LEGAL REGIME OF QUALITY CONTROL IN GOODS

Thesis submitted

by

V.S.SEBASTIAN

for

The Award of the Degree of

Doctor of Philosophy

in

the Faculty of Law

SCHOOL OF LEGAL STUDIES

COCHIN UNIVERSITY OF SCIENCE AND TECHNOLOGY

KOCHI 682 022

DECEMBER, 2002

DECLARATION

I declare that the thesis entitled **"Legal Regime of Quality Control in Goods"** is the record of bona fide research work carried out by me in the School of Legal Studies, Cochin University of Science and Technology. I further declare that this thesis has not previously formed the basis for the award of any degree, diploma, associateship or other similar title of recognition.

V.S.SEBASTIAN

Kochi - 682 022
December 31, 2002.

PREFACE

In the present day global market scenario, the word 'quality' has become the catchword for manufacturers and consumers alike. The modern market place has become highly competitive due to the onslaught of many producers and multinational corporations. Consumers find it extremely difficult to make a rational choice from among the large number of products available in the market. Consumers generally prefer to purchase those good that are best in quality and lesser in price. Quality thus becomes one of the most significant factors in customer decisions. Since consumers prefer quality products, manufacturers and sellers compete to produce quality goods to woo more customers. To the consumers 'quality goods' provide better performance, safety and satisfaction. For the manufacturers, better quality standards probably are the only factor that ensures their sustenance in the competitive market place. Quality in this sense arrests its significance to both consumers and manufacturers though differently.

It has long been said that market itself is the ideal regulator of all evils that may come up among traders. Free and fair competition among manufacturers in the market will adequately ensure a fair dealing to the consumers. However, these are pious hopes that markets anywhere in the world could not accomplish so far. Consumers are being sought to be lured by advertisements issued by manufacturers and sellers that are found often false and misleading. Untrue statements and claims about quality and performance of the products virtually deceive them. The plight of the consumers remains as an unheard cry in the wilderness. In this sorry state of

affairs, it is quite natural that the consumers look to the governments for a helping hand.

It is seen that the governmental endeavours to ensure quality in goods are diversified. Different tools are formulated and put to use, depending upon the requirements necessitated by the facts and circumstances. This thesis is an enquiry into these measures.

Chapter 1 is the introductory portion. The concept of quality, its relevance to consumers and the role of quality in the present day market are briefly examined in this Chapter. Quality control at times occurs as an outcome of the voluntary efforts from the part of certain manufacturers and sellers. These voluntary measures may arise as a part of the organizations' social commitment or due to market compulsions. In either case, consumers are benefited out of that. Voluntary measures adopted in this way in fact takes the form of self-discipline. Trade associations as a class can also encourage their members to pursue the code prescriptions formulated by it that contain many terms concerning adoption and improvement quality. Consumers by proper inspections made before and at the time of purchase can avoid goods of substandard quality. Consumers' preference for goods of better quality standards and voluntary codes adopted by traders together operate as self–regulatory schemes for quality control. Self-regulation as a method of quality control is examined in Chapter 2.

Even though the principles of liberalization and privatization that has taken place in the new economic policies of the governments, the significance of diverse

administrative measures cannot be ruled out in the area of consumer protection. The poor and illiterate consumers look to the governments for mitigating their grievances that are many. Licensing of trade activities, together with powers of inspection, search and seizure are very powerful tools in bringing in fair business standards in the market place. Administrative measures adopted as a means to control quality standards are analysed in Chapter 3.

Adoption and implementation of quality standards generally fall within the voluntary domain of the business houses. Even though the adoption of standards fixed by independent agencies are of considerable advantage to consumers, since its application remains within the violation of traders, quality standards in goods largely remains a dream. However, through the diverse activities that these agencies adopt, it is possible to inspire the businessmen to implement quality control measures that ensure enough standards for their products. An examination of the working of the agencies entrusted with the job of standard fixation and their impact on the improvement of quality standards are made in Chapter 4.

One of the most important enactments that have rendered substantial assistance to the buyers in ordinary sales transactions is the Sale of Goods Act, 1930. This Act has implied many terms into the sales contract, all meant to protect the buyers. An enquiry into these legal implications has been made in Chapter 5 with a view to assess its ability to ensure quality of the goods that the consumers purchase.

When quality standards are laid down by statutes, its non-compliance is generally dealt with under the criminal law and the civil law. While the criminal sanctions impose punishments on violators, civil law compensates the aggrieved for the loss or damage suffered due to the use of the substandard product. The impacts of the criminal and civil sanctions on improvement of quality are discussed in Chapter 6 and 7. The last chapter summarises the findings of the study and contains suggestions to improve the situation.

I have been helped by many in the preparation of this thesis. My own teachers, who later accepted me as their colleague, come to my mind first. I would like to mention the names of at least three of them viz. Prof. (Dr.) P. Leelakrishnan, Prof. (Dr.) N.S.Chandrasekharan and Prof. (Dr.) K.N.Chandrasekharan Pillai. They have inspired and encouraged me by instilling in my mind a sense of courage and confidence. I would also like to record by thanks to all colleagues in the Law School. Special mention must be made about my senior colleague and friend Dr.A.M.Varkey, Reader. He was kind enough to take up my job of taking classes while I was on leave on many occasions. He has taken much pain in getting the thesis corrected and also providing me with very valuable suggestions. Dr. D. Rajeev, Director and Dr. G. Sadasivan Nair, Professor, have been helping me always by their constant enquiries about the thesis. I am greatly indebted to them for their friendly cautions and persuasions.

I have been greatly benefited by the facilities made available to me at the Consumer Education and Research Center, Ahamedabad. Prof. Manubhai Shah, a great friend of our Law School and Managing Trustee of CERC was kind enough to

extend permission to use its Library. I also remember with thanks the immense help I received from the CERC Library staff especially the Librarian Mr. Mehta.

All the staff members in our Law School Library have been helping me in one way or the other. They have opened their files and hearts on my behalf. I am extremely thankful to them. Our Law School Office staff was rendering me all help that I needed, considering me as a member of the family.

Many are the students who have extended their help to me. Some of them helped me by leaving me alone. Some helped me willingly by going through the final draft. I remember with thanks the painful job of proof correction carried out by M/s. Thomas Roy Kadichini, R.K.Biju and Benoy Jose, Research Scholars of the Law School.

I also record my sincere appreciation to my wife and my sons Arun and Anoop in providing me a huzzle free environment at home that helped me significantly to finish the thesis.

Last but not the least, I record my appreciation to the commendable job taken up by Mr. G. Mohanan, Section Officer of the Law School and Mr. Sibiraj in getting the thesis neatly typed, formatted and printed.

They all made the work possible.

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Chapter 1

INTRODUCTION

In a liberal economy, guided by the principles of competition, it is possible to question the necessity of a legal regime to control quality. It may be argued that the market forces by themselves will be able to ensure quality and fairness in consumer affairs. Therefore, no external controls are required. The consumer who happens to be the victim of a bad bargain would certainly avoid a second purchase from the same producer. He may opt to go for another producer who produces superior quality goods. Consumer dissatisfaction reflected in this way would throw the manufacturer of low quality goods out from the market. Only producers of quality goods would develop and prosper. In this way it is arguable that quality control does not require legislative, administrative or executive interference. Laws are required only to ensure fair competition in the market.

Quality control through market mechanisms may work well in an ideal market situation where manufacturers and sellers compete fairly. But such ideal situations never come up and subsist for long in any economy. Hence legal interference becomes necessary. The notion of consumer's control of quality by his preference for standard goods also may not work in all instances. For example, poor quality of the product may lead to injury to consumer. It may cause severe harm to the society at large. Here, if quality or safety requirements are left exclusively to the market forces to determine, society will have to suffer. Since quality and safety requirements are so interlinked, unsafe products on many occasions are likely to cause threat not only to the purchaser of the product but also to the general public. Quality control in this

sense is not only a concern for the consumer, but also to the public at large. In instances where irreversible injury or damage is likely to occur to the citizenry, it becomes the duty of the state to come to the rescue of its subjects.

The effort made in this study is to have a humble but juristic travel into the various legal mechanisms that are generally switched on to ensure quality of the goods. How far these measures reach the target groups? To what extend the present legal regime is capable of meeting the challenges posed by economic liberalisation? Does the law require any change and if necessary in what manner? These are some of the poignant questions that warrant detailed enquiry.

Relevance of Quality Control in Protecting Consumers.

Manufacturers often misrepresent the quality, price, and measure of the goods and services they provide. They issue false and misleading advertisements to lure the consuming public. A good number of them indulge in unethical trade practices. Consumers are to be protected from these unscrupulous traders and manufacturers.

The old concept of '*consensus ad idem*'[1] finds no place in modern contracts. Manufacturers and sellers generally prescribe the terms of their contracts in advance. These 'standard form' contracts, besides being a tool for commercial convenience, have turned out to be an instrument of consumer exploitation. Businessmen usually insert in it as many provisions they can which are favourable to them. Besides, these contracts would generally include provisions limiting or excluding their liability to the

[1] The term means " meeting of minds". The medieval notion was that every contract is the result of a common agreement between the parties. Therefore, it is none of the business of the government or the judiciary to dismantle what the parties have agreed upon while they entered in to the contract. For a detailed discussion on this concept, see P.S. Atiyah, *An Introduction to the Law of Contract,* Clarendon Press, Oxford (1989).

consumer for obstreperous articles. The consumer is unable to make an amendment to the terms of the contract since in most of the situations he is placed in a position to accept what is offered in toto or to go without it.[2] Since the consumer cannot do away with such essential goods and services, he has to accept it on terms offered to him. This prejudicial situation that subsists in the market necessarily calls for adequate legal control.

Defect in goods also causes loss or damage to the consumer. The early rule insisted on was *caveat emptor*[3]. In the present day, commodities in the market consist of very complicated products. The *caveat emptor* rule designed in primitive agricultural society is outdated and unfriendly to the modern consumer. The principles of negligence under tort law or the principles of freedom of contract, render little help to the consumer. The manufacturers and sellers always dominate the market. Disunity and ignorance among the vast majority of consumers paved the way for their economic exploitation in terms of quality and price. Assurance to quality ensures value for the money spend by consumers. Qualitatively degraded products in the market put the consumers in an economically disadvantageous position. In this sorry state of affairs, the consumers need the support of the state to ensure their economic well-being and fair deal in the market.

Products primarily used as food and drugs may cause severe health hazards unless they are safe. Quality assurance is essential here to prevent injury to

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[2] This is true with regard to all essential goods and services, offered either through a monopolistic public corporation or a powerful private company.

[3] This maxim means, "let the buyer beware". The buyer as per this doctrine is supposed to know whatever information he need about the goods and the seller is not responsible for the defects in goods.

consumers. Mandatory quality standards may become essential. It may be made possible only through sovereign interference.

If the market is to function in an efficient manner, consumers need to be supplied with adequate information about the products and services available from competing traders. Possession of this information enables the consumer to make a prudent purchasing decision. If the consumer is adequately informed, he can indicate his preferences by himself. Enthusiasm among traders to satisfy the consumer preferences will lead to competition among them. However, if the necessary information about price and quality is not made available, the extent of competition created through the consumer preference mechanism will be marginal. The level of information therefore is to be adequate.

In England the Monoly Committee[4]examined these matters in detail and made the following proposals for consumer protection.

(i) Arrangements are to be made to give the consumer a positive assurance that the goods on offer are safe and of sound quality;

(ii) Provisions are to be made for information annexed to the goods, which will assist the consumer to judge for himself whether or not they will satisfy his particular requirement[5];

(iii) The assessment of the merits of the goods on offer by independent agencies;

(iv) The availability of adequate means whereby the aggrieved shopper may obtain fair redressal of his grievances;

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[4] The Committee on Consumer Protection (Comnd.1781) 1962 (U.K.).
[5] This is otherwise known as 'information labeling'.

(v) The restraint of mis-description of the significant characteristics of the goods on offer and

(vi) The restraint of objectionable sales promotion methods, whether in the form of advertisements or otherwise, which are calculated to divert the shopper from a proper judgement of his best interests.[6]

This philosophy is consistent with the legitimate needs of consumers.

The modern consumer law is an attempt to rectify the inequality of bargaining power, which exists between the individual consumer and the powerful suppliers of goods or services. Quality control law is one major aspect of this branch. The law of consumer protection is in substance the use of legal machinery to allocate consumer losses between the purchaser or user of goods and services, and the vendor manufacturer or others concerned with the production and distribution of goods and services.

The Target of Protection

It is appropriate here to consider whom the law purports to protect. The immediate reply is 'consumer'. Literally, the term 'consumer' means one who purchases goods or services [7]. In this sense any user of goods or services supplied by another would be a consumer. The term 'consumer' understood in this wider sense is 'everybody all the time'. This encompasses even the manufacturer or producer who consumes his own goods or goods manufactured by others. Ralph Nader, the American doyen of consumerism, has expressed the view that the term 'consumer'

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[6] *Supra* n. 4 para.48, as quoted in Brian W. Harvey, *The Law of Consumer Protection and Fair Trading*, Butterworths, London (1978), p. 20.

[7] Jess Stein (Ed.), *The Random House Dictionary of the English Language,* Random House, New York (1966), p. 315.

should be equated with the word 'citizen' and the consumer protection law should be regarded as an aspect of the protection of civil rights of citizenry.[8]

However, under (Indian) Consumer Protection Act 1986, the term 'consumer' has a narrower meaning. This is based on the capacity in which the consumer and the supplier of goods or services have acted. This definition is in tune with the law and practice followed in western countries[9]. In the limited sense, 'consumer' means one who acquires goods or services for private use or consumption[10]and not for business purposes. The picture provided by modern consumer protection legislation is of an individual dealing with a commercial enterprise, public or private. A consumer transaction is thus a purchase, lease or borrowing by an individual for primarily personal, family or household purpose[11]. Generally, a consumer is regarded as a non-business purchaser of goods or services.

A consumer transaction in simple terms involves at least three elements. (1) The consumer must be an individual who does not act in a business capacity. (2) The supplier must be acting in a business capacity. (3) The goods or services supplied must be intended for private use and not for commercial purpose.[12] While western

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[8] David Oughton and John Lowry, *Text Book on Consumer Law*, Blackstone Press Ltd., London (1997), p.1.

[9] See for example the following provisions contained in the British enactments viz., the Unfair Contract Terms Act,1977, s. 25 (1); the Sale of Goods Act, 1979, s. 61 (1); the Consumer Arbitration Agreements Act,1988,s. 3 (1); the Consumer Transactions (Restriction on Statements) Order,1976, clause 2(1); the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations, 1987, regulation 2 (c) and the Unfair Terms in Consumer Contract Regulations, 1994, regulation 2 (1).

[10] See the *Final Report of the Monoly Committee on Consumer Protection* (Comnd.1781), 1962, para.2. as quoted in J.A. Jolowicz, "The Protection of the Consumer and the Purchaser of the Goods under the English Law", 32 M.L.R. (1969), p.1.

[11] James R., McCall, *Consumer Protection: Cases, Notes and Materials*, West Publishing Co., Minnesota (1977), p.2.

[12] See *supra* n. 8 at p.2. A non-business purchase by an individual in all circumstances may not make him a consumer. For example a person who purchases at an auction sale is not regarded as a consumer under the Unfair Contract Terms Act, 1977 (U.K.), s.12 (2).

enactments totally exclude[13] purchases by individual for commercial or business purposes from the definition of consumer, the Indian law provides for an exception[14]. Under Indian Law commercial purpose does not include use by a consumer of goods exclusively for the purpose of earning a livelihood by means self employment.[15]. The Consumer Protection Act, 1986 defines 'consumer' as any person who buys any goods or hires any service for consideration[16]. Any user of such goods or the beneficiary of the services will also be treated as consumer if such use or availing of service is made with the approval of the first person.[17]

But a person who obtains such goods for resale or for any commercial purpose will not be treated as consumer.[18] However, a person who purchases goods to be used by him exclusively for the purpose of earning his livelihood by means of self-employment will not be considered as commercial purchaser.[19] Even if the goods are sold for commercial purpose, the purchaser will certainly be a consumer under the Act in respect of any services rendered or promised to be performed by the seller for the proper functioning of the goods during the period of warranty.[20]

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[13] The U.K. Consumer Protection Act, 1987, s. 20 (6). Also see, the U.K. Consumer Arbitration Agreements Act, 1988, s. 3 and the Consumer Transactions Restrictions on Statements Order, 1976 clause 2 (U.K.).

[14] The Consumer Protection Act, 1986, s.2 (1)(d).

[15] *Ibid.*

[16] *Id.*, s.2 (1) (d). The consideration might have been paid or promised to be paid or partly paid and partly promised.

[17] *Ibid.*

[18] *Ibid.*

[19] *Id.*, explanation to the definition. This explanation has been inserted by the Consumer Protection (Amendment) Act, 1993. Even before this legislative action, the National Commission had taken a similar view. See for example, *Secretary, Consumer Guidance and Research Society of India* v. *B.P.L India Ltd.*, (1992) 1 C.P.J.140 (N.C.) and *Jyothi Marketing and Projects Ltd.* v. *M. Pandian,* (1992) 1 C.P.J.337 (N.C.).

[20] See *Amtrex Ambience Ltd,* v. *Alpha Radios,* (1996) 1 C.P.J. 324 (N.C.).

Judicial Interpretation of the Term 'Consumer'

The definition of the term `consumer' under the Consumer Protection Act, 1986 had been interpreted by the Supreme Court on various occasions. In *Lucknow Development Authority* v. *M.K. Gupta*,[21] the Supreme Court observed that the term 'consumer' under the Act has two parts. The first part covers purchaser of goods and the other hirer or beneficiary of services. This part contains (i) *the substantive* part which defines the consumer to mean buyer of any goods for a consideration; (ii) *the inclusive part* which widens the scope of the definition to include users of such goods with the approval of the buyer and (iii) *the exclusionary part;* which exclude from the definition those persons who obtain goods for `resale' or for any `commercial purpose'. Consideration for the purchase of goods could be executed, executory or past.

The second part of the definition relates to services. This also contain (a) *the substantive part*, which defines the consumer to mean hirer of any service for consideration and (b) *the inclusive part* which expands the reach of the definition to include in it the beneficiary of such service who uses such service with the approval of such hirer.

The words in the explanation are simple and precise. Purchase of goods will not be for a commercial purpose if, (i) the purchased goods are used by the purchaser himself exclusively, (ii) such use is by means of self-employment and (iii) it is for earning his livelihood.

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[21] (1993) 3 C.P.J. 7. (S.C.).

Thus the judicial construction of the term `consumer' has shown the real metal, nature, scope and extent of the terminology. According to the court, the broad statement of the term 'consumer' in the Act is purposive to include anyone who consumes goods or services at the end of the chain of production. The comprehensive definition aims at covering everyman who pays money as the price or cost of goods and services.[22]

However, only a buyer under a concluded sale can be a consumer of goods. In *M.N.Narsimha Reddy v. Managing Director, Maruti Udyog Limited,*[23] the complainant had booked a car by depositing Rs.10, 000/-. The defendant subsequently varied the procedure for booking, which was challenged. The National Consumer Disputes Redressal Commission dismissed the petition on the ground that since sale was not complete, there cannot be an action for defect in goods. The Commission said:

> "It is thus seen that the scheme of the Act is that a transaction of sale and purchase of goods should have already taken place and the complaint must relate either to any defect from which the goods supplied to the complainant suffer or the charging of excessive price by the trader for the goods supplied"[24].

Similarly, in *Swaraj Mazda Ltd. v. Mohan Kumar Bhandari*[25] the complainant had deposited a sum of money for the purchase of a mini-bus. But it was not made available. Eventually the uncashed demand draft was returned to the complainant. When the complainant approached the National Commission, it held that 'there had

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[22] *Morgan Stanley Mutual Fund* v. *Kartick Das,* (1994) 2 C.P.J. 7 (S.C.).
[23] (1991) 2 C.P.J. 346 (N.C.).
[24] *Id.* at p. 349.
[25] (1993) 1 C.P.J. 54 (N.C.)

been no sale of any goods nor had the opposite parties undertaken to render any service for hire'. Since he had neither purchased any goods nor hired any service for consideration, the complainant was held not to be a consumer.

The Supreme Court in *Morgan Stanley* has affirmed the observations of the National Commission[26]. The Court said:

> "In order to satisfy the requirement of above definition of consumer, it is clear that there must be a transaction of buying goods for consideration under clause 2(1) (d) (i) of the said Act. The definition contemplates the pre-existence of a completed transaction of sale and purchase. If regard is had to the definition complaint under the Act, it will be clear that no prospective investor could fall under the Act".[27]

Therefore, to be a consumer under the Act, the transaction of sale and purchase of goods should have been completed. So, unless the property in the goods had been transferred, the purchaser will not become a 'consumer'.

The 1993 amendment[28] permits the lodging of a complaint even on allegations that the goods *agreed to be bought* by a person suffer from one or more defects. However, a corresponding amendment has not been made to the definition of the term 'consumer'.[29] So a person who agrees to buy goods does not become a 'consumer', in spite of the amended definition of `complainant'[30].

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[26] See *supra* n.22.

[27] *Id.*at p.16. This decision was subsequently followed by the National Commission in *Tata Timken Ltd. v. Consumer Protection Council*, (1995) 2 C.P.J. 164 (N.C)

[28] See the Consumer Protection Act 1986, s. 2(i) C (ii)

[29] *Id.*, s. 2 (1)(d)(i).

[30] S.2 (1) (c) of the Consumer Protection Act,1986 as amended in 1993 ,reads as follows:
"complaint" means any allegation in writing made by the complainant that –
... (ii) that the goods bought by him or *agreed to be bought by him* suffer from one or more defects;
(iii) that the services hired or availed or *agreed to be hired or availed of by him* suffer from any deficiency in any respect;... (Italics supplied).

However, in cases concerning deficiency in services, it has been held that the contract in its entirety need not be completed so as to make the receiver of services a consumer[31]. The extent to which people can benefit out of these findings can be a subject of debate.

Even though, the Consumer Protection Act, 1986 defines 'consumer' in a limited sense, the general connotation of the term is wide enough to encompass the whole consumer society. The limited meaning is used only to determine the jurisdiction of consumer forae. For the purpose of quality control, consumer is to be understood in its wider sense. Quality is essentially a concern for the entire community. Hence in this study the term is used to include the whole society.

Quality Control: Meaning and Definition.

The word "quality" has both in philosophy and in ordinary speech, a long history. It appeared in English as a translation of the Latin "*qualitas*" a word coined by Cicero.[32] The ordinary use of the word may be broadly distinguished under two headings. First, the word is sometimes employed as a synonym of 'property' or 'characteristic'. In this sense, it would cover almost anything that might be ascribed to an object for the purpose of describing it; its colour, shape, dimensions and so on. In the same sense, honesty and prudence may be spoken as 'qualities of character'. Secondly, the word is used, perhaps more commonly, in contexts where the merit, grade or value is in question. For example, when two kinds of cloth are said to "differ in quality", it would usually be meant not merely that they differ, but that one kind is better (by appropriate standards) than the other. It is usually in this way that the word

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[31] *Mohinder Gas Enterprises* v. *Jagdish Poswal,* (1993) C.PJ 90 (N.C.)
[32] *The Encyclopedia Britannica*, Encyclopedia Britanica, London, Vol.18, p.810.

'quality' is to be understood. The word is also often employed by itself in the sense of 'good quality'[33].

When one purchases a product or avails of a service, he expects it to serve a purpose. The product may be a consumable or durable item. Likewise, the service may be any of the numerous services one needs in society. When the product or service meets his needs and expectations, the consumer is satisfied. Then it is considered as a 'quality' product or service. Apart from meeting the need, customer satisfaction also depends on two more factors, 'cost' and 'timeliness'. Thus a product or service available to a customer satisfying the customers' needs and expectations at the right price and right time is deemed by him as of right quality. Obviously, quality is what the customer discerns and not necessarily what the supplier claims. The customer is the arbiter of quality. Thus the essence of quality is customer satisfaction.[34]

Quality is often treated as 'expensive' or a 'luxury'. This is not true. If properly understood and practiced, quality is inexpensive and necessary to meet the needs and desires of consumers. It is quality, which makes an organisation succeed in the fulfillment of its mission, profitability, growth, image and leadership. Quality is no more an 'option' but an imperative in a free market economy[35].

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[33] *Ibid.*

[34] K.V.Lakshmi Narayana, "Basics of Quality and Total Quality Management," *The Hindu,* Trivandrum, 5 June 1996, p.27.

[35] *Ibid.* Also see, Janak Mehta, 'Myths Discourage Adoption of TQM', *The Hindu*, Trivandrum, 4 January 1997, p.18.

For the purpose of legal control, quality can be defined as the composite of those characteristics that differentiate individual units of a product and have significance in determining the acceptability of that unit by the buyer.[36]In relation to food, quality embraces intrinsic composition, nutritive value and even aesthetic considerations. In short, quality means all those attributes that the buyer considers to be present in the goods he purchases.

Since the quality of an article comprises of many things, its elements cannot be few. Bertrand L. Hansen[37] opines that at least in three areas of operation of a business, quality control is important. They are (1) quality of design, (2) quality of conformance to design and (3) quality of performance.

Quality of design of a product is concerned with the stringency of specifications for manufacturing the product. Generally, the greater the requirement for strength, life, function and interchangeability of a manufactured item, the better the quality of design. Quality control as it has been known and used in the past has been closely associated with conformance to quality.[38]

When the product is put to work, how it performs largely depends upon both the quality of design and quality of conformance. It can be the best design possible, but poor conformance control can cause poor performance. Conversely, the best conformance control in the world cannot make a product function properly, if the design is not right.

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[36] See, Central Institute of Fisheries Technology, *Quality Control in Fish Processing* (1979).
[37] Bertrand L.Hansen, *Quality Control: Theory and Applications* (1966), p.2.
[38] *Ibid.*

The term quality is defined in the Sale of Goods Act, 1930. Under this Act, quality of goods includes their state or condition.[39] The (British) Sale of Goods Act, 1979, considers the following aspects also as part of the quality of goods.

(a) Fitness for all purposes for which goods of the kind in question are commonly supplied.

(b) Appearance and finish.

(c) Freedom from minor defects.

(d) Safety; and

(e) Durability.[40]

In the case of agricultural produce, quality includes the state and condition of those articles[41].

Based on the origin, quality can be broadly grouped as intrinsic and extrinsic. Intrinsic quality is inherent in the material or species in which it belongs. Extrinsic quality is the sum total of the effects of all the treatments the material receive till they reach the consumer. It is obvious that ordinarily intrinsic qualities are beyond direct control,[42] while extrinsic qualities can be effectively controlled. Among the extrinsic quality factors, degree of freshness, conformity to the desired mode of presentation, weight, size, ingredients and packing methods are important.

Historical Evolution of Quality Control Laws

Quality control is as old as the industrial civilization itself. From the time man began to manufacture, there has been an interest in the quality of output. As far back

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[39] The Sale of Goods Act, 1930, s.2 (12).
[40] The Sale of Goods Act, 1979, s.14 (2B).
[41] The Agricultural Produce (Grading and Marking) Act, 1937, s. 2 (f).
[42] The developments in the field of biotechnology can be made use of in improving the intrinsic qualities of living and non-living organisms.

as the middle ages, the medieval guilds insisted on a long period of training for apprentices and required that those who seek to become master craftsmen must offer evidence of their quality[43]. Such rules were in fact intended for the maintenance of quality.

Ancient Indian history on consumer protection and quality control dates back to the Vedic age[44] (5000 B.C.). Adulteration of articles of food, charging of excessive prices, tampering with weights and measures and the selling of articles forbidden by statutory prescriptions were considered criminal acts in the ancient texts of *Smritis*[45] and Kautilya's *Arthasastra.* Manu and Yajanavalkya in their *smritis* have recommended a punishment of maiming for dealing in impure gold and unclean meat[46]. The meat sellers were required to follow certain rules ensuring the purity and freshness of the meat they sell. They were to sell the flesh of freshly killed animals and rotten flesh and flesh of dead animals was not to be sold. If the meat supplied is found lesser in weight, the punishment prescribed was eight times the loss suffered by the customer[47]. Punishments are also seen prescribed for adulteration of different commodities in *Arthasastra* and the *Smritis.*[48] *Manusmriti* has stated that all weights and measures used be duly marked by the King and be re-examined in every six months. *Arthasastra* has provided for appointment of superintendents of Weights and Measures with a view to minimize the likelihood of fraud being committed on

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[43] Acheson J Duncan, *Quality control and Industrial Statistics* (1967).

[44] Chakradhar Jha, *History and Sources of Law in Ancient India*, Ashish Publishing House, New Delhi (1987), pp. 115-116.

[45] Popular Smritis are: Manusmriti, Yajanavalkyasmriti, Naradasmriti and Brihaspzatismriti. See *Id.* at pp. 93-95.

[46] Rama Jois, *Seeds of Modern Public Law in Ancient Indian Jurisprudence,* Eastern Book Company, Lucknow (1990), pp. 95-96.

[47] K.M.Agrawal, *Kautilya on Crime and Punishment,* Shree Almora Book Depot, Almora (1990), p.160.

[48] *Id.* at p.150.

consumers.[49] The *Agni Purana* has laid down that the merchants dealing fraudulently with honest men either in respect of the quality or price of a commodity shall be punished and their goods shall be confiscated to the State[50].

During the British regime, governmental policies were attuned towards protecting and promoting the British commercial interests than advancing the welfare of the natives. However, some pieces of legislation, which protected the overall public interest though not necessarily the consumer interest, were in existence. Prominent among these were the Indian Penal Code 1860, the Sale of Goods Act, 1930, the Dangerous Drugs Act, 1930, the Drugs and Cosmetics Acts, 1940 and the Prevention of Food Adulteration Act, 1954.[51]

Throughout the eighteenth century, by consumer protection, it was meant (a) protection from excessive prices levied on commodities and (b) protection from short measurement. Bread, beer, meat and fuel were singled out from earliest times as being commodities that the crown, through the agency of justices or other local courts should regulate both as to quantity and quality. The Justices of Peace were therefore empowered to fix the weight and price of Bread and Bakers and had to mark their loaves with their size and quality.[52] Basically, this involved setting the price and

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[49] *Id.*, p.80.

[50] Sukla Das, *Crime and Punishment in Ancient India*, Abhinav Publications, New Delhi (1977), pp. 23-24.

[51] For an account of the history of consumer protection in India, See Gurjeet Singh, "Problem of Consumer Protection in India: A Historical Perspective, (1997) 2 C.P.J.1-20 (*Journal*).

[52] Brian W.Harvey, *The Law of Consumer Protection and Fair Trading*, Butterworths, London (1978), p.2.

ensuring that the vessels made of wood, earth, glass, horn or leather should be made and sized and stamped or marked[53].

The medieval court's contribution to the assessment of quality was made largely through the investigations of its officer designated as Ale Conner. The Ale Conners can be termed as the direct ancestors of the modern Weights and Measures Inspectors. But the job of the Ale Conner was far more interesting in one respect that he was under a duty to undertake spot checks of the quality of beer and baked food by tasting it. His duties were officially described in a contemporary record. He was to examine bread and beer kept for sale, ensure its weights and measures, and to make a return of persons who offend the standards prescribed by authority.[54]

By the very nature of the volume of procurement, the defence agencies of the government have always had a great influence on promulgation and use of quality control techniques both directly and indirectly. Defence insistence upon requisite quality paved the way for the development of quality control. Growth of quality control measures can be attributed directly to the changing attitudes of defence agencies. Later, emphasis shifted to the *promotion* of the use of quality control techniques by the supplier, accompanied by *assurance* methods used by the inspection agencies of defense departments. Even now, emphasis on *promotion* and *assurance* still holds good. To these has been added an emphasis on the quality of design and

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[53] A reference in this regard is seen in Shakespeare's drama '*Taming of the Shrew*'. In induction Scene II, the First servant says to Christopher Sly...

"And rail upon the hostess of the house,
And say you would present her at the Leet,
Because she bought stone jugs and *no sealed quarts*".

See. W.J.Craig (Ed.), *Shakespeare Complete Works* (1971), p.245.

[54] See *supra* n.21 at p.3.

function, which has resulted in a new term – reliability. Reliability is essentially the quality control of design, development and function.[55]

Consumer protection law is quite often considered as a recent phenomenon typical of the twentieth century. However, many of the present statutes which now emphasis consumer protection, had its origin in the distant past.

In the past, consumer contract was the result of a consensus between the parties. Much of the contract law was based on the freedom of the individual to enter into whatever contracts he likes. This was on the assumption that all contracting parties have roughly equal bargaining strength. Any interference on this freedom was looked down upon. The state and its instrumentalities were supposed to remain neutral as far as possible. This common law attitude worked well in a mixed economy in which transactions were left to market forces operating according to the laws of demand and supply. With reference to any article available in the market the buyer and seller had equal knowledge. It was assumed that the buyer would act rationally while taking a decision to purchase. The principle prevalent was *caveat emptor*[56] and the parties were not obliged to volunteer information about the quality of the goods. If these informations were intended to become part of the transaction, parties should specifically contract for that and pay accordingly. The principle of *caveat emptor* was consistent with the principles of freedom of contract and self-reliance. This approach may well have been justified at that time since few goods would have warranted common law protection.[57] The attitude of the judiciary and the

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[55] *Id.* at p.4.
[56] This maxim means "buyer beware".
[57] P.S.Atiyah, *The Rise and Fall of Freedom of Contract,* Clarendon Press, Oxford (1979), p.179.

legislature was to afford protection to the manufacturers and sellers since the national economy was mainly dependent on them.

Quality Control Under Common Law

In the past the legislature had shown very little concern in recognition and enforcement of the rights of the consumer. Law accorded equal treatment to all its subjects. This equal treatment of people from different income brackets had caused great injustice. This attitude failed to guarantee any effective consumer protection measure[58]. The judge, according to the traditional concept, was regarded as a neutral arbiter who did not take any interest in the outcome of the case but simply applied the law to the facts presented to him. He was not allowed to help one party, for instance a consumer, to state his case more favourably.

So, when the consumer was supplied with goods, which were subsequently discovered to be unsuitable for his intended purpose, or of defective in quality, the only remedy available to him was to sue for damages under the contract with the seller.

The *laissez-faire* economy recognised two concepts, *viz.* freedom of contract and *caveat emptor.* It was considered that the government had nothing to do with contracts. Its duty was confined to preservation of law and order, defending the country from its enemies and promoting trade. Industry was left free to look after its own interests. The reflection of this judicial philosophy can be observed in the words of Sir George Jessel, M.R. He said:

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[58] N.Reich & H.W.Micklitz, *Consumer Legislation in E.C.Countries – A Comparative Analysis* (1980), p.185.

> " If there is one thing more than another which public policy requires; it is that they of full age and competent understanding shall have the utmost liberty in contracting, and that their contracts, when entered into freely and voluntarily shall be held sacred and shall be enforced by the courts of justice".[59]

In spite of the fact that the common law recognized the principle of freedom of contract to its optimal level, the courts could cut open quite a large number of leeways into it. It was thorough these leeways that the common law courts of England administered justice to consumers. In many cases the courts made use of the defeasible concepts of undue influence, misrepresentation and fraud and also its power to interpret the terms of the contract to render justice to the consumers. An excellent summary of the ancient case law where the court was prepared to nullify a contract can be seen in the Court of Appeal decision rendered by Lord Denning M.R. in *Lloyds Bank* v. *Bundy*[60]. In the opinion of his Lordship there are at least five such circumstances. In the first instance is 'duress of goods'. One is in a weak bargaining position and is urgently in need of certain goods. If the other who is in a superior bargaining position collects more from the other, courts would permit the recovery of the excess[61]. In the second type of cases, a purchase is made from a poor and ignorant man at a gross undervalue by another who is stronger. Even in the absence of fraud or misrepresentation the courts would be willing to set aside the transaction[62]. This

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[59] *Printing and Numerical Registering Company v. Sampson,* (1875) L.R. 19 Eq. p.462.
[60] [1974] 3 All E.R. 757 (C.A.).
[61] For example, see *Astley* v. *Reynolds* (1731) and *Green* v. *Duckett* (1883) 11 Q.B.D. 275, as quoted in C.J.Miller & Brian W.Harvey, *Consumer and Trading Law Cases and Materials,* Butterworths, London (1985), p.266.
[62] For example, see *Evans* v. *Llewellin* (1987) as quoted in C.J. Miller *op.cit.*p.266. and *Fry* v. *Lane,* [1888] 40 Ch.D. 312.

category covered all cases where an unfair advantage has been gained by the use of power by a stronger party against the weaker[63].

The third situation is that of 'undue influence'. This itself is divided into two classes as stated by Cotton L.J. in *Allcard* v. *Skinner*[64].

(i) The stronger has been found to be guilty of fraud or wrongful act in express terms whereby he has gained some advantage from the weaker.

(ii) The stronger, through the relationship that existed between him and the weaker, gained some advantage. Often, the relationship may give raise a presumption of undue influence[65].

The fourth category identified was that of 'undue pressure'. It occurs where one party stipulates for an unfair advantage to which the other party has no option but to submit.[66] The last category might find expression in certain salvage agreements. In vessel distress instances, the rescuer is in a strong bargaining position. The parties cannot be said to be on equal terms. In such circumstances of manifest unfairness that are apparent on its face, the courts will disregard it[67].

All these instances rest on a single thread of 'inequality of bargaining power'. By virtue of this principle the Common law was giving relief to a contracting party who without independent advice entered into a contract on terms which were very unfair. The inference of unfairness could be established by evidence or through the facts and circumstances of each case. Through this tool of interpretation, it became

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[63] *The Halsbury's Laws of England,* (3rd Edn.) vol.17, p.682.
[64] (1887) 36 Ch.D.145 at p.171.
[65] For example, see *Tate* v. *Williamson,* (1866) 2 Ch. App.55 and *Tufton* v. *Spern* [1952] 2 T.L.R. 516, as quoted in *Miller &Harvey op. cit.* p. 266.
[66] For example, see *Williams* v. *Bayley,* (1866) L.R. 1 H.L.200; *Ormes* v. *Beadel,* (1860), as quoted in *supra* n. 60 and *D&C Builders* v. *Rus,* [1965] 3 All E.R.837 (C.A.).

possible for the English courts to render justice to the consuming mass who were often placed in a poor bargaining position. The twentieth century has witnessed increased intervention by both the judiciary and legislature on behalf of the consumer. This is due to the recognition of the fact that in may transactions there is a significant inequality of bargaining power between the buyer and the seller. It is accordingly felt as unrealistic to ascribe to the buyer a freedom of contract especially when there is little choice to him but to accept on those terms of the offer.

Early British Statutes on Quality Control

There is a widespread notion that legislative measures to protect consumers are of recent origin. It is true that the notion of consumer protection as understood today was scarcely prevalent in ancient times. However, a wide variety of statutory documents existed which were meant to regulate diverse market activities. Therefore, we notice the existence of statutes[68] to prevent adulteration of tea[69], to prevent the inclusion of burnt vegetable substances in coffee[70], adulteration of beer[71] and bread[72]. These enactments turned largely ineffective due to the lack of necessary scientific skills for detection of adulteration at that time. The situation remained the same till adequate knowledge of analytical chemistry and microscopic examination came in.

Use of customary weights and measures, all different from each other became an obstacle to fairness in commercial dealings. Legislative efforts to provide a simple

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[67] See for example, *Akerblom* v. *Price* (1881) 7 Q.B.D. 129

[68] See Bell and O'keefi, *Sale of Food and Drugs,* London (1968), pp.1-3 as quoted in P.S. Atiyah, *the Rise and Fall of Freedom of Contract,* Clarendon Press, Oxford (1979), p. 546.

[69] Statutes of 1730 and 1777 were passed to prevent adulteration of tea. *(Ibid.)*

[70] Statutes of 1718, 1724 and 1803 tried to stop adulteration in Coffee. *(Ibid.)*

[71] Statutes of 1761, 1816 and 1819 were passed to prevent adulteration of beer. *(Ibid.)*

[72] Statutes of 1758, 1822 and 1836 were passed to prevent use of alum in bread. *(Ibid.)*

and uniform set of weights and measures were evident from various enactments[73] made from 1795 onwards. The Act of 1795 had provided for the appointment of local Inspectors with power to enter into shops, examine weights and measures in use and to certify its accuracy.[74]

The Act of 1824 had tried to standardise measurements of length and volume as well as weights.[75] All contracts made otherwise than in the standard weights and measures were declared null and void[76]. Amendments that followed tightened up many of the requirements of previous Acts and insisted that commodities are to be sold only by weight.[77]

History of marking the quality and purity of gold and silver goes back even to the middle ages[78]. Between 1770 and 1870 several Acts were passed on this subject.[79]. The practice that existed in England regarding marking of purity of gold and silver had resulted in maintenance of a high degree of excellence for all British hallmarked wares, which in fact raised the reputation of British workmanship[80].

Enactments on similar lines can be found in the case of trade marks and trade names[81], prevention of fraud[82], fixation of maximum rate of interest[83], licensing of

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[73] Major enactments are the Acts of 1795, 1796, 1797, 1815, 1824, 1835, 1859 and 1867. See *supra* n.37.
[74] See *supra* n. 37 at p.547.
[75] *Id.* at p.548.
[76] *Ibid.*
[77] The Act of 1835. See *Ibid.*
[78] See *the Report of the Departmental Committee on Hallmarking* (1959), Cmnd.163, Part II.
[79] The Acts of 1772, 1784, 1788, 1790, 1798, 1807, 1819, 1824, 1844, 1854 and 1867 are all cited as examples. See *id.*, Appendix A.
[80] *Id.*, Appendix.B.
[81] See the Merchandise Marks Act, 1842.
[82] The Hop Trade Acts of 1800, 1808, 1814 and 1866. These Acts were intended to prevent fraud by mixing goods of different qualities together.
[83] For example, the Usury Acts of 1790, 1816 and 1818.

doctors[84] and so on. Developments that occurred later can be said to be extensions and modifications effected to suit to the needs of the changing society.

The terms implied by courts under common law were given recognition by statutes during the nineteenth century itself. While assessing the remedies of the disappointed buyer of goods, the Sale of Goods Act, 1893[85], allowed the implying of various conditions into the contract.[86] However, this Act also recognised the freedom of the contracting parties and permitted them to contract out[87] by express terms to that effect, the conditions and warranties implied by law. Legislative endeavors that began during 1960's were meant enactment of provisions to control the exclusion of the terms and conditions implied by law[88].

In consequence of the permissive provisions contained in the Sale of Goods Act, the manufacturers and sellers began to standardise their contractual terms. These standard form contracts though justified on the ground of business efficacy, in many cases contained provisions exempting their liability to the consumers. Judicial attempts[89] to mitigate the rigour of exemption clauses though provided some help to the consumers that by itself could not contain the malady. Legislative intervention was called for and two enactments were made to set right the issue. The supply of Goods (Implied terms) Act, 1973 and the Unfair Contract Terms Act, 1977 came in to cover the field of exemption clauses. The thrust of these enactments was to reduce

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[84] For example, the Medical Act, 1858.
[85] Currently, the Sale of Goods Act, 1979. Corresponding Indian Law; the Sale of Goods Act, 1930.
[86] The Sale of Goods Act, 1979, (U.K.) ss.12-15.
[87] The Sale of Goods Act, 1979 (U.K), s.62.
[88] See, David Yates, *Exclusion Clauses in Contracts*, Sweet & Maxwell, London (1978).
[89] It has been stated that for longtime there existed a tug of war between the courts and the draftsmen of exemption clauses. While the latter would prefer to recast the clauses to ensure its sustainability, the courts developed new strategies to strike it down as ineffective and void. See D.N. Saraf, *Law of Consumer Protection in India*, N.M.Tripathi, Bombay (1995), p.9.

the issue of blank exemptions from liability and to ensure fairness in consumer dealings. These objectives were achieved by placing restrictions on the authority of the seller to contract out the terms implied by law in any sales contract. Sales are classified into consumer and non-consumer dealings. More rigorous attitude towards consumer sales was sought to be taken by making void all clauses exempting the sellers from liability arising out of the implied conditions and warranties in sale of goods. In case of non-consumer dealings, exemption clauses are subjected to a test of reasonableness. Only when the clauses satisfy this test as applied by courts, then only the clauses are allowed to sustain.

Legislative attempts to bring in the notion of fairness in the market led to the passing of other enactments. Thus we find law regulating consumer credit transactions[90], Hire purchases[91] Competition[92], Monopolies and restrictive trade practices[93], Unfair trade descriptions[94] and so on.

Flow of many products that posed threat to the health and safety of consumers and public resulted in the enactment of consumer safety laws[95]. These Acts provided for safety obligations on manufacturers to ensure consumer safety while the products are in use. It was also intended to compensate the consumer and the public if the obligations are violated[96]. When the Consumer Protection Act was enacted in 1987, it included - in addition to provisions for compensating the consumer for defect in goods and deficiency in services- a part set exclusively for regulating consumer safety

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[90] The Consumer Credit Act, 1974.
[91] The Hire-purchase Act, 1965.
[92] The Competition Act, 1980 & 1998.
[93] Restrictive Trade Practice Act, 1976.
[94] The Trade Descriptions Act, 1968.
[95] The Consumer Safety Act, 1978; The Consumer Product Safety Regulations, 1994.
[96] The Consumer Safety Act, 1978 and the Consumer Safety (Amendment) Act, 1986.

and health[97]. In effect the consumer protection law in Britain has taken into account the overall regulation of the business activity and its response to the consumer and society.

Quality Control: International Efforts

Cross border movement of goods and services in the 20th century led to formulation of quality control measures at the international level. Along with this, the increased concern for safe products among the consumers resulted in establishment of non-governmental international organizations for promoting consumer interests. The International Organisation of Consumer Unions and other similar organizations influenced the specialized agencies of United Nations to formulate their own consumer policies. Ultimately the United Nations General Assembly adopted certain guidelines for consumer protection. Regional international organizations like the European Economic Community[98] also established norms regulating product quality and safety. At present the non-governmental organizations, the specialized agencies of UN, the regional international organizations and the UN itself provide useful assistance promoting the interest of consumers.

Role of Intergovernmental Organizations

Much before the adoption of Guidelines for Consumer Protection by the General Assembly of the United Nations in 1985, intergovernmental organisations like, the Organisation for Economic Co-operation and Development[99], Economic and

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[97] The Consumer Protection Act, 1987, part II.
[98] Hereinafter referred to as EEC.
[99] Hereinafter referred to as OECD.

Social Commission for Asia and Pacific[100] and the Economic and Social Council[101] made several efforts to promote the quality of goods available in the market.

(i) OECD

The OECD Committee on Consumer Policy was started in 1969. The voluntary guidelines and policy studies by the Committee have had sufficient impact on national legislation of member states and served as a key to policy formulation in other international bodies especially the European Economic Community. Annual reports of the OECD on consumer policy development in member states have provided useful information on actions being taken by governments. OECD council decisions are binding on member countries. Its recommendations and guidelines are usually implemented as a moral obligation.

The most notable work of the OECD has been in the area of product safety. On this subject alone OECD has produced till 1987, nine reports.[102] These reports include labeling and comparative testing, compulsory packaging of repacked consumer products, protection against the toxicity of cosmetics and household products, safety requirements for toys, data collection systems related to injuries involving consumer products and recall procedures for useless products. Product safety measures to protect children, developing and implementing product safety measures, role of risk management and cost benefit analysis for safety of products are other notable subjects taken up by OECD[103].

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[100] Hereinafter referred to as ESCAP.
[101] Herein after referred to as ECOSOC.
[102] John Joseph, *Evolution of Consumerism and its Future Role*, The Education and Research Institute for Consumer Affairs, New Delhi, p.133.
[103] *Ibid.*

Consumer policy issues of the OCED member states are often brought to the Committee on Consumer Policy. The experiences and approaches adopted in other member states are discussed to resolve the problems through regulatory measures.

(ii) ESCAP

The ESCAP has had a direct influence on the development of consumer protection policy. In 1978, ESCAP and the International Organisation of Consumers' Unions[104] held joint consultation to examine the role of the U.N. in consumer protection. In 1981, many specific recommendations were made suggesting remedies for major consumer problems in developing countries[105]. These recommendations also had significant impact on the final version of the U.N. Guidelines for Consumer Protection[106].

The Economic and Social Council

The Economic and Social Council, in 1978, resolved to request to the Secretary General of the United Nations to produce a report which is supposed to form a background information for ECOSOC for its consideration towards some possible action in the field of consumer protection[107]. It was decided to pursue the elaboration of a set of general guidelines taking into account the needs of developing countries. The 1978 Report was followed by a number of further reports and documents. This has finally led to the formulation of the U.N. Guidelines on Consumer Protection, 1985.

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[104] IOCU, presently, Consumers International (CI).
[105] *Id.* at p.134.
[106] *Ibid.*
[107] See David Harland, "The United Nations Guidelines for Consumer Protection: Their Impact in the First Decade"as quoted in Iain Ramsay (Ed.), *Consumer Law in the Global Economy,* Ashgate Publishing , England (1997),p.2.

The United Nations Guidelines for Consumer Protection, 1985.

The U.N. Guidelines for Consumer Protection adopted by the General Assembly on April 9, 1985 is the final culmination of the international efforts and movements stated above. It was adopted by consensus. The object clause of the guidelines recognises the fact that consumers often face imbalances in economic terms, educational levels, and bargaining power[108]. It declares that consumers should have the right to promote just, equitable and sustainable economic and social development[109]. The guidelines urge the governments to develop, strengthen or maintain a strong consumer protection policy,[110] in accordance with the economic and social circumstances of the country. It recognises six rights for consumers[111]. They essentially restate the basic consumer rights, asserted by the U.S. President, John F.Kennedy, in his message to the United States Congress on 15 March 1962[112].

The Guidelines[113] emphasize the importance of ensuring that consumer protection provisions do not become barriers to international trade. It also calls for international co-operation in consumer policy matters.

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[108] *The United Nations Guidelines for Consumer Protection* 1985, para.1.

[109] *Ibid.*

[110] *Id.*, para.2.

[111] *Id.*, para 3 .They are :-

(a) The protection of consumers from hazards to their health and safety;
(b) The promotion and protection of the economic interests of consumers;
(c) Access of consumers to adequate information to enable them to make informed choices according to individual wishes and needs;
(d) Consumer education;
(e) Availability of effective consumer redress;
(f) Freedom to form consumer and other relevant groups or organisations and the opportunity of such organizations to present their views in decision-making processes affecting them.

[112] *Supra* n.76 at p.4.

[113] The guidelines are arranged under 7 headings:

(a) Physical safety.
(b) Promotion and protection of consumers' economic interests.
(c) Standards for the safety and quality of consumer goods and services.
(d) Distribution facilities for essential consumer goods and services.
(e) Measures enabling consumers to obtain redress.
(f) Education and information programmes.
(g) Measures relating to specific areas (principally food, water and pharmaceuticals).

The Guidelines seek recognition from the world community that consumers often face imbalances in terms of economy, education and bargaining power in comparison to the manufacturers and sellers[114]. Therefore, measures calculated to afford protection to the consuming population by facilitating the production and distribution patterns responding positively to the needs and desires of the consumers are emphasised. Abusive business practices by national and international enterprises are to be curbed. High levels of ethical conduct for those engaging in the production and distribution of goods and services are also visualized.[115]

The Guidelines invariably emphasis the need for protecting the consumers' health, safety and economic interests.[116] Standards for safety and quality of consumer goods and services have been dealt with in the guidelines under a separate caption[117]. It urges the governments to formulate and promote the elaboration and implementation of standards at the national and international levels for the safety and quality of goods and services. Review of the national standards is to be made from time to time with a view to ensure their compliance with the generally accepted international standards[118]. Governmental efforts in encouraging and ensuring the availability of facilities for testing and certification of the standards of safety, quality and performance of all essential consumer goods and services, are declared as a desideratum in the Guidelines.[119]

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[114] *Id.*, Article 1.
[115] *Ibid.*
[116] *Id.*, part II.
[117] *Id.*, part III, Clause C.
[118] *Id.* at para. 24.
[119] *Id.* at para. 26.

The U.N. guidelines for consumer protection have had a significant influence on consumer policy actions by both governments and consumer organisations in many countries. This is evident from the report[120]submitted by the Director General of U.N. in 1992.

The Guidelines however, does not contain any provision for continued monitoring and review. In July 1988, the Economic and Social Council of the U.N. passed a resolution urging all governments to implement the guidelines[121]. It also requested the Secretary General to continue to promote the implementation of the guidelines and continue to provide assistance to governments in implementing them. This resolution was reaffirmed in 1990 and the Secretary General was requested to develop a programme of action for the next five years on the implementation of the Guidelines.[122]

Evolution of Quality Control Laws in India

In India, until independence, there was hardly any legislation enacted to protect the interest of consumers. However, statutes made to safeguard public interest were in existence, which accorded protection to consumers also. Certain provisions in the Indian Penal Code that sought to curtail adulteration in food and drugs[123] were intended to ensure the quality of food and thereby public health. Similarly, sale or offer or exposure for sale articles of food or drink, which has become noxious or made noxious by adulteration, for human consumption has also been stated to be an

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[120] For a brief summary of the report, see David Harland, " The United Nations Guidelines for consumer Protection: The Impact in the First Decade" in Iain Ramsay, (Ed.), *Consumer Law in the Global Economy National and International Dimensions* Ashgate Publishing , England (1997), p.6.

[121] *Id.* at p.10.

[122] *Id.* at p.12.

[123] See the Indian Penal Code 1872, s.272. For a detailed discussion on these provisions, see *infra* chapter 6.

offence[124]. Adulteration of medicinal preparations in a manner to lessen its[125]efficacy and its sale will also attract the penal provisions of the Indian Penal Code[126]. The Penal Code also makes it an offence the use of false weight or measure[127], its possession,[128] manufacture and sale[129]. Quality formulation and grade marking as a system of quality control finds its finest expression in the Agricultural Produce (Grading and Marking) Act, 1937. This Act empowers the Central Government to fix the grade designation and to lay down the standards of quality of agricultural produces listed in the Schedule. However, this Act made no provision for marking of grade designations mandatory.

The civil remedies[130]available under the common law system were used extensively by Indian judiciary, since India was under British rule. The post independence era witnessed enactment of few legislation which had a direct thrust on quality control. The first among them was the Indian Standards Institution (Certification Marks) Act, 1952.[131] This act had provisions for fixation of national standards for diverse commodities with powers on the Central Government to make the standards thus formulated mandatory.

The Standards of Weights and Measures Act, 1956, which was enacted to provide a coherent system for measurement, had been in the forefront to save the consumers from deception due to short measure. In all these provisions, quality

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[124] *Id.*, s. 273.
[125] *Id.*, s. 274.
[126] *Id.*, s. 275.
[127] *Id.*, ss. 264 and 265.
[128] *Id.*, s. 266
[129] *Id.*, s. 267. For a detailed discussion on these provisions, see *infra* Chapter 6.
[130] For a detailed discussion on the civil remedies, see *infra* Chapter 7.

assurance was merely collateral. The main thrust was public safety, health and fairness in measure and weight.

Later enactments like the Dangerous Drugs Act, 1930, Drugs and Cosmetics Act, 1940, the Prevention of Food Adulteration Act, 1954, and the Drugs (Magic Remedies) Objectionable Advertisements Act, 1955 contain elaborate provisions for fixation and implementation of quality standards. The Monopolies and Restrictive Trade Practices Act, 1969 and the Consumer Protection Act, 1986 are mere extensions and developments of the old quality control law regime that were in existence.

Evolution of Quality Control Enactments: A Critical Overview

The above discussion on the evolution of the laws relating to quality control at the national and global levels shows that increased emphasis is given to ensure quality of products and services available in the market. Even during the hey days of *laissez-faire*, the courts and legislatures tried to ensure product quality by resorting to different techniques. The judiciary achieved this objective by a process of progressive interpretation of the existing legal principles of contract and tort. The legislature, on the other hand, imposed criminal sanctions for trading in unsafe and hazardous products. In matters of civil damages, terms were implied in to the contract to benefit the consumers. Quality of the product is one of the terms usually implied in this way. For the administration of these laws, machineries with various functions were also created. The overall picture is summarised below.

(i) ***Self-regulation by Traders and Consumers***

In ideal market situations, businessmen may prefer to have their activity regulated by them either individually or by associations of producers. Trades' regulation confers positive advantages to the consuming public in terms of better consumer-trader relationship and inexpensive administrative procedures. Traders are benefited by better consumer satisfaction and preference. They can by self-regulation prevent legislative interference, which may be rigorous, strict and difficult to be complied with. Businessmen often use setting up of standards of quality for goods through self-regulatory codes as a measure for ensuring customer satisfaction. Similarly, consumers also can ensure the quality of the goods they purchase by exercising prudent choice. The *laissez- faire* concept promoted this to a large extent. Modern legislative developments in England show that legislature encourages adoption of self-regulatory codes by traders and self help programmes by consumers. In India, these methods are hardly used. A detailed study of these methods is necessary to evolve an advantageous use of these techniques.

(ii) ***Quality control by Administrative Sanctions***

Administrative controls are often used as a preventive measure. Sanctions, civil or criminal, generally operate as punitive and curative rather than being preventive. Administrative measures however, anticipate the malady. It formulates rules and regulations with a view to prevent the happening of the undesirable act. Many are the ways with which the executive government and its agencies mobilize the administrative set up to ensure quality of products and services. Licensing and advertising controls can be cited as examples. How is this regulatory system function in ensuring quality of goods? Does it require any improvement functionally and

otherwise? How far this mode of regulation would survive in the era of de-regulation syndrome? These areas require cogent investigation.

(iii) ***Quality Control by Standardization***

The assessment of the quality of goods by a statutory body and its marking with a logo to identify its quality is adopted as another method to ensure quality. In the case of agricultural produce and industrial products this method is often used. Grade marking [132] would encourage the producers [133] to improve the quality. The consumers are also assured of certain specified quality the grade designation mark suggests. We find statutory specifications as to quality in respect of food[134] and beverages, and drugs and cosmetics.[135] The manufacture, storage and keeping [136]of or sale of foodstuffs that does not conform to the stipulated standards of purity and quality are prohibited.[137] Stringent standards of quality are prescribed for drugs and cosmetics.[138]

Standard setting is often done by a national standards organisation like the Bureau of Indian Standards. In prescribing standards, national and international practices are considered. All affected interests are also consulted as well. The finally adopted standards are implemented either compulsorily or by persuasion. The working of the scheme of standard setting and implementation require and in depth analysis.

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[132] See the Agricultural Produce (Grading and Marking) Act, 1937.

[133] Agricultural produces that meet the standards of grade would naturally fetch more prices. Therefore, it would be a positive source of encouragement for the producers to secure better quality to earn the grade and to reap more profits out of it.

[134] See the Prevention of Food Adulteration Act, 1954.

[135] The Drugs and Cosmetics Act, 1940.

[136] The Prevention of Food Adulteration Act, 1954, s. 7.

[137] The Prevention of Food Adulteration Rules, 1955, rule 5.

[138] See the Drugs and Cosmetics Act, 1940.

(iv) ***Role of Implied Conditions in Promoting Quality***

The study shows that the law relating to implied conditions in sale and supply of goods is undergoing drastic changes in England. The concept of merchantable quality has been substituted by the doctrine of satisfactory quality. The ingredients of satisfactory quality are more flexible and capable of adaptations to meet the needs of changes in the market. Similarly, restrictions are increasingly imposed on exclusion of terms implied by law. In some cases exclusion is totally prohibited. The desirability of suitable legislation in India is to be examined in the light of the developments in England and EEC countries.

(v) ***Quality Control by Criminal Sanctions***

Legal insistence on quality through the instrumentality of criminal law is largely used in the present day. Criminal liability on manufacturers and sellers are imposed over and above the civil liability to compensate the consumers suffering losses. We have many provisions in various enactments providing for criminal sanctions for not complying with statutory prescriptions concerning quality. Should criminal law be used to deal with a transaction that is essentially civil in nature? The judicial interpretation and application of criminal law provisions is helpful to find an answer to these questions.

(vi) ***Civil Damages and Quality of Products***

Civil action for compensation has long been recognised as the remedy available to a consumer who suffered loss or damage due to a defect in the product he purchased. The law of torts, contractual principles and consumer protection enactments contain provisions enabling the consumer to recover compensation from the manufacturers and sellers of defective products. Compensation and quality are

undoubtedly different concepts. But liability created by law to compensate the defects in goods is expected to persuade the producers and sellers to improve the quality of the goods they produce or sell. This will enable them to reduce their burden to compensate large number of consumers. Moreover, goods that are least complained of are mostly preferred by the consuming public. This will certainly boost up the sales and thereby the possibility of earning more profit. In the competitive market quality and customer satisfaction are the key factors that would provide a better foundation towards the prosperity of any business. The study shows that the compensatory schemes have been strengthened by legislative action. Giving of warranties and guaranties by manufacturers and sellers and making false and misleading claims are also brought within the scope of civil claims. Trading in products not conforming to the prescribed quality standards or violating implied terms in sale contracts can also be matters of civil dispute. These techniques are frequently used under the Indian law as well. A detailed study of these measures is undertaken to evaluate the efficacy of this mechanism.

Diverse ways and means for ensuring quality of products exist in the present day society. A proper understanding and implementation of these measures may lead to the desired goal of better consumer satisfaction. This study is an examination of this proposition in the light of statutory provisions and judicial decisions.

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Chapter 2

QUALITY CONTROL BY SELF REGULATION

Among the multitude of factors that influence the consumer in a purchasing decision, quality is undoubtedly the most significant factor. Amidst the diverse methods available for quality control, self-regulation may be considered as the best and cost-effective. Self-regulation is an expression of social obligation of business towards the public. Hence it is likely to be followed by the trade with utmost sincerity and responsibility. Self-regulation of a business may occur as a feeling of responsibility of individual business as well. Individual regulation of its business by a trader is usually in the form of self-discipline in his establishment that a system of Total Quality Management[1] is introduced in the production process. Introduction of TQM often enables the manufacturer to offer warranties and guarantees about the performance of his products. If quality is taken up as a collective social responsibility by a trade, the formulation of voluntary codes by the trade associations is essential. It is also possible that codes are formulated due to the persuasion exerted by administrative agencies established by law to ensure fair-trading. Codes can also be made binding by stipulating that before a licence to carry on a trade is given, undertaking to adhere to codes are made necessary. Quality assurance through statutory insistence to follow a specified mode of production prescribed by national or international codes can also be made.

The practice of prescribing manufacturers' warranties is another method of self-regulation prevailing in India. Statutory support to this, provide considerable

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[1] Herein after referred to as TQM.

benefit to the consumers. The extent of the benefit and the legal control over consumer warranties require a critical analysis.

Some amount of regulation of quality is possible if purchasers fruitfully inspect and reject the product before they buy it. This is a right of the consumer recognised by legislation universally. Examination of this method of quality control embedded in the statute is necessary to assess its efficacy, find out loopholes and to suggest improvements.

Need for Business Self-regulation

It is true to say that a business that is competitive cannot be selfless. Management cannot uitilise its funds irrationally just to satisfy public expectations in areas where there are no direct or indirect benefits. A firm however socially responsible it may be, is likely to be thrown out of business, if its profits are marginal. It is said that a corporation basically is not a charitable agency or a community service institution but is essentially an economic institution.[2]

In spite of this, in the ancient Indian society, the businessmen were looked upon with respect and confidence. People at large reposed their confidence even to leave their property with businessmen while they went for pilgrimage. If they died, they were confident that the businessman would make a fair distribution of their property among the heirs. If they returned after pilgrimage, they were equally confident that the businessman could be trusted to return safely all their properties.[3]

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[2] R.S. Nigam and V.S.P. Rao, " Corporate Social Responsibility: A Myopic Doctrine", *Chartered Secretary* 5, at p.6 (1984).

[3] Nani A. Palkhivala, *We The Nation: The Lost Decades,* UBS Publishers, New Delhi (1994), p.306.

Trading institutions are essentially social institutions and as such must live upto society's standards. It must mirror the ideals, values and aspirations of the society of which it is an integral part. As business organizations grow in size and strength, society continues to expect more benefits from them to improve the quality of their life and living standards. With growth, the institutions' responsibility to the society must also grow.[4]

However, most of the Indian managers remain as five-day sinners and two-day saints.[5] They indulge in political activities to flatten their coffers, and restrict the entry of healthy competitive forces. They even exploit the ignorance of consumers through high-pressure advertising, which at times is false, deceptive and misleading. Often, they resort to unethical trade practices and show very little concern for quality, after sales service and maintenance. All these turned the public confidence on businessmen to public distrust and hatred. Self-discipline and business self-regulation are attempts by the business community to recapture the lost glory[6].

Advantages of Self- regulation

Business self-regulation possesses a number of advantages over legislation. By encouraging to police themselves, the costs that the society will have to bear to put in motion an administrative agency are done away with. Remedial measures under the rules of self-regulation can be quicker and more efficient than government regulation because industry knows better what the problems and their realistic

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[4] Keith Davis, "Five Propositions for Social Responsibility", as quoted in *supra* n.2 at p.7.

[5] *Supra* n. 2 at p.9.

[6] It has been said that even though most of the corporations have become substantially more enlightened about their responsibilities to the consuming mass, the feeling abounds in many quarters that business performance in this respect is not always adequate particularly with regard to protecting consumers' health and safety. See Harper W.Boyd & Henry Claycamp, "Industrial Self-regulation and the Public Interest", 64 Mich.L.R. 1239 (1966).

remedies are[7]. It can be more flexible and hence suitably applied in changing conditions without much difficulty. However, legislation cannot move in a similar pace. According to Cranston, voluntary standards are well in advance of legal provisions and hence more favourable to consumers[8]. The standards so evolved for self-regulation can be applied in a practical and commonsense manner and not in a legalistic or rigid way of courts. Moreover, businesses comply with voluntary standards in its true spirit whereas they can push the law to its limit and find loopholes.[9]

Self Regulation and Self Discipline

Self-regulation is conceptually different from self-discipline. The latter describes the individuals' control, or attempts to control his own actions. Self-regulation entails control by the individuals' peers, subjection to whose judgment is central to the description of such systems as regulatory. In self-discipline, the only sanction is individual's conscience. The most characteristic sanction of self-regulation is exclusion from participation in the activity regulated.

In developed countries self-regulation is used as an effective tool for quality control. The driving force behind much of the self-regulation is the fear of legislation in the event of business standards not being improved.[10] Businessmen are aware that if they did not take the initiative to allay consumer dissatisfaction, they would face

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[7] For a detailed discussion on the pros and cons of self-regulation, see J.J. Boddewyn, *Advertising Self-Regulation and Outside Participation: A multinational Comparison*, Quorum Books, New Delhi (1988), pp.8-14.

