THE

BANARAS LAW JOURNAL

Cite This Issue

as

Vol. 41 No. 2 *Ban.L.J.* (2012)

The *Banaras Law Journal* is published bi-annually by the Faculty of Law, Banaras Hindu University since 1965.Articles and other contributions for possible publication are welcomed and these as well as books for review should be addressed to the Editor, *Banaras Law Journal*, Faculty of Law, Banaras Hindu University, Varanasi - 221005, India. Views expressed in the Articles, Notes & Comments, Book Reviews and all other contributions published in this Journal are those of the respective authors and do not necessarily reflect the views of the Board of Editors of the Banaras Law Journal.

In spite of our best care and caution, errors and omissions may creep in, for which our patrons will please bear with us and any discrepancy noticed may kindly be brought to our knowlede which will improve our Journal. Further it is to be noted that the Journal is published with the understanding that Authors, Editors, Printers and Publishers are not responsible for any damages or loss accruing to any body.

In exchange for *Banaras Law Journal*, the Law School, Banaras Hindu University would appreciate receiving Journals, Books and monographs, etc. which can be of interest to Indian specialists and readers.

Composed and Printed by Raj Kumar Jaiswal, Dee Gee Printers, Khojwan Bazar, Varanasi-221010, U.P., (India).

EDITORIAL COMMITTEE

A Commemorative Issue

of

150th Birth Anniversary

of

Pandit Madan Mohan Malaviya Ji

(The Founder of Banaras Hindu University)

(25.12.1861 - 12.11.1946)

"It is my earnest hope and prayer, that this centre of life and light, which is coming into existence, will produce students who will not only be intellectually equal to the best of their fellow students in other parts of the world, but will also live a noble life, love their country and be loyal to the Supreme Ruler."

- Madan Mohan Malaviya

Banaras Hindu University

Visitor : The President of the Republic of India *(ex-officio)*
Chancellor : Dr. Karan Singh
Vice-Chancellor : Dr. Lalji Singh
Finance Officer : Sri Abhay Kumar Thakur
Registrar : Prof. G.S. Yadav
Librarian : Dr. A.K. Srivastava
Head of the Department and Dean, Faculty of Law : Prof. B.C. Nirmal

LAW SCHOOL

The Faculty Staff

Sl. No.	Name & Qualifications	Designation
1.	Baeraiya, Babita, B.A., LL.M. (Sagar)	Assistant Professor
2.	Gupta, Shailendra Kumar, B.A., LL.M., Ph.D.(Banaras)	Associate Professor
3.	Haque, Md. Nasimul, B.Sc., LL.M., Ph.D.(Banaras)	Associate Professor
4.	Kumar, Adesh, B.Sc., LL.M., LL.D. (Lucknow)	Assistant Professor
5.	Kumar, Ajay, LL.M., Ph.D.(Rohatak) (On leave)	Associate Professor
6.	Majhi, Raju, B.Com., LL.M., Ph.D. (Banaras)	Assistant Professor
7.	Malaviya, M.K., B.A., LL.M., M.Phil.	Assistant Professor
8.	Mehdi, Ali, B.Sc., LL.M., Ph.D.(Delhi)	Professor
9.	Mehra, Surendra, B.A.(Hons.), LL.M.	Assistant Professor
10.	Mishra, Dharmendra Kumar, B.A., B.Ed., LL.M., Ph.D.(Banaras)	Associate Professor
11.	Mishra, N. K., B.Sc., LL.M., Ph.D. (Sagar)	Assistant Professor
12.	Mishra, Vinod Shankar, B.Sc., LL.M., Ph.D.(Banaras)	Associate Professor
13.	Murali, R. K., B.Sc., LL.M.(Andhra), Dip. In IRPM(Tirupati), Ph.D.	Associate Professor
14.	Nirmal, B. C., B.Sc., LL.M., Ph.D.(Banaras)	Professor
15.	Padhy, M. K., B.Sc., LL.M.(Berhampur), Ph.D.(Banaras)	Reader
16.	Pandey, Akhilendra Kumar, B.Sc., LL.M., Ph.D.(Banaras)	Associate Professor
17.	Pandey, B. N., B.Sc., LL.M., Ph.D.(Banaras)	Professor
18.	Patel, R. K., B.A.(Hons.), LL.M., Ph.D. (Gorakhpur)	Assistant Professor
19.	Pathak, V. K., B.Sc., LL.M., Ph.D. (Bareilly)	Assistant Professor
20.	Rai, J. P., B.A., LL.M., Ph.D.(Purvanchal)	Reader
21.	Rai, R. P., B.Sc., M.A., LL.M., Ph.D.(Rewa)	Professor
22.	Rai, S. P., B.Sc., LL.M.(Banaras), Ph.D. (Bhagalpur)	Associate Professor
23.	Sahoo, G. P., B.A., LL.M.(Utakal), Ph.D. (Banaras)	Assistant Professor
24.	Saroj, V. K., B.A., LL.M. Ph.D. (Banaras)	Assistant Professor
25.	Sharma, D. K., LL.M., LL.D.(Meerut)	Professor
26.	Singh, A. K., B.Sc., LL.M., LL.D. (Lucknow)	Assistant Professor
27.	Singh, M. P., B.Sc., LL.M., Ph.D.(Kashi Vidyapith)	Professor
28.	Singh, P. K., LL.M., Ph.D.(Agra)	Associate Professor
29.	Singh, R. K., LL.M., Ph.D.(Delhi)	Assistant Professor
30.	Singh, S. P., B.Sc., LL.M., Ph.D.(Banaras) *(on leave)*	Professor
31.	Singh, V. P., LL.B.(Hons.), LL.M., Ph.D. (Lucknow)	Assistant Professor

32.	Srivastava, Ajendra, B.A., LL.M., Ph.D.(Delhi)	Associate Professor
33.	Srivastava, D. K., B.Sc., LL.M., Ph.D.(Banaras)	Associate Professor
34.	Tewari, J., M.A., LL.M., Ph.D. (Banaras)	Research Assistant
35.	Tripathi, Bibha, B.A., LL.M., Ph.D.(Banaras)	Reader
36.	Tripathi, K. M., B.A.(Hons.), LL.M., Ph.D. (Banaras)	Assistant Professor
37.	Tripathy, Sibaram, LL.M., Ph.D. (Berhampur)	Associate Professor
38.	Trivedi, Abha Km., B.A.(Hons), LL.M.(Banaras)	Associate Professor
39.	Upadhyay, C. P., LL.M., Ph.D.(Agra)	Associate Professor
40.	Verma, D. P., M.A., LL.M.(Dalhousie)	Professor
41.	Verma, G. P., M.A., LL.M., Ph.D.(Banaras)	Professor

LIBRARY STAFF

1.	Nazim, Mohammad, B.A.(Hons.), M.Lib. & I. Sc.	Assistant Librarian
2.	Lal, Chunni, B.A., B.Lib. & I. Sc.	Professional Asstt.
3.	Kumar, Prabhat, M.A., M.Lib. & I. Sc.	Semi Prof. Asstt.
4.	Nath, Shobh, Inter, C.Lib.Sc.	Semi Prof. Asstt.
5.	Pal, Brij, M.A., M.Lib. & I. Sc.	Semi Prof. Asstt.

●

THE
BANARAS LAW JOURNAL

Vol. 41 No. 2 ISSN 0522-0815 July 2012 - Dec. 2012

ARTICLES

SHORTER ARTICLES

BOOK REVIEWS

●

ARTICLES

Vol. 41, No. 2, Ban.L.J. (2012) 9-46

PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION MAKING: INTERNATIONAL STANDARDS AND INDIAN STATE PRACTICE[1]

B.C. Nirmal*

Prakash C. Shukla**

ABSTRACT

Public participation is the most important factor which has the potential to ensure transparency in governmental decision making. It lays the foundation for efficient self administration and decentralization. It is important to note that it becomes all the more important in the context of environmental decision making. It challenges the traditional notion that experts are better equipped to advice administration rather than the stakeholders. It is based on an understanding that environmental decisions which are essentially political in nature and controversial cannot rest solely on the perception and knowledge of unelected experts. In this understanding public participation is not only a means to overcome the 'democratic deficit' in environmental decision-making but is also a device to incorporate value judgments into environmental decisions. This paper discusses the objectives, justifications, and various levels of public participation and the necessary pre-requisites for the success of such participation in the Indian context and in the backdrop of international standards on public participation as enshrined in treaties, conventions and declarations. The paper also highlights the importance of public participation and the role

1 This is a slightly modified version of a paper presented at Fifth ISIL International Conference on Environmental Law etc. 9-10 December, 2007. Although some important developments have taken place since then, identification and analysis of issues involved in this paper still remain valid and relevant.

* B.Sc. LL.M., Ph.D. (Law), Professor of Law, Head and Dean, Faculty of Law, Banaras Hindu University, Varanasi - 221005. U.P. India, Vice President, Indian Society of International Law (Since 2000). Editor in Chief, Banaras Law Journal.

** B.A., LL.B. (Gold Medalist), LL.M. (H.R.D.E.) (Gold Medalist) PCSJ. Civil Judge Junior Division, Ghazipur, U.P. (India)

expected from the individuals, communities and groups in the protection of the environment. The statutory provisions with regard to criminal prosecutions in environmental cases and the right to environmental information have been examined.

KEY WORDS: *Public participation, environmental decision making, The Aarhus Convention, Right to environmental information, Environmental impact assessment.*

"May peace prevail in the sky, may peace prevail in outer space, may peace be on the earth and may peace be in waters, may peace be in the planets and may peace be in the whole environment, may peace be in the universe and in all things; and may that peace come to me?"

- Yajurveda (36, 17)

I. INTRODUCTION

PUBLIC PARTICIPATION is a necessary component of a vibrant, dynamic, functioning and participatory democracy. As a good governance practice it has potential to make all governmental decision making transparent, rational, just, fair and responsive. It may also serve as a useful device to make government and its agencies accountable. At the conceptual level public participation is inextricably linked with democracy, decentralization, self-administration and self-management and respect for human rights and fundamental freedoms. The idea of public participation has also entered the arena of environmental protection and its recognition as an important part of environmental decision making is discernible at all levels of government. This has gained recognition in environmental statutes of many countries including U.S.A., U.K. and India and also in a number of international human rights texts and environmental treaties.

Public participation is not only a novel but even a radical idea which challenges expertise based administrative decision-making and also the appropriate role and the legitimacy of representative democracy.[1] It assails the conventional wisdom that experts have monopoly on judgment and that informed by experts, administrative agencies are wise enough to consider all choices and all affected interests and adjust the competing claims of various private interest likely to be affected by their policies in a fair and judicious manner without involving the affected interests in decisions making processes. The idea of public participation thus challenges the traditional models of administrative law and seems to be inspired by American pluralist theories.[2]

1 See Maria Lee and Carolyn Abbot, "The Usual Suspect, Public Participation under the Aarhus Convention", *Modern Law Review*, 66(2003), 80, 107-108.

2 See Barry Barton, 'Underlying Concepts and Theoretical Issues in Public Participation in Resource Development' in Donald Zillman, Alastair Lucas and George (Rock) Pring (eds.), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources*, (2002), 92-6.

Notably, the pluralist approach sees public participation 'as a form of competition or sometimes compromise between the fixed preferences of different interest groups, for example compromise between environmental interests groups and industry'.[3]

Public participation also seems to be inspired by democratic pragmatism according to which 'life is mostly about solving problems in a world of full of uncertainty'.[4] It is worth noting that democratic pragmatism denotes an orientation to governing in its entirety. This kind of orientation stresses interacting problem solving participants from both and within the government and outside. Significantly, its stress is not on widespread participation in problem solving but on bringing a plurality of perspectives to the environmental decision making process.[5] This is a familiar understanding of many established consultation processes.

Public participation rests on the belief that presence of environmental interests groups in decision making is necessary to counterbalance the interests of the business.[6] It is based on an understanding that environmental decisions which are essentially political in nature and controversial cannot rest solely on the perception and knowledge of unelected experts. In this understanding public participation is not only a means to overcome the 'democratic deficit' in environmental decision-making but is also a device to incorporate value judgments into environmental decisions.

Notwithstanding agreement on the desirability of public participation in environmental decision making, there are a plethora of ethical and legal issues relating to public participation which need to be addressed in a satisfactory manner so that public participation might become meaningful and effective. Some of these issues are as follows: What are the objectives of public participation? What are the justifications of public participation in environmental decision-making? What are the various levels of public participation and what are the necessary pre-requisites for the success of such participation? What is the importance of public participation and what role is expected from the individuals, communities and groups in the protection of the environment? What are the means by which pressure groups and individuals can seek to enforce environmental law themselves, principally by means of judicial review? What are statutory provisions with regard to criminal prosecutions in environmental cases? Is the right to environmental information recognized under the domestic law and if so what are the arrangements for providing such information? This paper addresses some of these issues in the Indian context and in the backdrop of international standards on public participation as enshrined in treaties, conventions and declarations.

---

3 Jabe Holder and Maria Lee, *Environmental Protection, Law and Policy*, (2nd ed. 2007) at 91.

4 Dryzek, *The Politics of the Earth: Environmental Discourses*, (1997) pp. 84-92

5 *Ibid.*

6 Sec, Holder, et. al., n. 3 at 131.

II. JUSTIFICATIONS FOR PUBLIC PARTICIPATION

In addition to justifications for public participation enumerated above, we need to pinpoint other possible rationales for such participation. In this context it is worth mentioning that there are two perspectives of public participation: a process perspective and a substantive perspective.[7] According to the former, participation is valuable in itself and imparts a certain degree of democratic legitimacy to decision making, while the emphasis of the latter is on the quality of decision making. The substantive approach to public participation involves not only better decisions but also better outcomes. It rests on the assumption that public participation in environmental law making enhances the possibility of its implementation by creating a sense of ownership and responsibility among citizens. To put specifically, citizen participation contributes to the implementation and enforcement of environmental law.

Another rationale for public participation emanates from the doctrine of public trust according to which the state is only the trustee of forests, trees, lakes, rivers and other natural resources which in fact belong to the public at large. As the major beneficiaries of environmental protection it is in the interest of individuals and communities to play an activist role in the enactment of good environmental laws and their proper implementation and enforcement. In fact, there now appears to be the general recognition that the protection of the environment cannot be left entirely to the government and its agencies. As pollution control agencies are often 'not sufficiently resourced and therefore would be hard pushed to monitor and regulate all discharges, emissions or pollution incidents', they may depend on members of the public to report incidents and draw their attention to unusual discharges or emissions.[8] Citizen participation can complement the enforcement measures of the pollution control authorities. As already noted, citizen participation is also essential to make these agencies accountable or at least responsible to the citizens.

Public participation could also be seen as an integral component of the environmental justice framework. Contrary to layman's understanding environmental justice is not confined to adjudication in environmental cases but looks beyond it and incorporates within its fold other social movements 'that seek to eliminate harmful practices (discrimination harms the victims), in housing, land use, industrial planning, health care and sanitation services'.[9] The environmental justice movement redefines environment to 'include place where people live, work, play, go to school, as well as how these things, cause impact on the physical and natural world[10] and challenge the dominant

---

7 *Id.*, at 87.

8 See Susan Wolf and Anna White, *Environmental Law*, (1995) at 135.

9 Robert D. Bullard, Environmental Justice in the 21st Century, available at http://www.ejrc/cau.edu/ejinthe21 century.htm, at 3.

10 *Id.*, at 5.

environmental pollution paradigm.[11] Veering around the view that the rights of all individuals to be protected from environmental degradation should be recognized and protected, the environmental justice framework adopts a public health model of prevention as the preferred strategy and focuses on redressal of disproportionate impact through targeted action and resources. In addition, this framework shifts the burden of proof to polluter/dischargers and allows disparate impact and statistic weight as opposed to 'intent' to infer discrimination.

Any discussion on public participation in the area of environmental protection will be incomplete without considering the role of environmental pressure groups (NGOs) in the protection of the environment. As we know, there are numerous nongovernmental environmental organizations, some of which have very large memberships and are interested in global environmental and conservation issues. Greenspace and the World Wide Fund for Nature are the obvious examples of such organizations. Others are small global organizations or exclusively national environmental organizations. These organizations have been able to exert an influence on both the introduction and enforcement of environmental law at international, regional and national levels. Generally speaking, it is only the larger and well-resourced organizations that can exert an influence on the law making process and the content of environmental legislation, but almost all environmental pressure groups can play a role in terms of monitoring compliance with environmental law. Groups having the financial and technical resources can also bring costly legal actions against polluters provided they are allowed to do so by the courts and tribunals.

III. INTERNATIONAL STANDARDS

The right to public participation appears in all important international human rights instruments[12] and current environmental

---

11 The dominant paradigm according to Bullard, exists to manage, regulate and distribute risks. a consequence, the current system has 'in situtionalised unequal enforcement', traded human health for profit, placed the burden of proof on the victims' and not 'the polluting industry and legitimated human exposure to harmful chemicals, pesticides, and hazardous substances'. It has promoted "risky" technologies, subsidized ecological destruction, created industry around risk assessment and exploited the vulnerability of economically and politically disenfranchised communities. And finally, the current system of environmental protection has failed to develop pollution prevention as the 'overarching and dominant strategy'. Bullard, n. 9, at 5.

12 See e.g., Article 21 of the Universal Declaration of Human Rights (1948), Article 25 of the Covenant on Civil and Political Rights (1966), Article 3 of the 1954 Paris Protocol I of the European Human Rights Convention. Article 13 of the African Charter on Human Rights (1981). Article 23 of the American Convention on Human Rights (1969), and ILO Indigenous Peoples Convention (1989) and Chapter 27 of Agenda 21 (1992).

texts,[13] The Rio Declaration 1992, for example, in Principle 10 declares that, 'Environmental issues are best handled with participation of all concerned citizens at the relevant level'. It should be noted that the Convention on Environmental Impact Assessment in a Transboundary Context, l991, calls for the establishment of an environmental impact assessment procedure that permits public participation in certain circumstances. An environmental impact assessment is "an examination, analysis and assessment of plant activities with a view to ensuring environmentally sound and sustainable development".[14] It may also be defined as a national procedure for "evaluating the likely impact of a proposed activity on the environment."[15] It is also seen as "Process for evaluating the environmental impacts of a proposed project or development taking into account inter related socio-economic, cultural and human health impacts, both beneficial and adverse".[16] Today more than hundred countries require EIA in certain circumstances. Most of the EIA Legislation is inspired by the 1969 National Environmental Policy Act of the United States. EIAs should be distinguished from the strategic Environmental Assessment (SEAs). While former generally focuses on the likely environmental impact of an isolated project SEAs are concerned with the cumulative impact of overall policy, plans and process on the environment health etc.[17]

Public participation is also emphasized in the WSSD Plan of implementation which urges states to ensure public participation in decision making, as well as access, at the national level, to environmental information and to judicial and administrative proceedings. It is generally recognized that the best protection of the environment and the effective implementation of

---

13 The process leading up to Rio Conference itself was an important step in encouraging the participation of non-governmental organizations and the representatives of economic interests. Principle 10 of the Rio Declaration (1992) recognized a general right to public participation and Principles 20-22 stress the participation of different components of the population. Public participation also is emphasized throughout Agenda 21(1992); See, further, Principle 23 of the World Charter for Nature (1982); Article 5 of the Desertification Convention' Article 6 of the Aarhus Convention (1998).

14 UN EP Goals and Principles of Environmental Impact Assessment (16 January 1987) adopted in UN GA resolution 42/184 (14 October 1987).

15 The Espoo Convention, 1991, Article 1(VI).

16 The Parties to the Convention on Biological Diversity defined EIA on these lines. See decision VI/7, identification, monitoring, indicators and assessment (UNEP/ CBD/COP/6/20.00.92, 19 April 2002).

17 Article 2(b) on the Kiev Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context defined SEA as follows : "[T]he evaluation of the likely environmental impact including health effects, which comprises the determination of the scope of an environmental report and its preparation, the carrying out of public participation and consultations, and the taking into account of the environmental report, and the results of the public participation and consultation in a plan or programme."

environmental rules can be achieved by involving as many people as possible in the environmental decision making. In this context, the participation of the tribal and indigenous peoples, women and youth is vital.

The desirability of public participation in the decision-making process concerning the environment is also recognized at the regional level. Thus, the EC's Fifth Environmental Action Programme envisages all important role for the citizens of Europe in ensuring that environmental legislation is enforced. The final text of the CSCE meeting on the environment held in Sofia in 1989, reaffirmed respect for the right of individuals, groups and organizations concerned with the environment to express freely their views, to associate with others and assemble peacefully, to obtain and distribute relevant information and to participate in public debates on environmental issues.

The Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, 1998[18] is by far the most comprehensive instrument on access to environmental information and public participation. Adopted through the United Nations Economic Commission for Europe, this Convention of far-reaching significance approaches public participation from a perspective that looks beyond political participation though periodic elections and lays stress on the following three elements of public participation namely, access to environmental information, public participation above the levels of information and consultation, and access to justice. The Convention seeks to achieve a wide range of diverse but connected objectives such as protection of the environment through quality environmental decisions, increased accountability of and transparency in decision making and strengthening of public support for decisions on the environment. The Convention also recognizes that to be able to assert the right to live in an environment adequate to one's health and well-being, and the duty to observe both individually and in association with others, to protect and improve the environment for the benefit of present and future generations, citizens must have access to information, be entitled to participate in decision making and have access to justice in environmental matters.[19] The Convention seeks to strengthen democracy in the region of the UNECE and promote environmental education to further the understanding of the environment and sustainable development and to encourage widespread public awareness of and participation in decisions affecting the environment and sustainable development. There is also recognition in the preamble of the Convention of the importance of fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-to-date environmental information. The Convention recognizes the importance of the respective roles that individual citizens, non-governmental organizations and the private sector

18 The Convention entered into force on 30 Oct. 2001. The analysis of the Convention in the present study draws upon, Jane Holder and Maria Lee, n. 3., pp. 97-119.

19 Preamble of the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, 1998.

can play in environmental protection and reflects a clear understanding of the public decision-making.

The Convention draws links between human rights and public participation and provides that each party "shall guarantee the rights of access to information, public participation in decision making and access to justice in environmental matters in accordance with the provisions of the Convention"[20]. The Convention provides for public participation in decision making at three stages: decisions on specific activities (for example activities within the 'mineral industry', chemical installations and water management) or other activities which may have a significant effect on the environment;[21] plans, programmes and policies relating to the environment;[22] and, the preparation of executive regulations and the generally applicable legally binding normative instruments.[23] Article 6 provides a fairly detailed framework for public participation, it contains what are now reasonably well established arrangements for environmental assessment in various jurisdictions. The Article lays emphasis on early public participation when all options are open and effective public participation can take place. The public participation procedure as envisaged under this provision includes reasonable time- frame for the different phases, allowing sufficient time for informing the public and for the public to prepare and participate effectively during the environmental decision making. Article 6(5) is radical in the sense that it calls upon each party to, wherever appropriate, encourage prospective applicant to identify the public concerned, to enter into discussion and to provide information, regarding the objectives of the application before applying for a permit.

Article 6(6) provides that each party 'shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charges and as soon as it becomes available to all information relevant to the decision-making referred to in this article, that is available at the time of the public participation procedure...'. Article 6(7) is the backbone of public participation and provides: 'Procedures for public participation shall allow the public to submit, in writing or as appropriate at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity'. Although parties can go further, this requirement can be easily satisfied by written consultation mechanisms. There is no suggestion of more active 'deliberative process' in this provision. Article 6(8) requires each party to ensure that in the decision due account is taken of the outcome of the public participation.

Article 7 of the Convention imposes three obligations on each Party (i) to make appropriate practical and/or other provisions for the public to

---

20 *Id.*, Article 1.

21 *Id.*, Article 6.

22 *Id.*, Article 7.

23 *Id.*, Article 8.

participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework; (ii) to provide the necessary information to the public and apply Article 6, paragraphs 3 (public participation procedures), 4 (early public participation) and 8 (due ac- count of the outcome of participation in the decision), and (iii) to require the relevant public authority to identify the public which may participate, taking into account the objectives of the Convention.

It needs to be recognized that the provisions of the Aarhus Convention on plans and programmes are more demanding than those on policies. To the extent appropriate, each party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment'[24]. As for plans and programmes, Article 9(1) of the Regulation for the Implementation of the Aarhus Convention imposes an obligation on the parties to provide 'early and effective opportunities for the public to participate during the preparation of modification or review of plans or programmes relating to the environment when all options are still open.' There is also an obligation to take 'due account of the outcome of the public participation', along with a reason-giving requirement The Convention is less rigorous in respect of 'executive regulations and other generally applicable legally binding rules'. Article 8 requires parties to 'strive to promote effective public participation at an appropriate stage, and while options are still open'.

As already noted, 'access to justice'[25] is the third important pillar of the Aarhus Convention. Access to justice has three elements, standing, economic costs involved in litigation and remedies (justice) actually provided The Convention's provisions on standing are welcome for it establishes the requirement for administrative as well as judicial review of access to environmental information and recognizes the desirability of allowing members of the public to take action against both private polluters and public regulators. Regarding the cost of litigation, parties are required under the Aarhus Convention to 'consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice'. Article 9(4) provides that Parties 'shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive'.

---

24 Holder and Lee, n. 3, at 114.

25 On Access to Justice see Article 2 of the Covenant on Civil and Political Rights (1966); Article 6 of the European Convention on Human Rights (1950); Article 8 of the American Convention on Human Rights (1969). See also Article 2 of the USA-Canada 1909 Boundary Waters Treaty; Article 5(3) of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (1968); Mines de Potasse d'Alsace (1976) case; Article 3 of the Nordic Convention (1974); Article 2(6) of the Espoo Convention (1991), and Articles 19 and 23 of the Council of Europe Civil Liability Convention (1993). See also OECD Council Recommendation on Implementation of a Regime of Equal Right of Access and Non-discrimination in Relation to Transfrontier Pollution (1977), and Principle 20 of WCED Legal Principles (1986).

Access to environmental information is the starting point for any public involvement in decision making. It can encompass both public regulators and polluters and promote environmentally more benign processes by raising educational public awareness in environmental issues. Access to environment information is also essential to avail of enforcement opportunities generally enjoyed by the public. Fortunately, the right to receive information on environmental issues is well entrenched in international human rights texts[26] and treaties on environmental protection.[27] Article 4 of the Aarhus Convention, for example, provides a basic right of access to 'environmental information' held by a 'public authority, without an interest having to be stated'.[28] This right can imply pro-active measures by the State to acquire and disseminate information on the state of the environment and on any emergencies that might arise as well as adequate product information to enable consumers to make informed environmental choices.[29] The Convention adopts a broad definition of 'environmental information' and a broad approach to 'public authority'[30]. Thus governmental bodies and environmental regulatory agencies have been brought clearly within the framework of the Convention. As aptly noted by a perceptive scholar, Paragraph (c) of Article 2(2) attempts to ensure that privatization does not 'take public services or activities out of the realm of public involvement, information and participation'[31].

As is to be expected, the Aarhus Convention contains a number of exceptions to the right of access to environmental information.[32] Thus a request

---

26 The right to seek and disseminate information appears in all human rights text, such as Article 19 of the Universal Declaration of Human Rights (1948), Article 19 of the Covenant on Civil and Political Rights (1966), Article 10 of the European Human Rights Convention (1950) and Article 9 of the African Charter on Human Rights (1981).

27 Numerous Environmental texts mandate the provision on specific information on the environment e.g., the European Union which has adopted a series of texts which provide for the right to information, the most general of which is the Directive on Freedom of Access to Information on the Environment (Directive 2003/4/EC) (2003). Almost all recent international treaties related to environmental protection include provisions concerning this issue: Article 6 of the Convention on Climate Change (1992), Article 3(8) of the Espoo Convention (1991); Article 16 of the ECE Transboundary Watercourses Convention (1992); Article 9 of the North-east Atlantic Convention (1992); Article I of the Council of Europe Civil Liability Convention (1993). See also Principle 16 of the World Charter for Nature (1982), Principle 10 of the Rio Declaration (1992), and Principles 2(c) and (d) of the Forests Principles (1992). Article 14 of the Danube Convention (1994) (states shall make available information concerning the state or the quality of revering environment in the basin to any natural or legal person in response to any reasonable request, without the persons having to prove an interest) and Aarhus Convention (1998)

28 *Supra note* 19, Article 4(1).

29 IUCN, *Draft International Convention on Environment and Development* (2004), at 57.

30 *Supra note* 19, Article 2(2).

31 Holder and Lee, n. 3, at 106.

32 *Supra note* 19, Article 4(3) to Article 4(7).

for environmental information may be refused if the public authority to which the request is addressed does not hold the information requested; the request is manifestly unreasonable or formulated in too general a manner, or the request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national laws or customary practice, taking into account the public interest served by disclosure. Similarly, a request for environmental information may be refused if the disclosure would adversely affect the confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law; or international relations, national defence or public security, or intellectual property rights or the environment to which the information relates, such as the preceding sites of rare species or the confidentiality of personal data and/or files relating to a natural person in certain circumstances.

Article 4 also allows for withholding of confidential, commercial and industrial information in certain circumstances but accords special treatment to information in emissions which is relevant for the protection of the environment. Such information shall be disclosed. Where the disclosures of environmental information would affect the interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material, information will be withheld. But these exceptions are to be interpreted in a restricted way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.

Article 4(5) puts an obligation on the public authority not having the environmental information requested to, as promptly as possible, inform the applicant of the public authority to which it believes is possible to apply for the information requested or transfer the request to that authority and inform the applicant accordingly. Recognizing that the practicalities of access can limit the actual transparency of information the Aarhus Convention provides that the parties shall endeavour to ensure that officials and authorities 'assist and provide guidance to the public in seeking access to information'; 'and 'to promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision making and to obtain access to justice to environmental matters'.[33]

As could be seen from the above, the Convention's provisions on information are by and large centred only around public authorities and no right to access is provided in respect of information held by private parties. Nevertheless, Article 5 contains certain obligations on public authorities to collect information from private parties as well as provisions on voluntary information disclosure by private parties through management systems and labeling.

The requirement of public participation is primarily to be fulfilled through Environmental Impact Assessment, which is universally recognized as a

33 *Supra note* 19, Article 3(3), See also Holder and Lee, n. 3 at 105.

fundamental impact process[34] to inform decision-makers of the environmental consequences of their decisions and to integrate environmental matters into other spheres of decision making. In a significant development the International Court of Justice in the 2010 Pulp Hills on the River Urugua[35] observed that the practice of environmental impact assessment (EIA) "has gained so much acceptance among states that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have significant adverse impact in a transboundary context, and in particular on a scrap resource".[36] But general international law does not specify the scope and

34 "See especially, Espoo Convention (1991), which is the most comprehensive International Instrument on EIAS. In addition to other instruments make reference to EIAS: e.g., Article 14(1) of the Convention on Biological Diversity (1982); Article 4(1)(f) of the Climate Change Convention (1992), where it is a suggested means for complying with the provision; Article 206 of the IJNCLOS (1982); Article XI of the Kuwait Regional Convention (1978); Article 13 of the West and Central African Marine Environment Convention (1981); Article 10 of the South-East Pacific Marine Environment Convention (1981); Article 14 of the ASEAN Agreement (1985). There are also several "soft law" instruments which call for EIAS: Principle 17 of Rio Declaration (1992). This is also complied in UNGA Resolution 2995 (XXVII) on cooperation between States in the Field of the Environment (1972); Principles 11(b) and (c) of the World Charter for Nature (1982); UNEP Goals and Principles of Environmental Impact Assessment (1987); note that Article 5 of the WCED Legal Principles (1986) suggests that EIAs are an emerging principle of international 1aw. For further details, see Alexander Gillespie "Environmental Assessment in International Law", *RECIEL*, 17(2) (2008), 221-233. A.H. Ansari, "Rio-Principle 10 and Environment Impact Assessment: A Study with Reference the Malaysian Practice", *IJIL*, 52 (2012), 2761.

35 Pulp Mills on River Uruguay (*Arg*. v. *Uru* judgment April 20, 2010, available at http:/www.icj.cij.org/ docket/files/135/15877.pdf (last visited April 22, 2010 (hereinafter referred to as the *Pulp Mills case*).

36 *Id*., para 200, In this case the 1975 Statute on the River Uruguay did not require an EIA, but the parties agreed that an EIA was needed. In this context it is worth mentioning that issues concerning status of EIAs under Customary International Law but it were in the *Pulp Mills case* that the International Court of Justice explicitly stated to view on them. This is certainly an important development in environmental jurisprudence of the court specially when one looks at non acceptance of the New Zealand contention in the *Nuclear Test Case*, that it was entitled to a properly conductes EIA and therefore it was unlawful to conduct nuclear test before undertaking an EIA. see ICJ 22 September 1995, request for an examination of the situation with paragraph 63 of the Court's Judgment of 20 December 1974 in the nuclear test. (*New zealand* v. *France*) case (1995) ICJ report 288, In *Hungary* v. *Slovakiya* (*Gabcikovo Nagymaros*) *case* (1997) ICJ Report, the International Court of Justice concurred with the parties that new peremptory norms of Environmental Law such as environmental impact assessment had evolved, but did not specifically rule on the content or application of the new norms of environmental law. In *Pulp* Mills, Argentina argued that Uruguay had an obligation to, *inter alia* to prepare a full and objective environmental impact assessment. In the instant case the 1975 statute on the River of Uruguay did not require an EIA, but the parties agreed that an EIA was needed.

content of an EIA. It is important to note that the Court did not find a legal obligation to consult, despite emphasis being given in treaties like the Espoo and Aarhus Conventions on Public consultations.[37] The International Court of Justice concurred with the parties that new preemptory norms of environmental law such as environmental impact assessment had developed, but did not specifically rule on the content or application of the new norms or environmental laws on Pulp Mills Argentina argued that Uruguay had an obligation inter alia to prepare a full and objective environmental impact assessment. In the instant case the 1975 statute on the river of Uruguay did not required an EIA, but the parties agreed that an EIA was needed.

An additional advantage of such an environmental impact assessment is to inform, and hear the views of the interested public on particular activities. Environmental Impact Assessments depend for their effectiveness on enhancing of the environmental knowledge of the public and its several segments, particularly indigenous peoples and local communities, and increasing the opportunities for environmental training and education. To be effective EIAs also require 'capacity building', especially in developing countries, which needs to be promoted through bilateral or multilateral assistance of States. Interestingly, there is a worldwide consensus that environmental education[38], training and knowledge and capacity building are essential to the effective participation of the public in environmental decision making process.[39]

Notwithstanding many of its salutary features, the Aarhus Convention may be criticized on several grounds. First, like other Conventions, it typically uses vague language, is deferent to national law, and is in any event 'subject to only weak enforcement'.[40] It may be noted that Article 15 of the

37 The ICJ however, did find that Uruguay in fact consulted affected populations of both nations. *Supra note* 1, para 219, For a critical assessment of the ICJ contribution to environmental jurisprudence in *Pulp Mills*, see Cymic R. Payne, "Pulp Mills on the Uruguay River: The International Court of Justice Recognizes Environmental Impact Assessment as a Duty under International Law", *ASIL Insegt*, 1419, April 22, 2010.

38 On the Right to the Child to Environmental Education see, Article 27 of the World Heritage Convention (1972); Article l of the 1982 Protocol Concerning Mediterranean Specially Protected Areas to the Barcelona Convention; and Article 6 of the Climate Change Convention (1992). See also Principle 19 of the Stockholm Declaration (1972); Principle 15 of the World Charter for Nature (1982); and Article 16(d) of the ECE Bergen Ministerial Declaration on Sustainable Development (1990). Article 19 of the Desertification Convention (1994) (capacity-building, education and public awareness); and Article 3(3) of the Aarhus Convention (1998) requires that each party promote environmental education and environmental awareness among the public, especially how to obtain access to information, to participate in decision making and to obtain access to justice in environmental matters.

39 On Capacity Building in Developing Countries see generally Chapter 37 of Agenda 21 (1992); See also Principle 12 of the Stockholm Declaration (1972) and Article 7 of the WCED Legal Principles (1986).

40 Maria Lee et. al., n. 1.

Convention provides that 'optional arrangements of a non-confrontational, non-judicial and consultative status should be established for reviewing compliance with the Convention. Such arrangements are to allow for public involvement and may include the option of considering communications from members of the public on matters relating to this Convention'. By decisions 1/7 adopted on 30 October 2002 an eight member Compliance Committee was set up to consider submissions made in regard to allegations of non-compliance with the Convention by one party against another or by members of the public against any Contracting Party unless that Party has opted out of the procedure within one year of becoming a party.[41] It is also permissible for the Committee to prepare a report on compliance with or implementation of the provisions of the Convention. Further, it may monitor, assess and facilitate the implementation of and compliance with the reporting requirements made under Article 10(2) of the Convention and specified in Decision 1/8.[42] In addition to this arrangement, the Aarhus Convention is being implemented through EC/EU directives such as Directive 2003/04/EC on public access to environmental information and Regulation 1367/2006/EC on the application of the provisions of the Aarhus Convention on access to information, public participation in decision making and access to justice in environmental matters to community institutions and bodies.

Another major criticism of the Convention is its emphasis on the involvement of NGOs in decision making and its lack of engagement with generalized public participation. It says very little about public participation at an international level[43] and simply requires parties to 'promote the application of the principles in the Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment'.[44] The Convention is most concerned with the role of environmental interest groups at the domestic level.

Principles and rules of international law in general and of international environmental law in particular have exerted far-reaching influence on the Indian environmental law and policy. This influence is clearly visible in environmental statutes[45] and the homespun environmental jurisprudence of the

---

41 See M.N. Shaw, *International Law* (Fifth Ed., 2003, reprinted 2005) at 758.

42 *Ibid*.

43 See also Directive 200 1/42EC on the assessment of the effects of certain plans and programmes on the environment. Directive 2000/60/EC establishing a framework for Community action in the field of water policy also contains planning provisions including public participation.

44 See, Holder and Maria Lee, n. 3, at 131.

45 For a partial list of environmental statutes, see Water (Prevention and Control of Pollution) Act, 1974; Water (Prevention and Control of Pollution) Cess Act, 1974; Wildlife Protection Act, 1972; National Green Tribunal Act, 2010; Public Liabilities Insurance Act, 1991; Indian Forest Act, 1927; Forest Conservation Act, 1980; Environment (Protection) Act, 1986; Air (Prevention and Control) Act, 1981; the Disaster Management Act, 2005.

judiciary. The reason for this lies in importance that the Indian Constitution accords to customary international law and treaties and conventions to which India is a party[46] in its scheme of constitutional governance. As is to be expected, international standards on public participation in environmental decision making have also made an abiding impact on public participation provisions of environmental statutes in India.

IV. PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION MAKING IN INDIA

The Constitutional Mandate

It will be useful to recall here the legal regime for environmental protection in India before discussing the evolution and development of the law relating to public participation in environmental decision making. At the outset it must be emphasized that the very concept of environmental protection and conservation of natural resources is not new for this country. Our Vedas and Puranas provide a complete code of environmental protection and emphasize the importance of harmony between man and nature. To maintain ecological balance the Vedic seers and sages prescribed not only respect for but even worship of animals, plants, mountains and rivers etc.[47] They also warned against pollution of water and unnecessarily killing of wild animals and felling of trees. Environmental protection and natural resource management, however, could not receive the needed attention during the medieval period, although some emperors, particularly Moghuls built some magnificent parks around their palaces and at other places in this country. The British period was perhaps the worst from the point of view of the environment and witnessed ruthless appropriation and exploitation of natural resources for earning revenue and serving the commercial and economic interests of the British colonialists.

The British policy regarding the environmental matters continued and

---

46 Articles 51(c), 246 and 253 of the Constitution. For further details see, V.S. Mani, *Implementation of International Law in India*, Asian Yearbook of International Law (1994); Rajeev Dhawan, "Treaties and People: Indian Reflections", *JILI*, 31(1997); B.C. Nirmal, "Cession of Territory and Its Validity", Ban. L. Journal, 10(1974), 231-262, at pp. 248-258; Nirmal, 'Human Rights and their Derogation under the Indian Constitution', in B.P. Panda et al (eds.), *Current Legal Issues* (2003), 1-26, at pp. 3-6; Nirmal, "An Ancient Indian Perspective on Human Rights and Its Relevance", *IJIL*, 43(2003), 445-478, at pp. 474-476; Nirmal, "The Legal Status of Refugees in India in Bimal N. Patel (ed), *India and International Law* (2005), 175-188 at pp. 178-180, on related issue, see Nirmal, "Poverty and Human Rights: An Indian Context", *IJIL*, 46 (2006) pp. 187-211.

47 See B.C. Nirmal, "From Vellore to Nayudu: The Customary Law Status of the Precautionary Principle", *Banaras Law Journal*, 30(2001), 58-99; Nirmal, "An Ancient Indian Perspective of Human Rights and Its Relevance", *IJIL* 43(2003), 445 at 458-460; Nirmal, 'Environmental Protection in Hinduism', Reading Materials, National Workshop on Role of Religion, Indian Culture and Traditions in Environmental Protection (June 22-23, 2002, Law School, Banaras Hindu University).

pursued even by the modern independent India till 1976 when the Government brought about a significant policy change in this regard by inserting Article 48A in Part IV and Article 51(A) in a newly inserted Chapter IV-A of the Constitution. Article 5 1(A)(g) makes it a fundamental duty of every Indian citizen to protect and improve the natural environment, including forests, lakes, rivers and wildlife and to have compassion for living creatures. Article 48A, a Directive Principle of State Policy, lays down: "the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country". The Constitutional provisions on environment protection are further reinforced and complemented by a plethora of 'green' as well as 'brown laws'. In fact, there has been so much legislative activity in the area of environment that it has startled even the judiciary.

Human Rights Approach to the Environmental Matters

The Supreme Court has slowly and gradually expanded the concept of 'quality of life' and used it as a springboard to declare that 'Every citizen has a fundamental right to have the enjoyment of quality of life and living as contemplated in Article 21 of the Constitution of India'.[48] It has also gone further to assert that 'Right to live ... includes the right to enjoyment of pollution free water and air for full enjoyment of life'.[49] The right to sweet water and the right to free air have been recognized by the judiciary as the attributes of the right to life, for these are the basic elements which sustain life itself.[50] The Supreme Court in *KM Chinnappa's case*[51] has stated that '(E)njoyment of life and its attainments including their rights to live with dignity encompass within its ambit, the protection and preservation of environment ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyment'. Hygienic environment is thus, an integral part of healthy life and healthy environment.[52] The right to pollution free environment, according to the Supreme Court, includes the right to enjoyment of life.[53] For this reason the need of proper utilization of the natural resources of air, water and soil has been repeatedly emphasized by the apex judiciary in its judicial pronouncements. Thus, in *Mehta* the court observed as under: The natural resources of air, water and soil cannot be utilized if the utilization results in irreversible damage to environment. There has been accelerated degradation of environment, primarily on account of lack of effective enforcement of environmental laws and noncompliance of the statutory norms.[54]

---

48 *Chhetriya Pradushan Mukti Sangharsh Samiti v. State of U.P.,* AIR 1990 SC 2060 (Mukerji C.J.).

49 *Subhash Kumar* v. *State of Bihar*, AIR 1991 SC 420 (K.N. Singh. J.) for other cases on the point.

50 *Attakoya Thangal* v. *Union of India*, 1990 K.L.T. 580, 583.

51 AIR 2003 SC 724 at 731.

52 State of *M.P.* v. *Kedia Leather and Liquour Ltd*., (2003) 7 SCC 388 at 394.

53 *Subhash Kumar* v. *State of Bihar*, AIR 1991 SC 420.

54 *M.C. Mehta* v. *Union of India*, AIR 2004 SC 4016 at 4044.

After having declared that the right to a safe and decent environment is a fundamental right implicit in Article 21 of the Indian Constitution (right to life and personal liberty) the apex judiciary has successfully balanced this right with the right to development in a number of cases and has declared that the right to 'sustainable development' is also implicit in Article 21 of the Constitution.[55] In a case where noise pollution regulations were challenged on the ground of violation of the right to freedom of religion courts have given preference to the right to a safe environment over the latter.[56] In addition, the judiciary has responded well to the problem of practical access .to the right to a safe and decent environment by recognizing the right to environment knowledge and the right to information on environmental matters.[57] Most importantly, the apex court has demonstrated its willingness to incorporate the principles of international environmental law such as polluter-pays[58] and precautionary principles[59] into domestic law even when their status under international law is unclear and controversial.[60]

---

55 *Vellore Citizen's Forum v. Union of India*, AIR 1996 SC 2715; *Mehta* v. *U.O.I.*, AIR 2004 SC 4051, 4056; *Essar Oil Ltd.* v. *Haldar Utkarsh Samiti*, AIR 2004 SC 1834 at 1843; *The Narmada Bachao Andolan case* (2000) 10 SCF 664; see generally, B.C. Nirmal, "Environmental Law", *Annual Survey of Indian Law*, Vol. XL (2004) 591 at 593-596; Nirmal, "From Vellore to Nayudu: The Customary Law Status of the Precautionary Principle", *Ban.L.Joumal* 30(2001), 58-99 at 85 et. seq. Recent cases on sustainable development are *N.D. Jayal* v. *U.O.I.* (2004) 9 SCC 362; Bom*bay Dyeing and Mfg Co. Ltd. v. Bombay Environmental* Action Group (2006) 3 SCC 434; Intellectual Forum Tirupathi v. State of A.P. (2006) 3 SCC 549; *Karnataka Industrial Areas Development Board v. C. Kenchappa*, judgment dated May 12, 2006. For insightful observations on the judicial approach to sustainable development, see Gurdeep Singh, "Human Right to Sustainable Development- An Indian Perspective", Soochow Law Journal, 3(2) (2006), 5 3-89.

56 See *Church of God (Full Gospel) in India* v. *K.K.R. Majestic Colony Welfare Association and others*, (2000) 7 SCC 282; See also, *Burra Bazar Fireworks Dealers Association* v. *Commisioner of Police*, Calcutta, AIR 1998 Cal. 121.

57 See, Section III -(iv) of this work.

58 See *Indian Enviro-Legal Action case*, AIR 1996 SC 2715 at 2721; *Vellore Citizens Forum v. Union of India*, AIR 1996 SC 2715; *Deepak Nitrate Ltd. v. State of Gujarat and others* (2004) 6 SCC 402. For the liability of the enterprise engaged in an inherently hazardous industry, See *M.C. Mehta* v. *U.O.I.*, AIR 1987 SC 1086.

59 See *Vellore Forum's case*; AIR 1996 SC 2715, Narmada *Bachao Andolan case*, (2000) 10 SCC 664; *M.C. Mehta* v. *Union of India and Ors.* (1997)2 SCC 353. For a pragmatic view See *Fertilizers and Chemical Travancore Ltd. Employees Association v. Law Society of India and Ors.*, (2004) 4 SCC 420 at 424.

60 For a critique of the judicial approach to the precautionary principle, see B.C. Nirmal "From Vellore to Nayudu...", *Ban.L.J.* 19 (2001), 58-99; See generally Ashok K. Desai and S. Murlidhar, "Public Interest Litigation Potential and Problems", in B.N. Kirpal et al. (eds.) *Supreme But Not Infallible* (2000) pp. 159-192.

