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DELHI LAW REVIEW

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THE RELEVANCE OF WTO RULES

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EDITORIAL NOTE

In the Editorial Note to the last volume of the *Delhi Law Review* I had expressed the fond hope of bringing out this volume in two issues of which the first was expected to appear by the middle of the last year. In the course of the preparation of this volume the Editorial Committee, however, decided to combine the two issues in one volume on the common theme of Legal Dimensions of Market Economy on which the Faculty had organised an International Conference from 8-10 March 1996. The Committee decided to publish the papers presented in the conference after seeking their revision by their authors. The process of revision, editing, computer setting and the first proof reading was over by the end of the year and this volume could have been out by January this year. Unexpectedly much delay was, however, caused in the final proof reading by some members of the Committee, including me, and in carrying out suggested corrections.

In view of the current and lasting importance of the theme of the papers, the Committee also decided to make these papers available in a book form. For this purpose the Committee had to seek the help of an expert publisher and distributor. As always, Messers Universal Book Traders, readily came forward to extend the required help to us. Apart from undertaking the responsibility of publicity, distribution and sale of the book they also introduced us to a professional printer. In the conversion of the manuscript from our system to that of the printer, however, further delay was caused because much of the manuscript, particularly the footnotes, was disturbed and had to be reset, proofread and corrected. This, in short, is the explanation for the delay in the arrival of this volume. For this delay I express my sincere apologies to all the readers and others concerned with the *Review*.

We have also not been able to keep some other promises and resolves made in the Editorial Note to the last volume. In view of a common and special theme of all the papers in this volume, the Committee decided to put them all under the category of articles instead of dividing them into articles and notes and comments. Similarly, in view of lack of enough enthusiasm and commitment on the part of the students experienced in the production of the last volume, the Committee also decided to defer their association for this volume. As regards the former of these two matters, the Committee for the next volume has already decided to follow the traditionally well recognised pattern of dividing the papers into articles and notes and comments. As regards the latter it has left it open for the future. I am still very hopeful that not in too distant future our students will undertake full responsibility of bringing out an improved, regular and more frequent *Review*.

With these explanations and apologies I am, on behalf of the Faculty of Law and the Editorial Committee, hesitatingly handing over this volume to its readers. I hope in spite of its many weaknesses and shortcomings they will magnanimously welcome it and find in it something interesting, stimulating and useful, particularly for the reason of topical relevance of its subject matter for us. We also look forward to their critical comments and suggestions.

With utmost sincerity and gratitude I thank and congratulate all the learned contributors of the papers and book reviews for this volume and all my colleagues,

office staff and others who undertook and successfully accomplished the task of bringing out this volume. Of course the maximum and most arduous task had to be naturally performed by the Editorial Committee under the able guidance of Professor Parmanand Singh who has been the moving force behind this venture. Although neither Professor Singh nor his team members expect any appreciation from me, all credit goes to them for the very hard work and extreme patience with which they have brought out this volume in very adverse conditions. I very much wish that we had many more such devoted colleagues and favourable conditions of work in the Faculty. I hope that will happen in due course.

I conclude with my special thanks to Ms. Sushma Khurana who was earlier looking after the Review work in the Dean's office and Mr. Ashok Sharma who has recently replaced her, Mr. Yogesh Khanna for computer type setting and correcting several proofs of the manuscript, Ms. Rita Khanna for assisting Professor Singh in the proof reading and getting the corrections carried out, Mr. Manish Arora from Messers Universal Book Traders for his expert advice and for taking the responsibility of publicity, distribution, and sale of the companion book, Mr. Amit Sayal from Sita Fine Arts Pvt. Ltd. for printing the Review with all care, concern and diligence and every one else who had directly or indirectly lent his or her support in bringing out this volume including my colleagues, students, subscribers and other readers who have patiently waited for its arrival.

Delhi
July 1997

Mahendra P. Singh
Dean

FREE TRADE AND ENVIRONMENTAL PROTECTION : THE RELEVANCE OF WTO RULES

*Michael von Hauff**

I. INTRODUCTION

The controversy over the relationship between free trade and environment protection re-emerged in the early 1990s and has been intensifying ever since. Already in the 70s there was a scientific discussion on the impact of environment policies on foreign trade. It was focused on the possible trade policy hazards emanating from increasing environment protection measures. Environmental measures were seen as a strain on international competitiveness and as an obstacle to international trade in general.

Discussion since the beginning of the 1990s is concerned with the converse view. The question is whether free trade has any effects on the environment; if so, what? and further: whether they give ecological cause and valid arguments for trade restrictions. The expected positive effects of the Uruguay Round on international trade in the form of trade expansion led to the possibility for both international environmental organisations and scientists to introduce such topics into the final phase of the last GATT round. Critics expect the encouragement of the principle of free trade to lead to negative environmental impacts, among other things through the increasing volume of transport. Furthermore, the worldwide boost to growth, centred on Southeast Asia is expected to lead to an increase in emissions and amounts of waste. Finally, they fear that the use of resources will increase and those branches of the economy exploiting the environment will switch to countries with lower ecological standards.

The advocates of the free trade principle on the other hand expect potentially positive environmental effects from increasing growth rates especially in the developing countries and argue that an increase in economic growth will increase their scope for environment protection. The exchange of goods makes possible a more rapid spread of innovative technologies which reduce emissions and save raw materials. Finally, the transfer of knowledge associated with the goods and factor exchange also means that a higher environment consciousness will take hold. The discussion is focused on the question whether the aims of environment protection and those of the WTO's regulations are in conflict or in harmony.

The international trade agreements in the Uruguay Round were signed on 15 April, 1994 in Marrakesh by 107 countries and the EU. The signing also put the seal on the founding of the World Trade Organization (WTO). The subject of environment protection is to become an important part of the work of the WTO and of the next

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GATT/WTO Round. The subject also became all the more topical and relevant through the EC Council resolution on "Environment protection and international trade" of 10 May, 1993, the OECD Ministerial Council's adoption of procedural guidelines on the integration of trade and environment policies of June 1993, UNCTAD with its Resolution 48/55 of 10 December, 1993 and UNEP.¹

The present paper will first of all attempt to clarify the issue of the relation between environment protection and free trade, analysing both the quantitative dimension of world trade and the fundamental relationship between trade and the environment. Then the GATT/WTO rules and principles will be examined to see whether they influence the environment positively or negatively. This will lead to the question whether an ecological reform of the GATT/WTO is necessary and what further implications may be expected. The specific problems of the developing countries will be taken into account throughout.

II. THE RELATION BETWEEN ENVIRONMENT AND INTERNATIONAL TRADE

In the past few years a number of works have been published which discussed controversially the structure of relation. The majority of publications on the controversy are theoretical in orientation. Some of them are more in the nature of case studies, such as the "Tuna War between the USA and Mexico". Nevertheless there are deficits regarding certain theoretical and empirical knowledge.²

The following remarks first of all address some quantitative development trends in order to show and demarcate initial features of the structure of world trade. Attention is then turned to the fundamental relation between trade and environment. Finally, we address the question whether the GATT/WTO rules are in need of ecological reform.

A. Development and Structure of World Trade

The development of international trade presents a dynamic picture and has been positively influenced by the GATT efforts towards strengthening free trade. World trade has risen about 11 fold since 1950 and had reached a volume of US \$ 4.09 bn by 1994.

1. C.Helm, SIND FREIHANDEL UND UMWELTSCHUTZ VEREINBAR ? ÖKOLOGISCHER REFORMVORWART DES GATT/WTO REGIMES 16 (1995).
2. G. Kirchgässner, *Internationale Umweltprobleme und die Problematick internationaler öffentlicher Güter*, ZEITSCHRIFT FÜR ANGEWANDTE UMWELTFORSCHUNG, 37, (1995)

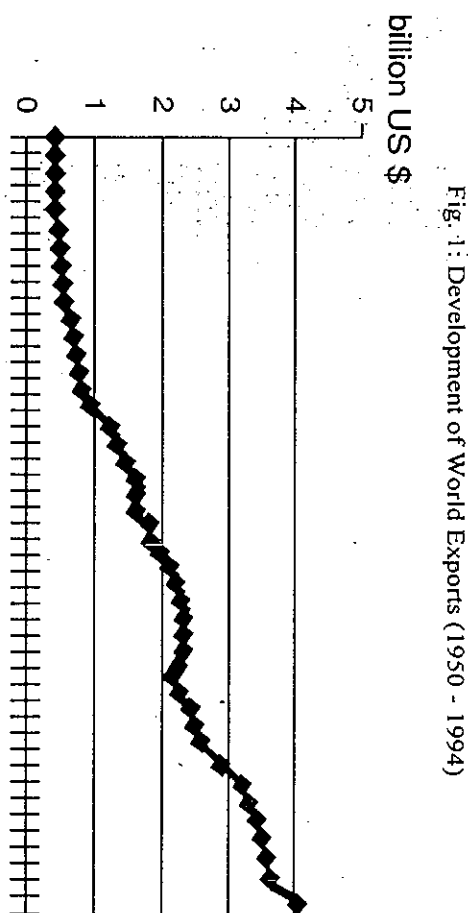
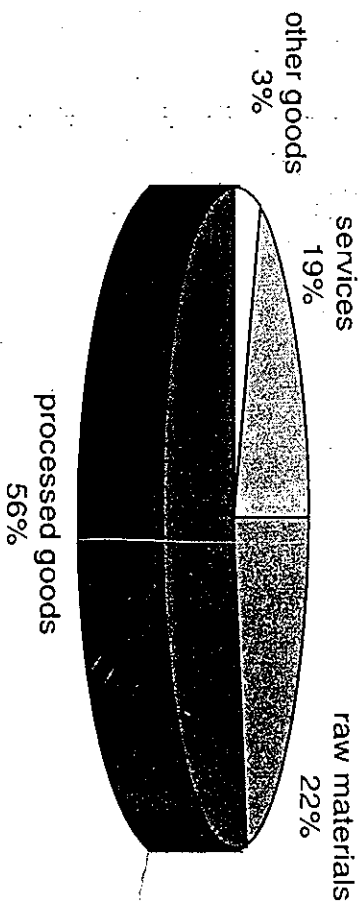


Fig. 1: Development of World Exports (1950 - 1994)

Source: International Monetary Fund

It must be stressed that world trade has risen significantly more than world production. In 1994 the difference between the growth rate of world trade of 9.5% and of world production of 3.5% was particularly noticeable. Furthermore, trade in commercial services also shows a strong increase (8% in 1994). In 1994 it was US \$1,100 bn. The structure of world trade shows, however, that finished products clearly dominate (with 56%) over primary products (22%) and services (19%).

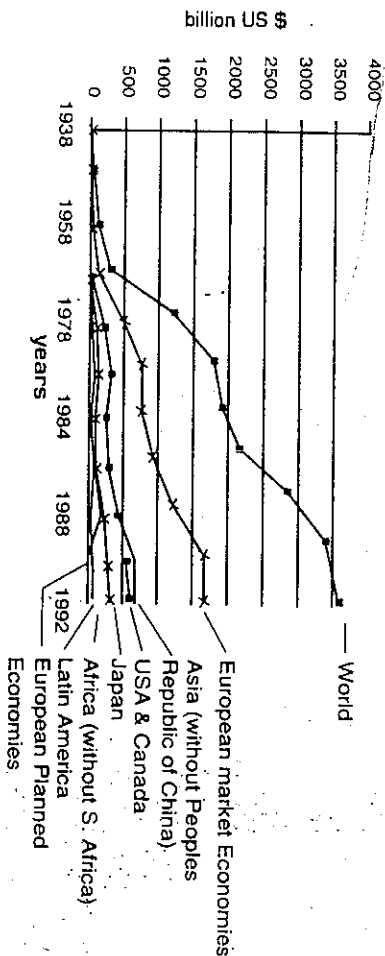
Fig.2: Structure of World Trade (1990)



Source: GATT, International Trade

There is a conspicuously uneven regional distribution of world trade, the trade gap having first widened to a significant degree in the 1960s. Partly opposite development trends must also be stressed. Whereas the West European countries, Japan and North America showed a considerable growth, there was a dramatic fall among the Latin American countries in the volume of exports in the late 1980s.

Fig. 3: Development of World Foreign Trade (exports f.o.b.)

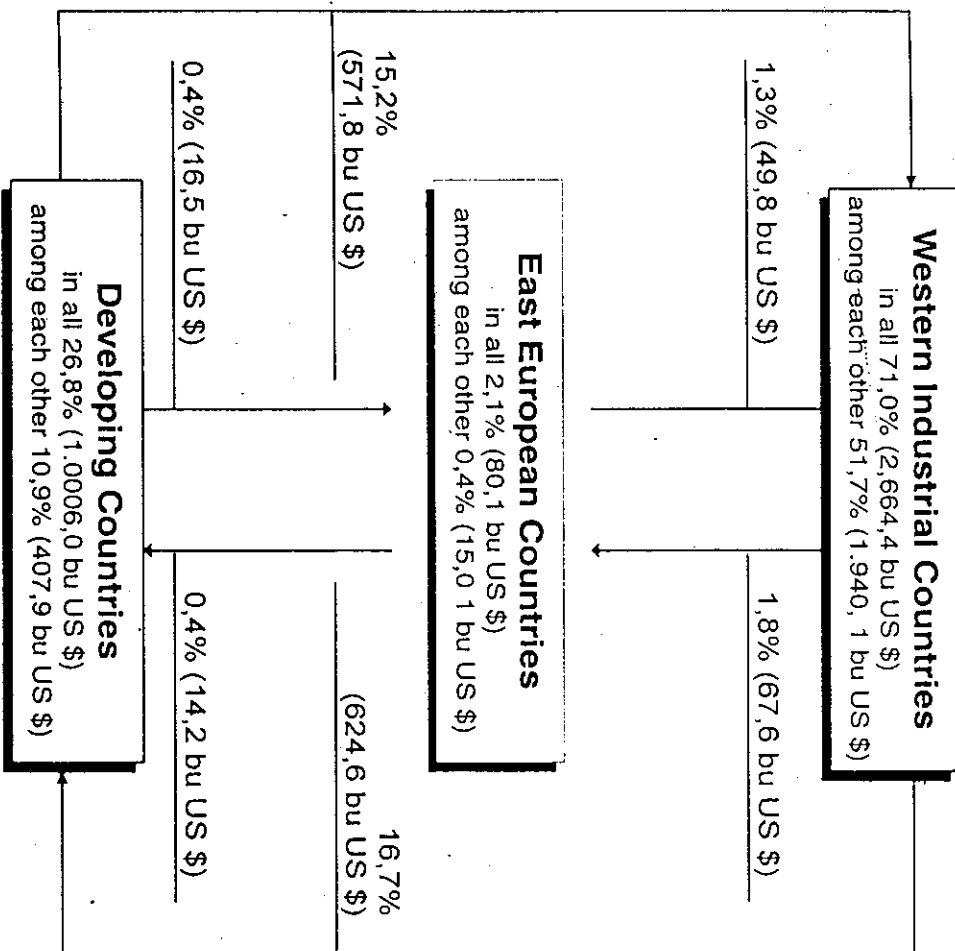


Source WTO 1995

The current structure of world trade shows that the industrial countries have a 71.0% share of the volume. Trade among the industrial countries is 51.7% of world trade. While the share of the East European countries has so far been neglected, the developing countries have a share of 26.8% in world trade, and trade among the developing countries is 10.9% of world trade.

While the development and structure of world trade shown so far make first environmentally relevant conclusions possible. For instance, an increased transport volume and an increased consumption of resources etc., what is required for a more differentiated analysis are, for example, the structure of world trade according to product groups and development over time.

Fig. 4: Structure of World Trade 1993



Source: UN, Monthly Bulletin of Statistics, own calculations

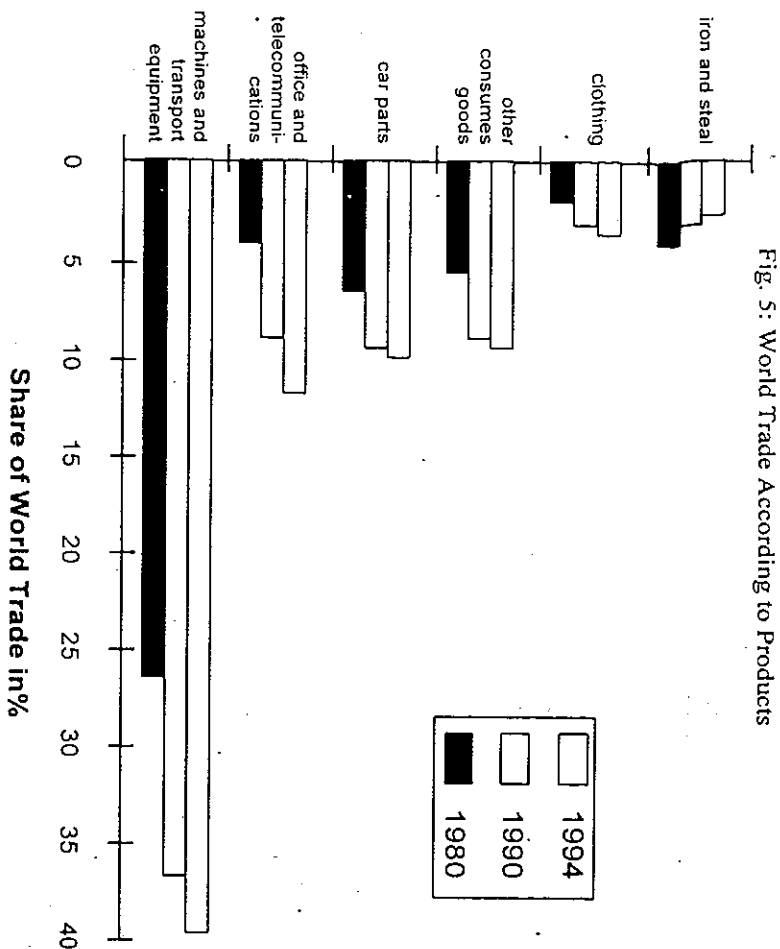


Fig. 5: World Trade According to Products

Source: WTO 1995

Fig. 5 shows that the environmentally relevant product groups such as machines and transport equipment take an above-average share of world trade and have seen high rates of growth since 1980. At a somewhat lower level this also applies to chemicals, while the share of agricultural products is decreasing. However, we cannot conclude from this that there is a trend towards relieving the strain on the environment. French shows in detail how the destruction of the rain forests in order to get tropical timber and to gain land for agriculture in the developing countries to maintain or develop their exports is still environmentally highly relevant.³

3. H.F. French, *Costly Trade-off: Reconciling Trade and the Environment*, World WATON PAPER 113 (1993).

He also shows that the conclusion of the Uruguay talks lowered the agricultural trade barriers for exports from the developing to the industrial countries. Nevertheless the export-oriented agriculture in many developing countries continues to be a great strain on the environment because of the great competitive pressure.⁴

Let us record in conclusion that a more far-reaching analysis of the environmentally damaging impacts of international trade requires a deeper aggregation of the patterns of trade. It would, for example, be of interest to find out the dimension and intensity of the export of waste materials.

On the other hand empirical analysis does not show that export-oriented enterprises in the developing countries are faced more and more in their European markets with ecological requirements on their products which are relevant to the sale of such products.⁵ What the future impact of this will be on trade patterns depends on how governments in the developing countries create the framework conditions and the enterprises cope with the complex learning processes. Thus for the analysis of the ecological impacts both new qualitative and quantitative knowledge is necessary which has not so far been sufficiently available.

B. The Environmental Effects of Trade

The analysis of the effects of trade on the environment can be delineated by opposing two extreme positions. They show contrary assessments of the free trade postulate.⁶ These are:

The conflict thesis: This is based on a great strain on the natural environment by free trade. This is what fundamentally gives rise to the danger posed by free trade to the environment, which applies particularly on the basis of the "steady state paradigm". This position is put forward among others by Daly and Morris.⁷

The harmony thesis: This thesis is based on the belief that free trade contributes to an improvement of the quality of the environment and that therefore from the point of view of ecological policy no particular restrictions are necessary. This position is advocated in particular by Bhagwati and GATT.⁸

The problem of a more subtle analysis results from the fact that there is a widespread network of connections between environment protection and free trade

4. *Id.* at 10 ff.
 5. L. Scholz, *Umweltverträglicher Außenhandel: empirische Erfahrungen aus drei chilenischen Exportbranchen, Nord-Süd Aktuell*, 4 (1994).
 6. M.E. Kulesa, *Umweltpolitik in Einer Offenen Volkswirtschaft* 17 (1995); H. Maier, *WIRTSCHAFTSWACHSTUM* (1996).
 7. D. Morris, *Free trade: The great destroyer*, *Ecologist*, 190ff (1966); OECD: *Freight Transport AND THE ENVIRONMENT 1991*; H.E. Daly, *Die Gefahren des freien Handels*, *Spektrum DER WISSENSCHAFT*, 54 (January 1994).
 8. J. Bhagwati, *Ein Plädoyer für freien handel*, *Spektrum DER WISSENSCHAFT*, 34, (1994); GATT: *Trade and the Environment*, GATT: INTERNATIONAL TRADE 1990-1991, 19 (1992).

which must be systematically revealed. This is the only way to make valid statements about positive or negative impacts. From economic theory it is already sufficiently well known that our view and our findings depend crucially on our assumptions and premises. The analysis which follows is therefore based on the certain knowledge that environmental standards in the individual countries differ to a greater or lesser extent and that harmonisation cannot be expected in the foreseeable future. Furthermore, full internalisation of the external costs of environmentally harmful activities even in the long term is an ideal state which actually cannot be realised. The second best solution which suggests itself is thus a series of international environment agreements.

Multilateral environment protection arrangements cannot in the short term raise worldwide environment protection to a level which is optimal for the world economy. In the medium term, however, there is a possibility of implementing usable environmental standards worldwide in the form of minimal standards. Positive beneficial effects of free trade could develop under such conditions without the danger of any significant worsening of environment quality.⁹ From international trade a number of economically relevant determinants can be derived. From the large number of relevant determinants some will be more closely analysed in the following as examples, regarding their environmental impact.

(a) *Trade Liberalisation Increases Economic Growth*: For many years there has been an intensive discussion on qualitative versus quantitative growth.¹⁰ It is clear from this discussion that economic growth in the form of an increased gross national product at least leads to a trend towards an increased strain on the environment. But it should not be overlooked that in the area of energy consumption, for example, there has been a partial uncoupling of energy consumption and economic growth. Even updated environment friendly production technologies and products can lead to a lessening of the relationship of tension between growth and environment. The negative ecological impacts of economic growth can also be mitigated in the future by goal-directed and effective environmental policies.¹¹ Comprehensive uncoupling of economic growth and environmental strain, however, is a long way off.

In the framework of trade liberalisation it is frequently stressed that trade-induced economic growth especially in developing countries is an important condition for successfully combating environmental damage brought about through poverty. According to this, increasing income leads to a stronger preference for a clean environment and fiscal scope for the government for more environment protection policies. Another argument for more trade liberalisation is that trade encourages the spread of relatively environment-friendly technologies and products. Whether such an impact really takes place, however, remains to be proved. As evidence of the impacts mentioned (growth raises income and increases the preference for more

environment protection) reference is often made to the study by Grossman and Krueger, according to which the concentration of sulphur dioxide and other noxious gases in various large cities has developed depending on the GNP.¹²

The study's findings are insufficient, however, for showing a positive connection precisely in developing countries. The results concentrate only on the quality of the air in large cities and neglect the issue of whether for example pollution-intensive production processes are being increasingly pushed out of the large cities. It is also established that trade-induced growth does not lead automatically to a trickle-down effect. As a rule, trade-induced growth has a tendency to reinforce the inequality of the income structure in developing countries, which leads to poverty-oriented environment destruction continuing. Whether and to what extent trading profits are used in developing countries to improve the environmental soundness of production and products also has yet to be empirically established.

(b) *Trade Liberalisation Leads To Intensified Competition And To An Expansion Of Sales Markets*: In most of the former eastern bloc countries a transformation process is currently taking place from the system of planned economy to that of the market economy. This means that these countries are making greater efforts to establish themselves on world markets. The same applies to developing countries like Vietnam and India, which have likewise initiated transformation processes and are opening up further regarding external trade.¹³

But in many other developing countries with particularly high debts too, demands are being made for market structures and a greater external market openness in the framework of structural adjustment programmes. What can be expected from this for many international markets is an increase in the intensity of competition.

Many developing countries and former eastern bloc countries too will be able to maintain the comparative cost advantages they have, if for example, they postpone their cost-relevant environment regulations. This will, at least in these countries, delay the internalisation of external environment costs.

It has to be taken into account further that an enlargement of sales markets of individual suppliers requires the economy of scales. There is no doubt about the danger that wasteful methods will increase and that the international access to limited natural resources will accelerate their exploitation.¹⁴ This statement is based on the fact that an intensification induced by foreign trade has a destructive impact on the environment.

12. See G.M. Grossman and A.W. Krueger, *Environmental Impact of American Free Trade Agreement*, No. 644 Discussion Paper 35(1992), Center for Economic Policy Research, London.

13. M. von Hauff, *The Transformation Process and the Structural Adjustment Programme in India. A Few Ecological Consequences*, in S. Reichgott, H. Sievers and V. V. Gasshu, (eds.), *Struktural. ADJUSTMENT (1995)*; *Tienam's Economy in Transition - Perspectives of Economic Development*, in R. Ohr, and F.P. Lang (eds.), *OPENNESS AND DEVELOPMENT (1996)*

14. J. Allmann, *Das Problem des Umweltschutzes im internationalen Handel*, in H. Sautter, (ed.), *ENTWICKLUNG UND UMWELT 220(1992)*.

9. See *supra* note 6 Kullessa at 73.

10. Cf. e.g. Majer *supra* note 6.

11. H. Siebert, *ECONOMICS OF THE ENVIRONMENT: THEORY AND POLICY*, 233 (3rd. Ed. 1992).

The traditional gains in efficiency of external trade integration in the form of realised economies of scale often give rise to additional external costs.¹⁵ Whether there are any effects on the environment or whether these can be avoided thus depends, though not entirely, on whether appropriate environmental measures can be taken and successfully carried through.

Trade policies strengthen the international division of labour and leads to an increased transport volume: This causality is distinguished by a high degree of plausibility. The strain on the environment through increasing goods transport is not disputed, since transport as a whole poses one of the greatest amounts of strain on the environment. In the OECD countries traffic is responsible for some 70% of carbon dioxide emissions, 50% of nitrogen monoxide and atmospheric lead emissions, 40% of hydro-carbon and 25% of carbon dioxide emissions.¹⁶ The plausibility of relating environmental damage to transport, however, should not lead us to draw sweeping conclusions.

It is undisputed that the greatest strain on the environment is posed by road traffic.¹⁷ Both energy consumption and the degree of air pollution produce the highest figures. But it must be taken into account that in European countries with a high transport volume only 13% on average of the international goods are carried by road. In the other important trading countries such as Japan, the United States and Canada this share tends to be even lower.¹⁸ The conclusion to be drawn from this is that transport as a consequence of increasing trade liberalisation must not be neglected. International goods transport, judged against environmental damage caused by traffic as a whole is, however, relatively low. What should therefore be demanded is not so much a restriction of trade liberalisation as the development of integrated transport concepts which lead to a reduction of external costs, except for the international transportation of toxic wastes, for which Article XX of the GATT regulations is valid, as will be shown in more detail in the following section.

