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## ARTICLES



*Contd.*

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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 inspite 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.

Mahendra P. Singh
Dean

Delhi
July 1997

# 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 Interational 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.

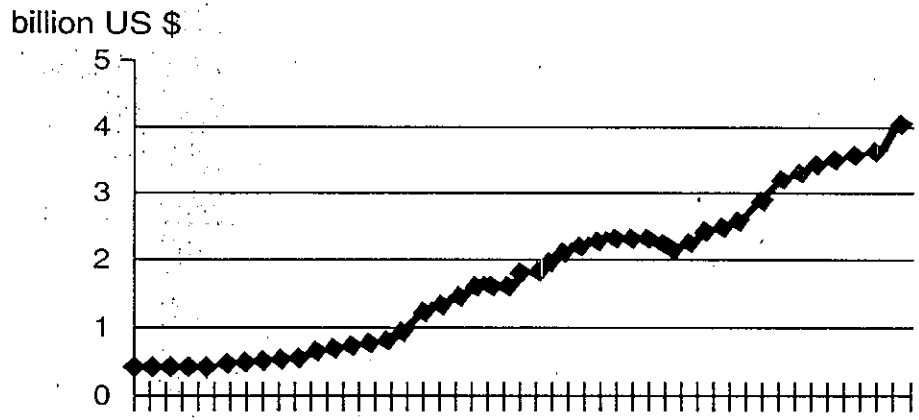
### A. *Development and Structure of World Trade*

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 ? Oekologischer Reformbedarf Des GATT/WTO Regimes 16 (1995).
2. G. Kirchgasessner, *Internationale Umweltprobleme und die Problematick internationaler offentlicher Guitez*, Zeirschrift Fuer Angewandle Umweltforschung, 37, (1995)



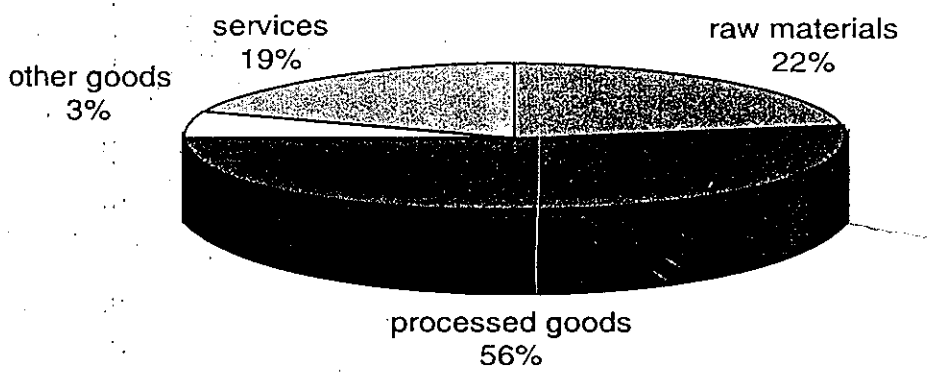
Fig. 1: Development of World Exports (1950 - 1994)




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%).

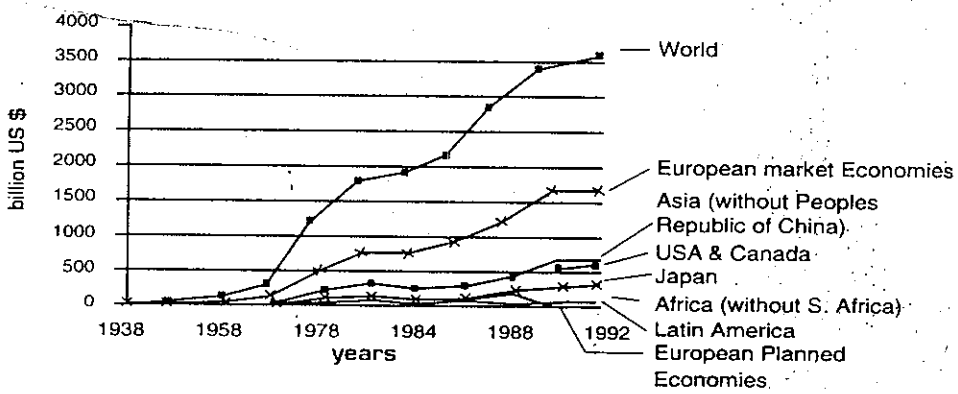
Fig.2: Structure of World Trade (1990)




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.)



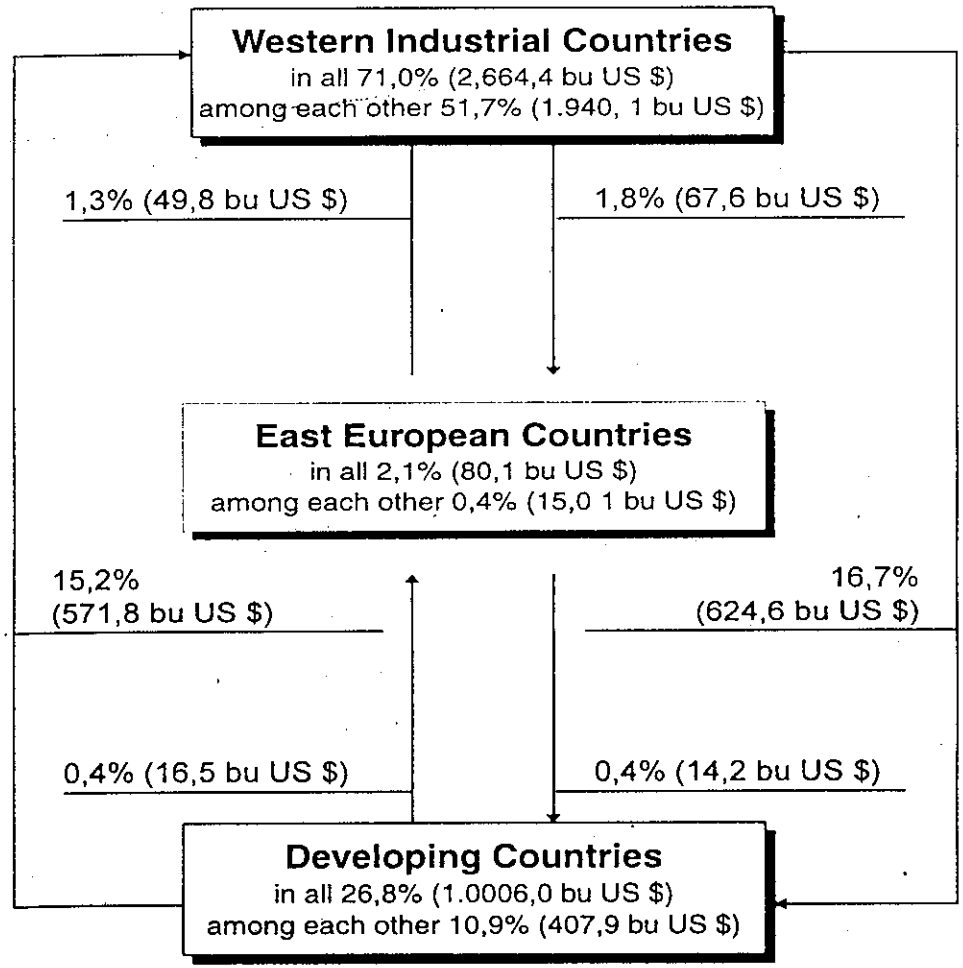

Source WTO 1995

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.

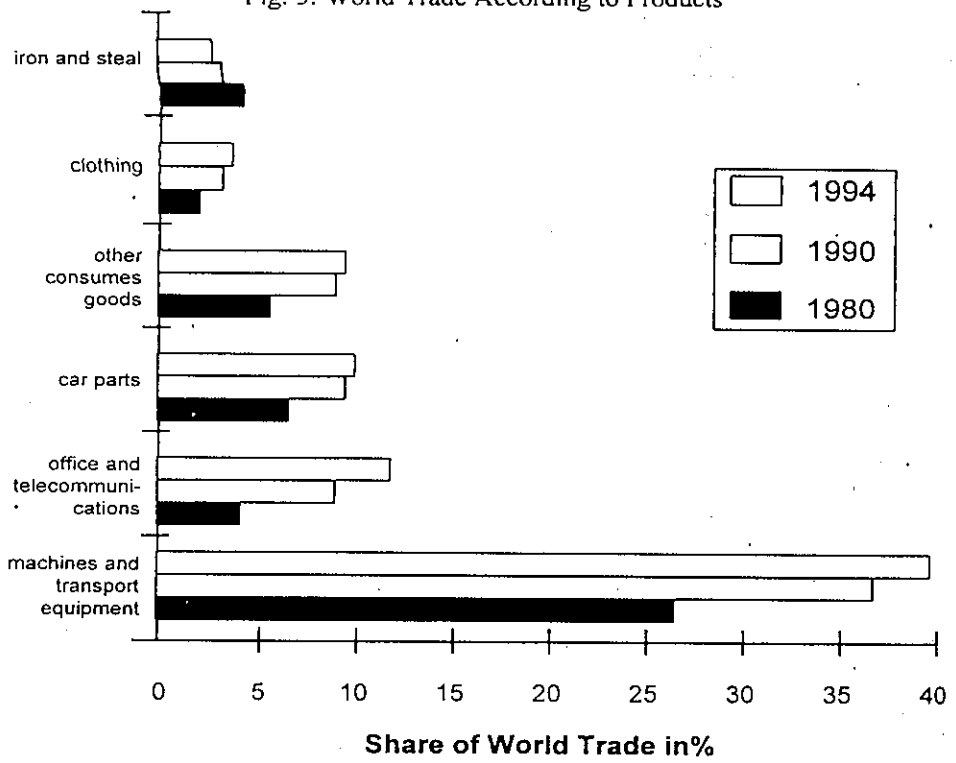


Fig. 4: Structure of World Trade 1993




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 WATCH 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. I. Scholz, *Umweltvertraglicher AuBenhandel: empirische Erfahrungen aus drei chilenischen* Exportbranchen, NORD-SUD AKTUELL, 4(1994).
6. M.E. Kulessa, UMWELTPOLITIK IN EINER OFFENEN VOLKSWIRTSCHAFT 17 (1995) ; H. Maier, WIRTSCHAFTSWACHSTUM (1996).
7. D. Morris, *Free trade: The great destroyer*, ECOLIGIST, 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 Plaedoyer fnr 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 uptodate 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

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

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

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



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. Grosmann 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. Reighuram, H. Sievers and V. Vgasuhu, (eds.), STRUCTURAL ADJUSTMENT (1995); *Vietnam's Economy in Transition - Perspectives of Economic Development*, in R. Ohr, and F.P. Lang (eds.), OPENNESS AND DEVELOPMENT (1996)

14. J. Altmann, *Das Problem des Umweltschutzes im internationalen Handel*, in H. Sautter, (ed.), ENTWICKLUNG UND UMWELT 220(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 causalty 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. Interna-tional 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 MARKET 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 protec-tion 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 ABSCHLUSSDER URUGUAY-RUNDE, 258 (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. Esty, *Making Trade and Environmental Policy Work Together: Lessons from NAFTA, 49* No. 1 AUBENENWIRTSCHAFT 51 (1994).

The World Trade Organisation has a larger set of rules than GATT, which also contains additional regulations on the preserva-tion 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 Fur Ordnung, Wirtschaft Und Gesellschaft 21 (1995)

24. See M. Reiterer, *Das multilaterale Handelsystem und internationaler Umweltschutz*, 40 WIRTSCHAFTSPOLITISCHE BLASTER, 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. Sorsa, *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 RELEVENCE 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 enterprise 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 productrelated 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 Multilaterialism: Regionalism and Aggressive Unilaterialism*, 100 ECONOMIC JOURNAL (1990).

28. WISSENSCHAFTLICHER BEIRAT DER BUNDERSREGIERUNG: ELT IM WANDEL. JAHRESGUTACHTEN 1995, 203 (1996).

29. See M.E. Kulessa, *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 develop-ment. 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.

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

31. M. von Hauff, M. Breitbarth, and K.D. Maier, INNOVATIONSERFOLGE DURCH UMWELTSCHONENDE INVESTITIONSGUTER, VOLKSWIRTSCHAFTLICHE DISKUSSIONSBETTRAEGE UNIVERSITAT KAISERLAUTERN 8 (1995).

# SOCIAL CLAUSE IN TRADE: HUMAN PROMOTION OR PROTECTIONISM ?

*Arun Kotenkar**

## I. 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 confor-mity 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 final 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 occu-pation 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).

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

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).



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 Sainjon 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).

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 strategical 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 armtwist.... 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.) : SOZIAKLAUSEIN 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 compar-ative 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 jailed 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. Bhowmik, *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 counteracting 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] Inspite 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. Unfortun-ately 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. Phillipines), 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 Regula-tion) 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, sub-contractor, 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.

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20. K. Bhatty, *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. Bhatty, *supra* note 20 at 385.

# ENVIRONMENT AND THE NEW ECONOMIC POLICIES: 1991-96

*Ashish Kothari**

## 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 advise 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

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1. See M. Kothari and A. Kothari, *Structural Adjustment vs Environment, 28* Economic And Political Weekly 473 (1993).



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, crea-ting 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.

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 tradi-tional 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 Acquaculture 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. Sakthivel, 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-Milleth 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 landhol-dings, 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 desertscapes 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 36% 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 Stirkes Draws Global Access,* ECONOMIC TIMES (18 Janurary, 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 untap-ped 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 then 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: Shaktivel,* 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 hutments: 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 incre-ased 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 recyling 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 Liberlisation: 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 unlearnt, 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. Bhittarkanika 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"! 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 Rovers; 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, planta-tions, dairies, poultry farms, horticulture, etc.[13] Not only prime agricultural land, but also pastures and wetlands,

12. G. Vaz, *Move For Major Changes in Karnataka's Land Reform Act*, ECONOMIC TIMES (6 September, 1995)

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



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 inclu-ding 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 Pachmarhi, Kanha, Bandhavgarh 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).

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; Hokke Club, Mitsubishi, Atochem, 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 collobarations 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 govern-ment 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 probl-ems 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, indiscrimi-nate 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 govern-ment's strategy of conserving natural resources, preventing and controlling pollution,conducting prior environmental impact assess-ments 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 improve-ment 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 progra-mmes 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. Integra-ted 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 depri-vation, 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 Sukhomajri (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 government 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 Jardhar 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 compo-nent 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 Bhittarkanika 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 National 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 or market solutions to the problems and difficulties of all descriptions.[1] Since 1980s major changes occured in the world which have affected the econo-mies 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 conserva-tives' 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 legitimation 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) Sydeny, Australia.
4. *Ibid.*
5. P. Self, Government By The Market? (1993).
6. D. Osborne and T. Gabler, 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. Connoly, 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 techinical phenomenon, but also a legal one.

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

17. See D. Korten, *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, therfore, 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 monoploy 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 justificiation 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, *Diverstitute of State Enterprises: An overview of the Legal Framework*, World Bank 9 (1992). And see also M.D. Cadiz, V.J.L. Gonzalez, *Privatisation: Nature, Methods and Some Legal concernes*, I 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 eleminate 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 craddle 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, thining of labour force and tarpedoing the existence of the welfare state all of which go against the constitutional underpinning of Indian socialism.[29]

21. See P. Self, *supra* note 5.
22. Kesvananda 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,* I 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 encompasing 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 I(J). See also S.S. Singh, *State Market and Basic Human Needs: Exploring Constituttional Legitimation,* paper presented in a SEMINAR ON CONCEPT OF DEVELOPMENT AND IMPACT OF GLOBALISATION ON THE POOR AND MARGINALISHED (28 January, 1996).

human dignity and has a fair share of the nation's general prosperty. 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 *Video 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 commit-ments or goals of the constitutional aspirations of this land".[35] It is, therefore, clear that regulation of economic development in the

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

33. VII Constituent Assembly Debates 494-95.

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

35. *Ibid.*



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 adjust-ment programme. Economic discontent can easily spill over into communal and regional conflict in a federal polity; stability and successs 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

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 principle 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 consitutional 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. Chamarbaughwala, AIR 1957 SC 699.
42. Fatehchand 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, *Etymology 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 legitimation foundation. Those foundations are essentially constitutional. The Constitution is where all arguments are ultimately to be resolved. Those who sidestep the constitutional legitimation 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 systamatic 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. Klitgard, *Adjussting 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

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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 expressiom 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

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. Barendt, *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 Guarantee 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 centruries before Gutenberg. The earliest dated printed book in China is from 868 AD. See, Cook, Chris (ed.) PEARS CYCLOPEDIA 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. Barendt, 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 wideranging, 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 *Gitlow 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 (1952). 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 restraint[26] 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 doityourself 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. Sullivani 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. McGrath 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 selfcensorship 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 punish-ment (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 selfcensorship 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, clasical 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 tethers 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 BAIKE 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 interwound 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 PEOPLES REPUBLIC OF CHINA Chs. 4 and 5 (1992); D. Xichuan 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 "susperstructure" 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).





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 examin-ation 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 Quanshu, *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]

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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 Gongan Gongzuo* 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 Baike Quanshu, 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 selfcensorship.

### 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

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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 Wingrove, Paul (eds.), REFORMING 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 Baike Quanshu*, *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 took place "not so much because of broad opposition in principle to any curtailment of free expression, but rather because the system in operation had become generally 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

73. *Id.* 532.

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

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

76. 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).

77. 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 suffi-cient 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 public-ations. 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 subs-tance 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 ont he 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 imprisionment 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 smugling 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 Punushment 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 selfregulation 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 altercations 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 of 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; Alfredsson, 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 embodies 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 1(1990); and R. Cullen, *Capitalism with Chinese Characteristics: Hong Kong - Past, Present and Future* in Haberle, Peter (ed.), 43 JAHRBUCH DES OEFFENTLICHEN 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: Complementarties 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 nothing 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. Zelezny, 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 (Broadcast) Press,* 55 TEXAS LAW REVIEW 39 (1976); O. Fiss, *Building a Free Press,* 20 YALE JOURNAL OF INTERNATIONAL LAW 187 (1995); and K. Boyle, *TheRight 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 selfexpression 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 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. Haiman, 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. Tomillo (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, Wot 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 discussd 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,* see, 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 2at38.

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. Ligislative 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 exeercise 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 whcih 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 government[123] 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).

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 Wenqing, 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 remarked upon. One commentator, in 1989, noted that the CCP "grips the party

129. 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.

130. *Editorial*, NEWSWEEK 3 (21 August, 1995).

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

132. 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 Xinwen Jie Remen Hfuati (Director of the Agency of media and Publications, Du Daozheng Discussing Hot Topics of Media Reform)*, 2 ZHPNGGUO 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 (Nationlist) 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.

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



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 deci-sions 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 Xinxi 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 MANGEMENT OF NEWSPAPERS (25 December, 1990).

137. Article 2, the Rules.

138. Article 3, the Rules.

139. Article 6, the Rules.

## 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 (Departmen-tal 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) a 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 these 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

126. *Dai, Linhua, Jiunli Xinwen Chuanba Jizhi De Jiben Guoxiang (Basic Ideas about Setting Up Control System for News Media)* 1 NANJING ZHENGZHI XUEYUAN 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 commune, 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 Chinese 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.



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 premises, 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.

143. Chinese law strictly forbids private ownership of newspapers. Previously, private individuals were allowed to establish a newspapers if they could find a government department to "attach to". This government department was the sponsoring unit for the newspaper and exercised supervision over the newspaper. The famous journal Qiao (Bridge) was in effect, an independent periodical attached to the China Reporters' Association. See Zhong, Ji, ZHONGGUO JUXIE GAISHU (INTERODUCTION TO CHINESE ASSOCIATION OF JOURNALISTS), ZHONGGUO JIZHE CHINA REPORTERS 13 (1 November, 1988). Another such famout journal, SHI JIE JINGJI DAPBAO (THE WORLD ECONOMIC HERALD), was banned after the 1989 protests. It was attached to the SHANGHAI SOCIAL SCIENCE ACADEMY and was given a certain administrative rank. Although many controls applied to these semi-private newspapers, the sponsoring department had no control over peersonnel appointments to such newspapers. See, Y. Han,

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 branch 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

*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 regulatio is: aim to land the ping pong ball on the very edge of the table. A number of publications which tested pre-1989 regulatory limits are discussed in J.P. Beja, The Challenge Role Of Intellectual In The Autonomistation Process Of Society (1 September, 1995) China Perspectives 6, 11-12 See, also, J.P. Beja. *The Year of the dog: in the Shado of the Ailing Patriarch* in Lo, Chi Ki Pepper, Suzanne, and Tsui, Kai yuen (eds.), China Review Ch. 1 (1995).

144. Gao, *supra* note 135 at 35.



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 struc-ture 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 respon-sible 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, alloçates 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

145. Gang Gao, Dangbao Shouji Yu Xinxi De Xianzhuang Ji Gaige Tujing: Linjia Sheng, Shi Dangbao De Kaocha Fengxi Baogao (*Present Reform of The Collection and Processing of Information In Partypapers: Investigation and Analysis of Six Provinciala 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.

daily reading, vetting deleting or modifying. The extent to which censorship is exercised and its vigorousness vary according to the nature of the news concerned. The Provisional Rules prohibit the publication of any materials if they:

(a) incite obstruction of or sabotage law enforcement,
(b) incite subversion of the socialist system,
(c) incite rebellion or riots,
(d) incite opposition to the leadership of the CCP,
(e) disclose state secrets,
(f) incite hostility and ill feeling among different races,
(g) incite sabotage of social order and stability,
(h) propagate indecency, obscenity, violence, superstition, or pseudo science, or defame or humiliate others.[148]

The above long list is supplemented by a catch-all clause: "any other contents which are prohibited by law".[149] These restric-tions are affirmed in the Code of Conduct for Journalists, which was passed by the All China Association of Journalists in 1994.[150] Apart from these formal prohibitions, there are many internal, less formal or ad hoc rules and also other more specific formal rules which prohibit or restrict the publication of certain information. The more important of these are as follows: state secrets; international affairs; defence matters; the leadership; emergencies; and crime.

Similar prohibitions and restrictions to those detailed above apply to reporting in relation to morality, religion, and race relations. In addition to prohibitive and restrictive orders, the CCP also issues orders of a directive nature, guiding the media towards the "correct" path. Thus the correct name for the Taiwan government and its officials is advised. When to use terms such as "Dalai's renegade clique" or "Tibetan countrymen residing aboard" is explained.

### 2. *Post-Publication News Examination*

News examination provides a further important mechanism for controlling the established press.[151] The purpose of news examination is to guide newspapers back towards the correct direction. In a study on news examination in Heilongjiang province, it has been argued that, despite pre-publication censorship by the editors, some articles coloured with "yellow, grey and black sentiment" were still consciously or unconsciously published. News examination is meant to uncover such problems and spark swift remedial measures, such as: forfeiting of publications, distribution controls;

148. Article 8, the Rules.
149. *Ibid.*
150. All China Association of Chinese Journalists, PROFESSIONAL ETHICS GUIDELINES FOR CHINESE JOURNALISTS (April 1994).
151. Xinwen Chuban Bao, NEWSPAPER OF MEDIA AND PUBLICATIONS (24 June, 1993).



education or criticism of the people involved; or imposition of other sanctions. In this way, it is hoped that similar mistakes will be prevented in the future.[152]

News examination is a fairly new, institutionalised method of press control in China. The AMP set up its own examination team in December 1993. Ten retired persons who used work in the mass media were organised to review newspapers and periodicals. Similar examination systems have also been set up in most provinces in the PRC. In Heilongjiang province, for example, news examination is carried on at three levels. At the provincial level, the BMP has full-time staff to examine all newspapers and periodicals in the whole province. At the prefectural level, the CCP perfectural propaganda department uses part-time staff to examine newspapers and periodicals to be published in the region. Finally, examination teams are also set up within each newspaper and periodical. These teams are responsible for the examination of their own products.[153]

### 3. *Self-Censorship*

An important Chinese political maxim is: to control a matter one has to control the personnel involved first. Unless the government controls the personnel of an enterprise, government control of the enterprise may not be effective.

Newspaper editors in China are government officials of a certain rank depending upon the rank of their newspaper. They are accountable to the CCP. Since the establishment of the PRC, whether a person can serve in media outlets depends upon how well he has followed CCP directives. This control of personnel compri-ses a crucial component in the tight control over the media exercised by the CCP. People working for the established press are always fearful of losing their livelihood. This fear is well-grounded. A licence for a newspaper can be suspended or revoked for publication of any article with questionable content. Editors and reporters can be removed from their positions or administratively disciplined for stepping into forbidden zones. Numbers of newspapers (and members of their staff) have been disciplined. These examples serve as a reminder to editors to respect the CCP line. To do otherwise is to risk their positions and their "rice bowls". With their fate directly controlled by the CCP, most media reporters voluntarily stear clear of the forbidden zones. The most effective control is thus self-censorship, that is, the internalisation of CCP discipline by editors and reporters and their supervisors. It should be noted, though, that despite all these restrictions, journalists (and editors) working for the established press do regularly test the limits of the regulatory apparatus.[154]

152. Xiang, Ying and Zhi, Jun, Jianlun Baokan De Shendu Zhi (Preliminary Discussion on the Post Publishing Censorship of Newspapers and Journals), 3 HULAN SHIZHUAN XUEBAO (HULLUN NORMAL COLLEGE JOURNAL) 69(1994).
153. *Id.* at 70.
154. See, for discussion of the importance of control of personnel in regulating the press and examples of testing of limits, Goldman, *supra* note 143.

### 4. *The Pressures for Change*

To insist that newspapers only report in way that is consistent with CCP policy creates major practical difficulties — apart from the inordinate problems of political ethics involved. This system of regulation politicizes newspapers to an extreme degree. It leads to a situation where the only thing which is ultimately relevant to a Party Paper is the politics of its control.[155] Everything else, including the newsworthiness of reports, is secondary to this imperative. As a result, the CCP only hears its own voice in its newspapers. The established press crucially fails to build real bridges from the CCP to the people. The overpoliticisation of newspapers means they fail to touch sensitive issues thus crucially diminishing their impact on and credibility with the public. The CCP wants, of course, to use newspapers to act as a channel to communicate with society. The newspapers fail to serve this purpose precisely because the control is so tight. They are plainly an unreliable source of frank information and sound comment due to this control.[156]

Another key criticism of the current system is that the established regulatory structure is chaotic and confusing. The established press is under the dual regulation of the CCP and its propaganda departments as well the executive government and its media and publications authorities at central, provincial and local levels (depending on the status of the newspaper in the hierarchy). As a matter of practice, all high ranking leaders in the CCP and government may issue orders and directives to the established press at their discretion.[157] All these directives appear to be binding on newspapers and their editors. This means, in fact, that instead of CCP and government regulation there is often regulation by powerful persons who occupy key political positions.[158]

Public dissatisfaction with China's newspapers is prevalent. A popular belief is that the "People's Daily gets nothing right except the date".[159] Shi commented, after

155. Ju, *supra* note at, 47.

156. See, M. Bonnin, *The Press in Hong Kong - Flourishing but Under Threat (1995).* China Perspectives 48, 55 (1 September, 1995).

157. Schoenhals, *supra* note 114 at 102. See, also, Sang, Yutang, *Xinwen Lingdao Tixhi Blxu Gaige (The Leadership of News Media Must Be Reformed),* 3 Xinjiang Xinwen Jie (New Media In Xinjiang) 5 (1988).

158. One story from Wuwer city is illustrative of this point. A reporter from the Wuwer news reported the speeches of some deputies in the city's congress. The speeches were published with the authorisation of the proper authorities. The publication irritated the Mayor of the city. He ordered reporters in the newspaper to retrieve all distributed copies. After the reporters failed to collect all the copies, the newspaper reprinted the same edition, replacing the deputies comments with a different conference report of the same meeting, with a notice saying: "please destroy the previous version of this paper". See, Chinese Youth (1 April, 1988).

159. N. Kristof. and S. Wudunn, China Wakes 287 (1995). In a survey in 1988, 1800 PRC jounalists were asked if PRC citizens believed what they read in the press. Only 1.1% of jounalists throughout their fellow citizens did so. See Hood, *supra* note 2 at 41.



reviewing 27 Party papers at provincial and prefectural levels,that "The major difference between the provincial papers is their titles and advertisements".[160] Survey results on PRC's newspapers, especially on the People's Daily, have been generally negative. The vast majority of readers strongly believe that PRC's newspapers avoid important issues which ordinary people care about. On important issues, PRC newspapers become irrelevant and foreign newspapers (and broadcasts) become the most authentic source of Chinese news. This partially explains the great quantity (and quality) of rumours in China.[161] People have formed their own information forum in place of the established press which is not trusted and has become largely irrelevant. While the suppression of expression is effective in controlling the official media, it creates "substitution effects", causing the relocation of dissenting voices into different forums.[162]

The CCP also faces other problems. All of the CCP papers are still dependent on government subsidies and public subscription. The burden of continuing these subsidies at current levels is becoming too great to bear. Moreover, subscribing to a newspaper is regarded as a political obligation but that sense of obligation is waning steadily. The official nature of newspapers in China has led one critic to argue that "under the current mass media structure, mass media outlets will survive even if no body reads newspapers, nobody listens to radio and nobody watches TV".[163] Subscriptions will likely continue to decline because of the reduction in subsidies, the increasing competition amongst newspapers, the competition from television, especially, and the fading sense of political obligation.[164]

Certain reforms have been introduced to try bolster readership. One is to make newspapers more readable and more reader-friendly. The CCP has called on newspapers to report less about the CCP and government meetings and the activities of senior CCP and government leaders. News reporting and commentaries are

160. T. Shi, *Shengbao De Kunjing (The Dilemma of Provisional Newspapers),* 10 Xinwen Zhanxian (News Frontline) 5 (1988).

161. See, Nathan, *supra* note 59, Ch. 9 One commentaor on the media in the PRC, Dr. Z.J. Jonathan, (once a reporter on the Jiefang Daily in Shanghai, now a Hong Kong academic) recently estimated that approximately 25% of the population in China gets its information from overseas transmissions (especially from the BBC and the Voice of America). He further observed that Chinese people are not naive and they see through some of the Mainland propaganda. He also emphasised the importance of word-of-mouth in the process of information dissermination in China. See, Noonan, Tim, *A media watchdog on board for 1997.* Linkage Newslette, City University of Hong Kong, 6, where Dr Zhu is interviewed (October 1995).

162. Sullivan, M. Kathleen, *Free Speech and unfree markets,* 42 UCLA Law Review 949, 961(1995).

163. J. Peng, *'Falu He Zhidu' Queren Xinwen Meijie De Xiangdui Dulixing (Law and System Determine the Relative Autonomy of News Media),* Shi Jie Jingji Daobao, World Economic Herald (4 April, 1988).

164. *Qin Qianren, Renmin Ribao Liannian Kuisun Fangying Sheng-Jing Qihou? (Does the Continuous Deficit by the People's Daily Reflect Political and Economic Circumstances?),* 8 Ming Pao Monthly 82 (1992).

becoming much shorter. The number of the pages for many major newspaper have been increased from 4 to 8 to allow coverage of moral, social and economic news. Other efforts are being taken to make newspapers profitable: advertisements are encouraged in order to reduce government subsidies; and newspapers are also allowed to set up other businesses to cover losses associated with the operation of newspapers. The distribution of newspapers is also being improved through exploration of the retail market. The People's Daily is now sold by newspaper kiosks on the streets in certain major cities.[165]

There are also signs that the division of power over the mass media between the CCP and the executive government is being made clearer. The AMP has been arguing for some time that, while the CCP is in charge of policy issues, it should limit itself to "important issues of principle"; operational matters should be left to the government.[166] Since the 3rd Plenary Session of the 14th CCP Central Committee in 1992, the AMP has come to play a more important role in the management of the mass media.[167]

*Summary*

The controls applying to the established press in China are breathtaking in terms of their scope, complexity and counter-productivity. First in the hierarchy of operational controls are those of the CCP. These are pervasive at all levels of the established press. Next come the separate but linked external controls of the government which, once more, permeate all levels of the established press. Then we move on to more internal modes of control. The system of accountability for each newspaper utilises a sponsoring unit and a supervisory unit within the government bureaucracy. And within each newspaper, further systems of internal control have been implemented.

The formal (legal) regulatory framework is quite limited but, nonetheless, highly restrictive. The Provisional Rules on the Management of Newspapers, introduced in 1990, provide a detailed system for issuing new newspaper licences. These rules are not easily complied with.The Provisional Regulations on the Responsibilities of the Sponsoring Unit and the Supervisory Unit of Publishing Units, introduced in 1993, formalise the regulatory obligations of the sponsoring and supervisory units for each newspaper. In particular, they ensure that crypto-private newspapers can no longer be established by attaching themselves to some recognised public institution. A crucial feature of these operational controls is the direct control over personnel they achieve. Ultimately, all hiring, firing and disciplining of established press staff is overseen by

165. These and other changes are discussed in Cheng and Xiong, *supra* note 125 at 16-18.

166. Q Wang, Xinwen Guanli He Baokan Fanrong (Media Management And The Prosperity Of Newspaper And Journals), 2 Ximwen Zhanxian (News Frontline) 6 (1992).

167. Fang, Hanqi, *Shisi Da Yilai De Zhongguo Xinwen Shiye (Media Enterprises in China since the 14th Central Committee Conference of the CCP)*, 2 Zhengzhou Daxue Xuebao (Zheshe Ban) Zhengzhou Unitersity Journal (Philosophy/Social Science Edition)1 (1994).



the relevant organs of the CCP and the government. The disciplinary effectiveness of this is self-evident. The impact of such a system on the communicative effectiveness of the established press is another matter, to which we return shortly.

Not content with complete public ownership of the established press and a multi-level system of dual (CCP and government) controls, the authorities have made a similarly remarkable effort to micro-manage the content of the established press. First, there are many forbidden zones where reporting is not allowed. Secondly, outside of the forbidden zones a plethora of semi-formal and informal rules and practices apply to regulate the style of reporting, length of reports and even the wording to be used. Lest anything unacceptable slip through this fine weave, a relatively recent innovation is the establishment of formal, post-publication, news report review systems. Where deviations from currently acceptable practice are detected, correction measures can be applied. It is hardly surprising that the sheer weight of all this operational control, content control and content review is self-censorship on an inordinate scale. It is even less surprising that, as a result, the established press has an appalling credibility problem.

We have discussed earlier some of the problems associated with the praxis of freedom of the press in the West. The difficulties with respect to mis-information, exploitation, manipulation and exclusion of many voices do not seem ever to grow any less. Self-censorship also is widespread. Sometimes this is as a result of subtle and not so subtle government pressures. More often, self interest, mass market driven fads and swiftly changing mass opinions influence owners, editors and all the other content decision makers. A wide-spread example, currently, which has strong resonance with stipulations in China about correct wording, is the excesses of the political correctness movements washing back and forth across Anglo-Western societies, particularly.We are not trying to argue some sort of equivalence of awfulness, here.The regulation of the established press in China is extreme, plainly offensive, clearly unacceptable and counter productive.Thankfully, one cannot justly describe the regimes which apply to the media in most Western jurisdictions in these terms. In the process of considering possible reform of regulation of the established press in China, the menacing aspects of a largely unregulated press must be addressed, however.

## IV. Conclusion

The regulation of the non-established press (general printing and publishing) and the regulation of the established press in China have both been affected by the forces of change unleashed over 17 years ago by the open-door policy adopted by the PRC leadership. In many ways, this policy was a deliberate reaction to the excesses of the Cultural Revolution which lasted for some 10 years from 1966.

The open-door policy has transformed the PRC, by no means entirely for the better. In the wake of the immense growth in economic freedom has come increased corruption, inequality and uncertainty. The old centrally planned economy, battered

dreadfully by the Cultural Revolution could not have survived, however. The open-door policy has ushered in an era of relative prosperity not seen for over 200 years in China, notwithstanding the growing disparities in wealth. Moreover, the mass of Chinese people today probably enjoy greater freedom to direct their own lives than at any previous time in history, despite the economic uncertainties confronting so many and recurring spasms of repressive behaviour by the government.The impact of the consistent shift towards a full market economy on the regulation of the print media is already striking. And it is likely that more change is on the way.

When we consider the regulation of the non-established press, we find that the PRC continues to rely heavily on a classical prior restraint system — with Chinese characteristics. Not surprisingly, given the continually developing economy, the sheer size of the regulatory task and the problem of finding adequate resources for the system, it is not working like a highly oiled machine. Indeed, it is mostly used only when profiteering or otherwise objectionable conduct (for example, unacceptable political dissent) is involved, despite the fact it has much greater reach. Political prior restraint also is widespread. Finally, the publicity given to punishments meted out to unlawful publishers is now playing a larger part in attempts by government to maintain control of general printing and publishing.

In terms of reform, the badly needed first step is a comprehensive legislative enactment to provide some sort of stable legal framework for regulating the non-established press. Presently China has no such comprehensive legislation. Although it has made major inroads in drafting codes across the civil and criminal legal spectra over the last decade especially, the rules governing general printing and publishing are unclear, incomplete and scattered across a range of not closely co-ordinated, non-Parliamentary instruments the majority of which have been drafted within government and CCP bureaucracies to address perceived crises. The relative ineffectiveness of the current system of regulation has created wide, (if uncertain and sometimes hazardous) opportunities for an expansion of free expression in print.

The position with the established press is somewhat different. The fundamental feature of the controlling system here might be termed macro-managerialism. That is, the established press tends still to be run like a single giant media conglomerate with the CCP Central Committee attempting to play the role of Rupert Murdoch, at least in terms of governance if not entrepreneurship. External institutional controls are conspicuous by their relative absence.

