

India

The judicial system in India remained overburdened but able to function independently. There was some controversy during the year regarding the lack of members of lower castes and indigenous populations in higher judicial office. Also, the end of the year was marked by large demonstrations by lawyers, which turned violent, over proposed changes to the rules regarding the legal profession. Generally, human rights violations continued to be a problem in India, particularly resulting from the Kargil conflict in Jammu and Kashmir in May.

India became independent from British rule in 1947 and its Constitution came into force in January 1950. The Constitution of India embodies the separation of powers and establishes India as a "Sovereign Socialist Secular Democratic Republic". The Constitution creates a federal union of 25 states and seven union territories.

The executive power of the Union is vested in the President, aided by a Council of Ministers headed by the Prime Minister, whose advice the President is obliged to follow. Although largely a ceremonial position, the President can exercise influence over the selection of the appropriate candidate for Prime Minister and in requiring the government to submit to confidence motions.

The President is elected for five year terms by the elected members of both houses of parliament and the legislative assemblies of the states, and is eligible for re-election. The current President is K. R. Narayanan. Members of the Council of Ministers are appointed by the President on the advice of the Prime Minister and hold office during the pleasure of the President. The Council of Ministers consists of members of either house of parliament and is collectively responsible to the House of the People.

Parliament consists of the President and two separate houses, the Council of States (Rajya Sabha) and the House of the People (Lok Sabha). The Council of States is composed of 12 members appointed by the President and 233 representatives elected by the legislative assemblies of the states and union territories. The House of the People consists of 543 members directly chosen by proportional representation in elections in the states and union territories. The President can also appoint two members to represent the Anglo-Indian community if he believes they are underrepresented. The Council of States cannot be dissolved and its members are elected at staggered biennial elections, whilst members of the House of the People serve 5 year terms, unless dissolved sooner.

Each state has its own parliament and executive. Article 356 of the Constitution allows the President to assume any of the functions of the government of the state, and declare that the powers of the legislature of a state be exercised by the Union parliament. The President can invoke "President's rule" upon receipt of a report from the governor, or if otherwise satisfied, that the government of a state cannot be carried out in accordance with the Constitution.

The BJP led coalition government of Prime Minister Shri Atal Bihari Vajpayee lost a confidence vote in the House of the People by one vote in April 1999. After elections held in September-October, the BJP and its National Democratic Alliance of 14 parties formed a government. Shri Atal Bihari Vajpayee was sworn in as Prime Minister on October 13 1999.

In May and June 1999 armed conflict occurred in the disputed region of Jammu and Kashmir. Islamic militants, allegedly backed by Pakistani forces, crossed the line of control near the town of Kargil in late May, resulting in heavy fighting. The fighting continued until an agreement was signed by both sides to withdraw on July 18 1999.

Human Rights Background

The Constitution of India contains certain fundamental rights that must be respected by the state. Part III also guarantees the right to petition the Supreme Court for the enforcement of the fundamental rights contained in the Constitution. The Supreme Court has also developed the notion of Public Interest Litigation. This allows a publicly spirited individual or social action group to petition the court on behalf of a socially and economically disadvantaged group who have suffered a legal wrong.

India is also a party to the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. India has signed, but not ratified, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requiring it to not act in a manner that would defeat the object and purpose of the treaty before its entry into force.

Human Rights Violations

Violations of fundamental human rights in India continue to be serious. Violations by the armed forces sometimes go undetected, are tried in military courts by a secretive court martial procedure or are subject to a weak supervisory mechanism by the National Human Rights Commission. Violations of human rights are of particular concern in the areas of Jammu and Kashmir, Punjab, and the North Eastern states.

Most human rights violations occur in areas of internal armed conflict or result from religious and racial discrimination and violence. Torture, extra judicial killings, rape and disappearances are frequently perpetrated by armed and security forces, and by militant forces supported by the government. Armed opposition groups also commit serious abuses. In the Kargil conflict in May many civilians were killed in the military action and from an increase of revenge violence by militant forces.