A preliminary conclusion is that the dangers of further trade liberalisation to the environment should not be overlooked.¹⁹ There is undoubtedly a need for action, and this will be discussed in the following chapter in connection with the GATT/WTO regulations hitherto valid. On the other hand we may state that the conflict thesis cannot be entirely confirmed. Thus the question remains whether and to what extent the universe of action for national and international environment protection measures should be further extended and how the structure of trade will develop in future. It is

15. See *supra* note 6 at 76.

16. Cf. OECD *supra* note 7.

17. G. Benett, *et al.*, THE INTERNATIONAL MARKER AND ENVIRONMENTAL POLICY IN THE FRG AND THE NETHERLANDS (1988).

18. See *supra* note 1 at 16.

19. H. E. Daly, R. Goodland, *an Ecological-Economic Assessment of Deregulation of International Commerce Under GATT*, 1 No. 4 INTERNATIONAL JOURNAL OF SUSTAINABLE DEVELOPMENT, 73 (1994)

particularly relevant here whether the industrial countries are prepared to provide the developing countries with new environmentally sound production technologies or whether they are primarily interested in shifting environmentally harmful products or exporting environmentally harmful technologies.

III. ENVIRONMENT PROTECTION AND THE GATT/WTO RULES

The danger of increasing national and international burdens on the environment by the great expansion of world trade are obvious. And this explains the increasing demands for including environment protection more and more into the GATT/WTO rules. A crucial demand is for an extension of the GATT regulations restricted to the sovereign stipulation of product regulations to include clear rules for the extraterritorial application of rules of practice (e.g., a ban on CFCs).²⁰

The question now arises which environmentally relevant regulations and procedures (e.g., conciliation facilities) exist and whether these are adequate. Here it is only possible to give a brief chronological survey of the relations between environment protection and GATT rules.²¹ The earlier GATT Agreements did not explicitly embody the protection of the environment. But there are two exceptions which deserve special attention, Article III and especially Article XX, the latter containing general exceptions for trade restrictions otherwise running counter to GATT. These two exceptions are:

- (b) Necessary to protect human, animal or plant life or health;
- (g) Relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

The import restrictions cited are not, however, explicitly founded on environmental goals. Rather, the GATT Agreement is based on the concept of "Non Discrimination": according to which imported goods which are similar to domestic goods are not discriminated against. The ban on discrimination is also valid if the imported product was produced in a way that was extremely harmful to the environment. GATT Article XX thus offers no possibility of imposing national sanctions on environmentally harmful goods, which has caused intense controversy.²² The issue is "eco-dumping versus eco-imperialism". What is feared by the developing countries in particular is the danger of additional trade barriers against their own goods which are produced on a lower ecological level.

20. H. Hauser and K. U. Schanz, DAS NEUE GATT - DIE WELTHANDELSORDNUNG NACH ABSCHLUSS DER URUGUAY-RÜNDE. 238 (1995).

21. For details see Daly, Goodland, *supra* note. 17 at 73-92 and V. Rege, GATT Law and Environment - Related Issues Affecting the Trade of Developing Countries, 28 JOURNAL OF WORLD TRADE 95 (1994).

22. D. C. Esy, *Making Trade and Environmental Policy Work Together: Lessons from NAFTA*, 49 NO. 1 AUßENWIRTSCHAFT 51 (1994).

The World Trade Organisation has a larger set of rules than GATT, which also contains additional regulations on the preservation of the natural basis of human life.²³ By the setting up of a Committee on Trade and Development which has a watchdog function and is intended to develop the relevant rules further, environment protection receives a further increase in value. The analysis of the connection between trade and environment protection is intended to lead to recommendations for a change in WTO rules and to an improvement in cooperation with supranational and non-governmental organisations. In 1997 the first Ministerial Conference is to receive a comprehensive report on activities (for details of the Committee's working programme).²⁴

The Preamble of the WTO, besides the classical lines such as increase in economic growth, standard of living and real incomes, full employment and expansion of production and trade, also contains the goal of "sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective need". However, the Preamble is not binding in law for the signatory countries, so that the significance of the extension and goals to include environment protection is controversial. In addition to that the exceptions (b) and (g) in Article XX are taken over unchanged.

For an evaluation of the present situation it is significant that the connection between environmental and trade policies is assessed quite differently by the various WTO member countries. Thus the "dispute settlement body" will have an important role in the future. At the present time two trends are noticeable:

1. The national sovereignty of the WTO member countries is recognised in the GATT Agreement despite certain obligations in the area of trade policy.
2. The mastering of global environment problems (global commons) can in principle only take place through Article XX (b) and (g) on the basis of the principle of non-discrimination.

What is controversial in this context is the connection between the WTO rules and international environmental agreements like the Basel Convention (regulating the international transport of toxic waste) the Montreal Protocol (trade restrictions on substances which contribute to the destruction of the ozone layer) and the Vienna Accord (protection of the ozone layer). These agreements envisage the use of political instruments to avoid free rider activities. While partly increasing conflicts between WTO rules and international environment agreements are expected,²⁵ others regard

23. A. Knorr, *Welthandelsordnung und Umweltschutz*, in ORDO - Jahrbuch Für Ordnung, Wirtschaft Und Gesellschaft 21 (1995)

24. See M. Reiterer, *Das multilaterale Handelssystem und internationaler Umweltschutz*, 40 WIRTSCHAFTSPOLITISCHE BLÄTTER, 477 (1993).

25. See Th. Schonbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?* 86 AMERICAN JOURNAL OF INTERNATIONAL LAW 717 (1992); P. Soosa, *The Environment: A New Challenge to GATT?* 1980, 128 (World Bank policy research paper, 1992).

it as improbable that the WTO will act against trade restrictions for which there are provisions in international environment agreements.²⁶ This remains to be finally settled.

IV. THE RELEVANCE OF AN ECOLOGICAL REFORM, OR "GREENING WTO"

Many states have a justified and necessary interest in greater protection of the environment, including on the international level. In this connection a fundamental distinction may be made between two levels which are relevant to trade. Firstly, there are regionally restricted environment problems at stake which require arrangements to be made for the countries concerned. Then there are a number of international environmental problems which require arrangements for all the countries involved. The need for regulations must, however, take special account of the fact that there are big differences in the levels of economic development of countries and thus different "ecological capacities" (public consciousness, expert knowledge and institutional facilities, financial resources for active environment policies on the part of individual enterprises and of whole economies etc.). In the interests of the weaker countries in particular there must be legal certainty.²⁷ There is broad agreement that the WTO is not the appropriate body to carry out environment policy itself. But there is a need to supplement Article XX. So far it implies a one-sided focus on product features and is thus geared to product-related measures to protect human health and the natural environment. Measures restricting trade taken to influence ecologically detrimental production standards are so far totally banned.²⁸

Furthermore, Article XV:5 allows for a waiver for releasing individual parties from GATT obligations and thus for international environment agreements to be put before the GATT Agreement. For an urgently necessary up-valuation of the international environment agreements, however, the environment protection agreements should be given absolute priority over the GATT Agreement. In this connection, clear definition of global environment problems or of "global commons" is also necessary.²⁹ The issue here is whether only the common goods should be termed scarce global commons according to the Code which are classified as such by all or at least half the signatory states.

The reform proposals highlighted here take too little account, however, of the North-South gap. The ecological room for manoeuvre in the politics of many developing countries is relatively narrow. Trade restrictions which may be justifiable in ecological policy, may increase the trade gap (cf. Fig. 5) and/or lead to undesirable

26. See *supra* note 18 at 267.

27. J. Bhagwati, *Departures from Multilateralism: Regionalism and Aggressive Unilateralism*, 100 ECONOMIC JOURNAL (1990).

28. WISSENSCHAFTLICHER BEIRAT DER BUNDESRREGIERUNG: ELT IM WANDEL, JAHRBERICHTEN 1995, 203 (1996).

29. See M.E. Kulesa, *supra* note 6 at 285.

ecological impacts.³⁰ Therefore, the success of measures taken in the framework of international environmental policy will depend crucially on whether more environmentally sound production technologies are exported to the developing countries too and the "ecological capacities" are reinforced in the framework of national and international cooperation on development. It is sufficiently well known from the industrial countries that advanced environmentfriendly production technologies have a market with high growth rates. They also imply high ecological savings potential (reduction of energy consumption and of emissions, etc.), which lead to cost savings.³¹ It would be unfair and unreasonable to deny these environmentfriendly technologies to the developing countries.

SOCIAL CLAUSE IN TRADE: HUMAN PROMOTION OR PROTECTIONISM ?

Arun Kotenkar *

1. INTRODUCTION

The idea of linking trade with adequate labour and social standards seems to be quite simple and is yet difficult to implement and monitor. "Conceptually, the social clause in an international trade arrangement renders it feasible to link imports with conformity to labour standards. This arrangement could provide for restriction or prohibition of imports of products from countries, industries or enterprises where there is no compliance with stipulated labour standards. It could also provide for preferential imports of products from where there is compliance with stipulated standards". The idea is also to give various trade related incentives (e.g. reduce custom duties, excise taxes, etc.) if the predefined standards are met and to promote the trade and help the countries to consolidate the social and political human rights in concordance with the national and international legal framework.

If these standards are violated then trade related barriers and sanctions (e.g. additional custom duties, restriction of the products, etc.) may be imposed, trade may be discouraged to force the producers to fulfil the human rights. In case of gross violations (e.g. forced or bonded labour, child labour, etc.) tough conditions can be imposed or the trade of these products banned, may be totally.

Though the idea itself is quite old, the concept of social clause in the international trade is being intensively discussed since last two years, when the metamorphosis of GATT (General Agreement on Trade and Tariffs) into WTO (World Trade Organisation) started in the 8th round of the Uruguay rounds in December 1993.

International Labour Organisation (ILO) has discussed this many times since its inception in 1919 and formulated a number of conventions to protect the social rights of the labourers.² But ILO is politically a weak institution. Even other UN bodies like the General Assembly, Security Council have practised trade restrictions in other contexts, e.g. apartheid in South Africa or the occupation of Kuwait by Iraq. Trade

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1. *The Fifth Conference of Labour Ministers of Non-Aligned and Other Developing Countries*, (19-23 January, 1995), Delhi. Published in *SOCIAL CLAUSE IN MUTILATERAL TRADE AGREEMENTS (A Dossier on Labour Standards, Environmental Standards and Human Rights in Global Trade)* 90 (1995).

2. Important ILO Conventions :

No.87 : Freedom of Association and Protection of the Rights to Organise (1948).

No. 98 : Right to Organise and Collective Bargaining(1949).

No. 111 : Freedom from Discrimination in Employment(1958).

No.100 : Equal Remuneration for Women and Men (1951).

30. J. Wiemann, UMWELTORIENTIERTE HANDELSPOLITIK: EIN NEUES KONFLIKTFELD ZWISCHEN NORD UND SÜD? 27 (1992).

31. M. von Hauff, M. Breitbarth, and K.D. Maier, INNOVATIONSERGOLGE DURCH UMWELTSCHONENDE INVESTITIONSGÜTER, VOLKSWIRTSCHAFTLICHE DISKUSSIONSBEITRÄGE UNIVERSITÄT KAISERLAUTERN 8 (1995).

with South Africa was officially banned during apartheid and was lifted when apartheid was abolished. But now in the WTO context, the social clause discussion may take different shape and develop long term monitoring instruments for implementing the ILO conventions globally.

The reactions of the governments, trade unions, employers' associations, non-governmental organisations (NGO) and human rights organisations in the South and North are quite divergent towards the social clause. The trade unions of the northern industrialised countries, the International Confederation of Free Trade Union (ICFTU), the governments of USA and France have all welcomed the idea of social clause, each having different motives behind their support. Employers' associations of most of the countries, most southern countries organised as the Non-Aligned Movement (NAM) and also many governments of the northern industrialised countries have partially or totally rejected the social clause. Even trade unions and NGOs in the south are sceptical. One cannot draw a clear line of separation between North and South, trade unions and employers associations NGOs and governments. Besides, the discussion concerning social clause is till now restricted to the international trade (Multilateral Trade Agreement) only. No one has thought whether the social clause could be applied to the internal trade of a country and discuss the consequences for labour, trade or social development of that country.

The Indian Constitution and the labour laws do provide the framework to accommodate the above mentioned ILO conventions. Why can we not campaign for boycotting the products and services of children below 14 years? Who will suffer more? We, the ignorant consumers or the feudal, capitalist employer of the children or the children themselves who suffer anyway and are being robbed of their emotional and intellectual development? I think, we should link the social clause also with the internal trade and seriously combat the gross violations of the social and labour standards.

II. "SOCIAL CLAUSE" DEBATE IN WTO CONTEXT : AN OVERVIEW

The debate on social clause intensified at the end of 1993 when the Uruguay rounds reached the final stage. The governments of USA and France tried very much to put this point on the agenda of the GATT final conference in April 1994 at Marrakesh and to define it as the priority task of the newly formed WTO. USA had just then introduced the social clause in the North American Free Trade Agreement (NAFTA) and was under tremendous pressure from the trade unions AFL-CIO and the US Labour Advisory Committee For Trade Negotiations and Trade Policy (LAC) to get the social clause anchored in the WTO. US trade laws like Omnibus Trade and Competitive Act (1988) or The Generalised System of Preferences Act (GSA) of 1984

cover some areas of the social clause (freedom of association, right to organise unions and bargain collectively, prohibition of forced labour, minimum age for child labour and acceptable conditions of work with respect to minimum wages, hours of work, occupational health and safety), allowing USA to enforce the standards in the bilateral trade.

France, too, was quite active through the European Union (EU) to press for the social clause during the formation of WTO. The EU had formed as early as February 1993 the Andre Sanjion Committee on External Economic Relations to prepare a report on the introduction of a Social Clause in the Unilateral and Multilateral Trading System. The report tabled in January 1994 recommended introduction of social clause stating: "The European Parliament... considers it essential that a social clause designed to combat child and forced labour and to encourage trade union freedom and the freedom to engage in collective bargaining on the basis of the ILO conventions mentioned above be introduced in the multilateral and unilateral framework (GSP) of international trade... and calls for GATT to be changed by introducing a ban on child and forced labour and the right to join trade unions and engage in collective bargaining; accordingly, considers it essential that a code be negotiated between all the Contracting Parties to determine the way in which these principles can be implemented in practice".³ In its explanatory statement the report states: "At present, the practice of relocation towards developing countries with low labour costs has taken on worrying proportions for Community countries in certain industrial and service sectors. This explains why relocation is a course of serious concern at national level, especially during periods of acute recession and growing unemployment.... We shall look more closely at the social aspects of the problem, in other words the unfair "social dumping" practices which are based on a lack of respect for certain human rights in the workplace and violate human dignity. It should, nevertheless, be pointed out that the debate on the introduction of a social clause in international trade should not be used as an excuse for greater protectionism against developing countries".⁴ Even after the formation of the WTO France continued to push forwards the debate on the social clause. In March 95 the "French Memorandum" was presented to Social Affairs Council of the EU in which the President urged to define "a core of fundamental social rights at world level".⁵

The resistance of many industrialised countries of the north and the Third World countries of the south, particularly from South East Asia, Brazil and India who threatened not to sign the GATT final document at Marrakesh, forced the conference only to mention the necessity of the social clause without committing to any concrete actions. The social clause was excluded from WTO till 1997. The issue was not resolved at Marrakesh.

3. EUROPEAN PARLIAMENT SESSION DOCUMENTS (6 January, 1994), see supra note 1 at 128.

4. *Id.* at 131.

5. *Documentation Centre European Parliament Brussels N (1928)*, BULLETIN EUROPE (4 April, 1995).

No. 155 : Occupational Safety and Health.

No. 138 : Minimum Age for Employment of Children (1973).

Nos. 29/105 : Freedom from Forced Labour and Compulsory Labour (1930, 1957).

In 1995 the discussion continued at different levels. The trade unions, employer's associations, governments and NGOs started studying the ILO conventions, national labour laws, human rights declarations, etc. In order to define their own political and strategic positions, OECD formed a committee to work on the social clause and submit the report to the OECD Council of Ministers in 1996. The OECD members still have divergent views. France favours the social clause, whereas Germany is reserved towards the concepts of linking trade with the social standards.

The foremost proponent of the social clause in the Multilateral Trade Agreement is ICFTU where the trade unions of the industrialised countries have a dominating influence. Its position is: "We believe that in an increasingly competitive world trade market, governments should agree to a minimum floor level of labour standards so as to ensure that social conditions improve as trade expands. The "trickle down" theory of trade policy does not work. There are no automatic mechanisms by which increased exports lead to improved wages and conditions. Increased exports do provide the resources for improvement but only trade unions through collective bargaining or governments through adequately enforced labour laws can ensure that increased trade does really lead to higher standards of living for all workers".⁶ For ICFTU the social clause is a practical proposition to ensure free trade and ease "the pressures for increased trade protection". It believes "that many if not most developing countries could derive great benefits from a social clause".

Many other national trade unions of the industrialised countries (Germany, Netherlands, USA) support the ICFTU position whereas the trade unions of the Third World countries are reserved. The Indian trade unions have rejected the social clause strongly "because it can be used as political weapon in the global politics against the interests of the country. There is no need to provide additional handle to certain developed countries' governments to arm-twist.... This may also lead to further immiseration.... HMS believes that India (and developing countries) must put forward their own social clause, dictated by our domestic needs of public welfare and development".⁷

The foremost opponents of the social clause are the employers', associations and the governments of the Third World countries organised in the Non-Aligned Movement (NAM). The employers' associations would either reject the social clause outright or would not like to link the implementation of the ILO conventions with trade.⁸

The Third World countries already demonstrated their reservation at the Marrakesh conference. The next opportunity to express reservation towards the social clause was offered at The Fifth Conference of Labour Ministers of Non-Aligned and

6. See *supra* note 1 at 136.

7. *Id.* at 167.

8. K. Piepel (ed.) : SOZIALEKLAUSEN IN WELTHANDEL—EIN INSTRUMENT ZUR FORDERUNG DER MENSCHENRECHTE ? 22(1995).

Other Developing Countries in January 1995 in New Delhi, which discussed in detail the implications of the social clause (Agenda Item six) and rejected it in the WTO context. Rather, the members gave ILO the preference to develop workable labour standards without any trade links. While the substantial number of developing countries are not inclined to accept the social clause, they are also generally unanimous in their opinion that objective and neutral ILO action for standard setting should continue and that ILO hands should be strengthened for the purpose. According to them the social clause will ultimately harm the workers.

"The issue is, in fact, one of resource transfer and comparative advantages or disadvantages. Invoking trade sanctions against exporters in developing countries on grounds of labour standards would hurt the workers themselves, causing unemployment and driving them from distress to destitution".⁹ The ministers declared : "We are deeply concerned about the serious post-Marrakesh efforts, seeking to establish linkage between international trade and enforcement of labour standards through imposition of the social clause. We wish to reaffirm the position... that the social clause is totally unacceptable. In our view what is imperative is a commitment to promote and safeguard human dignity through the promotion of measures aiming at improving the working and living conditions of all people and providing better levels of protection".¹⁰ Similarly, ASEAN expressed its reservation towards the social clause fearing possible protectionist practices of the industrialised countries. "Our main concern is that a social clause can become a means for developed countries to impose their social standards on us. The danger of a proposal for a social clause, a precise definition of which has not been established, is that it may be used as a protectionist tool to shield uncompetitive or stagnant sectors. The solution to the community's own structural problems cannot be found under the guise of action to promote social progress in developing countries".¹¹

A number of NAM countries are dictatorially governed where trade unions are banned, basic human rights are violated, feudal social structures are preserved, forced and jaited labour is used, free and democratic election of the government are not allowed, etc. The ruling elite is not willing to allow any political and social changes. In NAM, all of them influence the position to be taken towards the social clause.

Indian Parliament ratified the agreement establishing the WTO on 8 December 1994. Indian position towards the social clause remained critical and subsequent actions were oriented towards gaining time. The Chairman, Commission on Labour Standards and International Trade, Government of India states:

Our first step should be to slow down this unholy hurry to get this social clause incorporated in either the ILO Agenda or WTO charter... Secondly... the thrust of our argument should be positive: that the

9. See *supra* note 1 at 94.

10. *Id.* at 161.

11. ASEAN Brussels Committee Statement in Trade. *Id.* at 157.

improvement of labour standards per se, is plainly acceptable, but what is not acceptable is trade linkage even as a matter of principle as it would be a dangerous policy instrument that is capable of misuse Third, that the modalities of upgradation of labour standards ... would encompass other issues such as inter-national labour mobility which is presently hindered by the developed countries immigration policies. There can be no doubt that free labour movement will produce higher labour standards Fourth, India should unilaterally declare that it seeks international partnership to abolish bonded labour and child labour, the only problems where we are vulnerable on the social clause issue, and ask the proponents of the social clause issue either to create a Global Social Facility Fund in the ILO to finance the abolition of the two problems or share the burden of our domestic prominence through bilateral aid. This will put the true motive of developed countries to test.¹² But the government knows that sooner or later the decision on the social clause in the WTO charter is bound to come. The Chairman continues:

Nevertheless, the linkage of labour standards to international commerce is an inevitable pill that we may have sooner or later to swallow. The question is how to formulate a strategy to define its scope, minimise its side effects and how to facilitate its painless implementation. Some of the labour standards are worthy of adherence on our own, such as on abolition of child labour. We need a definite plan of action for that.¹³

III. ISSUES RELATED TO SOCIAL CLAUSE

Despite the vehement critics and rejection from different sides it is essential to look at the basic issues raised by the controversy, namely, the sad plight of labour in the developing countries and to view the social clause from this aspect rather than as a tool of the developed countries to suppress the developing world (which it has unfortunately become due to its linkage with trade).¹⁴ Child labour, bonded labour, forced labour, unequal payments for women and men, prohibition of trade unions, etc. is still widespread in many countries. Only a minority is living a good life whereby the majority is deprived of opportunities of brighter future. They have to struggle daily for pure physical survival. What are the tools available at the global level within GATT/WTO or ILO to combat these evils and define social and labour standards?

GATT established a number of trade related fundamental rules subject to certain limits of their range of application or subject to specified exceptions. None of the

12. Statement of Dr. S. Swamy, Chairman Commission on Labour Standards and International Trade, Government of India. (2 June, 1995).

13. *Ibid.*

14. S. K. Bhownik, *Social Clause: Is Its Opposition Justified?* 30 *ECONOMIC AND POLITICAL WEEKLY* 3199 (1995).

rules deal with labour related issues except Article XX which provides some indication in clauses (a), (b) and (e). It reads :

"Subject to the requirement that such measures are not applied in manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (e) relating to the products of prison labour."

But except for clause (e), Article XX does not reflect the direct link between labour issue and trade indicating that GATT did not give much attention to the issue of labour standards during its existence of more than four decades. The GATT (now WTO) has no comprehensive source of substantive labour and social stand-ards.

Unlike GATT, ILO, formed in 1919 and since 1946 a part of the UN system, has been dealing with the conditions of employment, developing a system of international social and labour standards to enable the 150 member countries to improve the condition of the labour with minimum effect on their competitiveness. It has drawn up 171 conventions and 178 recommendations. The effectiveness of enforcing the social and labour standards (without violating the sovereignty of individual nation) is weak. Distinct and vociferous debate on the social clause started in the recent times in July 1990 when in Germany a public campaign on child labour in carpet industry of India started. The campaign focussed on boycotting the carpets woven by children and certifying the carpets without child labour. With the introduction of the so-called Harkin Bill ("To prohibit the import of goods produced abroad with child labour and for other purpose") in August 1992, the social clause debate became intense and fundamental and widened its scope over to other areas of labour, like bonded labour and forced labour. By the time the WTO formation appeared on the GATT agenda in 1993, the issue was perceptible in all labour and trade consultations.

Presently the social clause debate broadly covers the following ILO conventions:

- No. 87: Freedom of Association and Protection of the Rights to Organise (1948).
- No. 98: Right to Organise and Collective Bargaining (1949).
- No. 111: Freedom from Discrimination in Employment (1958).
- No. 100: Equal Remuneration for Women and Men (1951).
- No. 155: Occupational Safety and Health.
- No. 138: Minimum Age for Employment of Children (1973).
- Nos. 29/105: Freedom from Forced or Compulsory Labour (1930, 1957).

The member countries have ratified some of the ILO conventions and also passed national laws on these issues without significant difference to the working conditions of the labour. India has ratified the conventions No. 29, 100 and 111 from among above mentioned conventions. India has not yet ratified the other conventions i.e., 87, 98, 105 and 138 but has its own national laws and Constitutional provisions.

Bonded Labour System (Abolition) Act was passed in 1976, yet people have to live and work in bondage. The child labour (Prohibition and Regulation) Act was passed in 1986. Yet about 45 million children below 15 are widely employed in all types of hazardous jobs.¹⁵ The Equal Remuneration Act was passed in 1976, but women in unorganised sector get wages lower than those of men. These and many more other issues have not been tackled by the government yet. The social clause has raised very vital social, political and labour issues which have not been tackled in India, neither in the pre-independence period nor during the five decades of independence. The social balance sheet of the country even in 1996 is extremely poor. Child labour, bonded labour, forced labour, illiteracy among half the population between 6 and 60, and extreme poverty among dalits and adivasis. The list is long. Though the economy showed enormous development over the decades, the wealth created by different labour, organised or unorganised, bonded or forced, women and children has not trickled down to change their plights. The society has remained by and large polarised with the concentration of the wealth and power among the 30% upper and middle class population in the society. They are by and large free from all this burden. The Indian government has failed, like in many other Third World countries, to address the issues raised by the social clause earlier. "Unfortunately they crop up only when there is a threat to international trade. Hence it is ironical that while some countries in the developed world attempt to use the social clause to better their own position in world trade, developing countries are countering these manoeuvres by opposing any attempt to protect their workers. They now tend to view any move to improve condition of workers as external threats. Had the conventions embodied in social clause been sincerely implemented by the government, the position of the labour in India may not have been as helpless as it is now ... the quality of the workers would have improved and this too would have served the national interest".¹⁶ In spite of the fact that India's share in world export is very low (1992:0.52%; 19.56 billion US \$)¹⁷ of which about 30% is covered by the unorganised sector (Agriculture, Leather, Garments, Carpets, Handicrafts, etc.) the policymakers react very sensitively to the international social pressure. Unfortunately the trade unions have been supporting the government's position on the social clause to uphold the national interest. The organised sector employs only 8.5% of the Indian Workers (Ministry of Labour, Annual Report 1993-94); the rest (91.5%), inclusive of children and the majority of women, work in unorganised sector and is not represented by the classical

15. ILO ANNUAL REPORT (1992).

16. See *supra* note 14 at 3199.

17. See *supra* note 1 at 57.

unions. The policymakers in government, employers' association and trade unions have ignored the problems of these workers, which is criminal.

There are many evidences to show that the policymakers react to social issues much faster only when they are exposed to international queries and put under external pressure. The government of India declared an ambitious scheme for eliminating child labour only when the Rugmark certification for the Indian carpets became an international issue. National Human Rights Commission was set up only after strong international criticism of India's human rights records. "Narmada project, one of the most environmentally unsound, economically ruinous and human misery enhancing schemes undertaken anywhere, would not have been subjected to scrutiny, however belated by the Jayant Patel Committee had it not been preceded by considerable international controversy, leading to the withdrawal of the World Bank from it".¹⁸

IV. ENFORCEMENT AND DISPUTE SETTLEMENT : SOME SUGGESTIONS

Rejection of the social clause by the Third World countries is based on the fear that they would be forced by the industrialised countries to harmonise the labour standards according to their norms "upward harmonisation" resulting loss of "competitive advantage" which they enjoy as they can practice low labour standards including cheap labour. These tensions would definitely lead to conflicts which WTO will have to handle.