In today's shrinking world a significant problem for the established press is that information flows from outside China are laying bare the very serious credibility problem it has more starkly than ever before. Moreover, senior PRC decision makers are seriously concerned about this credibility gap. Nevertheless, the control systems are formidable and their practical and theoretical underpinnings also remain axiomatic for many of the same senior decision makers in China. The realistic short to medium term prospect for reform, therefore, is for step by step improvement. Presently, there is wide agreement amongst those working in the established press that a formal Media Law (on the political agenda since the early 1980s) could be an important step in the right direction. There is support amongst senior CCP and government leaders for such a reform but some, at the same levels, prefer the present system with all its stifling freedom to micro-manage. The introduction of a Media Law would only be a single step, however. Real progress towards significant improvement of freedom of the press requires quite drastic changes. Within the present system of state ownership, some institutional independence could be conferred on the established press so as to allow it to monitor the performance of government to some meaningful degree. This means allowing newspapers to criticise senior CCP and government leaders without their consent, presently an unthinkable reform. A further step would be to relax the grip of the CCP on personnel hiring and firing. Yet more radical would be a move to allow some private ownership of daily papers and other periodicals.[168]



We mentioned earlier that freedom of expression and freedom of the press are protected by the Constitution of the PRC. We commented that these protections are largely symbolic. This is because the dominant view of such rights in China is, still, that:

1. rights are granted by the state and can be changed by the state;
2. rights are goals to be reached rather than a prerogative of person-hood; and
3. government can limit rights by legislation but government itself is not restrained by law.[169]

This view long predates the 1949 triumph of the CCP in the revolutionary war.[170] There is, however, evidence of growing recognition at all levels of the drawbacks of these values, despite their powerful and widespread historical influence.[171] Meaningful progress towards freedom of the press in China awaits both further growth in this awareness and a willingness (amongst the leadership) to encourage debate on the issues that this awareness is highlighting. No such willingness seems in prospect especially whilst while June 4, 1989 continues to cast its chilling shadow. In the meantime, the opportunities for testing the relaxation in media controls made unavoidable by economic reforms will continue to be exploited on a case by (accumulating) case basis.

168. In 1989, prior to the Tianaman bloodshed, and prior to his being deposed as General Secretary of the CCP, Zhao Ziyang had produced new guidelines for the press which stressed its roles in overseeing officials and fostering real debate. See Hood, *supra* note 2 at 49.

169. Luban, *supra* note 123 at 325.

170. *Ibid.*

171. *Id.* at 326.

# STATE, MARKET AND ECONOMIC REFORMS

*Parmanand Singh**

The basic argument of this paper is that the New Economic Policy of the Indian government as it operates today is not likely to achieve economic reforms. The reality is that the neo-colonial forces are operating in the Third World countries, including India, through both "market" and the "State". At the ideological level the institution of "market" is being projected as the sole social regulator for the legitimisation of the new global order. My argument is that "market" may not necessarily be a poor economic ideology and may be a global compulsion, but if basic human needs and aspirations of the impoverished Indians have to be realistically satisfied, which is a constitutional compulsion, then "market" requires to be tamed by activist state intervention. By and large in a changed global situa-tion, which is dominated by a single development model based on multinational capital and corporation and the campaign for the retreat of the state through deregulation, disinvestment and denationalisation, the measures of liberalisation without effective checks and controls would only result in increased inequalities, dismantling social services, with adverse effect on the poor, restrictions on trade union rights and dislocation of indigenous people. In other words, the gains of growth will be cornered by the top ten per cent of the Indian population. These top ten per cent comprising the upper and middle classes have become vociferous in their ideological campaign in favour of "anti-statism" and "minimum government".

Despite being a loose coalition, the present United Front government has set before the country a very ambitious programme of economic reforms. The common minimum programme of the UF government has estimated that investment in the infrastructure sector, including domestic and foreign, has to be stepped up from the present 3.5 per cent of Gross Development Product (GDP) to at least 6 per cent in the next five years. The Sukh Ram telecom policy, which was endorsed by the Supreme Court last year in *Delhi Science Forum*[1] has become the centre of controversy due to Sukh Ram's alleged habit of giving contracts to the parties in telecom deals for huge monetary considerations. Even if the Sukh Ram Telecom Tender awards were violative of the Article 14 requirement of non-arbitrariness, the Supreme Court had refused to examine the policy merely because it involved the New Economic Policy. This point will be pursued later. Let us first unfold the truth that there have emerged new forces of production generating new global social relations of production in which economic interdependence of developing economies is harnessed to the ends of the most advanced countries of the North.

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1. Delhi Science Forum v. Union of India (1996) 2 SCC 405.



## I. Hegemony Of International Financial Institutions

The new buzzwords "new world order", "liberalisation", "globalisation" and "privatisation" are both a reality and an illusion. These slogans are intended to create an ideology that economic growth is possible only if foreign capital and technologies and the rich businessmen can collaborate for promoting economic development. Globalisation in essence means collaborative relationship between global finance and local entrepreneurs under the overall hegemony of the financial networks of the advanced capitalist countries. Privatisation means a process through which direct involvement of the state or the public sector is reduced through transferring of the ownership, control and managerial responsibility for government enterprises, functions and activities to the private sector corporations, individuals and institutions. Privatisation can be accomplished in many ways including through deregulation, disinvestment and denationalisation.

After the collapse of the Soviet Union, there is only one financial network, namely that manned by the solitary super-power through the World Bank, the International Monetary Fund and the multinational corporations. In this network the developing countries of the Third World are being dominated by the global finance.

The hegemony of the global finance in creating dependence of the developing countries has been clearly summed up by William Graff thus :

> The world Bank, IMF, certain UN agencies and the great array of IFIs (International Financial Institutions) and multi-national corporations become a kind of ersatz state in laying down the rules and regulations within which the local state is required to operate in the sphere of international capital accumulation.[2]

According to William Graff, the global finance which is highly mobile does not move with the purpose of "development" but on the strength of "conditionalities". The debt crisis faced by the Third World has also been instrumentalised by the international financial institutions."Conditionalities" are imposed upon the dependent exporting countries on an assurance of a favourable share in the world Trade System. In reality, however, roughly 80 per cent of the global capital is concentrated or circulated within the advanced capitalist countries of the West. Consequently very little share of the world trade comes to the Third World. In these dependent countries the multinational corporations bring very little capital for productive investment and they usually gain favourable terms on the basis of the superiority of their technological goods and the corruption of their clients in the host regime relying for actual finance largely on domestic resources.[3]

2. W. Graff, *The State in The Third World* in L.P. Ellen Meikins Wood and J.Savile (eds), Socialist Register 149 (1995).

3. A. Ahmed, *Globalisation and the Nation State*, 437 Seminar 46 (1996).

One might ask here: Why is the transition from communism to a free market economy working very well in regions of the Third World such as South Korea, Hong Kong, Taiwan, Singapore and China? According to the economists, in these regions the infrastructural facilities are well developed and public corruption is relatively low. In South Korea the government has very intelligently concentrated on overall social development and on basic amenities such as health, nutrition, and education of the masses. In China too the governmental regulation of private enterprises and structural planning for social development has created favourable conditions for operation of market economy. The literacy rate and health standards of people in China are relatively better than in India.

The 1996 Human Development Report brought out by the United Nations Development Programme (UNDP) constitutes a reasoned refutation of the policies and programmes of the World Bank and the IMF. This report explicitly decries the doctrine of neo-liberalism that has influenced the structural adjustment and stabilisation (SAS) programme of the World Bank and the IMF. The report highlights the need of "an equitable distribution of public and private resources" in order to enhance the prospects of further growth. The report thus emphasises the need of direct redressal of poverty related needs of the people of the developing countries.[4]

## II. Liberalisation Without Reform

By July 1991 India faced an unprecedented economic crisis due to large scale debt formation and difficulties due to the balance of payment system. The country was in the mire of stagflation with poor export performance and decline in capital formation. It is in this background that India announced its New Economic Policy with little opposition from any quarter. Everyone saw large scale debt formation and the difficulties of balance of payment system as a legitimate reason for a free market economy. Thus in the ideological climate of dominance of global finance the Indian political masters became beholden to their creditors. Soon a belief system gained currency according to which economic growth and social equity was possible if foreign capital and technologies and rich industrial classes could collaborate for the globalisation of India. The government quickly dismantled the regime of discretionary controls over private investments in industries and trade. The requirement of licensing for investment was eliminated. The office of the Controller of Capital Issues was abolished. The government also liberalised the regime of foreign trade and foreign investment. At the same time the operation of public sector undertakings (PSUs) remained unreformed. The policy of liberalisation was not accompanied by institutional reforms and reform in the legal framework. Due to the hegemony of global finance the political rulers indulged in an open-arm flirtation with their creditor masters. Consequently the State's accountability towards its citizen has diminished. Even if

4. A Vanaik, *Refuting Neo-liberalism*, The Hindustan Times 13 (10 Septermber, 1996).



one agrees that the contemporary discourse on "globalisation" and "liberalisation" is preempted by the idea of reform, the immediate questions that arises are reform for whom and what reform ?

Amartya Sen has been reminding us time and again that "lack of a policy focused on the basic entitlement of the broad populace and the blind acceptance of the market as a social regulator shall undoubtedly thwart the State policy objectives of "liberalisation" itself, even if it were provisionally agreed that these objectives are in themselves desirable".[5] Aijaz Ahmed argues that both "the market" and introduction of global finance has to be strictly guided from the standpoint of employment generation, extensive prosperity rather than intensive accumulation by the few, ecological needs of the environment, such social entitlement as education, health and nutrition and the preservation of the independent capacity of the national state to undertake such guidance".[6] The tragic part of the story of "globalisation" and "privatisation" is that the limited gains of growth are cornered by the upper classes and upwardly mobile middle classes while the masses are totally deprived of the gains of growth. The regime of market oriented privatisation is intended only to satisfy consumerist cravings of these privileged classes.

The UNICEF-State of World Children's Report, 1995 also subscribes to the view that liberalisation will negate the rights of the poor in the Third World:

> Whereas it is obvious that free market economic systems are capable of generating economic growth ; it is far from obvious that they are capable of creating just, civilized and sustainable human society. And in the recent commitment to free market economic policies .... supported by the World Bank, and International Monetary Fund, insufficient account had been taken of the effects on the poor or vulnerable or on the environment.[7]

Rajni Kothari also maintains that in India the new philo-sophy of trade "would increase unemployment, lead to model of modernization that will push the people to the brinks of survival, erode worker's rights and further depress the conditions of migrant women and child labour".[8] Another critic blames the Indian government of handing over the country to "foreign sharks" and their "Indian business cohorts" whose sole interest would be quick profit and not the least concern for the poor Indians.[9]

5. Quoted in A. Ahmed, *supra* note 3 at 44.
6. *Ibid.*
7. Quoted in V.N. Narayanan, *Populism Is Not A Dirty Word*, The Hindustan Times 13 (20 January, 1995).
8. R. Kothari, *Flawed Democracies : A Critique of Indian and the US Models*, The Hindustan Times (30 May, 1994).
9. M. N. Buch, *Economic Reforms : Myth and Reality*, The Hindustan Times 13 (3 January, 1995).

## III. Need To Reform Public Sector

Everyone today is busy in trying to give economic reforms a "human face". The government occasionally announces expensive programmes for the benefit of the poor to show its concern for them but none of these programmes are accompanied by any infrastructure to deliver social services to the needy and deserving. The competitiveness of PSUs, which largely contribute to the nation's productivity especially GDP and play a key role in many sectors of the economy, has been allowed to be eroded by the new economic regime. Some eminent scholars have argued that PSUs can become more efficient and productive if they are granted complete autonomy and are freed from bureaucratic and political control. Only PSUs can provide social service and not the "market". Thus Professor M.D. Chaudhary observes :

> Some people think that it is possible to by-pass the need for reforming the public sector by allowing private investors — domestic or foreign — free entry into these sectors. For certain kinds of activities such a strategy can work, although at considerable social costs. For example, private sector banks, electric power campanies (generator and distributor), telecom services can be encouraged to enter in their respective fields to supplement the services provided by the existing public sector undertakings. But these profit seeking corporations will certainly take away from the inefficient public sector undertakings the entire profitable segment of the market by offering better quality of service. The government, in turn, will be unable to close down the public sector units which will become increasingly less viable. The flow of funds from the government budget to these loss-making units will have to go on increasing, correspondingly with perilous consequences in terms of government's ability to maintain macro-economic stability.[10]

S.L. Rao also argues that the political class will never endeavour to improve the performance of public enterprises operated by the government because "the politicians and the bureaucracy do not want to forego control over public sector for reasons of power and pelf, the funds that are now at their disposal, which they otherwise lose. Unless the public sector moves out of the control of politicians and bureaucracy sitting on the revolving chairs, with short tenures and hence little commitment to the enterprise there is no hope for an improved performance from the public sector".[11] Another consequence of an unreformed public sector would be that the poor citizens will have to pay disproportionately high price for the services provided by the private sector. Only rich customers shall be the beneficiaries of privatisation.

10. M. D. Choudhary, *Liberalisation Without Reforms, supra* note 3 at 32-35.

11. S.L. Rao, *Muddling Along Modesty, supra* note 3 at 39-42.



## IV. Need For A State Regulated Market Economy

There are ideologies which propagate the notion that in a free market economy regulatory role of the state should decline to a considerable degree. Such ideologies raise a compaign of what is called the "retreat of the state". "Retreat of the State" signifies a process in which the state contracts out of its social welfare commitments by transferring ownership, control and/or managerial responsibility of the government enterprises to private corporations through the measures of deregulation, disinvestment and denationa-lisation. The basic assumption is that private investors will offer a better quality of service in the face of sick public sector enterprises.

A policy of liberalisation thus involves dismantling of the regime of discretionary control over private investors in industry and trade and also liberalising the regime of foreign trade and investment. Such policies are also accompanied by a regime of incentives to the foreign and domestic investors and mark a transition to the "retreat of the State" from a socially responsible government. The free market economy is in this process restructured in favour of the privileged classes. This ideological slogan of "retreat of the state" or of "minimum government" entails disastrous consequence in terms of social and economic justice. These slogans are used in India for obtaining a class alliance between the top ten per cent upper classes against the impoverished sections of the society. These elite classes are bent upon dismantling the social welfare policies and the economic policies favourable to domestic industry. In our submission "market" should not be pitted against the "state". Even a market economy needs the "state". Unless the state intervenes there cannot be economic growth. It is the "state" and not the "market", which is the only legitimate mechanism for equitable distribution of the nation's wealth. Economic reforms should therefore be accompanied by state intervention to control private economic agents and transactions.

The market can be put to best use if it is regulated so as to achieve the constitutionally desired social and economic order. The aim of the market should not be to reduce the Indian citizens to the status of mere "consumers" or "clients" of the multinational capital. Market has to be strictly guided from the standpoint of employment generation, elimination of concentration of wealth in few hands and promotion of the common good. These tasks cannot be left to private economic agents.

It is true that the Indian Constitution is not wedded to any particular economic model, notwithstanding the fact that its preamble speaks about the socialistic pattern of society. The Supreme Court's decision in the *Delhi Science Forum case* also supports the notion that privatisation *per se* is not opposed to the constitutional values.

But one must always remember that Article 38 of the Constitution, a directive principle, obligates the state to "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". Similarly, Article

39 (b) directs the state to ensure that "the ownership and control of the material resources of the community are so distributed as best to subserve the common good". Further, Article 39 (c) dictates that the operation of the economic system should not result in the concentration of wealth and means of production to the common detriment. The implication underlying these policies is that the social welfare activities cannot be left to the market.

In the *Delhi Science Forum* case, even the Supreme Court has insisted that the privatisation policy would be legitimate only if it ultimately subserves the common good and conforms to the ideo-logy of the rule of law enshrined in the Constitution. The present author fully agrees with the view that the Indian Constitution envisions a "model of just Indian development according to which only those developmental policies are just which disproportionately benefit the masses of the Indian impoverished".[12] The foregoing discussion has tried to show that India's new economic policy as it operates today is at odds with the Indian constitutional vision of a just social order. The present scenario is that the "Indian state" is being "appropriated" by international economic institutions. A new form of imperialism is emerging under the rubric "global corporate capitalism". In the growing climate of desparation, the political rulers, with the complicity of the rich business classes, are striving to mobilise the consent of the masses for seeking legitimacy to the new economic order.

In this scenario, the need of the hour is to build up an ideology of resistance. It must be insisted that governmental as well judicial intervention is required to achieve the desired objectives of liberalisation. One must ask the questions: What is the share of the impoverished masses in the gains of economic growth? Are these policies not tailored only to benefit the upper classes in the society? Can markets be assigned the responsibilities of social regulation, social regeneration and social entitlement? Are not the "Hawala payoffs", recurrent scams, ciriminalisation of politics, politics of exigencies, decline in the principle of collective responsibility the necessary consequences of economic liberalisation ?

Professors S.S. Singh and Suresh Mishra, have very helpfully quoted the observation of Vejinovski:

> Politicians are self-interested individuals. They maximise returns just like businessmen. But obviously the constraints differ from those in the market place.... The political pay off from privatization is the one which will be the dominant influence of privatization.[13]

Legal ideology, like television images, is one of the clusters of belief. The need for legitimacy of the new economic order has compelled the government to develop

12. U. Baxi, *On Judicial Activism, Legal Education and Research in Globalizing India* 1-47 (1996) (mimeo).
13. S. S. Singh and S. Mishra, *Public Law Issues in Privatization Process,* I INDIAN JOURNAL OF PUBLIC ADMINISTRATION 396-410, 404 (1994).



a "human face" of the economic reforms so that gains of growth percolate down to the impover-ished masses. These promises may be utilised as rallying point for the impoverished to organise and agitate. The constitutional ideology enshrined in the preamble, and Articles 38,39 (b) and (c) can be utilised for constructing counter-hegemonic ideologies of econo-mic justice. Such an ideology of resistance can also emerge from judicial activism, even in the economic policy regimes. The justices may require the government to ensure that multinational capital and foreign investors invited by the political classes are accountable to the people of India. The market economy can seek its legitimation only if such economy can achieve structural adjustment with the constitutional conception of a just economic order. The costs of capitalist development can not be allowed to reproduce the excesses and horror of "primitive accumulation" to use the memorable phrase of Karl Marx.

## V. STRUCTURAL ADJUSTMENT OF JUDICIAL ACTIVISM

The baffling question that confronts the nation is that judicial activism, in so far as it extends to combat governmental lawlessness, political corruption, protection of human rights and other related issues is legitimate but the judicial review of economic policies is illegitimate even if such policies framed by corrupt politicians for their ends are violative of human rights of the poor. As stated earlier, the *Delhi Science Forum* case has flatly refused to examine Sukh Ram's telecom policy simply because it involved the privatisation of Indian economy. Speaking for the Court Justice N.P.Singh observed :

> The national policies in respect of economy, finance, comm-unications, trade, telecommunications and others have to be decided by Parliament and the representatives of the people on the floor of the Parliament can challenge and question any such policy adopted by the ruling government.[14]

Surprisingly, the court reiterated the view expressed in *R.K. Garg*[15] that the court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved.[16]

Justice Singh, therefore, held that policies of Parliament could not be tested in a court of law. He viewed the government's telecom policy as designed to improve the service so as to reach the common man. This is why the Telecom Regulatory Authority and the Central government have "not to behave like sleeping trustees but have to function as active trustees of the public good".[17]

14. See *supra* note 1 at 412.
15. R.K. Garg v. Union of India (1981) 4 SCC 675.
16. *Id.* at 690.
17. See *supra* note 1 at 428.

One might view the judicial approach in *Delhi Science Forum* as enunciating a principle that judicial intervention in policy issue will be legitimate and permissible only to the extent necessary for the enforcement of fundamental rights. It is well-known that the court has taken up the case of irregular allotment of government houses to favoured politicians and has taken action against national political parties for their failure to file mandatory income tax returns since 1979. In the *Hawala case* the Supreme Court issued directions to the Central Bureau of Investigation to prosecute all guilty of accepting bribes and kick backs, often channelled in foreign currency — a necessary fall out of the new economic policy.

It seems that *Delhi Science Forum* constitutes a judicial check on judicial activism in the area of the new economic policy. The judges are told to behave in market friendly ways so as not to dilute or circumscribe the multinationalisation of India. Professor Upendra Baxi has very rightly remarked that the managers of the globalisation of India have sent a clear message to the judges to discipline themselves by interpreting the Constitution of India as compatible with the gospel of globalisation. He states :

> Justices should so act as not to forfeit popular legitimacy but somehow they should harness it in such ways which favour policies of globalization. They should in other words fashion constitutional interpretation as a series of *Houdini-tricks* mesmerizing the marginalized people as the saviours of the people's rights while mysteriously serving both as *servants* and *savants* of globalization.[18]

One may take the view that the concept of socialism is one of the preambular promises of our Constitution and hence any economic policy which fails to achieve the socialistic goals enshri-ned in the directive principles would be inconsistent with the Constitution. In *D.S. Nakara* v. *Union of India,*[19] the Supreme Court considered the meaning of socialism and observed that "the basic framework of socialism is to provide a decent standard of life to the working people and especially to provide security from cradle to grave".[20]

It is doubtful whether the process of privatisation and market ideology would be consistent with the concept of modern welfare state. The reduction of state subsidies on social services such as health, food, education, transport, rural employment and poverty alleviation programmes would increase the demands on vulnerable sections of the society because of inflation and costly living. For example, the impact of the new economic policy on women is beginning to reveal a gendered impact of the process of liberalisation of trade, deregulation of investment, privatisation of industry

18. See *supra* note 12 at 12.
19. A.I.R. 1983 SC 130.
20. *Id.* at 139.



and reduction in state subsidies. Privatisation has resulted in an increased pressure on women to work outside the home and as a result of this labour market is being restructured. As has been remarked by Jayati Ghosh:

> The feminisation of work that is sometime noticed conse-quent upon such liberalising policies need not provide much cause for celebration, since they are often associated not only with exploitative work conditions and increased aggregate burden of women's work within and outside the household, but also with declining levels of total family or household income as male members lose gainful employment.[21]

According to Ratna Kapoor and Brenda Cossman, as a result of privatisation of economy and a shift in the manufacturing sector very few women are getting access to maternity benefits and the protective legislation. They observe:

> The gender impact of new economic policies is being shaped by and mediated through the gender segregation of the labour market and is having the effect of further inscri-bing this sexual division of labour. Furthermore, there is increasing talk of expressly rolling back some of these legislative protections. Export promoted zones are being set up where industries are granted adhoc exemptions from certain labour legislations.[22]

The free market economy will, therefore, not only accentuate the economic vulnerability of women and reinforce sexual division of labour, it will have a farreaching effect on moral regulation of women through familial ideology. In this process of privatisation and casualisation of labour market, women will increasingly be called upon to assume more responsibility both in the labour market and within the household.

The outcome of this discussion is that under the new liberalising policy the political masters would have the monopoly to define economic development. The multinational capital and technology imported into India by the policy makers and politicians would not need to be accountable to the people of India or to the Constitution of India. Labour laws would not be refashioned so as to protect the rights of the workers employed by the foreign investors. Casualisation of the labour force in the private sector would not be subject to judicial invigilation. Nor would the workers in multinational corporations or private enterprises be endowed with the right to participate in winding up proceedings. Even the consumer protection jurisprudence will be limited to the issues relevant under the Consumer Protection Act, leaving a vast area of product liability of multinational managers untouched by this Act.

21. J. Ghosh, *Gender Concerns in Macroeconomics Polity,* quoted in Ratna Kapur and Brenda Cossman, SUBVERSIVE SITES: FEMINIST ENGAGEMENT WITH LAW IN INDIA 148 (1996).
22. *Ibid.*

The likely fall out of these messages is still in the womb of the future. For many years to come the people of India will entertain the illusion that the New Economic Policy is compatible with the constitutionally desired social and economic order and that soon India will enter into the world market and the effects of economic growth will soon trickle down to the impoverished masses. But it is a delusion.

# DISTORTIONS IN "FREE MARKET" DREAM : IDENTIFYING THE CRIMINOGENIC TENDENCIES IN THE "NEW ECONOMIC POLICY"

*B.B.Pande**

Speaking about the "Human Development" objective of the Eighth Five Year Plan (1992-97), the Planning Commission, in its Mid-Term Appraisal document, observes: "Economic reforms and market liberalisation are not ends in themselves but are means to achieve the goals of development, consisting not only of increasing the per capita GDP with efficient use of resources, but also of equity and reduction of poverty".[1] Such a policy formulation clearly indicates the diversity of goals for the Indian model of free market economy. While the free market experiment is already being subjected to a scrutiny in the context of these diverse goals by the economists, political scientists, constitutional lawyers, the linkages between criminogenic tendencies or crime-rate and free market economy have remained, by and large, underexplored. The policy planners and administrators do insist that peaceful and orderly conditions are a pre-requisite for successful free market operations, but what factors contribute to achieving the peaceful and orderly conditions and at what cost, is rarely probed. It is only incidents like the Bomb blasts in the Bombay Stock Markets or the sensational *Hawala* revelations that compel us to think about the close link between crime and economy. The present article attempts to bring to centre-stage the development-deviance theme with a view to evaluating the manner and extent to which the new economic policy would be responsible for generating criminogenic tendencies and how best development-deviance link can be forged. Hereafter the term "development" would be used interchangeably with "free market economy" and "new economic policy".

## I. Theorising The Development - Crime Relationship

There are two opposed theoretical positions concerning development-crime relationship that can be stated as follows:

### A. *Development leads to Increase in Crime*

The positive impact of development on crime can again be understood in terms of two aspects, namely (a) the quantitative increase, and (b) the qualitative increase.

Speaking in the context of the first aspect, it is observed in the context of African societies: "Today the process of development is bringing pronounced changes, and

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1. Government of India *State of the Economy and Economic Reforms*, Planning Commission, XXXIV No 11 Mainstream 13 (17 February, 1996).

among the more serious is the general increase in crime. In fact, one measure of the effective development of a country probably is its rising crime rate".[2] Many other scholars have perceived the development - crime relationship in a similar manner.[3]

There are at least three prominent ways of explaining the positive relationship between development and deviance, namely :

(a) Deviance is embedded in the capitalist system.

(b) Deviance is the normal way of the "dominant-class" or "the privileged-class" interaction.

(c) Deviance is a product of strains, frustrations and "anomie", faced by the under-class population.

The above theory appears appropriate in the context of developed societies like the U.S. and U.K., where deviance rate is very high, or the under-developed and developing societies of Africa and Asia which report a relatively low deviance rate. But the theorisation breaksdown when we refer to the deviance situation in developed Japan, which has managed to keep the deviance rate low despite a high rate of development. Therefore, the development deviance positive relationship theory holds good only in respect of developed, individualist, plural and liberal societies like the U.S. or the U.K.

The second aspect uses the term "qualitative" increase to describe the phenomenon of new forms of crimes or deviance associated with the changing economic and social formations. The vast increase in the varieties of socio-economic crimes and corporate crimes is an instance of this phenomenon.

### B. *Development leads to Decrease in Crime*

This relational position is premised on an ideal view of development that promises allround betterment in the quality of human life, including decline in strife and deviance. The reverse of this proposition is that it is the absence of development or the state of underdevelopment that leads to generation of several forms of deviance associated with want and deprivation. Even the earliest writings on the deviance theme by Montesquieu and Beccaria describe economic destitution and unemployment as the main cause for crimes in the eighteenth century European society. However, it is only certain forms of deviant behaviour, associated with under-development, that are likely to decrease with development. In the Indian developmental context deviant behaviour such as *Thugee, Sati, Dacoity, Untouchability* practices have not only decreased but even vanished from the scene in the wake of postindependence development.

2. M.B. Clinard, and D.J. Abbott, CRIME IN DEVELOPING COUNTRIES V (1973).
3. See particularly S. Colin (ed.), CRIME, JUSTICE AND UNDER DEVELOPMENT (1982) K.S. Shukla (ed.), THE OTHER SIDE OF DEVELOPMENT (1987).



Development leading to decrease in deviance is presented in its reverse form by Steven Box in the light of economic recession in England in the nineteen eighties. According to Box the substantial rise in deviance rate in England in the eighties can be best explained in terms of growing unemployment and declining welfare support.[4]

Why should development lead to decline in deviance? The most ready answers to this can be :

(a) Social strife is minimised in a society where basic needs of all are met to a reasonable extent.

(b) Deviance arising out of frustrations and anomie drastically goes down with the achievement of developmental targets.

(c) With proper development the "resource" value of deviance goes down considerably.

The above theory appears apt in the context of postwar development in certain societies of Europe such as Germany, Sweden, Denmark, Holland, Finland, etc. where deviance rate has come down substantially. The uniform decline in deviance has emboldened these countries to undertake decriminalisation programmes.[5]

Can we find some commonalties in the low deviance rate in Japan and the declining deviance rate in certain European Countries? Both the societies have achieved the target of substantial improvement in the standard of living, but more important than this is that in both these societies the "community bond", that restrains the non-deviant and deviant alike, still subsists.

## II. TAKING APPROPRIATE LESSONS FROM DEVELOPMENT HISTORIES

Relationship of deviance with the larger society has been drawn by yet another set of thinkers, known as social historians, who perceive deviance as a subject of social history. The social historical approach to deviance expands the ambit of enquiry to the socio-political realities of the relevant historical period, thereby creating space for certain informations that would be blocked out in traditional deviance enquiries. Some of the most incisive insights into deviance have arisen as a result of social historical approaches in the writings of Leon Radzinowicz,[6] E.J.Hobsbawm,[7] E.P. Thompson,[8] Douglas Hay,[9] Peter Linebough.[10] This approach has special relevance for the state or society sponsored criminalizations.

4. S. BOX, RECESSION, CRIME AND PUNISHMENT (1987).
5. COUNCIL OF EUROPE ON DECRIMINALISATION, EUROPEAN COMMITTEE ON CRIME PROBLEMS, (1980).
6. L. Radzinowicz, A HISTORY OF ENGLISH CRIMINAL LAW, ITS ADMINISTRATION FROM 1750 (1948).
7. E.J. Hobsbawm, *From Social History to the History of Society* in M.W. Flinn and T.C. Smout (Eds.), ESSAYS IN SOCIAL HISTORY (1974).
8. E.P. Thompson, WHIGS ANG HUNTERS (1975).
9. D. Hay, *Property, Authority and Criminal Law* in Douglas Hay et al. (eds.), ALBIONS FATAL TREE (1975).
10. P. Linebough, THE LONDON HANGED (1991).

A recent notable social historical analysis of deviance is *The London Hanged — Crime and Civil Society in the Eighteenth Century.*[11] *The London Hanged* unfolds in a graphic manner the state of the crime and civil society in the eighteenth century England. As suggested in the introduction "this book explores the relationship between the organised death of living labour (Capital punishment) and the oppression of the living by dead labour (the punishment of Capital)".[12] The author has laboriously surveyed the crime and punishment reality in the backdrop of emerging capitalist social order. Describing the social origins of crime the author states:

> In short, people became so poor that they stole to live and their misappropriating led to manifold innovations in civil society. From this it follows that we can no longer regard the casualties at Tyburn as the lamentable victims of historical development, to be cast, forgotton, on the dustheap of time. The criminalised population of London was a force, in itself, of historic changes. Research revealed the difficulty of distinguishing between a "criminal" population of London and the poor population as a whole.[13]

Yet at another place the author unreveals the symbolic significance of hanging in these words: "The hangings were permitted and ordered by men of ruling class who had studied the application of death throughout human history and had power to apply that knowledge. The hanging was one of the few occasions (coronoations were another) that united several parts of the government (Monarch, Courts, Parliament, City and Church). Equally important to the meanings of these awful dramas was the renewal of (social contract). Most of those hanged had offended against the laws of property, and the heart of the social contract was respect for private property".[14] The value of *The London Hanged* lies in its attempts to relate the eighteenth century crime and punishment lessons to the present day realities. In this context the author raises a pertinent question: "In contrast to the eighteenth century London when news of hangings, the last words of the condemned, their biographies and descriptions of their behaviour were widely published, remarkably little is known about the recent victims of capital punishment, or about the attitudes of their peers".[15] Can we take a cue and embark upon social historical enquiries about the various crimes of the powerless sections of the society ? Can we make a social historical analysis of the reasons for the retention of hanging punishment (crime?) and the increasing justifications for the repressive state and non-state responses .?

The social historical approach to deviance teaches us that it is not safe to accept judgments relating to deviance uncritically, that the label of deviance is often assigned

11. *Id.*, Introduction.
12. *Id.* at XV.
13. *Id.* at XXI.
14. *Id.* at XX.
15. *Id.* at XVI.



by the dominant sections to control the under-class population.[16] In other words, the true and comprehensive understanding of deviance is preconditioned on a total view of the reality.

## III. Relating The Free Market Development To The Prominent Post-Reform Crime Trends

Free market development is characterised by certain features that are designed to give a free play to "market forces". Some of the features having a special bearing on the present discussion are as follows:

(a) Freedom in economic affairs in a neoliberal sense.
(b) Shrinking of the role of the government and control through market mechanism.
(c) Expansion of market domain beyond the national boundaries.

### A. *Economic Freedom*

The essence of free market lies in special emphasis placed on economic freedom. Economic freedom understood in terms of neo-liberal conservative agenda implies that individuals are economically free only if the property they have legally acquired is protected from invasions and intrusions by others and that the owner of the property is free to put it to use, exchange or sale etc. with the least restrictions on his freedom. Such a notion of economic freedom centres round the property holding classes, who are supposed to possess the key to economic progress of the whole society. In the wake of the current new economic policy debates in the developing countries the case of such conservative economic freedom has been strongly espoused by a recent book titled as Economic Freedom of the World : 1975-95[17] which, in the light of experience in some 102 countries during 1970-1990 period, concludes: "The more economic freedom a country had, the more growth it achieved and the richer its citizens became". However, the notion of economic freedom premised on private property tends to ignore (or intentionally disregard) the value of "freedom" for the large bulk of nonproperty holding classes, for whom freedom means selling their labour power, and even their bodies for meeting the basic survival needs.

Furthermore, the actualisation of the economic freedom of a few at the cost of others not only leads to widening the gap between the property holding classes and

16. *Id.* at 197. See particularly E.P.Thompson's following observation in his famous work cited in *supra* note 8, in respect of an early eighteenth centry English Law, better known as The Waltham Black Act: The Black Act could only have drawn up and enacted by men who had formed the habit of mental distance and moral levity, towards the lives of the 'loose and disorderly sort of people'. We must explain, not an emergency alone, but an emergency acting upon the sensibility of such men, for whom property and the privileged status of the propertied were assuming, every year, a greater weight in the scales of justice, until justice itself was seen no more than the outworks and defences of property and of its attendant status.
17. Gwartney and James *et al.*, Econimic Freedom Of The World : 1975-95 (1996).

the propertyless classes, but also becomes the cause for growing sense of relative depriva-tion and frustrations amongst the large number of propertyless classes.

It may be useful to refer to developments in the field of economic freedom in the postreform period in terms of key variables like prices and inflation, rate of unemployment and incidence of poverty. The Planning Commission in its Mid-Term Appraisal of the Eighth Five Year Plan has observed : "The average rate of inflation as measured by wholesale price index of 10.7 per annum in the period (1992-95) continues to be high. This is a matter of some concern since a stable price scenario is the cornerstone of the reform process".[18] Referring specifically to food prices, that affect the larger bulk of poor population more, the plan document concludes: "An important and disturbing characteristic of price behaviour since 1990-91 is that food prices have increased at much faster pace than prices in general".[19]

The findings of the Planning Commission about the rate of employment are that the rate of employment has been substantially lower than the Eighth Plan targets. In concrete terms it states: "The growth in employment opportunities of 6 million in each of the three years 1992-95 have fallen short of the target envisaged in the plan by about 2.5 million each year. It has also been smaller than the estimated growth of labour force during the period. Therefore, the level of unemployment in the Indian economy, which was estimated at 17 million in 1992, is likely to have increased to 19 million in 1994".[20]

Finally, equally vital for our purpose is the evaluation of incidence of poverty. The Plan document projects its assessment of poverty in terms of Official and Expert Group Data. The Official Data records a decline in combined (rural and urban) poverty from 25.2% in 1987-88 to 21.1% in 1992-93 while in the same period the Expert Group reports combined poverty to have gone up from 39.3% to 40.7%. Adverting on "Economic Reform and Poverty" C.P. Chandrashekhar and A.Sen[21] arrive at the following three conclusions: "First the rural poverty ratio at the all-India level, and in most states, fell sharply between 1973-74 and 1986-87 with the subsequent years showing no clear trend in either direction. Thus, if liberalisation of the economy is dated back to the mid-1980's, the entire period since then is characterised by a slowdown in the pace of poverty reduction. Second, there was a marked increase in rural poverty in 1992 as compared with either 1989-90 or 1990-91. This was true of almost every state except Kerala where poverty fell continuously. At the all India level, the number of poor increased by over 60 million between 1990-91 and 1992, or in the first 18 months of the reform period. Third, there was an appreciable moderation in poverty between 1992 and 1993-94 in both absolute and proportionate terms. None

18. See *supra* note 1 at 23.
19. *Ibid.*
20. *Id.* at 25.
21. C.P. Chandrashekhar and A. Sen, *Economic Reforms and Poverty,* FRONTLINE 101 (23 February, 1996).



the less, there were 30 million more people living in poverty in rural India in 1993-94 than before the reforms began. Considering individual rates, only four South Indian States (Andhra Pradesh, Karnataka, Kerala and Tamil Nadu) witnessed a reduction in the incidence of poverty between the onset of reform and 1993-94. On the other hand, poverty rose appreciably in Assam, Bihar, Haryana, Punjab and Uttar Pradesh".[22]

Thus, economic freedom relates to the criminogenic tendencies in two prominent ways :

First, encouraging "crimes of domination". Instances of growing criminalisation of politics and organised criminality are extreme examples of these types of crimes. This new kind of criminality has also been described as "Privileged Class Deviance",[23] which is a typical postindependence economic and social develop-ment inspired deviance. The new economic policy has come as the second opportunity for this brand of criminality which is associated with rapid growth and unregulated economic opportunities.[24]

A notable feature of such crimes is their dominant economic motivation. The privileged classes have not hesitated even in indulging in organised kidney theft racket for economic considerations.[25] Apart from crimes of domination the new economically liberated class has been responsible for the spurt in leisure and pleasure crimes like pornography and "child prostitution".[26]

22. *Id.* at 102.
23. B.B. Pande, *The Nature and Dimensions of Privileged Class Deviance* in K.S. Shukla (ed.), THE OTHER SIDE OF DEVELOPMENT 134 (1987).
24. The following observation of the Santhanam Committee in the context of corruption and other forms of developmental crimes in the immediate post independence era has great relevance for understanding the post reform criminality: "A Society that goes in for a purposively initiated process of a fast rate of change has to pay a social price, the price being higher where the pace of change excludes the possibility of leisurely adjustment which is possible only in societies where change is gradual ... In the emerging Indian society with its emphasis on purposively initiated process of urbanization, alongside of the weakening of social mores of the simpler society, signs are visible of materialism, growing impersonation, importance of status resulting from possession of money and economic power, group loyalties, intensification of parochial affinities, unwillingness or inability to deal with deviations from the highest standards of political, economic and social ethics, profession of faith in the rule of law and disregard thereof where adherence thereto is not convenient,. The rapid expansion of Governmental activities in new field involving expenditure of the order of 1000 crores of rupees a year afforded to the unscrupulous elements in public service and public life unprecedented opportunities for acquiring wealth by dubious methods. To this must be added the unfortunate decline of the real incomes of various sections of the community, and particularly that of the salaried classes, a large part of which is found in Government employment. "REPORT OF THE COMMITTEE ON PREVENTION OF CORRUPTION, 8-9 (1964) Government of India.
25. Eight doctors of more than one government hospital in Bangalore have already been charge sheeted for kidney theft and other allied offences, INDIAN EXPRESS (27 June, 1995).
26. S. Raikar, *Jalgaon: Journey from Jewellery to Sex Scandal,* INDIAN EXPRESS (21 August, 1994).