[8] See, Ross Cranston, *Consumers and the Law*, Weidenfeld and Nicolson, London (1984), p.59.

[9] *Ibid.*

[10] It has been said that in U.K. during the period when most of the codes of practice were prepared (i.e.1973-79), there was always a threat of regulation if a trade association did not sets its own house in order. See, David Oughton & John Lowry, *TextBook on Consumer Law*, Blackstone Press, London (1997), p.22. Also see, Russel.B.Stevenson, "Corporation and Social Responsibility", 42 Geo. Wash. L.Rev. 709 (1974).

more onerous government controls. They have also realised that self-regulation can lead to positive commercial advantage such as reduction of litigation costs, better profitability and consumer satisfaction. The money thus saved can be invested for better quality control methods, which would bring in more prosperity to the institution. It has also been said that self-regulatory measures projects the notion of the company as a "good corporate citizen".[11]

Business Codes

Rules of self-regulation generally appear in the form of codes of practice. Business codes mean the principles or standards of fair and ethical practice observed or agreed upon by particular industries or business groups[12]. They are infact the products of a consensus among the businessmen concerned. They spring from within the group whose interests they are designed to advance.

There are negative sides as well. Business codes may socialize extreme manifestations of the ruggedly individualistic competitive spirit by prescribing unfair methods of competition. It may also develop, formalize and perpetuate restraints of trade.[13] In fact, many business codes combine these social and selfish elements.[14] But they can be used as useful instruments of social control, if it is coupled with adequate public supervision.

Business codes mainly depend for their effectiveness upon the moral persuation and group pressure. The practical force of a business code tends to weaken and breakdown where compliance are compelled. Every trade or business may be said

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[11] See J.J.Boddewyn, *op.cit.* at p.32.
[12] *The Encyclopaedia Britannica,* Encyclopedia Britannica Ltd., London, Vol.4, (1964), p.471.
[13] *Ibid.*
[14] *Ibid.*

to have its own codes of ethics even though it is nothing more than the inarticulate body of conventions. The unwritten code of every business is simply its prevailing morality. A good business code is not from the viewpoint of the trader as a whole, entirely selfish. But it recognizes, in addition, the delegations of members of the trade to one another, their obligation to customers, suppliers and employees, and to the general public and the government.[15]. The Code of Ethics originated from the ethical principles developed by the learned professions of law and medicine can be cited as obvious examples of voluntary codes adopted in the service sector.[16]

Total Quality Management (TQM)

Total quality management can be considered as the best method of business self-discipline. All organizations profess its intentions to offer quality goods and services. But the experience, with a few exceptions is to the contrary. The primary blame rests on the management systems. Quality products and services will flow out naturally when the management system is in tune with quality concepts and the culture of quality pervades through the entire organisation. Such a management system is known as "total quality management".

Total quality management essentially means the identification of customer needs and adoption of processes and practices that fulfill the consumer needs. In the present competitive economy, companies across the country have started focussing on improving product or service quality with a view to delight their customers. Meeting and exceeding customer expectations has become very much important to marketers

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[15] *Id.* at p.472.
[16] *Ibid.*

of good and services. As a result there seems to be a quantum shift from national quality standards to international quality standards.

When, how and why did this obsession with quality become a distinct management philosophy? Patrick L. Townsend considered this question[17]. He opined that the current market offers a staggering array of choices to the consumer. Therefore, the managements have identified quality as the best device to appease the consumer and to stay strong in the market.

TQM essentially is not a set of rules or procedures. It is more in the nature of a culture or philosophy visible throughout the organisation. The distinguishing features of a TQM organisation are: (a) clear vision, (b)customer focus, (c) total involvement, (d) management by fact, (e) continuous improvement and (f) systemic support[18].

Modern markets are flooded with goods the ingredients of which are very much complicated. Business houses presently entrust the duty of quality control to an individual specially trained in this behalf or to a department consisting of such specialists. The quality control department must necessarily be in close touch with the production and marketing departments. The latter should be able to furnish required changes in outlook on quality and quality complaints, and the former should be willing to incorporate new suggestions from the quality control organisation.

It can be seen that TQM is rather a management technique without any support of law. It is entirely within the volition of the management to adopt TQM.

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[17] K.S.Rajagopal, "Quality is Everybody's Business", *The Hindu*, Cochin, June 27, 1998, p.27. Patrick L. Townsend is considered as a leading practitioner and theorist in quality management.

The only compulsion to adopt TQM is market pressure. A producer unconcerned about market pressure can avoid TQM. However, if the industries adopt TQM, it will certainly benefit the consumers. For this, legal recognition of TQM is needed. The requirement of compulsory filing of annual environment audit reports by companies can be cited as a good model[19] of legislative attempt in improving the quality of environment. The audit reports, in addition to the methods adopted for quality control, shall contain measures adopted for handling consumer complaints in the establishment. Similarly, economic incentives can be given to industries that volunteer in adopting effective quality control measures[20].

Consumer Complaints Handling

Consumer complaint handling can be a useful tool of business self- discipline. For this purpose, the trade should evolve a suitable mechanism for the handling of complaints they receive from consumers. In cases of defective quality, the consumer must be encouraged to approach the producer. Most businessmen will seek to resolve the issue at their level and avoid escalating the problem further. For retaining the consumers' goodwill, reasonable businessmen will seek a solution to the complaint, which may end up the matter promptly and with mutual satisfaction. In some cases, the adjustment by the businessmen will be more than what the law would require

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[18] *Supra* n. 2.

[19] See the Environment Protection Rules, 1986. Rule 14 make it obligatory on every industry to file an environment audit report every year. This will help the authorities to assess the environment conservation plan adopted by industries and to consider areas where mandatory rules are required. For a brief discussion on environmental audit, see P. Leelakrishnan, *Environmental Law in India,* Butterworths, New Delhi (1999), p.101.

[20] The Malcolm Baldridge National Quality Award in America and the Deming Awards in Japan are examples of such economic incentives. See K.S.Rajagopal, "Quality is Everybody's Business", *The Hindu*, Cochin, June 27, 1998, p.27.

them to do, and to this extent, consumer protection goes beyond the parameters of law.

By adopting the consumer complaint mechanism, the consuming public can play a significant role in quality control. It is mutually advantages to the consumer and the manufacturer alike. To the consumer, his grievances are readily taken care of. The manufacturer gets sufficient feed back about the performance of his products. It is known that the manufacturer cannot survive if consumer complaints against his products are numerous. Consumer complaint handling gives him an opportunity to improve the quality of his products so that similar complaints in future can be avoided. This enables him to carry out necessary improvements on his product design and quality. The retailer in these cases will be an important conduit in communicating these issues to the manufacturer. In many countries consumer complaint handling has developed as an important aspect of business self-discipline.[21]

Although consumers often perceive deficiencies in many of the products they purchase, they raise no complaints regarding a substantial number of these problems. However, the two usual ways in which consumers currently express their dissatisfaction with poor quality products is through voice to the retailer or exit.[22] Unless these consumer complaints voiced through the retailer are carried out in an

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[21] For a discussion on consumer complaint handling, see Rodney, L.Cron, *Assuring Customer Satisfaction* (1974), Chapters 6 and 13. Ross Cranston has given an example of the merit of consumer complaints handling. The Association of British Travel Agents launched their code of practice in January 1975.By the early summer of that year there, were significant number of complaints from consumers about surcharges and hotel overbooking. By July 1975, the association has announced revisions into the code to prevent similar complaints in future. Ross Cranston, in his book *Consumers and the Law,* Weidenfeld and Nicolson, London (1978), at p. 61.

[22] Iain D.C. Ramsay, "Consumer Redress mechanisms for Poor Quality and Defective Products", 31 *University of Toronto Law Journal*, 131(1981).

extensive scale with utmost sincerity, it may not have an optimal effect on a firm's performance or quality control.[23]

Consumer awareness about the role of consumer complaints in quality control of products is to be created by all possible means. Complaints thus lodged will yield the intended result only when the information received by the retailer is transmitted to the manufacturer and the manufacturer is induced to carryout changes in its production behavior. He may do so either when the law obliges him to do or when it is advantageous to him at least in the long run. The bargaining power of large departmental stores and retailers in relation to suppliers and manufacturers may make them important agents of quality control.

Voluntary Codes Adopted Under Administrative Pressure

Trade associations may formulate codes of business practices on their own. In Britain, it is considered as an important function of the Office of Fair-trading[24] to encourage business associations to formulate and publish codes for adherence by their members[25]. The OFT could disseminate a wide range of codes in a number of areas of trade such as motor vehicles, travel facilities, credit facilities, domestic electrical appliances, furniture, footwear and the like.[26] Areas of trade in which codes of practice have emerged have tended to be those from which the greatest number of consumer complaints have been heard. Where there is widespread consumer dissatisfaction, the OFT is supposed to initiate discussions with interested parties

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[23] See Christopher D.Stone, *Where the Law Ends,* Harper & Row Publishers, New York (1975), p.83.
[24] Herein after referred to as OFT.
[25] See the Fair Trading Act, 1973 (U.K.) s.124 (3).
[26] Upto 1992 the OFT could manage the formulation of 23 codes. For a list of the voluntary codes and the addresses of the sponsoring associations, see, Robert Lowe & Geoffrey Woodroffe, *Consumer Law and Practice*, Sweet & Maxwell, London (1995), pp.164- 165 and 433–37.

representing both consumers and the trade itself in order to identify deficiencies in the operation of the trade. Once the problems have been identified, the primary responsibility for preparing the code of practice lies with the trade association itself. It will submit a draft code to the OFT for approval. Modifications to the code may follow suggestions for improvement given by the OFT in order to ensure effective protection of the consumer. Consequent to the dissemination of the code, the trade associations' responsibilities continue in that it is important that the code is kept up-to-date in the light of changing circumstances and the identification of new consumer problems.

The OFT provides free leaflets which describes the codes negotiated by it. Participating members are required prominently to display the appropriate code for the benefit of the public and usually will provide a copy of the code for inspection. The role played by the OFT in this regard is significant since, unless there is pressure from a body which has the consumer interest in mind, there is a danger that self regulation on the part of the trade itself might address only the interests of traders.[27]

The codes generally provide conciliation procedures for redressal of grievances and provide arbitration as a last resort. Dissatisfied customers should first bring their complaints to the attention of the manager, proprietor or director of the business. If the complaint is not resolved, then it may be possible to seek the services of a Trading Standards Officer, Consumer Advice Center or Citizen's Advice Bureau. If the complaint relates to new goods the customer may agree to bring the

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[27] The famous economist Adam Smith has observed that where people of the same trade meet together, there is likely to be a conspiracy against the public or some agreement to raise prices. See R.H. Campbell and A.S. Skinner, *The Wealth of Nations,* Modern Library, New York (1937) Vol. 1, p.145.

manufacturer into the dispute. If the dispute is still not settled and the trader is a member of a trade association, the customer should ask the association to conciliate. Service of conciliation is rendered free of charge[28].

In case the code provides for arbitration' the customer will have to pay a fee prescribed, often refundable if the claim is upheld. Arbitrators generally render their decision within 12 weeks time and are supposed to give reasons for their decision. The procedure suggested is quick and cheap and can be an effective substitute for civil court litigation[29].

Consumer Expectations from a Self- regulatory Code.

A self-regulatory code, to be acceptable to consumers should contain some essential features. The trade association making the code should canvass a considerable influence on majority of the traders in the sector. Compliance with the Code must be made mandatory on members and the trade associations must have enough resources and disciplinary powers in its command.

While preparing the code, the trade association shall adequately consult organisations representing consumers and enforcement agencies. It must also demonstrate that the association members are willing to observe the code provisions. Only under these conditions, consumers will feel that they may be benefited by the code.

The code must offer benefits beyond the legal obligations and normal practices in the industry. It must reflect the legitimate expectations of consumers.

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[28] Ross Cranston, *Consumers and the Law,* Weidenfeld Nicolson, London (1984), p. 40.
[29] *Ibid.*

Measures directed towards the alleviation of consumer concerns and undesirable trade practices must also find a place in the code. The code should contain standards adopted for advertising and marketing of goods and services. The quality of product and customer service, terms and conditions of supply and manufacturers' guarantees and warranties should also be regulated by the code.

The code should make available viable machinery for consumer complaint handling. The trade association must regularly monitor functioning of the code by publication of annual report of operation of the code. It must assess periodically consumer responses and ensure that copies of the code are made available to consumers and consumer associations free of charge. Compliance with the code and procedures for handling consumer complaints must be made mandatory on the members. The code should also contain provisions for penalties for non-compliance. The Office of Fair Trading in England had recognised the above principles in early nineties.[30]

The Indian Scenario

Voluntary codes of practice are not so popular in India as in western democracies. India lacks an agency like OFT in England, to encourage and monitor the formation and implementation of codes. Still, the advertising business has framed a code[31] for its members and it is supervised by the Advertising Standards Council of India[32]. The Code binds the advertisers, the advertising agency and media owners[33].

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[30] See for details, *Guidelines on Code of Practice* (1991), issued by the Office of Fair Trading (U.K.).
[31] *The Code of Advertising Practice* adopted by the Advertising Standards Council of India in 1985.
[32] Sakuntala Narasimham, *Advertisements: the Hidden Persuaders,* Consumer Education and Research Centre, Ahmedabad (1992), p.50.
[33] Advertising Standards Council of India," Prelude to the Code of Advertising Self – regulation," *ASCI Compilation of Cases,* Vol.3 (1990-91), p.7.

As it is the advertiser who originates the advertising brief and sanctions its placement, the advertiser carries full responsibility for the observance of this code[34]. Being the creators and expert advisors, the advertising agency has full responsibility to ensure the observance of this code in as much as they know the facts[35]. Media owners are directed to view each advertisement offered for publication to them from the point of view of this code.[36]

Complaint on the ground that an advertisement is misleading, dishonest or bad in taste will be referred to independent Consumer Complaints Council[37] made up of 14 members. Six of these members are senior practitioners in advertising and eight are professionals unconnected with advertising. They include people from journalism, engineering, medicine, accounting, education, science and consumer movement. The Council will evaluate the complaint. If it is upheld, the advertiser concerned will be directed to withdraw or modify the advertisement.[38] The Council decisions are compiled and published periodically by the Advertising Standards Council of India.

The Directorate of Advertising and Visual Publicity, Government of India has also formulated a code for commercial advertising[39]. Enforcement of the code seems to be very mild in form. The Director General who receives any complaint about contravention of the code provisions, refers it for consideration by the advertisers'

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[34] *Ibid.*
[35] *Ibid.*
[36] *Ibid.*
[37] Herein after referred to as CCC.
[38] The Advertising Standards Council of India, *Compilation of Cases Handled by the Consumer Complaints Council* Vol.2 (1988-90) (front cover inner). In this volume 121 cases decided by the CCC is reported.
[39] *Code for Commercial Advertising over All India Radio* (1988).

association, if any, for suitable action. If it could not be resolved at that level, the Director General will consider a suitable action by himself.[40]

It is widely accepted that codes of practice are effective tools in dealing with trade abuses that are not susceptible to legal control. But many codes do not specify the duties of traders and the rights of consumers. Much of them are mere expressions of goodwill towards consumers.[41] There are problems of implementation, motivation and enforcement. So far as implementation is concerned, it is applicable only to the members of the association. The rogues among traders about whom the consumers generally have complaint may choose out from the membership of the trade association and hence are kept outside the sanctions of the code. Moreover, the trade associations are very slow to enforce the terms of the code against their members. They depend for their survival on members' subscriptions and hence they cannot be so strict to their members[42]. More over, these codes do not consider the views of consumers prior to their formulation.[43]

In order to make the voluntary codes more worthwhile, it is possible to make the codes enforceable by the consumer against a member of a trade association, when the trader fails to comply with the code[44]. More teeth can be given to the process of

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[40] *Id., Procedure for Enforcement of the Code.*

[41] Director General of Fair Trading, *Annual Report* 1976, p.9.

[42] *Ibid.*

[43] Codes of practice drawn in consultation with the OFT may be an exception where consumer organizations and other parties interested are always consulted.

[44] Even though codes are not generally enforceable due its non-incorporation in to a statute, it is possible for courts to look at it as evidence of better trade practices and procedures followed by a section of industry in question. For a brief discussion on two cases in which the courts have made use of the voluntary codes as evidence of good business practices, see C.J.Miller, Brian W. Harvey and Deborah L. Parry, *Consumer and Trading Law: Text Cases and Materials*, Oxford University Press, Oxford (1998), p.511.

enforcement by recognising them by statutes[45]. For example it is possible to include non-conformance with the code a 'deficiency'[46] or an 'unfair trade practice'[47] under the Consumer Protection Act, 1986. This will enable an aggrieved consumer to bring an action against a trader who is a member of the trade association for violation of the code provisions. Such an amendment would pave the way for application of the code to all members of a particular trade irrespective of the fact that he chooses not to join a trade association. It is one's choice to enter into a particular trade. Once he enters into the trade he is bound by the code and a formal membership in any trade association is immaterial. It is even possible to impose on the traders a statutory duty to trade fairly in express terms. As a part of discharge of this duty, a code can be interpreted and enforced.[48]

Manufacturer's Warranties and Guarantees.

It is usual among manufacturers and sellers to issue guarantees and warranties in which they undertake to replace unsatisfactory products or rectify the manufacturing defects. Among the plethora of factors that influence consumer choice, offer of a guarantee by the producer or seller is of foremost significance. A guarantee provides the consumer an assurance that the manufacturer is willing to assume responsibility for the quality, workmanship and performance of his product. To the consumer who knows his existing legal rights, guarantees confer extended rights.

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[45] See for example, *the Code of Practice for Traders in Price Indications* is given force of law in U.K. by the Consumer Protection Act, 1987, s. 25.

[46] The Consumer Protection Act, 1986, s. 2 (1)(g).

[47] *Id.*,s. 2 (1) (r). This section gives a long list of practices that will be treated as 'unfair trade practice'.

[48] This idea has been mooted by the office of Fair trading in 1982 and followed this up in 1986 with a discussion paper, *A General Duty to Trade Fairly*. Such a bold step was not welcomed by industry in a period of free market economy. The Governmental policy at that time was evident from the titles of two white papers viz., *Lifting the Burden* and *Building Business not Barriers*.

Generally, guarantees are given for a limited period. Guarantees often perform a promotional function for manufacturers and also act as a system of quality control. The trader thereby can get information about the performance of his product. A generous guarantee is advantageous to consumers since it affords them a remedy without resorting to the tedious formalities of establishing a legal claim. Repair by manufacturer himself confers better service because it is he who has enough expertise on the product. Guarantees seem to be one of the most effective means available to consumers to settle their disputes concerning defects in products.

However, in many instances, sellers and manufacturers have attempted to limit their legal responsibility. Sellers often limit their legal responsibility by expressly warranting only certain parts and excluding all parts not so expressly warranted. Many explicit warranties are efforts to camouflage disclaimers and limitation of the seller's responsibilities, which the law would otherwise require.[49] Manufacturers use warranties primarily as a sales tool or as a liability limitation device. Retailers have also used warranties to generate revenues by reducing sales resistance and to limit their liabilities as well.

It may be useful to refer to the remarks made by the (British) Office of Fair Trading about guarantees. It said:

> "All too often, it seems that guarantees are used merely as a marketing ploy, a source of additional revenue for the supplier, or even as a means of divesting consumers' attention from their legal rights."[50]

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[49] George Fisk, "Systems Perspective on Automobile and Appliance Warranty Problems", 15 *The Journal of Consumer Affairs*, 37 (1981).

[50] Office of Fair Trading, *Consumer Guarantees*, London, (1986), p.27.

Warranty and Guarantee: Distinction

The term 'warranty' and 'guarantee' are often used loosely and interchangeably. 'Manufacturer's guarantee' can be considered as a term of the contract under the Indian Contract Act 1872. It can also be treated as one aspect of 'warranty' under the Sale of Goods Act 1930[51]. Since sale of goods is a contract to sell, the basic conditions of a valid contract are also applicable to it. Damages for breach of the term can be decided according to the provisions of the Contract Act.[52]

Legal Guarantee and Commercial Guarantee

'Guarantee' for goods, may be either 'legal guarantee' or 'commercial guarantee'. The legal guarantee emerges directly from law. The producer or vendor of the goods or any other person in the product distribution chain offers commercial guarantee on a voluntary basis. The legal guarantee produces effects that are laid down by law and its implementation is subject to legally fixed conditions and procedures. The commercial guarantee produces effects, which are unilaterally determined by the guarantor. Its availability is subject to the conditions and procedures prescribed by that person.[53] But the relation between the two types of guarantees are far from clear in the legal literature and case law and even less so in the public mind. It has been said[54] that the consumer is unaware of the existence of the legal guarantees and knows only of commercial guarantees. Thus when there is no commercial guarantee or when it cannot be invoked, the consumer believes that

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[51] For a discussion on different aspects of warranty and contractual terms. see G.H.Treitel, *The Law of Contract,* Sweet & Maxwell, London (1996), pp. 703-724.

[52] See Rani Advani, *Warranties and Guarantees: Reading the Small Print,* CERC, Ahmadabad (1992), Chapter 3.

[53] Commission of the European Communities COM (93) 509(1993) Final Report, *Green Paper on Guarantees for Consumer Goods and After-sale Services* (1993), p.13.

[54] *Ibid.*

he has no rights. Moreover, in many cases the consumer believes that his rights are limited to the content of the commercial guarantee alone. The commercial warranty offered by the producer may be either explicit or secret. The secret warranty, consequent to its secrecy, has only a very limited application.

Secret Warranties

Manufacturers normally carry out repairs for defects in products freely during the warranty period. Consumers do not expect manufacturers to repair defects that surface after the expiry of the period of warranty. Nevertheless, manufacturers sometimes provide repairs without charge after the expiry of warranty when identical defect turns up in many units of the products they make. A manufacturer might do so to retain the goodwill of the customer on the hope that the customer will continue to buy the manufacturer's products. Many of the manufacturers who offer these goodwill adjustments strive to keep them confidential, so that few will request for them. Hence consumer advocates call these good will adjustments by the name 'secret warranties'[55].

These warranties, due to its secret nature are not available to many. Many manufacturers who provide them attempt to conceal their very existence. From the manufacturer's perspective, secret warranties offer advantages over a recall of products at least in some circumstances. Many consumers expect the product to be complaint free even after the expiry of the warranty period. Manufacturers often consider that if these consumer expectations are frustrated, the consumer may stop buying their products any more.

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[55] See Jeff Sovern, 'Toward the Regulation of Secret Warranties', 7 *Advancing Consumer Interest,* 13 (1995).

The consumer generally can get advantage of secret warranties only if he comes to know about its existence. So long as it remains secret, its availability is restricted to those limited ones who get information as to its existence. So as to ensure its availability to all consumers and to get rid of its secret nature, law is to be enacted to regulate them.[56]

Legal Basis of Commercial Guarantees

To explain the nature of commercial guarantees three different theories are often used. Each of these theories explains distinctively, the diverse features of commercial guarantees. The first theory looks upon guarantees as a device adopted by the manufacturers to exploit the consumers by unilaterally limiting their legal obligations. The second theory regards warranties as messages signaling the attributes of goods covered by the warranty.[57] The third theory considers warranties as a useful management tool.

a) *The Exploitation Theory*

A coherent and persuasive theory of the standardized warranty developed firstly in the legal literature and case law was by Friedrich Kessler[58]. In industries with multiple sellers, he found that all warranties are alike or substantially similar so that consumer is not in a position to shop around for better terms. According to him some manufacturers directly collude in establishing warranty terms. Trade associations

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[56] *Id.* at p.18. California, Connecticut, Virginia and Wisconsin all have legislation regulating secret warranties. Statutes in these states require manufacturers to notify owners of eligible autos of the existence of any good will adjustment programme. Manufacturers must also reimburse those who have previously obtained the repairs on their own.

[57] It has been said that both the theories have exerted its influence over judicial and legislative responses concerning product warranties. George L.Priest, "A Theory of the Consumer Product Warranty", 90 Yale L.J. 1297 (1981).

[58] Friedrich Kessler, "Contracts of Adhesion: Some Thoughts About Freedom of Contract", 43 Colum.L.Rev. 629 (1943).

quite often standardize warranty practices to achieve the same result. Thus the fact that there is one seller or many, the consumer possesses no meaningful choice.

As per the exploitation theory, the manufacturers will limit their legal obligations to consumer as far as possible. They collude with other manufacturers and the warranties within individual industries are likely to be similar. The exploitation theory found wide acceptance because it was the only one, which provided a proper explanation of standardized warranties. It is in tune with the warranty practices followed by manufacturers generally.

b) *The Signal Theory*

The signal theory of product warranties states that the terms of warranties provide information to the consumers about the reliability of the product in question. This theory is founded upon an economic theory that views warranty as a tool consumers can use to process information about products. It may be a costly affair for the consumer to determine the reliability of a product at the time of purchase by himself. A consumer however may look to the warranty as a signal of product reliability[59]. The more reliable the product, the lower the costs of warranty coverage for the manufacturer. The warranty coverage in the context will also be more extensive from the consumers' point of view. Hence, even though a consumer has no experience or knowledge of a product, he may infer its mechanical reliability and quality by

[59] A.M.Spence, *Market Signalling* (1974), pp.88-90. Also see, Kessler, "'The Protection of the Consumer Under Modern Sales Law Part I", 74 Yale L.J. 262 (1964).

inspecting the terms of the warranty alone. The utility of warranty under the theory is its use as a tool for information processing.[60]

The signal theory draws mainly three implications. Firstly, it implies that warranties of different products are likely to contain similar or identical provisions. The second implication is that wherever warranty terms diverge from the near-uniform standards, the divergent terms will offer more generous coverage than the uniform terms. The third proposition of the theory is that subordinate terms of a warranty, as opposed to central terms, are more likely to diverge and offer relatively more restrictive coverage. Therefore, consumer benefits more from information relating to central terms of warranty than to subordinate terms.[61]

The signal theory has exerted substantial influence on consumer product warranty policy in many countries. For example in America, the objective of the Magnuson Moss Warranty Act, 1974[62] was to make warranties as more efficient signals. The Act required manufacturers to redraft warranties in simple and readily understood language[63]. All important provisions of warranties as per the Act are to be displayed prominently so that they are available for consumer inspection prior to purchase of the product[64].

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[60] *Id.* p.89. Also see Jennifer L.Gerner, & W.Keith Bryant, "The Price of a Warranty, the Case for Refrigerators", 12 *Journal of Consumer Affairs,* 30 (1978) and Gerner & Bryant, " Appliance Warranties as a Market Signal," 15 *Journal of Consumer Affairs*, 75 (1981).

[61] See Gerner & Bryant, "Appliance Warranties as a Market Signal," 15 *Journal of Consumer Affairs*, 75, at p. 78-79.

[62] 15 U.S.C. 2301-2312 (1976).

[63] *Id.*, s.2302 (b)(1)(A). The Act requires manufacturers to designate all express warranties as either 'full' or 'limited' in order to reduce the costs of comprehending warranty content. The Act also prohibits disclaimers of the implied warranties and expands consumer remedies and prohibits lying provisions for 'full' warranties. (See *Id.* ss.2303-2304; 2308 and 2302).

[64] *Ibid.*

c) *The Investment Theory of Warranty*

The investment theory of warranty is an endeavour to develop a positive theory of the content of consumer product warranties.[65] According to this theory, there are two principal determinants of warranty content in a market. First, if losses from defects in products are avoidable through appropriate actions, the warranty will allocate the loss to the party who can avoid it at least cost. Sometimes losses are best avoided through preventive investments. Investments by the manufacturer in product design or quality control can often avoid product losses. Similarly, consumer investments in search for the product best suited to the intended use or proper care and maintenance by consumer can avoid product defects. In other instances, losses are best avoided through the replacement of the malfunctioning product and the manufacturer or the consumer can be the least cost repairer.[66] Whatever be the method of loss avoidance, the investment theory predicts that warranty terms will allocate losses to induce efficient loss avoidance by the efficient loss avoider.

The second determinant of warranty content under the investment theory is the effectiveness of the manufacturer as an insurer against losses. If risks of loss from product defects vary largely from consumer to consumer, the manufacturer will be a poor insurer because he may not be in a position to segregate consumers into risk classes cheaply and effectively as alternative insurers.[67] In these circumstances, the manufacturers will limit the warranty coverage to those risks that virtually all

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[65] See George L.Priest, *supra* n. 57.
[66] *Id.*, pp.1308 – 1313.
[67] *Id.*, pp.1314 – 1319.

consumers share. Consumers who face greater risks have to self-insure or obtain alternative insurance. Thus low risk consumers need not pay for more insurance[68].

Whatever may be the theoretical foundation of warranties, its usefulness to consumers cannot be under-estimated. Depending upon the nature and scope of warranties, the producer's faith in the performance of his products can be assessed. Therefore, warranties exert considerable influence on the consuming public. It is based on this reason that legal interference into the realm of formation and implementation of the terms of warranties has taken place.

Legal Framework for Regulating Warranties

Ideally, warranties should express the manufacturers' confidence in the quality of his product. This confidence on the manufacturer's side in turn will build up consumer confidence, which is essential to any commercial strategy.[69] One of the fundamental problems facing consumers at present springs from the general absence of a legal framework applicable to commercial guarantees. It has been pointed out that much of the consumer dissatisfaction emanates out of the failure of guarantees to cover labour costs. The lack of clarity in the language used to describe the guarantee disclaimers also causes problems.[70] Large-scale consumer dissatisfaction has led the National Consumer Council of U.K. to propose a regime of consumer product guarantees[71]. Later the Directorate of Trade and Industry[72] of U.K. made three general proposals[73] in improving the situation. It suggested that (a) the manufacturer

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[68] *Id.*, pp. 1318 and 1346. For a criticism on the investment theory, see William C.Whitford, "Comment on a Theory of the Consumer Product Warranty," 91 Yale.L.J. 1371 (1982).
[69] *Supra.* n.50 at para.7.9.
[70] Office of Fair Trading, *Consumer Guarantees (*1986), para.5.9.
[71] National Consumer Council (U.K.), *the Consumer Guarantees* (1989).
[72] Herein after referred to as DTI.
[73] Directorate of Trade and Industry, *Consumer Guarantees* (1992).

should be made legally liable under his guarantee; (b) the retailers should also be liable on the terms of the guarantee; and (c) the manufacturers should be held responsible for the quality of goods[74] manufactured by him but sold by someone else.

Proposals concerning consumer guarantees came from the European Commission also. It has published a Green Paper on Consumer Guarantees and After Sales Service in 1993. A proposal for a council directive on the sale of consumer goods and associated guarantees was also made in 1996. The Green Paper and the Directive have divided the guarantees into 'legal' and 'commercial'. It has suggested many measures for improvement of both the guarantee options. Proposal has been made to allow consumers to rely upon the producers advertising in order to base a claim against a retailer where goods are not in conformity with the contract.[75] This is different from the proposal made in the Green Paper to the effect that the producer and the retailer should be jointly liable for all goods not in conformity with the contract. The Green Paper has envisaged a legal guarantee in respect of the quality of goods, which should be borne jointly by the retailer and the producer. The proposed Council Directive has struck a compromise by stating that the seller should be responsible for a failure of goods supplied to conform to the contract within a period of two years from the date of purchase.[76] It is also proposed in the Directive that the legitimate expectations of the consumer should also be taken into account so as to decide whether the goods supplied conform to the contract.[77] In order to ease out the burden of proof, the Directive proposed that there should be a presumption that any

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[74] The manufacturer should be responsible under the Sale of Goods Act, 1979 for the merchantable quality.
[75] The Proposed Directive of 1996, Art.2 (2)(b).
[76] *Id.*, Art.3(1).
[77] *Ibid.*

defect manifesting itself in the goods within six months of the sale, existed at the time of sale.[78]

The proposed Council Directive has also suggested introduction of new remedial measures over and above the usual ones known to English law.[79] It is proposed that if lack of conformity with the contract becomes manifest within one year of the sale, the consumer will be able to reject the goods or demand repair, a partial refund or a replacement.[80]

In the case of 'commercial guarantees', the Green Paper said that there is no legal framework within which they can operate. Similarly, there is no means of filling gaps in guarantee documents.[81] Therefore, it has been suggested by the proposed Directive that commercial guarantees should be made legally enforceable.[82] Commercial guarantee should clearly be considered as a contract between the guarantor and the holder of the good[83] even though there is no direct relationship between these two persons.[84] It should confer additional benefits on the consumer over and above the rights already arising from the legal guarantee. It has been suggested that the guarantee documents should also mention the existence of legal guarantee and summarise its content.[85] The provider of the guarantee should freely

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[78] *Id.*, Art.3(3).

[79] English law offers remedies of rejection or damages or both where appropriate. But if the buyer has accepted the goods, rejection will not be permitted. For a detailed discussion on this point, see A.G.Guest *et.al* (Eds.), *Benjamin's Sale of Goods,* Sweet and Maxwell, London (1992), pp.539-552.

[80] *Supra* n. 75, Art. 3(4).

[81] See The European Commission, *The Green Paper on Consumer Guarantees and After Sales Service* (1993), p.79.

[82] See the Proposed Council Directive (1996), Art.5.

[83] Under the Sale of Goods Act, 1979, the buyer alone is entitled for the benefit. The Green Paper seems to extend this to any person holding the goods as beneficiary.

[84] *Supra* n.81, p.96.

[85] *Ibid.*

establish the content of the guarantee and its duration[86]. When the document does not specify the scope of the guarantee, it should be considered as covering the goods in its entirety against any defect, which could arise after delivery.[87] The guarantee would also be considered as entitling the beneficiary to have the item repaired or replaced free of charge. If no period is mentioned, the guarantee would be considered as valid for one year after the delivery to the purchaser. Unless the guarantee documents clearly state to the contrary, the guarantee would be automatically extended for the duration of the repairs. The spare parts should come with a new guarantee having the same duration as the initial guarantee.[88] Guarantee conditions, if advertised shall not mislead. If this is the case, the guarantors should be obliged to honour the guarantee advertised.[89] Consumers should normally be given freedom to refer to the guarantee prior to their purchase. Guarantees are to be displayed just like products are displayed.[90]

A possible disadvantage of guarantee is that where manufacturers decline to honour, consumers may not be able to exercise their right to reject as against the retailer because of the delay. The consumer remedy may be confined to an action for money damages. Manufacturers' guarantees now give consumers additional remedies without affecting any of their legal rights. However, guarantees may not be as extensive as consumers usually expect. Consumers will have to pay for labour and

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[86] *Id.*, p.97.
[87] *Ibid.*
[88] *Ibid.*
[89] *Id.* p.98.
[90] The U.S. Department of Commerce has also made many recommendations for making the warranties fair and uniform. See, U.S.Department of Commerce, Office of Consumer Affairs, *Product Warranties and Servicing* (1980).

transport charges where a product is repaired under guarantee[91]. A guarantee may not extend to all accessories and it may not apply at all if the consumer has attempted repairs. There are guarantees, which by virtue of its terms render them useless to the consumers.

Some guarantees in fact try to reduce the manufacturer liability to replace the goods[92]. Most of the customers never read the guarantee document supplied to them when they purchase goods. It may have the adverse effect of restricting the liability of the supplier to pay for the loss and escape from it by merely attempting to repair it. Lord Denning vividly describes this practice in the following words:

> "It is to my mind quite wrong that customers should be hoodwinked in this way. When supplier says he gives guarantee, he should be held to his word. He should not be allowed to limit it by clever clauses in small print – which in 99 cases out of 100 the customer never reads. Certainly, he should not be allowed to cut it down by phrases of doubtful or ambiguous import. If he wished to excuse himself from liability, he should say so plainly. Instead of heading it boldly 'GUARANTEE', he should head it 'NON–GUARANTEE': for that is what it is."[93]

In the absence of measures to impose a mandatory guarantee on manufacturers, legislation can attempt to ensure that consumers clearly understand the undertakings set out in guarantees. In Britain, the Fair Trading Act, 1973, provides for orders that can be issued by the Secretary of the State in this regard. He may

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[91] For instance, the Automobile Manufacturers' Guarantees generally specify that the vehicle in question is to be presented to their authorized service station for repairs. In certain cases, such as electrical, what is guaranteed may be the replacement of new parts for the defective one where the consumer is often asked to pay for labour.

[92] *Adams* v. *Richardson & Starling Ltd.*, [1969] 2 All E.R. 1221 (C.A.).

[93] *Id.* at p.1224.

direct that the guarantee is made known to the consumers and also that it does not affect their rights under the Sale of Goods Act.[94] The guarantee must be available to consumers prior to a transaction. It becomes legally binding on a business and cannot be disclaimed or modified[95]

When manufacturers or producers give a personal assurance to a consumer who later acquires the goods, there should be no difficulty in holding them liable under a collateral contract. There are several well-known cases on this point.[96] If a similar approach is adopted in guarantee cases, it is possible to hold manufacturers liable to consumers where the claims or assurances are not given directly and personally, but are contained rather in leaflets and other general advertising materials. Taking this view, the Court of Appeal in *Carlill* v. *Carbolic Smoke Ball Co.*[97], held that the plaintiff is contractually entitled to recover from the defendants the reward they had offered in their advertisement[98].

Damage may be caused not only by defect in the product, but also by something said about the product. For instance, a wire capable of lifting a ton weight may become very dangerous if it is inaccurately described as capable of supporting three tons. If the cable were accompanied by the misleading description, it would be

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[94] See the Fair Trading Act, 1973 (U.K.), s.17. Also see, Consumer Transactions (Restriction on Statements) Order, 1976, clause 5.

[95] The Office of Fair Trading, *A Guide for Manufacturers* (1979), clause 2.

[96] See for instance, *Wells (Merstham) Ltd.*, v. *Buckland Sand and Silica Co. Ltd.*, [1964] 1 All E.R.41 (Q.B.); *Shanklin Pier Ltd.* v. *Detel Products Ltd.*, [1951] 2 All E.R. 471 (K.B.); *Brown* v. *Sheen & Richmond Car Sales Ltd.*,]1950] 1 All E.R. 1102 (K.B.); *Andrews* v. *Hopkinson* [1957] 3 All E.R. 422 (Assizes) and *Yeoman Credit Ltd.*, v. *Odgers* [1962] 1 All E.R. 789 (C.A).

[97] [1893] 1 Q.B. 256 (C.A.).

[98] The respondents in this case, issued an advertisement stating that their product, *viz.* The carbolic smoke ball, would surely cure influenza if anybody consume it as directed in the advertisement. To ensure their honesty to the claim, they offered a reward to any person suffering from influenza after consumption of the smoke ball. The petitioner, though consumed the smoke ball as directed, could not get cured from influenza. He filed the present suit to claim the reward notified in the advertisement.

possible to classify the cable and its descriptive material taken as a whole, as a defective product.[99] In such circumstances, it may appear to be necessary to suggest the imposition of strict liability on the manufacturers[100]. Any statement made by the manufacturer for the purpose of determination of liability can be treated as 'false' if it is a mis-statement of fact.

Law has been primarily concerned with guarantees, which may be positively detrimental or misleading.[101] Statutory prescriptions as to the contents of guarantees will be necessary to take care of the difficulties, which the consumers may confront in their dealings. This may be possible at the instance of law or through administrative agencies or both. A guide for manufacturers[102] prepared by the Office of Fair Trading in England is worthy of examination. The Guide presupposes the existence of certain

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[99] See *Wormell* v. *RHM Agriculture (East) Ltd.*, [1986] 3 All E.R. 75 (C.A.). The Queens Bench Division has held that a product also include the instructions accompanying that product. The Court of Appeal, while agreeing with this proposition, set aside the decision of the Queens Bench on other grounds.

[100] See the Ontario Law Reform Commission, *Draft Bill to Impose Strict Liability on Business Suppliers of Defective Products* 1979. The Commission has suggested for imposition of strict liability for false statements about products. Clause 4 of the Draft Bill provides as follows:

(i) Where in the course of his business a person supplies a product of a kind that it is his business to supply and makes a false statement concerning the product, reliance upon which causes personal injury or damage to property, that person is liable in damages.

(a) for injury or damages so caused; and

(b) for any economic loss directly consequent upon such injury or damage, whether or not the reliance is that of the person suffering the injury or damage.

[101] For example, the Unfair Contract Terms Act 1977 (U.K.) s. 5, invalidates guarantees of consumer goods which seek to exclude or restrict liability under a contract to supply the goods in question. Similarly, Part II of the confers power on the Secretary of State to create offences where it can be established that a practice operates to the economic detriment of consumers. Also see, the Consumer Transactions (Restriction on Statements) order ,1976 (U.K.). Art.5 of this order prohibits statements, which sets out or limits obligations.

[102] Office of Fair Trading (U.K.), *A Guide for Manufacturers* (1979).

basic undertakings[103] in every guarantee. To ensure clarity in scope and application, it suggests the inclusion of some essential points in every guarantee.[104] The guideline suggests that all sorts of restrictive terms, which often produce unexpected problems to consumers, be avoided[105]. The consumers should be given an opportunity to read the guarantee prior to purchase in the case of all expensive goods they buy.[106]

Traditionally, in an economy where crafts and small business predominate, the bond of trust between the purchaser and the vendor was the dominant factor in the contractual relationship. In modern consumer societies, based on systems of mass production and distribution, consumer confidence concerning the product as such, is bound up more with the consumers' faith in the manufacturers than in the sellers. Competition between similar products is also more between brands than between vendors. The latter compete mainly on the basis of price and 'after sales service'. When the defect in a product results from its manufacture, it is rather illogical to attribute it to the vendor, who has no influence on the production process and who in

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[103] *Id.*, clause 1.The basic undertaking include that a manufacturer's guarantee should;
(a) undertake for a stated period, to repair or replace specified (or all) defective parts within a specified and reasonable time if asked to do so;
(b) undertake to do this free of any charge, including charges for labour, call out and return carriage;
(c) undertake to extend the specified period by any significant period during which the consumer is without the product because a defect is being repaired under the guarantee. See clause 1.

[104] *Id.*, clause 2. The essential points are :
(a) the name and address of the guarantor;
(b) the products or parts covered by, or excluded from, the guarantee;
(c) the duration of the guarantee;
(d) the procedure which the consumer should follow in order to present a claim under the guarantee;
(e) the remedies which the guarantor undertakes to provide in response to a valid claim under the guarantee;
(f) whether in order to benefit under the guarantee the consumer must complete and return a guarantee registration card.

[105] For the list of undesirable restrictions see *id.*, clause 3.

[106] *Id.*, clause 5.

many cases may not even have packed the product, should be the only person to whom the purchaser can look upon. Extension of the liability to the manufacturer will increase the chance of the consumer being compensated better, since the manufacturer's financial resources are often greater than that of the retailer. Accordingly, legal systems have started making the manufacturer directly liable for the legal guarantees.

Guarantee, in its modern sense, is considered as an element intrinsically linked to the product. Hence, it is just and proper to consider not only the initial purchaser but also any subsequent owner of the product as the beneficiary of the guarantee.[107] In certain jurisdictions it is possible for any user of the product, though he is not the owner, to invoke the legal guarantee.[108]

But if the manufacturers or sellers of a goods offer a commercial guarantee, the consumers not normally invoke his legal rights arising from the legal guarantee and will begin by trying to invoke the commercial guarantee. This situation is advantageous to both the parties because they have recourse to an advance agreement between one another and not to the long and tedious procedures of law.

The Indian Law on Manufacturers' Guarantees.

Regulation on manufacturer's guarantee in India is still in its infancy. India has not made any significant break through as in the case of the western world. However, the amendment made to the Consumer Protection Act, 1986[109] is a step in

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[107] The law of force in France, Belgium and Luxembourg are examples. See, Commission of the European Communitees. *Green Paper on Guarantees for Consumer Goods & After Sales Services* (1993), p.88.

[108] For instance, the Netherlands Civil Code provides so.

[109] The Consumer Protection (Amendment) Act, 1993.

the right direction. As per the amended provision, 'defect' in the goods means "any fault, imperfection or short coming in the quality, quantity, potency, purity or standard required to be maintained by any law in force or under any contract, express or implied or contrary to the claim made by the trader in any manner whatsoever".[110] If the claim made by the vender expressly or by implication is found untrue, it can be a ground for legal action against him under this provision. Manufacturer's guarantees can be considered as either a term arising out of the contract[111] between the producer and buyer or a claim made by the manufacturer.[112] The consumer can seek his remedy under any of these heads.

Similarly, the definition of the term 'unfair trade practice'[113] takes in its fold giving of any warranty or guarantee to the public about the performance, efficacy or duration of life of a product which is not based on adequate or proper test.[114] Making of a representation to the public in a form that purports to be a warranty or guarantee or a promise to replace, maintain or repair an article or part thereof, is an 'unfair trade practice' if it is materially misleading.[115]

So far as 'unfair trade practices' are concerned, the consumer has remedies under the Consumer Protection Act, 1986[116] and also under the Monopolies and Restrictive Trade Practices Act, 1969.[117] Enquiries by the Monopolies and Restrictive

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[110] The Consumer Protection Act, 1986, s. 2(i)(f).
[111] A contractual term that is express or implied, can be treated as a legal guarantee.
[112] Claims other wise than in a contract can be treated asa commercial guarantee.
[113] The Consumer Protection Act, 1986, s. 2 (i) (r).
[114] *Id.*, s. 2(1) (r) (vii).
[115] *Id.*, s. 2(1) (r) (viii).
[116] A 'complaint" under the Consumer Protection Act, 1986, includes a complaint for 'unfair trade practices' also. See *id.*, s. 2(1)(e).
[117] See the Monopolies and Restrictive Trade Practices Act, 1969, ss.36 B, 36 C, 36 D and 36 E. These sections are sought to be replaced by the proposed Competition Act, 2001. See the Competition Bill, 2001.

trade Practices Commission may end up in an order directing the party to discontinue or not to repeat the practice any more. The Commission can also award compensation in deserving cases.[118]

There are many instances of interference by the Monopolies and Restrictive Trade Practices Commission when the manufacturers had failed to honour their warranties. *In re Gem India,*[119] the respondents warranted that the refrigerator they sold are free from manufacturing defects. When complained of unsatisfactory performance, they have not made the replacement as warranted by them. The Commission found that there has been an unfair trade practice amounting to a breach of warranty. *In re Universal Instruments Co.*[120] the respondents contended that the warranty in question was issued only after delivery of the goods and hence it cannot be made applicable. The Commission opined that the statutory provision[121] did not say that warranty should be given prior to sale. Since the respondent has given a warranty, which they have not honoured, it amounted to an unfair trade practice.

Quality Regulation by Consumer Self-help.

The Consumers, by their prudent purchase decisions, can influence traders to market goods of standard quality. Statutory support to consumers to exert pressure on traders in this regard can be found in the Sale of Goods Act, 1930. The right to

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[118] See the Monopolies and Restrictive Trade Practices Act, 1969, s.12 B.

[119] U.T.P. Enquiry No.146/1986, Order dated 22-4-1991. See also, *In re Surendrapal Pathak and Escorts Ltd.,* U.T.P. Enquiry No.78/1985, Order dated 5-10-1987, *In re Chloride India Limited.,* U.T.P. Enquiry No.84/1985, Order dated 25-8-1988; *In re Logic Systems Pvt. Ltd.,* U.T.P. Enquiry No.51/1989, Order dated 15-11-1989; and *In re Birla Yamaha Ltd.,* U.T.P. Enquiry No.29/90, Order dated 4-4-1996.

[120] U.T.P. Enquiry No.153/90, Order dated 15-2-1996.

[121] The Monopolies and Restrictive Trade Practices Act, 1969, s. 36-A(viii).

inspect or examine the goods[122] and to reject goods[123] of unsatisfactory quality is the potential weapon in the hands of consumer.

Right of Inspection

The general obligation of the buyer in relation to any purchase he makes is to accept and pay for the goods in accordance with the contract. This does not mean that he must accept the goods tendered if they fail to conform to the sale contract. The buyer has the right to see that the goods delivered conform to the contract. This implies the existence of a right to inspect or examine the goods. The buyer will not be deemed to have accepted the goods until he has had a reasonable opportunity of examining them.[124] In *Sorabji Hormusha & Co.* v. *V.M. Ismail,*[125] the Madras High Court said:

> "At common law an opportunity to the buyer to inspect goods, whether availed or not, was sufficient to absolve the seller from responsibility in regard to defects which such examination might have revealed. Under the Act, an actual examination is necessary."[126]

The Court added that mere receipt of goods does not amount to acceptance. The buyer can claim a reasonable opportunity of examining the goods before accepting it. Such an opportunity is to be given by the seller on the request of the buyer.[127]

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[122] The Sale of Goods Act, 1930, s. 41.

[123] *Id.*, ss. 42 and 43.

[124] See, The Sale of Goods Act, 1930, s. 41; also see for corresponding English law, s. 34 of the Sale of Goods Act, 1979.

[125] A.I.R. 1960 Mad. 520.

[126] *Id.* at p.523.

[127] The Sale of Goods Act 1930, s. 41(2) reads:

> "Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract".

In *Heilbutt* v. *Hickson,*[128] military boots for the use of French army were delivered at a wharf in London. The buyers re-directed it to Lillie, for delivery to French authorities. The French authorities on examination discovered paper in the soles of the shoes, which rendered them unfit for military use. In an action for refund of the purchase price, the respondents contended that the plaintiff had examined the cargo at London and then accepted it by re-directing it to the French port. It was held that the buyers had not had reasonable opportunity for examining the goods at London wharf. Therefore, they had not accepted them and hence entitled to refund. Similarly, when the seller refused to allow the buyer to open the cases that contained the goods, the buyer was held not bound to accept them.[129] Correspondence of the goods with the requirements of the contract, upon test or inspection, is a condition precedent.[130] If the article does not correspond in kind, quality or condition to that which he has contracted for, the buyer may reject it.[131] The contract itself may contain provisions for the buyer's right of inspection, the place and manner of inspection. This right exists even though the contract does not expressly provide for it.[132]

Place of Inspection

The buyer may inspect the goods at any convenient place. In the absense of an agreement to the contrary, the proper place of inspection is the place of delivery. If a place is mentioned for inspection in the contract and it becomes impossible to carry

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[128] (1872) L.R. T C.P. 438 as quoted in Avtar Singh, *Principles of the Law of Sale of Goods and Higher Purchase,* Eastern Book Company, Lucknow (2000), at p.164.

[129] *Isherwood* v. *Whitmore,* (1843) 11 M&W 347 as quoted in Avtar Singh, *id.*. at p.166.

[130] The Sale of Goods Act, 1930, s. 41(1) reads:
"When the goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract."

[131] *The American Jurisprudence,* Lawyer Co-operative, New York (1962) (2d.), p.534.

[132] The Uniform Commercial Code (U.C.C.) of the U.S.A. also contains a similar provision with respect to inspection of the goods delivered, in order to determine whether they are the one that has been ordered by the consumer. See the U.C.C. s. 2-513(1) and s. 2-606 (i) (b).

on inspection at the place specified, inspection at another place is permissible. On the other hand, if it was possible for the buyer to inspect the goods in the place mentioned in the contract, buyer's failure to inspect at such place may be deemed as a waiver of his right.[133]

Where the goods are shipped by carrier, the buyer generally has the right to inspect them at the destination to ascertain whether they conform to the contract. The right to inspect implies the right to reject the goods if they are not of the quality and description required by the contract. Where the goods ordered are of a specific quality to be forwarded to the buyer at a distant place, the right of inspection, will continue until the goods are received and accepted at its ultimate destination.[134] This rule would apply even where delivery to a carrier is deemed to be delivery to the buyer.[135] But as agreed, if the goods are inspected at the place of shipment, no right of inspection would exist at the point of destination.[136]

Time of Inspection

It is open to the parties to specify the time for inspection in their contract itself. But if the agreement had not provided for any particular time, the buyer has to inspect it within a reasonable time. The question as to what would be a reasonable time within which the buyer has to inspect the goods is usually a question of fact.

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[133] *Id.*, s.2-513, Comment 6.

[134] In cases of C.I.F. contracts, before accepting the goods, the buyer has a right to inspect them. See, *Mysore State Co-operative Marketing Society* v. *KoMoung Gyi & Sons,* A.I.R. 1974 Mys. 20.

[135] *Supra* n. 131 at p.526.

[136] *E.Clemens Horst* v. *Biddel Brothers,* [1912] A.C.18 and *Hardy & Co.*v. *Hillerns & Fowler,* [1923] 2 K.B.490. (C.A.).

This is to be determined by the court based on the circumstances, custom or usage or the prior course of dealing between the parties.[137]

Manner of Inspection

The inspection is to be conducted in a reasonable manner.[138] The method of inspection may be fixed by the agreement between the parties. If compliance with a contract term as to the method of inspection becomes impossible, inspection shall be made in any reasonable manner unless the method fixed was clearly intended as an indispensable condition.[139] A particular method of inspection might be specified in the contract, like an inspection by a designated person. If that person could not make inspection, an inspection by a different person might be reasonable under the circumstances. In *Thornet* v. *Beers,*[140] the buyer of vegetable glue went into the seller's godown. The seller offered every facility to examine the goods. But the purchaser being pressed for the time examined the barrels from outside and did not get them opened up. He placed an order. It was held that the goods were examined and the buyer could not reject it subsequently[141].

The seller will be immune from such liability only to the extent the buyer's examination ought to have revealed. The liability will continue with reference to the defects, which the ordinary skill and judgement of the buyer ought not reveal.[142] In *Hasenbhoy Jetha Bombay* v. *New India Corporation Ltd.*,[143] the appellant was a

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[137] *Supra* n. 131 at p.529. Under s. 2-513(1) of the Uniform Commercial Code (USA), the buyer has a preliminary right of inspection before paying even though under the delivery term the risk of loss may have passed to him. Also see the U.C.C., ss. 2-512 and 2-606 (1)(a).

[138] See U.C.C. s. 2-513 (1).

[139] *Id,*. s. 2-513 (4).

[140] [1919] 1 K.B. 486. Also see , *Sorabji Hormusha & Co.* v. *V.M. Ismail,* A.I.R. 1960 Mad. 520.

[141] *Id.* at p. 525.

[142] See *In Re, Beharilal Baldeoprasad Firm of Merchants,* A.I.R. 1955 Mad. 271.

[143] A.I.R. 1955 Mad. 435.

reputed firm dealing in second hand crushing machines. The respondent company agreed to purchase one such machine, which was examined by an employee of the respondent. The employee tested the machine by using manpower. The court held that the defect in the machine could only be ascertained by demonstration with electric power. Hence examination by the employee of the respondent was of no defense.

Right of Rejection

It has been well established that the buyer was under no duty to accept goods that did not conform to the sales contract[144]. The buyer has a general right to reject the goods if either the goods themselves or the tender of delivery fail in any respect to conform to the contract. This right is subject to special rules with regard to breach in instalment contracts. If the goods fail to conform to the contract, the buyer has three options. He may reject the whole, accept the whole, or accept any commercial unit or units and reject the rest. In other words, there can be a complete rejection, complete acceptance or partial acceptance. If the goods are delivered to the buyer and he refuses to accept them, he is not bound to return them in the absence of an agreement. It is sufficient that he intimates the seller about his non-acceptance.[145] He is not bound to return the goods to the seller.[146]

In the United States, the Uniform Commercial Code[147] provides for greater right of rejection concerning goods sold on approval. Such goods may be returned to

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[144] The Sale of Goods Act, 1930, s. 43.

[145] *Ibid.* However, according to s.42 of the Act, if the buyer retains the goods beyond a reasonable time without rejecting them, he is deemed to have accepted them. Therefore, if the buyer wants to reject, he must intimate to the seller his intention to reject.

[146] *Union of India* v. *Sitaram Jaiswal,* (1976) 4 S.C.C. 505.

[147] See the U.C.C. (U.S.A.), s. 2-326 (i)(a).

the seller even though they conform to the contract. The buyer has a better opportunity of rejection here than in case of ordinary sale. In ordinary sale rejection is permitted only if the goods fail to conform to the contract.

Acceptance of the goods does not preclude the liability on the part of the seller for damages that come up due to the breach of any express or implied warranty. It only restricts the buyer's right to reject the goods so accepted. The consumers in general are not very much conversant with the existence of this right. Many who know it often disregard it. Many complaints about products could be avoided if consumers exercise their right of inspection and rejection prudently. Defects and deficiencies noted by the consumer in this process and transmitted to the manufacturers could be used as a good device intended to improve the quality and performance of products in future.

The right of inspection and rejection embodied in the law of sales is apparently intended to ensure that the consumer is given the goods that he has ordered for. The right of inspection extended to him is only to have a cross match with the description. So much so, a higher degree of quality assurance is not possible through the exercise of this right. Moreover, a fair description of the goods demands a higher level of knowledge about the goods and its components by the buyer. In this technological world only a very limited number of consumers can fruitfully exercise this right. Much of them suffer from lack of information. Product guides, which provide correct information about consumer goods, are not available in India[148] in

[148] *'Insight'*, a consume magazine, published by the Consumer Education and Research Society, Ahmedabad, probably is an exception. It contains a portion for product guidance for consumers. Considering the width and depth of consumer ignorance about product performance and quality, efforts and initiatives on a larger scale is a desideratum.

plenty. What are being disseminated through the media are predominantly the views of manufacturers and sellers who quite often try to mislead the consumers.

Apart from the rights recognised by statutes, consumers and consumer organisations can adopt other self-protection measures. Consumers should be trained to take rational purchase decisions instead of being influenced by commercial advertisements. They should assess their needs and purchase goods essential for satisfying those needs. Consumer associations can be instrumental in influencing the quality control measures of manufacturers and sellers. This can be done by involving in the consumer complaint handling procedures of the business houses and also by actively involving in the adoption of self-regulatory codes. Consumer associations can assist consumers by providing correct product information and help them to take prudent purchase decisions[149]. They can also help the consumers in getting redressal of their grievances through administrative and judicial authorities[150].

Conclusion

The above analysis shows that business self discipline, self-regulation by trade associations, manufacturers guarantees and self help by consumers and consumer organisations are widely adopted as quality control measures in many developed countries. India has not progressed much in this direction mainly due to lack of sufficient statutory support to these programmes. In the changed context of de-

[149] For instance, the Consumer Education and Research Society, Ahamedabad publishes regular columns on unsafe products along with test reports on quality standards of various goods in their magazine *Insight*.

[150] For example in India, the Consumer Protection Act, 1986, the Prevention of Food Adulteration Act, 1954, the Drugs and Cosmetics Act, 1940 etc. recognise the representation of consumer organisations in these processes.

regulation and global marketing, strengthening of these methods of quality control will benefit both the manufacturers and consumers.

In the area of self-discipline by manufacturers, what is required is proper recognition and encouragement of the voluntary and positive efforts taken by them. Economic incentives in the form of tax reliefs and quality awards are some useful methods that can be taken towards this end. Imposition of an obligation on manufacturers to file periodical reports on quality control measures adopted by them in their industrial establishments can also be considered.

Self-regulatory codes are being successfully practiced in developed countries like England and America. The British administrative agency viz. the Office of Fair Trading is encouraging adoption of consumer friendly codes by the traders. India also requires an agency to encourage and monitor adoption and implementation of self-regulatory codes. Notification of the essential requirements of self-regulatory codes may be helpful to the traders and consumers. The adjudicating agencies can also encourage these codes by recognizing it in their judgments. They may treat it as the existing reasonable practice among businessmen concerning quality standards in goods and services. Consumers can also be encouraged primarily to approach the redressal agencies under the code for settling their disputes, before they raise it for a formal adjudication.

'Manufacturers warranty' in consumer transactions is a neglected area in India. In many jurisdictions, substantial legislative controls are made to ensure that guarantees are properly made and performed. The Magnusson Moss Warranty Act, 1974 of the United States is a good example. The Act stipulates that detailed

information relating to warranty coverage and the procedures for claiming them are to be clearly stated.[151] In addition to the disclosure provisions, the Act requires that guarantees be clearly labeled as either 'full' or 'limited'. A 'full' guarantee must meet certain minimum standards. It must provide that defects will be rectified without charge and within a reasonable period. If this proves to be impossible, consumers must be offered a full refund or replacement.

Similarly, the North American legislation on warranties, in addition to providing guidelines on additional written warranties, declares that no additional written warranty will be considered void only on the ground that it is contrary to the guidelines provided in the Act.[152] It also says that the retailer will be deemed to be the warrantor for the additional written warranty attached to any consumer product sold by him.[153] He can be relieved from this obligation only when the retailer prior to the sale, make it clear to the consumer in writing that he does not adopt the additional written warranty[154] as his own. It will be treated as unreasonable to require a person claiming under a warranty to return any consumer product that because of its size,

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[151] See 15 U.S.C. ss. 2301-12. They include, (i) its name and address; (ii) the identity of those to whom it extends; (iii) the parts covered; (iv) what the guarantors will do, at whose expense and for what period; (v) what the consumer must do and what expenses he must bear. (vi) exceptions; the procedure to make the claim and (vii) that there are additional legal remedies available to consumers .

[152] See Saskatchewan Consumer Products Warranties Act, 1977, s. 17. However, it has been provided in s. 17(3) as follows:

"No additional written warranty shall:

(a) purport to make the warrantor or his agent the sole judge in deciding whether or not there is a valid claim under the warranty;

(b) purport to exclude or limit any express or statutory warranty or any of the rights or remedies contained in this Act;

(c) purport to make a claim under the warranty dependant upon the consumer products' being returned to the warrantor, when it would be unreasonable to so return the product;

(d) purport to limit the benefit of the warranty to the consumer or purport to exclude persons mentioned in sub-section 4(1) from receiving the benefit of the warranty; or

(e) be deceptively worded."

[153] *Id.*, s.17(1).

[154] *Ibid.*

weight or method of attachment or installation cannot be removed or transported without significant cost to such person.[155] When the warrantor fails to honour a valid claim for repair or replacement made by a consumer within a reasonable period of time, the consumer can have the defect remedied elsewhere and recover from the warrantor the repair costs, losses and damages suffered by him[156]. It has been made an offence for every manufacturer, retailer or warrantor to provide an additional written warranty that does not comply with the guidelines given under the Act.[157]

However, under Indian law, the prohibition is only against giving a warranty without any intention to perform[158]. Similarly, misleading statement claiming to be warranties are also treated unfair trade practice[159]. Provisions in the nature of the European Commission Green Paper on Consumer Guarantees and After Sales Services mentioned above[160] or that under the North American legislation[161] is necessary to make manufacturers' guarantee as an effective tool for quality control. This along with proper administrative monitoring may provide a viable system of quality control.

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155 *Id.*, s. 18.
156 *Id.*,s. 24.
157 *Id.*, s. 34.
158 See the Consumer Protection Act, 1986, s.2(1)(v)(viii).
159 *Id.*, s. 2(1) (r) (vii).
160 *Supra.*n. 81 p. 18.
161 *Id.* at p.32.

Chapter 3

QUALITY CONTROL: ADMINISTRATIVE MEASURES

Industrialization and mass production of consumer goods in many respects put the consumers in a disadvantageous position. The legislatures around the world began to intervene to ensure and protect the health and safety of consumers. Earlier enactments on consumer affairs thus concentrated mainly to the health and safety of people and quality of products like bread and beer[1]. Right to safety and health, and the right against the sale and supply of hazardous products are recognized as basic consumer rights[2]. For translation of these rights into practice, legislature has enacted many laws[3]. However, proper implementation of these laws can be achieved only through the establishment of elaborate administrative machineries. The legislation imposes civil and criminal liability for violation of its provisions. But the standard of quality to be maintained are often determined by the administrative agency. Similarly, monitoring of the quality control measures can only be done by administrative bodies. Identification of violations that occur and initiation of prosecution are also the functions of administration. For this purpose, maintenance of records and submission of periodical returns becomes necessary. Inspection and search of the premises may also become necessary to check violations of law. However, the rationale in exercising administrative controls is to be examined in a liberalized economy.

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[1] For a discussion on development of the earlier law, see *supra* Chap.1.

[2] See, the *U.N. Guidelines on Consumer Protection,* 1985.

[3] Provisions in the Indian Penal Code, 1860, the Essential Commodities Act, 1955, Prevention of Food Adulteration Act, 1954 and the Drugs and Cosmetics Act, 1940 are some of the examples.

Civil and criminal liabilities are imposed after an injury is suffered by the consumer due to the poor quality in goods or services. Loss of life or permanent disablement caused as a result of the defective product cannot be adequately compensated[4]. What can be done is to give an amount as a consolation. So it is recognized in all civilized countries including liberal economies that preventive measures are to be taken to achieve product safety. In India also administrative measures are aimed at preventing hazards to life and property by products of dubious quality. What is required is an efficient administrative machinery and proper check on abuse of powers by them. Judicial review of administrative action has developed as an effective tool to control the abuse of administrative power.

Administrative measures for quality control adopted in India include delegated legislation and administrative adjudication. Administrative adjudication is effected by licensing, registration, certification, labeling, issuing of permits, inspection and investigation. Quasi-judicial powers are also exercised by administrative agencies. Right to information of consumers, especially about quality of products is protected mainly through advertising controls. All these administrative measures need a detailed examination to assess the usefulness of this method.

Administrative Rule Making

All statutes regulating quality of goods confer power on executive governments to make rules for the purpose of implementation of the law. It is by the exercise of this power that detailed procedures for administration of the Act are formulated. For example, quality, price, storage and equitable distribution of essential

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[4] Damages for personal injuries and death are often quantified in an arbitrary manner since the real value of life or injury cannot be determined in an abstract sense. For a discussion on this topic see Munkman, *Damages for Personal Injuries and Death,* Butterworths, London (1973).

goods are regulated by the Essential Commodities Act, 1955. This enactment confers on the Central Government extensive power to control production, supply and distribution of essential commodities[5]. The Government can also regulate or even prohibit any commercial activity if non-regulation or absence of prohibition would be detrimental to the public interest[6]. In exercise of these powers, the Central Government has issued a large number of orders. These orders very often prescribe the quality standards that goods of different varieties should maintain[7]. The orders empower the administrative agencies to call for information, to give directions and also to enter and inspect any premises and seize any goods for contravention of the provisions of the Act and the orders. The Act also empowers the executive to issue licenses or permits and to lay down the conditions to be followed by the licensees. It can accept security for due compliance of these conditions[8]. The conditions can include among others, stipulations as to quality mark certification for goods under licence[9].

Similarly, the Prevention of Food Adulteration Act, 1954 enables state governments to make rules prescribing the forms of licence for the manufacture for

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[5] The Essential Commodities Act, 1955, s. 3.

