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# CONTENTS

Sr. No.	TITLE & NAME OF THE AUTHOR (S)	Page No.
1.	GEOGRAPHIC DIVERSIFICATION AND BANK PERFORMANCE: EVIDENCE FROM ETHIOPIA <i>DR. P. HRUSHIKESAVA RAO &amp; ELEFACHEW MOSSISA</i>	1
2.	RELATIONSHIP BETWEEN FIRM RESOURCES AND SMALL FIRM GROWTH IN BANGLADESH <i>MD. MOSHARREF HOSSAIN, YUSNIDAH IBRAHIM &amp; MD. MOHAN UDDIN</i>	6
3.	INNOVATION NETWORK IN TAIWAN TELECOMMUNICATION INDUSTRY BASED UPON SOCIAL NETWORK PERSPECTIVE <i>CHUN-YAO TSENG &amp; TZU-LIN CHIANG</i>	11
4.	ADVENT OF THE RETAIL SECTOR IN INDIAN ECONOMY: A PERSPECTIVE ACROSS DECADE <i>SWATI SAXENA &amp; DR. HUSEIN ABDULRAHIM HASAN</i>	16
5.	GOODS AND SERVICES TAX: A LEAP FORWARD ECONOMIC GROWTH AND DEVELOPMENT <i>MINAKSHI GUPTA</i>	19
6.	INITIAL PUBLIC OFFERING UNDER-PRICING: A CASE STUDY OF TWITTER IPO <i>SAVITHA, P &amp; B. SHIVARAJ</i>	25
7.	THE CONFINES OF EFFICIENT CONTRACT BETWEEN PRINCIPALS AND DISTRIBUTORS PERFECTLY CONTROL MARKETING MIX STRATEGIES: CHANNEL MANAGEMENT PERSPECTIVE OF FAST MOVING CONSUMER GOODS (FMCG) INDUSTRIES IN INDONESIAN <i>DR. AGUS TRIHATMOKO, R., DR. MUGI HARSONO, DR. SALAMAH WAHYUNI &amp; DR. TULUS HARYONO</i>	31
8.	AN ANALYSIS OF NON PERFORMING ASSETS OF INDIAN BANKS <i>OMBIR &amp; SANJEEV BANSAL</i>	37
9.	FINO'S TECHNOLOGICAL SOLUTIONS FOR THE YESHASVINI COOPERATIVE FARMERS HEALTH CARE SCHEME <i>DR. G. KOTRESHWAR &amp; V. GURUSIDDARAJU</i>	43
10.	PERFORMANCE OF FISH WORKERS COOPERATIVE SOCIETIES <i>A. NALINI &amp; DR. P. ASOKAN</i>	46
11.	A STUDY ON ASSOCIATION AND CAUSALITY RELATIONSHIP BETWEEN NSE EQUITY SPOT AND DERIVATIVE MARKETS <i>SATYANARAYANA KOILADA</i>	48
12.	DIVIDEND POLICY AND ITS IMPACT ON STOCK PRICE: A CASE STUDY ON SENSEX COMPANIES <i>BHAGYA LAKSHMI.K &amp; DR. N. BABITHA THIMMAIAH</i>	54
13.	IMPACT OF GLOBALIZATION ON THE EXTERNAL SECTOR OF INDIAN ECONOMY <i>IBRAHIM CHOLAKKAL</i>	58
14.	A STUDY ON GROWTH AND INSTABILITY IN INDIA'S BANANA CULTIVATION AND EXPORT <i>DR. R. GANESAN</i>	62
15.	ROLE OF ASHA WORKERS IN RURAL DEVELOPMENT WITH REFERENCE TO KOTTAYAM DISTRICT <i>TISSY ERUTHICKAL</i>	66
16.	ROLE OF MECHANIZATION IN AGRICULTURE IN THE PRESENT SOCIO-ECONOMIC SITUATIONS: A CASE STUDY OF ANDHRA PRADESH <i>H. RAMANJINEYULU &amp; DR. K. SOMASEKHAR</i>	70
17.	CRITICAL ANALYSIS OF THE RIGHT TO FAIR TRIAL <i>RIDDHIMA MUNSHI &amp; DR. SANJAY SOLANKI</i>	73
18.	DYNAMIC CAUSALITY RELATIONSHIP BETWEEN FDI INFLOWS, TRADE BALANCE, AND ECONOMIC GROWTH IN WORLDWIDE SELECTED TOP 25 HOST COUNTRIES DURING POST LIBERALIZATION REGIME: A QUANTITATIVE APPROACH <i>SARMITA GUHA RAY</i>	78
19.	WORKING CONDITIONS OF THE UNORGANISED SECTOR IN KERALA: REFERENCE TO SALES WOMEN IN THE TEXTILE SHOPS <i>FREEDA V SIMON</i>	84
20.	INTRA-GENERATIONAL RELATIONSHIPS AMONG THE AGED PENSIONERS OF BHUBANESWAR, ODISHA <i>AMITA MOHAPATRA</i>	86
	REQUEST FOR FEEDBACK & DISCLAIMER	91