Second, the growing feeling of relative deprivation, frustration and class antagonism amongst the large section of propertyless classes compels them to resort to criminal activities for sheer survival or as a strategy of competitive existence. The causes of such crimes are located in the undercurrents of tension between the privileged classes and the teeming millions, who live in the fringes of the civilized society. The growing instances of violent crimes by domestic servants, kidnappings and abductions for ransom are indicators of class tensions going beyond reasonable limits.

### B. *Shrinking of the Government*

In the government controlled and mixed economies the government plays a vital role in control and regulation of the economy. Under such a dispensation market remains subservient to economic policies and legal and administrative measures issued by the government from time to time. However, the free market development advocates substantial diminution of the governmental role in the economic field.

It means the government should desist from interfering with economic freedom either through macro-economic policies associated with inflation or any kind of regulation over production, exchange and prices or taxation or foreign exchange control, etc. But the space created by the withdrawl of the government from the economic field leaves the market forces to perform the control and regulation function. Thus in tune with the free market theorisation the role of the government in the economic field has been substantially limited. Many forms of control over business and market have been done away with. However, this trend of withdrawl of the government has not been free from side effects, of which at least two have been notable. First, increased demand from holders of economic freedom for better and more effective law and order maintenance. The demand coming from the captains of industry and business has been heeded to by the government resulting in greater professionalisation and deployment of scientific methods and advanced technology in crime prevention, investigation and trials. Such governmental measures are backed by better crime control coordination at the international level as well. At the non-governmental level also there is a trend of privatisation of crime control, by measures such as private agencies for watch and guard and detection of crimes.

Second, the withdrawal of the government from the economic field has been associated with a parallel trend of emergence of a repressive state, particularly to deal with protests and social movements of the underprivileged sections of the society. The infamous incident of death of slum dwellers of Ashok Vihar (Delhi) in police firing is an indicator of the resolve of the free market State to disciplining the

27. Interpol has been particularly active in controlling transnational crimes that are intimalety related to the interest of the foreign capital.



underclass population through repressive means.[28] The Muzaffarnagar Firing and Rape incident is yet another classical example of the changing character of the "Market State".

### C. *Globalisation Revolution*

Globalisation is the natural corollary of economic freedom understood in the neoliberal sense. This implies that the property owning classes, including the multinationals, should have unham-pered opportunity to do business all over the globe without much regard for the nation state boundaries. Such expansion and homogenisation of the market field is conditional on universalisation of laws and propogation of commonly accepted business practices and standards. In the process, globalisation involves redefining the boundaries of deviance as well as the form and patterns of responses to it .

As globalisation introduces new transnational business entities in the free market domain, the market comes under economic and political pressures of diverse varieties. Often, the high profit motivation of these new business partners brings to the fore the seamy side of economic freedom that is essentially criminogenic and socially detrimental in nature. The infamous *Hawala* crimes are inherently dependent on transnational links with the foreign based agents and tax haven country banks. Similarly the turning of India into an arms bazaar (*The Purulia Gun Running Case*) is also a direct spin off of globalisation and the run away economic freedom.

Globalisation may have other implications for crimes, which can be mainly of two kinds. First, it might lead to ushering in a repressive crime control regime that relies on technology backed-up prevention and investigation devices and of extreme forms of punis-hment like death penalty and mandatory long term prison sentences. Second, selective decriminalisation, particularly under situations that enhance esoteric individualist values. Decriminalisation of suicide and creating a right to die is a case on point.[29]

## IV. Evaluating The Criminogenic Tendencies In The Post Reform Period

(a) There are any number of development theorists and criminologists who treat criminogenic tendencies and increase in crime incidence as a true indicator of development. Development criminologists like Clinard and Abbott opine:

28. The recent slum dwellers shooting episode, that arose out of a minor incident involving defecation in a public park by a slum dweller, who was shot at by the police that was required to keep the public park free from defecators under a direction from the Delhi High Court (K. K. Manchanda v. Union Territory of Delhi CM 3691/92 in CM 531/90). This episode was extensively commented upon by the local media on January, 31, February 1 and 2, 1995; see particulary "Editorial" Indian Express (1 February, 1995).

29. See particularity Rathinam v. Union of India (1994) 3 SCC 394; Also see critical comment on the case by B.B. Pande, *Right to Life or Death: For Bharat Both Cannot be "Right"* (1994) 4 SCC 19 (J).

"One measure of effective development of a country probably is its rising crime rate".[30] This kind of thinking accepts crime rise as something normal and a kind of legitimate cost of development. In countries like the U.S.A. and England development has been marked by a fairly high crime rate.

But when we talk of the objective of "Human Development" in terms of the Eighth Five Year Plan we have to keep in mind the goal of "equity", of justice to all the sections of the society. Therefore, development where a large section of the resourceless and poor population is compelled to indulge in crimes of resistance and accommodation can hardly be called equitous. Equally, where a small section of the privileged classes indulge in crimes with impunity, merely because they are in a position to manipulate deferential application of the laws, can also not be described as equitous.

*Thus, a "Humane Development" can neither be indicated by a high crime rate nor by the absence of it, but it can certainly be indicated by effective control and check on "real crimes" that are counter indicative to the goals of genuine development.*

(b) The free market development is premised on limiting the role of the state to a minimum. But it is a paradox that in free market economies the state is expected to be more assertive and coercive in the sphere of law and order administration. This is particularly true in the initial stages. This is the reason why most of the successful free market economy regimes end up having an authoritarian state apparatus. Furthermore, often in such states the interests of the business class and that of the dominant political class more or less become aligned. Such a natural association of free market economy with an authoritarian state tends to support a thinking: Without curtailment of freedoms and violations of human rights economic development is not possible.

In India too, the extent and incidence of violation of human rights at the hands of lawless state officials has been mainly a post reform period phenomenon.

*Thus, the limiting role of the state in a free market development and the growing state authoritarianism can hardly go hand in hand. The space created by the exit of the state has to be appropriately occupied by a meaningful people's participation in the criminal justice administration.*

(c) A global view of crime and the responses towards it can be a useful means of standardisation of the norms. But in the name of standardisation, globalisation should not encourage imposition of laws and standards of the Western societies. There are certain crime trends, legislative reform and punishment practices in vogue in the affluent West that may not be suited to

30. See *supra* note 2.



our requirements. For instance one may approvingly, follow the U.S. and the U.K. trend of decriminalisation of suicide on the ground that the crime was based on out-dated moral standards. But the new U.S. standard that treats individual as a autonomous moral agent and concedes to him a "right to die" may not be necessarily acceptable in India, where a large majority is far from "autonomous" and still struggles to make the right to life a reality. Should we not rationally adapt these trends to our conditions?

*Thus, crime and the responses to it must be defined in terms of its ultimate purpose and the prevailing societal context.*

# THE WORLD TRADE ORGANISATION (WTO) AND THE PROBLEMS OF REGULATING INTERNATIONAL ECONOMIC INTERDEPENDENCE OR GLOBALISATION

*Autar Krishen Koul**

## I. Introduction

International Economic Interdependence or Globalisation has become a common phrase describing the present day conditions of international economic relations and the law. The international community after the World War-II is seeing a united and common surge towards linking each other economically and as such competition across the frontiers of nation states and amongst their economic enterprises has increased so much that the international legal concepts such as sovereignty, independence and equality of nations have been obliterated and virtually reduced to fiction. As a matter of fact and law the nations are not only living in the global village but are economically so interlinked that no nation can take independent decisions, howsoever great or small the nation may be, as a result of which the national governments find it increasingly difficult to regulate their economies independently. In the present day international economic interdependence many nation states and their leaders find it extremely difficult to fulfil their election promises and govern because of their being linked with international economic interdependence and law. As such nations are subjected to forces which are beyond their control. In some nations there is resentment to globalisation and foreign competition and the presence of foreign enterprises in these countries sting the national electorate which sometimes threatens the governments and the social fabric of these countries.[1]

However, the present day international economic relations in an international legal framework continue to strengthen the international economic interdependence or globalisation and the latest international legal institution to work out the modalities of such globalisation is the World Trade Organisation (WTO) established in 1995 as an outcome of Marrakesh Treaty under the auspices of GATT Uruguay Round of Tariff Negotiations.[2] Accordingly, the scope of this paper is restricted first, to briefly describe

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1. India, for instance after the economic liberalisationa and opening of its markets to foreign enterprises and competition in the last five years has witnessed public protests and demonstrations against the entry of foreign firsms. See generally, Government of India, Economic Survey, 1995-96.

2. Uruguay Round of Tariff Negotiations concluded as Marrakesh Treaty is the eight Round of Tariff Negotiations concluded under the auspices of GATT, see J.H. Jackson, *Managing the Trading System: The WTO ana post Uruguay Round GATT Agenda,* in C.F. Bergsten and P. Kenen (eds.), Managing The World Economy (1994); See also, T.P. Steward (ed.), The GATT Uruguay Round-A Negotiated History (1993). For Final Act embodying the results of the Uruguay Round of MTN, see GATT Secretariate MTN/FA, (15 December, 1993). Some parts of this Final Act have been reproduced in 33 International Legal Material 114 (1994).



WTO and its structural design of incorporating the international economic interdependence; secondly, to discuss the policy options which may or may not have been taken care of by the WTO; thirdly, to see how Uruguay Round responded to those policy options; and finally to analyse where the less developing countries (LDCs) stand in the scheme of policy options and WTO. In conclusion, it is a fact that the threat perceptions as a result of globalisation, in the form of social clauses such as labour and environmental standards, redeployment of man power etc., to the LDCs economic growth and development are real and not imaginary and as such international remedial measures are needed to remove these threat perceptions.

## II. Economic Theories And International Trade

Historically, the international economic relations after 1940's, have been guided by various economic theories such as Kindler-berger's theory of comparative advantage, Ohlin's production possibility curve, Paul Samulson's theory of free trade, Marxist theory of rent, Professor Kruggmans theory of economic differentials of states requiring different levels of treatment and technical push as well as Professor Jagdish Bhagwati's theory of free trade across the frontiers of the nations of the world with complete elimination of tariffs and complete globalisation of the economies of the world.[3]

On the theoretical plane, the consensus is that the globalisation and liberalisation of world economy has its own gains such as full utilization of labour; capital and land, efficiency of production techniques resulting in world welfare and more employment. The globalisation of world economy would also provide economies of scale and enlargement of market opportunities of further growth as well as contribution of domestic price stability which in the ultimate analysis would close the friction, economic and political, amongst the nations and in the final analysis would reduce the chances of future world wars. Of course, there is evidence at hand which demonstrates that free trade should be preferred to one of protectionism as unregulated trade leads to lower prices.[4] Free trade increases consumer choice. Quotas restrict the quantity and variety of goods and products that can enter the country. Quotas presuppose licensing and licensing in a developing country like India breeds

3. For a discussion of these theories, see, J.H. Jackson, Cases and Materials On International Economic Relations (3rd Ed. 1995); see also J.H. Jackson. The World Trading System, Law And Policy of International Economic Relations (1989). For an overview of some of these theories see C.P. Kindleberger, International Economics (1963). See also a very interesting article on trade policy that does not violate human rights is a policy of total, immediate and unilateral free trade, R.W. Mcgee, *The Moral Case for Free Trade,* 29 Journal of World Trade 71 (1995).

4. G.C. Hutbaner, D.,T. Berliner and K.A. Elliott, *Trade Protection in the United States,* 31 Case Studies (1986).

administrative and political corruption.[5] The economists have always abhorred tariffs as tariffs increase the price of commodities and products and raise the cost of both foreign and domestic products. Protectionism destroys more jobs than it saves. A particular protectionist measure according to one author would save 36,000 jobs in the apparel manufacturing industry but would destroy 58,000 jobs in retailing.[6] Another study says that the effect of the U.S voluntary restraint agreement on steel imports estimated that the agreement saved 16,900 jobs in the steel industry but destroyed 52,400 jobs in industries that use steel.[7] Another study estimated that 15 per cent import quota for the U.S. steel industry would save 26,000 steel jobs but destroy 93,000 jobs in the industries that use steel.[8]

The moral case for free trade, inter alia, suggests that the governments do not have the right to regulate trade because by doing so they go beyond the legitimate scope of the government as the governments are formed to protect basic human rights such as right to life, property and liberty;[9] these are the only functions which are legitimate functions of the government and are functions that benefit everyone.[10] Once the government goes beyond these basic but limited functions, the government becomes redistributive.[11] As the government does not have its own resources, whenever it confers benefits on one citizen or group of citizens, it necessarily takes away something from other citizens. The government that goes beyond the minimalist night watchman state model becomes a plunderer, who loots the general public and

5. The industrial licensing control or permit quota raj has been considered responsible for the slow growth of Indian economy as well as various scams which have happened across the board in the Indian economy in the last five decades generally and in the last five years particularly. The 1995-96 Economic Survey of India after the abolition of the quota permit raj suggests an improved performance of Indian economy and the reasons listed are : sweeping away of industrial licensing controls, number of industries reserved for public sector have been drastically reduced, elimination of separate permission required by large houses for investment and expansion under the Monopolies & Restrictive Trade Practices (MRTP) Act, automatic approval of foreign investment upto 51% (and foreign technology agreements permitted) for 35 priority industries, policy for the drugs and pharmaceuticals industry aligned with liberalised industrial policy and span of price control reduced and rationalised, revision of national mineral policy and amendment to the Mines and Minerals Development Act, opening up of this sector to private and foreign investment and Reserve Bank of India based automatic approval policy for foreign investment made applicable to mining subject to a limit of 50% on foreign equity, see generally ECONOMIC SURVEY, *Supra* note 1.
6. L.M.Baughman and T. Emrich, *Analysis of the Impact of the Textite and Apparel Trade Enforcement Act* of 1985, INTERNATIONAL BUSINESS AND ECONOMIC RESEARCH CORPORATION (June 1985) cited in R.W. Mcgee, *Supra* note 3 at 70.
7. A Denzan, HOW IMPORT RESTRAINTS REDUCE EMPLOYMENT (1985)
8. A Denzan. AMERICAN STEEL : RESPONDING TO FOREIGN COMPETITION (1985).
9. For an early exposition of the above doctrine, see J. Locke, THE SECONDTREATISE ON CIVIL GOVERNMENT (1690).
10. See generally, R.Nozick, ANARCHY, STATE AND UTOPIA (1974)
11. See generally, B.D. Jouvenel, THE ETHICS OF REDISTRIBUTION (1952).



distributes the proceeds to some special interest group or subgroup of the general population.[12] Thus any kind of trade restriction violates someone's human and other rights; quotas make it impossible for some individuals to buy the products they want which violates their basic right of contract and association; tariffs raise the price of the products that individuals buy, thus forcing them to transfer more of their property than would be the case-under the free trade; anti-dumping laws prevent some consumers from buying what they want, and cause them to pay more for the product when they can get their hands on it, thus violating their freedom of contract, property and freedom of association.[13]

International economic relations since 1940 have tried to imbibe the above mentioned economic theories of free trade in one or the other form and have developed a vast international economic institutional structure commonly termed as Bretton Woods System comprising institutions such as IMF, IBRD, GATT, UNCTAD and the U.N.O.[14] and its complex organisations and agencies. For the last fifty years, the international economic relations have witnessed innumerable treaty instruments in the fields of commodity trade, transport, manufactures, services, tariffs and taxation and many other subjects.[15] It has also been invariably felt in course of these years, that the international economic problems have become more complex and insurmountable, although the international economic institutions such as GATT, IMF, UNCTAD worked quite well to provide solutions to the international economic problems in the face of difficult international political and economic challenges. GATT's contribution has been maximum both in terms of freeing interna-tional trade from various tariff and non-tariff barriers as well as building a jurisprudence of its own which has resulted in building a rule of law in international economic relations. However, LDCs, except the newly industrialised less developing countries, have fared badly so far as their economic growth and general wellbeing is concerned.

## III . GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT) AND GLOBALISATION

Although GATT is not strictly an international economic institution, yet over the last five decades, it has achieved the character of an international economic institution which lays down sets of rules which member states have to follow with one another in trade in goods,[16] and after the Uruguay Round of Trade Negotiations

12. See R.W. Mcgee, *supra* note 3 at 70.
13. *Id.* at 75.
14. A.K. Koul, THE LEGAL FRAMEWORK OF UNCTAD IN WORLD TRADE, Ch I (1977); see also, A.K. Koul, *NIEO and the North-South Dialogue - In Retrospect,* FOREIGN TRADE REVIEW 318 (1986).
15. For a brief summary of some of these instruments see A.K. Koul, *The North-South Dialogue and the NIEO,* INDIAN JOURNAL OF INTERNATIONAL LAW 385 (1986).
16. GATT has come into being when the original International Trade Organisation (ITO) negotiated as one of the institutions of the Bretton Woods system was not ratified by the U.S. and GATT assumed the character of a stop-gap arrangement. However, since 1971 the GATT continued to rule the international economic relations and by 1994 has assumed the character of a multilateral

(URTN) of 1986-1994, the scope of GATT has expanded tremendously and new areas have been added to GATT and under its control and supervision,[17] such as intellectual property, services, investment *et al*, in addition to the creation of the WTO.

The main objective of the GATT is to raise the standard of living of people of the world and to secure progressive development of the economies of countries including the less developed countries and these objectives, according to the philosophy of GATT permeated in its articles, can be achieved by the expansion of international trade, reduction of tariffs and other barriers to international trade on a reciprocal and mutually advantageous basis.[18] GATT has been revised from time to time since its entry into force in 1947 to make it more responsive to the changing requirements of international trade and economic relations and more specifically in 1964, a new chapter on Trade and Development (Part IV) which, inter alia, includes commitments which developed countries (DCs) had to extend to the LDCs[19] in order to assist them in promoting their economic development was added to the text of the GATT. In 1979, on the completion of the Tokyo Round of Tariff Negotiations, a number of associated agreements or codes were added and became a part of GATT's jurisprudence.[20] The impact of the working of GATT since 1947 upto the conclusion of the Tokyo Round of Tariff Negotiations was by and large towards a process of reducing the tariffs to a level where they became meaningless and towards a realisation that unless the international economy is not integrated into a common whole, the international economy would find itself more fragmented and distorted by the new and complicated non-tariff restrictions. Globalisation is a sine qua non for any pragmatic approach to reduce if not completely eliminate the distortions in international trade and economic relations.

Accordingly, GATT has been subjected to a most ambitious trade liberalisation round or package commonly referred as the Uruguay Round of 1994 when one hundred and fifty countries of the world approved a world trade treaty aimed at opening

treaty. For a classic working of GATT see J.H. Jackson, THE WORLD TRADE AND THE LAW OF GATT (1969); J.H. Jackson & W.J. Davey, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS (2nd Ed., 1986); R.E. Hudec, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM (1987); K.W. Dam, THE GATT AND THE WORLD TRADING SYSTEM (1964).

17. The areas added to GATT's jurisdiction after the conclusion of URTN are: intellectual property, services, investments and of course a new institution has been added to the GATT in the form of World Trade Organisation (WTO). For the - URTN see, THE GATT AGREEMENTS AND FINAL TEXT OF URTN (1994).

18. Preamble of the GATT, 1947.

19. Part IV Trade and Development consisting of Arts XXXVI to XXXVIII were added to the GATT text.

20. These agreement or codes include Agreements on Technical Barriers to Trade, Subsidies and Countervailing Measures, Anti-dumping, customs valuation, Import Licensing Procedures and Government procurement. For an analysis of these codes see A.K. Koul, *The Legal Framework For The Conduct Of International Trade & Tokyo Round of Tariff Negotiations*, INDIAN INSTITUTE OF FOREIGN TRADE, RESULTS OF TOKYO ROUND 231 (1980).



up of international markets. The URTN has set the beginning of a process of fully integrating the economies of the states in a global economy and has established mechanisms of monitoring the globalisation of the world economy in future years to come.[21]

The Final Act embodying the results of URTN has extensively revised, modified, and amended some of the provisions of the GATT as well as some separate international legal instruments and agreements covering trade in services, trade related aspects of intellectual property and trade related investment measures have been established. The Final Act also established a new and unique WTO. The WTO envisages a single institutional framework that would provide supervision of the operation of all of these agreements and arrangements and for the settlement of disputes.[22]

## IV. STRUCTURE OF THE FINAL ACT OF URTN

(a) WTO

CONSTITUTION

(i) Goods
(ii) Services
(iii) Intellectual Property
(iv) Dispute Settlement
(v) Trade Policy Review
(vi) Plurilateral Trade Agreements

(b) MINISTERIAL DECISIONS AND DECLARATIONS.

A summary of the results of URTN resulting in a number of understandings, decisions, annexes and agreements which have been appended to the Final Act are catalogued as under:-

URTN Agreements on Trade in Goods. Final Act GATT 1994. Texts on the interpretation of the following articles are included in the Final Act:

— Understanding on the Balance of Payments.
— Schedule of concessions. Agreement on record in national schedules "other duties and charges" levied in addition to the recorded tariff and to bind them at the levels prevailing at the date established in the Uruguay Round Protocol.[23]

21. GATT since its inception in 1947, has regularly held trade negotiations towards its objective of freer trade. Prior to the Uruguay Round (1986-94), seven other Rounds took place under the auspices of GATT.

22. For analysis of WTO, see A.K. Koul, *URTN and the WTO - the Emergent Issues*, 1 KASHMIR LAW TIMES 10 (1995).

23. On the Uruguay Round, see OECD THE NEW WORLD TRADING SYSTEM, READING (1994); UNCTAD THE OUTCOME OF THE URUGUARY ROUND, AN ASSESSMENT, UNCTAD (1994).

— Understanding on the interpretation of Article XVII.

— Agreement increasing surveillance of state trading enterprises activities through stronger notification and review procedures.[24]

— Understanding on the interpretation of Article XII and XVII: B.[25]

— Balance of payments provisions. Agreement that contracting parties imposing restrictions for balance of payments purposes should do so in the least tradedisruptive manner and should favour price-based measures, like import surcharges and import deposits, rather than quantitative restrictions. Agreement also on procedures for consultation by the GATT Balance of Payments Committee as well as for notification of balance-of-payments measures.[26]

— Understanding on the interpretation of Article XXIV.[27]

— Customs Unions and Free-Trade Areas. Agreement clarifying and reinforcing the criteria and procedures for the review of new or enlarged customs unions or freetrade areas and for the evaluation of their effects on third parties. The agreement also clarifies the procedures to be followed for achieving the necessary compensatory adjustment in the event of contracting parties forming a customs union seeking to increase a bound tariff. The obligation of contracting parties in regard to measures taken by regional or local governments or authorities within their territories are also clarified.[28]

— Undertaking on the interpretation of Article XXV.

— Waivers Agreement on new procedures for the granting of waivers from GATT disciplines, to specify termination dates for any waivers to be granted in the future, and to fix expiry dates for existing waivers. The waivers provision concerning the granting of waivers are, however, contained in the Agreement on the WTO.

— Understanding on the interpretation of Article XXVIII. Modification of GATT Schedules Agreement on new procedures for the negotiation of compensation when tariff bindings are modified or withdrawn, including the creation of a new negotiating right for the country for which the product in question accounts for the highest proportion of its exports. This is intended to increase the ability of smaller and developing countries to participate in the negotiations.[29]

24. See the summary in GATT AGREEMENTS; FINAL TEXT OF URUGUAY ROUND (1994).
25. *Ibid.*
26. *Ibid.*
27. UNCTAD, *supra* note 23 at 14.
28. *Ibid.*
29. *Ibid.*



— Understanding on the Interpretation of Art. XXXV. Non-application of the General Agreement. Agreement to allow a contracting party or newly acceding country to invoke GATT's non-application provisions vis-a-vis the other party; after having entered into tariff negotiations with each other. The WTO agreement foresees that any invocation of the non-application provisions under the GATT must extend to all the multilateral agreements.[30]

Uruguay Round Protocol 1994. The results of the market access negotiations in which participants have made commitments to reduce or eliminate tariff rates and non-tariff measures applicable to trade in goods will be recorded in national schedule of concessions which will be appended to the Uruguay Round Protocol that forms an integral part of the Final Act. The Protocol has five appendices:

Appendix I, Section A: Agricultural Products-Tariff Concessions on the Most-Favoured Nations Basis. Appendix I, Section B: Agriculture Products-Tariff Quotas;Appendix II, Tariff concessions on a Most-Favoured Nations Basis on other Products; Appendix III: Preferential Tariff-Part II of Schedule (if applicable); Appendix IV: Concessions on Non-Tariff Measures-Part III of Schedule; Appendix V: Agricultural Products: Commitments limiting Subsidisation - Part IV of the Schedule; Section I: Domestic support: Total AMS Commitments; Section II : Export Subsidies; Budgetary outlays and quantitative reductions commitments; Section III: Commitments on limiting the Scope of Export Subsidies.

The schedule amended to the Protocol relating to a member shall become a schedule to the GATT 1994 relating to that member on the day on which the agreement establishing WTO enters into force for that member. For non-agricultural products the tariff reduction agreed upon by each member shall be implemented in five equal rate reductions, except as may be otherwise specified in a member's schedule. The first such reduction shall be made effective on the date of entry into force of the agreement establishing WTO (July 1995).[31]

A perusal of the above interpretation and modification of Articles of GATT 1947 by the Protocol of GATT 1994 makes it abundantly clear that the member states have little option of not adhering to the commitments of the GATT. The uncertainties and weak provisions of GATT 1947 have been either made clear or have been buffeted by stronger interpretations and clarifications so that the member states are under an obligation to give the fullest implementation to the globalisation of international economic rela-tions in the form of surveillance or as international reviews and as commitments limiting the discretion of the member states, etcetra.

## V. THE WTO AND GLOBALISATION

The WTO charter is confined to institutional measures of globalisation. However, the charter explicitly outlines four important annexes which technically contain hundred pages of substantive rules.

30. *Ibid.*
31. *Ibid.*

Annex 1 contains the largest text, termed 'Multilateral Trade Agreements', which comprise the bulk of the Uruguay Round Results. All these Agreements are "mandatory" in the sense that their texts impose binding obligations on all members of the WTO. This reinforces the single package idea of the negotiators, departing from the Tokyo Round approach of "pick and choose" side texts. The Annexure 1 texts include: Annex 1A : GATT 1994; the revised and all inclusive GATT agreement, with related agreements or codes and the vast schedules of concessions.

Annex 1B: GATS, is the General Agreement on Trade in Services, with its schedules of specific commitments and Annexures.

Annex 1C: TRIPS, is the Agreement on Trade Related Intellectual Property measures.

Annex 2: This annex contains the dispute settlement rules, which are obligatory for all the members, and which form for the first time an integrated and unified settlement mechanism covering the WTO charter, the agreements listed in Annex I, Annex 2 are made available for agreement in Annex 4.

Annex 3: This annex contains the Trade Policy Review Mechanism (TPRMS) by which the WTO will review the overall trade policies of each member on a periodic and regular basis, and report on those policies. The general thrust of the TRMS is not legalistic but the focus is on transparency and the general impact of the trade policies both on the country being examined and on its trading partner.

Annex 4: This annex contains four agreements which are "optional" and termed as "plurilateral agreements". This annex appears to be an open ended annex which provides flexibility for the GATT to evolve and redirect its attention and institutional support for new subjects that may emerge important during the next few decades. The agreements included in Annex 4 are: Agreement on Trade in Civil Air Craft, Agreement on Government Procurement, International Diary Agreement and International Bovine Meat Agreement.

Annex 1A is by far the largest and contains the GATT 1994, which is essentially the old GATT as it has been modified by amendments, Tokyo Round Codes as renegotiated in the Uruguay Round, as well as some new Uruguay Round Agreements. In addition to GATT 1994, Annex 1A includes: Agreement on Agricul-ture, Agreement on Sanitary and Phytosanitary Measures, Agreement on Textiles and Clothing, Agreement on Technical Barriers to Trade, Agreement on Trade Related Measures, Agreement on Article VI (Anti dumping), Agreement on Customs Valuation, Agreement on Preshipment Inspection, Agreement on Rules of Origin, Agreement on Import Licensing, Agreement on Subsidies and Countervailing Measures and Agreement on Safeguards. In addition to these agreements, there are a series of understandings which further modify GATT.

There are some issues also which WTO may have to address to itself in the future course of action. Some of these side issues which can be read from these agreements listed above are:



Enhancing and extending liberalisation of trade in agricul-tural products, future negotiations on services, further elaboration of the rules on subsidies, further rules on market access, further negotiations in trade related investment measures, rules of origin and greater integration of LDCs as well as monitoring of GATT/ WTO rules to ensure fair treatment of those countries. The problem of anti-dumping rules and the risks they raise for understanding some of the Uruguay Round results. And finally, WTO shall have to face the problem of how to integrate the economies of China, Russias, etc. into the WTO system.[32]

The working system of the WTO follows the GATT 1947 model to some extent but departs from it substantially in the sense that it[33] is an international economic organisation formed by a multilateral agreement whose purpose[34] is to provide the institu-tional framework for the operation of Multilateral and Plurilateral Trade Agreements and also act as a forum for international trade negotiations and dispute settlement between its members.[35] The thrust of the institutional framework of WTO is that the member states have voluntarily subjected their sovereignty, within the decision making power of WTO and in the general framework of URTN, resulting in achieving international economic interdepen-dence and globalisation so that there can be an increase in wealth and economic stability, in the world.

The organisational structure of the WTO is represented by a "Ministerial Conference", having decision making powers, which meets not less than every two years.[36] The decision making powers of the "Ministerial Conference" are : (a) to adopt interpretations of the WTO Agreement and the Multilateral Trade Agreements;[37] (b) the power to waive obligations under the WTO agreements;[38] and (c) the amendment of the Multilateral Trade Agreements under certain circumstances.[39] The form of the decision making is by consensus.[40] If consensus cannot be reached, the agreements provide for majority voting, unless otherwise specified.[41] In the interim, the powers

32. These related issues are discernible from the reading of the various Multilateral and Plurilateral agreements which form the text of UTN.
33. The creation of WTO completes the BrettonWoods system after a delay of fifty years. The International Trade Organisation (ITO) was supposed to be the third pillar of the IMF & IBRD but was never established, see J.J.Schott, THE URUGUAY : AN ASSESSMENT 16(1994) Institute for International Economics, Washington D.C.
34. WTO Agreement, Article III (2).
35. The WTO is a creation of public international law, see K.W. Abbott, *GATT As A Public Institution: The Uruguay Round and Beyond*, 18 BROOK JOURNAL OF INTERNATIONAL LAW 31 (1992)
36. WTO Agreement, Article IV.
37. *Id.*, Article IX (2).
38. *Id.*, Article IX (3).
39. *Id.*, Article X.
40. *Id.*, Article IX (1).
41. *Id.*

of the Ministerial Conference are exercised by the General Council.[42] The General Council also serves as the Dispute Settlement Body (DSB)[43] and as the Trade Policy Review Body (TPRB).[44] The Ministerial Conference is followed by three Council: one for Goods, for Services, for Trade Related Intellectual Property Rights (TRIPs).[45]

Globalisation of the international trade gets full recognition in the purposes of WTO, when it professes reduction of tariff and the elimination of discriminatory treatment in international trade relations. These purposes are achieved to facilitate,in the economies of member states, higher standards of living, full employment, a growing volume of real income and effective demand and expansion in trade and services.[46] However, the WTO imposes qualifications in pursuing these objectives such as (a) the optimal use of the world resources must be in keeping with sustainable development and preservation of environment; and (b) the objectives are to be pursued so as to ensure that LDCs, especially the least developed among them, obtain a share in the growth of international trade that reflects their economic development needs.[47]

Thus it is beyond doubt that the legal and structural design of WTO and its various councils empowers the WTO to link the members' economies into a web of international economy so that the international community has the final say in matters concerning member states' economy and the international trade.

## VI. Social Issue And The Uruguay Response

The policy formulations of social issues in terms of the Uruguay Round Results in the context of globalisation have taken a varied and complex dimension. The environmental policy and its linkages with globalisation have gathered a momentum where the member states of GATT are being faced with great challenges: how to integrate international environmental policy into the municipal economic policy. The free traders argue that trade liberalisation creates new market opportunities and economic wellbeing whereas environmentalist ordain that environment represents a higher order than trade. Free trade generates more wealth and benefits the consumers by way of cheaper prices. However, if free trade and economic growth is allowed complete freedom it would lead to pollution and environmental degradation.[48] Trade penalties to enforce environmental standards, whether embodied in multilateral agreements or unilaterally imposed, are justified without regard to trade or any cost/

42. *Id.*, Article IV (2)-(4).
43. The Dispute Settlement Body (DSB) was established by the 1994 Dispute Settlement Understanding.
44. See *supra* note 42.
45. *Id.*, Article IV (5) - (6).
46. *Id.*, Preamble.
47. *Id.*
48. See generally, Esty, Greening The GATT, Trade, Environment And The Future 43 (1994), Institute for International Economics, Washington D.C.



benefit analysis. Accordingly, the protection of the environment should have priority over free trade issues.[49] The municipal governments' regulations such as those relating to consumer protection, competition, banking, insurance and protection of human rights conflict with the free traders conception of environmental protection and the municipal regulations.

Environmental protectionists however, do not prove the link between the deterioration of the environment and free trade and they also do not suggest how the production related damage has a significant influence on global welfare and the importing country's well-being and that trade restrictions are the most efficient way to change the behaviour of the exporting country.[50] On the other hand, for free traders, there is no conflict between environment and liberal trade. If a country's environmental resources are correctly applied liberal trade improves a country's overall welfare and leads to more efficient use of natural resources which means that the increased economic growth stimulates the demand for environmental protection, generates additional income to pay for it and leads to improved environmental standards.[51] An argument goes further that a higher per capita income resulting from economic growth correlates with technological progress and reduces the environmental degradation.[52] However, the free traders are not concerned with the harm the free trade does to the environment but the free traders are concerned with the harm that trade-related environmental measures (TREMS) do to free trade.[53] Trade restrictions on environmental grounds work against and not for the environment. The environmental problems in LDCs can easily be attributed to the lower income level and poverty. Trade restrictions makes it difficult for the LDCs to find resources to improve their environmental standards.[54]

The GATT does not explicitly recognise environment in its charter, although Articles III and XX allow environmental protection,[55] yet there is lot of confusion on the role of GATT and WTO in the trade and environment debate: whether and in what degree the trade related environmental measures (TREMS) can be imposed.[56] The environmental Agenda 21 also recommends that GATT should be encouraged,

49. *Id.*, at 38.
50. M. Schlagenhof, *Trade Measures Based On Environment Processes And Production Methods*, 29 Journal Of World Trade (1995).
51. *Ibid.*
52. Robertson, *Trade and Environment : Harmonisation and Technical Standards*, International Trade And The Environment, World Bank Discussion Paper 309-321 (1992).
53. *Ibid.*
54. Sorsa, *GATT and Environment Basic Issues And Some Developing Country Concerns*. See *Supra* note 52 at 325-340.
55. Petersmann, *International Trade Law and International Environmental Law Prevention and Settlement of International Environmental Disputes in GATT*, 27 Journal Of World Trade 43 (1993)
56. See *supra* note 54 at 325.

"to avoid the use of trade restrictions or distortions as a means to offset differences in cost arising from differences in environment standards and regulations, since their application could lead to trade distortions and increase protectionist tendencies"[57]

The other policy options where the globalisation has posed problems of vast magnitude are (a) the growing of a feeling that some countries, such as the U.S.A, are trying to impose their will on other countries especially the LDCs and (b) the LDCs sovereignty has been blunted to the extent that they are completely marginalised. The external economic factors operating in a municipal setting have acquired a strong hold on municipal governments which have a detrimental effect on the LDCs economies.

There is increasing evidence that globalisation and liberalisation have increased political and bureaucratic corruption and the problems of poverty, unemployment and disease have increased. India, for instance, has witnessed the worst political and bureaucratic corruption over the last six years since it has liberalised and globalised its economy.

The policy option of security of member-states is also very important as globalisation and liberalisation takes away from the municipal states their role of defending themselves and decide about their security needs. Globalisation views national security as non-economic and subsidization of defence production by the municipal states as a waste of resources. It is assumed further that national security should be left to the market forces as the market forces themselves would determine the security needs of member states.