[6] *Id.* sub-section 3(2)(g). Also see, the Cement (Quality Control) Order, 1995. Para 3 of this order prohibits the manufacture, sale and storage of cement, which is not of the prescribed standards of quality. It also prohibits the storage, sale and distribution of cement that does not bear the standard mark of quality assigned to it. Similarly, the Cement Control Regulation of Production Order, 1981, introduces prohibition regarding production of certain varieties of cement. For further instances of prohibition orders see, the Cold Storage Order, 1980 clause 3; the Electrical Wires, Cables, Appliances and Accessories (Quality Control) Order, 1993, clause 3 and the General Service Electric Lamps (Quality Control) order, 1983, clause 3.

[7] See *infra*.

[8] The Essential Commodities Act, 1955, s. 3(2)(h)(n).

[9] See for example, the General Service Electric Lamps (Quality Control) Order, 1989 and the Household Electrical Appliances (Quality Control) Order, 1981. Both these orders prohibit manufacture, sale etc. of electrical appliances which are not of the standards prescribed by the Bureau of Indian Standards (BIS).

sale, storage, or distribution of articles of food[10]. State governments can also lay down the conditions subject to which such licenses may be granted and to accept cash security for the due performance of the conditions of licence[11]. The circumstances under which the licenses are to be suspended and the security sum to be forfeited can also be prescribed by the rules[12]. Quality of the goods can constitute a condition of the licence that may be issued under the Act[13].

Administrative regulations, which are wider in scope and amplitude, are contained in the Drugs and Cosmetics Act, 1940. The Act empowers the Central Government to make rules for various purposes.[14] The Central Government has prescribed the methods of test or analysis to be employed in determining whether a drug or a cosmetic is of standard quality[15]. It can specify the drugs or classes of drugs or cosmetics for which a licence is required and prescribe the form and conditions of such licence.[16] The rules made under the Act stipulate[17] that the licencee shall submit an undertaking stating his intention to conform to the conditions[18]. The undertaking includes the applicant's assurance to keep and maintain the standards of strength, purity and quality conforming to those prescribed under the Act.[19] Breach of conditions of licence entails either suspension or cancellation of the licence[20].

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[10] The Prevention of Food Adulteration Act, 1954, s.24.
[11] *Id.*, s. 24 (2)(b).
[12] *Ibid.*
[13] The Prevention of Food Adulteration Rules, 1955 prescribes the quality of many of the articles used as food.
[14] *Id.*, s.12.
[15] The Drugs and Cosmetics Act, 1940 s. 12(2)(b).
[16] *Ibid.*
[17] The Drugs and Cosmetics Rules, 1945.
[18] In form 9.
[19] *Ibid.*
[20] The Drugs and Cosmetics Rules, 1945, rule 85-I.

Administrative powers conferred on executive governments may even go to the extent of conferring power to prohibit certain activities in public interest[21]. Thus the Dangerous Drugs Act, 1930 also confers powers on governments to regulate the traffic in drugs and advertisements.[22]

Similar rule making powers can also be seen in other quality control enactments[23]. In all these cases, delegated legislation in the form of rules, regulations, statutory orders, circulars and clarifications are issued by governments and subordinate functionaries. There are many occasions where complaints are made against the abuse of these powers by executive governments and the agencies established for this purpose. The attitude of the judiciary in relation to these complaints is relevant in deciding the efficacy of the rule making powers.

Rule Making Power: Judicial Controls

Judicial review of administrative rule making[24] is subject to the normal rules governing review of administrative action. This power of the judiciary to review the rules made by administrative agencies and executive governments cannot be foreclosed in any manner by the enabling Act[25]. Following are the normal grounds on which the judiciary may nullify the rules made.

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[21] The Drugs and Cosmetics Act, 1940, ss.10-A and 26-A.

[22] For a detailed discussion on the provisions of these enactments, see M.L.Mehra, *The Handbook of Drug Laws,* Universal Book Agency, Allahabad (1998), pp. 678-688 and 717-737.

[23] For instance, see the Drugs and Magic Remedies (Objectionable Advertisements) Act,1954, s.16; the Dangerous Drugs Act, 1930, s.36: the Opium Act, 1857, s.31 and the Opium Act, 1878, s.5.

[24] Among the diverse devices for controlling the rule making power, judicial review is only one among them. Consultation, publication and legislative scrutiny are the other methods of control. For a detailed discussion on these methods, see P.P.Craig, *Administrative Law,* Sweet & Maxwell, London (1999), Chapter 12. Also see I.P. Massey, *Administrative Law,* Eastern Book Company, Lucknow (1995), pp.90-105.

[25] Statements such as "shall not be called in question in any court" or the rules made and published in official gazette which would be treated "as if enacted" in the Act cannot take away the power of judicial review. See for example, *State of Kerala* v. *K.M.C.Abdulla & Co.,* A.I.R.1965 S.C.1585 and *G.O.C.* v. *Subash Chandra Yadav,* A.I.R.1951 S.C.332.

(i) The Enabling Act is *Ultra Vires* the Constitution

If the court is of opinion that the enabling Act itself has crossed the permissible limits of the constitution and thus *ultra vires* the Constitution, the rules and regulations framed there under would also be void[26]. Therefore, in *Re Delhi Laws Act,*[27] when the court found that the Act confers power on the administrative agency to repeal a law, which in the opinion of the court was essentially a legislative function, the Act itself was held *ultra vires* the Constitution. Similarly, legislative interference into the fundamental rights guaranteed under Part III of the Constitution may also make an enactment constitutionally invalid. In *Chintaman Rao* v. *State of M.P.*[28], the Supreme Court observed that the Central Province Regulation of Manufacturers of Bidis Act, 1948 and the rules framed there under are *ultra vires* as it gave unbridled powers to the Commissioner to prohibit manufacture of bidis during agricultural season[29].

(ii) The Rule Itself is *ultra vires* the Constitution

Even if the enabling Act is constitutionally valid, the rules and regulations framed there under may violate the provisions of the constitution. The Act remaining *intra vires,* it is possible that the rules are *ultra vires* the constitution and hence void. So, when the Coal Control Order issued under the Essential Supplies Temporary Powers Act, 1946[30] conferred arbitrary powers on the State Coal Controller, the Supreme Court[31] held that it is *ultra vires* the Constitution[32]. Similarly, the A.P.

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[26] I.P. Massey, *op.cit,* at p.106.
[27] A.I.R. 1960 S.C. 554.
[28] A.I.R. 1951 S.C. 118.
[29] The contention that such a condition has been imposed to ensure availability of labour during agricultural season was turned down by the Court.
[30] See s. 3. As per this section, carrying on a business in Coal except under a licence is prohibited.
[31] *Dwaraka Prasad* v. *State of U.P.,* A.I.R. 1954 S.C. 224.

Catering Establishments (Fixation and Display of Prices of Food stuffs) Order, 1978 issued under the Essential Commodities Act, 1955, made it compulsory for hoteliers to sell all the seven eatable items provided in the schedule. The A.P. High Court has held that such a prescription directing a person to carryon a business against his will is violative of Article 19(1)(g) of the Constitution and therefore void[33]. Administrative rule making can also be challenged on the ground that it is discriminatory and hence constitutionally void[34].

(iii) Rules are *Ultra vires* the Enabling Act

Administrative rule making can be impeached on the ground that it is *ultra vires* the enabling Act. Courts may strike down the rules, if it is of opinion that the rules are in excess of the powers conferred by the enabling Act. In *Dwarka Nath* v. *Municipal Corporation*[35] the Supreme Court was confronted with an issue of this kind. Section 23(1) of the Prevention of Food Adulteration Act, 1954 authorised the Central Government to make rules for restricting the packing and labeling of any article of food with a view to prevent the public from being deceived as to the quality and quantity of the article. Rule 32 framed there under by government provided that there shall be specified on every label the name and business address of the manufacturer and batch number or code number. Action was initiated against the appellants for violation of rule 32. The appellants had written on their ghee tins only "Mohan Ghee Laboratories, Delhi-5". The company argued that the requirements as

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[32] The Court found that though the Act made a prohibition to deal in coal without licence, the order permitted exemptions at the discretion of the State Coal Controller, which in the opinion of the Court was arbitrary.

[33] *K.Panduranga* v. *State of A.P.*, A.I.R. 1985 A.P. 268. Also see *Girdharilal* v. *State of T.N.*, A.I.R. 1985 Mad. 234.

[34] Rules discriminatory in nature are held violative of Art.14 of the Constitution. See *Labh Chandra* v. *State of Bihar*, A.I.R. 1969 Pat.209; *G.Venkataratnam* v. *Principal, Osmania Medical College*, A.I.R.1969 A.P.35 and *R.S.Singh* v. *Dharbhanga Medical College*, A.I.R. 1969 Pat.11.

[35] A.I.R. 1971 S.C. 1844.

per section 23(1) is restricted to "quantity and quality" of the goods and not as to details of the manufacturer. Accepting the argument, the Supreme Court held that the rule is *ultra vires* the Act and hence void[36].

The rules made can also be declared invalid if it is in direct conflict with any provision of the enabling Act[37]. If the administrative authority fails to follow the procedure laid down by the enabling Act while exercising the rule making power, the rules made may be declared invalid[38]. Unreasonableness of administrative rule making has been recognized as a ground that affects its validity in countries like America and England[39]. But in India, though arbitrariness, unreasonableness and discrimination are recognized grounds for judicial review under the constitution, they cannot be the grounds of challenge in the case of a statute or rules[40]. This position of law has been criticised as an instance of judicial restraint[41].

Administrative rules made can also be challenged on the ground of *malafides* or ulterior purposes[42]. Similarly, if it arbitrarily encroaches upon the common law rights of citizens, it is possible to question its validity[43]. The common law rights of individuals can be interfered with by administrative rule making, only if expressly

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[36] See also, *Ibrahim* v. *Regional Transport Authority,* A.I.R. 1953 S.C. 79; *Ajoy Kumar Banerjee* v. *Union of India,* A.I.R. 1984 S.C. 1130; *General Officer Commanding in Chief* v. *Subash Chandra Yadav,* (1988) 2 S.C.C. 351 and *Tata Iron and Steel Co.* v. *workmen,* (1972) 2 S.C.C. 383.

[37] See *D.T.U.* v. *B.B.L. Hajelay,* A.I.R.1972 S.C.2452 and *State of Karnataka* v. *H.Ganesh Kamath,* A.I.R. 1983 S.C. 550.

[38] See for instance, *Banwarilal Agarwalla* v. *State of Bihar,* A.I.R.1961 S.C.849; *Raza Buland Sugar Co.* v. *Rampur Municipality,* A.I.R. 1965 S.C. 895 and *District Collector, Chittoor* v. *Chittoor District Groundnut Traders Association,* (1989) 2 S.C.C.58.

[39] For a brief discussion on the position of law in these countries, see I.P. Massey, *Administrative Law,* Eastern Book Company, Lucknow (1995), pp.115-116.

[40] *Central Inland Water Transport Corporation* v. *Brijo Nath Ganguly, (*1986) 3 S.C.C.167; *Trustees, Port of Madras* v. *Aminchand,* (1976)3 S.C.C.167 and *Narayana Iyer* v. *Union of India,* (1976) 3 S.C.C. 428. In all these cases the Court refused to look into the question of reasonableness on the ground that the rules emanated out of statutes.

[41] See I.P.Massey, *supra* n. 39 at p.112.

[42] *Id.* at p.116.

[43] *Sophy Kelly* v. *State of Maharastra,* (1967) 69 Bom. L.R.186.

authorised in the enabling Act[44]. Absence of such express authorisation invites invalidity to the rules.

In many cases it is possible that the rules made conflicts with the provisions of some other statute. This conflict can be a ground of invalidity of the rule in spite of express authorisation to that effect in the parent Act[45]. Courts have held that the power to repeal or amend a statute by administrative rule making is unconstitutional and hence void[46].

Rules declared as *ultra vires* by court become null and void and will be considered as not in existence at all. Judicial interference through the diverse ways stated above puts the administrative rule making in its correct track. It ensures fairness in administrative action.

Licensing of Trade

Licensing is the widely used method of administrative regulation. In the field of quality control, this mechanism is used in several legislations[47]. The significance of licensing is that business must satisfy certain pre-requisites before engaging in a specified commercial activity. In theory, licensing permits beneficial activity. At the same time it prevents its harmful consequences[48]. Licensing may be sought for engaging in a trade. It may also be made necessary for more specific activities, like

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[44] *Ibid.*

[45] Under English law, conflict with the statute law can be a ground of invalidity of the rules only when the empowering statute does not grant such power. See I.P. Massey *op.cit.* at p.117.

[46] *In re Delhi Laws Act,* A.I.R.1951 S.C. 332. However, if there is no express repeal or amendment but only a by passing of the existing law, the rules are held valid. See for instance, *Harishanker Bagla* v. *State of M.P.*, A.I.R. 1954 S.C.465 and *A.V.Nachane* v. *Union of India,* A.I.R. 1982 S.C. 1126.

[47] For example, the Prevention of Food Adulteration Act, 1954, the Drugs and Cosmetics Act, 1940 and the Essential Commodities Act, 1955 contain elaborate provisions for licensing.

[48] William G. Haemmel, Barbara C. George & James J. Bliss, *Text Cases and Materials on Consumer Law,* West Publishing Co., Minnesota (1975), p.372.

marketing of each product[49]. In this sense, licensing operates as regulatory and prohibitive at the functional level. By allowing only those who satisfy the required standards alone to function, it prohibits others from entering in to the trade. The licensing authority can modify the standards and insist that it will issue fresh licenses or renew the existing ones only to those who comply with the revised standards.

As a linchpin of the enforcement machinery, licensing system has many advantages. It provides an extremely powerful deterrent against deliberate law breaking. The offender risks not merely civil actions or even penalty, but the most drastic punishment of extinction from trade[50]. The mere threat of its imposition is sufficient in many instances to discourage the licensees from breaking conditions of license. On the other hand, a licensee who infringes the conditions due to his inadvertence can be cautioned without the need for resorting to the rigour of sanctions being used against him. The most valuable enforcement work of trading standards is achieved in England by friendly caution rather than by prosecution[51].

The licensing system has even more advantages. The value judgment that is invariably involved in determining the suitability of an applicant for the grant or renewal of a licence gives a measure of flexibility. It allows the licensing authority to take into account all facts known about the applicant. Through a central licensing system, consistency can be secured in standards of conduct insisted and imposed on licensees and in the approach to enforcement.

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[49] *Ibid.*
[50] R.M.Goode, *Introduction to the Consumer Credit Act 1974*, Butterworths, London (1977), p.42.
[51] *Ibid.*

Governmental schemes of licensing can function as an efficient method of quality control when mere reputation of the trader cannot[52]. Certain products having inherent risks such as prescription drugs and firearms are sold only through licensed screeners. They help the consumer to understand the delicate qualities of the product. Such licensed screeners are capable of testing the products for risks that would elude individual consumers. They can put their knowledge of past consumer product complaints to the advantage of subsequent purchasers[53].

The Standards Required in Licenses

Licensing schemes may vary depending on the reasons for adoption of this particular form of control. In many cases the unacceptable incidents of malpractices in trade is the major reason for introducing licensing. Therefore, good business practice is sought to be achieved by licensing[54]. The need for high standards in quality and performance is an important factor behind this. In some cases, financial solvency may also be a crucial factor. In such cases, financial soundness is insisted to ensure that the trader has sufficient financial backing to compensate consumers if things go wrong[55].

Safety and hygienic conditions of premises and utensils where goods are produced and stored may be a condition precedent for granting of licence[56]. Similarly, qualifications of the staff engaged in the production and distribution

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[52] Robert B.Reich, 'Towards a New Consumer Protection', 128 *University of Pennsylvania Law Review* 34 (1979).
[53] *Ibid.*
[54] See *supra* n. 50, p.380.
[55] Hence, under the Civil Aviation Act, 1971 (U.K.) ss.21-22, the license can be refused by the Civil Aviation Authority on the ground that the travel organizers who applied for the licence are not financially sound.
[56] For example, see the Prevention of Food Adulteration Rules, 1955, rules 49 and 50. Also see the Kerala Prevention of Food Adulteration Rules, 1957, rule 7 (a).

processes[57] and facilities for storage and transportation[58] may be insisted for issuing licences. It can be seen that the requirements for issuing licence vary depending on the objectives of control.

Licensing in Food and Drugs

The prevention of Food Adulteration Rules, 1955, prohibits the manufacture, storage distribution, sale or exhibition for sale any article of food without a license[59]. For issuing licenses for this purpose the state governments or local authorities appoint licensing authorities[60]. The licensing authority, before granting a license, inspect the premises to satisfy itself that it is free from any sanitary defects.[61] If the licensing authority is of the opinion that any alterations to the premises are to be made, the applicant is directed accordingly[62]. The licensee undertakes many responsibilities as conditions of the licence[63]. Violation of these conditions may lead to penal consequences[64] or even cancellation of the licence[65]. The duration of licence is normally one year, which may be renewed[66]. If the licence is not renewed before the expiry of the period or has not made an application for renewal, such person cannot continue his engagement in selling, storing or preparing articles of food any further[67].

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[57] For example the Drugs and Cosmetics Rules, 1945, rule 65 (1).
[58] *Id.*, rule 64.
[59] The Prevention of Food Adulteration Rules, 1955, rule 50.
[60] *Id.*, rule 50(2).
[61] *Id.*, rule 50(5).
[62] *Ibid.*
[63] See for example, the licensee should give notice containing the cooking medium used. He should not employ persons with contagious diseases. Vessels and containers used should be covered. Maintenance of a register of manufacture, wearing of badges by venders and display of notice boards are also insisted.
[64] *Id.*, s.16 (1) a (ii)(i).
[65] *Id.*, s.16 (1-D).
[66] Rule 51. Rule 8 of the Kerala Prevention of Food Adulteration Rules, 1957, has fixed the duration of licence to be for one year.
[67] *Gurumukh Singh* v. *State of Punjab*, A.I.R.1972 S.C.824. A person dealing without a license under the Act can be punished under second proviso to s.16 (1). Also see, *Badridas Chandak* v. *Purna Chandra Mishra*, 1996 Cr.L.J.902.

The Act also provides for cancellation of the licence by court in cases where the licensee is a second offender[68].

The Drugs and Cosmetics Act, 1940 also prohibits the manufacture for sale, distribution, storage or exhibition for sale of any drug or cosmetic except under a licence[69]. This Act prohibits sale or distribution of sub-standard, misbranded or adulterated drugs. The contravention of the requirement of licence is not merely an irregularity but an illegality punishable under the Act[70]. Nobody is permitted to store drugs without a licence[71]. The license once granted can be renewed[72].

For the purpose of granting licences under the Act, state governments are empowered to appoint licensing authorities[73]. The licensing authorities are responsible for the issue, renewal and cancellation of licences. Different conditions are prescribed for manufacture, storage, distribution and sale of drugs.[74] For the sale or compounding of a prescription drug, licenses will be issued only after satisfying the amenities like space and equipments available for preservation of drugs. The Licensing authority is also supposed to ensure the personal qualifications of the applicants.[75]

Licensing in Britain

In Britain, the Medicines Act, 1968 stipulates that sale, procurement for sale, supply or exportation of any medicinal product, shall only be done in accordance with

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[68] The Prevention of Food Adulteration Act, 1954, s.16 (1-D)
[69] The Drugs and Cosmetics Act, 1940, s.18(c).
[70] *Id.*, s. 27 (b)(ii).
[71] *Milkhi Ram* v. *State of Punjab,* 1983 F.A.J.22.
[72] See the Drugs and Cosmetics Rules, 1945, rules 59 and 63.
[73] *Id.*, rule 59.
[74] *Id.*, rules 61-65.
[75] *Id., rule* 71.

a license issued under the Act.[76] For the import of any medicinal product also license is necessary.[77] The manufacturers and wholesale dealers of medicinal products are also required to obtain license for that purpose.[78] An application for license is generally made in the prescribed form containing the prescribed details[79]. The licensing authorities are required to consider factors such as safety, efficacy and quality of the medicinal products while granting dealership licenses[80]. If the license applied for is manufacturer's license, factors such as hygiene of the premises, condition of equipments and qualification of persons are also to be looked into[81]. For wholesale dealer's license, premises where the medicinal products are proposed to be stored, the equipments used for storage and also the facilities available for distribution will be taken up as the prime factors.[82] The licensing authorities can refuse to grant a license on grounds relating to the safety, quality or efficacy of the medicinal products. But such a decision to refuse a license will be taken only after its consultation with the committee or commission established for advising the authority for this purpose[83]. If the licensing authority proposes to refuse a license, it shall give an opportunity to the applicant to raise his objections against it[84]. Licenses granted under the Act shall remain in force for a period of 5 years and can be renewed[85].

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[76] The Medicines Act, 1968 s.7 (2).
[77] *Id.*, s.7 (3).
[78] *Id.*, s.8.
[79] *Id.*, s.18.
[80] *Id.*, s.19 (1).
[81] *Id.*, s.19 (5).
[82] *Id.*, s.19 (6).
[83] *Id.*,s.20 (3). The committee or commission, consists of skilled experts in the field who are competent to render opinion about the matters referred to it.
[84] *Id.*, s.22.
[85] *Id.*, s.24.

Power of suspension and revocation of licences have also been conferred on the licensing authorities[86]. Many are the grounds on which the licensing authority can exercise this power[87]. In all these circumstances, the licensing authority should hear the licensee before it takes a decision to revoke or suspend a license[88].

It is through registration that the enforcement authorities under the British Food Safety Act, 1990 exercise its control. But the registration procedures established by the Act do not amount to a system of licensing. In spite of wide spread support among opposition parties and consumer groups for a system of licensing in food in the interests of consumer safety, it has been rejected[89] since the experience under the Consumer Credit Act, 1974, which introduced occupational licensing, was found to be very expensive and time consuming.

However, the Director General of Fair Trading, who is the competent authority under the Consumer Credit Act, will have to consider many factors[90] to decide whether a licence under the Act is to be granted to an applicant. His enquiry into these facts ensures the fitness of the applicant to carry on the business to the best advantage of the consumers.

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[86] *Id.*, s.28.
[87] *Ibid.*
[88] *Id.*, s.29.
[89] See David Oughton and John Lowry, *Text Book on Consumer Law,* Blackstone Press Ltd., London (1997), p. 408.
[90] Under section 25 of the Act, the Director General of Fair Trading is supposed to consider whether an applicant for a license is a fit person to carry on that business. The burden of proving fitness is on the applicant. Among the multitude o factors which the Director General is expected to consider while determining whether an applicant is a fit person, issues such as previous conviction of the applicant for offences of fraud, dishonesty or violence, or whether he has practiced discrimination on grounds of sex, colour, race, or national origin, or he has engaged in any oppressive or deceitful business practice etc. are relevant factors.

Licensing system obviously is a very powerful tool for controlling abusive trade practices since it serves to deny the opportunity to engage in a business. Therefore, it provides a wider network than what is possible with specific controls in individual transactions.[91] Moreover, the administrative agency has flexibility in the licensing programme. They can exercise their discretion in every case individually, which may not be possible by law. It can dissuade businesses from engaging in undesirable but lawful practices. Licensing as a means of control of business practices allows consistency of approach by the licensing agencies. By this process they can implement uniform standards of conduct required from licensees. The licensing system also has other advantages. It will provide considerable amount of information to the licensing authority on the specified area of business covered by the licensing regime. This enables the licensing authority to identify emerging business practices that require further legislative action[92].

But advantages of a licensing system are to be set against its disadvantages. The most important disadvantage is the cost of administration[93]. This cost can be borne by the public purse without much pain since the relative advantages that dwell on the consuming public is very large. It is also possible to make a licensing system self-supporting by charging necessary fees that will be sufficient to meet the costs in administering it. It can also be introduced on a cost-sharing basis where the traders and the governments equally bear the burden.

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[91] *Consumer Credit: Report of the Committee,* (Cmnd. 4596, 1971), Vol.1 p.255.

[92] David Oughton and John Lowry, *Text Book on Consumer Law,* Blackstone Press Ltd., London (1997), p.25.

[93] It is said that the general cost of the licensing system has caused concern to the Department of Trade and Industry, in England. For details see *Ibid.*

Judicial Scrutiny of the Licensing Process

Administrative controls by the grant, suspension, revocation and renewal of licences are matters of severe civil consequences. Courts have been often called upon to decide the validity of actions taken by administrative authorities in this regard. The principles formulated by judiciary in its effort to scrutinize administrative actions are popularly known as judicial review. Under the Constitution of India, judicial review has been recognized as an integral part, which cannot be abolished even by an amendment[94]. Judicial review has been stated to be the soul of democracy and rule of law[95]. Judiciary exercises this function by virtue of the powers given to the Supreme Court under Article 32 and 136,[96] and the High Courts under Articles 226 and 227[97].

The purpose of judicial review is not the review of the administrative authority but of the decision making process. Review power is essentially supervisory in nature. Therefore, the courts will not assume appellate jurisdiction and re-appreciate the fact finding by the administrative agency[98].

Judicial review of administrative action is possible under the Constitution[99] where the higher judiciary set right administrative derailment by the issuing of prerogative writs or other appropriate orders. The review by ordinary courts in

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[94] *Kesavananda Bharati* v. *State of Kerala,* A.I.R. 1973 S.C. 1461.
[95] *Minerva Mills* v. *Union of India,* (1980) 3 S.C.C. 625.
[96] For a brief discussion on the powers of judicial review of the Supreme Court, see I.P. Massey, *Administrative Law,* Eastern Book Company, Lucknow (1995), pp. 201-204.
[97] For a summary of the powers of the High Court, see, *id.* at pp. 205-207.
[98] *H.B.Gandhi* v. *Gopinath and sons,* (1992) Suppl.2 S.C.C. 312.
[99] The constitutional review is also called as 'public law' review. For a detailed discussion on the grounds on which judicial review under the constitution is exercised by the higher judiciary, see I.P.Massey, *supra* n. 96 at pp.249-265.

accordance with the ordinary law of the land[100] is exercised through injunction, declaratory action and suit for damages[101].

Judicial scrutiny of the licensing process, like any other type of administrative action, ensures fairness and avoids arbitrariness. Judicial review in this sense makes the administrative machineries more viable and dependable.

Administrative Control by Registration

The devices of registration and certification are some other effective administrative tools used for ensuring safety and quality standards in goods and services. This method is used where compliance with technical specifications are essential to ensure the safety of any product. The safety of products may depend upon several factors including the quality of the raw materials required for production, good workmanship and adoption of sufficient safety standards in the manufacturing process. Registration of automobiles and ships are good examples where this form of administrative controls are effectively used.

Certification as a Method of Quality Control

In the case of many agricultural and industrial products, certification is used as a method to ensure desirable standards of quality and safety. For this purpose, a technical committee, in consultation with all the interests affected determines the minimum standards of quality in relation to various products in advance[102]. In the process of certification, the goods are compared with the standards prescribed earlier. Products that comply with the prescribed standards are permitted to be marketed

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[100] Review by ordinary courts is otherwise called as 'private law' review.
[101] For a discussion on the exercise of review by ordinary courts, see I.P.Massey, *op. cit.* at pp.265-277.

under a quality certification mark like 'agmark'; FPO mark, 'wool mark' and ISI mark[103].

Registration, Certification and Licensing: Distinction

Distinction can be drawn between registration, certification and licensing. Registration requires that individuals must simply list their names in an official register. It is insisted generally to enable governments to identify those who are engaged in a particular activity. All those who are willing to do the job can get themselves registered[104]. The Food Safety Act, 1990 of the U.K. can be cited as example for use of registration as a means of control. This Act requires that the premises where articles of food are sold be registered with the authority under it[105]. Certification goes a step further, where an individual must demonstrate that he has reached a certain standard. But the government does not prevent the practice of skills by those who have not obtained a certificate. Certification of goods also mean more or less the same. Licensing proper is much more restrictive. Here, once individuals meet certain criteria, they are given the exclusive right to engage in a particular trade or occupation.

Quality control by licensing, registration and certification will be effective only if the violators are promptly identified and punished. For this purpose elaborate arrangements are made under quality control laws[106] for inspection and search of the

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[102] For example, See the Agricultural Produce (Grading and Marking) Act, 1937, and the Bureau of Indian Standards Act, 1986.

[103] For a detailed discussion on certification process, see Chapter 4 *Infra.*

[104] Registration of motor vehicles can be cited as an example. Standards are prescribed for vehicles in advance and its compliance is checked up at the time of registration.

[105] The Food Safety Act, 1990, s. 19.

[106] For example, see the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954; the Standards of Weights and Measures Act, 1976; the Dangerous Drugs Act, 1930; the Essential Commodities Act, 1955; the Preventions of Food Adulteration Act, 1954 and the Drugs and Cosmetics Act, 1940.

premises of traders who have obtained administrative sanctions for running the business. The premises of traders who unauthorisedly carry on the business can also be inspected to ensure compliance with the law. Efficient utilization of this power is necessary to ensure quality control. The working of this system of quality control may be explained in the light of the working of the Prevention of Food Adulteration Act, 1954 and the Drugs and Cosmetics Act, 1940.

Inspection, Search and Seizure

Supervision and control over licensees under the Food Adulteration Act, 1954 is exercised through the officers designated as Food Inspectors appointed under it. In order to ensure that the licensees comply with the provisions of the Act, rules and term of license, the Food Inspectors are entrusted with many powers. The powers of inspection, search and seizure[107] are few among them. The variety of powers conferred on him places the Food Inspector in a pivotal position. He is empowered to enter and inspect any place where any article of food is manufactured, stored or exposed for sale[108]. In exercise of this power the Food Inspector can break open any package in which any article of food may be contained[109]. He can break open the door of any premises where any article of food may be kept for sale[110]. The Food Inspector is also empowered to seize any article intended for food, which in his opinion appears to have been adulterated[111]. He can also seize books of accounts or other documents, which is relevant for investigation and prosecution[112]. Further, he is

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[107] These powers are in addition to the power to take samples and send it for analysis in order to assure compliance with the quality and other stipulations made under the Act. See the Prevention of Food Adulteration Act, 1954, s.10. Also see the Prevention of Food Adulteration Rules, 1955, rule 9.

[108] *Id.*, s.10 (2).

[109] *Id.*, s.10 (5).

[110] *Ibid.*

[111] *Id.*, s.10 (4 - A).

[112] *Id.*, s.10 (6).

also given the powers of a police officer[113]. The powers entrusted upon the Food Inspectors are not confined to the licensees alone. It also extends to others who may not have any license at all.

The Food Inspectors are empowered to take samples of food articles and send it for analysis[114]. The analysis and preparation of report are done by Public Analysts[115] appointed under the Act. Detailed procedures for taking of samples, packing and sending it for analysis are given in the Act[116]. The procedures to be followed by Public Analysts are also prescribed[117]. These procedures are made mandatory[118]. Any lapse in this regard may lead to acquittal of the offender[119]. Importance of these procedures for inspection, search, seizure and testing of samples are evident from the judicial decisions made in this regard[120].

However, it appears that the legislature is apprehensive of the possible abuse of the wide powers that are conferred on the Food Inspectors. Hence vexatious or unreasonable seizures made by them are made punishable with a minimum penalty on conviction[121].

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[113] *Id.*, s.10 (8). The Inspector has the same powers of a Police Officer under section 42 of the Code of Criminal Procedure, 1973. But this power is only for the limited purpose of ascertaining the name and residence of the person from whom the sample is taken or an article of food is seized.

[114] The Prevention of Food Adulteration Act, 1954, s.10(1)(a) and (b).

[115] *Id.*, s.8. Public Analysts are appointed by the Central or State Governments.

[116] *Id.*, s.11.

[117] The Prevention of Food Adulteration Rules, 1955, rule 7.

[118] See *Chintamani* v. *State*, 1984 All.L.J.893.

[119] See *Ultadanga Oil Mill* v. *Corporation of Calcutta*, 1973 Cri. L.J.448 (Cal.); *Food Inspector* v. *K.Kelu*, 1991(1) F.A.C.274 (Mad.); *Food Inspector* v. *Arumugha Nainar*, 1991(1) F.A.C.259 (Mad.) and *Ram Sarup* v. *The State*, 1992 (2) F.A.C.178 (Punj.).

[120] For judicial decisions on these procedures, see R.N.Bhardwaj, *Cases and Materials on Prevention of Food Adulteration Act*, Nasik Law House, Aurangabad (1998).

[121] *Id.*, s.10 (9).

The powers given to the Inspectors of drugs by the Drugs and Cosmetics Act, 1940 is also similar[122] to that of the Food Inspectors. The procedures that the Inspector of drugs will have to follow while taking samples and sending it for analysis are also similar[123]. Procedural formalities stated in the Act are intended for ensuring fairness and if they are not properly complied with, the entire prosecution is likely to be vitiated. This may end up in the acquittal of the accused persons[124].

Initiating Prosecution

Quality control legislation in India invariably provides punishment for violation of its provisions[125]. Until recently, administrative machinery established under respective Acts alone were authorised to initiate prosecution for violation. In the mid nineteen eighties this power was extended to consumers and recognized consumer organisations as well[126]. However, the decision of the administrative authority either to prosecute or not is of great importance even today. The consumers and consumer associations may take the lead only after the injury has taken place. But the administrative authorities can proceed even as a preventive measure. The offender can be punished only if the administration exercises their function in an effective and efficient manner[127].

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[122] The Drugs and Cosmetics Act, 1940, s.22

[123] *Id.*, rule 23.

[124] See *State of Punjab* v. *Mohinder Kumar,* 1980 Cr.L.T. (Punj. & Har.) as quoted in M.L.Mehra, *The Handbook of Drug Laws,* the University Book Agency, Allahabad (1998), p.62.

[125] See for example, the Prevention of Food Adulteration Act, 1954; the Drugs and Cosmetics Act, 1940 and the Essential Commodities Act, 1955.

[126] See for example, the Prevention of Food Adulteration Act, 1954, s. 20. This section has been amended in 1986 to allow consumer associations to launch prosecution for violation of its provisions. This amendment was made in the wake of the enactment of the Consumer Protection Act in 1986. Also see the Essential Commodities Act, 1955.

[127] For a detailed discussion on the procedures and precautions to be taken by the administrative agencies in prosecuting the offenders, see *Infra*. Chap.6.

Control over Advertising and Quality

The fight for consumer protection has often been considered as a battle for quality in goods and services. For this, fairness in advertising[128] and promotion of honesty in the market place are essential[129].

What is advertising?

The advertisement is performing a highly important function viz., informing prospective buyers and users about the availability and quality of a product. The effectiveness of any market economy depends upon the satisfaction of consumer demands. Thus producers survey consumer preferences and buyers seek information about available products in order to make their purchasing decisions. Advertising thus serves to facilitate this process of matching products with consumers. Advertising also acts as the communication link between someone with something to sell and someone who needs something. Advertising no doubt is the most efficient means of reaching people with product information. Advertising which is expected to play an informative role is seen as a manipulative device, which creates a scheme of wants in consumer by rearranging his motives.[130]

Studies and surveys show that people at large believe that advertisements mostly are misleading[131] or dishonest.[132] Since the consumer is paying for the cost of

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[128] The Council Directive of the European Economic Community has provided a meaningful definition to the term 'advertising – "Advertising" means the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services including immovable property, rights and obligations"

[129] William G. Haemmel, Barbara C. George & James J.Bliss, *Text, Cases and Materials on Consumer Law*, West Publishing Co., Minnesota (1975), p.2.

[130] A.J.Duggon, "Fairness in Advertising: In pursuit of the Hidden Persuaders", 11 Melb. U.L.Rev. 50 (1977).

[131] The Council Directive of the EEC has defined misleading advertising to mean any advertising which in any way, including its presentation, deceives or is likely to deceive the person to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor. See *the Council Directive Relating to the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Misleading Advertising*, 1984 (84/450/EEC), Article 2, Clause2).

the advertisement, fair play requires that he is made aware about the comparative merits of competing brands. He must be assured of being given only truthful and correct information. Legal prescription of truth in advertising can be one method. This can be implemented only by constant monitoring of commercial advertisements. For this, administrative agencies are established in many civilized countries.

Administrative Controls on Advertisements in England

The common law of England, though in a limited sense, had afforded the consumers, protection against misleading advertisements. If a statement in an advertisement amounts to a misrepresentation,[133] action can be initiated. It also made false advertisements actionable if it amounted to negligent misstatement[134]. But the remedy for breach of these common law rules is generally by way of damages or rescission of the contract made with the advertiser. Such rules are unlikely to serve a preventive role. The policing of advertisers and marketers in England are largely fulfilled by the criminal law along with voluntary codes.[135]

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[132] See, Sakuntala Narasimhan, *Advertisements: the Hidden Persuaders,* Consumer Education and Research Centre , Ahamedabad (1992),(Introduction).In a survey conducted in Delhi, a majority of 92% agreed that most advertisements are exaggerated and do not present a true picture of the product. The author also cites study conducted by the EEC Commission among the people of the community. 80% said that advertising often made people to buy things they did not really need. Studies in Britain revealed that67% of people believe that advertisements mislead them. The Californian experience is also not different. See Howard G. Schultz and Marianne Casey, " Consumer Perceptions of Advertising as Misleading", 15 *Journal of Consumer Affair,* 340 (1981).

[133] See, *Beale* v. *Taylor,* [1967] 1 W.L.R. 1193. In this case, the advertisement described the car purchased by the consumer as "1961 Herald Convertible". The car was found un roadworthy by virtue of the fact that it consisted of parts of two different cars welded together. Court held the seller liable.

[134] The liability lies under the rule in *Hedley Byrne & Co. Ltd.,* v. *Heller & Partners Ltd.,* [1964] A.C. 465. Subsequent decisions rendered by the House of Lords seem to restrict the liability. In *Caparo Industries* v. *Dickman,* [1990] 2A.C. 605, the House of Lords held that the maker of a statement will be liable only when the following three conditions are satisfied. (1) It must be foreseeable for the defendant that the petitioner will suffer damages in consequence of the reliance on the statement; (2) There must be a close relationship between the maker of the statement and the person to whom it is communicated and (3) It must be just and reasonable to impose liability on the maker of the statement (*Id.* at p.617-18 *per* Lord Bridge of Harwich).

[135] See for example, the British Code of Advertising and Sales Promotion, 1999.

Many legislation in England contain provisions for criminal sanctions for unfair trade practices, including false and misleading advertisements.[136] The Trade Descriptions Act, 1968 prohibits[137] the application of false or misleading trade descriptions[138] on goods or services and also false indications as to price of goods. Violation of the provisions is made an offence. It is possible for the Board of Trade to order the inclusion of any information, which it deems expedient in public interest, in the advertisement. Non-compliance with the order issued by the Board of Trade is also treated as an offence.[139]

The Control of Misleading Advertisements Regulations, 1988 empowers the Director General of Fair Trading to consider any complaint made to him that an advertisement is misleading unless he feels it as frivolous or vexatious.[140] If he finds that the advertisement is misleading, the regulation empowers him to take such measures necessary for seeking an injunction against any person concerned with the publication of the advertisement[141]. The court may require the person responsible for the publication of the advertisement to furnish evidence of the accuracy of any claim made by him in the advertisement[142]. If no evidence is furnished, or the evidence submitted in the opinion of the court is inadequate to substantiate the claim made in the advertisement, the injunction prayed for by the Director will be

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[136] See for example, the Trade Descriptions Act, 1968, the Consumer credit Act, 1974, the Consumer Protection Act, 1987, Food Safety Act, 1990, the Weights and Measures Act, 1985 and the Property Misdescriptions Act, 1991.

[137] Trade Description Act, 1968, s.1.

[138] The term 'trade description' is defined in s. 2 of the Trade Descriptions Act, 1968.

[139] *Id.*, s.9.

[140] Except for matters specifically assigned to the Independent Television Commission, Radio Authority or the Welsh Authority, the Director General can decide whether an advertisement is misleading or not.. See the Control of Misleading Advertisements Regulations, 1988, regulation 4.

[141] *Id.*, regulation 5.

[142] *Id.*, regulation 6.

granted[143]. The injunction may prohibit the publication or the continued publication of an advertisement.[144] Powers similar in nature are conferred on the Independent Television Commission, the Radio Authority[145] and the Welsh Authority to control misleading advertisements.

The most important control on advertising and sales promotion in England is through self-regulatory codes[146]. The Codes of Practice in itself do not carry with them much sanction apart from market deterrence of withdrawal of advertising space and adverse publicity. But the administrative agency, namely the Office of Fair Trading[147] has power to regulate self-regulatory codes.[148] In exercise of this power, the OFT has issued guidelines on self-regulatory codes.[149] The guidelines insist that all advertisements must be legal, decent, honest and truthful.[150] The Code of Practice also urges advertisers not to exploit the credulity, lack of knowledge or inexperience of consumers[151]. The advertisements should not mislead by inaccuracy, ambiguity, exaggeration or omission[152]. The OFT can persuade the trade associations to formulate self-regulatory codes[153]. It may also issue directions towards revision of the existing code if in its opinion such a change is necessary to safeguard the interest

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[143] *Ibid.*
[144] *Ibid.*
[145] *Id.*, regulations 9 and 10.
[146] See the British Code of Advertising and Sales Promotion, 1999. The codes are devised by the Committee of Advertising Practice (CAP). CAP members include persons from advertising, sales promotion and media business. CAP provides for a free and confidential Copy Advice Service for the industry.
[147] Hereafter referred to as OFT.
[148] See the Fair Trading Act, 1973, s. 124.
[149] For a detailed discussion on the guidelines, see *supra,* Chap. 2
[150] See OFT, *Guidelines on Self-regulatory Codes.*
[151] The British Code of Advertising and Sales Promotion, 1999, para. 6.1.
[152] *Id.*, para. 7.1.
[153] See the Fair Trading Act, 1973, s. 124 (3). This section places a duty upon the Director General of Fair Trading to encourage associations to prepare and disseminate codes of practice.

of consumers[154]. Failure to comply with the directions may lead to proceedings being initiated against for non-compliance before the Restrictive Trade Practices Court[155]. Similarly, the Advertising Standards Authority can refer a misleading advertisement to the OFT. The OFT can obtain an injunction from the Restrictive Practices Court established under the Fair Trading Act, 1973, to prevent advertisers from using the same or similar claims in future advertisements[156].

Regulation of Advertising in India

In India, in case of drugs, a total ban has been imposed on all advertisements alleged to possess magic qualities.[157] An advertisement of drugs, which is false or misleading, is also prohibited[158]. So publishing an advertisement, which contains any matter, which directly or indirectly gives a false impression regarding the true character of any drug, is an offence.[159] Imports or exports of such advertisements are also prohibited.[160] Sending out advertisements within the territories of India amounts to publication[161]. These restrictions are in consonance with public interest and public morality. The advertisements banned under the heading 'drugs possessing magic qualities' are those, which are meant for procurement of miscarriage, prevention of conception and correction of menstrual disorders.[162]

In order to ascertain whether there is any contravention of the provisions of the Act, the person authorized by state governments or persons authorized by them

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154 *Id.*, s.34. This section empowers the Director General of the Office of Fair Trading to use his best endeavors to set right a course of business conduct detrimental to the interest of consumers.
155 *Id.*, s. 35.
156 *Id.*, s.37.
157 The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, s. 3.
158 *Id.*, s. 4.
159 *Ibid.*
160 *Id.*, s. 6.
161 *Ibid.*
162 *Id.*, s. 3.

can order the manufacturer, packer, distributor or seller of the drug who issued such advertisement, to give information regarding composition of the drug for the purpose of scrutiny of the advertisement. The manufacturer or packer is under a duty to comply with such order[163]. The officials authorized are empowered to enter and search any place, which they have reason to believe to be a place where an offence under the Act has been or is being committed[164]. They can seize any advertisement that in their opinion contravenes the provisions of the Act[165].

The Supreme Court of India in *Hamdard Dawakhana* v. *Union of India*[166] examined the constitutional validity of these powers. The Court ruled that the purpose of control is to prevent objectionable and unethical advertisements in order to discourage self-medication and self-treatment[167]. The necessary condition for terming an advertisement as objectionable is that the advertisement induces others in using the drug advertised[168]. It is not necessary that there has been a habitual contravention[169].

In India, self-regulatory codes that regulate advertisements of products by trade associations are few. The Advertising Standards Council of India, a non-statutory organization of advertisers and publishers has adopted a Code of Advertising Practice for its members[170]. Similarly, the Ministry of Information and Broadcasting, Govt. of India has also adopted a code of practice for advertising in Doordarsan and

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[163] The Drugs and Magic Remedies (Objectionable Advertisements) Rules, 1955, rule 3.
[164] The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, s. 8(1)(a).
[165] *Id.*, s. 8(1)(b).
[166] A.I.R. 1960 S.C. 554.
[167] *Id.*, at p. 565, *per* Kapur J.
[168] *K.S.Saini & Another* v. *Union of India,* A.I.R. 1967 Punj. 322.
[169] *Dr. Yash Pal Sahi* v. *Delhi Administration,* A.I.R. 1964 S.C. 784.
[170] The Advertising Standards Council of India, *the Code for Advertising Practice*, 1985.

Radio[171]. But these codes are not supervised or controlled by any independent administrative agency. However, the misleading or false nature of any advertisement relating to the quality or performance of any product can be the subject matter of adjudication by quasi-judicial bodies like Consumer forae[172] under the Consumer Protection Act and the Monopolies and Restrictive Trade Practices Commission[173] under the Monopolies and Restrictive Trade Practices Act.

Grading and Marking of Products

Extensive powers are conferred on administrative authorities to prescribe minimum quality standards for products. In the case of agricultural produces, the administrative agency exercises powers to grade the produces based on product standards prescribed and allow the use of grade marking[174]. In the case of industrial products the Bureau of Indian Standards determines minimum standards and authorises the use of quality marks of the institution[175].

Labeling and Quality Control

The most common method of disclosing quality information is through compositional labeling. Consumer gets information about the goods from the labels or marking attached to the goods or from the sale literature that accompanies them. Traditionally, compositional labelling was confined to processed food; but in recent

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[171] The Directorate of Advertising and Visual Publicity, Government of India, *Code for Commercial Advertising,* 1988.

[172] A complaint for the purpose of the Consumer Protection Act, 1986, includes a false or misleading advertisement relating to the quality, place of origin or usefulness of a product. See the Consumer Protection Act, 1986, s. 2(1)(c)(1). This subsection brings within its purview as 'unfair trade practice', false and misleading advertisements. *Id.*, s. 2(1)(r).

[173] See the Monopolies and Restrictive Trade Practices Act, 1969, s.36A. The definition of 'unfair trade practice' under this provision includes false and misleading advertisements. For a brief discussion on the *quasi-judicial* powers, see *infra.*

[174] See the Agricultural Produce (Grading and Marking) Act, 1937.

[175] See the Bureau of Indian Standards Act, 1986.

years it has been extended to a wide range of products. Labeling of complex products to a great extent, assist the consumer to assess its quality. All E.E.C. countries[176], the United States[177] and Canada[178] compel fiber content labeling for textiles.

In India, mandatory labelling is insisted for drugs[179] and packaged commodities. The Drugs and Cosmetic Rules, 1945,formulated under the Drugs and Cosmetics Act, 1940, lays down that no person shall sell or distribute any drug unless it is labelled in accordance with the rules. The method of labeling to be adopted and its contents are prescribed[180]. The Packaged Commodities (Regulation) Order, 1975 attempts to strike a balance between the consumers right to know the contents of the packet and the sellers desire to keep the packet intact. The Order stipulates[181] the particulars to be indicated on every package, whether big or small. The package should invariably contain a label as to the identity of the package, its quantity, month and year of packing and its price together with the name and address of the packer or

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[176] Ross Cranston, *op.cit.* at p.283. A broad statement of the EEC Directive is that the names of fibers must be specified on a garment or in advertisements together with the percentage of the different fibers used. Further, the limited number of generic names mentioned in the directive must be used to describe fibers and restrictions are placed on the use of words such as 'pure' when referring to fibre content.

[177] See the Textile Fiber Products Identification Act, 15 U.S.C. s.70 (b).

[178] See the Textile Labeling Act, 1970 (Canada).

[179] The Drugs and Cosmetics Rules, 1945, rule 95.Rule 96 prescribes the manner in which drugs and cosmetics are to be labelled.

[180] The Drugs and Cosmetics Rules, 1945, rule 96. The manner of labeling includes the name of the drug, statement as to its net content, the name and address of the manufacturer and his licence number.

[181] Clause 3 of the Order reads: -

"No person shall pre-pack for retail sale or cause to be pre-packed for retail sale any commodity unless each retail package in which such commodity is pre-packed bears thereon a label securely affixed thereto, a declaration as to-

(i) the identity of the commodity in the package except it is identifiable through a transparent container,

(ii) the quality in terms of standard units of measurement, if solid in number, the accurate number of the commodity contained in the package,

(iii) the month and year in which the commodity is packed-except to liquid milk, aerated water etc.

(iv) the price of the package".

manufacturer[182]. Restriction is imposed on the sale or distribution of goods that does not comply with the orders[183]. Provision is also made for checking the packages at the premises of the manufacturer or packer for the purpose of verifying whether the quantity of the commodity corresponds with the quantity declared on the label[184]. Compliance with the requirements of labelling is ensured by administrative authorities like the Drugs Controllers[185] and Inspectors and the Officers under the Legal Metrology Department of the governments[186].

Administrative Adjudication of Disputes Relating to Quality

Administrative and quasi-judicial authorities exercise adjudicatory powers under various enactments. Administrative adjudication mainly relates to the granting or refusal of license or permits, prohibition on use of certification marks or logos, prohibiting trade by refusing permits and powers of similar nature[187]. The important quasi-judicial agencies exercising adjudicatory power in India are the consumer forae[188] and the Monopolies and Restrictive Trade Practices Commission.[189]

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[182] Clause 4 of the Order reads as follows:-
Every packer shall indicate on each package the name and complete address of the manufacturer or of the packer, if no manufacturer. If the smallness of the package is such that it is not reasonable to indicate the complete address of the manufacturer or packer, it shall be sufficient compliance, if a mark or inscription, which would enable the consumer to identify the manufacturer or packer, is made on such package.

[183] *Id.*, clause 5.

[184] *Id.*, clause 8.

[185] The Drugs and Cosmetics Rules, 1945, rules 50 and 51. These agencies ensure compliance about labelling by making labeling a condition of licence. *Id.*, rule 65(19).

[186] It is through the Controllers and Inspectors appointed under the Standards of Weights and Measures Act, 1976 that the labeling requirements in respect of ordinary goods are administered. See also, the standards of Weights and Measures (Packaged Commodities) Rules, 1977, Standards of Weights and Measures (Enforcement) Rules, 1985, Standards of Weights and Measures (General) Rules, 1987 and Standards of Weights and Measures (National Standards) Rules, 1988.

[187] These powers have been discussed in the chapter at appropriate places.

[188] Under the Consumer Protection Act, 1986.

[189] Under the Monopolies and Restrictive Trade Practices Act, 1969.

(a) Consumer Forum

The Consumer Protection Act, 1986 envisages a hierarchy of three redressal agencies viz. the District forums, the State Commissions and a National Commission to adjudicate on consumer disputes. Consumers who are aggrieved by defects in quality of any purchase they made can approach either of these agencies subject to territorial[190] and pecuniary[191] limitations. The procedures adopted by these grievance redressal agencies are summary in nature and devoid of the intricacies of evidentiary complexities found in other adjudicatory agencies. Moreover, no court fee is levied for redressal of consumer grievances and services rendered by the forae are absolutely free.

Shortfall in quality of any product may occur if any fault, imperfection or shortcoming as to purity or standard required to be maintained by any law or by contract between parties or as claimed by the trader, turn to the contrary[192]. In all these circumstances the aggrieved consumer is provided with the remedies of compensation or repair or replacement of the goods as the forum may deem fit. Compensation for the mental agony and suffering can also be allowed[193].

(b) The Monopolies and Restrictive Trade Practices Commission

Manufacturers and sellers often misrepresent the quality of the goods they produce or sell. They may raise tall and false claims that their products are of a

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[190] The territorial jurisdiction of a district forum will be the Revenue district and that of the State Commission, that state and the National commission, the whole of India.

[191] The pecuniary jurisdiction of the District forum is up to 5 lakhs. State commission, it is 20 lakhs and National Commission, above 20 lakhs. The State and National Commissions also have appellate jurisdictions.

[192] The Consumer Protection Act, 1986, s. 2(1)(f).

[193] For a detailed discussion on Consumer remedies in defects in quality, See Avtar Singh, *Law of Consumer Protection : Principles and Practice*, Eastern Book Company, Lucknow (1997) pp. 134-150; D.N.Saraf, *Law of Consumer Protection in India*, N.M.Tripathi, Bombay (1995), pp. 208-301.

particular standard, quality or grade. They may issue misleading information about the quality and performance of their products. They may give warranties about their goods without any intention to perform. Trade practices of these kinds are intended to lure the public. These unfair trade practices are subject to the rigour of legal action by the Monopolies and Restrictive Trade Practices Commission[194] established under the Monopolies and Restrictive Trade Practices Act,[195] 1969. Any consumer or a consumer association can lodge a complaint to the MRTP Commission alleging unfair trade practice by the seller[196]. It can by order direct the discontinuance of the practice,[197] grant injunction[198] and also award compensation[199] for the injury or loss suffered by the Consumer[200].

Administrative Techniques of Quality Control: an Appraisal

Administrative techniques adopted to control quality are varied. A single method in itself will not assure the desired objective. One important issue that surfaces in the context of liberalized economic policies followed at present is the extent to which the administrative intervention can be permitted. Economic liberalization calls for more and more freedom of action for the market operators and least interference by governmental agencies. But this does not mean that there shall not be any control at all and the operators enjoy an unbridled freedom of action. Administrative measures in fact facilitate the proper exercise of the freedom by

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[194] Hereinafter referred to as the MRTP Commission. The Competition Act, 2000 repeals the MRTP Act and seeks to establish a Competition Commission instead of the MRTP Commission.

[195] Hereinafter referred to as the MRTP Act.

[196] See the Monopolies and Restrictive Trade Practices Act, 1969, s.36-B

[197] *Id.*, s.36-D.

[198] *Id.*, s. 12-A.

[199] *Id.*, s. 12-B.

[200] For a detailed discussion on the powers and functions of the MRTP Commission, see S.M. Dugar, *Law of Monopolistic Restrictive & Unfair Trade Practices,* Wadhwa and Company, Nagpur (1997), pp.103-251.

regulating and limiting chances of excesses and abuses. In this sense it is not to be treated as a clog on freedom of action. Instead, it can be treated as facilitator of events.

Flexibility of action, efficacy in supervision and implementation are the dominant virtues of administrative controls. It is being used extensively in the sphere of consumer protection all over the world inspite of the cost factor. Its positive advantages over other systems of controls places administrative measures in a high pedestal. In product quality matters, they ensure quality of products reaching the market. This is achieved by exercising controls in anticipation of any mischief that may occur to the consuming public before the product leaves the manufacturers' premises. Remedial measures provided in administrative controls are quite often initiated *suo moto* by the administrative agencies. However, efficacy of the system largely depends on the sensitivity of the administrative machinery.

The main objection against administrative controls is the avoidable bottlenecks created by the agency itself, the expenses of administration and the possible abuse of powers by the administrators. If these apprehensions are removed, it can become an acceptable mechanism of quality control. Allowing increased participation of consumers and consumer organizations and bringing more transparency into the procedures can reduce administrative bottlenecks and abuse of power to a considerable extent. In the matter of administrative expenses, it can be argued that the state is in any way duty bound to protect the health and safety of its citizens by all possible means. So financial constraints that come in the way of its due discharge of this duty cannot be cited as a hurdle. The only question is whether

administrative expenses are to be met from the state revenue or by levies from manufacturers. It is suggested that the amount necessary to meet the administrative expenses shall be collected from the manufacturers as license fees who can later transfer it to the consumers of their products. If the other option is exercised, the entire public, irrespective of the fact that they use the product or not, will be bound to pay.

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Chapter 4

QUALITY CONTROL BY FIXATION OF STANDARDS

Prescribing a minimum standard for products by an independent and impartial agency, and sanctioning the use of quality logo in the products signifying compliance with those standards, is a useful method of quality control. This measure is of considerable advantage to consumers in making a rational choice of products. Standard designation mark is beneficial to the manufacturers and sellers also. It confers positive advantages on manufacturers and sellers by more customer preference. The consumers obtain a product with a certain degree of quality assured by the quality mark. The manufacturers can profit out of better consumer demand for their products. Maintenance of higher degrees of quality would attract not only domestic consumers but also consumers from abroad.

There are at least five types of standards seen in the present day life. The first among them are technical standards, which are intended to act as a common medium between manufacturers and consumers. They define a common language acceptable for all, for example, wattage marking in electrical appliances. The second type of standards represents those involving usages and practices influencing the behavior of all players in the market. Its concern probably is the health and safety of professional users and ultimate consumers. The code of practice in handling LPG to ensure safety can be cited as the best example. The third type of standards is known as reference standards. Standards of length, mass and time are reference standards. The fourth type is quality standards. It ensures customer confidence in the goods and services

offered by companies. Quality marking by the Bureau of Indian standards, and ISO 9000 certificate issued by the International Organization for Standardization are best examples. The fifth are environmental standards, which safeguard the environmental quality of our life. For example, the control of quality of the air we breathe is regulated by defining the admissible emission level of automobile smoke.[1] However, in this study the standards for quality of goods alone are examined.

In this era of globalisation, 'quality' is considered as the 'mantra' of competitiveness[2]. Quality has emerged as the prime factor in determining the international acceptability of the product. Gone are the days when it was possible to thrive on national quality standards prescribed by domestic agencies. The Indian and foreign buyers who wield the ultimate power are mercilessly selective on quality. Business perspectives have today shifted from price to product safety, reliability, durability and acceptability to the consumer[3].

If a manufacturer is to survive and prosper in the intensely competitive environment he has to live by a long-term commitment to quality and performance. Domestic markets of yester years have become global markets due to economic liberalization[4]. The special protection given to homemade goods by the imposition of trade barriers by domestic governments have been taken away. Survival in the global market is possible only if the product is qualitatively competitive. Global competition in this sense is advantageous to the consuming public. Without any conscious effort

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[1] M.S.S.Varadan, "Standards: Their Effect on Daily life", *The Hindu* (Trivandrum) Oct. 14, 1998, p.27

[2] The Cashew Export Promotion Council of India, "In Tune With a Quality – Driven World", *The Hindu* (Trivandrum), Sept. 9, 1997, p.5. Also see, B.S.Warrier, "ERP, the Modern Mantra for Results", *The Hindu* (Trivandrum), Oct. 14, 1998, p.27 and G.Chandran Pillai, "Bench Marking: a Creative Tool for Competitiveness", *The Hindu* (Trivandrum), Oct.5, 1996, p.27.

[3] B.S. Warrier, *Id.*, p.27.

from any agency, manufacturers are self-motivated to improve the quality of their product. But we cannot assume that competitive forces would percolate into the lower levels of business activity which certainly needs authoritative back up to come up and prosper. Even in competitive economy, businessmen at the higher ups in the market also are in need of periodical updating and improvement in their quality standards. Changing standards necessitate revision of existing standards. These changes can be better monitored by special agencies. It is pertinent to ensure that these agencies are technically competent for the job of formulation of standards. They should also consider national preferences and capabilities.

Institutional standards prevalent in any country can be of three types. Law may sometimes make standards compulsorily applicable to the commodities covered by it.[5] It may on the contrary, opt for a partial compulsion with reference to certain items of articles alone[6]. Legislative compulsion to make compliance with the standards mandatory, usually arises on grounds of public interest such as safety and health of the consuming public. Certain standards formulated can be left entirely to the volition of the manufacturers who may or may not follow those standards for their products[7]. In all the three cases, the illegal use or representations regarding the standard marks are punishable[8]. Businessmen are thus prevented from reaping

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[4] G.Chandran Pillai, *Id.*, p.27. Adoption of the GATT agreements by most of the nations paved the way for opening up of trade barriers in these countries.

[5] See for example, the Drugs and Cosmetics Act, 1940; the Prevention of Food Adulteration Act, 1954 and the Fruit Products Order, 1955.

[6] For example, some of the quality standards fixed by the Bureau of Indian Standards have been made applicable to certain commodities by orders issued under the Essential Commodities Act, 1955 while allowing other standards to remain optional for the producers to adopt it or not.

[7] This is true with reference to most of the quality standards fixed by the Bureau of Indian Standards.

[8] See for example, the Fruit Products Order, 1955, order 12; the Drugs and Cosmetics Act, 1940, s. 31 and the Prevention of Food Adulteration Act, 1954, s. 16.

commercial advantage without ensuring compliance with the prescribed quality for their products.

Standard fixation can be done by national or international agencies. In some cases international standards are incorporated into national law by legislation making international standards either voluntarily or compulsorily applicable in municipal jurisdictions.[9]

Whatever may be the mode of supervision exercised—voluntary or compulsory—the use of standard mark of quality is regulated through licensing. Standard fixation generally is done by a committee consisting of technical experts in the field. Representatives from industry and consumer organisations also take part in the deliberations leading to fixation of quality standards. Standards fixed are subjected to periodical revisions to accommodate technological and other changes that may occur from time to time. Indian scenario encompasses both voluntary and compulsory form of standardisation schemes.[10] Similar schemes are adopted in most of the civilized countries. An analysis of the global schemes for standardization will throw more light on the national standard setting process.

Global Standards

There are many international organisations, which work in the field of standardisation complementing each other. They publish international standards for compatibility of technology worldwide. The International Organisation for

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[9] See for example, the International Convention for the Safety of Life at Sea, 1974 (SOLAS' 74) which has now been incorporated in India by the Construction and Survey of Passenger Ships Rules, 1977. See also, K.R. Bhandarkar (Ed.), *Maritime Law of India,* Bhandarkar Publications, Bombay (1979), pp.130-257. Similarly many of the ISO standards have been incorporated into the BIS standards.

[10] The Obvious example of a compulsory scheme can be seen in the case of fruit products. See Fruit Products Order, 1955. The Agmark scheme under the Agricultural Produce (Grading and Marking) Act, 1937, is an example of voluntary scheme.

Standardisation[11], the International Electro-technical Commission[12] and the International Telecommunication Union[13] are some of the major organisations working in this field.

The significant role of international standards as the technical foundation for the global market is expressly stated in the World Trade Organisation[14] agreement on "Technical Barriers to Trade"[15]. The WTO agreement includes "Code of Good Practice" for the preparation, adoption and application of standards. While the GATT[16] standards Code of 1979 was signed only by 40 countries, the new version applies to all the 130 countries of the WTO, out of which 70 countries have so far notified their acceptance of the 'Code of Good practice'. Many countries are expected to join the group sooner or later.

For manufacturers from developing countries like India, longing for an access to the markets of developed countries, it is necessary to ensure that their products meet strict quality standards. Standards of quality are not confined to exports alone. Economic liberalization has permitted foreign companies to trade into the domestic markets of many developing countries. Manufacturers of products intended solely for home market will have to face stiff competition from companies abroad where quality standards are very high. The marketability of their products in domestic as well as foreign markets is severely affected. Improvement in quality standards is the order of the day for survival in the market.

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[11] Hereinafter referred to as ISO.
[12] Hereinafter referred to as IEC.
[13] Hereinafter referred to as ITU.
[14] Hereinafter referred to as WTO.
[15] Hereinafter referred to as TBT.
[16] GATT means General Agreement on Tariffs and Trade.

From a designer's point of view a single international standard is a real advantage instead of having to adapt the goods to each market at a great expense. It is a boon even for customers. It is encouraging to note that adoption of international standards is on the increase. Now that the ISO 9000 quality systems requirements have been accepted worldwide.

ISO 9000 – Its Origin and Importance

The ISO 9000 standards are looked upon as a powerful tool for efficient management for product quality and for all business operations irrespective of their area of business. An enterprise can remain in business and make profits in the long run only by satisfying the needs of its customers. Consumers while placing their orders generally submit product specifications. It is assumed that if these specifications are met during the production process followed by verification and inspection, full customer satisfaction can be attained.

International standardisation began for the first time in 1906 in the electro technical field by the IEC. In the mechanical engineering field, the International Federation of the National Standardisation Associations[17] was set up in 1926. It became functionally defunct due to the Second World War in 1942. In 1946 delegates from 25 countries met in London and decided to create a new international organization.[18] The object of this organization was to facilitate international co-operation and unification of international standards. The new organization, ISO,

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[17] Hereinafter referred to as ISA.

[18] It was on October 14, 1946 that the delegates met at London. World Standards Day is celebrated each year on October 14, which marks the birth of the ISO. The first World Standards day was celebrated in 1970. See M.S.S.Varadan, "Standards: Their Effect on Daily Life", *The Hindu,* Trivandrum, October 14, 1998, p.27. The ISO presently is a non-governmental organisation with worldwide acceptance.

began to function officially from 1947. The first ISO standard was published in 1951.[19]

A member body of ISO is the national body, most representative of standardization in that country. Therefore, only one body is accepted for membership. The member bodies are entrusted with the following tasks to accomplish:

(i) Informing potentially interested parties in their country relevant international standardization opportunities and initiatives.

(ii) Organising and expressing of a concerted view of the countries interest during international negotiations leading to standards agreements

(iii) To act as a secretariat for the ISO Technical Committees and Sale Committees in which the country has an interest.

(iv) Ensure the payment of the country's share of financial support for the operations of ISO.[20]

ISO also has provision for correspondent membership, which is granted to one organization in a country that does not have a fully developed national standards activity. Correspondent members do not take part in the technical work of ISO, but are entitled to be informed about its work, which are of interest to them. ISO has also a third category of membership *viz.*, subscriber membership, for countries of small economies. They pay only a reduced membership fee but are allowed to keep in touch with international standardization.

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[19] See, Sai Sravan, "ISO 9000—Its Origin and Importance", *The Hindu*, Trivandrum, October 15, 1997, p.27.

[20] *Ibid.*

The technical activities of ISO are highly decentralized. These functions are carried out through hundreds of technical committees, sub committees and working groups. Quality Management and Quality Assurance Technical Committees of ISO[21] is the forum for carrying out the standardization work pertaining to ISO 9000 family of standards. In these committees, representatives from industry, research institutes, government authorities, consumer bodies and persons representing organizations of standardization all over the world are allowed to take part in the evolution and resolution of global standardization problems.

The Central Secretariat in Geneva ensures the flow of documentation in all directions. It clarifies technical points with other regional secretariats. Agreements approved by the technical committees are edited and printed and finally submitted as draft international standards to ISO member bodies for voting. Although a greater part of the ISO technical work is done through correspondence, there are, on an average a dozen ISO meetings taking place somewhere in the world every working day of the year.[22] ISO closely collaborates with the IEC on all matters of electro technical standardization.

Factors such as technological evolution, new methods and materials, new safety and quality requirements may render a standard out of date. ISO has established a general rule that all ISO standards should be reviewed at intervals of not more than five years.[23] The latest revisions are still in progress[24].