Public Participation

a) Judicial Review and Public Interest Litigation

Citizens and environmental organizations can contribute immensely to the implementation and enforcement of the environmental legislations by making representations before administrative agencies and securing judicial review of environmental decisions. Fortunately, the Indian judiciary has during the last few decades, shown considerable enthusiasm in relaxing the rigor of *locus standi* and evolving strategies to compel decision making agencies to facilitate access to justice. The right to participation in environmental decision-making would have remained an empty formality had the judiciary not liberalized the principle of *locus standi* and allowed public spirited persons or organizations to bring public interest litigation cases before the Supreme Court under Article 32[61] and before a High Court under Article 226[62] of the Indian Constitution by broadening the ambit of these provisions and evolving a new processional jurisprudence for this purpose. As a result of liberalization of the *locus standi* rule public interest litigations have been brought by a wide spectrum of people in society such as lawyers, association of lawyers[63], environmentalists[64], groups and centres dedicated to environmental protection[65] and forest conservations[66], welfare forums[67], consumer research centres[68], societies registered under the

---

61 Article 32(1) of the Indian Constitution runs: The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. Article 32(2) states: The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, qua warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this part.

62 "Article 226(1) of the Indian Constitution states: 'Notwithstanding anything in Article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any government, directions, order or writs, including writs in the nature of habeas corpus, mandamus, prohibition, qua warranto and by Part III and for any other purpose.

63 The *Mehta cases*, AIR 1986 SC 1086; AIR 1987 SC 965; AIR 1992 SC 382; (1996) 4 SCC 750; (1997) 1 SCC 368; *Dr. B.L Wadhera* v. *Union of India*, (1996) 2 SCC 594: *Animal and Environment Legal Defense Fund* v. *Union of India*, AIR 1997 SC 1071; AIR 1996 sc 1426; (1996) 5 SCC 281.

64 *Pradeep Kishan* v. *Union of India*, AIR 1996 SC 2040.

65 *Executive Engineer AV Project* v. *E.E. Protection Samithy,* AIR 1993 Ker 320; *DahaanuTaluka Environment Protection Group* v. *BSES*, (1991)2 SCC 539; *Rural Litigation and Entitlement Kendra* v. *State of U.P.* AIR 1988 SC 2187.

66 *Banwasi Seva Ashram* v. *State of UP*. AIR 1987 SC 374.

67 *Vellore Citizen Welfare Forum* v. *Union of India*, AIR 1996 SC 2715.

68 *CERC* v. *Union of India*, AIR 1995 SC 922.

Societies Registration Act[69], urban social activists[70], societies for animal protection,[71] rural voluntary associations[72] and residents of housing colonies.[73] And the cases brought by these organizations have covered a host of issues ranging from compassion to animals[74], to the eco-system of the Himalayas and forests[75] to eco-tourism[76] and land use patterns.[77] Environmental pressure groups have also advocated issues relating to privileges of tribal people and fisherman[78] and vindication of an eco-malady of a village.[79]

Recognizing huge gaps in existing laws, courts have issued directions to fill up the voids and have gone even to the extent of asking the Government to constitute national and state regulatory authorities or environmental courts.[80] As a PIL litigation is by nature non-adversarial and consequently gathering of information necessary for its adjudication could have presented a serious problem, a number of committees and commissions have been created by the Supreme Court for overcoming this problem; while in some cases committees were appointed to oversee the compliance of notifications and orders or to provide expert advice[81], in others the court had appointed committees to study the problem.[82]

A detailed discussion of important public interest environment related cases is outside the scope of this paper. Suffice would be to say that there is hardly any aspect of the environment and the environmental law on which

---

69 *Goa Foundation* v. *Konkan Railway Corporation*, AIR 1992 Bom. 471.

70 *L.K. Koolwal* v. *State of' Rajasthan*, AIR 1988 Raj. 2.

71 *Satyavani* v. *A.P. Pollution Control Board*, AIR 1993 AP 257.

72 *Jagannath* v. *Union of India*, (1997) 2 SCC 87.

73 *V. Lakshmipathy* v. *State*, AIR 1992 Kant. 57.

74 *Satyavani* v. *AP Pollution Control Board*, AIR 1993 AP 257.

75 *Rural Litigation Kendra* v. *State of U.P.* AIR 1988 SC 2187; *Banwasi Seva Ashram* v. *State of U.P.* AIR 1987 SC 374.

76 See P. Leetakrishnan, *Environmental Law in India* (1999) Ch. II and cases cited inn. 474-80.

77 *V Lakshmipathy* v. *State*, AIR 1992 Kant. 57.

78 See *Pradeep Krishan* v. *Union of India* AIR 1996 SC 2041, *Suresh Lohia* v. *State of Maharashtra* (l996) 10 SCC 397, *Animal and Environment Legal Defence Fund* v. *Union of India*, AIR 1997 SC 1071.

79 *Indian Council for Envio-Legal Action* v. *Union of India*, AIR 1986 SC 1446.

80 See, *M.C. Mehta* v. *Union of India and Ors*. AIR 1987 SC 965. In this case the Supreme Court said, it might be desirable to set up Environmental Courts on the regional basis with one professional Judge and two experts drawn from the Ecological Science Research Group keeping in view the nature of the case and the expertise required for its adjudication.

81 See *M.C. Mehta* v. *Union of India* AIR 1987 SC 965, M.C. Mehta v. Union of India 1988 SC 1037, *Tarun Bharat Sangh, Alwar* v. *Union of India* AIR 1992 SC 4.

82 See *T.N. Godavaranam Thirumulkpad* v. *Union of India* AIR 1997 1228 and AIR 1997 SC 1233.

the Indian judiciary has not developed its own jurisprudence[83]. These decisions not only show a remarkable degree of judicial creativity but also reveals the dynamics of a slow but gradual evolution of the highest court in this country into an apex green court which is not only sensitive to environmental issues and but is also conscious of its role as a custodian of forests, minerals and other resources of which the state is a public trustee.

b) Citizen Suits

Before the advent of modern environmental statutes a traditional civil suit and other class actions provided in the Code of Civil Procedure were the only remedies available to public spirited citizens or organizations for vindication of their rights. Thus, the Indian Easement Act enabled an aggrieved individual to

---

83 *Court on Its Own Motion* v. *Union of India and others*, JT 2012 (12) SC 503; *Namit Sharma* v. *Union of India*, JT 2012 (9) SC 166; *Research Foundation for Science, Technology and Natural Resource Policy v. Union of India and others*, AIR 2012 SC 2973; *Monnet Ispat and Energy Limited v. Union of India and others*, [2012] 7 S.C.R. 644; *Research Foundation For Science and others* v. *Union of India and others*, [2012] 6 S.C.R. 489; *Village Panchayat, Calangute v. Additional Director of Panchayat-II and others*, [2012] 6 S.C.R. 277; *Bhushan Power and Steel Limited and others* v. *State of Orissa and another*, AIR 2012 SC 1329; *In Re: Networking of Rivers*, JT 2012 (3) SC 234; *Dipak Kumar Mukherjee* v. *Kolkata Municipal Corporation and others*, 2012 Indlaw SC 539; *Sterlite Industries (India) Limited Etc v. Union of India and others Etc*., (2011) 10 SCC 254; *Indian Council for Enviro-Legal Action v. Union of India and others*, JT 2011 (8) SC 375; *Lafarge Umiam Mining Private Limited and another* v. *Union of India and others*, AIR 2011 SC 2781; *Construction of Park at Noida Near Okhla Bird Sanctuary Anand Arya and another v. Union of India and others*, JT 2010 (13) SC 403; *Jayabheri Properties Private Limited and Others v. State of Andhra Pradesh and Others*, JT 2010 (3) SC 502; *M. Nizamudeen v. Chemplast Sanmar Limited and Others*, AIR 2010 SC 1765; *State of Uttaranchal v. Balwant Singh Chaufal and Others*, AIR 2010 SC 2550; *Tirupur Dyeing Factory Owners Association v. Noyyal River Ayacutdars Protection Association*, JT 2009 (13) SC 435; *Delhi Development Authority v. Rajendra Singh and Others*, JT 2009 (10) SC 137; *M. C. Mehta*; (2) *T. N. Godavarman Thirumulpad* v. *Union of India and Others*, AIR 2009 SC (Supp) 353; *Delta Engineers* v. *State of Goa and Others*, JT 2009 (9) SC 142; *M. Chandru v. Member Secretary, Chennai Metropolitan*, JT 2009 (2) SC 606; *Fomento Resorts and Hotels Limited and another v. Minguel Martins and others*, JT 2009 (1) SC 470; *Uttar Pradesh Pollution Control Board v. Dr. Bhupendra Kumar Modi and Another*, JT 2008 (13) SC 174; *Gujarat Pollution Control Board v. Nicosulf Industries and Export Private Limited*, JT 2008 (12) SC 519; *Mummidi Apparao (Dead) through L.Rs v. Nagarjuna Fertilizers and Chemicals Limited and another*, 2008(16) SCALE 228; *Chowgule and Company Limited v. Goa Foundation and Others*, JT 2008 (9) SC 175; *Atma Linga Reddy and Others* v. *Union of India and Others*, JT 2008 (7) SC 601; *T. N. Godavarman Thirumulpad* v. *Union of India and others*, 2008(8) SCALE 182; *M. C. Mehta v. Union of India and others*, (2007) 15 SCC 404; *T. N. Godavaraman Thirumulpad and another v. Union of India and others*, 2007(3) SCALE 430; *Research Foundation For Science Technology and Natural Resource Policy v. Union of India and Others*, AIR 2007 SC (Supp) 852; *Research Foundation For Science v. Union of India and Another*, AIR 2007 SC 3118; *National Council For Civil Liberties v. Union of India and Others*, JT 2007 (9) SC 201; *State of Punjab and Others; (2) New Town* v. *(1) Sanjeet Singh Grewal and Others*; JT 2007 (9) SC 38; *Southern Petrochemical Industries*

challenge an act of pollution[84] by filing a civil suit under the Code of Civil Procedure.[85] In all cases where environmental assaults amount to private nuisance an action could be brought before a civil court. But where such assaults constitute public nuisance Section 91 of the Code of Civil Procedure could be invoked. Although these provisions still adorn the, statute book, they have seldom been used. Section 133 of the Code of Criminal Procedure is yet another provision which has immense potential to deal with the cases of public nuisance caused by environmental pollution.[86] The famous *Ratlam case*[87]

Company Limited v. Electricity Inspector and E.T.I.O. and Others, JT 2007 (7) SC 613; *Parthiban Blue Metal Etc v. Member Secretary T.N. Polln. Cont. Bd. and Others*, AIR 2007 SC (Supp) 418; *T.N. Godavarman Thirumulpad v. Union of India and Others*, JT 2007 (2) SC 270; *M.C. Mehta v. Union of India and Others*, AIR 2007 SC 1087; *T.N. Godavarman Thirumulpad v. Union of India and Others*, (2006) 13 SCC 689; *Karnataka Industrial Areas Development Board v. C. Kenchappa and Others*, JT 2006 (5) SC 556; *M.C. Mehta v. Union of India and Others*, JT 2006 (11) SC 621; *T. N. Godavarman Thirumalpad v. Union of India and Others*, JT 2006 (4) SC 454; *T. N. Godavarman Thirumulpad v. Union of India and others*, (2006) 5 SCC 28; *Akhil Bharat Goseva Sangh v. State of Andhra Pradesh and Others*, JT 2006 (4) SC 482; *State of Tamil Nadu and Another v. P. Krishnamurthy and Others*, JT 2006 (4) SC 167; *Bombay Dyeing and Mfg. Company Limited v. Bombay Environmental Action Group and others*, JT 2006 (3) SC 235; Intellectuals Forum, *Tirupathi v. State of Andhra Pradesh and Others*, JT 2006 (2) SC 568; *M.C. Mehta v. Union of India and Others*, JT 2006 (2) SC 448; In Re: News Item Published In Hindustan Times Titled "and Quiet Flows The Maily Yamuna", (2009) 17 SCC 545; *Milk Producers Association, Orissa and Others v. State of Orissa and Others*, JT 2006 (2) SC 217; In Re: News Item Published In Hindustan Times Titled "And Quiet Flows The Maily Yamuna", (2009) 17 SCC 720; *State of Gujarat and Others v. Mirzapur Moti Kureshi Kassab Jamat, Ahmedabad and Others*, AIR 2006 SC 212; *T. N. Godavarman Thirumulpad v. Union of India and others*, JT 2005 (8) SC 588; In Re: News Item Published In Hindustan Times Titled And Quiet Flows The Maily Yamuna, (2009) 17 SCC 716; In Re: Noise Pollution (V), *In Re. With Forum, Prevention of Environmental and Sound Pollution*, JT 2005 (6) SC 210; *State of Himachal Pradesh and Others v. Gujarat Ambuja Cement Limited And Another*, 2005 Indlaw SC 1244; In Re: News Item Published In Hindustan Times Titled "And Quiet Flows The Maily Yamuna", (2009) 17 SCC 708; *Research Foundation For Science Technology and Natural Resources Policy v. Union of India and Another*, JT 2005 (11) SC 135.

84 The Indian Easement Act, 1882, Sec. 7, Illus. (b) (I) and (l).

85 The Code of Civil Procedure, 1908, Section 9.

86 For earlier cases see *Deshi Sugar Mill v. Tupsi Kahar*, AIR 1926 Pat. 506; *Raghunandan v. Emperor*, AIR 193 I All. 433 at 434. These cases seemingly enlarged the scope of the law of public nuisance to cover environmental pollution. But this trend received a serious blow as a result of the decision in *Shaukat Hussain v. Sheodayal*, AIR 1958 MP 350 at 353, to the effect that the law should not be used in the case of potential nuisance.

87. *Municipal Council Ratlam v. Vardichand*, AIR 1980 SC 1622, at 1628

provided the necessary stimuli to the use of the law of public nuisance in the Code of Criminal Procedure for the purposes of protection of the environment. In this case the Supreme Court asked the Municipality to prepare a scheme and abate the nuisance.

The Environment Protection Act 1986 provides for citizens suits. A person can file a complaint after giving the Central Government or any authority or officer authorized in this behalf by the Central Government, a notice of not less than 60 days of his / her intention to make the complaint.[88] Subsequently, similar provision was added to the Air Act and the Water Act by amendments in 1977 and 1988 respectively. The requirement of notice has its merits and demerits. On the one hand, its purpose is to push the Pollution Control Board to trigger its preventive measures. On the other hand, if gives the polluting company sufficient time to cover up its omissions or commissions. Once a complaint is made the board on demand has to make available to the complainant relevant reports in its possession. This should certainly help the complainant to prove its contentions before a court of law. Apart from the legal costs associated with citizen suits, problems that arise in relation to admissible evidence are likely to discourage such litigation. It should be recognized that private prosecutors are not entitled, like the pollution control authorities, to enter premises and take samples, records etc. They therefore have to rely on other evidence, such as samples taken by the individuals themselves at points of discharge and information and reports provided by the pollution control authorities. The privilege enjoyed by the Board under the Water Act to refuse to make the relevant report available to such persons on the ground of public interest is another formidable inhibiting factor in starting such litigations.

Appeal provisions of the Water Act and the Air Act[89] undermine the idea of public access to justice for protection of the environment. Under Section 28 of the Water Act only a person 'aggrieved by an order' of the State Pollution Control Board can prefer an appeal within 30 days from the date on which the order is communicated to him. It means in effect that while a polluter or potential polluter may have the right to prefer an appeal, a member of the general public does not have such a right because he was not a party to the proceedings before the Board. Surely, this lacunae in the law needs to be removed without any further delay and a provision granting members of the general public a right of appeal to a court or a special environmental tribunal against the decisions of an agency should be added to the Water Act in order to make decisions making process of the Pollution Control Boards just, fair, transparent, effective and equitable.

c) Consent order

Most businesses have statutory authority to pollute to some extent (in accordance with the conditions imposed in consent). The cause of

---

88 The Environment (Protection) Act, Section 19.

89 The Air (Prevention and Control of Pollution) Act, 1981, Section 31.

environmental protection will be better served if public spirited citizens or organizations were allowed to participate in an inquiry which will be conducted for the purpose of grant of permission. There seems to be a consensus that public participation in such inquiry should be made mandatory and Registers maintained by the Pollution Control Board are made available for inspection by the public free of charge. While public participation in a consent inquiry will provide members of the general public an opportunity to bring relevant factors to the attention of the consent granting authority and register their objections to the reasonableness of the conditions, access to registers would help the people to ascertain who is responsible for a particular discharge into a river or other water source, what the discharge conditions are, whether there has been any monitoring, whether conditions imposed in consent orders are being complied. Where a person or group of persons believes that an offence has been committed or is being committed or is likely to be committed the easiest thing for them will be to complain to the regulatory authority and ask them to take enforcement action. It is only when the regulatory authority does not take any action that they will be tempted to move to a court of law.

Unfortunately, consent provisions of the Water Act neither provide for a mandatory inquiry nor do they make the register of conditions open to the public. The Board has absolute discretion to decide whether or not it should make an inquiry and what the scope of inquiry will be.[90] The inspection of the register is confined to 'a person interested in or affected by an outlet or effluent'.[91] As a consequence, the process is overshadowed by the clouds of secrecy which is undoubtedly detrimental to the cause of environmental protection.

It does not need to be overemphasized that unnecessary secrecy undermines public confidence that pollution has been properly controlled. To the contrary, provisions requiring that registers held by the regulatory bodies be made available for inspection by the public would increase confidence in pollution control boards. They will also facilitate public participation in helping to protect the environment. If the members of the public were equipped with relevant information then every individual could become an environmental watchdog in his/her own right. By contrast the provisions of the Water Act referred to above are bound to discourage individuals from playing a meaningful role in the enforcement of this legislation. Moreover, they are inconsistent -with the right of the public to know and overlooks a vital fact that the public too has a beneficial interest in the environment. There is little doubt that wherever appropriate information should be withheld to preserve secrecy but cases where genuine secrets are involved are, in fact, comparatively rare. Judged from this perspective the British laws are more progressive, practical and pragmatic than their Indian counterparts. But it is not only the consent granting process which has been allowed to be surrounded by a mystery, there are other areas as well where people are kept

90 The Water (Prevention and Control of Pollution) Act, 1974, Section 25(3).

91 *Id.*, Section 25 (6).

in dark when environmental decisions are taken by the regulatory bodies. As a scholar has aptly stated, the iron curtain also 'falls on other environmental decision-making processes in India whether it related to installation of a nuclear plant, licensing of a chemical factory or development activities in a forest area or a coastal zone'.[92]

d) Environment Impact Assessment

In many jurisdictions public participation is a necessary component in EIAs. But in India very little attention was given to public involvement in such assessments which were also discretionary before the 1997 amendments to the final notification of 1994. It may be noted here that under the final notification of 1994, consultation of the MoEF, the impact assessment agency (IAA) with the Committee of Experts and visit of experts to sites and interact with the affected population or environmental groups were discretionary. The provision for environmental groups to have access to reports, recommendations and conditions was subject to public interest privilege. Public hearings for soliciting comments from the public could be arranged only if IAA decide to do so.

The 1997 Amendment for the first time involved and engaged the State Pollution Control Boards in the assessment process and also made public hearing mandatory.[93] Under the amended notification the project proponent was required to submit 20 sets of documents to the State Pollution Board. The Board had to give notice of hearing in two newspapers of wide circulation in the locality, one of which was to be in the vernacular language. The notice was required to mention the date, time and place of public hearing. Suggestions, views, comments and objections of the public had to be invited within 30 days from the date of the publication of the notice. Thereafter, a public hearing was required to be held by a panel consisting of representatives from the State Pollution Control Board, the State Government and the local authorities and not more than three senior citizens. The notification specifically provided for participation of bonafide residents, environmental groups and people affected by the project or displacement. Oral or written suggestions could also be made. Those who could have objected or made comments included persons likely to be affected by environmental clearance, persons having control over the project for which environmental clearance was applied for, association of persons likely to be affected by the project, associations functioning in the field of environment and the local authority within whose limits the project was proposed to be located.

The amended notification had made it necessary to keep the executive

---

92 Leelakrishnan, n. 76, at 176.

93 For recent judicial decision on Environment Impact Assessment see, *Deepak Kumar v. State of Haryana* (2012)4 SCC 629; *Jawinder Singh v. State of Punjab* 17 August 2012; *Deepak Kumar v. State of Haryana* I.A. No.12-13 of 2011 special leave petition No.19628-19629 of 2009 with SLP No.729-731/2011/21833/2009/2498-499/2010-16517/2011 CC 18235/2011; *Dev Sharma v State of U.P.* SLP.No.8939 of 2010 date of order 7.3.2011; *T.N. Godaverman v. Union of India* (1995-2009), See also www.ercindia.org.for orders of Supreme Court related to EIA.

summary of the project submitted by an applicant in certain specified offices such as the collectorate, district industry center, concerned local authority, State Pollution Control Board or its regional office and the State department dealing with environment. Persons desirous of giving their views or objections were entitled to have access to such summary. The impact assessment authority was duty bound to base its finding on the outcomes of the public hearing.

Provisions for public hearing were certainly a positive and constructive step ahead towards participatory democracy and the rationalization of the EIA procedures only in respect of scheduled projects reduced their utility. Subsequently, in *Centre for Social Justice v. Union of India and Ors*[94] the Gujarat High Court issued a number of very useful directions to the State of Gujarat about the manner in which a meaningful public hearing should be conducted before granting environmental clearance certificate to any industry, operation or process.

The original notification, along with the 1997 amendment was repealed and replaced by a new notification issued in 2006. This notification makes proper environmental clearance (EC) necessary for the following projects or activities: (i) all new projects or activities listed in the Schedule to the notification; (ii) expansion and modernization of existing projects or activities listed in the Schedule to this notification with addition of capacity beyond the limits specified for the concerned sector, that is, projects or activities which cross the threshold limits given in the Schedule, after expansion or modernization; and (iii) any change in product-mix in an existing manufacturing unit included in the Schedule beyond the specified range. All these projects and activities are broadly categorized into two categories. Category A and category B, based on the spatial extent of potential impacts and potential impacts on human health and natural and manmade resources. All category A and B projects, including expansion and modernization of existing projects/ activities and change in product mix require prior environmental clearance from the Central Government in the Ministry of Environment and Forests (MoEF).

The MoEF shall base its decision on the recommendation of an Expert Appraisal Committee (EAC). Likewise, all category B projects or activities but excluding those which fulfill the general conditions stipulated in the Schedule, require environment clearance (EC) from the State/Union Territory Environment Impact Assessment Authority (SEIAA). The latter would finalize its decisions on the recommendations of a State or Union Territory level Expert Appraisal Committee (SLEAC). EAC and SLEAs will act as screening, scoping and appraisal committees. Category B projects have been categorized into two categories B1 and B2. B1 projects are ones which require an E1A report, while B2 projects do not require such report. Determination of whether a project or activity requires an EIA is to be done by the SEAC.

---

94 AIR 2001 Guj. 71.

There are a maximum of four stages in EC process in new projects screening (only for category B projects and activities); scoping; public consultation and appraisal. Scoping is a stage next to screening and involves a determination of detailed and comprehensive Terms of Reference (TOR) by the EAC/SLEAC for the preparation of an EIA in respect of category A or category B projects/activities respectively. Such determination will be made on the basis of the following: (i) information furnished in the prescribed application Form I/Form 1A including Terms of References proposed by the applicant, (ii) a site visit by a sub-group of EAC/SLEAC as the case may be considered necessary by these committees; (iv) terms of reference suggested by the applicant (if furnished) and other information that may be available to EAC/ SLEAC. But scoping is not necessary for projects activities related to construction/township/commercial complexes/housing. There is also a provision for conveying of the TOR to the applicant or deemed TOR (when it is not finalized and conveyed to the applicant within sixty days of the receipt of Form I). Applications for EC may be rejected by the regulatory authority on the recommendations of the EAC or SLEAC concerned at the stage of scoping.

Stage (3) is of public parties' consultation. 'By public consultation' means the process by which the concerns of local affected persons and others who have 'plausible stake' in the environmental impacts of the project or activity are ascertained with a view to taking into account all the material concerns in the project or activity design as appropriate. The notification makes a public consultation necessary for all category 'A' or category B1 projects or activities (except 8 categories of projects activities). The requirement of public consultation is not applicable to all category B2 projects, activities or modernization of irrigation projects or all projects or activities concerning national defense and security or involving other strategic considerations as determined by the Central Government. Also exempted from public consultation are all building/construction projects/area development projects and townships, expansion of Roads and Highways not involving any further acquisition of land and all projects or activities located within industrial estates or parks approved by the concerned authorities, and which are not disallowed in such approvals.

Public participation shall ordinarily have two components. First is a 'public hearing' at the site or in its close proximity, district wise to be carried out in the manner prescribed in Appendix IV, for ascertaining concerns of local affected persons. And the second involves obtaining 'responses in writing' from other concerned persons having a plausible stake in the environmental aspects of the project or activity. The notification casts a duty on the State Pollution Control Board (SPCB) or the Union Territory Pollution Control Committee (UTPCC) concerned to conduct the Public hearing at or in close proximity to the site(s) in all cases in the specified manner and forward the proceedings to the regulatory authority concerned within 45 days of request to the effect from the applicant. Where the SPCB or UTPCC concerned does not undertake and complete the public hearing within the specified period, and /

or does not convey the outcome of proceedings of public hearing within the prescribed period directly to the regulatory authority concerned, the regulatory authority shall engage another public agency or authority which is not subordinate to the regulatory authority, to complete the process within a further period of forty-five days.

On receipt of a report from the nominated public agency or authority to the effect that owing to local situation, it is not possible to conduct the public hearing in a manner which will enable the views of the concerned local persons to be freely expressed, the concerned regulatory authority, may after consideration of the report and other reliable information decide that the public consultation in the case need not include the public hearing.

The notification makes it necessary for the concerned authority and the SCPB/UTPCC to obtain responses in writing from 'other concerned persons' having a plausible stake in the environmental aspects of the project or activity by inviting their responses by placing on their websites the following documents, within seven days of the receipt of a written request for arranging the public hearing. The documents that have to be placed on the websites are summary ETA report prepared in the format given in Appendix IIIA by the applicant along with a copy of the application in the prescribed form. Confidential information, including non-disclosable or legally privileged information involving intellectual property rights, source specified in the application are not to be placed on websites. The regulatory authority concerned may also use other appropriate media for ensuring wide publicity about the project or activity. The regulatory authority, shall, however, make available, on a written request from any concerned person, the Draft ETA report for inspection at a notified place during normal office hours till the date of the hearing. All the responses received as part of this public consultation process shall be forwarded to the applicant through the quickest available means.

After completion of the public consultation the applicant is required to make appropriate changes in the draft ETA .and EMP in the light of all the material, environmental concerns that were expressed during the consultation process and to prepare a final ETA report and to submit the same to the regulatory authority concerned. If the applicant so wishes it may alternatively submit a supplementary report to draft ETA and EMP addressing all the concerns expressed during the public consultation.

Appraisal is the fourth stage in the prior environmental clearance process for new projects and involves a detailed scrutiny by the EAC/SEAC of the application and other documents like the final ETA report, outcome of the public consultations; including public hearing proceedings submitted by the applicant to the regulatory authority concerned for grant of environmental clearance. In this process, the applicant shall be invited for furnishing necessary clarifications in person or through an authorized representative. The regulatory authority after considering the recommendation of the EAC or SEAC, will grant or reject prior environmental clearance.

Paragraph 7(ii) of the notification details the procedure for prior environmental clearance for expansion with increase in the production capacity beyond the capacity for which prior environmental clearance has been granted under this notification or with increase in either lease area or production capacity in the case of mining projects or for the modernization of an existing unit with increase in the total production capacity beyond the threshold limit prescribed in the Schedule to this notification through change in process and or technology or involving a change in the product mix The applications for EC have to be made in Form I and they shall be considered by the concerned EAC/SLEAC within sixty days. The latter will decide on the necessary due diligence, including preparation of ETA and public consultations and the application shall be apprised accordingly for grant of environmental clearance.

The notification also contains provisions on validity of environmental clearance. Most importantly, there are provisions for post-environmental clearance monitoring. It is mandatory for the project management to submit half yearly compliance reports in respect of the stipulated prior environmental clearance terms and conditions in hard and soft copies to the regulatory authority concerned on June and December of each calendar year. All such compliance reports submitted by the project management shall be public documents. Copies of the same shall be given to any person on application to the regulatory authority. The notification requires that such compliance reports are also displayed on the website of the regulatory authority.

Procedures for public consultation laid down in the recent notification are undoubtedly a step ahead. But consultation as the extent of citizens participation has its own inherent limitations for citizens may hear and be heard but under this condition they lack the power to ensure that their views will be heeded by the powerful. As aptly said by a scholar, when participation is restricted to informing and consultation, "there is no follow through, no 'muscle', hence no assurance of changing the status quo". It has been suggested that these levels of participation are not more than a kind of 'tokenism' and it is only at the higher, rungs of participation such as partnership, delegated power and citizen control that "have-not" citizens obtain the requisite power to negotiate and engage in trade-offs with the power-holders and get their view-points accepted by the latter. Another problem with citizens participation in the EIA procedure is the restricted scope of the 2006 Notification. As noted earlier, the notification is applicable only to scheduled category A and B categories projects activities. And the requirement of mandatory public consultation is not applicable to B2 projects and even certain category B1 projects/activities are expressly exempted under the notification from public consultation.

The Environment Impact Assessment (EIA) Notification, 2006, as amended, requires mining projects (new projects, expansion or modernization of existing projects as also at the stage of renewal of mine lease) with lease area of 5 ha and above, irrespective of the mineral (major or minor} to obtain prior environment clearance under the provisions thereof. Mining

projects with lease area of 5 ha and above and less than 50 ha are categorized as category 'B' whereas projects with lease area of 50 ha and above are categorized as category 'A'. The category 'A' projects are considered at the central level in the Ministry of Environment & Forests while category 'B' projects are considered by the respective State/UT Level Environment Impact Assessment Authority, notified by MoEF under the EIA Notification, 2006.

In *Deepak Kumar etc. v. State of Haryana and Ors*[95], implementation thereof regarding the Supreme Court vide its order dated 27.2.2012 directed as follows:

"We in the meanwhile, order that leases of minor miner including their renewal for an area of less than 5 ha be granted by the States/UTs only after getting environmental clearance from the MoEF."

In order to ensure compliance the above order MoEF on 18th March 2012, decided that all mining projects of minor minerals including their renewal, irrespective of the size of the lease would henceforth require prior environment clearance. Mining projects with lease area up to less than 50 ha including projects of minor mineral with lease area less than 5 ha would be treated as category 'B' as defined in the EIA Notification, 2006 and will be considered by the respective SEIAAs notified by MoEF and following the procedure prescribed under EIA Notification, 2006.

Further, the Supreme Court in its order dated 16.4.2012 in the above mentioned matter and the linked applications have observed as under:

"All the same, liberty is granted to the applicants before us to approach the Ministry of Environment and Forests for permission to carry on mining below five hectares and in the event of which Ministry will dispose of all the applications within ten days from the date of receipt of the applications in accordance with law," MoEF implemented this order also by its office memorandum of 18th May 2012.

In *Lafarge Umiam Mining Pvt. Ltd's Case*[96] the Supreme Court allowed the appeal of Lafarge, saying that there was no reason for the court to interfere with the decision of MoEF granting site clearance dated 18.6.1999, EIA clearance dated 9.8.2001 read with revised environmental clearance dated 19.4.2010 and Stage-I forest clearance dated 22.4.2010.

The Court opined that under Section 3(3) of the Environment (Protection) Act, 1986, the Central Government should appoint a National Regulator for appraising projects, enforcing environmental conditions for approvals and to impose penalties on polluters.

The court gave guidelines to be followed by the Central Government, State Government and the various authorities under the Forest (Conservation) Act, 1980. These guidelines are to be implemented in all future cases.

---

95 AIR 2012 SC 1386.

96 2011(7) SCALE 242.

According to the court, these guidelines are required to be given so that fait accompli situations do not recur. The Court said that these guidelines had been given in the light of the experience in the last couple of years. These guidelines will operate in all future cases of environmental and forest clearances till a regulatory mechanism is put in place.

The judgment presented an important opportunity to the MOEF to revamp procedures and plug loopholes, being exploited by development project promoters from both government and the private sector. It is believed that the MOEF is busy in formulating a policy on inspections verification, monitoring and the overall procedure relating to grant of forest clearance and identification of forests. It is hoped that the new policy will provide new conservation ideas based on sound science and tighten forest clearance and monitoring procedures.

Orissa Mining Corporation v. MoF and Ors[97] is a grim reminder of the contempt in which environmental legislation in general and Environmental Impact Assessment regulations is very often held by the powerful and influential big mining and refinery companies. In the instant case Orissa Mining Corporation (OMC), a State of Orissa Undertaking, approached the Supreme Court seeking a Writ of Certiorari to quash the order passed by the Ministry of Environment and Forests (MOEF) dated 24.8.2010 rejecting the Stage-II forest clearance for diversion of 660.749 hectares of forest land for mining of Bauxite ore in Lanjigarh Bauxite Mines in Kalahandi, OMC urged that the said impugned order of the MOEF had the effect of neutralizing two orders of this Court passed the *Vedanta Case*, (2008) 2 SCC 222 and the *Sterilite Case*. The Ministry of Environment and Forest rejected the request of OMC for clearance on the following grounds: the violation of the rights of the tribal groups including the primitive Tribal groups and the Dalit population; and enormous expansion of the project of the company Vedanta Alumina Ltd without obtaining environmental clearance as per the provisions of EIA Notification, 2006 under the Environmental (Protection) Act (EDA) and obtaining of the Environmental clearance by the Sterlite by wrongly stating that no forest land was involved in the project and that there was no reserve forest within a radius of 10 kms of the project site, challenge to the project after the grant of Environmental clearance, by the local tribals and other concerned persons, including Dongaria, Kondhs in four appeals before the National Environment Appellate Authority[98] and monitoring report of the Eastern Regional, office dated 25th May, 2010. In appeals it was alleged that the full Environmental Impact Assessment was not made available to the Public before the public hearing, different EIA reports made available to the public and submitted to MOEF, the EIA conducted was a rapid EIA

97 Writ Petition (Civil) No. 180 of 2011.

98 *Kumati Majhi and Ors v. Ministry of Environment and Forest, Srabbu Sikka and Ors. v. Ministry of Environment and Forests, R Sreedhar v. Ministry of Environment and Forest, Prafulla Samantara v. Ministry of Environment and Forests and Ors* Appeal No.18, 19, 20 and 21 of 2009.

undertaken during the monsoon months.

It is evident from the perusal of the judgment that it was after the *Sterlite*, State of Orissa and OMC unconditionally accepted the 'rehabilitation package' as suggested by the Apex Court in *Vedanta* that the Court granted clearance to the diversion of 660.749 ha of forest land to undertake the Bauxite mining in Niyamgri Hills and ordered that MOEF would grant its approval in accordance with law. MOEF, then considered the proposal of the State Government made under Section 2 of the Forest (Conservation) Act, 1980 and also the recommendations of the Forest Advisory Committee (FAC) and agreed in principle for the diversion of the said forest land for mining of Bauxite ore in Lanjigarh Bauxite Mines in favour of OMC subject to 21 conditions.

The environmental clearance was subject to grant of forestry clearance. It was also stated by MOEF that necessary clearance for diversion of 672.018 ha of forest land involved in the project be obtained before starting operation in that area without obtaining prior forestry clearance. MOEF placed the letter of state of Orissa regarding the compliance of stipulations of State I by the user agency and requested to take necessary steps in matters of according final approval for diversion of 660.749 ha of forest land for the project under Section 2 of the Forest Conservation Act, 1980 before the FAC which in turn recommended tha the final clearance be considered only after ascertaining the community rights of forest land after the completion of the process for establishing such rights under the Forest Rights Act. It was followed by the constitution of Dr.Usha Ramnathan Committee and the Saxena Committee. The recommendations of the FAC dated 23.8.2010 and Saxena Committee were considered by MOEF and the request for Stage-II Cleance was rejected on 24.8.2010 for the reasons stated above.

After an analysis of the relevant provisions of the Forest Rights Act, in the backdrop of the Forest Conservation Act, the Panchayat (Extension is scheduled Areas) Act, 1996 and the Mines and Minerals (Regulation and Development) Act, 1957 the apex Court concluded that not only has Gram Sabha powers, to determine the natures and extent of individual or community rights, it also has a role to play in safeguarding the customary and religious rights of scheduled Tribes (STs) and other Traditional Forest Dwellers under the Forest Rights Act. The Court went further and held that the question whether STs and other TFDs, like Dongaria Kondh, Kutia Kandha and oths, have got any religious rights i.e. rights of worship over the Niyamgin hills, known as Nimagin, near Hundaljali, which is the hill top known as Niyam-Raja have to be considered by the Gram Sabha.

The Gram Sabha can also examine whether the proposed mining area Niyama Danger, 10 km away from the peak, would in any way effect the abode of Niyam-Raja. The Court further said if the BMP, in any way, affects their religious rights, especially their right to worship their deity, known as Niyam Raja, in the hills top of the Niyamgiri range of hills, that right has to be preserved and protected. The Gram Sabha is also free to consider all the community, individual as well as cultural and religious claims, over and above

the claims which have already been received from Rayagada and Kalahandi Districts.

In the operative part of the judgment the Court directed the State of Orissa to place the aforesaid issues before the Gram Sabha with notice to the Ministry of Tribal Affairs, Government of India and the Gram Sabha would take a decision on them within three months and communicate the same to the MOEF, through the State Government. It also ruled that the MoEF shall take a final decision on the grant of Stage II clearance for the Bauxite Mining Project in the light of the decisions of the Gram Sabha within two months thereafter. The Court also advised the Alumina Refinery Project to take steps to correct and rectify the alleged violations by it of the terms of the environmental clearance granted by MoEF.

In order to ensure that the proceedings of the Gram Sabha are conducted in an independent manner the Court directed the same be done in the presence of an observer of a judicial officer of the rank of the District Judge, nominated by the Chief Justice of the High Court of Orissa who shall sign the minutes of the proceedings and give a certificate that the proceedings of the Gram Sabha took place independently and completely uninfluenced either by the Project proponents or the Central Government or the State Government.

e) Environmental Information

The right to know about the state of environment and measures taken for its protection is a judicially recognized right. The apex court has recognized a strong link between Article 21 of the Indian Constitution and the right to know, particularly when secret government decisions may affect health, life and livelihood.[99] Considering that the right to information not only constitutes an essential attribute of the democratic processes and the principle of popular participation but is also a key to the success of the environment management programmes and the implementation of environmental law, the apex court has accorded it a place of pride. In the homespun environmental jurisprudence repeatedly directed the state governments and other authorities to create environmental awareness amongst the students through the medium of education.[100]

The recognition of the right to environmental information as a fundamental right implicit in Article 21 of the Constitution, notwithstanding, information related provisions of environmental statutes fall short of expectation generated by the apex court in this regard. As we have seen, these statutes are essentially pro-secrecy enactments and are hardly designed to provide any worthwhile environmental information to the members of the general public. By contrast, access to information is the recurrent theme of the environmental

---

99 *Reliance Petro Chemicals Ltd. v. Proprietors of Indian Express Newspapers*, AIR 1989 SC 190, 192; In *Essar Oils Ltd. v. Haldar Utkarsh Samiti*, AIR 2004 SC 1834, 1835, the Court recognized the role of voluntary organizations in creation of environmental awareness.

100 *M.C. Mehta v. Union of India* (1992)1 SCC 358, 361; *M.C. Mehta v. U.O.I.,* (2004)1 SCC 371.

legislations in the U.K. Thus, the Environment Protection Act 1990, the Water Resources Act, 1991 and Environmental Information Regulations, 1992 provide for both publicity and access to information. The Environment Protection Act provides for the establishment of public registers of information to be made freely available to the public for inspection at all reasonable time. The Environmental Information Regulations go further and make further provisions for the freedom of access to information on the environment held by public bodies, They place a duty on every 'relevant person' who holds any information to which the regulations apply to make the information available to every person who requests it, subject to the exceptions listed therein. The regulations make a distinction between which must not be disclosed and other information which may/or may not be disclosed depending upon the exercise of discretion by the relevant person holding the information.

In India, there is no legislation similar to the Environmental Information Regulations. But the Right to Information Act, 2005 can be invoked to get relevant environmental information from the Central Pollution Control Board, State Pollution Control Board and other public agencies holding such information. This enactment confers on all citizens the right to information[101] and places a duty on every 'public authority'[102] to make the information available to the person who requests it on payment of such fee as may be prescribed.[103] The Act allows for certain categories of information to be excluded from the requirements of disclosure.[104] Here, it is important to recognize that exceptions to access are provided not for convenience, but to protect genuinely competing public interests. Accordingly, these exceptions need to be interpreted restrictively, and in each case the public interest served by

---

101 Section 3, The Right to Information Act, 2005; According to Section 2(j) "right to information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to-(i) inspection of work documents, records; (ii) taking notes, extracts, or certified copies of records; (iii) taking certified samples of materials; (iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such in4'ormation is stored in a computer or in any other device. Section 2(f) defines "information" thus: 'information means any material in any form, including records documents, memos, e-mails, opinions, advices, press releases, circulars, order, logbooks, contract reports, papers, samples, models, data material held in any private body which can be accessed by a public authority under any other law for the time being in force.

102 For the purposes of the Right to Information Act, 2005, 'Public authority' means any authority or body or institution of self-government established or constituted- (a) by or under the constitution; (b) by any other law made by Parliament;(c) by any other law made by State Legislatures; (d) by notification issued or order made by the appropriate government, and includes any-(i) body owned, controlled or substantially financed; (Vii) non-government organization substantially financed, directly or indirectly by funds provided by the appropriate government.

103 *Id.*, Section 4.

104 *Id.*, Section 8 (exemption from disclosure of information).

disclosure should be weighed against interests served by the refusal. That this is the intent of the legislature is evident from Section 8(2) which reads as follows: 'Notwithstanding anything in the Officials Secrets Act, 1923, nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interest'. What are most important are appeal provisions of the Act which confer a specific right of appeal on a person who is not supplied information in accordance with the provisions of the Act[105]. The Act provides for two appeals: one against the decision of the Central Public Information Officer or the State Public information Officer to such office who is senior in rank to the Central Public Information Officer or the State Public Information Officer, as the case may be, in each public authority, and second appeal against the decision of the senior officer to the Central Information Commission or the State Information Commission, as the case may be.

The arrangements under the Right to Information Act, 2005 appear to be generous and attractive but much will, depend upon how this pro-people legislation is implemented on the ground. The Act rests on the assumption that power holders and persons holding the information have nothing to hide from the public scrutiny and are more than willing and rather over- enthusiastic to receive requests for information, and accede to them without any demur and grudge and also to extend a helping hand to all those. who approach them for obtaining the needed information The Act also expects every public authority to take necessary steps 'to provide as much information suo motu to the public at regu1ar intervals through various means of communications, including internet, so that the public have minimum recourse to the use of this Act to obtain information.[106] But belying these hopes and expectations of the drafters of this progressive legislation, forces inimical to free flow of information, good governance public participation and human rights are working overtime to deny the downtrodden, voiceless, deprived and marginalized sections of society- the information that they desperately need to come out of misery, deprivations, and sufferings. Interestingly, this is being done by the bureaucracy and public agencies in the name of efficient operations of the government and the preservation of confidentiality of sensitive information.

In this grim scenario the role of the Central Information Commission and the State Information Commission in mitigating the concerns of persons who have been refused access to any information requested under this Act, becomes very important. But they too have seemingly failed to live up to the expectations of the general public. A common refrain against these bodies is their bureaucratic approach and avoidable adherence to legal technicalities.[107]

---

105 *Id.*, Section 19.

106 *Id.*, Section 4(2).

107 For an overview of cases decided by the Central Information Commission during 2006 see, Srinivas Madhav, "Decisions of the Central Information Commission in the First year of Right to Information Act", *Orissa Review*, November, 2006.

In fact, there are cases which suggest that unmindful of the fact that a technical and legalistic approach would defeat the very purpose and object for which the Act has been enacted, these bodies are construing the provisions of this self-contained Act in conjunction with the provisions of other legislation and are even creating new exceptions[108] to the disclosure of information, which are contrary to the very object and spirit of the Act. Surely and certainly, there is an urgent need to reverse these negative trends and make sustained and concerted efforts to make the information Act an effective instrumentality of social change. This in turn would inevitably require resources, time, capacity building and above all a positive change in the mindset of the bureaucracy.

f) Environmental Protests

Environmental protest is a potential weapon in the hands of public spirited individuals, and environmental pressure groups to draw the attention of the Government towards environmental issues and effect change in environmental law and policy. It is also used to mobilize public opinion in favour of green consumerism and eco-friendly products. In recent times, certain environmental protests have attracted. considerable media attention, particularly protesters have opposed the commencement of development projects. The opposition of the 'Sardar Sarovar Dam' by the members of the 'Narmada Bachao Andolan' is a case in point. Such protests have generally been peaceful. However, where protests involve some form of public disorder or violence[109], then they will be subject to police action or any other provisions such as the Indian Penal Code.

V. CHALLENGES OF PUBLIC PARTICIPATION

As could be seen from the foregoing discussion, public participation has gained universal recognition at least in the context of environmental decision

---

108 In a landmark decision of 26 September, 2007, the Central 1nformatin Commission has ruled that 'the judicial proceedings of all courts and tribunals are beyond the purview of the Right to Information. AOL Indian Editorial Sept. 26, 2007. Compare it with Section 8(i)(b)which exempts disclosure of information only when it has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court. Interestingly, the said order was passed just one day after the Commission's decision that Supreme Court Rules are not inconsistent with RTI Act, AOL Indian Editorial, 26 Sept. 2007.

109 NGOs have the right to freedom of speech and expression Art. l9(1)(a), freedom of assembly. Art. 19(l)(b) and freedom of association Art. 19(l)(c). The right to form association includes the right to assemble peacefully and without arms as guaranteed under Article 19(1)(b). The freedom of speech and expression in guaranteed not only to individuals but also to the associations. ln *Babulal Parate Case* (AIR 1961 SC 884), it was observed that the right of citizens to take out processions or to hold public meetings flows from the right in Article 19(1)(b) to assemble peaceably and without arms and the right to move everywhere in the territory of India.

making. The reason for this is aptly summed up in the following words of Sherry Arnstein[110], 'The idea of citizen participation is a little like eating spinach: no one is against it in principle because it is good for you.' Notwithstanding agreement on its desirability, organizing effective involvement of members of the public in environmental decision-making is a daunting task. Direct public participation requires reaching to the people at the grass-root level, raising of public awareness, creating an urge in them to participate in such decision making and securing their participation in reality by bringing them to the site/sites where the public debate is organized. It also requires creation of meaningful institutions for public participation and organization of public hearing/public consultation at a place within easy reach of the poor, voicelessness, disadvantaged and marginalized sections of society. Considering that a large section of the population is still living in utter poverty, misery, sufferings and deprivations without any glimmer of hope of better world in the near future, motivating these people to participate in environment decision-making is a great challenge for the government and adherents of direct public participation alike. This is more so given the fact that over two thirds of population do not participate in even the most basic form of political participation in periodic elections.