The social issue of labour standards is equally contentious as labour standards mean governmental rules on child labour, trade unions etc. The economists take the view that labour standards are unhealthy when the standards exploit the labour and the production is based on coercive relationship. Slave or bonded labour may be good for the consumer, but is bad for the slave. Child labour may be good for the investor but is bad for the child, government restrictions on trade unions may be good for the management but is bad for the workers.[58]

The labour standards were brought on the agenda of WTO by the U.S.A. and suddenly the susceptibilities of the LDCs were aroused. The LDCs have an abundant labour force and in certain sectors of production forced labour and children are involved, as well as the trade union laws are stringent, as a result of which there are some sectors of economy in which the LDCs have an edge over the DCs. Therefore the WTO invention in developing minimum international labour standards, that are obligatory on the member states, is antithetical to the comparative cost advantage of the LDCs.[59]

57. Chapter 2.22 (21) Agenda 21.

58. See generally S. Chamovitz, *The World Trade Organisation and Social Issues*, **28** JOURNAL OF WORLD TRADE 17-33 (1994).

59. *Ibid.*



The other social issue of globalisation is that although free international trade as a whole makes nations better off, yet the distribution of benefits is always uneven and some people may get impoverished in the process. The globalisation may warrant structural adjustment in the municipal economy and surplus workers should be compensated or adjusted.

Finally, globalisation has thrown up the social issue of community and culture. Globalisation may increase international trade and make nations better-off as a whole, yet it can devastate communities through changes in production patterns and can influence the local cultures with foreign influence which may cause more harm than good.[60]

## VII. DEVELOPING COUNTRIES AND GLOBALISATION

As seen above, the Uruguay Round, GATT and WTO offer a variety of strategies that can take care of international economic interdependence or globalisation. The Uruguay Round arrived at a variety of solutions to the pressing problems of international trade, and international economic relations have been laid on a firm and definite basis. The multilateral disciplines in the GATT have been strengthened and the settlement of disputes has been put on a more legalistic pedestal. Under the WTO a party to the dispute will be allowed to appeal the panel decision but the other party will be unable to block the decision of the appellate panel itself.[61] Under the earlier dispensation the adoption of a panel's report on a dispute required a unanimous vote, which meant that any country could block a decision that went against it. LDCs have traditionally made very little use of GATT's dispute settlement procedures, preferring to settle out of court. However, the revised procedures should alter the situation, particularly as the new dispute settlement procedures apply to all areas covered by the WTO and not just trade in goods.

The LDCs should accept WTO and the GATT 1994 as a development strategy and globalisation should be followed by economic reforms so that they can together reap the benefit of economies of the world. The LDCs should realise that the earlier development strategies in the form of Generalised Scheme of Preferences (GSP) or ... have not helped the LDCs economies and the concept of trade introduced in WTO ... equal and parity basis may in the long run help both international economy and ... LDCs. It is imperative on the part of LDCs to enhance the performance of their ...onomies and the traditional concepts such as socialism, paterfamilias, welfare to ...ople without a reciprocal obligation, subsidisation, monolithic public enterprises and ...k units have miserably failed and there is a need to infuse a new dynamism in the

60. *Ibid.*

61. For WTO text on Dispute Settlement contained in Annex 2, see The Results of the Uruguay Round of MTNS - The Legal Texts GATT Secretariat, Geneva (1994); see also P.J. Kuiper, *The New WTO Dispute Settlement System - The Impact On The European Community*, **29** JOURNAL OF WORLD TRADE 47-71 (1995).

economies of LDCs. The policy planners in the LDCs are either lazy, corrupt, incompetent and their policies are characterised by uncertainty, lack of credibility, excessive discretion, favouritism, and lack of transparency which stunt and often retard the economies of LDCs.

The WTO and the Uruguay agreements are international efforts to overcome the above mentioned shortcomings of the municipal governments and are steps towards the ongoing process of globalisation.

## VIII. Conclusion

From the above discussion, and in the context of the Uruguay Round agreements as well as with the establishment of WTO, the following conclusions are inescapable:

(a) That globalisation is a process set afloat by the Uruguay Round started in 1986 which culminated in the Final Act of the URTN 1994.

(b) That liberalisation is a *quid pro quo* of globalisation and no municipal state can escape from the above said *quid pro quo*. Economic liberalisation is necessary and all bottlenecks to the economic liberalisation must be removed, otherwise the municipal state will suffer more economically than before.

(c) The policy formulations in term of social clauses need to be explored in the context in which these policy formulations have been expressed. The LDCs' fear that the social clause would impinge upon their comparative advantage is real and before WTO accepts the social clauses, more research needs to be undertaken to explore fully the economics of social clauses. The issue of environment and labour standards prima-facie may harm the LDCs in the areas where LDCs have comparative advantage. It also cannot be denied that labour and environmental standards are protectionist measures perpetuated to safeguard the economic interests of the DCs.

In short, globalisation, for the LDCs, in the context of the Uruguay Round agreements of 1994 means that the LDCs have to take a fresh look at their economies, shed the old protectionist fervour, remove the bottlenecks in the domestic economy to make it more competitive, share the fruits of free trade and interdependence of world economy on a free and fair competitive basis. The LDCs also would lose budgetary support, special privileges, such as price preferences by the governments, in throwing open the domestic economy to international competition. Globalisation, in the ultimate analysis, means managing competition from domestic competitors and foreign competitors by cutting down costs, controlling costs and identifying redundant manpower and appro-priately dealing with it through means such as retraining, re-deployment and providing a handsome termination package through a national renewal fund.

# ECO-STANDARDS AND FREE INTERNATIONAL TRADE

*Gurdip Singh**

The debate on the issue of relationship between trade and environment is picking up. The United Nations Conference on Environment and Development held at Rio in 1992 projects the intensity of the debate and gives expression to the principle that environmental protection measures should not result in distortion of international trade and investment. The debate has become more intense in the post Rio scenario and has given rise to the emergence of three basic positions.

The first position is held by environmentalists who point out that international trade, globalisation of the economy, integration of developing countries, and all that has been agreed in the Uruguay Round is the worst environmental disaster. They argue that liberalisation of international trade means more trade, more economic growth and it would mean more transport and all this would have a negative impact on environment, local and global. Transport means, inter alia, carbon dioxide emissions and adds to the problem of the global warming which results in hotter summers, more cooler winters, change in monsoon patterns, frequent droughts and floods, heat waves and storms, and rise in sea levels. Economic growth dangerously harms the environment and adds to the problem of acid rain, depletion of ozone layer, water pollution and deforestation. So, many environmentalists argue that we should stop all this liberalisation of trade. We have gone the wrong way. We should go back to the old system where we had stricter environmental restrictions and should reduce the impact of international trade on the environment.

The second basic position is held by the economists who state that trade has nothing to do with environment. Let us have free trade, let us follow the results of the Uruguay Round, let us dismantle whatever trade barriers we have, and let us open our markets.

The third approach is more logical and strikes a balance between the above opposing approaches. It is based on the concept of sustainable development and aims at not only reconciliation but balanced synthesis of trade and environmental imperatives.

## I. Sustainable Development

Sustainable development is a process in which development can be sustained for generations. It means improving the quality of human life while at the same time living in harmony with the nature and maintaining the carrying capacity of the life supporting ecosystem. It modifies the previously unqualified development concept and rejects the proposition that environmental protection is antithesis of development.

The Brundtland Report defines sustainable development as development that

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meets the needs of the present without compromising the ability of the future generations to meet their own needs.[1] The report emphasizes that sustainable development means an integration of economics and ecology in decision making at all levels. The Caring for the Earth document defines sustainability as a characteristic or a state that can be maintained indefinitely whereas development is defined as the increasing capacity to meet human needs and improve the quality of human life.[2] This means that sustainable development would imply improving the quality of human life while living within the carrying capacity of supporting ecosystems.

Economic growth is not antithesis to sustainablity but a condition underlying sustainability. Only economic growth can eliminate poverty which is the biggest polluter. Economic growth also generates resources for the adoption of environmental protection measures.

It is economic growth which accelerates enormously the momentum of the rolling ball of sustainable development. Economy and ecology are the overlapping circles and the terrain of sustainable development is found where these circles overlap. In view of the critical links between economic and environmental concerns, it is appropriate to consider both these concerns together. Thus, a global consensus for the economic growth must be consistent with sustainable development.

## II. Environmental Aspects Of The Uruguay Round

The Uruguay Round was aimed at trade liberalisation through the removal of the remaining barriers to free and fair trade. Trade liberalisation, *per se*, is not necessarily linked to either environmental degradation or environmental preservation. However, environmentalists attempted to make an environmental dent on the GATT Uruguay negotiations which resulted in the greening of the negotiations. The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations at Marrakesh of 15 April 1994[3] contains certain provisions of environmental significance.

### *A. Environment and The World Trade Organisation*

The new multilateral trade accord lowers trade barriers and accelerates the process of economic growth of the participating Nations. The most significant achievement of the Uruguay Round is that it establishes the World Trade Organization (WTO) which enjoys increased powers and a broader mandate as compared to its

1. World Commission on Environment and Development, *Our Common Future* (1987).
2. *Caring for the Earth : A Strategy for Sustainable Living*, 1990 developed by the Second World Conservation Project comprised of the representatives of the World Conservation Union (IUCN), United Nations Environment Programme (UNEP), and World Wild Fund for Nature (WWF).
3. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement establishing WTO (WTO Agreement), GATT Doc. MTN/FA, Reprinted in 33 International Legal Material 1125 (1994).



predecessor GATT. The Agreement establishing the WTO renders functioning institutional structure to GATT.

The desire to create a World trade body has been around as long as the GATT rules themselves. The concept of WTO goes back to 1919 when the U.S. President Woodrow Wilson proposed a World Trade Board as part of the Covenant of League of Nations. The Board was dropped from a later draft but the idea did not die. Wilsonian vision has finally been achieved with the reconstitution of GATT into a functioning institutional structure in the form of the WTO.

The WTO voices environmental concern in its preamble by stating the goal of the optimal use of the world's resources in accordance with the objective of sustainable development.[4]

### *Committee on Trade and Environment*

The most significant achievement of the environmentalists in the Uruguay Round is the decision of the members of the GATT at the meeting for the signing of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations at Marrakesh between April 12 and April 15,1994 to establish a Committee on Trade and Environment within the WTO. The Committee on Trade and Environment was formed within the WTO under Article IV, paragraph 7 of the WTO Agreement which permits the addition of committees with such functions as the members deem appropriate. The Trade and Environment Committee has been established in an attempt to make trade an effective and efficient agent of sustainable development.

The formation of the Committee on Trade and Environment constitutes a significant change in the GATT's approach and provides an opportunity for trade and environmental analysis within the WTO inasmuch as Article IX, paragraph 2 of the WTO Agreement confers exclusive authority on the WTO to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.

### *B. Environmental Barriers to Trade*

Environment and trade supplement each other. The question arises whether international trade can be subjected to environmental barriers. International jurisprudence provides an answer to this question.

#### *(a) U.S. Import Restrictions on Tuna*

In 1991, the GATT Dispute Settlement Panel ruled that the U.S. import restrictions on Tuna to protect dolphins from an incidental kill during purse seine

4. Preamble, WTO Agreement.
5. Trade and Environment, Ministerial Decision of 14 April, 1994, 33 International Legal Material 1267 (1994).

fishing operations violated the GATT.[6] However, the ruling was not adopted by the GATT Council. The U.S. import restrictions consisted of an embargo on the import of Tuna harvested through the use of purse seine nets deployed to encircle dolphins which resulted in the killing of dolphins.

In 1992, the European Economic Community (EEC) and the Netherlands held consultations with the United States on the issue of importation of certain tuna products. The consultations did not result in satisfactory adjustment of the matter. The GATT Council, at its meeting on 14 July 1992, agreed to establish a panel on the matter.

The co-complainants argued that the U.S. embargo constitutes a quantitative restriction violative of the GATT whereas the U.S. justified the embargo as an exception: firstly, for the protection of the environment; and secondly, for the protection and conservation of the natural resources i. e., dolphins.

In June 1994, the GATT Dispute Settlement Panel gave its ruling that the U.S.import restrictions violated GATT.[7] The GATT rules (Article III) are based on the long established principle of national treatment. This means that a State can apply its domestic standards to imported products but cannot put imported products at a disadvantage. The panel noted that Article III calls for a comparison between the treatment accorded to domestic and imported like products, not for a comparison of the policies or practices of the country of origin with those of the country of importation. The panel noted that the U.S. import embargo distinguished between tuna products according to the harvesting methods and was, therefore, inconsistent with Article III of the GATT rules.

However, the principle of national treatment contained in Article III admits of two exceptions contained in Article XX of the GATT rules. The first exception comprises of measures designed to conserve exhaustible natural resources and the second exception comprises of measures necessary to protect human, animal or plant life and health. The U.S. argued that dolphins were an "exhaustible natural resource" and the embargo was necessary to protect them. The panel rejected the U.S. argument and concluded that the U.S. import restrictions were neither justified as measures designed to conserve natural exhaustible resources nor measures necessary to protect human, animal or plant life and health.

*(b) U.S. Import Restrictions on Gasoline*

In United States Standards for Reformulated and Conventional Gasoline (Gasoline Rule)[8], the Appellate Body of the World Trade Organization Dispute

6. 30 INTERNATIONAL LEGAL MATERIAL 1594 (1991).
7. 33 INTERNATIONAL LEGAL MATERIAL 839 (1994).
8. United States Standards for Reformulated and Conventional Gasoline, 35, INTERNATIONAL LEGAL MATERIAL 603 (1996); Maury D. Shenk et al, *International Decisions—WTO Dispute Settlement Body*, 90 AMERICAN JOURNAL OF INTERNATIONAL LAW 669 (1996).



Settlement Body in its first decision addres-sed one of the most difficult contemporary issues in international trade — the tension between the growing international trade and the protection of the global environment. The EPA's Gasoline Rule of 1990 involved the methods for determining the baseline for conve-ntional gasoline and the baseline for reformulated Gasoline.

Venezuela and Brazil challenged the Gasoline Rule under the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes. Venezuela and Brazil, inter alia, argued that the Gasoline Rule violated Article I of the GATT, providing for most favourable national treatment, by discrminating against an identifiable group of countries exporting gasoline to the United States; and Articles III : 1 and III : 4 of the GATT providing for national treatment, by applying less favourable treatment to imported than to domestic gasoline. The European Communities as an interested third party supported the position of Venezuela and Brazil. The United States denied any violation of the GATT and, inter alia, argued that the Gasoline Rule was permissible under the exceptions of Article XX of the GATT regarding measures necessary to protect human, animal or plant life or health (Article XX (b)), measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT (Article XX(d)), and measures related to the conservation of exhaustible natural resources (Article XX(g)).

The Dispute Settlement Panel established under the Dispute Settlement Understanding decided that the Gasoline Rule provided less favourable treatment to imported gasoline than to the U.S. produced gasoline and therefore violated national treatment obliga-tion contained in Article III : 4 of the GATT.

On appeal to the Appellate Body established under the Dispute Settlement Understanding, the Appellate Body ruled that the rules regarding standards of gasoline provided in the Gasoline Rule, which required importers of Gasoline to meet different stan-dards from those required of domestic refiners, were not justifiable restrictions on trade under the environmental exceptions of Article XX of the GATT. The Appellate Body held that the import restrictions of the Gasoline Rule constituted unjustifiable discrimination and disguised restrictions on international trade and there-fore negated the environmental goals of Article XX. The Appellate Body clarified that the Gasoline Rule was a measure for the conservation of exhaustible natural resources under Article XX (g) of the GATT but in adopting the Gasoline Rule, the United States had failed to follow other, less restrictive, courses of action that would have furthered its goal of protecting clean air in the United States.

On June 19, 1996, the United States informed the WTO that EPA the would initiate procedures to bring the United States into compliance with the Gasoline decision.[9]

9. Richard W. Stevenson, *U.S. to Honor Trade Ruling Against it on Foreign Fuel*, NEW YORK TIMES D4 (20 June, 1996).

*(c) WTO Barriers to Trade*

The WTO strikes a balance between trade and environment by concluding two agreements governing national laws on environment and public health, namely agreement on technical barriers to trade (TBT) and the agreement on sanitary and phytosanitary measures (SPS). The TBT agreement deals with government regulations on products, e.g., auto emission standards. The SPS agreement deals with government regulations on food safety and disease spreading products. The overlapping of the two agreements is avoided by excluding the matters covered by SPS agreement from the TBT agreement.

The WTO rules are based on a new principle of international treatment that a State should apply international standards to imported products. The principle admits of exceptions in two situations involving environment or health. WTO may permit the application to imports of standards more restrictive than internatio-nal standards only in situations involving environment and health.[10]

The States can apply their own environmental regulations to import of products only under two conditions. Firstly, the old GATT rules regarding national treatment must be met. National treatment requires that imported products must be given the same status as domestic products. Secondly, the WTO applies a new rule, often called the least trade restrictive test.

According to TBT agreement, national regulations shall not be more trade restrictive than necessary to fulfil a legitimate objec-tive of environmental protection or health.

The "least trade restrictive test" leaves an excessive degree of uncertainty and it is not known as to how the WTO panels will interpret the "least trade restrictive" test. It is for the Committee on Trade and Environment to fill the gap by formulating guidelines and principles for the application of the "least trade restrictive" test. While formulating the guidelines and principles, the Committee on Trade and Environment must take into account that environmental protectionism should not operate as a disguised restriction on international trade.

*(d) Environmental Subsidies*

The issue of environmental subsidies has witnessed controversy in the Uruguay trade negotiations. Environmentalists supported the inclusion of environmental subsidies in the Final Act. Environmentalists were confronted by other negotiators who argued that environmental subsidies would distort international trade and investment which would in turn nullify principle 16 of the Rio Declaration of 1992. Principle 16 of the Rio Declaration insists on the internalisation of the environmental costs taking into account that the polluter should bear the costs of pollution without distorting international trade and investment. The polluter pays principle holds that

10. Technical Barriers to Trade Agreement, Article 2, Paragraph 2.



the price of a good or service should fully reflect its cost of production and the cost of the resources used, including environ-mental resources. The task of reconciliation of the environmental subsidies with the polluter pays principle posed problems for the negotiators in the Uruguay trade negotiations.

Environmental subsidies could not be reconciled with the polluter pays principle by the trade negotiators. However, the effort to balance the need for environmental subsidies with polluter pays principle resulted in the inclusion of environmental subsidies in Part IV of the Agreement on Subsidies and Countervailing Measures (SCM). Article 8.2 (c) of the SCM Agreement permits the environment subsidies in the form of governmental assistance to promote the adaptation of existing facilities to new environmental requirements. However, the subsidies must be nonrecurring and must be limited to 20 per cent of the cost of adaptation. Such subsidies are defined as nonactionable.

Article 9 of the Agreement permits countermeasures to a member only if the environmental subsidy has adverse effect on the domestic industry of such member and the countermeasures are authorised by the WTO Committee.

## III. WTO And International Environmental Agreements

The issue of the relationship between the WTO and international environmental agreements assumes importance in view of the fact that certain environmental agreements contain trade provisions which are inconsistent with the WTO. The question is whether the WTO should be subordinated to or prevail over international environmental agreements in situations where these conflict with each other.

Article 4 of the Montreal Protocol on Substances that Deplete the Ozone Layer, 1987[11] requires each Party to ban the import of controlled substances from any State not party to this Protocol. It also bans the export of controlled substances to any State not a party to this Protocol. Each State party shall also discourage the export, to any State not party to this Protocol, of technology for producing and for utilizing controlled substances. Article 4 of the Montreal Protocol conflicts with the WTO's mandate of free international trade.

Furthermore, Articles 10 and 10A of the London Adjustments and Amendments of the Montreal Protocol of 1990 which deal with the grant of subsidies to the industrial sector of the developing countries in the form of financial assistance and transfer of technology also conflict with Article 8.2 (c) of the Agreement on Subsidies and the Countervailing Measures. Likewise, there are conflicts between intellectual property provisions of the Biodiversity Convention of 1992[12] and the Agreement on Trade Related Aspects of Intellectual Property Rights.[13]

26 International Legal Material 1541 (1987).
31 International Legal Material 822 (1992).
See *supra* note 7 at 1197.

The question is how such conflicts should be resolved ? The later-in-time rule of international law permits the trumping of the former treaty by the later.[14] By resetting GATT's date to 1994, the WTO trumps all the former environmental treaties that use trade measures and leapfrogs over them. The subject of the relationship of international environmental agreements with the WTO must be taken up on a priority basis by the Committee on Trade and Environment. The Committee must formulate the necessary guide-lines in this regard.

## IV. Conclusions

Environment shall be the biggest business of tomorrow. Greening of the market economy is the mandate of the time.Market economy should not only be free but green as well.

We should have economic growth but we cannot consume our assets. The most important asset that mankind has got is nature. It is the capital and we have to treat capital, the most valuable capital, carefully so that our children and grandchildren can live on that capital. We all are starting to learn that we have to take our mother nature as our most precious capital and that we should not consume capital. Every entrepreneur should be aware that he should not consume his working capital which includes a healthy environment. International trade is one of the means to achieve the end of sustainable development.

The creation of the Committee on Trade and Environment is the most significant accomplishment of the Uruguay Round to achieve the goal of sustainable development. The Committee on Trade and Environment must work in close association with the Sustainable Development Commission established at the U.N. Conference on Environment and Development and continue its efforts to reconcile the trade provisions of the international environmental agreements with the provisions of the WTO Agreement and other multilateral trade agreements. To save life on the planet earth the international community of sovereign States has been left with no choice but to employ the WTO as an agent of sustainable development.

14. Vienna Convention on the Law of Treaties, 1969 (entered into force on 27 January, 1980) 8 International Legal Material 679 (1969). Article 30 of the Convention provides general rules governing the relationship of successive treaties. When the provisions of two treaties are in conflict the later in time prevails, as between parties to both, unless one treaty expressly specifies otherwise. If a State is a Party to only one of the treaties; under Article 30 (4) (b) only that treaty prevails.

# LIBERALISATION, HUMAN FACE AND THE LABOUR JUSTICE SYSTEM

*Debi S. Saini**

## I. Introduction

Since the last fifteen years or so world economic scenario has been undergoing structural change. India is pursuing the New Economic Policy of Liberalisation in the form of Manmohanomics since July, 1991. "Flexibility", "competitiveness", "deregulation", "globalisation" have become new catchwords. A growing internationalisation of the economy is being witnessed. "Infringing upon national sovereignty and power of organised labour", among others, is tending to fundamentally affect the form and outlook of labour relations and labour law. The developed world too is facing rapid technological advances, market globalisation and shorter product life-cycles. They are facing competitive challenges not just from developing countries with low labour costs but also from the industrially advanced countries which have set new records in levels of productivity, product quality, innovation and flexibility as a consequence of new consumer preferences. Self reliance is becoming old fashioned and anti-modern.

Industry is increasingly indulging in competitive approaches so as to ensure low-wages strategy. Efforts are being made to avoid unionisation at new work sites so as to discourage union influence of existing plants. The value of union formation is being frowned upon by capital as "negative", and antithetical to efficiency and competitiveness; thus, they are in a state of deep crisis. Human resource management strategies are pursued by larger organisations to dilute union power and to individualise the collective labour law. In the U.S.A. too, both legal and illegal drives are being intensified to fight organising drives. A flourishing class of labour consultants is emerging to counter union-organising campaigns. It is estimated that 70 percent of the U.S. employers used outside consultants to counter union-organising campaigns and 40 percent of the workplaces are not able to secure a collective bargaining agreement with their employer after winning certification.[1]

In its attempt to reduce costs, there is increasing tendency on the part of managements to employ contingent, non-permanent employees in the form of part-time, temporary and contract workers. In the new dispensation egalitarianism is doomed and so are concepts like dignity of worker, human values, "countervailing power of people". All these concepts are viewed from the eye of the market. Society

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1. See P. Weiler, Governing The Workplace : The Future Of labour And Employment Law (1990); Also see Commission On The Future Of Worker-Management Relations : The Fact Finding Report (1994).

is tending to move from status to contract and in the sphere of labour-management relations is giving to managerial prerogatives and rationality. Taylorist work practices are showing tendencies of rejuvenation and internalisation. Industrial restructuring is threatening large-scale unemployment due to expected closure of sick industrial units.

The present paper seeks to analyse the human values dimension of the liberalisation policy in India. In this context are discussed the present structure of the labour justice system, the likely impact of liberalisation on it and a broad agenda for bringing about reforms in it.

## II. Crisis Of The Top-Down Model Of Indian Development

A bureaucratic framework usually involves a top-down model. After independence, the Indian state, under its tutelage, devised a massive programme of modernisation, reflecting Nehru's vision of a modern India. Jawahar Lal Nehru impressed by the modern West and sought to devise India's development vision through such a top-down model, which could be evident in all areas of public policy. The state was made the centre of national life. This dispensation conferred a massive role to central planning and the public sector. This ensured a key role to India's elite administrative service. Nehru's vision of India's modernisation was guided by his belief that "in a degenerate society with substandard "human material" a few enlightened men wielding political power offered the only hope of change".[2]

An over-expanding governmental involvement in social and economic life of people carries with it the dangers associated with bureaucratic maladministration. Bureaucratic administration is known to suffer from "the overdevotion of officials to precedent, remoteness from the rest of the community, inaccessibility, arrogance in dealing with the general public, ineffective organization, waste of manpower, procrastination, an excessive sense of self-importance, indifference to the feelings of convenience of citizens, an obsession with the binding authority of departmental decision, inflexibility, abuse of power and a reluctance to admit error".[3] Administrative law has been evolved — an unwritten law in India —to check bureaucratic misuse of power and executive lawlessness through judicial review of administrative action. But it does not include control of policy. Also, it is difficult to expect miracles from courts in this regard as tremendous grey area of residuary powers exists where misuse of authority is difficult to arrest through judicial review.

The Constitution of India assigned a massive instrumentalist role to the Indian State by obliging it to follow the goals of the Indian Republic as stated in the Preamble and the Directive Principles of State Policy. This meant strengthening the bureau-cratic network of the state. It is well known that Nehru's top-down model of development helped laying strong foundations of a vigor-ous liberal democracy, shaped vital legal

2. B. Parekh, *Jawaharlal Nehru and the Crisis of Modernisation* in U. Baxi and B. Parekh (eds), Crisis And Change In Contemporary India 43 (1994).
3. 26 Encyclopaedia Britannica 342 (19987).



and political institutions and strengthened the roots of Indian federalism. But this model of development gave tremendous powers to the bureaucracy which virtually became the "sole guardian of its [state's] collective interest".[4] A number of laws were designed and fitted in the legal framework of the Constitution. Among others,these laws envisaged regulatory organisations. Tremendous responsibilities were assigned and powers conferred to bureaucracy. Its thinking was dominated by a colonial mentality which could not motivate and take along masses in the development task. Parekh argues, since the bureaucracy could not execute the gigantic task it became "inefficient" and eventually "corrupt".[5] This happened in the area of labour bureaucracy as well. Some of the recent researches in this area reveal that instead of promoting industrial justice, the labour administrators colluded with employers and union leaders to work as saboteurs of labour laws.[6] They did power dispensation through structures created by the labour law system, in effect to control the labour power. This alliance involved, apart from employers and labour bureaucrats, even those who are adjuncts to the industrial justice system like certain outsider union leaders, management consultants and labour lawyers. The alliance has been found conspicuous at the conciliation, labour administration, exercise of reference power, strike prohibition, award implementation and general law and order maintenance levels.

The new instrumentalities of change carved out to transform a traumatically changeful, hierarchical, feudal society such as India did not work in the way they were intended to. Assessment —empirical and intuitive — of these politicolegal institutions revealed powerful gaps between promise and reality. The bureaucratic model so worked that, as Rajeev Dhavan has argued, "over the years, the Indian State has been directly or indirectly privatized to the use of some sectors of the political economy to the exclusion — or partial exclusion — of the other sectors".[7]

As is known, various institutions of the state are riddled with corruption,are susceptible to manipulation and have thus led to considerable distance between state and society. The present legal structuring projects that by holding on to liberal institutions and huge bureaucracies we can change the future of Indian masses. Rajeev Dhavan has argued that the bureaucracy as a part of the emergent class has contributed to corrupting the institutions to a point that they could not secure any substantive rationality to the Indian political economy. The working of our socio-political system has led to the emergence of a number of privatised interest groups in various parts of the political economy. In economic jargons they are described as rentseekers or quasi rentseekers.

Despite monumental legislative output merely an impression has gained ground that society cares for the poor and deprived; in effect, however, legislations are mostly

4. B. Parekh, *supra* note 2 at 45.
5. *Ibid.*
6. See. D.S. Saini (ed), Labour Law, Work And Development (1995).
7. M. Galanter, Law And Society In Modern India, *Introduction* XXXII (1989).

seen legitimating the status quo. Many legislations have facilitated the powerful to repress the poor and powerless. It is often discernible that "the same set of forces which ask for passage of certain social laws collude to sabotage the realisation of the goals of such laws... providing [in effect] only symbolic protection".[8] These very forces which "support the movement (of modernisation) and which are released by it defeat it from its apparent destination".[9] This is happening in the sphere of labour justice institutions as also in other areas of planned economic and social change. The Constitution of India promises the legal system to act as instrument of production of politics through an active utilisation of law as an instrument of change; but its working reveals that it is becoming an instrument of the dominant class and interest groups to repress the disempow-ered.[10] Our model of development has kept the masses at bay to watch their doom in bureaucratic processes and latent rentseeking collusions between power wielders.

## III. Liberalisation, Work Place And Human Face

Liberalisation and globalisation are being looked by same people at as means to faster development; restructuring of the economy and by using the potential of the infrastructural set up in a proactive way. But even the proponents of liberalisation do express their concern for liberalisation with a human face. It must, however, be remembered that looking at the way industrial restructuring and liberalisation are working at the global level in both the advanced and the developing world, the simultaneous commitment to liberali-sation and the concern for human face appears to be paradoxical and perhaps a wishful thinking. The proponents of the new economic policies thesis seem to simply wish away the fact that there was a labour aspect involved in the whole process of liberalisation. It is perhaps due to the fact that the most severe impact of the new thinking will be on the marginalised and deprived sections of the working class, who do not enjoy a modicum of power in the existing politico-legal dispensation, and thus can be ignored.

It appears in the enthusiasm to restructure, we are oblivious to the reality that the worker is somehow fading away. The kind of changes which are being heralded by the ensuing dispensation, it is certain that they will decisively register the subjugation of labour by the iron rule of capital. It is important that this subjugation is resisted or at least minimised through effective union power. However, the role of unions, world over including in the third world, is coming under renewed scrutiny. But despite all their limitations, unions are fundamental organisations of the working class which workers "cannot do without" if they have to resist exploitation by the

8. D.S. Saini, *supra* note 6 at XIX.
9. M. Galanter, *Justice in Many Rooms : Courts, Private Orderings and Indigenous Law, 19* Journal Of Legal Pluralism (1981).
10. M. Burawoy, The Politics Of Production (1985).



capital.[11] It has been rightly argued that it will not be right to ignore the emerging "employment patterns, changes in the labour process, class formations, trade union forms and practices, system of labour control, union-state relations due to changes in the international division of labour". We need to be concerned at the continuance and reemergence of Taylorist work principles which are applied by the capital in the emerging economic scenario. It is equally important that we understand the way in which the production shapes working class struggles and resistance to unilateral imposion of managerial rationality on issues concerning the work place.

It is noticeable that in the post-Reagonomics U.S.A.,"union membership has dropped to below 16 percent of the total labour force and 12 per cent of the private-sector labour force in 1994"; which was 35 per cent in 1954.[12] There are tremendous pressures on union practices and membership in the Indian case also, which will eventually lead to grave diminution of labour power.Our industrial jurisprudence has projected union formation as in inalienable right of the industrial workers, even as only less then 10 per cent of the country's work force of 306.8 million is organised.[13]

In a well argued human development critique of the new economic policy, Prayas Mehta has convincingly challenged the claims of its protagonists that a human face can be salvaged by carefully working the new economic policy.[14] He shows that in the atmosphere of "exit" and "downsising" which will result from the policy of privatisation, workplace and society as a whole may have to suffer moral and mental health problems which would suck into the self-esteem and self-efficacy of workers. This, he argues, would eventually hit their skills, capability and human development. Based on J.Walse,[15] Mehta Summarises the socio-psychological effects of the new economic policy as follows :

> (i) The unemployment rate in 1993 was about 11 per cent with nearly three million people out of work. (ii) A depressing loss of idealism has invaded the society. (iii) The permanently jobless youth have taken to crimes and vandalism .... (iv) The Thatcher Government ... corroded the society with grab-the-money ethic .... (v) General moral decay. (vi) Gains of productivity in the British industry have been achieved largely by sacrificing jobs rather than by boosting output through innovative work .... Public opinion surveys have revealed that nearly 50 per cent of the

11. P. Waterman, *The Labour Aristocracy in Africa : Introduction To A Debate, 6* Development And Change 3 (1975). Also see, R. Southall (ed), Labour And Unions In Asia And Africa : Contemporary Issues, *Introduction 6 (1988).*
12. T. Kochan and M. Weinstein, *Recent Developments in U.S. Industrial Relations,* 32 British Journal Of Industrial Relations 483-484 (1994).
13. Centre For Monitoring Indian Economy, Basic Statistics Relating To Indian Economy (1992).
14. P. Mehta, *New Economic Policy, Workplace and Human Development,* 29 Economic And Political Weekly 75 (1994).
15. J. Walse, *Isle of Despair,* Time Magazine (15 March, 1993).

working Britons would like to emigrate as ... Britain would become a worse country to live in.

Undesirable effects of unbridled individualism and consumerism in the Indian case could be gazed, for example, from the rat,race between private blueline buses plying on Delhi roads defying even a semblance of sensible driving, and killing on an average two persons every day and injuring many others. The "grab-the-money ethic" will surely lead to general moral decay, social unrest and acceleration in crime rates.[16] This would debilitate the working of the workplace and will be antithetical to human development. In U.S.A. due to the dismal effects of the working of the Reagono-mics, the Clinton Administration is putting labour market and workplace policies back on the national agenda. Shortly after Bill Clinton took office in 1993 he established the Commission on the Future of Worker-Management Relations under the chairmanship of former Labour Secretary John T. Dunlop.[17] It has been asked to consider means to (i) promoting employee participation; (ii) improve performance of collective bargaining law; (iii) facilitate resolution of workplace problems that now are subject to government regulations and court litigation. The final report of the Dunlop Commission is expected shortly. In its interim report the commission notes large-scale resort to unfair labour practices, legal and illegal efforts of employers to curtail trade union activity or avoid collective bargaining. The commission has also noted rise in litigation over employment disputes and that the government enforcement procedures are inefficient leading to delays. These developments are tending to put industrial relations issues back on the academic agenda in the U.S.A. and the developed countries after their clouding for more than a decade.

We thus notice that what is most important for us is a choice relating to value systems. It is not a simple choice between current economic policy and its alternatives. It is the people collective who should evolve the value structure. It is agreed that no constitution is immutable and can change as per the exigencies of time.But we must resist imposition of value structure by the funding fathers — the Breton Woods twins (the World Bank and the IMF). In a democracy, people must decide to optimise the welfare of society as a collectivity and not individual benefits resulting from unbridled individualism. It is time that we unbundle the structural adjustment package and rework it to accommodate the impoverished, their requirements for subsidies, and the value of dignity, freedom, autonomy, and freedom from dependency and subjugation.

## IV. Working Of The Labour Justice System

Before we deal with the question of reforms in the labour justice system, it should be appropriate to map out the arrangements which constitute this system and how they are working. The goals of the Indian labour justice system are discernible from the Preamble and Parts III and IV of the Constitution. The Preamble sums up

16. P. Mehta, *supra* note 14.

17. T. Kochan and M. Weinstein, *supra* note 12 at 484.



the constitutional vision and values; so important is considered the Preamble that the contents of the Constitution are treated as a "long massive footnote to the Preamble". It envisages the pursuit of Liberty, equality, justice, fraternity and dignity. Part III, among others, contains fundamental freedoms such as rights to equality (Art. 14); assembly (Art. 19 (i) (b)); association (Art. 19 (i) (c); occupation, trade and business (Art. 19 (i) (g)); protection of life and personal liberty (Art. 23); and prohibition on employment of children in factories (Art. 24 ). Part IV of the Constitution contains, among others, Directive Principles which relate to an adequate means of livelihood (Art. 39(a)); equal pay for equal work for men and women (Art. 39 (d)); protection of health and strength of workers and children (Art. 39 (e)); equal opportunity by the legal system (Art. 39A); just and humane conditions of work and maternity relief (Art. 42); living wage (Art. 43); and workers participation in management (Art. 43A).

A reading of the Constitution shows that it provides certain minimalist and ameliorative duties of the Indian state towards its working people.[18] We see in Directive Principles an incrementalist model of law as furthering the production of politics [referring to the term used by Burawoy] concerning "unorganised labour and weaker sections". To operationalise the constitutional vision a number of labour laws were passed by Parliament or existing labour laws were continued. The principal labour laws in India can be classified into four broad headings. First, the law relating to minimum conditions of employment can be said to consist of: the Factories Act,1948; the Mines Act, 1952; Beedi and Cigar Workers (Conditions of Employment) Act,1966; the Dock Workers (Regulation) Act, 1948; the Motor Transport Workers Act, 1961; the Plantation Labour Act,1951; the Working Journalists Act, 1955. The Contract Labour (Regulation and Abolition) Act, 1970; the Bonded Labour System (Abolition) Act, 1976; the Inter-State Migrant Workmen Act, 1974. Second, the law relating to wages and other monetary benefits consists of : the Payment of Wages Act, 1936; the Minimum Wages Act, 1948; the Payment of Bonus Act, 1965; and the Equal Remuneration Act, 1976. Third, the law of social security is contained in : the Workmen's Compensation Act, 1923; the Employees State Insurance Act, 1948; the Employees Provident Fund Act, 1952; the Maternity Benefit Act, 1961; the Payment of Gratuity Act, 1972; and the Public Liability Insurance Act, 1991. Fourth, the industrial relations law is contained in the Industrial Disputes Act, 1947; the Trade Unions Act, 1926; and the Industrial Employment (Standing Orders) Act, 1946.