Unlike in the World Bank and IMF, WTO has one country one vote system. The industrialised countries cannot overrule the voting majority. The GATT/WTO does provide an established process for trade related disputes under Article XXII and XXIII. In its first year of functioning (i.e. 1995), the WTO received 27 complaints.¹⁹ The majority of the cases are among the industrialised countries. The Third World cases are south-south disputes. The only judgment given so far (Venezuela and Brazil v. USA) has been in favour of Venezuela and Brazil. The other cases are still pending. The WTO dispute machinery does not require unanimous decision and has to settle the disputes within 18 month, including time for appeals.

The Dispute Settlement Body of GATT/WTO is no doubt highly experienced in trade related issues. But it has no experience in social issues related to trade. The principles, terms of reference, the procedures, etc., therefore, are yet to be developed. One may doubt if WTO alone is the right body or if WTO and ILO can cooperate in the area of dispute settlement and enforcement. ILO is well experienced and has already developed many important social and labour conventions and recommendations. Many of them are ratified by the member countries. ILO and WTO can define and monitor the terms of reference of an Extended Dispute Settlement Body for social and labour disputes related to trade. This body can

18. P. Bidwai, THE ECONOMIC TIMES (13 February, 1995).

19. 10 against European Union, 4 against USA, 4 against Japan, 3 against S.Korea, 1 each against Poland (v. India), Malaysia (v. Singapore), Brazil (v. Philippines), Venezuela (v. Mexico).

- prepare regular reports on the state of labour rights and trade and make recommendations;
- monitor the norms and monitor them periodically;
- examine the complaints and settle them as far as they fall within the mandate. If a complaint relates to a specific business act within which the labour dispute can be resolved, then this body can deliver the judgment within short time ;
- but in cases where the dispute resolution requires the change in social structure and production processes, and probably economic inputs (e.g. child labour), the body can insist on a national plan of action with specific time frame and in compliance with international laws; the body can offer any possible help within WTO and ILO competency and monitor the implementation;
- an international welfare fund should be set up to help national activities for combating worse forms of labour standards violations (child labour, bonded labour);
- WTO can develop a flexible trade preference mechanism to encourage the member countries to enforce the standards;
- and if a member country would not submit a plan of action or would not implement the activities to practice the labour standards, then trade sanctions can be suggested.

V. SOCIAL CLAUSE AND CHILD LABOUR IN INDIA

Let us take the case of child labour in India where about 45 million children (the highest figure world-wide) are employed in production and service sector for the export industry and the internal market. According to UN estimates more than 100 million children are at work globally under exploitative conditions. The ILO Report of 1992 says that Asia has the highest figures relating to child labour, up to 11% of the total labour force in certain countries. Article 24 of the Indian Constitution prohibits employment of children below the age of 14 in factories, mines or other hazardous occupations. The Child Labour (Prohibition and Regulation) Act, 1986 defines further areas of prohibition and regulation but excludes the family labour which allows many small scale industries to function as family units without prohibiting child labour. Even the Factories Act, 1948 does not prohibit child labour for small units of 10 persons or more with power or 20 persons or more without power. Child labour is rampant, in the small scale industry.

Why do children have to work? Why is the child labour so high and has been existing for so long (for centuries) in India? The common belief is that poverty and economic problems force them to work hard and long in order to meet both ends. But a number of studies have shown that this is not quite true. It is less a phenomenon of poverty than of social attitude and sensibilities.

"So far child labour has been accepted in India because it is believed to have an economic basis that fits a demand-supply framework".²⁰ Equally, the monetary

contribution of the children to family budget is marginal and does not justify the child labour at all.²¹ Moreover, the damage done to children in their early age makes them vulnerable and unemployable in their later life. Even the argument that cheap child labour gives competitive advantage in international trade is not quite true. In the carpet industry, for example, a number of actors are involved; home based weaver, subcontractor, contractor, exporter on one side and importer, retailer on the other side. About 75% of the selling price of the carpet is a value addition after import. The labour costs of the weaver are marginal and may increase by only 5% if the children are replaced by adult labour.

Would that justify the continuation of child labour practice in India? Who will lose (how much?) in the international trade if these children are sent to school? Is a nation going to suffer if the profits of some traders are reduced marginally for the price of the education of the children? Indicators relating to living standards and schooling show a significant correlation between the two factors.²² Many Third world Countries (Sri Lanka, Vietnam, Tanzania, Uganda, Zaire, Burma, Kenya and China) show that the principle of compulsory education can be successfully adopted, with corresponding decrease in child labour. This puts to question the notion of industrial development acting as precursor to the abolition of child labour. Instead, it indicates a political will and commitment to put an end to a problem. It also stresses the role of education in reducing child labour.²³

VI. CONCLUSION

By rejecting the social clause, the Indian government has put off its responsibilities of sincerely combating the plight of the labour, particularly in unorganised sector. If it is not under pressure, internally and externally, it will not show any political will to abolish even the worse forms of labour, namely child labour and bonded labour. Social clause implementation may provide an opportunity to focus this at the centre of social change. The Indian labour will only gain from the social clause.

20. K. Bhaty, *Child Labour: Breaking the Vicious Circle*, 31 ECONOMIC AND POLITICAL WEEKLY 384 (1996).

21. THE CHILD AND THE STATE IN INDIA 33 (1990).

22. UNDP ANNUAL REPORT (1992).

23. K. Bhaty, *supra* note 20 at 385.

ENVIRONMENT AND THE NEW ECONOMIC POLICIES: 1991-96

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I. INTRODUCTION

The natural environment has been viewed by conventional economists and development advocates as an exploitable resource, and a sink into which the wastes of economic development can be thrown. This view ignores the fact that for the majority of people on earth, and particularly in so-called "developing" countries, the natural environment forms the very basis of survival. Forests, land, and waterbodies directly meet the food, water, housing, energy, medical and cultural needs of much of humanity. When these resources are targeted by development planners for commercial use or for appropriation by small elite in the name of some unspecified "national interest" and the single-minded pursuit of economic growth, it is the lives and livelihoods of these people which are threatened.

Much the same worldview guides the planners of India's economy, and at no time has this been clearer than in the 1990s. At the start of this decade, the Indian Government, under advice from the International Monetary Fund and the World Bank, embarked on an ambitious programme of "structural adjustment" and "economic liberalisation". These New Economic Policies (NEP) were ostensibly introduced to meet India's severe balance of payments crisis, and to propel its economy into quicker growth and global integration towards the 21st century. Apart from direct fiscal policies, the major components of the new package include boosting exports to earn foreign exchange, liberalising industrial production, dropping barriers to the entry of foreign companies and goods, expanding privatisation, and cutting government spending.

Three years back we started a review of the impact of the NEP on India's environment and on those communities which depend directly for their subsistence and livelihood on the natural environment; this resulted in a series of annual articles.¹ With half a decade of the NEP over, and with a possible change of government coming into India, it is an opportune moment to take a full-fledged look at this impact. What follows is not a rigorous quantitative analysis of the NEP, for ecological and social impacts are not necessarily amenable to such an analysis. While facts and figures are given wherever relevant and available, the stress is much more on the qualitative impacts of the NEP. Environment, after all, is about the quality of life. In addition, no attempt has been made to look at the environmental impacts of purely fiscal measures and trends (e.g. price fluctuations, monetary deregulation, etc.), as I am not

competent to do such an analysis. Despite these shortcomings, however, it is my contention that the environmental impact is clear enough to show a trend, and to comment on in some detail.

In the last five years, evidence strongly suggests that each of the major components of the NEP is having a severe environmental (and consequently social) impact:

- a) the liberalisation of trade had two consequences: the move towards export-led model of growth was rapidly sacrificing natural resources to earn foreign exchange; as was especially seen in the fisheries and mining sectors; secondly, there had been a sudden flood of consumer goods and toxicwastes coming into India, creating serious waste disposal and health problems.
- b) the move towards industrial and agricultural liberalisation had resulted in an atmosphere of a free-for-all, with industries increasingly ignoring environmental standards, and state governments sacrificing natural habitats and prime food-growing land to make way for commercial enterprises; in addition, the goals of equity were being given up, e.g. in the move to relax land ceilings to allow agro-industrial expansion.
- c) the opening up of the economy to foreign investments was bringing in companies with a notorious track record on environment, and with demands to further relax social and environmental measures.
- d) privatisation, while bringing in certain efficiencies, was encouraging the violation or dilution of environmental standards, and the neglect of social services/goods for the poor.

II. TRADE LIBERALISATION

A. Exports : Selling Our Future

Heavy reliance is being placed on exports as a means to drive the economy forward, and to ease the balance of payments crisis. India has plenty of potential for increasing its exports, but this must be done within an overall policy which would ensure that:

- a) the domestic availability of the products is not jeopardised;
- b) the exports do not cause domestic prices to skyrocket;
- c) the exploitation of natural resources to extract/produce these products is ecologically sustainable;
- d) the rights of local communities from whose areas the resources are being extracted are respected; and
- e) these communities are the primary beneficiaries of exports.

Unfortunately, the NEP violates each of these principles. The clearest examples of this destructive thrust are in the case of fisheries and aquaculture, floriculture, cash cropping and mining, which are all amongst the fastest growing export sectors.

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1. See M. Kohari and A. Kohari, *Structural Adjustment vs Environment*, 28 ECONOMIC AND POLITICAL WEEKLY 473 (1993).

Exports of fish and fish products as a whole, with marine products as their major component, have risen from 159,000 tonnes, valued at Rs. 960 crores, in 1990-91, to 321,000 tonnes, valued at Rs. 3537 crores, in 1994-95.² In the period 1991-94, 82 companies were given clearance for joint (foreign and Indian) venture marine fisheries, using 255 deep sea fishing trawlers. Further clearances have been frozen due to protests from traditional fisherfolk but more on that later. Not surprisingly, joint ventures being allowed into India are all export-oriented. According to available data, fishery stocks in most of the world's seas have been exploited to their full potential, or even over-exploited, one of the exceptions is the Indian Ocean. It is obvious that the major fishing companies, and the rich fish-eating nations, are eyeing our waters to satiate their large appetites. Unfortunately, lured by the foreign exchange prospects, our government has given in to this unjustified and unsustainable demand. Proponents of trawling claim that these ventures will be allowed to fish only in deep waters, where traditional fisherfolk do not go. But past experience has shown that trawler owners find it convenient and cheaper to fish closer to shore.³ Also, trawlers are often used in the fish-breeding season, during which time traditional fisherfolk usually give the seas a rest. The results, for India's marine ecosystems and traditional fisherfolk, are already proving to be disastrous. Physical clashes between trawler owners and local fisherfolk are a common occurrence.

Fisherfolk and farmers along the coasts will also be seriously hit by the spate of new prawn and shrimp farming ventures which are being cleared. There has been a rapid expansion of such aquaculture, largely oriented to the foreign demand for seafood. Such farming involves intensive management of coastal ecosystems, oriented to a single species; this invariably disrupts the delicate salinity balance of coastal areas, causes pollution, and reduces their biodiversity. In many countries of the world (Thailand, Mexico, Ecuador), such farming has destroyed large stretches of mangrove forest, and caused serious pollution.⁴ In India, surveys by the National Environmental Engineering Institute (NEERI) have shown serious negative impacts in Orissa and other states. The environmental and social repercussions have been shown to have economic implications also; for instance, the report notes that in Tamil Nadu, there was a net loss of Rs. 142 crores due to damage to farm land and salt pans, wage losses to farmers, fall in rice production, and losses in fishing income.⁵ Since large-scale operations standardised to meet stringent export requirements are affordable mainly by big companies, benefits hardly go to small fisherfolk.

2. See Government of India, *Economic Survey 1994-95* (1996).

3. J. Kurien, *Impact of Joint Ventures on Fish Economy*, 30 *Economic and Political Weekly* 300 (1995).

4. Greenpeace International, *COASTAL AQUACULTURE IN THE CONTEXT OF CBD* (1995).

5. S. Vishwanathan, *Survival Stakes: The Battle On The Aquaculture Front*, *FRONTLINE* (14 July 1995).

Both the public and private sectors have big plans for aquaculture in the country. The head of the Aqua Foundation of India, M. Sakhivel, was recently quoted as projecting a jump of shrimp exports from 70,000 tonnes at present to 2,00,000 tonnes by 2000 AD, and stating that the world is looking towards India to meet its shrimp requirements. The Gujarat Fisheries Development Corporation and other agencies have signed an agreement to develop one lakh hectares of the state's coasts for aquaculture.⁶ Of a total of 1.4 million hectares of brackish water area in India, upto 1 million hectares may be suitable for such operations. The promise is that these projects will provide employment to several million people, cause minimal environmental damage and no displacement, and of course earn the country immense foreign exchange. However, studies of farms which have been set up in the last few years, for instance in the Nagai Quaid-e-Millath district of Tamil Nadu, and the Nellore district of Andhra Pradesh, have shown that serious pollution problems have been caused by prawn farming, and that per unit of area, aquaculture has provided less than half the employment that farming previously did. In addition, considerable depletion of groundwater has taken place, and salinity of the water and of the soils on land surrounding the aqua-farms, has increased significantly. Threats have been reported to the biodiversity and livelihood resources of ecologically sensitive areas like the Pulicat Lake Sanctuary (straddling Andhra Pradesh and Tamil Nadu) by indiscriminate expansion of aquaculture. Similar experiences are being reported from other parts of India's coastline.

Other sectors slated for major export-oriented production are agro-products (including processed foods) and floriculture. In the 1990s, India's agro-exports have more than doubled in value. On the face of it, agro-industries should help rural communities in adding value to their produce, thereby getting them a better price.

However, the dictates of the export market often have ecological and social consequences which undermine the sustainability of such value addition, and keep the benefits out of reach of small farmers. There is, first of all, a transformation of food cropping to cash cropping lands, with some of the major export items being targeted being cotton, sugar, tea, etc. The exception to this could be rice, which is also slated for major export increases. In both these cases, however, there is going to be an intensification of production through artificial inputs like fertilisers and pesticides, a jump in the demand for water (already scarce), and the loss of genetic diversity.

This last impact, genetic erosion, is as yet largely ignored. Export markets and largescale agro-industries typically demand standardised, uniform products, and result in the replacement of a high diversity of indigenous crops by a few so-called high-yielding varieties. Already a single variety of Basmati rice, favoured by foreign consumers, has replaced dozens, possibly hundreds of other local varieties of rice.

6. INDIA MONTHLY MONITOR : A SURVEY OF MAJOR ECONOMIC AND POLICY DEVELOPMENTS (1995-1996).

Pepsi has reportedly encouraged farmers to grow one particular variety of tomato, which is suited to its production process. Kentucky Fried Chicken is reported to have delayed the start of its operation in India because it wants maize-fed chicken, which it will introduce to replace the local Indian breeds of poultry.

From 1991 to 1994, 41 joint ventures for export-oriented flower production were approved. Intensive floriculture can be ecologically destructive, given that production is highly dependent on the use of fertilisers, pesticides and other artificial inputs. It is also likely to push out the small farmer, who will not have the necessary resources to invest, in favour of the large farmer and the private corporation. Indeed, as will be shown below, state governments are increasingly considering relaxing the limits to landholdings, to encourage large commercial farming by the corporate sector.

Mining is another major thrust area for investments, especially related to exports. 1994 saw major changes in the National Mining Policy and amendments in the Mines and Minerals. Development Act, primarily towards easing investments by the private sector, including foreign concerns. Immediately several companies have evinced interest. A subsidiary of an Australian consortium of mining firms, the Australia Indian Resources, has applied for prospecting licenses over a staggering 50,000 sq. km. in Andhra Pradesh, Karnataka, and Maharashtra. One of the world's largest mining companies, the British RTZ Corp. Plc, has set up a subsidiary in India named Rio Tinto Minerals Development Ltd., which recently signed a joint ventures agreement with the public sector Orissa Mining Corporation, for iron ore mining in Orissa.⁷ These are just tips of the coming iceberg. The concern is that in the desire to cash in on the country's vast mineral resources, neither state governments nor private companies are likely to bother about such niceties as natural resource conservation and local community rights. Mining, especially surface mining, is extremely devastating, as witnessed in the vast deserts created in the iron ore belts of Goa, the limestone belts of Rajasthan and Uttar Pradesh hills, the coal belts of east India and other areas. As an example of what is to come, Orissa's export earnings have risen by 35% per annum over the decade, with minerals topping the list of items exported, what is ignored is that this has been at the cost of largescale deforestation and dispossession of lands from tribal communities. Even rich wildlife habitats are being sacrificed by state governments which once declared them protected; in 1993-94 the Kudremukh Iron Ore Company Ltd. (KIOCL) was given a new lease to prospect for iron-ore in the middle of the Kudremukh National Park, one of the few remaining large evergreen forest patches in Karnataka. The chilling news is that KIOCL subsequently hit upon traces of gold in its existing iron-ore mines, attracting two multinational gold mining companies to consider asking for prospecting rights.⁸ Diamond mining is reportedly proposed by the mining giant De Beers, along with India's own Ambanis, within the

7. N. Patnaik, *RTZ Ties Up with OMC For Iron Ore Project*, ECONOMIC TIMES (7 April, 1995).

8. D. Bhattacharjee, *Kudremukh Gold Strikes Draws Global Access*, ECONOMIC TIMES (18 January, 1995).

thick forests of Udanti Sanctuary in Madhya Pradesh, home to the endangered wild buffalo. Bihar state's Chief Minister, Laloo Yadav, recently toured the USA and other countries, portraying his state as having untapped mineral wealth which foreign companies were welcome to tap.⁹

It is argued that multinational companies are able to do mining in a safer and less environmentally destructive way, but their global track record indicates otherwise. For instance, RTZ Corp. is known to be one of the world's most destructive companies, and has been charged with violation of indigenous people's territorial rights in South America and South-East Asia, encouraging a bitterly fought civil war in Papua New Guinea, furthering white rule in South Africa, and running away from its responsibility for cleaning up uranium mining wastes in Canada.¹⁰ A company like this should not be touched with a barge pole by the Indian government; but then, forex speaks, much more powerfully in its current mindset than does environmental sustainability and human rights. It is perhaps symbolic that RTZ plans to mine ironore from the Gandhamardhan hills; an earlier proposal for such mining was the centre of controversy in the 1980s, till it was rejected due to environmental pressure.

A final indication of the impact of an export-led economy are the revisions made, in April 1993, in the policy regarding export. In one sweeping move, some 144 items and sub-items were removed from the negative list of exports, i.e. products whose export was banned or severely restricted. Most of these were from the agricultural and biological materials sector, though chemicals and minerals also figured prominently. Chills were sent down the spines of those who have fought for years to ban the export of threatened plant and animal species: the notification removed or severely diluted restrictions on the export of wild orchids, kuth extract of *Saussurea lappa*, roots of *Diosgenin* and *Dioscorea* spp., and other plants whose continued survival in India is already a matter of great concern. Also on the list were brown sea weeds and agarophytes (mushrooms), processed timber of all species except Sandalwood and Red sanders, and items made of peacock tail feathers, sandalwood, and seashells. A general category of "plants, plant portions and derivatives obtained from the wild" was also removed from the negative list, leaving open to interpretation whether virtually all wild plants were now exportable. In early 1996, the government has indicated that it is considering leaving very few items on the restricted category in its next revision of the exportable list.

With the acceptance of the General Agreement on Trade and Tariffs (GATT) by the Indian Government, the above trends can only intensify. The GATT secretariat projects that the major boost in international trade by this treaty will be in the sectors

9. India Abroad News Service, *Laloo Portrays Bihar as a Mine of Opportunities*, BUSINESS STANDARD (12 October, 1995).

10. Anon, *Crop Holiday No Solution To Shrimp Virus Attack*, SHAKHVEL, BUSINESS STANDARD (7 February, 1995).

of textiles, agriculture/forestry/fisheries, and processed foods/ beverages. In its official Economic Survey for 1994-95, the government has gleefully reported that these are the precise sectors in which "India's existing and potential export competitiveness lies", and that they could earn the country an extra 2.7 to 7 billion U.S. dollars per annum. The commercial stakes are very high, and competitiveness can be greatly increased by ignoring the costs of environmental conservation and social security measures needed to achieve sustainability in production in these sectors. Also pushing the unsustainable thrust towards export-oriented exploitation will be India's continuing debt-repayment burden. The burden is expected to about U.S. \$13 billion in 1995-96, and about \$14.5 billion in 1996-97, and the government has clearly stated that a healthy balance of payments situation can only be achieved with greatly increased exports. The finer print reads: "no matter at what cost".

B. *Import Liberalisation: Consumerism And Waste*

Another direct result of import liberalisation, coupled with other factors, is a boost to conspicuous consumerism. The consumerism thrust that the 1980s witnessed — already a cause of serious ecological damage and social distortions — is likely to pale into insignificance in comparison to what is coming now. Fuelled by the electronic media, aggressive advertising, slashing of import duty and other such measures, the upper middle class consumer is now being flooded with dazzling luxury goods. Flashy advertisements for elite products towering above an ugly cluster of squatter's huts: this classic visual of riches in the midst of increasing poverty is now a common sight in any of India's cities. While the social consequences of this consumerism boom are frightening enough, the environmental implications are also serious. The rapid rise in production of luxury goods can only place a greatly increased strain on natural resources, with ecological consequences from the time of resource extraction (mining, tree-felling, etc.) to the time of production (pollution, working hazards, etc.). After consumption too, environmental impacts are felt in the increasing wastes which are generated. In this respect the phenomenal rise in the use of plastics, detergents and other non-biodegradable or hazardous materials in the last few years is alarming. Visions of the massive waste dumps that dot the USA, till now only available in magazines and TV, may well come alive if we continue to encourage the wasteful consumerism track which the Western countries have taken. Perhaps then we will do to our less powerful neighbours what industrialised countries have begun to do to us: treat them as dumping grounds for the waste that we can no longer manage.

Indeed, the last few years have seen India emerging as a major importer of toxic wastes from the industrial countries, much as has happened to many other tropical countries in the past. According to information unearthed by Greenpeace International, hundreds of tonnes of plastic, metal, lead, copper, and other wastes coming into India from countries like Australia, Canada, U.K., and U.S.A., ostensibly for recycling.¹¹

11. PUBLIC INTEREST RESEARCH GROUP, *New Delhi, Toxic Waste Trade: A Primer* (1994).

Undoubtedly a substantial part of this does get recycled, but much also gets dumped as it is not re-usable, and in any case the recycling process itself yields serious effluents. Greenpeace International reports that an Indian company, Futura Industries of Tamil Nadu, has imported 10,000 metric tons of plastic waste since 1992. This is for recycling, but Futura has admitted that 30-40% of this could not be reused. Between 1992 and 1993, imports of lead acid battery wastes from Australia increased nearly three-fold from 1,26,000 kg. to 3,46,000 kg. This government appears not to think twice before sacrificing the health of its citizens for the sake of some foreign exchange. In 1995, India was even considering opposing the ratification of the Basel Convention, banning transboundary movement of toxic waste, but public pressure fortunately persuaded it to withdraw its opposition.

III. INTERNAL LIBERALISATION: A FREE-FOR-ALL?

The thrust towards exports has been accompanied by a corresponding relaxation of various controls which were earlier exercised over the industrial and commercial sector. Once again, no-one is arguing that bureaucratic controls should not be relaxed. However, all industrial countries of the world have gone through a process of tightening environmental standards and controls over industrial and development projects, for the simple reason that project authorities and corporate houses on their own have not shown environmental and social responsibility. In India, there is a reverse process going on, that of loosening, in policy or in practice, the environmental safeguards so painstakingly built up over the 1980s. Bureaucratic red-tapism was an inappropriate bathwater for the environmental baby; what the new economic policies are doing is to throw out the baby with the bathwater.

In an earlier article we had lamented the delay in issuing a notification making environmental clearances legally mandatory for certain types of development projects. This notification, drafted and twice opened for public objections in the early 1990s by the Ministry of Environment and Forests (MOEF), was till recently pending with the Prime Minister. It was finally gazetted in 1994, but in a considerably diluted form. For instance, a provision that development projects near ecologically fragile areas would need special clearance, has been dropped.

This dilution is due to severe opposition from industrialists and politicians, whose objections are simple: when all regulations are being removed, and the economy is moving into fast gear, why impose environmental regulations? A simple argument, but deadly in its consequences. In no industrialised country of the world are development projects, even privately owned ones, given a free reign over how and what natural resources they can use, and what they are to do with the adverse social and environmental impacts of their activities. These issues are subject to stringent regulations, including environmental clearance procedures, siting considerations, monitoring exercises, and penalties for violations. Such regulations have been put into place after learning the hard way, that an uncontrolled development process is a recipe for ecological and social suicide.

Till the late 1980s it appeared that India was willing to learn from this experience, by instituting the appropriate safeguards and regulations. In the 1990s, the lessons are being unlearned, as the move towards the "fast track" bulldozes even the environmental measures taken in the past. The Union Minister for Environment and Forests recently admitted that the Forest Conservation Act of 1980, which helped to reduce the diversion of forests for non-forest purposes by subjecting this diversion to scrutiny by the central government, is itself being challenged by state Chief Ministers, who now see in it a roadblock to industrialisation. In late 1995, the Rajasthan State Government issued a directive to its forest officers to identify forest lands which could be denotified for mining purposes, openly defying the Forest Conservation Act. The MOEF is itself considering leasing forest land for industrial plantations. Ostensibly to reduce pressure on natural forest lands, this move has been opposed for years by environmentalists and local communities for several reasons. In places, good forest areas may be leased out in the guise of degraded forest lands, and the dependence of local poor people (especially pastoralists) on degraded lands and grasslands will be denied if these lands are leased to industry. Astonishingly, former Environment Minister Kamal Nath defended the move by saying that state governments were not fully able to protect forest lands and that private companies may be able to do this better! Alternative suggestions regarding farm forestry to meet industrial demands have so far been ignored by the MOEF. It is indeed sad that the very ministry which should be resisting and moderating the new economic forces, is capitulating to unjustified industrial demands. Fortunately, widespread protests have so far stalled the move.

For those who have struggled to save India's last few wildlife habitats from destructive processes in the last few decades, the NEP presents horrifying prospects. The 1990s have seen a spate of proposed and actual denotifications (or degazetting) of national parks and sanctuaries in various states. Both the declaration and management of such wildlife protected areas is in the hands of state governments, as is the procedure for their denotification: Taking advantage of this, the Himachal Pradesh government took the lead in 1992, denotifying the Darlaghat Sanctuary to make way for a cement factory. Nation-wide protests after this fact became public forced the government to renotify a smaller portion of the previous sanctuary, but the damage had been done. A clear signal had gone out to other states that they too could sacrifice such areas and that the central government was unwilling or unable to stop them. Gujarat followed in 1993, with the denotification of the Narayan Sarovar Sanctuary, a critical habitat for wildlife typical of the western arid zone and coastal ecosystem interface. Once again, the beneficiary is a cement factory. NGO protests reduced the damage, as the government renotified a portion of the sanctuary, but over 300 sq. km. were still sacrificed. Several other areas are threatened with denotification. Bhitarkanika Sanctuary in Orissa, home to the world's largest nesting congregation of the endangered olive ridley sea turtle, may be truncated in size to accommodate trawling jetties and roads linking the jetties to inland markets. The one that really takes the cake, in terms of the sheer audacity of the private sector, is the proposed denotification of a part of the Marine National Park in the Gulf of Kutch, Gujarat.

Reliance Industries proposes to set up a refinery on the Kutch coast, in collaboration with the Japanese firm, C. Itoh. Interestingly, in one of its project documents Reliance had explicitly sought the denotification of a part of the national park, even giving details of the areas to be denotified ("Reliance Refinery Complex", undated, Reliance Group of Industries). These included the famous Pirotan Island and surrounding coral reefs. In the same document, Reliance stated that C. Itoh, its collaborator, "required, in principle, clearance of limited denotification of marine park".¹ The implication, not explicitly stated but obvious, was that in the absence of this and other conditions being met, C. Itoh would not be interested in collaborating.

