded people as writ petitions.¹⁸ Thus, when a prisoner wrote a letter to the Supreme Court detailing the acts of torture being perpetrated on a fellow prisoner, the Court accepted it as a writ petition.¹⁹

Justice is also made more accessible by public-spirited lawyers working, individually or collectively in an organisation, to advance human rights by, *inter alia*, providing legal aid and conducting legal literacy and awareness programmes. These human rights organisations and lawyers co-ordinate and work with social activists to agitate

various social issues in Courts. Law graduates in India are often willing to join the offices of such actors as they receive invaluable training by getting to work on complex and difficult cases. A good law education in India is cheaper as compared to some of the Asian countries and the costs relating to bar enrolment are also comparatively less. Thus, a fresh law graduate in India is not indebted and free to pursue a career in human rights law which might not be as financially rewarding as other fields of law. Consequently, human rights organisations are able to recruit bright legal minds which in turn improves their work.

India also has legal services authorities from national to district and sub-district levels. They ensure legal aid to persons from weaker sections, collect and disburse funds for facilitating free legal representation to such persons, and provide legal awareness.²⁰

3. Lack of Effective Human Rights Act

One of the shortcomings of the human rights practice in India is the lack of a human rights legislation which provides effective and readily accessible legal remedies for infringement of human rights. At present, the Protection of Human Rights Act, 1993 is in force and while it recognises all the rights in the Constitution as well as the International Covenant for Civil and Political Rights and the International Covenant for Economic Social and Cultural Rights,²¹ the remedies provided by the Act are neither effective nor readily accessible.

The Act creates the Human Rights Commissions at the national and state levels, which have the power to investigate human rights violations – on receipt of a complaint or *suo motu* – and make recommendations to the concerned governments. However, the reports and recommendations of the Human Rights Commissions are not binding on the governments and are rarely accepted. The present Chief Justice of India has bemoaned the non-binding nature of the Commissions' recommendations.²² Moreover, in most states the State Human Rights Commissions were not established and in 2015, the Supreme Court had to direct state governments to do so.²³

Section 30 of the Act also provides for the establishment of special district-level human rights courts. These courts, if established, will be accessible locally, thus removing the expense involved in litigation before the Supreme Court or High Courts. District level human rights courts can redress infringements by public officials and private persons (including companies and other legal en-

11 *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

12 Article 32 and 226, Indian Constitution.

13 *Ibid.*

14 *Hussainara Khatoon v. State of Bihar*, (1980) 1 SCC 98.

15 *S.P. Gupta v. President of India*, (1981) Supp 1 SCC 87.

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*

19 *Sunil Batra v. Delhi Administration*, (1978) 4 SCC 494.

20 Legal Services Authorities Act, 1987.

21 See Section 2(d) and 2(f) of Protection of Human Rights Act, 1993.

22 Review PHR Act to make Human Rights Commissions more effective, says Chief Justice of India on Human Rights Day, 10 December 2015, available at <http://nhrc.nic.in/dispArchive.asp?fno=13798> (last accessed on 4 June 2016).

23 *D.K. Basu v. State of West Bengal*, (2015) 3 SCC (Cri) 824.

tities), whereas the Supreme Court and High Courts can only enforce the Fundamental Rights against the State authorities. District-level human rights courts, as opposed to constitutional courts, can also try facts and award damages including punitive damages for human rights infringements such as in tortious cases. Special courts in each district will also ensure a faster rate of case disposal. However, even after the Supreme Court direction to state governments to consider setting up district-level human rights courts,²⁴ there have been no developments in this regard.

4. Liberal Interpretation of the Constitution

India's judiciary has interpreted the Constitution to extend the purview of enforceable rights and the remedies available for their enforcement. Courts have achieved this by first, liberally (and harmoniously, with the other provisions of the Constitution) interpreting the Fundamental Rights to widen the scope of rights expressly provided in the Constitution; and, secondly, expanding the scope of its own jurisdiction and powers of judicial review. The former brought in certain social and economic rights into the fold of Fundamental Rights which were originally mostly civil and political rights, whereas the latter expanded the judicial remedies available for enforcement of Fundamental Rights.