On an analysis of these four sets of labour laws in India, we note that the first three contain a system of protective labour legislation. The labour bureaucracy was expected to supplement the instrumental role of these protective laws. The fourth, i.e. the industrial relations laws, mainly provide certain minimum conditionalities for a voluntary system of just sharing of gains of industry and failing which provides a framework of processing the disputes not settled by voluntary arrangements — these

18. U. Baxi, *Unorganized Labour, Unorganized Law* in D.S. Saini (ed), Labour Law, Work And Development 3-18 (1995).

include provision of union registration, precisely specifying the terms of contract of employment, and making a provision of form us for settling the dispute.

In plan and after plan the state emphasised labour laws as means to secure social justice to the working class. The academics as well as the judiciary repeatedly remind the executive that the constitutional scheme is a just conception of development. The labour bureaucracy has been conferred reactive as well as proactive powers and duties to operationalise the objective of these labour laws. Though not very many empirical accounts of the actual working of these laws are available, intuitive analyses abound. It has been argued that the working of these laws is far from satisfactory.[19]

For understanding of the working of the labour justice system, one can analyse its working in: a) transnational corporations; b) public sector industries; (c) large and mediumsised private sectors industries; (d) medium-and small-scale private industries with semi-organised work force; and (e) the unorganised private sector.

Geographically, the TNCs in India are largely limited to Calcutta and Bombay Industrial belts. In the private sector they are largely involved in chemicals, pharmaceuticals, light and medium engineering, food and various modern consumer products. It is well know that in the TNC sector there exists union rights to a fairly good extent which include recognition of unions, periodic wage settlements, voluntary dispute settlements, grievance procedure and general observance of labour laws. Alongwith large private sector industries especially in the Bombay region the TNCs are envied as "high wage islands"; though this picture is not even over the whole region. Negotiations have become the common method of dispute processing, and unions have often signed productivity deals, even as the incidence of strikes and lockouts among them is no less than that among other private sector industries. It can be said of this sector that the labour law framework has helped the working class in this sector to a great extent; the desire of voluntarism on the part of both the labour and management has not allowed labour bureaucracy to play any substantially negative role.

The working of the labour law system especially through the role of the judiciary in the public sector did make a meaningful impact in imposing fair and just procedural norms in industrial governance. But in the private sector industries even large organisations could still use the bureaucratised labour justice system to their advantage by entering into surreptitious deals with union leaders camouflaged under facades of legal forms. The role of the labour administration system in the small-scale and often in the medium-scale sector as well has been noted to be indifferent, fraudulent, or even tyrannical. In the area of implementing of minimum conditions of employment in the unorganised sector one can guess what kind of anarchy prevails. Typical bureaucratic syndrome, as identified in the foregoing paragraphs, can be observed at its pinnacle.

19. D.S. Saini and R. Advani, *The Constitutional Vision of Development, Unorganised Labour and Accessibility to Justice System* in D.S. Saini (ed), LABOUR LAW, WORK AND DEVELOPMENT 189-201 (1995).



## V. AN AGENDA FOR REFORM IN THE LABOUR JUSTICE SYSTEM

We do need to effect reform, among others, in the bureaucratised set up of the labour justice system including enforcing the minimum standards of employment. Moreover, the reforms suggested are not intended to serve the micro-objectives of the MNCs to further their pursuit of profit maximisation. Debureaucratistion, however, should aim at reforming arrangements and institutions so as to be conducive to the realisation of their objectives. We could briefly consider the suggested reforms for the unorganised and organised labour as follows :

a. Reforming the system must aim at making law (conceived as legislation, administration and adjudication) as instrumentality of production of politics for the impoverished sections and unorgani-sed labour. The first step in this direction, of course, is to so carve out our national agenda as not just to tolerate but to encourage organisation of the unorganised, so as to realise their civil and political rights. It requires not a repressive state but a state reflecting commitment to the values and convictions accepted in the Constitution.

b. Mere exhortations, including "a programme of social action or a Crystalclear instrument of instructions"[20] to administrators are not seen as producing results. But we need a model of law which truly "strives" and "endeavours" to realise the desirable and feasible goals. The programme of action must be proactive. This essentially requires involvement of representatives of concerned people in the implementation programme. This will help flight bureaucratic inertia and corruption. Peoples participation in all aspects of life including economic and political realms are necessary for building a just society .

c. A programme of action such as enforcing minimum standards of employment requires "constant monitoring of its implementation" and "a continued" review of legislative and administrative performance.

d. We need an integrated approach to legal protection for the unorganised. At present the labour laws are piecemeal, numerous and complex. There is need for condification for amelioration of the unorganized labour.

e. In the organised sector, the point of utmost importance is restoring autonomy of labour administrators and adjudicators, and delinking them from the state apparatus. Also, there is need to make these bodies as consisting of multiple people including those possessing professional competencies. The history of Indian industrial relations shows it is most difficult to come by.

f. As is noted above, in relation to the liberalised framework in the U.S.A., a large number of outside consultants have emerged in the industrial relation scene to guide the employers towards subverting the labour law framework. This would lead to further juridification of the system and make the position

20. See. Baxi, *supra* note 18 at 11.

of individual worker and labour collectives further vulnerable in India as well. If liberalisation must succeed, this must be the most serious area of concern for all sympathisers of the labour class. The state must take effective measures to avoid this situation.

g. The Bonded Labour System (Abolition) Act, 1976 can be described as a fine piece of a social legislation. It involves the community in its administration. There may be a number of environmental variables which dilute its efficacy in the abolition of the bonded labour. But this type of community involvement even in the enforcement of other labour laws can have a general salutary effect.

h. A greater use of public interest litigation and a greater role of legal aid committees should also be attempted as a short term measure of empowering labour in the matter of implementing mini-mum conditions of employment.

# INTELLECTUAL PROPERTY TAXATION IN FREE MARKET ECONOMIES

*Rajesh Sharma.* *

Intellectual property law, which is related to patent, copyrights, trademark and allied rights,is a strong force pulling countries together. Readily transferred and easily multiplied intellectual property holds great promise for breaking down barriers, building economies and bridging ideological differences and distances between nations.

The fast growing importance and impact of intellectual property in the business world is becoming more evident today. The more intellectual property rights are acknowledged and protected the more they will be used as a key element of business. Intellectual property rights are one of the means to achieve globalisation of economies. Globalisation of economies in its widest sense includes the giving of an equitable portion of profits from global business to every country. The sharing of profit is not limited to individuals but it also includes a government. It gets its portion of global profit by way of taxation. To impose tax is a sovereign right of a state. It is one of the major sources of revenue. It helps a country in achieving the proper standard of economic growth, high employment and appropriate control over the financial activities of businessmen and entrepreneurs. The government always looks for a new basis on which tax can be charged. As the number of tax bases increases the rate of tax lowers down which auguments the investment and reduces the frustration of tax payers.

In this regard, intellectual property provides a solid base for taxation by which a state can generate a considerable amount of revenue. Taxation of intellectual property rights is justified because when a country provides ample protection against infringement of those rights as a matter of duty then it has every right to generate revenue by imposing tax on their commercial exploitation. Tax is not usually imposed directly on any intellectual property itself but it is levied when a right in an intellectual property is transferred from the holder of the right to another.[1] The transfer of such rights attracts tax provisions which apply according to the nature of the transfer.

An intellectual property may be transferred by way of sale, assignment and licence. When all rights pertaining to any intellectual property are transferred forever, it is called a sale. If the right is transferred only for a limited period of time, it is called an assignment. And when only the right to exploit or use of an intellectual property is granted, it is called a licence.[2] Since the terms of sale,

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1. A Shipwright and J.W. Price, UK TAXATION AND INTELLECTUAL PROPERTY 69 (1989), *(Hereinafter* "Shipwright and Price").

2. Licensing is the most common method by which an intellectual property is commercially exploited. Through licence the right to use is acquired by the third party which otherwise could be prevented by law. In licensing agreement all other rights still remain with the owner. An assignment agreement involves the outright transfer to a purchaser. See A. Pickford and D. Harris, TAXATION OF INTELLECTUAL PROPERTY 2 (1993).

assignment and licence are very crucial in determining the real effect of transfer, so it is important to scrutinise those terms very carefully otherwise it may slip out of the tax net.

It is important to note that taxation of intellectual property presupposes the identification and valuation of intellectual property before it can be subjected to tax.[3] Due to a lack of awareness most businessmen do not know exactly what are the intellectual property rights they possess. In this situation, valuation of those rights will become even more difficult. In these circumstances, general tax laws may be ineffective to recognise them as a source of revenue. Thus, taxation of intellectual property includes three stages, i.e. identification, which can be done by looking at the intellectual property laws, valuation of intellectual property by standard accounting method, and finally determination of the question whether the tax law applies or not.[4] Thus intellectual property laws, accounting methods and tax laws apply together in the taxation of intellectual property. This suggests why a close examination is required in the area of intellectual property taxation. It also suggests for creation of a new tax regime of intellectual property. It is needed to create an awareness of intellectual property rights (a solution for identification problem). Secondly, it is needed to propagate a new method of accounting for intellectual property so that appropriate consideration may be obtained when transferring those rights and also maximum tax benefit can be availed (a solution for the problem of valuation). Thirdly, it will generate revenue for a country.

This paper starts with the discussion on the role of taxation in free market economies together with the basic characteristics of market economies and tax system. To understand the basic mechanism of intellectual property taxation more clearly, the second part of this paper looks at the accounting practices of the UK and the USA and highlights the problems related thereto which affects the proper functioning of the tax regime. The focal point of the paper is concentrated on the third part which deals with the legal issues involved in the area of intellectual property taxation. These issues and related problems are discussed by taking examples from Hong Kong. This paper concludes with a suggestion for having a standardised and unified tax regime for intellectual property which would be conducive for free market economies.

## I. The Role Of Taxation In Free Market Economies

Any economic system which is governed by market forces is called the market economy. In other words, in market economy all economic operations are organised via market mechanism and the market plays a basic role in resource allocation.

3. For underline theory of commercial exploitation of intellectual property and policy of imposing tax on those transactions, see R. J. Gallafent, N.A. Eastaway and V.A.F. Dauppe, Intellectual Property : Law And Taxation 59-62 (1992).
4. *Id.* at 59-60.



Under free market economy conditions, taxation is a means by which the state redistribute social products and raise public revenue.[5] At the same time the state regulates social production at all stages through taxation since it is directly controlled by the state. Taxation plays such a role in an economic system that no other administrative measure or economic lever can replace. Particularly in any country which is changing from the planned economy to market economy system (such as China), taxation, undoubtedly becomes one of the most important macro control means of the state, since it possess both legal status as well as economic regulating functions.[6]

Generally speaking, taxation plays the following functions in a free market economy:

a) guaranteeing the healthy operation of a market economy;
b) promoting the formation and perfection of market mechanism;
c) regulating social distribution for the purpose of reaching common prosperity and limiting the negative effects of a market economy.[7]

If taxation as such is so important in free market economies, the importance of intellectual property taxation becomes even more important. Because it deals with those elements which shape the market economic system. Any transaction of intellectual property rights influences market forces and by imposing tax on that transaction public revenue is raised for a state. Thus the role of intellec-tual property taxation becomes very delicate and complicated in free market economies.

Before a tax regime works effectively in a market economy some basic conditions must be satisfied without which the tax system would be of no use. These conditions are:

1. all economic activities must be directly or indirectly placed within the market relationship.
2. all enterprises must have enough autonomy to do their business and must bear the obligation of paying tax in accordance with the law. They must undertake the responsibility of accounting for their own profits and losses.
3. the government instead of interfering with the day to day business activities of enterprises should regulate and standardise the operational activities of enterprises through financial, taxation, price and banking policies.

5. The same is true in the country like China which practices the idea of "socialist market economy". Theoretically there may be differences between a "free market economy" and "socialist market economy" but practically there is no difference between the two. For example, India has embarked upon the practice of "free market economy" but the ultimate aim is the same as that of the "socialist market economy".
6. See Xu Shanda and Ma Lin, *Market Economy and Tax Reform In China, 222* World Bank Discussion Papers 69 (1993), (*Hereinafter* Shanda and Ma).
7. *Ibid.*

4. all business operations must be conducted in accordance with laws and regulations.[8]

At present many developing countries, such as China and India, are transforming from the planned economy to a market economy. At the same time they are pressurised by the developed countries to make their laws adequate according to the international standards.[9] As developing countries are now providing enough protection for intellectual property rights,[10] they should enjoy the right to impose tax on such intellectual property if it is commercially exploited in their region so that they can enjoy their share of profits from the global economy.

Intellectual property transfers give rise to significant income tax consequences for both the transferor and the transferee. It is important that each party to a transaction must understand the tax consequences in calculating the anticipated cost and rate of return on the transfer by sale, licence and assignment of its intellectual property rights. The tax issues from the point of view of transferor are:

a) characterisation of the transfer, i.e. whether the transfer is a sale, licence or assignment ;
b) tax consequences of the transfer ;
c) immediate and deffered imposition of tax on the transfer ;
d) eligibility of the transfer for long term capital gain treatment.[11]

Since the transferee is concerned with the extent and timing of the deductibility of payments the tax issues from his point of view are:

8. *Id.* at 69-70.
9. The US government often criticises China for not having a proper intellectual property laws or effective sanction mechanism against the violation of intellectual property rights. Every year the US government threatens to impose trade sanction against China as there is a gross violation of copyrights in the territory of the People's Republic of China. It is also alleged that the Chinese government is unable to protect copyrights. Being pressurised by the US in 1992 China had to sign a *Memorandum of Understanding on the Protection of Intellectual Property* to avoid "Super 301". After considering the length and breadth of China and ignorance of the intellectual property rights among businessmen, general public and the enforcing agencies it can be said that the alleged violation of intellectual property rights in China is because of ignorance rather than deliberate. See Wang Guiguo, WANGS BUSINESS LAW OF CHINA 439 (Student Ed, 1996).
10. With an intention to bring its intellectual property laws in line with the international practice China has now revised its relevant laws. For example, the Trademark Law of the People's Republic of China was first adopted in 1982 which was further amended in 1993. The corresponding Implementing Regulations were first adopted in 1983 whcih were amended three times in 1988, in 1993 and in 1995. The latest amendment was made in May 1995.
11. For a detailed discussion on these points see, J.E. Olson, FEDERALTAXATION OF INTELLECTUAL PROPERTY TRANSFERS (1995).



a) whether the transfers was a sale or licence or assignment, i.e. characterisation of transfer ;
b) deduction of payments made for the transfer of intellectual property rights and eligibility for the relative tax deductions;
c) amortisation of purchase price (for intangible properties instead of instant depreciation generally amortisation is available which varies from 5 to 40 years depending on jurisdiction).[12]

In any intellectual property transfer the income tax consequences depend on whether the transfer is a sale, or it is the transfer or assignment of a licence.[13]

As stated above intellectual property taxation is a delicate as well as complicated issue in the free market economy. It can affect market forces and government exchequer together. Since the intellectual property taxation regime is in its nascent stage, it suffers from peculiar difficulties. These difficulties are its accounting practices and applicable tax law on it. This has been discussed below. First the prevailing practices and laws are discussed and during discussion lacunas under those practices and laws are also pointed out.

## II. INTELLECTUAL PROPERTY AND ACCOUNTING PRACTICES

Financial statement of any company is enough to give all information about the company. It is like a magic mirror which can show innermost or hidden picture of a company. For practical purposes it separates 'wheat from the chaff' which facilitates the valuation process. But this basic theory of accountancy becomes inadequate as far as the valuation of intellectual properties are concerned.[14] Every business concern has some intangible assets or intellectual property but either due to ignorance or lack of knowledge these assets are generally not mentioned in the financial statement of a company.[15] It also reflects the prevailing uncertainties created by the

12. *Ibid.*
13. See Gallafent, Eastaway and Dauppe, *supra* note 3 at 59-62.
14. The two basic elements of a balance sheet are assets and liabilities. Accounting principles require that the assets and liabilities of a business must be equal, so the balancing amount is the equity, or net assets of the business. For details about the characteristic of these elements in American perspective see *Statement of Financial Accounting Concepts*, 6 FINANCIAL ACCOUNTING STANDARDS BOARD 10 (1985) (*Hereinafter* "FASB Statement No. 6").
15. According to Section 482 of Internal Revenue Code, the term "intangible asset" means any commercially transferable interest in any item included in the six classes of intangibles that has substantial value independent of the services of any individual. The six classes of intangibles include among others: patents, copyrights, trademarks, franchises, licences, methods programmes and other similar items.

Intellectual properties constitute the subset of intangibles which is distinguishable in the context of licensing. Intellectual properties are legally protected and can be transferred by way of licensing. However, not all intangibles (e.g. management experiences) can be readily licensed or legally protected. See Merck & Co. *v.* United States, 91-2 US TAX CASES. 456 (Cl. Ct. 1991).

subjectivity involved in the decision as to whether a transaction has resulted in the creation of asset or liability.[16] This uncertainty ultimately affects the taxation of those transactions. If any intellectual transaction does not adequately appear in balance sheet either as an asset or as a liability, it would be impossible to levy tax on that transaction. We do find goodwill in the financial statement of a company. Sometimes intellectual properties or intelligible assets are mixed with goodwill and stated under that head.[17] Very often we find that the vital ingredients of business intellectual properties are missing from such financial statements. The failure of accounting practices to adequately reflect intangible assets and intellectual property in financial statements nearly always understates the amount of investor equity, and in some cases dramatically.[18]

Failure to include intellectual properties in the financial statement shows the lacuna in the accounting principles which guides the preparation of financial statements. Particularly in late 1960s when the "merger mania" was going on, the government authorities, the accounting professionals and the securities and exchange commission were forced to face the issue of how to account for acquired intangibles in order to prevent what they perceived was potential for misleading financial statements, as business executives were directing their companies' resources into acquisitions with the objective of reducing taxes and enhancing earning per share.[19] To plug the loop holes of this accounting practice the Accounting Principles Board of America came out with a practice which dealt with the acquisition of intangibles as a part of business combinations.[20]

According to the new principles when intangible asset is purchased separately from a business combination its cost is recorded as an asset. When specifically identifiable intangible assets are purchased as a part of a business combination their cost for future accounting purposes is represented by their value at the time of acquisition and they are amortised over their estimated

16. Uncertainty about economic and business activities and results is pervasive, and it often clouds whether a particular item qualifies as an asset or a liability of a particular enterprise at the time the definitions are applied. See FASB Statement *supra* note 14 at 15.

    These uncertainties due to subjectivity have been accepted but they are criticised by the academicians as they paralyse the decision about whether to reflect economic worth in the financial statement of an enterprise. See G.V. Smith and R.L. Parr, INTELLECTUAL PROPERTY : LICENSING AND JOINT VENTURE PROFIT STRATEGIES 46 (1993).

17. Now it has been established that goodwill is different from intellectual properties. Sometimes both mingle with each other and then it becomes difficult to separate them. Details of this position will be discussed later.

18. R. Greene, *Equitable Equity*, FORBES 83 (11 July, 1988). He also quoted a statement of professor Alfred Rappaport "as we become a more information intensive society, shareholder's equity is getting further away from the way the market will value a company".

19. See Smith and Parr, *supra* note 16 at 47-48.

20. See, Opinions of the Accounting Principles Board (of the American Institute of Certified public Accountants 1970). Generally referred to as APB 16 and APB 17.



useful lives.[21] Also it became necessary to appraise the "Plant, Property and Equipment" of the acquired company together with any identifiable intangible assets such as contracts, patents and franchises, whether or not they were recorded on the balance sheet of the acquired company.[22]

According to Generally Accepted Accounting Principles (GAAP), intangible assets whose existence is to be recognised on a balance sheet of an ongoing business must have certain characteristics: Identifiability (e.g. patents, copyrights, franchises, trademarks), Manner of acquisition (Purchased or developed internally), Determinate or Indeterminate life (e.g. patents are issued for 17 years but goodwill has no determinate life.), Transferability (the rights of patent, copyright, franchise can be separately identified and bought and sold but goodwill is inseparable from a business).[23] Intangible assets which appear on the balance sheet may be subject to amortisation (capital recovery), if they are determined to have a reasonable economic life.

Accountants always find themselves in dilemma as how to treat the cost of intangible property in financial statements particularly when expenditure was made for research, a training programme or advertisement materials. The essence of the question is, whether the expenditure created an asset that will have some benefit to the enterprise beyond the current period. If it will, then accounting theory would require to match revenues and expenses as closely as possible and therefore capitalise and amortise the amount.[24] This is one of the problems of accounting methods regarding intangible assets. It can be better explained by the following example. In 1993, a share of Coca Cola Co. common stock was priced in the market at $ 43.13. With almost 1.3 billion shares of stock outstanding, the equity of the company had a market value of over $ 55 billion. at the same time, the amount recorded in Coca Cola's books for its equity was about $ 4.6 billion. So the bottom line question was why there was a difference of opinion between investors and accountants? According to accounting principles the amounts spent over the years by the Coca Cola Co. in advertising, promotion, product development and quality control were "in doubt" as to their future benefits and were therefore expensed when incurred. Investors, on the other hand, by pricing Coca Cola stock the way they do, implicitly recognize the value (and the earning power) of the brand asset that has been created over the years by these expenditures. Their outlook is more representative of the way Coca Cola's financial statement would appear if the expenditures had been capitalized over the years.[25]

21. See APB 17.

22. *Id.*

23. M. A. Miller, MILLER COMPREHENSIVE GAAP GUIDE 21.02 (1987). Smith and Parr (*supra* note 17) criticised these standards that they are so narrow that intangible assets or elements of intellectual property ever are reflected on a balance sheet. *Id.* at 52.

24. Smith and Parr, *supra* note 16 at 52-53.

25. *Id.* at 53.

All of the major industrialised countries either allow or require the recognition of purchased identifiable intangible assets and their subsequent amortisation. Specifically with respect to brands, only the UK and Australia permit capitalisation of internally developed brands, though under the alternative valuation rules of the EEC 4th Directive, current cost valuation of intangibles is permitted.[26]

The UK Companies Act permits firms to include intangible assets in their accounts.[27] Following that Ranks Hovis McDougall, valued their brands at # 678 million in its 1988 balance sheets. This practice put UK in troublesome position because it raises two important questions:

1. Should intangible assets created by a business enterprise be reflected as assets on the balance sheet?
2. If these assets are to be reflected, should they be amortised against earnings?

Both of these questions are being addressed in various parts of the world and quite different answers are emerging. At present, UK companies who have put brands on their balance sheet have answered these questions in "Yes" and "No" respectively, and are getting a "free ride", improving the appearance of their capital structure without reducing reported earnings.[28]

The US accounting rules require this amount to be reflected on the balance sheet as goodwill, and amortised over a period of years. This reduces reported earnings which cannot be taken lightly.[29] The UK companies restore the equity amount by revaluing assets particularly by revaluing those intangible assets and intellectual property which are already on the balance sheet.[30] Now the UK directors have taken position that brands are eternal and should not be amortised just to ensure that their current strategies must not result in lower earnings due to amortising these

26. *Id.* at 54.
27. Companies Act, 1985 balance sheet formats include, within the permitted fixed asset categories, "development costs" and "concessions, patents, licences, trade marks and similar rights and assets". These categories are used to record the historic cost of relevant assets which, by their nature, will generally have a determinable finite life over which amortisation through the profit and loss account is provided.
28. The UK accounting rules allow an acquiring business, if it pays more than the net asset value of the target, to write off the excess against common equity. That is, the equity of the combined entity is reduced by the amount of excess.
29. This can be well explained by the example that Phillip Morris Companies Inc. is reportedly amortising the $ 11.6 billion goodwill allocation that resulted from the purchase of Kraft, Inc. at an annual amount of $ 290 million, which reduces earnings per share by £ 25. UK acquirors do not suffer this reduction in earnings.
30. The Companies Act, 1985 permits revaluation of intangible assets only on the basis of current cost. For further discussion on this point see A. Simmonds, *Goodwill and Intangible Assets : New Proposal for Accounting Reform*, 1 EUROPEAN INTELLECTUAL PROPERTY REVIEW 34 (1995).



new assets on the balance sheet.[31] Putting brand name on the balance sheet by the UK company was vigorously criticised by the Accounting Standard Committee and other groups too.[32]

Although constant efforts are being made to standardise accounting practice of intangible and intellectual property which could be acceptable by all, still long way to go to reach to a agreeable position. This confusing state will not only hamper the business operation but it would also open a flood gate to flush out government revenue by way of tax avoidance. No matter which method of accountancy is employed by a country but for tax purposes every transaction of intellectual property must be listed in the financial statement of a company. If we follow the UK practice, where intangibles and intellectual property are clubbed together with goodwill and treated accordingly (i.e. elimination of intangibles from the balance sheet), it would undermine the importance of intellectual property as such.[33] In the present market economies it is hard and difficult to ignore the commercial viability of intellec-tual property. In the USA intangible and intellectual property are treated separately from the goodwill. Under this practice the main problem is to identify the separable intangibles and their valuation. Both practices have some positive and negative aspects. It is very difficult to reconcile these two concepts and reach to a unified principle. This has a detrimental

31. See Smith and Parr, *supra* note 16 at 57.
32. A team from the London School of Business acting for the Institute of the Chartered Accountants, has concluded that putting brand on the balance sheet is, in the words of Hamilton Burger to Perry Mason, "irrelevant, irresponsible, and immaterial". Its report further says: "UK accounting practice is out of line with international practice both in terms of accounting treatment of goodwill, and in terms of companies' ability to recognise brands". The central conclusion of the report states that neither internally created nor acquired brands should be recognised on the enterprise's balance sheet.The report also objected the valuation practices of the brands because they are unable to separate the value of brand from the rest of the organisation and from goodwill. Also the means by which the brands could be amortised has created problems for the authorities as current U.K. accounting does not require any amortisation of the amount associated with brands. The report concludes that they should "be amortised over a fairly short period probably not exceeding 5-10 years". A very recent contribution to this debate was forwarded by the Australian Accounting Research Foundation (AARF) inits Exposure Draft 49. The relevant points made therein are as follows :

1. Acquired intangible assets must be recognised in financial statements at their cost of acquisition.
2. Internally generated intangible assets qualify for recognition in financial statements.
3. Periodic-revaluation of these assets is permissible.
4. Identifiable intangible assets must be amortised over the period of time during which the economic benefits of ownership are derived.
5. All valuations must be carried out by an independent professional expert.

33. Some writers have suggested a different interpretation to the UK accounting practice which argues that only those intangibles are required to club with goodwill which cannot be separated from that. At the same time it divides intangibles in three categories separable, separate and not separable intangibles (more or less like the US practice). For an alternative approach towards the UK practice see A. Simmonds, *supra* note 30 at 38.

effect on the operation of tax laws. Unless and until intellectual properties are mentioned in the financial statement of a company it can not be taxed or deducted from the taxable amount. Since intellectual property transaction has crossborder effect the two accounting principles often create problem. It is also a hurdle in the way of adopting a tax regime for intellectual properties.

## III. Taxation Of Intellectual Property : Legal Issues

Tax law does not look into the real transaction of intellectual property rights.[34] It only considers the amount of royalties coming out from those transactions. Due to this faulty practice many intellectual property transactions slip out of the tax net and cause loss of revenue for a state. Secondly, tax laws are not complete enough to cover all types of intellectual property transactions. For example, there is no specific tax legislation in the UK dealing with income from trade marks, service marks and designs.[35] So most of the companies attach a high value to trade marks, service mark and designs to avoid the deduction of tax at source. In the case of trade marks and service marks, the life is indefinite.[36] Another example may be found in the Chinese tax laws. In the new Individual Income Tax Law of the People's Republic of China,[37] incomes derived from royalties,[38] leasing of property[39] and assignment of property[40] are taxable. The Detailed Rules for the Implementation of the Individual Income Tax Law of the People's Republic of China[41] provide further explanation regarding above mentioned taxable income in the new IIT. The new Regulation has incorporated trade marks as a source of royalty income.[42] Although the new IIT has included "assignment

34. It has been seen under the accounting principle that how transactions of intellectual property rights are reflected in the balance sheet of a company and the related problems thereto. If these transactions will be placed in the wrong side or mixed with other intangibles and thus eliminated from the financials of the company then that cannot be taxed under prevailing laws. See *supra* text regarding relationship between accounting methods and its implication on taxation.

35. This is the reason why there is no capital tax, no capital allowance or no withholding tax in the UK on the transaction of trade mark, service mark or design. If the royalties are paid on annual basis then the withholding of tax will apply. See Gallafent, Eastaway, Dauppe, *supra* note 3 at 93.

36. *Ibid.*

37. Originally this law was adopted on 10 September, 1980 at the Third Session of the Fifth National People's Congress (*Hereinafter* the "old HT".) This law was amended on 31 October, 1993 in accordance with the "Decision on the Amendment of the Individual Income Tax Law of China" of the Fourth Session of the Standing Committee of the Eighth National People's Congress (*Hereinafter* the "New IIT".)

38. *Id.*, Article 2(6).

39. *Id.*, Article 2(8).

40. *Id.*, Article 2(9).

41. the old regulations were promulgated by the Ministry of Finance on 14 December, 1980 (*Hereinafter* the "Old Regulations"). The new corresponding regulations were Promulgated on 28 January, 1994 by the Ministry of Finance. (*Hereinafter* the "new Regulation".)

42. See Article 8(6) of the New Regulations. It is noted that in the Old Regulations "trade mark" was not mentioned which reflects that the Chinese authorities did not consider it as a source of income and thus they had been loosing revenue for the last 14 years.



of property" as a new source of income but its corresponding new Regulation has failed to include intellectual property in its definition.[43] It shows ignorance or undermining of intellectual property as a source of income. The root of this problem relates to the definition of "property" which is prevalent in China. Since these concepts are new for China so they are not reflected in the legislations but it is anticipated that these problems will very soon be overcome by the Chinese authorities as it has been done in case of royalty income.[44]

The other problem is the determination of jurisdiction. In some cases due to cross border effect of intellectual property trans-action it is very difficult to determine which country has jurisdiction to charge tax on those transactions. For example, an assignment of a trademark executed in one country but registered and intended to exploit in another country, in this case which country has jurisdiction to charge tax is an issue to be discussed in details. Thus the basic question is related to the source of income. To determine the source of income in case of an intellectual property transaction is also a complicated issue. This is explained below through Hong Kong cases.

Currently Hong Kong practices schedular tax system like the UK.[45] In schedular tax system unless and until an income falls under any of the schedules it cannot be taxed.[46] Another feature of the Hong Kong tax system is that taxes are levied only on the Hong Kong sourcebased income.[47]

In 1985, the High Court of Hong Kong in *Sinolink Overseas Ltd.* v. *CIR*[48] ruled that for a merchandising operation the pre-and-post contract activities as well as the

43. In the old ILT "leasing of property" was there but its assignment was not included. In the old Regulations the examples of property includes buildings, machinery and equipment, motorised vehicles and boats and other kinds of property. This definition is still same in the new Regulations. See Article 8(8) of the new Regulations.

The assignment of Property includes: assignment of marketable securities, share rights, buildings and land use rights, machinery and equipment, motor vehicles and ships and other property. See Article 8(9) of the new Regulations.

44. The definition of "property" is not very clear in China because earlier there was no concept of private ownership of property in China. Now since China has adopted the "socialist market economy" concept the laws related to private ownership of property or the Western definitions of "property" are emerging in China.

45. This system will continue, even after the hand over of the sovereignty of Hong Kong to China, for at least 50 years as is guaranteed by the Basic Law of the Hong Kong Special Administrative Region. See Article 5 of the Basic Law.

46. According to Inland Revenue Ordinance, 1947 different types of income are charged under the category of Property Tax, Salaries Tax, and Profit Tax. In addition to these taxes Stamp Duty and Estate Duty are also charged in Hong Kong.

47. For the detailed discussion on the features of Hong Kong tax system and its post 1997 situation see R. Cullen, *Hong Kong Revenue Law—the Present, 1997 and Beyond*, 7 Tax Law International 1109 (1993).

48. 2 Hong Kong Taxation Cases 127.

making of the purchase and sale contracts had to be scrutinised to ascertain the true source of the trading profit. Although Hunter J., in delivering his judgement, explicitly stated that the decision should not be used as a precedent, both the Inland Revenue and the Board of Review relied on this case when determining the source of a profit. This "total operations" approach created uncertainties as to which factor carried more weight in determining the proper source of profit.[49]

In *CIR* v. *Hang Seng Bank Limited*[50] the court held that profits earned from the buying and selling of overseas securities by a Hong Kong tax payer through its overseas agent were not subject to Hong Kong profits tax, even though no branch was maintained by the tax payer outside Hong Kong. In reaching its decision, the Privy Council stated that it was the place where the critical events took place to earn the profits which determine their source of profits. This case emphasised on two things, first to scrutinise individual transaction/s which give rise to profit and then to determine the geographical place where such transaction/s took place.[51] The decision removed most of the doubts then existing in the minds of tax practioners on the proper principles to be applied in determining the source of profits-doubts shown by the *Sinolink* case.[52]

The *CIR* v. *HK-TVB International Limited*[53] deals with the issue related to the source of income in an intellectual property transaction. In this case the court considered a fact pattern different from that in *Hang Seng Bank*. The facts of the TVB case were that a Hong Kong incorporated company (TVBI) was carrying on business in Hong Kong. A related company, HK-TVB Limited, granted TVBI the exclusive rights to broadcast and export television films and to grant sub-licences to others outside Hong Kong for a fee. The issue was whether the fee income TVBI received through this sub-licensing to overseas customers was subject to tax in Hong Kong. This issue was determined by considering the true source of the fee income. The Privy Council was of the view that since TVBI was a Hong Kong based company carrying on business in Hong Kong, its acquisition in Hong Kong of the right from TVB-HK to exhibit and sub-licence films and programmes to overseas customers were the most important factors in the earning of the profits concerned.

The Privy Council rejected TVBI's argument that the exploitation of the rights outside Hong Kong was the crucial factor in earning the profits, given the absence of any financial interest on the part of TVBI in that exploitation of the rights. In simple terms, the Privy Council was of the view that TVBI had effectively earned the profits

49. See P.L. Tosi, *Source of Profits*, ASIAN LAW JOURNAL 37 (October 1992).

50. 3 HONG KONG TAXATION CASES 351.

51. See HONG KONG MASTER TAX GUIDE 1995/96, 140.

52. See Tosi, *supra* note 49 at 37.

53. See HONG KONG TAXATION CASES 468. This case was considered four times bydifferent tribunals and courts, and the decisions were reversed each time. the TVBI won this case in Board of Review and Court of Appeal while the CIR won in the High Court and finallyin the Privy Councill.



by carrying out the profit earning activity in Hong Kong. In making this determination, the Privy Council considered the following factors relevant:

a) the negotiations for sub-licensing the rights were conducted between TVBI and its overseas customers in the country of the customer;

b) the broadcasting of the rights granted to the customers under the sub-licences were exercised outside Hong Kong;

c) the fee received by TVBI, which was unrelated to the profits earned by TVBI's customers, was either agreed at the time of the contract negotiation or subsequently by telex;

d) contracts were generally prepared by TVBI in Hong Kong and were subject to Hong Kong Laws;

e) the work in connection with transferring the footage from film onto video cassettes and for dubbing was all done in Hong Kong;

f) the films were then dispatched to TVBI's customers from Hong Kong;

The Court of Appeal, in giving its decision in favour of TVBI, ruled that TVBI carried on marketing activities outside Hong Kong resulting in agreements for the sale or sub-licensing of intellectual property rights which were exercisable only outside Hong Kong, the profit derived should also be from source outside Hong Kong and were therefore non-taxable. This judgment was in line with the previous Privy Council decision in Hang Seng Bank case where it determined that the profit source was the place or places where the most important events had taken place rather than focusing exclusively on the fact that Hang Seng Bank had a place of business in Hong Kong. The Privy Council then overruled the Court of Appeal in TVB by putting more emphasis on the activities of TVBI in Hong Kong. In TVB, the Privy Council has said quite simply that the activities or operations that in reality gave rise to the profits all took place in Hong Kong. The final appellate tribunal took a view of what the taxpayer did to earn the profits than did the Court of Appeal. Thus, the Privy Council once again confirmed that a permanent establishment offshore is not a precondition to a successful offshore profit claim.

On the basis of the Privy Council's decision in the Hang Seng Bank case and TVB case the Inland Revenue Department issued a Departmental Interpretation and Practice Note No. 21 in which it has laid down six basic principles which, according to the IRD, emerged out of those two decisions. These Principles are:

(i) The question of locality of profits is a hard, practical matter of fact. No universal rule will cover every case. Whether profits arise in or are derived from Hong Kong depends on the nature of the profits and the transactions giving rise to them ;

(ii) the broad guiding principle is that one looks to see what the taxpayer has done to earn the profits in question and where he has done it. In other words, the proper approach is to ascertain what the operations were which produced the relevant profits and where those operations took place;

(iii) the distinction between Hong Kong profits and offshore profits is made by reference to gross profits arising from individual transactions ;

(iv) in certain situations, where gross profits from an individual transaction arise in different places, they can be apportioned as arising partly in and partly outside Hong Kong;

(v) the place where day-to-day investment decisions are taken does not generally determine the locality of profits ;

(vi) the absence of an overseas permanent establishment of a Hong Kong business does not, of itself, mean that all of the profits of that business arise in or are derived from Hong Kong.[54]

In general the DIPN-No. 21 draws a boundary so that where it is proved that the profit derived was sourced outside Hong Kong to allow exemption from the Hong Kong Tax.[55] The Inland Revenue Department, however, stresses in the Note that it will look closely at cases where there has been an attempt to create an artificial offshore source for profits, and asks taxpayers and their representatives to anticipate requests from assessors for the information needed to verify claims that profits are not Hong Kong source. An initial claim for offshore profits should always be supported with reasons which can be substantiated with evidence.[56] It is still too early to say how the IRD will treat cases of intellectual property transactions which involved more than one country and parties. Hence to decide about the real source of profit either according to the principle of Hang Seng Bank case or TVB case together with Departmental Notices would certainly create problems for the Revenue department of Hong Kong.[57]

54. The Departmental Interpretation Notice of IRD is a common feature in Hong Kong which simply provides a guidance to a taxpayer. It reflects the stance of Commissioner related to a particular issue. It has no legal binding force and it does not affect taxpayer's right to appeal. For details of the legal and practical effect of these Departmental Interpretation Notices see, R. Cullen, *Taxation Rulings: Proctice and Policy in Hong Kong*, 25 HONG KONG LAW JOURNAL 190 (1995).