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- Garg, Bhavet (2011): Towards a New Gas Policy, Political Weekly, Viewed on January 01, 2012 <http://epw.in/user/viewabstract.jsp>



**CRITICAL ANALYSIS OF THE RIGHT TO FAIR TRIAL****RIDDHIMA MUNSHI****STUDENT****BARODA SCHOOL OF LEGAL STUDIES****THE MAHARAJA SAYAJIRAO UNIVERSITY OF BARODA  
VADODARA****DR. SANJAY SOLANKI****ASST. PROFESSOR****BARODA SCHOOL OF LEGAL STUDIES****THE MAHARAJA SAYAJIRAO UNIVERSITY OF BARODA  
VADODARA****ABSTRACT**

*The study finds out that as private individuals living in a democracy we are allowed to be what we are and act as we wish within the limits of the law. That is the beauty of a constitutional democracy. But being a judge is a high and honourable calling. As an adjudicator of the law, a judge has to be something more than his or her natural self. A judge has to leave behind the private person, with preferences and with prejudices, and become a fair and neutral umpire. He or she has to become a guardian of the law; the guardian of people's rights; the guardian of justice; the guardian of fairness and equity. That is a heavy responsibility. For rights to be effectively realized, judges, prosecutors and lawyers have an essential role to play. The police and prosecutorial authorities have a duty under the law to protect these rights, as do the judges, who must at all times be alert to any sign that these have not been respected. It is only when these rights are strictly adhered to and any breaches checked at the earliest stages, that a judicial system is created where it functions for the ultimate purpose of administering justice fairly and efficiently.*

**KEYWORDS**

right to fair trial, constitutional democracy.

**INTRODUCTION**

Judges are only human and come with all the failings of other human beings. Personal predilections and preferences, socialized behaviour, political beliefs and egos all factor into their behaviour as judges along with the pressures of a very imperfect system.

Fair trial is not a favour afforded to the supplicant at law but a bundle of legally enforceable rights guaranteed by the state to its citizens, for whom the state itself exists. The application of fair trial norms to every single instance and at every stage of the criminal law is recognized both internationally and nationally in India, as a fundamental right. These rights, constitutionally guaranteed, compel and cast a legal duty on the judge to ensure that they are respected realized and never violated.

The scope of this study is based on the basic principles of natural justice. It is said that principles of natural justice are of very ancient origin and was known to Greek and Romans. The word 'Natural Justice' manifests justice according to one's own conscience. It is derived from the Roman Concept 'jus naturale' and 'Lex naturale' which meant principle of natural law, natural justice, eternal law, natural equity or good conscience.

**REVIEW OF LITERATURE**

This paper outlines the nature and objective of study. It lists out the importance of the study and hypothesis formulated for the paper.