Arguably, the involvement of NGOs in environmental decision-making on behalf of the general public may satisfy the demands of public participation. Surely, it is a workable and convenient method for the Government to arrange public participation but this useful but shortcut method is hardly in consonance with the ideals of public participation because NGOs are not representatives of the 'public' or even the 'public interests'[111]. Further, as they do not have any electoral mandate, their participation in environmental decision-making suffers from legitimacy deficit. Paradoxically, the proxy role played by NGOs in environmental law alters the character of participation from a participatory mode to representative one which in fact runs counter to the very idea of public participation, which as we have noted earlier, represents a move from representative democracy to participatory democracy.[112] Well, it is plausible to argue that NGOs derive legitimacy because of their expertise but then nobody can claim monopoly of judgment in environmental matters and further their knowledge may not necessarily correspond with the 'situated knowledge', the knowledge of persons likely to be affected by environmental degradation caused by the proposed development projects. Furthermore, the interests that NGOs represent are interests of a miniscule minority. As NGOs are many in numbers and their memberships and financial resources are varied, the larger and well resourced organizations are likely to dominate the decision making

110 Sherry R. Arnstein, "A Ladder of Citizen Participation", *Journal of American Planning Association* (1969) 216 at 217

111 See generally, Karen Morrow, "Public Participation in the Assessment of the Effects of Certain Plans and Programmes on the Environment", *Yearbook of European Environmental Law*, 4(2004) 49, pp. 54-57

112 *Ibid*.

process and even to push the weak ones from the arena.[113]

To argue that the incorporation of NGOs players in environmental decision making is problematic is not to deny the useful role they are playing or can play in decision-making processes. It only underlines the need to recognize its limitations. In our considered view, any attempt directed towards achieving the ideas of public participation in the area of environment needs to be informed by the awareness of the legitimacy deficit associated with the role of NGOs as players in environmental decision making. One such limitation is a relatively limited role of such organizations in decision making processes which are usually dominated by the business interests. A perceptive analyst stresses the obvious when he observes that 'in the face of the expertise that business interests are able to mobilize, NGOs can in themselves breath less, lacking real weight in the decisions taken by the bodies in which they participate'.[114] In a similar vein Holder and Lee warns: 'Environmental interest groups always have to be cautious that their limited involvement does not simply disguise the continued dominance of economic interests'.[115]

While the underlying philosophy of public participation in environmental decision making is to involve as many people in the process as possible, it might actually enhance exclusion. Exclusion can be direct and visible as well as less visible or indirect.[116] If adequate care and necessary steps are not taken, the poorly educated people or poorly organized people are most likely to be excluded from public participation. To overcome this problem international treaties, conventions and declarations expressly, and specifically require inclusion of the traditionally marginalized groups such as indigenous peoples, local communities, women and youth in environmental decision-making.

VI. CONCLUSION

The principle of public participation is a well recognized principle of international environmental law. International norms relating to public participation in environmental decision making have made profound impact on environmental legislations and policies of many jurisdictions in India. Although the arguments in favour of public participation in environmental decision-making are at the best persuasive its adherents seem to be successful in persuading the national governments to recognize the intrinsic as well as instrumental value of public participation in the protection of the environment. It is now widely recognized that public participation not only impact a sort of democratic legitimacy to environmental decisions but also improves their quality. It modulates governmental process, contributes to law making and ensures public acceptance of environmental decisions.

Environmental information; public hearing and consultation; and access to

113 *Ibid*.

114 Holder's Lee, n. 3, at 131.

115 *Ibid*.

116 *Id*., at 129.

justice are three recognized pillars of public participation. These are also the bedrock of the public participation/edifice in India. While existing arrangements for providing environmental information and access to justice are generous and fascinating, public hearing under environmental impact process is available only in respect of projects noted in the schedule to the 2006 Notification. As noted earlier, organizing public participation is a challenging task and is beset with a number of practical difficulties. The participation of NGOs in environmental decision making is undoubtedly a simple and convenient device to formally satisfy the requirements of public participation and government and business seem to have lost much of their fear on account of their participation. It is believed that the proxy role of NGOs for the general public would be contrary to the ideals of public participation; the generalized public participation faces real obstacles and remains a big challenge to the government. As the idea of public participation in environmental decision making has come to stay all possible efforts should be made to secure generalized public participation in this process by promoting training, environmental education and capacity building through appropriate programmes.

●

Vol. 41, No. 2, Ban.L.J. (2012) 47-64

SCIENCE, TECHNOLOGY AND THE NEED FOR REFORMS IN THE CRIMINAL JUSTICE SYSTEM#

David W. Tushaus*

ABSTRACT

Since 1987 DNA testing has exonerated 300 innocent prisoners in the United States, 18 of these serving on death row, and exposed injustices committed in the criminal justice system. Of the 300 prisoners exonerated by DNA evidence, approximately one-half of these cases involved invalid or improper forensic science techniques. Other leading causes of wrongful convictions include witness misidentification, poor defense work, prosecutorial and police misconduct, false confessions and the improper use of informants. This paper will provide specific case examples, the causes of the wrongful convictions and reforms needed to reduce these injustices. When wrongful convictions do occur, the International Covenant on Civil and Political Rights (ICCPR) recognizes the need to compensate the victims. While the paper will draw from United States data, wrongful convictions are likely a part of all criminal justice systems. The need for reform should be viewed with an eye toward applicability to any jurisdiction which has not already implemented reforms suggested by recent social science research and known causes of wrongful convictions.

KEY WORDS: *Criminal justice system, science and technology, wrongful conviction, forensic science, DNA test*

I. INTRODUCTION

SCIENCE, TECHNOLOGY and the law can work together to reduce the risk of error and create a better functioning criminal justice system.

Paper presented at the National Seminar on 'Science, Technology & Law Reform' organized by Law School, BHU, on 2-3 November, 2012.

* Chairperson, Department of Criminal Justice, Legal Studies & Social Work, Missouri Western State University, Fulbright Nehru Scholar Banaras Hindu University, Varanasi-221005 (India).

Access to justice is a critical need for those living in poverty. Unfortunately, an estimated 4 billion people worldwide are excluded from the rule of law and therefore adequate access to justice. To legally empower the poor they must have effective, legally protected rights, including the right to vote, the right to free expression, and the right to due process.[1] To improve the poor's access to due process, the Commission on Legal Empowerment of the Poor recommended that courts give due consideration to the interests of the poor; support alternative dispute resolution; broaden the scope of legal services to the poor; and support concrete measures for the legal empowerment of women, minorities, refugees, internally displaced persons, and indigenous peoples.[2]

This paper will focus on the United States criminal justice system and how it fails to provide the poor access to justice, which results in wrongful convictions. More specifically, it will look at how the science of DNA has helped expose injustices in our system and some of the reforms that may be used to reduce the rate of error. Specialized Legal Aid Clinics in the United States commonly referred to as "Innocence Projects", have lead the way in obtaining these DNA exonerations. Every state is served by an Innocence Project, many of which have connections with law schools. This makes it possible to utilize law students to investigate these labor intensive cases in a service learning course environment. Service learning is one of the most effective tools for teaching analytical skills as well as the importance of social justice. There are also Innocence Projects in Australia, Canada, England, Ireland, the Netherlands and New Zealand.[3]

II. THE UNITED STATES CRIMINAL JUSTICE SYSTEM

"It is better and more satisfactory to acquit a thousand guilty persons than to put a single innocent one to death."[4] This call for justice by 12th Century Rabbi and Philosopher Moses Maimonides demonstrates an early recognition of the need for due process in the criminal justice system. William Blackstone's similar 18th Century call for justice is probably more familiar in today's legal circles. "Better that ten guilty persons escape than that one innocent suffer." Unfortunately, the United States' criminal justice system does not always reflect this sense of justice in its proceedings today. In a Missouri Supreme Court appeal of a wrongful conviction, where new DNA testing was available to confirm or rule out the convicted prisoner on death row, the

---

1 Making the Law Work for Everyone: Report of the Commission on Legal Empowerment of the Poor, Volume 1 (2008) at 32

2 *Ibid*.

3 The Innocence Project at http://www.innocenceproject.org/about/Other-Projects.php, retrieved on October 19, 2012.

4 2 Maimonides, *The Commandments: Sefer Ha-Mitzvoth of Maimonides* 270 (Charles B. Chavel Trans., 1967) (c. 12th century) as cited in Daniel Issacs, *Baseline Framing In Sentencing*, 121 Yale L.J. 426, 456 (2011).

Assistant Missouri Attorney General argued that the Court need not stop the execution of an innocent person as long as the prisoner had a fair trial.[5]

The Assistant Attorney General's argument reflects an adversarial position, not a neutral party seeking truth and justice. This underscores the importance of an evenly matched adversary in terms of representation in court proceedings. But that has been difficult to achieve in U.S. history. In the United States, the accused is promised rights under the Sixth Amendment to the Constitution, including the right to a speedy trial, an impartial jury, to be confronted with the witnesses against him or her, to have compulsory process and the "assistance of counsel for his defense". The Constitution does not specifically say, however, whether such counsel must be appointed for the defendant, or the level of competence or advocacy that counsel must provide.[6] It was not until the early 20th century that social justice leaders of the bar began advocating for a professional public defender system. The first such system was established in Los Angeles County in 1914.[7] In 1932, Supreme Court decisions began to carve out a right to an attorney in a criminal proceeding under the Sixth Amendment with *Powell v. Alabama*,[8] which involved nine black youths accused of raping two white women. This case held that counsel must be appointed in the limited circumstances of a capital case with suspects incapable of defending themselves.[9] It took over 30 years for the Court to expand Powell and decide that lawyers are a constitutional necessity in a criminal proceeding with Gideon v. Wainwright.[10] While Gideon involved a felony charge, the right to free counsel to indigent defendants was then expanded over the next 40 years to include some misdemeanors,[11] to apply to juveniles[12] and adults in pretrial proceedings[13] as well as on the defendant's first appeal of a conviction.[14]

---

5 Joe Amrine is Released: 109th wrongly-convicted person exonerated after 16 years under sentence of death. Available at http://www.deathpenaltyinfo.org/node/874, retrieved on 18 October, 2012.

6 Sixth Amendment, United States Constitution.

7 Deborah Rhode, *Access to Justice*, (Oxford University Press, 2004).

8 287 U.S. 45 (1932).

9 *Ibid*.

10 *Gideon v. Wainwright*, 372 U.S. 335 (1963).

11 *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972); *Alabama v. Shelton*, 535 U.S. 654, 662, 674 (2002).

12 *In re Gault*, 387 U.S. 1, 41 (1967).

13 *United States v. Wade*, 388 U.S. 218, 224 (1967); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *United States v. Ash*, 413 U.S. 300, 311 (1973); *Coleman v. Alabama*, 399 U.S. 1 (1970); *White v. Maryland*, 373 U.S. 59, 60 (1961); *Iowa v. Tovar*, 124 S.Ct. 1379, 1383 (2004); *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972); *White v. Maryland*, 373 U.S. 59 (1963).

14 *Douglas v. California*, 372 U.S. 353, 355-357 (1963). See *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* at 2 (2004).

But Gideon and its progeny have failed to provide meaningful access to justice for many criminally charged indigent persons.[15] Three hundred post conviction exonerations through DNA testing have been recorded through October 20, 2012. These exonerations and others are giving researchers some idea of the error rate in the United State's present criminal justice system.[16] The overall error rate is difficult to determine. Social science research has estimated the error rate to be between 3-5 percent.[17] Unfortunately, only a small percent of cases can benefit from a DNA analysis. Those cases where DNA testing of the convicted has lead to exonerations have been studied to determine what types of errors lead to wrongful convictions. Problems with the criminal justice process that play a role in wrongful convictions include forensic science mistakes and fraud, eyewitness misidentification, inadequate funding for defense attorneys, prosecutorial overzealousness, improper police investigations and false confessions. Many of these issues can be addressed through reform efforts. Some of these issues and their reforms are discussed below.

The State of Forensic Science

DNA analysis is a fortuitous byproduct of cutting-edge science. Not so for other forensic techniques, which have been developed empirically within the forensic community, with little foundation in scientific theory or analysis. Errors in forensic science testing were found to be present in sixty-three percent of DNA exoneration cases by one study[18] and seventy-four percent by another.[19] This makes forensic science prevalence in wrongful convictions second only to eyewitness' misidentifications. Use of false or misleading testimony by forensic scientists was present in twenty-seven percent of cases, the fifth most common contributor to wrongful convictions.

a) Serology

The source of errors in these cases includes serological evidence. Before DNA analysis was available, serology could exclude a defendant; but it could not identify the culprit with the precision that DNA evidence can today.[20] Before DNA analysis was available, serological evidence was a common type of forensic evidence introduced at trial. Serology typically involved analysis of

---

15 See infra notes 73 to 84 and accompanying text.

16 The Innocence Project at http://www.innocenceproject.org/ retrieved on October 19, 2012.

17 D. Michael Risinger, "Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate," 97 *J. Crim L. & Criminology* 761, 780 (2007).

18 See Michael J. Saks & Jonathan J. Koehler, "The Coming Paradigm Shift in Forensic Identification Science", 309 *Sci.* 892 - 893 (2005), cited in Simon Cole, "Forensic Science And Wrongful Convictions: From Exposer To Contributor To Corrector", 46 *New England Law Review*, 711, 718 (2012).

19 See Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 12, 86 (2011), cited in Cole at 716.

20 Cole at 725.

materials from a rape kit prepared after an assault. Studies have found that in spite of its lack of precision and probative value, serological evidence often bolstered other evidence at trial. Worse yet, a preliminary study found that many cases involved improper use of serological evidence and forensic science, overstating the certainty that test results identified the suspect, rather than merely that the suspect could be one of many from whom the physical evidence (e.g. blood or semen) had come.[21] The most notorious of these cases involved forensic "scientist" Fred Zain.

Fred Zain was the West Virginia State Police serology supervisor and prize "expert" witness. He was a police officer, not a scientist. He was sent to an FBI serology course in 1977. Although he did poorly in the course, and two of his technicians complained about his techniques to the trainers, no serious follow-up occurred. He received a certificate at the end of the course.[22] After this, over a 16 year period, he put countless people in prison with his forensic lab testimony. A 1987 double rape conviction of Glen Dale Woodall eventually exposed Zain's misconduct. Zain's testimony that blood and hair evidence from the rape victims and crime scenes must belong to Woodall was the main evidence used to convict Woodall, inspite of Woodall's alibi. Woodall went to prison for five years. His exoneration with the use of DNA evidence lead to an investigation of Zain.[23]

The Supreme Court of Appeals of West Virginia commissioned an investigation into Zain's work as a forensic scientist and state expert witness over 16 years. The investigation found a "systematic practice" of misconduct which violated due process. "Shocking" and "egregious" violations by Zain of the right of defendants to a fair trial included overstating the strength of results, reporting inconclusive results as conclusive and altering laboratory records.[24] The investigation reported Zain's impropriety in at least 37 rape and

---

21 Brandon Garrett, "Judging Innocence", 108 *Columbia Law Review* 55, 82 (2008)

22 Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence* (New American Library, 2003) pp. 158-60

23 Kathleen Griebel Fred Zain, "The CSI Effect, and A Philosophical Idea of Justice: Using West Virginia as a Model for Change", 114 *West Virginia Law Review* 1155, 1182 (2012)

24 *In re Investigation of W. Va. State Police Crime Lab., Serology Div.*, 438 S.E.2d 501, 516 (W. Va. 1993). The complete list found Zain had committed misconduct by: (1) overstating the strength of results; (2) overstating the frequency of genetic matches on individual pieces of evidence; (3) misreporting the frequency of genetic matches on multiple pieces of evidence; (4) reporting the multiple items had been tested, when only a single item had been tested; (5) reporting inconclusive results as conclusive; (6) repeatedly altering laboratory records; (7) grouping results to create the erroneous impression that genetic markers had been obtained from all samples tested; (8) failing to report conflicting results; (9) failing to conduct or to report conducting additional testing to resolve conflicting results; (10) implying a match with a suspect when testing supported only a match with the victim; and (11) reporting scientifically impossible or improbable results.

murder cases out of the 134 cases that were investigated.[25]

b) Hair

Hair comparison evidence is another example of a forensic investigation technique that has been improperly used to convict innocent persons in the United States. The U.S. Law Enforcement Assistance Administration (LEAA) performed a test of 240 laboratories doing criminal justice work in the 1970's. While many kinds of tests showed poor results, including paint, glass, rubber, and fibers, hair analysis was the least reliable.[26] Yet comparisons of hair from a suspect, with hair left at the scene of the crime, continued to be made. Thanks to later DNA exonerations of these innocent prisoners, we know that hair comparisons are a part of the junk science that should be left out of courtroom testimony. In 2009, the National Science Foundation's Committee on Science, Technology and the Law (Forensic Science Committee) found no scientific support for the use of hair comparisons for individualization in the absence of nuclear DNA.[27]

In 1982, microscopic analysis of 17 hairs was used to convict two co-defendants, Ron Williamson and Dennis Fritz, of an Ada, Oklahoma rape and murder. The state's forensic evidence witness had used the hairs to rule out another possible suspect, who then testified for the prosecution in the Fritz and Williamson trial. In 1999, after over 10 years in prison, the same hairs were tested using the latest DNA techniques. The precise DNA test showed that the "expert witness" had been 100 percent wrong. None of the hairs belonged to Fritz or Williamson because they had not committed the crime. Ironically, two of the hairs matched up with the state's main witness against Fritz and Williamson. The witness and actual perpetrator had been ruled out as a suspect based on the original, erroneous microscopic hair examination during the 1980's investigation.[28]

The Forensic Science Committee found that the standard for admissibility of scientific evidence, the U.S. Supreme Court's *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[29] had not improved the court system's handling of forensic evidence since it was decided in 1993. The Supreme Court in *Daubert* applied Rule 702 of the Federal Rules of Evidence to a civil case; but the rule and the decision are also applicable to criminal cases. In general, a trial judge must decide whether the scientific testimony or evidence admitted is both relevant and reliable.[30] The trial judge is supposed to focus on the

25 Griebel, at 254.

26 Actual Innocence, pp. 209-10.

27 "Strengthening Forensic Science in the United States: A Path Forward", *National Research Council*, 161 (2009)

28 *Actual Innocence*, pp. 213-14, This case is more completely chronicled in The Innocent Man: Murder and Injustice in a Small Town by John Grisham, Doubleday Books, 2006, ISBN 0-385-51723-8, Library of Congress Catalog Card Number 2006048468.

29 509 U.S. 579 (1993).

30 *Id.*, at 589.

expert witnesses' principles and methodology in determining admissibility.[31] This is intended as a flexible standard, where trial court's may weigh several factors, which include:

(1) whether the scientific theory or technique has been tested;

(2) whether the theory or technique has been subjected to peer review and publication;

(3) the known or potential rate of error of the scientific technique;

(4) the use of standards controlling the technique's operation; and

(5) a scientific technique's degree of acceptance within the scientific community.[32]

The idea is that every forensic science witness' work will be challenged by opposing counsel. The courtroom cross-examination should expose any shortcomings at trial. Instead, the Forensic Science Committee found that,

"The criminal defendant's challenge is usually perfunctory. Even when the most vulnerable forensic sciences-hair microscopy, bite marks, and handwriting-are attacked, the courts routinely affirm admissibility citing earlier decisions rather than facts established at a hearing. Defense lawyers generally fail to build a challenge with appropriate witnesses and new data. Thus, even if inclined to mount a Daubert challenge, they lack the requisite knowledge and skills, as well as the funds, to succeed."[33]

The Forensic Science Committee found that court decisions dealing with judicial dispositions of Daubert type questions indeed fail to apply Daubert critically, even for the most suspect types of forensic evidence.[34] For example, in United States v. Green the court admitted tool mark identification not because it met the Daubert test, because it did not meet the test in the courts analysis. Instead, the evidence was admitted because of precedent, just what Daubert was designed to avoid.[35]

Reforms

In 2005, after hundreds of DNA exonerations of innocent victims of the criminal justice system, the United States Congress authorized the National Academy of Sciences to conduct a study on forensic science.[36] The Forensic Science Committee, consisting of scientists and legal professionals, published "Strengthening Forensic Science in the United States: A Path Forward." The

---

31 *Id.*, at 595.

32 *Id.*, pp. 593-94.

33 P.J. Neufeld, "The (Near) Irrelevance of Daubertto Criminal Justice: And Some Suggestions for Reform" *American Journal of Public Health*", 95, 2005 (Supp.1): S107, S110, cited in Strengthening Forensic Science in the United States: A Path Forward, National Research Council (2009)http://www.nap.edu/catalog/12589.htmlat 107.

34 Strengthening Forensic Science, at 107.

35 *Ibid.*

36 *Ibid*.

Committee noted that advances in DNA have helped to exonerate the wrongly convicted and convict perpetrators of crimes that were previously unsolvable. The report also recognized the potential dangers of imperfect testing and analysis, imprecise or exaggerated expert testimony, erroneous or misleading evidence.

Recommendations from the Committee include establishing and enforcing best practices for forensic science professionals and laboratories, mandatory certification of scientists, accreditation of laboratories, and overseeing educational programs in forensic science.[37] The United States' inadequate laboratory capacity was also a note of concern to the Committee. At the time of the report, there were 175 publicly funded forensic laboratories and approximately 30 private laboratories handling hundreds of thousands of DNA cases annually.[38] The overall laboratories showed a combined backlog of 435, 879 requests for forensic analysis of some kind. DNA testing in 2005 showed a backlog of 86 requests at the beginning of the year and finished it with 152 backlogged requests.[39] Such backlogs not only delay justice, they increase the potential for shortcuts and mistakes.

International Issues

The problem of forensic science contributing to miscarriages of justice is not unique to the United States. After all, there are Innocence Projects in Australia, Canada, England, Ireland, the Netherlands and New Zealand.[40] In the United Kingdom, wrongful convictions lead to the Royal Commission on Criminal Justice's 1993 "Runciman Report" and the "May Inquiry" the next year. The Runciman Report identified several issues, including forensic labs failing to be impartial and objective. It also found there to be a pro-prosecution bias, low accuracy of the explosive residue detection techniques and defense attorneys being denied access to samples.[41]

In Canada, the "Kaufman Report" arose out of the Guy Paul Morin wrongful conviction. Microscopic hair evidence was found to have been faulty in the case. Contamination problems had not been disclosed at any point in the investigation or trial. The probative value of the forensic analyst's findings were another contributing factor in the wrongful conviction.[42]

New Zealand formed a commission to determine the best way to address the problem of compensating victims of wrongful convictions. This commission recommended the establishment of statutory remedies that would incorporate wrongful conviction compensation. The legislature opted for an ex gratia or

---

37 *Id.,* pp. 183-237.

38 *Id.,* at 41.

39 *Id.,* at 39.

40 *Supra note* 3.

41 See Cole, at 716.

42 Cole, at 717, See also the Thomas Sophonow Inquiry Report on a Manitoba case and the policy changes made in response to it, available at http://www.gov.mb.ca/justice/publications/sophonow/index.html?/ retrieved on October 19, 2012.

good will payment by the government.[43]

International law under Article 14(6) of the International Covenant on Civil and Political Rights recognizes the need to compensate for "miscarriages of justice" that have resulted in wrongful imprisonment.[44] Of the 154 party countries to the ICCPR, 145 have accepted it without reservation.[45] The United States is the only party to the ICCPR that currently recognizes no national right to compensation for wrongful conviction. In fact, with 50 different states handling the majority of criminal prosecutions in the country, there is no uniformity in the U.S. compensatory scheme.[46]

Eye Witnesses

Eyewitness identification has long been important in criminal justice proceedings in the United States. Convictions often rely on testimony of a witness to the crime. But social science research has been establishing for years now that eyewitness identification may be unreliable for a number of reasons.[47] Over 100 years ago Hugo Munsterberg found that eyewitnesses are often unable to recall many details and they make up things that never happened.[48] He also found that eyewitness confidence, which is a key component in court proceedings, is not a good indication of eyewitness accuracy.[49] Studies of DNA proven wrongful convictions have found that witness misidentification is the single greatest cause of DNA proven wrongful convictions nationwide. Over 75% of convictions overturned through DNA testing in the United States involved witness misidentification.[50] A broader study of 340 exonerations through both DNA and other means found 64% of the exonerees were identified by one or more eyewitnesses.[51] Eyewitnesses are influenced by many factors that may affect their accuracy. Some are

43 Jason Costa, "Alone in the World: The United States' Failure to Observe the International Human Right to Compensation for Wrongful Conviction", 19 *Emory International Law Review*, 1615, 1628 (2005).

44 International Covenant on Civil and Political Rights, art.14(6), Dec. 16, 1966, 999 U.N.T.S. 171.

45 Costa, at 1622.

46 *Id.,* at 1637.

47 Deborah Davis and Elizabeth F. Loftus, "The Dangers Of Eyewitnesses For The Innocent: Learning From The Past And Projecting Into The Age Of Social Media", 46 *New Eng. L. Rev*. 769 (2012). See also Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (2011).

48 Hugo Munsterberg, "On the Witness Stand: Essays on Psychology and Crime", 11-12 (1908), as cited in Nicholas Kahn-Fogel, "Beyond Manson And Lukolongo: A Critique of American and Zambian Eyewitness Law with Recommendations for Reform in the Developing World", 20 *Fla. J. Int'l L.* 279, 289-90 (2008).

49 *Ibid*.

50 Brandon L. Garrett, "Convicting the Innocent: Where Criminal Prosecutions Go Wrong", (2011), at 9, as cited in Davis, *supra note* 47, at 770.

51 Samuel R. Gross et al., "Exonerations in the United States: 1989 Through 2003", 95 *J. Crim. L. & Criminology* 523, 542 (2005).

outside the control of the criminal justice system; but other misidentifications may be addressed through reforms.

Outside influences

Eyewitnesses to a crime are usually under a lot of stress. Whether the eyewitness is a direct victim of a crime or an observer, the eyewitness is usually aware that illegal activity is occurring. Sometimes this activity directly affects the victims' safety or security. Burglaries, assaults, rapes and murders are likely to create a lot of stress in a witness. Studies show that witnesses under stress are less reliable.[52]

Race

Cross-racial identification is also a problem in criminal proceedings. U.S. studies show individuals are less accurate in identifying members from another race than of their own race.[53] Add the stress factor to the interracial issue and eyewitness accuracy becomes less likely in cross-racial crimes.[54] The *Jennifer Thompson-Cannino and Ronald Cotton* case is a famous example of this.[55] Thompson-Cannino was a young, white college student when she was raped by an African-American male in her apartment. She spent her time during the ordeal studying the rapists' face for details so that she could positively identify him if she lived through the rape. Police set their sights on Ronald Cotton, who closely resembled the composite sketch made from Thompson-Canino's description. There was no other evidence against Ronald Cotton. He had an alibi that he was home sleeping at the time. It was not enough to overcome Thompson-Canino's positive identification. Cotton was convicted of raping her and another woman, who was less certain of her identification of him. Cotton spent over 10 years in prison for crimes he did not commit until one day he saw Bobby Poole. To Thompson-Canino's credit, Poole looked a lot like Ronald Cotton. Years later, Poole was in prison for a separate rape when he crossed paths with Cotton. Cotton had a hunch Poole was the real rapist of Thompson-Canino instead of Cotton. Cotton eventually was able to get the Innocence Project to represent him. DNA testing was obtained that in fact ruled Cotton out as a suspect. Bobby Poole

---

52 Kenneth A. Deffenbacher; Brian H. Bornstein; Steven D. Penrod; E. Kiernan McGorty, "A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory", *Law and Human Behavior*, 28, 687-706. Tim Valentine; Jan Mesout, "Eyewitness Identification under Stress in the London Dungeon", *Appl. Cognit Psychol*. 23: 151-161 (2009). Peter J.B. Hancock; Karen Burke; Charlie D. Frowd, "Testing Facial Composite Construction under Witness Stress", *International Journal of Bio-Science and Bio-Technology*, Vol. 3, No. 3, September, 2011.

53 John Rutledge, "They All Look Alike: The Inaccuracy of Cross-Racial Identifications", 28 *American Journal of Criminal Law*, 207 (2001).

54 Fredrik H. Leinfelt, "Descriptive Eyewitness Testimony: The Influence of Emotionality, Racial Identification, Question Style, and Selective Perception", *Criminal Justice Review*, Volume 29, Number 2, Autumn 2004.

55 Jennifer Thompson Cannino; Ronald Cotton and Erin Torneo, Picking Cotton: Our Memoir of Injustice and Redemption, St. Martin's Press (2009).

was eventually determined to be the rapist.

Recent research suggests several reforms that may reduce eyewitness misidentifications like in the Cotton case. "The results of this research have nearly unanimous approval within the relevant scientific community, and the Department of Justice has endorsed many of the suggested reforms in its recommendations for law enforcement agencies around the country."[56] Unfortunately, the standard for evaluating whether a witness testimony should be allowed into evidence was formulated over thirty years ago, before the bulk of the recent research, and DNA exonerations of 300 persons, most of whom were convicted at least in part on eyewitness testimony. The outdated case used in the United States is Manson v. Braithwaite, which was decided by the U.S. Supreme Court in 1977. The Court set up a two part rule for evaluating witness identifications. First, the court must determine whether the identification procedure was impermissibly suggestive. Second, even if the identification procedure was suggestive, the court must also determine whether, under all the circumstances, the suggestive procedure gave rise to a substantial likelihood of irreparable mistaken identification. The Court provided for five criteria to evaluate the reliability of the witness concerning (1) view,(2) attention, (3) description, (4) passage of time, and (5) certainty.[57] Subsequent psychological evidence calls this test into question, which will be discussed below.

The Power of Suggestion

Manson's criteria rely heavily on what psychologists call retrospective self-reports. These are often inconsistent with objective facts.[58] Context, social pressures, a desire to be consistent, and reinterpretations based on new events affect a witnesses' self-reports on view, attention, and certainty. So, Manson requires courts to ask eyewitnesses to report on his or her own credibility.[59]

While under the best of circumstances an eyewitness may make a mistake in identifying a suspect, police can exacerbate the problem of misidentification in an even greater way. DNA exonerations in the United States show that police have suggested the wrong suspect to witnesses in a number of ways, from line-ups to show-ups to photo identifications. In one case a witness in a rape case was shown a photo array. The photo of the person police suspected was the perpetrator was marked with an "R" for

56 Nicholas Kahn Fogel, citing U.S. Dep't of Justice, Technical Working Group on "Eyewitness Evidence, Research Report: Eyewitness Evidence: A Guide for Law Enforcement", (1999), at https://www.ncjrs.gov/pdffiles1/nij/178240.pdfretrieved September 28, 2012.

57 432 U.S. 98 (1977).

58 Nisbett, R. E., & Wilson, T. D., "Telling More Than We Can Know: Verbal Reports on Mental Processes", Psychological Review, 84 (1977) 231-259 as cited by Gary L. Wells, Deah S. Quinlivan, "Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science", 33 Law & Hum.Behav.1 (2009).

59 Wells and Quinlivan.

Rapist. In other cases, the trial may just overstate the witnesses' confidence that the perpetrator is the culprit. For example, in a case where the witnesses only made an identification after multiple photo arrays or lineups - and then made hesitant identifications, at trial the jury was told the witnesses did not waver in identifying the suspect. Neither the police nor the prosecution disclosed the witness' uncertainty to the jury.[60] Studies show that even less suggestive identification procedures will improve an eyewitnesses' performance on three of the five criteria set forth in Manson for the court to decide whether the suggestive procedures are a problem. Witness identification procedures may induce witness misidentification, even if there was merely pressure on the eyewitness to make a lineup identification, suggest a given person is the suspect, as in the case above or that the identification response was correct or incorrect. Pre-lineup instructions, lineup composition, and suggestive behaviors of lineup administrators have all been studied extensively and found to have the potential to induce an incorrect identification.[61]

Witnesses tend to use relative judgments in identifying a suspect. Studies show that if the suspect is not present in a line-up, the witness is likely to choose a person out of the line-up who best resembles the suspect. Identification procedures that suggest a suspect in some way, even if it is the wrong person, tend to increase the witness' confidence. This makes the mistaken witness appear more credible to the fact finder, which in turn makes the fact finder more confident in the mistaken witness' statements.[62]

Reforms have been recommended by many groups, including the DOJ's National Institute of Justice, the ABA's Criminal Justice Section, the Justice Project, the Cardozo School of Law Innocence Project and other organizations and advocates. Some of the simpler reforms can be implemented at a minimal cost.[63] Cost is important for any department; but especially departments in rural areas and developing nations. The Executive Committee of the American Psychology/Law Society (AP/LS) has urged the implementation of four reforms to maximize the effectiveness of lineups and photo arrays and reduce the chances of misidentification without reducing the likelihood of identifying the perpetrator. Importantly, these reforms are not expensive. They are adaptable to developing countries as well as developed countries.[64]

Cost-Effective Reforms

a) Double-blind Procedures

Requiring double-blind procedures is good science and good investigation technique. Double-blind procedures should be required in all witness identifications during an investigation. This requires that neither the witness

60 Wells & Quinlivan

61 *Ibid*.

62 Kahn-Fogel, at 292

63 Sandra Thompson, "What Price Justice? The Importance of Costs to Eyewitness Identification Reform", 41 *Tex. Tech L. Rev*. 33, 41 (2009)

64 *Id*., at 293

nor the administrator know the identity of the suspect going into the procedure. Identification procedures are similar to a scientific experiment. Investigators have a hypothesis for who the perpetrator is. The identification procedure tests the investigators' hypothesis. Science has proven that the investigator can influence the outcome of an experiment if the investigator knows the desired response. Therefore, law enforcement agencies should remove investigators from the photo array and line-up process. In all but the smallest departments, this reform can be implemented in most circumstances without significant expense.[65]

b) None of the Above

The DNA era of exonerations has proven that police do not always get the right suspect. For any photo array or line-up police should instruct witnesses that the perpetrator may not be one of the choices. Studies show failure to include this warning increases the likelihood that an innocent person is chosen as the suspect. Otherwise, the assumption is that the criminal is there and the witness just has to pick out the right one. Fortunately, advising the witness the perpetrator may not be there seems to have no significant reduction on accurate identifications. Witnesses need a "none of the above" choice to help avoid choosing the wrong person. Advising a witness that "none of these may be the criminal" is a very inexpensive addition to the identification process.[66]

c) Identification Procedure

The identification procedure should not make the suspect stand out or blend in too much. In general, the lineup fillers and photos provided to the eyewitnesses should fit the description the witness gave. To continue the multiple choice metaphor, a proper procedure will not telegraph an answer to the witness, or test taker. Even if "none of the above" is a choice, if the process suggests an answer the results may be inaccurate and an innocent person may be identified.[67]

The AP/LS subcommittee's general recommendation is that fillers for lineups and photo arrays fit the description the eyewitness gave.[68] For most situations, compliance with this rule will avoid suggesting a given suspect by providing reasonably closely related fillers who are known to be innocent.[69] Using known innocent fillers based on the description avoids the possibility that the police suspect is the only one in the lineup who matches the description.

---

65 Kahn Fogel, at 294.

66 Gary L. Wells et al., "Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads", 22 *Law & Hum. Behav.* 603, 610 (1998) as cited in Nicholas Kahn Fogel, Beyond Manson And Lukolongo, "A Critique of American and Zambian Eyewitness Law with Recommendations for Reform in the Developing World", 20 *Fla. J. Int'l L.* 279, 293 (2008).

67 *Id.*, at 630, Kahn-Fogel 294.

68 *Id.*, at 630, Kahn-Fogel 295.

69 *Id.*, at 632, Kahn-Fogel 296.

There are exceptions when this approach is not advisable. If the suspect does not match the description, but the fillers do, then you will have a suspect who stands out. The AP/LS subcommittee recommends changing the procedure so that the fillers are a combination of the description of the suspect and the actual appearance of the suspect.[70]

d) Sequential Presentation

This reform requires witnesses to be presented with suspects one at a time. The witness must make a decision on each suspect at the time he or she is presented. Ideally, this is done in conjunction with other reforms, such as the double-blind research style presentation described above, and asking witnesses to indicate the level of certainty described below.

e) How sure are you?

Witnesses should be asked how confident they are in an identification immediately after it is made, according to the AP/LS. It is important to establish certainty at the time of identification, before the witness builds additional confidence in the decision. Studies show the more confident a witness is the more likely that witness will be believed. However, there is not a causal connection between confidence and accuracy. If the initial confidence level is low, this may give jurors or even investigators pause regarding an identification.[71]

Bad Lawyering

"In the end, a good lawyer is the best defense against wrongful conviction..."[73], Said Janet Reno, United States Attorney General (2000).

---

70 *Id*., pp. 632-34, Kahn-Fogel, at 296.

71 R.C.L. Lindsay & Gary L. Wells, "Improving Eyewitness Identification From Lineups: Simultaneous Versus Sequential Lineup Presentations", 70 *J. Applied Psychol*. 556 (1985); Nancy Steblay et al., "Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison", 25 *Law & Hum. Behav*. 459 (2001).

72 Kahn-Fogel pp. 297-98, See Amy L. Bradfield et al., "The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy", 87 *J. Appl. Psychol*. 112, 118 (2002); Wells et al., *supra note* 53, at 627; Bradfield et al., *supra note* 70, at 119; Gertrud Sophie Hafstad et al., "Post-identification Feedback, Confidence and Recollections of Witnessing Conditions in Child Witnesses", 18 *Applied Cognitive Psychol*. 901, 908-09 (2004); Jeffrey S. Neuschatz et al., "The Effects of Post-Identification Feedback and Age on Retrospective Eyewitness Memory", 19 *Applied Cognitive Psychol* 435, 441 (2005) (describing effects of post-identification confirming feedback).

73 Office of Justice Programs, U.S. Department of Justice, National Symposium on Indigent Defense 2000: Redefining Leadership For Equal Justice, at Vi-Vii (2000), cited In American Bar Association Standing Committee on Legal Aid and Indigent Defendants (SCLAID), Gideon's Broken Promise: America's Continuing Quest for Equal Justice. A Report on the American Bar Association's Hearings on the Right to Counsel in Criminal Proceedings (2004) at 3 (hereinafter Gideon), Available at http://www.indigentdefense.org.

On the 40th anniversary of the Gideon case, the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants held hearings on the right to counsel in criminal proceedings. Witnesses were called to testify from 22 of the 50 states. Although the United States Constitution guarantees the appointment of an attorney in a criminal case, the system for providing representation of defendants is inadequate. Throughout the hearings, witnesses reported inadequate funding to provide representation to indigent defendants. For comparison, England spends over three times as much per capita on criminal defense as the United States spends.[74] In fact, England spends over twice as much on criminal defense than it does on criminal prosecution, which is the opposite of the U.S. ratio that favors the prosecution.[75] The lack of funding in the U.S. makes it difficult to adequately compensate attorneys. Competitive salaries and training are necessary to recruit and train good attorneys.[76]

The National Advisory Commission on Criminal Justice Standards and Goals has recommended caseloads for defense attorneys should be kept within the following limits:

" 150 felonies per attorney per year; or

" 400 misdemeanors (excluding traffic) per attorney per year; or

" 200 juvenile court cases per attorney per year; or

" 200 mental commitment cases per attorney per year; or

" 25 appeals per attorney per year.[77]

Attorneys may stay within these standards by mixing some kinds of cases with others. So, for example, an attorney may have a yearly caseload of 100 misdemeanors, 50 juvenile court cases and 50 mental commitment cases per year and still be working within the guidelines. Unfortunately, witnesses from some states reported attorneys exceed these guidelines by 40 to 50 percent. Caseloads have also grown over the years, exacerbating the problem.[78] It is not surprising, with the inadequate funding to hire and retain enough attorneys, resulting in case overload, that there is lack of contact with clients and inadequate representation.[80]

Inadequate funding also results in a lack of resources needed to adequately prepare cases for indigent clients. The indigent defendant cannot afford to hire an investigator, expert witnesses or other support services. These are not superfluous to an adequate defense. The U.S. Supreme Court has recognized that a meaningful defense requires more than just an attorney

---

74 *Id.*, at 8.

75 *Id.*, at 13.

76 *Id.*, at 8.

77 *Id.*, pp. 17-18.

78 *Id.*, at 18.

79 *Id.*, at 30.

80 *Id.*, at 26.

in the courtroom.[81] Similarly, there are national standards that recommend that funds be used to provide training, professional development and continuing education to counsel and staff in public defenders' offices.[82] Testimony at the hearings showed these standards are not being met.

Inadequate counsel has manifested itself in many ways, with attorneys who have:

- o slept in the courtroom during trial
- o been disbarred shortly after finishing a death penalty case
- o failed to investigate alibis
- o failed to call or consult experts on forensic issues
- o failed to show up for hearings[83]

Sometimes inadequate counsel is institutionalized by the court. In Riverside County, California the following scene was witnessed:

I went into municipal court to watch an arraignment. The judges told the defendants, 'If you plead guilty today, you'll go home. If you want an attorney, you'll stay in jail for two more days and then your case will be set for trial and, if you can meet the bail amount, you'll be released.' Almost everybody in the room pled guilty. And of course the system is not opposed to that because the court moves on.[84]

Other Causes

There are many more causes of wrongful convictions and reforms to be suggested for them. False confessions, government misconduct and informants or snitches have also contributed in significant numbers to the wrongful convictions overturned with DNA evidence in 300 cases.[85] A suspect's mental health issues and aggressive law enforcement tactics usually combine to cause innocent people to confess to crimes they did not commit. DNA exonerations prove this problem is more prevalent than previously considered, with about 25% of the DNA exonerations involving some kind of false confession, admission or statement. Reforms for this issue are relatively simple. Electronic recording of interrogations from the time of arrest would reduce the number of false confessions.[86]

---

81 *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (defendant in capital trial must be provided with funds to hire expert psychiatrist where sanity is only material issue). See also McMann v. Richardson, 397 U.S. 759, 771 (1970) ("defendants facing felony charges are entitled to the effective assistance of competent counsel") as cited in Gideon, at 10.

82 Gideon, at 11.

83 The Innocence Project at http://www.innocenceproject.org/understand/Bad-Lawyering.php,retrieved on October 19, 2012.

84 Gideon, at 25.

85 The Innocence Project at http://www.innocenceproject.org/understand/, retrieved on October 19, 2012.

86 The Innocence Project at http://www.innocenceproject.org/fix/False-Confessions.php, retrieved on October 19, 2012.

DNA exonerations have exposed official misconduct at every level and stage of a criminal investigation. In addition to coercing false confessions, a review of DNA exonerations reveals cases where police have lied on the witness stand to mislead jurors, failed to turn over exculpatory evidence to prosecutors, and given informants incentives to provide unreliable evidence. Inappropriate incentives have included payments and release from prison to testify.[87] This kind of "snitch" testimony is the leading cause of wrongful death penalty convictions.[88] Prosecutors have also withheld exculpatory evidence they were aware of, destroyed or otherwise mishandled exculpatory evidence, allowed untruthful witnesses to testify, made misleading arguments and relied on fraudulent forensic experts. The Innocence Project recommends criminal justice reform commissions to reduce such conduct resulting in wrongful convictions.[89]

III. CONCLUSION

Innocence Projects and the legal aid clinics they are connected to have used DNA evidence to do more than exonerate innocent victims of the United States' criminal justice system. They have raised doubts about the integrity of the criminal justice system in the United States and anywhere else that does not have a system designed to adequately protect against human error. The criminal justice system puts life and liberty at stake, so errors cause grave harm to the individual and society. Under the social contract theory, the state is established to protect the rights of society's members. Convicting an innocent person violates this contract and is one of the greatest injustices a state can inflict. The state, as the creator of the risk, has an enhanced moral duty to reduce such risk as much as practicable.[90] While individual reforms are important, this cannot be done in a piecemeal fashion.

The criminal justice system should have what some industries call a "safety-critical system", a system which recognizes the possibility of error, controls the factors that may increase the chance of error, and strives for an overall performance that will reduce the chance of error. Building safety-critical systems is essential to ensuring public safety in many industries, from

---

87 The Innocence Project at http://www.innocenceproject.org/understand/Snitches-Informants.php, retrieved on October 19, 2012.

88 The Center on Wrongful Convictions, The Snitch System: How Snitch Testimony sent Randy Steidl and Other Innocent Americans to Death Row, at 3 (Northwestern University School of Law 2005) at http://www.innocenceproject.org/docs/SnitchSystemBooklet.pdf, retrieved on October 19, 2012.

89 The Innocence Project at http://www.innocenceproject.org/understand/Government-Misconduct.php, retrieved on October 19, 2012.

90 "Protecting the Guilty", 6 *Buffalo Criminal Law Review*, 1163, 1172-79, 1186-87 (2003) as cited in Mordechai Halpert & Boaz Sangero, "A Safety Doctrine For The Criminal Justice System", 2011 *Michigan State Law Review*, 1293, 1303 ((2011). See, e.g., *De Shaney v. Winnebago Cnty. Dep't of Social Servs.*, 489 U.S. 189, 201-02 (1989).

public transportation to medical care. The criminal justice system should be seen as no less important than the air transportation industry in terms of ensuring safety against wrongful convictions, the system's counterpart to a plane crash.[91] The path to safety in criminal law begins with evidence. Most wrongful convictions are the result of misuse of physical evidence, the forensic evaluation of such evidence, and eyewitness testimony.

We have had unfounded confidence in the safeguards presently in place. Police have an incentive to solve crimes with a conviction. There is no systematic incentive to convict the right person. Usually there is no way to know the wrong person was convicted. When DNA exposes a wrongful conviction, there is no system in place to study that error at the department level and implement reforms to change the process. We must implement such procedures and adopt the suggested reforms in order to reduce the errors known as wrongful convictions in our criminal justice system.

Other safeguards include an adversarial system that is skewed toward the prosecution in terms of resources available and public opinion. The admissibility of junk science and the failure to identify white coat fraud in the process has also led to wrongful convictions. The burden that guilt be proven "beyond a reasonable doubt" is insufficient to counterbalance these systematic problems. These and other issues have lead to calls for reform in terms of evidence gathering and evaluation, reforms that have only been implemented in some jurisdictions. As a result, a systematic change has been suggested whereby in addition to guilt proven beyond a reasonable doubt, the criminal justice system ensures that all reasonable measures be taken to prevent wrongful convictions consistent with a comprehensive safety theory for criminal law.[92] Such change is necessary so that the criminal justice system does not unnecessarily victimize innocent bystanders in the name of justice.

●

---

91 Mordechai Halpert & Boaz Sangero, "From a Plane Crash to the Conviction of an Innocent Person: Why Forensic Science Evidence Should Be Inadmissible Unless It Has Been Developed as a Safety Critical System", 32 *HAMLINE L. REV* 65 (2009), cited in Mordechai Halpert & Boaz Sangero 1294 ((2011). For an engineering definition of a safety-critical system see 14 C.F.R. § 401.5 (2011).

92 Halpert & Sangero, at 1296.

Vol. 41, No. 2, Ban.L.J. (2012) 65-100

DISCLOSURE PHILOSOPHY IN COMPANY LAW: A POLICY AGENDA FOR REFORM IN NIGERIA

Rufus A. MADU*

ABSTRACT

This paper gives a deep insight into the concept of disclosure in company law and its underlying philosophy. It examines the various shades of disclosure requirements in Nigeria corporate law with a view to discovering the effectiveness or weakness in the legal framework. The paper specifically queries the continued failures of corporations as a result of insiders' abuse and information asymmetry in Nigeria despite the monitoring and supervisory roles of regulatory bodies as the Corporate Affairs Commission and the Securities and Exchange Commission. The question asked is whether the disclosure regime is sufficient and has been able to guide investors and other stakeholders who come in contact with the corporate form, to make informed decisions and safeguard their investment. In doing this, the paper did a comparative analysis of what is obtainable in other jurisdictions to discover where the Nigerian system lacks. The writer concludes that there is urgent need for reform of the disclosure mechanism in Nigeria Corporate law if the war against corporate failures and insider abuse is to be won.