55. See R. Cullen, *supra* note 47 at 1126.

56. See para 2 of the DIPN-No. 21.

57. It is to be noted that the issue of precedence or binding effect of Hang Seng Bank case and TVB case is not yet settled by the experts. Some argue that the Hang Seng Bank case sets out the real guiding principles while the TVB is a murky judgment and should be treated as independent case decided on its own facts and circumstance without leaving any effect on the Hang Seng Bank decision. See, R. Cullen, *supra* note 47 at 1125.

The stand that TVB case has overruled Hang Seng Bank case in principle by indirectly attesting the principles laid down in the Sinolink case (the principle which was overruled by the Privy Council in Hang Seng Bank case) is too aggressive and it needs to be reconciled. It is argued that the decision of TVB should not be interpreted to include the "operation test" forwarded by the Sinolink case. See Tosi, *supra* note 49 at 38.



Based on those two important decisions of the Privy Council and DIPN-No. 21 the Board of Review decided few cases recently which demonstrate the course of action taken by the Board with regard to the cases related to source of income controversy. In a *Merchandising*[58] case the Commissioner relied on the *Hang Seng Bank* case and rgued that all the essential work related to the sale of products took place in Hong Kong. The evidence adduced before the Board, however, revealed that the "real deal" including all meaningful negotiation took place outside Hong Kong.[59] Accordingly, on the basis of evidence not previously available to the Commissioner, the Board allowed the taxpayer's claim that its trading profits were sourced outside Hong Kong. Had this evidence placed before the Commissioner whether he would have decided this case in the same way as the Board did, is doubtful.

In another complex case related to *Manufacturer*[60] the Board although applied the principle of *Hang Seng Bank* case, it changed the point to be stressed prescribed by the Privy Council in the same case.[61] In this case the taxpayer entered into a contract manufacturing arrangement with an independent manufacturer of Hong Kong. The taxpayer purchased the raw materials and asked the Hong Kong manufacturer to fabricate them into Jewellary according to the design provided by the taxpayer. Sales were made both inside and outside Hong Kong, the latter being arranged by sales representative of the taxpayer. The Board decided that the taxpayer was a manufacturer, notwithstanding that the fabrication was carried out by an independent party and that the majority of the jewellary produced was sold through the taxpayer's retail outlet in Hong Kong.[62] The Board accepted the argument of the Commissioner that according to the *Hang Seng Bank* case, the profit of the manufacturer were sourced where the manufacturing takes place. However, the Board also opined that "fundamentally, the act which earned the profit was not each transaction entered into by each salesman offshore. Rather, it was the decision reached in Hong Kong to explore the possibility of securing purchasers overseas. The decision carried with it the fixing of price, the extent of the discount and the credit terms... all of which fettered the (salesman's) discretion when overseas". By saying this the Board appears to have emphasised the place of decision-making as a crucial factor determining source of profit. This is what exactly the Privy Council, in *Hang Seng Bank* case, suggested should not to be done. It seems that the confusion regarding source of income will remain at an unsettle stage. This might also affect the cases related to intellectual property transactions.

58. D64/93 9 IBRD 31; (1994) 1 HKRC 80, 280.

59. For the analysis of this case see, A.J. Halkyard, *Board Reviews Source Cases*, THE NEW GAZETTE, 54 (January 1995).

60. D66/93 9IRBRD 54; (1994) 1 HKRC 80, 291.

61. See A.J. Halkyard, *supra* note 59 at 54.

62. *Ibid.* This aspect of the decision could open up interesting source of profit arguments for Hong Kong "manufacturers" whose goods are produced in China and other places on a true contract manufacturing basis whereby the Hong Kong party is not actively involved in the manufacturing operation.

Thus the source of profit is an important factor to decide which country has jurisdiction to charge tax on the profits earned from any intellectual property transaction which has a cross boarder effect. As far as Hong Kong is concerned the TVB case will be the authority as far as intellectual property transactions are concerned.[63] The Privy Council in this case opined that the exercise of intellectual property rights cannot be compared to the exploi-tation of immovable property. That is, the fact that these property rights were being exploited in one jurisdictions other than Hong Kong did not mean that profits were arising from the exploitation of property outside Hong Kong.[64] How the decisions of Hang Seng Bank case and TVB case be reconciled, is a matter of great concern.

## IV. Conclusion

The importance of intellectual property rights in free market economies and the different accounting system coupled with changing legal position regarding its taxation aspect are giving a clear indication for the adoption of a standardised tax regime of intellectual property. Any delay in the identification, valuation and taxation of intellectual property is resulting in huge loss of revenue as its effect can be seen across the border. The sooner the authorities will act the better will be the result. In the context of free market economies we need an intellectual property tax regime based on the principles of effectiveness, equity, standardisation, stabilising economy, and neutrality.[65] In free market economies since the market is unified, therefore, the law on intellectual property taxation should be unified, since the market is open, therefore, intellectual property tax structure and tax administration should be open and be aligned to common international taxation norms, since the market is competitive, therefore, the intellectual property tax policy must reflect the principle of equitable tax burden, and since the market operates in conformity with objective economic rules, therefore, intellectual property taxation should play a greater role in strengthening macroregulation and promoting a better micro-environment.

63. It is noted that the TVB case directly deals with the intellectual property transactions while in the Hang Seng Bank case banking activities were involved.

64. 3 Hong Kong Taxation Cases 468 at 480. In fact, the rights were defined in such a way that they could be exploited only outside Hong Kong. See R.Cullen, *supra* note 47 at 1125.

65. These basic principles were applied while creating a new and reforming the current tax regime in China to facilitate the establishment of a "socialist market economy". Those new and reformed tax regimes are functioning well in China so far. See Shanda and Ma, *supra* note 6 at 70. The same principles may be applied for creation of intellectual property tax regime in other jurisdictions which are practising free market economy.

# GOVERNING LAW OF INTERNATIONAL COMMERCIAL CONTRACTS

*Lakshmi Jambholkar**

The process of economic reforms in India, which began in 1991, has virtually covered all parts of our economy for private investments. Apart from liberalising the investment regime, the government has introduced reforms in the trade regime, the finan-cial sector, taxes and public enterprises. One of the critical areas, wherein, the government has initiated substantial reforms for liberalisation objectives to be achieved, is in the legal sector. Though, India's legal system is adequate to facilitate the objectives of the ongoing reforms, there is need to enhance the capacity of the system by efficiency of the administration of justice and by adjusting specific laws affecting labour, taxes, land and the dispute settlements.

India has a highly developed and sophisticated legal system with an institutional and professional depth unparalled among developing countries.[1] India's legal system is a valuable asset in its efforts to permanently alter the country's development paradigm and achieve substantial growth. The two main issues which have received priority attention for the government are : reducing delays and increasing efficiency and reforming high priority laws — like labour laws, tax laws, land laws and most importantly commercial dispute settlement laws.

This paper concerns itself with the dispute settlement of international commercial contracts. In particular attention will be focused on the applicable or the governing law of such transactions. Conflict of laws or the socalled private international law contains rules regulating international contracts. These rules govern issues like capacity, validity, formation, performance and a host of other aspects of international contracts. Apart from the governing law of international contracts generally under the conflict of laws the paper also concerns with provisions of the United Nations Commission on International Trade Law (UNCITRAL) Model Law rules and International Chamber of Commerce (ICC) Rules including Indian state practice through legislation and relevant case law. Alternative Dispute Resolution system has also been referred to in the paper.

## I. Development Of The Regime Of International

The development in the field of contractual conflicts as regards the governing could be traced in the first instance at least to four approaches, namely,

1. The law of the place where a contract is made — *lex loci contractus*.
2. The law of the place where the contract is to be performed— *lex loci solutionis*.

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1. World Bank Report On India 75 (1995-96).

3. The law intended (express/implied) by the parties (identified as party-autonomy) and ;
4. Grouping of elements of the contracts (localisation of the contract).

The next stage of development saw an all-inclusive doctrine of intention of the parties for all the contractual obligations in private international law. Three situations of intentions, "express, tacit, and presumed" were identified.[2] This doctrine came to be known as "Proper Law Doctrine" in England. Lord Atkin formulating this doctrine observed: "The legal principles which are to guide an English Court on the question of the proper law are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract if any, which will be conclusive. If no intention be expres-sed, the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances".[3]

In a leading case the Judicial Committee of the Privy Council stated the doctrine :

> It is now well settled that by English law the proper law of contract is the law which the parties intended to apply. That intention is objectively ascertained, and, if not expressed, will be presumed from the terms of the contract and the relevant surrounding circumstances.[4]

Cheshire sums up the current position of the doctrine in England as follows :

> The doctrine of the proper law was of common law origin and a vast case law developed to take account of the difficulties.... It was both sophisticated and flexible in its approach. The key features of the doctrine were... [t]he parties could choose the proper law, with very little restriction on this right. If the parties did not express a choice, and one could not be inferred by the courts, an objective test was applied. This sought to localise the contract by looking for the system of law with which the transaction was most closely connected.

Dicey's work which is equally authoritative adopts the same approach as that of Cheshire. Discussing the determination of the applicable law, Dicey says :

> A contract is governed by the law chosen by the parties...[6] and in the absence of choice of law by the parties a contract is governed by the law of the country with which it is most closely connected.[7] Indeed in USA the Second Restatement also endorses the contractual choice of law.

2. For a detailed account see Rabel, THE CONFLICT OF LAWS 363 (1947).
3. Rex v. International Trustee for the Protection of Bond Holders AG, (1937) AC 500 at 529.
4. Vita Food Products, Inc. v.Unus Shipping Co, (1939) A.C. 277 at 289.
5. P.M. North and J.J.Fawett, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 458 (12th Ed. 1992).
6. DICEY AND MORRIS ON CONFLICT OF LAWS 1211 (12th Ed., 1993).
7. *Id.* at 1230.



Thus the proper law in an international contract can be ascertained in at least three situations. First, where the parties have expressly chosen the applicable law; secondly, where, in the absence of such express choice, the proper law is inferred through choice of jurisdiction or arbitration clauses among other factors and thirdly, by an objective test of presumed intention of the parties inferred from terms and circumstances of the contract.

## II. SOME LEADING INDIAN CASES ON PROPER LAW OF CONTRACT

The Indian approach to the question of governing law of an international contract follows closely the trends set by UK and USA. It also demonstrates the ascertainment of proper law under different situations mentioned earlier.

In *British India Steam Navigation Co. Limited v. Shanumgha Vilas Cashew Industries*[8] the Supreme Court was concerned with the choice of law by the parties to govern their contract. The case involved purchase of cashew nuts which were shipped by the appellant English company through chartered vessels in pursuance of a contract of affreightment. The respondents had sued the appellant for short landing of bags containing cashew nuts. The parties had chosen English law as the governing law. The Supreme Court considered issues such as, proper law chosen expressly by the parties and the limitations on freedom of choice of the governing law. Basing itself on Dicey, Morris and Cheshire and other leading authorities on conflict of laws, the Supreme Court observed:

> According to the authors the parties to a contract in international trade or commerce may agree in advance on the forum which is to have jurisdiction to determine disputes which may arise between them. The chosen forum may be a court in the country of one or both the parties, or it may be a neutral forum. The jurisdiction clause may provide for a submission to the courts of a formula in a printed standard form, such as a bill of lading referring disputes to the courts of the carrier's principal place of business. It is a question of interpretation, governed by the proper law of the contract, whether a jurisdiction clause is exclusive or non-exclusive, or whether the claim which is the subject matter of the action falls within its terms. If there is no express choice of the proper law of the contract, the law of the country of the chosen court will usually, but not invariably, be the proper law.... The jurisdiction of the court may be decided upon by the parties themselves on the basis of various connecting factors.[9]

The court then examined the limitations on the party's autonomy and stated :

> It is true that in English law there are certain limitations on freedom to

(1990) 3 SCC 481. Exactly on the same lines of factual situation is British India Steam Navigation Co. Limited v. Hindustan Cashew Products Limited, (1990) Supp. S.C.C. 543.
*Id.* at 492 and 494.

choose the governing law. The choice must be bona fide and legal, and not against public policy. It may not be permissible to choose a wholly unconnected law which is otherwise a proper law of contract. English courts, it has been said, should, and do, have a residual power to strike down for good reasons, choice of law clause, totally unconnected with the contract. Where there is no express choice of the proper law it is open to the court to determine whether there is an implied or inferred choice of law in the parties contract.[10]

In another leading case, *NTPC* v. *Singer Company*[11] the Supreme Court dealt with the proper law of contract in all its perspectives generally, as well as with reference to the Indian context. The Indian Company (a Public Sector Undertaking) and the US Company entered into two contracts wherein the latter agreed to supply the equipment and erect certain works in India for the former (NTPC). The parties have clearly and categorically stipulated that their contract, entered into in India, to be performed in India, governed by the laws in force in India, and the courts in India were to have exclusive jurisdiction in all matters. The parties also had agreed to submit their disputes to arbitration conducted by ICC. The venue of arbitration, however, was not chosen. The ICC gave an interim award at London against NTPC, which approached the Indian Courts for setting aside the same. The Supreme Court examined at length in this case the proper law of arbitration, including the substantive and procedural aspects. The Supreme Court rightly observed: "the parties have freedom to choose the law governing an international commercial arbitration agreement. They may choose the substantive law governing an international comm-ercial arbitration agreement as well as the procedural law governing the conduct of the arbitration....The arbitration proceedings are conducted, in the absence of any agreement to the contrary, in accordance with the law of the country in which the arbitration is held".[12]

In *Delhi Cloth and General Mills Co.* v. *Harnam Singh*[13] the issue before the Supreme Court was whether a debt due from the defendant-appellant to the plaintiff-respondent that arose in Lyllapur (Pakistan) could be held discharged by payment to

10. *Id.* at 497. For a detailed treatment of this case see L. Jambholkar, XXVII ANNUAL SURVEY OF INDIAN LAW 499 (1991).

11. (1992) 3 SCC 551. This case was concerned with two important aspects in the context of international commercial arbitration, namely, the proper law of contract and definition of a foreign award. At this juncture, the former aspect was considered. However, for the inconsistent stand of the Indian Supreme Court with regard to the latter see F.S. Nariman, *Suggestions for Amending Indian Arbitration*, XXIV THE INDIAN ADVOCATE 92-94 (1992). The new Arbitration Conciliation Act, 1996 removes this inconsistency. For a detailed implications of this case in this regard see again F.S. Nariman, *Finality in India : The Impossible Dream*, 10 ARBITRATION INTERNATIONAL 373-84 (1994). See also L. Jamholkar,*Conflict of Laws*, 28 ANNUAL SURVEY OF INDIAN LAW 345 (1992).

12. (1992) 3 SCC 551 at 563-64.

13. AIR 1955 SC 590.



the Pakistan authorities (as custodian of evacuee property) in accordance with a Pakistani law. The Supreme Court applied the grouping of elements test to ascertain the proper law of contract endorsing the objective approach. It held that the elements of the contract were most densely grouped at Lyllapur and therefore the Lyllapur law was the applicable law as "proper law of contract" in this case.

## III. GOVERNING LAW OF AGREEMENTS TO ARBITRATE

An arbitration agreement is an agreement to submit differences (present or future) to arbitration. It is contractual in nature and has to comply with all the necessary requirements of a valid contract. Agreement to arbitrate in an international trade transac-tion is governed by its applicable law and is determined in the same way as that of an international contract, based on the parties' choice express, tacit or inferred, including the "closest and most real" connection between the applicable law and the transaction, i.e. the arbitration agreement. In other words contractual conflicts law principles govern international agreements to arbitrate on the same lines as of an international commercial contract. The principle of party-autonomy along with its logical limitations to choose the venue of arbitration and the applicable law has world-wide acceptance. One of the important perspectives of the doctrine of parties' autonomy is that it recognised the power of the parties to choose the law to govern their relations throughout the existence of the contract. The almost universal acceptance of the doctrine for more than half a century signifies the reposition of confidence in the tradesmen in matters of trade and commerce all over the world. The international acceptance of the doctrine of autonomy to select the applicable law is evident in almost every treaty concerned with international trade and commerce. The 1923 Geneva Protocol on Arbitration Clauses, paragraph 2 (1) says : "The arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by the will of the parties...." The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, however, incorporates the autonomy principle indirectly, in Article v (i) (a). The Convention states that the recognition and enforce-ment of a foreign arbitral award may be refused if the arbitration "agreement is not valid under the law to which the parties have subjected it".

Again the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States, sponsored by the International Bank for Reconstruction and Development provides in Article 42: "tribunal shall decide a dispute in accord-ance with such rules of law as may be agreed by the parties".

### *(i) Uncitral*

The United Nations Commission on International Trade law (UNCITRAL), established in 1966, proceeded with the mandate to further the progressive harmonisation and unification of the law of international trade. In the area of dispute settlement the Commission's work resulted in the UNCITRAL Arbitration Rules (1976), UNCITRAL Conciliation Rules (1980) and UNCITRAL Model Law on

International Commercial Arbitration (1985). We are, however, concerned for the discussion at this juncture with the UNCITRAL Arbitration Rules and the UNCITRAL Model Law, confining to the topic of the Arbitration agreement. The Rules and the Model Law though constitute "model-provisions" differ from one another in their legal nature.[14] Both the Rules and the Model Law give wider recognition to the conflicts principle, of intention of parties to choose the law. Under the UNCITRAL framework party-autonomy has reflected besides the applicable law, in matters of appointment of arbitrators, venue of arbitration, languages used and appointment of experts as well. Thus Article 28 (i) of the UNCITRAL Model Law refers to "rules of law chosen by the parties as applicable" and Article 28 (ii) makes the conflict of laws rules apply in the absence of choice of law by the parties.[15] A similar trend is seen in Article 33 of the UNCITRAL Rules.[16]

### *(ii) Icc*

International Chamber of Commerce is an international non-governmental organisation. It is one of the oldest and biggest international arbitration institution in the world founded in 1919. It conducts arbitrations by arbitral tribunals under the ICC Rules. The Rules of Arbitration framed by International Chamber of Commerce have given effect to party autonomy principle. Thus Article 12 says that "The place of arbitration shall be fixed by the Court, unless agreed upon by the parties". Under Article 13 (3) "The parties shall be free to determine the law to be applied by the arbitrator to the merits of the disputes. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate".

ICC awards in many arbitrations have upheld the choice of the parties of a particular law to govern their contract. Thus in 1971 a sole arbitrator, Professor Pierre Lalive, sitting in Geneva in a dispute between an Indian corporation and a Pakistani national corporation, upheld the autonomy principle. In this case Indian law was the applicable law on the basis of the terms of the contract. The arbitration enforced the contract clause as a "principle universally admitted in private international law".[17] In

14. Model Law is in the nature of a legislation recommended to the states for their further enactment in their domestic laws. UNCITRAL Rules on the other are addressed to the actual users, businessmen and their lawyers. They are like contractual rules that may be construed as applicable arbitration law.

15. Article 28. Rules applicable to substance of dispute.
   i. The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.
   ii. Failing any designation by the parties, the arbitral shall apply the law determined by the conflic of laws rules which it considers applicable.

16. Article 33(1). The arbitral tribunal shall apply the law designated by the parties as applicable t the substance of the dispute. Failing such designation by the parties, the arbitral tribunal sh apply the law determined by the conflict of laws rules which it considers applicable.

17. ICC Award No. 1512, DOC No. 410/1935 (24 Feburary, 1971).



an analysis of the text of Article 13 of the ICC Rules it has been pointed out : In providing that the arbitrators shall apply the rule of conflict which they "deem appropriate," Article 13(3) is intended to inspire ICC arbitrators to apply choice of law rules which have some logical relationship to the parties and to the dispute, but it is not required that they apply the choice of law system of the seat nor that they rely on a system of conflicts provided by a specific national law.[18]

Choice of applicable law by the arbitrators in the absence of parties' selections appears to be a continuing controversy. The ICC arbitrators seem to have had varied experience in this regard. In fact in one of the ICC arbitral award it was opined:

> The rules determining the applicable law vary from one country to the next. State Judges derive them from their own national legislation, the lex fori. But an arbitral tribunal has no lex fori in the strict sense of the word, particularly when the arbitration case is of an international nature by virtue of the object of the dispute, the choice of the arbitrators, and the organization itself which supervises the arbitration.[19]

In the ICC experience the arbitrators have chosen the proper law of contract by:

(i) Application of the choice of law system in force at the seat;
(ii) Cumulative application of the choice of law system of the countries having a relation with the dispute ;
(iii) Application of general principles of conflict of laws ; and
(iv) Application of a rule of conflict chosen directly by the arbitrator.[20]

In many ICC cases private international law rules of the seat of arbitration have been followed.[21]

### *(iii) The Indian Scene*

Settlement of international commercial disputes through arbitration process is carried out on the basis of statute law and at the institutional level. Three statutes, the Indian Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961, have been repealed by the Arbitration and Conciliation Act, 1996 which regulates the international commercial dispute settlement in India besides modernising the domestic situation.

The consolidated Indian Arbitration and Conciliation Act supports the party autonomy principle in matters of rules of procedure, venue, language and the governing

18. W.L. Craig, W.W. Park and J. Paulsson, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 287 (2nd Ed., 1990).

19. ICC case 1689/1970 referred to in *supra* note 18 at 286.

20. *Id.* at 288.

21. See D. L. Julien, APPLICABLE LAW IN COMMERCIAL ARBITRATION 201-202, 239-40 and 255-272 (1978).

law of the dispute.[22] Thus, in paragraph 28 (1) (b) in international commercial arbitration—

(i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute,

(ii) ....

(iii) failing any designation of the law under clause (1) by the parties the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

This provision clearly establishes acceptance of the conflicts principles. While party-autonomy finds express reference in the Act application of conflicts principles to choose the applicable law in the absence of the selection by the parties, can be inferred by implication. Indeed the Act differs in this respect from the international trend found in the Institutional Arbitration, i.e. ICC rules, UNCITRAL Model Law Rules.

Institutional arbitration in India is carried out by Interna-tional Centre for Alternative Dispute Resolution and Indian Council of Arbitration both at the national and international levels keeping in line with the international practice in matters of law governing the dispute submitted to arbitration. From the foregoing discussion it is clear that when an international commercial dispute is submitted to arbitration, the question of law applied to the substance of the dispute is based on proper law doctrine of conflict of laws. This is evident from the various rules of arbitration which refer to party autonomy and failing such choice of law chosen by the arbitrator according to the conflicts principles. Lew, who has contributed largely to the concept of party autonomy in international commercial arbitration opines: "By applying the law chosen by the parties, arbitrators are alleviated from the difficult task of determining the applicable law and can be given effect to the expectation of the parties.... The Fact that party-autonomy is recognised in most national private international law systems gives to the rule a special "transnational" character".[23] Continuing the discussion on party-autonomy, it has been observed," in international arbitrations, as in court proceedings, the main criterion is ... the choice by the parties".[24] Further, the choice of the applicable substantive law in international arbitration, if not made by the parties, is one of the most difficult issues.[25]

Another important aspect to be noted is that the governing law of the substance of the dispute or the main contract is being different from the applicable or the proper law of arbitration agreement. It may well happen that the arbitration clause may be

22. See Sections, 19, 20, 21, 22 & 24 of the Act 1996.
23. See *supra* note 21 at 81.
24. M.R. Sammartano, INTERNATIONAL ARBITRATION 251 (1990).
25. *Ibid.*



part of the terms of the main contract. Craig clearly points out: "Normally, the arbitration agreement is to be deemed separate from and independent of the contract in which it is contained. Acceptance of this autonomy of the arbitration clause is a conceptual cornerstone of inernational arbitration".[26]

The twin issues, namely, applicable law to the main contract and that of the arbitration agreement being separate on the one hand and the existence of substantive and procedural laws of the arbitration agreement on the other may be illustrated through a few cases. In *Campaigned Armament Maritime S.A.* v. *Compagine Tunisienne de Navigation S.A.*[27] the House of Lords pointed out the distinction between the law governing the arbitration ("curial law") and the "proper law" of the main contract and observed : "It is not now open to question that if parties to a commercial contract have agreed expressly upon the system of law of one country as the proper law of their contract and have selected a different curial law by providing expressly that disputes under the contract shall be submitted to arbitration in another country, the arbitrators must apply as the proper law of the contract that system of law on which the parties have expressly agreed".[28] Similarly existence of the main contract with its applicable law and an arbitration agreement with a separate governing law was confirmed in India in *COSID Inc.* v *Steel Authority of India* .[29] The Indian Supreme Court in *NTPC* v *Singer Co.*[30] examined the law of arbitration from the point of view of the law governing the arbitration agreement, (its proper law) and also in the context of the law governing the conduct of the arbitration (its procedural law). It observed:

> The proper law of arbitration agreement is normally the same as the proper law of the contract.... The parties have the freedom to choose the law governing an international commercial arbitration agreement. They may choose the substantive law governing the arbitration agreement as well as the procedural law governing the conduct of the arbitration.... The arbitration proceedings are conducted, in the absence of any agreement to the contrary in accordance with the law of the country in which the arbitration is held.[31]

There is unanimity as regards parties' choice in matter of substantive law governing arbitration. On the question of conducting the arbitration proceedings, it is the *lex fori*[32] of the seat of arbitration which is more acceptable rather than the application of party-autonomy. One author points out that "the right of the parties to

26. See Craig et al *supra* note 18 at 65, 134, 135.
27. (1971) AC 54.
28. *Ibid.*
29. AIR 1986 Delhi 8.
30. See *supra* note 11.
31. See *supra* note 11 at 563-64.
32. It may be pointed out here that procedure is always governed by *lex fori* in private international law.

choose, if they wish, a procedural law different from that of the place of arbitration" is now admitted.[33] In *Union of India* v. *Mc Donnel Douglas Corporation*[34] the agreement to arbitrate contained the following terms:

> The arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act of 1940 or any re-enactment or modification thereof. The arbitration shall be conducted in the English language. The award of the Arbitrators shall be made by majority decision and shall be final and binding on the parties hereto. The seat of the arbitration proceedings shall be London, United Kingdom.[35]

Upon arising a dispute the parties referred the matter to arbitration. Interestingly the parties sought the court's decision for the determination of law governing the arbitration proceedings despite their agreement on the issue in the Agreement in Arbitration Clause (Article 8) in clear terms. Under these circumstances the court observed:

> In an international bargain of the present kind, the parties, ... may make a choice of law to govern their commercial bargain, of a law to govern their arbitration and of a law to govern the procedures in any arbitration held under that agreement .... In this circumstance the fact that the parties have agreed to a place for the arbitration is very strong pointer that implicitly they must have chosen the laws of that place to govern. For this is essentially one of common sense. By choosing a country in which to arbitrate the parties have, ex-hypothesis, created a close connection between the arbitration and that country and it is reasonable to assume from their choice that they attached some importance to relevant laws of that country, i.e. those laws which would be relevant to an arbitration conducted in that country.[36]

The court in its analysis considered the obvious consequences of application of Indian or the English laws for the arbitration proceedings. The court observed, "by their agreement the parties have chosen,[37] English law as the law to govern their arbitration proceedings, while contractually importing from the Indian Act those provisions of that Act which are concerned with the internal conduct of their arbitration and which are not inconsistent with the choice of English arbitral procedural law".[38]

The court's views also seem to reflect on exterritoriality of national legislations as seen from its observation:

33. Sammartano *supra* note 24 at 283.
34. 3 Lloyd's Rep. 48 (1993).
35. *Ibid.*
36. *Id.* at 236-37.
37. Express choice in the arbitration clause referred to here is for the application of INDIAN ARBITRATION ACT, 1940 for proceedings.
38. See *supra* note 24 at 239.



> The question posed is ... whether upon the proper construction of Article 8 of the Launch Agreement the pending arbitration between the parties and any award made by the arbitral tribunal is subject to the supervisory jurisdiction of the Indian Courts or the English Courts ... my answer to this question is that it is the latter.[39]

The court's decision of English law as the governing law of arbitration proceedings held in London could have been based on the well known and universally admitted principle of private international law: procedure is governed by the *lex fori*.[40]

## IV. ADR SCHEME FOR INTERNATIONAL COMMERCIAL TRANSACTIONS

The ADR Movement is gaining momentum and impetus to the international commercial dispute settlement all over the world. The Arbitration and Conciliation Act,1996 has brought this movement to the Indian scene.

The theme, however, is indeed not new. What is new is the awareness of parallel dispute resolution mechanisms to seek procedural justice. In India the 1996 Act provides arbitration and conciliation methods for dispute resolution. Parties are free to choose either of these. The Act reenacts the operative portions of the Foreign Awards (Recognition and Enforcement) Act, 1961 and the Arbitration (Protocol and Convention)Act, 1937 in part-II. The Act also refers to International Commercial Arbitration and International Commercial Conciliation in its general provisions (in part - I) apparently for situations falling outside the purview of part-II. However, it may be pointed out that the general provisions do not define a foreign arbitral award. The Ordinance in Section 74 (part-III) confers the status of an arbitral award on the settlement agreement reached in conciliation proceedings. The question then arises whether arbitral awards in international commercial arbitration proceedings and the settlement agreements arrived at in international conciliation proceedings would constitute foreign awards. The reason for this query is that there are two separate definitions of "foreign awards" found in part-II which deals with India's commitments under Geneva and New York arbitration schemes concerning recognition and enforcement of foreign arbitral awards.

## V. CONCLUSION

In conclusion the following points emerge :

(a) Proper law of contract has established itself as a permanent theme in international contracts.

(b) In the contract of international commercial arbitration the party-autonomy has gained more ground as the entire process of arbitration is based on parties' agreement to arbitrate.

39. *Ibid.*
40. DICEY AND MORRIS ON CONFLICTS OF LAW 169 (12th Ed., 1993); CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 74 (12th Ed., 1992).

(c) Parties have freedom to chose the law applicable:
  (i) to the substance of the dispute
  (ii) the substantive law of arbitration
  (iii) procedure law to govern the conduct of the arbitration though on this aspect there are differing views.

(d) ADR system provides a conducive legal framework for increased private investment in international business. ADR procedures being extrajudicial in character are thus a sine-qua-non for the contemporary business world.

# THE SOCIAL COST OF INTERNATIONAL TRADE : A MAJOR CAUSE OF POLLUTION AND ENVIRONMENTAL DEGRADATION

*Suman Gupta**

Every age has its defining terms. The current one is "globalisation". It conveys that we are living in a borderless world. Economists, journalists, scholars, political leaders all are referring to the term globalisation of economic activity. Industries are losing their national identity as they are roaming the planet for capital, markets, labour and technology.[1] This international expansion has reduced the ability of state to control domestic economic activity and thus undermined its sovereignty.[2] States are finding it difficult to strike a balance between increasing economic interdependance and the pursuit of legitimate national objectives.[3] The management of economic policy has been further complicated by the rise of multinational and transnational corporations, who do not possess any national identity and are making decisions solely on the basis of profit maximisation. States themselves are responsible for creating such political conditions that made the globalisation possible. The policy makers never tried to accurately predict the consequences of the development of global economy.[4] Even where the problems associated with free trade were accurately predicted (for example, the signing of free trade agreement leads to closure of many domestic industries) the policy makers responded to economic change thinking that societal benefits will outweigh the costs of international trade.

Indian economists and government also trumpeted the benefits of free trade and championed laissez faire in foreign commerce. India's dependence on international commerce, particularly addiction to imports, has increased. Slowly but steadily most of the trade barriers are being eliminated. To be for *laissez faire* is considered to be for progress, prosperity and peace: to be against it, is to invite the wrath of economists, political leaders and the press. The opposite of free trade is assumed protectionism, meaning that domestic industries should be protected from competition through a variety of barriers such as tariffs and quotas. Economists denounce protectionism as a bankrupt idea devoid of logic and common sense which jeopardises the broader interests of the nation and promotes monopolies and lazy unionised workers. However, these economists forget the costs of free trade in terms of lay offs, lost wages, environmental destruction and ruined families.

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1. R. Robert, *"Who is us" ?*, 68 HARVARD BUSINESS REVIEW 53 (Jan-Feb. 1990).
2. A. Walter, WORLD POWER AND WORLD MONEY 72 (1991).
3. R.N. Copper, THE ECONOMICS OF INTERDEPENDENCE (1988).
4. K. Polany, THE GREAT TRANSFORMATION (1944).

## I. Manufacturing, Not Trade, Is The Route Towards Prosperity

Most of the countries have experienced that prosperity lies in the expansion of manufacturing rather than services, because manufacturing provides higher worker productivity and salaries than other sectors. In a particular country, if free trade promotes manufacturing, it raises overall productivity as well as general standard of living; but if it fosters services at the expense of manufacturing both productivity growth and real earnings decline.

In India, ever since the liberalisation, services have outpaced manufacturing and as a result entire economic landscape has been transformed. Cheap imports are destroying and even exterminating industry after industry. The flood of imports is increasing at alarming pace despite the anguish of domestic manufacturers and workers. If this trend persists then perhaps at the start of year 2000, the Indian pharmaceuticals, TVs, textile and many other industries would become extinct. However, despite such clear evidence, free trade is popular and protectionism is in disrepute. The reason is that before liberalisation India had always favoured "monopolistic protectionism" meaning protecting domestic industries without altering their monopolistic structure and because of this monopolistic protectionism these companies were producing shoddy products at higher prices .

Currently the gross national product (GNP) and per capita income is on upward trend, though the prosperity has been bought by record debt and sudden fondness for India by foreign bodies. However, in reality the debt is rising among consumers, companies and government; educational standards and achievements are on decline; productivity growth has become stagnant; middle-class backbone for a society is shrinking; soaring imports are decimating industry after industry; banks are straining; manufacturing is shrinking; and there are endless lay off of workers. The gloom is too widespread to be silenced by barren averages such as GNP and per capita income, which confuse the prosperity of the few with the mediocre living of the masses.

## II. Some Explanations For The Decline Of Productivity

The main reasons for the productivity debacle are :

(a) *Low Savings and Lower Rates of Interest:* The rate of savings is abysmally low; since savings are the backbone of investment, the rate of investment is much lower and since investment is the backbone of productivity the productivity gain is very less.

(b) *Decline in Education:* Education has suffered a longterm decline; workers are not being trained to handle sophisticated technologies and equipment.

(c) *High Interest Rates:* Huge government deficits and debt have kept the interest rates very high and as a result companies are at a disadvantage in borrowing for investment. This also has compelled the companies to spend a very minimum on research and development.



(d) *Deindustrialisation and Higher Tax Rates:* Deindustrialisation, in the face of cheap imports, has caused sharp decline in productivity growth. The taxes are also too high.

(e) *Broken Families :* The single-earner family has given way to the two-earner family. It is causing social frictions because there is less time for children, personal intimacy, elderly parents and leisure. The families are crumbling and divorce rate is increasing.

(f) *Free Trade: The Real Culprit :* Trade and competition from abroad is not new. What is new is the game plan — the ease with which foreigners have been allowed to compete with resourceless Indian industry. What is new is India's commercial policy — the signing of a global agreement GATT whose purpose is to reduce or eliminate barriers that country had erected against the free international flow of goods and services.[5] It is free trade and low tariff rate that is responsible for crippling the economy.[6]

The best measure of living standards is not GNP figures, but real wage of production or non-supervisory workers because they constitute eighty percent of the populace. Free trade has decimated the real earning of a vast majority.

## III. Some Outrageous Assumptions Of Free Trade

(a) *Free Trade Facilitates Exchange of Surplus Goods:* The conventional argument for free trade is that it is beneficial to all nations as it facilitates exchange of their surplus goods.[7] The logic behind free trade is that it is a partnership among nations with each concentrating on sectors in which it has the highest comparative labour productivity. Free trade is the best policy because trade and hence specialisation are then maximised.[8] But it means more you specialise, the more you have to import and pay for it in exports. Hence all forms of protectionism — tariffs, quotas, subsidies and many other barriers are bad for international welfare.[9] The conventional wisdom is that free trade creates two types of gains: the convenience gain from exchange and the productivity gain from specialisation.[10] This whole concept is so simple and appealing and is popular among economists; but they fail to see the depredations of free trade as they focus only on productivity and ignore earnings.

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5. M. Wolff, Where We Stand 10 (1992).
6. A tariff is a tax imposed on foreign products at the port of entry. This tax raises the prices of foreign goods and thus discourage their consumption and import.
7. J. Odell and T. Willetts (eds.), International Trade Policies : Gains From Exchange Between Economics And Political Science (1990) ch. 1.
8. E.E. Leamer, Sources Of Intranational Comparative Advantage : Theory And Evidence (1984).
9. J.N. Bhagwati, The Generalized Theory Of Distortions And Welfare In Trade Balance Of payments And Growth 69-70 (1971).
10. M. Cordon, *The Normotive Theory of International Trade*, 1 Handbook Of International Economics 63-130 (1985).