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[21] This Committee is numbered as ISO/176.

[22] *Ibid.*

[23] ISO's work has resulted in more than 9300 international standards. *Ibid.*

[24] See A.K. Talwar, "Latest Developments in the next Revision of ISO 9000 Standards", *The Chartered Secretary,* June 1999, p.636.

There are a variety of internal and external advantages for a company in obtaining ISO 9000 certification. International benefits comprises of better clarity, less confusion, reduced crisis management, higher confidence of employees, higher morale, more productivity and congenial atmosphere at shop floor, reduced errors, reworks and rejects[25]. External benefits include improved competitiveness, worldwide recognition, and increased credibility and customer satisfaction.[26] When the customer purchases a product or a service from an ISO 9000 company, he is assured of a known standard of quality.[27]

The question why Indian companies are going for ISO 9000 registration at this point of time is of considerable relevance. Some writers opine that it is simply to protect self-interest.[28] It became evident to Indian companies that if they wanted to do business abroad especially in Europe, they needed to have ISO 9000 registration. Major global companies insist that their own part suppliers must be an ISO 9000 registered organization. The reward is that companies that have re-organized themselves to achieve ISO 9000 certification have a significant drop in customer complaints and operating costs[29].

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[25] See Sai Sravan, *supra* n.19.
[26] *Ibid.*
[27] Anand Parthasarathy, "ISO 9000 Club: Making Sense of ISO 9000 and all that", *The Hindu*, (Tvm.), Nov. 24, 1997, p.5.
[28] *Ibid.*
[29] *Ibid.*

But many are the requirements that are to be complied with to obtain an ISO certification.[30] It needs a third party assessment and attestation of the organization that it meets the requirements of the relevant ISO 9000 standard. Assessment is being done in minutest details. If any discrepancy is noticed and found trivial, the auditor may still certify that the organization has complied with relevant ISO 9000 standard. But the registration agency will maintain a close surveillance at half-yearly intervals to ensure that the organization doesn't slip back.

Certification Schemes for Drugs and Pharmaceutical Products

Standardization of drugs and pharmaceutical products is an area where the World Health Organization[31] has made significant contribution. The adoption of a Good Manufacturing Practice and evolving a system of certification at the international level by WHO has made positive results in the improvement of quality of these products.

The 'Good Manufacturing Practice' Recommended for Drug Industry

International concern for health and safety of mankind through standard drugs paved the way for formulation of a draft text on 'Good Manufacturing Practice'[32]. The Draft Requirements for Good Manufacturing Practice in the Manufacture and

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[30] The Organization is to undertake the following activities:
(a) produce a manual documenting the quality system;
(b) produce a document describing how the work in the plant is carried out;
(c) create a system to control distribution and re-issue of documents;
(d) design a corrective and preventive system to ensure faults in quality don't occur;
(e) identify in house training needs;
(f) check, recalibrate and repair test and measuring equipment and
(g) plan and conduct periodic quality audits. *Ibid.*

[31] Hereinafter referred to as WHO.

[32] Hereinafter referred to as GMP.

Quality Control of Drugs and Pharmaceutical Specialties submitted by the World Health Assembly was accepted in 1967. It was subjected to many revisions.[33]

The requirements of GMP presented in the guidelines are in three parts. The philosophy and the essentials of quality management in drug industry is dealt with in the first part. Quality assurance is considered as the joint responsibility of the top management and of the production and quality control management. The second part deals with practices in production and quality control. Actions to be taken by the personnel in the production and quality control departments are outlined in this part. Part three contains two supplementary guidelines. Further guidelines can be developed in future.

The Essentials of Quality Management in Drug Industry

In the drug industry, 'quality management' is defined as an aspect of the managerial function that determines and implements the quality policy of the organization formally expressed and authorized by top management. The basic elements of quality management as per the GMP are:

(i) existence of an appropriate infrastructure or 'quality system' encompassing the organizational structure, procedures, processes and resources; and

(ii) systematic actions necessary to ensure adequate confidence that a product (or service) will satisfy given requirements of quality. The totality of these actions is termed 'quality assurance'.[34]

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[33] Revisions are made in 1971, 1975, 1988 and finally in 1992.

[34] WHO, *Good Manufacturing Practice,* as appended in M.L.Mehra, *The Hand Book of Drug Laws,* Universal Book Agency, Allahabad (1998), p.22.

Quality Assurance

Conceptually 'quality assurance' covers all matters that individually or collectively influence the quality of a product. It is in fact the sum total of the arrangements made with a view to ensure that pharmaceutical products are of the quality required for their intended use. According to the GMP a quality assurance system appropriate to the manufacture of pharmaceutical products must ensure the following:

(a) the pharmaceutical products are designed and developed in a way that it takes into account the requirements of GMP and other associated codes such as Good Laboratory Practice[35] and Good Chemical Practice[36];

(b) the production and control operations are clearly spelt out in a written form and GMP requirements are adopted;

(c) managerial responsibilities are clearly specified in job descriptions;

(d) arrangements are made for the manufacture, supply and use of the correct starting and packing materials;

(e) all necessary controls over materials and products are carried out;

(f) the finished products are correctly processed and checked in accordance with defined procedures;

(g) sale and supply of pharmaceutical products are done only after certification by authorities;

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[35] Hereinafter referred to as GLP.
[36] Hereinafter referred to as GCP.

(h) satisfactory arrangements ensuring maintenance of quality of pharmaceutical products during storage and distribution are made; and

(i) a procedure for self-inspection and quality audit that appraises the effectiveness of the quality assurance system is established.[37]

The GMP guidelines consider that the manufacturer must assume responsibility for the quality of the product to ensure that they are fit for their intended use. He must ensure that his marketing of goods shall not place patients at risk due to inadequate safety, quality or efficacy.

Quality Control Under GMP

Quality control is concerned with sampling, specification and testing along with documentation and release procedures. This ensures that necessary tests are actually carried out and that materials and products are not released for supply or use until their quality has been judged to be satisfactory.[38] Each manufacturer should have a quality control department independent from other departments.[39] This department must be under the authority of a qualified person with laboratories and resources at his disposal to ensure the basic requirements of quality control.[40]

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[37] WHO, *Good Manufacturing Practice* (1992), clause 1.
[38] *Id.*, clause 3.
[39] *Ibid.*
[40] *Id.*, clause 3.2. The basic requirements of quality control of pharmaceutical products are:-
a) Adequate facilities, trained personnel and approved procedures must be available for sampling, inspecting and testing starting materials, packaging materials, and intermediate, bulk and finished products.
b) Samples of starting materials, packaging materials, intermediate products, bulk products and finished products must be taken by methods and personnel approved of by the quality control department.
c) Test methods must be validated.
d) Records must be made demonstrating that all the required sampling, inspecting and testing procedures have actually been carried out and that any deviations have been fully recorded and investigated.
e) The finished products must contain ingredients complying with the qualitative and quantitative composition of the product described in the marketing authorization. The ingredients must be of the required purity, in their proper container and correctly labeled.

The GMP also provides for complaints handling,[41] product recalls[42] and self-inspection and quality audits[43].

Good Practices in Production and Quality Control

All operations relating to production as per GMP guidelines must follow clearly defined procedures in tune with the manufacturing and marketing authorizations.[44] All handling of materials and products should be done in accordance with written procedures or instructions.[45] Testing requirements in the guidelines say that before delivery of materials for use, the quality control manager should ensure that the materials have been tested for conformity with specifications for identity, strength, purity and other quality parameters.[46] The quality control department should evaluate the stability and quality of finished pharmaceutical products and when necessary, of starting materials and intermediate products. A written programme for ongoing stability determination is suggested to be developed and implemented[47] in the establishment. Systems guidelines percolating into minutest details are dealt with in the GMP of the WHO.

WHO Certification of Pharmaceutical Products in International Commerce

The WHO certification scheme[48] is an administrative instrument that requires each participating state, to alert the competent authority of another participating state. This can be done on an application made by an interested member state. Under this

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[41] *Id.*, clause 6.
[42] *Id.*, clause 7.
[43] *Id.*, clause 9.
[44] *Id.*, clause 15.
[45] *Id.*, clause 15.2.
[46] *Id.*, clause 16.8.
[47] *Id.*, clause 16.17.
[48] The World Health Assembly endorsed this scheme in May 1992.

scheme, information regarding the following matters can be notified to the concerned authority:

(a) A specific product is authorized to be placed on the market within its jurisdiction or, if it is not thus authorized, the reason why that authorization has not been accorded;

(b) The plant in which it is produced is subject to inspections at suitable intervals to establish that the manufacturer conforms to GMP as recommended by WHO; and

(c) All submitted product information, including labeling, are currently authorized in the certifying country.[49]

As per this certification scheme, the importing country is assured of the quality of the pharmaceutical products imported into its territory from another member state. A state intending to use the scheme should satisfy itself that it possesses the following national systems:

(i) An effective national licensing system, not only for pharmaceutical products, but also for the responsible manufacturers and distributors exist;

(ii) GMP requirements, consonant with those recommended by WHO, are to be complied with all manufacturers of finished pharmaceutical products;

(iii) Effective controls to monitor the quality of pharmaceutical products registered or manufactured within the country are adopted. This should include access to an independent quality control laboratory.

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[49] Para 1.3 of the scheme.

(iv) A national pharmaceutical inspectorate is established; which operate as an arm of the national drug regulatory authority, and having the technical competence, experience, and resources to assess whether GMP and other controls are being effectively implemented. It should have the legal power to conduct appropriate investigations to ensure that the manufacturers conform to these requirements;

(v) The state should have administrative capacity to issue the required certificates and also to institute inquiries in the case of complaint. It should notify expeditiously both to WHO and the competent authority in any member state known to have imported a specific product that is subsequently associated with a potentially serious quality defect.

The question whether a country has satisfied the above pre-requisites is a matter for that country to determine by self-evaluation. No external agency is provided for in the scheme for inspection or assessment.

By the joint adoption and operation of the GMP and the certification scheme, the quality of medicinal products is maintained to a large extent. But it is an accepted fact that many developing countries could not adopt the GMP and the certification scheme of the WHO for economic reasons. Even those countries can try to introduce changes in their manufacturing practices of pharmaceutical products at least incrementally. However, the WHO has done a commendable job in providing for GMP guidelines for the drug industry of the globe.

National Standards in India

Whatever may be the standards prevailing at the global level, national governments, taking into account the stage of development of the economy and other relevant factors, can lay down quality standards for various goods. The Government

of India also has prescribed standards for many goods including agricultural and industrial products. In certain instances these standards are made compulsory. But in most cases it remains within the domain of volition of the manufacturers. The major standardisation schemes prevalent in India are those coming under the Fruits Products Order, 1955, the Bureau of Indian Standards Act, 1986 and the Agricultural Produce Grading and Marking Act, 1937

Fruits Products Order and FPO Mark

The Essential Commodities Act, 1955 authorizes the Central Government to regulate the quality production of essential commodities by issuing appropriate orders.[50] The Fruit Products Order, 1955 is an important order issued under the Act. This order envisages a compulsory licensing scheme for manufacturing fruit products[51]. It also insists that manufacture of fruit products shall be in conformity with the sanitary requirements and quality standards that are specified[52]. The FPO licence number granted to the manufacturer must be exhibited prominently on the side label of the container or bottle in which the fruit product is packed and sealed[53].

It is the Central Fruit Product Advisory Committee constituted by the Central Government, that prescribes the standards of quality of various fruit products.[54] This Committee consists of technical experts in the field together with representatives from the fruit products industry, vegetable growers and one representative from consumer

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[50] The Essential Commodities Act, 1955,3. Several orders were issued by Governments, Central and State, to regulate, the quality and price of many goods.
[51] The Fruit Products Order, 1955, clause 4.
[52] *Id.*, clause 7. The standards of quality and composition of each fruit product is specified in the second schedule to the Order.
[53] *Id.*, clause 8 (b) and (c).
[54] *Id.*, clause 3.

organisations[55]. It is based on the advice of this committee that the Central Government lays down the standards of quality and composition of fruit products.

It can be seen from the constitution of the committee that all interests affected are given representation in the committee. The difficulties faced by the manufacturers get due recognition at the stage of formulation of the standard itself. The Consumers also get an opportunity to ensure that their interests are not sidelined in the standard setting process. This enables the administrative agency to strike a fair balance between the conflicting interests. Fruit products thus manufactured through licensed production units following standards of quality, composition and hygiene provides an assurance to the consumer that it is of the quality prescribed by government.

The Licensing Authority can seek information from any manufacturer about the manufacture and disposal of any fruit products manufactured by him[56]. The Licensing Officer can enter and inspect any premises of the licensee or manufacturer to satisfy himself that the requirements of the Order are being complied with. He is empowered to seize or detain any fruit products manufactured, marked, packed or labeled otherwise than in accordance with the Order or in contravention of the Order[57]. He can also seize or detain any raw materials, documents, account books or other relevant evidence connected with manufacture of fruit products[58]. The Licensing Officer is also empowered to take samples of any fruit product and send it for analysis[59] in order to ensure that it is of the required standard. The Licensing

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[55] Consumer representative was allowed only from 30.6.1997 vide clause 5 of the Ministry of Food Processing Industries Order No.S.O.1530 dated 30-6-1997.

[56] The Fruit Products Order 1955, clause 13.

[57] *Id,*. clause 13 (b) (i).

[58] *Id.*, clause 13 (b)(ii).

[59] *Id.*, clause 13 (d).

Officer can prohibit the sale or manufacture of fruit products for contravention of the Order[60].

According to the Order any beverage that does not contain at least twenty five percent of fruit juice in its composition shall not be described as fruit syrup, squash or crush[61]. It shall on the contrary be described as 'non-fruit syrup'[62]. Containers containing any such 'non-fruit' products shall not have anything printed or labelled on it that may lead the consumer to believe that it is a fruit product[63]. The use of the term 'fruit' to describe such a product and the use of the label that carries the picture of any fruit is prohibited by the Order[64].

It can be seen that the mandatory licensing scheme, confers vast powers on the Licensing Officer to enter, inspect, seize, suspend or cancel a license. Criminal prosecution for contravention is also envisaged. Thus, the FPO appears to be very much consumer oriented. However, one inherent weakness of this Order is the restriction as to institution of prosecution for violation of its provisions. Prior permission of the Licensing Officer is essential for launching prosecution[65]. In the changed consumer context, it is laudable if the Order is so amended, enabling consumers and consumer associations to institute prosecutions. This will ensure better consumer participation in the implementation of the Order.

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60 *Id.*, clause 13 (f).
61 *Id.*, clause 11.
62 *Ibid.*
63 *Id.*, clause 11(2).
64 *Ibid.*
65 *Id.*, clause 15.

Grading and Labeling

Grading and Labeling is yet another method of standardization popular among the consumers. The Agricultural Produce (Grading and Marking) Act, 1937 provides for the grading and marking of agricultural and other allied commodities. This is used for making available quality agricultural produce including horticulture and livestock produce to the consumers. Under this Act, the Central Government is authorised to make rules[66] fixing grade designation to indicate the quality of an article[67]. It can also specify the 'grade designation mark' to represent a particular grade. Grade designation as per the Act means a designation prescribed as indicative of the quality of an article mentioned in the schedule[68]. The insignia used for grading is 'AGMARK'

Articles that are properly graded and marked by an authorized agency are very much helpful to the consuming public to determine the quality choices available to them. Grading and marking under the Act was purely voluntary till 1986. It is now possible for the Central Government to introduce compulsory grading with respect to commodities where such grading is necessary in the public interest or to afford better protection to consumers[69].

Procedure for 'Agmark' Labeling

An 'Agmark' label under the Act comprises of labels that specify the name of the commodity, the grade designation and the prescribed insignia[70]. Grading and

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[66] The Agricultural Produce (Grading and Marking) Act, 1937, 83.
[67] The items for which quality can be determined are given in the Schedule.
[68] *Id.*, s.2 (d).
[69] Once such a notification introducing compulsory grade designation is issued by the Central Government, sale or distribution of any such article is made an offence. *Id.*, s. 5-B.
[70] See the General Grading and Marking Rules, 1988, rule 2(c).

marking of an article under the Act is usually done by the person authorised by the Agricultural Marketing Adviser or an authorized officer of the Central or state governments[71]. When an application to grant a certificate of authorisation is received, the concerned authority looks into the bona fides of the application by an inspection of the premises, laboratory and processing units of the applicant. On being satisfied of the requirements, the Agricultural Marketing Adviser issues a certificate of authorisation to the applicant[72]. The applicant will have to establish a laboratory of his own or ensure access to a State Laboratory if the goods require laboratory testing for quality assessment[73]. He should also seek the services of approved chemists for chemical analysis[74]. A certificate of authorisation issued is liable to be suspended or cancelled if it is found that the grade designation is marked incorrectly[75]. Similar consequence will follow if there is a violation of the provisions of the Act, Rules or instructions[76]. Punishment is prescribed for selling misgraded articles[77]. The aggrieved person, and recognized consumer organizations are also permitted to launch prosecutions[78].

In addition to the original list of items sixty new items, have been added to the schedule[79]. In spite of introduction of the new provision for compulsory grade designation of articles, it is doubtful whether any notification has been issued so far

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[71] *Id., rule* 3.

[72] *Id.*, rule 3(6). For commodities that require laboratory testing for quality assessment the applicant will have to establish his own laboratory or have access to an approved State Grading Laboratory. See rule 8.

[73] Rules 8 and 9.

[74] *Ibid.*

[75] *Id.*, rule 7.

[76] *Ibid.*

[77] See the Agricultural Produce (Grading and Marking) Act, 1937, s.5A. The punishment and fine prescribed has also been enhanced by the amendment of the Act in 1986.

[78] *Id.*, s.5 C.

[79] This is done in exercise of powers under section 6 of the Act.

making grade designation obligatory. It is high time that the consumers and consumer associations shall take the lead in inspiring the Central Government to make grade designation compulsory at least for food products. Gradually, it can be extended to other articles also. This will motivate agriculturists to produce items of high grade since it is likely to fetch them more prices in the market. In the highly competitive market of the present day world, high-grade quality goods alone can withstand the market pressure of elimination. Government and governmental agencies can take the lead by insisting that they procure and deal only in goods and products that are grade marked. Governments shall also ensure that manufacturers who opt for grade marking get the maximum commercial advantage. For this purpose, governments should device effective mechanisms[80]. Governmental efforts, coupled with the commercial advantage, would certainly encourage others to come in line. If businessmen do not voluntarily adopt grade marking, it is essential that the government shall, in public interest, introduce a compulsory scheme for grade marking incrementally.

The Eco-mark Labeling

Many goods that are produced and sold in the market may cause severe threat to the quality of environment. Environmental degradation as a result of the production and consumption of certain goods has evoked the attention of governments only recently. Britain is considered as the world leader in development of eco-auditing and environmental management systems[81]. There are at least three main systems in operation in the U.K. They are (1) the environmental management system

[80] Governmental measures to encourage manufacturers to go for grade marking may include, tax concessions, subsidies and publicity.

developed by the British Standards Institute in 1994, (2) the Eco management and Audit Scheme[82] Regulation of 1993 and (3) the Environment Management Standards developed by the International Organisation for Standardisation[83]. In addition, there is the European Community Regulation[84] through which an Eco-labeling Board has been established in November 1992. Based on these labeling schemes, criteria are developed to enable the analysis of the environmental impact of a product.

Eco-mark Labeling in India

In India, the Environment Protection Act, 1986, empowers the Central Government to adopt and implement measures similar to those existing in England. The planning and execution of nationwide programmes for the prevention and control of pollution and laying down of standards for the quality of environment are legitimate functions of the Government.[85]. In tune with these requirements, the Ministry of Environment and Forests, Government of India, has formulated a scheme on labeling of environment friendly products. Household and other consumer products can be labeled as satisfying environmental criteria. This is done in addition to the quality requirements laid down by the Bureau of Indian Standards. This label is known as 'Eco mark'. The scheme provides for incentive to the manufacturers and importers for measures taken towards the reduction of adverse environmental impact of their products. The 'eco mark' also helps consumers to become environmentally responsive by providing necessary information to consider environmental factors also

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[81] For a brief account of the three systems operating in England, see, Stuart Bell, *Ball and Bell on Environmental Law*, Blackstone Press Ltd., London (1997), pp.124-127.
[82] This scheme is popularly known as EMAS.
[83] This is known as ISO 14000.
[84] Regulation No. 880/92 EEC.
[85] The Environment Protection Act, 1986, ss.3 (1), 3(2)(ii) and 3(2)(iii).

in their purchase decisions. It is expected that these measures would help to improve quality of the environment leading to sustainable management of resources.[86]

The scheme is made operative through the establishment of three committees. The steering committee[87] determines the product categories for which labeling is required. A technical committee identifies the specific product on individual criteria.[88] The Bureau of Indian Standards is the authority, which assess and certify the product.[89]

The consumers and industries are given representation in the Steering Committee set up by the Central Government. This Committee apart from identifying product categories, formulates the strategies for promotion, future development and improvement of the scheme.[90] The Technical Committee determines the criteria for awarding eco mark.[91] This Committee is composed of technical experts and representatives from industry and consumer groups nominated by the Central Government[92]. Once the criteria for awarding 'eco mark' are laid down, the implementation of the scheme is the responsibility of the Bureau of Indian Standards.[93] The Bureau discharges this function by its usual procedure of inspection, assessment, certification, licensing and cancellation of licenses[94]. Eco mark is often allowed to be affixed to a product by the Bureau in terms of a licence granted to a

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[86] For the objectives of the Scheme, see, Ministry of Environment and Forests, Notification No. G.S.R. 85 (E) Dated 20 February 1991, clause 2.
[87] *Id.*, clause 3(1).
[88] *Id.*, clause 3(2).
[89] *Id.*, clause 3(3).
[90] For the functions and composition of the Steering Committee, see *id.*, clause 3.1.1.
[91] The functions assigned to the Technical Committee and its composition is outlined in clause 3.1.2. The criteria for Eco-mark are outlined in clause 5 of the order.
[92] *Ibid.*
[93] *Id.*, clause 3.1.3.
[94] *Ibid.*

manufacturer who applies for testing and certification of his products. The procedure for granting licenses shall be the same as in the case of other licenses under the Bureau of Indian Standards Act, 1986.[95] The criteria for awarding 'eco mark'[96] are subject to revision from time to time. Therefore, the license awarded may also be reviewed accordingly.[97] A licensed product under the scheme can carry the logo for the eco mark, which ensures the environment friendly nature of the product.

The 'eco mark' guarantees environment friendly quality of the goods covered by it. If the 'eco mark' is coupled with the quality mark of the Bureau of Indian standards, it is certainly ideal for the consumer. But, both the quality mark of BIS and 'eco mark' are not made compulsory. The businessmen may not opt for taking the trouble to acquire the eco mark logo, unless it confers on them positive commercial advantages. When consumers become aware of the usefulness of environment friendly products, they will give preference to products covered by 'eco-mark'. What is required is to create maximum consumer awareness about the virtues of 'eco-mark', which is considered as an avowed objective of the 'eco-mark' scheme.[98]

The Bureau of Indian Standards and the ISI Mark

The significance of a system of national standards in the creation of a dynamic industrial society was realized even before India's independence. Thus before the process of industrialization actually took its roots in India, the Indian Standards Institution (ISI) was set up.[99] This helped to initiate the necessary spadework

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[95] *Ibid.* See also, P. Leelakrishnan, *Environmental Law in India,* Butterworths India, New Delhi (1999), p.103.

[96] The criteria for 'eco-mark' have been broadly laid down in clause 5 of the Order.

[97] *Id.*, clause 6.

[98] See the Eco-mark scheme, clause 8.

[99] The Indian Standards Institution was registered as a society in January 1947, under the Societies Registration Act, 1860.

required for the foundation of a strong industrial base. As the wheels of industry started rolling one after the other, the ISI expanded its operations in a planned manner. This enabled the ISI to meet the growing demand to lay down standards and prescriptions oriented to the country's available material resources and manufacturing capacity.[100]

During the years, the industrial and agricultural sectors have undergone structural and qualitative transformation to a large extent. The necessity for giving an added thrust to standardization and quality control was felt during 1986. This resulted in the passing of the Bureau of Indian Standards Act, 1986.[101] Today BIS has sufficient network of regional and branch offices at metropolitan and other industrial centers all over the country, besides its head quarters at New Delhi.

The Bureau of Indian Standards is responsible for setting up of and maintaining Indian Standards[102] for products and process of manufacture. The BIS functions as a purely voluntary organization. No producer is obliged to get its quality mark affixed on his products. The working of the Bureau can be summarized as follows.[103]

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[100] A.K.Gupta, "Indian Standards Conventions–A View in Retrospect", *The Indian Express*, Trivandrum, Jan. 17, 1982, p.10.

[101] The Bureau of Indian Standards Act, 1986, *the Statement of objects and reasons*. This Act is intended to enable the BIS to formulate standards and other related matters, which were not governed by the earlier legislation. Hereinafter the institution is referred to as BIS.

[102] The Bureau of Indian Standards Act, 1986 s. 2(g) reads as follows: 'Indian Standard' means the standards (including any tentative or provisional standard) established and published by the Bureau, in relation to any article or process indicative of the quality and specification of such article or process and includes: -

(i) any standard recognized by the Bureau under clause (b) of Section 10; and

(ii) any standard established and published or recognized by the Indian Standards Institution and which is in force immediately before the date of establishment of the Bureau.

[103] Functions of the Bureau are given in section 10 of the Bureau of Indian Standards Act, 1986.

The BIS has the power to establish, publish and promote Indian Standards in relation to any article or process.[104] It can recognize as an Indian standard, any standard established by any other institution in India or elsewhere, concerning any article or process.[105] The BIS can design and specify the 'standard mark' of the institution to represent a particular 'Indian standard' and may grant, renew, suspend or cancel a license for the use of the standard mark.[106] In relation to any article or process to which a standard mark has been used, the BIS may make such inspection and take samples of those materials, to ensure that they conform to the standard.[107] For a fertile exercise of its powers, the BIS is empowered to establish, maintain and recognize laboratories for standardization and quality control.[108] Standard formulation is the outcome of long research, which the BIS is supposed to carry out.[109] It can do it by itself and also through institutions recognized by it.[110]

Standardization requires specified production procedure and quality checking at all stages. The BIS can provide its services to consumers and manufacturers of articles and can also appoint agents in India or outside for inspection and testing.[111] Moreover, it can co-ordinate the activities of any association of manufacturers or consumers engaged in standardization and improvement of the quality of any article or process.[112] The use of standard designation mark of the BIS is restricted through

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104 *Id.*, s.10 (1)(a).
105 *Id.*, s.10 (1)(b).
106 *Id.* ,s.10 (1)(c) & (d).
107 *Id.*, s.10 (1)(f). This power can be exercised even in cases were the mark is used without a license.
108 *Id.*, s.10 (1)(h).
109 *Id.*, s.10 (1)(i).
110 *Id.*, s. 10(1) (j).
111 *Id.*, s.10 (1)(k)&(l).
112 *Id.*, s. 10 (1)(o).

licences.[113] A licence under the Act will be granted for use of the standard designation mark in relation to any article or process only when such article or process conforms to the prescribed standard.[114] Improper use of the standard mark would invite punishment.[115] The property in question will also be liable for forfeiture.[116]

The BIS Certification Scheme

The BIS has provided a certification scheme, under which manufacturers are licenced to use the standard mark on their goods. Any producer having the requisite production and testing facilities may apply for a licence under the scheme. The Bureau may authorize him to use the standard mark on his products if the manufacturer is entitled to it. For this purpose, the BIS processes the application received from manufacturers. The inspection and testing facilities maintained by the applicant is assessed with the help of information supplied in the prescribed form or supplementary information furnished.[117]

Inspection

The Bureau can make spot enquiry through its inspectors to verify the evidence produced by the applicant. For this purpose it may direct the applicant to afford facility to the inspecting officer.[118] The spot inspection is made for an appraisal of the controls exercised by the manufacturer during production. The facilities available for carrying out tests on the raw materials at the in-process stages

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[113] *Id., s.* 11.
[114] *Id.*, s.11 (2).
[115] *Id.*, s.33. The penalty prescribed is imprisonment for a term up to one year or a fine up to fifty thousand rupees or both.
[116] *Id.*, s.33 (2).
[117] For a detailed procedure see the Bureau of Indian Standards (Certification) Regulations, 1988.
[118] *Id.*, sub clause 6(c) of regulation 3.

of production and on the final product are also judged. Inspection of the office, workshop, testing laboratories and go downs are also made[119].

For the purpose of determining the quality of the product, the applicant is required to submit samples of the product to the testing authority[120] of the Bureau.[121] On the basis of the Inspector's report and the report of the testing authority, the Bureau may direct the applicant to carryout alterations or additions or both to the scheme of testing and inspection or to the process of production.[122]

The Bureau may grant a licence authorizing the applicant to use such standard mark in respect of the article or class of articles manufactured by him on the basis of satisfaction arrived as above.[123] The licence can be subject to such conditions as the BIS may deem fit to impose.[124] The licence can also be renewed.[125] It is possible for the BIS to alter the terms and conditions attached to a licence during the operation of its tenure after giving notice to the licensee.[126]

Protections against rejection of application on frivolous or vexatious grounds are provided in the Act. If the application is to be rejected, the BIS must give an opportunity to the applicant of being heard either in person or through a representative

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[119] *Ibid.*

[120] The Bureau of Indian Standards Rules, 1987, rule 10(2)(b) require the BIS to maintain a Register of Recognized Laboratories for testing of samples.

[121] *Id.*, sub clause 6(d).

[122] *Id.*, sub clause 6(e).

[123] *Id.*, regulation 4(i).

[124] *Ibid.* See also, regulation 5. This regulation gives a long list of conditions of a license. The license given shall be in the prescribed form and for a prescribed period.

[125] *Ibid.*

[126] *Id.*, regulation 4(3). The notice period is one month.

authorized by him. [127] Before a final order of rejection is passed the BIS shall take into consideration the facts and explanations submitted by the applicant.[128]

Measures Ensuring Compliance with the Standards

Mere granting of a licence and the investigations conducted prior to such grant need not always assure quality. Monitoring is required during the whole period of the licence. Therefore, provisions are made for periodical inspection and testing. There is even provision for revocation of the licence.

Every licensee under the Act is obliged to establish and maintain a system of control to keep up the quality of his product or process. For this purpose a scheme of inspection and testing is made condition of the licence. This is insisted to ensure that the articles or processes comply with the relevant standard. In addition, the licensee is obliged to maintain a full record of the inspections and tests[129]. These records subject to verification by the Inspectors.[130]

The BIS, as per the Act, should arrange at least two inspections a year in respect of each licence granted.[131] The Inspectors appointed under the Act have been granted wide powers[132]. These powers include authority to:

a) enter and inspect any premises in which any licensed article is produced or process is carried out;

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[127] *Id.*, regulation 4(4).
[128] *Ibid.*
[129] *Id.*, regulation 5(4.)
[130] *Ibid.*
[131] *Id.*, regulation 5 (13).
[132] The Bureau of Indian Standards Rules, 1987, rule 21. This rule deals with the powers of the Inspecting Officer.

b) inspect and take samples of any article or any material used in the manufacture of such article;

c) inspect any process and examine the records kept by the licensee and

d) enter into and search such place, premises or conveyance for such article or process and seize such articles[133].

So, it is clear that the inspection can be made with regard to any article or process to which the standard mark has been used. This power extends to inspecting the premises of manufacturers using the mark without licence or violating the conditions of licence

Protection Against Abuse of Power by Inspectors

As a measure to minimize the possible abuse of power by Inspectors, it is provided in the Act that before any inspection of the premises of a licensee, it is necessary to give a reasonable notice[134] to the occupier. He can take samples of any article or other substance only in the presence of the licensee or a responsible person belonging to the establishment[135]. If demanded, the Inspector can, at his discretion, take duplicate samples and give one sample to the licensee[136]. However, the inspecting officer can take samples of articles marked with the standard mark from the godowns or premises of any agent of the licensee or from open market.[137]

The inspector may enter into any premises during the usual business hours. This is to ensure that the standard mark is being used in accordance with the terms

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[133] The procedures that are to be complied with while inspecting, are given in regulations 5(11) and (12) of the Bureau of Indian Standards (certification) Regulations, 1988.
[134] The Bureau of Indian Standards (Certification) Regulations 1988, regulation 5(11)(a).
[135] *Id.*, regulation 5(11)(b).
[136] *Id.*, regulation 5(11)(c).
[137] *Id.*, regulation 5(12).

and conditions imposed by the BIS. He can also verify whether routine inspection and testing specified by the Bureau is being correctly followed.[138] The Inspector is also empowered to inspect any process in those premises. Besides, he may examine the records kept by the licensee relating the use of the standard mark.[139] Every licensee is obliged to provide all reasonable facilities to the Inspector in the discharge of his duties. Any failure in this regard may give rise to suspension or cancellation of the licence[140].

Inspection of the Premises of a Non-licensee

Since the standard mark as to quality is apt to canvass consumers, it is likely to be misused by unscrupulous manufacturers or sellers. BIS, an institution established for the purpose of formulating and maintaining quality standards in relation to goods, is also empowered to see that the licensees as well as non-licensees to do not abuse the privileges granted by the certification mark. The Act and the Rules enables the inspecting staff of the Bureau to enter into and search any premises or conveyance for detecting contravention of the Act[141]. If as a result of the search, any article or process has been found to contravene the provisions of the Act[142], the Inspector can seize such article and use it as evidence in any proceedings under the Act.[143] If seizure is found impracticable, the Inspecting Officer may issue an order that the party shall not remove or part with or otherwise deal with the article without the previous

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[138] The Bureau of Indian Standards Rules, 1987, rule 21(a).
[139] *Id.*, rule 21(d).
[140] The Bureau of Indian Standards (Certification) Regulations, 1988, regulation 3(6) (c).
[141] The Bureau of Indian Standards Act, 1986, s. 26. Also see, the Bureau of Indian Standards Rules 1987, rule 21.
[142] S. 11 prohibits the use of standard mark except under a license and s. 12 prohibits the colourable use of name similar to 'Indian Standard' or Indian standard specification without permission of the BIS.
[143] The Bureau of Indian Standards Act, 1986, s.26(2).

permission of the officer.[144] The Inspecting Officers are given the powers of the police under the Code of Criminal Procedure, 1973 in respect of search and seizures.[145]

Persons making improper use of standard mark are punishable[146]. Forfeiture of property in respect of which the contravention has taken place can also be resorted to.[147] Since the use of the standard mark is limited exclusively to the licensees and the use of the name resembling the name of the BIS and the 'Indian Standard' are restricted, contravention on any of these grounds can similarly be penalized under the Act.[148]

Power to Call for Information

In addition to the periodical inspection carried on by the Bureau through its Inspectors, it can seek information from any licensees. They are obliged to supply to the Bureau the information demanded.[149] Similarly, it can ask the licensees to supply the samples of any material or substance used in relation to any article or process.[150]

Suspension and Cancellation of License

Penal provisions by way of imprisonment and fine or confiscation of the property[151] are supplemented by the power to suspend or cancel the licence. This can be done in the event of improper use of the 'standard mark'. The Bureau can make suspension or cancellation of a licence in the following circumstances:

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144 *Id.*, s.26 (2), proviso.
145 *Id.*, s.26 (3).
146 *Id.*, s.33. The punishment may be either imprisonment or fine.
147 *Ibid.*
148 *Ibid.*
149 *Id.* s.28.
150 *Ibid.*
151 See the Bureau of Indian Standards Act, 1986, s.33.

i) The articles marked with the 'standard mark' under license do not comply with the related 'Indian standard'.

ii) The licensee has used the 'standard mark' in respect of a process, which does not come up to the 'Indian standard'.

iii) The licensee has failed to provide reasonable facilities to the inspector to discharge his duties.

iv) The licensee has failed to comply with the terms and conditions attached to the licence.[152]

Prior to an order of suspension or cancellation of the licence, the BIS must give the licensee at least two weeks notice[153]. Within seven days of receipt of the notice, the licensee may submit his explanation[154]. The licensee shall also be given a hearing within the period prescribed.[155] But if no explanation is submitted, the Bureau may, on the expiry of the notice period, proceed to suspend or cancel the licence[156]. The fact that a licence has been suspended or cancelled will be published in the Official Gazette.[157]

The suspension and revocation of licence may lead to serious civil consequence to the licensees. It is an accepted principle of administrative law that such powers are subjected to judicial scrutiny. The BIS certification being a voluntary scheme, there had been hardly any case law available on this aspect.

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[152] See the Bureau of Indian Standards (Certification) Regulations, 1988, regulation 5(3).
[153] *Id.*, regulation 5(5)(b).
[154] *Id.*, regulation 5(5)(c).
[155] *Ibid.*
[156] *Id.*, regulation 5(5)(d).
[157] *Id.*, regulation 5 (6).

Duty to Stop Standard Marking

The quality control system existing in a licenced manufacturing process may get interrupted due to certain machineries going out of order. This in turn is likely to affect the quality of the end product. In such circumstances, the licensee shall stop marking the product with the 'standard mark' under intimation to the BIS.[158] It is possible for the licensee to resume such marking as soon as such defects are removed and the BIS is informed.[159] Similarly, if the Bureau is satisfied that the product carrying the 'standard mark' is not conforming to the 'Indian standard' prescribed, it can direct the licensee to stop marking of such product.[160] The resumption of marking of such product shall be permitted only if the licensee satisfies the Bureau about the rectification of the deficiencies.[161]

Standard Promotion Strategies

Formulation of standards and their implementation are of equal importance. The object of implementation can be achieved only if the concept of standardization has permeated into each and every productive effort. The BIS promotes the idea of standardization through mass media, seminars, symposia, lectures and exhibitions, conduct of conventions and quality assurance services.

i) ***Standard Conventions***

. The Bureau also organizes standards conventions in different parts of the country. It is meant to arouse 'standard consciousness' among public and producers.

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158 *Id.*, regulation 5 (7) (a).
159 *Ibid.*
160 *Id.*, regulation 5(7)(b).
161 *Ibid.*

If also take stock of the latest trends of development within and outside the country in different technical fields and their impact on standardization programmes.

Indian standards conventions are designed to discuss problems affecting specific areas in relation to standardization and quality control. Implementation of Indian standards and operation of the certification marks scheme are also discussed in the conventions. This also provides a feedback to the BIS on the needs and problems of the industry with special reference to standards and standardization.[162] It also helps the Bureau to take stock of the work accomplished in different fields and chalk out new directions for the future. The Indian standards conventions thus play a notable role in taking the message to the doorstep of individual entrepreneurs in the region in which they are organized.

The programmes for the conventions are selected after considerable thought with a view to focusing attention on issues and themes of topical interest. The venue is selected keeping in view, its importance as a center of activity in relation to a particular industry and also the question of 'standards consciousness' prevailing in the area. The papers presented not only form the basis for discussion at the sessions, but are also considered for further action by the relevant committees of the BIS.[163]

This procedure has been found to be extremely useful in bringing up issues requiring elucidation and in promoting useful exchange of ideas and information. Besides, visits into selected industrial units are also arranged to give the participants an idea of the industrial development strategies.

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[162] See A.K. Gupta, "Indian Standards Conventions–A View in Retrospect", *The Indian Express*, Trivandrum, Jan.17, 1982, p.10.

[163] *Ibid.*

The conventions bring together high-ranking experts, scientists, technologists and top officials from central and state governments, to take part in the deliberations. Participants from research and industry, trade and commerce, producers and consumers are invited to the conventions. Thus the consumers also get an opportunity to air their views about the issues affecting their interests.

The topics covered by the past conventions include safety in electrical appliances and information labeling of consumer goods[164]. The 1982 convention gave more importance to other consumer problems. It discussed the problems and prospects concerning mandatory standards for consumer protection, quality grading in Indian standards, standardization for development of automobile industry and quality control and standardization in handloom industry.[165]

Over the years, it is claimed that Indian standards conventions have been successful in creating greater awareness about the necessity for quality control in different parts of the country. As a result, in plant and inter-plant standards activity has received considerable impetus. More and more industries are coming forward to cover their products under the certification marks scheme of the Bureau[166].

ii) ***Quality Assurance Services***

It may not be possible for many industries, manufacturers and sellers to understand and implement the scheme of inspection and testing, as envisaged by the BIS. Many of them may find it difficult to know even what all testing schemes the Bureau would recognize as sufficient for the purpose of certification. In order to assist

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[164] *Ibid.*
[165] *Ibid.*
[166] *Ibid.*

these manufacturers or producers, who themselves are unable to arrange for a standard system of routine inspection and testing, the BIS administers a Quality Assurance Service.[167] The terms and conditions of such service are generally on the basis of mutual agreement. The services may be provided either to groups of manufacturers or as in-house quality improvement in manufacturing or processing units.[168]

In addition to the major job of formulation and implementation of quality maintenance and improvement, the Bureau may provide information, documentation and other services to consumers and recognised consumer organisations.[169]

Compulsory Standard Marking

According to the scheme of the Bureau of Indian Standards Act, 1986, it is optional for producers to get BIS certification. The quality control processes certainly involve additional expenditure. Economic factors may operate as a deterrent to many who otherwise would have strived to obtain quality certification. A scheme of voluntary quality certification may be sufficient for many products. But for some, quality may be highly essential to protect the health and safety of human beings. Therefore, it becomes necessary to make quality marking compulsory at least for those products that are likely to cause threat to the life and security of the buyer. Hence, on the ground of public interest, the Central Government, in consultation with the Bureau may order that any article or process of an industry shall conform to the

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[167] Bureau of Indian Standards (Certification) Regulations 1988, regulation 7. The services include application of statistical quality control techniques aimed at improving design development, process control and process capabilities.

[168] *Ibid.* Also see, Bureau of Indian Standards Rules, 1987, rule 13.

[169] The Bureau of Indian Standards Rules, rule 13 (c). It is worthwhile to note that the Bureau consists of among others, ten persons representing consumers, representatives of recognised consumer organisations and persons capable of representing consumer interests. Also see, the Bureau of Indian Standards Rules, 1987, rule 3.

Indian standard and the use of 'standard mark' under a licence be compulsory on such article or process.[170] This provision is a welcome measure for promoting consumer interest. The government can, after taking into account the stages of industrial development, needs of the consuming public and the interests of the citizenry at large, implement the mandatory standards incrementally without doing much violence to the industry as such. However, what can be seen is that only inherently dangerous products like electrical appliances, petroleum products and some engineering products alone are brought under compulsory certification scheme. A far more beneficial exercise of power by the Government is necessary in the present day market situations where manufacturers and sellers from the entire globe compete to establish themselves. Such a bias in favour of the consumers is necessary to afford better consumer protection especially in the context where much of the consumers remain un- organized.

Indian Standards and the Global Market

The very purpose of globalisation is to ensure free flow of goods and services between countries. This gives customers the benefit of having the choice of goods and services from anywhere in the world to suit their needs and tastes. However, trade barriers in the form of diverse product standards among nations come in the way of such free flow. Difference in standards means diversity in quality. Standards that are universally recognised became prominent in the world market situation. The 1997

[170] The Bureau of Indian Standards Act, 1986, s14. BIS have brought in about 120 products for mandatory certification.

'World Standards Day' selected 'World trade needs worldwide standards' as the theme.[171] This shows the growing concern for universal standards.

The study reveals that there are national and international agencies to assess not only product standards but also process standards. This ensures continuous maintenance of quality standards. The certification schemes adopted by the Bureau of Indian Standards and other agencies, national and international, are salutary and advantageous to consumers. But accreditations by these agencies are more often voluntary. True, that market forces do exert a lot of pressure on producers to go for standard marking.[172] National governments may insist on standard marking compulsory for certain products considering the safety and health hazards. This apart, maintenance of quality standards remains purely a voluntary affair for individual manufacturers to decide upon.

Public interest[173] is the ground on which standard marking can be made compulsory. If public interest is the governing criteria, compulsory marking should be applied in most of the products and services. But standard marking is made compulsory in very limited cases at present. It is not because the public is not interested in compulsory marking. Consumers always aspire for compulsory standard marking. Conferring a mark of quality as recognition of compliance with certain specified standards is advisable in any market economy. Obviously, well-educated consumers will benefit more out of it. Illiterate may not know the real difference

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[171] For a brief discussion on the necessity of universal standards, see M.S.S. Varadan, "Need for World-wide Standards", *The Hindu*, Trivandrum, Oct. 15, 1997, p.27. The theme selected in 1998 was 'Standards in Daily Life'.

[172] *Supra* n. 93. Certain manufacturers who purchase product components from other manufacturing concerns do insist on quality marking on the wares they purchase

[173] The Bureau of Indian Standards Act, 1986, s.14.

between a standard marked article and others. Still quality marks help the illiterate consumers also. Rather than looking into the intricacies of the product, which they may not be able to do, they can very well look for the quality mark and depend upon it.

Considering these factors, compulsory standard marking may be extended to more and more articles and processes. Similarly, industrial-licensing procedures can be so modified to include terms that require new licensees to seek compulsory standard marking for their products and processes.

The consumers in general and the illiterate in particular must be educated about the virtues of a quality mark. Presently, the job of educating the public about the positive advantages of purchasing a quality-marked product is entrusted to the licensees of the mark. Licensees will certainly give adequate publicity to it since it provides them commercial benefits. That alone is not sufficient. In developed countries, where the consumers are educated and quality conscious, compulsory quality standards need only be prescribed in a limited sense. A highly competitive market will certainly push out producers of low quality products. But in developing countries, the scenario is entirely different. Consumers are vulnerable to the deceptive practices of producers. They are not quality conscious nor organized. What can be suggested is that the manufacturers be encouraged to publish the BIS emblem as a mark of quality through their advertisements. Apart from that, the public relations departments of various governments may be entrusted with the duty to give wide publicity through various medias, details about the goods that fulfill the required

quality. Publication in the official gazette alone is not adequate.[174] Wide publicity given to standard marking would encourage the producers to improve the quality of their products, since the consumers would prefer to buy quality goods. Governmental publicity must be oriented towards creating better consumer awareness about quality standards.

Presently, there is no incentive from the side of the governments to the manufacturers to go for quality marks voluntarily. The governments can encourage producers of quality products by adopting a policy of preference to quality marked goods in their purchases. The present system of inviting competitive tenders can be confined to producers who have to their credit the quality mark of BIS or any other equivalent institution. A governmental decision in this regard will certainly be a bold step towards encouragement and improvement of the quality standards of goods in the market[175].

The quality assurance services of the BIS should be more enlarged to ensure better availability of its services. The terms with which such services are made available to manufacturers may be made simple and attractive.[176] Service charges shall not be allowed to stand as a deterrent for quality marking. Thrust of its activity

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[174] The old common law doctrine of 'constructive notice' is not suited to the ideals of a welfare state. Publication in the official gazette is only a statutory compliance and may not reach the peoples. Mass medias like Radio, Television and Newspapers and publications from various government departments etc., can be made use of, to sub serve public good.

[175] Governments are considered to be the biggest consumer of goods and services in the market. Governmental decision in this regard will certainly persuade the manufacturers and sellers to go for quality certification with a view to get themselves considered in government purchases.

[176] The terms and conditions based on which the BIS extends its services now is based on terms agreed between by the BIS and the producer. See The Bureau of Indian Standards (Certification) Regulations, 1988.

shall not be mere economic criteria as it is often criticised.[177] The services of the BIS shall be made available to all concerned at reasonable rates. Continued availability of the services is to be ensured until the producers attain the standards of quality prescribed by the Bureau.

Since quality mark would improve the sales and thereby the profits of the producer, abuse of the mark cannot be ruled out. It cannot be said that the BIS has an efficient system of administration to prevent unauthorised use of its certification mark. Similarly, the continued use of quality mark on goods when it does not comply with the quality requirements should also be checked. For this purpose, inspection of the quality marked goods in open market and at the premises of the manufacturers must be made a routine affair of the Bureau. Sample collection from open market from various parts of the country can be carried out with the assistance of local bodies, consumers and consumer organizations.

There are limitations in prosecuting offenders for improper use of quality mark. Prosecution at present can be initiated only upon a complaint made by or under the authority of the Government, the Bureau, any consumer or recognized association[178]. Instead, all associations registered or otherwise working for the protection of civil rights can be permitted to launch prosecution. This will enable better compliance of the provisions by the traders.

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[177] When the Government has made the ISI mark compulsory for bottled water, the response of the bottled water industry was that it would push the industry in to deep waters as the change over require heavy investment. Moreover, the fee for obtaining the ISI mark alone has been estimated to be Rs.1.34 lacks. See "Bottled Water Industry in Deep Waters" *The Hindu,* Cochin, April 3, 2001, p.3.

[178] The Bureau of Indian Standards Act, 1986, s. 34.

Chapter 5

QUALITY CONTROL BY IMPLYING TERMS IN CONTRACTS

In a contract for sale and supply of goods, prior to the actual agreement, many statements are exchanged between the parties. Statements made during pre-contractual negotiations have varying degrees of significance to the parties. The importance of such statements will depend on whether those statements become an essential term of the contract or not. The effect of the statement in enabling a party to enjoy the benefit of the negotiation may also depend on whether the statement is treated as a condition or a warranty. A close examination of the nature of the statements in achieving the benefit of the sale or supply contract is made considering its importance in promoting product quality.

The terms of the sales contract are often negotiated by the parties. But some important matters relating to the sale may be left out by them believing that negotiations on those matters are unnecessary. But unless such terms are read into the contract the outcome will be unpredictable. The right of a person to sell the goods or that the goods are free from encumbrances or hazards are not generally stated but presumed by both the parties. When a conflict arises, the non-incorporation of such a term arrests utmost importance. It is necessary to examine whether the courts or legislature can supplement such terms in the absence of express statements made by parties on those matters. An affirmative answer in this regard may lead to substitution of a contract by court or legislature for the one made by the parties. But if the answer

is in the negative, it may lead to absurd results leaving the benefit of the contract to one party alone.

The meaning and scope of the terms often implied by law in sales contracts require a close scrutiny. The recent tendency appears to be to expand the meaning of the implied terms for promoting consumer interest. The adoption of the concept of 'satisfactory quality' instead of 'merchantable quality' is an indication of the growing concern of the legislature to promote quality of consumer goods. These aspects are examined to assess the role of implied terms in achieving quality control.

Exclusion of implied terms is widely used by traders as a method to overcome the judicial and legislative initiatives and efforts for promotion of product quality. Realising the danger of such clauses in a contract for sale and supply of goods, several measures are adopted to contain the rigour of exclusion clauses. An analysis of these measures is made to assess the status of exemption clauses in contracts of sale.

Representations in Contract of Sale

During the course of the bargaining leading to the conclusion of a binding agreement, the contracting parties may make statements or give assurances calculated to induce the other to enter into the contract. The other party may believe that those facts would render the proposed bargain to his advantage. Such undertakings and promises contained in a contract are known as terms of the contract. In a dispute between the parties, the court may have to decide whether the statements or assurances formed part of the contract or was merely a representation.

Representations may induce the party to whom it is made to enter into the contract. But unless it becomes a term of the contract, he may not get any remedy.

Representations will become terms of the contract by its express incorporation. It may also become part of the contract by incorporating a different document in the contract[1].

Representations and Terms of Contract

Representations made before the conclusion of the contract may become a term of the contract. When the representation has become a term of the contract, the aggrieved party can base his claim under it. However, the right of the injured to treat the contract as terminated is dependant upon the nature of the term and the magnitude of the breach. The injured is always entitled to recover damages resulting from the breach of the term. The object of awarding damages for breach of the term in most cases is to protect the plaintiff's expectation interest[2]. This is done by putting him into a position as if the contract had been performed

Representations found in documentary form but not in the contract itself are not considered as statements inducing contract. They are not terms of the contract also. But it is possible that these representations may confer rights on third parties who relied on those statements[3]. The dividing line between a term of the contract and a mere representation is not practically easy to draw.[4]

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[1] For example, the terms in a charter party agreement is incorporated into a contract of bill of lading by providing a term 'all liabilities under the bill of lading will be as per charter party'. See Stewart C.Boyd, Andrews S.Burrows and David Foxton (Eds.), *Scrutton on Charter Parties and Bills of Lading,* Sweet & Maxwell, London (1996).

[2] For a discussion on the different types of interests protected, see G.H. Treitel, *The Law of Contract,* Sweet & Maxwell, London (1995), pp.846-849.

[3] Stewart C.Boyd *et.al; supra* n. 1 at p.111.

[4] Guest A.G., (Ed.), *Anson's Law of Contract,* English Language Book Society (1975), p.125.

Classification of Contractual Terms

Once it has been established that a statement forms a term of the contact, the question is whether all the terms are equally binding? It was always open to the judiciary to determine whether a term is a condition or a warranty. Until the statutory prescription of condition and warranty came in, the common law courts through the interpretative technique classified contractual terms into three broad categories. They are (i) conditions, (ii) warranties and (iii) innominate or indeterminate terms[5]. According to the court, if the parties regard them as essential, it is a condition[6]. Breach of a condition enables the innocent party to treat himself as discharged from the obligations and also to sue for damages. If they did not regard it as essential, but only as subsidiary, it is a warranty.[7] Breach of a warranty can only give rise to an action for damages for breach.[8] Innominate terms were never been treated as either conditions or warranties. They lie in between and when an obligation of this kind is broken liability is dependant on the seriousness of the breach[9].

In *China Pacific* v. *Food Corporation of India*[10], the cargo on a stranded ship was unloaded and stored for its safe presentation. There was no contract whatsoever about meeting the expenses thus incurred and who will bear it. The House of Lords held that the owners of the cargo were liable to pay for the expenses of unloading and

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[5] For a brief account of these terminologies, see Stewart C.Boyd *et.a., supra* n. 1 at pp. 88-107. See also, P.S.Atiyah, *An Introduction to the Law of Contract,* Clarendon Press, Oxford (1992), pp.186-88.

[6] See for a discussion on the legal concept of condition, Samuel J.Stoljar, "The Contractual Concept of Condition", 69 L.Q.R. 485 (1953).

[7] See F.M.B. Reynolds, "Warranty, Condition, and Fundamental Term", 79 L.Q.R. 534 (1963).

[8] See the Sale of Goods Act, 1930, ss.12 (2) and (3). Also see, *Dansons Ltd.* v. *Bonnin* [1922] 2 A.C. 413; *Bettini* v. *Gye,* (1876) 1 Q.B.D.183; (These cases give excellent explanations of the distinction between 'condition' and 'warranty'. See also *Anson's Law of Contract, supra* n. 5 at p.125 and Guest A.G., (Ed.), *Chitty on Contracts*, Sweet & Maxwell, London (1977) Vol. I. p.319.

[9] See Stewart C.Boyd *et.al, supra* n. 1 at p. 88.

[10] [1981] A.C. 939.

storing, although the parties had not entered into any contract for this purpose. The court assumed the existence of a 'bailment' which enabled the court to impose a sort of 'implied' obligation to pay even in the absence of an express contract.

Similarly, if a person professes to act as an agent of a principal, it is assumed that he impliedly warrants of having his principal's authority to act on his behalf. If it turns out that he has no such authority, the other party who suffered loss can hold the agent liable on this implied warranty. This principle was evolved in the famous decision of *Collen* v. *Wright*[11]. In this case, the defendant acted as the agent of a third party during the negotiation of a lease agreement with the plaintiff. The terms were agreed upon and the plaintiff started occupation of the property. The third party, who was in fact the principal, claimed that the agent had exceeded his authority and ultimately the plaintiff had to vacate the property. The court held that the plaintiff is entitled to seek reimbursement of his losses against the agent who must be taken to have warranted that he had the principal's authority to grant the lease.

A slightly different but similar is the 'request principle' formulated by courts. This principle holds that a person may be held liable to another where he has requested the other to do some act for him and having been done in pursuance of the request, suffered loss. *Sheffield Corporation* v. *Barclay*[12] is one such case. Here, the defendants had accepted from a client, certain share certificates of Sheffield Corporation. These certificates, though unknown to the defendants, were stolen. The defendants presented the certificates to the company for transfer, and later on getting transferred, sold it to a third party. The Corporation was held liable to the original

[11] (1857) 8 E&B 647 as quoted in Michael Bridge, *The Sale of Goods*, Oxford University Press, Oxford (2000), p.13.
[12] [1905] A.C.392.

owner and also to the bonafide purchaser from the defendants. The Sheffield Corporation sued the defendants claiming that they are responsible for the loss since they had started it by sending the stolen certificate for transfer in their name. The Court held that the company is entitled to recover because the defendants can be taken to have impliedly agreed to indemnify the company against any loss when they sent the certificate. They may also be taken to have impliedly warranted the certificate to be genuine and not stolen.

A more recent example of an implication of the kind is provided by the decision of the House of Lords in *Harvela Investments Ltd.* V. *Royal Trust Company of Canada Ltd.*[13] Here, a trustee who was negotiating for the sale of shares invited two bidders to make sealed bids stating the highest prices. One bidder offered a specified amount and the other offered a specific sum or 'a sum higher than the other bidder'. The question before the court was whether the last bid was valid or such a bid, by implication, to be ruled out. It was held that there was a necessary implication in the original invitation that such bids could not be made.

In cases of informal property transactions,[14] collateral contracts,[15] and situations of special relationship between parties,[16] courts on many occasions

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[13] [1985] 2 All E.R. 966 (H.L.).

[14] For example, see *Eves v. Eves,* [1975] 3 All E.R. 768 (C.A.); *Tanner* v. *Tanner,* [1975] 3 All E.R. 776 (C.A.). In the latter case, Lord Denning M.R., openly admitted that the function of the court was to imply or impose a contract on the parties.

[15] For examples, see *Charnock* v. *Liverpool Corporation,* [1968] 3 All E.R. 473 (C.A.). In this case the plaintiffs' damaged car was sought to be repaired by the insurance company of the plaintiffs, with the defendant. When there was inordinate delay in rendering the repairs, the court said that the plaintiff is entitled to sue the defendant under an implied contract to do the work in a reasonable time.

[16] For instance, see *Seager* v. *Copydex Ltd.*, [1967] 3 All E.R. 415 (C.A.). In this case, there was prolonged negotiations between the parties based on a patent use which ultimately failed. When the defendants started working on an alleged invention of the plaintiff, the court held that there is a breach of confidence and the plaintiff is entitled to succeed.

formulated rules, which kept the parties binding[17]. The belief that courts do not make contracts for the parties is stated to be a mere dogmatic proposition that is misleading.[18]

It can be seen that the courts can and do imply many terms into the contract to give business efficacy[19] to the transaction. Terms usually and invariably implied by courts in contracts of sale and supply of goods have received statutory recognition. The implied terms in a contract of sale enumerated in the Sale of Goods Act are nothing but the principles recognized by common law discussed above.

Conditions and Warranties

The obligations created in a contract are not of equal importance. Some terms go directly into the core of the contract that its non-performance may frustrate the very purpose of making the contract. Others may not be so important and its non-performance may not have such impact. The former terms are called 'conditions' and the latter are known as 'warranties'. The term 'condition' has been defined as a stipulation 'essential to the main purpose of the contract, the breach of which gives rise to a right to repudiate the contract.[20] The term 'warranty' has been defined as a 'stipulation collateral to the main purpose of the contract', breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as

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[17] For a detailed discussion on the circumstances in which the courts made contracts, see P.S.Atiyah, *An Introduction to the Law of Contract,* Clarendon Press, Oxford (1992), pp.96-116.

[18] *Id.* at p.96.

[19] This principle of 'business efficacy' has been laid down by Mackinnon L.J. in the famous case *The Moorcock,* (1989) 14 P.D.64.

[20] The Sale of Goods Act, 1930, s. 12 (2).

repudiated.[21] Whether a stipulation in a contract of sale of goods amounts to a condition or a warranty depends upon the construction of the contract.

A stipulation mentioned in the contract as a 'condition' may amount to a 'warranty' and vice-versa, under the facts and circumstances of each case.[22] In *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Ltd.,*[23] the court considered this issue in detail and held that if the breach went to the root of the contract, the other party was discharged from his obligation, but if it does not, he is not.

However, if a stipulation is treated as a condition,[24] the plaintiff is entitled to repudiate such contract even if he does not sustain any damage. But if it only amounts to a warranty, the breach will entitle him to claim damages,[25] but not repudiation of the contract.[26] The distinction between a warranty and a condition lies in the remedy for breach. In case of breach of warranty there can only be a claim for damages. But for breach of condition the party injured can refuse to perform his own part of the obligation and invoke in appropriate cases, remedies of recission and restitution.[27]

A comparative analysis of the Indian and English law relating to conditions and warranties with that of the U.S. shows that there is no superficial distinction

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[21] *Id.*, s.12 (3).

[22] *Id.*, s.12 (4). This rule of law is based upon the decision of the court in *Behn* v. *Burness,* (1863) 3 B&S 751, as quoted in Michael Bridge, *The Sale of Goods,* Oxford University Press, New york (2000), p.153. See also *Cehave.N.V.* v. *Bremer,* [1975] 3 All E.R. 739 (C.A.).

[23] [1962] 1 All E.R. 474 (C.A.).

[24] For an analysis of the conceptual framework of 'condition', see Samuel J. Stoljar, "The Contractual Concept of Condition", 69 L.Q.R. 485 (1953).

[25] *Arcos Ltd.,* v. *E.A. Ronasen & Sons* [1933] A.C.470.

[26] For a detailed discussion on conditions and warranties, see A.G.Guest *et.al.* (Eds.), *Benjamins' Sale of Goods*, Sweet & Maxwell, London (1992), pp.437-452.

[27] For a brief analysis of the distinguishing features of condition and warranty, see F.M.B.Reynolds, "Warranty, Condition and Fundamental Term", 79 L.Q.R. 534 (1963).

between conditions and warranties under the U.S. law. The Uniform Commercial Code uses the term 'warranty' not only to cover both conditions and warranties as used under Indian and English law, but also to representations, which induced making of such contracts. The breach of such a warranty is remediable by recission, rejection or damages.[28]

The ambiguities and uncertainties that galore around the terms, conditions and warranties under the Indian and English law need to be straightened by legislative action to the best advantage of all concerned.

Conditions are either expressed or implied. Express conditions are those terms agreed upon by the parties either orally or in writing. However, in certain circumstances, stipulations are implied and are read into the contract as an essential part of it.[29] In this process the court or legislature is supplementing terms to the contract made by the parties.

Circumstances in Which Courts Imply Terms into a Contract

Instances were not rare where courts implied into the contract, terms that the parties have not themselves expressly inserted. The parties may sometimes either through forgetfulness or due to bad drafting, fail to incorporate into the contract some essential terms. Had they adverted to the situation in its proper perspective, they would certainly have inserted them in to contract. In such cases, the courts may in order to give 'business efficacy' to the transaction, imply such terms as are necessary

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[28] The U.C.C. (U.S.A.), ss. 2–313 and 2- 507.

[29] *Howell* v. *Coupland* (1876) 1 Q.B.D. 258 (C.A.). Indian application of this principle can be seen in *Sannidhi Gundayya* v. *Illoori Subhaya*, A.I.R. 1927 Mad. 89.

to bring out that result.[30] But courts cannot imply terms into the contract unless the failure in this regard will lead to absurd results.

Terms Implied in Contract of Sale

The role of state in a welfare economy at present is diverse and complex. It is not only an administrator but also has assumed the roles of a protector, provider, entrepreneur, and arbitrator[31]. In tune with this notion, states have started helping the consumers against defective goods. Starting with the *laissez faire* doctrine of *caveat emptor* [32]and enforcing only the express terms, the courts slowly evolved a process of providing protection to the ordinary purchasers of goods. This was achieved by a long and continuous process[33]. Ultimately the change took an advanced form of consumer protection measure compelling the seller to sell only goods that are of certain quality and reasonably fit for all purposes for which they are generally used. The terms implied by way of conditions and warranties in the law of sale of goods[34] play an important role in quality control and consumer protection.[35]

Concept of Merchantable Quality

The most significant implied condition in a contract of sale is that of merchantability.[36] The Sale of Goods Act does not give any definition to the word 'merchantable'. But the word has by long use become a term of art in commercial

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[30] *Liverpool City Council* v. *Irwin*, [1977] A.C. 239. Also see *Sealty* v. *Southern Health Board*, [1992] A.C. 294.

[31] Friedmann, *Law in a Changing Society* (1972), p.506.

[32] Hamilton, "The Ancient Maxim Caveat Emptor", 40 Yale L. J., 1140 (1961).

[33] Milson, "Sale of Goods in the 15th Century", 77 L.Q.R, 257 (1961).

[34] In India, the law relating to sale of goods was incorporated as a part of the general principles of contract till the enactment of the Sale of Goods Act, 1930. This Act, in many respects is similar to the Sale of Goods Act, 1893 of England.

[35] The Sale of Goods Act, 1930, ss. 11 to 17.

[36] William C.Pelster, "The Contractual Aspect of Consumer Protection: Recent Developments in the law of Sale warranties", 64 *Michigan Law Review* 1430, (1965-66) at p. 1435.

law. Goods are of merchantable quality if they are of such a quality and condition that a reasonable man, acting reasonably, would after a full examination, accept them in performance of the offer[37]. Merchantability is a relative term. The test is whether the goods are merchantable under the particular description in the contract or not.[38] This view was taken by the Calcutta High court in *Trustees, Port of Calcutta* v. *Bengal Corporation.*[39] Here, the Port Commissioners invited tenders for wire ropes of certain specification for use in cranes. The Bengal Corporation, which dealt in these goods agreed to supply the same, the port being entitled to inspect the goods. In an action for price the defendant contended that the plaintiff supplied ropes, which did not correspond with the agreement and the condition or warranty as to quality and fitness. It was held that the goods in question were not of merchantable quality and were not fit for the purpose for which they were required, since the wire ropes were not fit to be used in cranes for which it was purchased. 'Merchantable quality' in this sense means that the goods purchased shall comply with the description in the contract so that a purchaser buying goods of that description would regard it as a good tender[40].