4.1. Liberal Interpretation of Fundamental Rights

The Constitution already provides a wide array of Fundamental Rights. However, given the stark social and economic disparities in India, the Supreme Court has expanded the scope of these rights. Thus, the right to life has been interpreted to mean not "mere animal existence" (which a large section of the Indian population given their abject poverty and extremely low social capital are condemned to), but a right to enjoyment of a meaningful and dignified life.²⁵

The "right to life with dignity" has become a compendious term which has been interpreted to include, amongst others, the right to protection of privacy in cases of domiciliary visits from police,²⁶ the right of weaker sections of society to shelter,²⁷ right to freedom from malnutrition and hunger,²⁸ and the right of tribals to live in forest areas with incidental rights such as fodder and fuelwood.²⁹

In *Mohini Jain v. State of Karnataka*,³⁰ the Supreme

24 *Ibid.*

25 *Francis Mullen v. Administration, Union Territory of Delhi*, (1981) 1 SCC 618.

26 *Kharak Singh v. State of Uttar Pradesh AIR*, 1963 SC 1295; *Gobind v. State of Madhya Pradesh AIR*, 1975 SC 1378.

27 *Shantistar v. Narayan*, (1990) 1 SCC 520.

28 *People's Union for Civil Liberties v. Union of India*, (2010) 15 SCC 147.

29 *Banwasi Seva Ashram v. State of Uttar Pradesh*, (1986) 4 SCC 753.

30 *Mohini Jain v. State of Karnataka*, (1992) 3 SCC 666.

Court read the DPs to interpret that the "right to education" is implicit in the right of a citizen to lead a dignified life. The Supreme Court reasoned that a large majority of illiterate citizens will not be able to realise the freedoms and rights guaranteed to them as Fundamental Rights. For instance, the right to freedom of speech and expression cannot be appreciated and fully enjoyed by citizens unless they are educated and conscious of their individual dignity.³¹ Thus, the non-justiciable DPs were read into an enforceable "right to education". However, in doing so the Supreme Court did not indulge in an unbridled exercise in judicial activism but bound itself to the duties of the State mentioned in DPs.

4.2. Expanding the Scope of Judicial Review and Powers of the Court

The wide and unqualified jurisdiction of the Supreme Court and the High Courts to pass any order for the enforcement of Fundamental Rights has been used to not only judicially review the actions or inactions of the executive and legislative branches, but also to provide citizens with an innovative array of legal remedies. *Vishakha v. State of Rajasthan*³² was a case where the State had failed to provide any law to prevent or punish sexual harassment of women in the workplace and there existed a legal vacuum in the field. The Supreme Court in order to enforce women's fundamental right to freedom of profession, right to equal protection of law and the right to personal liberty, undertook the legislative exercise of making guidelines for prevention of sexual harassment at the workplace. Though contrary to the basic tenets of separation of powers and representative democracy, the guidelines continued to be the only law protecting women from sexual harassment at the workplace for 16 years until the Indian Parliament finally enacted legislation in 2013.³³

In *Bandhua Mukti Morcha v. Union of India*,³⁴ the Supreme Court of India was moved to abolish the practice of bonded labour and slave labour in India. Although there was legislation in place prohibiting and criminalising bonded and slave labour, these laws were poorly implemented. In this case, the Supreme Court exercised its powers to appoint Commissioners to inspect the quarries where the abhorrent practices were rampant and submit their report to Court. On the basis of the reports, the Court directed the Government to draw a scheme for rehabilitation of bonded workers and itself issued guidelines for providing humane work conditions. Finally, the Court directed the concerned state government to submit reports of compliance to the Court showing a proper implementation of the above scheme and guidelines.

31 *Ibid.*, para 13.

32 (1997) 6 SCC 241.

33 Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

34 (1984) 3 SCC 161.

Similar monitoring of the implementation of government policies can be seen in the *People's Union for Civil Liberties v. Union of India*,³⁵ where the Court has been monitoring the implementation of food supply policies from the year 2001 until today.