Relaxation of environmental measures is taking place in other fields too. I have already mentioned the new mining policy above, which has made it considerably easier to obtain permission to mine in forest areas. In the 1993-94 budget, the government announced a five-year tax holiday for new industries being set up in industrially backward areas; this has now been extended to all backward areas by the department of revenue. Since such areas are defined primarily from the narrow economic point of view, almost invariably they are areas where the last vestiges of natural habitats and traditional cultures remain. The Government is still viewing relatively non-monetised, non-commercialised livelihoods (such as traditional organic farming, small-scale fishing, pastoralism, and village industries), as "backward", not realising (or not wanting to accept the fact) that these are in fact the most sustainable ways of living on earth, and not thinking of ways to encourage and enhance these livelihoods to meet the challenges of modernity. And so in large parts of the country which have so far been free from the suicidal path of industrial development (Kutch, Ladakh, Andaman and Lakshadweep Islands, Bastar), industries are being given a red-carpet welcome by the new policies. Gujarat, for instance, has industrial projects worth Rs. 5000 crores pending for the Kutch area. With virtually no monitoring by official environmental agencies in these "remote" areas, and with weak local NGO presence, this process is inevitably going to lead to ecological devastation and social disruption on a massive scale.

A sample of the industrial policy reforms which some states have announced, as listed in the Economic Survey 1994-95, gives a taste of things to come:

- a. Haryana has set up a High Powered Committee to take spot decisions on foreign investments, NRI projects, and 100% export-oriented projects; it has also announced that all projects will be cleared through the State Pollution Control Board within 15 days.
- b. Kerala has introduced a Green Channel Scheme to expedite clearances.
- c. Punjab has constituted a committee to provide land "off the shelf" and is formulating a policy to ensure clearances within 24 hours of the submission of a proposal.
- d. Rajasthan has exempted 155 SSI industries from obtaining No Objection Certificate from the State Pollution Control Board and reduced the number of industries to be inspected under the Factories Act from 15 to 3.

In each of these cases, it is clear that the state governments attach no importance to the critical environmental appraisal process which industries must go through. It is impossible for such an appraisal to be done within 15 days (Haryana), much less within 24 hours (Punjab), not to mention "on the spot" (Haryana)! The whittling down of the list of industries requiring pollution clearances and Factories Act inspection (which includes the plant's working environment and state of maintenance) by Rajasthan, is even more chilling.

A specific alarming example of industrial deregulation is the automobile industry. The Economic Survey 1994-95 boasts that "delicensing of the automobile industry has led to a boom in investment in automobile components and plans for producing new cars"; it notes that many of the biggest international names in the field are entering into joint ventures, including General Motors, Peugeot, Mercedes, Daewoo and Rover; it also records the following jumps in vehicular sales over the period 1993-94: 20% for cars, 30% for jeeps, 25% for commercial vehicles, 18% for 2-wheelers, and 41% for 3-wheelers. Already Indian cities are amongst the most polluted in the world with severe health impacts on their residents. While undoubtedly many of the new vehicles will be less polluting than the existing Indian models, the sheer jump in numbers will lead to an increase in aggregate pollution levels. This is very evident in Delhi, for instance, where the last few years have seen a quantum jump in pollution levels caused primarily by the 90,000 new vehicles which get added to its streets every year.

Apart from the threat posed by liberalisation to our air and water, there is a direct attack on land resources also. As noted above, Punjab is ready to sell land "off the shelf". In an astounding move, state governments are considering relaxing their Land Reforms Acts and land ceiling rules to make way for the massive land holdings which industrial projects, commercial farming, aquaculture and floriculture will require. These Acts and rules were passed after independence in a bid to reduce the gap between large landowners and the landless or marginal farmers, and were used to initiate land redistribution measures. And now, in a naked show of contempt for such egalitarian measures, Karnataka state has proposed a series of radical changes in the Karnataka Land Reforms Act of 1961: the power to "exempt any extent of agricultural land for any specific purpose", a maximum agricultural holding of 216 acres instead of the current 54 acres, holdings of upto 108 acres for industrial development and horticulture/floriculture and the reintroduction of the tenancy system for aquaculture.¹² Amazingly, West Bengal, long known for its radical land reforms under a leftist government, has also proposed to lift the land ceiling of 25 acres to make way for the establishment of industries, townships, plantations, dairies, poultry farms, horticulture, etc.¹³ Not only prime agricultural land, but also pastures and wetlands,

which are critical for biodiversity conservation and for poor local communities are likely to fall victim to this trend.

In yet another twist to this game of depriving the poor to benefit the rich, the Andhra Pradesh state government has hit upon a new way of circumventing the constitutional guarantees given to tribals. In most parts of the country, tribal lands cannot be transferred to non-tribals, to protect the interests of the former. However, in Andhra Pradesh, the state government has given itself the power to take over tribal lands: now, it is acting as-a-front to lease tribal lands for mining to about 15 private companies. Amongst the beneficiaries is the Birla group of companies, one of India's largest corporations. The losers, of course, are the tribals and the forests of the area, including the ecologically sensitive Eastern Ghats belt.

The latest thrust under the NEP is for tourism. Several states are opening up areas previously restricted for tourists including sensitive border areas of the north and north-east. Infrastructure for these fussy tourists is being created at a frenetic pace and governments are bending over backwards to make it easier for the private sector to get involved. In Madhya Pradesh, for instance, "free" (on equity) land has been offered for joint venture tourism projects (hotels, golf courses, water sports, convention centres, etc.). These projects will also enjoy exemption from luxury tax, sales tax, and entertainment tax for 10 years along with exemption under section 20 of the Urban Land Ceiling Act. Among the areas to be opened up for this are ecologically sensitive habitats in Pachnamahi, Kanha, Bandhavgadh and Pench, all currently protected areas for wildlife. In Andaman Islands, there has been a spate of tourism related structures coming up on the coast in violation of the Coastal Zone Regulations.

IV. FOREIGN INVESTMENT

Foreign firms are being wooed by the current government as if they were the saviours of the Indian economy. Drastic policy measures to ease their entry have been taken including automatic approval for foreign investment upto 51% equity and in the case of some industries, the possibility of 100% equity. Nearly 6000 foreign collaboration proposals have been approved since 1991 (though only a few of these have actually materialised yet). While I do not believe that foreign companies are necessarily any worse than Indian ones, the haste and desperation with which they are being invited to set up shop in India leads one to fear that environmental norms could be severely compromised to allow for easy entry. Many of the examples discussed above, for foreign collaborations in deep sea fishing, aquaculture, mining of granite and other minerals, food processing and industrial products, are cases in point. The transfer of hazardous industries and commodities, as has already happened in other developing countries, becomes much more possible with the NEP. Information on the foreign companies who are investing in India confirms this view. Among the multinationals who have a notorious environmental record, and whose investments in India have already been approved are Imperial Chemical Industries or ICI (UK), Du Pont, Monsanto, and Cargill (all USA), Shell (Netherlands) and Ciba Geigy (Switzerland).

12. G. Var, *Move For Major Changes in Karnataka's Land Reform Act*, Economic Times (6 September, 1995)

13. A. K. Biswas, *J Capitalist Twist*, Outlook (3 January, 1996)

One of the major areas targeted by foreign corporations is pesticide production. Recently the Economic Times reported that several "major international players in the pesticide industry are now scouting for partners to set up shop in India". These include Japan's largest pesticide company, Kumiai Chemical Industries, as also Nippon; Hakkai Club, Mitsubishi, Atocchem, Dow Chemicals, and Du Pont. The intentions are clear. The *Economic Times* quoted a Du Pont official as saying that there was vast market potential in India: "In Japan, the average use of pesticides per hectare is 10 kg. In India, it is 450 gm. Considering that India is mainly an agricultural economy, the industry has ample scope to grow". This, at a time when the world is moving away from pesticides towards biological pest control and organic farming. An example of what this move by pesticide multinationals entails is provided by collaborations which have already been approved. Ciba Geigy, which justifiably earned notoriety when it tested pesticides on Egyptian children, plans to manufacture Monocrotophos in collaboration with its Indian counterpart Hindustan Ciba Geigy. Monocrotophos is classified as a "highly hazardous" pesticide by the World Health Organisation and is banned or severely restricted in many countries, yet it is freely being used in India. Since Ciba Geigy's technology to produce it is no longer of use in industrialised countries, what better way to make a killing than to transfer it to countries like India?

The ridiculous extremes to which the new open-door policy can go is highlighted by the proposal to import cowdung from Holland! A more hare-brained scheme for a country which has the world's largest livestock population would be hard to think up. This proverbial coal to Newcastle situation has been seriously proposed by a Dutch firm, Seaswan B. V., in collaboration with an Indian fertiliser and pesticide company, EID Parry. The proposed label "Envirodung" will hide the fact that the dung may contain residues of the chemicals used in the intensive livestock farming systems of Holland. Indeed, these residues, which in Holland leak into the groundwater, are the major reason the Dutch government wants to get rid of the dung. The proposal, fortunately, has got buried after strong protests from Indian farmers.

Another indication of the eagerness of the Indian government to please foreign investors and major Indian industries is the alacrity with which it has proposed an intellectual property rights (IPR) system for new plant varieties. Under GATT, India is obliged to introduce a sui generis IPR system for plants, however, it has a five year grace period in which to do so and there is no written obligation to follow any existing model of IPR legislation. However, under pressure from seed companies who want monopolistic rights to the varieties they produce, including powerful multinationals, the Agriculture Ministry has not only already drafted a Plant Varieties Act, but more or less modelled it after the International Convention for the Protection of New Varieties of Plants (UPOV). The UPOV Convention has recently been amended to dilute sections guaranteeing farmers and researchers the right to use genetic material without being subject to IPR monopolies. Though the Indian draft has included strong sections on farmers' and researchers' rights, it is feared that these will not stay for

long. It is probably a matter of time before the Indian government succumbs to the intense pressure from the international seed industry, which caused the dilution of these aspects in the UPOV Convention. Once we are on the road to accepting private IPRs on life forms, there is no way we will be able to resist the global trend to make such IPRs more and more monopolistic affecting both farmers and the crop genetic diversity which they have developed and continue to depend on. India could well have adapted a system of protection which gave common/public/community rights to plants, which obliged breeders to publicly share their inventions while assuring them financially adequate and socially acceptable returns, which emphasised diversity rather than uniformity in the use of crops and which used public good rather than private profit as the major incentive for creativity (as has so far been done in the public sector seed development programme). But Cargill and Imperial Chemicals Industries (ICI) and WR Grace would not have liked that, so it was not to be.

V. THE ECONOMIC SURVEY, ENVIRONMENT AND EQUITY: LIPSERVICE

The Government of India brings out an Economic Survey every year, reviewing the major trends in the economy and providing an outlook for the coming year. For the last three years, the official Economic Survey of the Government of India has included a section on environment, previously absent. However, in these documents, the environment section is an insignificant component (e.g. all of 2 pages out of 183 in the 1995-96 Survey) tucked away in the chapter on Infrastructure. It is clearly being treated like an irritating aside which has to be paid lip-service to.

There is obviously no understanding amongst the country's economic planners, of the cross-cutting significance of the natural environment. The fact that all human (including economic) activity is ultimately based on four elements — land, water, air and biological resources — and that therefore economic activity must be mindful of the sustainability of these elements, continues to elude our decision-makers. If the government was serious about sustainable development (as grandly proclaimed by former Prime Minister Narasimha Rao at the Earth Summit in Rio in 1992), it would at the very least analyse the two-way relationship between environment and development as it unfolds every year, and then take corrective measures.

There is no evidence of this in the Economic Surveys. The section on environment gives a general picture of the dismal situation regarding forests, land, water and pollution, then lists a few steps that the government is taking to tackle these. It does not link the year's major economic developments with this situation; it does not, for instance, analyse whether the impact of these developments was detrimental or corrective. Nor does it do the reverse: analyse the implications of the environmental situation for future economic development in India.

This failure is all the more glaring because the facts presented in this brief section all point to the need to drastically review the economic policies of the country. Perhaps this is why no analysis is presented, for if done honestly, the government would have to admit that the environmental crisis is an outcome of these very policies.

The 1994-95 Survey admitted, for instance, that:

- a. industrialisation has put severe pressure on natural resources;
- b. 90% of water in 241 Class II cities is polluted
- c. 54% of the urban and 97% of the rural population do not have sanitation facilities

The 1995-96 survey adds other tales of woe. Yet, both surveys fail to state that the economic activities of the past few years (or for that matter of the 1990s as a whole) have only served to put further pressure, cause more pollution, destroy more forests; and on the other hand, the drastically increased budgets that would be required to tackle the pollution and sanitation and other problems have not been forthcoming. It does not draw the logical conclusion from the data presented: that mechanised trawling, large-scale aquaculture, intensive cash cropping, mining, indiscriminate industrial growth in ecologically sensitive ("backward") zones and other activities which are now being promoted, must be halted and alternative forms of economic activity sought which do not cause irreversible ecological damage. It blithely talks of the government's strategy of conserving natural resources, preventing and controlling pollution, conducting prior environmental impact assessments and involving people in afforestation, but does not show how the past year's policies and programmes have actually managed to achieve these steps or indeed how the next year's policies and programmes will do so. The 1995-96 Economic Survey, for instance, does not tell us whether Class II cities are now better off in terms of pollution abatement, or whether there is an improvement in the provision of sanitation facilities to the urban and rural population.

To give a specific example of the failure to logically diagnose its own data, the 1994-95 Survey mentions that stress needs to be given to Integrated Pest Management (IPM), which emphasises a mix of pest control methods, minimising the use of hazardous pesticides; yet in the same breath, estimates that pesticide use has increased from 68 thousand tonnes in 1992-93 to 83 thousand tonnes in 1993-94. Though it claims that 5000 extension workers have been trained in IPM techniques for cotton and rice, no policy statement is made that there will be an attempt to gradually replace pesticide use by IPM or other safer methods. More generally on agriculture, the Survey states that there is a "large unfinished agenda of agrarian reform, special support programmes for small farmers", but fails to analyse how the thrust towards agro-product exports, floriculture, and aquaculture is likely to affect this agenda. Nor does it anywhere mention the need to take the path towards sustainable agriculture, which would involve getting away from the Green Revolution model towards farming which uses minimal chemicals, indigenously produced seeds, locally harvestable water and soil/moisture conservation measures. Integrated watershed development and conservation schemes are mentioned in passing, but the Survey does not show how, if at all, the policies and programmes being pursued actually encourage these schemes.

The Government has grandly declared, in various Economic Surveys, that the

country's basic goals are "growth, equity, self-reliance, and modernisation" and "sustained improvement in the living standard of people of India, especially the poor". While there is plenty of evidence that the goals of growth and modernisation are being vigorously followed, those of equity and self-reliance are quite obviously being sacrificed at the altar of short-term material growth. The Indian Planning Commission in a mid-term report of the 8th Five Year Plan has said that poverty has increased, welfare programmes are worsening and foodgrains availability has fallen from 510 grams per person in 1991 to 474 grams in 1994. In any case, one uncontested fact is that many non-marketed goods and services (e.g. fresh water, free fodder, medicinal plants, non-timber forest produce and other benefits which derived from natural habitats) are increasingly being snatched from the poor to make them available to the rich.

Inequity (between countries and communities/classes, between humans and other species, and between different human generations) is the root cause of environmental problems. It allows the powerful and rich to usurp a disproportionate and unsustainable share of natural resources, while forcing the weak and poor to overstrain whatever little resources are left with them. It allows the powerful to defile and pollute the water, air and soil, while forcing the weak to bear the consequences of such defilement. In turn, environmental degradation intensifies inequalities and social deprivation, as when tribal livelihoods are destroyed by deforestation, or when fisherfolk are affected by water pollution.

In this sense, the NEP is dealing a double blow to India, fuelling and greatly accelerating the spiral of social/economic inequality and ecological degradation. As mentioned above, the thrust towards export-orientation, liberalisation, privatisation and foreign investments is likely to favour those who have significant investment opportunities: the trawler owner, the large (often absentee) farmer, the big domestic corporation, the foreign multinational, the mine owner and of course the upper and upper middle class consumer. These classes of Indian society are already putting an unsustainable pressure on the environment. By encouraging them, at the expense of the large mass of poor people, the NEP is ultimately leading to the undermining of the very natural resource base on which our entire economy, our very society stands. There could not be a more suicidal path to progress.

It is not my case that all investments being made as a result of the NEP by foreign or Indian companies are environmentally destructive. Several investments in pollution control technologies, non-conventional and renewable energy sources, recycling and so on, are increasingly being made. For instance, proposals for the generation of 450 MW by wind farms and solar plants are presently under consideration. But even a cursory glance at industrial trends clearly shows that investments on sustainable and conservation-oriented projects are insignificant compared to what is going into resource-exploitative, polluting, land-grabbing, inequitous projects. This is not surprising given that quick money is easier to make from the latter than from the former and that those who stand to gain from short-term

exploitation of natural resources are the ones who are dictating the decisions on economic policies and programmes. If forest-dwellers, village women, marginal farmers, tribals and nomads, small-scale fisherfolk and other such ecosystem-dependent people were taking the decisions, we would have a very different structural adjustment process taking place.

VI. EXPLORING ALTERNATIVES, STRENGTHENING PEOPLES MOVEMENTS

A critique of the NEP should not be construed as an argument for returning to the State-controlled system which prevailed before the 1990s. By no stretch of imagination were the pre-NEP days ideal from an environmental and social justice viewpoint. Centralisation of power and the domination of economic growth as the developmental paradigm had already created a mess. Structural transformation of our society and economy was definitely required. But the NEP was no solution to the ills created by the earlier system.

Any meaningful transformation in India must tackle the patently unequal control over natural resources (especially land, water and forests) which allows the minority elite to race towards a luxurious 21st century at the cost of further dispossessing the poor of whatever little they have. This transformation must also redirect the present model of development which is socially iniquitous and ecologically unsustainable. The NEP shows no potential for this, but rather reinforces the status quo.

The true alternative to the economic crisis lies in getting away from both an over-centralised system, which has existed since Independence and an excessively privatised one, which is looming on the horizon. Community management of resources needs to be revived with a clear set of rights and obligations for local communities, governmental agencies and voluntary organisations. Nor is this an empty slogan; if sustainable development is the goal of economic policies, then there is much to learn from the many genuine people's and governmental developmental efforts that are scattered throughout India. The watershed and land management experiments of Ralegan Siddhi (Maharashtra) and Sukdomajri (Uttar Pradesh), involving villagers with the help of some enlightened individuals who had their feet firmly on the ground, have turned food and cash-deficit villages into surplus economies. Ralegan Siddhi is in fact quite an eye-opener, for it is in one of India's most drought-prone areas (an average rainfall of 400 mm) and has achieved adequate water supplies for drinking and agriculture through rainwater harvesting without the help of a costly, debt incurring big dam. These experiments have also ensured a greater degree of equity in the distribution of the resultant benefits than has been possible in most governmental programmes. Such equity has been the hallmark of another unique effort, the water management and distribution system of Pani Panchayat in villages of Pune district of Maharashtra. Then there are the dozens of efforts at switching to organic farming either through traditional methods or new ones, reducing or eliminating completely the need for expensive, ecologically disastrous and fossil-fuel guzzling chemical fertilisers and pesticides. Gloria Land in Pondicherry, the Beej Bachao Andolan's biologically diverse

fields in the Garhwal Himalayas, Narayan Reddy's farm in Karnataka, Bhaskar Save and P.D. Baphna's orchards at Bordi (Maharashtra) and myriad others come to mind yet remain neglected by the dominant agricultural establishment. As for governance, there is a lot to learn from the tribal village of Seed (Rajasthan) which is managed by a Gram Sabha (village council) having the legal and executive power to decide all matters relating to local land and natural resource use under the Rajasthan Gramdan Act of 1971. Here, as also at Kaila Devi Panchayat within the Ranthambhor Tiger Reserve in Rajasthan and at Jaridhar village in Tehri Garhwal Himalayas and in many other places, stringent rules regarding the use of common lands ensure their conservation and sustainable use. But in many places local community structures have broken down; they will need to be revived and collaborative management strategies between them and the government thought of to complement each others strengths. There are, for instance, the joint forest management (JFM) systems evolved in many parts of India between villages and forest departments which are proving to be successful not only in afforesting degraded lands but also in providing employment and economic security to impoverished village communities. According to a recent estimate about 2.5 million hectares are under protection by village committees set up under various JFM schemes.

Simultaneously, people's groups along with intellectuals are working out policy and legal alternatives to the present developmental and governance system. Scientists and activists have proposed a People's Nature, Health, and Education Bill with detailed provisions for governing resources from the village to national level. A widespread process of consultation in the 1990s led, in 1995 to the formulation of a people's Forest Act, as an alternative to the present Act which is a carryover from colonial times.

While this quiet constructive work of sustainable development and alternative policy formulation goes on, there is increasing people's resistance to the NEP. Mass protests and public debates are having some effect not only on individual projects but on the policies themselves.

Most significant and widespread was the agitation of 7 to 8 million fisherfolk with a series of mass actions including three nationwide strikes in the last two years, against the deep-sea fishing policy. Apart from achieving impressive following amongst fishing communities, the agitation supported by a cross-section of intellectuals, scientists, and politicians led the Government of India to appoint a committee to review the policy on deep-sea fishing. After an year of consideration, the committee recommended that all permits for joint venture or charter vessels for deep sea fishing should be cancelled (subject to legal processes) and that no such permits should be given in future. For Indian fisherfolk, this is a major victory; they have shown that sustained resistance coupled with informed debate can force the withdrawal of a major component of the NEP.

Significant successes elsewhere also signaled hope:

- a. Sustained opposition by villagers and activists stalled work on the Du Pont-Thapar Nylon plant in Goa for years; the agitation reached a head in early 1995 when a young boy was killed in police firing during a demonstration against the plant, and villagers in retaliation burnt structures on the plant premises. Du Pont finally had to move out of Goa, but are now encountering resistance from villagers near the new proposed site in Tamil Nadu.
- b. In Orissa, a mix of environmental and political opposition stalled the proposed denotification of Balukhand Sanctuary, to make way for a hotel complex until the government dropped the proposal. Similar opposition continues to protect the Bhitarkanika Sanctuary from the proposed development of jetties and roads. In Gujarat, the High Court ordered a stay on the denotification of the Narayan Sarovar Sanctuary, based on a petition by environmental NGOs. The stay did not last long, as the state government managed to obtain legislative approval for the denotification; however, it had to renotify a substantial part of the sanctuary.
- c. Pressure from concerned politicians, public interest legislation by environmental groups and mass protest by farmers in other states halted the indiscriminate expansion of aquaculture along many parts of India's coasts. In Tamil Nadu, an NGO coalition "Campaign Against Shrimp Industry" was formed; 40 Members of the Legislative Assembly in Orissa demanded a total halt to such farming and several international groups like the Mangrove Action Project appealed for a boycott of shrimp and prawns imported from India. Acting on a writ by the Tamil Nadu Gram Swaraj Movement the Supreme Court asked for a stay on further allotment of land for aquaculture till further hearings. In a belated move in late 1995, the Government of India issued guidelines on how to make aquaculture more environmentally friendly, though these are not comprehensive and leave most critical decisions to the state's discretion.
- d. The MOE's proposal, to lease forest lands to industry for growing commercial plantations, was quietly buried after intense opposition from environmental and social action groups. These groups are keeping a close tab on events, as proposals such as this have a habit of resurfacing time and again.
- e. Greenpeace International joined Indian groups in demanding a halt to toxic waste exports from industrial countries to India. Innovative protests against the ridiculous proposal to import 7-10-million tons of cattle dung from Holland, including the dumping of 50 tons of "swadeshi" (indigenous) dung by farmers outside the Indian parliament, led to the proposal being rejected.
- f. The Indian Government's proposal to amend the Indian Patents Act, to bring it in line with GATT, has been twice defeated in the upper house of parliament, thanks to some intense political lobbying by NGOs and intellectuals. Across the country, several mass movements have joined to fight against the NEP and to present alternatives under the banner of the Nation

Alliance of People's Movements.

These successes and moves are certainly helping to buy time. But the most pressing need is for environmentalists, social activists and sensitive academics to work out an alternative strategy for the economic renewal of the country, a strategy which is socially sensitive and environmentally sustainable. Elements of such a strategy are present in the widespread mass movements built around natural resource conflicts, in the various alternative-energy, agricultural, and industrial projects which are successfully being run by citizens' groups and a handful of government agencies across the country, and in the alternative governance models which are being practiced in several areas. But unless these elements can be bound together into a comprehensive conceptual and practical alternative, the powerful forces unleashed by the NEP will lead the country over the brink of survival.

STATE AND MARKET : A CONSTITUTIONAL ANALYSIS

S.S.Singh* & Suresh Mishra**

I. INTRODUCTION

Political ideology translated into policy choices needs to be legitimised constitutionally and legally for its implementation. Political preference of today, for whatever the reasons, emphasises private sector autonomy and non-governmental market solutions to the problems and difficulties of all descriptions.¹ Since 1980s major changes occurred in the world which have affected the economies and societies of every country. These changes are having impact, on our country too since July 1991 with the "economic liberalisation". In support of these changes conservatives have argued that government have grown too fat and must be reduced. In opposition however, liberals have contended that the conservatives' campaign for efficiency through market prescriptions is really intended to do away with the welfare state Government employees' unions, on the other hand, have sensed in market arguments an effort to eliminate their jobs.² Claims and counterclaims apart, the fact is that the influence of market is growing and growing fast. Australia, New Zealand and United Kingdom have gone further in the direction of a customer/contractor structure, with diminishing core ministries and throwing open a large number of areas to market forces to transact heretofore governmental business.³ The impact of market ideology on government are broadly described as the new way of governance,⁴ government by the market,⁵ reinventing government,⁶ new public management,⁷ sharing power,⁸ slimming of state,⁹ the hollowing out of the state,¹⁰ really reinventing government,¹¹ and so on. The task undertaken hereinafter is to analyse and examine constitutional legitimisation of free market economy in India.