**NEED/IMPORTANCE OF THE STUDY**

The paper emphasis the critical role and obligation of a judicial officer to ensure a trial is completely fair at all its stages. It draws attention to the constant need for judges to reflect on endemic and occasional prejudices, whether conscious or subliminal, that can or may impact judicial decisions. It assists judicial officers to recognize the existence of such prejudices and deal with them, lest inattention or inadvertence lead to unfair results.

**OBJECTIVES**

The object of this paper is to critically analyze the right to fair trial. It is a key role of any government is to maintain law and order on behalf of the whole society; to hold people to account for crimes they have committed and to ensure that justice is done and seen to be done. But this carries with it a grave responsibility, because convicting someone of a criminal offence and potentially taking away a person's liberty is one of the most serious steps any government can take against an individual. This step can only be justified after the person has been given a Fair Trial. The Right to a Fair Trial is one of the cornerstones of a just society.

**HYPOTHESIS**

1. Whether right to be presumed innocent is available?
2. Whether right to equality before law and equal treatment by law available?
3. Whether right to remain silent available?
4. Whether right to consult a legal counsel available?

**RESEARCH METHODOLOGY**

The scope of the study is very wide. In the present study the authors have mostly relied upon the statutory provisions of the Act, National and International conventions and case laws. Various judgments relating to Fair Trial have been critically analyzed. Judgments of High Courts, Supreme Court, have been referred. The use of the most modern media i.e. Internet is also explored several times in order to get more information about the topic and to accomplish this study.

**BASIC CONCEPTS**

The concept of fair trial is based on the basic ideology that State and its agencies have the duty to bring the offenders before the law.

**1) Audi alteram partem (or audiatur et altera pars)**

It is a Latin phrase meaning "listen to the other side", or "let the other side be heard as well". It is the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them.



**2) Nemo judex in causa sua (or nemo judex in sua causa)**

It is a Latin phrase that means, literally, no-one should be a judge in his own cause. It is a principle of natural justice that no person can judge a case in which they have an interest.

**RIGHT TO BE PRESUMED INNOCENT**

Criminal procedure is built around the principle of “innocent until proven guilty” and is designed to protect this right. When it is said that a defendant to a criminal charge is presumed to be innocent, what is really meant is that the burden of proving his guilt lies on the prosecution.” This means that it is the duty of the accuser to show not merely the general probability of guilt in the circumstances, but requires him to prove every element of the offence beyond reasonable doubt.

The Apex Court in *P.N. Krishna Lal v Government of Kerala*<sup>1</sup> clarified that the principle of presumption of innocence is entrenched in the Indian Constitution, the Universal Declaration of Human Rights and the Civil and Political Rights Convention, to which India is a member, guarantee fundamental freedom and liberty to an accused person. The procedure prescribed for trial must also stand the test of the rights guaranteed by those fundamental human rights.

Section 101 of the Indian Evidence Act further reinforces this right, by providing that whoever desires a court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove those facts.<sup>2</sup>

To protect this right to be presumed innocent, Section 161(2) of the Code of Criminal Procedure permits persons questioned by the police to refrain from answering questions which might expose them to criminal penalty.

**RIGHT TO EQUALITY BEFORE LAW AND EQUAL TREATMENT BY THE LAW**

Article 14 of the Constitution states: “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.” Article 15 lays down the principle of non-discrimination according to which: “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.”

**Mrs. Maneka Gandhi v Union of India (UOI) and Anr.<sup>3</sup>**

Mrs. Gandhi had her passport impounded by the Indian Passport Authority pursuant to the Passports Act, 1967. However, in contravention of the Act, the Authority did not provide Mrs. Gandhi with any reason why her passport was impounded, nor did the state permit her a hearing to challenge the decision.

Although the Court disposed the matter without passing any formal judgment due to the Attorney General's subsequent independent efforts to remedy the matter, the Court's opinion noted that the Passport Authority's conduct violated Articles 14 and 21 of the Constitution.

**RIGHT TO REMAIN SILENT**

Article 20(3) of the Constitution protects the right of the accused to remain silent by providing that: “No person accused of any offence shall be compelled to be a witness against himself.”