Another innovative judicial remedy for enforcement of Fundamental Rights developed by the Indian judiciary is the payment of compensation (normally granted by civil courts trying claims for damages) by the Supreme Court and High Courts in purely constitutional law proceedings and without any trial of facts, to victims of gross and serious violations of Fundamental Rights such as custodial killings by police³⁶ and illegal detention by the police.³⁷

The above cases demonstrate that courts in India have been highly active and innovative in expanding the scope of Fundamental Rights and their enforcement. Although the manner and extent of judicial activism have been a subject of criticism. There have been various public calls, one even from the President of India, for the judiciary to tread carefully so as not to encroach on the prerogatives of the legislature and the executive.³⁸ Scholars have argued that certain acts of Courts, such as creation of new laws by issuing guidelines, are not legitimate judicial functions and violate the doctrine of separation of powers in the Constitution.³⁹ Unguided judicial discretion has led to inconsistencies in selecting cases for judicial intervention.⁴⁰

5. Conclusion

Human rights practice in India would not have been the same but for an independent and highly active judiciary. In relaxing the rules of standing and procedure, Indian courts made the judiciary accessible for Indian masses to seek the enforcement of their human rights. Public spirited lawyers and the civil society have made sure that issues plaguing the most disadvantaged sections of Indian society reach the Indian courts.

35 (2010) 15 SCC 147.

36 *Nilabati Behera v. State of Orissa*, (1993) 2 SCC 746.

37 *Rudul Shah v. State of Bihar*, (1983) 4 SCC 141.

38 "Rein in judicial activism: Pranab", *The Hindu*, 17 April 2016, available at <http://www.thehindu.com/news/national/rein-in-judicial-activism-pranab/article8483829.ece> (last accessed on 1 June 2016).

39 S.P. Sathe, "Judicial Activism: The Indian Experience", in *Journal of Law & Policy*, 2001, vol. 29, no. 6, p. 88.

40 Surya Deva, "Public Interest Litigation in India: A Critical Review", in *Civil Justice Quarterly*, 2009, vol. 28, no. 1, p. 37.

Developments outside the judicial sphere make it clear that the legislature and executive have been ineffective in protecting and expanding the human rights of Indians. Consequently, the judiciary had to fill the lacunae in governance by liberal interpretation of the Constitution, issuance of guidelines, and monitoring the performance of executive agencies. An independent judiciary which does not yield to the expectations of the legislature or executive is paramount to the expansion and realisation of human rights. However, the judiciary must tread carefully when overruling the acts of the executive and legislature; overzealousness here might be perceived as undermining the democratically elected government and by extension the will of the people.

There still remain glaring blind spots in the Indian human rights practice. Avenues of justice are so far and few that most Indians accept rightlessness as a fact of life and for those who dare to yearn for freedom justice is not without undue delay. Lack of a robust human rights act and human rights courts at the district-level exemplify the superficial nature of human rights initiatives by the legislature and executive. The fears of judicial over-reach are justified, but if the judiciary does not over-reach, human rights will only remain a false promise.

Human rights litigation in India is far from perfect but nonetheless has achieved significant results. Other Asian States may derive inspiration from Indian experience and expand the human rights protection in their jurisdictions while taking heed of the shortcomings of the Indian model.

The rapid economic growth of China and India has made observers name the twenty-first century the 'Century of Asia', while it has been questioned whether the century will be an "Age of Rights".⁴¹ Looking at India, which is going to surpass China's population by 2022, it just might be an "Age of Rights".

Devasheesh Bais is Research Assistant, Centre for International Criminal Justice and Humanitarian Law, O.P. Jindal Global University, N.C.R. of Delhi. *Vinamra Kopariha* is an Advocate at the High Court of Judicature at Bombay.

ISBN: 978-82-8348-043-6.

FICHL-PURL: <https://www.ficjl.org/pbs/64-bais-kopariha/>.

LTD-PURL: <http://www.legal-tools.org/doc/a96555/>.

41 Galligan, 2011, see *supra* note 3, p. 213.