KEY WORDS: *Disclosure, Company Law, Corporate Governance, Reform.*

I. INTRODUCTION

DISCLOSURE CONNOTES openness in company affairs at all levels. It refers to the volume of information to be made available to concerned and

* Lecture, Dept. of Business & Private Law, College of Law, Osun State University, Osogbo, Nigeria and Barrister and Advocate of the Supreme Court of Nigeria

interested members of the public either through the regulatory authorities or by all persons involved before, during, or after the formation of the company on the one hand; and during the lifetime of the company, its dying times and after the death of the company on the other hand. Disclosure of information by companies has, over the years, become a very important tool of corporate governance. Its importance is anchored on the fact that issues of transparency and good governance have attained prominence in the effort by nations to increase their competitiveness in the global economic market. Disclosure has become more relevant in recent times in view of several high profile corporate scandals, unimaginable collapse of several industrial giants, business failure and particularly in Nigeria, as recently discovered by the Central Bank of Nigeria (CBN); the monumental level of corruption and insiders' abuse in the Nigerian banking sector.[1] A security market will be efficient if information affecting the value of securities is readily available to investors. The ultimate aim of regulation therefore, is to prevent or minimize abuses, which might distort information and the value of securities, thereby having investors' confidence and the market's integrity marred. Security laws of different countries have a tendency to converge due to certain reasons hereinafter discussed. As succinctly put by Farrar[2], the disclosure of information is the best guarantee of fair dealing and the best antidote to mistrust. Its overriding aim is to afford an umbrella protection primarily to investors and to some degree, the creditors and those to whom the corporate form owes corporate responsibility[3]. Arguing

---

1 Igwe Kingsley, "Investment, Nigeria Capital Market and Corporate Governance Laws, Practice and Ethics" (2005) *Corporate Governance, Disclosure and Transparency Law Development*, Research, Publications & Consulting Ltd Vol. 3 at 1 in Funmi Ogundare's, "Sanusi: Corporate Governance, Key to Financial Stability" *This Day* (Lagos, 11 February 2010); The Governor of Central Bank of Nigeria, Mallam, Sanusi Lamido Sanusi called on captains of industries to find lasting solutions to the lingering problem of weak corporate governance confronting the country's financial system; Sanusi made the call in the 2010 Edition of the Continuous Education Programme for Directors of Financial Institutions, which has as theme, 'Value-Based Board Leadership for Corporate Relevance' in Lagos. He lamented that corporate government principles arising from poor value-based leadership has been largely abused and advocated that a value-based leadership remains one of the guiding principles of corporate governance which is closely tied to core values that should be promoted by the leaders and subordinates. He noted that the Central Bank of Nigeria in collaboration with other regulatory agencies is aggressively drawing up measures to stem unethical practices in financial institutions in Nigeria.

2 Farrar J.H. & Hannigan B.H., *Farrar's Company Law* (4th edn, London, Butterworth, 1998) Chapter 29, at 463; See also Tosin Fodeke, "Tightening the Bolts in Banks" *Corporate Governance Structure, The Guardian* (Lagos, 03 November 2010).

3 The general principles of regulatory control centre around the following issues; Reporting: the Companies and Allied Matters Act, Cap C20 *Laws of the Federation of Nigeria*, 2004 (hereinafter referred to as 'CAMA'), Investment and Securities Act, 2007 (hereinafter referred to as 'ISA'), Bank and Other Financial Institutions Act (hereinafter referred to as 'BOFIA') et al; impose various reporting requirements.

further, Gower[4] said:

"England has pinned its faith on a philosophy of disclosure rather than of supervision. Our rules are based upon the assumption, which indeed underlies the whole of our company law that the best protection of the public lies in publicity. It is assumed that if one gives the investor full information about the company's affairs he will avail himself of it and make an intelligent appraisal of the worth of the security offered."

For example, to ensure transparency in the operations of banks in Nigeria,[5] the Central Bank of Nigeria has recently adopted the practice of publishing on its website the total interest rates and charges obtainable in each of the financial institutions in Nigeria. The publication of the rates and charges for January 2009 was sequel to allegations by the banking public of hidden charges by Nigerian banks. These publications as against the past ones contain the lending rate of every bank, including all charges, fees and commissions.

There are four main themes underlying disclosure of information in company law. The first theme is that the assumption behind many disclosure requirements is that behaviour can be influenced merely by requiring it to be disclosed without the need of negative prohibition or positive regulation.

These may be general such as Directors' Reports under s 342 of CAMA or Financial Statements under sec. 345 of CAMA and Auditors Report and filing with the Commission under sec. 345 (3) of CAMA. Reporting could be to shareholders in a general meeting or to the regulators or both. Sec. 24 of BOFIA contains duty of director to ensure that proper books of accounts are kept on all transactions necessary to explain such transactions and give a true and fair view of the state of affairs of the bank. Disclosure: Various laws require disclosure by directors of certain information; conflict of interest situations, interests in transactions, loans to directors, related party transactions etc. Sec. 18 of BOFIA provides that no manager or any other officer of a bank shall (a) in any manner whatsoever, whether directly or indirectly have personal interest in any advance, loan or credit facility? And if he has any such personal interest, he shall declare the nature of his interest to the bank. Regulatory Responsibilities: Prohibition/exemption- Certain conduct may be prohibited (e.g. insider dealings in securities, ISA sec. 111; See also Solomon, Lewis D Bauman, Jeffrey D et al, *Corporation Law and Policy Materials and Problems* (4th edn, St Paul, MINN, 1990) 281. They submitted that the only standard which must be met when registering securities is adequate and accurate disclosure of required material facts concerning the company and the securities it proposes to sell.

4 Gower LCB, *Principles of Modern Company Law* (4th edn, London, Stevens & Sons Ltd, 1979).

5 According to Bolodeoku Ige, "Corporate Governance: The Law's Response to Agency Cost In Nigeria", [2007] 32 *Brooklyn Journal of International Law* 467; the Code of Corporate Governance Practices issued by the Central Bank of Nigeria known as Code of Corporate Governance for Banks in Nigeria Post Consolidation (2006) 1.7, unlike most corporate governance code is mandatory. The facts that banks must comply with it and include the Code's compliance status report in the audited financial statements underscores the banks' responsibility to actively take steps that policymakers believe could prove useful in dealing with agency costs. The Code among other provisions requires banks to establish 'whistle-blowing' procedure that encourages (including assurance of confidentiality) all stakeholders to report any unethical activity or breach of the corporate governance code using, among others, a special email or hotline to both the bank and the CBN.

According to Gower, 'If those who invest in, and manage companies know that their activities will be subjected to public security, their behaviour will be modified to avoid public disapproval'.[6]

The second theme is that, apart from making full and frank disclosure to the creditors and shareholders, pieces of information that are more obviously in the public interest must also be disclosed by the companies because of the externality companies generate. Categories of information in this context are information of particular interest to employees and information that would fully reflect the company's social responsibilities to stake holders and those living in the vicinity of the company. Hence, disclosure can be viewed from this background as the recognition of new interest, besides those of investors, in the way the company operates.

The third underlying theme is that, company must make disclosure to the shareholders by the registration of its audited balance sheet, financial information and at registration at the Companies House.[7] The purpose of disclosure to the shareholders is to promote efficient management by requiring the management to account for their stewardship of the company. In this respect, disclosure is just one of a number of techniques used by company law to ensure the accountability of the management to the shareholders.

The last underlying disclosure philosophy in company law is that, disclosure of information is needed by corporate regulators such as the Security and Exchange Commission and the Corporate Affairs Commission for the purpose to carry out their supervisory and monitoring functions, and provides investment advice and information to the investing public, creditors and to those who seek information about the corporation.

Disclosure therefore, helps to reduce asymmetric information, and hence, lowers the cost of trading the firm's securities and the firm's cost of capital.[8] According to Oladele,[9] 'Despite regulatory and institutional effort to make information available to investors there usually is inequality of information between securities issuers and investors'.[10]

---

6 Gower, n. 4 at 463, The Learned Authors cited the example of the philosophy behind the provision introduced in the United Kingdom in 1967 that companies must keep a copy of any written service contract or if not in writing a written memorandum of its terms available for inspection by members of the company-the philosophy is that if the members could see how the Directors provided for themselves they might be more restrained in their generosity.

7 Farrar & Hannigan, n. 2 at 464, In Nigeria, the Companies House is the Corporate Affairs Commission established under the Companies and Allied Matters Act, 1990.

8 See Christian Leuz and Peter Wysocki, 'Economic Consequences of Financial Reporting and Disclosure Regulation: What have we Learned?' (2006) University of Chicago Working Paper available at: http://www.lums.lancs.ac.uk/files/02PaperEconomicCon.pdf accessed on April 22, 2012.

9 Olayiwola Oladele, 'How Secured are Securities', (2011) Osun State University, Osogbo, Nigeria, 2nd Inaugural Lecture. Available at: http://www.google.com.ng search?q=Olayiwola+Oladele%2C+'How+Secured+are+Securities'%2C+(2011)+Osun+State+University%2C+Osogbo%2C+Nigeria%2 accessed on April 22, 2012.

10 See Leuz and Wysocki, n. 8.

This paper argues that the requirement of registration of companies at the Corporate Affairs Commission (CAC), (as it is known in Nigeria) is in itself a justification for disclosure in the public interest. Therefore, disclosure is all about openness and transparency in the affairs of the corporate form. Many authors have referred to the word 'disclosure' in a number of ways which captures its very essence.[11] The critical issue about disclosure is that it is the price to be paid by shareholders in return for the conferring of limited liability which insulates their personal fortunes from the reach of the company's creditors unless the shareholders have been persuaded to give personal guarantees.

This paper answers the questions: Is the disclosure regime in Nigeria adequate and contains information needed to safeguard the corporation, corporate investors and the public from corporate frauds? How efficacious and punitive are the sanctions contained in the Company and Allied Matters Act Cap C20 Laws of the Federation of Nigeria 2004 (hereinafter referred to as 'CAMA') and the Securities and Exchange Commission Act 2007 (SEC Act) in deterring those who man corporations in Nigeria from hoarding and trading such information against the corporate interest and the investing public?

Part II of the paper discusses Disclosure at the formation of the Company in Nigeria. It highlights the scope of CAMA and other extant laws dealing with the issue, while bringing out the underlying philosophy of Disclosure at the formation stage. Part III examines Disclosure by way of recurrent obligation and financial reporting. The need for continuous disclosure after the corporation has been registered is highlighted and the underlining philosophy examined. Part IV examines Disclosure at the dying times of the company and Disclosure under Securities Laws. This shall entail a study of public offers and necessary disclosure items required in a prospectus under the relevant laws with particular reference to the following options: securities based registration system versus company based registration system; and mandatory versus voluntary disclosure rules. Part V raises a poser whether with all these volume of disclosure required, the National Assembly have been able to achieve its very aims and objectives for imposing disclosure obligations. Part VI of the paper undertakes a comparative analysis of disclosure on a global vista and juxtaposes it with what is obtainable in Nigeria. The Companies Act 2006 of the United Kingdom in particular, the CAMA and other relevant pieces of legislation will be examined to discover marked differences in disclosure items and sanctions thereto between Nigeria and these foreign jurisdictions with a view to extracting lessons for Nigeria. Finally, Part VII makes a case for the imperativeness of Company Law Reform in Nigeria. The paper asserts that the disclosure regime in Nigeria has not been able to check corporate frauds and failures compared to what obtains in other jurisdictions. It reasons that the Disclosure practice in Nigeria is grossly insufficient and ineffective to combat corporate fraud in Nigeria. The paper concludes by proffering suggestions and recommendations.

II. DISCLOSURE OF INFORMATION AT THE CORPORATE AFFAIRS COMMISSION DURING THE FORMATION OF THE COMPANY

Till date, the cardinal business legislation in Nigeria remains the Companies and Allied Matters Act Cap C20 Laws of the Federation of Nigeria, 2004 and the Investment and Securities Act 2007 as amended.[12] The Companies and Allied Matters Act itself has a rich history of evolution influence by Nigerian colonial history with Britain. From the Bubble Act of 1720 to the Joint Stock Companies Act of 1844, it developed to the Companies Ordinance of 1922 and later the Companies Act of 1958. It later evolved into the Business Act of 1968 before the formal Companies Act of 1968 emerged to become the gamut of Nigeria business law for the next 20 years. The Companies Act of 1968 was eventually replaced by the current Companies and Allied Matters Act Cap C20 Law of the Federation of Nigeria 2004.

Disclosure of Information on Incorporation[13]

An important aspect of company law which those forming and running a company must cope with is the amount of disclosure they must make to the

---

11 Brenda Hannigan, *Company Law* (2nd edn, London, Oxford University Press, 2008) at 500, refers to Disclosure as 'Transparency Obligation'.

12 The Companies and Allied Matters Act Cap C20 LFN 2004 governs corporate affairs under the administration of the 'Corporate Affairs Commission', while the Investment and Securities Act, 2007 governs investment and securities matters under the administration of the Securities and Exchange Commission (SEC). Other legislation aimed at facilitating the inflow of foreign investment into Nigerian Economy include: The Nigerian Investment Promotion Commission Act Cap N LFN 2004. Foreign Exchange (Monitoring and Miscellaneous Provision) Act, Cap F LFN 2004; National office for Technology Acquisition and Promotion Act, Cap N LFN 2004, Industry Inspectorate Act, Cap I LFN 2004; and the revised Immigration Act Cap I LFN 2004.

13 Sec. 1 of CAMA established Corporate Affairs Commission (hereinafter called 'CAC'). Sec. 7 sets out the functions of the CAC amongst others thus: (a)-to regulation and supervision of the formation, incorporation, registration, management and winding up of companies under or pursuant to this Act; (b) to establish and maintain a company's registry and offices in all the states of the Federation suitably and adequately equipped to discharge its functions under the Act; (c) to arrange or conduct an investigation into the affairs of any company where the interest of the shareholder and the public demand. In the United Kingdom, Registration under the Companies Act, 2006 is the responsibility of the Registrar of Companies. The head office of the registrar is Companies House in Cardiff. Companies House is a public registry with three main functions to wit (i) the incorporation, re-registration and striking-off of companies; (ii) The registration of information relating to companies which is required to be delivered under companies insolvency and related legislation; and (iii) the provision of company information to the public together with compliance functions relating to these matters. Generally on this, available at: http://www.companieshouse.gov.uk accessed on November 18, 2011. It is submitted that although the legislative drafting style employed in respect of the English Act appears to have conveyed the functions of the Companies House in much simpler language, the functions of the CAC are broader in scope.

investing public and creditor. Because corporation was seen from its inception as a privilege or concession to businessmen, in return, certain amount of documentation is required to be opened for public inspection and scrutiny. The reasoning behind this requirement, Simon Goulding[14] explained, was encapsulated by the American judge, Justice Brandeis when he stated that, 'Sunlight is the best of disinfectants; electric light the best policeman.'[15] Continuing, Goulding opined that:

"The reasoning behind the disclosure requirements is that fraud and malpractice are less likely to occur if those in control of corporate assets have to be specifically identifiable and know they have to disclose what they have been doing. This means that public disclosure is intended to protect investors and creditor who either put money into the company or who deal with it."[16]

Incorporation requires the submission of various documents to the Registrar of Companies who will then issue a Certificate of Incorporation signaling the commencement of the company's existence.[17] Foremost among the documents are the copies of the proposed Company's Memorandum and Articles of Association[18] which must disclose the name of the proposed company,[19] the registered office of the company, the nature of the business which the company is authorized to carry on, that the company is a private company as the case may be, and that the liability of the members is limited by shares.[20] If the company has a share capital, the Memorandum shall state the amount of authorized share capital[21] reflect the total number of shares the shareholder have taken among themselves.[22] The Memorandum shall state the number of shares taken by each subscriber written opposite the name.[23]

Apart from the Memorandum of Association and Articles, other documents of incorporation to be submitted at the CAC include the Notice of Address of the registered office of the company also referred to as Form

14 Simon Goulding, *Principles of Company Law* (2nd edn, Routledge-Cavendish, 1999) 10. The learned author quoted a dictum from the 1973 White paper on company law reform which gave the reasoning on disclosure that 'it was the government view that disclosure of information is the best guarantee of fair dealing and the best antidote to mistrust.'

15 *Ibid*.

16 *Ibid*.

17 Sec. 27 of CAMA; see also sec. 8 (1) and (2) and sec. 9, UK Act, 2006.

18 Sec. 27(1) of CAMA; see also sec. 8(i)(a) of the UK Act, 2006. A Memorandum of Association is a Memorandum stating that the subscribers (a) wish to form a company under this Act, and (b) agree to become members of the company and in the case of company that is to have a share capital to take at least one share each.

19 The Company and Allied Matters Act Cap C20 Laws of the Federation of Nigeria, 2004, Sec. 27(1) (b); see Sec. 9(5) of the UK Act 2006.

20 *Id*., Sec. 27(1)(f); see sec. 3 (2) of the UK Act, 2006.

21 *Id*., Sec. 27(2)(a); see sec. 10 (2) of the UK Act, 2006.

22 *Id*., Sec. 27(2)(b); see sec. 10 (4) of the UK Act, 2006.

23 *Id*., Sec. 27(2)(c); see sec. 10 (4) (a) of the UK Act, 2006.

CAC3, a list and particulars together with the consent of the persons who are to be the First Directors of the proposed company also referred to as Form CAC7, a statement of the authorised share capital signed by at least one Director also called Form CAC2, a statutory declaration of compliance also called Form CAC4. The rationale behind these items of disclosure has been aptly stated by Tom Hadden[24] as follows: 'These previsions are intended to ensure that the current capital structure, ownership and control of any company at any time may be ascertained by any interested party.'

Sound as the above provisions appear, the reality on ground today in Nigeria is a sad commentary on the transparency disclosure is meant to engender. While CAMA provides that the above disclosure requirements be met before a company is incorporated, there are no consequential or follow up provisions mandating the CAC to carry out an investigation or assessment of the veracity or accuracy of the information disclosed to it. Rather, the investing public, the creditor and all those who come in contact with the corporation are left to dig out the truth about the information the promoters of the company submitted to the Commission for registration. A situation where a company comes forward to be registered for the purpose of manufacturing waste bins but ended up as a petroleum product importer and defrauds the government of huge oil revenue leaves much questions to be asked why regulatory bodies was not be to nib such illegality in the bud.

For example, in a telephone chat with the Chairman of the House of Representatives Committee which probed the management of subsidy funds, Hon. Lawan Faruk, stated that during their investigation, they discovered that some firms that participated in the process were not registered with the Corporate Affairs Commission, CAC neither were they even registered by the Petroleum Products Pricing and Regulation Agency (PPPRA), yet they participated in the process and benefited from the subsidy.[25]

Continuing Disclosure Obligation

Once incorporated and on the Register of Companies, companies are subjected to continuing disclosure to ensure that the company's public record remains up to date[26]. There are two aspects to these on-going obligations:

24 Tom Hadden, *Company Law and Capitalism* (2nd edn, London, Weidenfeld & Nicholson, 1972) at 208.

25 Jide Ajani, Emmanuel Aziken et al, "Shocking: Unregistered Companies Benefitted From Subsidy", FG sacks Akintola Williams, Adekanola Coys' *The Vanguard* (Lagos, 22 April 2012) at 1.

26 The writer is of the view that the historical significance depicted by this requirement reminds one of the Bankers engaged by the South Sea Company for purposes of its floatation. It would be recalled that one of the major scandals of that era was the discovery that Bankers were operating on a charter belonging to a sword blade company. This factor amongst others precipitated the failure of the Bank and the eventual collapse of the South Sea Company. The point being made is that perhaps the South Sea Company would not have had the problem if there was a Company Registry where searches could have been conducted on the affairs of the Bank.

a) Occasional Disclosure

Companies must notify the Registrar General at the CAC of what can be described as occasional changes, such as change of company name,[27] changes of director[28] or of company secretary, of location of registered office, of alteration to the share capital and increase in share capital, creation of company charges and changes in the company register of charges. The disclosure philosophy behind this disclosure requirement was explained by Brenda Hannigan in the following words: "To anyone proposing to grant credit to the company or to invest in its securities this is perhaps the most valuable safeguard for he can see to what extent the company's assets are already mortgaged."[29] These changes occur on a random basis with some companies having to report very frequently and others very occasionally, depending essentially on the size and nature of their activities.

b) Disclosure By Way of Recurrent Obligation

The address of the registered or head office of the company given to the commission in accordance with s 35(2)(1) of CAMA, or any change in the address made in accordance with the provisions of this section shall be the office to which all communications and notices to the company may be addressed. Notice of any change in the address of the registered or head office of the company shall be given within 14 days of the change to the commission.[30] Also director's service contract[31] disclosure by directors of interest in contracts, disclosure by registration and copies of certain resolutions,[32] publication of name[33] and disclosure of beneficial interest in

27 See Part 4 chapter 5, Section 80 UK Act, 2006 on Change of Name: Registration and Issue of new certificate of incorporation. This section applies where the registrar receives notice of change of a company (a) name, if the registrar is satisfied that the new name complies with the requirement of this part, and (b) and that the requirement of the company's Act and any relevant requirement of the company's Articles with respect to a change of name are complied with, the registrar must enter the new name on the registrar in place of the former name. On the registration of the new name the registrar must issue a certificate of incorporation altered to meet the circumstances of the case.

28 *Supra note* 19, Sec. 292(4); see sec. 164 of UK Act, 2006.

29 Hannigan, n. 11 at 8.

30 Sec. 83 on Register of members. See also sec. 114 of UK Act, 2006.

31 Sec. 291 on Director's Contract of employment for more than 5 years. See also sec. 228 of UK Act, 2006.

32 *Supra note* 19, Sec. 237.

33 Sec. 548(1)(a) provides that every Company after incorporation shall paint or affix and keep painted or affixed its name and registration number on the outside of every office or place in which its business is carried on in a conspicuous position in letters easily legible; (b) have its name engraved in legible characters on its seals and (c) have its name and registration number mentioned in legible characters in all business letters of the company and in all notices, advertisements and other official publication of the company and in all bills of exchange, promissory note, endorsement, cheques and order for money or goods purporting to be signed by or on behalf of the company; and in all bills or parcels, invoices, receipts and letters of credit of the company.

shares,[34] must all be made to the commission. The rationale behind this category of disclosure is to give creditors, investors, suppliers and the public the confidence that they are dealing with a known personality with an address and location and certainly not with fictitious persons who may not be traced or found in the event of any liability or fraud against the investing public and creditors.

c) Annual Disclosure

The most significant disclosure requirements imposed on companies are the annual requirements with respect to filing of accounts[35] to be prepared by the directors and to be supplemented by the Auditor's reports and Directors' report and the publication of full individual or group financial statements as well as abridged financial statement. The overriding philosophy in respect of the balance sheet and profit and loss account is that they should reveal accurately and in detail sufficient information on the total and types of company's liabilities and how its fund are spread between various types of assets and most importantly the liquidity position of the company in order to avoid cash flow problems. They must give a true and fair view of the state of affairs of the company at the end of its financial year. Explaining the underlining philosophy behind these items of disclosure Gower[36] said that:

"Members and the public (which for practical purposes, mean creditors and others who may subsequently have dealings with the company and become its members or creditors) are supposed to be able to obtain information which they need to make an intelligent appraisal of their risk, and to decide intelligently when and how to exercise the rights and remedies which the law affords them."

Finally, the principal source of financial information still remains the periodical balance sheets, profit and loss account and directors and auditors reports that companies are required not only to lay before their general meetings but also to deliver them for registration thus making them available to the general public.

d) Information on Business Communication

The letter heading must mention the company's name and if the company is limited that last word of the name must announce this. The names of the Directors must also appear and if the company is in liquidation or in the hands of a receiver this too must be disclosed. In addition, a company must state on all business letters and other forms the number with which it is registered and the address of its registered office.

---

34 *Supra note* 19, Sec. 94(1), the rationale behind this provision is to prevent sudden, unexpected and usually hostile takeover bids. Also it is to prevent surreptitious accumulation of control of public companies through nominees, and finally obligation to disclose arises in this instance because it brings to focus and exposes those members who have acquired or cease to acquire shares carrying an unrestricted right to vote at General meetings.

35 *Supra note* 19, sec. 334 contains the disclosure items.

36 Gower, n. 4 at 497.

e) Annual Returns

Every company shall at least once in every year make and deliver to the Commission an annual return in the form, and containing the matters specified in sections 371, 372 or 373 of CAMA[37] as may be applicable except in the year of its incorporation. The disclosure philosophy behind the requirements for companies to file Annual Return include providing annual consolidation of the periodical information so that a searcher will not generally have to go back beyond the last annual return and providing the public with opportunity to obtain certain additional information which would otherwise be available only at the company's office but for the disclosure items contained in the Form of Annual Return submitted at the commission. Lastly, filing of annual return affords the registrar the opportunity to strike-off the names of erring moribund companies from the Register.

This paper argues that the issue of recurrent Disclosure in Nigeria corporate law has not been encouraging. Corporate Nigerians are notorious for going to sleep as soon as they are registered. They hardly make the mandatory annual returns to CAC and to the Nigerian Stock Exchange (NSE). The Nigerian Stock Exchange, NSE, has placed emphasis and adopted a strict posture on the timely rendition of financial statements by quoted companies. This led to its sanctioning of 13 quoted companies, in January 2012 for their failure to submit their December 2010 and March 2011 yearly financial statements. The NSE, For example had said that failure of companies to submit their financial statements at the expiration of the accounting year, is a clear violation of the Post-Listing Rules of the NSE, as contained in Key Issue No. 5 (Annual Accounts Procedures), which states that 'Audited annual accounts of companies ought to be submitted within three months of the year end'.[38]

The paper queries the position whereby companies in default of the above continuous disclosure items continue to trade their shares and products to the unsuspecting public. This paper warns might give rise to the situation where the company may be dead or heavily indebted but the uninformed public buys into it because information needed to update the investors is either outdated all the same not distorted after registration. What is the fate of the businessman who after a search with the CAC, he discovers that a company he want to buy into has changed address from that contained at the CAC

---

37 The items to be disclosed in the Annual return forms are the address of the registered office of the company, register of members and debenture holders, shares and debentures, the amount of share capital, the number of shares taken by members, particulars of Directors and Secretary, particulars of existing members of the company containing the names and addresses and those who have ceased to be members after the last AGM and the amount of shares held by each of the existing members at the date of the return.

38 Michael Eboh, 'CBN backs NSE, Threatens to Sack Banks' Chairmen, CEOs', *The Vanguard* (Lagos, 13 April 2012) available at: http://www.vanguardngr.com/2012/04/cbn-backs-nse-threatens-to-sack-banks-chairmen-ceos/ accessed on April 19, 2012.

records? This paper submits that because corporation as a person is subject to change, the investing public and the creditors should be updated of the current situation of the company.

III. DISCLOSURE AT THE DYING TIMES OF THE COMPANY AND UNDER SECURITIES LAW

Disclosure on Dissolution

Just as the law compels disclosure of certain pieces of information at the formation of a company, the law makes it obligatory for disclosure to be made when a company is insolvent or otherwise restructuring or being taken over. There are a variety of mechanisms, such as receivership[39] and liquidation[40] all of which will come to play at the dying stage of the company. Disclosure will be required of these processes in order that those searching the public record are aware of the termination or imminent termination of the company's existence.[41]

Receivership

In modern business context, receiverships are associated particularly with a default by a corporate borrower on secured loan.[42] Notice of the appointment of a receiver shall be given to the Commission within 14 days disclosing the terms and remuneration for the appointment and publication shall be made of the appointment on all documents bearing the name of the company.[43] Other sections of the Act relating to a company under Receivership also impose disclosure obligations both on the company and on the Receiver.

Liquidation

The liquidation or winding up of a company is the process whereby its life is ended and its property administered for the benefit of its creditors and members.[45] In Nigeria, disclosure under this head is governed by two regulations.[46] The Liquidator is appointed under CAMA and he must disclose the fact of his appointment by publishing same in the Gazette and in two daily newspaper and also register the Notice of its appointment with CAC so that both searchers and the public will be forewarned that the company is in liquidation[47]. Once liquidation begins, the importance of disclosure becomes enhanced as it ensures that creditors and investors are not unfairly treated by the liquidator however much the directors of the liquidating company may have

---

39 *Supra note* 19, sec. 392(1).

40 *Ibid*.

41 Hannigan, n. 11 at 8.

42 *Ibid*.

43 *Supra note* 19, sec. 392(1).

44 *Supra note* 19, sec. 396 (1)(b) and 396 (1)(c).

45 Gower, n. 4 at 719.

46 The CAMA and Company Winding up Rules.

47 *Supra note* 19, sec. 473(1).

previously treated those creditors and investors.[48]

The Companies Winding up Rules makes provisions for press advertisement[49] of the various steps in the liquidation process. For example, the petition for winding up of the company[50] as well as the winding up order must be published to afford creditors and the investing public, information needed to protect their investments or stakes in the company.[51] The disclosure requirements entitle every member and creditor to inspect the court's file of proceedings[52] and attend hearings if they wish. Also, creditors and members are entitled to inspect the minute books which have to be maintained by the Liquidator.[53] The court may allow them inspection of any of the books and papers of the company[54] thus, giving them far greater powers to investigate the company's indoor management than they had while the company was a going-concern.

With regard to information on the finance of the company during liquidation, the liquidator is duty bound to disclose to the Corporate Affairs Commission at least twice a year, all monies received and payments made as a liquidator.[55] In a voluntary liquidation, the winding-up resolution is required to be filled at the CAC and the Notice of it must be advertised in the Gazette and two daily newspapers.[56] If there is a declaration of solvency, this too must be filed.[57] The implication of filling the above documents is that they become available to members of the public for inspection.

Finally, on disclosure by way of publicity during liquidation, all business communication from the company must contain a statement that the company is being wound up.[58] Consequently, every invoice, order for goods and business letters issued by or on behalf of the company or a liquidator of the company or a receiver or manager of the property of the company, being a document on or in which the name of the company appears shall contain a statement that the company is being wound-up to wit "In receivership" or "In Liquidation".

This paper reasons that the disclosure requirements at the dying time of the company is not exhaustive enough as information leading to causes of the liquidation and death of the company may not always be captured in the disclose information. Besides, it is illogical to ask a company to disclose the reasons for its failure cum liquidation by the same directors or shareholders who might have fraudulently contributed to the failure of the company in the first

48 *Supra note* 19, sec. 491(1).

49 Rule 19 (1), the Company Winding up Rules of the Federal High Court, 2001.

50 *Id*., Rule 19 (1), (2), (3), and (4).

51 *Supra note* 19, sec. 416.

52 *Supra note* 49, Rule 10.

53 *Supra note* 19, sec. 430.

54 *Supra note* 19, sec. 516(2).

55 *Supra note* 19, sec. 429(1).

56 *Supra note* 19, sec. 458(1).

place. Without sounding too pessimistic, this paper opined that such disclosure has the tendency of been tainted or blurred and leans towards exonerating insiders and management from the guilt of the corporate failure. Except independent liquidators are appointed to oversee the liquidation of the company, this paper fears that the transparency of such exercise is prone to suspect.

For example, report has it that the special anti-fraud unit of the Nigerian police arrested the former managing director of InterContinental Bank, Mahmoud Lai Alabi, for fraud related to a questionable loan write-off.[59] Mr. Alabi's arrest followed a petition submitted to the unit by the brother of a whistleblower who was allegedly assassinated by hired killers for revealing shady dealings involving Bukola Saraki, the once-powerful governor of Kwara state who is now a senator. Sanusi Lamido Sanusi, current Governor of the Central Bank of Nigeria (CBN), had appointed Mr. Alabi to run InterContinental Bank at the start of the CBN's controversial banking reform. The reform began with the CBN's sacking of several commercial bank chief executives deemed to be linked to corruption, and the appointment of new CEOs by Mr. Sanusi.[60] The appointment of Mr. Alabi raised serious concerns at the time. Mr. Alabi had served as the managing director of Songa Farms which is owned by the Saraki family. Mr. Saraki's businesses owed some 32 billion naira to InterContinental Bank. Mr. Alabi had improperly written off N8 billion in loans to companies with links to Saraki. He gave the companies' names as Linkers, Dicetrade, Skyview Properties and Joy Petroleum. Police sources told Saharareporters that Mr. Alabi did write off billions of naira in unserviced loans linked to Mr. Saraki after Alabi released four houses in Lagos and another two in Abuja that the Sarakis had been used as collateral to secure the huge loans.

The paper argues that the role of the CAC and the SEC during period of liquidation should go beyond merely sitting down at their office and receive disclosure items from the dying corporation as experience has shown that at such time, corporat directors and insiders abuse are high and the perpertrators can do anything within their reach to cover up their dirty record in the corporate file. The Commission must be more vigilant and deligent in its surpervisory and monitoring role.[61]

Disclosure under Securities Law

This area of the law deals with the responsibility of the company and its Directors and others who sponsor issues for the way they present the company's affairs to the public when raising it share and loan capital.[62] It is

57 *Supra note* 19, sec. 462(1).

58 *Supra note* 19, sec. 512(1).

59 Sahara Reporter (New York, 18 April 2012) available at: http://saharareporters.com/news-page/former-bank-executive-arrested-writing-massive-loan-sarakis> accessed on April 20, 2012.

60 *Ibid*.

61 *Ibid*.

62 Gower, n. 4 at 296.

also concerned with regulations which have to be complied with, whenever a public issue is made in order to give the public the fullest possible information about the nature of the concern in which they are being invited to invest.[63] Eminent Authors and commentators[64] have addressed this issue in their various books under different names.

However, they have unanimously agreed on the basic principle that 'Going Public' refers to the modalities by which a company becomes entitled to raise capital from members of the public.[65] Therefore, if a private company desires to raise capital by way of public subscription, it must first be converted to a public company by following the procedure laid down under the law.[66] The

63 *Ibid*.

64 Joseph Abugu, *Company Securities: Law and Practice* (Lagos, University of Lagos Press, 2005) at 153, Captions it 'GOING PUBLIC'; Hannigan, n. 11 at 643 named the chapter, 'Raising Capital from the Public', Gower, n. 4 at 338 addressed the issues involved in detail under the chapter on 'Floatation'. See also Oladele, n. 9.

65 Abugu, n. 64 at153; Gower, n. 4 at 338 and Hannigan, n. 11at 644.

66 *Supra note* 19, sec. 50 provides thus: (1) Subject to this section, a private company having a share capital may be reregistered as a public company if- (a) a special resolution that it should be so re-registered is passed; and (b) an application for re-registration is delivered to the commission together with the documents prescribed in subsection (3) of this section (2) The special resolution shall - (a) alter the company's memorandum so that it states that the company is to (become) a public company and (b) make such alterations in the memorandum as are necessary to bring it into conformity with requirements of this Act with respect to the memorandum of a public company in accordance with section 27 of this Act; and (c) make such alterations in the company's article as are requisite in the circumstances. (3) The application shall be made to the commission in the prescribed form and be signed by at least one director and the secretary of the company and the document to be delivered with it are the following- (a) a printed copy of the memorandum and articles as altered in pursuance of the resolution; and (b) a copy of a written statement by the directors and secretary certified on oath by them, and show in that the paid up capital of the company as at the date of the application is not less than 25 percent of the authorized share capital as at that date; and (c) a copy of the balance sheet of the company as at the date of the resolution or the preceding 6 months, whichever is later; and (d) a statutory declaration in the prescribed form by a director and the secretary of the company (i) that the special resolution required under this section has been passed; and (ii) that the company's net assets are not less than the aggregate of the paid up share capital and undistributable reserves; and (e) a copy of any prospectus or statement in lieu of prospectus delivered within the preceding 12 months to the Securities and Exchange Commission established under the Investment and Securities. (4) If the Commission is satisfied that a company has complied with the provisions of this section and may be re-registered as a public company, it shall- (a) retain the application and other documents delivered to it under this section; (b) register the application and other documents; and (c) issue the company a certificate of incorporation, stating that the company is a public company. (5) Upon the issue to a company of the certificate of incorporation under this section. (a) the company shall be virtue of the issue of that certificate become a public company; and (b) any alterations in the memorandum and articles set out in the resolution shall take effect accordingly. (6) The certificate shall be prima facie evidence that- (a) the requirements of this Act in respect of re-registration and of matters precedent and incidental thereto.

need for Capital Market regulation cannot be faulted.[67] Disclosure under securities laws is regulated by a combination of the following:

1. Investment and Securities Act, 2007
2. Rules and Regulation of Securities and Exchange Commission made pursuant to the Investment and Securities Act 2007
3. Companies and Allied Matters Act
5. The Borrowing by Public Bodies Act
6. The Companies and Allied Matter Act
7. The Insurance Act
8. The Central Bank of Nigeria Act
9. The Nigeria Social Insurance Trust Fund Act
10. The Banks and other Financial Institutions Act
11. The Foreign Exchange (Monitoring & Miscellaneous Act)
12. The Chartered Institute of Stockbrokers Act.

Disclosure of Information by Registration

The present SEC (hereinafter called 'The Commission') is the apex regulatory body for the Nigerian Securities Market.[68] The Commission is charged as provided in the Investment and Securities Act 2007,[69] with the

---

67 See Securities and Exchange Commission, (2000) "20 years of Securities Market Regulation in Nigeria" at page 23-25 where it was submitted that the instrument traded in at the securities market do not lend themselves to physical examination by the buyers, unlike familiar consumers goods. The prospective investor therefore relies on the information available to him on every particular issuer and issuer to make an informed judgment. Such information must be concise, comprehensive, timely and not misleading or ambiguous. The objective of regulation is thus the protection of investors from deceitful and other unscrupulous and manipulative practice in the sale of securities which can destabilize the market and erode confidence. Regulation therefore maintains stability in the capital market and prevents systemic risks. However, Oladele Olayiwola, in "The Bases of Securities Information Disclosure", (2010) ISLJ pp.49-66, appraised the capacity and effectiveness of the existing regulatory system to sustain market integrity and investors protection in Nigeria through information disclosure and compliance enforcement in the light of theoretical underpinnings and concluded that despite the regulatory and institutional effort to make information available to investors, there usually is inequality of information between securities issuers and investors. He submitted that even finance experts investing in securities could suffer the diluting adverse effect of information asymmetry in the hands of corporate insiders who abuse non-public price-sensitive information in insider securities trade.

68 Abugu, n. 64 at 80 herein obviously restates part of the head note to the Investment and Securities Act, 2007 almost in the same context the only different being that in place of 'capital' the Learned Author used 'securities'.

69 The Investment and Securities Act, 2007 (hereinafter called ISA 2007 repealed ISA Act, 1990). The Act establishes the Securities and Exchange Commission as the apex regulatory authority for the Nigerian Capital market as well as regulation of the market to ensure the protection of investors, maintain fair, efficient and transparent market and reduction of system risk and for related matters.

power to carry out the functions[70] set out in the Act. The relevant points for the purpose of emphasis are those functions of the Commission contained in clauses (a), (b), (c), (f), (g), (k), (I), (n), (o), (q) and (r). These sections deal with the requirement of registration. A great deal of disclosure is required at

70 *Id*., Sec. 13 sets out the functions of the Commission thus, sec. 13 provides that the Commission shall be the apex regulatory organization for the Nigerian capital market and shall carry out the functions and exercise all the powers prescribed in this Act and in particular, shall: (a) regulate investments and securities business in Nigeria as defined in this Act; (b) registered and regulate securities exchanges, capital trade points, futures, options and derivatives exchange, commodity exchanges and any other recognized investment exchange; (c) regulate all offers of securities by public companies and entities; (d) register securities of public companies (e) render assistance as may be deemed necessary to promoters and investors wishing to establish securities exchanges and capital trade points; (f) prepare adequate guidelines and organize training programmes and inseminate information necessary for the establishment of securities exchanges and capital trade points. (g) registered and regulate corporate and individual capital market operators as defined in this act; (h) registered and regulate the workings of venture capital funds and collective investments scheme in whatever form; (i) facilitate the establishment of a nationwide system for securities trading in the Nigerian capital market in order to protect investors and maintain fair and orderly markets; (j) facilitates the linking of all markets in securities with information and communication technology facilities; (k) act in the public interest having regard to the projection of investors and the maintenance of fair and orderly markets and to this end establish a nationwide trust scheme to compensate investors whose losses are not covered under the investors protection funds administer by securities exchanges and capital trade points; (l) keep and maintain a register of foreign portfolio investments; (m) register and regulate securities depository and such other agencies and intermediaries; asset and securities, credit rating agencies and such other agencies and intermediaries (n) protect the integrity of the securities market against all forms of abuse including insider dealing; (o) promote and register self regulatory organizations including securities exchanges, capital trade points and capital market trade association which it may delegate its powers; (p) review, approve and regulate mergers, acquisition, takeovers and all forms of business combinations affected transactions of all companies as defined in this Act; (q) authorized and regulate cross-border securities transaction; (r) call for information from and inspect, conduct inquires and audit of securities exchanges, capital market operators, collective investment schemes and all other regulated entities (s) promote investors' education and the training of all categories of intermediaries in the securities industry; (t) call for, or furnished to any person, such information as may considered necessary by it for the efficient discharge of its functions; (u) levy fees, penalties and administrative costs of proceedings other charges on any person in relations to investments and securities business in Nigeria in accordance with the provisions of this Act; (v) intervene in the management and control of capital market operators which it considered has failed, is failing or crisis including entering into the premises and doing whatsoever the Commission deems necessary for the protection of investors; (w) enter and seal up the premises of persons illegally carrying on capital market operations; (x) in furtherance of its role of protecting the integrity of the securities market, seek judicial order to freeze the

the stage of registration of securities market institutions. In this respect, registration of securities market institutions and participants by the Commission compels a disclosure of information on a variety of issues relating to the fitness or otherwise of all institutions and persons proposing to operate in the capital market. Ascertaining their suitability is critical to confidence building, given that any unscrupulous action could erode confidence and destroy the fabric of the market. Registration demands that accurate and comprehensive information be sought and obtained from prospective registrations. Information submitted is required to be sworn before a Commissioner for Oaths.

Notwithstanding, the Commission still verifies all information submitted to it. A satisfactory police conduct certificate is also required from all prospective individual registrants to ensure that ex-convicts and criminals are revealed and denied entrance at the point of registration.

In addition, the Commission compels disclosure of information in the course of registering securities in the capital market. Its function in this regard[71] affords the Commission the opportunity to ascertain the value and worthiness of the securities and the credibility of the issuers. In this way worthless securities are revealed and denied entrance into the market. The overall aim of the Commission's insistence on the registration of all and sundry is the protection of investors.

Other provisions of the ISA on disclosure items are the requirements enjoining capital market operatives to:[72]

(i) Register prospectus

(ii) Keep a register in the prescribed form of the securities in which they have interest

(iii) Particulars of the said register to be furnished to the Commission

(iv) Yield to the powers of inspection by the Commission and

(v) To all the Commission to make extract of the register with a view to disclosing same to any person who in the opinion of the Commission should in public interest be informed of the dealings in securities disclosed

---

assets (including bank accounts) of any person whose assets were derived from the violation of this Act, or any securities law or regulation in Nigeria or other jurisdictions; (y) relate effectively with domestic and foreign regulators and supervisors of other financial institutions including entering into co-operative agreement on matters of common interest; (z) conduct research into all or any aspect of the securities industry; (aa) prevent fraudulent and unfair trade practices relating to the securities industry (bb) disqualify persons considered unfit from being employed in any arm of the securities industry; (cc) advise the Minister on all matters relating to the securities industry and (dd) perform such other functions and exercise such other powers not inconsistent with this Act as are necessary or expedient for giving full effect to the provisions of this Act.

71 *Supra note* 69, Part VIII sec. 54 (1-6).

72 *Supra note* 69, sec. 80; sec. 56(1-5); sec.57 (1-5); sec. 58(1-3); sec. 59; sec. 60(2)(a-f); sec. 69; sec. 71; sec. 72; and sec. 73(1).

in the register

(vi) Recurrent Reporting Obligation: The Commission imposes an obligation on public companies to file audited financial statements and such other returns as may be prescribed by the Commission from time to time. The rationale behind this is to enable the Commission to be abreast of the development in the company and to know whether the company is still a going concern or has become moribund

(vii) Invitation to the public - The Act defines what will constitute an invitation to the public

(viii) Form of Application for shares to be issued with a prospectus

(ix) Every prospectus is bound to publish its effective date

(x) Disclosure the contents of a prospectus consistent with the Third Schedule of the I.S.A.

(xi) Registration of prospectus.

Besides, these disclosure provisions of the ISA are effectively backed up by the Rule and Regulations of the Commission.[73] Prominent among these rules are those touching and concerning areas like registration of securities exchange,[74] capital market operators,[75] issuing house,[76] underwriters, broker,[77] dealers and jobbers,[78] rating agency,[79] capital market consultant,[80] notice of proposed offering,[81] form, size, number etc of prospectus,[82] statement required in a prospectus,[83] content of a prospectus,[84] application form, purpose of the offer and proceeds of the issue. In all, the overriding rationale for disclosure in this area of the law is to lay bare before the investors full information about the company's affairs to enable him make an intelligent appraisal of the worth of the security before coming to a conclusion on whether or not to subscribe and participate in the scheme.

Having gone public, the company becomes competent in law to make a

73 The available Rules and Regulations is till the old one made pursuant to the repealed Investment and Securities Act ISA 1999. This is still considered very useful because there is no significant difference between the ISA 1999 and ISA 2007, hence Securities and Exchange Commission Rules and Regulation (SEC) Rules and Regulations of 1999 are still very relevant.

74 *Id*., Part A3, Rule 22.

75 *Id*., Part A3, Rule 28 (1)-(13).

76 *Id*., Part A3, Rule 29.

77 *Id*., Part A3, Rule 30.

78 *Id*., Part A3, Rule 31.

79 *Id*., Part A3, Rule 28(12).

80 *Id*., Part A3, Rule 28 (13).

81 *Id*., Part B1, Rule 51.

82 *Id*., Part B1, Rule 53.

83 *Id*., Part B1, Rule 55.

84 *Id*., Part B1, Rule 56.

public issue. A public issue is the process by which a public company raises long term funds from general public.[85] This can take the form of an offer for subscription or an offer for sale. Either way, when a company wishes to raise money from the public either in the form of a share issue or in the form of a debenture issue, it must proceed by way of a prospectus which must receive the prior approval of SEC.[86]

This takes us to the first major issue for consideration: What are the various disclosure requirements under the law in respect of a prospectus? The prospectus is designed to give the company an opportunity to disclose so much of its affairs to prospective investors, so as to enable them make an informed investment judgment in selecting or rejecting the securities on offer.[87] A prospectus is a document which describes to the members of the public the nature and functions of the company's operation, the persons who are its Directors, their qualifications and addresses, the financial or other backing of the company and the reason why the particular funds are being raised and how they are to be used. It will contain in most cases important supporting evidence from experts who may describe the activities of the company. It will usually contain detailed accounts of the company's activities of previous years so as to give the person being invited to subscribe for securities in the particular company, some indication of the financial organization they are becoming involved with through the fund raising.[88]

The mandatory content of a prospectus is set out in full under the Investment and Securities Act 2007 to include the following matters:

1. Information on the company's proprietorship, Management and Capital requirement. Details are set out below;[89]
2. The prospectus shall state details of the offer and issues contained under item 3, third Schedule;[90]
3. There shall be stated the number, description and amount of any shares or debentures of the company which any person has or is entitled to be given an option to subscribe for;
4. The prospectus shall state the number and amount of shares and debenture which, two years preceding the current offer for shares, the existing shareholders have or agreed to be issued to them as fully or partly paid up shares otherwise than in cash;
5. Property acquired or to be acquired by the company to be disclosed[91];

---

85 Abugu, n. 64 at 154.

86 Sec. 80, the ISA, 2007.

87 Abugu, n. 64 at 162.

88 Robert Baxt, *An Introduction to Company Law* (2nd edn, Sydney, the Law Book Co Ltd, 1982).

89 *Supra note* 80, sec. 1, third schedule.