Section 161(2) of the Code of Criminal Procedure leaves no room for doubt when it states that an accused is bound to answer all questions of a state official truthfully except “questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture”.

The Code of Criminal Procedure, Section 313 further protects the right to silence. It says: “the accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.”

**Nandini Satpathy v P.L. Dani<sup>4</sup>**

Ms Nandini Satpathy was accused of embezzling funds while serving as Chief Minister of Orissa. She was made to present herself before the Deputy Superintendent of Police (Vigilance) and provide answers to written questions. She refused to answer the questionnaire on the grounds that it was a violation of her fundamental right against self-incrimination.

The Supreme Court held that Ms Satpathy had to answer all questions that did not materially incriminate her. For questions she refused to answer, she was required to provide, without disclosing details, her reasons for fearing that answering such questions would result in self-incrimination.

**NULLUM CRIMEN SINE LEGE: PRINCIPLE OF NON-RETROACTIVITY**

Article 20(1) of the Constitution states: “No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.”

**G.P. Nayyar v State (Delhi Administration)<sup>5</sup>**

Two public officials were tried in 1973 for criminal conspiracy and illegal gratification under the Prevention of Corruption Act, 1947, for allegedly accepting bribes from 1955 to 1961. The accused appealed to the Supreme Court claiming that the burden of proof applied to their trial mandating that the court presume the accused guilty unless proved otherwise was in violation of Article 20(1), as in 1964 the legislature had repealed the relevant statute which applied this standard. The Supreme Court denied the appeal, explaining that repealed statutes remain applicable to crimes committed before the statute's repeal. Also, here, the repealed statute was revived by a subsequent statute in 1967, thus further allowing for application of the rule even during the repeal period for acts committed before the repeal.

**RIGHT TO FREEDOM FROM ARBITRARY ARREST & DETENTION**

Freedom from arbitrary arrest and detention means that no one may be deprived of his or her personal liberty except through means that are “fair, just and reasonable”. The state cannot take away life or personal liberty by the mere enactment of a law.

Article 21 of the Indian Constitution guarantees that “no person shall be deprived of his life or his personal liberty except according to procedure established by law”.<sup>6</sup>

Article 22 specifies the protections to which each arrested person is entitled by law, namely the right to be informed of the grounds for his/her arrest as soon as possible after being taken into custody;<sup>7</sup> the right to consult and be represented by a legal practitioner of choice;<sup>8</sup> and the right to be produced before a Magistrate within twenty- four hours of arrest and not to be detained beyond twenty-four hours without the approval of a Magistrate.<sup>9</sup>

**Joginder Kumar v State of UP<sup>10</sup>**

Joginder Kumar, a young lawyer was detained for five days without due process of law in an undisclosed location. Rejecting the police version that Joginder Kumar was cooperating with them out of his own free will, the Court said: “The law of arrest is one of balancing individual rights, liberties and privileges on the one hand and individual duties, obligations and responsibilities on the other; on weighing and balancing the rights of the single individual and those of individuals collectively....”. Stressing the importance of balancing the interests of society with the liberties of the individual, the Supreme Court of India held that a police officer “must be able to justify the arrest apart from his power to do so”. It went on to declare that “a person is not liable to arrest merely on the suspicion of complicity in an offence.

The Universal Declaration of Human Rights (UDHR) asserts that “no one shall be subjected to arbitrary arrest, detention, or exile”.<sup>11</sup> Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) reads as follows: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” Further to this, Article 9(2) of the ICCPR provides that: “Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.”<sup>12</sup>

**RIGHT TO A LAWYER OF CHOICE**

The right to legal counsel which necessarily includes the right to communicate with counsel is one of the most essential elements of a fair trial. A suspect/accused without counsel is often unaware of all his rights and will therefore often be more compliant with the investigative authorities. The Constitution provides every arrested person with the right to consult and be defended by a legal practitioner of his choice.<sup>13</sup>