It is not sufficient that the goods are marketable or saleable. The term that the goods shall be of merchantable quality is fulfilled only when they do not differ from the normal quality of the described goods.[41] In the case of foodstuffs, where they are purchased by description, an implied condition as to their being sound and are of

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[37] *Bristol Tramway Co.* v. *Fiat Motors Ltd.*, [1910] 2 K.B. 831.
[38] *Agha Mirza Nasarali Khoyee & Co.* v. *Gorden Woodroffe Co. (Madras) Ltd.*, A.I.R. 1937 Mad. 40.
[39] A.I.R. 1979 Cal.142. Also see *Bhagavati Prasad* v. *Chandramaul,* A.I.R. 1956 S.C. 593.
[40] *Summer Permain and Company* v. *Webb and Company,* [1922] 1 K.B. 55.
[41] *Supra* n 39.

merchantable quality may also arise[42]. In *Hasenbhoy Jetha Bombay* v. *New India Corporation Ltd.*[43] the machine in question was found to be less productive. The court held that the machine was not of merchantable quality in as much as it differed substantially from the description.[44]

Goods cease to be merchantable due to defects rendering them unfit for the purpose for which they are usually sold. Merchantability is fulfilled when the goods do not differ from the normal quality of the described goods including the state or condition required by the contract. The goods should be immediately saleable under the description by which they are known in the market.[45]

The goods remain merchantable even if they are unfit for some particular purpose. It is sufficient that they fulfill the requirements of merchantability within the meaning of the description given to it in the contract. This is the view expressed by the House of Lords in *B.S.Brown and Sons Ltd.* v. *Craiks Ltd.* [46] In this case the buyers ordered for some cloths of a prescribed quality at an agreed rate per yard. The cloth supplied by the manufacturers was not fit for the buyer's purpose, even though it conformed to the prescribed quality. The sellers had thought that the cloth was for some industrial purposes for which it was fit. Reselling could fetch only a reduced price. The House of Lords rejected the buyers' claim for damages on the ground that the goods were not merchantable. The goods were still commercially saleable for industrial purposes. A mere difference in price did not make the goods

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[42] *In Re, Beharilal Baldeoprasad Firm of Merchants,* A.I.R. 1955 Mad. 271.
[43] A.I.R. 1955 Mad. 435.
[44] *Id.* at p. 438.
[45] See *Sorabji Hormusha Joshi & Co.* v. *V.M.Ismail and another,* A.I.R. 1960 Mad. 520. Also see *Grant* v. *Australian Knitting Mills Ltd.*, [1936] A.C.85 (P.C.).
[46] [1970] 1 All E.R. 823 (H.L.)

unmerchantable[47]. But if the goods could be resold at a substantially lower price, it would be unmerchantable.[48]

In India, the Sale of Goods Act, 1930,[49] confers protection to the buyer who purchases goods from a seller who deals in goods of that description by implying a condition of merchantable quality.[50] But the seller or producer might have been a person who habitually deals in goods of that kind. He must not be a stray dealer. Constant dealing in commodities of a certain kind enables the dealer or manufacturer to be in touch with the quality and performance of the product in question. His experience with the goods makes him more enlightened about the diverse aspects of the goods. Because of his superior knowledge about the goods, it is justifiable in law to saddle him with the responsibility to compensate the consumers for defects in those goods.

But if the buyer has examined the goods, the implied condition of merchantability will not come to his rescue as regards defects, which such examination ought to have revealed.[51]

Implied conditions and warranties as to quality or fitness for a particular purpose may be attached to a contract by custom or usage of a trade.[52] It has also

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[47] This position is substantially altered by the Sale and Supply of Goods Act, 1994 of the U.K.

[48] *Id.* at p.828.

[49] The Sale of Goods Act, 1930, s.16 (2) reads: "Where the goods are bought by description from a seller who deals in goods of that description (whether he is manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality."

[50] The British Sale of Goods Act, 1979,s. 14 (6), before its amendment in 1994, had provided for a definition to the term "merchantable quality" as follows: "Goods of any kind are of merchantable quality... if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstances."

[51] The Sale of Goods Act, 1930, s. 16 (2), proviso.

[52] *Id.*, s. 16(3).

been stated that express warranties and conditions stated in a sales contract will not negate a warranty or condition implied by the Act unless it is inconsistent with it.[53]

Merchantable Quality and the Rule of *Caveat Emptor*

One essential feature embedded in the sale of goods law is the maxim *caveat emptor*[54]. The practical impact of the introduction of implied term of merchantability has been to bring down the importance of this principle. The Sale of Goods Act, 1930, being an enactment to strike a balance between the interests of both the contracting parties, a virtual restatement of the principle of *caveat emptor* doctrine can be seen in the opening words of section 16. It reads:

> " Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows..."[55].

The rule of *caveat emptor* holds the view that it is the buyer's duty to select goods that are in conformity with his requirements[56]. Even though a seller is not supposed to conceal the defects in his wares, he is not ordinarily bound to disclose the defects, which are known to him.[57]. The scope of the rule of caveat emptor is seen explained by the Irish Court of Appeal in the following words:

> "*Caveat emptor* does not mean in law that the buyer must take chance. It means, he must take care. It applies to the purchase of specific

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[53] *Id.*, s. 16(4).

[54] This term means 'buyer beware'. It has been stated that the doctrine of *caveat emptor* is dying through the benevolent hands of law. See Steve Hedley, "Quality of Goods, Information and the death of Contract", [2001] J.B.L. 114.

[55] *Ibid.* Similar provisions can be seen in s.14 (1) of the Sale of Goods Act, 1979 (U.K.)

[56] *Ward* v. *Hobbs,* (1878) 4 A.C.13.

[57] *Id.* at p.26. See also *Dixon Kerly Ltd.*, v. *Robinson,* [1965] 2 Lloyds Rep.404.

things upon which the buyer can exercise his own judgment. It applies also whenever the buyer voluntarily chooses what he buys and that the buyer is not relying on the skill or judgment of the seller"[58].

However, the exceptions enlisted in this section arrest more significance to the consumers. Even though in normal situations there is no legal fiction of implied condition or warranty in any sales transaction, in the circumstances narrated there under, it is thus presumed to advance the consumer interest. The rule of merchantable quality and fitness for purpose in the law of sales appear as exceptions to the rule of *caveat emptor.* These exceptions at present have become more prominent than the rule itself[59].

Evolution of the Concept of Satisfactory Quality

Since the implied condition of merchantability applies only where the seller sells in the course of a business, there is no statutory requirement of quality when the transaction is a private sale. The legislative wisdom in treating private sales distinct from other sales may not be questioned since this enactment is to ensure and regulate specific conduct in the market where sellers and buyers transact as a class. But the absence of a proper definition to the term 'merchantable quality'[60] has paved the way for divergent interpretations depending upon the facts and circumstances of

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[58] *Wallis* v. *Russel* [1902] 2 I.R.585 at p.615 as quoted in Michael Mark (Ed.), *Chalmer's Sale of Goods Act,* 1893, Butterworths, London (1967), p.66.

[59] Avtar Singh, *Law of Sale of Goods and Hire Purchase,* Eastern Book Company, Lucknow (2000), p.53.

[60] For a general discussion on 'merchantable quality', see A.G.Guest *et.al.* (Eds.), *Benjamin's Sale of Goods,* Sweet & Maxwell, London (1981), para 790; P.S.Atiyah, *The Sale of Goods,* Universal Book Traders, Delhi (1995), p142 and R.M.Goode, *Commercial Law,* Sweet & Maxwell, London (1982), p.256.

each case[61]. The British Consumers' Association in 1979 had pointed out[62] that the statutory definition given to the term 'merchantable quality' was unsatisfactory at least in two respects. In their opinion the definition concentrates excessively on the fitness of the goods for their purpose and ignores aesthetic considerations and appearance. They also argued that reference to the 'standard which a buyer might reasonably expect' could open the door to an argument that a buyer could not complain if his new car had 'teething troubles' since it was widely known that all new cars had them. Because of the uncertainties attached to the definition, it was eventually decided by the British Law Commission[63] that it would be appropriate to adopt a test of 'acceptable quality' so as to reflect the concerns of consumers. But the Law Commission has acknowledged that there is no magic formula to cover all cases. The British Parliament chose not to adopt a test of acceptability, opting instead to set a standard of 'satisfactory quality'. The reason, which underlies the use of this alternative adjective, is that many consumers may regard goods as unsatisfactory without wishing to reject them. In other words, people are prepared to accept goods with which they are not wholly satisfied. Moreover, it is opined that if the standard of 'acceptable quality' had been adopted, this might have given rise to confusion. The concept of acceptance is closely related to the separate issue of whether a buyer may

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[61] For example, see *Bristol Tramways etc. Carriage Co. Ltd.* v. *Fiat Motors Ltd.*, [1910] 2 K.B.831; *Cammell Laird & Co. Ltd.* v. *Manganese Bronze & Brass Co. Ltd.*, [1934] A.C. 402, *Henry Kendall & Sons* v. *Lillico & Sons Ltd,*. [1969] 2 A.C. 31 and *Brown & Son Ltd.* v. *Craiks Ltd.*, [1970] 1 All E.R. 823 (H.L.).

[62] Consumer Association, *Merchantable Quality – What Does It Mean?* (1979).

[63] *Report of the British Law Commission* 1987, No.160.

terminate his contractual obligation to perform and to reject the goods delivered by the seller.[64]

Meaning of 'Satisfactory Quality'

Under the British Sale of Goods Act, 1979, after its amendment[65] in 1994, goods are considered to be of 'satisfactory quality', if they meet the standards that a reasonable person would regard as satisfactory, taking into account any description of the goods, the price (if relevant) and all the other relevant circumstances.[66] The following aspects will also be treated as relevant in appropriate cases: -

a) fitness for all the purposes for which goods of the kind in question are commonly supplied,

b) appearance and finish,

c) freedom from minor defects,

d) safety, and

e) durability.[67]

It is true that the amendment bid a farewell[68] to the term 'merchantable quality'. However, in determining the status of the implied term and the circumstances in which the implied term is inapplicable, the judicial propositions made earlier can be looked into.[69] It has been said[70] that the new standard of

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[64] David Oughton & John Lowry, *Text Book on Consumer Law,* Blackstone Press Ltd., London (1997), p.159. Also see, Robert Lowe and Geoffrey Woodroffe, *Consumer Law and Practice,* Sweet & Maxwell, London (1995), pp. 50 –51 and Ewan Macintyre, *Blackstone's Learning Text: Commercial Law,* Blackstone Press Ltd., London (1998), pp. 19-21.

[65] Amendment to the Act was effected by the Sale and supply of Goods Act, 1994.

[66] The Sale of Goods Act, 1979 (U.K.), s.14 (2A).

[67] *Id.*, s. 14 (2B).

[68] See Patrick Milne, "Goodbye to Merchantable quality," 145 *New Law Journal,* 683 (1995).

[69] See David Oughton & John Lowry, supra n. 64, at pp. 160-163.

[70] *Id.*, p.162.

'satisfactory quality' divorces English law from a century old jurisprudence concerning the meaning of 'merchantable quality'.

The Uniform Commercial Code of U.S.A. though not changed the terminology, gives an elaborate list of ingredients that constitute merchantable quality. It includes, tradability with the same description, fair average quality, packing, labeling and price[71].

Limitation to the Doctrine of Merchantable Quality

Section 16(2) of the Sale of Goods Act, 1930, provides for exceptions to merchantability doctrine where the buyer has examined the goods. In such cases, there will not be any implied condition as to merchantability.[72] This limitation is confined to those defects, which such examination ought to have revealed[73]. If the defects are not perceivable through naked eyes, a mere examination will not relieve the seller from the obligations under the section. The purchaser cannot, however, be expected to make a thorough examination. He need only conduct a reasonable

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[71] U.C.C., Para 2-314. reads : "Goods to be of merchantable quality must –
a) pass without objection in the trade under the contract description;
b) in the case of tangible goods, are of fair average quality with the description;
c) are fit for ordinary purposes for which such goods are used;
d) run within the variation permitted by the agreement of even kind, quality and quantity within each unit involved;
e) are adequately contained, packaged and labelled as the agreement may require;
f) conforms to the promises or affirmations of fact made on the container or label if any;
g) must fetch that price, on which it is bought, if sold under that description."

[72] The proviso reads: "...if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed".

[73] The English Act of 1979 and the U.S. Code also contain an exception on similar lines. See the Sale of Goods Act, 1979, s.14(2C)(b) and the U.C.C. s.2-316(3)(b). In the Code, a particular buyers' skill and the normal method of examining the goods in each circumstances determine what defects are to excluded from the scope of warranty coverage by examination.

examination, which is to be interpreted by the commonsense standards of everyday life.[74]

In *Godley* v. *Perry,*[75] a six-year-old boy bought a plastic catapult from a retailer who had exhibited it in the show-window of his toyshop. The catapult broke, while being used and a piece struck the boy's eye blinding him. The plaintiff succeeded in an action for breach of implied conditions of fitness for the purpose and of merchantable quality.

The protection to the buyer will not be available if it was understood by both parties that the buyer would carryout some process to the goods to make them merchantable and he has not done this. This was thus held in *Heil* v. *Hedges.*[76] The plaintiff in this case bought some pork chops, which were infected with worms. Due to improper cooking, he became ill on eating as a result of infection. The court held that the seller was not liable since proper cooking would have destroyed the worms.

In India, the developments made in these aspects in western countries are not incorporated in the Sale of Goods Act, 1930. Still, the implied condition as to merchantability is a reliable source of protection to consumers. In an era where majority of the goods sold in the market are complex and packed in containers, the implied condition of merchantability has more significance. Besides, being a protective provision, it has the unique effect in indirectly compelling the producer to improve the quality of his wares and at least to avoid causing harm to the consumers.

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[74] *Godley* v. *Perry,* [1960] 1 All E.R. 36 (Q.B.).
[75] *Ibid.*
[76] [1951] 1 T.L.R. 512, as quoted in Brian Ball and Frank Rose, *Principles of Business Law,* Sweet & Maxwell, London (1979), p. 79. Also see Christopher Carron, "The Supply of Goods (Implied Terms) Act, 1973", 36 Mod.L.Rev. 519 (1973).

The seller can in this process absolve himself from the civil liability to compensate which in the long run will certainly improve his profits and goodwill in the business. In this sense, it is mutually advantageous.

Implied Conditions as to Fitness for the Purpose

Law recognizes that the buyer is the best judge to determine the nature and quality of the goods he purchases. But if the purchaser makes known to the seller, expressly or by implication, the particular purpose for which the goods are required, then the law implies a condition that the goods shall be reasonably fit for the purpose for which it is bought[77]. In such a situation, the law presumes that the buyer is relying on the skill and judgment of the seller. This condition applies only if the seller is a person usually dealing in goods of that description. The trust by the buyer on the skill and judgment of the seller creates an implied condition that the goods he supplied are fit for the purpose mentioned by the buyer.[78]

'Reasonable fitness' means fitness for the general purposes as well as for specific purposes. A defect in the tiniest part may become a source of danger to the finished product. Courts have interpreted this provision liberally[79] to do justice to consumers against 'defective and unfit' goods.

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[77] Similar provisions can be found in the Sale of Goods Act, 1979, s.14 (3); the Supply of Goods (Implied Terms) Act, 1973, s. 10(3) and the Supply of Goods and Services Act, 1982, ss. 9(4),5, 4(4) and (6).

[78] The Sale of Goods Act, 1930, s. 16 (1).

[79] See for instance, *Baldry* v. *Marshall,* [1925] 1 K.B. 260; *Grant* v. *Australian Knitting Mills Ltd.,* [1936] A.C. 85; *Joseph Mays* v. *Phani Bhusan Ghose,* A.I.R. 1936 Cal.210; *Council of the Shire of Ashford* v. *Dependable Motors Ltd.,* [1961] A.C.336; *Rogers* v. *Parish (Scarborough) Ltd.,* [1987] Q.B. 933 and *Ashington Piggeries Ltd.* v. *Christopher Hill Ltd.,* [1972] A.C. 441.

In *Priest* v. *Last,*[80] the seller told the purchaser of the hot water bottle that it was suitable for holding hot water but not boiling water. The purchaser was able to recover from the seller the expenses incurred for treatment of his wife's injuries as the hot water bottle burst on being used.

Similarly, in *Jacson* v. *Watson & Sons,*[81] a person purchased some tinned salmon from a grocer and provision merchant. Since the salmon was poisonous, the buyers' wife died and he suffered illness. The court held that the buyer was entitled to recover damages including a sum which would compensate him for being compelled to hire someone to perform the services which had been rendered by his wife. This finding was based on the fact that salmon, being a food material, the purpose is known to the seller and the seller could reasonably assume the consequences if it is contaminated by poison. If the goods can be put to one purpose only, there will be a breach of the requirement of fitness for purpose if they cannot be used for that purpose. In such a case, it is unnecessary to require the buyer to make that purpose known to the seller expressly. It will be assumed that the seller is aware that the buyer requires the goods for that purpose. The buyer in such a situation is not required to prove that he relied on the seller's skill or judgement. In *Manchester Liners Ltd.* v. *Rea Ltd.,*[82] the court held that the mere disclosure of purpose might amount to sufficient evidence of reliance.

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[80] [1903] 2 K.B. 148. Also see *Gaddling* v. *Marsh,* [1920] 1 K.B. 688.
[81] [1909] 2 K.B. 193 (C.A.).
[82] [1922] 2 A.C.74.

In *Ranbir Singh Shanker Singh Thakur* v. *Hindustan General Electric Corporation Ltd.*,[83] the seller sold a Radio set of a particular make with a guarantee to repair freely if defects are found within a specified period. It was found defective from the very beginning. When sued for refund of the price, the court held that the communication of the purpose by the buyer to the seller might be inferred from the description of the goods given by the buyer and from the circumstances of the case[84]. Therefore, when the seller sells a watch,[85] its purpose can very well be inferred. It is not essential that it must be specifically spelt out.

The position will be different if the goods can be put to different purposes. Here, it cannot be assumed that the goods are fit for a particular use to which the buyer wishes to put them. Hence it is necessary for the buyer to show that he has communicated to the seller the particular purpose for which he requires them. If the goods fail to serve the purpose required by the buyer, he cannot recover damages if the goods are put to abnormal use, which is not made known to the seller.[86]

The British Sale of Goods Act, 1979, now makes it clear[87] that once the buyer's purpose is notified to the seller, the condition as to fitness will be implied " except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgement of the seller...." However, this provision also did not project the law in question with sufficient clarity. Therefore, the

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[83] A.I.R. 1971 Bom. 97.
[84] *Id.* at p.100.
[85] *Raghava Menon* v. *Kuttuppan Nair,* A.I.R. 1962 Ker. 318 and *Crowther* v. *Shannon Motor Co.,* [1975] 1 All E.R. 139 (C.A.).
[86] *Slater* v. *Finning Ltd.,* [1996] 3 All E.R. 398 (H.L.). Also see *Griffith* v. *Peter Conway Ltd.,* [1939] 1 All E.R. 685 (C.A.).
[87] The Sale of Goods Act 1979, s.14 (3). The U.C.C., s.2-316 reiterates the U.S. law on this point.

lacunae is sought to be removed by the Supply of Goods and Services Act, 1994. Under this Act, 'satisfactory quality' of goods will be presumed only if they can be put to all usual purposes for which goods of that description are generally used.[88]

Sale Under Trade Name

. The protection afforded to the buyer is excluded if he relies on any particular patent or trade name.[89] The exclusion provision in the Act says that the buyer is not relying on the skill or judgement of the seller if he asks for a particular brand. Instead, he opts to purchase the product on his own assessment. In such a case, the seller need not be saddled with any further obligation. But difficulty arises when the buyer orders goods under a trade name but at the same time intends to rely upon the skill and judgement of the seller. Trade name or brand name to the buyer in this context is only to identify the product. In *Baldry* v. *Marshall* [90] the following propositions were made:[91]

i) Sale of an article under its trade name is not in itself sufficient to attract the proviso.

ii) Where the buyer asks for an article and the seller sells under its trade name, the proviso does not apply.

iii) Where the buyer says "I have been recommended such an article" giving a trade name – "will it suit any particular purpose"? and the seller after

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[88] The Sale of Goods Act, 1979, s.14 (2B) (a). See also *Aswan Engineering Establishment Co.*, v. *Lupdine Ltd.*, [1987] 1 All E.R. 135 (C.A.).

[89] The Sale of Goods Act, 1930, s. 16(1) proviso. The proviso reads: "In case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose."

[90] [1925] 1 K.B. 260.

[91] *Id.* at p.266 *per* Banks, L.J.

having heard the purpose, sells it without disapproval, the proviso will not apply;

iv) Where the buyer tells the seller, "I have been recommended such an article as suitable. Please send it". Then the proviso does apply.

The scope of the proviso must be confined to articles, which in fact have a trade or patent name under which they can be ordered.[92] In *Taylor* v. *Combined Buyers Ltd.*[93], Salmond, L.J. observed that the reliance on trade name does not permit the vendor under the shelter of this proviso to sell useless goods. The mere fact that what has been purchased is having a trade name alone is not sufficient to exclude the presumption of reliance.[94] For this purpose, the circumstances should show that the buyer did not rely upon the skill and judgment of the seller.[95]

Most of the goods produced and pushed into the modern market bear a trademark or trade name. Consumers quite often identify a product by its brand name. Viewed from this perspective, it may not be right to think that a consumer by demanding a product in its trade or brand name intends to exclude the liability of the seller. Hence the British and American law reformers[96] recommended wiping out of this proviso from the statute book. In India, no attempt is seen made in this direction.

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[92] *Bristol Tramways etc. Co.* v. *Fiat Motors,* [1910] 2 K.B. 831.

[93] (1924) N.Z.L.R. 627, as quoted in S.S.H. Azmi, *Sale of Goods and Consumer Protection in India,* Deep and Deep Publications, New Delhi (1992), p. 194.

[94] *Baldry* v. *Marshall,*[1925] 1 K.B. 260.

[95] *Taylor* v. *Combined Buyers Ltd.*, (1924) N.Z.L.R. 627. Also see *R.S. Thakur* v. *Hindustan General Electric Corporation Ltd.*, A.I.R. 1971 Bom. 97, where the court held that even though goods are sold under a patent or trade name by a seller who deals in it, there is such an implied condition. The proviso in the opinion of the court will not absolve the dealer from his liability under the Act.

[96] H.R.Gokhale, *Pollock and Mulla on the Sale of Goods Act*, N.M.Tripathi Pvt. Ltd., Bombay (1977), p.85.

Implied Conditions on Sale by Sample

At common law, the legal effect of a sale by sample was that the seller had in express terms warranted to the buyer that the goods sold should answer the description of a small parcel exhibited at the time of the sale. Here, since the quality of the article is determined by the quality of the sample that the buyer has selected, the seller need only deliver the goods, which conform to the sample. If it does not correspond with the sample, the purchaser is entitled to reject it. The protection envisaged by the Sale of Goods Act, 1930,[97] is distinct in nature and has special importance to retailers and wholesalers whose usual practice is to buy by sample. This, in effect gives a right to indemnity to the retailer, who has often been sued by customers.

In practice, this provides insurance to the retailer against injury caused by the merchandise he sells. [98] It is only a guarantee that when the buyer determines the quality by identification of the sample, he will unconditionally get the same quality in bulk. The sample here in effect largely replaces the need for any description of the goods by words.[99] It is therefore natural to imply a term that the bulk will correspond with the sample in quality.

But a mismatch with the intrinsic qualities of the sample may occur in the bulk supplied. Hence it may not be possible to find out easily whether there is a

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[97] The Sale of Goods Act, 1930, s. 17 says that in case of a contract for sale by sample there is an implied condition –

a) that the bulk shall correspond with the sample in quality;
b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;
c) that the goods shall be free from any defect, rendering them un merchantable, which would not be apparent on reasonable examination of the sample.

[98] *Godley v. Perry* [1960] 1 All E.R. 36 (Q.B.).

[99] *James Drummond* v. *Van Ingen* (1887) 12 A.C. 284.

violation of the implied term. *Steels & Busks Ltd.* v. *Bleecker Bik & Co. Ltd.*,[100] explains this point. In this case, S agreed to buy 5 tons of pale crepe rubber from B, stating the 'quality as previously delivered'. In a previous contract, S had bought pale crepe rubber from B. The item supplied in this contract was treated as sample. The bulk was the five tons to be delivered. The 5 tons were delivered, and S used the rubber to make corsets. However, this contained an invisible preservative, PNP, which had not been present in the rubber previously supplied. This preservative stained the fabric of the corsets. The court held that the sellers were not liable for breach of the implied condition because the rubber supplied was not substantially different from the sample. It could be used for any of its normal purpose once the dye had been washed out. According to the court PNP was not an impurity, but a preservative, the presence of which did not affect its quality.

According to the Act, the buyer should be given a reasonable opportunity of comparing the bulk with the sample to verify whether the bulk correspond with the sample in quality.[101] It is also stipulated that a condition can be implied that the goods shall be free from any defect, rendering them unmerchantable,[102] which would not be apparent on reasonable examination of the sample.[103]

The implied guarantee enshrined in the Act seems to ensure the quality standard predetermined by the buyer when he has decided upon the sample in

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[100] [1956] 1 *Lloyds' Rep.* 228.

[101] The Sale of Goods Act, 1930, s. 17(2)(b). The Sale of Goods Act, 1979 of U.K., s. 15 (2) (b) which formerly contained a similar provision has now been repealed presumably on the ground that right to inspection is a basic right of the consumer which is to be made available in all type of sales. See the Sale of Goods Act, 1979(U.K.) ss. 34 & 35.

[102] The British Act uses the term 'unsatisfactory quality' for 'unmerchantable'. See the Sale of Goods Act, 1979, s. 15(2) (c).

[103] *Ibid.*

question. Duty is cast upon the seller to supply goods conforming to the sample. A corresponding right is given to the buyer to compare the bulk with the sample to make sure that the goods supplied are what he had ordered. In this sense, this provision also stands for assuring better trading standards.

Sale by Description

In a sale by description the goods are described by some attributes like quality, origin or finish and the buyer relies on that description. This principle applies even to specific goods. In such a sale, the buyer might not have seen the goods but purchased them based on the nature and other qualities described. The phrase 'sale by description' covers a wide-range of transactions. It will encompass transactions in which the buyer does not see the goods but relies on a written or oral description of the thing ordered. It will apply even where a consumer orders for something yet to be made. In such a contract, there is an implied condition that the goods shall correspond with the description.[104] Since description may have reference to quality, the goods must satisfy the description as to quality to that extent.[105]

Unlike the provisions relating to quality and fitness discussed above, this condition is not confined to sellers acting in the course of a business. It also covers private sales.

It is worthwhile to note that under the (U.K.) Sale of Goods Act, 1979, it is even possible[106] for a sale to be by description where the consumer has seen the goods

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[104] The Sale of Goods Act, 1930, s. 15.
[105] *In Re, Beharilal Baldeoprasad Firm of Merchants*, A.I.R. 1955 Mad. 271.
[106] The Sale of Goods Act 1979, s. 13(3). It reads: "A sale of goods is not prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer".

before purchase. Thus in a typical supermarket dealing, where the consumer selects pre-packed goods from a shelf, it is unlikely that the precise subject matter of the contract can be examined then and there. Even where the goods are specific and are identified at the time of the contract, the sale may be by description, where the goods are sold under a descriptive label. But if it is clear that the buyer places no reliance at all on the seller's description, there will be no sale by description.[107]

This provision of law gives protection to the consumer from false statements relating to quality of the goods. In *Beale* v. *Taylor,*[108] the seller advertised his car as a "Herald Convertible White, 1961 model". Actually it was composed of two different cars welded together one part from a 1961 model while the other did not. This in effect changed the quality of the subject matter. It was held that the words '1961 Herald' formed part of the description of the car. Therefore, the court held that there was a breach of the statutory implied condition.

Similarly, in *Grant* v. *Australian Knitting Mills Ltd.,* [109] the appellant contracted dermatitis as a result of wearing a woolen garment. This has occurred due to the presence of excess sulphites, negligently left in the process of manufacture. In an action against both the retailer and the manufacturers, the court said:

> " It may also be pointed out that there is a sale by description even though the buyer is buying something displayed before him on the counter: a thing sold by description, though it is specific, so long as it

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[107] *Harlingdon & Leinster Enterprises Ltd.* v. *Christopher Hull Fine Art Ltd.,* [1990] 1 All E.R. 737 (C.A.).
[108] [1967] 3 All E.R. 253 (C.A.)
[109] [1936] A.C. 85.

is sold not merely as the specific thing but as a thing corresponding to a description".[110]

In *Re Andrew Yule & Co.,*[111] Ameer Ali J. said that what amounts to description of goods is a mixed question fact and law[112]. In this case, the buyer rejected the cloth he had ordered for packing foodstuffs on the ground that it gave a bad smell. This was because of certain bleaching process adopted by the seller. The court opined that smell undoubtedly was a quality, which could form part of the description of the goods.

The provision, no doubt, is intended to protect the buyer from misleading statements made by the seller about the goods he intends to sell. By insisting on the fulfillment of his representations, the seller is forced to state only the true quality of his products. If the descriptions are made by the buyer, the seller shall supply goods in total conformance of the description.

As noticed above, it is really a fallacy to leave out packed goods on display selected by the buyer from the purview of the protection afforded by the Act. In order to ensure that it is applicable to such goods also, the legislation is amended in England.[113]

In order to remove the ambiguity, it is desirable to amend the Indian Sale of Goods Act also on similar lines. Such a step would certainly make the sales law in India more consumers friendly.

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[110] *Id.* at p.100 *per* Lord Wright. This view has received statutory assent in U.K. by its incorporation in the Sale of Goods Act, 1979.
[111] A.I.R. 1932 Cal. 879.
[112] *Id.* at p.881. Also see *Varley* v. *Whipp* [1900] 1 Q.B. 513.
[113] See *supra* n. 106.

Exclusion of Implied Terms

The legal provisions implying conditions and warranties discussed above are beacon lights to the consumers in many respects. The principle of freedom of contract suggests that it should be open to the parties to a contract to agree on whatever terms they find necessary and feasible. In partial recognition of this principle, the Sale of Goods Act, 1930 has incorporated a provision that enables the parties to exclude all or any of the conditions and warranties implied by law.[114]

Before the evolution of the ideas of consumer protection, many seem to have justified such exclusion clauses especially when the buyer contracted to purchase a chance.[115] But judged by the standards of today, this provision[116] is perhaps the most obvious target of criticism. As a corollary to this, no distinction is drawn between the protection afforded in a private sale and in a commercial sale. In the present day world the belief that every contract is the result of *consensus ad idem* finds no acceptance. The exclusion clauses in standard form [117]contracts became a lethal weapon for the exploitation of the consuming public. The judges continued to support the commercial interests [118]of the capital. However, slowly but steadily, the attitude of the judges turned towards an approach in favour of the consumers.

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[114] The Sale of Goods Act, 1930 s.62 reads: "Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties or by usage, if the usage is such as to bind both parties to the contract". The British Sale of Goods Act, 1979 still contains similar provisions in s. 55. But the operation of this section has been declared as subject to the provisions of the Unfair Contract Terms Act, 1977, which places controls on exemption clauses.

[115] See A.H. Hudson, " The Condition as to Title in Sale of Goods", 20 Mod.L.Rev. 236 (1957); Meville, "The Code of Contract", 19 Mod.L.Rev. 1 (1956) at p.27.

[116] The Sale of Goods Act, 1930, s. 62 permits exclusion of liability by express agreement.

[117] See Sales, "Standard Form Contracts", 16 Mod.L.Rev. 318 (1953); Isaacs, " The Standardization of Contracts", 27 Yale L.J. 34 (1917); Kesler, "Contracts of Adhesion," 43 Colum. L.Rev. 629. (1943).

[118] Delvin, "The Relation between Commercial law and Commercial Practice," 14 Mod.L.Rev. 249 (1951).

Judicial Control of Exemption Clauses

The British courts have developed certain techniques to control the legal effect of exemption clauses[119]. Judicial hostility to exemption clauses is due to consumer ignorance, non-negotiation and inequality of bargaining power. The courts have been scrutinizing the exemption clauses very closely to decide the following two basic problems.

(a) Was the clause exempting the liability, duly incorporated into the contract and

(b) does it, in its true construction, cover the event that has occurred?

(a) Incorporation

The general contractual principles of incorporation treats signed documents and those unsigned differently. If a contractual document is signed, it operates as incorporation of all the terms that appear on that document or which are referred to in it.[120] However, the signatory will not be bound, if he signed the document without negligence and it turns out to be a document fundamentally different from the one he thought, he was signing.[121]

If the consumer has not signed the contractual document, a clause will be treated as incorporated into it, only if reasonable steps were taken to bring it to his notice. Courts in several fact situations have applied this principle.

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[119] For a detailed discussion on legal control of exclusion clauses, see G.H.Treitel, *The Law of Contract,* Sweet & Maxwell, London (1995), pp.197-226; J.C.Smith and J.A.C.Thomas, *A Case Book on Contract,* Sweet & Maxwell, London (1982), Chap.12; Paul Dobson, *Charlesworth's Business Law,* Sweet & Maxwell, London (1997), pp.41-47.

[120] *L.Estrange* v. *Graucob,* [1934] 2 K.B. 394.

[121] This principle is otherwise known as the ' *theory of non-est factum* '

In *Thompson v. L.M.S. Railway,*[122] a lady bought a railway excursion ticket containing the words "for conditions see back". The back of the ticket referred to conditions in the railway timetable, which were available for purchase. Had she obtained and read the railway timetable she would have seen a clause excluding liability for negligence. The Court of Appeal held that the exemption clause had been incorporated into the contract.

But in *Olley v. Marlborough Court Hotel,*[123] a different position was taken. Here a consumer booked a room in a hotel. When he got inside the bedroom he saw an exemption notice on the wall of the room. It was held that there was no incorporation of the term since the clause had been introduced too late. The court opined that the position might have been different if the notice was prominently displayed at the reception desk or if the customer had stayed in the hotel on previous occasions.

Thornton v. Shoe Lane Parking Co. Ltd. [124] can be considered as the best modern example of adopting the basic rules of contract, to standard form consumer transactions. Mr. Thornton went to park his car at a new multistorey car park where he had not been before. When he arrived opposite to the ticket machine a ticket popped out, the light turned from red to green and he went through and parked his car. The ticket referred to conditions displayed on the premises. These conditions excluded liability for personal injuries caused by negligence of the defendants or its employees. There was an accident caused partly by the defendants' negligence and

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[122] [1930] 1 K.B.43. Such a clause might now be 'unfair' under the Unfair Terms in Consumer Contracts Regulations, 1994 (U.K.),

[123] [1949] 1 K.B. 532.

[124] [1971] 2 Q.B. 163 (C.A.).

Mr. Thornton was injured. The Court of Appeal held that the defendants had not taken reasonable steps to bring this particular exemption clause to the notice of the petitioner. Lord Denning, M.R.said:

> "It is so wide and destructive of rights that the court should not hold any man bound by it unless it is drawn to his attention in the most explicit way... In order to give sufficient notice, it would need to be printed in red ink with a red hand pointing it to – or something equally startling."[125]

In *Interfoto Picture Library Ltd.* v. *Stiletto Visual Programmes Ltd.*,[126] the Court of Appeal had to consider the situation where one clause in a set of conditions was particularly onerous. Here, SVP, an advertising agency, telephoned to IPL, a photographic library, requesting photographs of the 1950s for a presentation to a client. IPL sent by hand 47 transparencies in a bag with a delivery note stating that they must be returned within 14 days. Across the bottom of the note were printed nine conditions in four columns, under a fairly prominent heading "conditions." One of the conditions stated that all transparencies must be returned within 14 days and that a holding fee of £. 5/- plus tax per day will be charged for each transparency, which is retained longer than the said period of 14 days. SVP accepted delivery, but did not use them and by oversight kept them for 28 days. When IPL sent an invoice for £. 783.50, SVP refused to pay. According to them most libraries charge less than £. 0.50 per day as late fee. Following Lord Denning's suggestion of "red-ink – red hand" in *Thornton* v. *ShoeLane Parking Ltd.*,[127] the Court of Appeal held that the

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[125] *Id.* at p.170.
[126] [1988] 1 All E.R. 348 (C.A.).
[127] *Supra* n..124.

condition, imposing an exorbitant holding fee was not part of the contract. Dillon L.J. stated the principle in the following words:

> "It is in my judgment a logical development of the common law into modern conditions that it should be held, as it was in *Thornton* v. *Shoe Lane Parking Ltd.*, that if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that, that particular condition was fairly brought to the attention of the other party."[128]

Even though the clause was not an exemption clause, it is interesting to see the extent to which the courts will use the principle of 'non incorporation' as a tool to protect consumers in an area that the legislature has left out.

The analysis of the cases discussed above shows that exclusion of liability by incorporating an exemption clause in the sales contract will be closely monitored by courts. For an effective incorporation of an exemption clause, the seller should prove to the satisfaction of the court that the buyer knew about the exemption.

(b) Rules of Construction

The exemption clause, even if incorporated into the contract, will not automatically become effective. The courts have evolved a number of techniques to counter their effect. The rule of privity of contract, rules of interpretation, doctrine of fundamental breach and the concept of reasonableness are used for this purpose.

Many of these techniques are statutorily recognized in England[129]. In India, all these methods are still relevant.

(i) The Privity Rule

An accepted principle of the traditional contract law[130] is that an exemption clause in a contract between two persons could not protect a third party, even if he was an employee or contractor employed by one of the parties to the contract. However, this principle is relaxed in subsequent cases. It is possible to have terms expressly included in the contract extending the coverage to third parties as well[131]. A separate contract between the employees and other party can also be made where performance of the main contract will provide consideration to it.[132]

(ii) *Rule of Strict Construction and Contra Proferentem rule*

Exemption clauses are generally construed strictly against the party who instigated for its inclusion into the contract and now pleads for its reliance. Any party

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[129] The Unfair Contract Terms Act, 1977(U.K.).

[130] *Scruttons* v. *Midland Silicons Ltd.*, [1962] A.C. 446.

[131] See for instance, *Jackson* v. *Horizon Holidays Ltd.*, [1975] 3 All E.R.92 (C.A.). In this case the issue before the court was whether the quantum of compensation awarded to a touring family consequent to the tour being distorted is excessive. Held that if the loss or agony suffered by the entire family is taken in to account (though they are only third parties) which in fact been done, the amount is not excessive. However, extension of the benefit to third parties was turned down by courts in cases where there was an exclusive jurisdiction clause in the contract. So for example see *NewZealand Shipping Co. Ltd.*, v. *A.M. Satterthwaite & Co. Ltd.*, [1975]A.C. 154; *Port Jackson Stevedoring Ltd;* v. *Salmond,*[1980]3AIIE.R.257 (P.C.) and *The Mahkutai* [1996] 3 W.L.R.1 (P.C.) It is worth while to note the recommendations made by the British Law Commission concerning the tests of enforceability by a third party in its Report No..242 of 1996. It has suggested for a 'dual intention' test. In its view, a third party shall have a right to enforce a contractual provision (1) where the right is given to him by an express term of the contract and (2) where the provision purports to confer a benefit on a third party who is expressly identified as a beneficiary of that provision. If by proper construction of the contract it appears that the contracting parties did not intend the third party to have that right, no enforceability will be allowed to the third party. Where a third party seeks to rely on the test of enforceability to enforce an exclusion or limitation clause, he may do so only to the extent that he could have done so, had he been a party to the contract. (See the British Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties,* Report No.242(1996), *para* 7.6(8) and *para* 5.

[132] *New Zealand Shipping Co. Ltd.* v. *Satterthwaite & Co. Ltd.*, [1975] A.C. 154 (P.C.).

seeking refuge under an exemption clause must establish that the wording is clear enough to cover the alleged breach. If the words are ambiguous, they are construed by courts in a manner least favorable to the party relying on them. The following cases are apt to illustrate this point. In *Wallison and Wells* v. *Pratt and Haynes,*[133] a commercial contract for sale of seeds contained a term excluding "all warranties". The seller supplied seed of a different description and the buyer claimed damages. The House of Lords held that the seller in the case has broken a *condition* and not a *warranty* and hence the clause referring only to *warranties* did not protect him.

In *Andrews Bros. (Bournemouth) Ltd.* v. *Singer & Co. Ltd.,*[134] the seller sold a "new singer car" with a clause excluding "all implied conditions and warranties". The seller supplied a car, which was not new. The Court of Appeal held that the seller had broken an *express* condition and therefore, a clause which merely referred to *implied* conditions and warranties will not came to his rescue.

In *Nichol* v. *Godts,*[135] the sellers agreed to supply rapeseed oil "warranted only equal to the sample". Sellers supplied a mixture of rapeseed oil and hemp oil, which matched the sample. It was held that the exclusion clause did not protect them from their overriding duty to supply rapeseed oil in accordance with the description.

Similarly, an exemption clause may be overridden by an oral promise inconsistent with it. Thus in *Mendelssohn* v. *Normand,*[136] a suitcase was stolen from a car. The plaintiff had parked it at the defendants' car park. An employee of the

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[133] [1911] A.C. 394. See also, *Southern Water Authority* v. *Carey,* [1985] 2 All E.R. 1077 (Q.B.).
[134] [1934] 1 K.B. 17.
[135] (1854) 10 Exch. 191.
[136] [1970] 1 Q.B. 177. Also see *J.Evans & Son (Portsmouth) Ltd.* v. *Andrea Merzario Ltd.,* [1976] 2 All E.R.930 (C.A.).

defendants promised the plaintiff that he would lock the car, but he failed to do so. The Court of Appeal held that a clause excluding "loss or damage howsoever caused" was ineffective in view of the express oral promise.

The rule of *contra proferentem* is an extension of the rule of strict construction. This rule provides that an ambiguity in a contract must be construed against the party who wishes to rely on the clause. *Houghton* v. *Trafalgar Insurance Company Ltd.,*[137] can be cited as a case that illustrates this principle. At the time when the plaintiff's car met with the accident, there were six persons inside, including the driver. The car normally provided seating for five persons two in front and two behind. The policy under which the plaintiff claimed damages contained an exclusion clause exempting the insurers from liability "whilst the car is conveying any load in excess of that which it was constructed". The insurers contended that since at the time of accident the car was carrying a load in excess of that for which it was constructed, the assured was not covered under the policy. The Court of Appeal held the insurers liable on the ground that the exemption clause will come to the rescue of the insurers only when the load carrying capacity is specifically mentioned in the policy. Here the laden weight was not specified and hence the exemption clause was held inoperative.

Even though the *contra proferentem* rule has been applied to all exemption clauses, the rigor varied considerably between clauses which merely limited the liability and which purported to exclude liability altogether[138]. The courts were of the

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[137] [1953] 2 All E.R.1409 (C.A.).

[138] See for example, *Ailsa Craig Fishing Co. Ltd.* v. *Malvern Fishing Co;* [1983] 1 All E.R. 101 (H.L.). See also, *George Mitchell* v. *Finney Lock Seeds Ltd.*,[1983] 2 A.C.803.

view that while it is rather 'improbable' to assume that the injured will agree for a total exclusion of the other party's liability, there is no such high degree of improbability in agreeing to a limitation of the liability[139]

The views expressed by the Supreme Court of India are also similar. In *B.V.Nagarajau* v. *Oriental Insurance Co. Ltd.*,[140] the petitioner's vehicle was a goods carrier. At the time of accident, it was carrying nine passengers. An exclusion clause in the insurance policy limited the liability of the insurer to strangers. But it allowed six employees of the petitioner excluding the driver to be as passengers. Accident caused severe damages to the vehicle. The Insurance Company rejected the claim depending on the exclusion clause in the policy. The Supreme Court allowing the appeal held that the number of passengers in the vehicle or their character (employees or others) has not in any way contributed to the occurrence of the accident. The misuse of the vehicle though irregular is not so fundamental in nature to put an end to the contract. Following its own decision in *Skandia Insurance Co. Ltd.*, v. *Kokilaben Chandravadan*,[141] their Lordships has held that when the choice is between relieving the distress and misery of the victims and that of the profitability of the insurer in regard to an occupational hazard undertaken by him, the courts should opt for the former. This is generally done by reading down the exclusion clauses in the light of the main purpose of the contract.[142]

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[139] *Id.* at p.970.
[140] (1996) 2 C.P.J. 28 (S.C.).
[141] (1987) 2 S.C.C. 654.
[142] See also *United India Insurance Co. Ltd.*, v. *M.K.J. Corporation*, (1996) 3 C.P.J. 8 (S.C.) In this case the Court refused to read into the contract a term inserted after the issue of the policy by the insurer which ought to have negated the very claim of the assured.

(ii) Doctrine of Fundamental Breach

The harsh effects of an exemption clause may not be allowed to subsist if it will lead to breach of a fundamental term of the contract.[143] Lord Denning explained the reason for this rule in *Levison* v. *Patent Steam Carpet Cleaning Co. Ltd.*[144] His Lordship said:

> "The doctrine of fundamental breach...still applies in standard form contracts, where there is inequality of bargaining power. If a party uses his superior power to an exemption or limitation on the weaker party, he will not be allowed to rely on it if he has himself been guilty of a breach going to the root of the contract".[145]

The development of the doctrine of fundamental breach involved a process of identifying breaches, which were fundamental to the contract. In particular, it was said that there would be such a breach if the party not in default were deprived of substantially the whole benefit it was intended that he should obtain from the contract. In the context of consumer protection, the doctrine of fundamental breach came to be regarded as a rule of law. The result is that every time there is such a breach of contract, an exclusion clause in the contract would automatically fail. This operates as a useful measure in the context of consumer protection. But this rule is criticized because if this general principle is applied to commercial contracts, sensible business allocation of risk might be upset. This has led to the abolition of the rule of law

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[143] *Smeaton Hanscomb & Co. Ltd.* v. *Setty (Sassoon) Sons & Co.*, [1953] 2All E.R.1471 (Q.B.). Also see *Karsales (Harrow) Ltd.* v. *Wallis,* [1956] 2 All E.R. 866 (C.A.).

[144] [1977] 3 All E.R.498 (C.A.).

[145] *Id.* at pp. 94-95. See also, *Instone* v. *A. Schroeder Music Publishing Co. Ltd.*, [1974] 1 All.E.R.171 (C.A.). In this case, Lord Diplock said that the standard form contract is the result of concentration of particular kinds of business in relatively few hands.

approach.[146] Now the doctrine of fundamental breach is regarded as laying down nothing more than a rule of construction, which requires the court to consider whether the exclusion clause, as worded, was sufficiently clear to cover the particular breach under consideration. As such it can be regarded as an aspect of the *contra proferentem* rule explained earlier.[147]

In insurance contracts, courts have applied the principle of fundamental breach by devising the doctrine of reading down contractual clause. Thus when an insurance company sought to avoid liability by pleading suppression of material facts by the insured, the Supreme Court of India defeated the insurer's claim by applying the doctrine[148]. This has considerably reduced the rigour of the exclusion clauses to the best advantage of the insured. In *Skandia Insurance Co. Ltd.* v. *Kokilaben Chandravadan,*[149] the exclusion clause in the policy of insurance limited the liability to passengers and employees not exceeding six.. At the time of accident there were nine persons in it. When the Insurance Company pleaded exemption from liability for damages to the vehicle, the court opined that the number of persons did not in any way contributed to the accident. In such circumstances, the said exclusion clause would be read down so as to serve the main purpose of the policy, which is to indemnify the insured for the loss sustained due to the accident.

What should emerge is the doctrine of reading down the exclusion clause in the light of the main purpose for which the contract is entered into. The effort, in the

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[146] *Photo Production Ltd.* v. *Securicor Transport Ltd.,* [1980] A.C. 827. Also see *George Michael (Chester hall) Ltd.* v. *Finny Lock Seeds Ltd.,* [1983] 1 All E.R. 108 (C.A).

[147] See *supra* nn.133-142 and the accompanying text.

[148] *Skandia Insurance Co. Ltd.* V. *Kokilaben Chandravadan,* (1987) 2 S.C.C. 654.

[149] *Ibid.* Also see *B.V.Nagaraju* v. *Oriental Insurance Co. Ltd.,* (1996) 2 C.P.J. 18 (S.C.).

opinion of the court, must be to harmonize the two instead of allowing the exclusion clause to defeat the main purpose of the contract. Therefore, wide exclusion clauses will have to be read down to the extent to which they are inconsistent with the main purpose or object of the contract. Accordingly, it was held that the exemption clause must be read down so as to serve the main purpose of the policy of insurance[150].

Legislative Endeavors to Control Exclusion Clauses

Widespread use of standard form contracts led to a proliferation of exclusion clauses. Even the cleverest application of the rules of construction could not avoid such exclusions. While the common law rules of incorporation and construction of exemption clauses in contracts served to curb some excesses of the business, it was strongly felt that those rules alone were not capable of affording protection to the consumers. In England, the matter was referred to the Law Commission for consideration. The Law Commission submitted two reports[151] recommending legislation. The first was in relation to the exclusion of liability for breach of the implied terms in contracts for supply of goods. The later was in respect of the use of exemption clauses in standard form contracts in general. The Law Commission has opined that in many instances the consumer was unaware of how he was being treated. Even where he has, he was often powerless to do anything but to accept the terms offered.[152] The effect of the exclusion of liability was to deprive the consumer of rights which social polity required that he should have.[153] The Law Commission was of the opinion that the consumers are not in equal bargaining

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[150] *B.V.Nagaraju* v. *Oriental Insurance Co. Ltd.*, (1996) 2 C.P.J. 18 (S.C.).
[151] Law Com. No. 24 (1969) and Law Com. No. 69 (1975.).
[152] Law Com. No. 24 (1969), para. 68.
[153] Law Com. No. 69 (1975), para. 146.

strength compared to the business with which they deal. All these considerations constituted the reasons for its recommendations for legislative action. The first report was implemented in 1973[154] and the second report in 1977.[155] The Supply of Goods (Implied Terms) Act, 1973, made major changes in the possibility of excluding liability in the fields of sale and hire purchase. These changes were re-enacted with major additions in the Unfair Contract Terms Act, 1977.

The Unfair Contract Terms Act, 1977, applies to exclusions of both contractual liability and liability under the tort of negligence. It covers unilateral exclusions of liability such as notices displayed by the occupier of premises, which generally do not form part of a contractual relationship. The Act divides contracts into two groups, those where the buyer is dealing as a consumer and those where it is not[156]. Where the buyer is dealing as a consumer and the supplier seeks to exclude or restrict any of his liability in respect of a breach of the implied terms in the Sale of Goods Act, 1979 or related legislation, the exclusion will be regarded as void.[157] Even if the buyer is not dealing as a consumer still the liability for breach of the implied terms about title[158] cannot be excluded.[159] However, liability for breach of implied terms about description, quality and fitness may be excluded in non-consumer transactions. This is also subject to the statutory requirement of reasonableness.[160] In effect, the implied terms become mandatory in consumer sales and even in

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[154] The Supply of Goods (Implied Terms) Act, 1973.
[155] The Unfair Contract Terms Act, 1977.
[156] *Id.*, s. 6.
[157] The Unfair Contract Terms Act, 1977, ss. 6(1), 6 (2); 7(2) and (3A).
[158] The Sale of Goods Act, 1979, s. 12; Supply of Goods (Implied Terms) Act, 1973, s. 8; The Supply of Goods and Services Act, 1982, s.2.
[159] The Unfair Contract Terms Act, 1977, s. 6(1) and (2).
[160] *Id.*, s. 3(1).

commercial sales the seller will only be able to exclude them if he is able to satisfy the court that the term excluding or limiting liability was in all circumstances reasonable.

Manufacturers' guarantees, instead of providing additional advantages to the consumers, are used as a tool to exempt the liability of the manufacturer or seller. In England, the Unfair Contract Terms Act, 1977, now regulates guarantees. It provides that where goods of a type ordinarily put to private use or consumption cause loss or damage, either as a result of the defect in goods or due to negligent manufacture or distribution, the liability for such loss or damage cannot be excluded or restricted by reference to a guarantee.[161]

Any attempt to exclude or restrict liability for death or bodily injury resulting from negligence is also declared as void. [162] Exclusion or restriction of liability for negligently inflicted harm other than death or personal injury should satisfy the test of reasonableness.[163] Thus, the purported exclusion of liability in respect of property damage or economic loss, resulting from the failure of a supplier of goods or services to exercise reasonable care, may be struck down on the ground that it is unreasonable for them to rely upon it.

The above discussion shows that the Unfair Contract Terms Act, 1977 applies both to the consumer and non-consumer transactions. The provisions are stringent where the person is dealing as a consumer. The requirement that the exclusion clauses must satisfy the test of reasonableness can save the buyer in commercial sales.

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[161] *Id.*, s.5.
[162] *Id.*, s. 2 (1).
[163] *Id.*, s. 2(2).

(i) ***Dealing as Consumer***

In order to apply the provisions of the Act in consumer sales, it must be shown that the purchaser is 'dealing as a consumer'.[164] If the procurement is made in relation to goods that are ordinarily supplied for private use or consumption and the contract is made in the course of business of the former, the purchaser is deemed to be 'dealing as a consumer'.[165] But if the goods are procured on sale by auction or by competitive tender, the buyer is not regarded as 'dealing as consumer'.[166] Subject to this exception the burden to prove that a person is 'not dealing as consumer' lies on the party who raises such allegation.[167]

If a consumer purchases in the course of his business he cannot be termed as a person who deals as consumer.[168] But the issue becomes complex when the purchase is for partly domestic and partly for business purposes. The Court of Appeal considered this issue in *R & B Customs Brokers* v. *United Dominions Trust.*[169] In this case the plaintiff was a limited company owned and controlled by Mr. and Mrs. Bell. The company conducted the business of shipping brokers and forwarding agents. It purchased a four-wheel vehicle, which turned out to be defective. The issue was whether the purchase was a consumer transaction or not. In the former

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[164] *Id.*,s. 12(1) defines the term 'dealing as consumer' as follows:
"A party to a contract deals as consumer in relation to another party if: -
(a) he neither makes the contract in the course of a business nor holds himself out as doing so;
(b) the other party does make the contract in the course of a business; and
(c) in the case of a contract governed by the law of sale of goods or hire-purchase or by section 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption".

[165] *Ibid.*

[166] *Id.*,s.12(2).

[167] *Id.*, s.12(3).

[168] *Id.*,s.12(1) (a).

[169] [1988] 1 All E.R. 847 (C.A.).

case, the defendant's standard printed form would be totally ineffective. The defendants argued that the transaction must be considered a business transaction because companies only exist for the purpose of doing business. The Court of Appeal, however, held that the company was 'dealing as a consumer'. The principal reason for this decision was that the company was not in the business of buying cars.[170] To treat the company as a business customer, the purchase must be an integral part of the business carried on by it. Although this decision is laudable from the viewpoint of consumers, it is criticized as un understandable.[171]

(ii) ***Reasonableness of the Term***

The question whether a term in a contract is 'reasonable' or not is dependant on the circumstances which were or ought reasonably to have been known to or in the contemplation of the parties when they made the contract.[172] The burden of proving reasonableness of the term lies on the supplier.[173]

In any case involving the reasonableness test, the court has a wide discretion and must consider all the relevant circumstances. Schedule 2 to the Act contains a non-exhaustive list of guidelines for consideration by courts.[174] They are:

a) "the strength of bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customers' requirements could have been met;

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[170] *Id.* at p. 853, *per* Dillon L.J.

[171] See Professor Michael Furmston, *Sale and Supply of Goods,* Cavendish Publishing Ltd., London (1994), p. 138.

[172] The Unfair Contract Terms Act, 1977, s. 11(1).

[173] *Id.*, s.11(5).

[174] The Unfair Contract Terms Act, 1977, Schedule 2 contains a non-exhaustive list of guidelines for consideration by courts. These guidelines apply only to contracts for supply of goods where the plaintiff's claim virtually rests on the statutory implied terms.

b) whether the customer received an inducement to agree to the term or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;

c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);

d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition could be practicable;

e) whether the goods were manufactured, processed or adapted to the special order of the customer."

In other cases no specific guidelines are laid down by the Act. However, by analogy the courts are applying similar guidelines with emphasis on the first three criteria – bargaining power, choice and knowledge. Lord Wilberforce is seen to have taken clue from the guidelines while considering a pre Act case of *Photo Production Ltd.* v. *Securior Transport* when his Lordship said;

> "After this Act, in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention – undemonstrated, but there is everything to be said and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions."[175]

The Act was passed to give added protection to consumers who are at times in a weak bargaining position. It has been pointed out that[176] early cases confirm that the Act is having its desired effect. The traders became more prepared to settle out of court than to subject their clauses to the searchlight of the "reasonableness" test.[177]

Implying Terms as a Method of Quality Control: A Critical Evaluation

What has been discussed above shows that the device of implying terms relating to quality in goods into contracts has been used as a powerful tool of quality control from ancient days. Early attempts were judicial and legislative intervention was only subsequent. Improvement of quality standards in goods and services was attained to a considerable extent through this process. Justice to consumers was ensured through the favorable attitude adopted by the judiciary. Legislation, under the pretext of recognition of the principle of freedom of contract, gave enough discretion to the contracting parties to contract out even the beneficial terms implied by law into the contracts. The net result of that freedom was the formulation of standard form contracts by powerful businessmen. These contracts always contained terms excluding or limiting the liability of the businessmen to the consumers.

Judicial emphasis at this stage shifted from interpreting exclusion clauses in a way to minimize its rigor and to render justice to the consumers. For this purpose, the courts evolved many principles of interpretation. Intervention by the legislature also showed greater enthusiasm in controlling contractual clauses that exempt their

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[176] See Robert Lowe and Geoffrey Woodroffe, *Consumer Law and Practice*, Sweet & Maxwell, London (1995), p.143.

[177] *Ibid.* Consumer contracts in England have been regulated further by the Unfair Terms in Consumer Contracts Regulations, 1994. This in fact implements the EEC Directive on Unfair Terms in Consumer Contracts, 1993.

liability to consumers. In England and the European Economic Communities, many enactments have been made towards this end. India must necessarily learn from the experiences of developed countries and must join the queue. In order to improve the plight of Indian consumers, it is very much necessary to have a comprehensive legislation touching upon all evils that the consumers confront in their purchases. Rigorous controls can be made in ordinary sales as distinct from non-consumer sales. Such a bold and urgent step is necessary to save Indian consumers from the present day global market situations.

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Chapter 6

CRIMINAL LAW AND QUALITY CONTROL

In protecting consumer interest, criminal law is widely used as a measure that deters traders and producers from engaging in certain types of trading abuses. While civil remedies provide compensation for the harm suffered by consumers, criminal law prohibits certain undesirable practices. Criminal offences created for consumer welfare are mostly 'strict liability offences'.[1] Public authorities enforce these statutory offences. This avoids expenses for consumers to enforce the law. Moreover, in strict liability offences, the prosecution is relieved of the responsibility of proving that the alleged offender has the necessary *mens rea*[2].

The Indian Penal Code, 1860 contains two separate chapters[3] dealing with offences relating to consumer interest. Protection by way of punishment is provided against the use of false instrument for weighing or measuring[4], fraudulent use of false weight or measure[5], its making or selling[6] and its possession[7]. Adulteration of food and drinks and its sale is also made punishable[8]. Here the prosecution, unlike in strict liability offences, is bound to prove the state of mind of the accused to impose punishment. Many special enactments are made to overcome the difficulties in properly prosecuting the offenders under the provisions of the Indian Penal Code.

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1 For example, mental culpability is not envisaged in the penal provisions of the Prevention of Food Adulteration Act, 1954, Essential Commodities Act, 1955 and the Drugs and Cosmetics Act, 1940.
2 The phrase means 'guilty mind'.
3 The Indian Penal Code, 1860, Chapters XIII and XIV.
4 *Id.*, s. 264.
5 *Id.*, s.265.
6 *Id.*, s.266.
7 *Id.*, s.267.
8 *Id.*, ss. 272 and 273.

Offences Relating to Weights and Measures.

Prohibited activities relating to weights and measures are seen dealt with in the Indian Penal Code, 1860,[9] as well as in the Weights and Measures Act, 1976. Though these provisions may not have any direct bearing on the quality of the goods supplied, they provide an important mechanism to ensure fairness in dealings by sellers. Moreover, there exists an inseparable linkage between, quality, quantity and price of every commodity that the consumer purchases. The Indian Penal Code deals with the following offences:

i) Fraudulent use of false weight or measure;[10]

ii) Possession of false weight or measure;[11]

iii) Making, selling or disposing false weight or measure[12].

The first set of offences can be committed in two ways; one by using a false balance[13] and the other by the use of a false weight or measure.[14] It must be established in both the cases that there is a fraudulent use of the instrument for weighing or false weight or false measure of length or capacity. The offender must have been using the instrument or weight or measure knowing that it is false.

Police can, when there is reason to believe that any false weights, measures or instruments for weighing is kept in a place, enter, inspect or search[15] the place without

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9 See the Indian Penal Code, 1860, Chapter XIII and XIV.
10 *Id.*, ss.264 and 265.
11 *Id.*, s. 266.
12 *Id.*, s. 267.
13 *Id.*, s.264.
14 *Id.*, s. 265.
15 S. 153 of the Code of Criminal Procedure, 1973.

a warrant. If he is convinced about its falsity, he may seize the same[16] with intimation to the magistrate.

The possession of any false instrument or measure, intending to use the same fraudulently[17] is also an offence. Similarly, making or selling of any false weight or measure with the knowledge of its falsity[18] is an offence. The punishment prescribed for all these offences are uniform[19].

All offences, except the offence of making or selling of false weight or weighing instrument or measure, have been made non-cognizable. Therefore, prosecution of the offender by police may not be possible. Hence aggrieved parties will have to lodge private complaints before magistrate courts. Considering the difficulties in privately prosecuting an offender, many consumers may not venture to make use of the opportunity. This in turn will act as a boon to the traders who often take advantage of it. Moreover, the prosecution has to prove that the offence was committed with the intention or knowledge to deceive the consumers. This may turn to be an onerous task for the people who wish to launch prosecution. So even when false weighing or measuring instruments are detected or even use of these instruments are established, conviction may not be possible.[20] Hence many of the cases end in acquittal.

In the above circumstances, it is suggested that all the offences relating to Weights and Measures be made cognizable so that after formal information to the

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[16] *Ibid.*
[17] See *supra* n. 11.
[18] *Supra* n. 12.
[19] The Indian Penal Code, 1860, ss.264-267.
[20] This situation warrants a shifting of burden to prove guilt by the prosecution, to the accused.

police, the prosecuting agency can take up the cause for and on behalf of the general consuming public. It is also necessary to shift the burden of proof to the accused when incriminating articles are recovered from him. Amendments that may be made towards this end will be in tune with the evolving consumer jurisprudence in India. The Standards of Weights and Measures Act, 1976 has attempted to set right many of the inadequacies found in the Penal Code.

The Standards of Weights and Measures Act, 1976

This enactment prohibits the use of non-standard weight or measure or numeral other than those specified.[21] Manufacture and sale of non-standard weights and measures are also prohibited.[22] Penalty is provided for violation of these provisions[23]. For subsequent offence, enhanced punishment is prescribed.[24] The standards prescribed by the Act for weights and measures are virtually enforced by the Director of Legal Metrology of the provincial governments. He makes periodical and surprise inspections. If the Director has reason to believe, either from any information given to him or obtained *suo motu* that an offence has been or is likely to be committed, he can enter and inspect any such premises.[25] He is empowered by the Act to seize any weight or measure or other goods and any record, register or other document that evidence the commission of an offence[26]. False or unverified weight or measure seized is also liable to be forfeited to the Government[27]. Anybody who

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[21] The Standards of Weights and Measures Act, 1976, s. 21.
[22] *Id.*, s. 22.
[23] The normal penalty prescribed is six months imprisonment and or fine up to one thousand rupees.
[24] *Id.*, s. 50.
[25] *Id.*, s.29.
[26] *Ibid.*
[27] *Id.*,s.30.

causes objection to the Director or other officer in the due discharge of his functions can also be punished[28].

The Act has also made special provisions as to declarations[29] to be made compulsorily on packaged commodities through labels securely attached on it. Violations are visited with penal consequences.

This enactment also does not provide effective public participation in its implementation. It has been provided that cognizance concerning the commission of an offence under the Act can be taken by a Magistrate, only on a complaint in writing made by the enumerated agencies[30]. The plurality of weighing and measuring implements in use in the society makes periodical inspection by the Inspectorate to have only a marginal impact. In such a state of affairs it is not surprising if violations galore and supervision becomes ineffective. In this context, it is suggested to make use of wider public participation in the implementation and supervision of the Act.

Another noticeable weakness of the Act is the provision for punishment of officers who initiate vexatious actions, inspections and seizures[31]. No doubt, erring officers are to be punished for the mischief that may occur from their side. There is a feeling that if the officers are also punished in the same way the people who violate standards of weights and measures, it is likely to affect their morale and motivation in sincerely performing their duties. Considering the paucity of staff attached to the

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[28] *Id.*, s.54. The punishment may be two years imprisonment in normal situations. For subsequent offence, it may be five years imprisonment.

[29] *Id.*,s.39. The declaration should include –

i) the identity of the commodity in the package, (ii) the net quantity in terms of the standard unit of weight or measure, of the commodity in the package; (iii) where the commodity is packed or sold by number, the accurate number of the commodity contained in the package; (iv) the Unit sale price of the commodity in the package and (v) the sale price of the package.

[30] *Id.*, s.72.

[31] The Weight and Measures Act, 1976, s.71.

Legal Metrology Department and the heavy task, which they are supposed to accomplish, this provision is likely to act as a deterrent in the due performance of their duties. The alternative to prevent abuse of power by the officers is to initiate departmental action or allow private actions by aggrieved parties.

Offences Affecting Public Health

The mixing of noxious ingredients in food or drink or rendering it unwholesome by adulteration is made punishable under the Penal Code[32]. In order to establish an offence under this provision, it is essential to show that an article of food or drink has been adulterated. It should also be proved that it was intended to be sold or that it was likely to be sold as food or drink[33]. But if a person exposes for sale milk adulterated with water, he may not be committing an offence under this section because the mixture is not noxious or injurious as food or drink[34]. The sale or offer or exposure for sale of any noxious food or drink is also made punishable[35].

In order to preserve the purity of drugs sold for medicinal purposes, the Penal Code has incorporated few provisions. Adulteration of any drug or medicinal preparation, which would lessen its efficacy or making it noxious, has been declared as an offence[36]. Knowingly effecting sale of any adulterated or noxious drug for medicinal purposes would also be punished under the Code[37]. Sale of a drug as a different drug or preparation is also declared as an offence[38].

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[32] The Indian Penal Code, 1860, s. 272.
[33] *Suleman Shamji* v. *Emperor,* A.I.R.1943 Bom.445 and *Joseph Kurian* v. *State of Kerala,* A.I.R. 1995 S.C.4.
[34] *Dhava* v. *Emperor,* A.I.R.1926 Lah.49.
[35] *Id.*, s.273.
[36] *Id.*, s.274.
[37] *Id.*, s.275.
[38] *Id.*, s. 276.

Adulteration and sale of drugs for medicinal use is undoubtedly a serious health problem. But that seriousness is not seen depicted in the penal provisions enshrined in the Penal Code. Here also, what is noticed is the meager punishment prescribed[39]. All the offences are made non-cognisable and are of summary in nature. But it is interesting to note the amendments made by some state governments[40]. These states have increased the punishment to imprisonment for life, with or without fine.