Discrimination based on caste (dalits) or against members of the indigenous population continues to be pervasive. Dalits are considered to be unclean and outside the caste system and, as a result face violence, discrimination in labour, education and land ownership. Violence between castes also continues to be a serious problem, with an escalating cycle of attacks and reprisal attacks by members of different castes. These problems are particularly of concern in the state of Bihar, Tamil Nadu and Uttar Pradesh. In February 1999, caste violence in Bihar resulted in the suspension of the state government and the imposition of direct rule by the President.

In the north eastern states of Arunachal Pradesh, Nagaland and Manipur members of the security forces commit extra-judicial killings and make use of torture and illegal detention to suppress political, and often violent, dissent by members of independence organisations.

Civilians are often caught in the crossfire and other human rights defenders are subjected to violence and threats due to their perceived political activities.

Religious violence increased this year, particularly against Christians. Christian churches and schools were destroyed, and people accused of converting others to Christianity were subjected to physical violence. In Orissa in January 1999, an Australian missionary and his two sons were murdered, and in August a Muslim man was killed and set on fire in front of 400 witnesses. Members of leading political parties such as the BJP and Shiv Sena, a Hindu party, often support this violence.

Human Rights Commissions

A National Human Rights Commission (NHRC) was established under the Protection of Human Rights Act 1993 (PHRA). The NHRC is empowered to inquire into alleged violations of, and intervene in legal proceedings involving, human rights, however its powers are recommendatory only. It can utilise the services of government investigation agencies with the consent of the government for the purposes of conducting an investigation. The Commission has limited powers to summon witnesses and require the production of public documents. The act authorises the creation of State Human Rights Commissions with similar functions and powers.

Alleged human rights violations by the members of any of the federal armed forces cannot be inquired into by the NHRC. In this area it is limited to requesting a report from the government and the making of recommendations based upon that report. The Commission's inquiry powers are also restricted in relation to Jammu and Kashmir. The NHRC can only inquire into matters relating to entries in List I and List III of the Seventh Schedule of the Constitution, thereby excluding violations, inter alia, related to the police, prisons and public order of a state. Article 36(2) of the act limits the NHRC to inquire into matters occurring within one year of the alleged violation. These limitations were criticised by the Human Rights Committee in 1997 (see Attacks on Justice 1998).

A review of the PHRA was undertaken by an advisory committee established by the NHRC in June 1998, and it delivered its report in October 1999. The Advisory Committee recommended, inter alia, that financial autonomy be secured; the definition of armed forces be changed so that the NHRC can inquire into human rights violations by paramilitary forces; and that the national and state human rights commissions be allowed to investigate violations after a year has expired if there is sufficient reason for not filing a complaint within the required period.

The PHRA also authorises the creation of Human Rights Courts, which have been established in Tamil Nadu, Uttar Pradesh and Andhra Pradesh. These courts have not been established as separate courts, but hear cases in special hearings of Sessions Courts.

Restrictive Legislation

Several pieces of legislation contribute to impunity in India. The Armed Forces (Special Powers) Act (AFSPA) and the Disturbed Areas Act continue to be in effect in several states. This AFSPA allows officers to use lethal force in response to a suspicion of, or the commission of, an offence against a law prohibiting the freedom of assembly or the carrying of weapons, or things capable of being used as weapons. This force can be used after the

giving of such prior warning that the officer considers necessary, and the officer must be of the opinion that it was necessary to do so to maintain public order. The AFSPA also allows the army to arrest without a warrant, using such force as is necessary, anyone who is suspected of, has committed, or is about to commit any offence.

Section 197 of the Criminal Procedure Code (CPC) prohibits the commencement of legal proceedings against members of the armed forces and public servants acting in their official capacity without the prior consent of the relevant government. Section 6 of the AFSPA similarly restricts the commencement of proceedings without prior consent against members of the armed forces acting under the act.

The National Security Act and the Jammu and Kashmir Public Safety Act permit the detention of people considered to be a security risk. Detention periods can be for up to a year, subject to approval by three High Court judges after seven weeks of detention. Under the Terrorism and Disruptive Practices (Prevention) Act, which lapsed in 1995, many violations of human rights occurred. People continue to be detained under this act due to delays in being brought to trial in special courts. The Law Commission of India has advocated the revival of this act.

