

The great divide: theory and practice of criminal defence laws in India

Madhurima Dhanuka looks at the gap between criminal law and practice in the sub-continent

Pradip was arrested in the year 2000 in Kolkata, India from a motel room he was sharing with an acquaintance. The acquaintance was charged with possession of drugs while Pradip was charged as an accomplice. Ironically, Pradip had met the main accused only at the station and agreed to share the room due to monetary constraints. He had come to Kolkata to meet a prospective suitor for his daughter. Like any father, he wanted the best for his daughter. Destiny had other plans. His trial went on for 12 years. He remained behind bars throughout this time before being finally acquitted of all charges in 2012. The 12 long years witnessed rejection of bail on flimsy grounds, lack of legal representation, vacant courts due to lack of appointment of judges, misplaced records, violation of High Court orders directing speedy trial and many other incidents which highlight the plight of the common man stuck in a dysfunctional criminal justice system.

Pradip's tale highlights the huge gap which exists between the criminal law and practice in India. Even with numerous safeguards for suspects and defendants the criminal justice system suffers from major deficiencies and shortcomings. This article will outline the constitutional and statutory safeguards and highlight how in practice they are often violated.

Constitutional and statutory safeguards

A just and effective criminal justice system is the explicit aspiration of all nations, and India is no different.

Fair trial norms assist the state in this endeavour. The Indian Constitution (in particular Articles 20-22) lays down the standards and limitations within which the three major criminal statutes – the Indian Penal Code, the *Indian Evidence Act* and the Code of Criminal Procedure – must operate. This framework defines the delivery of criminal justice according to the principle that 'justice must not only be done but be seen to be done'.

To ensure fair trial, both constitutional and statutory laws in India set in place many safeguards. From the minute a person is arrested these safeguards kick in, promising to protect an accused from any form of abuse by law enforcement agencies.

A widely held principle recognised in international law is that no person shall be subject to arbitrary arrest, detention or exile. Indian law is precisely in line with the international legal standards as outlined under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The rights to freedom from arbitrary arrest and detention, to be brought promptly before a judge or judicial officer, to seek release on bail, to legal representation at the pre-trial stage, and to freedom from custodial torture, are clearly defined under the constitutional and statutory laws in India. Similarly, police powers of investigation and to arrest, magistrates' powers to review remand and detention, conditions for the grant of bail, the right to legal aid, and safeguards against custodial

torture are all well defined by the laws governing criminal procedure.

The determination of guilt or innocence by means of a trial by a competent, independent and impartial court is also guaranteed by the criminal procedural laws, which must comply with the constitution. Thus the right to be legally represented in court by a lawyer of one's choice, to a hearing in open court, to be presumed innocent, to a speedy trial, to be informed of the charges, to disclosure of all documents produced in court, to be present during the trial, and to a reasoned judgment, are all guaranteed by law.

The task of the criminal justice system does not end at judgment. What happens to the person after he has been convicted or acquitted is also as important. Both the Constitution and the Code of Criminal Procedure provide for a right of appeal to either the High Court of that particular state or to the Supreme Court of India. In cases where the death sentence or life imprisonment is imposed, the convicted person also has a right to seek clemency, commutation or mercy from the executive.

Moreover, where a person is convicted and sentenced to imprisonment, it must be ensured that the sentence is imposed 'as' punishment and not 'for' punishment. Thus both statute and prison rules recognise that the conditions of imprisonment must be such that they do not curtail any other fundamental right but the liberty of the prisoner.

Fair trial rights in practice

The existence of fair trial rights and procedural safeguards, though important, is meaningless if they are not implemented in practice. For instance, consider an illiterate woman, arrested in some remote village at midnight – the likelihood of her being aware (which is the case in law) that she can resist arrest between sunset and sunrise is minimal. The chances, if she did happen to know of her rights, that she could do anything about it are even less. Lack of public awareness, lack of proper training for

the police and other state officials, burgeoning case-loads, and delay in the disposal of cases are just some of the major problems that the Indian criminal justice system faces. From the moment a person comes in contact with the criminal justice system – both suspects and victims alike – they face the brunt of the dysfunctional system. Violations of fair trial rights mostly occur where the accused, victim, or witness is indigent and illiterate. Conversely, the rights of those with knowledge, money or power, are generally respected (Commonwealth Human Rights Initiative, 2012).

Despite the existence of many constitutional and statutory safeguards, arbitrary arrests by police are a common occurrence. Such arrests are often accompanied by torture in custody, and as a result the accused person may not be physically produced before the magistrate within the mandatory 24 hours of arrest, but are produced 'on paper'. Even if the accused is physically produced they are often not represented by a lawyer. Without legal representation, the accused is then routinely remanded to judicial custody. Delay in investigation is also a recurrent issue, especially in high profile cases where politics and corruption play a major role.

Needless to say, delay in investigation and lack of legal representation of the accused often lead to a prolonged trial process. These problems are further exacerbated by infrastructural issues such as a shortage of judges and courtrooms. Delays in conducting trials are the biggest challenge that the Indian criminal justice system faces today. Not only is this in violation of the constitutional right to speedy trial, but it also leads on to many other problems such as: a huge under-trial population (i.e., people remanded in custody pending trial), reported to be 65.1 per cent of the total prison population (National Crime Records Bureau, 2010a); prison overcrowding, with a reported 115.1 per cent occupancy rate (National Crime Records Bureau, 2010b); and a massive number of pending cases, reported to be nearly

30 million (National Courts Management System, 2012).

Even at the appellate stage, much reform is needed. The huge caseload of appellate judges causes great delay in the hearing of appeals. Often appeals become irrelevant as prisoners complete their sentence before the appeal is heard. Deplorable prison conditions too are an issue of concern, along with lack of rehabilitation schemes to help reintegrate offenders back into the society.

Bridging the divide

This chasm between the legal framework and practice is well known in India, and is often the subject of public debate. The case of a girl being raped in a moving bus in Delhi in December 2012 (Burke, 2013) brought all these issues – speedy justice, adherence to fair trial norms, and protecting the identity of rape victims – under public scrutiny.

How far public outcry will be able to bridge the divide is arguable. The judiciary, especially the higher judiciary, has been trying to bring practice more in line with the legislation for many years. Time and again the Supreme Court of India has reiterated the legal safeguards, tried to resolve the gaps in practice, and attempted to improve the functioning of the system. The right in Indian law for any person to file a 'public interest' petition in the constitutional courts has frequently been used to subject violations of fair trial rights to judicial scrutiny.

Civil society, especially non-governmental organisations, have been vigilant. Supported by the *Right to Information Act 2005*, civil society is constantly fighting for effective monitoring and implementation of fair trial guarantees. Such organisations have been quick to identify violations and bring them to the notice of the government, the public, and in many cases the judiciary as well. Backed by the constitutional guarantees, many organisations have sprung up all over India to provide pro-bono legal services to indigent accused persons, to provide rehabilitation for offenders, and to train lawyers, judges, police

and prison staff (Commonwealth Human Rights Initiative, 2008).

With the adoption of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (United Nations, 2012), the emphasis in India is now on strengthening access to legal aid, particularly at the pre-trial stage, where the majority of rights violations take place. Arbitrary arrests, lack of proper judicial review of remand, custodial torture – all are problems that can be tackled if effective legal representation is provided at the early stage of the criminal process.

Countries all over the world are struggling with their criminal justice systems. Many of these countries still have years to go before they enact laws recognising fair trial rights as an indispensable part of effective criminal defence. India has such laws, but unless and until mechanisms are established to ensure that these rights are respected in practice and are available to all persons alike, the right to fair trial will remain, to many, a dream. ■

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