(b) *Free Trade Raises National Income:* The modern theory of the gains from free trade, instead of comparative labour productivity, emphasises on comparative costs which are determined by the productivity of factors like labour, land and capital — and their earning. The modern theory acknowledges that trade may hurt wages, but other factors benefit so much that their earning gains outweigh the loss of wages.[11] Hence free trade still makes the nation better off, although it may harm the workers.[12] However, this theory has little practical relevance because any theory that ignores wages and focuses only on national aggregates such as social welfare, GNP or national income is worthless. If economists say that trade benefits a nation while possibly hurting labour, they really mean that capital owners thrive and rich get richer. Free trade definitely promotes the rich man's welfare, not necessarily social welfare. So it is not surprising why the TNCs, MNCs and their CEOs adore free trade. Even the dubious idea that free trade benefits nations by raising its real per capita GNP is based on an outrageous assumptions that wage rates in different industries are the same. However, the fact is that people with the same skills working in different industries have sharply unequal salaries. Typically manufacturing firms offer wages much higher than the service industry. Thus, if trade is increased, manufacturing, production and employment falls, whereas the service sector makes corresponding gains. Thus, free trade may reduce social welfare.[13]

(c) *Free Trade Benefits Consumers* : Free trade protagonists argue that trade may hurt some workers, but it definitely benefits consumers; as imports bring the prices down and keep a lid on inflation. However, this all is far from the truth. Consumers are not different from workers. If eighty per cent of labour force suffers a loss in real income, then how can they and their families, who are also consumers, be benefited. Free trade definitely keeps prices low, but what matters are not just prices but wages as well. This wage loss far exceeds the fall in inflation.

(d) *Free Trade Is Stimulus To Competition* : Another argument is that domestic industries are forced by foreign competition to produce high quality goods at lower prices. Under protectionism and with mergers and acquisitions, some companies because of their monopoly, have become lethargic. Their employees also become insensitive to the needs of consumers. In such companies product quality suffers and prices rise generating enormous profits for businesses. Free trade forces such companies to be innovative, energetic and courteous to customers; and in the absence of foreign competition, domestic companies would continue to be inefficient.

This analysis contains a great deal of truth. Since 1991, foreign competition has jolted many industries. Some of them have become highly efficient and competitive. It is also true that innovation and new products are result of competition

11. R. Batra, *Protection And Real Wages,* Oxford Economic Papers 355-360 (Nov 1968).
12. D. Greenway, Current Issue In International Trade Theory And Policy (1992).
13. J. Bhagwati, *Domestic Distortions. Tariffs and the Theory of Optimum Subsidy,* 81 Journal Of Political Economy 44-50 (1963).



among firms. Trade undoubtedly promotes competition while protectionism may retard it, but there are other less destructive ways to stimulate rivalary among the domestic firms.

## IV. Free Trade v. Domestic Rivalry

Foreign competition, when carried to extreme, can be disruptive and destructive. It is only disruptive but not destructive in countries where wages in different sectors are close to one another. It is because workers who lose jobs in import-competing industries soon find jobs in expanding export or service industries with the same wages. However, in reality salaries are marketdly different in different sectors and foreign competition becomes disruptive and destructive if it causes a shrinkage of the high-wage sectors relative to low-wage industries. In comparison domestic rivalry can be, at the most, disruptive but never destructive. In domestic competition all the firms pay the same wages, hire workers from the same pool, source finance from the same financial institutions. Thus, there becomes a greater compulsion to innovate and be resourceful; as success depends on industry's intensity of efforts, not on any advantage based on natural resources or low wages.[14] Usually a foreign firm is always in a better position even with inferior technology if it uses labour of lower cost. A developing country with backward technology definitely benefits by opening its borders to foreign investment, technology and competition (domestic rivalry may not be enough). However, it will benefit more if foreign investment increases manufacturing not trade.

## V. Competitive Protectionism v. Free Trade

The governmental steps to increase and enforce rivalry at home while protecting domestic firms from global competition is called competitive protectionism. Countries which are well endo-wed with people and natural resources, competition protectionism is far superior to free trade, it retains the merits of competition while avoid demerits of free trade. However, protection should not be granted on piecemeal basis, where a few industries are granted moderate shelter while other trade grew by leaps and bounds.[15]

## VI. Restrict Free Trade Not Foreign Investment And Technology

The international transfer of technology is a great boon to humankind, because it can cure the problem of hunger and deprivation. Unlike free trade, foreign technology has no predatory effects, except when it harms the environment. That too can be precluded through strict anti-pollution laws. Flush with foreign exchange, MNCs have opened plants to extract raw materials as well as to produce finished goods.[16] In the

14. M. Porter. Competitive Advantage Of Nations (1990).
15. V. Aggarwal, Liberal Protectionism : The International Politics Of Organized Textile Trade 114 (1985).
16. R.E. Caves, Multinational Enterprises And Economic Analysis (1982).

process they have transferred advance technology from which the host countries have benefitted greatly in the form of greater productivity as well as high quality products. Thus, the flow of benefit was not just a one-way street.[17]

The main benefit of foreign inflow is the state-of-the-art-technology that the host country receives without sinking large sums into the process of innovation. Foreign capital and technology, unless restrain competition are beneficial;[18] it helps in the process of industralisation.[19] So, nothing should be done which restrains the inflow of foreign investment and technology.[20]

## VII. Competitive Protectionism : A Better Way For Economic Revival

Monopolistic protectionism is the worst of all commercial policies because it stifles competition altogether. But exposing monopolistic firms to international competition is more dangerous if domestic companies despite their best efforts are unable to meet the foreign companies. It will result in the loss of millions of high paying jobs. But granting protection to such inefficient industries without interjecting a strong dose of inter-firm rivalary only perpetuates inefficiency.[21]

India has taken the route of monopolistic free trade which means that it has exposed monopolistic firms to maximum international competition. The country has exposed elephantine firms to foreign sharks, who are swallowing them in a frenzy of takeovers and mergers, while the government is standing idle. To damage more, the government is opening new rounds of global negotiations for still freer trade. Domestic rivalry is the single most important weapon for fighting international competition; yet the government is doing nothing while whatever has remained of domestic competition is submerging under the flood of mergers.[22] In this background further liberalisation of trade is like throwing an amateur into the boxing ring with a world champion, whose one punch will put him to the floor.

So India should reverse its policy of monopolistic free trade and turn to competitive protectionism; otherwise, the country will be stripped off its industrial base. Keen domestic rivalry is the single most important factor of the richness of many nations, but keen rivalry calls for the creation of many small to medium sized firms. However, the position is that because of poor implementation of ineffective anti-trust laws the industrial structure is becoming concentrated beyond imagination. So, it is

17. A Chandler, The Evolution Of Modern Global Corporation 27-35 (1986).
18. R. Batra and R. Ramchandran, *Multinational Firms*, 70 American Economic Review 278-90 (1980).
19. R.J. Ruffin, *International Factor Movements*, 1, Handbook Of International Economics 147 (1985).
20. United States, Economic Reports Of President (1992).
21. P. Lake, Power, Protection And Free Trade (1985).
22. Porter, *supra* note 14.



necessary to protect manufacturing from foreign invasion and simultaneously breaking up the mammoth firms so as to prevent an increased abuse of monopoly power.

## VIII. Research And Development Spending

Once monolithic firms are split into small entities, they will prod each other to be innovative and competitive; but as small they may be reluctant to spend large sums on research and development. So, it is for the government to take an active role in R&D. The State, like Germany and Japan, should subsidise private R&D spending.

Today, success depends on development or the purchase of state-of-the-art-technology and the translation of that technology into high quality products through the medium of intensely competitive firms. Furthermore natural resources combined with manufacturing give a great competitive edge to a nation. India has an advantage over many other nations with regard to natural resources, but that advantage has to be supplemented with the discovery of new technology and high-tech products. The government can play a crucial role in the discovery of new techniques as it does in the creation of infrastructure. As the benefits of improved infrastructure go to all firms; the state supported technical discoveries should also be diffused among all firms. This would keep a lid on the growth of monopoly power. The government should also pour finance into reducing industrial pollution, so that already invented products could be built without damaging the environment.

Thus, there is a need to generate competitive protectionism not monopolistic protectionism. The competitive protectionism will put back the nation towards prosperity; the technology is there; the factories are there; what is lacking is a proper understanding of the nature of international trade.

The tumour of worldwide environmental degradation and pollution, is spreading without check in all directions. This is the side effect of science, technology, growing population and international trade. It has emerged with such a ferocity that it cannot be ignored while considering free market economy. One cannot ignore the auto fumes, noxious chemicals in air, vehicular congestion, oil slick ravaging beaches, rivers spewing fire or vomiting dead fish, smog suffocating our lungs, airplanes shattering our eardrums, nuclear wastes irradiating our landfills and other various toxins whose dangers are yet not known. One cannot also ignore the growing health problems ranging from heart diseases; respiratory failures to deformed and retarded babies.

Pollution is not partial to any country or ideology. All suffer from it. Affluence has much to blame as poverty. Environmental sickness is not a capitalist disease, but a disease of unbridled materialism.[23] Our environment comprises air, water, land and light. It provides us a habitat in which we live and provide resources which are used in the process of production and consumption. Pollution occurs when we use our habitat as a dumping ground for inexhaustible wastes and we litter the land, the

23. E. Mishan, The Costs Of Economic Growth (1967).

rivers, the air and the seas.

Nature, to some extent, recycles these wastes. For example, we exhale carbondioxide while plants inhale it and emit oxygen, which we need. Wood, iron and steel disintegrate into dust over time. Dead plants and animals decompose and merge into soil. Waste products that disintegrate overtime are called biodegradable, but some like plastics, rubber and aluminium are either not biodegradable or take a very long time to decompose. So pollution occurs when the environment is unable to absorb wastes at the rate we create them. Thus, pollution is as old as civilization itself, but it was not a major problem, because the earth and its resources were vast enough to sustain the world's population without damaging the environment. It was also because the use of energy was low; nonbiodegradable products were nonexistant and the fumes generated by burning of wood and coal were easily absorbed by the vast forests. Pollution, thus, existed but it was local, not global.[24]

Today, however, our activities are producing such a great quantities of waste that environment can no longer deal with them. The wastes are not only solid but also airborne — the toxic air contains carbon dioxide, monoxide, nitrogen oxides, etc — which produce smog, dizziness, nausea, fatigue and damage to animals and vegetation.[25] They also generate heat and changes in climate which is dissolving the polar ice flows, raising the sea level and submerging small islands. Another impact is the creation of an ozone hole which springs mostly from the emission of chlorofluorocarbons used in aerosol propellants, refrigeration and fire extinguishers. Such depletion has increased our skin's exposure to sun's ultraviolet radiation and has made us more vulnerable to skin cancer and cataracts. Not only air, we have not even spared land and oceans. Water which is the elixir of life is being polluted at an enormous rate. Industries are dumping all sorts of chemicals into lakes and rivers, which in turn is flowing into seas. In land pollution, we consider, garbage dumps and landfills as modern monuments of our progress through industrialisation.

## IX. Sources Of Pollution

The most obvious source of pollution is the mushrooming world population. As everyone has to be fed, clothed, transported, educated and employed, so the economic activity has grown, not to provide a decent living but just for survival. Science and technology which has done an admirable job in this survival, has made the environment gasping in the process. Industry, without which humming life would come to a halt is discharging poisonous chemicals into rivers and pumping millions of tons of pollutants into the air every year. Not only the industry, even modern machanised agriculture is no less culpable. Tons of fertilizers, pesticides and other chemicals which are used to provide more grains, fruits, vegetables, seep into the underground water table.

24. A. Sharp and R. Leftwich, Economics Of Social Issues Ch. 6 (1992).

25. A. Gore, Earth In The Balance (1992).



Transportation for people and freight is another source of pollution, which is seeping waste into atmosphere. Electricity is another high-profile polluter, no matter how it is generated. Hydroelectricity floods valleys; nuclear power generates radiation and radioactive wastes; coal power creates acid rains; solar energy produces arsenic among other toxins. Elimination of forests under the population pressure, which excels in the absorption of carbon dioxide, is one more reason.

## X. Causes Of Pollution

Sources of pollution should not be confused with the causes of pollution because causes are economic and man made. Causes suggest that there is yet a hope of living in a nontoxic world.

Economic theory suggests that pollution occurs because the environment comes nearly free to its users. The economic agents, both producers and households, are abusing the environment because to them environmental costs are negligible. For example, a company economises in the use of resources because it has to pay a price for them. It pays wages for labour, interest for capital and rent for land,. So company uses these factors very efficiently because it has to pay for them. But it liberally dumps its wastes into the environment because it is available at little or no cost. Thus, if chemical dumping were costly, no firm would do it with abandon. In the same way, smoker freely contaminates the air because he does not have to pay for its use. But if we add together the pollution caused by each smoker, it becomes a burdensomé national cost. Thus, the pollution is causing social costs some of which can be calculated and some are uncalcuable. For example, we can estimate, though roughly, the health cost of pollution by measuring the expenses in terms of lost wages due to illness and low productivity. But we cannot calculate the mental cost incurred from fatigue and irritation.[26]

If polluters had to pay for their actions, private costs would rise, giving them an incentive not to pollute, but these private costs would reduce the social costs of a toxic environment. Social costs are much higher than the private costs, this is the reason that conventional economists recognise this divergence between private and social costs as the main cause of pollution. If businesses are made to pay a heavy price for contaminating the environment than pollution and its social costs will automatically decline.

## XI. International Trade : Another Major Cause Of Pollution

International trade is another most important cause of pollution and economic degradation. Trade liberalisation definitely enriches some nations, but no one is saving from its polluted effects. Free trade is generating enormous costs for the environment.[27]

26. J.S. Cannon, The Health Costs Of Air Pollution (1990).

27. The global economic activity has quadrupled since 1950 and the world trade has grown faster than even GDP, in Economic Report Of The President (US, 1991-92). G-7 nations are the biggest polluters as their export is 65 per cent of the world's total and energy consumption is four times of the rest of world. See World Development Report (1991).

The volume of trade causes an increase in toxins, because trade occurs through transportation whether they may be trucks, ships, large airplanes or wide body jets. While airborne trade pumps millions of tons of fuel wastes into the atmosphere helping to create an ozone hole, the merchant ships dump contaminants into the water. Road transport also burns petrol or diesel and pollute. Thus, international trade is a major source of environmental degradation, specifically in an era when the air transport has made possible international commerce in perishable goods like fruits, vegetable and sea foods, etc.

According to Global Outlook 2000, the share of transportation in energy consumption has risen from 24 per cent in 1970 to 31 per cent in 1990.[28] Air freight fuel consumption has almost tripled in two decades between 1970 to 1990.[29] Most of the marine pollution arises from sewage, plastics, pesticides and oil from routine transport and spills.[30] This shows that trade is bigger polluter than industrialisation.

International trade also increases the risk of accidental pollution on a vast scale. Usually one third of the industrial waste is hazardous because it is a byproduct of chemical, mineral or metal processing industries.[31] These wastes are shipped to other countries for disposal which is very dangerous because there are frequent accidents and also there are many unreported cases of ocean dumping of such hazardous substances. Since 1975 there are 170 documented cases of large accidents involving the shipping of toxic wastes including nuclear materials, while many collisions have not been reported. Further, every year out of about 3,000 million tons of crude petroleum shipped around the globe, 2 million tons slips into marines environment from tank cleaning, ballasting and oil spills. It does not include the large oil spills that regularly occur as a result of accidents.[32]

Thus, international trade is a vast source of pollution, and the environmental costs of global commerce have been totally ignored by economists who propogate free trade. This is a major flaw in the analysis of international economics.

## XII. Energy Use : Another Big Polluter

Each economic activity has energy intensity. Under the international terminology, energy intensity may be defined as the amount of energy used by an activity per dollar of value added by it. Activities with a high energy intensity use more energy and hence generate excessive pollution. For purposes of the environment, the smaller the energy intensity, the greater the energy efficiency.

28. Global Outlook 2000 (1990).
29. Environment Data Report, UNEP, London (1991-92).
30. World Resources 96-97, Oxford (1990-91).
31. See *supra* note 29.
32. The infamous Exxon Valdes spill in 1989 spilled 38,000 tons of oil into water causing a huge loss of aquatic life. Yet it was only one seventh of the size of largest spill on record.



## XIII. Intraindustry Trade And Pollution

Most of the international trade is intraindustry trade — trade in similar products. For example, the United States exports as well as imports cars. It has also reciprocal trade in electronics, machine tools and farm products.[33] Intraindustry trade is distinct from intercommodity trade, which is one way exchange of totally different goods. For example, India is exporting textiles to the US in exchange for electronic items. Typically, rich nations have more intraindustry trade than intercommodity trade. It can be explained by two different theories. The consumer demand theory explains that it is because consumers in rich countries demand a wider range of a product than any one country produces. For example, US consumers want European cars, while Europe demands American cars. However, price dumping theory explains that firms can sell only so much in their own market at a given profit rates. By producing more they drive their costs down through the economies of scale and then sell the extra output abroad at a lower but still profitable price. By this way they make more money and also maintain higher prices in local markets. Such a practice is called price discrimination or dumping.

In US consumers had a choice among 567 car models.[34] But there are limits to materialism. Social welfare will not fall if a car buyer had only 100 models to choose from. Thus, intraindustry trade is ridiculous. It generates a waste of capital, labour and the environment on a collassal scale. There is hardly any gain to consumers and not much to producers. TNCs are engaged in this type of commerce and are opening plants in different countries to make not a finished product but just some components. While one plant in Asia makes nuts, another in Europe makes bolts and a third in US puts the two together. We can imagine that how much unnecessary transportation it involves and how much it ravages the environment with no addition to the supply of goods and services.

## XIV. Trade In Raw Materials : Another Factor In Pollution

About sixty per cent of international trade is of intraindustry nature and about thirty percent is in raw materials. If intraindustry trade is eliminated and countries produce their own goods from their own raw materials, then global oil demand will plummet. There would be no need to tranport so many goods, materials and oil across the globe. This fall in global energy prices would generate massive growth around the world. The decline in energy prices will not only decline the production costs but it would benefit also the environment.

Thus, the twins — intraindustry trade and trade in raw materials — are hurting the world economy and contributing to pollution, high energy prices and a higher global rate of inflation.

33. Intra industry trade is nearly 60 per cent of the total trade of G-7 countries and 56 per cent of world commerce. See N. Grimwade, International Trade (1989).
34. United States Industrial Outlook 37 (1991).

## XV. Need For A New Theory Of Economic Development And Trade

There is a crying need for a new paradigm, a new understanding of economic development and trade that may be consistent with the imperatives of our time. Both, the idea of Adam Smith of competition and international trade and the practice of west which discarded the concept of internal competition and focused on global trade, are out of place today. Domestic monopolies generate inequality and poverty, while trade imperils the industrial base and environment. The new development should take care of the rapidly growing global population and should also not destroy the habitat in which we live and breathe. In this respect P.R. Sarkar has provided a thesis called "PROUT" which is an acronym for Progressive (pro) Utilisation (U) Theory (T). According to PROUT Theory," there should be maximum utilisation of the "mundane resources" of the world: otherwise vast hordes on our planet will remain trapped in a vicious circle of illiteracy, procreation and poverty. We cannot afford to waste even a penny of our penurious planet. The maximum utilisation of resources is today a matter of survival not just of the weak, but of the fittest as well".[35]

## XVI. Computing Of Net National Income According To New Economic Theory

The current economic theory recognises three main factors or inputs of production — labour, land and capital. These three inputs are combined with raw materials and technology to generate outputs. The raw materials are themselves produced by the combination of technology with labour, land and capital. These inputs can be increased in quantity, quality or both. For example, education improves the quality of labour, whereas growth in population increases its supply. Similarly, savings and investment enhance the supply of capital, while the quality of goods improves through technology. In the case of land output, though there is a physical limit to quantity, quality can be improved through irrigation, fertilizers and new mechanisation technologies. Thus, technology and education improve the productivity of one or all inputs. According to current economic theory, economic develop-ment springs from growth in population, savings, human intellect, inventions, education and technology. This theory ignores the pollution and environmental degradation that occurs in the process of production while calculating national output. But the above is a myopic view. Environment is an important part of the mundane resources. It should not be neglected, because it is as essential to the production as the other inputs. So a proper theory of development would regard the environment including water, air and light, as another factors of production. Uptil now, the theory of economic development as well as of international trade has neglected it and treats it as a seperate branch rather than as an integral part of the inputs. It is necessary that the environment should be

35. P.R. Sarkar, Prout In Nutshell (1987) See also : R. Batra, Prout And Economic Reform In India And The Third World (1989).



viewed in the same way as capital goods. As capital depreciates in the production; so does environment. Businesses set funds aside for depreciation of capital; so they should do for environmental depreciation. As capital needs to be periodically renewed through replacement of old machines; so the renewal of the environment matter just as much. Businesses ignore environment costs in the calculation of total costs, only because capital depreciation hurts business directly whereas the depreciation of environment occurs gradually and hurts business invisibly. Furthermore, since environment comes mostly free to them, they abuse it with abandon .

At present national income which is considered as a measure of aggregate economic activity equals "GNP minus capital depreciation and indirect taxes". It does not take into account environmental depreciation. Though business consumption of the environment may be small and may be not as visible as the consumption of capital, it cannot be denied that the nation as a whole suffers from pollution. Hence, net national income must be calculated after deducting the cost of environmental depreciation. There are, of course, difficulties with this concept as capital depreciation can be quantified but it is not easy to estimate environmental depreciation.

Since there is no market price for the purity of air or water, there is problem in incorporating the cost of the environment into national income. A simple way to estimate environmental costs over time is to define an index of such costs, select a base period and then to see how this index performs through the years. Robert Repetto had made an exploratory approach to the construction of this index. He has analysed the case of electric power industry, which is the most notorious for pollution. When oil, coal, or nuclear plants are used to produce electricity, the output is not only Kilowatt Hours but also tons of harmful emissions which seep into atmosphere. According to Repetto, when a 500 magawatt coal fired power station produced 3.5 billion Kilowatt Hours of electricity by using 1.5 million tons of coal and 0.15 million tons of limestone, it also emits 50,000 tons of sulphur out of which 5,000 tons are emitted in atmosphere as sulphur oxides, 5,000 remain in the fly ash and the remaining 40,000 tons are captured in the srubber sludge. With it are also released 10,000 tons of nitrogen oxides, 225 tons of arsenic and 114 pounds of lead.[36]

Thus, an electricity plant not only produces billions of kilowatts but also thousands of tons of pollutants which find their way into the air and water. National income estimates include the market value of kilowats but exclude the other outputs. A proper estimate, however, should be the value of kilowatts minus the value of emission. To the question that how such emission can be estimated, Repetto has a measure. He says that the value of a pollutant equals its incremental costs to those who are exposed to it.[37] That is the money spent on medicines and other medical expenses and the loss of wages because of forced vacation.

36. R. Repetto, *Environmental Productivity and Why It Is So Important*, 34 Challenge 34 (Sept-Oct, 1990).

37. *Id.* at 35.

Today millions of people live and breathe in a toxic atmosphere. Their health costs, low productivity and loss of wages are real, not imaginary.[38] Such costs should be estimated by the government and incorporated into the GDP accounting system. In US, the Environmental Protection Agency (EPA) has taken a small step in this direction by calculating an index of pollution.

So, if only coal fired 500 megawatt power plant emits 5,000 tons of sulfur oxide, the annual cost of which is 3.2 million, than we see that thousands of such electricity plants cause pollution cost of billions of dollars. This is the case of one industry. If we add costs of other polluting sectors like chemicals, steel, automobiles and even agriculture, we can get an idea of the cost of pollution to society each year.

Thus a conclusion can be made that free trade is not always beneficial to a nation. It is profitable to countries that import raw materials,without which their manufacturing sector cannot exist. It has also been salutary to the oilexporting countries. But for others, free trade is harmful because it is a major source of pollution. Free trade does indeed maximise the world's national income; but it does not maximise the World's net national income, defined as national income minus the cost of environmental depreciation. The purpose of all economic activity is to satisfy human needs and wants without hurting the environment. Free trade leads to maximum trade which pollutes the earth maximum. So it is essential that it must be kept to the minimum.

## XVII. Some Suggestions

### *A. Need For A Heavy Tax On Polluters*

The producers are abusing environment because it comes to them about free of charge. If a heavy dose of taxes are imposed on polluters, they will economise on the use of the environment to cut their costs. This measure will not only generate revenue but would also help in pulling down the pollution. However, international trade stands in the way of this simple solution.[39] If a country were to tax its polluters of whom some compete intensely with foreign rivals, they would be at a disadvantage in world markets. Pollution taxes would bestow a corresponding cost edge on producers abroad.[40] Because of this risk, governments are reluctant to tax their polluters heavily. Thus, international trade is a major barrier to a sound environmental policy.[41] International trade comes out as the worst villian in the destruction of the environment.

38. Cannon, *supra* note 26.
39. Environmental Challenges To International Trade Policy, A Conference Report, WWF, Washington (1991).
40. S. Shrybman, *International Trade and the Environment : An Environmental Assessment of present GATT Negotiation*, 17 Alternatives 91-101 (1990); see also J.J. Schatt (ed), Uruguay Round: What Can Be Achieved In Completing The Uruguay Round 1-12 (1990).
41. C.H. Fomsworth, *Environment Versus Free Trade*, New York Times (11 February, 1991).



In other words, in order to meet human wants, local production is preferable to imports so that trade and hence pollution are minimised.

### *B. Need Of A New World Economic Order*

The global trading network today is guided by the GATT Rules. There is a necessity that GATT should give way to a new set of rules to create a new world order, whose guiding principles should be the satisfaction of human needs with minimum pollution, which means minimum international trade. Specifically, two types of trade, intraindustry and in raw materials, are wasteful and unnecessary to meet human demands around the world. So, in order to minimise trade induced pollution, GATT should be replaced by the following principles:

(a) Monopolistic companies in all nations should be broken up in order to generate domestic competition and preclude the need for foreign competition;

(b) Interindustry trade should be minimised. MNCs should as much as possible, produce and sell goods in the same nation or swap their production facilities in different countries ;

(c) International transfer of technology should be augmented. Instead of maximising global trade, the international transfer of capital and technology should be maximised. If instead of exporting goods and causing pollution in the process, MNCs open plants around the world, they can meet the local needs by foreign controlled production but without much trade. This will also reduce the import of raw materials in exchange for exports. Not only this would minimise the trade but also third world countries which are the major exporters of raw materials, would be industrialised .

(d) Countries rich in technology and capital should export them in exchange for raw materials for home production. The Third World should not import primary goods but should either import technology or invite foreign companies to utilise its raw materials in local production. The idea is to locate plants near mineral rich areas as well as near population centres, so that international trade could be minimised.

(e) All resource-rich but industry-poor economies should impose high tariffs on imports of manufactures while vigorously generating competition in domestic markets. This would induce technology-rich countries to locate their plants in tariff-imposing countries. Domestic competition would sharply reduce inequality and stimulate the demands for goods at home, which in turn would reduce the need for exports and trade.

(f) Government should increase their Research & Development spending that can reduce pollution as well as the optimum size of plants; thereby reducing the need for economies of scale. Some MNCs enter into exports just only to utilise economies of scale. New technologies should be developed to make this unnecessary.

The migration of factories to mineral rich areas and the restrains of intraindustry trade can cut out the global trade by at least seventy five percent without harm to

overall output and without reducing the global living standards. This trimming of international trade would have a small or negligible effect on output; but its benevolent impact on the environment would be tremendous. As energy use would plummet, the oil prices would tumble, oceans would be safe from oil and chemical spills, atmosphere would be free and secure from toxic gases, risk of accidents would be minimised and there will be less noise pollution. These all will be the beneficial effects of minimum international trade and competitive protectionism.

# THE ENVIRONMENT, FUTURE GENERATIONS AND INTERGENERATIONAL EQUITY : OUR DUTIES TO THE POSTERITY

*Vikram Raghavan**

## I. INTRODUCTION

From the early beginning the mankind has not been oblivious to the fact that its actions could alter considerably ecological balance and adversely affect the environment. However, whether this realisation extended to showing concern for the generations to come had never been considered elaborately.[1] As Dalai Lama aptly stated: "It is not difficult to forgive destruction in the past which resulted from ignorance. Today, however, we have access to more information and it is essential that we re-examine ethically what we have inherited and what we will pass on to future generations".[2] The realisation that people have an obligation to protect their future generations was slow and was present only in a latent manner in the norms relating to international environmental law. However, after the Bruntland Report, the publication of Professor Edith Brown Weiss' work,[3] and the Rio Conference,[4] the concern for future generations found place probably in every important book or essay on the international legal regime relating to the environment.[5]

A variety of international legal instruments have come to recognise the need to protect future generations,but on a theoretical and jurisprudential plane difficulties are encountered with respect to the nature, character and the extent of the obligation. While this debate continues globally, in India environmental scholarship is unconcerned with these developments. In the Indian context it is possible to suggest that such obligations do exist by reference to the constitution as well as to statutory and judicial material. However the formulation of this obligation is yet to be properly conceived.

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1. See Generally, G. P. Supanich, *The Legal Basis of Intergenerational Responsibility*, 1 YEAR BOOK OF INTERNATIONAL ENVIRONMENTAL LAW 94 (1993). The author discusses the theoretical and conceptual basis of a proposed obligation that mankind should owe to future generations.
2. Message from the Fourteenth Dalai Lama Tenzing Gyatso on World Environment Day, 1986 cited in W. G. Rosen, *Diversity in Danger, The Current Status of the Earth's Biological Wealth*, GLOBAL DEVELOPMENT AND ENVIRONMENT CRISIS 133 (1988).
3. E. B. Weiss, IN FAIRNESS TO FUTURE GENERATIONS : INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY (1989).
4. United Nations Conference on Environment and Development held in Rio de Janciro, Brazil on 3-14 June, 1992, where 170 countries and thousands of participants gathered; a declaration was also passed at this conference. See Generally, THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, U.N. Doc. A/Conf.151/5/26 reprinted in 31 INTERNATIONAL LEGAL MATERIALS 74 (1992).
5. A. D'Amato, *Do We Owe a Duty to Future Generations to Preserve the Global Environment*, 84 AMERICAN JOURNAL OF INTERNATIONAL LAW 190 (1990).

This article seeks to examine critically the various theories on intergenerational equity and to locate a proper setting for the obligation to future generations in Indian jurisprudence.

## II. Tracing The Origins Of An Obligation Across Generations

### *(a) The U.N. Charter*

The foundation for the United Nations Charter was laid to save the succeeding generations from the scourge of war.[6] The U.N. Charter was drafted in the face of great destruction and death that had resulted in the World War. The loss of millions of lives prompted the making of the charter which expressed deep concern for the people yet to be born.[7]

### *(b) Permanent Sovereignty Over Natural Resources*

In the 1950s and 60s there arose a great number of nations out of colonial slumber, taking their place on the world stage as independent members of the comity of nations.[8] These nations had long been under alien rule which had resulted in their natural and economic resources being handed over to entities largely under the control of the earlier regimes.[9] A loose coalition of these newly independent states spearheaded a movement in the United Nations General Assembly which ensured the passage of a number of resolutions.[10] These resolutions had a common theme of recognising the right of people to Permanent Sovereignty Over Natural Resources.[11] The use of the phrase "people" was for the purpose of ensuring that even those under colonial yoke did have a right to utilise their natural resources.[12] It is possible to suggest that the use of the phrase "people" could be interpreted to suggest that the obligations were

6. Preamble, Charter Of The United Organisation (1945).
7. See generally B. Simma, Commentary On The Charter Of The United Nations (1995).
8. See generally J. Crawford, The Creation Of State In International Law (1979).
9. Most colonial territories were a store house of vast natural resources. The resources were virtually sold for a pittance, through concession agreements which were for a long period of time with negligible royalties, which were not used to better the miserable conditions of the native inhabitants of most of these territories. See D. N. Smith and L. T. Wells, *Mineral Agreements in Developing Countries: Structures and Substance*, 69 American Journal Of International Law 560 (1975), for an exhaustive study of such agreements see also S. K. Asante, *Restructuring Mineral Agreements*, 73 American Journal Of International Law 335 (1979).
10. See, General Assembly Res. 1803, U.N.GAOR, 17th Sess. Supp. No.17 at 15, U.N.Doc. A/52/17 (1962). See also, K. Hossain and S. R. Chowdhury (Eds.), Permanent Sovereignty Over Natural Resources 39 (1984).
11. See, A. Anghie, *The Heart of My Home: Colonialism, Environmental Damage and the Nauru Case*, 34 Harvard International law Journal 445 (1993).
12. Stockholm Declaration On The Human Environment, UN Doc. A?CONF. 48/14, 11 International Legal Materials 1416 (1972).



not temporal but transcended generations. The use of the word, "permanent", was also significant in this context. However, these resolutions were mainly used to justify expropriations made by the newly independent regimes of the property and business of large corporations and have not generally been utilised to assure rights to future generations. However, the broad terms employed by the drafters of the resolution are wide enough to include incorporation of such rights.

### *(c) Stockholm Conference*

In 1972, a conference was held in Stockholm, Sweden wherein the preamble stated that to defend and improve the human environment for present and future generations had become an imperative goal for mankind.This is also echoed in the provisions of the resolution adopted.[13]

Generally this resolution has been viewed to be an important commencement point for environmental principles in international law. The principles enshrined in this resolution are important to the concept of intergenerational equity. Man is both endowed with a right to a healthy environment and at the same time entrusted with a solemn responsibility to protect and improve the environment.

### *(d) World Charter For Nature*

In 1982, the World Charter for Nature[14] was adopted by the United Nations General Assembly which explicitly states that governments have a duty to pass on their natural heritage to future generations.

### *(e) Bruntland Commission*

At the same time a general awareness was growing about the need to ensure that the developmental models must also include one which takes into account the needs of the generations to come and to the growth that relies upon self perpetuating and renewable limits of resources.[15] In this regard, Gro Harlem Bruntland of Norway was asked by the Secretary General of the United Nations to propose long term environmental strategies for achieving sustain-able development by the year 2000 and beyond. Her mandate operated under the aegis of the World Commission on Environment and Development (WCED). The report, brought out by the WCED proposed a set of legal principles for sustainable development and suggested that a

13. Principle 1 states: "Man...bears a solemn responsibility to protect and improve the environment for present and future generations". Principle 2 states: "the natural resource of the earth including the air, water, land, flora and fauna and especially representative sample of natural ecosystems must be safeguarded for the benefit of the future and present generations through careful planning or management as appropriate".
14. World Charter for Nature, UNGA Res.37/7, GAOR, 37th Sess., Supp. No.51 (A/37/51).
15. Pearce, *Foundations of an Ecological Economics*, 38 Ecological Modelling 9 (1987).

global convention on environment and develop-ment be prepared on the basis of those principles.[16]

*(f) Rio Earth Summit*

In December 1989 the General Assembly of the United Nations responded to the report of the Bruntland Commission and decided to call for a world conference to discuss sustainable development, arrest further degradation of the environment and repair the damage already done. A large number of persons participated in the Conference.[17]

An agenda for action called Agenda 21 incorporating the work programme of the international community as global partners in progress for the period beyond 1992 and into the 21st century was prepared and released as the "Earth Charter or Rio Declaration".[18] In relation to intergenerational equity the relevant principles were:

1. Human beings are at the centre of concerns for sustainable development.
3. The right to development must be fulfilled so as to equitably meet development and environmental needs of present and future generations.
6. The special situation and needs of developing countries particularly the least developed and those most environmentally vulner-able shall be given special priority.
22. The states should recognise and duly support the identity (of indigenous people) and enable their effective participation in the achievement of sustainable development.

A climatic treaty to reduce the green house gases was also signed at the summit.[19] Besides the Treaty for Conservation of Forests[20] and Biodiversity,[21] the Rio Summit has given its seal to the principle of intergenerational equity. However, the manner in which the model has been adopted renders it susceptible to the same criticism of the theory propounded by Edith Weiss, which is discussed later.

A fund for cleaning up the planet called the Global Environmental Facility has also been created. The fund will be used to tackle urgent environmental problems like

16. World Commission On Environment And Development, Our Common Future (1987), See also, Pearce, *Optimal Prices for Sustainable Development* in Collard, Pearce and D. Ulph (Eds.), Economics, Growth And Sustainable Environments (1988) .
17. An interesting aspect of the Conference was that it was attended apart from the official delegates, by environmentalists, scientists, industrialists, indigenous people and NGOs.
18. *Rio Declaration on Environment and Development*, 31 International Legal Materials 874 (1992).
19. *Framework Convention on the Climatic Change*, 31 International Legal Materials 849 (1992).
20. *Statement of Principles for a Global Concensus of the Management, Conservation and Sustained Development of All Types of Forests*, 31 International Legal Materials 881 (1992).
21. *Convention on Biodiversity*, 31 International Legal Materials 818 (1992).



global warming, ozone depletion, deforestation and loss of biodiversity. Thus the Earth Summit firmly laid the foundation for a better world of tomorrow.[22]

## III. Weiss Theory Of Intergenerational Equity

Edith Weiss in her work,[23] argues that the natural environ-ment of our planet is common to all members of the human species, past generations, the present generation and future generations. The theory is based on relationship between the members of generations of the human species and the natural system.[24] The human species is alone endowed with the competence to safeguard the environment and therefore has a special responsibility to care for the planet.[25] The second relationship is between different generations of the human species, all generations being inherently linked to each other.

Three basic principles are proposed by Weiss to constitute the obligation of intergenerational equity.

1. Each generation should be required to conserve the diversity of the natural and cultural resource base, so that it does not unduly restrict the options available to future generations in solving their own values. This is the principle of "Conservation of options".
2. Each generation should be required to maintain the quality of the planet, so that it is passed on in no worse condition than that in which it was received. Future genrations should also be entitled to planetary quality comparable to that enjoyed by previous generations. This is the principle of "Conservation of quality".
3. Each generation should provide its members with equitable rights access to the legacy of past generations and should conserve this access for future generations. This is the principle of "Conservation of access"

These principles are used to govern the acts of the present generation on how to utilise the resources of the planet.The other components of the theory explained by Weiss are as under:

*(a) Conditions Of Planet Earth:* The theory proposes that each generation has to pass on the planet in no worse condition than it received it. But the question arises whether later generations can inherit the planet in a much better state than currently

22. *R. K. Sinha, Global Environmental Protection and Eco-Politics at Earth Summit*, in R.M.Lodha (Ed.), Environmental Ruin: The Crisis Of Survival 400 (1993).
23. See *supra* note 3.
24. E. B. Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 American Journal Of International Law 198 (1990).
25. This idea comes in for scathing criticism by A. D'Amato who argues that this represents a highly anthropocentric view; A. D'Amato, supra note 5.

being enjoyed.[26] Weiss seems to suggest that this is consistent with the principles she has formulated.[27]

*(b) Holders Of The Right:* The theories of intergenerational equity have been assailed on a conceptual level as to the nature of the obligations. Who can enforce the rights? Prof. Amato, in his critique discussed later, considers that it is not possible to suggest that rights are available to individual persons living say a hundred years hence as it would be a wasted exercise in jurisprudence. The reply given by Weiss is that these rights are enforced by the members of the present generations themselves who act on behalf of members of the future generations.[28] When held by members of the present generation they acquire attributes of individual rights in the sense that they are identifiable interests of individuals that the rights protect. Generations hold these rights as groups in relation to other generations.