Threats to NGO's

In September 1999, the government threatened strong use of the Foreign Contribution (Regulation) Act 1976 to limit contributions to NGO's which it perceived to be acting politically. This act provides that organisations of a political nature must receive prior approval by the government before they can receive foreign funding. The government sent certain NGO's a presumptive notice classifying them as a political organisation which they were required to refute. The NGO's targeted by the government's action had sponsored an advertisement promoting a peoples' agenda on secularism, social justice and gender issues. These threats clearly constitute an attempt to intimidate these organisations and interfere with the important role they play in defending human rights.

Judiciary

India operated under British rule until 1947 and its legal system has largely been shaped by the common law tradition. The Indian judiciary plays a central role within the Indian constitutional structure, with the right to apply to the Supreme Court for the enforcement of the fundamental rights contained in the Constitution in Article 32, itself a fundamental right. The Constitution is the fundamental law of the land and actions of state organs are subject to judicial review.

Under the terms of List III, Schedule 7 of the Constitution of India, the central and state governments have concurrent responsibility for the administration of justice, criminal law and procedure, and civil procedure. Matters involving the development or use of any armed forces of the Union, or use of the civil power, remain within the competence of the central government. States have exclusive competence with respect to police and public order. The Attorney General is responsible for providing advice to the government on all legal matters and for the performance of all duties of a legal character that may be assigned by the President.

Schedule 7 of the Constitution also provides that the central government has exclusive authority to determine the constitution, organisation and the people entitled to practice before the Supreme Court and the High Courts, and the jurisdiction and powers of the Supreme Court. Jurisdiction can be conferred on other courts by the central and state governments in accordance with their legislative competencies. Provisions regarding officers and servants of the High Courts come within state power.

Court Structure

The Supreme Court sits at the apex of the court structure and its decisions are binding on all lower courts. Section 131 of the Constitution gives it original jurisdiction to hear any dispute between the government and the states, or between states if and in so far as the dispute involves any question, whether of law or fact, on which the existence of a legal right depends. The Supreme Court has appellate jurisdiction from any judgement, decree or final order of a High Court, if the High Court certifies that a party can appeal under Article 134A, in:

- civil, criminal or other proceedings, if the case involves a substantial question of law as to the interpretation of the Constitution: Article 132;
- civil proceedings that involve a substantial question of law of general importance: Article 133;
- criminal proceedings where the High Court has, on appeal, reversed an order of acquittal, or withdrawn a case from a subordinate court for trial before itself and subsequently convicted the person, and then sentenced the person to death, or if the High Court believes the case to be fit for appeal to the Supreme Court: Article 134.

Article 136 grants the Supreme Court a discretionary power to grant special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed by or made by any court or tribunal in the territory of India. The President can also request an advisory opinion from the Supreme Court, under Article 143, on a question of law or fact that has arisen or is likely to arise. Cases involving the determination of a substantial question of law as to the interpretation of the Constitution, and requests for an opinion under Article 143 must be heard by a panel of at least five judges. The seat of the court is in Delhi.

Chapter V, Part IV of the Constitution creates a High Court of Record for each state, and Article 241 extends the provisions of that chapter to any High Courts created for union territories. Each existing High Court, subject to the Constitution, has the same jurisdiction as it had before the commencement of the Constitution. All High Courts have such jurisdiction as may be conferred on them by the central or state governments on subject matters within their legislative competencies. High Courts also have original jurisdiction to issue writs and orders for the enforcement of the fundamental rights contained in Part III of the Constitution. State High Courts have a supervisory power over all subordinate courts and tribunals in areas where they exercise jurisdiction. There are currently 18 High Courts.

The Constitution places the power to establish subordinate courts within the competence of both the central and state governments. Article 235 places the administrative control of all district and other subordinate courts in the High Court of that state. Special tribunals and courts are under the judicial control of the High Courts and the Supreme Court. Section 6 of the Criminal Procedure Code 1973 requires that the following criminal courts, in descending order of superiority, be created in each state: Courts of Sessions, Judicial Magistrates of the First Class, Judicial Magistrates of the Second Class and Executive Magistrates. Similarly,

the Civil Procedure Code 1908 requires the establishment of a District Court. The Sessions and District Courts are the principal courts of original jurisdiction in civil and criminal matters subordinate to the High Court. The precise jurisdiction of these courts and their names vary from state to state.