90 *Id.*, sec. 3.

91 *Id.*, sec. 4.

6. As respect any relevant property the prospectus shall state[92];
7. There shall be stated the amount (if any) paid or payable as purchase money in cash, shares or debentures for any relevant property, specifying the amount (if any) payable for good will[93];
8. The definition of a vendor[94];
9. The prospectus shall state the amount paid as commission within the two preceding years[95];
10. The prospectus shall give the details of parties to every contract concerning the company and also state the general nature the contract[96];
11. The prospectus shall state the names and addresses of the company's Auditors;
12. The prospectus shall give full particulars of the nature and extent of the interest (if any) of every director in the promotion of or in the property proposed to be acquired by the company[97];
13. If the prospectus invites the public to subscribe for shares in the company and the company's shares capital is divided into different classes of shares the prospectus shall state the right of voting at meetings of the company conferred by and the rights in respect of capital and dividends attached to the several classes of shares respectively[98];
14. Prospectus to state the length of time during which the business of the company has been carried on;
15. The prospectus shall set out a report by the Company's Auditor;
16. The prospectus shall set out and contain accountant's report; and
17. The prospectus shall contain and set out Accountant's report on the application of the proceeds of sale subject to the conditions set out under s 18(2) and (3) of Schedule 3 of ISA[99];

In summary, the original disclosure philosophy behind filing prospectus was to inform those subscribing for shares in the company of the identities of those behind the floatation and the precise nature of the enterprise. The range of information required was then cumulatively extended in the face of glaring malpractices by promoters to include details of pre-incorporation contracts and arrangements, reports from experts and accountant and where appropriate the actual performance of the enterprise in the years before floatation. This paper argues that as useful as the prospective appears, it poses an understanding challenge to the lowly informed businessman who may not have the entire

92 *Id.*, sec. 5.
93 *Id.*, sec. 8.
94 *Id.*, sec. 9(2).
95 *Id.*, sec. 10.
96 *Id.*, sec. 11.
97 *Id.*, sec. 13.
98 *Id.*, sec. 14.
99 *Id.*, sec. 17.

patient to go through them before investing in a corporation. This is particularly so in a country such as Nigeria with high illiteracy rate and weak independent regulatory bodies.

IV. HOW ADEQUATE IS THE CURRENT DISCLOSURE REGIME IN NIGERIA

In spite of its numerous merits, there seems to be a sharp division among scholars on certain issues raised by the concept of disclosure. A school of thought[100] while acknowledging the merits of disclosure philosophy, still contends that disclosure of information will only afford protection to investors if the information supplied is true. Continuing, they argued that even though the penalties of being found to be untrue are severe, most rogues would be prepared to risk subsequent exposure if they had a reasonable chance of first collecting the proceeds of their villainy and disappearing with it. Consequently, this school advocates prevention. To them, prevention is worth any amount of ex post facto penalties. Beyond this, the school of thought argued that there is apparent inadequacy in checking the truth of the information disclosed. The Registrar-General cannot and does not attempt to check the accuracy of the data on incorporation documents at the point of submission at the CAC, all he ensures is that exfacie they comply with the statutory regulation. Abugu[101] argued that a company's past performance and future prospect should determine the value of its securities. He added that there however, is the problems of getting the information to the investors to enable them make informed decision concerning their existing investment. He added that availability of the information that affects the value of the securities makes a securities market efficient. The ultimate aim of the regulation therefore, is to prevent or minimize abuses, which distort information and therefore the value of the securities mar investors' confidence and the market integrity.

This paper does not agree with the position expressed by Abugu that the value of shares must be determined by the company's past and future prospect. Nigeria and most developing countries of the world are bedeviled by inaccurate and deliberately falsified audit records. A company's financial report may after all not be a pointer to the fact that the company is doing well as figures are easily cooked up to attract the investing public notwithstanding that a great number of the companies may heavily be debt.

For example, before the CBN tsunami in the Nigerian banking sector, Nigerian has been made to swallow hook, line and sinker the falsehood churned out by banks as their annual financial reports. Some of them had won awards both locally and internationally ranging from 'Bank of the Year' to 'Most Capitalized Bank in Africa'.[102]

100 Hadden, n. 24 at 30.

101 Abugu, n. 64 cited with approval in Oladele, n. 64.

102 Mallam Lamido Sanusi, 'Address by the Governor of the Central bank of Nigeria, on Developments in the Banking System in Nigeria' available at: www.cenbank.org/documents/speeches.asp accessed on April, 20 2012.

However, On August 14, 2009, the Governor of the Central Bank of Nigeria (CBN), Mallam Sanusi Lamido Sanusi, exercising his powers as contained in Sections 33 and 35 of the Banks and Other Financial Institutions (BOFI) Act 1991, as amended, announced the firing of the chief executive officers (CEOs) and board of directors of five banks in Nigeria and replaced them with CBN-appointed CEOs and boards of directors.[103]

Forty-eight days later, on October 2, 2009, he announced an additional sack of three bank CEOs and their respective boards of directors (and replaced them with CBN appointed CEOs and directors), bringing it to a total of eight bank CEOs and their respective Board of Directors who were fired from their jobs as helmsmen of financial institutions in 2009. The affected banks were Afribank Plc, Platinum Habib Bank (PHB) Plc, Equatorial Trust Bank Plc, Finbank Plc, Intercontinental Bank Plc, Oceanic Bank Plc, Spring Bank Plc and Union Bank Plc.[104] The CBN highlighted the following as reasons for its action (henceforth termed intervention) in the Nigerian banking industry:[105]

1. The affected banks constituted a systemic threat to the financial sector in Nigeria due to their operational failure (insolvency);

2. The affected banks lacked sound risk management processes;

3. The absence of corporate governance regimes and practices in the affected banks; and

4. The prevalence of unethical practices by the management of the affected banks.

For the CBN, the removal of these officers as well as the injection of 420 billion naira ($2.8billion) of government funds was necessary, not only because the managements of these banks had acted in manners that were detrimental to the interest of their depositors and creditors, but also in order to stabilize the banking industry and prevent its collapse.[106]

It is therefore, the submission of this paper, that to allow only SEC verify accuracy of information disclosed to it, is hopelessly inappropriate as the only time SEC may test the information is when the company decides to 'go-public' and the disclosed information becomes guiding tools in the hands of investors, else the information verification is left to SEC and that is if ever the company decides to go-public. All these highlight the need for mandatory rules.

---

103 *Ibid*.

104 Tony Adibe and Clement Nwoji, '*Nigeria: CBN Sacks 3 More Bank CEOs, Directors*' Daily Champion (Lagos, 03 October 2009) available at: www.allafrica.com/stories/200910051496.html accessed on April 22, 2012.

105 *Ibid*.

106 Francis C. Chiejine, '*Corporate Governance in the Nigerian Banking Sector: An Ethical Analysis of The 2009 Regulator Intervention And Operators' Behaviors*', University of Pennsylvania Scholarly Commons available at: http://repository.upenn.edu/od_theses_msod/29. accessed on April 22 2012.

Another school of thought views Disclosure under Securities Laws from the regulatory point of view. The contention here is between two dominant regulatory approaches applicable on Registration of Public Issues. They are the Security-Based Registration Model and the Company based Registration Model.

The Security-Based Registration Model

The applicable registration model in Nigeria today is the Securities - Based Registration Model.[107] The Thrust here is the registration of securities as opposed to registration of companies under the applicable law.[108] That is, the regulations come into play only when a company decides to 'go public' with its securities. The Investment and Securities Act does not regulate[109] private offering or securities sold other than by way of a public offer. It makes detailed provisions about the disclosure obligations of companies 'going public' and or up-dating information on companies whenever they intend to issue further or other securities.

It is aimed at disclosure that would inform an investor about an investment in a 'public offering' but does not aim at providing future or on-going information about 'an issuer'. The point to note is that once the public offering is complete, the Act required no further disclosure despite the fact that the securities may continue to be actively traded on the stock exchange, any regulation thereafter being left to the stock exchange. This paper is of the view that such a system is condemned to lead to corporate fraud and failures because investors are left at that point, at the mercy of stock brokers who could manipulate the naivety of investors to their advantage. Different rules are involved at the SEC and at the Nigerian Stock Exchange and these rules must be fully understood for an informed investment. Any regulatory system which do not allow for a continuous disclosure of information to investors in the same way the security is continuous traded, lacks the transparency needed for corporate undertakings.

Company-Based Registration System

The other equally important registration approach worldwide is the Company-Based Registration of the companies and not merely of the securities they resolve to issue. The focus of a Company-Based Registration System would be one which would require certain companies identified either by size of capital assets or employment enrolment, to mandatorily register with the Commission and by way of periodic filing, provide market information about its activities to investors and traders in its securities, whether such trade be on an exchange or not. Under this system, the Commission's record about an issuer and its performances in the market is readily available and updated by periodic filings. Consequently, at the time of an offering, less attention is paid to the issuer but to the securities being issued. This would occasion less

107 Abugu, n. 64 at 199.

108 *Supra note* 80, sec. 54(1-7).

109 *Supra note* 107.

documentation and costs would be saved in accounting fees, legal fees and printing costs.

Abugu, an exponent of this view,[110] made a strong case for the need to review the present regulatory scheme from the present Securities-Based Registration System to a Company-Based Registration System. He went further to enumerate the pitfalls of the present systems,[111] while setting out the merits of the Company -Based Registration System to include the following:

" That a Company-Based Regulatory System lends more credence to available information on the issuer and the securities;

" That the basic requirement of regular filing inherent in the Company-Based Registration System leaves no room for the accounts presented to be tailored by an issuer essentially for the purpose of meeting the issue requirements because an issuer has a duty to put its accounting and other records in proper perspective always;

" That the mechanism facilitates the flexibility by a company of raising a wide range of securities; and

" That a Company-Based Regulation System would ensure parity of disclosure rules applicable to both public and private companies. He maintained that the hypothesis here is that an investor asked to invest in the shares of a private placement is as much entitled to full disclosure and information as the investor who subscribers to shares on the basis of a publicly issued prospectus. Here lies one of the advantages of a Company-Based Registration System.

Finally, Abugu[112] made a case for the need to require private companies of a certain size to be subjected to the registration and disclosure rules of the commission. He advocated that eligibility for compliance purposes could be dependent on the size of the company measured by its capital and number of employees. To him, a company with assets above N10, 000,000.00 (Ten Million Naira) for instance has responsibilities to the public notwithstanding that its membership is 50. The determinant is its loan portfolio which it invariably owes to public finance institutions with obligations to savers or members of the public. In addition, a private company with a staff strength of 100 can issue securities to its staff vide a trust deed to raise capital and remain a private company even though the actual number of members is 50.

While this paper agrees with Abugu that the Company-based Registration System allows for parity of disclosure for both public and private companies,

---

110 *Id*., at 200.

111 Abugu noted that the current securities based registration system imposes unnecessary costs and restrictions on issuer's access to capital as the cost of going public are enormous and often deters firms. He stressed that the securities based registration systems also serves as an impediment to full and timely disclosure to investors and the realization of the full potential for investor protection envisaged by the Act.

112 *Supra note* 107, at 201.

it would however, amount to begging the issue to argue that the size of a company is determined by its assets and membership. This paper argues that disclosure remains a price that must be paid by corporation irrespective of size in assets or membership because corporation having been insulated from personal liability but to the amount of their investment alone, they are bound to disclose information to the investing public and creditors without whose resources, the company cannot remain in business. The concept of the corporate personhood of corporation supposes that corporation been a mere creation of the law and driven by natural persons should be made accountable to its actions to drive sanity into management who may hides under the corporate personhood of company to hoard and trade on information to their selfish gain at the detriment of investors. To me, this is the best way to prevent information asymmetry and boost investors' confidence in corporate business.

Voluntary versus Mandatory Disclosure Rules

Another issue generating a lot of controversy among scholars is the choice of the type of rules to invoke in the regulation of Securities Market Operations and disclosure requirement generally. The option is between voluntary and mandatory disclosure rules. The specificity of disclosure requirements varies among nations. Most developing countries like Nigeria and Ghana have opted for mandatory rules. There are two schools of thought in this respect. The first requires a list of items and specific instructions for fulfillment. Others give weight to custom and have only a general obligation to disclose all materials information. The proponents of the compulsory disclosure regime include Louis Loss and Joel Seligman,[113] Franco,[114] Oladele,[115] as well as Abugu.[116] There is consensus amongst them that:

" under this approach, companies are obliged, on a continuous basis to provide certain information for the effective evaluation of their securities in the market;

" without a compulsory disclosure regime, some issuers would not disclosure or would misrepresent information material to investment decisions;

" underwriting costs, insiders salaries and prerequisites would be higher; and

" there would be less 'public confidence' in the markets and that neither state laws nor the rules of self regulatory organizations would ensure an

113 Seligman J, "The Historical Need for a Mandatory Disclosure System" [1983] J, Corp; Seligman J, "Loss and Seligman on "Securities Regulation: An Essay for Don Schwartz" [1990] 78 *Georgetown* LJ 1753.

114 Franco JA, "Why Antifraud Prohibitions are not Enough: The Significance of Opportunism, Candor and Signaling in the Economic Case for Mandatory Securities Disclosure", [2002] 223 *Columbia Business Law Review* 236 - 237.

115 Olayiwola Oladele, "Securities Information Disclosure and Legal Protections of Investors in Nigeria" (2007) Ph.D. Thesis, Faculty of Law, Obafemi Awolowo University, 244 cited in Oladele, n. 9.

116 Abugu, n. 64.

optimal level of disclosure.

Specifically, Oladele[117] argued that securities issuers have no incentive to voluntarily disclose information. He added that in the face of the ingenious overzealousness of some of the issuers to conceal or falsify information, mandatory disclosure, coupled with stiff sanction for infringement is highly commended.

On the other side of the debate are Stigler, Benston and Kripke.[118] They argued that few benefit to investors could be shown from the mandatory disclosure regime in America and that the costs these laws imposed on corporations were unwarranted. Kripke contended that a mandatory disclose system is unnecessary because corporations have sufficient incentives to disclosure information to investors without incurring costs required to comply with extensive disclosure requirements. He reasoned that because of competition for capital, a company that seeks to raise funds must furnish sufficient information to enable investors make intelligent investment decisions, for insufficient information will lead to either higher costs of capital or a complete lack of access to the capital market.

Moreover, companies will continue to make periodic disclosures to investors to attract market professionals on whom many investors rely. Failure to do so will cause a loss of confidence in the company, thus leading to lower prices. Kripke also argued that corporate managers have a personal incentive to ensure that their corporations perform their disclosure obligations. Moreover, Kripke concluded on voluntary disclosure with the submission that managers run the risk of personal liability for securities fraud resulting from inadequate or misleading corporate disclosure.

This writer aligns himself with Abugu's contribution to this debate. Abugu maintained that the need for mandatory disclosure system far outweighs whatever atom of merit which may be associated with voluntary disclosure regime. Because Manager's compensation is tied to higher stock prices, they have significant motives to delay or conceal disclosure of adverse information. In addition, it is not true that disclosure decisions are based solely on financial consideration such as stock market prices or the cost of capital; rather companies have traditionally resisted additional disclosure requirements because of the fear that increased information will give their competitors otherwise unavailable data. Thus, some firms would be willing to pay the financial price for non-disclosure rather than weaken their competitive position.

It is clear from the above that if asymmetry information is a sine qua non in an ideal securities market, and if investors are to be given the opportunity to arrive at an informed decision based on the publicly available information, then, mandatory disclosure regime becomes inevitable and remains the only virile solution.

Despite the divergent views expressed by writers on several areas of

117 Oladele, n. 64.

118 *Supra note* 107, at 204.

disclosure under Securities Law,[119] one fundamental area survived the criticisms and remains untouched; this area is 'the disclosure philosophy'. To Abugu,[120] 'There is considerable unanimity that the philosophy of disclosure should be the guiding philosophy in securities regulations'

Other writers of repute have echoed the above view. Akanki[121] lucidly stated his view that: 'The virtue of publicity as a remedy against fraud was strongly urged and its philosophy transcends the entire gamut of Nigerian statutory law on companies'.

Gower[122] also drove home the point with admirable clarity:

"Over and above this consensual obligation of disclosure is one yet more powerful fact, although devoid of any basis in law: Press publicity. The financial columnists have their own channel of information and once their interest is aroused they explore these channels with sleuth-like pertinacity. The result may be that what the board had looked upon as a confidential decision or a domestic difference is suddenly brought out into the harsh light of day. This may be embarrassing, and even in some circumstances, detrimental to the true interest of investors: but if the power of the financial press is exercised with wisdom and fairness, as on the whole it undoubtedly is, informed newspaper comment is perhaps the most potent protection afforded to investors and, to a lesser extent, to creditors."

At this juncture, this writer cannot but agree with the view expressed by Abugu that a mandatory disclosure system functions most effectively under a company based registration system. Compliance by issuer companies is more readily enforced if the issuer is registered and reports periodically to SEC.[123] Mandatory Disclosure, this paper submits, remains the best guarantee that investors would get information they need to make investment decisions. Leaving disclosure to the voluntary desire of corporation is to leave corporate investors and their investment to the whims and caprises of corpoatre managers. Competition among corporation is not a guarantee that corporation would voluntrialy disclose important information to the public because of the fear that such information could be used by competitors for corporate advantage. The paper submits that because corporation would not lose focus

119 The contrasting views referred to above are those expressed by Abugu on his preference for Company based Registration System in place of the Securities based registration system being practiced by SEC under the ISA Act; the need to extend Registration and disclosure requirements of SEC to private companies because of the externality they generate; as against the obvious legal constant militating against this view; the better option between Voluntary and Mandatory rules as potent tools for extracting information from players or participants at the capital market and the argument of notable scholars on the two sides of the divide.

120 Abugu, n. 64.

121 Akanki E O, "The history of Company Law", 77 *Nigerian Journal of Contemporary Law Volume* II; cited with approval by Abugu in Abugu, n. 64at 203.

122 Gower, n. 4 at 506.

123 Abugu, n. 64 at 205.

of its overall goal of maximization of profits, it is prepared to avoid disclosure if it could without so doing make the profits at the detriment of investors and credit.

In response to the substratum of the topic, I adopt the views of writers earlier mentioned - Philosophy of disclosure should be the guiding philosophy in securities regulation and in Nigerian Statutory Law on companies.

V. NEED FOR REFORM

Law Reforms are meant to chart the way forward. They are most times directed at making deficient or weak areas of the law more potent in order to realize the intention of the legislature. The question as to the adequacy or otherwise of the Disclosure requirements contained in Nigeria's corporate laws was answered. Disclosure regimes in US and Australian was also examined and juxtaposed with the reality in Nigeria. As earlier discussed in this paper, the major principle behind the idea of disclosure is to ensure that full information about the company's affairs are laid bare before investors, creditors and other stakeholders thereby affording them excellent opportunities to make informed decisions about the worth of the securities offer.

As rightly pointed out by Oladele;[124] "The capacity and effectiveness of the existing regulatory system to sustain market integrity and investor protection in Nigeria through information disclosure and compliance enforcement in the light of theoretical underpinnings is weak". He continued that:

"Despite the regulatory and institutional effort to make information available to investors, there is usually inequality of information between securities issuers and investors. This phenomenon, known as information asymmetry, is greater in the relationship between retail investors without expertise in finance on one side and issuers and securities market professionals on the other."

Abugu[125] identified certain basic components of an ideal securities market regulatory structure. These shall be the benchmark for determining whether our securities laws and institutions are indeed in need of reform or not.[126] In

124 Olayiwola Oladele, "The Bases of Securities Information Disclosure", [2010] *ISLJ* pp.49-66.

125 Abugu, n. 64 at 95.

126 The parameters are: (a) Comprehensive Companies legislation governing the formation, operation and winding-up of companies; investor protection including the prescription of disclosure standards, investigation and accounting standards, and prohibition of securities market malpractice; (b) The establishment of a securities market control agency to oversee the securities market control agency to oversee the securities market and in particular regulate the issue, pricing sale and other aspects of dealing in company securities; (c) The establishment of formal market for trading in company securities such as a stock exchange; (d) Recognition and regulation of informal dealings in securities such as over the counter transactions; (e) Provisions for the existence and regulation of a sufficient number

this context, this paper submits that the Nigerian companies and securities laws on disclosure, and by extension, corporate governance must be revisited with a view to reforming the system and protecting corporate investors and the corporation as an entity.

Firstly, this paper recommends that the Nigeria Companies and Allied Matters Act 1990 should be amended to vest the Registrar-General with more powers under s 35 (1) - (3) to scrutinize the documents and information supplied on the incorporation documents with a view to confirming their correctness and reliability. The verification carried out on incorporation documents submitted at CAC is certainly not comprehensive enough.

Under the Security and Exchange Commission Act, securities are registered through the use of prospectus to provide information to the investing public. Oladele[127] argued that information disclose in the prospectus do not usually vouch that the issuer is profitable, well managed and not risky. Summing up the import of securities registration, Solomon et al., learned scholars in corporation law and securities regulation submitted:

"The only standard which must be met when registering securities is adequate and accurate disclosure of required material facts concerning the company and the securities it proposes to sell. The fairness of the terms, the issuing company's prospectus for successive operation, and other factors affecting the merits of investing in the securities (whether price, promoters' or underwriters' profits, or otherwise) have no bearing on the question of whether or not securities may be registered."[128]

Secondly, this paper suggests that our numerous laws on securities should be compiled and codified into a comprehensive volume. The Companies and Allied Matters Act 1990, and Investments and Securities Act 2007 both made attempts in this direction but left a lot to be desired. Not only should the laws be codified and made more reachable to the investing public, the language of the law should be watered down to meet the literacy challenges of Nigeria. It is in furtherance of this that this paper argues that commerce unarguably is not the preserve of the educated alone, but for the semi-illiterate and illiterate. Efforts must be made by the government and corporate experts to translate the companies and securities laws of the country into local languages especially into the three main Nigerian language, so that those members of the public who although illiterate in the English language, are able to access and understand disclosure rules and information in the language they understand rather than requiring the services of experts or lawyers for explanation and

---

of securities market dealers such as Brokers, dealers and underwriters; (f) Provision for the existence and regulations of financial intermediaries such as saving institutions, leasing companies, venture capital companies, merchant banking firms and insurance companies; (g) An active judiciary that is well informed about securities law.

127 Oladele, "Securities Information Disclosure and Legal Protections of Investors in Nigeria", n. 115.

128 Solomon, Lewis D, Bauman, Jeffrey D et al n. 3 at 281.

interpretation. This paper reasons that if the above recommendation is implemented, the danger of the corporate middlemen and agency cost will be ultimately watered down. As submitted by Oladele[129] 'One of the most significant challenges to securities regulation in Nigeria is that a huge population of the target of disclosure are largely uninformed in this matter and; are unable to make sense out of the most exhaustive and truthful disclosure'.

Moreover, having taken an in-depth look at the role and functions of SEC, this paper recommends that there is the compelling need to set up a regulatory body to act as an ombudsman to oversee the affairs of the securities market. This regulatory mechanism may function through some government recognised self-regulatory bodies comprising of participants in the securities market. Alternatively, the control of the securities market may be entrusted solely to a Government Agency or Special Commission. Often, the mechanism operates with a combination of both systems, i.e. a dual system of regulation comprising in part self-regulation by professional participants in the securities market as may be recognized by law and in part by regulation through a government agency. The task involved here is to be able to strike a balance between market freedom and investor protection.[130] Although by the existing law SEC is the apex regulatory authority in the Nigerian Capital Market, the hegemony of SEC is being proposed to be extended to the money market. In essence SEC's supervisory powers will transcend securities to cover Banking, Insurance and Pension Fund industries whose activities impact directly on the securities market.

There is an urgent need to enlarge the supervisory spectrum of SEC in the financial industry. Such wide responsibility will be visionary and proactive being necessitated by a projection into the future course of developments in the financial markets.[131] The attraction for adoption of this concept is embedded in the merits which includes; provision of opportunities for developing a rational and coherent regulatory system to accommodate rising cases of corporate fraud and failures, removal of avoidable duplications and inconsistencies in the regulatory powers of SEC to guarantee certainty and efficiency in the system and offering scope for significant effectiveness and economics of scale.

Mention must also be made of the primary and secondary securities market for newly issued and existing securities. The rate of growth of the stock exchange has not been encouraging. The stock exchange is characterized by various negative features ranging from few quoted securities, low level of market awareness, low demand for securities and a lack of timely and easy access to information. This paper therefore recommends improved

129 Oladele, n. 9.

130 Abugu, n. 64 at 99.

131 Abugu at Abugu, n. 64 at 101 advised that SEC ranking as a single ombudsman, shall occupy the same pride of place on the same level with British Financial Services and Markets Acts, 2000; Norway's 'Kaved Hilsynet' and Sweden's 'Finansins Pekktiobnen'.

information systems to address the problems of low level of securities awareness as well as aggressive market advertisement and investors education for them to be able to demand, evaluate and constructively apply information at their disposal to investment advantage.

Another part of securities laws worthy of mention is the apparent conflict between some sections of the Investment and Securities Act and the Nigerian Constitution. The ISA by its s 274 established a Securities and Investment Tribunal. The Act purports to vest jurisdiction over all matters under the Act in the tribunal. This paper contends that there is need for reform in this area of the securities law in that by purporting to vest jurisdiction over all matters under the Act in the tribunal the ISA has created a manifest absurdity in the light of the constitutional jurisdiction of the Federal High Court. The position at law is that the ISA is void to the extent of its inconsistency with the Constitution. The Constitution is a superior law to the statute. Moreover, the ISA is an existing law on the promulgation of the 1999 Constitution and by s 315 of the Constitution; an existing law only has effect with such modifications as may be necessary to bring it into conformity with provisions of the Constitution. It is therefore clear that the Federal High Court still retains exclusive jurisdiction flowing from s 251 of the Constitution over all such issues from the operation of companies to securities law regulation.

Another pertinent aspect of the Nigerian Security Law that needs to be reformed is the structure and operation of SEC. As the apex regulatory authority, SEC has not been able to effectively monitor and prosecute malpractices such as insider dealings by company directors, brokers, solicitors, accountants, and others. The above weakness is attributable to a major gap in the regulation of securities and the activities of Capital Market Operators by the SEC and Corporate Affairs Commission. The SEC is essentially a securities market ombudsman whose principal concern is investor protection and stability of the Capital Market. On the other hand CAC is conceived as a public depository of information about Companies, business associations, partnerships and other forms of corporate bodies.

The CAC is further conferred with investigative powers over companies generally. Here it takes on the scope of a capital market ombudsman with powers to initiate prosecution of breaches of Companies Act. The SEC on the other hand, lacks such powers. This certainly creates room for confusion and leaves a lacuna in the efficient regulation of the Securities Market.

The above described situation is due to the fact that, Nigeria being a transplant country of the United Kingdom, borrowed the concept of a company's registry that serves both as a Company Registry and as a securities regulatory agency and sought to blend that with the American concept of an independent securities agency like the SEC. This has created a situation where SEC has power to regulate securities but has no regulatory control over the issuers; hence the paper recommends reform in this area.

This paper also proposes that there should be a revisit to the state of the law regarding the regulations of private companies with a view to widening

their scope. Realities of the present times contradict the view taken by the law that private companies are commercial ventures of private concerns and as such, private companies should be subjected to minimal disclosure. That view, this paper submits, is no longer valid and realistic. The law should accept the view that they are companies limited by shares and therefore there is the need for as much control over their activities in the same manner as SEC regulates dealings in shares by public companies. The reasons are not far-fetched. First, private companies constitute the majority of incorporated companies and have ceased to be mere family based businesses. Secondly private companies are increasingly being funded by public funds and loans provided by financial institutions from the vast accumulation of public savings. This is beside the fact that there has been informal trading in the shares of private companies. In light of the above, the paper proposes that the present state of the law as it affects the securities of private companies be reviewed as follows:

1. The disclosure philosophy should be extended to cover the form and operations of private companies.
2. There is need for SEC to regulate private offering of private companies with the same tenacity as public offers of public companies.
3. The same law applicable to public companies in respect of prospectus, disclosure, allotments liability for misstatements and free transferability of shares should also extend to private companies.
4. Considering the relevance of private companies in term of the externalities they generate with the investing public, there is the compelling need to subject private companies to a compulsory registration and disclosure regime with a securities ombudsman, SEC.
5. Private placement documents generated by private companies should be subjected to the same disclosure rules stipulated by SEC for public companies.
6. The private placement memorandum should be made to contain as much detail as the prospectus. The front page of the memorandum should summarize the terms of the offering. A brief description of the issuers business should be given. Ideally, the front page should contain legal legends or red herring with respect to legal requirements of the offering; persons capable of accepting the offer, the absence of representation other than those contained in the memorandum and the need for investors to obtain independent advice with respect to the offering and other matters.
7. The proposed reform should also provide for the requirement of thorough scrutiny of memorandum of private placement with same vigour as that imposed on prospectus.
8. The statutory civil and criminal liabilities attached to a misstatement in prospectus should also apply to misstatement in memorandum of private placement.

Furthermore, this paper recommends a review of the registration of public companies. The present position is that public issues in Nigeria are patterned

after a securities-based registration model. That is, the regulations come into play only when a company decides to go public with its securities. The Investments and Securities Act 2007, does not regulate private offering or securities sold other than by way of public offer. It makes detailed provisions about the disclosure obligations of companies going public and for updating information on companies whenever they intend to issue further or other securities. It is aimed at disclosure that would inform an investor about an investment in a public offering but does not aim at providing future or ongoing information about an issuer. The present procedure is a complete antithesis of disclosure philosophy which in simple terms preaches continuous inflow of information. Under the ISA, public companies seeking to raise capital from the securities market are obliged to make very extensive disclosure of the companies' activities and prospects.[132]

Consequently, this paper proposes a company-based registration system where the focus will be on the registration of companies and not merely on the securities they intend to issue. The focus of a company-based registration system would be one which would require certain companies identified either by size of capital assets or employment enrolment to mandatorily register with SEC. The merits of this system are numerous but paramount among them is the ease of information flow. Company-based registration models mandate the company (issuer) to make available information by periodically filing its performance in the market and updated records of its activities for the investing public.

There is the urgent need for reform to require private companies of a certain size to be subject to registration and disclosure rules of the SEC. Eligibility for compliance by private companies could be dependent on the size of the company measured by its capital and number of employees. A company with assets about N10 million (Ten Million Naira) equity and loan capital inclusive for instance, has responsibilities to the public notwithstanding that its membership is below 50. Its loan portfolio is invariably owed to public finance institutions with obligations to savers/members of the public. This paper submits that they be co-opted under the regulatory ambit of SEC.

Finally, this paper submits that it amounts to passing the bulk for a regulatory agency such as the Corporate Affairs Commission, a so called 'Super Regulator' and corporate ombudsman not to be saddled with the responsibility of verifying authenticity of information promoters of corporations bring to it to register companies. This writer believes that the CAC as a regulator should take responsibility and be accountable to not only the investors and creditors relying on the Commission's judgment of the state of affair of a company, but also to the public at large for harm that may result over information they obtained from the Commission on any corporation. It is illogical to hold that because corporation must be registered, persons who ordinarily may be hiding under false identity, address and information, may approach the CAC to register company without the Commission going the mile

132 See Investment and Securities Decree No. 45 (1999).

to check and cross-check the filled forms for accuracy of the information supplied. This situation had led to monumental frauds and abuses as people could just come together with no identifiable object to form a company with fictitious names and other information and use the company to defraud unsuspecting public and the government with reckless abandon.

The recent conviction of James Onanefe Ibori, a former Governor of the oil-rich Delta State of Nigeria for money laundry through several companies registered under fictitious names and the sale of the shares of V-Mobile Limited,[133] speaks volume of the extend the corporate entity could be so manipulated to the detriment of the investing public and creditors. This paper does not agree that the Commission's duty should be limited to acceptance of document for registration only without attending powers to carry out investigations of the veracity or otherwise of the information provided to it by promoters. While critics may argue that such information are not to be regarded as ordinary as they are usually sworn on oath or presented for filing by duly accredited CAC's lawyers and accountants presumed to be above board in the discharge of their professional callings, experiences have shown that corruption and the tendency to hoard or distort information are not the preserve of non-lawyers and non-accountants. Lawyers and accountants have been found to be neck deep in corporate manipulation of information to suite their client's need irrespective of the lack of credibility that may taint the information.[134]

Of more shocking, are the revelations of the fraudulent activities of fuel importing companies in Nigeria and the Nigerian National Petroleum Corporation, where lack of effective disclosure mechanisms and regulation on the part of the CAC have left Nigeria, milked high and dry of billions of her revenue accruing from oil. It is reported by the House of Representative Committee that probed the Oil Subsidy regime in Nigeria between 2009 and 2011 that a waste disposal firm got N1.9billion subsidy payment for petroleum products that the company never supplied.[135]

133 Sky News, "This Day Live" (Lagos, April 17, 2012) available at: http://www.thisdaylive.com/articles/money-laundering-uk-court-gives-ibori-13-years/113938/ accessed on April 22, 2012. Ibori pleaded guilty to a number of corruption and money laundering charges against him put at about $250million before Judge Pitts. This includes the V-Mobile and Bombardier scams which amounted to $50million. Ibori and Victor Attah, former Akwa Ibom state governor also formed a phantom company called ADF to siphon US$37.5million from Delta and Akwa Ibom states' shares in V-Mobile. He was accused of embezzling these funds during his tenure as governor and using most of them to live a lavish lifestyle and acquire property and assets around the world.

134 See Nairaland, "Ibori's Lawyer Pleads Guilty In V-mobile Shares Fraud" (06 December 2011) available at: http://www.nairaland.com/563712/iboris-lawyer-pleads-guilty-v-mobile accessed on April 19, 2012.

135 Yusuf Alli, Victor Oluwasegun and Dele Anofi, "Panel: Waste Disposal Firm got N1.9b Fuel Subsidy", *The Nation* (20 April, 2012) 1 available at: http://www.thenationonlineng.net/2011/index.php/news/43786-panel-waste-disposal-firm-got-n1-9b-fuel-subsidy.html accessed on April 22, 2012.

According to the report[136] of the House of Representatives Ad-Hoc Committee which probed the controversial subsidy:

A representative example was that of two promoters who allegedly received an email and came in from the USA with a proposal of waste management with NNPC. Instead, the two promoters came together and incorporated Eco-Regen Ltd on 3rd August 2010 with corporate address as 3rd Floor, UAC Building, Central Business District, Wuse Abuja; applied for PPPRA registration on 11th September, 2010, got its first allocation of 15,000 mt on 20th January, 2011 and was paid N1, 984,141,091.10 as subsidy for products not supplied.

According to the report; 'It became apparent to the committee that the operations of the NNPC were opaque and not transparent. The implication on this is that it created room for abuses, inefficiencies and manifest lack of accountability.' Thus, NNPC acted as importer, marketer, claimant, payer and payee; it was not accountable to anybody or to any authority.

This paper submits that unless there is a deliberate attempt at reforming this lopsidedness in the registration power of the CAC, the investing public and the creditors will continue to fall victim of corporate frauds and failures.

VI. CONCLUSION

This paper has examined the concept of disclosure philosophy from the formation of the corporate form to its termination. It had traversed the length and breadth of Company Law to highlight the importance of disclosure as an ideal concept in Company Law. The concept of disclosure urges on the promoters and businessmen alike, the importance of publicity and transparency in the affair of the corporate form. In doing this, the paper also examined the concept from the standpoint of securities laws. Authorities and scholars on company law and stakeholders alike are unanimous in their voices that disclosure in the affair of the corporate form remains the most important guide and shield to corporate fraud and failure. The debate on whether the rules to be invoked in extracting information should be voluntary or mandatory has also be amply evaluated on both side of the debate highlighting the merits and demerits of each school of thought. The paper submitted that the rules should be mandatory and made a case for Company-Based Registration System as opposed to Securities- Based Registration System. The paper recommended that private companies and their offers as well as memorandum of placement should be regulated by SEC the same way as those of Public Company. Key areas of Nigerian laws on disclosure and securities were identified and suggestion made to strengthen them.

●

136 *Ibid*.

Vol. 41, No. 2, Ban.L.J. (2012) 100-118

ROLE OF THE JUDICIARY, MEDIA AND LAW ENFORCEMENT AGENCIES ON CRIME RATE AND SECURITY IN NIGERIA

O. A. Orifowomo*

J. O. Agbana Esq.**

ABSTRACT

The importance of law and order to orderly development and growth of a society, in all ramifications, cannot be over emphasized. It is only a mind that is secured and at peace that can rationally address the issues of procreation, economic development and societal growth. Deviant and errant conduct has also become inescapably linked with organised human society. It is therefore imperative to have peace and order in the society to assure its security, growth and development. This is to be achieved through a careful balancing of the law and the functioning of various agencies established to assure societal security.

KEY WORD: *Security; Law Enforcement; Jurisdiction; Freedom of Information; Governmental Powers*

I. INTRODUCTION

ARGUABLY, THE state of law enforcement in Nigeria has been brought under severe threat; a reality that has precipitated an inescapable crisis in the realm of rule of law and legal authority. Insecurity has many forms, and varies from nation to nation. The security of life and liberty is constantly at risk. Insecurity comes from ethnic and religious restiveness, from banditry and brigands, but also terrifyingly, from those meant to protect the public and uphold the law - the police.[1] The landscape is dotted with many unsolved political and other criminal assassinations, kidnappings, religious unrest yielding monumental loss of lives and properties and grave insecurity, suicide bombings,

* LL.B. (Hons), BL., LL.M., M.Phil., PhD, MBA, ACTI; Senior Lecturer, Dept. of Jurisprudence & Private Law, Faculty of Law, Obafemi Awolowo University, Ile-Ife, Nigeria; Email: orifowomo@oauife.edu.ng or oorifowo2003@yahoo.co.uk; P. O. Box 2065, O.A.U. Post Office, Ile-Ife, 220005, Nigeria.

** LL.B. (Hons), B.L., LL.M., Lecturer, Dept. of Jurisprudence & Private Law, Faculty of Law, Obafemi Awolowo University, Ile-Ife, Nigeria.

1 H. Eso "Onovo, Law, Order, and State of the Nation", available at <http://www.kwenu.com/publications/hankeso/2009/onovo_law_order_state.htm> (accessed 7 July 2011).

"419" propensities that have refused to resolve, extra-judicial killings, among others.

In this paper, we shall be looking at the Judiciary, the Media and some of the agencies saddled with law enforcement, in the quest of the Nigerian nation to create and promote a secure and crime free or crime controlled environment conducive for growth and development and the realization of the potentials of the individual and the nation as an entity.

II. ALLOCATION OF GOVERNMENTAL POWERS

The governmental powers of any State are typically divided among the Legislature, Executive and the Judiciary. The Legislature is the body vested with the powers to make laws; the Executive is the "administrative" arm of government saddled with the responsibility for implementation of the laws and general administration of the State. The Judiciary is the arm of government that enforces the law; seeing to compliance and visiting deviant behaviour amounting to breaking of the law with appropriate sanctions.

The Legislature

Section 4 (1) of the 1999 Nigerian Constitution[2] states that the legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation, which shall consist of a Senate and a House of Representatives. The National Assembly is vested with the power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to the Constitution.[3] The Constitution vests the legislative powers of a State of the Federation in the House of Assembly of the State.[4] The House of Assembly of a State shall have power to make laws for the peace, order and good government of the State or any part thereof with respect to the following matters, that is to say:

(a) any matter not included in the Exclusive Legislative List set out in Part I of the Second Schedule to the Constitution.

(b) any matter included in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to the Constitution to the extent prescribed in the second column opposite thereto; and

(c) any other matter with respect to which it is empowered to make laws in accordance with the provisions of the Constitution.[5]

The Executive

The executive powers of the Federation are vested in the President and may be exercised by him either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation. The powers extend to the execution and maintenance of the Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has power to make laws.[6]

---

2 1999 Constitution of the Federal Republic of Nigeria, ("the Constitution") Laws of the Federation of Nigeria 2004, Cap. C23 (as amended) available at <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> (accessed 10 December 2011).

3 *Id*., section 4 (2).

4 *Id*., section 4 (6).

5 *Id*., section 4 (7) (a) - (c).

6 *Id*., section 5 (1) (a) & (b).

In the same vein, the executive powers of a State are vested in the Governor of that State and may be exercised by him either directly or through the Deputy Governor and Commissioners of the Government of that State or officers in the public service of the State. The powers extend to the execution and maintenance of the Constitution, all laws made by the House of Assembly of the State and to all matters with respect to which the House of Assembly has power to make laws.[7]

The Judiciary

Section 6 of the 1999 Constitution vests the judicial powers of the Federation in the courts established thereunder for the Federation and the states as applicable.[8] The courts are listed as: the Supreme Court of Nigeria; the Court of Appeal; the Federal High Court; the High Court of the Federal Capital Territory, Abuja; a High Court of a State; the Sharia Court of Appeal of the Federal Capital Territory, Abuja; a Sharia Court of Appeal of a State; the Customary Court of Appeal of the Federal Capital Territory, Abuja; a Customary Court of Appeal of a State;[9] such other courts as may be authorised by law to exercise jurisdiction on matters with respect to which the National Assembly may make laws; and such other court as may be authorised by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a House of Assembly may make laws.[10]

It should be noted that by virtue of the provisions of section 2 of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act[11] which amended section 6 (5) of the Constitution (the Principal Act) the National Industrial Court has now been included in the list of courts vested with the exercise of judicial powers under the Constitution. Therefore, the court alongside with the other courts so listed[12] shall be a superior court of record and shall have all the powers of a superior court of record.[13]

The courts are empowered to exercise all inherent powers and sanctions of a court of law in their determination of all matters between persons, or between government or authority and any person in Nigeria.[14] However, section 6 (6) (c) of the Constitution makes matters under Chapter II, that is, Fundamental Objectives and Directive Principles of State Policy non-justiciable. In other words, the courts cannot inquire into the propriety or otherwise of governmental actions or omissions in relation to matters contained in Chapter II of the Constitution.

III. JURISDICTION OF COURTS OVER CAUSES AND MATTERS

"Jurisdiction" is the legal authority a court has to decide matters that are litigated before it, or take cognizance of matters presented in a formal way for its decision. It is the authority the court has to exercise judicial power. It is the power to hear and

---

7 *Id*., section 5 (2) (a & (b).

8 *Id*., section 6 (1) & (2).

9 It should be noted that in addition to provisions of the Constitution which have established these courts, there are also relevant statutes made by the National Assembly or the State House of Assembly, as the case may be, which make provisions in relation to these courts.

10 *Id*., section 6 (5) (a) - (k).

11 Act No. 3, 2010.

12 See note 9 above.

13 Section 6 (3) 1999 Constitution.

14 *Id*., section 6 (6) (a) & (b).

determine the subject matter in controversy between parties to a suit.[15] According to Oputa JSC, "jurisdiction may therefore, imply the power or authority of a court to adjudicate over a particular subject matter."[16]

"Jurisdiction is termed the blood, life wire, bedrock and foundation of adjudication".[17] According to Belgore JSC (as he then was):

"jurisdiction is the very basis on which any tribunal tries a case; it is the lifeline of all trials. A trial without jurisdiction is a nullity."[118]

Absence of jurisdiction in a court is fatal to any action brought before that court.[19] Jurisdiction is a threshold issue in that a court must have jurisdiction before it can enter into the cause or matter at all or before it can make binding order in it.[20] Where a court takes upon itself the exercise of a jurisdiction which it does not possess, its decision amounts to a nullity.[21] According to Ogundare JSC:

"The question of jurisdiction is not mere technicality but one that goes to the root of the entire proceedings and unless there is competence, any proceedings however well conducted and decided will be a nullity."[22]

Jurisdiction, Judicial Power and Competence of a Court

Jurisdiction is the authority of a court to exercise judicial power. Judicial power is the totality of powers a court exercises when it assumes jurisdiction and hears a case.[23] If a court cannot exercise judicial powers, it cannot exercise jurisdiction. In other words, if it has no judicial powers, the court cannot exercise whatever jurisdiction the Constitution or law vests in it. This is because the jurisdiction conferred, is an area mapped out by the Constitution or law for the exercise of judicial powers.[24] There ought, first and foremost, to exist a jurisdiction before the issue of the judicial powers exercisable under that jurisdiction can arise.[25]

---

15 *A. G. Anambra State & Ors. v. A. G. Federation & Ors. (1993) 6 N.W.L.R.* (Pt. 302) 692 at 742 per Ogundare, JSC; Ibafon Co. Ltd. & *Anor. v. Nigerian Ports Plc. & Ors*. (2000) 8 N.W.L.R. (Pt. 667) 86 at 99 - 100, per Aderemi, JCA; *Onyenucheya v. Military Administrator, Imo State & Ors*. (1997) 1 N.W.L.R. (Pt. 482) 429 at 443, per Onalaja, JCA; *Bronik Motors Ltd. & Anor. v. Wema Bank Ltd*. (1983) 6 S.C. 158.

16 See *Tukur v. Govt. of Gongola State* (1989) 4 N.W.L.R. (Pt. 117) 517 at 557, per Oputa, JSC.

17 *Braithwaite v. G. D. M. & Ors*. (1998) 7 N.W.L.R. (Pt. 557) 307 at 342, per Onalaja, JCA.

18 *P. E. Ltd. v. Leventis Trading Co. Ltd*. (1992) 5 N.W.L.R. (Pt. 244) 675 at 693, per Belgore, JSC.

19 *Karim v. Native Authority* (2002) 4 N.W.L.R. (Pt. 758) 716 at 729, per Galadima, JCA

20 *Odofin & Anor. v. Agu & Anor.* (1992) 3 N.W.L.R. (Pt. 229) 350 at 372, per Nnaemeka-Agu, JSC.

21 *Resident Electoral Commissioner & Anor. v. Nwocha & Ors*. (1991) 2 N.W.L.R. (Pt. 176) 732 at 760, per Oguntade, JCA; *Peenock Ltd. V. Hotel Presidential Ltd*. (1982) 12 S.C. 1.

22 *Bature v. State* (1994) 1 N.W.L.R. (Pt. 320) 267 at 292, per Ogundare, JSC; see also Ike v. Nzekwe (1975) 2 S.C. 1.

23 *Onyenucheya v. Military Administrator, Imo State & Ors*. (1997) 1 N.W.L.R. (Pt. 482) 429 at 443, per Onalaja, JCA; see also *Bronik Motors Ltd. & Anor. V. Wema Bank Ltd*. (1983) 6 S.C. 158.

24 *Osadebay v. Attorney General, Bendel State* (1991) 1 N.W.L.R. (Pt. 169) 525 at 562, per Obaseki, JSC.

25 *Tukur v. Govt. of Gongola State* (1989) 4 N.W.L.R. (Pt. 117) 517 at 554, per Oputa, JSC.