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1. C. F. Edley, ADMINISTRATIVE LAW-RETHINKING JUDICIAL CONTROL OF BUREAUCRACY (1990). This book rests on a broad rejection of this view. Modern administrative state cannot be dismantled.
2. F. K. Donald, SHARING POWER : PUBLIC GOVERNANCE AND PRIVATE MARKET 157 (1993).
3. *The Changing Role of Government : Administrative Structure and Reform*, PROCEEDINGS OF A COMMONWEALTH ROUNDTABLE 20 (24-28 February, 1992) Sydney, Australia.
4. *Ibid*.
5. P. Self, GOVERNMENT BY THE MARKET? (1993).
6. D. Osborne and T. Gahler, REINVENTING GOVERNMENT (1992).
7. N. Lewis, *Reviewing Change in Government*, *New Public Management and Next Steps* PUBLIC LAW 105-113 (1994).
8. See *supra* note 2.
9. See *supra* note 5.
10. R.A.W. Rhodes, *The Hollowing out of the state: The Changing Nature of Public Services in Britain*, 65 THE POLITICAL QUARTERLY 138-54 (1994)

II. STATE, MARKET AND THE CONSTITUTION

People live, work, breathe, interact and choose in social settings. This means choosing in a context of otherness. This may also be emphasised that the social enterprise is people-driven. Although choosing takes place in a context of otherness it does so within a framework where each other counts for the same value. Therefore any social setting constitutes a real definition of human association and interaction. This human association through the device of interaction is able and capable to arrive at common agreements for common good. "Common good is not a set of interests but a set of shared purposes and standards which are fundamental to the way of life prized together by the participants".¹² Much of the unanswered business of constitution making, law and politics related to how the social setting comes into being and what are the collective responsibilities/entitlements for reordering it to allow choice, experiment and self-fulfilment to be played out. It is therefore logically inherent in state-making that the social setting has to be adjusted from time to time and kept in constant repair so that human beings can fulfil their hopes, wishes, aspirations, expectations and dreams in the preferred conditions. The state, therefore, is a social instrument backed by the people's power democratically or otherwise. It has character of dependency on society it seeks to govern and regulate.¹³

Market economies saw perhaps their greatest triumph of the century during the 1980s. There is an endless variety of the free market. There is the free market of the American version, there is the free market of Germany and there is the socialist free market of China. Can any one claim that they are one and the same?¹⁴

However, the essence of market is the freedom of choice of individual. The language of political change in recent decades has been choice, especially in opposition to bureaucratic and statist solutions. This concept of public choice is based on the assumption of "self interest" and "rationality". The basic behavioural postulate of public choice, as for economics, is that man is an egoistic, rational utility maximiser. Public choice ideology rejects the traditional dichotomy of "public interest" and "private interest".¹⁵

Choice as ideological support to governance has presently attained the state of a received wisdom, perhaps especially in the field of consumer affairs and even more especially in the field of state consumer services. What, however, needs to be emphasised is that choice is a multi-layered, fecund concept attached as it is to the unique status of the individual qua individual. In other words, it carries heavy ontological baggage. It is, therefore, essential for those who argue for a minimal state.

11. P. F. Drucker, *Really Reinventing Government*, *Span* (11 December, 1995).
12. W. E. Connolly, *Appearance AND REALITY*. In *Politics* 81 (1981).
13. K. N. Kabra, *Structural Adjustment Programme : Emerging Policy Regime in India*, *ECONOMIC GROWTH AND CHANGE* 94 (March 1993).
14. V. P. Dutt, *Return of Socialism in East Europe*, *The Hindustan Times* (28 December, 1995).
15. Mueller, *Public Choice* 1-2 (1989).

to understand the nature of human personality. It would, perhaps, be appropriate for those who argue for minimal state to explain exactly what concept of human personality constitutes their fundamental presuppositions of state authority to act. Responsibility for setting the frameworks for organised living in a state of flexible readiness to provide the maximum opportunities for the growth of the individual personality is required to be carried out democratically, transparently and with a sense of accountability.

The constitution is the collective, compact community conscience. The very fact of a constitution, of an organised state, is a recognition that it will facilitate by creating conditions which on any interpretation are beyond the capacity of any one human being or group to achieve and enjoy. In this sense, a constitution is the fundamental and foundational law of the land and operates for the most part at the national level. On the other hand, market tends to be international, hence the requirement of liberalisation and globalisation of economy through free trade. "By this way, capitalism has become truly global in its reach and character."¹⁶

The justifications for markets are normally made on the grounds that markets are more "efficient". Markets create competition and act against monopoly. It should be mentioned here that efficiency is a means not an end. If markets are efficient in maximising people's wants then they are justified because expressing wants and having them delivered is a choosing exercise. And choice as freedom is at the heart of the human condition. The justifications of markets are questionable and are being questioned. The concept of "efficiency" is especially ambiguous. Efficiency in producing what and for whom? More efficient in delivering goods, but what goods? Improving the quality of goods and services, but for whom and for how many?; etc. In a society like India, which is marked by pathetic economic conditions of vast majority of its population, uneven distribution of power, resources, capabilities and regional imbalances, doubts are being raised on the success of the economic reforms on the ground that this will at the maximum benefit only two hundred fifty million population out of 910 million. According to a report, reforms have benefited only 15 percent and the rest 85 percent became poorer.¹⁷ Let it be as it may.

III. CONSTITUTIONAL IMPLICATIONS OF MARKET

Adopting and implementing economic policies influenced by market ideology is not only a political, social, economic, and technical phenomenon, but also a legal one.

16. P. Self, *supra* note 5 at 273.

17. See D. Kortan, *When Corporations Rule the world, and Multinationals Create poverty*, The Hindustan Times (7 February, 1996) and A. N. Roy, *Whither Neo-liberalism*, The Hindustan Times (20 February, 1996). According to A. N. Roy: "The new liberals sidelined the social issues. The role for social policy was virtually left to private markets, charity and voluntary efforts. The cut back in social expenditure led to the growth of poverty and economic marginalisation even at the time of economic growth."

From start to finish, the legal and regulatory requirements effectively shaped the work of privatisers and beneficiaries alike, no matter what type of actions are involved. A variety of legal issues permeate the whole privatisation process. It has been said that "law is one of the principal instruments which governments use to interact with the economy, to translate economic, social and other policies into rules which are meant to be followed in practice."¹⁸ The constitution of the country must be respected by the government in power in matters of its policies. It is, therefore, mandatory to examine the constitution of a country whether it intends to opt for market. The fundamental law might expressly authorise, prohibit or restrict the power of the government to privatise. It would be beneficial to mention in this context the statement of the Finance Minister of France, where privatisation programme was aimed solely at the competitive sector of public ownership: the monopoly utility, and enterprise in highly regulated markets were not included. As the Minister of Finance responsible for privatisation put it while presenting the proposal to Parliament:

Which enterprises must we privatise. Once more, the principles are clear. There is no question of privatising enterprises which operate a public service or have control of monopoly. To do so would be contrary to the constitution. It would also be contrary to our beliefs. So don't accuse us of that.¹⁹

It is evident that constitutional considerations have a considerable implication in shaping the scope of privatisation process and accountability for privatisation. This does not, of course, mean that privatisation of national public services or of monopolies is impossible. Such privatisation would be feasible, but would require a specially demanding form of democratic scrutiny and adjusting the constitutional ideological spirit and philosophy in tune with the free market economy.

At the outset it should be mentioned that privatisation of public enterprises signals an advance of capitalistic thinking as nationalisation signalled an advance of socialistic thinking.²⁰

The proclaimed justification for privatisation of public utility services and selling off state assets to the private sector, deregulation of economy to facilitate private sector activities on business considerations and contracting out of social welfare functions to the private contractors and operators are the measures to be adopted under the influence of the free market economy. It is the assumed trust, perhaps misplaced, in the efficiency of markets, and the distrust in the efficiency of the government which explains the recent thrust on privatisation in many countries, i.e. private is good and

18. P. Guislain, *Diversities of State Enterprises: An overview of the Legal Framework*, World Bank 9 (1992). And see also M.D. Cadiz, V.J.J. Gonzalez, *Privatisation: Nature, Methods and Some Legal concerns*, 1 Indian Journal Of Public Administration 509-524 (1994).

19. Cited in T. Prosser, *Constitutions and Political Economy: The Privatisation of Public Enterprises in France and Britain*, 53, Modern Law Review 309-311 (1990).

20. D. Bos, *Privatisation - A Theoretical Treatment* (1991).

public is bad. One of the objectives of this new way of governance has been to reduce the operational zone of the government and to liberate market forces in a variety of ways, such as deregulation and adoption of various monetary and fiscal measures. The second objective has been to import market concepts and incentives into the operations of government.²¹ It would be better to analyse the new market-oriented economic policy within the constitutional framework.

First of all, it would not only be desirable but essential to analyse ideological and philosophical underpinnings of free market economy and the Constitution. One of the preambular promises of our Constitution is the socialist pattern of society. The import of the preamble to the Constitution is inviolable because the Supreme Court has insisted that this preamble is the basic feature of the Constitution since the rulings in *Kesavananda Bharati*,²² *Minerva Mills*²³ and *S.R. Bommai*.²⁴ The law is that the basic structures cannot be breached even by the constituent power of Parliament.²⁵ Explaining the meaning and the principal aim of a socialist state the Supreme Court observed in *D.S. Nakara Case*²⁶ as follows:

The principal aim of a socialist state is to eliminate inequality in income and status and standards of life. The basic framework of socialism is to provide a decent standard of life to the working people and specially provide security from cradle to grave. This among others on economic side envisaged economic equality and equitable distribution of income. This is a blend of Marxism and Gandhism leaning heavily towards Gandhian Socialism.²⁷

Former Prime Minister, P.V. Narasimha Rao, referring to the reforms, had insisted that "the India had not abandoned socialism which was enshrined in the constitution, but had modified it to conform to present realities".²⁸ In this context it would be pertinent to know that how anything which is enshrined in the Constitution can be modified. At least not by mere economic policy change. This is, in no way, a coherent explanation of the relation of the reforms to Indian socialism. It may not be disputed by any one, with a clear and unbiased conscience, that the economic reforms, with their overwhelming faith in privatisation and free market economy, involving disinvestment in public enterprises, thinning of labour force and tarpedding the existence of the welfare state all of which go against the constitutional underpinning of Indian socialism.²⁹

21. See P. Seif, *supra* note 5.
22. *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 SC 1461.
23. *Minerva Mills v. Union of India*, (1980) 3 SCC 625.
24. *S. R. Bommai v. Union of India*, (1994) 3 SCC 1.
25. V. R. Krishna Iyer, *Human Rights - A Judges Miscellany* Ch. II (1995).
26. AIR 1983 SC 130.
27. D. S. Nakara v. Union of India. *Id.* at 139.
28. *The Hindustan Times* (30 October, 1995).
29. S. S. Singh and S. Misra, *Public Law Issues in Privatisation Process*, INDIAN JOURNAL OF PUBLIC ADMINISTRATION 396-410 at 402 (1994).

The second question relates to the position of the individual "We the people of India". The position of individual under the constitution and in relation to the system and sub-systems created by it is that of citizenship. Citizenship position of the individual places him or her in distinct uniqueness in relation to state power.

There are certain rights and privileges available to him or her by virtue of this position. In addition, citizenship is itself a right and obligates state to provide protection to citizenship and associated rights. There are duties constitutionally imposed on a citizen (Part IV-A). It should also be emphasised that responsible citizenship is the essential foundation of any society which values both liberty and justice. In Germany, the Basic Law does not perceive the citizen as an individual apart from the rest but as a person living in the community and linked with it in many ways.³⁰ On the other hand, in a market place individual is placed only as a client, customer and consumer. There is nothing under the concept, theory or ideology of market for the citizenship.

In a democratic community governed by the rule of law the key position of individual in the state and in relation to its instrumentalities is of citizenship. Therefore, there is a need of encompassing the positions, viz. client, customer and consumer, which are of temporary nature, within the concept of citizenship. This necessitates the role of the state, even in market playing, to take care of the citizen by way of ensuring transparency, all information about the nature of products/services and their quality. What need to be emphasised is the consumer audit, consumer rights and institutional devices, predictable efficient and inexpensive consumer grievances redressal system to protect citizen as consumer. State as guardian of the constitution is charged with certain enduring moral duties. All talks about global village and global citizenship are illusory and illfounded because of their distance from reality.

The third question pertains to the area of "basic rights" or "basic needs", which are most important for human survival and existence as human beings. These rights include the right relating to livelihood, education, health, shelter, environmental protection and so on. The satisfaction of basic needs is widely acknowledged as a mark of any just society.

The United Nations has identified following list of basic human needs: (1) Nutrition, (2) Shelter, (3) Health (4) Education, (5) Leisure, (6) Security (both physical and economic) and (7) Environment.³¹ The role and responsibility of the state in providing and protecting these rights are considered and adjudged by the courts in a number of cases as constitutionally mandated. The state is required to ensure that every member of the community is free from want, can live in circumstances worthy of

30. *The Basic Law of the Federal Republic of Germany* (August 1976) cf. Margaret Thatcher used to say that there was no society, there were only individuals.

31. B.B. Pande, *The Constitutionality of Basic Human Needs: An Ignored Area of Legal Discourse*, (1989) 4 SCC 1(1). See also S.S. Singh, *State Market and Basic Human Needs: Exploring Constitutional Legitimation*, paper presented in a SEMINAR ON CONCEPT OF DEVELOPMENT AND IMPACT OF GLOBALISATION ON THE POOR AND MARGINALISED (28 January, 1996).

human dignity and has a fair share of the nation's general prosperity. Can these rights be left on the mercy of private markets? Can the obligation of the state the left for the charity of the market? And who should decide these vital questions?

Human rights and environmental protection are against the market concern. This poses a greater responsibility on all those who are championing the cause for market as against the state. There is, perhaps, no scope for retreat of the state from its responsibility from these areas. There is, therefore, a special responsibility on law enforcing agencies including judiciary and lawyer community to protect human rights and environment from market forces in the interest of human survival and dignity of individual. These areas present a strong case for regulation as opposed to deregulation claim of market. The liberal interpretation of the Constitution by the judiciary and the liberalisation of Indian economy need to be harmonised. This may further be emphasised by the following observation:

Political liberty cannot be treated as the dependent variable of a strong, autonomous market system. Such a belief ends by gobbling up political liberty in order to suppress or by-pass opposition to the rigours of the market order. The most that can be claimed is that liberty requires some balancing of the roles of the state and the market.

The state's role, however, is structurally and morally prior to that of the market. The market system is a cultural artifact, dependent upon political rules and capable of being changed by those rules. Without wise and acceptable rules, "market freedom" would soon degenerate into an atomistic chaos.³²

The fourth area relates to the broad constitutional directions relating to the economic policy. Preambular philosophical promise of the socialistic pattern of society apart, there are constitutional provisions which envisage economic policy direction for this country. A combined reading of Articles 38, 39 (b) and 39 (c) would provide economic policy direction and the role of state not only as facilitator but also as active participant in the economy. It would be pertinent to recall Dr. B.R. Ambedkar, Chairman, Constitution Drafting Committee that one of the objectives of the Constitution is to lay down that our ideal is "economic democracy" and also to prescribe that every government shall strive to bring about "economic democracy".³³ The economic democracy of India means the equal economic development of all parts of India for unity and integrity. The Supreme Court giving emphasis on this aspect, observed in a *Vidco Electronics*³⁴ that "the economic developments of states to bring them into equality with all other states and thereby develop the economic unity of India is one of the major commitments or goals of the constitutional aspirations of this land".³⁵ It is, therefore, clear that regulation of economic development in the

interest of the economic unity of India is one of the constitutional goals which will not permit any government to adopt hands-off policy in the name of autonomy to market forces, in the matter of economic development of India.

An independent study commissioned by the Ministry of Finance, has underlined the reasons associated with the implementation of the economic reforms. It says: "tensions can also arise on the social front: If living conditions deteriorate, if the deterioration is associated with reform, political pressures can arise to threaten the adjustment programme. Economic discontent can easily spill over into communal and regional conflict in a federal polity; stability and success of a democratic nation ... may be at stake".³⁶

The requirement of Article 38 of the Constitution is that "the state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice social, economic and political, shall inform all the institutions of the national life." How the market conditions will respond to this constitutional requirement is doubtful. In addition, requirement of Article 39 (b) of the Constitution is that the state shall, in particular, direct its policy towards securing that "the ownership and control of the material resources of the community are so distributed as best to subserve the common good" and further Article 39(c) stipulates that "the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment". It should be mentioned that constitutional directives are not mere political slogans, a device to acquire power, but people's desires and expectations. They are fundamental in the governance of the country. It should further be emphasised in the light of the *Lusaka Statement on Government* Under the Law issued in conformity with the *Harare Commonwealth Declaration* that "it lies to the government to make and execute policy, it rests with the judiciary to ensure that policies are both made and implemented within the parameters prescribed by our Constitution and by our country's laws".³⁷

On the other hand, concepts like "common good", "material resources", "common detriment" and "justice—social, economic and political" are foreign to the free market ideology which concentrates on and revolves around "self-interest" and "maximum profit". Thus, in a situation of diagonal opposition between constitutional commitment for "common good" and the "self-interest" thrust of the free market, the scope of harmonisation becomes an empty cry, a fruitless exercise.

The fifth area is that of the "Freedom of Trade, Commerce and Intercourse". Article 19 (1) (g) guarantees the freedom to practice any profession or to carry on any occupation or business to the citizens of India. This is one of the freedoms enumerated in Article 19 (1) which is recognised as the natural right inherent in the

32. P. Self, *supra* note 5 at 254.

33. VII CONSTITUENT ASSEMBLY DEBATES 494-95.

34. *Vidco Electronics Pvt. Ltd. v. State of Punjab*, AIR 1990 SC 820.

35. *Ibid*.

36. Cited in K.N. Kabra, *supra* note 13.

37. *Lusaka, Zambia* (15 October, 1992), cf. The verdict of the Supreme Court in *Delhi Science Forum v. Union of India*, (1996) 2 SCC 405 decided that economic and other policies which have been adopted by Parliament cannot be tested in court of law.

status of a citizen. However, none of these freedoms is absolute or uncontrolled, for each is liable to be curtailed by laws. Clauses (2) to (6) of Article 19 recognise the right of state to make laws putting reasonable restrictions in the interests of the general public, security of the state, public order, decency or morality and for other reasons set out in those clauses. The power of the state to impose restrictions is based on the principles that all individual rights of a person are held subject to such reasonable limitations and regulations as may be necessary for the protection of the general welfare.³⁸

The freedom under Article 19 (1) (g) is not uncontrolled. Clause (6) of Article 19 authorises legislation which (i) imposes reasonable restrictions on this right in the interest of the general public (ii) prescribes professional or technical qualifications necessary for carrying on any profession, trade or business; and (iii) enables the state to carry on any trade or business to the exclusion of private citizens, wholly or partially. The expression "in the interest of general public" is of wide import comprehending public order, public health, public security, morals, economic welfare of the community and the objects mentioned in Part IV of the Constitution. A law providing for basic amenities; for the dignity of human labour is a social welfare measure in the interest of general public. There are activities which do not come within the ambit of this freedom such as trading in adulterated food or gambling or rural moneylending.⁴² Therefore, the power of state to regulate trade and business by way of putting reasonable restrictions in the interests of the general public is well mandated by the Constitution and also upheld by courts. Similarly, the freedom of trade, commerce and intercourse under Article 301 of the Constitution is subject to regulations and restrictions in the public interest. Thus, the need of harmonising market autonomy, state power and public interest cannot be overemphasised.⁴³

The sixth area is Articles 292 and 293 of the Constitution which relate to the power of the government of India and the State governments only to borrow "upon the security of the Consolidated Fund of India". There is, perhaps, no provision for sovereign guarantees in the matter of repatriation of guaranteed profits out of Consolidated Fund of India. Today, the sovereign guarantees are being given by the government of India for a, tax free, minimum return of 16 per cent to the foreign investors. These guarantees can be met only out of the Consolidated Fund of India. The constitutional validity of sovereign guarantees on foreign investments need to be examined.⁴⁴

38. M. P. Singh, *CONSTITUTION OF INDIA* (9th Ed., 1994).
39. *Municipal Corporation v. Jan Mohd. Usmanbhai*, (1986) 3 SCC 20.
40. *State of U.P. v. Kartar Singh*, AIR 1964 SC 1135.
41. *State of Bombay v. R.M.D. Channarbaughwala*, AIR 1957 SC 699.
42. *Fatchchand v. State of Maharashtra*, AIR 1977 Sc 1825.
43. For detail see M.P. Singh, *supra* note 38 at 137-150 and 757-775.
44. A Ghosh, *Ethnology of Liberalism and Efficiency*, 29 *ECONOMIC AND POLITICAL WEEKLY* 2393 (1994).

In addition to the above Constitutional issues, one may also like to discuss the scope of judicial review under the impact of market economy resulting into the flow of state power from public to private; the concept of public purpose in relation to private body; the impact of privatisation on administrative law; need of regulation of deregulated areas and activities and government contracts in contracting out areas in the interest of predictability; rule of law and accountability, etc.

IV. CONCLUDING OBSERVATIONS

Every polity has legitimization foundation. Those foundations are essentially constitutional. The Constitution is where all arguments are ultimately to be resolved. Those who sidestep the constitutional legitimization issues appear to us to be saying that whatever goes, goes. The free market economy is required to be constitutionalised for its legitimisation. The defence of the market is best conducted not in terms of its contribution to an imaginary general or collective welfare, but instead by reference to its role in contributing to the wellbeing of the individual. The constitution of a country is not a fair weather assurance. It must be respected in periods of calm as well as in times of trouble. In addition, it should be mentioned that fair and efficient markets do not occur by accident. They are the products of, inter-alia, intelligent laws, transparent public policies and environment rich in information. The role of the state is not only confined to the areas of human rights, basic human needs and environmental protection, but also extends to help markets become efficient, just and fair. "For free markets to work better, the state must also work better".⁴⁵ Finally, it should be mentioned that the modern ambitious administrative state cannot wither. However, there is a strong need to reinvent government and to reform the state. The virtue of selective state intervention in a systematic way to generate economic growth as well as to redis-tribute national prosperity to give meaning to the equal opportunity to all as constitutionally promised and also to ensure equal development of all parts of India cannot be overemphasised.

45. R. Kilgard, *Adjusting to reality--Beyond State versus Market*, *ECONOMIC DEVELOPMENT* 232 (1991).

THE IMPACT OF MARKET ECONOMY REFORMS IN CHINA ON PRINT MEDIA REGULATION

H L Fu and Richard Cullen***

I. CONSPECTUS

In the late 1970s the open-door policy was adopted in the People's Republic of China (PRC). This policy has opened up of the PRC to trade in goods, service and also ideas with the rest of the world. It has involved the widespread introduction of market economy principles into the PRC. Since the commencement of the open-door policy, many economic, social and political aspects of life in China have changed dramatically. One area where change has occurred is in the regulation of the media. In this article we consider the effects of the major moves towards a market economy in China over the last 17 years on the regulation of the media.

There remains a huge state sector in the economy (large parts of which are insolvent) and the political system in the PRC is still basically authoritarian. The market economy reforms in the PRC have allowed the private sector to flourish as never before since 1949. However in any state dominated by a single party, such as the PRC, one expects there to be significant control over most forms of expression. In the past this control was more extensive than is the case today; it remains extensive in form but in certain cases, the degree of control is markedly reduced in substance.

During the Cultural Revolution which lasted for some 10 years from 1966, levels of control of expression were at their most severe in the PRC. Moreover, the outlets for expressing opinion were reduced significantly in number. In very important part, the open-door policy has been a reaction to the excesses and failures of the Cultural Revolution. The effects of the open-door policy on media regulation in the PRC can be summarised as follows. With respect to what we call the established press, controls still remain very strong. By the established press, we mean those newspapers, including periodicals, providing, under official auspices, political, economic and social information or commentary in either general or specialised forms. Publications outside of this category, including books, pamphlets and magazines that are published other than under official control or under the official system are proving increasingly difficult to control closely. We refer to publications in this category as the non-established press or general printing and publishing. Although the dividing line between these two categories is not razor sharp, this separation forms a useful analytical division

for the purposes of this article. Thus, in the discussion below, we consider, first, the position with respect to regulation of the non-established press. Then we review the many systems for regulating the established press. The system for regulating general printing and publishing could be described as legal-bureaucratic. The system for regulating the established press is more political-managerial. Finally we draw some conclusions based on these reviews with respect to future development in the regulation of expression in China.

We concentrate on the print media. There is insufficient space to consider the position of the broadcast media (radio, television and related media) in this article. Many of the regulatory systems applying to the established press are replicated with respect to the broadcast media, however.

This article incorporates a comparative perspective to inform the main discussion. The comparative materials are principally from the United States of America (USA) with some reference being made to the United Kingdom (UK). The reliance on the USA as a source for comparative purposes is explained by the sheer abundance of USA materials related to freedom of expression issues.¹ The reason for taking a comparative view is to locate the law and practice of print media regulation in China in a wider context so better to grasp the distinctiveness of that regulation, and the direction, pace and likelihood of change in Chinese print media, regulatory regimes.

II. REGULATING THE NON-ESTABLISHED PRESS IN CHINA

A. Introduction

This part discusses the regulation of general printing and publishing in the PRC. That is, we review here the regulation of the print media other than the established press in the PRC. The established press, along with radio and TV, is part of the official media. Many news periodicals also are in this category. The official media are as directly controlled as any components within government as we will see in Part 3. Publishing outside of the established press category is still subject to stringent regulation, but, more and more, this area of publishing (books, magazines, pamphlets and the like) is regulated by a combination of the new free market forces operating in the economy and government administrative systems for controlling general printing and publishing. What is of real importance is that it is in this sector that alternative

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1. In the USA there have been more cases and more commentary and more issues have been considered in depth than elsewhere. One commentator has explained the contribution from the USA in these terms: "American thinking on the freedom of speech is relevant to the rest of the world because our experience in wrestling with free speech conflicts and communications policy is unusually rich. American society may not have the best answers, but it has thought about the problems more." R. A. Smolla, quoted in E. Barandt, *Importing United States Free Speech Jurisprudence?* in T. Campbell, and W. Sadurski, (eds.), *Freedom Of Communication* 57, 72 (1994).

political and social points of view have the greatest potential to be published. If anything, despite expanded general regulatory measures and set-backs since 1989, that potential appears still to be growing.

The comparative analysis in this part looks at the development of explicit executive control of printing and publishing in the UK, in overview, in the context of the rejection of that system of control in the USA. This control method is commonly referred to as "prior restraint". It is often contrasted, in the publishing context, with "subsequent punishment"; prior restraint prevents unacceptable publication while subsequent punishment penalises actual publication found to be unacceptable.

In the USA the term "prior restraint" has been expanded to mean much more than classical prior restraint: pure executive control of printing and publishing. The judicially crafted stipulations governing the use of prior restraint in the USA have come to be known as the doctrine of prior restraint. It might more accurately have been termed the doctrine of no prior restraint as the doctrine comprises a set of rules generally prohibiting prior restraint, as it is understood, except in exceptional circumstances. Nevertheless, as the literature refers simply to the doctrine of prior restraint we have maintained this usage.

Within the last decade, the courts have begun to play a greater though still limited role in this control process. China has yet to pass a formal law specifying what sort of expression is allowed in print. Control is maintained through administrative regulations. That is, the fundamental controls now operating have been crafted directly by the government by the Chinese Communist Party (CCP) and by their bureaucrats rather than by the Chinese Parliament, the National People's Congress (the NPC). The absence of a comprehensive law on expression from the NPC has hindered judicial participation in the control process.² China does stipulate, in its current Constitution, that free expression is protected. The comparative significance of this protection is discussed later.

B. Prior Restraint Restrained

1. The United Kingdom

The intrinsic appeal, to powerful authorities, of control by ad hoc executive decision of the right to print is readily apparent. If you are in power, especially when you are unsure of your popular support, there is a visceral attraction in being able to regulate comments on your performance closely.

2. The development of formal laws (rather than ad hoc regulation) to govern the media has been a burning political issue within the PRC since the early 1980s. See, M. Hood, *The Use and Abuse of Mass Media by Chinese Leaders During the 1980s* in Lee, Chin-Chuan (ed.), *CHINA'S MEDIA, MEDIA'S CHINA* 37, 48-52 (1994). See also, Haocheng Yu, *On human Rights and Their Guarantees by Law* in Davis, Michael C., (ed.), *HUMAN RIGHTS AND CHINESE VALUES* 93, 108 (1995).