Judges

The independence of judges is safeguarded by extensive constitutional provisions regarding their selection, conditions of tenure and removal. The main threats to judicial independence in India derive from an overburdened court system and from the lack of enforcement of their decisions in areas of armed conflict, such as in Jammu and Kashmir.

Selection

Article 124 of the Constitution of India states that every judge of the Supreme Court shall be appointed by the President after consultation with such judges of the Supreme and High Courts as the President may deem necessary. In the case of appointments other than the Chief Justice, the Chief Justice shall always be consulted. Article 217 provides that every judge of a High Court shall be appointed by the President after consultation with the Chief Justice of India and the Governor of the state, and in the case of appointments other than the Chief Justice of a High Court, the Chief Justice.

The Supreme Court of India, in *Supreme Court Advocates-on-Record Association v Union of India* 1993(4) SC 441 (the Second Judges Case), ruled on the selection process for judges. The court ruled that the Chief Justice has a pre-eminent position in the appointment process. The Chief Justice is responsible for the initiation of the process, and no appointment can be made without the consent of the Chief Justice.

In Special Reference No. 1 of 1998 (JT 1998(5)) the court further stated that consultation with the Chief Justice required consultation by the Chief Justice with the four most senior judges of the Supreme Court in the formation of the opinion of the Chief Justice. The individual opinion of the Chief Justice was not sufficient to be considered a consultation.

The practical effect of the 1988 decision resulted in some controversy. The decision laid out in detail the procedure for appointments and transfers of judges, with the final authority lying with the judiciary. After the decision the President took an active role in ensuring that all the procedural requirements set down in the decision were followed. A difference of opinion between the President and the Chief Justice as to whether appointments of High Court judges as Chief Justices of other High Courts should be considered appointments or transfers, resulted in delays in the filling of vacancies. Appointments and transfers entailed different procedural requirements. The responsibility for the selection and transferral of judges lies exclusively with the judiciary, with the President unable to approve such an action without the consent of the Chief Justice of the Supreme Court.

The President, in considering the appointment of four Supreme Court judges, also suggested that "it would be consonant with constitutional principles and the nation's social objectives if persons belonging to weaker sections of society like scheduled castes and scheduled tribes, who comprise 25% of the population, and women are given due consideration." The President further suggested that such candidates are available and their under-representation is not justifiable.

Part VI, Chapter VI governs the appointment of judges to subordinate courts. Article 233 provides that the appointment of district judges shall be made by the Governor of the state in consultation with the High Court of the state. Appointments of persons other than district judges to the judicial service of a state shall be made by the Governor in accordance with rules made by him after consultation with the State Public Service Commission and the High Court of that state. The provisions of this chapter can be extended to any class of magistrate upon public notification by the Governor.

Conditions of Tenure

Articles 124 and 217 provide that Supreme Court and High Court judges shall hold office until attaining the age of 65 and 62 years respectively. Articles 125 and 218, in conjunction with Part D of the Second Schedule, provide that judges of the Supreme and High Courts shall be paid a salary and entitled to such privileges, allowances and rights as may be determined by law. The latter benefits may not be altered to their disadvantage after their appointment to office. These salaries and benefits were increased by the legislature in 1998.

Removal

The Constitution provides that Supreme and High Court judges cannot be removed from office except by an order of the President passed in the same session after an address by each house of parliament, supported by a majority of the total membership of that house, and by a majority of not less than two thirds of those voting and present. Removal can only be on the grounds of proved misbehaviour or incapacity.

Under the Judges (Inquiry) Act 1968, 100 members of the House of the People (Lok Sabha) or 50 members of the Council of States (Rajya Sabha) can request their respective Speaker or Chairman of the House to consider material relating to accusations of misbehaviour or incapacity. A committee consisting of a Supreme Court judge, a Chief Justice of a High Court, and an eminent jurist is formed to inform the judge of the charges against him and to allow him to defend himself. If the committee is of the opinion that misbehaviour or incapacity have been proved they will report this to parliament for action. Members of the subordinate judiciary can only be removed by the High Court, in its administrative capacity.