Competence of a court is the hand maiden of the jurisdiction of a court. There is sometimes some tendency to equate jurisdiction of a court with its competence, as if the two mean one and the same thing; but this is not so. A court must have both jurisdiction and competence to be properly seized of a cause or matter.[26]

A proceeding is described as competent when it is before a court which is competent as defined in *Adeigbe* v. *Kusimo*[27]. A court is competent when - (1) it is properly constituted as regards members and qualifications of the members of the bench and no member is disqualified for one reason or another; (2) the subject matter or the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction; and (3) the case comes before the court initiated by due process upon fulfilment of any condition precedent to the exercise of jurisdiction.[28]

Thus, competence of a court or tribunal is not only determined by the tribunal being competent, it also involves that the competent question or subject matter is brought to it. The competence of the action or the matter and the competence of the court to adjudicate on a matter before it (including even the composition of the tribunal itself) are matters that determine jurisdiction of the court or tribunal.[29]

Source of Jurisdiction

Jurisdiction is conferred by the Constitution and substantive law, not by procedural or adjectival law.[30] Courts are creatures of statutes and it is the statute that created a particular court that will also confer on it its jurisdiction. In specific terms, too, jurisdiction may be conferred on the court by a specific statute on the subject matter in issue.[31] Since a court is invariably a creation of statute, its authority to enter into adjudication is necessarily controlled by statute. The control or limitation may be either as to the kind and nature of the actions and matters that may be brought before the court or as to the area over which the jurisdiction extends.[32]

Determination of Jurisdiction

It is the claim before the court that has to be looked at or examined to ascertain whether it comes within the jurisdiction conferred on the court.[33] In other words,

26 *Ibeanu v. Ogbeide* (1994) 7 N.W.L.R. (Pt. 359) 697 at 709, per Ogundare, JCA.

27 (1965) 1 All N.L.R. 248 at 252.

28 *Abiegbe v. R.T.A.C.* (1992) 5 N.W.L.R. (Pt. 241) 366 at 383, per Omosun, JCA; see also *Madukolu v. Nkemdilim* (1962) 2 S.C.N.L.R. 341; *Erhummunse v. Ehanire* (1998) 10 N.W.L.R. (Pt. 568) 53; *Alexander Marine Management & Ors. V. Koda International Ltd.* (1999) 1 N.W.L.R. (Pt. 585) 40 at 47; *Mohammed & Ors. v. Husseini & Anor.* (1998) 14 N.W.L.R. (Pt. 584) 108 at 159 - 160, per Ogundare, JSC; *B.R.T.C. v. Egbuonu* (1991) 2 N.W.L.R. (Pt. 171) 81 at 90.

29 *Okafor & Anor. v. The Miscellaneous Offence Tribunal & Anor.* (1995) 4 N.W.L.R. (Pt. 387) 59 at 82.

30 *Eze v. Okechukwu & Ors.* (1998) 5 N.W.L.R. (Pt. 548) 43 at 87, per Akpabio, JCA; *Fawehinmi v. Akilu* (1989) 3 N.W.L.R. (Pt. 112) 643 at 671, per Nasir, PCA.

31 *Nwosu v. Imo State Environmental Sanitation Authority & Ors.* (19990) 2 N.W.L.R. (Pt. 135) 688 at 726 - 727, per Belgore, JSC

32 *Ibafon Co. Ltd. & Anor. v. Nign. Ports Plc. & Ors.* (2000) 8 N.W.L.R. (Pt. 667) 86 at 99 - 100, per Aderemi, JCA.

33 *Egbuonu v. B.R.T.C.* (1997) 12 N.W.L.R. (Pt. 531) 29 at 43, per Ogwuegbu, JSC; see also *Attorney General Anambra State & Ors. v. Attorney General Federation & Ors.* (1993) 6 N.W.L.R. (Pt. 302) 692 at 742, per *Ogundare JSC; Tukur v. Govt. of Gongola State* (1989) 4 N.W.L.R. (Pt. 117) 517 at 549, per Obaseki, JSC; *Adeyemi v. Opeyori* (1976) 9 - 10 S.C. 31 at 51; *Western Steel Works v. Iron & Steel Workers* (1987) 1 N.W.L.R. (Pt. 49) 284.

jurisdiction is determined by the claim of the plaintiff and not by the defence put up by the defendant.[34] In deciding the issue of jurisdiction of court to entertain a matter, the relevant processes are the writ of summons, the statement of claim, and the affidavit evidence in support of the application by way of preliminary objection. This is primarily so because it is the plaintiff's case that determines the jurisdiction of the court.[35] Thus, it would be appropriate to agree with Salami JCA that:

"the issue of jurisdiction of a court is not a matter of law per se but it is of mixed law and facts…"[36]

IV. LAW ENFORCEMENT AGENCIES

Law enforcement agencies are agencies set up by law to maintain internal security of the state.[37] According to the United Nations Blue Book, the term "Law enforcement officials" includes all officers of the law, whether appointed or selected, who exercise police powers, especially the powers of arrest or detention. It states further that in countries where police powers are exercised by military authorities, whether uniformed or not, or by state security forces, the definition of law enforcement officials shall be regarded as including such services. The law enforcement officials shall at all times fulfill the duty imposed on them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession. They shall respect and protect human dignity and maintain and uphold the human rights of all persons. They shall not commit any act of corruption.[38]

In the light of the foregoing, principal law enforcement agencies in Nigeria will include the Police, Economic and Financial Crimes Commission operatives, the Independent Corrupt Practices Commission operatives, the Nigeria Security and Civil Defence Corps, among others. We shall now proceed to examine these agencies.

The Police

The word "Police" is derived from the Greek word "Polis" meaning that part of non-ecclesiastical administration having to do with safety, health and order of the state. In the same vein, "policing" meant the act of governing and regulating the welfare,

---

34 *Ari & Ors. v. Paiko* (1997) 10 N.W.L.R. (Pt. 524) 335 at 351; see also *Yalaju-Amaye v. A.R.E.C. Ltd. & Ors.* (1990) 4 N.W.L.R. (Pt. 142) 422 at 441, per Karibi-Whyte, JSC; *Akinfolarin v. Akinnola* (1994) 1 S.C.N.J. 30 at 43, per Iguh, JSC; *F.D.B. Financial Service & Ors. v. Adesola & Ors.* (2000) 8 N.W.L.R. (Pt. 668) 170 at 180, per Aderemi, JCA; *Ajaka v. Izenkwe & Ors. v. Nnadozie* (1953) 14 W.A.C.A. 361 at 363.

35 *Ames Electrical Co. Ltd. v. F.A.A.N.* (2002) 1 N.W.L.R. (Pt. 748) 354 at 369, per Onneghen, JCA.

36 *Nigerite Ltd. v. Dalami (Nig.) Ltd.* (1992) 7 N.W.L.R. (Pt. 253) 288 at 296, per Salami, JCA.

37 "The Role of Law Enforcement Agencies in the Promotion And Sustainability of Participatory Democracy And Rule of Law"; Being a Speech Delivered By Mr. Sunday Ehindero (IGP) Ably Represented By Cp. Bukar Maina, Commissioner Of Police, Kwara State Command, Wednesday 13th December, 2006, available at <http://www.mafng.org/symposium1/role_law_enforcement_agencies.pdf > (accessed 7 July 2011).

38 UN Blue Book, "The Role of the Police", available at <http://www.hrea.org/erc/Library/display_doc.php?url=http%3A%2F%2Fwww.uncjin.org%2FDocuments%2FBlueBook%2FBlueBook.pdf&external=N> (accessed 8 August 2011).

security needs and order of the city-state in the interest of the public.[39] The word "Police" has been defined as the government department charged with the preservation of public order, the promotion and protection of public safety and the prevention and detection of crime. Officers and members of the department are also referred to as police.[40]

Policing has always been necessary in all societies for the preservation of order, safety and social relations. The necessity of policing becomes even more evident in modern societies characterized by diversities and contradictions arising from population heterogeneity, urbanization, industrialization, conflicting ideologies on appropriate socio-political and economic form of organization.[41]

In *Fawehinmi* v. *I.G. of Police*[42] the Supreme Court held that the police is outward civil authority of the power and might of civilized country and that the generality of the public is potentially affected one way or another by the action or inaction of the police. Further, that the Force can exercise discretion in the exercise of their duties in maintenance of law and order and more specifically in their investigation of any particular allegation of crime depending on the circumstances of the occasion, the best of their capability, their image as a Force and the overall interest of the society.[43]

According to section 214 of the Constitution, there shall be a Police Force for Nigeria, which shall be known as the Nigeria Police Force,[44] and no other police force shall be established for the Federation or any part thereof. The Nigeria Police Force shall be organised and administered in accordance with relevant provisions as may be prescribed by an Act of the National Assembly. Furthermore, the members of the Nigeria Police shall have such powers and duties as may be conferred upon them by law.[45]

Arising from the foregoing, section 4, Police Act[46] states the general duties of the Police thus: prevention and detection of crime; apprehension of offenders; preservation of law and order; protection of life and property; due enforcement of all laws and regulations with which they are directly charged; military duties within or outside Nigeria as may be required of them by, or under the authority of this or any other Act.

Noticeably, the Police Force in Nigeria is the body primarily saddled with the responsibility of maintaining security, law and order in the country. The police have variously been referred to, rightly or wrongly as "the first line of defence of the nation", "the first line of attack by the public," "the keeper of the public's peace". To the

---

39 "The Role of Law Enforcement Agencies in the Promotion And Sustainability of Participatory Democracy And Rule of Law", *supra note* 37, p. 7.

40 B. A. Garrer *Black's Law Dictionary*, 7th ed., 1999.

41 "Analysis Of Police And Policing In Nigeria", A Desk Study On The Role Of Policing As A Barrier To Change Or Driver Of Change In Nigeria, Prepared For The Department For International Development (DFID), By Prof. E. O. Etannibi Alemika and Innocent C. Chukwuma at The CLEEN Foundation, Lagos, available at <http://www.cleen.org/policing.%20driver%20of%20change.pdf> (accessed 8 July 2011).

42 (2002) 98 LRCN 1165.

43 Id., at 1187; see also D. U. Ibe "A Critical Appraisal of Nigeria Police Force and the Need for State/Local Police in Nigeria Polity", Igbinedion University Law Journal, Vol. 7, Jan. 2009, p. 86.

44 Section 3, Police Act, Cap. P19 Laws of the Federation of Nigeria 2004 also contains similar provision on the establishment of the Nigeria Police Force.

45 Section 214 (1) & (2) (a) & (b) 1999 Constitution.

46 *Supra*, note 44.

average Nigerian, the Police represent the most visible epitome of the established authority, the sustainers of the status quo or the government of the day.[47] Uniformed police officers are a visible part of every community and play important roles in sustenance of order, legality, development and democracy.[48]

In the discharge of its duties, section 9 (4) Police Act states that the President of the Federal Republic of Nigeria shall be charged with operational control of the Force, while section 215 (2) 1999 Constitution and section 9 (5) Police Act provide that the Inspector-General[49] shall be charged with the command of the Force subject to the directive of the President.[50] In the same vein, section 6 of the Act provides that the Force shall be under the command of the Inspector-General, while the contingent of the Force stationed in a State shall, subject to the authority of the Inspector-General, be under the command of the Commissioner of that State.

A) Powers of the Police

Nigeria Police have powers: to take measures to prevent crime; investigate crime; interrogate suspects; prosecute suspects; search properties and persons in order to prevent crimes, detect or investigate crimes, detect and apprehend offenders, and collect evidence for prosecution; grant bail to suspects pending investigation or arraignment in court; serve summons; regulate processions and assemblies; disperse 'illegal' or 'unlawful' procession and assembly. The police prosecute most of the criminal cases in the country handled by the lower courts, especially the magistrate courts.[51]

B) Police Power to Prosecute

Presently, police officers do prosecute offences before a court of law. Sections 174 and 211 of the 1999 Constitution cede the power to prosecute to the Attorney-General and any other person to whom he may delegate the power. It is taken for granted that

---

47 A. K. Otubu & S. A. Coker "Police And Crime Prevention In Nigeria", available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1126645&http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1126645&http://www.google.com.ng/> (accessed 8 August 2011).

48 A. T. Akande "If I were to be the new Nigeria Inspector General of Police", available at <http://www.codewit.com/letters-a-opinions/opinion/2552-if-i-were-to-be-the-new-nigeria-inspector-general-of-police> (accessed 1 September 2011).

49 The office of the Inspector-General and Commissioner of Police for each State of the Federation is established under section 215 of the Constitution. This is echoed by section 5 of the Police Act which also provides for the positions of Deputy Inspectors-General and Assistant Inspectors-General to be appointed in such numbers as may be determined by the Nigeria Police Council. Furthermore, there shall be a Commissioner of Police for each State of the Federation. The Nigeria Police Council itself is established under section 9 of the Act.

50 Police Act, *supra note* 44, p. 9.

51 See generally, sections 23 - 30 Police Act, supra note 44, p. 9; sections 3 - 10, 27 - 28, 53 - 55, 107, Criminal Procedure Act, Cap. C41 Laws of the Federation of Nigeria, 2004. There are corresponding provisions in the Criminal Procedure Code, Cap. 30 Laws of Northern Nigeria 1963, applicable in the Northern region of Nigeria; see also Alemika, E. E. "Human Resources Management In The Nigeria Police Force: Challenges And Imperative", Presentation at the Police Service Commission Retreat on Understanding the Mandate and Operations of the Police Service Commission, August 18-20, 2008; also available at

<http://www.psc.gov.ng/files/Human%20Resources%20Management%20in%20the%20Nigeria%20Police%20Force% 20Challenges%20and%20Imperative.pdf> (accessed 3 September 2011).

the Attorney-General has delegated the power to officers in his office according to section 160 of the Constitution. Similarly, section 23 of the Police Act permits a police officer to conduct in person all prosecution before the court whether or not the case is filed in his name.

By the wording of the section, this power is subject to the power of the Attorney-General to take over or stop further prosecution by the police. The critical question for the purpose of review of the Police Act is whether police officers should have the power to prosecute for serious criminal offences. There are two key issues to consider. The first is the capacity of the police to prosecute. Do police officers have the requisite skills to effectively prosecute crimes in a way that entrenched rights are not violated and criminals do not go scot-free? No doubt, there are many lawyers in the Police Force who may effectively prosecute. Secondly, is the environment conducive for criminal prosecution? Does it not appear untidy for the police to investigate crimes and still appear as prosecutor and, in some cases, witnesses?

It is suggested that a neater arrangement will be to hire the equivalent of district attorneys in Britain, who will have office in police stations or divisional offices and co-ordinate prosecution on behalf of the police. The relationship will be cordial and interdependent, yet these attorneys will be answerable to the Attorney-General. The arrangement will take away the latent contradiction between sections 174 of the Constitution and section 23 of the Police Act.[52]

C) Diagnosis and Prognosis of the Nigeria Police Force

Arguably, the Police Force in Nigeria has been caught in the throes of a legitimacy and credibility crisis, from which it has persistently struggled to extricate itself. This is exemplified in the poor self and public image of the institution. The Nigeria Police is perceived by members of the society as instrument of oppression used by the government of the day, as agency that has no regard for fundamental human rights, civil order and as people of low integrity; and ironically a friend of the public.[53] There is therefore the need for the institution to demonstrate greater accountability at different levels: to the Law, the Courts, the Constitution, the government, and the public.

i. Poor Police - Community Relation: Due to long years of military rule, the police which is supposed to be a community organization has become alienated from the community they are to serve. Ibrahim Coomassie, former Inspector-General of Police in his acceptance speech for a honorary Doctorate Degree award by the Imo State University maintained that "the Force (Nigeria Police Force) has been torn between the civil populace and the military so much that its [civil tradition] are almost lost to military authoritarianism."[54] There is a call for civility by the law enforcers. They need to show respect and decorum in the exercise of their statutory duties; this will promote and enhance good governance.

---

52 "The Role of Law Enforcement Agencies in the Promotion And Sustainability of Participatory Democracy And Rule of Law", *supra note* 37, p. 7.

53 *Id.*

54 S. O. Akpan "Enhancing The Effectiveness Of The Nigerian Security Agencies Before, During And After Elections In Nigeria- The Way Out"; A Memoranda Submitted By Police Community Partnership Forum to the Presidential Committee On Electoral Reform During Its South South Zonal Public Hearing, June 2-4 2008 at Calabar Cross River State, also available at <http://www.ssrnetwork.net/documents/Events/PreviousEvents/2-4_06_08_MEMORANDUM%20TO%20THE%20PRESIDENTIAL%20ELECTORAL%20REFORM%20COMMITTEE%20BY%20POLICE%20COMMUNITY%20PARTNERSHIP%20FORUM.pdf> (accessed 7 July 2011).

ii. High Concentration of Police on Law Enforcement Using Force: Study has shown that hostilities and lack of trust tend to be higher in a society where the police concentrated on law enforcement to the detriment of maintenance of law and order. Accusations of torture of citizens and extrajudicial killings supposedly done in the process of law enforcement are rife. Consequently, the Police being the most visible arm of law enforcement become the people's enemy number one to the detriment of their civil duties.[55]

iii. Cases of extra-judicial executions and torture: In 2002, Amnesty International published the report 'Security Forces: Serving to protect and respect human rights?'[56] The report highlighted numerous and regular human rights violations carried out by the Nigerian police and armed forces, ranging from extra-judicial executions to deaths in custody, torture and other ill treatment of suspects. The organization called on the Federal Government to ensure that law enforcement officers do not carry out extrajudicial executions, nor resort to torture or inflict cruel, inhuman or degrading treatment on detainees under any circumstance. Several years after the publication of the report, little has changed. The Nigerian police tend not to bring suspects of crimes before a judge within the constitutional 24 or 48 hours,[57] but detain them for longer periods of time in police custody. Often no one has access to those in police detention; sometimes families are not aware that their relatives are in police custody. The Nigerian Police frequently use torture while interrogating suspects. There appears to be no mechanism to prevent torture and other ill treatment in police custody. Moreover, suspected torturers are not brought to justice but continue to commit their crimes with impunity.[58]

iv. Perceived inefficiency of the Police Force: The perception of the public is that the Police has been inept in the performance of its duties, in particular the maintenance of law and order. This observation is underlined by the widespread kidnappings, institutionalized bribery, extra-judicial killings, unwarranted searches, recurrent waves of brutalities, election malpractices, torture, harassment and loss of personal liberties; frequent armed robbery involving the use of sophisticated weapons and high casualty recorded from occurrences of communal and ethno-religious conflicts across the country.[59] Lately, increasing wave of terrorists activities, including bombings, loss of lives, wanton destruction of public and private properties, and general insecurity have joined the list. Now and again, suspects of these heinous crimes escape from police custody in very suspicious circumstances suggestive of ineptitude and complicity. A recent case in hand is the disappearance from police custody of Kabiru Sokoto. The suspected operative of the Boko Haram sect had escaped from custody three days after he was arrested at the Borno Governor's Lodge in Abuja. Sokoto is believed to have masterminded and coordinated the Christmas Day bombing of St. Theresa's Catholic

---

55 *Id*.

56 Amnesty International, AFR 44/023/2002, Nigeria: Security forces: Serving to protect and respect human rights? (19 December 2002).

57 Section 35 (4) & (5) 1999 Constitution (as amended).

58 "Nigeria: 'Pragmatic policing' through extra-judicial executions and torture", Amnesty International, available at.

<http://www.univie.ac.at/bimtor/dateien/nigeria_ai_2008_pragmatic_policing.pdf> (accessed 5 July 2011).

59 A. T. Akande "If I were to be the new Nigeria Inspector General of Police", *supra note* 48.

Church, Madalla, Niger State, which led to over 40 deaths.[60] The Police has now placed a N50 million ransom on his head.[61] There may be the need for clean-up of the Aegean stable and a deepening of professionalism in the Police.

v. Allegation of corrupt practices: It is alleged, among others, that "innocent people are regularly detained and a fee demanded for their release…the rank-and-file police officers are often forced to pay their senior officers a share of the money extorted from the public…people who are assigned to lucrative posts such as roadblocks or working traffic are given monetary targets that they must meet and give back to their superiors…officers who did not meet those monetary targets, would be punished with a transfer to a less lucrative post".[62] Thus, when you have a traffic jam on the expressway, or any of our roads for that matter, from a distance you are not so sure if it is the police or a quiet road robbery that is in operation. However, on getting closer you get to see that it is the police doing their rounds of stop and pay; almost every public/commercial vehicle that passes gives the police a sum of N20 or something more, depending on the capricious mood of the Police at work in the traffic. There is the assumption that any driver who refuses for any reason to comply with the menacing demands of these officers could be toying with his own life or that of his co-workers/ passenger.[63] The civil society groups can enhance education of the public about their rights under the law, while emphasizing as well the need to cooperate with law enforcement agencies in the lawful discharge of their duties and exercise of proper powers.

vi. Insufficient articulation of the mission of the Police Force in the Police Act: The Police Act as the enabling law for policing in Nigeria should state as clear as possible the mission of the Nigeria Police Force. The Act is not simply a legal authorization for the police to act. It is also business and managerial authorization. It should guide the operations of the police and define its culture. Section 4 of the Police Act simply and inadequately articulates this mission as general duties of the police. The section should be redrafted in such a way that the culture of civility and protection of human rights is announced upfront as the anchor of policing. The police should be defined in a language that focuses on fairness, deference to human rights in the prevention and investigation of crimes and efficiency in combating crimes. The mission statement should define further a community-oriented policing that sees the work of the police as enabling the effective enjoyment of rights and happiness. This redefinition through the mission statement (legal mandate) is a political responsibility, which the National Assembly can authorize through a legislative amendment.[64]

---

60 "Nigeria: CP Suspended Over Escape of Boko Haram Operative", This Day Newspaper, 18 January, 2012, available at http://allafrica.com/stories/201201191126.html; (accessed 21 January 2012).

61 "Anxiety as Police declare Sokoto wanted", Vanguard Newspaper Online, available at http://www.vanguardngr.com/2012/01/anxiety-as-police-declare-sokoto-wanted/; (accessed 21 January 2012).

62 A. T. Akande "If I were to be the new Nigeria Inspector General of Police", *supra note* 48, p. 10.

63 O. Onagoruwa "The Nigeria police, rule of law and our constitutional order", available at <http://www.nigerdeltacongress.com/narticles/nigeria_police_rule_of_law_and_o.htm> (accessed 7 July 2011).

64 "Review of the Nigerian Police Act, 1943: Legal Diagnosis and Draft Bill", Publication of CLEEN Foundation, Lagos, Nigeria, available at <http://www.cleen.org/Legal%20Diagnostic%20on%20Police%20Act.pdf> (accessed 3 July 2011).

vii. Much about Policing Left to Discretion: One of the problems of policing, in fact, the general exercise of executive power is the abuse of discretion. The rule of law and the protection of human rights require that officials who exercise power on behalf of the state must not be allowed to act according to their prejudices, biases and in furtherance of personal or group interests. The Police Act and other legislations authorizing policing fail in many critical points to lay down objective and intelligible principles to guide a police officer called upon to decide whether to grant or refuse bail. If the police must operate under the law, the law must find a way to balance the need to allow for flexibility for the sort of expert judgment intrinsic to policing, without promoting the cult of personal fancy and fantasy. Absolute power corrupts absolutely; in today's bureaucratic state there is no greater threat to freedom than an executive agency whose exercise of power is not properly and clearly delineated.[65]

viii. Ill Equipment, Poor Remuneration, Inappropriate or Lack of Proper Training, etc.: It is acknowledged that criminals now possess sophisticated weapons, fast moving vehicles and good communication equipment nearly surpassing those available to the police. Also, the remuneration is poor, making the level of self-actualization a dream and a mirage; the struggle of an average policeman is between food and shelter. There is also the need for appropriate and relevant training in the Nigeria Police, with training content capable of being translated into an improvement on job performance.[66] There is the need for the government to give quality support in provision of proper equipment and funding instead of unnecessary proliferation of law enforcement agency for instance EFCC, ICPC, NAFDAC, FRSC and host of others to handle matter that fall within the purview of the criminal law for which the Police is statutorily suppose to be responsible. Generally, the success of these agencies is not due to any form of magic training or professional superiority since their personnel are indeed drawn from the Police Force but rather due to proper equipment, high level of operational autonomy and adequate funding.

Economic and Financial Crimes Commission (EFCC)

The International Monetary Fund (IMF) defined corruption as "abuse of authority or trust for private benefit: and is a temptation indulged in not only by public officials but also by those in positions of trust or authority in private enterprises or non-profit organizations".[67] The World Bank describes corruption as "the abuse of public office for private gains. Public office is abused for private gain when an official accepts, solicits or extorts a bribe. It is also abused when private agents actively offer bribes to circumvent public policies and processes for competitive advantage and profit. Public office can also be abused for personal benefit even if no bribery occurs, through patronage and nepotism, the theft of state assets or the diversion of state revenue."[68]

According to Justice Emmanuel Olayinka Ayoola, former Chairman, Independent Corrupt Practices and Other Related Offences Commission (ICPC), "the commonest form of corruption in Nigeria used to be bribery but in recent years this has been overtaken in level of prevalence by embezzlement and theft from public funds, extortion, abuse of

65 *Id.*

66 "The Role of Law Enforcement Agencies in the Promotion And Sustainability of Participatory Democracy And Rule of Law", *supra note* 37, p. 7.

67 International Monetary Fund, 2000.

68 The World Bank (1997); see also R. A. Okoduwa "Combating Corruption In the Public Sector And The Role Of The ICPC", available at <http://www.cenbank.org/OUT/PUBLICATIONS/TRANSPARENCY/2007/TRANSPARENCY2007.PDF> (accessed 8 July 2011).

discretion, abuse of public power for private gain, favouritism and nepotism, conflict of interest, extortion and illegal political party financing".[69]

Transparency International (TI) in its Source Book 2000 states that while corruption is defined as "the misuse of entrusted power for private benefit," it can also be described as representing non-compliance with the arms-length principle, under which no personal or family relationship should play any role in economic decision-making, be it by private economic agents or by government officials. Section 2 Corrupt Practices and Other Related Offences Act[70] states that "corruption" includes bribery, fraud and other related offences.

It is noteworthy that corruption is prevalent in almost every country. Thus, the war against corruption has become a preoccupation of many governments, non-governmental organizations as well as multilateral institutions world-wide. In the fight against corruption in Nigeria, the government enacted, among others, the Economic and Financial Crimes Commission (Establishment) Act 2002[71]. This statute was later repealed and substituted by Economic and Financial Crimes Commission (Establishment) Act 2004.[72]

Economic and Financial Crimes Commission (Establishment) Act 2004[73]. According to section 46 of the Economic and Financial Crimes Commission (Establishment) Act, "Economic and Financial Crimes" means the non-violent criminal and illicit activity committed with the objectives of earning wealth illegally either individually or in a group or organized manner thereby violating existing legislation governing the economic activities of government and its administration and includes any form of fraud, narcotic drug trafficking, money laundering, embezzlement, bribery, looting and any form of corrupt malpractices, illegal arms deal, smuggling, human trafficking and child labour, illegal oil bunkering and illegal mining, tax evasion, foreign exchange malpractices including counterfeiting of currency, theft of intellectual property and piracy, open market abuse, dumping of toxic wastes and prohibited goods, etc.

Section 7 of the Act provides for power of investigation by the Commission. The Commission has the power to cause investigations to be conducted as to whether any person, corporate body or organization has committed an offence under the Act or other law relating to economic and financial crimes. The Commission has also the power to cause investigations to be conducted into the properties of any person if it appears to it that the person's life style and extent of the properties are not justified by his source of income.

Section 13 charged the General and Assets Investigation Unit with responsibilities for, inter alia, the prevention and detection of offences in violation of the provisions of the Act and the arrest and apprehension of economic and financial crime perpetrators.

69 E. A. Owolabi "Corruption And Financial Crimes In Nigeria: Genesis, Trend And Consequences", available at <http://www.cenbank.org/OUT/PUBLICATIONS/TRANSPARENCY/2007/TRANSPARENCY2007.PDF> (accessed 8 July 2011).

70 Cap. C31 Laws of the Federation of Nigeria 2004.

71 Cap. E1 Laws of the Federation of Nigeria 2004.

72 Section 44, Economic and Financial Crimes Commission (Establishment) Act 2004, also available at <http://www.efccnigeria.org/index.php?option=com_docman&task=doc_view&gid=5> (accessed 10 December 2011). It should be noted that some sections of this Principal Act were later amended by an Economic and Financial Crimes Commission (Establishment) (Amendment) Act 2007.

73 *Id.*

The Legal and Prosecution Unit is charged with responsibility for prosecuting offenders under the Act.[74] Section 19 of the Act provides that the Federal High Court or High Court of a State or of the Federal Capital Territory has jurisdiction to try offenders under the Act.

Section 25 of the Act provides for seizure of property. Any property subject to forfeiture under the Act may be seized by the Commission in the following circumstances: (a) the seizure incidental to an arrest or search; (b) in the case of property liable to forfeiture upon process issued by the court following an application made by the Commission in accordance with the prescribed rules. Whenever property is seized under any provision of the Act, the Commission may: (a) place the property under seal; or (b) remove the property to a place designated by the Commission. Properties taken or detained under the section will be deemed to be in the custody of the Commission, subject only to an order of court.[75]

Sections 19 - 24 of the Act provide for forfeiture of properties. Section 19 provides for forfeiture after conviction in certain cases. Section 20 provides for properties that will be forfeited by the Federal Government. Section 21 provides for the forfeiture of foreign assets. Section 22 provides for forfeiture of passport. Section 23 provides for consequence of forfeiture of property. Section 24 makes further general provision on forfeiture.[76]

The Corrupt Practices and Other Related Offences Act[77]. Section 3 (1) of the Corrupt Practices and Other Related Offences Act, established a Commission to be known as the Independent Corrupt Practices and Other Related Offences Commission. The duties of the Commission as stated in Section 6 (a) - (f) of the Act are, in summary, as follows: to receive and investigate reports of the attempts to commit or the actual commission of offences as created by the Act and, in appropriate cases; prosecute the offender (s) (this comes under enforcement); examine, review and enforce the correction of corruption-prone systems and procedures of public bodies with a view to eliminating and/or minimizing corruption in public life (prevention); educate and enlighten the public on and against corruption and related offences with a view to enlisting and fostering public support for the fight against corruption (education).

From the above, the Commission's duty is not only to investigate, arrest and prosecute people for corruption; it is also charged with corrective, preventive and educational responsibilities. The whole essence of the Act is not just to punish offenders but to facilitate the creation of a corruption-free society by engaging in a systemic overhaul of the machinery of the state which hitherto had sheltered administrative lacunae and thus encouraged the widespread incidence of corruption. The creation of this new society is also expected to be facilitated through the general re-orientation of the Nigerian populace.[78]

---

74 Section 13 (1) & (2) Economic and Financial Crimes Commission (Establishment) Act 2004

75 *Id.*, section 26 (1) - (3).

76 See generally, N. Tobi "The Rule Of Law And Anti-Corruption Crusade In Nigeria", Lecture delivered at the 9th Justice Idigbe Memorial Lecture, at the Akin Deko Auditorium, University of Benin, Benin City, Nigeria on 6th August, 2008, also available at <http://www.nigerianlawguru.com/articles/general/THE%20RULE%20OF%20LAW%20AND%20ANTI-CORRUPTION %20CRUSADE%20IN%20NIGERIA.pdf> (accessed 8 July 2011).

77 Cap. C31 Laws of the Federation of Nigeria 2004.

78 R. A. Okoduwa "Combating Corruption In the Public Sector And The Role Of The ICPC", *supra note* 68, p. 16.

Sections 27, 28 and 29 of the Act provide for power to investigate reports and enquire into information, power to examine persons and power to summon persons for examination respectively. The three sections provide for power of investigation and interrogation.

Where an officer of the Commission has reasons to suspect the commission of an offence under the Act following a report or information received by him, he will cause investigation to be made. For such purpose the officer may exercise all the powers of investigation provided for under the Act or any other law.[79] Section 28 of the Act specifically empowers an officer to give three orders[80] which the person investigated must comply with.[81]

Subject to the provisions of section 29 - 34 of the Act,[82] the Commission has the power to issue summons directed to a person complained against or any other person to attend before the Commission for the purpose of being examined in relation to the complaint or in relation to any other matter which may and or facilitate the investigation of the complaint. A summons so issued must state the substance of the complaint and the time and place at which the inquiry is to be held.[83]

Section 36 of the ICPC Act empowers the Commission to obtain search warrant from a Judge or Magistrate to conduct a search in any place there is evidence of the commission of any offence under the Act.[84] Under section 37 of the Act, an officer of the Commission, in the course of his investigation, may seize property, which he has reasonable grounds to suspect is related to an offence.[85] Section 38 provides for the custody of seized property.

Sections 47 and 48 of the Act provide for the forfeiture of property. While section 47 provides for the forfeiture of property upon prosecution for an offence, section 48 provides for forfeiture of property where there is no prosecution. In the section 48 situation, the Chairman of the Commission is enjoined to apply to a Judge of the High Court for an order of forfeiture of the property before the expiration of twelve months from the date of the seizure.

Section 61 of the Act provides for the prosecution of offences. Every prosecution for an offence under the Act or any other law prohibiting bribery, corruption and other related offences will be deemed to be done with the consent of the Attorney-General.[86]

79 *Id*., section 27 (3).

80 *Id*., section 28 (1) (a) - (c); that is, (a) order any person to attend before him for the purpose of being examined in relation to any matter which may, in his opinion, assist in the investigation of the offence; (b) order any person to produce before him any book, document or any certified copy thereof, or any other article which may, in his opinion, assist in the investigation of the offence; or (c) by written notice require any person to furnish a statement in writing made under oath or affirmation setting out therein all such information required under the notice, being information which, in such officer's opinion, would be of assistance in the investigation of the offence.

81 *Id*., section 28 (3) - (9).

82 Section 29 provides for summons against suspects. Section 30 provides for forms and service of summons. Section 31 provides for mode of service. Section 32 provides for substituted service. Section 33 provides for acknowledgment of service. Section 34 provides for detention of person refusing to acknowledge service.

83 *Id*., section 29.

84 *Id*., section 36 (1) & (2).

85 *Id*., section 37 (1).

86 *Id*., section 61 (1).

Without prejudice to any other law prohibiting bribery, corruption, fraud or any other related offences by public officers or other persons, a public officer or any other person may be prosecuted by the appropriate authority for an offence of bribery, corruption, fraud, or any other related offences committed by such public officer or other person contrary to any law in force before or after the coming into effect of the Act and nothing in the Act will be construed to derogate from or undermine the right or authority of any person or authority to prosecute offenders under such other laws.[87]

Nigeria Security & Civil Defence Corps (NSCDC)

The Nigeria Security and Civil Defence Corps was established by The Nigeria Security and Civil Defence Corps Act No.2 of 2003[88] and amended by Act No.6 of 4th June 2007.[89] The Corps shall consist of such number of volunteers and regular members as may, from time to time, be recruited under the provision of the Act. The Corps is a para-military agency of the Government of the Federal Republic of Nigeria that is commissioned to provide measures against threat and any form of attack or disaster against the nation and its citizenry.

The Nigeria Security and Civil Defence Corps was first introduced in May 1967 during the Nigerian Civil War within the then Federal Capital Territory of Lagos for the purpose of sensitization and protection of the civil populace. It was then known as Lagos Civil Defence Committee. It later metamorphosed into the present day Nigeria Security and Civil Defence Corps in 1970. In 1984, the Corps was transformed into a National security outfit and in 1988, there was a major re-structuring of the Corps that led to the establishment of Commands throughout the Federation, including Abuja, and the addition of special functions by the Federal Government. Subsequently, The Nigeria Security and Civil Defence Corps Act No.2 of 2003 was enacted to give statutory backing to the Corps; this automatically changed the status of the Corps in the International Civil Defence Organization from the previous observer status to full membership status.[90]

The Corps is vested with a lot of responsibilities which include but is not limited to the following: assist in the maintenance of peace and order and also in the protection and the rescuing of the civil populace during the period of emergency; maintain twenty-four hours surveillance over infrastructures, site and projects for the Federal, State and Local Governments; have power to arrest, investigate and handover to the Nigeria Police for further investigation and prosecution of any person who is involved in any criminal activity, including activities aimed at frustrating any government programme or policy, riot, civil disorder, revolt, strike or religious unrest, or power transmission lines and oil pipelines vandalisation.

Others are to monitor and report any planned criminal activity aimed at depriving citizens of their properties or lives; or syndicate activity aimed at defrauding the Federal, State and Local Governments; license, supervise and monitor operations of

---

87 *Id*., section 61 (2); see generally, N. Tobi "The Rule Of Law And Anti-Corruption Crusade In Nigeria", *supra note* 76, p. 18.

88 The Act is available at http://www.nassnig.org/nass/acts.php?pageNum_bill=3&totalRows_bill=153 (accessed 20 August 2011).

89 Nigeria Security and Civil Defence Corps (Amendment) Act No. 6, 2007 available at https://www.nscdc.gov.ng/ndocs/NSCDC%20ACT.pdf (accessed 20 August 2011).

90 "About NSCDC" available at https://nscdc.gov.ng/pagedisp.php?id=7 (accessed 20 August 2011).

Private Guard Companies; provide necessary warning for the civilian population in times of danger; provide assistance to restore and maintain order in distressed areas in any period of emergency; crime control generally, including riot, disorder, revolt, strike or religious unrest and subversive activity by members of the public aimed at frustrating any government programme or policy, among others.[91]

V. THE MEDIA

The bedrock of the liberty of the media in Nigeria is situated in the provisions of section 39 of the 1999 Constitution. It states profoundly that every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference. Furthermore, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions.[92] However, no one may own, establish or operate a television or wireless broadcasting station for any purpose whatsoever except duly authorized in compliance with the provisions of relevant laws.[93]

In addition, section 22 of the 1999 Constitution provides that the press, radio, television and other agencies of the mass media shall at all times be free to uphold the fundamental objectives contained in this Chapter and uphold the responsibility and accountability of the Government to the people. The cumulative effect of the foregoing appears to be that the media and their operators patently enjoy the freedom to disseminate information; albeit, this liberty is circumscribed by the demand to be responsible and accountable to the government and the people of Nigeria, guided by the ideals of the Constitution and the general law of the land.

In *Adikwu v. House of Representatives*[94] the court held that a free press is one of the pillars of freedom in Nigeria as indeed in any other democratic society. It went further to hold that the purpose of section 36 of the 1979 Constitution (now section 39 of the 1999 Constitution) is not to erect the press into a privileged institution, but is to protect all persons (including the press) to write and to print as they will and to gather news for such publication without interference. The provision does not authorise the press to publish fake news.

It is important to note that the plenary of section 39 is benignly moderated by the provisions of section 39 (3). This is to the effect that the freedom of the press therein guaranteed is not absolute; it is subject to laws which are reasonably justifiable in a democratic society like the law of libel, sedition, etc. In *Oyegbemi v. A.G.*[95] the court held that the right to withhold source of information is not absolute. No Editor, Reporter or Publisher of a newspaper can be compelled to disclose his source of information of any matter published by that person and non-disclosure cannot amount to contempt; however, this fundamental right is subject to the interest of justice, national security, public safety, public order, public morality, welfare of persons or prevention of disorder or crime.

---

91 See generally, International Civil Defence Directory, "Nigeria Security & Civil Defence Corps", available at http://www.icdo.org/Directory%20ORIGINAL/Directory-english/Nigeria.2006.ang.pdf (accessed 20 August 2011).

92 Section 39 (1) & (2) 1999 Constitution.

93 *Id*., see proviso to section 39 (2).

94 (1982) 3 NCLR 394.

95 (1982) 3 NCLR 895.

Freedom of Information Act, 2011[96]

The freedom of the media appears to have received a boost by the recent enactment of the Freedom of Information Act 2011. This is an Act to make public records and information more freely available, provide for public access to public records and information, protect public records and information to the extent consistent with the public interest and the protection of personal privacy, protect serving public officers from adverse consequences in disclosing certain kinds of official information without authorization and establish procedures for the achievement of those purposes and; for related matters.

Section 1 (1) of the Act states that notwithstanding anything contained in any other Act, law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is established. By section 7 (1), where the government or public institution refuses to give access to a record or information applied for under the Act, or a part thereof, the institution shall state in the notice given to the applicant the grounds for the refusal, the specific provision of the Act that it relates to and that the applicant has a right to challenge the decision refusing access and have it reviewed by a Court. Where a case of wrongful denial of access is established, the defaulting officer or institution commits an offence and is liable on conviction to a fine of N500, 000.[97]

VI. CONCLUSION

In a civilized society, the existence, role and impact of any agency is benchmarked against the law. In other words, there must be the enactment and observance of enabling laws for the Judiciary, the Media and Law Enforcement Agencies, in the enforcement of law and order. The law creates and defines the crime; the law enforcement agencies are saddled by their enabling laws to, in the main, prevent and detect any breaches of the law; the judiciary in the exercise of proper jurisdiction determines the culpability or otherwise of an accused person and imposes appropriate sanctions where he is adjudged guilty; the media disseminates all the transactions to the public and may help to form, shape and co-coordinate public opinion.

The moral is that each of these organs must itself not be a law breaker, else its actions or inaction would amount to an unlawful act, by the application of the provisions of the Constitution or any relevant law. By maintaining order and enforcing law in consonance with the principles and practices of a democratic society, these agencies will foster the collective weal of the society for entrepreneurial initiative and public safety, which are critical to development and human cooperation in general.[98]

●

96 The Act is available at <http://www.mediarightsagenda.net/pdf%20files/FOI_Act_2011_Signed.pdf>.

97 Section 7 (5) Freedom of Information Act.

98 See generally, World Development Report 2000/2001.

Vol. 41, No. 2, Ban.L.J. (2012) 119-135

RIGHT TO SAFE FOOD: LAWS AND REMEDIES

Sheeba Pillai*

ABSTRACT

Food borne illnesses are prevalent in all parts of the world, resulting in millions of death seach year. In developed countries, such as Australia and the United States, about one in three persons experience some type of food borne illness every year, which can range from mild to fatal. In the developing world, the World Health Organization (WHO) estimates that contaminated food contributes to 1.5 billion annual episodes of diarrhea in children below the age of five and at least 1.8 million deaths. Food also can carry traces of hazardous chemicals, like pesticides or heavy metals that cause neurological and hormonal damage as well as cancer. But there are other consequences which can disturb the order of society. Outbreaks of food-borne illness can damage trade and tourism and can lead to loss of earnings, unemployment and litigation. Poor quality food can destroy the commercial credibility of suppliers, both nationally and internationally, while food spoilage is wasteful and costly and can adversely affect trade and consumer confidence.[1] From production to consumption, it is the responsibility of national governments, food industry, and consumers themselves to ensure that food is safe. However, governments have the pivotal role of providing a frame work for establishing effective food safety programs.[2] Safe food is one of the most significant components of right to food.

---

* Assistant Professor,School of Indian Legal Thought, Mahatma Gandhi University, Kottayam.

1 WHO/FAO, Understanding Codex Alimentarius, Issued by Secretariat of Joint FAO/ WHO Food Standards Programme, FAO, Rome, 2007.

2 WHO, Guidelines for Consumer Organizations to Promote National Food Safety Systems, Safe Food International.

KEY WORDS: *Right to food, Food safety standards, Food and Safety Standards Act, 2006.*

I. INTRODUCTION

RIGHT TO food is an important right which is linked to a human being's very existence. Human rights are universal and interdependent -qualities which have been reiterated time and again in all discussions concerning the evolution and link between human right to food is a complex one. It is interrelated and interdependent with other rights like right to life, right to employment, right to health etc.[3] There is little doubt that without food, sustenance of life is not possible. Hence this right is of utmost importance. Thus right to food not only enjoys an independent status of a right but is also an integral part of other rights like right to life and health. The General Comment of Human Rights Committee in regard to right to life under Article 6 of ICCPR[4] refers among other matters to widespread and serious malnutrition leading to extensive child mortality, as a non-fulfillment of the right to life. Remedies to counteract child nutrition often required Government organized provision of food.[5] Right to food is a natural right. The natural right proponents say that natural right is a right that rest ultimately neither on law nor on the good of the society but on the nature of man.[6] They are certain inalienable rights. The American Declaration of Independence asserts that 'it is self-evident truth that "all men….are endowed by their creator with certain inalienable rights and among these are life, liberty and pursuit of happiness."[7] As already mentioned, right to food is surely a requirement for living a dignified life. What meaning would life or happiness hold to a person starving of hunger? Thus food is a basic need, whose fulfillment could alone sustain life.

Natural rights are sometimes understood as a right that man possesses as an individual before they enter into a state of political society, they belong to a man in a state of nature prior to civilized life.[8] But T.H Green clarifies the position by stating that it is not that "they actually exist when a man is born or have been as long as the human race, but that they are necessary for and arise out of a moral capacity without which a man could not be a man.[9] Thus one can see adopting either argument, right to food is a natural right.

---

3 Sudarshana Nimma (ed.), *Right to Food-Reforms and Approaches*, Amicus Books, ICFAI University Press, 2007.

4 GA OR, Supplement No 40, A/37/40, 1982, at 93.

5 AsbjornEide, Human Rights in the 21st Century,p.465.

6 Otta A. Bird, *The Idea of Justice*, (New York, Frederick A Praeger Publishers, 1968) at 127.

7 The French Declaration of the Rights of man and Citizens claims to enumerate 'natural, imprescriptibly and inalienable rights'.

8 *Supra note* 6, at 128.

9 *Ibid.* at 129.

Defining the Right

The Special Rapporteur on the right to food states that the right to food entails 'the right to have regular, permanent and uninterrupted access either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food, corresponding to the cultural tradition of the people to which consumer belongs and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear.[10]

It was authoritatively defined by the Committee on Economic, Social and Cultural rights[11] by stating that the 'right to adequate food is realized when every man, woman and child, alone and in community with others, has physical and economic access at all times to adequate food and means for its procurement. In fact the General Comment can be acknowledged as one of the most relevant and authoritative legal interpretation of right to food. The normative content of right to food is much more than freedom from hunger. According to the General Comment, the right to adequate food is fully realized when 'every man, woman and child alone or in community with others has physical and economic access at all times to adequate food or means for its procurement. The document also states[12] that right to food shall not be interpreted in a narrow and restricted sense which equates it with a minimum package of calories, proteins and other specific nutrients. It specifies not only adequacy of food but also of access to food. 'Accessibility' encompasses both economic and physical accessibility.[13] The General Comment puts a particular emphasis on the accessibility of such food in ways which are sustainable.

The notion of sustainability is intrinsically linked to the notion of adequate food or food security implying food being accessible for both present and future generations…….and sustainability incorporates the notion of long term availability and accessibility.[14] Thus one finds that the General Comment 12 has given a comprehensive definition of right to food, elaborating the various dimensions to the same. In his 1987 report the Special Rapporteur to the Economic and Social Council of the UN on the right to food gave the following formulation- 'Everyone requires food which is (a) sufficient, balanced and safe to satisfy the nutritional requirement (b) culturally acceptable (c) accessible in a manner which does not destroy one's dignity as a human being.[15]

The first historic document to codify the right in specific term was the Universal Declaration of Human Rights which says under Art 25(1) that 'Everyone has a right to standard of living adequate for health and wellbeing

10 A/HRC/7/5 para 17.

11 General Comment 12, 1999, para 6.

12 *Ibid*. 6.

13 *Ibid*. 13.

14 *Ibid*. 7.