After the rather late arrival of printing in Europe in the 15th century, its use developed quickly.³ Rulers, temporal and spiritual, recognised the political significance of the new medium and their rights, divine or otherwise, to control it. By 1501, Pope Alexander VI had issued a bull prohibiting unlicensed printing in the Church's temporal domain. This was prior restraint in its pure form.⁴

In the UK, the Crown, with the assistance of Parliament, actively developed the techniques of prior restraint to control printing and publishing. The apogee of this system of control was the Licensing Act (1662) (the Licensing Act). The Licensing Act controlled printing and distribution of all materials used by requiring prior executive permission for these activities. The system also controlled all imported printed material and allowed for severe subsequent punishment for any publishers of any seditious or heretical material which managed to slip through the prior restraint net. For good measure, printing presses had to be registered, the number of master printers was limited and sweeping search and seizure powers applied to most premises.⁵ The system could be and was evaded, most famously, perhaps, by the poet and political apologist, John Milton who, in 1644, published a tract, without prior approval, urging a reduction in official control of the publishing of opinions.⁶

The various licensing laws had what today would be called "sunset clauses". That is, they had to be renewed. In 1695, when it came time to renew the then current Licensing Act, the House of Commons prevailed over the House of Lords and the law was not renewed. It has not been renewed since. Commentators attribute the collapse of the licensing system more to its complex unworkability rather than to objections on grounds of free speech infringement. The system had become something of a laughing stock and a commercial blight.⁷ The laws providing for subsequent punishment for illegal publication remained. It was only later that the principle of the press being free from prior restraint systems in the UK was articulated, most famously by Blackstone. He explained that, in a free state, the press must enjoy liberty to publish without any prior restraints. There was not, however, to be any freedom from the risk

3. The Chinese were printing over five centuries before Gutenberg. The earliest dated printed book in China is from 868 AD. See, Cook, Chris (ed.) *Pears Cyclopaedia A 5* (103rd Ed. 1994). See, also, D. Waters, *Faces Of Hong Kong* 26 (1995).
4. T. I. Emerson, *The Doctrine of Prior Restraint* 20 *LAW AND CONTEMPORARY PROBLEMS* 648 (1955). This article is widely regarded as the classic article on the doctrine of prior restraint. See, J. C. Jeffries, *Rethinking Prior Restraint* 92 *Yale Law Journal* 409 at 411 (1983). The historical overview of the operation of prior restraint in this article draws heavily on Professor Emerson's article. See, also, P. Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press* 37 *STANFORD LAW REVIEW* 661-765, 674 (1985) and E. Barandt, *FREEDOM OF SPEECH* (1987). There is a good review of the varieties (and vices) of prior restraint in the last listed book (114-124).
5. T. I. Emerson, *supra* note 4 at 650; Hamburger, *supra* note 4 at 674.
6. J. Milton, *A Speech for the Liberty of Unlicensed Printing* quoted in Holsinger, Ralph I. and Dilts, J. Paul, *Media Law* 22, 23 (3rd Ed. 1994).
7. T. I. Emerson *supra* note 4 at 651 and Hamburger *supra* note 4 at 674.

of subsequent criminal punishment if a person published what was "improper, mischievous or illegal".⁸

This has been the guiding principle underpinning regulation of the print media in the UK since. The dichotomy between prior restraint and subsequent punishment has proved far from clear in practice in the UK, however. Although the classical methods of prior restraint from the 16th and 17th centuries are no longer used, indirect prior restraint mechanisms are applied. Two common procedures used in the UK are classification systems and governmental pressures on journalists and publishers. In the first case, government classifies certain information as restricted or secret. In the second case, requests for voluntary restraint are made known or are understood. If these measures fail, then widening, subsequent punishment devices can be invoked.⁹ It is in the USA, however, in the context of interpreting the First Amendment, that the most detailed review of the meaning of prior restraint has occurred.

2. *The United States of America*

Much judicial and academic ink has been consumed debating the meaning of prior restraint in the USA. In summary, the Supreme Court of the USA (the Supreme Court) has explained, in a series of judgments, that the doctrine of prior restraint generally prohibits official restrictions on various forms of expression in advance.¹⁰ As noted above, the doctrine could more accurately be titled the doctrine of no prior restraint. The doctrine is essentially based on the First Amendment of the Constitution of the USA which, *inter alia*, guarantees free speech and a free press.¹¹

The validity of punishment measures subsequent to publication to deal with seditious activity is another important facet of First Amendment learning. It is from this line of Supreme Court interpretation that the "clear and present danger" test emerges. In summary, the advocacy of unlawful conduct remains protected by the Constitution unless it is directed to inciting or producing imminent unlawful action and is likely to incite or produce such action.¹² Our principle concern in this article, however, is with the development of the prior restraint doctrine in the USA.

8. S. W. Blackstone, 4 COMMENTARIES ON THE LAWS OF ENGLAND 151-152 (1979)
9. J. E. Wallach, *Executive Powers of Prior Restraint over Publication of National Security Information: The UK and the USA Compared*, 32 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 424, 449, 451 (1983).
10. T. I. Emerson, *supra* note 4 at 648.
11. The First Amendment also guarantees freedom of religion.
12. *Brandenburg v. Ohio* 395 US 444 (1969). See also the dissenting judgment of Justice Brandeis in *Whitney v. California* 274 US 357 (1927) and the discussion in D.R. Pember, *Mass Media Law* 53, 64 (6th Ed. 1993).

As Professor Emerson notes, for almost 130 years after its adoption, the First Amendment received little attention from the Supreme Court. In 1931, in *Near v. Minnesota*,¹³ this position changed. The State of Minnesota had enacted a law which provided that "any person" who "engaged in the business" of publishing or circulating an "obscene, lewd and lascivious" or "malicious, scandalous and defamatory" newspaper or periodical was guilty of nuisance. The Act further allowed an action to be brought in the name of the State to seek a perpetual restraint on any further commission of the nuisance. Once the injunction was obtained, it could be enforced, as in other cases of contempt of court, by fine or jail.¹⁴

The action which triggered the Supreme Court opinion was brought against a Minneapolis weekly which specialized in reporting the alleged crimes of Jewish hoodlums. This reporting was placed in the context of more general antisemitic material which the weekly ran.¹⁵

The court reviewed the history of prior restraint practices in the UK.¹⁶ The court held, 5:4, that the Minnesota law constituted a prior restraint, because it limited freedom of expression in contra-vention of the First Amendment. In 1925, in *Gilow v. New York*,¹⁷ it was established that the First Amendment placed limitations on the actions of States (via the Fourteenth Amendment) so that avenue of escape was denied.¹⁸ The court rejected the claim that the Minnesota law provided for a system of subsequent punishment; it amounted, rather, to effective censorship. The Act did not provide for punishments, apart from the contempt mechanism. It provided for suppression by injunction or a restraint on publication.¹⁹ The court also noted that there were exceptions to the (no) prior restraint doctrine. Certain limited exceptions might be justified in war time or in the case of incitements to violence or in the case of obscenity.²⁰ The dissenters found, using more literal arguments, an absence of the elements of prior restraint.²¹

It was widely agreed that *Near* both clarified and, more importantly, widened the definition of prior restraint. Professor Jeffries puts it thus:

13. 283 US 697 (1931).
14. Emerson, *supra* note 4 at 652.
15. See J. C. Jeffries, *supra* note 4 at 414.
16. See *supra* note 13 at 713.
17. 268 US-652 (1925). As it happens, G Benjamin a left wing political activist, won the Fourteenth Amendment argument but failed to persuade the court that his political agitation was not dangerous.
18. The Fourteenth Amendment of the Constitution states that: "No state shall ... deprive any person of life, liberty or property without due process of law...." The court agreed that amongst the liberties guaranteed by the Fourteenth Amendment is the freedom of expression guaranteed by the First Amendment.
19. See *supra* note 13 at 712.
20. *Id.* at 716.
21. *Id.* at 735.

Prior restraint of speech is presumptively unconstitutional, even when the speech in question is not otherwise protected;

An injunction is a prior restraint;

Therefore, an injunction against speech is presumptively unconstitutional, even when the speech enjoined is not otherwise protected.²²

In 1971, in *New York Times v. United States*,²³ the Federal Government sought a permanent injunction to prevent the publication of certain papers from the Department of Defence that contained information which, according to the government, presented a threat to national security if released. The Supreme Court refused permanent injunctive relief. The matter had to be dealt with within a very short time frame.²⁴ Public pressure and pressure from the publishers strongly encouraged a swift resolution of the case. The reasons given ranged from the affirmation of absolute press freedom (Justices Black and Douglas) to a clear application of the Near prior restraint doctrine (Justices White and Stewart). The findings of the court were not, thus, clear cut. In the same year, however, the court's belief in the presumptive unconstitutionality of injunctive action was more plainly stated in *Organization for a Better Austin v. Keefe*.²⁵

From the discussion so far, it is clear that classical prior restraint practices (administrative licensing and censoring systems) and injunction based press control are encompassed by the prior restraint doctrine. That is, they are presumptively unconstitutional. The scope of the doctrine does not stop here, however. A gross receipts tax on newspapers can be prior restraint²⁶ as can informal or advisory censorship.²⁷

In 1979, an interesting exception to the presumption against prior restraint based on national security grounds emerged at the (subordinate) District Court level in *US v. Progressive*.²⁸ (It is generally agreed that the wartime exception in Near has since become a national security exception.²⁹) The District Court judge was prepared to make an exception to prevent publication of an alleged do-it-yourself guide to making a hydrogen bomb on grounds of national security and granted an injunction. Another paper subsequently published most of the material and the *Progressive* case proceeded no further.³⁰ Many further examples of the courts interpreting and usually applying

22. J.C. Jeffries *supra* note 4 at 417.

23. 403 US 713 (1971).

24. J.C. Jeffries, *op. cit.* note 4 at 409.

25. 402 US 415 (1971).

26. *Grosjean v. American Press Company* 297 US 233 (1936).

27. *Bantam Books Incorporated v. Sullivan* 372 US 58 (1963).

28. 467 F Supp 990 (1979).

29. D. R. Pember *supra* note 12 at 95.

30. *Id.* at 72-73.

the doctrine of prior restraint in the interests of freedom of expression may be found.

In the Vietnam War, the US authorities prominently failed to control reporting of that war through neglecting to impose prior restraints. The war was reported in virtually unrestricted, constant graphic detail by all media throughout the World. The lessons of this experience were not lost on the military. Prior restraint systems have been applied with great effectiveness (from the military standpoint) since, for example, during the invasions of Grenada and Panama by US forces in 1983 and 1989 respectively and during the Gulf War in 1990.³²

In his seminal article, Professor Emerson noted the lack of common understanding of what prior restraint meant. Forty years later, we seem little closer to a precise understanding. In 1955 he outlined four broad categories of prior restraint which he thought could be identified.³³ These categories remain useful. They are set out here with some minor revision.

1. *Executive or classical prior restraint.* Here, advance approval of a government or executive official is required to publish (or speak) and mere failure to obtain approval constitutes an offence in itself regardless of the content or manner of the publication.
2. *Judicial or injunctive prior restraint.* Here the judiciary (as against just the executive) is involved. Typically, injunctive action (backed by contempt enforcement mechanisms) is used to prohibit publication of certain kinds of material in future (as in Near) or to prohibit a publication ever publishing at all.
3. *Legislative prior restraint.* Now the legislature is involved by laying down specific conditions in legislation that must be complied with prior to publication. An example would be stipulating payment of certain taxes prior to publication.
4. *Political prior restraint.* Here the restraint usually will be indirect. An example would be vetting someone's political position prior to appointing them as a journalist.³⁴

31. See for example: *Poulos v. New Hampshire* 345 US 395 (1953); *Southeastern Promotions Limited v. Conrad* 420 US 546 (1975); *Hazelwood School District v. Kuhlmeier* 108 S Ct 562 (1988); *Stanley v. McGraw* 719 F 2d 279 (1983); *Pico v. Island Trees* 474 F Supp (1979); *Chaplinsky v. New Hampshire* 315 US 568 (1942); *R.A.V. v. St Paul* 112 S Ct 2538 (1992); *H & L Messengers v. Brentwood* 577 S W 2d 444 (1979); *Daily Herald v Munro* 838 F 2d 380 (1988); *International Society for Krishna Consciousness v. Wolke* 453 F Supp 869 (1978); *Houston Chronicle v. Houston* 630 S W 2d 444 (1982); and *D.R. Pember, supra* note 12 at 79-95, 97-108.

32. *D.R. Pember, supra* note 12 at 73-79.

33. T.I. Emerson, *supra* note 4 at 655-656.

34. T.I. Emerson was writing just as J. Mc Carthy's witchhunt was coming to an end: an era when the punishment of individuals, especially those working in the media, on the basis of their political views was exceptionally widespread. Over 100,000 persons are estimated to have been affected by the Mc Carthyist campaigns in the USA.

Professor Emerson urged the Supreme Court to develop the doctrine in a more rational and comprehensive form and apply it wholeheartedly.³⁵ The typology set out above offered a framework for undertaking this task. Professor Jeffries, on the other hand, has argued that the doctrine should be abandoned as a separate category of First Amendment analysis because of its lack of coherence and the availability of alternative modes of analysis.³⁶

Professor Mayton favours a redefining of the doctrine. He argues strongly that the presumptive description of injunctive relief as a prior restraint is wrong on constitutional and pragmatic grounds.³⁷ Moreover, he makes a powerful case for recognising the de facto prior restraint effects of the various forms of subsequent punishment permitted under the doctrine. The "chilling" effect of the threat of prosecution with its uncertainties and costs is stressed.³⁸ On the other hand, the potential for reflective judicial weighing of the issue, in resolving freedom of expression cases, is severely curtailed by the conventional view of injunctive action as a presumptive prior restraint.³⁹ These views are criticised, to a degree, by Professor Hunter.⁴⁰ He draws attention to the problem of relying so greatly on the judiciary when recurring examples of judicial bias and lack of competence both give cause for concern.⁴¹ He also notes the possible positive aspects of self-censorship in societal governance.⁴²

Summary

In the USA the position now appears to be as follows.

1. Executive or classical prior restraint has been emphatically discarded principally on constitutional grounds.
2. Judicial prior restraint remains presumptively unconstitutional.
3. Other forms of prior restraint, for example legislative prior restraint, are also markedly constrained although the relevant tests and their application are less clear cut than in categories 1 and 2.
4. The categories of prior restraint are not closed.
5. Although there is near complete agreement about category 1, categories 2, 3 and 4 remain topics of active debate.

35. T.I. Emerson, *supra* note 4 at 671.

36. J.C. Jeffries, *supra* note at 434.

37. W.T. Mayton, *Towards a Theory of First Amendment Process: Injunction of Speech, Subsequent Punishment, And the Costs of the Prior Restraint Doctrine*, 67 CORNELL LAW REVIEW 245 (1982).

38. *Id.* at 253-270.

39. *Id.* at 270-280.

40. H.O. Hunter, *Towards a Better Understanding of the Prior Restraint Doctrine: A Reply to Professor Mayton*, 67 CORNELL LAW REVIEW 283 (1982).

41. *Id.* at 287-292.

42. *Id.* at 284.

Sometimes the expressions "chilling" speech and "freezing" speech are used in the debate in the USA over the respective effects of prior restraint and subsequent punishment. Subsequent punishment (a criminal statute penalising defined unacceptable publication, for example) has been said to chill speech but prior restraint (including injunctive relief) freezes it. That is, subsequent punishment has less adverse consequences in terms of restraining free speech because it still allows publication, whereas the application of prior restraint means the material will not be seen in public at all.⁴³ Others use the refrigeration metaphor to argue the reverse: the widespread nature of the chilling potential of a criminalizing statute means that it is more restrictive of free expression than a targeted injunction.⁴⁴ On balance, there seems to be a good case that the threat of subsequent punishment sustains the practice of wide spread self-censorship in the USA. Nevertheless, political accountability, access to judicial review and a political culture steeped in doctrines of individual freedom all place significant limits on what governments can do when seeking to chill expression. In particular, when government goes too far, there is always the risk that the Supreme Court will bend the doctrine of prior restraint so as to welcome another instance of hitherto unrecognized prior restraint to this fraternity with its disposition towards anomalous membership.⁴⁵ These sorts of counters to excessive regulation of the media are conspicuously absent in the PRC.

C. Policing General Printing and Publishing in China

1. Overview of the Regulatory Regime for General Printing and Publishing

The government department in charge of regulating printing and publishing has differed from time to time during the history of the PRC. In 1949, when the PRC was established, an independent Agency General for Publications was set up to exercise control over publications. It was directly responsible to the State Council, the executive government. This Agency was incorporated into the Ministry of Culture in 1954 as the Bureau of Publications Management. The Bureau became independent in 1973 but was again incorporated into the Ministry of Culture in 1982. In 1987 the State Bureau of Publications became the authority in charge of publications. It was soon replaced by the Agency of Media and Publications (AMP), the current authority in charge of publications in the PRC.⁴⁶ The AMP is directly accountable to the State

43. J.C. Jeffries, *supra* note 4 at 429, quoting Professor Bickel.

44. *Id.* at 429, quoting Professor Barnett approvingly.

45. In the UK, classical prior restraint remains as unacceptable as ever but other effective methods of restraining the print media prior to publication have evolved. Further, the factors encouraging self-censorship are as strong if not stronger than in the USA. The political and constitutional levers on governmental abuse are less overt and likely weaker than in the USA but they remain significant. See, further, Wallach, *supra* note 9.

46. ZHONGGUO DA BANKE QUANSHU (CHINA ENCYCLOPAEDIA: MEDIA AND PUBLICATIONS) 59-60 (1984).

Council and to the Central Propaganda Department of the Party (CPD).⁴⁷

Printing and publishing have historically been tightly controlled by the government, which has always aimed for oversight of printed materials through the stages of editing, publishing and distribution.⁴⁸ All publishing houses are owned by the government and private ownership is not allowed. No publishing house may be set up without the permission of the media and publications authorities of the government, which also imposes a strict quota as to how many of them should be established.⁴⁹ The number of publishing houses has remained under much closer control than the number of printing businesses.

The government also determines how many books should be published by each publishing house through its control of the China Standard Book Number (CSBN) system. No book can be published or printed without a number assigned by the government. Only a government recognised publisher may apply a CSBN in China. The government assigns an annual CSBN quota to each recognised publishing house according to its size and performance.

A publishing house has to submit an annual publication plan. The proposed books to be published in the coming year have to be submitted to the media and publications authorities of the government for examination and approval. The plan must contain the working titles of the books, the authors, proposed numbers of copies to be printed, and a synopsis of each book. The plan may subsequently be varied to a limited degree, subject to further approval from the authorities. At the end of each year, the general performance of each publishing house is meant to be examined by the authorities.

If the contents of a proposed book belong to a certain category, pre-publication censorship is required. For example, books on minority nationalities have to be

47. The political structure of the PRC is characterized by several striking features. Briefly, it is difficult to tell where the CCP ends and the government begins so closely intertwined are the two. The State Council is the title of the PRC executive central government. The government and the CCP certainly are, as a matter of form, separate institutions. The need for substantive separation of the CCP and the government is matter of ongoing debate in the PRC. See, further: Chen, A.H. Yee, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA Chs. 4 and 5 (1992); D. Xiexhan and Z. Linguan, CHINA'S LEGAL SYSTEM Ch. 4 (1990); and, also Section III and the Constitution of the PRC. The CPD (together with all the lower level propaganda departments in the PRC) is responsible, according to Marxian theory, for developing and maintaining the "superstructure" of society (in contrast to the economic basis of society). The superstructure includes education, the mass media, entertainment and anything which directly relates to thought. See, K. Lieberthal, GOVERNING CHINA: FROM REVOLUTIONS THROUGH REFORM 197 (1995).

48. The publication of newspapers and periodicals are subject to separate licensing regimes. For newspapers, see AGENCY OF MEDIA AND PUBLICATIONS, *Provisional Regulations for the Management of Newspapers* (25 December, 1990). For periodicals, see AGENCY OF MEDIA AND PUBLICATIONS, *Provisional Regulations for the Management of Periodicals* (24 November, 1988).

49. STATE BUREAU OF PUBLICATIONS, *Notice on the Standard of Examination and Approval of New Publishing Houses* (8 August, 1986).

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examined and approved by the CCP's Department of United Front,⁵⁰ and books on policing have to be approved by the Ministry of Public Security. Moreover, the CCP's propaganda departments and the government's media and publications authorities have the power and duty to examine publications related to the former Soviet Union and the Eastern Europe,⁵¹ on the Cultural Revolution,⁵² or on key Party and State leaders (both current and former ones).⁵³ Sensitive books, if allowed to be published, have to be published by designated publishing houses and distributed through designated channels.

For most books published, there is, however, no institutionalized government pre-censorship to check the contents of a book before it is published. This responsibility lies with the editors and directors of a publishing house, who censor publications according to the particular political climate. Since 1952, a three-level examination system has been imposed on all publishers in China. Before a book is published, it has to go through the examination of an editor, the chief of the editorial office and the editor-in-chief.⁵⁴ The CCP exercises control over the content through the self-censorship of the editors.

Most of the publishers in China do not have their own printing facilities. The government also serves as a broker by assigning a publisher's book to a proper printing house. Theoretically, all materials have to be published at a printing house designated by the government. The government also approves the establishment of printing houses, although the regulatory framework is less stringent. The cardinal feature of China's regulation of printing houses is the listing of printing as a "special business" which has made printing houses subject to extensive scrutiny by the police.

The distribution of books is also strictly regulated by the government. The government's Xinhua book stores used to have a monopoly over the distribution of books sold in China.⁵⁵ Although the distribution was diversified in the 1980s through limited privatization of book distribution, private book sellers are licensed and regulated by the government.⁵⁶

50. AGENCY OF MEDIA AND PUBLICATIONS, *Notice on the Selection of Topics which Needs Special Application* (6 June, 1988).

51. AGENCY OF MEDIA AND PUBLICATIONS, *Notice on Strengthening the Management of Publications related to the Soviet Union and Countries in Eastern Europe* (9 April, 1990).

52. Central Propaganda Department of the Chinese Communist Party and the Agency of media and Publications, SEVERAL RULES ON THE PUBLICATIONS OF BOOKS ON THE CULTURAL REVOLUTION (10 December, 1988).

53. Central Propaganda Department of the Chinese Communist Party and the Agency of Media and Publications, RULES ON STRENGTHENING THE MANAGEMENT OF PUBLICATIONS ON KEY PARTY AND STATE LEADERS (5 May, 1990).

54. Zhongguo Da Baike Qianshu, *supra* note 46 at 252.

55. *Id.* at 540.

56. AGENCY OF MEDIA AND PUBLICATIONS AND STATE BUREAU OF INDUSTRIAL AND COMMERCIAL MANAGEMENT, *Provisional Regulations for Strengthening the Management of Collective, Individual and Private Book Stores (Pitches)* (25 November, 1989). AGENCY OF MEDIA AND PUBLICATIONS

2. *The Rise of Prior Restraint*

Printing houses belong to the category of "special business". A special business is defined as "any business which can be easily used by criminal elements to hide or rest, to falsify documents, to handle proceeds of crimes, or to conduct other criminal activities".⁵⁷ What is a special business is determined by the police in conjunction with other government authorities. Examples of special businesses include hotels, repair shops, second-hand shops and printing houses. The business is lawful in itself but, because it is vulnerable to unlawful activities, it is subject to the special control of the police. This special control can include both the approval of the establishment of a special business by the police and police supervision of daily operations.⁵⁸ What is a special business changes according to political and social circumstances.

By the mid 1950's a government monopoly over printing had been established. Two features were cardinal to the regulatory regime in the early years of the PRC. First, control over materials was vital. Unauthorized printing was difficult if not impossible because materials such as typewriters, printing machines, inks and even paper were tightly controlled by the government. Deng Xiaoping was, thus, moved to enquire about one unofficial publication by dissidents in the early 1980s: "where did they get the paper?"⁵⁹ One of the official functions of the AMP remains the management of the supply of materials needed for publication.⁶⁰ The second crucial control feature was the extensive police involvement in overseeing printing businesses. The police now stress the guiding principle that, in controlling special businesses, such as printing, the convenience of the people should be given serious consideration.⁶¹ The essence of the control is thus to strike a balance between the interests of the public and effective control of the special business. In the hotel business, for instance, the old police practice was to knock on doors in the middle of the night and conduct general or random checks of the identity of hotel guests. In the 1985 Notice on the Management of Special Businesses issued by the Ministry of Public Security (The 1985 Notice), this practice was abandoned and replaced by a more subtle system of checking on customers who behaved suspiciously.⁶²

AND STATE BUREAU OF INDUSTRIAL AND COMMERCIAL MANAGEMENT, *Provisional Rules for the Macro Management of Book Distributions* (11 May, 1992).

57. Wang, Fang, (ed.), *Dangdai Zhongguo De Gonggan Gongzhuo Public Security Work In Contemporary China* 257 (1984).
58. *Ibid.* The Third Bureau of the Ministry of Public Security, *Xinshi Zhencha Xiu* (Criminal Investigation) 260 (1979).
59. A.J. Nathan, CHINESE DEMOCRACY 42 (1985).
60. *Zhongguo Da Baika Qianshu*, *supra* note 46 at 58.
61. The Third Bureau of the Ministry of Public Security, *supra* note 58.
62. Ministry of Public Security, NOTICE ON THE REFORM AND STRENGTHENING OF MANAGEMENT OF SPECIAL BUSINESSES (21 March, 1985).

The control of special businesses has generally loosened up and police involvement has been reduced in both scope and intensity since the 1980s. This change of policy is clearly shown in the 1985 Notice, which reduced the number of special businesses under direct police control and made police control a mere formality in some cases. The establishment of a special business, as a general rule, no longer requires permission from the police. It is usually sufficient for the business to report the establishment to the police for the purpose of recording its existence. Special businesses have become more autonomous, but they bear greater responsibility for maintaining internal control.⁶³

The 1985 Notice also called for professionalisation of police control of special businesses. It requires that police in large and middle sized cities set up a separate section in charge of special businesses. The staff of such sections should be permanent and work on a full time basis. The training of staff was also emphasised.⁶⁴ Discretion in applying controls and seeking the cooperation of staff in such businesses also were emphasised.⁶⁵ Where the staff are reluctant to report to police and the where co-operation is not forthcoming, the police can set up an independent mechanism to ensure that they receive relevant information. The police may, when it is necessary, establish informants, "the ears and eyes" within the special business and through them detect unlawful activities.⁶⁶

In several senses, these mechanisms did not replicate the classical prior restraint model. With a classical prior restraint system, one normally sets widely defined standards and allows broad discretion to the executive in their implementation. As Nathan argues "In a culturally managed society, it is hard to give a clear definition of official standards of acceptability. When a line changes, the boundaries blur, to become clear again only as the authorities praise or ban specific works."⁶⁷ The initial Chinese prior restraint system thus lacked any continuous basic guidelines on acceptability. This continues to be the case.

The reliance on prior restraint measures meant that specific subsequent punishment measures were not given detailed attention. Also, there is less need for such specific measures in the context of a politically repressive system where the fear of committing a very generally defined political mistake produced a chilling effect inducing editors and printers to exercise self-censorship.

3. *The Fall of Prior Restraint*

Before the 1980s, the police had been able to control special businesses because of tight police surveillance of society, tight self-censorship by the editors, and, more

63. *Ibid.*
64. *Ibid.*
65. *Ibid.*
66. *Ibid.*
67. Nathan, *supra* note 59 at 21.

importantly, the repressive political climate.