**RIGHT TO FREEDOM FROM TORTURE**

In Indian law, torture is a violation of fundamental rights, a crime, and a civil wrong. As such, it attracts imprisonment, liability to compensate the victim, and contempt proceedings. In what has now become famously known as the D.K. Basu<sup>14</sup> case, the Supreme Court characterized torture as one of "the worst kind of crimes in a civilized society". Court stated: "Using any form of torture for extracting any kind of information would neither be right nor just nor fair and, therefore, would be impermissible, being offensive to Article 21."<sup>15</sup>

**Nilabati Behera v State of Orissa<sup>16</sup>**

Nilabati Behera's 22-year-old son, Suman Behera, was taken into police custody in connection with the investigation of a theft. The next afternoon, Suman Behera was found dead on a railway track with multiple injuries to his body. Mrs. Behera filed a writ petition under the constitutional Article 32, alleging that her son died as a result of injuries inflicted while in police custody and requested that she be monetarily compensated for the death of her son. The police defence asserted that Suman Behera had escaped from police custody the night before and was run over by a passing train during his escape. The Court ultimately held that his death was not a result of a train accident. On the contrary, Suman Behera had succumbed to injuries most likely inflicted by police-administered lathi blows. The Court then explained that the state was liable for compensation in these cases where police conduct during custodial detention results in the deprivation of a fundamental right, in this case, right to life in Article 21. Ms Behera was awarded Rs 150,000 from the State of Orissa and the state was also ordered to pay the Supreme Court Legal Services Committee Rs. 10,000.

**RIGHT TO RESPECT FOR ONE'S PRIVATE LIFE**

The right to privacy is now established in India, but as part of Article 21, and not as an independent right in itself. The Constitution does not grant in express terms any right to privacy.

Kharak Singh v State of Uttar Pradesh,<sup>17</sup> the Uttar Pradesh (UP) Police Regulations regarding domiciliary visits were in question and the majority of the Judges held that though the Constitution did not refer to the right to privacy expressly, it could still be traced from the right to "life" in Article 21. According to the majority, Clause 236 of the relevant regulations in UP, was bad in law; it offended Article 21 in that there was no law permitting interference by such visits. The majority did not question whether these visits violated the "right to privacy". But, the minority view while concurring that the fundamental right to privacy was part of the right to liberty in Article 21, part of the right to freedom of speech and expression in Article 19(1)(a), and also of the right to movement in Article 19(1)(d), held that the Regulations permitting surveillance violated the fundamental right of privacy. In effect, all the seven learned Judges held that the "right to privacy" was part of the right to "life" in Article 21.

Article 17 of the ICCPR states: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

**RIGHT TO BE TRIED BY A COMPETENT, INDEPENDENT & IMPARTIAL COURT**

A Court is a place where justice is administered. The independence of the judiciary is one of the pillars of the rule of law. Independence is essential for the protection of fair trial standards. The principle of an independent judiciary requires that a judge can make every decision without the intervention of the government, parliament or administration. Court decisions can be only reviewed by higher courts. The impartiality and independence of the courts may be guaranteed by ensuring that a judge hearing a case has no relationship with either party that may affect the decision-making process. Judges are required to view both parties in a fair and equal manner making an objective decision based solely on the facts and evidence of the case.

Article 50 of the Constitution ensures that "the State shall take steps to separate the judiciary from the executive in the public services of the State".

**RIGHT TO FREE LEGAL AID**

The state is obliged to provide free legal aid to a prisoner who is indigent or otherwise disabled from securing legal assistance where the ends of justice call for such service. The due process rights guaranteed to all individuals in Article 21 of the Constitution require that an individual has access to free legal counsel if he cannot afford it.<sup>18</sup>

**NE BIS IN IDEM: PROHIBITION OF DOUBLE JEOPARDY**

The principle of double jeopardy or ne bis in idem, whereby nobody can be tried or punished twice for the same offence protects against three distinct abuses:

1. A second prosecution for the same offence after final acquittal.
2. A second prosecution for the same offence after final conviction.
3. Multiple punishments for the same offence.