Lawyers

In late 1999 and early 2000 large protests and strikes were held by lawyers against changes proposed by the Code of Civil Procedure (Amendment) Bill 1999 and other changes to the Advocates Act 1961. The changes were aimed at alleviating the excessive delays in the administration of justice, improving the quality of legal services and incorporating changes required by the General Agreement on Trade and Services.

Two issues regarding the legal profession were of concern to the lawyers. A working paper had proposed that advocates would be subjected to an assessment every five years before their licence to practice would be renewed. It was reported that the lawyers were concerned that the mechanism for evaluation would not be sufficiently independent. Also, changes that would allow foreign firms and individuals to practice in India were objected to on the grounds that the principle of reciprocity, a requirement for access, would not be followed in practice.

On 21 December 1999, approximately 3,500 lawyers in Delhi who protested the changes were detained and later released. A further protest occurred on 24 February 2000. Approximately 33 lawyers were injured when the police responded with tear gas and a cane charge against lawyers who allegedly attempted to force their way through barricades. On 15 March 2000 the Delhi government suspended three junior police officers and transferred two Assistant Commissioners of Police involved in the police action on 24 February 2000. A press release by the Home Department stated that "some police officials used force against some individual lawyers, including a lady lawyer, which was unwarranted and should have been avoided."

Principle 23 of the Basic Principles on the Role of Lawyers guarantees lawyers the rights to freedom of expression, belief, association and assembly and in particular the right to participate in matters concerning the law and the administration of justice. The UN Code of Conduct for Law Enforcement Officials, adopted by the General Assembly, requires that force only be used when strictly necessary and to the extent required for the performance of their duty.

The Union government announced on 28 March 2000 that an inquiry commission, constituted by retired Justice N. C. Kochlar, would investigate the circumstances leading to the use of force by police on 24 February 2000. The terms of reference are:

- to enquire into the facts, circumstances and events leading to the use of force, i.e. the lathi charge and the use of tear gas, by the police on the lawyers' demonstration;
- to examine and report whether the force used by police was excessive and disproportionate and, if so, fix the responsibility on the erring police officials;
- to recommend measures that need to be taken to avoid occurrence of such incidents in the future.

The commission of inquiry is required to report to the government within three months of the first hearing. Justice N. C. Kochlar was later replaced by former Supreme Court Judge, Justice G. T. Nanavati.

Cases

Justice Shivappa (judge of the Madras High Court): In March 1999 Justice Shivappa of the Madras High Court was removed from office after the President made a determination under Article 217(3) of the Constitution. This article provides that if a question arises as to the age of a High Court judge, the question shall be determined by the President after consultation with the Chief Justice of the Supreme Court and the President's decision shall be final. The Supreme Court ruled in *Union of Trade v Jyoti Prakash Mitter* (AIR 1971 S.C. 1093) that no procedure had been established under this section, but the President could establish one. Justice Shivappa was not given an oral hearing but the President invited him to provide a written statement.

Justice Shivappa alleged at the time of removal that it had occurred for political reasons. He had heard corruption cases involving the leader of the All India Anna Dravida Munnetra Kazhagam (AIADMK) political party, J. Jayalalitha, and was to hear a case involving relatives of the Union Law Minister. The Union Law Minister, at that time, M. Thambidurai, had been nominated by J. Jayalalitha.

Irrespective of the actual merits of the decision the judiciary should have a more formal role to play in this process. Principle 17 and Principle 20 of the UN Basic Principles on the Independence of the Judiciary provide, respectively, that the judge shall have the right to a fair hearing in any discipline, suspension or removal proceedings and that this decision should be subject to independent review. Also, in light of the central role of the judiciary in India in the selection process and in any proceedings for removal of a judge, it would be consonant with the principles of judicial independence if a formal investigation procedure was established involving members of the judiciary. The consent of this body should be necessary before any determination is made by the President under Article 217(3).