This control system was strained by the economic reforms of the early 1980s, however. Special businesses have expanded and their ownership has diversified, making police control more difficult. There was a tremendous shortage of books and other reading materials after the Cultural Revolution and an urgent need for printed materials to satisfy the demand. There was a national availability crisis of "difficult to publish books" and "difficult to buy books." Even the text books for students in schools and Universities could not be printed before classes started. The CCP itself realised that there was a serious shortage of printing facilities in China and called for modernisation of printing businesses.⁶⁸

Concrete measures were taken to solve the crisis. In addition to an increase in government investment in publishing and printing businesses, the internal management of such businesses was reformed. By 1984, the State Council had circulated a Notice which, in principle, cancelled government sponsorship to all periodicals and allowed them to be financially independent.⁶⁹ The decentralization of publication and financial independence has made public opinion, reading preference and profitability, instead of political standards, more important and influential in editorial decision-making.⁷⁰

Another important measure to encourage publications was to allow a publisher to contract out certain publications. One system employed was the production of so called "cooperative publications" (or "joint publications"). This system was used to speed up the process of publication. The publisher supplied the CSBN and, in return, received a percentage of the profit. The other partner would be responsible for arranging a manuscript and the editing and printing and distribution of the book. Both parties were meant to agree on the content of the book as well as the size of the print run.⁷¹

The growing demand for publications also led to the commercialisation of printing businesses, which created massive problems for the old prior restraint system. While the growth of publishing houses has been contained,⁷² printing houses have grown greatly in number. In 1949 there were 2,809 printing houses in China. The

68. The Communist Party Central Committee and the State Council, Decision On Strengthening Publication Work (6 June, 1983).

69. State Council, Notice On The Matter That The Publications Of Periodicals Should Be Financially Independent (29 December, 1994).

70. Wedell-Wedellsborg, *Anne, Literature in the Post-Mao Years* in Benewick, Robert and Wingons Paul (eds.), *Rethinking The Revolution: China In Transition* 194 (1988).

71. AGENCY OF MEDIA AND PUBLICATIONS, Notice on the Rectification of Joint Publication and the Practice of Contracting out Printing and Distribution in the Publishing Houses in the Country (11 July 1989), *Complimentary Explanations on Several Concrete Problems in Rectifying Joint Publication and the Practice of Contracting Out Printing and Distribution* (14 August 1989).

72. There were 211 publishing houses in China in 1950, and 467 in 1987. *Zhongguo Da Baoli Quanshi*, *supra* note 46 at 61.

number reached 25,523 by the end of 1985.⁷³ Faced with this explosive growth in printing businesses, the police withdrew from their responsibilities step by step.

The prior restraint system also faced tremendous difficulties in the editing and distributing stages. A more liberal political climate provided opportunities for editors to venture into grey areas and to test the tolerance of the system.⁷⁴ The economic imperative also made it difficult for the government to control the content of publications. As Wedell-Wedellsborg points out: "There is fierce competition between publishing houses, and the profusion of publications makes strict pre-publication censorship and surveillance impracticable."⁷⁵

Even the government control through the issue of CSBNs has been weakened by the joint publication scheme. Theoretically, a publisher and its partner should both agree on the content and the quantity of a publication. In practice, the editorial control of the publisher is minimal. All of the work, from editing and printing to distributing, is completed by a contractor who is external to the main stream publication system. The lack of vigorous editorial control, it is said, has resulted in the book market being flooded with objectional publications. Still worse, some publishers have openly sold CSBNs at a profit.⁷⁶

The prior restraint system of China's printing businesses thus began to fall under its own weight. Like the downfall of the licensing system in UK in 1695, the demise of free expression, but rather because of broad opposition in principle to any curtailment unwieldy, extreme and even ridiculous.⁷⁷

4. *Reaffirming Prior Restraint*

Problems with unlawful publications began to be felt as early as 1980 when the people's complaints against the old regime associated with the Cultural Revolution started to touch upon the new government in power. Faced with the rapid growth of unlicensed publications, which were also objectionable in content, the government moved to tighten up the administrative control of printing businesses.

The first official document was the 1980 Report issued by the State Bureau of Publications and other Ministries and circulated by the State Council (The 1980

1/4, 532.

73. Lin, Haik, *The Secret Network of the Chinese Communists in Media Control*, 4 MING PAO MONTHLY 55 (1995).

74. Wedell-Wedellsborg, *supra* note 70 at 194.

75. AGENCY OF MEDIA AND PUBLICATIONS, *supra* note 70. Notice on the Rectification of Joint Publication and the Practice of Contracting out Printing and Distribution in the Publishing Houses in the Country (11 July, 1989), *Complimentary Explanations on Several Concrete Problems in Rectifying Joint Publication and the Practice of Contracting Out Printing and Distribution* (14 August, 1989).

76. T.I. Emerson, *supra* note 4 at 651; Hamburger, *supra* note 4 at 714.

Report).⁷⁸ The 1980 Report pointed out that many materials were being published without a licence and their contents were violent, obscene or superstitious, or otherwise of very low quality. The proposed controls were comprehensive. The 1980 Report called upon all organisations involved in the editing, printing and circulating of books and magazines to take necessary measures to combat the abuse. In addition, it prohibited the banks from opening accounts for organisations involving in unlawful publications, the departments in charge of paper and printing machines from providing necessary material, and news and broadcasting agencies from advertising the unlawful publications. Punishment for violating the regulations was not clearly prescribed, however.⁷⁹

In 1983, the Central Committee of the CCP and the State Council jointly made a decision on improving publishing standards and strengthening controls on publishing (The 1983 Decision).⁸⁰ The 1983 Decision set down the principle that, in socialist China, publishing was an instrument of general education and pointed out the necessity of strengthening the controls on publishing.

Unlawful publication received serious attention in 1987 in conjunction with the notorious campaign against "bourgeois liberalization."⁸¹ The CCP moved to tighten control over publishing businesses which had been loosened during the previous years. Top CCP and government officials with more liberal views were removed from their positions. An independent State Bureau of Publications was set up in 1987, which was soon replaced by a more powerful AMP in the following year. A series of Notices were issued by the State Bureau of Publications and the AMP to reaffirm the prior restraint system in China.⁸²

5. *The Limits of Prior Restraint*

Prior restraint measures in China have suffered from several severe defects. These have undermined all government attempts to stamp out unlawful publications. First

78. State Bureau of Publications and other Ministries: A REPORT ON PROHIBITING THE ABUSES IN PRINTING BOOKS AND MAGAZINES AND STRENGTHENING THE MANAGEMENT OF PUBLICATION WORK (22 June 1980).

79. *Ibid.*

80. The Communist Party Central Committee and the State Council, *supra* note 68.

81. For an explanation of and commentary on the resurgence of political conservatism following the pressured resignation of Hu Yaobang as General Secretary of the Party, see R. Lawrence, Sullivan, *Assault on the Reforms: Conservative Criticism of Political and Economic Liberalization in China*, 1985-86, 23 CHINA QUARTERLY 198 (1987).

82. See the 1986 Urgent Notice on Severely Suppressing Unlawful Publishing Activities, the 1987 Notice on Severely Suppressing Unlawful Publishing Activities, the 1987 Joint Notice on Enforcing the Notice on the Severe Punishment of Unlawful Publishing Activities of the State Council, the 1988 Provisional Regulations for the Management of Printing Businesses and the 1989 Several Rules on Strengthening the Management of the Printing of Newspapers and Periodicals.

there is a great demand for books and other reading materials in China. Meeting this demand is severely hampered by government restrictions. Completely legitimate channels of publication cannot meet this huge demand. It remains relatively easy (and much simpler) to publish "unlawfully". Secondly, unlawful publishing is also highly profitable. The opportunities to make quick and large profits by publishing unlawfully are so attractive that pecuniary-administrative sanctions can often be covered from the profits, where necessary. People in the publishing business from editors and printers to distributors, have routinely ignored rules to make profits. Thirdly, the government maintains a monopoly over publishing businesses. As these businesses are part of the establishment, administrative regulations hardly provide sufficient deterrence; publishing businesses break rules which are, essentially, of their own making. In almost all the cases involving unlawful publications where government publishing businesses are involved, the offenders are only dealt with internally and the possibility of criminal punishment rarely arises.

Finally, the government has been reluctant to intervene against unlicensed publications unless the content is objectionable. The content of printed material has to be unlawful (counter revolutionary, obscene, superstitious, or illegally copied, for example) before action is taken. The curious result is that the prior restraint systems deal with the substance rather than the form of publications. The government uses the prior restraint system forcefully when the substance of a publication is offensive. The formal breaches of the system are then invoked to clamp down on that publication. This content-driven use of the prior restraint system has created opportunities for unlawful publications to grow. Thus, when students and workers began to carry out private mimeographing in the late 1980s, printing unofficial journals supporting political and economic reform, they were welcomed, even by the government. They were later attacked as in breach of the control system only after the government changed its mind and decided the same journals were hostile and dangerous, that is, that their substance was objectionable.⁸³

6. *The Role of Subsequent Punishment*

The lack of an effective criminal punishment system has been a serious problem in preventing unlawful publications. It was not until 1985 that the Ministry of Culture proposed economic sanctions against unlawful publications. This 1985 Notice was distinct both for the mild language it used and the way it highlighted the difficulties faced by the prior restraint system:

The Ministry of Culture and State Bureau of Publications have made a series of rules. But some publishers have been disobeying them in order to make profits. As a result, some books which should be controlled cannot be controlled. In addition, some units which are not publishers also publish books in order to make profits. This problem has not been

83. Nathan, *supra* note 59.

rectified for a long time. In order to execute the Party's directives on publications and strengthen the management of publishing, we propose to use economic sanctions as a supplementary measure in addition to continuing to strengthen the administrative measures.⁸⁴

The first criminal prosecution against an unlawful publication occurred in September 1987. Four accused persons were convicted of unlawful speculation. The accused falsified an International Standard Series Number and published a magazine which was found to be obscene.⁸⁵ Two months after the case was decided, the Supreme People's Court and Supreme People's Procuracy issued a Notice, which criminalised unlawful publication (The 1987 Joint Criminalising Notice).⁸⁶ Accordingly, those who for the purpose of making profits, publish, print, circulate, or sell unlawful publications are now subject to a penalty for committing the offence of speculation contrary to articles 117 and 118 of the Criminal Law (CL).⁸⁷ Where the circumstances are very serious, the offender is to be penalized according to the Decision on Severely Punishing Offences which Seriously Damage the Economy passed by the National People's Congress in 1982, which increased the punishment in article 118 in the CL to imprisonment for not less than 10 year, life imprisonment or death.⁸⁸

The 1987 conviction and the 1987 Joint Criminalising Notice signified a growth in the involvement of the judiciary in the control of unlawful publications. At the time, the AMP pointed out that the conviction and 1987 Joint Criminalising Notice were "major steps" toward applying the rule of law in the regulation of publishing.⁸⁹ The

84. Ministry of Culture, Ministry of Finance, and State Bureau of Industrial and Commercial Management, Notice on the Circulation of the "Request of Ministry of Culture to Use Economic Sanctions to Strengthen the Management of Publications" (15 November, 1985).

85. *Zhongguo Fazhi Bao*, Legal News (25 September, 1987).

86. Supreme People's Court, and Supreme People's Procuracy, Notice on the Severe Punishment of Crimes of Unlawful Publications According to Law (27 November, 1987).

87. Article 117 of the CL provides: "Whoever engages in speculation in violation of the laws and regulations on the control of monetary affairs, foreign exchange, gold and silver, or on the administration of industrial and commercial affairs, if the circumstances are serious, shall be sentenced to fixed-term imprisonment of not more than three years of criminal detention, or be may concurrently or exclusively be sentenced to a fine or confiscation of property."

Article 118 of the CL provides: "Whoever makes a regular business of smuggling or illicit speculation, smuggles or speculates in huge amounts or is the ringleader of the group that smuggles or engages in illicit speculation shall be sentenced to fixed-term imprisonment of not less than three years and not more than ten years, and may concurrently be sentenced to confiscation of property."

88. Standing Committee of the National People's Congress, Decision Regarding the Severe Punishment of Criminals Who Seriously Sabotage the Economy (8 March, 1982).

89. Agency Of Media And Publications, Notice on the Execution of "Provisional Regulations on Administrative Penalties for Speculation" by the State Council and the "Notice on Severe Punishment of Crimes of Unlawful Publications According to Law" by the Supreme People's Court and Supreme People's Procuracy (10 December, 1987).

1987 Joint Criminalising Notice was not strictly followed, however. In a joint Notice issued by the Supreme People's Court, Supreme People's Procuracy and the Ministry of Public Security in 1991 (the 1991 First Notice) it was acknowledged that "important judicial explanations were not seriously enforced in some places. Many cases which amounted to criminal offences were never subject to criminal prosecution and the tendency to replace imprisonment with fines was still very common, leading to the continuation of unlawful publications by some criminal elements who should have been punished."⁹⁰ As noted above, the profits from unlawful publication often can cover any pecuniary penalties imposed.

In December of 1991, a new Notice (The 1991 Second Notice) was circulated.⁹¹ Apparently the unlawful publication situation had deteriorated since the circulation of the 1991 First Notice. The 1991 Second Notice again stressed the prevalence of abuse and the serious social and political consequence which would result if the abuse were not contained. The 1991 Second Notice concluded by repeating that the regulations and laws which applied must be strictly enforced.

Summary

When we contrast the working of the two regulatory regimes, for general printing and publishing, of the USA and the PRC certain differences are starkly clear. In the USA, the doctrine of prior restraint has been developed so as to guard the citizenry from excessive regulation of freedom of expression. The Supreme Court has outlawed classical or executive prior restraint and said no to judicial or injunctive prior restraint. It also has laid down stiff tests for exceptions to the prior restraint doctrine. This has not stopped government from regulating expression by exploiting the exceptions and, more importantly, by encouraging self-censorship utilising the chilling potential of subsequent punishment measures. The Constitution, the political culture, the representative democratic political system and an independent judiciary combine to provide checks and balances on excessive regulation of expression, however.

None of these restraints on government obtains in the same way in the PRC. The PRC government does not operate without constraints. Public opinion is important as is international opinion and, within the single ideology prevailing, wide consultative and decision making systems apply. Various government agencies often dispute policies and practice with one another also; a kind of bureaucratic pluralism exists. These limitations are meagre, however, compared to those which apply in the USA. The PRC government has largely a free hand to decide how to regulate general printing and publishing.

90. Supreme People's Court, Supreme People's Procuracy, and Ministry of Public Security, Notice on the Severe Punishment of Crimes Related to Unlawful Publications (30 January, 1991).

91. Supreme People's Court, Supreme People's Procuracy, Agency of Media and Publications, Ministry of Public Security, and State Bureau of Industrial and Commercial Management, Notice on further Severe Punishment of Unlawful Punishment Activities (23 December, 1991).

Initially, the Communist government used this power to introduce the most direct control methods. After 1956, through State monopolization of printing and publishing, they were able to apply a Chinese version of classical prior restraint with great thoroughness. Even before the reform period commenced in 1978, the inefficiencies in this system were becoming apparent, however. With the liberalisation of commerce gathering great pace throughout the 1980s, the government monopoly faded markedly. The lure of profits, political and social activism and growing demand all combined to leave the original systems of prior restraint in a state of impotent decay. A parallel with 17th century England is noticeable both in terms of the systems used and the reasons for their failure.

Real concerns began to emerge about this deterioration in control and its consequences in the early 1980s. A series of measures have been taken to try and reinstate a system of prior restraint. The characteristics of the new system appear to be that it is meant to be less openly intrusive (and thus more workable) but it is also meant to encourage maximum self-regulation. Various ad hoc provisions for serious subsequent punishment are now in place and clearly are being used, to boost self-regulation by publicising widely the crimes and the severe punishment of persons publishing unlawfully. Major targets are profiteers or speculators and political subversives or counter revolutionaries. From what one can tell, the chances of profiteers, especially, being caught and punished remain rather low, however. Moreover, the government remains most concerned about what it considers to be objectionable materials. The myriad instances of breaches of formal prior restraint mechanisms are largely ignored—until these are associated with some substantively objectionable content.

When we apply Emerson's typology of prior restraint, it conspicuously highlights various features of the PRC model. First, as there are no significant political constitutional restraints applying, executive prior restraint remains both a complete option and the control system of first choice. The sheer and ever growing size of the task and resourcing complications continuously sap the effectiveness of this system, however. The Chinese legal system derives from different traditions, suffers from under development and is still notably subject to executive direction and influence. The option of judicial prior restraint, as it is understood in the USA, thus does not really exist. When we consider legislative prior restraint, the thought which springs immediately to mind is the lack of even a basic legislative statement stipulating acceptable content standards for printing and publishing businesses. The law, such as it is, is still mostly contained in a series of ad hoc pronouncements and regulations, often prepared to try and stem some developing crisis. Political prior restraint remains another major means of control in the PRC, as one would expect in a country dominated by a single official ideology.

III. REGULATING THE ESTABLISHED PRESS IN CHINA

In the PRC, the mass media play a key role in political and social development.⁹² The PRC employs the full range of mass media for these purposes. Our focus in this Part is on one segment of the PRC mass media, the established press, that is those newspapers (including periodicals) providing, under official auspices, political, economic and social information and commentary in either general or specialized formats. We do not include in this category, the books, pamphlets and magazines not published under official auspices.

The established press remains the most tightly controlled segment of the PRC media. Our purpose here is to examine the system of control devised to ensure its close regulation and the significance of the established press in the PRC.

In order to place this discussion in a wider context, the next Section explains our understanding of the concepts freedom of expression and freedom of the press as they have evolved and have been practised in the Western world, particularly. Following Sections provide: an overview of theoretical role and the composition of the established press; a review of operational and content controls; a review of the practical outcome of all these control mechanisms; and a discussion of the pressures for change.

A. Freedom of the Press: A Conceptual Outline

1. Introduction

Freedom of individual expression and freedom of expression for the press (freedom of the press) are clearly similar concepts, so much so that some consider no real difference exists between the two. The better view is, however, that there are differences between these concepts and, indeed, they sometimes find themselves in opposition. The purpose of this Section is to establish what freedom of the press means today in the world at large. We draw on the development of the theory and practice of maintaining freedom of press in the West and particularly in the USA, where these topics have been most extensively discussed.⁹³

Difficulties with freedom of expression long predate problems with freedom of the press. It is reasonable to suppose that the former problems emerged during the first

92. This repeats a pattern found in other (now usually former) communist countries. For a comparative discussion of the role of the mass media and social and political development, see, L. J. Martin, and A. G. Chaudhary (eds.), *COMPARATIVE MASS MEDIA SYSTEMS* (1983); L. W. Pye (ed.), *COMMUNICATIONS AND POLITICAL DEVELOPMENT* (1972); and A. Buzek, *HOW THE COMMUNIST PRESS WORKS* (1964). With respect to the PRC, see, Nathan, *supra* note 59, Ch. 8.

93. See further *supra* note 1. Some of the discussions below relates to cases involving the broadcast media. The term *opresso* has both a specific meaning (newspapers and periodicals) and more general meaning (all media involved in the public distribution of information). The case law and commentary in the USA usually is using the term *press* in the second sense. This is the sense which the terms *press* has come to have where it is used in the First Amendment of the Constitution of the USA. When the First Amendment was ratified in 1791 the printed word was the sole means of mass communication over any distance, of course.

argument between humans using verbal language and perhaps even before. Freedom of the press alterations had to await two crucial developments: (a) the development of a meaningful levels of literacy; and (b) the development of mass printing. In the Western world, these two components were in place by the late 15th century. Measures to restrict press freedom followed shortly afterwards.⁹⁴

During the 20th century there has been considerable refinement of what is understood by the terms freedom of expression and freedom of the press in the context of the wider ongoing debate about the need to protect individual rights. Particularly since the Second World War, there has been constant attention paid to finding mechanisms to protect what are described as basic or fundamental rights. The appalling abuses of individual rights during that War on a scale never before recorded has energised this search for protection ever since, although much ground work had been done prior to that period. In 1946, at the first meeting of the United Nations (the UN) after the Second World War, the concept of freedom of expression was identified as a touchstone of all individual rights. The Universal Declaration on Human Rights of 1948 (the UDHR) by the UN stipulates, inter alia, that individuals are to enjoy rights to freedom of thought, conscience and religion, opinion and expression.⁹⁵ The UDHR was just that, a declaration only, but the early UN debates and the UDHR underline the key importance of protecting freedom of expression. Although the UDHR binds the PRC, the UDHR does not impose obligations on parties so bound. Rather, it urges parties to promote, respect and observe those rights set out in the UDHR.

These rights to free expression are also stipulated in the International Covenant on Civil and Political Rights of 1966 (the ICCPR). Although the PRC is not a party to the ICCPR,⁹⁶ the Constitution of the People's Republic of China of 1982 (the Constitution of the PRC) stipulates that freedom of expression and freedom of the

94. See *supra* note 4 and accompanying text.

95. See, Articles 18 and 19 of the UDHR. See, also, Eide, Asbjorn, Alfreðsson, Gudmundur, Melander, Goran, Rehof, L. Adam, Rosas, Allan and Swinehart, Theresa (eds.), *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY* (1992).

96. The ICCPR does, however, apply in Hong Kong, (soon to become a part of the PRC) and is (largely) embodied in statutory form in Hong Kong's Bill Of Rights Ordinance (Ch. 383 of 1991) (the BORO). The ICCPR is also incorporated into the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (the Basic Law) both by reference and by repetition of many of the ICCPR rights in the Basic Law itself. The Basic Law is the principal constitutional document which will govern Hong Kong after it becomes the Hong Kong Special Administrative Region (the HKSAR) of the PRC once sovereignty over Hong Kong reverts to China on 1 July, 1997. For further commentary on the Basic Law and its impact on the HKSAR, see, Y. Ghai, *The Basic Law: A Comparative Perspective* in Wesley-Smith (ed.), *HONG KONG'S BASIC LAW: PROBLEMS AND PROSPECTS* (1990); and R. Cullen, *Capitalism with Chinese Characteristics: Hong Kong - Past, Present and Future* in Heberle, Peter (ed.), *43 JAHRBUCH DES DEUTSCHEN RECHTS DER GEGENWART* 709, 716-718 (1995). For detailed discussion of the respective rights protected by the Basic Law, the ICCPR and the BORO and their relationship with one another, see Y. Ghai, *The Hong Kong Bill of Rights Ordinance and the Basic Law of the Hong Kong Special Administration Region: Complementarities and Conflicts* 1 JOURNAL OF CHINESE AND COMPARATIVE LAW 30 (1995).

press are protected.⁹⁷ The significance of these constitutional protections is discussed in more detail below. Here, we simply make the observation that the protection is currently (and has been since the current Constitution was adopted in 1982) little more than symbolic.⁹⁸

2. Freedom of Expression

Various commentators have elaborated specific reasons why freedom of expression is important. The following list summarises what are generally regarded as the most important reasons.⁹⁹ Freedom of expression is both intrinsically and instrumentally valuable because:

- (i) *It promotes the discovery of truth.* It is argued that freedom of expression is necessary to provide a constant testing of conventional wisdom or accepted truth. Flawed "truths" are eliminated as better explanations arise in the market place of ideas. This justification has two elements. First, it is argued that there is an intrinsic good in seeking the truth. Secondly, it is argued that seeking the truth is good for teleological or consequential reasons, also. That is, the seeking of truth will produce an improved society.
- (ii) *It promotes political participation.* This justification addresses the need for individuals in a society to be well informed in order for them to participate effectively in the public affairs of that society. This informed participation is regarded as necessary for the effective operation of government.
- (iii) *It helps maintain social stability.* This justification relates to the benefits arising from a free exchange of information in ensuring social stability. Through a free exchange of information, society's problems, it is said, will be more quickly and accurately identified and responses can be crafted accordingly.
- (iv) *It provides a "safety valve".* This justification is closely related to the previous

97. Article 35 of the Constitution of the PRC provides, inter alia, that citizens of the PRC enjoy freedom of speech and freedom of the press.

98. It is worth noting at this point that the Chinese view that the content of such rights at an individual level is heavily circumscribed by the interests of society is not a post-1949 (PRC) phenomenon. It is an approach embedded in historical Chinese political practice. See, S. Lubman, *Studying Contemporary Chinese Law: Limits, Possibilities and Strategy*, 39 AMERICAN JOURNAL OF COMPARATIVE LAW 293, 324-328 (1991).

99. This list draws on a number of sources including: the judgment of Brandeis J in *Whitney v. California* 274 US 357, 372 (1927); J. Zelezný, *COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS AND THE MODERN MEDIA* (1993); T.I. Emerson, *Towards a General Theory of the First Amendment*; 72 YALE LAW JOURNAL 877 (1963); A. Meiklejohn, *The First Amendment is an Absolute Supreme Court Review* 245 (1961); L.A. Powe, *Or of the (Broadcasts) Press*, 55 TEXAS LAW REVIEW 39 (1976); O. Fiss, *Building a Free Press*, 20 YALE JOURNAL OF INTERNATIONAL LAW 187 (1995); and K. Boyle, *The Right to Freedom of Expression*, paper presented at Hong Kong's Bill of Rights Conference, Faculty of Law, University of Hong Kong (20-22 June, 1991).

justification. Here the argument is that freedom of expression guarantees mean that "steam" can be let off. Individuals or groups in society are less likely to repress their concerns and, in doing so, possibly develop tendencies towards later violent expression of those concerns.

- (v) *It enhances self-fulfilment.* This justification refers to the natural or ethical right (and desire) which, it is said, individuals have to improve themselves and the key role which self-expression plays in that process of development.
- (vi) *It provides a crucial check on government.* This justification relates to the way that freedom of expression is argued to be pivotal in ensuring the accountability of government. Free expression guarantees mean that a government's behaviour can be openly and effectively criticized.

3. Freedom of the Press

The justifications just outlined are powerful arguments in favour of maintaining freedom of expression generally. Some of them apply, in particular, to the justification for protecting freedom of the press. A review of these justifications, bearing freedom of press in mind, helps to differentiate between freedom of expression and freedom of the press.

Protecting freedom of the press is clearly important for maintaining the market place in which ideas are exchanged, thus enhancing the operation of society. Similarly, it provides a forum in which ideas for improving society generally can be argued. The press also serves as a principal mechanism for providing commentary and criticism of government performance. In fact, it is sometimes referred to as the fourth arm of government. After the three principal arms of government, namely the executive, the legislature and the judiciary, the press provides a fourth key component related to the operation of government by providing a means for freely expressing the widest cross-section of views on the performance of government. The role of the press in providing a forum for the public discussion of ideas related both to society and to government, in particular, has been stressed by Professor Meiklejohn. He has argued that:

Public discussion of public issues ... must have a freedom unabridged by our agents [those governing]. Though they govern us, we, in a deeper sense govern them. Over our governing, they have no power. Over their governing, we have sovereign power.¹⁰⁰

There has been ongoing dispute about the differences, in principle, between the concepts of freedom of the press and freedom of expression and their significance.¹⁰¹ As a matter of practice, we can readily identify differences, however. In the USA, for example, the press enjoys special privileges with respect to expression which individuals do not enjoy. These privileges include an immunity from some defamation actions. The press also is protected from certain impositions such as, for

^{100.} Quoted in Powe, *supra* note 99 at 39.

example, being ordered to provide a right of reply. Thus, in certain cases, where a citizen (or a group of citizens) wishes to express a point of view in a given newspaper, freedom of the press, that is the right of the newspaper to decide on its own contents, prevails over the freedom of expression of that citizen or these citizens.¹⁰² As we noted earlier, although the freedom of expression and freedom of expression and freedom earlier, although they share many characteristics, freedom of expression and freedom of the press can some times find themselves in conflict. Finally, freedom of expression is necessary to fulfil the "safety value" and self-fulfilment functions mentioned above. Freedom of the Press can assist in achieving these ends. But it is not necessary in the same way as freedom of expression in this quest.