The principle of double jeopardy is safeguarded under Article 20(2) of the Constitution which prohibits prosecuting or punishing a person for the same offence more than once.<sup>19</sup> Section 300 of the Criminal Procedure Code states that a person acquitted or convicted by a competent court may not be tried again for the same offence.<sup>20</sup>

**RIGHT TO BE TRIED WITHOUT UNDUE DELAY**

A fair trial implies a speedy trial and no procedure can be reasonable, fair or just, if it extends for an unreasonably long time. Quick justice is recognized as implicit in the spectrum of Article 21 of the Constitution and is now regarded as a sine qua non of Article 21.<sup>21</sup>

The design of investigation and trial proceedings laid out in the Criminal Procedure Code also reaffirms that the requirement of swiftness and promptitude applies to all stages of the criminal process – investigation, inquiry, trial, appeal, revision and retrial.

**RIGHT TO BE NOTIFIED OF CHARGES/FRAMING OF CHARGE**

Section 207 of the Code of Criminal Procedure dictates that in any criminal proceedings instituted on the basis of a police report, the Magistrate must freely furnish to the accused:

1. A copy of the police report.
2. A copy of the first information report.
3. The statements of any prosecution witnesses.
4. Any recorded confessions or statements.
5. Any other documents forwarded to the magistrate by the police.

**State of Orissa v Debendra Nath Padhi<sup>22</sup>**

The issue before the Apex Court was: Can the trial court while framing the charges consider material filed by the accused? In the case of Satish Mehra v Delhi Administration and Anr.<sup>23</sup>, the Apex Court concluded that if the accused succeeded in producing reliable material at the stage of taking cognizance or framing charges, which might fatally affect even the very sustainability of the case, it would be unjust to suggest that no such material should be looked into by the court

at that stage. This decision was challenged by the state on the grounds that observations in the Satish Mehra case amounted to upsetting well-settled legal propositions and making nugatory amendments in the Code of Criminal Procedure and would result in conducting a mini trial at the stage of framing the charges. The matter was referred to a larger bench. The Court made the following observations:

1. At the stage of framing charge, the court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion, at the initial stage of framing of charge, is sufficient to frame the charge.
2. Permitting the accused to adduce his defence at the stage of framing of charge and for examination would result in a mini trial at this stage. This is against the criminal jurisprudence and would defeat the object of the Code.
3. The expression "hearing the submissions of the accused" cannot mean opportunity to file material to be granted to the accused. Thereby amending the settled law, the Court held that at the stage of framing charges hearing the submissions of the accused has to be confined to the material produced by the police.

Article 14(3)(a) of the ICCPR guarantees anyone charged with a criminal offence the right to be promptly informed in detail of the nature and cause of the charges against him in a language that he understands.<sup>24</sup>

### RIGHT TO A PUBLIC HEARING

Any criminal court that is either inquiring into or trying an offence is an open court to which the general public can have access, to the extent that the courtroom can conveniently contain them.<sup>25</sup>

### RIGHT TO BE PRESENT AT ONE'S TRIAL

The presence of an accused during his trial is an absolute right. Section 273 of the Code of Criminal Procedure which says: "Except as otherwise expressly provided, all evidence taken in the course of trial or other proceeding shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his pleader."

Where a judge has proceeded with hearings in the absence of the accused and recorded witness evidence even after seemingly receiving agreement from the defence counsel, it was held by the Madhya Pradesh High Court that the trial was defective. The death reference was not confirmed and a retrial was ordered.<sup>26</sup> With the introduction of video linking the Supreme Court has held that evidence recorded via video in the presence of the accused or his pleader fully meets the requirements of Section 273.<sup>27</sup>

### RIGHT TO FREE ASSISTANCE OF AN INTERPRETER

All rights to an adequate defence are useless even if the accused is present, if he lacks the ability to understand the charges brought against him, follow the proceedings or communicate his own defence and challenge properly because he does not understand the proceedings or cannot understand the language.