The inadequacy of the Penal Code to meet the challenges and problems concerning food and drug quality has been rectified to some extent by the enactment of two important legislations, namely, the Drugs and cosmetics Act, 1940 and the Prevention of Food Adulteration Act, 1954.

Offences Relating to Drugs and Cosmetics

The Drugs and Cosmetics Act, 1940 has initiated a more comprehensive measure by providing for a uniform control over the manufacture and distribution of drugs and its import[41] into India. The magnitude of the enactment was enlarged by subsequent changes made by amendments[42].

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[39] The maximum punishment prescribed is imprisonment for six months or fine which may extend to one thousand rupees or with both.

[40] U.P. Act, No. 47 of 1975 and the West Bengal Act, No.42 of 1973.

[41] The Bill was initially intended to regulate the import of drugs into British India only. The Select Committee appointed by the Legislative Assembly has suggested for a comprehensive legislation and hence the Act.

[42] For instance, the Act was amended in 1960 to bring pharmaceutical profession under statutory control. The 1962 amendment brought in regulation over the manufacture of cosmetics. The 1964 amendment was intended to bring Ayurvedic and Unani preparation also under control and to enhance the punishment to make it more deterrent. The 1982 amendment widened the expressions 'cosmetics', 'drugs' and 'proprietary medicine' and enhanced the punishment further. The 1986 amendment was intended to empower recognised consumer associations to draw legal samples and launch prosecution.

Standards of quality of drugs and cosmetics are defined in the Act.[43]. The 'standards of quality' means: -

a) in relation to drugs, compliance with the standards set out in the schedule and

b) in relation to cosmetics, compliance with standards which may be prescribed.

The second schedule to the Act states that 'drugs' included in the *Indian Pharmacopoeia* should comply with the standards of identity, purity and strength specified in the relevant edition of the *Indian Pharmacopoeia* for the time being in force and such other standards as may be prescribed.

It is a condition precedent for imposition of penalty for infringement of standards of quality that there is in existence a quality standard prescribed. In *Gopilal Aggarwal* v. *State of Orissa,*[44] the appellant was prosecuted and punished for infringement of the standards quality of 'gudakhu'. The Orissa High Court held that since no quality standards has been prescribed for 'gudakhu' by the Act and the rules, the penalty imposed was unsustainable.[45]

The Act also imposes criminal sanctions for adulteration, misbranding, manufacture and sale of spurious drugs[46] and cosmetics[47]. Penal provisions are similar whatever may be the system of medicine involved in the case. Higher penalty is prescribed for repeat offenders. [48] Where a company has committed the offence, the

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[43] *Id.*, ss.8 and 16.
[44] A.I.R. 1973 Ori. 15.
[45] *Ibid.*
[46] Ss. 27 and 31-(I).
[47] *Id.*, s.27 A.
[48] *Id.*, ss. 30 and 33-(J).

person or persons responsible for the conduct of the business of the company as well as the company are deemed to be guilty of the offence.[49]

For the smooth working of the Act, agencies such as Inspectors[50] and Government Analysts[51] have been appointed. Drugs Inspectors are the watchdogs of drugs quality standards at its production and distribution levels. They are empowered[52] to have spot checks, to take samples of drugs and cosmetics, and to send it for analysis by Government Analysts and also to initiate prosecution.[53]

The manufacture, import, stocking,[54] sale and distribution[55] of drugs are regulated by licences. Separate licences are required for different systems of medicine. The Central Government is empowered to prohibit[56] the manufacture, sale or distribution of any drug or cosmetic if the use of that drug or cosmetic is likely to involve any risk to human beings or animals. It can exercise similar powers if the drug does not have the therapeutic value as claimed.[57] Non-compliance with such an order of the Central Government is also made an offence.[58]

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[49] *Id.*, s.34.
[50] The Drugs and Cosmetics Act, 1940, s. 21.
[51] *Id.*, s.20.
[52] *Id.*, s.22. This section confers enormous powers on the Inspectors. Also see, s.23 for the procedures to be followed by the Inspectors.
[53] *Id.*, s. 33-M.
[54] *Id.*, s.10.
[55] *Id.*, s.18 (c) and s.33 EEC (c).
[56] Ss. 26A and 33EED.
[57] Governmental powers to prohibit the manufacture, sale, and distribution etc., of any drug or cosmetic have been challenged by manufacturers as arbitrary and violative of Arts. 14 and 19(1) (g) of the Constitution of India. The Court has held in all those cases that since the decision taken by the government is based on studies and opinions submitted by committees consisting of technical experts in the field, it cannot be said as arbitrary. It was held that the ban is imposed generally on public interest to sub serve public good and the restriction imposed by the prohibition is well within the reasonable restrictions permissible under Art. 19(6) of the Constitution. See, for instance, *Franklin Laboratories (India) Pvt. Ltd.* v. *Drugs Controller (India)*, A.I.R. 1993, P&H. 107 and *Systopic Laboratories Pvt. Ltd.* v. *Dr. Prem Gupta*, A.I.R. 1994 S.C. 205.
[58] *Id.*, s. 27.

Leaving apart the threat of cancellation of the licence, the driving force behind adherence to the Act and rules is the criminal sanctions provided for violations. The punishments suggested widely vary depending upon the gravity of the offence. Minimum punishment is insisted for certain offences.[59] For other offences, the courts are permitted to decide the proper punishment. Courts are also given freedom to move on from the minimum punishment prescribed, by giving special reasons for such variance. The State of West Bengal[60] and Uttar Pradesh[61] have provided for higher punishment of imprisonment for life by corresponding state amendments to the Act.. Courts under these amendments have been given discretion to give a lesser punishment for special reasons to be recorded in writing.[62]

The stringent punishment provided by the legislature is seen neglected by courts in some cases. In *Ram Shanker Misra* v. *State of U.P.*[63] the Drugs Inspector purchased certain tablets from the appellant and sent it directly to the Central Drugs Laboratory for analysis. The test report indicated that the tablets were of sub-standard quality. The appellant was prosecuted and was found guilty. He was sentenced to undergo rigorous imprisonment for one month and a fine of rupees five hundred. On appeal, the Supreme Court found that the Act prescribes a minimum sentence of not

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[59] For Instance, by s. 27 (a), the manufacture, sale, distribution or stocking or exhibition for sale of any drug deemed to be adulterated or of spurious, the use of which is likely to cause death or grievous hurt under the I.P.C. solely on account of such adulteration or spurious nature or not of standard quality, shall be punishable with imprisonment for a term which shall not be less than five years which may extend to a term of life and with fine which shall not be less than ten thousand rupees. But under clause (b), if such adulteration is not going to inflict the injury or harm mentioned above, the minimum imprisonment is reduced to one year, which may extend to three years and with fine, which shall not be less than five thousand rupees. It is provided under this section that the court may for adequate and special reasons to be recorded in the judgment impose a sentence of imprisonment for a term less than one year and of fine of less than five thousand rupees.

[60] The West Bengal Act, 42 of 1973, s. 5.

[61] The U.P. Act, 47 of 1975, s. 5.

[62] *Ibid.*

[63] A.I.R. 1979 S.C. 727.

less than one year[64] unless the court decides otherwise for reasons to be stated. Surprisingly, neither the trial court nor appellate court had given any reason for imposing a lesser sentence. The Supreme Court expressed its inability to enhance the punishment, as there was no prayer to revise the quantum of punishment.

It is true that the lower courts on many occasions have failed to appreciate the prescription of a minimum punishment by the Act. It is also true that the state government has failed to prefer a revision petition for correction of the discrepancy. But the Supreme Court could have found it as a fit case to be remitted back to the lower court for decision according to law. Similarly, there is nothing that prevents the Supreme Court in correcting the mistakes of the lower courts by awarding a proper punishment. Absence of a revision petition to enhance the punishment was not an obstacle to the Supreme Court in awarding punishment according to law. The view taken by the Supreme Court in this case therefore has resulted in negation of law which ought to have been avoided.

In *Rajasthan Pharmaceutical Laboratory* v. *State of Karnataka,*[65] the Drugs Inspector conducted a search over the business premises of the appellant. About 42 items of drugs had been seized from a room. Thirty-three of them were found not in the approved list of drugs appended to the licence issued to the appellant. The Drugs Inspector demanded the disclosure of the source of the 33 drugs. The appellant denied the fact of seizure of those items from his premises. Test analysis established one drug to be of substandard quality. The appellant was prosecuted for keeping

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[64] This was the position before the amendment of the Act in 1982.
[65] A.I.R. 1981 S.C. 809.

drugs without licence,[66] stocking drugs of substandard quality[67] and non-disclosure of the name of the manufacturer[68]. The trial court acquitted the appellants but the Karnataka High Court convicted them for all the offences charged and imposed a fine of two thousand rupees.

On appeal, the Supreme Court observed that no separate punishment is found imposed for the different offences charged. The fine imposed was in excess of the amount prescribed for any one offence. Hence the Supreme Court held that the High Court was in error in imposing the punishment. The case was remitted back to the High Court to decide the punishment afresh on all proved offences. This, it is submitted, is the correct approach.

In spite of stringent quality control measures provided in the Act, only a few states enforce them rigidly. In many states, its enforcement is not satisfactory. It has been pointed out that there exists in many states the most deplorable tendency to provide special concessions to firms located in their states in making purchases of drugs disregarding the quality control measures.[69] It has also been pointed out that only very few states have a qualified Drugs Controller to head the drugs administration.[70] It has been recommended that there shall be at least one Inspector of Drugs and Cosmetics for every 200 selling premises.[71] But these requirements and suggestions are sparingly followed. In consequence, drugs quality control system fails on many respects and public suffer out of that.

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[66] Drugs and Cosmetics Act, 1940, s. 18 (e).
[67] *Id.*, s. 18 (a) (ii).
[68] *Id.*, s. 18 A.
[69] B.Ekbal, *A Decade After Hathi Committee* (1988), p.69.
[70] *Ibid.*
[71] *Id.* at p.70.

According to the test reports published by the Consumer Education and Research Society Ahamedabad, many drugs are of sub-standard quality.[72] Medical equipments, which are widely used in diagnosis and application, are found to be of substandard quality or unsafe.[73] These test results establish that manufacture and sale of adulterated or spurious drugs[74] are rampant in the country.

Protection Against Food Adulteration

The widespread evil of food adulteration and the sale of un-wholesome food to the people are regulated by the Prevention of Food Adulteration Act, 1954. By this Act, it is easier for the government to deal with companies or individuals who indulge in the terrible crime of adulterating articles of food.[75] The deterrent punishment provided under the Act, does help to get rid of this dishonesty. Inspite of this Act, adulteration of food articles continue to be rampant in the country and has become a grave menace to the health and well being of the community[76]. Due to the gravity of the problem, the Act was amended in 1974 to plug the loopholes and to provide for more stringent and effective measures.[77] The judiciary also contributed to the efforts of the Legislators. This is done through a process of purposive interpretation of the Act. The courts also gave a wide interpretation to the term 'food' so that sales of many spurious goods are brought within the purview of the Act.

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[72] For example, see, *Insight*, September – October 1998, pp. 6 – 10 and *Insight,* Sept.- Oct. 1999, pp. 6-11.

[73] See the test report on I.V.fluids, *Insight,* May- June 1999, pp.6-14. It has been reported that out of the 41 brands of I.V.fluids tested, 14 brands were proved to be unsafe. More embarrassing is the test report on I.V.sets. All the 15 brands tested found to be unsafe. See the test report on I.V. sets, *Insight,* Nov.-Dec. 1999, pp. 6-9.

[74] See the Drugs and Cosmetics Act, 1940, s. 3 (b). 'Drugs' under the Act includes, among others, all such devices intended for internal or external use in the diagnosis, treatment etc. of any disease or disorder in human beings or animals as may be specified by government from time to time.

[75] The Prevention of Food Adulteration Act, 1954, statement of objects and reasons.

[76] The Prevention of Food Adulteration (Amendment) Act, 1974, statement of objects and reasons.

[77] See the Prevention of Food Adulteration (Amendment) Bill 1974, statement of objects and reasons.

Need for Purposive Interpretation

The necessity for a purposive interpretation to the provisions of the Act has been stated by the Supreme Court of India in *Municipal Corporation Delhi* v. *Kacheroo Mal.*[78] The Court said:

> "It is well settled that wherever possible, without unreasonable stretching or straining, the language of such a statute should be construed in a manner which would suppress the mischief, advance the remedy, promote its object, prevent its subtle evasion and foil its artful circumvention."[79]

Similarly, Justice Krishna Iyer of the Supreme Court went heavily against those who indulge in adulteration of food. He emphasized the role of food laws in society and how it is to be interpreted to sub serve public good in *Muralidhar Meghraj Loya* v. *State of Maharashtr.*[80] His Lordship observed:

> " It is trite that the social mission of food laws should inform the interpretative process so that the legal blow may fall on every adulterator. Any narrow and pedantic, literal and lexical construction likely to leave loopholes for this dangerous criminal tribe to sneak out of the meshes of the law should be discouraged. For, the new criminal jurisprudence must depart from the old canons, which make indulgent presumptions and favoured constructions benefiting accused persons and defeating criminal statutes calculated to protect the public health and the nation's wealth".[81]

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[78] A.I.R. 1976 S.C. 394. For a detailed discussion of this case, see *infra.*
[79] *Id.* at p. 395 *per* R.S. Sarkaria J.
[80] A.I.R. 1976 S.C. 1929.
[81] *Id.* at p. 1932, It is to be noted that these words came from a judge, who is known for his humane approach to offenders.

Justice Iyer had on a previous occasion, expressed the view that there is the necessity of educating the sentencing judges regarding attitudinal changes in dealing with economic offences. In *Pyrali K. Tejani* v. *Mahadeo R. Dange and others,*[82] the Magistrate on conviction imposed a fine of Rs.100/- only on the accused while the law[83] had prescribed a minimum imprisonment of six months and a fine of Rupees one thousand. Condemning the attitude of the Magistrate, his Lordship observed:

> " The Magistrate has completely failed to appreciate the gravity of food offences when he imposed a naively negligible sentence of Rs.100/- fine. In a country where consumerism as a movement has not developed, the common man is at the mercy of the vicious dealer. And when the primary necessaries of life are sold with spurious admixtures for making profit, his only protection is the Prevention of Food Adulteration Act and the Court. If the offenders can get away with it by payment of trivial fines, as in the present case, it brings the law in to contempt and its enforcement a mockery."[84]

Widening the Meaning of the term 'Food'

The term 'food' is defined as any article other than drug and water,[85] used as food or drink for human consumption[86]. Any article ordinarily used in the composition or preparation of human food, any flavour or condiments or any other

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[82] (1974) 2 S.C.R. 154.

[83] The Prevention of Food Adulteration Act, 1954, s. 16(i) (a).

[84] *Id.* at p.168. Also see *Ishar Dass* v. *The State of Punjab,* 1972 F..A.C. 150 (S.C.), wherein the Supreme Court opined that adulteration of food is a menace to public health. The Prevention of Food Adulteration Act, has been enacted with the aim of eradicating that anti-social evil and ensuing purity in the articles of food.

[85] 'Water' though not covered by the Prevention of Food Adulteration Act, it is regulated under the Essential Commodities Act. For a discussion, see *infra.*

[86] *Id.*, s.2(v)

notified article also comes within the definition.[87] The scope of this definition is still widened by judicial interpretations.

The Supreme Court in *State of Bombay* v. *Virkumar Gulabchand Shah,*[88] while examining the question whether turmeric was 'food stuff' within the meaning of the Spices (Forward Contracts Prohibition) Order, 1944,[89] held that the term food is susceptible of two types of interpretation. One can be in the narrow sense and other in a wider sense. In the narrow sense the term 'food' is limited to articles, which are eaten as food for nutrition and nourishments. Therefore, it would exclude condiments and spices such as yeast, salt, pepper, baking powder and turmeric. However, in its wider meaning 'food' includes everything that goes into the preparation of food to make it more palatable and digestible. Whether the term is to be taken in the narrow sense or in the wider sense, in the opinion of the court, must depend upon the context and background in which it is used. The object of the Act being to meet effectively the menace of food adulteration, the court opined that the definition of 'food' should be attributed a wider meaning.

Similar was the view taken by the Supreme Court in *Pyarali K. Tejani* v. *Mahadeo Ramachandra Dange*[90]. In this case the Court was considering the question whether 'supari' can be considered as 'food' under the Prevention of Food Adulteration Act, 1954. The Court held that the term 'food' is defined in the Act very widely. Therefore, it would encompass any article used as food including every component that enters into it. Therefore, even flavouring matters and condiments

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[87] *Ibid.*
[88] A.I.R. 1952 S.C. 335
[89] This order was issued under the Essential Supplies (Temporary Powers) Act, 1946.
[90] A. I.R. 1974 S.C. 228.

come within the purview of the term 'food'. The term 'food' in this sense applied to all things that are eaten by men for nourishment including its subsidiaries. 'Supari' is something which people takes for relish and therefore held food.

The Supreme Court in *Shah Ashu Jaiwant* v. *State of Maharashtra*[91] examined the question whether 'Til seeds' that are generally used for 'pooja' can be considered as 'food'. The appellants had kept for sale insect infected 'Til seeds'. The Public Analyst certified it as adulterated and unfit for human consumption. The appellants contended that 'Til seeds' are not generally used as food by human beings. It is used only for 'pooja' for being burnt like incense or thrown into fire in the course of 'pooja'. Hence it cannot be considered as 'food' under the provisions of the Act. The High Court had held that the 'Til seeds' used for 'pooja' are consumed by the devotees and hence it is 'food'.

The Supreme Court held that *mens rea* is not required for proving an offence under the Prevention of Food Adulteration Act. It is enough that the article is either manufactured for sale, or stored or sold or distributed in contravention of the Act. However, the prosecution has to prove beyond reasonable doubt that what was stored or sold was 'food'.[92] The question whether the goods kept by the seller was 'food' or not must be resolved by evidence. [93] Food necessarily denotes articles intended for human consumption. Certain articles such as milk, bread, butter or food grains are meant for human consumption as food and these are matters of common knowledge. Certain other articles may be presumed to be meant for human consumption from representations made about them or from the circumstances in which they are offered

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[91] A.I.R. 1975 S.C. 2178.
[92] *Id.* at p.2180, *per* M.H. Beg J.
[93] *Ibid.*

for sale. The Court opined that there is no evidence to dis-lodge the contention of the appellant that 'Til seeds' are sold only for 'pooja' purposes and not as food.[94] The appellant also could not adduce evidence in support of his contention. The issue whether 'Til seeds' can be used as food or only for pooja purposes in the opinion of the court remains doubtful and the court allowed the appeal giving the benefit of doubt to the appellant. But the Court has categorically said that it is the duty of the prosecution to prove that the article, which is the subject matter of the offence is ordinarily used for human consumption as food. But if the goods sold or exposed for sale is 'food' as generally known, marking it with the inscription 'pooja purposes' or 'for lighting lamps' etc. will not alter its character as food.

The liberal trend shown by the Supreme Court in the above decisions is seen followed by the various high courts also. In *State of Himachal Pradesh* v. *Raja Ram,*[95] the question before the Himachal Pradesh High Court was whether 'country liquor' falls within the definition of 'food.' The High Court itself on an earlier occasion had taken the view that country liquor is not food.[96] But adverting to the decisions of the Supreme Court discussed above, it was opined by the court that from the statutory definition given to the term 'food', the intention of the legislature is clear. The legislature in the opinion of the Court intended to bring in all articles that are used as food or drink for human consumption other than drug and water to be covered by the definition. The Court also pointed out that if the legislature wanted to exclude 'liquor' from the definition of 'food' it ought to have done that expressly. The

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[94] *Id.* at p. 2181.
[95] (1990) 2 F.A.C. 231 (H.P.).
[96] *Associated Distilleries Pvt. Ltd. Hissar* v. *State of H.P.,* (1989) 2 F.A.C. 180 (H.P.).

existence of such exclusions[97] in various state legislations were within the knowledge of the parliament when it defined the term 'food' in 1954. Therefore, it is natural to assume that Parliament ascribed the intention of not excluding 'liquor' and excisable intoxicants from the ambit of the word 'food'. Hence the Court came to the conclusion that liquor including country liquor is an article used as a drink and is meant for human consumption. The fact that everyone does not use liquor, or it is covered by provisions of the Excise Acts of various states, does not effect any change that 'liquor' is meant for human consumption.

In *State of Tamil Nadu* v. *Krishnamurthy,*[98] the respondent was found selling gingelly oil mixed with 15% groundnut oil. The defence of the respondent was that he kept the oil in his shop to be sold not for human consumption but for external use only. The trial court rejected the defence and convicted him under the Act. But the Sessions judge before whom the respondent preferred an appeal against conviction accepted the defence and acquitted him. According to the Court the respondent could be punished only if it is established that the sale of gingelly oil was for human consumption. State's appeal to the High Court also failed. In the second appeal, the Supreme Court held that for the purpose of the Act 'food' means: -

> "Any article which is ordinarily used as food or drink for human consumption including any articles which ordinarily enters into or used in composition or preparation of human food. It is not necessary that it is intended for human consumption or for preparation of human food. It is also irrelevant that it is described or exhibited as intended for

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[97] For example the U.P. Pure Food Act, 1950, s. 2(g) defined 'food' to mean any article of food or drink other than drug, water, wine, liquors or other excisable articles (intoxicants) used for human consumption.

[98] A.I.R. 1980 S.C. 538.

> some other use. It is enough if the article is generally or commonly used for human consumption or in the preparation of human food."[99]

The Court pointed out that due to poverty, many of those who live below the subsistence level would opt to consume that which may otherwise be thought as not fit for human consumption. They are often tempted to buy and use as food, articles which are adulterated and even unfit for human consumption but which are sold at inviting prices under the pretence or otherwise and are intended to be used for purposes other than human consumption. In the opinion of the Court, it is to prevent the exploitation and self-destruction of those poor, ignorant and illiterate persons that the definition of 'food' is couched in such terms as not to take into account whether an article is intended for human consumption or not.

If the article is not generally or commonly used as food but could have been used in certain cases, it may be a question of fact whether it is food in an instant case. The Court said that it is undisputed that gingelly oil mixed or not with groundnut oil and sold as gingelly oil whether described or exhibited as an article of food for human consumption or as an article for external use only, is food within the meaning of the definition contained in the Act.[100]

In *Food Inspector, Puri Municipality* v. *K.C. Anjamayulu,*[101] the accused was found selling adulterated ghee unfit for human consumption and was convicted. In his revision petition against conviction, he contended that the ghee was sold for lighting lamps in the Jagannadha Temple and not intended to be used as food. The Orissa High Court held that the fact that large quantities of ghee is required for

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[99] *Id.* at p. 539, *per* O. Chinnappa Reddy, J.
[100] *Id.* at p. 540.
[101] A.I.R. 1966 Ori. 144.

lighting purposes in the temple does not mean that such ghee must necessarily be adulterated. Ghee according to the Court is undisputedly a foodstuff as it is used in various forms in the preparation of human food. Although ghee may have other uses, it cannot loose its use or importance as a foodstuff. It was possible for the accused to sell it in any other name. But once he sells it in the name of ghee, he is bound to sell it in an unadulterated form and once it is found to be adulterated, the seller becomes liable under the Prevention of Food Adulteration Act. The Court held that the prescription on the label 'for lighting purposes' is no notice to the customer that it is unfit for human consumption. Moreover, there is no bar for pure ghee being used for lighting purposes and also for food.[102]

Similarly, in *Public Prosecutor* v. *Palanisami Nadar,*[103] the accused was found selling adulterated 'asafoetida'. He represented to the Food Inspector at the time of sale that it was being sold for feeding cows and goats. The Madras High Court held that 'asafoetida' is a well-known flavouring substance in the preparation of human food. When the article sold is intrinsically an article of food, which ordinarily enters into or is used in the preparation of human food, it is immaterial to consider whether there was any separate understanding between the buyer and the seller at the time of sale that the article sold should be used for some purposes other than food.[104]

Penalty for Adulteration of Food

Import, manufacture for sale, or storage, selling and distribution of any adulterated[105] or misbranded[106] food has been criminalized.[107] Similarly, contravention of the terms of license issued under the Act and failure to comply with the lawful directions of the administrative authorities are also made offences.[108] The normal penalty prescribed is a minimum imprisonment of six months, which may extend to three years and with a minimum fine of one thousand rupees. [109] It is possible for the court to award a lesser punishment for special reasons to be recorded in the judgment[110]. In that case also, the term of imprisonment shall not be less than three months, and a fine of not less than five hundred rupees.[111] For example, the court may award a lesser sentence if the adulteration or misbranding render the quality or purity of the article fall below the standard prescribed by the Act or the constituents present below the prescribed limits of variability without rendering the article injurious to health. But if due to the adulteration, injury to health is likely to occur, the term of imprisonment shall be a minimum period of one year.[112] If such article of food or adulterant when consumed by any person is likely to cause death or grievous hurt, the punishment will be still higher.[113]

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105 The Prevention of Food Adulteration Act, 1954, s. 2(I-a).
106 *Id.*, s. 2(ix).
107 *Id.*, ss. 5 and 7.
108 *Ibid.*
109 *Id.*, s. 16.
110 *Id.*, s. 16, proviso (ii).
111 See, first and second proviso to s.16.
112 The punishment can be extended to six years and a fine of not less than two thousand rupees. See, s.16 (1-A).
113 The prescribed punishment is a minimum term of three years imprisonment, which may be extended to imprisonment for life and with a fine not less than five thousand rupees. See proviso to s.16(1-A).

Enhanced punishment is provided for repeat offenders. Moreover, court may also order cancellation of the licence granted to him.[114] Likelihood of cancellation of a licence in this way is highly deterrent since it will throw him out of his business. It is suggested that provisions may be made to the effect that such persons shall be denied fresh license for a period specified or for a period proportionate to the seriousness of the violation. While granting a fresh license, they may also be required to execute a bond of good business behaviour.

The publication of the name, place of residence, the offence and penalty imposed on the offenders at his expense is another welcome measure envisaged under this Act.[115] Publicity given about the offender and the offence will enable the consuming public to avoid the offender in their future dealings. Adverse publicity given in this manner can be an eye opener to other businessmen to discipline themselves and to refrain from such consequences.[116] Conferring this power on judiciary also provides the safeguard against abuse.

Criminal law and Quality Control of Essential Commodities

The Essential Commodities Act, 1955 is primarily intended to exercise control over the production, supply, distribution and trade and commerce in certain commodities that are essential to the general public. Power has been given to the Central Government,[117] to ensure the supply and distribution of essential commodities[118] and their availability at fair prices. The government is also

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[114] S. 16 (1-D).

[115] S. 16 (2). Expenses in this regard shall be recoverable under the Act in the same manner as a fine.

[116] But instances in which this provision has been made use of by courts are virtually nil.

[117] The Essential Commodities Act, 1955, s. 3.

[118] The term 'essential commodity' is defined in s.2 (1)(a). By clause (xi), the Central Government is permitted to add to the list of essential commodities, any commodity which the Central Government by order determine subject to its power to make laws under the concurrent list of the Constitution of India.

empowered to prohibit the production, supply and distribution of any commodity and its trade in public interest[119]. These powers are often used to control quality of products as well.

The Central and State governments have issued large number of orders regulating the production, distribution, supply and price of many goods. In many instances licensing and inspecting regimes have been set up to enforce the orders. The Act does not appear to have the object of controlling quality of essential commodities. However, governments have on many occasions issued orders to ensure. It can be seen that the governments have adopted the same standards as prescribed by the Bureau of Indian standards[120] on many occasions.[121] In some other instances the licensing officers are empowered to prescribe the standards.[122] Yet others empower the government to prescribe the quality.[123] In certain cases the quality standards laid down by other statutes are also made applicable.[124]

The governments are empowered to prohibit the production, sale or distribution of essential goods, which do not conform to the standards prescribed[125].

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[119] See the Essential Commodities (Second Amendment) Act, 1967.

[120] Formerly, the Indian Standards Institution.

[121] See for example the following orders:
- (i) The Household Electric Appliances (Quality Control) Order, 1981;
- (ii) The Cement Control (Regulation of Production) Order, 1981;
- (iii) The Oil Pressure Stoves (Quality Control) Order, 1987;
- (iv) The Multipurpose Dry Batteries (Quality Control) Order, 1987;
- (v) The General Service Electric Lamps (Quality Control) Order, 1989;
- (vi) The Electric Wires, Cables, Appliances and Accessories (Quality Control) Order, 1993; and
- (vii) The Cement (Quality Control) Order, 1995.

[122] For example, see the Fruit Products Order, 1955 and the Cold Storage Order, 1980.

[123] For instance, the Fertilizer (Control) Order, 1985 and the Vegetable Oil Products (Standards of Quality) Order, 1975.

[124] See for example the Edible Oil Packing (Regulation) Order, 1998. The quality standards laid down by the Prevention of Food Adulteration Act has been made applicable here.

[125] The Essential Commodities Act, 1955, s.3 empowers the governments to issue the orders for this purpose.

Violation of the order is made an offence. In addition to the penalties prescribed, the offensive goods can be forfeited to the Government.[126] Repeated or subsequent convictions may lead also to cancellation of the trade licence.[127]

Orders may require the manufacturers to comply with the standards of quality laid down by the Bureau of Indian Standards.[128] They may be required to obtain certification under the BIS scheme. This would ensure product quality since the entire production process and the system of quality control is thoroughly investigated by the BIS before certification is granted. These orders may also require that the sale, distribution or storage of goods shall be made only if it is manufactured by a certified manufacturer.[129] In effect, the production, sale, storage or distribution of goods not in conformity with the prescribed standards are prohibited.

The Essential Commodities Act, 1955 has been effectively used by the governments even in the case of food products not covered by the Prevention of Food Adulteration Act, 1954. For example, water is specifically excluded from the definition of 'food' under the Prevention of Food Adulteration Act. The increased instances of public injury consequent to the sale of spurious mineral and drinking water prompted the governments to regulate the production, distribution and sale of mineral and drinking water. The need for such an action is clear from the guidelines issued by the World Health Organisation on the quality of drinking water.

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[126] Essential Commodities Act, 1955, s.7 (ii)(b).

[127] *Id., s. 7* (2) A.

[128] See for example, the General Service Electric Lamps (Quality Control) Order, 1989; the House hold Electric Appliances (Quality Control) Order, 1981 and the Electric Wires, Cables, Appliances and Accessories (Quality Control) Order, 1993.

[129] *Ibid.*

Quality of Drinking Water

The Prevention of Food Adulteration Act, 1954 excludes water from the definition of 'food'. Natural water might not have required any type of legal controls at the time when the Act was made. Natural water was supplied everywhere free of cost and trading in mineral and bottled water was not so popular at that time. Now the collection, packing and sale of water have developed itself into a big business. In some cases water costs even more than milk.[130] Bottled water use has become very common all over the country.

Now 'mineral water' is brought under the Prevention of Food Adulteration Act. Bottled drinking water is still exempt from this Act. The Bureau of Indian Standards has set specifications for both drinking and mineral water. Absence of compulsory certification helped the manufacturers of bottled drinking water to sell any water without any standard on its quality. The test results published by the Consumer Education and Research Society, Ahmedabad[131] on 13 brands of bottled and mineral water, showed the necessity for effective legal controls.

It was found that two brands failed in the safety parameters laid down by BIS. Small quantities of floating particles were found in almost all brands of water tested. The tests could not find out any material distinction between mineral and drinking water brands.[132]

Much more embarrassing was the test result published recently by the Quality Assurance and Management, a division of the Central Institute of Fisheries

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[130] Bottled water is available for Rs.10/- per liter only in Railway Stations. In other places it is sold for Rs.15/- per liter. But the price of milk is only in between Rs.12 and 13 per liter.

[131] *Insight*, Jan – Feb 1988, pp. 6-11.

[132] *Id.* at p.7 (Key findings).

Technology, Cochin.[133] Test on the mineral water samples of six market leaders revealed that none of them met the mineral water standards. To the dismay of all concerned, the water samples contained toxic chemicals that are harmful to health. The samples recorded also the presence of heavy metals like mercury, lead, copper and manganese beyond the permissible limits.[134] Excess presence of mercury can cause muscle paralysis in human beings, as it would destabilize body enzymes. The presence of excess copper in the body can cause blood poisoning as the metal reduces the oxygen carrying capacity of blood. All the samples, it is stated, contained higher presence of the poisonous metal lead in them[135]. Even mild lead poisoning can cause lethargy. An increased dose as seen in the samples tested can even lead to death.

Three samples, recorded bacterial count beyond the permissible limit [136] Synthetic cleaning agents like detergents were also detected in the mineral water samples. None of the popular brands marketed under the label 'mineral water' contained desirable levels of minerals for being qualified as mineral water.[137]

It is to be noted that mineral water companies are mushrooming each day. It has been stated that there are over a dozen mineral water companies functioning in Cochin area alone.[138] Even though 'mineral water' is brought within the purview of

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[133] K.S.Sudhi, " Bottled Mineral Water Contaminated by 'Harmful Chemicals' : A Study", *The New Indian Express,* Cochin , Feb.25, 2000, p.3.

[134] *Ibid.* The BIS has fixed the permissible level of mercury as 0.001 Parts Per Million (ppm) in potable water. But the samples contained 0.1 to 0.6 ppm of mercury. Heavy metal was detected to 64 ppm in all the samples as against the permissible level of 1 ppm.

[135] Lead content ranging from 7 ppm. to 27 ppm. against the permissible level of .01 ppm. was detected in the samples.

[136] 570-8600 cells per ml. were found as against the permissible 100 cells/ml.

[137] As per the BIS norms, the mineral water should have 60 ppm hardness together with the presence of carbonates and bicarbonates mainly of sodium and potassium, for being labeled as mineral water. Of the samples collected, one recorded 120 ppm. hardness . All others recorded only 18 ppm, nearly ¼th of the desired level. *Ibid.*

[138] *Ibid.*

the Prevention of Food Adulteration Act in 1995, the standards prescribed by BIS in this regard are not made compulsory. This will enable many manufacturers to escape from the penal provisions of the Act. It is high time that BIS standards are made applicable for mineral water. In the case of bottled drinking water, other than mineral water, practically no legal controls exist. Regulations sought to be imposed on sale of bottled drinking water under the Essential Commodities Act, 1955 would be a salutary measure. It is to be examined whether the WHO guidelines on the quality of drinking water is adopted in India.

WHO Guidelines for Drinking Water Quality

The World Health Organisation has formulated the Guidelines for Drinking Water Quality in 1984.[139] The object of the guidelines is the protection of public health. It also seeks the elimination or reduction to a minimum of the constituents of water that are known to be hazardous to the health and well being of the community.[140] Quality of water defined by the guidelines is such that it is suitable for human consumption and for all usual domestic purposes including personal hygiene. The guidelines treat it as ideal if the organizational arrangements to ensure quality of drinking water standards are entrusted to a separate agency.[141] Even though the storage and supply function and surveillance over quality are mutually complementary, the guidelines suggest that these functions are better carried out if entrusted to separate agencies because of the conflicting priorities that exist when both functions are combined.[142]

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[139] W.H.O , *Guidelines for Drinking Water Quality* (1984), Vol.1.
[140] *Id.*, p.1.
[141] *Id.*, p.8.
[142] *Id.*, p.9.

Bottled water, as per the guidelines, should be at least as good in bacterial quality as unbottled potable water and thus contain no coliform organisms. The source used for bottled water should be free from pollution. The bottling process and subsequent transit and storage should not be allowed to contaminate the water. The source of water must therefore be protected and bottling must be done hygienically. These guidelines do not provide for mineral water although bottling procedures and standards of hygiene are same for both.[143]

WHO has estimated that each year about 500 million people are affected by water borne or water associated diseases. As many as 10 million—of these about half of them infants—die.[144] It has also been estimated that 25% of the Worlds' Hospital beds are occupied by patients due to the use of unwholesome water.[145] The illness includes typhoid, cholera, infectious hepatitis, bacillary and amoebic dysenteries and many varieties of gastro intestinal diseases. Taking into account the large volume of illness and the possible health hazards associated with the quality of water, it is a felt need that the WHO guidelines be implemented in our country. The BIS have already laid down the safe water quality standards for bottled water and mineral water taking into account the WHO guidelines. What is required further is only a governmental decision to make the standards mandatory at least in the bottled water business.

Application of Criminal Law for Quality Control in England

The British consumer law is concerned with two separate consumer interests, namely, the economic interests and safety interests. Courts hold safety interests in

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[143] W.H.O, *Surveillance of Drinking Water Quality* (1976).
[144] *Id.* at p.13.
[145] *Ibid.*

high regard than economic interests. Very high standards are required of businesses, which prepare and supply food for human consumption or produce goods, which pose safety threats to consumers. Gorden Borrie, former British Director General of Fair Trading, has remarked that the creation of new criminal offences in the sphere of consumer protection has in fact overshadowed the importance of civil law.[146] The Trade Descriptions Act, 1968 has been cited as the best example of the use of criminal law to combat trade abuses and excesses. This Act forbids false or misleading descriptions of goods and empowers the local weights and measures authority to adopt methods to enforce it.[147] The Act prohibits the application of false trade descriptions in the course of trade or business in relation to any goods.[148] Contravention of this provision is declared as an offence.[149]

The Consumer Safety Act, 1978 is yet another example where criminal law is used to deal with new products which may cause new hazards. At present the Consumer Protection Act, 1987 regulate this aspect also[150]. This enactment provides for compensation in case of defects in goods.[151] However, the breach of safety requirements concerning goods supplied or exposed or offered for sale, is treated as an offence.[152] Safety regulations are formulated by the Secretary of the State[153] in consultation with trade organizations that are likely to be affected by the regulations.

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[146] Gorden Borrie, *The Development of Consumer Law and Policy – Bold Spirits and Timorous Souls,* (1984), p.45.

[147] The Trade Descriptions Act 1968, s. 26.

[148] *Id.*, s.1.

[149] *Ibid.* The punishment provided is imprisonment for a period of two years or with fine or both. See *Id.*, s.18

[150] See the Consumer Protection Act, 1987, Part II.

[151] The Consumer Protection Act, 1987, Part I.

[152] The Consumer Protection Act, 1987, s.10. The Punishment prescribed is six months imprisonment or fine or both.

[153] *Id.*, s.11.

The views of consumer organizations and the Health and Safety Commission are also considered.[154]

The Consumer Credit Act, 1974 also makes it an offence to engage in an activity without a license, if license is required for engaging in such activity.[155] It will also be an offence if a licensee carries on a business under a name not specified in the licence.[156] This enactment criminalizes about thirty-five business conducts concerning consumer credit and provides for different periods of punishment.[157] All these offences are strict liability offences.[158]

Similarly, contravention of orders issued by the Secretary of the State,[159] prohibiting any 'consumer trade practice'[160] is treated as an offence.[161] The Food Safety Act, 1990, contains many provisions imposing criminal liability. They are (1) rendering food injurious to health by adding any article or substance to the food, (2) using any injurious article or substance as an ingredient in the preparation of food; or (3) abstracting any constituent from the food and subjecting the food to any other process or treatment with the intent to sell it for human consumption,[162] (4) sale or offer for sale, or advertise for sale any food, which fails to comply with food safety

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[154] *Id.*, s.11 (5).
[155] The Consumer Credit Act, 1974, s.39 (1).
[156] *Id.*, s. 39 (2).
[157] See, Consumer Credit Act 1974, Schedule 1.
[158] In all these cases, the element of *mens rea* is dispensed with to render better consumer justice.
[159] The Fair Trading Act, 1973, s. 23 enables him to issue such orders.
[160] *Id.*, s.13. The Advisory Committee constituted under the Fair Trading Act, 1973, decides what is a 'consumer trade practice' detrimental to the interesting consumers.
[161] *Id.*, s.23 (a) and (b).
[162] The Food Safety Act, 1990, s.7.

requirements,[163] (5) sale of any food which is prejudicial to the purchaser because it is not in the nature or substance or quality demanded by the purchaser,[164] and (6) applying a false description or presentation of any food that is likely to mislead the consumer as to its nature, substance or quality.[165] Criminal sanctions can be seen provided in other enactments also.[166]

In most of the strict liability offence cases, the innocent offender is provided with a statutory defense of due diligence. The person charged can show that he had taken all reasonable precautions and had acted with due diligence in order to avoid the commission of the offence charged.[167] The inherent weakness of this defense is that the effect of doing so is to accept that an offence has been committed but there is some excuse which exonerates him. Due to this reason, it is said that there seems to be a reluctance to use the defense provisions in the consumer protection statutes.[168] Once such a defense to an offence is taken, he has to prove that he has both taken reasonable precautions and exercised due diligence to avoid the commission of the offence by himself or any person under his control. The defense therefore contains

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[163] *Id.*, s.8. For the purpose of this section, food will be to have failed to satisfy food safety requirements, if –
(a) it has been rendered injurious to health;
(b) it is unfit for human consumption or
(c) it is so contaminated that it would not be reasonable to expect it to be used for human consumption in that state. *Id.*, s. 8 (2).

[164] *Id.*, s.14.

[165] *Id.*, s.15. Publication by advertisement which falsely describes or misleads the nature, substance or quality of any food will also be an offence (*Id.*, *s.*15 (2)).

[166] Strict criminal liability provisions can be seen in the Weights and Measures Act, 1985[166] and the Property Mis-descriptions Act, 1991.

[167] See, the Trade descriptions Act, 1968, s. 24 (1)(b); Fair Trading Act, 1973, s. 25(1)(b); Consumer Credit Act, 1974, s .168 (1)(b); Weights and Measures Act, 1985, s. 34(1); Consumer Protection Act, 1987, s. 39(1); Food Safety Act, 1990, s. 21(1) and the Property Misdescriptions Act, 1991,s. 2(1). In some enactments variables of this defense are coupled with other requirements such as mistake, reliance on information supplied by another, act or default of another act or accident or some other event beyond the defendants control. For example, see the Trade Descriptions Act, 1968, s. 24 (1)(a)).

[168] David Oughton & John Lowry, *Text Book on Consumer Law* (1997), p.368.

two distinct elements. Firstly, it must be shown that the initial precautions taken by the accused are sufficient. Secondly, it must also be shown that he has continued to act diligently thereafter in order to secure compliance with the regulatory scheme.[169]

What is a reasonable precaution is a question of fact that will vary according to the facts and circumstances of each case. Reasonableness is to be assessed applying objective criteria that could reasonably have been expected in the circumstances in question. For example, food producers and retailers must show that they have taken specific steps to avoid the presence of some undesired substance in food.[170]

In due diligence defense it is not adequate enough to have a mere 'paper system' for avoiding the commission of an offence. That system must be put into operation in a diligent manner. In *Tesco Supermarkets Ltd.* v. *Nattrass,*[171] the branch manager of the accused company allowed a misleading indication of the sale price on packets of soap powder to be displayed in the store. The company claimed that they had set up a proper system of education and training to the personnel concerned and hence had taken reasonable precautions and acted with due diligence to avoid commission of an offence. However, the House of Lords held that it was not sufficient for the company to show that they had a system of training. They also had to show that they had diligently put that system into operation.

The question whether due diligence defense can be considered sustainable when the goods sold in question are in compliance with statutory standards and have

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[169] *Ibid.*
[170] *Id.*, p.372.
[171] [1972] A.C. 153.

been so certified by a third party, came for consideration before the Divisional Court in *Balding* v. *Lew ways Ltd.*[172] The accused in this case was charged with supplying a 'tipper trike' (a toy), which was unsafe by virtue of a dangerous and accessible protrusion. This was in violation of the provisions of the Toys (Safety) Regulations 1989 and was amounting to an offence under the Consumer Protection Act, 1987.[173] It was found that there were material differences between the standards prescribed by the British Standards Institution[174] and the standards required by the regulations made under the Consumer Protection Act, 1987. Moreover, it was established that when the BSI certificate was given, the producer was warned that this did not confer immunity from legal obligations. The court held the company guilty of the offence of violating safety regulations. It suggests that reliance on third party certification is not usually sufficient evidence of exercise of due diligence.

In addition to the criminalisation of diverse trade practices under the various enactments, there are large number of statutory instruments concerned with specific types of trading abuses creating criminal offences.[175] These primary and secondary legislations jointly work to bring in discipline and responsiveness among the traders in England.

Invoking Criminal Law for Quality Control: Judicial Response

The study of the cases decided under the Prevention of Food Adulteration Act and other quality control legislations reveals that the judiciary has failed to appreciate

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[172] (1995) 159 JP 541, as quoted in David Oughton & John Lowry, *supra* n. 169.

[173] The Consumer Protection Act, 1987, s.12 (1).

[174] Hereafter referred to as BSI.

[175] For example see the Consumer Transactions (Restriction on Statements) Order, 1976; the Business Advertisements (Disclosure) Order, 1977; the Property Mis-descriptions (Specified Matters) Orders, 1992; the Package Travel, Package Holidays and Package Tours Regulations, 1992; and the General Product Safety Regulations, 1994.

fully the need for criminal sanctions in this area. Punishments are imposed on convicts at least for two purposes. The deviant behaviour ought to be punished depending upon the gravity of the offence. The punishment must remain as a model that will deter others from committing the offence. Considering the seriousness of food adulteration cases, any leniency, other than those permissible under the Act are uncalled for. The concern shown by the Supreme Court in many cases[176] shows that the lower judiciary often fails to acknowledge this. So far as the lower judiciary is concerned, it is flooded with cases. Food adulteration cases are few among the multitude of cases it is supposed to decide. The seriousness that ought to have been shown towards this dangerous tribe is seen lost sight of. Food offences that encompass a new criminal jurisprudence are overshadowed by presumptions and favoured constructions benefiting the accused under the ordinary criminal law. In spite of repeated exhortations by the Supreme Court of India, the situation has not improved much.

In most of the cases, the issue in question reaches the Supreme Court after long periods of protracted litigation before lower courts. Therefore, the Supreme Court has been expressing its displeasure and helplessness in straightening the position of law. These in turn allow the culprits on many occasions to escape from the rigour of law.

For instance, in *Municipal Corporation Delhi* v. *Kacheroo Mal,*[177] the criminal proceedings lasted for 81 months. The Supreme Court refrained itself from passing an order for remand of the case on the ground that defending the case for

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[176] For example, see *Pyarali K. Tejani* v. *Mahadeo R. Dange and others,* (1974) 2 S.C.R. 154 at p. 168; *Muralidhar Meghraj Loya* . v. *State of Maharashtra,* A.I.R. 1976 S.C. 1929 at p. 1932.

[177] A.I.R. 1976 S.C. 394.

81 months before various courts itself is ample punishment for the respondent. Hence the court refused to interfere with the High Court order of acquittal.

Similarly, in *State of Orissa* v. *K.Rajeswar Rao,*[178] the offence was committed before the introduction of a provision for minimum punishment in the Act[179]. The accused was acquitted by the lower courts. The Supreme Court found the accused to be guilty. But since 15 years were already passed after the commission of the offence, it was held that at this distant point of time, ends of justice might not be served by sending the accused to the jail. According to the Court the agony of prosecution suffered by him during these years would be a sufficient punishment for him.

Instances in which courts, clinching on procedural infirmities, set free the accuseds are not uncommon. In *N. Sukumaran Nair* v. *Food Inspector, Mavelikara,*[180] a sample of ice cream was purchased by the Food Inspector from the appellant. The Public Analyst reported that due to reduction in milk, fat and solids, the ice-cream was adulterated. When prosecuted, the trial court acquitted the appellant on the ground that the mandatory rules for collection and sending of specimen were not complied with.[181] In this case, the Food Inspector failed to support his testimony with the postal receipt to establish that he had sent not only the sample of ice cream properly sealed, but also the specimen of the seal separately. Hence the

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178 (1992) 1 S.C.C 365.

179 This clause was introduced by the Prevention of Food Adulteration (Amendment) Act, 1976.

180 (1997) 9 S.C.C 101.

181 Prevention of Food Adulteration Rules, 1955, rule 18 deals with the procedure. It says that a copy of the memorandum and specimen impression of the seal used to seal the packet shall be sent in a sealed packet separately to the Public Analyst by any suitable means – immediately but not later than the succeeding working day. In *State of Haryana* v. *Isher Das,* 1985 Cri. L.J. 1061, it was held that rule 17, which deals with the manner of despatching containers of samples and rule 18 are interlinked and are part of the same scheme and both rules are mandatory.

public analyst could not certify that the seal affixed on the container and the outer cover of the sample tallied with the specimen sent separately to him. So the court concluded that the offence was not established.

On appeal, the High Court reversed the order on the ground that the Analyst had certified that the seals and specimen sent to him tallied and hence fit for analysis. The oral testimony by the Food Inspector was thus corroborated by the certificate from the Public Analyst. That was enough to find the accused guilty. The High Court reversed the sentence, and awarded simple imprisonment of six months and a fine of Rupees 1000/-. On appeal, the Supreme Court agreed with the finding of the High Court but observed that the offence was committed a decade before the imposition of sentence. Hence the Court directed the state government to formalise the commutation of six months simple imprisonment to a fine of Rs.6000/- thereby exempting the accused from imprisonment.

In *State of Haryana* v. *Pawan Kumar,*[182] the respondent was found exposing for sale adulterated red chilly powder. The trial court convicted him and sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.1000/-. Respondent's appeal to the Sessions Court failed and a revision petition was filed in the High Court. While upholding the conviction, the High court reduced the imprisonment to the term already undergone by the accused. In this case the term undergone was less than a month.

On appeal, the Supreme Court held that the High Court was in error in reducing the sentence as the minimum substantive sentence to be imposed under the

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[182] (1998) 8 S.C.C. 521.

Act for the above offence being six months. In this case also, considering the fact that the offence was committed more than 16 years ago, the Court felt that the minimum sentence prescribed under the Act would meet the ends of justice. High Court order to that extent was ordered to be modified.

Considering the volume of criminal cases pending before various courts in the country, delay in the disposal of cases are inevitable. The appellate courts go on adopting a lenient view about punishment only on the ground of delay in the final disposal of cases. It is felt that this trend will only be antithetical to the purpose of the Acts. The culprits are likely to take advantage of the delay in the judicial process. Executive and legislative measures for establishment of special courts for food and drugs cases in each district are desirable. Such a step is necessary to keep the rigour of law and punishment prescribed by the Prevention of Food Adulteration Act. Sharpening of the existing tool in this manner would provide sufficient deterrence to the trade. This will help to improve the quality of food and drugs sold in the market. Enterprises, which thrive on compensating the few who complain and exploiting others by adulteration in the civil law regime, cannot thrive under the rigour of criminal law any more. This, it is expected, will pave the way for a qualitative change in the business practices concerning food and drugs. The experience in the U.K. also shows that the criminal sanctions have considerably helped to discipline the traders. It serves a predominant role in consumer transactions. But in India, the position is different. The compensatory regime of civil law is given supremacy and the criminal law is put into motion slowly. Even this is done only in areas where the health of the consumers is likely to be adversely affected. The courts also appear to be indifferent. It is doubtful whether the usefulness of criminal law as an instrument to ensure

fairness in trade practices is properly recognized in India. The relevance and significance of criminal law in regulating the market is to be understood in its true perspective. Laws need to be enacted and implemented properly to improve the performance of manufacturers and sellers.

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Chapter 7

QUALITY CONTROL UNDER CIVIL LAW

Criminal sanctions and civil liabilities are imposed on traders as social responses towards abusive trade practices. The former punishes the offender by imposing corporeal punishment whereas the latter compensates the aggrieved by allowing the recovery of damages for the loss suffered. The fundamental law of the land, namely the Constitution, enables citizens to compel traders to follow quality standards by invoking fundamental rights. The instrumentalities of public interest litigation and class actions are often used for this purpose. In the modern world, promotion of market competition is regarded as the ideal method for quality control. In spite of its inadequacies in achieving all its desired results, free competition certainly evokes quality consciousness among traders and consumers alike. It is necessary to examine the constitutional dimension of consumer protection and the competition law of the country to assess its efficacy in the new economic scenario.

In spite of the enactment of various statutes on quality control, the common law principles of tort and contract are also increasingly used even today. In fact most of the modern statutes are embodiments of the principles evolved by courts under common law. For example, the product liability laws of today are extensions of the common law principles of the tort of negligence. The laws relating to representations, implied terms, exclusion of contractual liability and advertising controls are extensions of contract law principles. The relevance of these common-law remedies is probed for a better understanding of modern statutes.

The Consumer Protection Act, 1986, apart from providing an alternative mechanism for dispute settlement, has given a useful legal framework for quality control measures. The working of the Consumer Protection Councils and Consumer forums show that they can also be used as effective tools for quality control. Similarly the trademark law, essentially designed to promote traders interest, is also used to advance consumer interest as well. The modalities and methods adopted for this purpose also deserve close scrutiny.

Common Law Principles on Quality

In the past, the judiciary contributed considerably in specifying the basic obligations of the traders dealing in consumer goods. Accordingly, the goods sold are insisted to be of merchantable quality and reasonably fit for their purpose. The basic obligation on traders who provided services was that they must carryout their work in a proper and workmanlike manner.[1] But traders frequently sought to exempt themselves from these basic obligations by the incorporation of appropriate exclusion clauses in their contracts. The courts, relying on the principle of 'freedom of contract' allowed such exemption clauses even when there was an obvious imbalance of bargaining power. The common law could not adequately cope with this problem. This is evident from the remark made by Lord Devlin. He said:

> "The courts could not relieve in cases of hardship and oppression because the basic principle of freedom of contract included freedom to oppress."[2]

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[1] Sir Gordon Borrie, *The Development of Consumer Law and Policy – Bold Spirits and Timorous Souls*, Stevens & Sons, London (1984), p.7.

[2] Devlin, "The Common law, Public Policy and the Executive," *Current Legal Problems*, 10 (1956).

Attempts by certain judges to combat exemption clauses had led to a good deal of judicial conflicts, which resulted in bringing down the image of common law[3]. But the courts' rulings on 'reasonable notice' of exemption clauses together with construction of ambiguity in the wording of exemption clauses against the traders were sources of immense relief for the consumers[4]. Moreover, the judicial inertia to exemption clauses when there was fundamental breach of a contract also accorded positive advantage to consumers.[5]

The notable contribution of the common law to consumer protection was the landmark decision of the House of Lords in *Donoghue* v. *Stevenson.*[6] It was decided by their Lordships that a manufacturer could be made liable in damages for the tort of negligence to anyone who is killed or injured or whose property is damaged by a defective product. For this purpose it is to be established that there was lack of care on the part of the manufacturer or his employees. This decision led to a series of judgments establishing a duty of care to the consumer on the part of manufacturers of different types of goods such as hair-dye,[7] underpants,[8] cars,[9] elevators[10] and many others. The 'duty of care' has been extended from manufacturers to cover repairers,[11] assemblers[12] and retail

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[3] H.K.Lucke, "The Common Law: Judicial Impartiality and Judge-made Law", 98 L.Q.R 29 (1982), at p.84.

[4] For a detailed discussion on these pointes, see *supra* Ch. 5.

[5] However, Lord Reid in *Suisse Atlantique* v. *N.V.Rotterdamsche Kolen Centrale*, [1966] 2 All E.R. 61 (H.L.) at 76 had opined that this common law doctrine of fundamental breach was incapable of distinguishing between cases where parties bargained in terms of equality and otherwise. His Lordship called upon the Parliament to provide a solution.

[6] [1932] A.C. 562.

[7] *Watson* v. *Buckley, Osborne, Garrett & Co.*, [1940] 1 All E.R. 174 (Assizes).

[8] *Grant* v. *Australian Knitting Mills Ltd.* [1936] A.C. 85 (P.C.).

[9] *Andrews* v. *Hopkinson*, [1957] 1 Q.B. 229; *White* v. *John Warwick & Co.*, [1953] 2 All E.R. 1021 (C.A.) and *Griffiths* v. *Arch Engineering Co. Ltd.*, [1968] 3 All E.R. 217 (Assizes).

[10] *Haseldine* v. *Daw*, [1941] 2 K.B. 343.

[11] *Stennet* v. *Hancock*, [1939] 2 All E.R. 578 (K.B.).

[12] *Howard* v. *Furness, Houlder Ltd.*, [1936] 2 All E.R. 781 (K.B.).

dealers[13]. A mere distributor or supplier may not actively create a danger in the same way as a manufacturer can have, but he too may be under a duty to make enquiries or carryout an inspection of the product. If it is found dangerous for some reason, which he should have known, his failure to warn about it will amount to negligence.[14]

The duty of reasonable care has been extended to any container,[15] package or pipe[16] in which it is distributed and also to the labels, directions or instructions for use that accompany it.[17]

A study of the common law contribution towards consumer protection in the latter part of the 20th century shows many observations concerning the quantification of damages for defective products. The courts started allowing damages for tort or breach of contract not only in respect of physical injury, damage or financial loss but also for distress and disappointment. The Court of Appeal decision in *Jarvis* v. *Swan Tours*[18], can be cited as an example. The appellant, an English solicitor, booked a holiday in Switzerland on the basis of a brochure issued by the respondent tour operators. The brochure had promised for a welcome party on arrival, afternoon tea and cakes, a bar that would open on several evenings a week and a charming owner who spoke fluent English. To the dismay of the

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[13] *Watson* v. *Buckley, supra* n. 7, where the distributors of dangerous hair dye was held liable since they advertised it as positively harmless and requiring no tests.

[14] See for example *Chaudhury* v. *Prabhakar,* [1989] 1 W.L.R. 29. In this case the court held a gratuitous agent inspecting the property liable to the principal.

[15] *Donoghue* v. *Stevenson, supra* n. 6 at p.595 *per* Lord Atkin, L.J.

[16] *Barness* v. *Irwell Valley Water Board,* [1938] 2 All E.R. 650 (C.A.).

[17] *Watson* v. *Buckley supra n.* 7; *Holmes* v. *Ashford,* [1950] 2 All E.R. 76 (C.A.); *Vacwell Engineering Co. Ltd.,* v. *B.D.H. Chemicals Ltd.,* [1971] 1 Q.B.88 and *Wormell* v. *R.H.M.Agriculture (East)Ltd.,* [1987] 3 All E.R. 75 (C.A.).

[18] [1973] 1 All E.R. 71 (C.A.). Also see, *Jackson* v. *Horizon Holidays Ltd.,* [1975] 3 All E.R. 92 (C.A.).

solicitor there was no welcome party. He was not served with the nice swiss cakes that he was hoping for. For tea, there were only potato chips and dry nut cakes. The bar was an unoccupied annex kept open only one evening a week and the swiss owner could not speak English. The Court of Appeal held that the solicitor was entitled to be compensated for the distress and disappointment and awarded twice the cost of the holiday as damages.

It can be seen that the common law courts succeeded in extending liability of producers for defective goods. However, in dealing with the sweeping exclusion clauses, the common law courts were not successful. This lacunae was filled by legislative intervention[19]

The Law of Torts and Quality in Goods

The modern principles of product liability law were originated in the common law principle of the tort of negligence. The landmark decision of the House of Lords in *Donoghue* v. *Stevenson*[20] is an obvious example of the adaptation of the tort of negligence in determining the liability of manufacturers and producers of defective products. In that case their lordships held that a manufacturer owes a duty of care to consumers in respect of the safety of his product.

Lord Atkin has enunciated the manufacturer's duty of care in the following words:

> "A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate

[19] For a detailed discussion on this point, see *supra* Ch.4.
[20] [1932] A.C. 562.

examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care".[21]

Later cases have raised the question whether a manufacturer owes duty of care to a consumer who suffers economic loss including diminution in value of the defective product itself. The English law seems to be reluctant to such a duty except in most extreme cases. In other situations a producer owe no duty of care in respect of pure economic loss. The consumer in such cases will be confined to an action for breach of contract, if such a contract exists.[22]

In *Muirhead* v. *Industrial Tank Specialities Ltd.*,[23] the plaintiff conceived a scheme to supply lobsters at times of high demand by keeping them in tanks. He purchased the tanks from the defendants. Due to the improper functioning of the pumps attached to the tank, large number of lobsters died and the plaintiff suffered loss. There was a good claim for breach of contract against the defendants, but they were insolvent. Hence, the plaintiff sued the French manufacturers of the pumps with whom he had no contract alleging that they were negligent in supplying the equipment, which was not suitable for use in English voltage conditions. The court allowed damages to be recovered for dead lobsters but the plaintiff failed in his claim to recover the cost of pumps and profits that could have been made in the business had the pumps functioned properly. Their Lordships opined that the manufacturers duty to take care to the ultimate consumers, who are not in

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[21] [1932] A.C. 562.

[22] *C&F Estates Ltd.* v. *Church Commissioners for England*, [1989] A.C.177 and *Murphy* v. *Brentwood District Council*, [1991] 1 A.C. 398.

contractual relationship with him, is confined to not causing damage to persons or property. The damages occurred due to loss of business because the pumps were unsuitable for their purpose occurs in a claim in contract but not in tort against the manufacturers.

The Extent of Manufacturers' Duty to Take Care

The extent of the duty of care to be taken by the manufacturers was also considered by courts in various cases[24]. The consensus appears to impose a duty to take reasonable care. However, what amounts to reasonable care is determined by a standard framed by the Court. Manufacturer's negligence, as it developed in the nineteenth century, meant that businesses were not responsible for industrial accidents or for injuries from defective products unless it could be established that they were at fault. The courts were justified in adopting this approach since liability without fault may ruin infant industries. The anxiety of the courts to save new industries[25] though justified is not conducive to the notion of consumerism, as it exists in the present day.

Gradually there was a visible change in the judicial philosophy towards negligence liability particularly in the industrial sphere. This was partially due to societal apathy against the miseries caused due to failure of the law in not compensating injured persons and partly due to the feeling that industry no longer require the same degree of protection as before. The complex and sophisticated

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[23] [1984] Q.B. 507.

[24] For example see *Donoghue* v. *Stevenson*, [1932] A.C. 562; *Grant* v. *Australian Knitting Mills Ltd.*, [1936] A.C. 85; *Hill* v. *Crowe (James) Cases Ltd.*, [1978] 1 All E.R. 812 (C.A.) and *Andrews* v. *Hopkinson*, [1957] 1 Q.B. 229.

[25] See Lawrence M. Friedman and Jack Ladinsky, "Social Change and the Law of Industrial Accidents", 67 Col.L.Rev. 50 (1967). Also see Gary T.Sachwartz, "Tort Law and the Economy in Nineteenth Century America: A Reinterpretation," 90 Yale L.J. 1717(1981).

nature of the products and parliamentary efforts to compensate parties for defects in products encouraged manufacturers to take steps to prevent defective products getting into the market.

In the United States also similar development occurred. In *McPherson* v. *Buick Motor Co.*[26], the New York Court of Appeal held that the car manufacturer must compensate the consumer who had been injured when one of the car wheels collapsed because of a defect. The court expressed the view that the manufacturer had been negligent because he could have discovered the defect by a reasonable inspection. It is to be noted that in Britain, this principle was adopted by the House of Lords in *Donoghue* v. *Stevenson*[27] only after many years. Subsequent cases clarified the position. Accordingly, the duty of care that the manufacturers entail includes the duty to see that products are designed to ensure reasonable safety to consumers[28]. It was further held that manufacturers must have an adequate system of quality control to prevent the occasional defects in a product. Moreover, manufacturers have a duty, while marketing products, to attach instructions or warnings when it is not clear to consumers that there can be a danger.[29] Manufacturers may be held negligent if they fail to warn about, recall or stop marketing a product once it is discovered by them to be dangerous.[30]

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[26] 217 N.Y. 382 (1916), as cited in Ross Cranston, *Consumers and the Law*, Weidenfeld and Nicolson, London (1984), p.148.

[27] [1932] A.C.562.

[28] See for example, *Hill* v. *Crowe (James) Cases Ltd.*, [1978] 1 All E.R. 812 (C.A.) and *Lambert* v. *Lewis*, [1982] A.C. 225.

[29] *Clarke* v. *Army and Navy Co. Op. Society*, [1903] 1 K.B. 155 and *Fisher* v. *Harrods Ltd.*, [1966] 1 *Lloyds, Rep.* 500.

[30] *Watson* v. *British Leyland (U.K.) Ltd. Product liability International*, (1980), pp. 156-160, as quoted in David Oughton & John Lowry, *Text Book on Consumer Law*, Blackstone Press Limited, London (1997), p. 186 & 187. In this case it was held that the manufacturer's failure to take reasonable remedial steps even after discovering that a range of its cars suffered from an axle defect due to which the wheels might be detached during use, amounted to failure to take reasonable care and hence also liable for not providing sufficient warning to the consumers.

A more recent exposition of law concerning the manufacturer's duty after putting the product into circulation came out from the case *Carrol* v. *Dunlop Ltd.* [31] Dunlop disputed their liability for tyre defects in a range of their tyres, which were in use since 1981. They or their agents had received over 300 complaints from worried motorists about the safety of this brand of tyres. But nothing had been done to alert the public to the danger and no report had been made to the Ministry of Transport. The Court concluded that a responsible manufacturer ought to have kept an eye on the number of complaints received and warned the users of the product if there exists any substantial risk of injury in normal or unforeseeable conditions. In all the above circumstances the manufacturers should at least adhere to current standards of practice in their particular industry. The adherence by itself is not conclusive evidence that the duty of reasonable care is satisfied.[32] Compliance with the standards prescribed by voluntary bodies might also be necessary to satisfy the duty of reasonable care.[33] However, manufacturers are not liable for design defects, which they could not have foreseen, given the state of scientific knowledge existing at the time[34].

In order to establish that a manufacturer has broken the duty of reasonable care, consumers can in many cases seek assistance from the doctrine of *res ipsa loquitur.* Under the doctrine, the very fact that the defect has occurred raises a rebuttable presumption of negligence on the manufacturer.

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[31] *Product Liability International* (April 1996), pp. 58-59. Also see David Oughton, John Lowry, *id.*, p.187.
[32] Ross Cranston, *Consumers and the Law* Weidenfeld and Nicolson, London (1984), p. 149.
[33] *Ibid*
[34] *Ibid.* This is called the 'state of art' defense.

Grant v. *Australian Knitting Mills*[35] may probably be the best example to illustrate this point. Here the consumer contracted dermatitis due to the presense of excess chemicals, which remained in the woolen underclothes manufactured by the defendant. The House of Lords opined that it did not suffice for the manufacturer to show that he had a system of eliminating excess chemical or that it had produced millions of similar garments without being complained by anybody. According to their Lordships:

> "Negligence is found as a matter of inference from the existence of the defects taken in connection with all the known circumstances even if the manufacturers could by apt evidence have rebutted that inference they have not done so."[36]

Similar was the case in *Lockhart* v. *Barr*.[37] Here, a consumer bought a bottle of soft drink and was injured by drinking its contents since it was contaminated by phenol. Without any hesitation the House of Lords held that they could draw the inference of negligence. It was not necessary for the consumer to prove exactly how the presence of phenol had come about. The inference can be drawn in clear cases like those involving foreign matter in sealed containers or foreign substances in clothing.