15 Report on the Right to Adequate food as a Human Right submitted by Asbjorn Eide, Special Rapporteur, E/CN.4/Sub/1987/23/para 52.

of himself and of his family including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age, lack of livelihood or in circumstances beyond his control. This thought was reiterated in the ICESCR, 1966, though a little more elaborately. The State Parties 'recognize the right of everyone to adequate standards of living for himself and the family, including adequate food, clothing and housing and to the continuous improvement of living conditions.'[16] The Convention on the Rights of Child, 1989[17] recognizes the importance of right to food but is words in a different manner. The Convention acknowledges the State Party's broader obligation to recognize the right of child to adequate standard of living.[18] Thus most of the documents which mention adequate standards of living, in fact also embody food as already seen in the documents discussed above. The idea has also been reflected in the Guiding Principles on Internal Displacement, 1997.[19] Principle 18 states that all the internally displaced persons have the right to adequate standard of living. Further it states that at the minimum such persons must be ensured safe access to essential food and potable water among other things.

The 1996 World summit hosted by the FAO in Rome with almost all States participating was significant in the sense that it not only refers to right to food rhetorically, but formulated a commitment[20] towards the clarification of

16 Art 11(1), The Covenant also emphasized on the fundamental right of everyone to be free from hunger and made it obligatory on the State parties to take measures including specific programmes both individually and through international co-operation-(a) to improve methods of production, conservation and distribution of food by making full uses of technical and scientific knowledge of the principle of nutrition and by developing or reforming agrarian system in such a way as to achieve the most efficient development and utilization of natural resources. (b) Also to take into account the problems of both food importing and food exporting countries to ensure an equitable distribution of world food supplies in relation to need.).

17 Adopted by GA resolutions 44/25 on 20th November ,1989.

18 Art 27(1) says that the State party recognize the right of every child to a standard of living adequate for a child's physical ,mental ,spiritual, moral and social development) and also reaffirms the responsibility of the parents to do what is necessary for the child's development; Art 27(2) says that the parents or the others responsible for the child have the responsibility to serve within their abilities and financial capacities, the conditions of living necessary for the child's development; Art27(3)- The State party in accordance with national condition and within their means shall take appropriate measures to assist parents and others responsible for the child and to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

19 The principles are published in the Report of the Representative of the Secretary General, Francis M. Deng submitted to the Commission of Human Rights, pursuant resolution 1997/39, to Commission Addendum: UN doc E/C.N4/1998/53/Add2.

20 Objective 4 of Plan of Action.

state's obligation and the development of guidelines for their implementation.

Regional Instruments and the Right to Food

Regional instruments have also granted status to the right by acknowledging the importance of right to food. The American Declaration of the Rights and Duties of Man,1948 states that every person has the right to preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community services. Right to food was acknowledged as a distinct right in the Additional Protocol to the American Convention on the Human Rights in the area of Economic, Social and Cultural Rights, 1988. The Protocol states[21] that everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development. Further the article also states[22] that to promote the exercise of this right and eradicate malnutrition, the State Parties undertake to improve methods of production, supply and distribution of food and to this end agree to promote greater institutional co-operation in support of national policies.[23] The African charter also guarantees the right but under the heading of health and health services.[24] Thus it is clear that right to food has been awarded a distinct status by the international community in the various documents and treaties. In doing so it has discussed the various dimensions of the right. The right encompasses not only freedom from hunger but also accessibility to healthy, safe and quality food that does not compromise with the dignity of a person.

This article seeks to discuss the nuances of right to safe food. Food safety and quality standards are very important. Recent years have seen an increased concern by the public over safety of foods especially with respect to intentional and unintentional chemical additives and the incidence of microbial food borne diseases.

In 1985, the United Nations General Assembly Guidelines for consumer protection stated that "When formulating national policies and plans with regard to food, Governments should take into account the need of all consumers for food security and should support and, as far as possible, adopt standards from the Food and Agriculture Organization's and the World Health Organization's Codex Alimentarius." Following which in 1991, the FAO/WHO Conference on Food Standards, Chemicals in Food and Food Trade (in cooperation with GATT) agreed that ..."The process of harmonizing national food regulations to bring them into line with international standards and recommendations was an urgent one, which needed to be accelerated."[25] Again in 1992, the FAO/WHO

21 Art. 18.

22 Art. 12(2).

23 Art. 15, the protocol also directs the State Party to guarantee adequate nutrition for children at the nursery stage and during school attendance years.

24 Art 14(3) guarantees adequate nutrition and safe drinking water.

25 And that: "Provisions essential for consumer protection (health, safety of food, etc.) should be the focus of emphasis in Codex standards.".

International Conference on Nutrition Recognized that: "Access to nutritionally adequate and safe food is a right of each individual." And doing so acknowledged the importance and contribution of International Standard setting bodies.[26] Other agreements on the International front have also discussed the importance of safe food and for that have emphasized the contribution of world bodies.[27] The Fifty-Third World Health Assembly recognized: "The importance of the standards, guidelines and other recommendations of the Codex Alimentarius Commission for protecting the health of consumers and assuring fair trading practices." and urged Member States to: "Participate actively in activities in the emerging area of food safety risk analysis."[28] The World Food Summit held Five years later (earlier one was held in 1996) reiterated the importance of Codex in the coming years.[29]

One of the main concerns of national governments are that any food produced in the country or imported into their territory from outside are safe and do not pose a threat to human, animal or plant health. National governments therefore have their own mandatory standard and regulation to avoid such threats. Modern food laws must be more precise in their application, more specific and complete in content, and take account of situations beyond national borders. Protection of the consumer has been extended to the control of false descriptions of products, nutritional declarations, and misleading claims in labeling and advertising. Trading partners now require a working knowledge of each other's food laws. It is sad to see that, even today, some countries have either unsatisfactory food laws, no food laws at all, or laws which for one reason or another they do not or cannot apply. Often countries adopt standards and recommendations set by world bodies as they have universal recognition and can facilitate barrier free trade.[30]

II. INTERNATIONAL BODIES AND FOOD SAFETY STANDARDS

The need for improved health and food control and the rapidly expanding international food trade stimulated cooperation on an international level. After

---

26 "Food regulations should fully take into account the recommended international standards of the Codex Alimentarius Commission."

27 In 1995, Agreement on the Application of Sanitary and Phytosanitary Measures and Agreement on Technical Barriers to Trade Formally recognized: International standards, guidelines and recommendations, including the Codex Alimentarius, as reference points for facilitating international trade and resolving trade disputes in international law.

28 Held in 2000.

29 Held in 2004, it stated "We reaffirm the important role of Codex Alimentarius to provide effective, science-based, internationally accepted standards of food safety as well as to facilitate international food and agricultural trade.

30 The WTO has adopted two crucial agreements- the SPS agreement and the TBT agreement which as relevance to food and the WTO strongly recommend the standards laid down by the Codex Alimentarius Commission.

World War II, activity in international standardization started intensively in the framework of ISO.[31] A Joint FAO/WHO Food Standards Program was established in 1962, and a joint subsidiary body was created: the Codex Alimentarius Commission (CAC). The trend in the field of food regulation is characterized by growing efforts for harmonization at an international level.

Codex Alimentarius Commission

The Codex Alimentarius Commission is the main international body responsible for developing and setting international food standards.[32] The Codex Alimentarius or the Food Code contains the compilation of all the standards, codes of practice, guidelines and recommendation of the CAC.[33] The Commission has also published a Code of Ethics for International Trade in Food. One of the main objectives of which are to stop exporting countries and exporters from dumping poor quality and unsafe food in the international market. It contains certain general principles such as- International trade in food should be conducted on the principle that all consumers are entitled to safe, sound and whole some food and to protection from unfair trade practices. Further the code says that no food should be in the international trade which has in it or upon it any substance in an amount which renders it poisonous, harmful or otherwise injurious to health or consist in part or whole of a filthy, putrid, rotten, decomposed or diseased substance or foreign matter or is otherwise unfit for human consumption; is adulterated; is labeled or presented in a manner which is false, misleading or is deceptive or is sold, prepared, packaged/stored or transported for sale under unsanitary condition.[34]

The CAC has so far adopted more than 200 food commodity standards, more than 40 hygiene and technological practice codes and set more than 3200 maximum residue limits for pesticides and veterinary drugs.

In achieving its objectives the Codex is assisted by several committees. Primarily the General subject Committee[35], Commodity

---

31 The International Organisation of Standardisation.

32 It was established in 1962 by the FAO and WHO both of which bodies jointly fund the CAC. The FAO funds 75% and WHO -25%. The CAC is an intergovernmental organization and any country which is a member of the FAO or WHO can become a member of the CAC.

33 The Statute of the CAC can be found in the Procedural Manual- Structure of the CAC, Procedural Manual,19th Edition, 2010, FAO/WHO.

34 Dominique Lauterburg, Food Law: Policy and Ethics, Cavendish Publishing House, London, 2001, pp.41-42.

35 Codex Committee on Contaminants in Food, Codex Committee on Food Additives, Codex Committee on Food Hygiene, Codex Committee on Food Labeling, Codex Committee on Pesticide Residues, Codex Committee on the Residues of Veterinary Drugs in Food etc. General Subject Committees are so called because their work has relevance for all Commodity Committees and, because this work applies across the board to all commodity standards, General Subject Committees are sometimes referred to as 'horizontal committees'.

Committee[36], Ad Hoc Inter governmental Task forces[37], Coordinating Committees for regions or groups of countries to coordinate food standards activities in the region, including the development of regional standards[38], Expert Committees[39], ad hoc Expert Consultations and many other initiatives were also taken in the area of foods derived from biotechnology in order to emphasise on the safety of such food.

In its 21st meeting in 1995, the Codex adopted statement of Principles concerning the role of science in Codex decision making process and the principles among other things state that the standards, guidelines and other recommendation of Codex Alimentarius shall be based on the principle of thorough review of all relevant information in order that standards assume the quality and safety of food.[40]

Food Standards involve more than just cleanliness. It involves all practices involved with protecting food from risk of contamination including harmful bacteria, poisons and foreign subject; preventing any bacteria present in the food multiplying to a level that would result in food poisoning or the early spoilage of food; destroying any harmful bacteria in the food through cooking or processing. The Joint FAO/WHO Food Standards Programme, the purpose of which is to protect the health of consumers and to ensure fair practices in the food trade. The document follows the food chain from food production through to final consumption highlighting the hygiene controls at each stage. It recommends a HACCP based approach wherever possible to enhance food

---

36 These committees deal with specific kinds of food like Codex Committee on Fats and Oils, Fish and Fishery Products, Codex Committee on Processed Foods and Vegetables, etc. Commodity Committees have the responsibility for developing standards for specific foods or classes of food lies with the Commodity Committees. In order to distinguish them from the 'horizontal committees' and recognize their exclusive responsibilities, they are often referred to as "vertical committees". Commodity Committees convene as necessary and go into recess or are abolished when the Commission decides their work has been completed. New Committees may be established on an ad hoc basis to cover specific needs for the development of new standards.

37 Joint FAO/WHO Committee of Government Experts on the Code of Principles Concerning Milk and Milk Products, Ad Hoc Intergovernmental Task Force on Animal Feeding.

38 FAO/WHO Coordinating Committee for Africa, Asia, Europe, etc Coordinating Committees play an invaluable role in ensuring that the work of the Commission is responsive to regional interests and to the concerns of developing countries. The country that chairs the Coordinating Committee is also the Regional Coordinator for the region concerned. These Committees have no standing host countries. Meetings are hosted by countries of a region on an ad hoc basis and in agreement with the Commission.

39 Joint FAO/WHO Expert Committee on Food Additives (JECFA), JMPR- pesticide residues in food, JEMRA -microbiological hazards in food.

40 *Supra* note 27.

safety as described in the Hazard Analysis and Critical Control Point (HACCP) System and Guidelines for its application also indicates how to implement these principles. The FAO and the WHO has initiated several programmes for ensuring and protecting the safety standards of food.

FAO & WHO

FAO and WHO complement the Commission's activities significantly in a number of practical ways. FAO and WHO help developing countries to apply Codex standards and strengthen national food control systems and take advantage of international food trade opportunities. One of the most important contributions of FAO and WHO to the Commission's work is to provide scientific advice, especially risk assessments, developed by expert committees and consultations.

a) Technical Assistance[41]

Assistance given to developing countries has included:

o to establishing and strengthening national food control systems, including the formulation and revision of food legislation (acts and regulations) and food standards in accordance with Codex standards;

o helping with the establishment and strengthening of food control agencies, as well as with training in the necessary technical and administrative skills to ensure their effective operation;

o strengthening laboratory analysis and food inspection capabilities;

oconducting workshops and training courses, not only for transferring information, knowledge and skills associated with food control, but also to increase awareness of the Codex Alimentarius and activities carried out by the Commission;

o providing training in all aspects of food control associated with protecting the health of consumers and ensuring honest practices in the sale of food;

o extending guidance on matters directly related to Codex activities, such as safety assessment of food produced using biotechnology;

o developing and publishing manuals and texts that are associated with food quality control and that provide recommendations for the development and operation of food quality and safety systems;

o developing and publishing training manuals on food inspection and quality and safety assurance, particularly with respect to the application of the HACCP system in food processing industry.

b) FAO/WHO Trust Fund for Participation in Codex

Launched in 2003 by the Directors General of FAO and WHO, the Trust Fund is seeking US $40 million over a 12 year period to help developing countries and countries in transition to increase their participation in the vital work of the Commission. Increased participation will be achieved by: helping regulators and food experts from all areas of the world to participate in

41 *Supra note* 1, p.33.

international standards setting work in the framework of Codex; and enhancing their capacity to help establish effective food safety and quality standards and fair practices in the food trade, both in the framework of the Codex Alimentarius and in their own countries.

c) International Food Safety Authorities Network

INFOSAN promotes the exchange of food safety information among food safety authorities at national and international levels. A food safety emergency network is an integral part of INFOSAN and will implement the emergency information exchange system recommended by the Codex Alimentarius Commission in its Guideline on the Exchange of Information in Food Control Emergency Situations. WHO maintains a list of food safety emergency contact points and envisages the strengthening of information exchange between national authorities in the case of international health emergencies.[42]

d) Regional Conferences and Global Fora on Food Safety

The Global Fora of Food Safety regulators provide the opportunity for food safety regulators from all regions of the world to meet together to consider, discuss and share experiences on food safety issues that are of concern to everyone. The Fora are dedicated to sharing experiences in the management of food safety. FAO and WHO also convene regional food safety conferences that allows a more detailed analysis of food safety problems in the light of regional practices and cultures.

e) Main FAO /WHO expert bodies

(i) Joint FAO/WHO Expert Committee on Food Additives (JECFA)

The Joint FAO/WHO Expert Committee on Food Additives was established in1955 to consider chemical, toxicological and other aspects of contaminants and residues of veterinary drugs in foods for human consumption. The Codex Committee on Food Additives, the Codex Committee on Contaminants in Foods and the Codex Committee on Residues of Veterinary Drugs in Foods identify food additives, contaminants and veterinary drug residues that should receive priority evaluation and refer them to JECFA for assessment before incorporating them into Codex Standards.

(ii) Joint FAO/WHO Meetings on Pesticide Residues (JMPR)

JMPR began in 1963 following a decision that the Codex Alimentarius Commission should recommend maximum residue limits (MRLs)for pesticide and environmental contaminants in specific food products to ensure the safety of foods containing residues. It was also decided that JMPR should recommend methods of sampling and analysis. There is close cooperation between JMPR and the Codex Committee on Pesticide Residues (CCPR). CCPR identifies those substances requiring priority evaluation. After JMPR evaluation, CCPR discusses the recommended MRLs and, if they are acceptable, forwards them to the Commission for adoption as Codex MRLs.

42 These include emergencies where food is the vehicle causing serious international public health risks. INFOSAN is managed by WHO.

(iii) Joint FAO/WHO Expert Meetings on Microbiological Risk Assessment (JEMRA)

It began work in 2000 to develop and provide advice to the Codex Alimentarius Commission on microbiological aspects of food safety. In addition to providing risk assessments, JEMRA develops guidance on related areas such as data collection and the application of risk assessment. JEMRA works most closely with the Codex Committee on Food Hygiene, but has also provided advice to other Codex Committees, such as the Committee on Fish and Fishery Product.

FAO and WHO are not the only sources of scientific excellence on which Codex depends. Codex encourages other scientifically based intergovernmental organizations to contribute to the joint FAO and WHO scientific system. The International Atomic Energy Agency (IAEA) provides advice and support on levels of radionuclide contamination in foods and on food irradiation. The World Organisation for Animal Health (OIE) provides advice on animal health, on animal diseases affecting humans and on the linkages between animal health and food safety.[43]

International Standards Organisation

The International Organisation for Standardisation (ISO) in Geneva is a world Federation of National Standards bodies for more than 140 countries. ISO's work results in international agreements which are published as international standards. ISO 22000 is a standard developed by the International Organization for Standardization dealing with food safety. It is a general derivative of ISO 9000. ISO 22000 standards define the requirements of a food safety management system covering all the organizations in the food chain from "farm to fork", including the catering and packaging companies. ISO 22000 is a safety standard that is accepted and trusted the world over.

The ISO 22000 international standard specifies the requirements for a food safety management system that involves the elements of interactive communication, system management, prerequisite programs and HACCP principles.[44] ISO 22000 integrates the principles of the Hazard Analysis and Critical Control Point (HACCP) system and application steps developed by the Codex Alimentarius Commission. By means of auditable requirements, it combines the HACCP plan with prerequisite programmes. Hazard analysis is the key to an effective food safety management system, since conducting a hazard analysis assists in organizing the knowledge required to establish an effective combination of control measures. ISO 22000 requires that all hazards that may be reasonably expected to occur in the food chain, including hazards that may be associated with the type of process and facilities used, are identified and assessed. Thus it provides the means to determine and document why certain identified hazards need to be controlled by a particular organization and why others need not.

---

43 *Supra note* 1, at 24.

44 Wikepedia, visited on 6-7-2013.

The ISO 22000 family contains a number of standards each focusing on different aspects of food safety management.

ISO 22000:2005 contains the overall guidelines for food safety management.[45]

ISO/TS 22004:2005 contain guidelines for applying ISO 22000.

ISO 22005:2007 focuses on traceability in the feed and food chain.

ISO/TS 22002-1:2009 contains specific prerequisites for food manufacturing.

ISO/TS 22002-3:2011 contains specific prerequisites for farming.

ISO/TS 22003:2007 provide guidelines for audit and certification bodies.

III. INDIA AND FOOD SAFETY STANDARDS

Right to Food: Constitutional Protection

India is a party to the International Covenant on Economic, Social and Cultural Rights and it has also ratified other treaties relevant to the right to food including the ICCPR[46], the CRC[47] and CEDAW[48]. This means that under its international commitment, the Government of India is obliged to ensure the right to food for all Indians.

The Constitution of India imposes duties on the State under articles 39(e) & (f)[49] and 47 where the Constitution directs the State to raise the level of nutrition and standard of living and to improve public health.

Right to food is a fundamental right under Art 21.[50] The Supreme Court has through various decisions highlighted the importance of right to food and its contribution in ensuring the right to life. The Supreme Court in *Francis Coralie's case* said that right to life includes right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter over the head.[51] In yet another case the Supreme Court has emphatically stated that right to life guaranteed in any civilized society implies the right to food, water, decent environment, education,

---

45 ISO 22000:2005 sets out the requirements for a food safety management system and can be certified to. It maps out what an organization needs to do to demonstrate its ability to control food safety hazards in order to ensure that food is safe. It can be used by any organization regardless of its size or position in the food chain.

46 Article 6.

47 Articles 24 & 27.

48 Articles 12 & 14.

49 The State shall in particular, direct its policy towards securing (e) that the health and strength of workers, men and women, and the tender age of children are not abused and (f) that the children are given full opportunities and facilities to develop in a healthy manner.

50 *PUCL v. Union of India*, 2007(1) SCC 716.

51 *Francis Coralie Mullin* v. *UT of Delhi and Ors*, AIR 1981 SC 746.

medical care, shelter etc.[52] Though the question of right to food as an enforceable right arose for the first time in the case of *Kishen Patanayak v. State of Orissa*,[53] it was PUCL v. UOI,[54] that brought out a great advance in the justifiability of the right to food as a human right, as the orders in this case have transformed the policy choices of the Government into enforceable, and justifiable right.[55]

Thus it is very clear that India has an obligation to fulfill and protect the right to food which includes the right to safe food.

India and Codex Standards

India became a member of the Codex Alimentarius Commission in the year 1964. At the time the main legislation dealing with food regulation was the Prevention of the Food Adulteration Act, 1954. The object and the purpose of the Act were to eliminate the dangers to human life from sale of unwholesome article of food. It is enacted to curb the widespread evil of food adulteration and is legislative measure for social defense.[56] The Act suffered from a number of loopholes. For instance, there was no requirement for training to food inspectors, does not provide for mandatory standardization of food products, inspectors to the population ratio is missing in the Act.[57] The Act fails to mark distinction between the categories of adulteration and have the same punishment for all kind of adulteration.[58] Also there was a lack of coordination between the food inspectors and public analyst who are not legal persons and the public prosecutor who is not a technical person.[59]

Food and Safety Standards Act, 2006: A Critique

The Food and safety Standards Act, 2006 was enacted to consolidate the laws related to food. It does not deal with food adulteration alone but gives a broad definition of the term 'unsafe food'[60] along with many other expressions important for laying down standards. The implementation of FSSA, 2006[61] formally repeals regulatory framework established by PFA 1954 and

52 *Chameli Singh & Ors v. State of UP*, AIR 1996 SC 1051.

53 AIR 1989 SC 677.

54 2007(1) SCC 719.

55 Also see *C.E.S.C Ltd. v. Subhash Chandra Bose*, AIR1992 SC 573; *M. K. Balakrishnan (2) & Ors. v. Union of India & Ors*. 2009 (5) SCC 511; *Shantistar Builders v. Narayan Khimalal Totame*, AIR 1990 SC 630 for discussions on right to food.

56 As cited in Prakash C. Juneja, "Prevention of Food Adulteration Act and Consumer Protection", 8 *Cental law Quarterly*, 371(1988).

57 Anubha Dhulia, "Laws on Food Adulteration: A Critical Study With Special Reference to the Food Safety and Standards Act, 2006, *ILI Law Review*, 168(2010).

58 Subhash C. Sharma, "Consumer Protection", 8(4) *Central India Law Quarterly* 377, 381(1995).

59 *Supra note* 44, at 171.

60 Section 3(zz).

61 On August 2011, India fully implemented the FS & SA, 2006 by issuing Food Safety & Standards Rules, 2011 vide Notification No GSR 362(E).

several other Acts.[62]

The Food Safety and Standards Authority of India is a statutory authority set up under the Act[63] for laying down science based standards for articles of food and to regulate their manufacture, storage, distribution, sale and import, to ensure availability of safe and wholesome food for human consumption. The Act aims to establish a single reference point for all matter relating to food safety and standards by moving from multi-level, multi department control to a single line of command. Ministry of Health and Family Welfare is the administrative ministry for the implementation of the Act.

Thus, setting of science based standards is the most important objective of the Act. The Act adopts the "Food Safety Management System" which includes the adoption Good Manufacturing Practices, Good Hygienic Practices, Hazard Analysis and Critical Control Point and such other practices as may be specified by regulation, for the food business.[64] It is the responsibility of the food business operator to ensure that articles of food comply with the requirements of the Act at all stages of production.[65] The manufacturers, packers, wholesalers, distributors and sellers shall be liable for such article if they do not meet the standards set by the Act.[66] The Act imposes responsibility on the operator of business to recall the articles of food if they do not satisfy the standards of the Act.[67] If the Designated Officer has reasonable ground for believing that any food business operator has failed to comply with any regulations to which this section applies, he may, serve an improvement notice to the food business operator asking him to[68] take certain measures necessary within the period mentioned in the notice. Prohibition order may be imposed on a food business operator who has been convicted of an offence and the court feels that there is a health risk with respect to the food business.[69] The Food safety officer has been conferred several powers and on any misuse makes him liable to a penalty of rupees one lakh.[70]

Thus, India has an obligation to provide its people with food and articles of food which are devoid of any thing that is detrimental to their health. The Act proposes to set standards in food which are acceptable for human consumption. The Act clearly states that the no article of food should contain any food additives or processing aid unless it is accordance with the provisions of the Act. Further no article of food should contain any contaminant, naturally occurring toxic substances or toxins or hormone or heavy metals in excess of

---

62 Fruit Products Order 1955, Meat Food Products Order,1973,Vegetable oil products (regulation) order,1988, The Solvent Extracted Oil, De-oiled Meat& Edible Flour (Control) Order, 1967, Milk and Milk Products Order, 1992 and the Essential Commodities Act,1955.

63 For details as to the functions of the authority, see Chapter II of the Act.

64 Food Safety and Standards Act,2006,Sec 3(1)(s).

65 *Id.*, Sec. 26.

66 *Id.*, Sec. 27.

67 *Id.*, Sec. 28.

68 *Id.*, Sec. 32.

69 *Id.*, Sec. 33.

70 *Id.*, Sec. 39.

such quantities specified by regulation. The food should also not contain insecticides or pesticide residues, veterinary drugs residue, antibiotic residues, solvent residues, pharmacological active substances and micro-biological counts in excess of such tolerance limits.

For carrying out the various responsibilities under the act a huge infrastructure with large paraphernalia has been elaborated under the Act. The food authority must establish scientific panels on food additives, GM organisms and food, biological hazards, labeling etc. Food laboratories established by the Central or State Government and accredited by the National Accreditation Board for testing and Calibration Laboratories and these must be recognized by the Food Authority. The Act also provides for a Food safety audit whereby a systematic and functionally independent examination of food safety measures adopted by manufacturing units is made to determine whether such measures and related results meet with objective of food safety. The Act has also constituted scientific committees, Central advisory Committee, appointed food safety officers, food analysts etc. In Chapter IX, the Act deals with various offences and the penalties in an elaborate manner.

The Food Safety and Standards Authority of India (Ministry of Health and Family Welfare) has been designated as the nodal point for liaison with the Codex Alimentarius Commission. The National Codex Contact Point (NCCP) has been constituted by the Food Safety and Standards Authority of India for keeping liaison with the CAC and to coordinate Codex activities in India. It has several functions, the most important of them are to act as a link between the Codex Secretariat, National Codex Committee and Shadow Committee; Coordinate all relevant Codex activities within India; Receive all Codex final texts (standards, codes of practice, guidelines and other advisory texts) and working documents of Codex Sessions and ensure that these are circulated to those concerned.[71] The National Codex Committee has the function to advise government on the implications of various food standardization, food quality and safety issues which have arisen and related to the work undertaken by the CAC so that national economic interest is taken into account, or considered, when international standards are discussed.

The Act is very impressive in its object and ambition. But to implement the Act in its true spirit is a mammoth task. In India, the food industry is of different sizes such as the organized sector, small scale and unorganized sectors. The requisites of standards in each sector are different. The domestic market in itself is quite large. The food value chain has stakeholders ranging from a small farmer to street vendors to retailers to the big industrialists. The protocols thus developed for standardization of food articles should keep in mind the actual users of these standards, the environment, the culture and the

71 Send comments on Codex documents or proposals to the CAC or its subsidiary bodies and/or the Codex Secretariat within the time frame; Work in close cooperation with the National Codex Committee and its Shadow Committees; Act as a channel for the exchange of information and coordination of activities with other Codex Members; Receive invitations to Codex Sessions and inform the relevant Chairpersons and the Codex Secretariat of the names of participants representing India; Maintain a library of Codex standards, Code of Practice, Guidelines and any other documents and publications on or related to Codex; and Promote Codex Activities throughout India.

present infrastructure of the country where they are to be implemented; which presently it seems is being overlooked.

One of the basic requisites for effective implementation is setting up of fully equipped laboratories and providing trained manpower to man them. All food testing has to be done in accredited laboratories and prosecutors based on testing in non-accredited laboratories will fail on this ground alone. Presently all the public sector food laboratories are not accredited. FSSAI commissioned a gap analysis study for up gradation of 50 food laboratories under the Central and State government. The study indicated that there is an urgent need to upgrade the infrastructure, strengthen staffing and training inputs and put in place more reliable laboratory management and operational procedure. The sub-group observed that a network of efficient laboratories is the backbone of any credible food safety initiative. Most of the existing food laboratories lack facilities for testing of microbiological parameters, heavy metals and residues.[72]

The food testing science and technology is continuously evolving each day. The high-tech instrumentation/techniques to detect the minutest levels of undesirable substances demands sophistication right from the sampling and sample preparation stage. At the same time the food laws, globally, are becoming stringent and demand the industry to cope up with the same. The biggest bottleneck in expanding the food processing sector, in terms of both investment and exports, is lack of adequate infrastructure including skilled human resource. It is also necessary to get the right people to man the various committees under the Act. The Food Standards Safety Authority and its allied committees like the scientific committees, scientific panels, the Central Advisory Committee require very talented people with expertise and experience to man the distinguished posts. To get the right person is a complex task and the working and effectiveness of such committees will largely depend on this factor.

Another major block in implementation of the food standards is that the changing scenario of food standards and their rigid requirements typically do not reach rural India timely. The public knowledge is quite limited such that only few farmers are aware of the procedure. Though agricultural extension services are established all across rural India but they do not provide any information about prevailing national and international standards, nor do they assist farmers in imparting techniques about changing cultivation practices to meet these standards.[73]

The Standard setting exercise for food requires availability of authentic and continually updated data not only on consumer related indicators but also on ingredient related indicators. In a study that was done from the industry perspective several respondents felt that since reliable data for food consumption is not available, the Food Safety and Standards Authority would need to undertake a comprehensive monitoring of data pertaining to food additive levels , contaminant levels, health survey. Also estimates have to be gathered on the hazards in the food industry and their sources.[74]

---

72 Government of India, Report of the Working Group on Drugs and Food Regulation for 12th Year plan, No. 2(6) 2010,Planning Commission, New Delhi, May 2011, at 41.

73 Kirti Joshi, Mechanism of Developing & Fixing Food Standards for Rural India and Inclusive Growth, Science and Technology, Food Safety Certification, 2008.

74 FICCI Study on Implementation of Food Safety Standards Act-An Industry Perspective, May 2007, at 26, available at foodsafetynews.filers.wordpress.com.

There are certain expressions which have not been defined under the Act and this can create confusion. For example phrases like 'good manufacturing practices' and 'good hygienic practices' has not been defined .Further the definition of 'food' expressly excludes the animal feed from its purview. The fact is that pesticides, insecticide etc gets into animal feed and consumed by the animal (cow, goat, etc) and becomes a part of the food chain. Hence it should be made a part of the definition.[75]

People at large are totally unaware of the Act. The consumers are not aware of the elaborate protection that they can avail of under the Act. Similarly the food manufacturers/producers and food handlers are also not familiar with the Act. Ignorance of law can create a lot of hurdles in the implementation of the Act.

IV. CONCLUSION

Lack of infrastructure is a significant area where the Act is already facing hurdles. Lack of adequate laboratories and those exist in terms of proper equipment. Hence there is an urgent need to increase the number of laboratories and to provide them with latest testing facilities.

Manpower and manpower training must be given optimum importance as the implementation of the Act largely depends on the experts who man the various committees. For generating skilled labor in food testing sector, food courses are being offered by Central Food Technology Research Institute (CFTRI), International Food Technology Training Center (IFTTC), IGNOU, Defense Food Research laboratory, ICAR, Industrial associations like CII, FICCI & SOPA etc. These institutes offer graduate, post-graduate, diploma and certificate courses in various fields of food sector like food analysis, quality assurance, food safety & microbiology, bioengineering, biochemistry, grain science and technology etc. It is seen that the courses offered formidably cater to the organized sector, and there are no specific programmes focusing on the unorganized sector. Moreover there is great emphasis on technology development and up-gradation but no thrust on food safety systems & regulatory requirements. Hence these areas must be given focus.

Training to the food handlers on the various aspect of the Act is an immediate need. Not only food handlers but also the general public is unaware of the provisions of the Act. NGOs must be made a part of the movement to educate people about the nuances of the Act or the Act will fail to achieve what it has aimed to do. The definition of food should include animal feed.

Thus to conclude, I would like to say that the Act is laudable in its attempt to follow the guidelines issued in the area of food safety by the international bodies. But while setting the standards for the Indian scenario the standard setting bodies have to be extra cautious to take into consideration the wide variety of socio- cultural aspects attached to food and food eating habits. But in doing so, India cannot make any compromise on food safety .The Act and its implementation is still at a nascent stage but there is no doubt that with certain amount of trial and error it can do wonders in achieving the objectives of safe food in the coming years.

●

75 *Supra note* 56, at 182.

SHORTER ARTICLES

Vol. 41, No. 2, Ban.L.J. (2012) 136-141

JUSTICE FOR ALL: EQUITABLE ACCESS TO JUSTICE IN INDIA : ROAD AHEAD

S. Sivakumar*

I. INTRODUCTION

"Equal justice under law is not merely a caption on the facade of the Supreme Court building; it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists...it is fundamental that justice should be the same, in substance and availability, without regard to economic status."

-Lewis Powell, Jr.[1]

THE NOTION of justice in the broader sense is "constant and perpetual will to render to everyone that to which he is entitled".[2] Given that the justice is defined in terms of rights, access to justice, most simply put would include the ability of any person to approach the appropriate authority and effectively claim the enforcement of his rights.[3] Thus, access to justice, in more real terms, would include the sum total of all those rights and remedies available to a person through which he can seek the enforcement of his or her rights. Over the years, access to justice has been termed to be a basic right of every human being and probably the most important fundamental right.[4] The concept of access to justice encompasses the requirements of a nation's legal system and is widely argued and developed in the major Florence Access to Justice Project whose results were published in six volumes by Mauro Cappelletti in 1978. Access to justice involves focus on the two basic purposes of the legal system, first, the legal system must be equally accessible to everyone and the

---

* Professor, Indian Law Institute, Bhagwan Dass Road, New Delhi-01.

1 Lewis Powell, Jr., U.S. Supreme Court Justice's address to the American Bar Association Legal Services Program, American Bar Association's Annual Meeting, August 10, 1976.

2 Justinian's *Corpus Juris Civilis.*

3 See Inaugural address of Justice Y.K. Sabharwal, the then Chief Justice of India, "Access to Justice, Role of Law and Legal Institutions in the Alleviation of Poverty and Deprivation" delivered at golden jubilee regional seminar of Indian Law Institute at Cuttack, Orissa on 9th September 2006.

4 See generally, Francesco Francioni (ed.), *Access to Justice as a Human Right* (Oxford University Press, London, 2007).

access must be effective. Secondly, access to the system must lead to results that are individually and socially just.[5] Further, it is protected by Article 8 of the Universal Declaration of Human Rights.[6] Effective access to justice is being seen as the most basic requirement-the most basic 'human right'-of a system which purports to guarantee legal right.[7]

The Constitution of India visualizes for a society in which justice is equally and impartially provided for all. Article 14 provides that 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 22 (1) provides that no person who is arrested shall be denied the right to consult, and to be defended by, a legal practitioner of his choice. Article 38 of the Constitution states that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. These articles reaffirm the Preamble which mandates the Republic of India to secure to all its citizens social, economic and political justice.

The Indian constitution is a pro-poor, pro-labor and pro-human rights document. In order to ensure social justice, in India, Constitution and various legislations provide for the rights of persons arrested or detained; protection of women and children from domestic violence; protection of children from abuse, exploitation and discrimination; development of agriculture and empowerment of small farmers; and protection to labours. Further, by enacting the Legal Services Authorities Act, 1987 and reiterating the entitlement of legal aid & advice in various other enactments dealing with social justice for example Mental Health Act 1987; Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 and Protection of Women from Domestic Violence Act, 2005, the State is now under a statutory obligation to make available the "legal services" including "rendering of any service in the conduct of any case or other legal proceeding before any court or other authority or tribunal and the giving of advice on any legal matter".[8]

Although, the constitutional framework and the legislative initiatives reflect India as a nation guaranteeing cent percent 'access to justice' to all, the ground reality is quite different. Equitable access to justice for the indigenous, rural poor, low income middle class people, women, children and senior citizens

---

5 Robin C.A. White, *The Administration of Justice*, 266 (Blackwell Publisher, London, 1985).

6 Article 8 reads: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." See, UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: http://www.unhcr.org/refworld/docid/3ae6b3712c.html.

7 Mauro Cappelletti, quoted by the Australian Law Reform Commission and mentioned in *State of Haryana v. Darshana Devi*, AIR 1979 SC 855.

8 Section 2(c), Legal Services Authorities Act, 1987 (No. 39 of 1987) [As amended by the Legal Services Authorities (Amendment) Act, 1994 (No. 59 of 1994)].

is still a dream to be fulfilled. In this regard, the observation of Arijit Pasayat, J. in *Zahira Habibullah Sheikh v. State of Gujarat*[9] is worth noting wherein he observes : "Increasingly, people are believing that laws are spider's webs; if some light or powerless thing falls into them, it is caught, but a bigger one can break through and get away."[10] The concept of equitable access to justice requires that people have a comparable level of access to justice regardless of where they live or who they are. But, in India, several barriers - financial, social and cultural act contrary. According to UNDP Commission on Legal Empowerment of the poor, 2008 about 65% of the pre-trial detainees are in jail primarily due to economic poverty and lack of awareness of law. In Tihar Jail more than 85 percent of the prisoners have been reported to be under trials.[11] Many under trials are detained because they have no money to make bail or hire a lawyer to assist them. Meaningful access to justice by the poor necessarily requires access to counsel which certainly lacks in such cases.

Certainly, there exists scarcity of private attorneys and law firms able or willing to provide pro bono representation. A lesson in this regard needs to be learned from Australia, wherein private law firms provide *pro bono* services to remote areas and are key players in the framework of cooperative legal service delivery that involve legal aid commissions and community legal service providers. The Australian National *Pro bono* Resource Centre's national survey (released on September 10, 2008) indicated that about 200,000 hours have been delivered *pro bono* by 25 of Australia's largest law firms in the past year.[12] This is an enormous contribution by the private sector towards enhancing access to justice. Similar practices needs to be opted in India so that Justice may not become a play ground for men with long purses only and poor and marginilised segments of India may have equal access to justice.

Remarkably, over the year, national legal services authority and the several state services authorities have done much to improve access to justice for disadvantaged people. They have set up Lok Adalats (People's Courts) as a form of Alternate Dispute Resolution mechanisms. Further, under the paralegal volunteers' scheme, paralegals are being trained to not only assist in accessing legal support by those who require it the most but by making them aware that this is their entitlement. Yet, a new outlook for a collaborative approach by all legal service authorities, *pro bono* lawyers and pro bono law firms within each jurisdiction is vital to providing services across the vast rural and remote areas of India.

---

9 (2006) 3 SCC 374.

10 *Id.*, para 24.

11 See "Tihar under trial inmates no longer eligible for campus placements", available at: http://articles.timesofindia.indiatimes.com/2012-06-25/delhi/32408265_1_tihar-inmates-campus-placements-senior-tihar-official.

12 See "Top Australian Firms Giving it Away", available at: http://www.nationalprobono.org.au/page.asp?from=4&id=209#1 (Last visited on December 24, 2012).

Another challenge to equitable access to justice is gender discrimination. Discrimination against members of several social categories has upheld the hierarchical world order and supports entrenched unequal treatment. Despite concerted attempts at making the police more gender-sensitive, the police in our society still suffers from the hangover of colonial authoritarianism. The police in India have not only failed to protect women from harm, but have inflicted harm on women. After a woman is displaced from her parent's home, her rights become fraught with insecurity, and she is subject to incipient violence.[13] At the district and the state level sensitivity on women rights among judicial officers and administration is quite low. Even though, punitive law against domestic violence is in action, the cases of domestic violence in India are continuously increasing. A recent study[14] by Navsarjan Trust shows the ineffectiveness of police and judiciary in cases of gender violence against Dalit women. With regards to the family violence, the Australian experience in facilitating legal services to the women victims of family violence has been quite successful wherein Family Violence Prevention Legal Services (FVPLS) program is operational since 1998.[15] FVPLS units also assist indigenous adults and children who are victims of family violence, including sexual assault, or who are at immediate risk of such violence. The primary function of the units is to provide legal assistance, casework, counselling and court support. FVPLS units are located predominantly in regional, rural and remote areas. A similar model can be adopted in India.

Court congestion, inefficiencies in court procedures, lack of manpower and resources in addition to delay and cost are other hurdles in way of equitable access to justice. Recently, on the basis of an RTI reply it was flashed in newspaper that about 43 lakh cases are pending before the various high courts in India and the same time there exists 262 vacancies for judges in these courts.[16] I have learned that the Department of Justice is trying to minimize these problems. The Planning Commission of India, in lieu of it, had constituted a Working Group on the Department of Justice with the objective of making recommendations to the 12th five year plan.[17] Amongst the suggestions made by the Working Group are strengthening of Alternate Dispute

---

13 See Report of the Asian Development Bank's Symposium on Challenges in Implementing Access to Justice Reforms, 2005.

14 See "Gender-Violence and Access to Justice for the Dalit Woman", available at: http://idsn.org/fileadmin/user_folder/pdf/New_files/India/2012/Gender_violence_and_access_to_justice_for_Dalit_women_2011_Navsarjan_Trust.pdf.

15 See Australian Human Right Commission Report on Social Justice, 335-347 (2007).

16 See "Over 43L cases pending before high courts", available at: http://articles.timesofindia.indiatimes.com/2012-10-05/india/34278926_1_high-courts-crore-cases-supreme-court.

17 See Report of the Working Group for the Twelfth Five Year Plan (2012-2017), September 2011, Department of Justice, Ministry of Law & Justice, Government of India, available at: http://planningcommission.nic.in/aboutus/committee/wrkgrp12/wg_law.pdf.

Resolution system to benefit the marginalised and to strengthen the capacity of the Legal Service Authorities. The Thirteenth Finance Commission of India, as an outcome, has made an award of Rs. 5000 crores (one billion US Dollars) for carrying out judicial reforms, in the next five years from 2012 - 2015. At the same time, an innovative e-Courts scheme with an allocation of Rs. 935 crore (US $ 180 million) has been undertaken for ICT enablement of all the courts in the country.[18] These projects are aimed towards improvement of citizen centric services. Additionally, National Mission for Justice Delivery and Legal Reform[19] has also been constituted in 2011 with the objectives of reducing pendency and increasing accountability through structural changes and setting performance standards. Also, the United Nations Development Programme in collaboration with Department of Justice is going to move to the second phase of its project "Access to Justice for Marginalized People".[20]

Apart from all the above, some of the major problems concerning the access to justice are the lack of competency and comparability of lawyers and the lack of legal aid clinics or co-operatives. On a more basic level the problem is the legal illiteracy and ignorance of certain sections of the society. Law schools can play a major role and contribute in an important manner to ensure that this access to justice to all is achieved faster and more efficiently and to ensure that it does not remain a mere right without the possibility of enforcing it. A current critique of legal education is that students are not graduating with practice-ready skills. Although many students enroll in law school with a passion to serve others, the law school experience can depress, postpone, or re-route that passion. Moreover, burdened by law school debt, some students may feel pushed to choose between a social justice career and making a living. Meanwhile, a persistent lack of meaningful access to justice plagues many segments of society. This deficit of non-representation for lower- and middle-income people unable to afford counsel is exacerbated by the current economic crisis. Law schools and the legal profession must confront this need for greater access to legal services. Many law schools are pursuing innovative ways to reinforce the ethical principle of the lawyer as a public citizen who has a special responsibility for the quality of justice in society. The legal academy and profession can do more to instill a commitment to social justice and public service in marginalized, subordinated, or underrepresented clients and causes. Law schools should focus upon curricular innovations that engage students in social justice or access to justice issues.

---

18 See "Computerisation of District & Subordinate Courts being implemented as a Mission Mode Project - (E-Courts)" , available at: http://doj.gov.in/?q=node/141&page=1.

19 See National Mission for Delivery of Justice and Legal Reform Towards Timely Delivery of Justice to All: A Blueprint For Judicial Reforms, Strategic Initiatives, 2009 - 2012, available at: http://www.lawmin.nic.in/doj/justice/National_Legal_Mission-7NOV2009.pdf.

20 See "Access to Justice for Marginalized People", available at: http://www.undp.org/content/india/en/home/operations/projects/democratic_governance/access_to_justice.

The concept of free medical services in medical colleges can be replicated in law schools. In India and in other countries various universities and law schools have started an in house clinical course. It involves running clinical law offices inside or near the law college. The students work under the direct supervision of the faculty who are lawyers qualified for practice. Another form of legal service that can be provided by the law schools is by ensuring that all the people who come to them get a good lawyer. The inaccessibility of good lawyers is one of the major causes of the inaccessibility to justice. So the law schools can ensure that these underprivileged people get good lawyers at nominal fees. The law schools can attach certain lawyers with them who would be willing to take up cases for these people through the law schools.

The development of the concept of Public Interest Litigation (PIL) in the recent times has given hope to millions of poor and downtrodden people in our country. Notable orders/decisions have been delivered by the Apex Court through the modality of PIL in matters of improvement of living conditions of under trials in Bihar[21], reducing custodial deaths[22], environment degradation[23], rape of tribal girls by army jawans in moving train[24], starvation deaths[25], bonded labour[26] and many others. Some important legal principles have also developed through PIL like "polluter pays principle", the "precautionary principle" and the principle of "award of compensation for constitutional wrongs". In the upcoming years, certainly India is going to witness more and more public interest litigations carving shielding the rights of poor, downtrodden and needy against the mighty. It is in this regard, that the law school should instill amongst its students skills of Public interest lawyering.

The justice dispensation system, be it in the executive, the legislature and the judiciary, needs some bold and innovative reforms. To win enhanced public confidence in the system, it is essential to ensure transparency and accountability in all government procedure. Access to justice does not mean merely access to the institutions, but also means access to fair laws, procedures, affordable, implementable and appropriate remedies in terms of values that are in conformity with constitutional values and directives. The objective should be to develop legal education with social justice perspectives to foster greater integrity and pro-poor sensitivity in the legal profession, and encourage educational institutions to become more active in community education and monitoring of justice institutions and thereby ensuring equitable access to justice. India in this regard has to go miles to ensure justice for all.

●

21 *Hussainara Khatoon(I) v. State of Bihar*, (1980) 1SCC 81.

22 *D.K. Basu v. State of West Bengal*, (1997) 1SCC 416.

23 *M.C. Mehta v. Union of India*, AIR 1988 SC 1115.

24 *Domestic Working Women's Forum v. Union of India*, (1995) 1 SCC 14.

25 *Kishan v. State of Orissa*, AIR 1989 SC 677.

26 *Bandhua Mukti Morcha v. Union of India* (1991) 4 SCC 1169.

Vol. 41, No. 2, Ban.L.J. (2012) 142-148

ON THE ESSENCE OF CRIMINAL PROCEDURE

Bo Yin*

I. INTRODUCTION

The present study of comparative criminal procedure is more concerned with the differences between systems than their similarities.[1] For example, in 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure', which is the pinnacle of comparative criminal procedure studies, Dāmāska created the dichotomy of the 'hierarchical model' and the 'co-ordinate model'.[2] These pieces of research unintentionally mislead us into ignoring commonalities of criminal procedure rules in different jurisdictions. In this paper, we I will argue for a general jurisprudence of criminal procedure. Specifically, I will identify the essence of criminal procedure and analyse its resulting procedural conducts. Finally, a short discussion will be made as regards the moving orbit of criminal procedure.

II. A GENERAL JURISPRUDENCE OF CRIMINAL PROCEDURE

For those who follow the divergence of criminal procedure in different jurisdictions, it is plausible to argue that criminal procedure is localized in its own jurisdiction. The terminologies and mechanisms of criminal procedure vary from one jurisdiction to another.The details of criminal procedure are influenced by particular political and cultural factors. On the basis of these differences, proceduralists are likely to create typologies of criminal procedure. For example, the 'hierarchical model' and the 'co-ordinate model' created by Dmaska is a typology.