As far as language is concerned, Section 279 of the Code requires that "whenever any evidence is given in a language not understood by the accused, and he is present in court in person, it shall be interpreted to him in open court in a language understood by him."

In addition, Section 318 of the Criminal Procedure Code recognizes that there may be categories of persons who "cannot be made to understand the proceedings". However, in such cases the Section allows the judge to proceed with the trial even if the accused cannot understand the proceedings, but, if such proceedings result in conviction, the judge must forward the proceedings to the High Court along with a report of the circumstances of the case, and the High Court will then pass such order as it thinks fit.

These provisions are of course intended to "safeguard" defendants' interests.<sup>28</sup> Denial of the right to an interpreter violates Article 21 of the Constitution and requires a re-trial.

Similar to the domestic right, Article 14(3)(f) of the ICCPR mandates that a criminal defendant is entitled to "the free assistance of an interpreter if he cannot understand or speak the language used in court".<sup>29</sup>

### SUGGESTIONS

1. The government needs to fast track judicial reforms and the process of appointing judges needs to be sped up on priority.
2. Expansion of mobile courts. This will help take the process of law into the interiors and actually to people's doorsteps. Today, poor people from rural areas have to travel to the district or state capital to attend their ongoing legal cases. The extensive use of mobile courts will go a long way in easing people's burden.
3. The quality of support staff, especially in lower courts, needs to be improved through better training. This has to be accompanied by superior training to investigating agencies like the police on how the legal system works. Most people suffer from unfair judgments on account of shoddy investigation by the police.
4. With high illiteracy still plaguing India, lack of awareness of one's fundamental rights is one of the major reasons people are still getting exploited. This is further compounded by the complete lack of knowledge on how our legal system works. With technology and multimedia, it is now possible to educate people on their rights and on where and how to seek good legal advice. In fact, a lot of legal advice can be made available online so that a large section of people can take informed decisions on legal action.
5. The law-makers introduce the use of 'simple English' in legal application and pronouncements. The current use of complicated and outdated British English must be done away with immediately.
6. As the population continues to grow and pace of development increases, so will the number of litigations. The judicial system has to respond rapidly to ensure justice is delivered quickly and fairly to all, as 'Justice delayed is Justice denied'.

### CONCLUSION

As private individuals living in a democracy we are allowed to be what we are and act as we wish within the limits of the law. That is the beauty of a constitutional democracy.

But being a judge is a high and honourable calling. As an adjudicator of the law, a judge has to be something more than his or her natural self. A judge has to leave behind the private person, with preferences and with prejudices, and become a fair and neutral umpire. He or she has to become a guardian of the law; the guardian of people's rights; the guardian of justice; the guardian of fairness and equity. That is a heavy responsibility.

For rights to be effectively realized, judges, prosecutors and lawyers have an essential role to play. The police and prosecutorial authorities have a duty under the law to protect these rights, as do the judges, who must at all times be alert to any sign that these have not been respected. It is only when these rights are strictly adhered to and any breaches checked at the earliest stages, that a judicial system is created where it functions for the ultimate purpose of administering justice fairly and efficiently.

### LIMITATIONS

The research was extensively long having a huge data which was bit difficult to comprehend in a limited time frame. However, all the relevant cases with landmark judgments dealing with the subject are reflected in the paper.

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22. (2005) 1 SCC 56.
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24. ICCPR, *supra* note 47, Article 14(3)(d).
25. Code of Criminal Procedure, 1973, Section 327(1).
26. State of Madhya Pradesh v Budhram 1996 CrLJ 46 (MP).
27. State of Maharashtra v Praful B Desai AIR 2003 SC 2053.
28. K.M. Subramani v State of AP 2003 CrLJ 3526, para. 8.
29. "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than that was applicable at the time when criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of lighter penalty, the offender shall benefit thereby." ICCPR, Article 14(3)(f), 16 December 1966, G.A. Res. 2200A (XXI).

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