In spite of the *res ipsa loquitur* doctrine coming to the rescue of consumers in certain instances, issues may become complex and complicated if the defect can be attributable to a faulty component supplied by another. The consumer's discovery of the defect might have occurred very late. Still the manufacturer of the

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[35] [1936] A.C. 85.
[36] *Id.* at p.101.
[37] [1943] S.C. (H.L.) 1, as quoted in Ross Cranston, *supra* n. 32., at p.150.

finished product is liable if the consumer succeed in proving that he failed to take reasonable care by not checking the reputation of the supplier or by failing to carryout random tests on the components supplied.[38]

Inadequacy of the Law of Negligence to Protect Consumers.

Consumers often confront practical problems in making successful claims in negligence. In order to establish negligence regarding complex products, consumers may require knowledge of the manufacturing process, means and measures of quality control and the system of distribution. Manufacturers will not make available those informations freely. The circumstances in which a consumer can obtain recovery of the information are also limited. Therefore, consumers may often find their claims defeated or their damages reduced. This is because of certain standard defenses to an action for negligence available to the manufacturers[39].

The inadequacy of the law of negligence to take care of product quality and safety can best be explained in the context of the *Thalidomide* tragedy. *Thalidomide* was promoted widely as a safe tranquilizer without side effects. It was produced by Chemise Gruenethal, a German Company. It was manufactured in several countries under licence. Its marketing resulted in nearly ten thousand children being born deformed. This tragedy demonstrated the total inadequacy of the law of most countries either to prevent the marketing of an unsafe drug or to compensate those injured. The first difficulty that came up was the absense of clear authority as to whether the common law provided a remedy for those suffering from a pre-natal injury caused by use of a product. Another question was whether the company had

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[38] *Taylor* v. *Rover Co. Ltd.*, [1966] 2 All E.R. 181 (Assizes).

[39] The standard defenses are: (i) that they voluntarily assumed the risk and (ii) that their claim is brought too late and falls outside the limitation period.

fallen below the standard of care in marketing the drug or withdrawing it once evidence of its effects became apparent. The company had subjected the drug only to a limited number of unsystematic clinical tests. Most of these tests were conducted by doctors who were in regular commercial relationship with the company. They lacked special training for this purpose. Early reports of adverse side effects were suppressed by the company who misrepresented when doctors enquired whether such side effects had been previously encountered. They also tried to suppress unfavourable reports and promoted favourable publicity by dishonest means.[40] The British distributors through their advertisements claimed that the drug could be given with complete safety to pregnant women and nursing mothers. They carried out no scientific tests themselves before marketing the drugs to establish this claim. The fundamental question was whether the distributors were negligent in not doing so. They argued that tests for teratogenic effects were not customary at that time. Scientific opinion prevalent at that time did not conceive that drugs would damage the developing foetus. It was really doubtful for all concerned that negligence in the circumstance would be established. The court approved a settlement for some of the children[41]. The spread of social discontentment and threat to boycott other products of the distributors persuaded them to come to a far more favourable settlement.[42]

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[40] For the *Thalidomide* episode, see Harvey Teff and Colin Munro, *Thalidomide – The Legal Aftermath*, Saxon House (1976); Insight Team of *Sunday Times, Suffer the Children*, Future, London, (1979); Robert Nilsson, *Thalidomide and the Power of the Drug Companies*, Penguin, Harmondsworth (1972).

[41] *S.* v. *Distillers Co. (Biochemicals) Ltd.*, [1969] 3 All E.R. 1412 (Q.B.).

[42] *Allen* v. *Distillers Co. (Biochemicals) Ltd.*, [1974] Q.B. 384.

The common law remains unreformed regarding compensation for persons suffering injury when a drug unexpectedly proves to be unsafe. Still compensation depends largely on proof of negligence.

The Fault Principle

It is seen that the law of tortuous liability is mainly built upon the fault of another, which takes the form of the intention to injure or negligence. Fault generally is considered to be the natural standard of liability. Morally, it seems to be right when a person who injures another through his fault should pay compensation. The reason for the 'fault principle' taking hold in tort law has been attributed to the pressure from newly formed industrial concerns of the 18th and 19th Centuries to save itself from the threat of strict liability in respect of many inevitable accidents.[43] The moral and legal basis of the fault principle has been disputed by academics for more than one reason and has pointed out the issues and problems.[44] The inadequacies of the fault principle to compensate the victims have accounted for the evolution of the rule of strict liability.

The Rules of Strict and Absolute Liability

Under the regime of strict liability, it is not necessary for the plaintiff to prove that the injury was attributable to the defendants fault. It is enough that the defendant has caused the plaintiff's injury. The modern law has adopted strict liability only in exceptional cases. Recognition of the rule of strict liability in the classic case of

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[43] Mark Lunney and Ken Oliphant, *Tort Law: Cases and Materials*, Oxford, New York (2000), p.791.

[44] See generally, Peter Cane, *Atiyah's Accidents, Compensation and the Law*, Butterworths, London (1999). Prof.Atiyah, in this book has attacked the fault principle on many counts. He argues that (i) the compensation payable and the degree of fault bears no relation; (ii) the compensation payable and the means of the defendant are not related; (iii) the defendant may be liable without being morally culpable and vice-versa; (iv) fault principle pays seanty attention to the conduct and needs of the plaintiff; (v) justice may require more often than not compensation without fault and (vi) it is difficult to adjudicate allegations of fault.

Rylands v. *Fletcher*[45] was followed sooner by efforts to restrict its scope and application to a large extent[46] even though the case itself had provided for many exceptions.[47] The inability of the common law to develop any significant breakthrough has resulted in the enactment of a number of statutes imposing liabilities of this nature in England.[48]

The Pearson Commission[49] had in its report in 1978 recommended for introduction of strict liability regimes in areas of rail transport, defective products and drugs.[50] It had also recommended that strict liability in respect of personal injury caused by dangerous things and activities should be made on a statutory basis.[51] In making such a recommendation, the commission has taken out two guiding concerns. The first is the insurability of the risk in question by the person liable, cheaply and easily than those who are likely to be injured. The commission further concluded that in cases of defects in products, the victims often experience difficulty in proving fault.[52]

The decision rendered by the Supreme Court of California in *Greenman v. Yuba Power Products*,[53] following and approving its own decision pronounced in 1994 by Justice Traynor in *Escola v. Coca Cola Bottling Co.*[54] can be cited as an

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[45] (1868) L.R. 3 (H.L) 300.
[46] See Mark Lunney, *supra.* at pp.569-578.
[47] The strict liability rule in this case was held to be inapplicable in cases of: (i) natural user of land, (ii) act of god, (iii) act of stranger or the act of the plaintiff himself, (iv) the thing escaped due to the consent of the person injured and (v) statutory authority for causing the injury.
[48] See for example The Employers Liability Act, 1880, The Workman's Compensation Act, 1897, The Factories Act, 1961, The Nuclear Installation Act, 1965, The Gas Act, 1965, The Animals Act, 1971, Health and Safety at Work Act, 1974, The Civil Aviation Act, 1982, etc. Many enactments of similar nature can be seen in India also.
[49] *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (Comnd. 7054) 1978.
[50] *Id., para.* 1642.
[51] *Ibid.*
[52] *Id., para.* 316.
[53] 377 P 2d 897 (1963) as quoted in Mark Lumney, *supra.* at p.794.
[54] 150 P 2d 436 (1944).

obvious argument in favour of imposing strict liability in cases of defective products. His Lordship said:

> "I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one .... Even if there is no negligence .... public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products to life and health inherent in defective products that reach the market .... The cost of an injury and the loss of life or health may be an overwhelming misfortune to the person injured and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business".

The Council Directive 85 of the European Economic Community[55] has also emphasized the 'deterrence' basis of the strict liability doctrine. It states that liability without fault on the part of the producer is the sole means of solving the problem of damage caused to consumers by the defectiveness of his product, which is peculiar to the modern age of increasing technicality. Strict liability according to the Directive reduces the flow of defective products to the market and increases its overall economic efficiency.

The necessity of making the manufacturer absolutely liable for dangerous industrial activities has also been propounded by Chief Justice P.N. Bhagwati of the Supreme Court of India in *M.C.Mehta* v. *Union of India.*[56] It was opined that the rule of strict liability and its exceptions that we find in *Rylands* v. *Fletcher* was evolved at a time when the developments of science and technology has not taken place as at

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[55] *Council Directive* 85/374 EEC.
[56] (1987) 1 S.C.C 395.

present. Therefore, it cannot afford any useful guidance[57] in fixing the standard of liability of the present market, which is highly complex. Moreover, the rule is not in tune with the constitutional norms and the needs and desires of the present day economy and social structure. Commenting on the need to formulate new rules of liability for inherently dangerous industries, the court said:

> "We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas, owes an *absolute and non-delegable duty* to the community to ensure that no harm results to anyone on account of ... the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the ... activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be *absolutely liable* to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part."[58]

The liability of the enterprise in such situations has to be strict and absolute.[59] This liability in the opinion of the court shall not be subjected to the exceptions provided to the rule of strict liability in *Rylands* v. *Fletcher*.[60]

The Supreme Court's enunciation of a rule of absolute liability devoid of any exception no doubt is a significant contribution to the law of tortuous liability in India. However, it is very pertinent to note that the court in this

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[57] *Id.* at p.420.
[58] *Id.*, pp. 420-421.
[59] *Id* at p.421.
[60] *Ibid.*

case was addressing itself to a mass disaster where the judicial mind of the judges got disturbed. Such an overwhelming response cannot be expected of from courts in normal isolated cases of hazards caused by industrial products. This is evident from the fact that ever since this decision in 1987, no significant breakthrough has taken place in cases of products liability in India. What is required is the enactment of a law stipulating strict liability on manufacturers for defects in products.

Strict Liability: Recent Trends

The *Thalidomide* tragedy discussed above pointed towards the need for reforms in negligence law concerning defective products. Strict liability on manufacturers has been suggested as the alternative[61]. The US courts have adopted strict liability for defective products. The US courts developed this principle from the English law of warranty action[62]. The U.S. courts adopted the idea of implied warranty undertaken by manufacturers of products that their products are free from defects. Now it is accepted by law that manufacturers and distributors are liable to any person who is injured by a defective product even if the business has exercised all possible care.[63]

The British law had strict liability provisions at least in two legislations.[64] But the defenses permitted by these statutes made them virtually ineffective[65].

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[61] See Harvey Teff and Colin Munro, *supra* n.40.

[62] A warranty action would lie in Tort law in U.S. if one falsely affirms a fact to be true whether or not the person making the affirmation knew it was false.

[63] See the *Second Restatement on Torts* (U.S.A.), s. 402 A. Also see, Richard A. Epstein, *Modern Products Liability Law*, West port, Connecticut (1980), Friedrich Kessler, "Products Liability" 76 Yale L.J. 887 (1967).

[64] The Consumer Protection Act, 1961 and the Consumer Safety Act, 1978.

[65] Both the Consumer Protection Act, 1961 and the Consumer Safety Act, 1978 provided for a defence of 'reasonable steps' and 'due diligence' clause to avoid the liability. The Consumer Protection Act, 1987, replaced both these Statutes.

There were pressures for legislation to introduce absolute liability for manufacturers of defective products that cause personal injury and property damage. The European Economic Community,[66] a Convention of the Council of Europe,[67] the Law Commission[68] of England and the Royal Commission[69] recommended to effect changes in the law.

The British Law Commission has given many reasons for imposition of strict liability on producers of defective goods.[70] The first argument is that losses associated with any defective product should be borne by the manufacturer who creates the risk by putting it into circulation for commercial gain. Secondly, the easiest way of spreading the loss fairly is to place it on the manufacturer who can recover the cost of insuring against the risk in the price charged for a product. Thirdly, it is desirable to impose liability on manufacturers because they are in the best position to exercise control over the quality and safety of products and they can conveniently insure against the risk. Finally, it is desirable to bring the law in line with consumers' expectations created by advertising and other promotional techniques adopted by manufacturers and sellers.

The most serious objection to strict liability is the cost. It has been stated that imposition of strict liability on manufacturers would give rise to price increase since

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[66] *Proposal for a Council Directive Concerning Liability for Defective Products* submitted by the Commission to the Council, October 1979. See also, *Council Directive of 25 July 1985 on the Approximation of the Laws Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products* (85/374/EEC). The Consumer Protection Act, 1987, now has implemented this Directive in U.K. (see Part I.).

[67] The *European Convention on Products liability in Regard to Personal Injury and Death*, European Treaty Series No. 91 (1977).

[68] The Law Commission, *Liability for Defective Products*, Law Com. No. 82 (1977).

[69] The *Royal Commission on Civil Liability and Compensation for Personal Injury*, (Popularly known as the Pearson Commission.) Comnd. 7054 (1978).

[70] Law Commission, *Liability for Defective Products* (*supra*), pp.6-7 and 11-12.

they will transfer their burden to the consumers. However, in view of the United States experience, it has been stated that insurance expenses to cover the risk adds only a small amount to the manufacturing costs.[71]

Common Law Principles of Contract and Quality Assurance

Product quality issues are regarded as a matter falling largely within the province of the law of contract. If a product is not qualitatively sound, it will defeat consumer expectation. The consumer's loss is largely economic and is different from personal injury or damage to property arising out of a defective product. This does not mean that the physical damage such as personal injury suffered as a result of eating a substandard article of food or damage to property other than the defective product itself are not recoverable in an action for breach of contract. It has long been accepted that such physical losses are actionable since they may be regarded as consequential upon the defectiveness of the product itself, provided the damage is foreseeable

Where a product suffers from defect in quality, the consumer's principal remedies will be against the retailer rather than the manufacturer or producer of the goods. The retailer of goods becomes a guarantor of the quality and safety of the goods he sells.[72] The reason in most cases is the absence of privity of contract between the consumers and the manufacturer[73]

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[71] See the Ontario Law Reform Commission, *Report on Products Liability*, Toronto, Ministry of the Attorney General (1979), p.13.

[72] See for example, *Godley* v. *Perry*, [1960] 1 All E.R. 36 (Q.B.). In this case the retailer was held liable for eye injuries caused to the child purchaser of a defective catapult. Similarly, in *Wilson* v. *Rickett Cockrell & Co. Ltd.*, [1954] 1 Q.B. 598, the seller of a brand name domestic fuel was held liable for damages caused to the plaintiff.

[73] The requirement of privity of contract is abandoned in England.

Since the predominant means by which a consumer may obtain redressal for defects in the quality of goods, he or she acquires, will be under the law of contract, it may be necessary to consider the different varieties of contract based on which goods are generally supplied. In many instances, the contract will be one of sale within the meaning of the Sale of Goods Act.

It is the sale of goods legislation that implies many terms into a contract for the sale of goods, which favour the consumers considerably. As seen earlier, some of these implied terms would not translate directly to all contracts for the supply of goods since all such contracts may not involve in the transfer of property. But a consumer of goods, supplied under a contract of hire or a contract for work and materials, is likely to expect the goods supplied to satisfy reasonable standards of quality as in the case of an outright purchase.

The Sale of Goods Act, 1930 defines[74] a contract for sale of goods as one under which 'the seller transfers or agrees to transfer the property in goods to the buyer for a price'. Because of this definition, any contract for the supply of goods, which does not have as its principal object the transfer of property in goods, will not fall within the Act. Similarly, if a contract involves the transfer of possession, but not the property in goods, as in the case of contracts of bailment, the contract fall outside the scope of the Sale of Goods Act. Since the very purpose of a contract for the sale of goods is to facilitate the transfer of property in those goods, if a contract serves some other predominant purpose, it is likely that the contract falls outside the scope of the Sale of Goods Act. For instance, a contract for hire purchase, which

[74] See, The Sale of Goods Act, 1930, s.4 (i). For corresponding English law see, the Sale of Goods Act, 1979, s. 2(1).

confers on the consumer an option to purchase as opposed to an obligation to purchase, is not a contract for the sale of goods. But in England, terms identical to those, which apply to sale of goods contracts, are implied in hire purchase contracts[75].

Restitutionary Remedies and Quality Control

The remedy of restitution is based on a reversal of an unjust enrichment by the defendant at the expense of the plaintiff. A restitutionary remedy may arise quite independently of any contract. Such a situation may arise where there has been an induced mistake of fact caused by a deliberate misrepresentation, which results in a transfer of wealth, by the plaintiff to the misrepresented. In those circumstances, the enrichment of the defendant can be reversed through a court order for rescission of the contract entered into by the consumer and return of the benefit received., In the context of restitution within the contract, the main reasons why enrichment may be regarded as unjust are that the benefit has been conferred by mistake or due to a misrepresentation or by compulsion of some sort[76].

Generally, if there is breach of a valid contract, the appropriate remedy is an award of damages to protect the plaintiffs' expectation. Hence, what matters much is the loss suffered by the plaintiff. However, in case of a serious breach of contract, one of the options open to the plaintiff is to terminate his performance obligations. In these circumstances the plaintiff may seek to recover any payment he has made on the ground that there has been a total failure of consideration. This remedy is

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[75] See the provisions of the supply of Goods (Implied terms) Act, 1973 and the Supply of Goods and Services Act, 1982.

[76] For a brief discussion on the restitutionary remedies available to consumers, See David Oughton and John Lowry *supra* n. 30 at. pp.138-144.

restitutionary in nature since the contract has come to an end with the result that the plaintiffs' expectation interest is no longer protected[77].

Protection of Trademarks and Quality Control

Trademarks,[78] property mark[79] and brand names[80] occupy a unique position in the market. Many products are identified through their trademarks and brand names. Manufacturers are quite often distinguished through the different trade marks applied to their goods. Consumers use the trademark as the shortcut to know the manufacturers. The quality standards of many products can be easily discernible by the consumers solely by looking at the trademarks. The trademarks in this sense might have established a good will among the consuming public and the consumers see the invisible manufacturer through the trademark. The good will and reputation that the manufacturer acquired in the market over the years by producing quality goods has in common law, taken the form of an incorporeal property capable of legal protection.

The thrust of common law and statute law while protecting trademarks was to protect the owner of the trade mark from invasion by another into the property rights. Therefore, against violation of the property rights in trademarks only the owner of the trademark or his assignee could complain and no others. Right over trade marks, being a private right, was not enforceable by consumers. Hence,

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[77] *Ibid.*

[78] The Trade and Merchandise Marks Act, 1958, S.2(I)(j) defines a trade mark to include any device, brand, heading, label, ticket, name, signature, word, letter or numerical or any combination thereof.

[79] A property mark is used for denoting that a moveable property belongs to a particular person. While trademark denote the quality of goods the property mark devotes the ownership in them. For a detailed discussion on the difference between the two, See Salil K. Roy Chowdhary & H.K.Saharay, *Law of Trade Marks, Copy Right, Patents and Designs,* Kaimal Law House, Calcutta (1999), p.446.

trademark protection was entirely within the domain of the owners of the trademarks.

In the present day global market, protection of trademarks and brand names is not the exclusive concern of its owners. Trademarks and trade names provide many advantages to the consuming public too. The trust and confidence which the public repose on a product identified through a brand name or a trade mark will be jeopardized when the goods supplied through that trade mark is entirely different from the one produced by the original manufacturer. Hence the law allows both traders and consumers to initiate action to protect trademark and trade name. The traders exercise this right through infringement action and passing off action. These protections ensures quality and genuineness of consumer products

A trademark can be described as a sign that individualises the goods or services of an establishment and distinguishes them from the goods or services provided by its competitors.[81] A definition of this type attributes two main functions to the trademark viz. (i) it indicates the source or origin of the product from where it comes and (ii) it gives the product a unique personality of its own. In the market-driven economies of the modern world, trademarks operate as an important source for product differentiation especially in consumer goods. A consumer normally attributes certain qualities with the products available in the market sold under different trademarks. A trademark thus helps the consumers to attach certain characteristics such as quality, durability, performance, and efficiency and after sales services. The

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[80] Brand names are letters or words or numerical by which a product is identified and asked for. Also see for details Salil K. Roy *et. al., ibid.*

consumer, while making a choice, assumes about the quality of the product sold under a trademark. He expects the manufacturers to maintain certain standards irrespective of who makes the product or where it is made. Therefore, a trademark creates a phantom manufacturer, who through the distinct production processes ensures that goods of uniform quality are made available to the consumers always.[82]

However, this perception is only notional. The trademark laws all over the world do not require the proprietor to maintain any declared quality or performance. The issue of standards to be maintained is entirely at the discretion of the enterprise. If it feels that the benefits from lowering quality outweigh the loss in market share it may confront, it may proceed with selling goods of inferior quality. The stake for the proprietor of the trademark is the goodwill he has been able to create for the particular brand. Thus, the consumer goodwill is the measure of the success of a trademark and therefore, a source of its economic value. Building up of goodwill requires heavy investments and adoption of fair and prolonged marketing techniques. The actual domain of goodwill lies partly with the consumers' psychology and partly with the quality, consistency and performance of the goods the trademarks represent.[83]

The enormous amount of economic value a successful trademark has in the market called for their protection in law. From the consumers' perspective, trademarks play a key role in facilitating their choices. However, trademarks law essentially functions in favour of the proprietors for their profit maximisation.

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[81] Aswani Kumar Bansal, *Law of Trade Marks in India*, Commercial Law Publishers, Delhi (2003), p.6.
[82] *Id.* at p.7.
[83] *Ibid.*

Trademarks in fact establish a monopoly of its use and application on its proprietor, who strives for its non-use by others even on different goods or services. The trademark owners, through advertising campaigns, create brand loyalty and establish product differentiation. The end result would be the creation of an enviable goodwill and market power, which may nip competition from others and can also place an entry barrier for new firms producing same or similar goods into the market.

Property in a Trademark

Trademarks confer on its owners two types of property rights. All rights attached to the trademark primarily are in a form of intangible property. Secondly, as stated earlier, a right of goodwill as distinct from property is created which can be sold or even shared by licensing. These two forms of rights enjoyed by owners of trademarks play an important role in the business.

Modern Role of Trade Marks

In general, trademarks perform four main functions:

(i) to identify the sellers' goods or services and to distinguish them from goods or services sold by others;

(ii) to signify that all goods or services bearing the trade mark come from a single source;

(iii) to signify that all goods bearing the trade mark are of equal level of quality, and

(iv) as a prime instrument in advertising and selling of goods or services.[84]

In its purest form, the trademarks law has two primary objectives viz. (i) to protect the consumers from confusion and (ii) to protect the investment of the owner of the trademark.[85] Trade marks cause consumers to associate the mark with the trademark owners' product. This form of identification prevents customer confusion, mistake and deception about the source and quality of the products purchased. A consumer buying a product bearing a particular trademark is assured that another product purchased with the same mark is of the same quality. Moreover, a trademark tells a consumer that the product comes from one particular source, and it distinguishes that product from other similar products bearing different trademarks. By recognising the source of goods in this way, the consumers' search costs are also reduced. In this way, the trademarks become an easy method to identify and distinguish different products.[86]

Trademarks law also protects the investment of the trademark owner. As stated above, consumers rely on trademarks as a means to identify the source of the goods they are buying or using. Customers repeatedly buy from the same source because of the consistency in quality of the goods coming from that source. By restricting others from exploiting the recognition and consumer goodwill, another's mark has earned the owner's efforts in developing his product stands protected. If the producer fails to maintain a consistent level in quality or reduces the quality below what consumers expect from earlier experiences, the value of the trademark to that

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[84] See J.T.McCarthy, *Trade Marks and Unfair Competition*, Rochester, New York (1973), and Vol.1, p.86.

[85] Noah B.Bleicher, "Trade Marking Tragedy: The Fight for Exclusive Rights to Let's Roll", 52 *Emory Law Journal*, 1847 (2003), at pp.1852-53.

[86] *Id.* at p.1853.

extent is reduced.[87] Hence, trademark protection tends to encourage expenditures in investments on quality because improvements in quality will be recognised as coming from the trademark owners' goods and none other.[88]

Stated briefly, the essential function of a trademark in law and economics is to indicate the origin of goods or services and to distinguish them from those of other undertakings. In other words, the role of a trademark is to act as a badge of origin distinctive in nature perceived as trademarks by consumers and those in the production and distribution chain.[89] So long as this function is performed, the trademark will be an asset for its owner.

The Origin Function of Trademarks

The role of trademark as an indicator towards the origin of a product has been deteriorated considerably during modern times through brand proliferation. However, since consumers can trace the origin of their purchase through trademarks, it would help them substantially in their purchasing decisions. Once a product is identified through a certain trademark, it is possible for consumers to purchase it again if they are satisfied about it or to desist from its repeated purchase if they feel dissatisfied.

The Quality Function of Trade Marks

It has been stated earlier that trademarks contribute in protecting consumers against confusion in the market place. Trademarks facilitate quality checking carried out by consumers themselves through their own experience. In this sense, trademarks give a guarantee of consistency than quality. Opinions differ as to whether trade

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[87] *Ibid.*

[88] William M.Landes & Richard A. Posner, "Trade Mark Law: An Economic Perspective", 30 *Journal of Law and Economics*, 265, 270 (1987).

[89] Professor David Brain Bridge, "Smell, Sound and Shape Trade Marks: An Unhappy Flirtation", [2004] J.B.L 219, 222.

marked goods or services are of same level of quality or they give consistency in quality at all.[90]

Quality identification function indirectly serves the consumer's interest in providing him with better information. An unprecedented high quality is generally expected from goods marked with reputed trademarks. However, no law expressly or impliedly imposes an obligation on the trademark owner to maintain any specific quality for products bearing his mark. The trademark owner is thus free to improve or deteriorate the quality of his goods or services at any time without running the risk of loosing his trademark rights. Normally, the trademark owner would not desire to diminish the quality of his branded goods. Nevertheless, legally there is no obstacle whatsoever in the lowering of quality.

Trademarks operate as the basic element in building up a reputation for the products or services to which they are attached and to the firm providing them. Thus, the fundamental function of trademarks is the creation of good will. Goodwill is created by influencing the behaviour of the buyer in purchases and building brand loyalty. This is possible only through customer satisfaction based on parameters like price, quality, performance etc. Trademark protection in this sense would accord indirect benefits to consumers, as they are assured of the origin of the product though not always its quality. However, it is possible to attach liability on the manufacturer of trade marked goods if some associated literature, leaflets or brochures or

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[90] See E.W.Hanak, "The Quality Assurance Function of Trade Marks", 65 T.M.R. 318 (1975) and S.A.Diamond, "The Historical Development of Trade Marks", 65 T.M.R. 289 (1975), as quoted in A.K.Bansal, *Law of Trade Marks in India*, Commercial Law Publishers, Delhi (2003), p.21.

advertisements makes certain representations as to quality or performance of the product.[91]

Coercing the User of Trade Marks to Ensure Quality

The trademarks perform another useful function of far reaching advantage to the consumers. In the process of trademark licensing, the trademark owners not only acquire money, but also exercise a right of quality control over the licensees. In this process, the consumer is assured of the quality expected of from the product originally manufactured and marketed by the trademark owner himself. However, if the proprietor allowed his trademark to be placed on the goods on payment of royalty or for a specified price without any supervision as to the consistency or quality of the product, it may give rise to cheating the consumers.

Non-supervision as to quality requirement of licensed products can be a ground for cancellation of registration as registered user of trademarks.[92] When a trademark is used without supervision of quality, under the Trade and Merchandise Marks Act 1958, it could be treated also as trafficking in trademarks.[93] However, this Act had not provided for any punitive sanction against a trademark owner indulging in trademark trafficking. The recent Trade Marks Act of 1999 has withdrawn from the issue of trafficking in trademarks on the ground that such practices are minimal and it will get self-regulated by market forces.[94] However, we cannot always presume that market forces by itself would work out miracles. In the interest of the consumers

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[91] The law in this respect is uniform for trade marked goods and others provided the producer can be traced in any way. The Consumer Protection Act, 1986 considers representation of this kind as an unfair trade practice. See s.2 (1)(r) with its explanation given in the 1986 Act.

[92] The Trade and Merchandise Marks Act, 1958, s.52 (1)(d).

[93] *Id.*, s.48 (1).

[94] See A.K.Bansal, *supra.* at p.216.

in India, majority of whom are illiterate, supervision of quality of goods produced by licensees of trademarks by the proprietors of the trademarks would have been a matter of great interest. If we understand the role that trademarks perform in the market and the advantages that they confer on consumers properly, legal insistence on supervision by the proprietors on quality of goods on which their trademarks are affixed would go a long way in protecting the consumers. Law should make it obligatory for the proprietors to do so and dispel them from trafficking in trademarks by prescribing proper punishments.

Implied Warranty on Sale of Marked Goods

In spite of its obvious advantages to consumers and proprietors, the notion about the quality function of trademarks in India is often misconceived. It has been stated that even educated people do not know that a trademark by itself is not a guarantee of any quality.[95] However, the new Trade Mark Act of 1999 has implied into the sales contract a warranty by the seller or provider of services that the goods or services marked with a trademark is genuinely applied.[96] This provision would enable a consumer who has been misled by a falsely applied trademark or trade description – which is so rampant in the market – to be compensated by the seller or provider of services as the case may be. Consumers and consumer associations are to be sensitised about this salutary provision in the Act. Consumer vigilance depicted in this manner would certainly help in the better administration of the trademark law.

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[95] A.K.Bansal, *supra* at p.22.

[96] The Trade Marks Act, 1999 s.126. See also the Trade and Merchandise Marks Act, 1958, s. 96. It is also to be noted that (i) applying false trade marks or trade descriptions, and selling goods or providing services with false trade marks or false trade descriptions have been made cognizable offences. See *id.*, s.115.

The trademark law prescribes for two types of remedies for protection of trademarks. The civil and criminal law machineries can be put into motion to safeguard the interests of those concerned. For trademarks registered under the Act, the normal remedy is infringement action. Trademarks, which are not thus registered, the appropriate remedy would be the common law action for passing off.

The trademark law in India has been thoroughly remodelled by the recent Trade Marks Act, 1999. This enactment has divided registered trademarks into two types for actions on infringement[97] viz. (i) registered and (ii) registered and reputed in India. In the case of ordinary registered trademarks, if a mark confusingly similar to a registered trademark is used on *same or similar goods or services*, it would constitute infringement if such use is likely to cause confusion in the mind of the public.[98] In the case of registered trade marks having reputation in India, if a similar mark is used in relation to *even dissimilar goods or services* and it is found that an unfair advantage is being taken without due cause or the use of the offending mark is detrimental to the distinctive character or repute of the reputed registered trade mark, it would constitute an infringement.[99] To prove infringement in relation to use of trademark on differential goods or services, it is enough if reputation of the trademark is established.

The changes made by the new Act by enlarging infringement action even to dissimilar goods or services are positively advantageous to consumers. It is known that a reputed trademark, even if applied to dissimilar goods, would persuade consumers to think that its origin is from the owner of the trademark whom they know

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[97] See the Trade Marks Act, 1999, s.29.
[98] *Id.*, s. 29(2).
[99] *Id.*, s. 29(3).

from their previous experiences of purchase. This belief in all probability would lead them to go for a wrong purchase. Extension of the infringement action to dissimilar goods and services for reputed registered trade marks would certainly save consumers from confusion since it would dispel others from using reputed trademarks to their goods or services.

The new Act also enlarged the incidences of infringement by incorporating more actions constituting infringement.[100] Instances of infringement thus cover the use of trademarks or trade names even in business papers or in advertisements.[101]

The Infringement Action

Infringement action is essentially a civil law remedy available under the law of torts. Later it is recognised statutorily by the Trade and Merchandise Marks Act, 1956. Under the Act, this remedy is made available to the proprietor of a trademark in addition to the criminal sanctions enshrined for falsifying[102] or falsely applying[103] trademarks. But criminal actions under the Act are confined to registered trademarks. However, civil action for damages is available for unregistered marks

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[100] See s. 29(2) to (10).

[21] *Ibid.*

[102] The Trade and Merchandise Marks Act 1958, s.77 defines falsification of trademark as "A person is deemed to falsify a trade mark, if either –

(a) without the assent of the proprietor of the trade mark, makes that trade mark or a deceptively similar trade mark;

(b) falsifies any genuine trademark, by alteration, addition, effacement or otherwise."

[103] *Id.*, s.77 Relevant portion of the section reads: "A person shall be deemed to falsely apply to goods a trade mark, if without the assent of the proprietor of the trade mark –

(a) applies such trade mark or a deceptively similar trade mark, to goods or any package containing goods;

(b) uses a package bearing a mark, which is identical with or deceptively similar to the trademark of such proprietor, for the purpose of packing, filing, or wrapping therein any goods other than the genuine goods of the proprietor of the trademark."

also. The action for infringement is a statutory remedy conferred on the registered proprietor of a registered trademark for the vindication of the exclusive right.[104]

Infringement occurs when a person, other than the registered proprietor or a licensed user, uses an identical or deceptively similar trademark, in relation to any goods in respect of which the trademark is registered.[105] In respect of some trademark[106] a relief for infringement will not be granted if the use of the trademark is not likely to deceive or cause confusion.

In deciding whether there is an infringement, the following questions will be considered:

(i) Whether the defendants' trademark is identical with the plaintiffs' trademark?

(ii) Whether the defendants' trade mark contains or consists of the whole or any essential or leading features of the plaintiffs' mark combined with other matters, and

(iii) Whether the defendants' mark is deceptively similar to and is a colourable imitation of the plaintiffs' mark?

In an action for infringement it is essential that the plaintiff must make out that the use of the defendants mark is likely to deceive visually, phonetically or otherwise. Therefore, if the defendant has adopted the essential features of the

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[104] Trade and Merchandise Marks Act, 1958 s.28: *Rights Conferred by Registration* – (1) Subject to other provisions of this Act, the registration of a trade mark shall, if valid, give to the registered proprietor of the trade mark the exclusive right to the use of the trade mark in relation to the goods in respect of which the trade mark is registered and to obtain relief in respect of infringement of the trademark in the manner provided by this Act.

[105] The Trade and Merchandise Marks Act, 1958, s.29.

[106] Trademark registered under Part B of the Trademark register. For a detailed discussion on the point see, Salil K.Roy Chowdhary and H.K. Saharay, *supra* n. 79.

trademark of the plaintiff, any difference in the get up and packing is immaterial. Similar is the case regarding indications relating to a trade origin different from that of the registered proprietor of the mark. In order to come to this conclusion, the broad and essential features of the two marks are to be considered. It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with the product.[107] The totality of the impression produced by the trademark should be such as to cause confusion or deception in the mind of the consuming public. Comparison of the marks side by side is not a sound test since a purchaser will seldom have the two marks actually before him when he makes his purchase.[108]

Even though phonetic and or visual similarity in the trademarks is considered as the distinctive feature to determine whether an infringement has taken place, it may occur in case of similarity in the wholesome appearance of the two products. In *Camlin Pvt. Ltd.* v. *National Pencil Industries*[109], the plaintiff's pencil was marked with the trademark "Camlin flora". The defendants' pencil was marked with "Tiger flora" but in appearance both were similar. It was held that there was no similarity or resemblance phonetically or visually between the two marks. However in view of the similarity in appearance of both the pencils, which were purchased by children who would be confused, interim injunction prayed for was granted by court. However, where the plaintiffs' registered trademark and the defendants' trademark were dissimilar and a reasonable prudent buyer was not likely to be

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[107] *Parle Products (P) Ltd.* v. *J.P.&Co. Mysore*, A.I.R. 1972 S.C. 1359.
[108] *R.S.Kandasamy* v. *New Jyothi Match Industries*, A.I.R. 1995 Mad. 421.
[109] A.I.R. 1988 Del. 393.

misled no injunction shall be granted.[110] But when the plaintiff used the name 'Fevicol" for the adhesive manufactured and marketed by it and the defendant used "Trevicol" for similar adhesive, the court opined that the suffix "vicol" is found common in the two marks even though there is a difference in the prefix. In an overall comparison, a visual similarity in the writing style is also seen. The court held[111] that the two marks were deceptively similar both phonetically and visually. In *Bombay Oil Industries Pvt. Ltd.* v. *Ballarpur Industries Ltd.*[112], the plaintiffs complained that their registered trade mark 'saffola' is infringed by the defendants mark 'shapola'. Viewing the mark as a whole the court opined that there is every likelihood that the two marks may give rise to confusion to the consumers, as they are phonetically similar.

Passing off Action

The underlying principle in passing off action is that no man shall be permitted to sell his goods under the pretence that they are the goods of another man. It is immaterial whether the misrepresentation or deception has proceeded from a registered or unregistered user of trademark. One shall not be permitted to represent his own wares as that of somebody else.[113]

It has long been considered an actionable wrong for a person to represent for trading purposes that his goods or his business is that of the plaintiff. It is of no consequence whether the representations are effected by direct statements or by

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[110] *Brij Mohan Dutta* v. *Jallo Subsidiary Industries Co. (India)* Pvt. *Ltd.*, A.I.R. 1990 P.&H. 229.
[111] *Pidilite Industries Pvt. Ltd.* v. *Mittees Corporation*, A.I.R. 1989 Del. 157.
[112] A.I.R. 1989 Del. 77. See also, *Revlon Inc.* v. *Sarita Manufacturing Co.*, A.I.R. 1998 Del. 67; *Biopharma* v. *Sanjay Medical Store*, 66 D.L.T. 705 (1997) and *Cadila Laboratories Ltd.* v. *Dabur India Ltd.*, 66 D.L.T. 741 (1997).
[113] *N.R. Dongre* v. *Whirlpool Corporation*, (1996) 5 S.C.C. 714.

using some of the badges by which the goods of the plaintiff are known. Same is the case where colourable resemblance calculated to cause the goods to be taken by ordinary purchasers for the goods of the plaintiff.[114] The concept of passing off in brief is that the goods in question are telling a lie about themselves which is calculated to mislead the public.[115] The law of passing off is designed to protect traders against that form of competition which consists in acquiring for oneself by gales or misleading devices the benefit of the reputation already achieved by rival traders.[116] The law of passing off is intended to prevent unfair trading and to afford protection to the property right of a trade in its goodwill.[117]

Judicial attempts to identify the ingredients that constitute the basic characteristics of passing off gave rise to substantial enrichment to the legal literature on the subject. A juristic travel into few of them will provide us with a good idea about what constitutes a passing off. The High Court of Andhra Pradesh in *Teju Singh* v. *Shanta Devi*[118] has laid down the test to decide whether a passing off has taken place. According to the Court an answer to the question whether the words used in the trade names of the plaintiff are mere descriptive words of common use or they have come to acquire a distinctive or secondary meaning in connection with the plaintiffs' business is material. If the use of those words in the trade names adopted by another is likely to deceive the public, it is a case of passing

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[114] T.A. Blanco White, *Kerly's Law of Trade Marks and Trade Names*, Sweet & Maxwell, London (1966), p.361.

[115] R.F.V.Heuston, *Salmond on the Law of Torts*, Sweet & Maxwell, London (1973), p.408.

[116] *Ibid.*

[117] W.V.H. Rogers (Ed.), *Winfield & Jolowicz on Torts*, Sweet & Maxwell, London (1998), p.670. Also see *Sarabhai International Ltd.* v. *Sara Exports International*, A.I.R. 1988 Del. 134.

[118] A.I.R. 1974 A.P. 274. See also, *Sree Sai Agencies (P) Ltd.* v. *Chintala Rama Rao*, A.I.R. 1998 A.P. 86.

off. In the opinion of the Allahabad High Court[119] a passing off action would lie even if the defendants were not manufacturing or producing any goods similar to that of the plaintiff. A passing off action would lie where a misrepresentation is likely to be caused[120] or a wrong impression created, as if the product was of someone else.[121]

Lord Diplock[122] has classified the essential characteristics of a passing off action. According to him it includes (i) misrepresentation, (ii) made by a person in the course of trade, (iii) to prospective customers or ultimate consumers of his goods or services supplied by him, (iv) which is calculated to injure the business or goodwill of another trader (in the sense that it is a reasonably foreseeable consequence), and (v) which causes actual damage to the business or goodwill of the trader by whom the action is brought or will probably do so.

The Delhi High Court in *Hindustan Radiators Co.* v. *Hindustan Radiators Ltd.*[123] has listed out eight distinctive features that must be established by the plaintiff for a successful action of passing off. They are:

(i) The plaintiff has been using its trading style and trade mark for quite a long period and continuously, whereas the defendant has entered into the said field only recently.

(ii) There has not been much delay in the filing of the suit for injunction by the plaintiff.

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[119] *Bata India Ltd.* v. *Pyare Lal & Co.*, A.I.R. 1985 All. 242.
[120] *Id.* at p. 251.
[121] See also, *Ranga Watch Co.* v. *N.V.Philips*, A.I.R. 1983 P&H 418.
[122] *Erven Warnink etc.* v. *J.Townend & Sons (Hill) Ltd.*, [1979] 2 All E.R. 927 (H.L.).
[123] A.I.R.1987 Del. 355.

(iii) The goods of the plaintiff have acquired distinctiveness and are associated in the minds of the general public as goods of the plaintiff.

(iv) The nature of activity of the plaintiff and that of the defendant are the same or similar.

(v) The goods of the parties, with which the trademark of the plaintiff is associated are the same or similar.

(vi) The user of the same trade mark or trade name by the defendant is likely to deceive and cause confusion in the public mind and injury to the business reputation of the plaintiff

(vii) The sphere of activity and the market of consumption of goods of the parties are the same

(viii) The customers of the plaintiff *inter alia* include uneducated, illiterate and unwary customers, who are capable of being deceived, confused or misled.[124]

A more recent view on passing off can be seen in the decision of the Kerala High Court in *National Garments Kaloor* v. *National Apparels*.[125] The Court held that the plaintiff, in an action for passing off, has to establish that his products have derived a distinctive character recognised by the market. The principle of law, according to the court is that nobody has any right to represent his goods as the

[124] Also see *Charter Extractions Ltd.* v. *Kochar Oil Mills Ltd.*, A.I.R. 1996 Del. 144. Where the court held that it is not necessary to prove that all persons or substantial number of persons in the market are aware of the mark. It is enough that a good number of them identify the goods as that of the plaintiff. In *Malhotra Tyre Service Co.* v. *Malhotra Tyres Pvt. Ltd.*, A.I.R. 1991 Del. 94, the court held that the plaintiff has to prove that the name has acquired a distinctive meaning in connection with his business. Even though the trade name adopted by the defendant is similar to that of the plaintiff, he was dealing only in tyre retrading and the defendant in manufacturing, sale and purchase of tyres and tubes. As such it cannot be held that the defendant passed off his goods as that of the plaintiff. In *Khemrai Shrikrishnandas* v. *Garg & Co.*, A.I.R. 1975 Del. 130, the court held that actual deception is not required to be proved but reasonable ground of apprehension of deception must exist.

[125] A.I.R. 1990 Ker. 119.

goods of somebody else and to sell it in the market for his own advantage. In general, any misrepresentation calculated to injure another in his trade or business can be regarded as passing off.

The Supreme Court of India had the occasion to determine the concept of passing off in *Wander Ltd.* v. *Antox India (P) Ltd.*[126] The court has held that passing off is a species of unfair trade competition or an actionable unfair trading by which one person, through deception attempts to obtain an economic benefit of the reputation which another person has established for himself in a particular trade or business. The action on the tort of passing off according to the court includes a misrepresentation made by a trader to his prospective customers calculated to injure, as a reasonable foreseeable consequence, the business or goodwill of the other trader.[127]

Trademark Law and Consumers: a Critical Appraisal

The law relating to trade mark protection is, essentially attuned to confer monopoly rights on the proprietor. The goodwill and reputation that a trader has acquired through the long and continuous use of the trademark shall remain infallible. This intangible property is tried to be protected by the law relating to trade marks. The epicenter of this branch of law is not consumer protection but protection of the private property having a public flavour. However, as a result of the protection afforded to the proprietor of the trademark, consumers also get collateral advantage in the sense that they are saved from deception.

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[126] (1990) Supp. S.C.C. 727.

[127] In *Cadbury Schweppes (P) Ltd.* v. *Pub Squash Co. (P) Ltd.*, [1981] 1 All E.R. 213 (P.C), the Privy Council opined that the respondent deliberately taking advantage of the appellants' advertising campaign will not amount to the tort of passing off since the public are not deceived or mislead by it.

The traders go for imitation of trademarks to reap its economic advantage consequent to representing his goods as that of another trader who has established himself in the market with a trade mark which the public value most due to its inherent virtues and quality standards. The defendant lack all these and hence he wants to sell his goods as that of the plaintiff. Safeguarding the economic interest of the proprietor of the trademark thus affords protection to the consumers. Consumers are thus assured of the genuiness of their choice in their purchasing decisions, which was mainly based on its qualities.

However, the Act provisions do have some inherent weaknesses. The offences of (i) falsely representing a trade mark as registered,[128] (ii) improperly describing his place of business[129] and (iii) falsifying entries in the register of trade marks[130] have been made cognizable only if lodged by the Registrars of Trade Marks or any officer authorized by him in writing.[131] It is true that a sustainable prosecution of the offences said above is possible only by the above said officials who are the custodians of the relevant official records. However, normal investigating agencies of the state like the police officers, consumers and consumer organizations would have been permitted to associate with the process with a view to encourage better administration of the Act. Even the 1999 Trade Marks Act has not changed the position.[132] However, this recent enactment has made offences of (i) applying false trademarks and trade descriptions,[133] (ii) selling goods or services with false trade

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[128] The Trade and Merchandise Marks Act, 1958, s.81.
[129] *Id.*, s.82.
[130] *Id.*, 83.
[131] *Id.*, 89.
[132] The Trade Marks Act, 1999, s.115.
[133] *Id.*, s.107.

descriptions[134] and (iii) falsification of entries in the Register of Trade Marks[135] expressly cognizable.[136]

Competence to lodge a complaint for trademark violation came for consideration of the Supreme Court of India in *Vishwa Mitter* v. *O.P. Poddar*[137]. The complainant in this case was a dealer who was habitually selling the goods marked with the registered trademark. Lower court dismissed the complaint on the ground that the complainant is not the registered owner of the trademark. The High Court also dismissed the appeal on the same ground. In this appeal, their lordships of the Supreme Court held that Section 190 of the Code of Criminal Procedure, which deals with the issue of taking cognizance, does not speak of any particular qualification for the complainant. Therefore, generally speaking, any one can put the criminal law in motion unless there is a specific provision to the contrary provided for in the statute. Therefore, if the person complaining has a subsisting interest in the protection of the registered trademark, his complaint cannot be rejected on the ground that he had no cause of action or sufficient subsisting interest to file the complaint.[138]

In *State of U.P.* v. *Ram Nath,*[139] the Inspector of Trade Marks reported a trademark infringement to the nearest judicial magistrate. He ordered the police to investigate into the offence. The Supreme Court turned down the argument of the respondent that the Trade Marks Inspector had no right to make a complaint and

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[134] *Id.*, s.108.
[135] *Id.*, s.109.
[136] *Id.*, s.115. These offences were not expressly made cognizable under the 1958 Act.
[137] A.I.R. 1984 S.C. 5.
[138] *Id.* at p.8, *per* D.A.Desai, J.
[139] A.I.R. 1972 S.C. 232.

therefore the prosecution was invalid.[140] It can be seen that the judicial decisions permit launching of prosecution for infringement of trademark, registered or not registered,[141] by any person interested in the protection of that mark. It can also be argued that the consuming public also has a subsisting interest in the protection of the trademarks and trade names. Therefore, consumers can also be complainants against trademark violations. However, it is better to clarify the law by making suitable amendments made in the Trade and Merchandise Marks Act.

Enforcement of remedies is another area in which the trademarks law needs change. Trademark violations are actionable only at the instance of the proprietors or licenced users. The consumers who are deceived by the falsified trademarks find no remedy under the Act. Consumers and consumer associations are permitted to initiate civil action only under the Consumer Protection Act, 1986. Consumer associations can effectively check injustices perpetuated to the consuming public if they are permitted to approach the court under the Trade and Merchandise mark Act, 1958. Law of trademark protection must necessarily recognise this perspective.

Statutory Liability for Defective Products

In England, and in other countries in the European Union, supplementing the common law rules,[142] the law imposes on the producer strict liability and obligation to compensate the consumer wherever damages are caused by a defect in the

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[140] It was also held in this case that the contention of abandonment of the trademark for some years by the company would not absolve the respondents from criminal liability. Abandonment operates as a ground for application to remove the trademark from the Register of Trade Marks. It does not entitle the respondents to use the trademark whether it is current or has been removed from the register. *Id* at p.235 *per* P. Jagamohan Reddy, J.

[141] A criminal action for trademark violation can be initiated for registered as well as unregistered trademarks. See *State of U.P.* v. *Ramnath, supra* n. 92 at p.235.

product.[143] Primary liability in respect of defective products rests with the producer rather than the retail supplier. In order to make a person liable under the British Consumer Protection Act, 1987, it must be established that he has supplied a defective product[144] and that the supply was in the course of his business[145]. It is recognised as a defence for the producer to show that the product was not supplied[146] to make profit[147].

Liability under the Act is not confined to those who manufacture a finished product. The liability extends to those who have won or abstracted a raw material and to those who have processed a natural product where the essential characteristics of the product are due to that process.[148] Similarly, a person who puts his own name on a product thereby holding himself out as the producer will also be treated as a producer[149]. Any person who in the course of his business imports any product from outside for supply to another is also a producer.[150] If it is not possible to identify the producer or importer of a product, the Act provides for secondary liability on the part of another supplier of the product.[151] For the purpose of making the supplier liable for the harm suffered by the consumer, the following requirements must be satisfied:

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[142] The Consumer Protection Act, 1987, s.2. This section says that the liability created by this part shall be without prejudice to any liability arising otherwise.
[143] *Id.* s.2(1)
[144] *Id.* s. 4(1)(b).
[145] *Id.* s. 46(5).
[146] *Id.* s. 4(1)(b). 'Supply' for the purpose of the Act includes selling, hiring, lending, supply pursuant to hire purchase agreement and a contract for work and materials, exchange for any consideration, provision pursuant to a statutory function, voluntary transfer by way of gift and the provision of a source by which gas or water is made available.
[147] *Id.* s.46(1).
[148] *Id.*, s.1 (2).
[149] *Id.*, s.2 (2) (b).
[150] *Id.*, s. 2(2)(c).
[151] *Id.*, s.2 (3).

(i) The consumer must have asked the supplier to identify the producer.[152]

(ii) The request by the consumer must be made within a reasonable time after the occurrence of the damage.[153]

(iii) It must have become impracticable for the consumer to identify the actual producer[154]

(iv) The supplier must have failed, within a reasonable time of the request to comply with it or to identify the person who supplied him with the product.[155]

These provisions make it important for retailers to keep records of purchases for some more time after initial supply to the consumer, so that they can identify their own supplier, the producer or importer so as to avoid liability on themselves. If the supplier does identify the producer of the product or the person who supplied him the product, he has satisfied the requirements with the result that he will no longer be liable to the consumer.

The fundamental basis of the producer's liability is that the product is defective. A product is defective if it is not as safe as persons generally are entitled to expect.[156] The consumer must prove damage, defectiveness and a causal link between the two.[157] The Act identifies few factors that can be considered in order to determine the safety of a product. These include the marketing[158] of the product, its

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[152] *Id.* s.2 (3)(a).
[153] *Id.* s.2 (3)(b).
[154] *Ibid.*
[155] *Id.* s.2 (3)(c).
[156] *Id.* s.3 (1).
[157] *The product Liability Directive* (85/374/EEC dt. 25 July 1985), Art.4.
[158] The Consumer Protections Act, 1987, s.3 (2)(a).

get up and the provision of instructions or warning about use, expectations about use of the product[159] and the time of supply.[160]

The significance of identifying the 'producers intended market' lies in the safety considerations affected by the group of people targeted by him. For instance, if the product is intended for use by children, or intended for consumption by infirm or aged, it might be expected to reach higher standards of safety than food aimed at ordinary adult population. The Act also allows the court to consider the purpose for which the product has been marketed. This would enable the court to engage in a cost benefit analysis based on the objective of the producer in putting the product into circulation balanced against the risk it creates.[161] It is also relevant to consider whether or not it has been supplied along with adequate instructions for use and appropriate warnings in respect of known dangers.[162] If the producer provides suitable instructions for use or appropriate warnings, this may prevent the product from being defective. Therefore, the fact that a producer supplies an inherently dangerous product does not automatically subject him to the strict liability regime. He can negative the danger created by his product by warning the consumers in a suitable manner. The time of supply is considered relevant particularly in relation to the shell-life of certain products. It is possible that certain products will remain unsold for a considerable period of time. In such circumstances, the product is judged according to the standards of safety, which prevailed at the time when he put the product into

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[159] *Id.*, s.3 (2)(b).
[160] *Id.*, s.3 (2)(e).
[161] Hence the court may treat as sufficiently safe a beneficial pharmaceutical product, which contains certain inherent safety defects, provided the risks to the users are not substantial.
[162] See generally, McLeod, "Instructions as to the Use of Consumer Goods" 97 L.Q.R. 550 (1981).

circulation, and not when the product is supplied to the consumer.[163] It is for the consumer to prove that the defect in the product has caused him damage.[164] The damage recoverable includes that for death or personal injury and for any loss or damage to property.[165]

Even though product quality and safety are different, they are infact so closely interlinked. A product, which is qualitatively poor, cannot be a safe one even though it may not cause severe safety hazards. But goods that are of high quality standards would certainly ensure safety to its consumers. Hence measures adopted to ensure safety of goods are bound to improve the standards of quality of those commodities.

In India there is no general statute dealing with product safety. However, Consumer Protection Act, 1986 provides that sale of unsafe or hazardous product can be a subject matter for lodging and compliant under it.[166] But it is not made clear what products are hazardous and under what circumstance products are to be considered as unsafe. Special statutes enacted for dangerous products like insecticides, pesticides and poisons are dealing with the precautionary measures that are to be taken concerning those products. The absence of an umbrella legislation dealing with the liability of all defective products places the Indian consumers in a very disadvantageous position.

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[163] See The Consumer Protection Act, 1987 s.4 (1)(d) and 4(2)(a). Compliance with the mandatory requirements of a community obligation or a domestic statutory provision can also be taken up by the producer as a defence. (See s. 4(1)(a). Change in the Scientific and Technological development is also recognised as a defence under the Act. (See S.4(1)(e).

[164] *Id.*, s.2 (1).

[165] *Id.*, *s.* 5(1).

[166] The Consumer Protection Act, 1986, s.2(1)(c) (v). Under this section a 'complaint' means any allegation in writing made by a complainant that –

Public Interest Litigation and Quality Control

Latter part of the twentieth century India witnessed the remarkable phenomenon of judicial activism that facilitated increased access to justice for citizens belonging to different income brackets, especially those from the lower strata of the society. Through the new strategy of public interest litigation[167], courts started admitting the right of social action groups and public-spirited men to approach them when legal rights of an individual or class of persons are alleged to have been violated. This added a totally new dimension to the concept of *locus standing* and encouraged public-spirited citizens to litigate on behalf of the poor, illiterate and the oppressed. The public interest litigation that has proved to be an effective tool in checking administrative excesses and governmental lawlessness soon expanded its wings to issues concerning consumers among others[168].

In *Vincent Panikulangara* v. *Union of India*[169], the petitioner was an Advocate by Profession and the General Secretary of the Public Interest Law Service Society, a voluntary organisation. He filed the present petition under Article 32 of the Constitution[170] seeking an order from the court banning the import, manufacture and distribution of drugs recommended for ban by the Drugs Consultative Committee of the Central Government. The petitioner also sought the assistance of the court in asking the Government to constitute a high-powered committee to go into the hazards

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.... "(v) Goods which will be hazardous to life and safety when used, are being offered for sale to the public ...".

167 It is otherwise called as 'social action' litigation.

168 Various environmental issues are taken up by way of public interest litigation even before consumer forums. For a detailed discussion on certain cases that has been thus agitated See Gurjeet Singh, "Consumer Organizations and Environmental Issues: The Indian Perspective", (1994) I C.P.J. p. 1.

169 A. I. R. 1987 S.C. 990.

suffered by people of the country because of such drugs being in circulation and to suggest remedial measures including compensation. Even though the court expressed its view that court is not a fit forum to determine to impose a ban when experts differ, the necessity of a total elimination of all injurious drugs from the market was emphasized. The court also opined that drugs that are found necessary should be manufactured in plenty to satisfy the demand[171]. However, it warned against undue competition by allowing too many substitutes, as it may tend to affect quality[172]. The court expressed its view that consumer representation in the Drugs Consultative Committee must also be ensured[173]. As a token of appreciation towards the petitioner's enthusiasm in bringing before the court such an important issue he was ordered to pay compensation by the Central Government[174].

In *A.S. Mittal* v. *State of U. P.*, [175] the issue of irreversible damage to the eyes of patients operated upon in an eye camp was taken up by a social organisation. Many of the patients lost their eye sight permanently due to infection of the intra ocular cavity caused by the use of contaminated 'normal saline' to clean up the eyes at the time of surgery. It was alleged that the agencies responsible for the camp had virtually disregarded the guidelines issued by government in this regard. The court while awarding compensation to the victims of the tragedy emphasized the need for professional commitment towards proper enforcement of the guidelines. It was found that even though the guidelines insisted that the medicines used should be of standard

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[170] This article provides for a fundamental right to constitutional remedies through Supreme Court of India.
[171] *Id.* at p.996.
[172] *Ibid.*
[173] *Id.*, p.997.
[174] *Id.*, p.998.
[175] A.I.R. 1989 S.C. 1570.

quality and verified to be so by the doctor in charge of the camp, proper verification was not done and hence the tragedy. The court also awarded costs to the petitioner organisation for espousing the cause of the victims.

Common Cause v. *Union of India*[176] was a public interest litigation highlighting serious deficiencies and shortcomings in the mater of collection, storage and supply of blood though blood centers operating in the country. Considering the gravity of the issue involved, the court issued number of directions to the central and state governments. Among others it was ordered to establish National Council for Blood Transfusion as well as State Councils[177]. Since 'blood' being a drug under the Drugs and Cosmetics Act, 1940, it was ordered that the machinery under the Act be strengthened and the frequency of inspection by Drug Inspectors be increased[178]. It was also directed that a separate legislation for regulating collection, processing, storage, distribution and transportation of blood and operation of blood banks be made[179].

Inadvertence and disregard shown by the local administration in keeping the city premises neat and clean was brought before the Supreme Court through a public interest litigation in *Dr. B L Wadhera* v. *Union of India*[180]. Holding that the residents have a constitutional as well as statutory right to live in a clean city, the court issued many directions. The court reminded the authority of their mandatory duties and directed to clean the city every day. Directions were also issued to install enough number of incinerators in hospitals to contain hospital wastes. So as to

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[176] (1996) 1 S.C.C. 753.
[177] *Id.*, pp. 764-765.
[178] *Id.*, p.766.
[179] *Ibid.*
[180] (1996) 2 S.C.C. 594.

improve the quality of public life in the civic society, the court directed the visual media to educate the residents to their civic duties. Local authorities were directed to increase the periodicity of inspections and to wind up the rigour of law to the maximum.

Administrative disregard towards the quality of drinking water supplied in the city of Agra was brought to the notice of the Supreme Court by a public-spirited litigant in *D K Joshi* v. *Chief Secretary, State of U.P.*[181]. Agra being a city of international importance both for tourists inside and abroad, the pathetic condition of the sewage and drainage systems was also brought to the notice of the court in this petition. The court has issued directions to the state Government to appoint a Monitoring Committee[182] headed by the Commissioner of Agra, which in its view must look into the effective functioning of all machineries responsible for the supply of drinking water, disposal of solid waste and sewage.

Public Interest Litigation in the area of consumer protection obviously sub serve wider public good and consumer justice. The Supreme Court while exercising its powers under Art.32 of the Constitution can issue any direction to any public authority through out the territory of India. Since these directions are binding on them better justice is ensured and it also avoids the possibility of filing large number

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[181] A.I.R. 2000 S.C. 384.

[182] It was directed by the apex court that the government notification appointing the Monitoring Committee shall be issued within three months of receipt of its order. *Id. at* p.385. Some Public interest litigations entertained by the Supreme Court on other issues can be found in *Unnikrishnan J. P.* v. *State of A.. P.*, (1993) 1 S.C.C. 645, *Pavai Ammal Education Trust* v. *Government of T. N.*, (1994) 6 S.C.C. 259 and *Manipal Academy of Higher Education* v. *State of Karnataka*, (1994) 2 S.C.C. 283 (Education and Capitation fees); *Khedat Mazdoor Chetna Sangath* v. *State of M.P.*, (1994)6 S.C.C. 260 (Human Rights) and *Rakesh Chandra Narayan* v. *State of Bihar*, A.I.R. 1995 S.C. 208, *Supreme Court Legal Aid Committee* v. *State of M.P.*, A.I.R. 1995 S.C. 204 (Mental Hospitals).

of litigations by individuals and organisations. It is also possible to invoke by way of public interest litigation in order to ensure Consumer Justice.

Competition and Quality Control

Ever since the evolution of the notion of free market economy, it has been suggested that free and fair competition among producers and sellers would be the best tool that will take care of trading abuses. The invisible regulatory mechanism present in a competitive market is said[183] to produce better results than those realized by executive or legislative intervention. However, for bringing in a level playing ground for the entire market operators, some kind of legislative measures are required. This is generally being done by the law of competition. Competition law, while recognizing the rights of businessmen to conduct their own affairs, strives to ensure a fair and reasonable commercial environment. Many countries have their own competition law to sub serve this purpose[184]. Even though competition law is not directly addressing itself towards consumer protection and business standards that are its ultimate purpose. The development of competition law can be traced back to the common law doctrine of restraint of trade. The essence of this doctrine is that it is contrary to public policy to enforce contracts that are in unreasonable restraint of trade. It is therefore considered that a contract in restraint of trade[185] as void unless it has been shown to be reasonable. The issue of reasonableness is to be judged both in relation to the parties and also as to the public interest involved[186]. Due to the

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[183] Mark Furse, *Competition Law of the UK and EC*, Black Stone Press Ltd., London (1999), p. 1. Due to the collapse of most of the planned economies, this view finds its widest acceptance.

[184] The judicial trend was one of reluctance. This is evident from the view expressed by Fry L.J. in *Mogul Steamship v. McGregor*, (1889) 28 Q.B.D. 598. His Lordship has expressed the view that to draw a line between fair and unfair competition is beyond the power of the court. *Id.* at p.625.

[185] For a discussion on the doctrine of restraint of trade, see A.G.Guest (Ed.), *Chitty on Contracts*, Sweet and Maxwell, London (1994), *para* 16-066.

[186] See Mark Furse, *supra* n. 135. at p.284.

presence of the element of public policy in the doctrine of restraint of trade, changing ideas in public policy provided room for enough flexibility to it[187].

In modern commercial contracts, the doctrine of restraint of trade arises only in exceptional circumstances. However, it is possible to consider it as a part of the wider class of illegal or unenforceable contracts. It can also be raised in cases where there are inequalities of bargaining power[188].

Even though the mere act of competition that might have harmful effects for others could not be classified as tortuous, deliberate acts to harm another's economic interests were considered tortuous. Therefore severe acts of dishonesty, intimidation, molestation and other illegalities were regarded as anti competitive[189]. In spite of the fact that the courts were not well equipped to regulate competition, civil actions on the tort of 'conspiracy to injure'[190] and unlawful interference with the economic interests of others[191] had provided some relief[192].

Even though the principles aforesaid remain good law, they have been fallen into disuse by the enabling provisions found in the competition law enacted in many countries[193]. Variety of reasons[194] prompted the abandonment of state ownership.

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187 See William Holdsworth, *A History of English Law*, Methuen (1937), Vol. 7, p.6.

188 Mark Furse, *supra* n. 135 at p.291.

189 See *Mogul Steamship* v. *McGregor*, (1889) 28 Q.B.D. 598 (C.A.)

190 See *Crofter Hand Woven Harris Tweed* v. Veitch [1942] A.C. 435. See also *Sorrel v. Smith*, [1925] A.C. 700; *Quinn v. Leathem*, [1901] AC 495 and *Lonhro Ltd. V. Shell Petroleum Co.*, [1982] A.C. 173.

191 See *Lonhro* v. *Fayed*, [1990] 2 Q.B.D. 479. Also see *Allen v. Flood*, [1898] A.C.1.

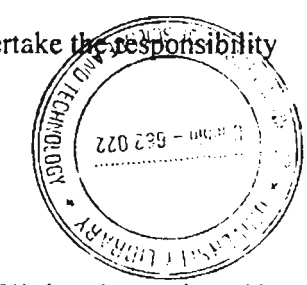
192 For a brief account on the concepts of 'conspiracy to injure' and unlawful interference with the economic interests of others', see Mark Furse, *supra* n. 135 at pp. 292-294.

193 The U.S. enactment in question is the Sherman Act, 1890. The British law, which introduced radical reforms to the domestic structure, is the Competition Act, 1998 that succeeded the Competition Act, 1980.

194 Reasons for privatization have been said as (i) market failures in the utility industries of states, (ii) reasons such as ideological, budgetary and some grounded on economics. See Dieter Helm and Tim Jenkinson (Ed.), *Competition in Regulated Industries*, Oxford University Press, Oxford (1998), p1.

States' assets have been transferred to private sector in the course of a policy of liberalization and privatization[195]. State monopoly in many areas has been done away with to allow free and fair competition in the market. Regulators were entrusted with the general duties to promote, facilitate or secure competition[196].

Indian response towards globalisation and privatization was in a slow pace. The Monopolies and Restrictive Trade Practices Act, 1969, which was enacted to curb monopoly, was found obsolete in many respects[197]. It was felt that there must be a shift in the focus from curbing monopolies to the promotion of competition[198]. With a view to achieve this object the Central Government constituted a high level committee on competition policy and law. Based on the report of this committee it was decided to enact a law on competition. The Competition Bill 2001 therefore seeks to ensure fair competition in India by curtailing trade practices that is likely to have adverse effect on competition. It also provides for the establishment of a quasi-judicial agency called the Competition Commission[199]. The Commission is empowered to pass orders granting interim or any other appropriate relief[200]. It can also pass orders granting compensation[201] and impose such other penalties[202]. In addition to the aforesaid powers, the Competition Commission shall also undertake the responsibility



[195] Public assets thus transferred to the private sector in Britain during 1980's have been estimated in excess of 100 billion pounds. *Ibid.*

[196] *Id.* at p.16. For a detailed exposition about U.K. experience in regulated industries see Dieter Helm and Tim Jenkinson, *supra* n. 146 pp.77-192.