4. Freedom of the Press in Practice

So far we have discussed freedom of press (and freedom of expression) in fairly general terms. In the real world, the worthy rationale outlined above for freedom of the press is severely tested. As we shall see, the PRC provides an unmistakable example of the very serious problems which can arise from complete public ownership of the press, particularly where there is a dominant and enforced ideology. A common impulsive, reform-minded response to such a system as that prevailing in the PRC is to urge a rapid change to full private ownership.¹⁰³ Private ownership of the press presents its own serious difficulties, however. Professor Bollinger has argued strongly that an unregulated private press comes at too high a price. An unregulated private press is likely to abuse its freedom, he feels, by excluding points of view, misrepresenting information, avoiding public issues and playing to the fears and biases of the population.¹⁰⁴ These problems are exacerbated when press ownership is concentrated in a few hands.¹⁰⁵ Professor Fiss makes similar points in the context of discussing the prospects for development of private media outlets in post-1987 Eastern Europe. In particular, he notes problems with respect to:

^{101.} For discussion of this issue, see: M.B. Nimmer, *Is Freedom of the Press a Redundancy - What Does it Add to Freedom of Speech* 26 *HASTINGS LAW JOURNAL*, 639; (1975) D. Lange, *The Speech and Press Clauses*, 23 *UCLA LAW REVIEW* 77 (1975); R.M. Kaus, *The Constitution, the Press and the Rest of US*, *WASHINGTON MONTHLY* 51-52 (November 1978); S. Schiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 *USC LAW REVIEW* 923 (1978); F.S. Hartman, *SPEECH AND LAW IN A FREE SOCIETY* (1981); G. Marshall, *Press Freedom and Free Speech Theory* *PUBLIC LAW* 40 (1992); and Barendt, *supra* note 1.

^{102.} See, for example: *Columbia Broadcasting System v. Democratic National Committee* (1973) 412 US 94 where the Supreme Court denied the public interest supported any right to have paid political announcements broadcast; and *Miami Herald Publishing Co. v. Tornillo* (1974) 94 SC 2831 where the Supreme Court held that a State right of reply statute violated the freedom of the press protection in the Bill of Rights. See, also, however, *Columbia Broadcasting System v. Federal Communication Commission* (1981) 453 US 367, where the Supreme Court upheld an affirmative right of reasonable access to broadcasting stations candidates for federal office.

^{103.} Fiss, *supra* note 99 at 187-188.

Economic imperatives: the need to make profits can quickly lead to reduced expenditure on expensive, serious news gathering;

The influence of advertising: the preference of advertisers for news programs and general programs which help sales can influence media content in a manner adverse to the public interest; and

The lack of consumer power: the atomistic nature of media consumers means they rarely are able to express their collective interests which leaves the definition of media content very much in the hands of private proprietors.¹⁰⁶

Professor Barendt, in a recent comparative review of the approach to freedom of expression issues in the USA and in the European Union (and especially in Germany), summarizes the achievements and drawbacks of the American approach as follows.

Achievements:

- severe restrictions on press silencing, prior restraint practices;
- restrictions on the scope for defamation actions to silence the press; and
- protection of speakers from hostile audiences.

Drawbacks :

- no limits on the wealthy using their economic power to influence electoral politics;
- hostility to legislation aimed at equalising expression opportunities;
- hostility to regulation of content (for example, hostility to anti-hate-speech laws); and
- seriously enfeebled regulation of content on the broadcast media.¹⁰⁷

Some argue that the market will in due course solve most or all these problems by regulating press performance (and ownership). These market based arguments, in the case of the press (including the electronic media), are quite weak and indeed faulty. In the first place there usually are serious economic barriers to entry of new operators. These include the capital intensive nature of media operations, distribution difficulties and costs and the "brandname" advantage of existing participants. Secondly, the consumer often is in a poor position to judge the worthiness of existing product or,

104. A recent example of such press behaviour involved the 1992 General Election in the United Kingdom, (the UK). A new study has estimated that deliberate distortion of Labour Party policy by the Conservative Party supporting "Sun" newspaper in the UK may have helped gain the Conservative Party 23 more seats in the House of Commons than the Conservative would otherwise have won. See, Wol won it? *THE ECONOMIST* 62 (4 November 1995).

105. L.C. Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICHIGAN LAW REVIEW 1 (1976).

106. Fiss, *supra* note 99 at 190.

107. Barendt, *supra* note 1 at 69-72.

as Fiss argues, take action. There often is little opportunity to make comparisons and the average consumer is rarely well enough informed (or has the time to become so informed) to recognise other than egregious substandard performance, manipulation or editorial abuse by the media.¹⁰⁸

Some commentators go so far as to say that, functionally, the processes of control in the West of the media are comparable with those which used to prevail in the old East European communist world.¹⁰⁹ This overstates the position; the fact that such commentators can freely make such claims establishes this. The general thrust of this comparative observation is sound, however. The "free press" in the West is free only according to a definition of free shaped by numbers of deforming influences. For Fiss, pressing for autonomous, privatized media outlets is seriously flawed as a policy without government mandated, widespread access by the general population to those media outlets.¹¹⁰

5. *The Established Press in China: An Overview*

The theory of the role of the established press in the PRC is clearly explained by Lenin. In bourgeois societies, according to Lenin, "The capitalists... define as 'freedom of the press' a state of affairs under which censorship is abolished and all parties freely publish all kinds of newspapers. In reality, this is not freedom of the press, but freedom to deceive the oppressed and exploited masses... by the rich, by the bourgeoisie". The private ownership of the press in bourgeois societies determines, it is said, that the free press concept is a deception.¹¹²

In a communist society, the ownership of the press has to be public. According to Lenin, the press in such societies represents the interest of the masses. The masses, however, cannot speak for themselves, so the Communist Party (the Party), as the vanguard of the working class, has to exercise democratic control and express the view of the masses. As the Party represents the people and there is an identification between the Party and people, the voice of the Party becomes the voice of the people. What is important is to use the press as a revolutionary instrument.¹¹³ In the PRC, the theory of the press as an instrument of the revolution has been applied with vigour. The press has become the "throat and tongue" of the CCP.¹¹⁴ The new democratic freedom manifests itself through the single voice of the CCP. For Lenin as well as

108. These difficulties are discussed in detail in: L.C. Bollinger, *Images Of A Free Press* (1991); and T. Gibbons, *REGULATING THE MEDIA* (1991). See also, Fiss, *supra* note 99.

109. J. Pilger, *DISTANT VOICES* 11-12 (1992).

110. Fiss, *supra* note 99 at 196-197.

111. Quoted in Martin and Chaudhary, *supra* note 92 at 27.

112. *Ibid.*, sec. also, J. Pilger, *supra* note 109.

113. Yu, T.C. Frederick *Communications and Politics in Communist China*, in L.C. Pye, (ed.), *COMMUNICATIONS AND POLITICAL DEVELOPMENT* 259 (1972).

114. M. Schoenhals, *DOING THINGS WITH WORDS IN CHINESE POLITICS: FIVE STUDIES* Ch. 1 (1992). The term "throat and tongue" is the CCP's official metaphor for the press, see Hood, *supra* note 2a138.

for the CCP, the strategy was to urge press freedom as long as the enemy was in control but to curtail press freedom once victory had been achieved.¹¹⁵ Like the Bolsheviks in the former Union of Soviet Socialist Republics, the CCP abolished freedom of press, for which they had previously fought, once they came to power.¹¹⁶

When the CCP came to power, in 1949, there were 235 newspapers in China owned either by the state or privately. Private ownership of newspapers was massively reduced by 1953 and was finally abolished by 1957. The number of newspapers increased to 273 from 1959 to 1962. This number fell to 186 during the Cultural Revolution (1966-1976).¹¹⁷ From 1978 to 1988, the number of newspapers increased by more than 1,500; an average of one new newspaper every two and half days. Periodicals increased by more than 4,000; an average of one new periodical every one and half days. By the end of 1993, there were 2,040 newspapers registered in the PRC.¹¹⁸

The leading newspapers in the PRC are the institutional newspapers of the CCP (the Party Papers). They are controlled directly by a variety of CCP committees. The People's Daily is the pre-eminent Party Paper because it is run by the CCP Central Committee.¹¹⁹ Each province has its own Party Paper under the direct control of the provincial CCP committee. By the end of 1987, there were 428 Party Papers in China. Thirty-five of them were directly run by central and provincial CCP committees. The rest of them were run by CCP committees at the levels of prefecture, city or county.¹²⁰ The number of Party Papers remained approximately the same at the end of 1994.¹²¹ The CCP also runs other newspapers in addition to the Party Papers. These papers are mostly published by CCP propaganda departments.¹²²

There are other newspapers which are not as official as the Party Papers but which still are of great political significance. Newspapers run by the Communist Youth

115. K. Lu, *Press Control in "New China" and "Old China" in China's Media*, *Media's China*, *supra* note 2 at 147, 151.

116. *Ibid.*

117. Legislative Affairs Commission, National People's Congress, 2 INTRODUCTION TO THE MEDIA AND PUBLISHING ENTERPRISES IN CHINA (19 October 1994) (This is a policy paper prepared as part of the process of drafting a Media Law for the PRC. No such Media Law has yet been passed).

118. *Id.*, at 4.

119. The Central Committee of the CCP is one of the key formal structures in the Constitution of the CCP. The substantive reality is that the Political Bureau (or Politburo) of the Central Committee and the Politburo Standing Committee exercise the leadership functions of the Central Committee and the Politburo Standing Committee exercise the leadership functions of the Central Committee. The same pattern is replicated at the provincial level. See, A.H. Chen, *supra* note 47 at 69-74.

120. CHINA ENCYCLOPEDIA: MEDIA AND PUBLICATIONS 491 (1990).

121. Legislative Affairs Commission, *supra* note 117 at 2.

122. Propaganda departments are in charge of what Marx called the "superstructure" of society (in contrast with the economic basis of society). The superstructure includes education, the mass media, entertainment and anything which directly relates to "thought". See, further, *supra* note 47.

League, the National Labour Union, and the Women Association are not strictly as "official" as the People's Daily or other Party Papers, because, in a constitutional sense, these entities fall into the category of so-called mass (or social) organizations. These organizations are de facto official, however, because the government assigns them a certain administrative rank, regards them as part of the political establishment and assigns them certain tasks. Their newspapers, Chinese Youth, the Workers Daily, and Chinese Women, respectively, have significant status.

The central government¹²³ also runs its own paper. The Economic Daily is the official newspaper of the State Council. Each Ministry or ministerial level department also runs its own newspaper related to its portfolio. The Ministry of Public Security has the People's Public Security, the Ministry of Supervision has the People's Supervision, and the Ministry of Justice has the Legal Daily, for example.

Figures for 1987 show that newspapers covered a wide range of topics and target audiences. There were: 119 newspapers on science and technology; 61 newspapers on broadcasting and television; 59 on legal matters; 59 on education; and 54 on art and literature at that time. A large proportion of newspapers are oriented towards specific professions or age groups. Again, in 1984, there were: 37 oriented towards peasants; 30 towards juveniles; 20 towards youths; 13 towards industrial workers; 12 towards the aged; 10 towards soldiers; and 3 towards women.¹²⁴

Each newspaper has its own administrative rank, according to the rank of the government department which publishes it. The People's Daily has the highest status, among Party Papers because it is the CCP Central Committee's official newspaper. The Economic Daily also enjoys the same sort of status as the official newspaper of the State Council. Other major nationwide newspapers include the Enlightenment Daily, the Workers' Daily, and Chinese Youth. Provincial papers show the same patterns. The status of a newspaper is important for several reasons. As newspapers reflect the political and administrative hierarchy, a newspaper with higher status carries more weight. The status is also important in terms of the size of the annual budget, access to government (and CCP) sources and whom and what the paper may criticize.

All of these papers are published officially, subscribed to by official departments and read more by employees and members of government and the CCP than any other groups. Until very recently, they were uniformly subscribed for through the post office (instead of being sold by retail). Limited retail sale of some newspapers is now occurring.¹²⁵

123. The State Council is the title of the PRC's executive central government. Although closely intertwined, the CCP and the government are separate institutions. See note 47. There has been discussion in the PRC of the need for a full separation of the CCP and government but serious reform in this regard has yet to occur. See, further, Lubman, *supra* note 98 at 317.

124. CHINA ENCYCLOPEDIA (MEDIA AND PUBLICATIONS), *supra* note 120 at 485. These are the most recent readily available figures for these categories.

125. Y. Chen, and L. Xiong, *War for More Subscribers*, *Window* 16 (24 November, 1995).

newspapers firmly in its hand".¹³⁴ The CCP also issues directives, controls the sources of information, censors proofs and writes commentaries for newspapers. Another commentator pointed out, in 1987, that the CCP imposes its decisions on every aspect of decision making about news reporting, ranging from content, style, titles, layout, and even the length of a report and the selection of wording.¹³⁵

2. The Formal Regulatory Regime

The Provisional Rules on the Management of Newspapers (the Rules) provide one of the few legally formal components in the current regulatory regime. The Rules were passed in 1990 by the AMP to formalize the licensing system for new newspapers.¹³⁶

A newspaper is defined as a publication which contains mainly news and is published, in numbers, at intervals not exceeding one week.¹³⁷ There are formal and informal newspapers. Formal newspapers include the papers which have been: (a) examined and approved by the media and publications authorities; (b) properly registered; and (c) granted a newspaper registration certificate by the AMP. Formal newspapers are either publicly circulated or internally circulated. A publicly circulated paper means the paper may be "subscribed for generally and displayed and sold in public within the PRC, or overseas with the permission of the AMP." An internally circulated paper is one which may only be subscribed for or displayed and sold to a specifically limited group.¹³⁸

An informal newspaper is one which is circulated within a government department and used for the purpose of circulating information related to that department. An informal newspaper may not be subscribed for or distributed, displayed or sold in public. It cannot carry any advertisements. It must be distributed free of charge.¹³⁹

According to the Rules, all applications for setting up a new newspaper, either for national or local circulation, have to be examined and approved by the AMP before a licence is granted. The Rules also stipulate several preconditions to be met before a newspaper can be established. First, the newspaper must have a goal which is consistent with the Constitution of the PRC. It also must have: fixed and competent

134. X. Ju, *Guanyu Xinwen Gaige De Yixie Lilun Sikao (Some Theoretical Considerations on media Reform)*, 2 FUDAN XUEBAO, SHE KE BAN (JOURNAL OF FUDAN UNIVERSITY, SOCIAL SCIENCE EDITION) 47(1989).

135. G. Gao, *Dangbao Xinxu Xitong De Xianzhuang Yu Gaige (Reform of the Information System in the Party Papers)*, 5/7 XINWEN XUEKAN (JOURNAL OF JOURNALISM) 35 (1987).

136. Agency of Media and Publications, PROVISIONAL RULES ON THE MANAGEMENT OF NEWSPAPERS (25 December, 1990).

137. Article 2, the Rules.

138. Article 3, the Rules.

139. Article 6, the Rules.

of the General Secretary of the CCP. The liberal chief who served under Hu Yaobang was removed from his position after the June 1989 Tiananmen bloodshed. Deng Xiaoping then appointed a more conservative chief, Ding Guangen, to control the developing liberal tendencies in the mass media. Mr Ding is about to be replaced by a confederate from Shanghai of the CCP General Secretary, Jiang Zemin.¹²⁹ Xu Guangchun, the heir apparent, is currently deputy to Mr Ding.¹³⁰

The CPD assigns a quota of newspapers to each province to limit the number of new newspapers a province may establish each year.¹³¹ Through the licensing system the Party exerts macrocontrol over the number as well as the kinds of newspapers which are allowed to enter the market each year. The CPD has been able to promote the kinds of newspapers which are deemed to be necessary, such as satellite (or democratic) Party Papers,¹³² and papers which can fulfil a perceived social or economic need. Since the early 1990s, the CPD has refused applications to run newspapers which appear to deal with redundant subject matters and which have negative budget implications for the government.

The CCP frequently prescribes forbidden zones which limit the areas of news which the press may cover. Former deputy minister for Broadcasting, Film and Television, Xie Wengqing, puts it this way: "One of the problems with respect to media reform is to improve the Party's leadership over news reporting, and allow news workers more freedom... There are too many forbidden areas which are strictly enforced in the current system, which makes it very difficult for the news media to supervise the government."¹³³ This mild criticism of an ex-official seriously understates the scope of forbidden news reporting zones in China, as we shall see.

The excessiveness of the CCP's control over newspapers has been widely marked upon. One commentator, in 1989, noted that the CCP "grips the party Mr. Jiang, the (apparent) heir apparent of the ailing (at the time of writing) Deng Xiaoping is also the Chairman of the powerful Military Commission as well as President of the PRC. Editorial, NEWSWEEK 3 (21 August, 1995).

129. Y. Ni, *Baokan Shiyong Shehuizhuyi Shichangjingji Wenti Chutan (Preliminary Discussions on Question of Newspapers and Journals being adapted to Suit the Socialist Market Economy)*, 2 ZHONGGUO DAXUE XUEBAO, ZHESHE BAN ZHENGZHOU UNIVERSITY JOURNAL, PHILOSOPHY AND SOCIAL SCIENCE EDITION 19 (1994).

130. It is now much easier for one of China's so-called democratic parties to set up a newspaper as the CCP is promoting their political participation. *Xinwen Chubanshu Shuzhang Du Daozheng Tan Xinxun Jie Remen Huatui (Director of the Agency of media and Publications, Du Daozheng Tan Discussing Hot Topics of Media Reform)*, 2 ZHONGGUO JIZHE CHINA REPORTER 8 (1989). These parties existed prior to the creation of the PRC in 1949. Most of these parties were formed in the 1940s and consisted of former Guomindang (Nationalist) members who switched to the CCP and intellectuals, industrialists and businessmen with communist sympathies. They are typically very small and exist with the permission of the CCP. Their composition and their role are explained in Chen, *supra* note 47 at 63-65.

131. Quoted in L. Yang, *Xinwen Gaige Redian Mianmian Guan (Aspects of Media Reform Hot Topics)*, 7 QIAO BRIDGE 16(1988).

B. The Established Press in China: Operational Controls

1. An Overview of the Role of the Chinese Communist Party

The operational control of the press is effected in four principal ways. These mechanisms are: Tongyi (Unified); Shuangui (Two Track); Fengji (Hierarchical); and Pumen Guanli (Departmental Control).¹²⁶ The unified mechanism refers to the unified leadership of the CCP over newspapers through the Central Propaganda Department (CPD) and subsidiary propaganda departments. The CPD not only makes policies on the mass media, such as deciding the priority of news reporting at a certain period of time but also supervises major national newspapers and other mass media outlets. The CPD sometimes even becomes directly involved in supervising day to day operations in newspapers.¹²⁷

The Two Track mechanism refers to the dual leadership of the CCP (through the CPD) and the government (through the AMP). In fact, the AMP is also subject to direction by the CPD. The main task of the AMP is to maintain day to day newspaper control. Given the fact that the CPD has assumed responsibility for supervising the mass media in China under the principle of unified leadership, the political control of the CCP rather overwhelms the executive management role of the AMP, however.

The Hierarchical mechanism refers to the system arising from the fact that each province has: (a) its own propaganda department in its provincial CCP, and (b) Bureau of Media and Publications (BMP) in the provincial government to supervise newspapers within the province. Each BMP answers to the AMP as well as to the propaganda department of the provincial CCP. The power structure and lines of authority follow those applying in the central government.¹²⁸

The Departmental Control mechanism refers to the fact that each newspaper belongs to a CCP organ or government department, and each CCP organ or government department is expected to take responsibility for supervising each of the newspapers. This is a mechanism to enforce internal accountability to buttress the external control of the CCP and government.

Organisationally, the CCP exercises direct control over the appointment of cadres in charge of the mass media. The chief of the CPD is always a close follow

sponsoring and supervisory units within government; a specific subject matter and editorial policy which are consistent with the portfolio of its sponsoring and supervisory units; competent editors and reporters; and the necessary premisses, equipment and capital.¹⁴⁰ The process of obtaining approval for a new newspaper is very demanding.

3. Administrative Control Mechanisms

All newspapers (that is the established press including professional newspapers) old and new are subject to a secondary level of administrative control. This administrative control system is set out in the AMP Provisional Regulations (the Provisional Regulations) which were issued in 1993.¹⁴¹

There is a three-level internal supervisory system within any newspaper, in addition to the external control just discussed. First, there is the publishing unit, that is the newspaper itself, secondly, the sponsoring unit and thirdly the supervisory unit. The relationship between the three units is strictly hierarchical. A newspaper is run by its management under the direct leadership of the sponsoring and the supervisory units. Each subordinate unit is directly accountable to its superior, and all three are collectively responsible for the newspaper. Political correctness is the object of this collective responsibility system. A crucial point is that the people holding key positions in a newspaper must be employees in the sponsoring unit. The newspaper may not be contracted out to an independent third party. An "attachment system", which was previously in use, has now been explicitly prohibited by the Provisional Regulations.¹⁴² By controlling the people who run the newspaper, the sponsoring unit is able to control the newspaper. The attachment system was probed to its edges in the 1980s. Its use was forbidden in the aftermath of the June 1989 Tiananmen bloodshed.¹⁴³

The supervisory unit and the sponsoring units share responsibility for the supervision of the newspaper. Both of them are responsible for examining news

¹⁴⁰ Article 10, the Rules.

¹⁴¹ Agency Of Media And Publication, Provisional Regulations on the responsibilities of the Hosting Unit and Supervisory Unit of Publishing Units (29 June, 1993).

¹⁴² Article 6, the Provisional Regulations.

¹²⁶ *Dai, Linhua, Jimin Xinwen Chuancha Jizhi De Jiben Guoxiang (Basic Ideas about Setting Up Control System for News Media)* 1 NANJING ZHENGZHIXUEYUAN XUEBAO (JOURNAL OF NANJING INSTITUTE OF POLITICS) 87 (1992).

¹²⁷ Yu argued, in 1963, that "The long arm of the department (of propaganda) reaches all the way from interpreting Marxism-Leninism to answering simple questions from a peasant in a comment from deciding policies of national newspapers to criticizing some obscure "blackboard newspaper in a tiny village". Yu, *supra* note 113 at 269. Newsweek noted, in a recent editorial, that the department of propaganda was "mixing everything from radio talk shows safe sex to China movies that have garnered award overseas." *Newsweek* 3 (21 August, 1995).

¹²⁸ For further elaboration of these power structures, see (Chen, *supra* note 47, Chs. 4 and 5.

reporting and censoring important articles, commentaries and reporting. Both are directly liable for serious mistakes in the contents of the newspaper. Both have the power to determine whether an article should be published or not. If the newspaper is closed, both are responsible for the reallocation of the employees and the liquidation of its assets.

As external bodies, the media and publications authorities lack the capacity to monitor the day to day operation of newspapers effectively. By creating this (internalized) collective responsibility, the propaganda and media and publications authorities can hold the senior government unit responsible for each newspaper liable for newspaper content. The media and publications authorities have thus delegated some of their powers to the sponsoring and supervisory units. These units are expected to enforce internal accountability. The political correctness of each newspaper is secured by situating it within the government hierarchy and by making it accountable internally within that hierarchy.

4. Internal Management Controls

There are two basic structures for major newspapers in China, depending upon whether they nationally or locally circulated. For national newspapers, the Editorial Committee is the highest authority in a newspaper. The full title is the Editorial Committee of the Communist Party Committee (of the newspaper). Its task is to receive instructions from the CCP and report back on the implementation of those instructions. After receiving instructions, from the CCP, the Editorial Committee draws up a propaganda plan for the newspaper. The Editor-in-Chief and the Editorial Board are the executive arm of a newspaper. Their duty is to implement the plan made by the Editorial Committee. The Editorial Board is composed of editors from the newspaper, each responsible for editing news in a particular field. Reporters at different brand stations cover news according to the instructions of the Editorial Board. The reports are sent back to the department of that reporter within the newspaper which forwards the news to the Editorial Board. The Editor in Chief decides the daily contents of the paper according to the plan made by the Editorial Committee.¹⁴⁴ A variation on this pattern applies in some national newspapers. In this varied scheme, there is a Reporters Department and the Editorial Board. The Editorial Board is responsible for news within the city where the newspaper is located. The Reporters Department is responsible for

managing reporters in the branch stations. Both entities operate separately and are directly accountable to the Editor-in-Chief.

For a locally circulated newspaper, there is a simpler structure but a finer division of labour. The Editorial Committee is the final decision maker for the newspaper. Under the Editor-in-Chief, reporters are divided into special departments, which are responsible for covering news in their field. Each department, which is headed by a departmental editor, is responsible for selecting and writing the news in its area, which is then directly forwarded to the Editor-in-Chief for examination and publication.

A particular feature of the structure of PRC newspapers which is worth noting is the internal reference department. Whenever a newspaper discovers news which is newsworthy but not suitable for publication for some reason, this news should be reported to the internal reference department. This department writes a report for CCP and government leaders at certain ranks.¹⁴⁵

Such reports apparently proceed slowly through the bureaucratic hierarchy.¹⁴⁶

The structure and process of news reporting reflects the importance of maintaining consistency with CCP policy at all times. After receiving orders from the relevant CCP propaganda department, the Editorial Committee of a newspaper formulates a propaganda plan, and, according to the plan, allocates tasks to each department or station. The department or station in turn assigns tasks to each reporter to look for news which fits the plan. After the reporters complete their tasks, the top-down process is reversed. All the reports move back up the hierarchy. The reports, after being filtered, are forwarded to the Editor-in-Chief and his Editorial Board for selection and decision. Through this "up-down and down-up" process, the CCP's policy is understood by reporters and correctly reflected in the newspaper.¹⁴⁷

C. The Established Press in China: Content Controls

1. News Genres and Controls Applying

Direct censorship of newspapers is extensive in China. The principal method of censorship is by proscription of reporting of certain types of news rather than by

¹⁴⁴ Shi Jie Jingji Daobao Fengbo Zhenxiang (*The Truth About The Incident of The World Economic Herald*), ZHONGGUO JIAOYU BAO (CHINA EDUCATION NEWSPAPER) 1 (20 July, 1989). See also, M. Goldman, *The Role of The Press in Post-Mao Political Struggles* in China's Media, Media China, *supra* note 2 at 23, 28-32. One Chinese metaphor for testing the limits of relaxed regulation is: aim to land the ping pong ball on the very edge of the table. A number of publications were tested pre-1989 regulatory limits are discussed in J.P. Beja, *The Challenge Role Of Intellectuals In The AUTONOMISATION PROCESS OF SOCIETY* (1 September, 1995) CHINA PERSPECTIVES 6, 11-12.

¹⁴⁵ See, also, J.P. Beja, *The Year of the dog: in the Shade of the Ailing Patriarch* in Lo, CHIN PEPPER, Suzanne, and Tsui, Kai yuen (eds.), CHINA REVIEW Ch. 1 (1995).

¹⁴⁶ Gao, *supra* note 135 at 35.

¹⁴⁵ Gang Gao, Dangbao Shouji Yu Xinxi De Xianzhuang Ji Gaige Tuijin; Linjia Sheng, Shi Dangbao De Kaocha Fengxi Baogao (*Present Reform of The Collection and Processing of Information in Party Papers: Investigation and Analysis of Six Provincial and City Party Papers*), 2 XINWEN ZHANXIAN (NEWS FRONTLINE) 19 (1987).

¹⁴⁶ Gao, *supra* note 135 at 34. An example of such a report is given in J.P. Beja, and M. Bonin, *The Destruction Of The Village China PERSPECTIVES* 21, 24 (2 November, 1995). In this instance a reporter filed an unpublished report documenting alleged drug, firearm and other offences in Zhejiang Village in the Fengtai District just south of Beijing. One commentator suggests that these formal and informal internal reference publications are both generally candid and highly influential. See Hood, *supra* note 2 at 38-41.

¹⁴⁷ *Id.* at 33.