While global criminal procedures are not a neutral and unified body of rules, they are not entirely indeterminate and divergent either.[3] Due to the

---

* Ph.D, Aberdeen, UK, Associate, College for Criminal Law Science, Beijing Normal University, Beijing-100875 (China)

1 R.B. Schlesinger, "The 1976 James McCormick Mitchell Lecture, Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience", (1976) 26 *Buff. Crim. L. Rev*. 361.

2 M. Damaška, "Structures of Authority and Comparative Criminal Procedure", (1975) 84 *YLJ* 480-544.

3 J. Williams, "Is Law an Art or a Science? Comments on Objectivity, Feminism, and Power", (1998) 7 *Am. U. J. Gender Soc. Pol'y & L*. 375.

intrinsic thirst of human being for unity and order, once a concept is coined and widely used, its basic traits will be gradually explored and articulated.[4] Criminal procedure is defined as 'the rules governing the mechanisms, under which crimes are investigated, prosecuted, adjudicated, and punished'.[5] It might be oversimplified if it only comprises those important steps, i.e. investigation, prosecution, adjudication and punishment. Instead of a few separate, albeit orderly steps, criminal procedure should be understood as a continuous process to be gone through.

It will be crucial to arrive at a commonsense understanding of general criminal procedure regardless of the issue of jurisdiction. This implies a basic measurability of criminal procedure. A general jurisprudence of criminal procedure can help lawyers free themselves from the chains of their national system. They can launch a science-oriented and theory-conscious legal reform in lieu of a value-oriented, non-theoretical stereotype.[6] Herein, we will discuss the common essence of criminal procedure as a starting point of the general jurisprudence of criminal procedure.

III. THE ESSENCE OF CRIMINAL PROCEDURE

What is the 'essence' of criminal procedure? Initially, criminal procedure was not independent from substantive criminal law. The purpose of criminal procedure was only to implement the state power of punishing guilty. This view also results from static observation on criminal procedure. Gradually, lawyers began to explore the value of the key noun, namely 'procedure', beyond criminal law. They realised the distinction between criminal procedure and substantive criminal law.Criminal procedure has its unique function of processing criminal cases to the finality, which can hardly be found in substantive criminal law.

In 1868, German proceduralist Bülow, proposed the doctrine of 'Legal Relationship' to explain the unique traits of criminal procedure.[7] According to his doctrine, criminal procedure is the developing legal relationships (i.e. rights and obligations) between the court and both parties. This type of explanation was derived from civilian private law theory whereby legal relationships are often used to conceptualise legal transactions. To cite the simplest type of legal transaction a gift as an example, this means a relationship of voluntary transfer of property between donor and recipient. The recipient has a right to receive this property whilst the donor has an obligation to present this property.

4 P. M. Craig, "Structural Differences between Common and Civil Law", (1951) 9 *Seminar Jurist* 55.

5 B. A. Garner (ed), *Black's Law Dictionary* (8th edition Thomson West, St Paul 2004), at 403.

6 For example, legal scholars are likely to use deontological grounds, such as protection of human rights to morally condemn abuse of process. Such arguments are lacking in formulating logical grounds for systematically tackling the problem.

7 O. Bülow, *Dis Lehre von den Processeinreden and die Prozess-voraussetzungen* (Giessen, 1868) 5.1.

However, in criminal procedure, legal relationship between certain actors is not quite clear and stable. For example, at trial, the relationship between court and the accused is not articulated. Their interaction hinges upon the variation of the trial. The doctrine of 'Legal Relationship'is not sufficient for explaining the essence of criminal procedure. Criminal procedure is continuously moving towards the end wherearelationship between actors does not become clearusually until being decided by the seised agents. It is necessary to demonstrate this variation and developmentin theessence of criminal procedure.

In 1925, Goldschimidt substituted the doctrine of 'Legal Position' for the doctrine of 'Legal Relationship'.[8] He proposed variation and development as the essence of criminal procedure.[9] Legal position can be seen as an unclear and unstable relationship of expectation and burden aboutres judicata between court and parties.[10] For example, the role of court vis-à-vis the accused may vary in the course of trial. The accused tries to defense his case and influence the mind of the seised judges. He tries to convince the court to arrive at a verdict in his favour. Their position may vary with the development of the trial and become certain when the verdict is reached. However, this doctrine ignores certain basic legal relationships in criminal proceedings. For example, when the accused appoints a defense counsel, the allocation of procedural rights and duties between them are explicitly prescribed in most jurisdictions.The counsel has the obligation to advise the accused, appear at trial, and attend oral debate, etc. whilst the accused has the right to these services.

In 1972, Baumgärtel developed this theory of 'Legal Position'. He deemed that the whole process is within the range of procedural effect. According to his theory, the target of criminal procedure from the beginning to the end comprises two dimensions: (1) procedural development as a continuous course of actions; and (2) the rulings as the purpose of procedural development.[11] Then Dand goes further and expressly proposes that the both dimensions can be regarded as 'legal relationships' and 'legal positions' respectively.[12] It is clear that this analysis is more justifiable than the theories of Bülow and Goldschimidt. Generally, the procedures influencing the inner mind of the seised agents and their rulings demonstrate the essence of legal positions. These rulings can be either intermediate or final. Legal positions can be vividly seen as the substantive facet of criminal procedure. In contrast, those formalities, which do not directly influence the inner mind of the seised agents and their rulings, demonstrate the essence of legal relationships. Legal relationships can

8 J. Goldschimidt, *Der Prozessals Rechtslage* (Berlin, 1925) 252.

9 *Ibid*.

10 *Ibid*.

11 B. Grunst, *ProzeßhandlungenimStrafprozeß* (Aktiv Druck &Verlag GmbH, Ebelsbach 2002); G Baumgärtel, Wesen und Begriff der ProzeßhandlungeinerParteiimZivilprozeß (2nd end Köln, Berlin, Bonn, München 1972); R Liu, 'Defects of Civil Actions and Treatment Thereof' [1999] 3 *China Legal Science* (in Chinese) 112.

12 D. Shigemitsu, *A Sketch of New Criminal Procedure Law* (5th edn, Chuangwen Press, Tokyo), at 118.

be seen as the procedural facet of criminal procedure. The substantive line inner conviction and the resulting rulings (including final judgment) and the procedural line formalities as the two facets of procedure constitute an undivided integrity. This essence is not normative but descriptive. This is the principle hidden behind criminal procedure rules.

Nevertheless, both legal relationships and legal positions in the above analysis are not comprehensive enough. For example, rulings by the court should not be the only purpose of procedural development. During the whole criminal proceedings, there are some dispositive decisions other than the rulings by the court. Police may dismiss the case. The prosecutor may discontinue the prosecution. These are all diversions of the case. We need to analyse both legal positions and legal relationships from the perspective of the entire criminal proceedings. Legal relationships and legal positions are created from acts of specific conduct. A single act of conduct is the smallest analytical unit of the ontology of criminal procedure, like the atom vis-à-vis an object. In order to extend the province of them to the widest, it is necessary to analyse procedural conducts.

IV. THE RESULTING CATEGORIZATION OF CRIMINAL PROCEDURAL CONDUCTS

Criminal procedural conduct is the conduct which is done by the actor during the criminal process and results in certain procedural effects. If the conduct is carefully scrutinised, we may well-understand the essence of criminal procedure. Herein, We will categorise criminal procedural conducts into three groups: disposition-influencing conduct (e.g., testimony adduced at trial), procedure-inducing conduct (e.g., summons) and adjudicative conduct (e.g., verdict).

Disposition-influencing Conduct

Disposition-influencing conduct, as its name claims, implies that these conducts are able to psychologically influence the mind of the agent seised of the case and his dispositive decision. For example, adducing evidence before the court is used to influence judges' inner reasoning of the case and their final decision. Overall disposition-influencing conducts must be objectively evaluated and re-organised on the basis of causality through the mind of the seised agents. The procedural result of disposition-influencing conduct is much concerned with substantive truth. Hence, disposition-influencing conduct does not have the formalistic and volitional features.

It must be noted that not all dispositive decisions are given by the court. For instance, the prosecutor may decide not to act on receipt of a report from the police. The conducts influencing the decisions on some essential aspects of the disposition of the case can be also seen as disposition-influencing conducts. Thus, these other disposition-influencing conducts can be exemplified by challenge of an investigator, prosecutor or judge, application of restoration of the status quo ante and so on. The criteria for the resulting decisions are not as rigid as 'proof beyond a reasonable doubt' which conviction of the accused must follow. Procedure-inducing Conduct.

Procedure-inducing conduct is used to further criminal proceedings by inducing the conduct of a subsequent actor. For example, as a procedure-inducing conduct, the issue of an arrest warrant may direct a law-enforcement officer to arrest and bring a criminal suspect to court. Procedure-inducing conducts are rather formalistic. For example, an arrest warrant by a judge must contain particulars of the offence and be signed by the seised officer. Procedural regularity is a predominant restraint on procedure-inducing conduct. Accordingly, the validity of procedure-inducing conduct is closely related to whether the conduct conforms to the law. Disposition-influencing conducts, such as adducing evidence, are used to influence the disposition of the case, whereas procedure-inducing conducts are not. One of the most typical procedure-inducing conducts is initiation of public prosecution. It does not directly influence the inner conviction of the judge, but merely forms a procedural relationship for moving further towards conviction or acquittal.In addition, as against disposition-influencing conducts, the formalistic attributes of procedure-inducing conducts must be reconciled with individual propriety, because procedure-inducing conducts manifest a sequential order in the progression to the final disposition of the case. This also implies that sometimes the strict formality may be moderately sacrificed to the demand of finalising the proceedings.

Of course, procedure-inducing conduct and disposition-influencing conduct usually interrelate with each other.For example, the instrument allowing a police search is a procedure-inducing conduct whilst the prosecutor adducing the resulting evidence before the court is a disposition-influencing conduct. If a procedure-inducing conduct is defective or even invalid, it may have an impact on the legal result of its subsequent disposition-influencing conduct. For example, if the procedure for gathering evidence is severely violated, the evidence may be excluded and may not serve as the basis for conviction. Similarly, if a disposition influencing conduct is defective or even invalid, it may have an impact on a later procedure-inducing conduct. For example, if the illegal evidence exhibited by the police is improperly approved by the prosecutor, the resulting prosecution may be voidable.

Some procedural conducts have the attributes of both disposition-influencing conduct and procedure-inducing conduct. For example, victim statements may contain both presentation of direct oral evidence and claims, such as the claim of compensation from the alleged offender. Therefore, disposition-influencing conduct and procedure-inducing conduct are not exclusively divided without an overlapping contour.[13]

Adjudicative Conduct

Adjudicative conduct (e.g., verdict) is peculiar. It not only plays a role of ascertaining the substantive facts of the case, but it may also be used to bring

---

13 See H. Cao, 'The Foundational Theory of Criminal Procedural Conduct I: Legal Effect of Criminal Procedural Conduct' in P. Chen, *The Selective Works of Criminal Procedure Law Thesis* (Wunan Press, Taibei, 1984) (in Chinese) 112, citing D. Hirano, *Criminal Procedure Law* (Tokyo University Press, 1982), at 23.

an end to the whole proceedings in many cases. The latter attribute is significant for adjudicative conduct, as this distinguishes it from some conducts having the attributes of both disposition influencing conduct and procedure inducing conduct, such as a plea. Both procedural regularity and substantive truth are important in conceptualising adjudicative conduct. Accordingly, it is appropriate to categorise it as a separate type of conduct.

It is necessary to highlight some communicative conducts, which might be difficult to categorise. For example, in the Anglo-US systems, the judge sometimes needs to define the element of the offence, leave to the jury a defence for which a foundation has been laid by the evidence, and give an adequate direction on the burden and/or standard of proof. True, it is not correct to constantly treat the judge and jury as an adjudicative whole. Their functions are quite different and even mutually exclusive in many cases. We need to figure out the category of the conduct between two bodies on the basis of its external attributes. Sometimes, it is disposition-influencing, and sometimes, it is still procedure-inducing. If the direction is on fact-finding, such as a warning about suspect evidence, this is a disposition-influencing conduct. If the direction is about the trial practice and procedure, such as the juror's oath and affirmation, this is a procedure-inducing conduct.

V. THE MOVING ORBIT OF CRIMINAL PROCEDURE

The essence of criminal procedure analysed above is useful for us to understand the orbit of criminal procedure. Yet this orbit might not be clear and evenenough. We cannot mechanically understand criminal procedure. Although criminal procedure flows from the beginning to the end, it is not 'a mechanised assembly line in a car factory'.[14] At least, the following three reasons can be proposed to disprove this metaphor.

First, criminal procedure is concerned with people and it is people who carry out criminal procedure.[15] Each part of the process might involve repeated inter-subjective communication between one participant or agency and another. For example, pursuant to Article 76 of the Chinese Criminal Procedure Law, if the procuratorate discovers illegalities in the investigatory activities of the police, the procuratorate shall give the police a curative instruction to correct the errors;

Second, a particular process may achieve its anticipatedresult prior to the end of the whole proceedings. For example, if the partial appeal is raised, the points of judgment which are not subject to appeal will be valid and differentiated from the appealed points. Similarly, some counts for the proceedings may be diverted by certain measures, such as cautions, before the formal information is lodged; and

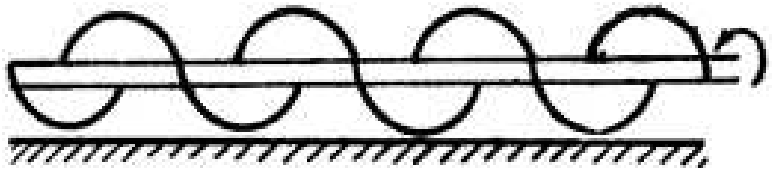
Third, criminal procedure in most jurisdictions can be split chronologically

14 A. Ashworth and M. Redmayne, *The Criminal Process*, (3rd edn, OUP, New York, 2005) 22; see also S. Bibas and R.A. Bierschbach, "Integrating Remorse and Apology into Criminal Procedure" (2004) 114 *Yale Law Journal* pp. 88, 91, 95, 125, 148.

15 Ashworth and Redmayne, *Ibid.*

into similar stages.In the continuouscriminal proceedings, there are relatively separate, closed phases. The general line of criminal procedure is not so even or well-distributed but grossly moving forward to the end. Therefore, criminal procedure is not a pure assembly. It is fluctuating sometimes, which resembles several evolutional spirals.

The following scheme can be used to vividly depict the moving orbit of criminal procedure as an adjective law, though it might be not exactly precise:



The procedural result of a criminal procedural conduct intertwines with the position of the related conducts. If the previous conduct of criminal procedure is invalid, a later conduct may be invalid as a result of the chain effect of criminal proceedings. For example, if police trickery may render the resulting accused's confession inadmissible. In addition, a later revocation may also render a previous conduct void. For example, if an appeal was lodged by the accused, this appeal may be void if the accused then withdraws his appeal.

Nevertheless, criminal procedure is not strictly sequential in terms of procedural result. Sometimes, procedural result of a procedural conduct is not inevitably premised on the legitimacy of its intermediately antecedent conduct. This can be indirectly exemplified by Article 206, para 1-2 of the French Criminal Procedure Code:

'Subject to the provisions of articles 173-1, 174 and 175, the investigating chamber examines the lawfulness of the proceedings of which it is seised. If it discovers a ground of nullity, it pronounces the nullity of the instrument vitiated and, where necessary, of all or part of the subsequent proceedings.'

The phrase 'where necessary' means that the later conduct might be valid whilst its underpinning conduct is nullified. This implies that the chain effect of criminal proceedings is not absolute. The description of the moving obit is a useful and necessary supplementation to the essence of criminal procedure.

VI. CONCLUSION

Overall, the essence of criminal procedure comprises two aspects: the substantive line (dispositive decisions) and the procedural line (formalities). Legal positions and legal relationships can be used to conceptualise them respectively. Three categories of criminal procedural conducts can be derived from these two doctrines: disposition-influencing conduct, procedure-inducing conduct and adjudicative conduct. In spite of continuous attribute, the moving orbit of criminal procedure is not mechanical and even.

●

Vol. 41, No. 2, Ban.L.J. (2012) 149-156

CHALLENGES OF DEMOCRACY

A. P. Singh*

I. INTRODUCTION

ETYMOLOGICALLY SPEAKING, the expression 'democracy' is said to have been derived from a latin expression 'demos', means the people and the 'cratia', meaning the system or the paraphernalia of administration that manages the system. Understood this way a democratic system is one where the system of governance is managed by the people, or where the people get an opportunity to participate in the decision making process. It is therefore rightly said, that "democracy is a political method by which every citizen has the opportunity of participating through discussion in an attempt to reach voluntary agreement as to what shall be done for the good of the community as a whole"[1]. This way democracy can be said to be an egalitarian form of government in which all the citizens of a nation together determine public policy, the laws and the actions of their state, requiring that all citizens have an equal opportunity to express their opinion. In practice, democracy is the extent to which a given system approximates this ideal, and a given political system is referred to as a democracy if it allows a certain approximation to ideal democracy.[2]

Democracy as a form of political system first appeared in the political and philosophical thought of the Greeks. There used to be city states consisting of certain number of people and these people would decide the way the entire administration was to run. This was called direct democracy. However in course of time, the population of the political systems increased and therefore it became impossible to consult everyone as to the process of governance, the form of democracy we call representative democracy came into vogue. After the advent of nation state system and the onset of modern political ideologies, representative democracy came to be recognised as the dominant form of democracy. The most common system that is deemed democratic in the modern world is parliamentary democracy, in which the voting public takes part in elections and chooses politicians to represent them in a legislative assembly. The members of the assembly then make decisions with a majority vote. A purer form is direct democracy in which the voting public makes direct decisions or participates

---

* M.A. English, (Meerut Univ.), LL.B. (Poona Univ.), LL.M. (Constitution), M.D.S. University, Ajmer, Ph.D. (Rajasthan Univ.), LL.M. (Legal Theory), European Academy of Legal Theory, Brussels (Belgium), Associate Professor, University School of Law and Legal Studies, GGS IP University, New Delhi.

1 V. D. Mahajan, *Indian Democracy and Governance*, Asia Publishing House, Bombay, 1988

2 All men and women should have a voice in decision-making, either directly or through legitimate intermediate institutions that represent their interests. Such broad participation is built on freedom of association and speech, as well as capacities to participate constructively. Kofi A. Annan, We the Peoples: The Role of the United Nations in the 21st Century, 7, G.A. Res. 2000, U.N. GAOR, 54th Sess., at 22, U.N. Doc. A/54/2000

directly in the political process. Elements of direct democracy exist at a local level and as such in modern dominantly representative democracies some elements of direct democracy can be found to be operating, though in a very mild form and given minimal functions at local levels to take decisions.

Without getting into the details as to types of democracies we have in the current world around, wherein even dictatorial regimes would call themselves democratic or republican systems, it would be safe to assume that democracy is the most acceptable form of governance today. Indeed ours is a democratic age and it is unfashionable for anyone, anywhere in the world to proclaim them to be anything but a democrat.[3] Francis Fukuyama puts it beautifully, "we have arrived at the 'end of history', where there are no plausible competitors to the basic ideology of liberal democracy in a capitalist economic context".[4] Even military dictators take pains to argue that they are just stabilizing the situation so that democracy can be restored or attained fullness of time. For Robert Dahl, justification for public interest theories lies in participatory democracy, wherein a demo is fully inclusive and where it exercises final control over the agenda and decisions.[5] As a result of which, a high priority is accorded to direct participation in civil society by the citizenry, which operates not only through the constricted medium of political parties but also through a plurality of interest groups.

Since no system in the world has ever been found to have obtained the ideal of every member of the community participating in the governance process, an element of 'increasing inclusivity', can be said to be an important ingredient of democratic process. In Jain philosophy in particular and Indian philosophy in general life process is said to be a journey from imperfections to perfection, wherein one keeps on moving in life's journey with a certain hope of 'Moksha', since life would essentially be imperfect and perfection is to be found in a world beyond this. Looking at the democratic process from this perspective democratic process would be process which ultimately would be taken to be moving towards increasing inclusivity in the governance process. Indeed there are many imperfections in the current democratic form of governance. Nevertheless this form of governance is considered the most cherished form of governance today. Churchill had provided a better justification for this, saying, that "democracy is the worst form of governance except those that have been tried so far." Indeed there are many problems associated with the working of democracy; nevertheless this is the only form of governance which is found to be better as compared to any existing system of governance.

Looking at Indian democratic system from this perspective, a general belief is that democratic form of governance is alien to Indian system, that democratic organization was the gift of British colonial system to this country. With a little understanding of history, my humble submission is that if respect for people's wishes and concern is the touchstone of democratic process, Indian system was probably the most democratic form of governance throughout the ages, from ancient to medieval to modern ages. Few examples can be given to illustrate this. Wars of succession and bloodsheds have been common occurrence throughout human history across the globe. India has not been an exception to this. However a distinguishing feature of Indian system, one could discover is that wars for political supremacy never disturbed the common man. Every new ruler as and when he would succeed to the throne by way of war or otherwise would tend

3 Jane Holder and Maria Lee, *Environmental Protection: Law and Policy*, Cambridge University Press, 2007.

4 Francis Fukuyama, *The End of History and the Last man*, Free Press, 1992

5 Robert Dahl, *Dilemmas of Democracy, Autonomy Versus Control*, Yale University Press, 1982.

to declare that common man's faith shall not be disturbed. They would never interfere in the day to day lives of the people.[6] India's Panchayats were probably the first institution which ensured people's justice, by people themselves, according to the rules which people believed and had faith in. In the post independence phase democracy was said to be a transplant of the British system, which has worked well in this system unlike many Afro-Asian systems. What made the democratic system function perfectly in this system and not in others? To my understanding it is the resilience and essentially a democratic spirit which was inherent in Indian system that allowed the democracy to function and flourish in this system comparatively better. This is how today we are known as the largest democracy of the world. The kind of democracy that we operate in this country, is an experiment which has not been done elsewhere in the world. A thousand million plus population, every single religious system of the world represented, twenty two official languages, thousands of dialects and unimaginable variety of people in this country, trying to go together is, by any standard, a unique example of democratic process anywhere in the world. Therefore one of the major challenges for Indian democratic system would be to keep the faith of the people in the current system and keeping to reform it from within and without, in discursive ways. Indian democratic system, despite all its limitations and imperfections is probably the best that we could hope for excepting the fact that a lot remains to be done and there is a lot of scope to improve and reform the system.

Finances have always been crucial to any democratic process as to run the democratic institutions you need money. To run for an election; to run the party machinery; and to make one heard needs money. This money is to come from somewhere. The model prevalent at the moment is private finances, by the corporates and business people. Generally speaking the businessmen would finance a party with a hope to get favours when that party comes to power. This way political system has been generating resources by trading favours and fruits of political power. This leads to the generation of black money at a large scale which hampers the general process of welfare administration. This constitutes the second most important challenge for Indian democratic system in particular and political systems in general across the globe.

One thing has got to be understood is that no political system in the world has provided a model form of systemic finances, which would not involve trade in political favours. However, the systems like US where every single pie collected by way of finances for political process is accounted for or a system like Germany where there is large amount of public finances involved in helping the process can be taken as a starting point to arrive at some kind of working model for raising finances for political process in a transparent manner. The current spate of dissatisfaction at the working of political system and movement against corrupt practices of political and bureaucratic structures is just a tip of the iceberg and might lead to some kind of greater political upheaval. This could be proper time to make amends and provide some viable method of financing of political system. As has been seen above there can be two types of such finances, public and private. The current model of political financing is essentially private right now, moving from private to public financing of political system has its pros and cons and would involve lot of political will power which appear to be lacking at the moment.[7]

India is, as the Preamble to the Constitution puts it, a socialist, secular and

6 A.S. Altekar, *State in Ancient India*, Bhandarkar Research Institute, Pune, 1968.

7 A.B. Kafaltiya, *Election Laws In India*, Deep and Deep Publications, New Delhi, 2008.

democratic model of state system[8]. Directive Principles of State Policy provides the architecture of making of a socialist welfare state. Though there is no particular significance involved in the use of the word "socialist", however reading the directive principles in the light of the preamble to the Indian constitution, it becomes clear that framers of the Indian Constitution were clear about the goals and objectives of the system, wherein the system was expected to be governed in such a manner that the means of economic control are not concentrated in few hands and that they subserve the common good. In terms of principles the provisions appear to be fairly simple, however the practical face of economic governance is apparently a complicated idea and in the wake of liberalization of the economy we appear to have entered into an era significantly different than what was envisaged by the constitutional principles.

The governance of the economic system is clearly not adequately inclusive and majority of the population of the country is out of the mainstream of developmental process. Chaudhary Charan Singh, the former Prime Minister of India would very often comment that the way of the prosperity of the country passes through its villages as the majority of India's population lives in villages. However the fact remains that right now the agricultural sector of Indian economy which coincides with the rural set up contributes just 14 percent of the wealth of the country,[9] though it has above 60 percent population of the country. What does it mean? It simply means that 60 percent population of the country has to do with just 14 percent of income. In fact the scene as the economic data would put it is even worse, 80 percent of country's wealth today; one likes it or not, is controlled by less than 15 percent of the population[10]. This is certainly not what was intended by the constitutional principles. No body denies that economic reforms cannot be undone and that there cannot be backtracking in terms of economic reforms, but the government of the day will have to make timely interventions to ensure that the developmental process is adequately inclusive so as to take care of at least minimum bare needs of the people. Making the economic system inclusive to an extent that the bare needs of the people are taken care of and the constitutional ideals are also substantially realized constitutes the third biggest challenge for Indian democratic order.

Equality and Justice have been the most cherished goals and organizing principles of Indian constitutional system. One way of understanding the amount of importance given to these principles can be by contrasting the same with the evolution of political systems in western context. Right since the time of renaissance to the current century during which political systems in their current form can be said to have evolved in the western systems, protection of "life liberty and property" of the citizens are supposed to be the important objectives/goals of State systems to achieve. In fact the supposed social compact is only for this purpose. From this perspective look at the objectives of Indian Constitution, the Preamble providing for major goals and objectives of the system being justice, liberty and equality; justice & equality in the background of elaborate injustices and inequalities, extensively extant in the system. Apart from the fact that equality and justice have been given a place of pride in the very preamble of the Constitution itself, the Indian constitution also demonstrates its commitment to equality and justice by variety of other methods as well. Untouchability was abolished by way of article 17 and its practice in any form was made a punishable offence. Exploitation in any form and child labour have been prohibited and the constitution by

8 The Indian Constitution, The Preamble.

9 Economic Survey 2012, Government of India Ministry of finance.

10 Conclusions generally drawn from the data presented in the Economic Survey of 2012, n.10.

way of articles 15 and 16 comes up with one of the most advanced affirmative action programmes to ameliorate the conditions of the exploited sections of the society. What, however, happened later is something which has not only distorted the whole process of affirmative action programme but even made it absolutely an obnoxious fact of India's socio-political process. In fact the political system treated this affirmative action programme as a form of political weapon to garner the political support and made it operable on caste and class lines. This helped the political masters to draw voters to the polling booth by manipulating their caste and class identities[11]. This also resulted in underlining the caste and class differences more, making them more conspicuous at the socio-political stage. This has resulted in the whole sale displacement of the objectives of the constitutional ideals and turning the wheel back in terms of abolishing caste/class differences. This constitutes another major challenge to the democratic process in this country.

Indian Constitution, to begin with, provided a fine balancing tool for larger national interest to be combined with local and regional interests. Division of powers with an extremely fine-tuned model for harmonizing these legislative and executive powers at the central and state levels was one of the most advanced mechanism that constitutional framers came up with. Systemic name given to it was 'federalism'. And for a very long time it worked perfectly well. We had troubles in central state relations right since 1950s through 1970s and 1980s to this day, however, the better sense prevailed and judiciary too contributed its bit by way of judgements like, *State of West Bengal v. Union of India*[12] in 1960s to *Rajasthan v. Union of India*[13] and S.R. Bommai[14] in 1980s and 1990s. Inclusion of 73rd and 74th Constitutional amendments provided another dimension to the constitutional process in this country by way of providing a wonderful mechanism to ensure the local contribution and popular tool of local participation in the decision making process. However the way devolution of financial powers to the local levels have been denied and the autonomy of decision making process compromised, has turned these bodies into showpieces of local self governance to which elections happen periodically, the structures are used for political mobilization of the people but little use is made of these structures for developmental purposes. A very strange situation has been created where governmental agencies who have financial powers but have no structures to use these resources for welfare administration of the system, on the other hand there are local self governance structures but no financial means to sustain them. The distribution of financial resources is already skewed in favour of the center and the states keep on making all hue and cries about it. Worst thing is that lot of politics is played in the name of giving aid to this or that state in terms of economic packages.[15] In fact the political alliances in this coalition era do claim their share in the pie in lieu of their support to this or that government. This amounts to a crass misuse of federal process and demeans the whole constitutional mechanism so painstakingly designed by the framers. Developing a more responsible and balanced Federal System, devolving powers to the lowest level of governance process whereby the least privileged individual in the whole chain has an opportunity to have his say, would constitute another major challenge to India's democratic order.

---

11 Rajni Kothari, *Caste and Class in Indian Politics*, Asia Publishing House, Bombay, 1967.

12 AIR 1963 SC 1241.

13 AIR 1977 SC1361.

14 *S.R. Bommai v. Union of India*, AIR 1994 SC 1918.

15 Latest example could be the politics of claiming special status category to obtain more aid from the centre. Economic Times, New Delhi Edition, June 10, 2013.

Modern political thought makes a distinction between constitution and constitutionalism. A country may have a constitution but not necessarily constitutionalism and also vice versa. Pakistan and UK, one having Constitution but no constitutionalism, the other having constitutionalism and no constitution. Constitutionalism connotes a limited Government and as such may be described as the balancing force of constitutional functionaries, it recognizes the need of the government but insists on the limitations being placed upon governmental powers. It envisages checks and balances and putting the powers of the legislature and the executive under some restraint and not making uncontrolled and arbitrary decisions. An Indian parallel to what we call 'constitutionalism' can be found in the expression 'Maryada', it is difficult to define 'Maryada', but for an Indian mind who is exposed to the fabled stories of 'Maryada Purushottam Ram', the concept is not difficult to understand. With every element of power, there comes a certain responsibility and it is balancing of this duo that amounts to maintaining the 'Maryada' of the system. Constitutionalism is no different from this.

Constitution springs from a belief in limited government and may be defined as "a written organic instrument, under which governmental powers are both conferred and circumscribed." Constitutionalism is descriptive of a complicated concept, deeply imbedded in historical experience, which subjects the officials who exercise governmental powers to the limitations of a higher law. Constitutionalism proclaims the desirability of the rule of law as opposed to rule by the arbitrary judgment or mere fiat of public officials. Throughout the literature dealing with modern public law and the foundations of statecraft the central element of the concept of constitutionalism is that in political society government officials are not free to do anything they please in any manner they choose; they are bound to observe both the limitations on power and the procedures which are set out in the supreme, constitutional law of the community. It may therefore be said that the touchstone of constitutionalism is the concept of limited government under a higher law.

If we talk in terms of constitutionalism from Indian perspective, one may notice a very queer phenomenon. Basically a transplant, the constitutional system has worked perfectly well in independent India : what could have been the reason of its functionality? While similar systems all over Asia and Africa have failed consistently, including in our own neighbourhood, which until yesterday was part of this country itself, what makes Indian system to click? It may be a matter of intense research, but my preliminary understanding is that in broad terms it is not only the characters of the transplant which are relevant in terms of the functionality of a constitutional system but also the terrain in which it has been planted. Indian terrain in which this system has been transplanted provides such a fertile, flexible and adaptable ambience that any kind of a transplant gets functional, though sometime in a very typical, chaotic, Indian way. What gives order to this chaos is the spirit behind the material structures of governance process and that has a very typical Indian colour, and varieties of psychological patterns go into the making of this order. Can we think in terms of operating these structures of governance process with a sense of 'maryada', with a sense of responsibility and accountability? That, to my understanding poses another major challenge to Indian democratic system.

The way law and state have been designed and organized during last two hundred odd years does give an indication that law is meant to be used as a tool of social transformation. The law in the broad sense and the whole legal system with its institutions, rules, procedures, remedies, is society's attempt through state to control this change process and give it a desired direction. This logic puts legal institutions

and the state at the core of all social discipline.[16] In theory the sovereign power, the ultimate, legal authority in a polity can legislate on any matter and can exercise control over any change process within the state.[17] Indeed in a highly centralized political system, with advanced technology and communication apparatus, it is taken for granted that legal innovation can effect social change. Roscoe Pound perceived the law as a tool for social engineering. Underlying this view is the assumption that social processes are susceptible to conscious human control and the instrument by means of which this control is to be achieved is law.

At the time of independence, when the fledgling democratic system faced variety of bottlenecks in terms of governance process, modern law, which has come to be recognized as a technical instrument of rational governance, freed from its traditional roots in culture and communal values and moral contents was considered the only viable option for it served a modern urge to remake the world grounded in the discovery of that world's contingent and changeable character. This law appeared morally and intellectually autonomous both in the sense of its distinctiveness as a governmental tool and its superiority over and independence from other competing normative systems. It also seemed comprehensive as it could be used to cover all contingencies and provide man made solutions to all problems of order; unified and systematic as a body of doctrines linked by its formal rational qualities; a structure of human reason, subduing chaos and contingency and principled as a consistent expression of essential conditions of human life.

This tradition and approach of modern law, continued to work during last 60 years of our republican existence and is used spontaneously in the face of all kinds of socio-economic pressures in the governance process. How does this affect the social organism in the long run is probably not the concern of either the law makers or the interpreters as such. Long term socio-economic perspective in any case has ceased to exist as a guiding force for Indian state system. There are umpteen number of examples where law making process or the law interpretation process seldom takes into account the long term sociological impact of a particular rule system. A familiar example can be the 2006 amendment in Hindu Succession Act, whereby the sister has now been entitled to be the coparcenary of the ancestral property. Karnataka and Maharashtra did try to circumscribe its deep impact on the social organism by providing 1992 as the cut of date, and those girls who are married before that date could not open the partition and family settlement. The matter is needed to be objectively analysed by the Supreme Court after taking into consideration variety of claims.

There can be number of such examples that can be quoted both from legislative process and from decision making process of the judicial system. Can there be some mechanism whereby a proper social impact assessment of such laws and decisions of the higher judiciary be made? That is another major challenge of Indian democratic order.

The modern State system, as it has been designed, consciously or unconsciously and the way it has evolved, is inclusive of many types of people, ideologies, religious traditions and practices, so much so that there can always be some unsatisfied groups of people within the state system, who may not agree with the ultimate goals of the system as they are agreed to be at a given point of time. These groups sometimes may give rise to disgruntled elements within the system leading to sometimes major socio-political upheavals in the form of terrorist activities. However, since the democratic

16 Roger Cotterrel's *Sociology of Law: An Introduction*, Buttorworths, 1992.

17 Sally Falk Moore, *Law as a Process*, Routeledge and Kegan Paul, London, 1993.

system, while trying to arrive at consensus and working on the basis of inclusivity principles would seek to achieve a balance of different types of peoples and ideologies or would in the long run seek to evolve an all inclusive culture[18], as Indian system has always done, there shall be issues on which urgent actions may be needed to meet the exigencies of particular situations. It is these needs of emergent situations for which, there are attempts in the system to arrive at some kind of a 'bi-partition' approach on core national issues. US system of 'bi-partition' politics is one example of political systems seeking to agree on core systemic issues on which, partition approach would be avoided by political parties or interest groups within the system. This is an area which requires lot of ground work in India's democratic functioning to evolve a healthy bi-partition system in the political process.

We have seen that democratic process is essentially an exercise to arrive at consensus by taking as many views as possible on board, with a view to decide the course of action as to what shall be good for the community as a whole. Given the variety of human propensities, such a system is bound to be imperfect at any given point of time as consensus with respect to every aspect of socio-economic or politico-legal process amongst rational human individuals would amount to contradiction in terms. The best thing, however, about democracy is that it provides a systemic frame, which apart from being resilient and accommodative is inclusive and conciliatory in nature. In fact these are the essential ingredients of any system that claims to be democratic in any sense of the term. What has been talked about above in terms of challenges before India's democratic system is not exhaustive, but illustrative in character and it is believed that despite the fact that democratic experiment is said to be a concept of western origin, the kind of an experiment that we have been witnessing in India, with so much of variety of people and so many faiths trying to pull together in the true democratic spirit, in unprecedented, unparalleled and unheard of in human history. And therefore despite all limitations the democratic experiment in India is likely to throw many surprises in these troubled times and is expected to provide ultimate benchmark in accommodating, adjusting and including the divergent ideas and ideals across the spectrum, in the true Rigvedic spirit of "Sangachhdhwam, samvad-dhwam, sam-vo-manansi Jantam". Let's move together, let's talk in the same voice and let's be empathetic about others opinions and beliefs. That would be ultimate triumph for India as a democratic order.

●

18 Composite culture indicated under Article 351 of the Indian Constitution.

Vol. 41, No. 2, Ban.L.J. (2012) 157-160

BOOK-REVIEW

TEXT BOOK ON JURISPRUDENCE by Dr. Veena Madhav Tonapi, Second Paper Back Edition (2013), Universal Law Publishing Company, New Delhi, pp. xxiv + 247 Rs. 240/-

Jurisprudence seeks to address the question 'What is law?' In human society perhaps it is such a perplexing question continuously asked and the thinkers have answered in many diverse ways[1]; nevertheless, the exercise to determine its province remained elusive despite jurisprudence being accepted as the first of the social sciences born. Jurisprudence is an intellectual investigation of law done in a systematic manner. Jurisprudence is, in fact, concerned with disquisitions about law.[2]

The book under review[3] comprises twenty five Chapters. On the basis of its contents and convenience, this book may be broadly divided into four Parts. In part one theory of law, in part two idea of justice and its administration, in part three sources of law and in part four legal concepts have been dealt with. Chapter 1 of the book under review is introductory and it has addressed to the meaning of jurisprudence, its nature and value. Beside the intrinsic advantage of jurisprudence, it may be useful in developing the legal acumen and skill in changing socio-political and economic milieu. The author has critically analysed the definition of 'law' given by eight important jurists - Holland, Aristotle, Salmond, Goodhart, Blackstone, Holmes, Kelsen and Roscoe Pound. The author could have taken care in discussing these jurists in a logical order. Under sub head VI of the Chapter only three schools of jurisprudence, namely, Historical, Analytical and Ethical- have been discussed and under sub head VII discussion on Teleological School, Scandinavian Realism and Ancient Hindu School also finds place. Though the author has taken up Classical School under Chapter 2 separately but it would have been better from the point of view of a new reader if this school would also have been mentioned in this part of the Introduction.

---

1 While idealist thinkers believe that jurisprudence is the science of just and unjust; it is the philosophical aspect about the knowledge of law; it is philosophy of positive law or formal science of positive law, say analytical positivist. The jurists of sociological school say jurisprudence is science of law or jurisprudence is lawyer's extroversion. For details See Julius stone, *Legal System and Lawyer's Reasonings*, (N.M. Tripathi Pvt. Ltd., 1964).

2 See, Dias, RWM, *Jurisprudence*, Aditya Books Pvt. Ltd., New Delhi, First Indian Reprint (1994), at 4; G.W. Paton, *A Textbook of Jurisprudence*, 4th ed., (Oxford, 2007); H.L.A. Hart, *The Concept of Law*, (Oxford, 1997); John Rawls, *A Theory of Justice*, (Belknap Press, 2005); Ronald Working, *Laws Empire*, (Belknap Press, 1988); Richard A. Posner, *The Problems of Jurisprudence*, (Harvard Univ. Press, 1993); Montesquieu, *The Sprit of the Laws* (Cambridge Univ. Press, 1989); A.K. Sarkar, *Summary of Salmand's Jurisprudence*, 3rd ed. (1973); H. Kelsen, *The Pure Theory of Law*, (The Law Books, Exchange Ltd., 2002).

3 Veena Madhav Tonapi, *Textbook on Jurisprudence*, Second Paper back Edition (2013).

Part one, i.e., theories of law is covered under four Chapters spread over in twenty nine pages.[4] Natural Law theory has been dealt under Chapter 2. In this Chapter the author has given a lucid picture of nature of law to a beginner in law. The author has, beside the history of natural law theories, very briefly discussed the important features of natural law thinking along with its merits and demerits. In this Chapter the author has also discussed the application of natural law theory in Indian context and referred to relevant cases decided by the courts. The value and utility of the book could be further enhanced by devoting some space for revival of natural law in 20th century, particularly, by mentioning the contribution of Rudolf Stammler and Joseph Kohlar.

Positivist theory of law is diametrically opposed to natural law school. Positivism seeks to separate law from morality. The command or imperative theory of law given by John Austin has been discussed in Chapter 3. While positivism tried to bring more certainty in ascertaining the province of jurisprudence, in fact, it invited more problems in understanding the true nature of law. The author has also effectively addressed the limitations of command theory of law.

The Realist movement is said to be 'a radical wing of the sociological school of law.'[5] Realism is anti thesis of idealism and the realists jurists desire to be realistic at all cost thus it may not be possible to classify them as a school. It is also known by many other names like Scientific Approach to Law, Fact Research, Objective Method and Skeptical Movement in Law. The realist movement has not eschewed sociology and psychology from law. It argues that law is made not by the political sovereign but by the courts. Chapter 4 of the book entitled 'Law as the Practice of the Court: Legal Realism' has very briefly discussed the important features of this movement without mentioning the names of important thinkers like Karl Llewellyn and Jerome Frank.

The contribution of Prof. H. L. A. Hart in understanding the nature of law has been dealt with in Chapter 5. Hart has viewed law as a system of rules. A legal system is union of Primary and Secondary rules. While Primary rules create obligation, secondary rules confer power. In pre - legal societies, primary rules exist but it has three defects of uncertainty, static and inefficiency and these three defects are remedied by supplementing the primary rules with secondary rules. The author has also given point wise criticism of Hart's theory of law.

The author has devoted one full Chapter 7 on International Law. This aspect could have been appropriately addressed in Chapter 3 of the book under review. Though the author has given some passing reference of Pure theory of Law by Hans Kelsen, Volkgeist Theory of Law by Savigny, Anthropological Approach to Law by Sir Henry Maine[6] and Social Engineering Theory of Roscoe Pound in Chapter 1 but by avoiding Chapter 8 on 'Law and Fact', Chapter 9 on 'Territorial Nature of Law' and Chapter 10 on 'Constitutional Law' more space for the said theories could have devoted in order to give a better opportunity to its readers in understanding the nature of law in its traditional sense. With a view to inform and update the conscientious readers the new advancement made in understanding the nature of law, for example, Critical Legal Studies, Postmodernism and Law, and Legal Feminism may possibly be incorporated in its next revised edition.

---

4 Chapters 2, 3, 4, and 5 pp. 16-44.

5 Bodenheimer, Edgar, *Jurisprudence The Philosophy and Method of the Law* (2004), Fourth Indian Reprint, at 124.

6 In the last Chapter of the book under review cursory reference of Sir Henry Maine has been made.

Part Two of the book is devoted to Function and Purpose of Law[7] and the Administration of Justice.[8] These two aspects have been covered in seventeen pages under Chapter 7 and 11 respectively. Law is not an end in itself; it is a means to an end. Law is an instrument to secure justice. Justice is a dynamic concept and changes from time to time. The author has divided justice in two categories, namely, Distributive and Corrective Justice. The author has sought to explain these two categories of justice under the Indian Constitutional scheme and with the help of cases decided by the courts in India. The author has not discussed the theories of justice. It would be better to devote some space for theories of justice as well in its next revised edition. The necessity and purpose of administration of justice has been discussed in Chapter 11 of the book.

Part three of the book comprising four Chapters deals with sources of law.[9] The author has given space of forty one pages to cover this topic. In Chapter 12 the legal and historical sources of law including the distinction between them has been discussed. The author has also pointed out the dilemma involved in distinguishing these two sources of law. Chapter 13 of the book is devoted to legislation as a source of law. Legislation is that source of law which consists in the declaration of legal rules by a competent authority. Legislation in its wider sense means all methods of law making; and in strict sense it means laying down of rules by the sovereign. To legislate means to make new law. However, law that has its source in legislation has been accurately termed as 'enacted law'.[10] The legislation may be either supreme or subordinate. The author has pointed out the advantages of legislation over precedent. The author has also given some of the important rules of interpretation of enacted law and at the end of this Chapter he has given a reference of few Indian cases where the courts have deviated from traditional British practice in interpreting the statute. However, in order to make the contents of the book more authentic, the citation of the case should not go unnoticed.[11]

Chapter 14 of the book deals with precedent as a source of law. Precedent is a statement of law and it has been the distinguishing characteristics of English law. The common law is, in fact, the product of decided cases. Though the common law in orthodox legal theory is regarded as customary law and the judicial decisions as evidence of custom, but judicial precedent in England is regarded as authority and a source of law. The author has very clearly discussed the issues pertaining to precedent, for example, the advantage of precedent, theories of precedent-Declaratory, Authoritative and Persuasive, the circumstances when precedent may be discarded, the circumstances that weakens the binding force of precedent, the hierarchy of courts in England and in India. While ratio decidendi is binding, obiter dicta is not binding. The author has also discussed two methods, namely, the reversal method of Prof. Wambaugh and material test method of Dr. Goodhart for determining the ratio decidendi.

Custom is to society what law is to the state.[12] The state gradually over shadowed the society. With the growth of legal system the importance of custom as a source of

7 Chapter 7.

8 Chapter 11.

9 Chapters 12, 13, 14 and 15.

10 See, Fitzerald, P. J., *Salmond on Jurisprudence*, Twelfth Edition (1966) N.M. Tripathi Private Ltd, Bombay, at 116.

11 At page 102 of the book case of *Kanu Sanyal v. District Magistrate* has been referred without citation.

12 *Id.*, at 191.

law has diminished. The custom as a source of law has lost its significance partly due to efficacy of legislation and partly due to precedent. Earlier a law that was not the product of legislation had its source in custom. In Chapter 15 of the book under review the author has discussed custom as the source of law. There were valid reasons for attributing to custom the force of law. First, custom is embodiment of those principles which are commended themselves to national conscience as principles of justice and public utility. Secondly, the existence of usage is the basis of a rational expectation of its continuance in future. The kinds of customs and essentials for a valid legal custom have been effectively addressed by the author. The difference between custom and prescription has also been highlighted by the author by suggesting that while custom operates as the source of law, prescription operates as a source of right.

Part four of the book deals with legal concepts like legal rights[13], ownership,[14] possession,[15] legal person[16], titles,[17] principles of Liability,[18] property[19], obligation[20] and procedure.[21] The author has given substantial space for covering these topics. Last Chapter book is on evolution of law.

The beauty of the book lies in the fact that the author has made an effort to contextualize, wherever possible, the subject in Indian matrix. The author has made a mammoth effort in covering all important topics within two hundred and forty seven pages. The glossary of important words at the end of the book and a table of cases has enhanced the utility of the book. The book is useful for the students at LL.B. level and also to the law practioner. The book is handy and the price is moderate.

Akhilendra Kumar Pandey*

13 Chapter 16.
14 Chapter 17.
15 Chapter 18.
16 Chapter 19.
17 Chapter 20.
18 Chapter 21.
19 Chapter 22.
20 Chapter 23.
21 Chapter 24.

* Associate Professor, Faculty of Law, Banaras Hindu University, Varanasi-221005 (INDIA)