[197] See the Competition Bill 2001, *Statement of Objects and Reasons.*

[198] *Ibid.*

[199] The Competition Bill, 2001, clause 7.

[200] *Id.*, clauses 27,33,42-46.

[201] *Id.*, clause 34.

[202] *Id.*, clauses 42-46.

of competition advocacy[203] and the imparting of training programmes on competition[204].

In order to ensure fair competition, the Competition Commission is empowered to prohibit agreements that are anti-competitive in nature[205]. It can also interfere when there is abuse of the dominant position by a firm[206]. The Commission can by order regulate business combinations[207] to create a climate conducive for free competition.

When a level playing ground is created for the enterprises to compete on an equal footing, free and fair competition is ensured. In a fairly competitive market, manufacturers and sellers give utmost concern to the needs and desires of consumers. Businessmen know that consumer satisfaction largely rests on quality of the goods and services they provide. Competitive climate thus indirectly takes care of products quality to the best advantage of its consumers.

Consumer Class Actions

Law generally prescribes that the consumer of poor quality goods may seek his remedy under the private law where he can be compensated for the loss or injury suffered. If this compensatory regime is to exert significant influence on the manufacturers and sellers to improve the quality of the goods they produce or sell,

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203 *Id.*, clause 47.
204 *Ibid.*
205 *Id.*, clause 3.
206 *Id.*, clause 4.
207 *Id.*, clause 5. However, it is criticised that creation of such a 'bureaucratic leviathan' would impede competition than facilitating it. It is also pointed out that the power given to Central Government to supercede the Competition Commission would be destructive to the autonomy of the Commission and hence to be repealed. See "Trade Bodies Seek Changes", *The Hindu* (Cochin), February 12, 2002, p.13.

there must be considerable amount of consumers who will complain if things go wrong. Among the multitude of victims if only very few complain, the manufacturers may opt for compensating those who complain and to continue to get along with the marketing of the shoddy products. But they cannot thrive in the market for long by compensating large number of consumers. In this context, the best option for the producers will be to change their production practices by introducing a system to improve the quality of the products.

Even in the most enlightened consumer societies, the response of the consumers may be marginal if the stake involved is negligible or the loss or injury suffered is too little to warrant a formal complaint. Imprudent businessmen will thrive on the inertia expressed by the consumers in not complaining to the authorities established for that purpose. What is required in these instances is the willingness by consumers to treat the little injustices into a collective harm. Class actions by consumers can play a significant role in disciplining the manufacturers and sellers who profit out of the little injuries inflicted. Large number of insignificant individual claims can be aggregated into a single large claim. Class actions have the obvious advantage of saving time and money over separate proceedings. Action of this kind can also attract wide publicity since large number of people are involved. The businessmen may also feel deterred from class actions when they find that their trade abuses no longer remain unchallenged.

Consumer class actions can also provide an incentive to the consuming public to form and remain in consumer associations. Class actions have been provided for by

the civil[208] and consumer law[209] jurisdictions. Normally, class actions are allowed to be instituted when the classes are so numerous and therefore jointer of all members is impracticable. It is also necessary that the question of law and fact involved is common to the class and the claims or defenses of the representatives are typical[210]. It must also be established that the representatives are able to fairly and adequately to protect the interests of the class[211].

The class action suits undoubtedly go a long way in over coming the weaknesses of private law. Threat of consumer class actions operates as a deterrent to businessmen enabling them to improve the quality of the goods and services they provide. This ultimately will prove advantageous to consumers, manufacturers and the society at large. However, in order to see that sufficient number of class actions come up, it is essential to encourage the formation of vibrant and sensitive consumer associations. The presence of many such associations would by itself be a stumbling block to erring businessmen.

Quality Control under the Consumer Protection Act, 1986

The Consumer Protection Act, 1986, apart from providing a mechanism for enforcement of quality control laws, widens significantly the scope and amplitude of

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208 Class actions in the form of representative suits are allowed in civil matters. See order I rule 8 of the Code of Civil Procedure, 1908.

209 The Consumer Protection Act 1986, enables consumer associations to lodge consumer complaints in its representative capacity. Similarly, one or more consumers, where there are numerous consumers, having the same interest can be a complainant. See the Consumer Protection Act, 1986. s. 2(1)(b). Also see, *Upbhokta Snrakshan Manch* v. *Winsor Foods Ltd.*, (1993) 2 C.P.R.608 (Raj); *Consumer Protection Council* v. *Lohia Machines Ltd.*, (1992) I.C.P.R. 127 (Guj.) and *Pushpa Builders Flat Buyers Asswociation* v. *Pushpa Builders Ltd.*, (1996) 2 C.P.J. 212 (N.C.).

210 See Ross Cranston, *Consumers and the Law*, Weidenfeld and Nicolson, London (1984), p. 96.

211 Two major class recovery procedures recognized in the U.S. are (i) 'fluid' class recovery and the 'yellow cab'. In the former, the damages ordered goes primarily into a fund against which individual consumers can make claims. In the latter, the scheme apply for a period of time like lowering the taxi charges as against overcharging made earlier. *Ibid.*

quality control. This is done by giving a wide meaning to the term 'defect' while defining the term. It is defined as follows:

> "Defect means any fault, imperfection or shortcoming in the quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied, or as is claimed by the trader in any manner whatsoever in relation to any goods."[212]

From the definition it can be seen that any fault, imperfection or shortcoming in quality required to be maintained by or under any law is a defect. Along with that, breach of any express or implied promise made by the trader relating to the quality of goods, is also treated as defect in quality. The first part of the definition covers all the existing quality control enactments like the food quality laws, drug control laws and other similar legislation. Goods under these enactments are considered as defective if they do not fulfill any of the legal requirements applicable to them or are not in accordance with the claims made by the trader with reference to them. A complaint would lie if the goods supplied do not meet the requirements of any of the whole range of marketing legislation. For instance, if any food item supplied fails to satisfy the standard required to be maintained under Prevention of Food Adulteration Act, 1954 it would be a defect in the goods[213]. Drugs generally are marketed according to their power or potency. Some of the requirements of drugs are prescribed by law and manufacturers declare some others, voluntarily or otherwise. In either case, if the standards prescribed or promised are not met, it would be a defect.

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[212] The Consumer Protection Act, 1986, s.2(1)(f).

But the second part creates a new concept of quality control. Giving of assurances and promises about the quality etc. of goods without intending to perform or without testing the veracity of the claim made can become an actionable wrong. In *Malaprabha Neerwari Balakadara Irrigation Consumer Co-Operative Sangha* v. *State of Karnataka Department of Agriculture*[214], the farmers while purchasing cottonseeds were told that the particular seed had a better yield. But it turned out to be of low resistance and poor germination capacity. The National Commission held that the heavy loss suffered by the farmers was clearly due to the defective quality of seeds supplied by the opposite party and hence liable to compensate the complainant.

Another instance where the Consumer Protection Act, 1986 provides additional measures for quality control is to be found in the reluctance of the courts in consumer issues to recognize exclusion clauses in sale contracts. The exclusion clauses if permitted to prevail over the main purpose of the contract, in many instances would perpetuate consumer injustice. By reading down the exclusionary clauses, courts in many cases paved the way for improvement of the quality of business and service standards[215]. In cases where terms are seen incorporated subsequent to the formation of the contract, courts even refused to read those terms

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[213] The Prevention of Food Adulteration Act, 1954 s.2(i-a), (l) and (m).

[214] (1994) 1 C.P.J 80 (N.C.). Also see, *Maharashtra Hybrid Seeds Co. Ltd.* v. *Alavalapati Chandra Reddy.* (1998)3 C.P.J.8 (S.C). In this case, the complainants purchased sunflower seeds from the opposite parties which when sown was found lacking germination and the crop failed. Even though the Agricultural officer reported the matter to the opposite parties they took no care to the letter. The court held that since the opposite parties had not taken any measure to get their seeds analysed nor to conduct any study about the complaint, it is reasonable to presume a defect in their seeds.

[215] See for a detailed discussion on this point Chapter III *Supra.* See also *B.V.Nagaraju* v. *Oriental Insurance Co. Ltd.*, (1996) 2C.P.J.28(S.C.) and *Skandia Insurance Co. Ltd.* v. *Kokilaben Chandravadan,* (1987)2 S.C.C. 654.

into the contract when it found that those terms negated the very purpose of the contract[216].

Judicial construction by elucidation, explanation and illustration of the term 'defect' has contributed substantially to the legal literature. The requirement as to particular quality, quantity, potency, purity or standard for the goods bought may stem from the sale of Goods Act or any other law, or by a contract between the buyer and seller. These requirements may be expressed in the contract or implied from the circumstances or from a claim made by the trader.

In *Abhayakumar Panda* v. *M/s. Bajaj Auto Ltd.*,[217] the complainant purchased a chassis of a trailer auto from the respondents. It was found to be defective inspite of repeated repairs from time to time. It was held by the National Commission that the vehicle suffered from a structural manufacturing defect that the manufacturers instead of being sold to any customer should have condemned it. The Commission has expressed severe doubt as to the testing and quality control system in operation in the manufacturing company and ordered replacement of the vehicle. Similarly, in *Wheels World* v. *Tejinder Singh Grewal and Another*[218], where the Montana diesel car had to be taken for repairs a couple of times soon after its purchase and lastly to the manufacturers for removal of the engine block, the National Commission endorsed the view of the State commission that the car was

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[216] See for example, *United India Insurance Co. Ltd.* v. *M.K.J.Corporation*, (1996) 3C.P.J.8(S.C).

[217] (1992) 1 C.P.J. 88 (N.C.)

[218] (1995) 1 C.P.J. 133 (N.C.). Also see, *Byford Leasing Ltd.* v. *S.V.R. Rao* (1995) 2 C.P.J. 232 (N.C.), where it was held that the necessity to sent the vehicle frequently to the workshop for repair soon after purchase gives an irresistible inference about its quality to be defective.

defective which warranted its return to the manufacturers. However defect in title to goods and delay in supply was held not 'defects' under the Act. [219]

Interesting but complex was the issue raised before the National Commission in *Sahithya Pravardhaka Co-operative Society Ltd.* v. *K.N.Narayanan Pillai.*[220] The complainant in this case pointed out many mistakes in the subject matter of the 'Encyclopaedia' published by the opposite party. Books being goods, it is alleged as defective in the sense that it contains incorrect information in many places and hence the respondents are to be held liable. The National Commission after a thorough perusal of the definition of the term 'defect' held that though books published by the opposite parties are goods, there is no defect in the printing and binding of the books. It opined that there is no law by or under which it can be said that the alleged mistakes in an Encyclopaedia published by the opposite party will amount to a defect. In the absense of an express or implied contract in that respect, it was held that a publisher who publishes informations collected from large number of scholars cannot be held liable.

Consumer Grievance Redressal Agencies: How far an Improvement over Civil Courts?

It has been mentioned earlier that the consumer grievances redressal agencies established under the Consumer Protection Act 1986 are entirely different from ordinary civil courts in style, functioning and procedure. A brief examination of the structure and functioning of these agencies would throw much light on its usefulness from the perspective of the consuming public.

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[219] See *Kuldip Singh Kalra & Another* v. *Roshan Lal Pal & another* (1993)2 CPJ 170 (NC) and *Vidarbha Bricks Manufacturer's Association & Others* v. *Coal India Ltd., and Others* (1993) 2 C.P.J. 248 (N.C.)

[220] (1996) 1 C.P.J. 329 (N.C.).

The Act has established three type of grievance redressal agencies viz. at the district, state and national levels. The State as well as the National Commission exercises original as well as appellate powers whereas the District Forums have only original jurisdiction.

District Forum: The District Dispensary of Consumer Grievances

Consumer Dispute Redressal Forum to be known as the 'District Forum' is established by the State Government in each district by official notification.[221] State Governments may establish more than one forum in any district if it deems fit.[222] Each District Forum shall consist of a president and two other members.[223] The President shall be a person who is or has been or qualified to be a District Judge and the members shall be of persons of ability, integrity and standing and one of them shall be a woman[224]. Their specialized knowledge in the respective fields is intended to be made use of by the forum in its decision making process. So, unlike a legal expert deciding the issue in ordinary civil cases, consumer forum gets assistance from the diverse but specialized faculty possessed by its members. Consumer and related issues mostly affect women and housewives; the perceptions of a female member in the forum would be an added advantage.

Jurisdiction and Procedure of District Forum, State and National Commissions

The District forum shall have the jurisdiction to entertain complaints instituted within the territorial limits, where the value of the goods or services or the

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221 The Consumer Protection Act, 1986, s. 9(a).

222 *Ibid.* (Proviso)

223 *Id.*, s.10.

224 *Id.*, s.10 (b). The members have to possess adequate knowledge or experience of or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration. *Ibid.*

compensation if any claimed does not exceed rupees five lakhs.[225] A complaint can be flied either at the place where each or whole number of the opposite parties reside or carryon business or at the place where the cause of action arises.[226] In the case of manufactured goods, apart from the place of manufacture, the cause of action arises also at the place where the product is marketed.[227] Therefore, it was held in *Avniben Nihil Kumar Shah* v. *Khaitan Hostombe Spinels Ltd.*,[228] that the place where shares were applied for and the place to which share certificates were dispatched, but not received have jurisdiction to entertain the complaint. If the complaint is against a corporation, it has been held [229]by the National Commission that jurisdiction to entertain the complaint does not exist at each and every place where the corporation might be having its offices or branches. Jurisdiction would exist only at the place where the cause of action arose or the corporation had its head office.

It is to be noted that the legislature in its collective wisdom has provided an extensive meaning to the terms 'complaint'[230] and 'complainant'[231]. A complaint is

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[225] *Id.*, s.11.

[226] *Ibid.*

[227] *State of Punjab* v. *Nanak Chand,* (1984) 3 S.C.C. 512.

[228] (1995) 3 C.P.J.565 (Guj.). Also see, *Hitendra Raman Lal Shah* v. *Jagson Airlines,* (1995) 2 C.P.J. 90 (Guj.), where an air ticket was purchased through an agent from Ahmedabad for a travel to Delhi to Kulu and back. It was held that as the money was paid at Ahmedabad, a part of the cause of action arose there.(The ticket showed a wrong time of departure and hence the petitioner missed the flight.)

[229] *Indian Airlines Corporation v. Consumer Education & Research Society,* (1992) 1 C.P.R. (N.C.)

[230] Section 2(1)(c) of the Consumer Protection Act 1986 gives the meaning of the term complaint as under:

"Complaint" means any allegation in writing made by a complainant that –

(i) an unfair trade practice or a restrictive trade practice has been adopted by any trader

(ii) the goods bought by him or agreed to be bought by him suffer from one or more defects;

(iii) the services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect;

(iv) a trader has charged for the goods mentioned in the complaint a price in excess of the price fixed by or under any law for the time being in force or displayed on the goods or any package containing such goods;

(v) good which will be hazardous to life and safety when used are being offered for sale to the public in contravention of the provisions of any law for the time being in force requiring

not confined to an allegation of defect in goods and deficiency in services of the opposite party, but extends to allegations about violations of safety requirements, charging of excessive price, non providing of required information and the practice of unfair and/or restrictive trade practices by him. Similarly, the term 'consumer' has taken into account in addition to the aggrieved consumer, registered voluntary consumer associations, the Central or any State government which can take up any consumer cause and one or more consumers acting for and on behalf of all those who are interested in the cause.

Any consumer, and others who are fit to be designated as complainants aforesaid can lodge a complaint to the District Forum.[232] The procedure that the District Forum has to observe has been detailed in section 13 of the Act. The first step on receipt of a complaint is to refer a copy of the complaint to the opposite party with a direction to give his version of the case within a period of thirty days.[233] It is possible for the forum to give an extension of time for fifteen days but not further.[234] When the opposite party denies or disputes the allegations made in the complaint, a dispute arises which is to be settled by the Forum following the procedure mentioned in that section.[235] The forum can obtain a sample of the goods from the complainant and cause it to be tested or analysed by such laboratory as it

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traders to display information in regard to the contents, manner and effect of use of such goods, with a view to obtaining any relief provided by or under this Act".

[231] S.2 (1)(b) of the Consumer Protection Act, 1986 defines the terms 'complainant' in the following way:
"Complainant " means –
(i) a consumer; or
(ii) any voluntary consumer association registered under the companies Act 1956, or under any other law for the time being in force; or
(iii) the central government or any state government, who or which makes a complaint; or
(iv) one or more consumers, where there are numerous consumers having the same interest".

[232] *Id.*, s.12.

[233] *Id.*, s.13 (1)(a).

[234] *Ibid.*

deem fit.[236] The expenses for testing shall be born by the complainant.[237] On receipt of the test report, the Forum shall cause a copy of the test report to be served on either parties[238] and direct them to submit their objections if any. After hearing their objection the forum shall pass appropriate orders on the issue.[239] But if the case does not require laboratory or other tests, the forum shall settle the dispute on the basis of the evidence brought in by the complainant and the opposite party[240]. If the opposite party fails to submit objections and/or evidence, it shall be decided on the basis of the evidence adduced by the complainant.[241] In exercise of its powers under the Act, the District Forum shall have the same powers as are vested in a civil court[242] under the Code of Civil Procedure, 1908. Every proceeding before the District Forum shall be deemed to be a judicial proceeding and it shall be deemed to be a civil court.[243]

A complaint concerning defective goods can be made against those who manufacture or market goods. A trader, therefore means a person who sells or distributes any goods for sale and includes the manufacturer of those goods[244].

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[235] The procedures to be followed are detailed in s.13 (e) to (g) of the Act.
[236] *Id.*, s.13 (1)(c).
[237] *Id.*, s.13 (1)(d).
[238] *Id.*, s.13 (1)(f).
[239] *Id.*, s.13 (1)(g).
[240] See s.13 (2)(b)(i).
[241] *Id.*, s.13 (2)(b)(ii).
[242] See s. 13 (4). The powers of the Civil court conferred by this section are:
- (i) summoning and enforcing attendance of any defendant or witness and examining the witness on oath;
- (ii) the discovery and production of any document or other material object producible as evidence;
- (iii) the reception of evidence on affidavits;
- (iv) the requisitioning of the report of the analysis or test concerned from the appropriate laboratory or from any other relevant source;
- (v) issuing of any commission for the examination of any witness; and
- (vi) any other matter which may be prescribed.

[243] *Id.*, s.13 (5).
[244] S. 2(1)(q).

Where the goods sold are in packages the word 'trader' would include the packer also[245]. Manufacturer[246] under the Act means a person who makes or manufactures goods or parts thereof including a person though not in fact the manufacturer but claims to be the manufacturer of the end product by reason of the fact that he assembles the parts into the end product. A person will also be considered as manufacturer when he puts or causes to be put his own mark on the goods so as to claim that they are manufactured by him though they are infact manufactured by another person.[247]

Since the consumer Protection Act seeks to provide for better protection of the interests of the consumers and to provide speedy and simple redressal of consumer disputes, the consumer protection rules made under the Act by various state governments have prescribed a time limit for deciding a complaint by the District forum. Generally it is 90 days where the complaint does not require analysis or testing of goods. If testing or analysis is required, the time limit shall be 150 days.[248] The time limit prescribed for decisions by State and National Commissions are also the same.[249] Appeals are to be disposed of within a period of three months.[250] The procedure to be followed by the State Commissions and the National Commission while deciding a complaint originally filed before it is the same as in the case of District Forum.

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[245] *Ibid.*
[246] S.2 (1)(j).
[247] *Ibid.*
[248] See for example, rule 4(a) of the Andhra Pradesh State Consumer Protection Rules, 1987; The Assam State Consumer Protection Rules, 1989 rule 4(9) and The Bihar Consumer Protection Rules, 1987 rule 4(9).
[249] *Id.*, rule 7(9).
[250] The (Central) Consumer Protection Rules 1987, rule 14(4).

If the forum is convinced that the goods complained of are defective it shall issue any one or more of the following orders[251] against the opposite party:

(i) to remove the defects from the goods that has been pointed out by the appropriate laboratory;

(ii) to replace the goods of similar description which is free from any defect;[252]

(iii) to return to the complainant the purchase price or the charges of the services;[253]

(iv) to pay to the complainant a sum of money as compensation for loss or injury suffered by the consumer due to the negligence of the opposite party;[254]

(v) to remove the defects or deficiencies in the services in question;[255]

(vi) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;

(vii) not to offer hazardous goods for sale;

(viii) to withdraw the hazardous goods from being offered for sale; and

(ix) to provide adequate costs to parties.

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[251] *Id.*, s.14.

[252] In *Issac Mathew* v. *Maruti Udyog & Ltd.* (1991) 2 C.P.J. 75 (Ker.), the complainant was supplied with a car which was damaged and repaired as new. It was ordered to replace with a new car along with compensation for inconvenience. Also see, *Kailash Kumari* v. *Narendra Electronics* (1991) 2 C.P.J. 276 (N.C.) (defective T.V.set was ordered to be replaced with compensation.)

[253] In *Bhamy* v. *Shenoy* v. *Karnataka Road Transport Corporation* (1991) 1 C.P.J. 133 (Kart.), the passenger was allowed to recover from the KSRTC the ticket money when he could not be conveyed to his destination.

[254] In *M. Meenakshisundaram* v. *General Manager, Southern Railway* (1991) 1 C.P.J. 131 (T.N.), the Railways were directed to pay Rs. 1000/- as compensation to the complainant who was superseded in favour of another in the waiting list.

[255] *Pushpa Pathania v. Rajasthan Housing Board,* Kota (1995) 1 C.P.J. 150 (N.C.), when the construction of the house was found to be deficient an order for removal of the deficiencies was granted.

In the remedies enumerated above compensation for loss injury can only be considered if the complainant is successful in proving negligence of the opposite party. This has been cited as one of the disquietening features of the Act.[256] In this era of industrialization, complicated nature of the products make it virtually impossible for a consumer to establish it is negligence that resulted in loss or damage to him. Consumerism demands a change in policy and perspective in this area to the effect that instead of an onus to establish fault on the manufacturer or seller, it would have been ideal, if it is considered adequate to show that loss or damage can be attributable to the fault of the product, and the damage suffered is due to no fault of his own[257]. But the National Commission in many cases[258] has strictly applied the principle of negligence in cases of deficiency in service. For instance, in *Federal Bank, Bistupar* v. *Bijon Misra*[259] the National Commission concluded by holding as under:

> "a claim for compensation against a Banking company cannot be sustained under the Act if the failure to render service was occasioned by reasons wholly beyond the control of the Bank and *was not attributable to any negligence on the part of the Bank.*"[260]

Quantum of Compensation

How is that the Fora quantify compensation or damages under the Act? It is undisputed that award of compensation by the Fora have to be made on well-

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[256] See. D.N. Saraf, *Law of Consumer Protection in India*, N.M.Tripathi Pvt. Ltd., Bombay (1995), p.295.

[257] *Ibid.*

[258] *Federal Bank, Bistupur* v. *Bijon Misra*, (1991) 1 C.P.J. 16 (N.C.); *Consumer Unity and Trust Society, Calcutta*, v. *Bank of Baroda*, (1992) 1 C.P.J. 18 (N.C.).

[259] (1991) 1 C.P.J. 16(N.C.).

[260] *Id.* at p.22. This view of the National Commission is seen endorsed by the Supreme Court of India in *Consumer Unity and Trust Society, Jaipur* v. *The Chairman and Managing Director, Bank of Baroda*, (1995) 1 C.P.J. 1 (S.C.).

recognised legal principles governing the quantification of damages. The National Commission through a catena of decisions has expounded the principles to be followed while awarding compensation. The compensation to be awarded has to be quantified on a rational basis giving due consideration of the material produced before the Fora showing the extent of injury suffered and the manner in which and the extent to which monetary loss has been caused to the complainant[261]. Under section 14(1)(d) of the Consumer Protection Act, compensation is payable to the consumer for loss or injury suffered by the consumer 'due to the negligence of the opposite party'. It has been held that where there is no evidence of negligence of the opposite party, the Consumer Forum was not entitled to grant any compensation.[262] However, while quantifying compensation, the failure of the complainant to show the exact extent of loss suffered by him due to the defect need not be considered a material fact.

In *Jaidev Prasad Singh* v. *Auto Tractor Ltd.*,[263] it has been held by the National Commission that when it is abundantly clear that tangible loss must have resulted to the complainant by reason of the defective condition of the tractor supplied to him and the failure on the part of the opposite party to rectify those defects which rendered the tractor unfit for use, it is just and proper that the Consumer Redressal Forum constituted under the Act should quantify to the best of its judgement the loss that can reasonably be estimated as reasonable compensation

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[261] *Commercial Officer, Office of the Telecom District Manager, Patna,* v. *Bihar State Warehousing Corporation* (1991) 1 C.P.J. 42, at p.44 (N.C.)

[262] See, *Air India* v. *Suganda Ravi Mashelkar,* (1993) 1 C.P.J. 63 (N.C); *B.H.Talani* v. *Rajasthan Housing Board,* (1993) 1 C.P.J. 524 (Raj.) and *Gurunath Travels* v. *Dr. A.P.Paliwal,* (1994) 2 C.P.J. 56 (N.C.)

[263] (1991) 1 C.P.J.34 (N.C.).

to the complainant.[264] Quantification of damage in consumer disputes and ordinary commercial transactions like contracts may widely vary. A doctors' practice would be seriously affected if he cannot readily communicate with his patents due to disconnection of his telephone facilities. The subscriber and his family may also suffer from personal inconvenience for frequent and prolonged faults in the functioning of the telephone and its disconnection. In these circumstances, it was opined by the National Commission[265] that the granting of Rs.2000/- as compensation by the State Commission is quite conservative which can be described as a token compensation.

In *Kailash Kumari* v. *Proprietor, Shankar & Co.*[266], the complainant had purchased a T.V.set from the opposite parties. On account a defect in the set, the complainant was put to a great deal of inconvenience, expense and mental suffering. There was also failure on the part of the opposite party to set right the defects in spite of the fact that the complainant having repeatedly made representations to the dealer on many occasions. The National commission had expressed the view that it is not right to insist that the aggrieved party should adduce more concrete and specific evidence regarding the inconvenience etc., suffered. In its opinion, when a person invests a substantial sum and purchases a T.V. or any other goods, he does so under a reasonable expectation that he would be able to have the effective beneficial use of the article from the date of its purchase. In these circumstances where it is practically impossible to adduce tangible evidence regarding the actual monetary equivalent of the inconvenience, mental suffering etc., caused to the petitioner, it is

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[264] *Id.* at p.36.
[265] *District Manager, Telephones, Patna* v. *Dr.Tarun Bharthuar,* (1992) 1 C.P.J. 47 at p.50 (N.C.).
[266] (1992) 2 C.P.J. 443 (N.C.)

the duty of the concerned Redressal Forum to assess and determine in the light of all evidence available in the case what amount would reasonably compensate the petitioner for the inconvenience, mental agony etc., caused on account of the negligence of the opposite party. [267] However, payment of compensation is confined to the loss or damage actually suffered and hence it is not to be given for any equitable indulgence or for any remote or indirect loss.[268]

A comparison of the ordinary civil court remedy and that under the Consumer Protection Act 1986 for defects in goods, it is obvious that the latter is far ahead than the former. The Act remedies are speedy and inexpensive. The procedure followed in filing a complaint is informal. Trial procedures are summary in nature and remedies granted are diverse. The Consumer Protection Act in this way is a real blessing to the consumers of this country.

Liability to compensate the aggrieved consumer who suffered defect or injury due to defect in goods no doubt will persuade the manufacturer or supplier, at least indirectly, to make provisions for improvement of the performance of the product against which consumers frequently lodge complaints. Manufacturers cannot thrive for long compensating large number of consumers. Compensatory regime in this sense compels the manufacturers and sellers to improve the quality of the products. But if this method is to yield the intended result it is necessary that consumers are made very much sensitive and are willing to complain when things

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[267] *Id.* at p.444. Also see, *D.C.M. Data Products v. Hanuman Prasad Poddar Cancer Hospital, Gorakhpur,* (1994) 1 C.P.J. 200 (N.C.); and *Shadi Ram Raghubir Sharan I v. National Insurance Co. Ltd.* (1993) 2 C.P.J. 183 (N.C.).

[268] *General Manager, Mahanagar Telephone Nigam Ltd.* v. *Mauli Chand Sharma* (1995) 2 C.P.J. 183 (N.C.).

they purchase go wrong. Larger the complaints from consumers more rapid and positive will be the attitude of the traders.

Need for Strengthening Civil Remedies for Quality Control

The forgoing discussion reveals that the civil remedies available to consumers who have been the buyers of defective products are limited in scope. The major hurdle appears to be the lack of a comprehensive law for all commodities. Civil liability to compensate for defective standards are so scattered and thereby lack clarity and consistency. The principles in the tort and contract law seems to be of very little help to the consumers of the present day world mainly due to the presence of many bottlenecks contained therein. The law relating to trademarks, though a consumer friendly enactment is so framed to be a property law and therefore its violations are placed in the domain of private law. Trademarks law even today is considered as one that protects the intangible private property rights of its owners and therefore it lacks the public interest element in approach and outlook. The consumers are also very much interested in trademark protection. The positive impact of trademark protection through public authorities by itself or through public participation through consumer and consumer organizations or through public interest litigation has not been properly understood or implemented. The need for trade mark protection as a consumer protection measure is to be given recognition and amendments are to be made accordingly. The Trade Marks Act, 1999 which repealed the Trade and Merchandise Marks Act, 1958 and introduced many new provisions also failed to give the Act this directional thrust and orientation and hence allow its inherent weaknesses to galore. However, through an intelligent use of the provisions enabling a consumer to sue for deceptive trademarks, the desired result can be attained. Consumers'

concern on products that raises issues of health and safety are given predominance in all developed countries. However, India has yet to take it seriously. As in the case of Britain, the health and safety requirements of consumers must find a place in the Consumer Protection Act itself. Violations of the prescribed quality standards must invite heavy liability for the producers and sellers.

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Chapter 8

CONCLUSIONS AND SUGGESTIONS

In the past, it was considered that every contract is the result of a common agreement between the parties. A contract of sale was also treated on par with any other type of contract. The simplicity involved in identifying and assessing the quality of the goods one purchases at that time paved the way for evolution of the principle of *caveat emptor* – let the buyer beware. In those simple and closely-knit societies, the judicial and legislative attitude was to accord fuller recognition of the concept and afford protection to the manufacturers and sellers since the national economy was largely depended on them.

The advent of mass production and distribution consequent to industrialization has resulted in consumers facing an information gap whenever they enter to transactions involving the purchase of goods. Articles are now being marketed in such a manner that it is extremely difficult for consumers to judge their qualities and performance properly. The advances in science and technology have made large variety of consumer products that are very much complex and complicated. Apart from questions of judgment, style and taste, a very high degree expertise is essential to appreciate properly the features of most of these modern products. A non-expert examination will not divulge many of the important characteristics of the items available in the market. Therefore, they fall below the threshold of perception of the ordinary consumers. The disparity in knowledge and resources between the consumers and sellers, put the consuming public in a very disadvantages position.

The problems created by the modern marketing techniques like advertisements added fuel to the consumer ethos further. Advertisements far from being a useful business tool, turned to be purveyors of false and misleading information to the consumers. Literacy, in the context of advertisement, has been painfully stated as a curse since it tempts innocent to read and believe and to go for shopping believing the propaganda to be true not knowing that every glittering purchase is a treachery practiced by unscrupulous corporate pickpockets[1].

Basic Consumer Rights

The engine of consumer protection can be stated to have been kick-started by the U.S. President John F. Kennedy in 1962 through his landmark message made in the Senate. He attributed four basic rights to the consumer and suggested means for the realization of the same. They are:

(i) *The right to safety:* This means that the consumers are to be protected against the marketing of goods, which are hazardous to health or life.

(ii) *The right to be informed:* This encompasses protection against fraudulent, deceitful or grossly misleading information, advertising, labeling or other practices. It includes delivery of positive information based on facts, which are necessary to assist the consumer for an informed choice.

(iii) *The right to choose:* Consumer is to be assured, wherever possible, of access to variety of products and services at competitive prices and assurance of satisfactory quality of goods and services at fair price.

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[1] See V.R.Krishna Iyer, "Exotic Soap Opera for Kerala", *The Hindu* (Cochin), October 6, 2002 p.5.

(iv) *The right to be heard:* Consumer is to be assured that his interest will receive full and sympathetic consideration at all levels of administration including information of governmental policies[2].

In order to promote fuller realization of these consumer rights, it is necessary that the existing governmental programmes are strengthened and in certain areas new legislation be enacted. Soon after this famous pronouncement by Kennedy, we notice a remarkable change in governmental attitude towards consumer and their problems all over the world. These proclaimed rights are further enlarged at national and international levels on many occasions. However, the right of the consumers to be informed about the quality standards and their right to be protected against substandard goods remain solid.

Quality of goods, which is always a matter of great concern for the consumers, is rapidly becoming the most significant factor in customer decisions. This is true even if the purchaser is a housewife, a large industrial corporation or a military procurement agency. It is even a subject of importance to industrialists and businessmen of all types since quality is considered as the modern mantra to woo more consumers.

Traditionally, quality control and quality assurance was considered a managerial function and hence the law has very little role to play. However, large number of unscrupulous manufacturers has started marketing goods of poor quality to

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[2] William G.Haemmel *et.al, Text, Cases and Materials on Consumer Law,* West Publishing Co., Minnesota (1975) pp.15-16. However, M.K.Gandhi, while he was in South Africa in 1890, had in his speech said the nicest words ever known to the world about how a consumer is to be treated by businessmen. He said: "A customer is the most important visitor on our premises. He is not dependant on us. We are dependant on him. He is not an interruption of our work. He is the purpose of it. He is not an outsider of our business. He is part of it. We are not doing him a favour by serving him. He is doing us a favour by giving us an opportunity to do so".

the dismay of all concerned. Degraded quality in goods not only failed in giving 'value for the money' to its consumers, but also posed severe health and safety problems to the public at large. The state could not in those situations stick on to its 'neutral arbiter' position any longer. Society at large and consumers in particular has started looking towards the various organs of the state to tackle the difficulties created out of marketing goods of substandard quality with a view to get a helping hand to the suffering mass of consumers. Thus we observe large number of enactments and judicial decisions favoring consumers of poor quality goods and services. However, this transition was not with sufficient intensity that the situation warranted. Therefore, large variety of consumer problems remained unsolved both by the judiciary and legislatures. Efforts to achieve improvements quality of goods can be summarised under the following heads.

Quality Control Through Self-regulation

(a) Code of Practices

When we look upon law as an instrument to control quality of goods and services, many modalities would come to the forefront. Quality control far from being an agenda for action by lawmakers and law enforcers can be a priority concern for the producers and consumers also. Producers can take up quality control as a matter of volition in their establishment so as to attract better consumer preference. But business houses that formulate and implement business codes voluntarily are very rare. Only those businessmen who have already established a stake on their goodwill in the market may opt for that since codes may enhance their goodwill further among consumers. Many businessmen often strive to do business only in the short run and to make maximum economic advantage out of that. Manufacturers and sellers who aim

at long term returns alone are generally formulating voluntary codes as a matter of self-discipline and others may not. However, it is possible to encourage traders to go for voluntary codes by governmental actions. It can give tax concessions and preference in purchases from producers of quality goods. Various agencies of the Government can also be instructed to follow the line

. Producers and sellers as a class can formulate business codes through their trade organisations. Codes thus made is generally supervised and enforced by the association of traders itself. Business codes invariably contain provisions ensuring quality standards for goods and services. This form of quality control is otherwise known as self-regulation.

In self-discipline, we have noticed that traders who long for short term gain generally will disregard voluntary codes. However, codes formulated and administered by trade associations cannot be neglected even by firms intended to earn short-term gains, since no trader can withstand for long, ostracisation by the trading community. However, rogues in any businesses cannot be caught so easily in this way.

The utility and value of voluntary codes remains to be resounding so long as its implementation and supervision are properly done to ensure better compliance. But it is always said that codes are not rigorously implemented and a lenient view is taken in most cases since trade associations apprehend loss of membership if actions turn to be rigid.

Voluntary codes, being a reflection of the trades' commitment to the society and the consumers, it is often suggested as the best method to dispense with many consumer problems including degraded standards in quality. Even though codes are widely encouraged and practiced in many western countries, what we observe in India is a totally different scene. Business codes as a tool to protect consumers and to ensure quality, finds no wider acceptance in India. But for few trades, code procedures are unpopular here. Requirement of an agency to encourage businessmen to go for this form of self-regulation is absolutely necessary to provide speedy and inexpensive consumer justice.

(b) Self-regulation Through Commercial Guarantees

Consumer guarantees offered to purchasers by producers and sellers more often than not contain clauses assuring the quality of the products in question. Guarantees can be either 'legal guarantee'- that emerge directly from law– or 'commercial guarantee'–that is offered voluntarily by the producer or seller. The rights and obligations of a legal guarantee are laid down by law. Commercial guarantee terms are unilaterally determined by the guarantor and therefore its availability is always subject to the conditions and procedures prescribed by that person. One of the fundamental problems facing consumers at present springs from the general absence of a legal framework applicable to commercial guarantees. Commercial guarantees are often offered in small print and contain terms limiting the liability of manufacturers. This in effect undermines the usefulness of the guarantees. The consumer dissatisfaction that galore about commercial guarantees led the European Commission and the Directorate of Trade and industry of England, to issue specific directives to improve the situation. Commercial guarantees in

England are made legally enforceable. Under the English law, a commercial guarantee should necessarily confer additional benefits on the consumer over and above those prescribed by legal guarantees.

However, the Indian scenario on commercial guarantees is in it infancy. Express provisions of law in this regard are lacking. But it is possible to treat commercial guarantees as 'defects' in the goods, if any imperfection or shortcoming in quality happens to be contrary to the claim made by the trader, under the Consumer Protection Act, 1986 and therefore actionable. Similarly, the term 'unfair trade practice' takes in to its fold guarantees and warranties and is made actionable both under the Consumer Protection Act and the Monopolies and Restrictive Trade Practices Act, 1969.[3] However, that much alone is not adequate. A more legible and comprehensive legal package promoting and streamlining commercial guarantees is necessary in the new globalised market situations.

(c) Self-regulation Through Information, Inspection and Rejection

If consumer is properly informed of about the product and is given sufficient opportunity to inspect the goods, many complaints that may come up after the purchase can be avoided. A legal framework that insists for providing necessary information to consumers together with a right to inspection and rejection would be a strong source of protection of consumer interest. Through this process of inspection and rejection, consumers can determine the qualities of their purchase. Consumer appreciation depicted in this way would be a source for manufacturers and sellers to assess the areas that require modifications and improvements in their products.

[3] The Competition Act, 2001, which is yet to be brought into force, replaces the Monopolies and Restrictive Trade Practices Act, 1969.

Since the self-regulatory regime is largely self-supporting, these forms of protective measures are to be encouraged to the maximum extent possible. A system that allow the operators in the market to discipline themselves, will afford sufficient flexibility and ensure better compliance. Self-regulatory regime would ultimately prove to be a boon to the exchequer since it can save enormous amount of money that it will have to invest if any other alternative system of control is to be brought in.

Quality Control Through Administrative Actions

For controlling the quality of goods, diverse administrative techniques are used. In the present day world of liberalization and privatization, there are many who question the desirability of administrative regulations. The craving for freedom of action by the market operators necessitates substantial reduction of governmental interference. But that doesn't mean that parties are to be given an unbridled freedom of action. Administrative measures rather facilitate the proper exercise of the freedom by regulating and limiting chances of excesses and abuses.

Administrative regulation in product quality generally is in the form of granting of licenses to manufacture, distribute and sell. Conditions are imposed on licenses at all stages with a view to attain the desired results. The eligibility of the licensees is scrutinized and an undertaking from them is also taken to ensure compliance with the terms of licenses. On many occasions, it is insisted that the producer shall seek necessary quality certification from accredited agencies. This is done with a view to ensure quality assurance. For example, quality standards are formulated for food products under the Prevention of Food Adulteration Act, 1954 and for drugs under the Drugs and Cosmetics Act, 1940 through the administrative

agencies created under it. Department of Legal Metrology created under the Standards of Weights and Measures Act, 1976 also supervises the standards in weights and measures.

Flexibility of action and the efficacy in supervision and implementation are considered the dominant virtues of administrative controls. In issues concerning product quality, administrative steps taken often ensure standards of performance, safety and durability of diverse goods that come to the market. The conduct of manufacturers and sellers are kept under constant vigil by the administrative agencies. Periodical inspections, searches and seizures enable the deviant among them to come to the main stream. Severe offenders are thrown out of their business by cancellation of the trade licenses granted to them, others properly warned and punished as found necessary.

The major objection against administrative controls is the hefty amount of money required in meeting the expenses involved in the proper monitoring of the scheme. It is also said that administrative agencies create unnecessary bottlenecks and there may be the possibility of abuse of power. If these apprehensions are successfully removed, it can become an acceptable mechanism of quality control. Increased participation by consumers and consumer organizations, together with sufficient transparency in to the procedures, can reduce the administrative excesses and bottlenecks considerably.

The issue of administrative costs can be justified from many angles. State is in any way destined to protect the health and safety of its citizens and financial constraints are not generally taken seriously in issues concerning health and safety.

However, it can be suggested that state and the trade in an agreeable proportion share the cost. It is also possible to charge the licensees sufficiently to earn money to cater to the needs of maintaining the agency. The licensees can pass it on to its consumers who alone need to bear the burden and not others.

Quality Control Through Independent Agencies

Quality of products can best be assured, if standards are set, implemented and supervised by an independent agency. If the logo of standardization adopted by the agency is prominently affixed on the products, consumers can depend on them as it depicts a minimum quality standard. Standardisation of products through this mechanism is seen used globally to sub serve public good. However, for the success of this system of quality assurance, it is necessary that producers are encouraged to adopt standardisation and consumers are made aware of the virtues and benefits if they prefer to purchase such standardised goods. But the extent to which manufacturers can be encouraged to volunteer for adoption of quality standardisation is far from clear. Eventhough improvement of quality standards is necessary for any business to survive in this era of global competition; many of them keep themselves out from the main stream. Consumer illiteracy that pervades in the markets of developing economies may not adequately compensate the producers who prefer to adopt standardisation. High quality goods are generally priced high and consumers in poor economies may not opt for such goods since their purchasing power is low. In these state of affairs, producers with the intention of grabbing short-term gains will come to the market with substandard and low priced goods to woo the consumers who can easily afford to buy their products.

Degradation in quality, would among others, gives rise to health and safety problems not only to consumers but also to the general public. Quality cannot be left out as a matter of volition for the manufacturers and sellers. The perils that substandard goods may produce cannot be compensated adequately in many instances. Dangers occurred to life, health and property might not be compensated adequately in terms of money. All these suggest the necessity for introduction of a compulsory standardisation scheme. But, considering the state of the national economy, such a compulsory scheme can only be introduced incrementally.

The Bureau of Indian Standards is the national agency in India to formulate and implement quality standards for various goods. It is established to provide third party assurance to common consumer about quality. The Bureau has in fact done a commendable job in laying down quality standards to a large number of goods.[4] It has incorporated many international standards into Indian standards so as to bridge the gap between national and international standards. It offers technical services to willing entrepreneurs to introduce a system of quality control in their establishments. The Bureau also organises seminars and conferences to spread its message to all concerned including consumers. However, the quality certification scheme of the Bureau remains largely voluntary which producers may adopt if they so desire. This makes the legitimate expectation of consumers for quality goods a dream.

It is possible under the Bureau of Indian Standards Act, 1986 to make the quality certification scheme compulsory. At any point of time, the Central Government may by notification in its official gazette, make any quality standards of

[4] Till March 2001, the BIS has formulated 17,600 Indian Standards out of which nearly 2000 are for products that are of direct interest to common consumers. See D.P.S.Verma, "Developments in Consumer Protection in India", 25 *Journal of Consumer Policy*, 107 (2002).

the Bureau, compulsory. But instances in which the government is seen to have exercised its power under the Act are only few. The government ought to have considered the wider public interest involved in declaring and making the standards compulsory at least in cases in which the health and safety of consumers are in question.

Even though notifications under the Bureau of Indian Standards Act, 1986, making Indian standards compulsory are few, we find its application in plenty under the Essential Commodities Act, 1955. A catena of orders issued under this Act, make the certification of the Bureau quality control scheme compulsory. In addition to this, the Fruit Products Order, 1955, lays down separate quality standards for fruit products and insists that every manufacturer shall obtain a license for manufacturing fruit products.

Quality Control Through Grading and Labeling

(a) Agmark

Grading and labeling is yet another method of standardisation popular among consumers. The 'agmark' labeling envisaged under the Agricultural Produce (Grading and Marketing) Act, 1937 is intended for quality marking in agricultural produces including horticulture and livestock products. However, grading and marking under this Act remains voluntary. By an amendment made in 1986, it has now become possible for the Central Government to make grading and labeling under the Act compulsory for any produce. It is in the interest of consumers and public that the government may exercise this power liberally at least in stage-by-stage to improve upon the quality of products under the Act.

(b) Eco-mark

The 'eco-mark' labeling ensure the quality and eco-friendly nature of the products in question. Increasing concern for environment the world over signifies the necessity of adoption of 'eco-mark' labeling of diverse products. True that the Government of India, under the Environmental Protection Act, 1986, has formulated a scheme for certification of eco-friendly products. But the scheme is entirely optional for the producers. Voluntary schemes, however attractive and beneficial it may be, will be slow in adoption and implementation. Measures are to be formulated to encourage and inspire producers to go for eco-marking. Financial and other incentives can be considered. When better consumer awareness is generated through educational exercises, it is likely that they may prefer to purchase eco-friendly products. Consumer preferences reflected in this way would certainly confer better commercial advantage to manufacturers.

Encouraging Adoption of International Standards

The concepts of global village and global market necessitate the introduction of international standards than national standards into the manufacturing process. In this highly competitive economy, quality standards occupy a unique position in the market. Gone are the days when national standards are treated as an adequate answer to questions of quality. Global competitiveness warrants global standards. Consumers are becoming more and more aware about quality and standardisation and the benefits that it confers on them. Therefore manufacturers and sellers should strive to adopt standardisation not only as answer to global competitiveness but also to show their concern and commitment to the consuming public. Together with these voluntary efforts, incremental introduction of mandatory schemes of standardisation

would certainly confer positive advantages to the consuming mass. Executive activism in the area of compulsory standardisation seems to be a strong desire of the consumers for long.

Merchantable Quality and Satisfactory Quality

Legislative response to consumers' desire for goods of standard quality can be best seen in the provisions implying terms and conditions in the law of sale of goods. The Sale of Goods Act, 1893 of England can be said to be the pioneer in the law of quality assurance. This Act reads into the contract of sales many terms. In all sales of goods, the Act implies that the goods are of 'merchantable' quality. The Act does not give any definition to the term 'merchantable'. Hence judiciary ventured to find out its meaning. This gave rise to large amount of legal literature. However the uncertainties attached to the definitions given by the judiciary gave rise to introduction of a new term of 'satisfactory quality' instead o merchantable quality in Britain. The Sale of Goods Act, 1979 of England after its amendment in 1994, consider goods to be of 'satisfactory quality' if they meet the standards that a reasonable person would regard as satisfactory, taking into account any description of the goods, the price and all other circumstances. The fitness for all purposes for which goods of the same kind are commonly supplied, its appearance and finish, freedom from minor defects, safety and durability will also be considered as relevant in appropriate cases. Eventhough the English law has bid a farewell to the uncertain term of 'merchantability'; India has not taken any step in this direction. We still loiter around the earlier 'merchantable quality' doctrine. As a positive step towards better protection of consumers, it is necessary to clear ambiguity in the existing law.

The sales law generally presumes that the buyer is the best judge to determine the nature and quality of the goods that he purchases. However, if the purchaser informs the seller either expressly or by implication the purpose of his purchase, law implies a condition that the goods supplied are fit for the purpose of the buyer. But this legal implication may not be available if the buyer relies on any particular patent or trade name. The inference drawn in such instance will be that the buyer is not relying on the skill or judgement of the seller and therefore, he need not be saddled with the obligation prescribed by law. However, what can be noticed at present is that most goods are sold under a trademark or trade name. The trademark or trade name may be used by the consumer to identify a product and not with the intention of excluding the seller from his liability. It can therefore be seen that in England and America, this proviso has been removed from the statute book. India has to take initiative in this direction.

Implied Terms and Conditions

Implied conditions as to sale by description and by sample are also intended to ensure that the consumer gets goods of the quality he desired for. The conditions and warranties implied under the sales law no doubt remain as beacon lights for consumers. However, the Sale of Good Act itself contains a provision enabling the parties to exclude all or any of the conditions and warranties implied by law. Eventhough the provision is intended to recognise the principle of freedom of contract, in the hands of businessmen it became a powerful weapon for consumer exploitation. The exclusion clauses in standard form contracts became so rampant even to suggest that it neutralized the beneficial provisions in the Act protecting consumers. Before any legislative attempt to remedy the evil effects of exclusion

clauses, the judiciary seems to have understood the regressive trend of exclusion clauses. Hence the courts started interpreting the exclusion clauses in a way to subserve the interests of consumers.

Legislative endeavors that followed in England are highly oriented towards protecting the legitimate interests of consumers. Britain enacted at least two enactments to contain the evil effects of exclusion clauses. The Supply of Good (Implied Terms) Act, 1973 and the Unfair Contract Terms Act, 1977 are the obvious examples of legislative enthusiasm shown in England. The cumulative effect of these enactments is to invalidate the effect of all exclusion clauses that limit the liability of sellers for breach of implied terms under the sales law. In consumer sales such exclusion clauses are declared void and in non-consumer dealings, the exemption clauses are subjected to a severe test of reasonableness to assess its maintainability.

In effect, the implied terms in sales law become mandatory in consumer dealings and even in commercial sales the seller can exclude them only if he is able to satisfy the court that the term excluding or limiting liability was in all circumstances reasonable. Exemption from liability under the pretext of manufacturers' guarantees is also sought to be regulated under the Unfair Contract Terms Act, 1977. It has been stated that liability for loss or damage resulted out of defect in goods or due to the negligence of the manufacturer cannot be excluded through the garb of guarantees. Consumer contracts in England have been regulated further by the Unfair Terms in Consumer Contracts Regulations, 1994.

The device of implying terms relating to quality in goods in sales contracts has been a powerful tool of quality control. But this device happened to be weakened by

the emphasis given to the principle of freedom of contract through exemption clauses. The result was disastrous. The exemption clauses virtually negated the implications of implying terms and the usefulness of this device became defunct. It was at this stage that the judicial trend turned towards consumers. Legislative endeavours that followed were encouraging. However the legislative enthusiasm visible in western countries has not shown its presence in India so far. Therefore, the Indian consumers remain as victims of exemption clauses in sales contract. A change in trend is highly neccssary for better protection of the consuming public in India.

Increased Use of Criminal Sanctions

In order to prevent trading abuses and thereby to ensure quality, the tool of criminal sanctions are used extensively all over the world. While civil remedies provide compensation for the injury caused to the consumer, criminal law prohibits certain undesirable trade practices. Activities that are criminalized for consumer welfare are mostly 'strict liability' offences. Criminal law being enforced by public authorities, consumers are relieved of the expenses of prosecution. In strict liability offences, the prosecution is relieved of from the burden of proving the offender's guilty mind.

Many criminal enactments make it an offence to indulge in trade practices that are adverse to consumer interests. The Indian Penal Code, 1860 itself contain provisions penalizing manufacturing and selling of false implements for weighing and measuring. Even though weights and measures are not related to quality, there exists an inseparable link between weight, 'value for the money' and quality. A far more comprehensive enactment that regulates standards in weights and measures is the

Standards of Weights and Measures Act, 1976. This Act keeps the issue of weights and measures under the administrative control of the Department of Legal Metrology. A major weakness of the 1976 Act probably is the provision intended for punishing officers for vexatious actions, inspection and seizures. Erring officers must necessarily be punished. However, if they are punished in the same way as the people who violate the standards of weights and measures, it is likely to dissuade them from performing their duties sincerely. Therefore, aggrieved parties can be permitted to deal with the abuse of power by officers departmentally or through private action.

The Penal Code also encompass provisions ensuring quality of food articles, drugs and medicinal preparation by punishing persons who interfere with their purity by adulteration. The Prevention of Food Adulteration Act, 1954 and the Drugs and Cosmetics Act, 1940 enlarge the scope and amplitude of the issue of prevention of adulteration. Standards for diverse food articles and medicinal preparations under different systems of treatment have been prescribed. Laboratories are established and Analysts and Inspectors are appointed to carry out the purpose of these enactments. Depending up on the gravity of the offence, different punishments are prescribed. State amendments made to the Acts by certain states have prescribed very heavy penalties. However, the convictional trend prevailing in various courts in India is distressing. The magnitude of the issue of adulteration and its repercussion on consumer's health and safety are not seen appreciated in its true perspective. Even the prescription of a statutory minimum punishment for adulteration is found neglected in many cases. This type of laxity in attitude is not confined to judiciary alone. The rigid quality control measures envisaged by these enactments are not strictly implemented either due to paucity of qualified staff or due to absence of

necessary enthusiasm required from the governments. Proper executive and judicial vigil is called for in this area to improve the situation.

The spread of criminal law into other areas of consumer interest must be made. In the area of consumer safety, consumer credit and trade descriptions we find the use of criminal sanctions in Britain. Consumer safety and false trade description including misleading advertisements are fertile areas of consumer deception in India. It is high time that India must learn from the experiments and experiences from others to afford better protection to its consumers from the domestic and global operators in our market.

Encouraging GMP for Consumer Products

Quality of drugs and pharmaceutical products occupy an important position in consumer protection. This is an area where the World Health Organisation has made significant contributions. WHO has expressed the international concern for health and safety of mankind through the formulation of a draft text on 'Good Manufacturing Practice'. The GMP advocates for quality in pharmaceutical products through sampling, specification and testing together with documentation and release procedures. These methods ensure that necessary tests are actually carried out before materials and products of medicinal use are released for supply. Diverse testing procedures are provided to ensure safety and quality of drugs and pharmaceutical products. However, many nations including India have not made GMP a condition for licensing in drug manufacture and distribution. The reasons cited are economic among others. Considering the severe threat that sub standard drugs may pose in any society, it is mandatory for the state to adopt and implement the GMP as a

compulsory requirement in the production of any drug. The health and safety of its citizens shall not be allowed to be sacrificed in the altar of financial constraints.

The war against production and marketing of substandard articles of food and drugs must be fought seriously. In the lines of the 'Good Manufacturing practice' formulated by the World Health Organisation for drugs and pharmaceutical products, it is essential to make and get implemented a code of good production and distribution practice for food products also. Proper implementation of these practice codes must inspire all concerned to the best advantage of the consuming public.

Civil Liability and Compensation

In order to discipline the trade and to bring them in tune with consumer expectations, law envisages diverse methods. Apart from the criminal liability already discussed, creation of civil liability for loss or damages that has occurred due to defects in quality standards is the other remedy. Even the fundamental law of the land viz., the Constitution of India, through the instrumentalities of public interest litigation and class actions, enable citizens to compel traders to follow quality standards. It is also felt that free and fair competition among producers and sellers can evoke quality consciousness among traders and consumers alike.

The contribution of the common law towards consumer protection can be seen embedded in the legal principles of contracts and torts. The common law courts while sticking on to the principle of contractual freedom rendered many judgements making the manufacturers and sellers liable for defective quality of the goods they sold. The courts attributed a 'duty to take reasonable care' towards any one who come across their product. Compensation was awarded not only for physical injury, damage or

financial loss but also for distress and disappointment. However, it was burdensome for consumers to establish a breach of 'duty to take care' by manufacturers. Judicial attempts to take stock of the situation, paved the way for development of the principles of strict liability and absolute liability. Courts used these principles in those grave situations that perpetuated large-scale consumer injustice. Still, it was not clear in what all situations the courts will be applying these principles, which made the legal system to that extent fluid and vague.

Trademark Law

The law of trademarks is traditionally considered as a branch that protects the private property rights of its proprietors or licensed users. However, through protection of the proprietary rights of its owners, the consumers are also benefited. Long and continued sustenance of a trademark or trade name in the market place may give rise evolution of good will and reputation among consumers. Consumers through the trademark or trade name attached to the product often identify manufacturers and sellers. Protection accorded to trademarks and trade names from invasion or imitation by imprudent tradesmen saves the consumers also from deception. The quality standards of goods marketed through trademarks and trade names would have won consumer confidence. Others to reap its economic advantages may subject consumer dependence on the product identified through the trademark to exploitation. Unauthorised use of the trademark or use of a deceptively similar trademark is visited with civil ad criminal consequences by actions for infringement and passing off.

But the civil actions for infringement and passing off can be initiated only at the instance of the proprietor or licensed users of the trademarks. The consumers who are deceived by the falsified trademarks find no remedy under the Trade and Merchandise Marks Act, 1958. Consumers and consumer associations can effectively check the injustices perpetuated to them if they are also permitted to approach the court under the trademark law.

Comprehensive Legislation for Consumer Safety

An overall picture presented by the law granting civil remedies to consumers in India is not encouraging. Compensatory provisions for defect in goods are so scattered and avoid easy perception. In spite of provisions for damages for loss or injury, there are still ambiguities about the extent to which the safety and health standards are maintained through compensation. Minimum quality standards for all goods to ensure safety and health of consumers and public are to be prescribed by law. For this purpose a comprehensive legislation is essential.

A remarkable change in consumer grievance redressal is seen effected through the Consumer Protection Act, 1986. It has provided for the establishment of consumer grievance redressal agencies all over the country at the district, state and national levels. Unlike in ordinary civil litigations, this enactment has dispensed with court fee. Simple and speedy disposal of through summary procedure is contemplated. For over a decade, consumers in India have started enjoying the benefit provided by this Act. However, these agencies, under the pretext of disposing cases summarily, have often abdicate their responsibilities by dismissing cases involving complicated questions of facts. In the threshold of speedy and summary disposal, consumer justice

has been denied. But the latest decision of the Supreme Court of India in *J.J.Merchant v. Shrinath Chaturvedi,*[5] has provided sufficient relief to Indian consumers. Their Lordships of the Supreme Court has rejected the plea that complicated question of facts cannot be decided in summary proceedings. It was held that consumer forum is an alternative forum established to discharge the functions of a civil court. Hence delay in disposal of complaint cannot be a ground for rejecting it and directing the complainant to approach the civil court.[6] The court also upheld the competency of the forae a to decide issues of facts and law.[7] It also advocated for using the latest techniques of video or telephone conferencing in the examination and cross-examination of witnesses[8].

The Consumer Protection Act, 1986 is amended and many far reaching changes have been made[9]. It has introduced a court fee system for adjudicating disputes as in ordinary civil courts[10]. An initial screening to determine its maintainability is also there.[11] Even though an initial screening of cases filed to determine its maintainability is not going to create much harm to consumers, introduction of a court fee system is highly detrimental. Most of the consumers who are vulnerable to injustices are poor. Court fee system would certainly deter many of them from approaching the fora. If at all court fees is to charged, it can be levied from the erring respondents in addition to and along with the compensation granted to

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5 A.I.R. 2002 S.C. 2931.
6 *Id.* at p.2933.
7 *Id.*at p.2935.
8 *Id.* at.p.2937.
9 See the Consumer Protection Amendment Act, 2001.
10 *Ibid.*
11 *Ibid.*

the petitioners. Such a scheme would be more in consonance with the ideals of consumer justice and also less burdensome to the revenue of the exchequer.

Consumer rights sought to be protected under the Consumer Protection Act, 1986 are many. These rights are within the functional domain of the Consumer Protection Councils established at the center, states and districts. These councils are to be provided with sufficient funds for its proper functioning. From the compensatory costs collected from the respondents as said above, funds may be diverted to meet its expenditure. Similarly, the present status of functioning of consumer associations in India is far from satisfactory. Consumer associations may be asked in appropriate cases to negotiate, mediate and arbitrate consumer disputes. Empowerment of the consumer associations in this way by law would make their role far more significant. This would encourage consumers in taking membership in consumer associations, which would strengthen the associations considerably. State may finance the consumer associations liberally since strong associations would help in the proper administration of the Act to the best advantage of all. Administrative costs of the Act could be reduced considerably if consumer associations are strong enough to fight out large number of evils that their members confront in the market. Strong consumer associations are necessary to neutralize the power that corporate houses wield in the market. Balancing the power ensured through measures adopted to strengthen the weaker would create a level playing ground where both the contestants can compete fairly. The state in this way can withdraw from its role as a powerful administrator in the marketplace.

Paying higher price for low quality goods is considered as a necessary incidence of poverty[12]. However, the plight of the teeming millions in India cannot be thrown to the destiny. Positive action from all possible quarters is necessary to render justice to them. But the Indian society is yet to understand the behaviour and problems of different groups of consumers and sellers in the market place and the relationship between this private behaviour and the activity within the official legal system. The issues are far more than of mere academic significance. It has been stated that in developed countries the public opinion is much cooler towards consumer protection efforts than it was a decade before.[13] For many, consumer protection has become a synonym for bureaucracy and inefficiency of governmental regulations[14]. In the opinion of Sir Robert B.Reich, people have started a retreat towards consumer protection. He said:

> "Consumer Protection was fine when the economy was buoyant, but in times of belt-tightening, it is regarded as an unaffordable luxury, since its benefits are often less immediately apparent than its costs. Ask the average consumer whether he wants unsafe cars, adulterated foods, dangerous toys etc. he will answer with a resounding "no". But ask him whether government regulators should intervene to remedy these problems; his response is likely to be ambivalent. In its crudest form, the question has become: whom do you trust less – big businesses or the government? Recent history offers no particular reasons for trusting either"[15].

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[12] A.F. Dickey and P.J.Ward, "The Adequacy of Australian Consumer Protection Legislation-Observations and Proposals from Economic Theory" 14 *University Western Australia Law Review,* 133 (1979).

[13] Iain D.C.Ramsay, "Consumer Redress Mechanisms for Poor Quality and Defective Products", 31 *University of Toronto Law Journal,* 117 (1981).

[14] *Id.* at p.120.

[15] Robert B.Reich, "Towards a new Consumer Protection", 128 *University of Pennsylvania Law Review,* 1 (1979), at pp. 2-3.

It is therefore necessary that consumer protection efforts including measures for quality control be channeled through the least costly and most effective mechanisms and institutions.

What is good for the consumer is good for the business also. Many businessmen know this and build their trade on this philosophy. There is no better foundation for any business than assuring that the product or services produced is worthy of acceptance by the consuming public.

Specific Performance with Compensation

As stated earlier, under the general principles of contract, the ordinary remedy for breach of contractual obligations is to give damages from such breach. A consumer who has suffered loss or injury due to a defect in the quality of the goods he purchased has only a contractual remedy of compensation. This leaves the seller free to cause small amounts of damage to many people without fear of retribution. He can run the business profitably even after payment of damages. Therefore, an action for damages and compensation is not an effective and equitable remedy in many consumer complaints. Compelling the seller for specific performance and to compensate the aggrieved buyer for the loss can be suggested as a better remedy to the purchaser[16]. This remedy would have a dual effect (1) to compensate for the loss and (2) to exert a pressure to remove the defects and thereby to improve the quality of the goods supplied.

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[16] Charles Harpum, "Specific Performance with Compensation as a Purchaser's Remedy – a Study in Contract and Equity", 40 C.L.J. 47 (1987).

Strengthening of Consumer Associations

Consumer problems are generally individual in nature. The individual consumer in most cases will be unsuccessful in his move against the big corporate houses. Therefore, successful consumer protection lies in measures, which are capable of reconceptualising little injustices as collective harms.[17] Only if individuals become conscious that they suffer as a group, there is likely to be the possibility of a change in the social perception of accepting low quality goods as an inevitable part of life. There may be difficult cultural and social barriers to the recognition of a group consumer interest. However, the aggregation of consumer claims and the mobilization of public opinion are important steps towards the success in the resolution of individual problems. Consumer activists in general, recognize the value of effective class action provisions in dealing with consumer affairs[18]. A class action provision that enables a right to recover damages would hold the seller accountable for the total loss caused to many individuals. This would provide a useful deterrent against violation of quality standards that are even in minor amounts would give rise to huge savings or profits to the enterprises. Reforms must concentrate on the facilitation of sustained collective activity by consumers at all levels of government – legislative, executive and judicial.

Consumer associations exist to offer advice on individual problems. They are very common in the United States and Britain. Although the scope of their activities is wider than just advice on consumer problems, advice accounts for a fair proportion

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[17] See Iain D.C.Ramsay, *op. cit.* at pp. 146-147.

[18] However, The judicial opinion expressed by Fletcher Moulton L.J. in *Markt & Co. Ltd.*, v. *Knight S.S.Company* [1910] 2 K.B. 1021 (C.A.) about class actions is not encouraging. His Lordship opined that since damages are personal to the person suffering them, there is no common interest among those who have suffered the damage. This attitude requires change.

of their work. It supplies the consumer with information about products and services by testing them and publishing the results in their magazines. These organisations can be either sponsored by the government and local authorities or by its member subscribers. They through its network of offices even help the consumers in getting satisfaction when they feel unhappy about faulty goods or poor services and also give advice before they purchase goods.[19] Through these associations the consumers have a ready source of help close at hand. They will act as close associates of the market place. Consumer associations shall remember that their journey is long and the enemy is strong. Their functioning will persuade the business community to go for self-regulation to improve the quality of the goods and services.[20]

In India, there is a need of strong consumer organisations. After the enactment of the Consumer Protection Act, 1986, many consumer associations have been formed. Their scope and reach seems to be limited. Many toil out of paucity of funds and many are mere paper associations. The Consumer Education and Research Centre, Ahamedabad is one of the consumer organisation which functions at the national level rendering all services that the consumers require. They publish consumer guides, carry out product testing, conduct training and education programmes, render aid and advice on individual consumer issues and spreads consumer literacy. They are the watchdogs in consumer markets. India should strive for more consumer associations of this kind all over India. Consumer gains strength and wield power only when they are organized under able consumer activists.

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[19] For a brief account of the functioning of the Consumer Organisations in U.K., see Anthea Worsdall, *Consumer Law for the Motor Trade,* Butterworths, London (1981), p.177 *en. seq.*

[20] The major consumer organisation in U.S.A. is the Council of Better Business Bureau (CBBB) that came into existence in 1970. The CBBB besides other services provides for consumer arbitration for consumer justice and also consumer education programmes. See William G. Haemmel *et.al., op.cit.*at p.100.

Governments, Central and States, should encourage by all efforts the formation and functioning of consumer organisations. Organised consumers would be a powerful watchdog against trade abuses of all sorts including marketing of substandard goods. This in effect facilitates the evolution of a system in which the market operators themselves regulate their behavior.

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