*(c) Enforcement:* To enforce this scheme of intergenerational rights and obligations, Weiss proposed the establishment of the institution of Ombudsman for future generations as well as the creation of a Planetary Rights Commission to hear complaints and a Commission on the future of the planet to assess the effects of present action on future generations. Weiss also proposed the creation of planetary user's fees and trust funds for future generations. The launching of scientific and technical research programmes to analyse the threats to the environment and to develop adequate technological responses was also envisaged.

*(d) Model Of Conduct:* Weiss based her entire theory on the adoption of what she perceived as the "equality model". This modal requires the conduct of a generation to be in conformity with the requirements of the future and in the absence of committed waste.[29] The adoption of the equality modal is central to this theory. This modal is the take-off stage for the intergenerational modal discussed earlier. The equality model starkly contrasts with two other modals. The opulent model, which denies any such obligation and permits extravagance and waste and the preservationist model which requires the present generation to make substantial sacrifices of denial so as to enhance the environmental legacy that they will beqeath to the future.

*(e) Generational Equity:* In championing the cause of the rights of future generations, Weiss was also concerned about achieving equity for the current generations. Lament is expressed at the imbalance in global development. Weiss suggested that the problems of the environment of the third world are more serious than that of the developing world. She calls for achieving of equity through elimination of poverty in Africa, Asia and Latin America.

26. See, Callahan, *What Obligations Do We Have to Future Generations* in Partridge (Ed.), RESPONSIBILITIES TO FUTURE GENERATIONS 73 (1981).
27. Weiss, *supra* note 24 at 200.
28. *Id.* at 202.
29. *Id.* at 211.



*(f) Critique Of The Weiss Theory:* Anthony D'Amato rendered the most virulent attack on the Theory of Intergenerational Equity as proposed by Weiss.[30] He adopts the paradox of Derek Parfit.[31] This paradox presupposes that it is impossible to predict who the individuals will be, who will constitute future generations. If we take an instance of one intervention by us to protect the environment, e.g., the imposition of mandatory pollution control units in industries, then, according to Parfit, the slight difference in the environment as a result of this step will affect the conditions under which the human sperm and ovum fuse. This is because even slightest change in the environment can change the conditions under fusion of the two primary materials that are necessary for life to take place. Thus a slight change will ensure that a different sperm will fuse with the egg subsequent to the intervention in the environment. Thus different people will be born, from those who would have been born if we had not intervened in the environment.

Amato then poses the question as to how one can owe a duty to future persons, if through the very act of discharging that duty, the very individuals to whom this alleged duty is owed, are in effect wiped out. Amato also found fault with the Weiss model for being too anthropocentric and species chauvinistic.[32] He said that inadequate attention has been paid in this paradigm to the important concept of animal rights. The conceptions of the rights of future generations are essentially limited in human terms. This criticism went to the root of the human rights approach on which the theory of intergenerational equity rests. D'Amato proposed, in the alter-nate, that humans should cultivate their natural sense of obligation, not to act wastefully or wantonly. D'Amato makes no reference to any imaginary rights of future generations.

*(g) Human Rights Critique:* The theory of Weiss was also questioned on the basis of the human rights approach.[33] The theory as such seeks to extend to future generations an intertemporal human right to the environment.[34] The critisicm on this aspect is that there exist few workable norms on an international plane for implementing the duty to conserve for future generations.

30. See D'Amato, *Do We Owe a Duty To Future Generations To Preserve The Global Environment, supra* note 5 at 190.
31. *Ibid.*
32. D'Amato, *supra* note 5 at 191. In reply to this criticism by D'Amato, Weiss suggest that every policy decision of government and business affects the composition of future generations so it would be meaningless to argue in the above fashion, see Weiss, *supra* note 24 at 206. Guindling also joined issue with D'Amato saying that humans have always interfered with history even when they were not aware of the need to take care of future generations, See Guindling, *Our Responsibility to Future Generations*, 84 AMERICAN JOURNAL OF INTERNATIONAL LAW 207 at 210 (1990).
33. Nickel, *Review of In Fairness to Future Generations*, 1 COLUMBIA JOURNAL OF INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 199 (1990).
34. Alston, *A Third Generation of Solidarity Rights Progressive Development or Obfuscation of International Environmental Law*, 29 NETHERLANDS INTERNATIONAL LAW REVIEW 307 (1982).

*(h) Enforcement*: The conceptual problem that seems to dog the Weiss model is whether generations in the future can travel backwards in the time to make claims against earlier generations.[35] The view of Weiss that the members of the present generation can claim rights against past generations fails to answer the following questions:

1. How will members of the present adequately gauge the extent of the rights required by those in the past ?
2. Is the right completely barred if the members of the present generation do not indicate these rights with sufficient clarity? In this regard Brian Berry is of the view that generations can only affect the reputation of past generations.[36]

*(i) Needs Of Future Generations:* What do men and women, fifty or a hundred years in the future would require? It is difficult to estimate the needs, technologies and values that will be in vogue for persons, who are to be born in the remote future. Further, since the representatives of these people are members of the current generation, the contours of the needs to be safeguarded are indeterminate. The absence of objective norms that can be used to gauge and the nature of the duty to the posterity, render it difficult to understand whether our present day conduct will help or hurt future generations.[37]

Transfer Of Authority: The scheme of Weiss envisages substantial devolution of power to the bodies that are to regulate generational conduct. However, since states are central actors in international law, there are fears that they may be reluctant to entrust power to a world body for this purpose, though the experience in the establishment of the United Nations and the World Trade Organisation suggests otherwise. It is however, doubtful whether the creation of a world body for regulating intergenerational equity will find favour with the present eco-planners and policy-makers.[38]

## IV. Jurisprudential Basis Of Intergenerational Equity

It is appropriate at this stage to examine the jurisprudential foundations of the theory that rights can accrue to future genera-tions and that present generations have obligations to use the planet in a sustainable manner. Christopher Stone[39] attempts to

35. Laslett and Fishkin, *Introduction: Processual Justice* in P.Laslett and J. Fishkin (Eds.), Justice Between Age Groups And Generations 1 at 78 (1992).
36. B. Berry, *Justice Across Generations* in P. Harker and J. Raz (Eds.), Law, Morality And Society 268 at 270 (1977).
37. Christenson, *Review of In Fairness to Future Generations*, 1 Year Book of International Environmental 392 at 396 (1990).
38. Boyle, Review of In Fairness to Future Generations, 40 International And Comparative law Quarterly 230 (1991).
39. C. Stone, Earth And Other Ethics: The Case For Moral Pluralism (1987).



advance a legal theory to justify the concepts of the equity for the future. In this regard he utilises two concepts, persons and non-persons. Persons are those who are normal adult humans, live as neighbours in time and space and are capable of knitting the bonds of a common community. Non-persons include future generations and the unborn.[40] He suggests that these persons are to be made "legally considerate" and this is to be done by demonstrating that they advance human welfare in some fashion and that continuation of the human species is in the best interest.[41]

Stone's theory assumes on a moral and ethical plane that the continuation of human life on earth is perhaps the best solution. Heilbroner[42] suggests that this assumes that it is eminently desirable to justify the preservation of human life on earth and suggests that there is no great spin off in continuing the survival of the human species on earth, which apart from religious convictions, is bereft of any credible necessity. Unwittingly perhaps, this enters the great realm of the abortion and suicide debates, which are too vast to encapsulate herein, but yet this approach does merit serious concern.[43]

Burke's writings also seem to support on a socio-legal claim the theory that the persons yet to be born have rights. He considers that society is a partnership between the living, the dead and those yet to be born.[44]

Most classical socio-economic writings in the western world have relied on the Lockean theory that resources would be so plentiful that consumption even in large measure would not prejudice the rest of humankind.[45] These writings did not concern themselves with the possibility of exhaustion of resources. At the time most of these writings emanated, the consumption patterns of society were considerably small and the ravages of the industrial world had not set in. However, not all of western thought assumed that resources were plentiful and could be utilised wantonly. In the writings of Plato, prudence in the use of resources is advocated.[46] Professor Weiss also found support in the writings of Hans Kelsen and John Austin, whose theory of obligations

40. C. Stone enumerates other categories of non-persons as consisting of animals, nations, tribes, corporations and universities.
41. It is seen that there appears in this theory of Stone an element of Utilitarianism. Whether the greatest good for the greatest number, which depends on the pain and pleasure calculus, can be accurately measured across time is open to doubt.
42. R. Heilbroner, An Inquiry Into The Human Prospect: Updated And Reconsidered For The 1980s, 190 (1980).
43. However, it appears that the great advances in science and technology, whereby the human species is being made super human through an array of genetics, vaccines, medical operations, etc. seems to have been ignored in this paradigm. Heilbroner's theory also assumes that the miserable nature of human existence as he percieves it, cannot be remedied in the future, making life easier than before.
44. E. Burke, Reflections On The Resolution In France 143-144 (1790).
45. J. Locke, Essay Concerning The True Original Extent And End Of Civil Government, Ch. V.
46. Plato, The Laws, Book V (Reprint 1985).

runs across generations.[47] One might view John[48] Rawls theory of justice as providing a basis for intergenerational rights. Rawls says that through a scheme of justice generations may be linked together under a pattern of cooperation. He highlights the harm that would be caused to the selfesteem of the human race, whose situation on the planet is unique, if the rights of posterity were not preserved.[49] The present generation should act at least for protecting the interests of at least two future generations. The interests of future generations, beyond these two would be protected through "ties of sentiment".[50]

## V. The Nauru Case

An instance for a practical demonstration of the working of the concept of intergenerational equity was witnessed in the matter relating to Nauru. Nauru is an island, blessed with a natural resource base of phosphates. From the 1st World War until 1968 it was administered as a trust territory[51] by Australia.[52] Australia authorised the conduct of large scale mining operations in Nauru by an outside entity without payment of much royalty.[53] Considerable environmental damage was also caused.

In 1987, Nauru commenced proceedings against Australia before the International Court of Justice and in 1992 the court ruled that the Australian preliminary objections to the Nauruan claim could not be accepted.[54]

The *Nauru* Case then entered the phase of merits. In this stage various legal arguments justifying the Nauruan claim were sought to be advanced. Intergenerational Equity was to play a key role in this regard.[55]

47. H. Kelsen, Pure Theory Of Law 62 (M. Knight Translation: 1969); J. Austin, Lectures On Jurisprudence 413-15 (1873).
48. J. Rawls, A Theory Of Justice (1971).
49. *Id.* at 292.
50. Handl explains this concept by suggesting that failure to act in the cause of future generations will harm oneself. He perceives that this is due to the fact that an essential defining aspect of the human experience is one's understanding of oneself as part of a larger, intergenerational body of humanity. Any disturbance of this sense will amount to a basic value deprivation, Handl, *Environmental Security and Global Change: The Challenge to International Law*, 1 Year Book Of International Environmental Law 3 (1990).
51. Until 1945 Nauru was under a mandate agreement and thereafter it was replaced by the trusteeship system provided for in the UN Charter.
52. See Generally, A. Anghie, *supra* note11.
53. The disastrous effects of the mining activity that was carried out on Nauru is exhaustively documented in a ten-volume report prepared by a Commission of Inquiry. An abridged version is available in C. Weermantry, Nauru; Environmental Damage Under Trusteeship (1992).
54. Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, 1992 I.C.J 240.
55. Weeramantry, *supra* note 53 at 338.



It was sought to be argued that if the environmental damage done to Nauru was left unrestored, disregard for the rights not only of those who were in charge but of the rights of their posterity would be affected. It was stated that succeeding generations of Nauruans would be able to point a finger to the period of mining as a period when the rights of the Nauruans were considerably jeopardised.[56]

Another aspect of the *Nauru* Case was that since the island itself was being held under a sacred trust of civilization, as was required from the authority administering the mandate over *Nauru*, by international law,[57] a further trust to conserve the natural resources for the future was superimposed upon it. Thus it was sought to be contended that the administering authority was liable on account of breach of both trusts. However, the *Nauru* Case did not proceed on merits since a settlement was effected by Australia whereby 50 million dollars was to be paid in accordance with a Rehabilitation and Co-operation Agreement with Nauru, under which Australia will fund 2.5 billion worth of jointly agreed rehabilitation and development activities.

The *Nauru* Case, however, threw up important issues related to the theory of intergenerational equity, despite the fact that the I.C.J could not formulate concrete legal norms on the same.

1. The concept of intergenerational equity was viewed as a distinct norm whose breach in international law was considered to give rise to a cause of action.[58]
2. The norm of intergenerational equity was considered in a manner that would embellish the existing provisions in international law like the trusteeship system. This system did contemplate the necessity for the administreing authority over a trust territory to safeguard certain rights but the specifics of these rights being actually enjoyed by a future generation has been provided by the norm of intergenerational equity.
3. The knotty problem of how one generation can enforce the obligation against another was resolved in a curious way through the bringing of a claim by one generation of Nauruans against one generation of Australians for acts performed by another generation of Australians. However, this leads to the conceptual problem as to whether a future generation or present generation can be made to pay for the sums of the past.

56. The conception of the mandate system under which Nauru was being administered by Australia was to confer upon advanced nations, the charge over primitive territories so that their well being could be ensured, see Wright, Mandates Under The League Of Nations 1-63 (1930).
57. Weeramantry, *supra* note 53 at 341.
58. Normally in international law, responsibility for a state arises when there is a breach of an obligation. This obligation can stem from prescriptions in both treaty and customary law. Apart from treaty provisions of the trust system, under which Nauru was administered by Australia, it is possible to state that since intergenerational equity has reached customary status it can be the basis for fixing responsibility. Edith Weiss suggested that the theory is now part of customary law by reference to civil law, the Judaeo-Christian tradition, Islamic law, socialist tradition, african tradition, etc. see E.B.Weiss, *supra* note 3 at 18-20.

4. The Nauruans interestingly relied upon the pleadings by the Australian Government in the *Nuclear Tests Case*,[59] wherein it was asserted that the rights of unborn Australians were being prejudiced by France's conduct of nuclear tests in the South Pacific.[60]
5. A fundamental consequence was the vindication of the rights of the Nauruan people who had not yet emerged independent. Accordingly, the fact that equity across generations can accrue to people without the concomitant of a state being required was demonstrated to exist.[61]

## VI. The Indian Constitution And Future Generations

It is proposed to embark at this juncture upon an exercise to examine whether the theory of intergenerational equity can find place in the existing corpus of Indian law and jurisprudence. In this regard our search must begin with the Constitution.

The Preamble sets out the main objects of the Constitution, which the Constitution makers intended to be realised through state action.[62] This introductory paragraph of the paramount law proclaims that the people of India on the 26th of November, 1949, resolved to constitute India into a Republic as well as to secure to its citizens the goals of Justice, Liberty, Equality and Fraternity. The citizens referred in the Constitution are those to whom the Constitution has given great rights and freedoms with the concepts enshrined in the Preamble not being mere platitudes.[63] The citizens of India mentioned in the Preamble include both persons living in India, at the time of the inauguration of the Constitution and after.[64] For most people born after the Constitution came into force the Citizenship Act of 1955 grants the status of citizens, the prerequisite for automatic citizenship being birth in India. Therefore it is clear that the citizens of India for all generations to come may enjoy the guarantees of the Preamble. Fundamental to these guarantees is the conferring of dignity on the individual and the "equality" aspect. These two concepts are intended to be assured to all citizens for all times as per the sacred promise made on 26th November 1949. Thus an aspect of the theory of rights and guarantees to future generations is found in the Preamble itself.

The Constitution of India guarantees certain fundamental rights which can be intertemporal. The first right in this connection is the equality guarantee. It has been

59. 1974 ICJ 253.
60. See Weeramantry, *supra* note 53 at 339.
61. An important objection raised by Australia in the Nauru Case was to the effect that no state was in existence during the period in which the allegations of environmental degradation due to mining operation was made and hence independent Nauru could not vindicate the rights of a people not organised as a state. However, the Court ruled that this did not impede the Nauruans from ventilating their claims before it.
62. Golak Nath v. State of Punjab, AIR 1967 SC 1643 at 1655.
63. Keshavananda v. State of Kerala, (1973) 4 SCC 225 at 424 and 904.
64. They have a Constitutional right to citizenship under Article 5.



held that the guiding[65] principle of the guarantee is that all persons and things similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed.[66] This principle has also been intepreted as a prohibition on arbitratry action.[67] It could be possibly argued that future generations must be treated in a manner that conforms to this principle of equality. The principles of intergenerational equity requires that all actions must be taken ensuring that the interests of future generations' will not be put in jeopardy. However, the question arises whether the persons belonging to the future generations are similarly situated vis-a-vis members of the present generations. Accordingly equality must be fashioned in such a way that the future generations are not discriminated against.[68] How unequal or dissimilar from the present are the future generations is the important question. One thing is certain that if they are not going to be equal to our generation, the degree of treatment accorded to them must vary.

However, to suggest that the right to equality in the Indian Constitution assures intergenerational rights is beset with the problem because the guarantee of equality can only be enforced against an entity that is classified as "state".[69] But in the sphere of environmental harm, the requirement of Article 12 has been dispen-sed with in making a private company liable for the violation of the rights of persons who were affected by the pollution caused by it.[70]

Article 21 of the Constitution proclaims that no person shall be deprived of his right to life and personal liberty except through a procedure that is established by law. The Supreme Court has held that this guarantee of life is not confined only to bare existence and is of much wider import[71] to encompass the right to live with human dignity.[72] This human dignity has various elements which will be discussed in particular reference to the Directive Principles. The dignity of the human person that is inherent in the guarantee of life has been used to grant relief that would have some link to the principles of intergenerational equity.

1. It has been utilised to grant relief against the ill effects of X-ray radiation on the employees of a state corporation.[73]

65. Article 14 guarantees all persons equality before the law and the equal protecton of the laws.
66. K. Satish Chandra v. Union of India, AIR 1953 SC 250 at 252.
67. E.P.Royappa v. State of Tamil Nadu, AIR 1974 SC 555.
68. Builders Assn. of India v. Union of India, (1989) 2 SCC 645.
69. This term is defined in Article 12 of the Constitution and generally requires that an entity must perform some public function, or must be connected with governmental activity to be called state, R.D.Shetty v. International Airports Authority, AIR 1979 SC 1628.
70. M.C.Mehta v. Union of India, (1987) 1 SCC 395.
71. Francis Coralie v. Union Territory, (1981) 1 SCC 608.
72. Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161
73. M. K.Sharma v. Bharat Electronics, (1987) 3 SCC 231.

2. A right to reasonable quality of life has also been recognised to be part of the guarantee of life.[74] One might argue that the Article 21 protection should be extended to the quality of life for future generations. However what impairment is likely to be caused to the quality of life of a person living fifty years hence may be difficult to estimate. But in order to vindicate that the right exists and has been affected, no demonstration of deterioration in exact terms is necessary.

3. Life includes all that gives meaning to a man's life including his tradition, culture and heritage and protection of his heritage in full measure.[75] This dictum can be easily utilised to suggest that the rights of future generations may also include the right to the wholesome existence that can be denied because of the wanton destruction of the environment.

The right to the unpolluted environment and preservation and protection of nature's gifts has also been included under Article 21. The guarantee of right to life has been expanded to include the right to a clean and wholesome environment.[76] It may be stated that the rights of future generations relating to environmental protection might also be included in Article 21.The requirement of "state action" under Article 12 may be a hurdle in protecting environment from the actions of private persons. However, in many areas the judiciary has invoked the guarantee of the article even when the persons concerned are not "state" entities.[77] More importantly it is significant to note that the impediment of locus standi is sufficiently diluted, in relation to filing a petition claiming that the fundamental rights of citizens are being violated.[78] It is possible for public spirited members of the present generations to bring a petition to prevent violation of the rights of the future generations to inherit the planet in a proper condition by contending that they are acting on behalf of these persons who are unable to do so themselves. It is also possible, apart from seeking the relief in the form of stopping the threat to the environment or planetary integrity, for the persons complaining to ask for compensation for the wrongs to be remedied.[79]

Part IV of the Constitution deals with the Directive Principles of State Policy which shall be fundamental in the governance of the land. In *Sachchidanand Pandey* v. *State of West Bengal*,[80] the Court ruled that it would interpret the Directive Principles

74. State of Himachal Pradesh v. Umed Ram, (1986) 2 SCC 68.

75. Ramsharan Antayanuprasi v. Union of India, (1989) Supp. (1) SCC 251.

76. T. Damodar Rao N.S.O. v. Municipal Corpn., Hyderabad, AIR 1987 AP 171; Rural Litigation and Entitlement Kendra v. State of UP, AIR 1987 SC 2426; Chhetriya Pardushan Mukti Sangarsh Samiti v. State of UP, (1990) 4 SCC 445; Subash Kumar v. State of Bihar, (1991) 1 SCC 598.

77. J.P.Unnikrishnan v. State of AP, (1993) 1 SCC 645.

78. See, S.P.Gupta v. Union of India, AIR 1982 SC 149, where the Supreme Court explained that public spirited individuals can bring actions even if they are not personally injured. Many cases have been entertained in an era of public interest litigation that later followed. This is especially true in the environmental litigation.

79. Rudul Shah v. State of Bihar, (1983) 4 SCC 141.

80. AIR 1987 SC 1109.



in a manner that it would examine whether appropriate considerations have been borne in mind by the state while acting. Whether these appropriate considerations include the principles of the equity theory is open to question. Article 39(b) mandates that the owner-ship and control of the material resources of the community should be so distributed as best to subserve the common good. While this clause has been mostly used in relation to laws that nationalise private property or business, etc.[81] its scope to safeguard the rights of future generations cannot be doubted. The term "material resources" has been interpreted widely and includes natural resources.[82] It may be contended that the common good includes even the "good" of the future generations. The emphasis, therefore, is on the common resource and on the group rights, which is particularly significant after the removal of the right to property as a fundamental right from the Indian Constitution.

Article 47, also a directive principle, requires the state to improve the health of its people. It is not possible to suggest that this has only a temporal connotation since acts that are unfriendly to the environmenat affect the health of future generations, who are also persons to be taken care of by the everenduring entity called the state.

Article 48-A requires that the State shall endeavour to protect and improve the environment and safeguard the forests and wildlife. The use of the term "safeguard" clearly requires the state to act in a manner that is beyond the times of current generations. The phrase "improve" the environment, is also apparent. For whose sake should the environment be improved? Rosencranz[83] suggests that this calls for an affirmative governmental action to improve the quality of the environment. In this regard, the Andhra Pradesh High Court held:

> It would be reasonable to hold that the environment of life and its attainment and fulfilment guaranteed by Article 21 of the Constitution embraces the protection and preservation of nature's gifts without which life cannot be enjoyed .... It therefore becomes the duty of Courts to forbid all action of the State and the citizen from upsetting the environmental balance.[84]

81. State of T. N. v. Abu Kanvar Bai, (1984) 1 SCC 575.

82. The egalitarian social order that Article 39 (b) forms the core must therefore take into account the interests of future generations. This is evidenced in the series of nationalisation laws which purported to restructure the order. However, the restructuring should be intertemporal and equitable for all time to come. The Indian experience has shown that restructuring a social or proprietal order always means that one class usually replaces the other, perpetrating the same hegemony that the restructuring intended to prevent, thus in a sense no real concern has been shown for the future.

83. Rosencranz, Divan and Noble, ENVIRONMENTAL LAW AND POLICY IN INDIA 54 (1991).

84. T. Damodar Rao v. Special Officer, AIR 1987 AP 171 at 181. Similar rulings have been rendered in L.K. Koolwal v. Rajasthan, AIR 1988 Raj. 2; Madhavi v. Tilakan, 1988 (2) Kerala L.T. 730; Kinkri Devi v. State of Himachal Pradesh, AIR 1988 HP 4 at 9.

In a case the Supreme Court laid down certain safeguards to protect the tribal forest dwellers from being ousted from their land in the implementation of a development project for erecting a power plant. One might view this approach as recognizing the principle of intergenerational equity. The Court observed that the tribals "for generations had been using the jungles for collecting the requirements for their livelihood" and, therefore, should not be disturbed.[85]

The *Ganga Pollution Cases* might be regarded as the most significant cases in relation to the environment in India. A petition was filed seeking a direction to the authorities to stop pollution in the river Ganga. After considering the sacred and historic nature of the river, the Court observed that the cleanliness of the stream in the river needs protection which was in fact the life sustainer of a large part of northern India.[86]

Article 51 of the Constitution requires that the state must foster respect and regard for international law. Intergenerational equity due to the concomitant elements of state practice and opinio juris, has now been transformed into a principle of customary international law and is to be respected by India.[87]

The fundamental duty to protect the environment under Article 51A(g) may be viewed as protecting the interests of future generations. The duty under this article enjoins every member of the present generation to protect the environment and the rights of future generations.[88]

## VII. Concern For The Future In The Indian Statutory Framework

We have argued that the Indian Constitution allows a theory of intergenerational equity. Let us now refer to the various laws in force in India that can be said to support this theory.

### *The Water (Prevention And Control of Pollution) Act, 1974*

This Act aims at controlling pollution in the water resources of India through the creation of regulatory authorities and enabling them to prescribe standards. A set

85. Banawasi Seva Ashram v. State of UP, AIR 1987 SC 374. The Court had earlier ruled in Olga Tellis v. Bombay, AIR 1986 SC 180, that the right to livelihood formed a part of the guarantee of life. Could a future generation argue that their right to livelihood was being deprived by the environmental impact? The problem arises in ascertaining what could be the livelihood of persons fifty years hence.

86. M.C.Mehta v. Union of India, AIR 1988 SC 1037. The Court also called for a number of measures such as calling for setting up of treatment plants. In the second phase, M.C.Mehta v. Union of India, AIR 1988 SC 1115, the Court invoked Article 51A (g) to suggest the education in India must be promoted, that is directed towards protection and improvement of the environment.

87. These two elements when present together in a principle can have the effect of converting it into a norm of customary international law, North Sea Continental Shelf Case, 1969 ICJ 3.

88. Article 51A (g) casts a duty to conserve and to improve the environment. This duty is cast upon every citizen the moment he is born and perhaps there is no clearer recognition of the Weiss' principles of intergenerational equity.



of judicial reliefs are also provided including fines, etc. Though the Act is primarily procedural, the rationale underlying this legislation is clearly to improve the environment. The Act may be seen as securing to the future generations, the indispensable resource of water. Apart from its menace to health, polluted water considerably reduces the water resources of a nation since the total amount of a country's utilisable water remains essentially the same and demand for water is always increasing.

### *The Air (Prevention And Control of Pollution) Act, 1981*

The Air Act meant to control the air pollution is riddled with procedure like the Water Act. However, it is important to note that the preamble to the Air Act expresses its concern on the detrimental effect of pollution on the health of the people.

### *The Water (Prevention And Control of Pollution) Cess Act, 1977*

The Water Cess Act aims primarily to finance the Central and State Water Boards which implement the provisions of the Water Act. The Act creates economic incentives for pollution control and requires local authorities to pay a cess for water consu-mption. This legislation perhaps conforms to the Weiss model which also calls for the setting up of such a tax or cess.

### *The Wildlife Protection Act, 1972*

The Wildlife Protection Act, 1972 forms the core of wildlife legislation in India. It was primarily enacted to protect wildlife, prevent hunting in wildlife and to set up protected areas. There is a critique offered that this legislation excludes people's participation in the management of their natural resources and undermines the symbiotic relationship between the tribals and the forests.[89] In relation to future generations is it really necessary to preserve the wildlife? In what manner would we be have been better off, if previous generations had not finished off the Dodos? However, it is important to note that Wildlife Act perhaps incorporates the critique of Amato that generally the intergenerational equity theory is anthropocentric.

### *The Forest Act, 1927*

The forests in India have seen a turbulent legislative history. From the designs of the colonial rulers to ensure that the rich raw material base was utilised for their economic wealth to the confu-sion that plagued successive forest policy documents in India, a great deal of vacillation can be observed vis-a-vis forest legislation and policy in India.[90]

89. N.R. Jena, *People, Wildlife and Wildlife Protection Act*, 29 Economic And Political Weekly 2767 (1994).

90. R.Guha, *Forestry in British and Post-British India*, 17 Economic And Political Weekly 1882 (1983).

The 1927 Forest Act makes a clear emphasis on revenue yielding aspects of forests. A continuous debate has ensured between NGO groups and the government on the proposed overhauling of forest laws in India.[91] However, without getting into the dynamics of this debate, it is clear that the local committees and the indigenous populations have to play an important role in conserv-ation of forests.[92]

The question that follows is whether the future generations can also be the stake holders in the forest management. Can it be argued that the local communities are stake holders for the future generations in trust or whether this should be left to a sarkari "conservation" officer. The rights of the future generations are specially important to the the natural resource of the forest.[93]

## VIII. Intergenerational Equity In Government Policy

In the Sixth Five Year Plan the hints of the theory are discernible;

> India is endowed with an immense variety of natural resources. While the maintenance of the country's basic biological productivity through proper land and water management is vital to ecological concern, the preservation of its genetic diversity and conservation of its species and ecosystems for sustainable utilization is of crucial impor-tance for the future survival and development of our people.[94]

The plan statement highlights the problems relating to the environment in India and the sheer enormity of environmental problems. This is perhaps the closest approximation to the theory of intergenerational equity in a government document.[95]

## IX. Intergenerational Equity In Practice

In the first case of its kind, the Phillipines Supreme Court applied the theory of intergenerational equity in order to prevent the degradation of the environment.[96] The plaintiffs sought an order that the government should scrap existing and future timber license agreements, stating that deforestation was causing environ-mental damage. It was contended on behalf of the state that since the questions were political they could

91. A. Chhatre, *Draft Forest Legislation*, 29 Economic And Political Weekly 2473 (1994).
92. A. Baviskar, *Fate of the Forest: Conservation and Tribal Rights*, 29 Economic And Political Weekly 2493 (1994).
93. R. Sobha, *Structural Adjustment : Environmental Concern*, 29 Economic And Political Weekly 164 (1994).
94. Planning Commission, Government of India, Sixth Five Year Plan 1980-85, 343 (1981).
95. The Seventh Five Year Plan also discussed these principles in a slightly diluted manner while referring to environmental mangement, Planning Commission, Government of India, Seventh Five Year Plan 1985-90, 385 (1985).
96. Minors Oposa v. Secretary of the Department of Environment, 33 International Legal Materials 173 (1994).



not be gone into by a Court of law. It was also argued that cancellation of existing timber licences would violate due process guarantees in the Philipines' Constitution.

It was held by the Court that the petitioners could file a class suit on behalf of themselves and future generations. Their personality to sue on behalf of the succeeding generations could only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology was concerned. It was acknowledged that the obligation to protect the environment was insisted in the suit. The Phillipines Supreme Court traced the right to health and balanced ecology in accord with the rhythm and harmony of nature.[97] It disregarded the fact that this right was not a part of the Philipines' Bill of Rights and said that it belonged to a different category concerned with self preservation and perpetuation. Importantly, it ruled that the advancement of this right may be said to predate all governments and constitutions.

The Court interpreted the constitution as imposing a solemn duty on the state to preserve the environment for the future generations. The Court also referred to statutes in force in the Philipines that recognised the right of future generations. It ruled that the case was justiciable and that the police power of the state superseded the rules of contract.

## X. Biodiversity And Intergenerational Equity

Biodiversity represents the collection of biological and genetic wealth of the world. Mostly occurring in the nations of the South, these resources have generally been considered as common property of the mankind .[98]

The Convention on Biological Diversity signed pursuant to a proposal in Agenda 21 came into force in late 1993. It could be argued that this fulfils the mandate of Agenda 21.[99] Article 3 of the Convention says that rights of biodiversity are sovereign rights of nation states. This safeguards the south's germplasm.[100] Article 8(g) requires conservation and sustainable use of biological diversity.[101]

It can be stated that the preservation of this diversity is for posterity and is to be a common right that will be available to all generations. In this regard the Declaration on the Cultural and Intellectual Property Rights of Indigenous People

97. This provision found in Sec. 15 and 16 of the Phillipines Constitution, 1987 is part of the Declaration of Principles and State Policies akin to the Indian Constitution's Directive Principles of State Policy.
98. See generally, A. Kothari, *Politics of Biodiversity*, 27 Economic And Political Weekly 749 (1992).
99. Particularly the principle requiring states "to foster traditional methods and knowledge of indigenous people and their communities"
100. See Shiva, *Farmer's Rights, Biodiversity and International Treaties*, 28 Economic And Political Weekly 557 (1993).
101. This is done by respecting preserving and maintaining the knowledge, innovations and practices of indigenous and local communities.

assumes significance since it recognises the rights of these people with respect to their rights and that they are willing to share it with all humanity. Can it then be argued that they are the custodians or trustees of the common resources for the future generations at least with respect to the matters recognised in this declaration?[102]

## XI. Status Of Intergenerational Equity As A Norm Of International Law

The theory of intergenerational equity has some basis as a rule in international law. But what is the strength of this doctrine is open to question. The theory is founded in the UN Charter, the International Covenant on Civil and Political Rights, the Preamble to the Universal Declaration of Human Rights,[10-3] the Convention on the Prevention and Punishment of the Crime of Genocide and the American Declaration on the Rights and Duties of Man. Besides, Weiss has found traces of this theory existing in Islamic Judeo-Christian, civil, socialist, African and Asian legal traditions.[104]

With the incorporation of this principle in the Stockholm and Rio declarations and the Biodiversity Convention, its status is considerably strong as a norm of customary international law. Equity is also an integral part of international law, having been recognised by judicial decisions and the writings of publicists.[105]

## XII. Conclusion

The theory of intergenerational equity though a controversial subject needs careful consideration. The Rio and the *Oposa Case*[106] demonstrate the importance of this principle. In India, the adoption and application of this theory is possible both within the constitutional and legislative framework. The theory of intergenerational equity however still remains to be endorsed by a judicial tribunal. In the *East Timor Case*[107], the ICJ again missed an opportunity to determine the actual legal content of the principle since it dismissed on preliminary points the claim of Portugal that Australia was in fact violating these rights.

Regardless of whether intergenerational equity is accepted internationally, for developing nations like India there is an urgent need for sustainable development. This means that there is a need to emphasise the preservation of capital stock and natural

102. L. Rajamani, *Intellectual Commons to Intellectual Property*, 8 National Law School Journal 19 at 124 (1996).

103. The Preamble refers to the human family. All generations are probably included in the intertemporal family.

104. Weiss, *supra* note 3 at 18-20.

105. W. Friedman, The Changing Structure Of International Law 197 (1964).

106. See *supra* note 96.

107. 1995 ICJ 90.



resources while pursuing economic goals in order to safeguard the interest of the future. However, there is no use of thinking for the future, if current situation is not changed. Thus the concern for intergenerational equity must be transformed into a need for equity within the generation.[108] In India, particularly alleviation of poverty is considered inseparable from sustainable development and poverty is seen as both the cause and effect of environmental problems. Thus the creation of equity in a true sense that reaches out to all humans whether present or in the future is an imperative need.

108. K. Parikh, *Sustainable Development and the Role of Tax Policy*, 13 Asian Development Review 127 at 129 (1995).

# REFLECTIONS ON FREE MARKET ECONOMY IN INDIA

*Harish Chander**

## I. Introduction

The twentieth century has witnessed a bitter struggle between ideologies of free market capitalistic and planned and controlled socialist models as system for the economic growth and development of a country. Differences in ownership of the means of production, in the methods of distribution and the existence of a planned economy constitute the major distinction between a capitalist and a socialist economy. In the free market capitalist system, the ownership of means of production vests in the hands of the private entrepreneurs whereas in a socialist system, the ownership is with the state. It is believed that a capitalist industry is one in which the material instruments of production are owned or hired by private persons and are operated at their orders with a view to selling at a profit the goods or services that they help to provide. A socialised industry is one in which material instruments of production are owned by a public authority or voluntary association and operated, not with a view to profit by sale to other people, but for the direct service of those whom the authority or association represents.

After independence, India did not completely rely either on the capitalist model or on the socialistic model. We chose the Nehruvian model for our country. Therefore, in the important areas of economy India made huge investments in the Public Sector Undertakings (PSU's). The Government also nationalised financial institutions and banks to give a boost to the economic growth with the social objective to serve the society without the profit motive. With this India did establish the basic economic and industrial infrastructure but the economy did not take off as was expected. The high growth rate (GDP) was not achieved. Rather most of the PSU's where huge investments were made started making losses which had to be compensated by the Government through taxes on the public.

## II. Reasons For Shift Towards Free Market Economy

For more than four years the Indian Government is making efforts to bring about economic reforms in the economy towards a free market economy. Some basic reasons, inter alia, towards this shift could be listed as following :

(1) The trend of the world towards globlisation in which India could not remain isolated particularly when there was changing economic system in Eastern Europe, the collapse of the U.S.S.R. and the shift towards new economic model in the region, as well as Chinese concern for transition from communism to a competitive market oriented economy.

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(2) To raise the rate of economic growth (GDP) which could be possible only through efficient running of industries with competetive approach and profit motive.

(3) To privatise those PSU's which were not running on efficient, productive and profit basis, so that they could compete with other industries.

(4) To liberalise the economy with a view to encourage more investment particularly from the foreign countries. Therefore, the Government is projecting liberal policies in the form of free market economic reforms.

However, it may be added that inspite of globalisation and liberalisation Indian economy is not a pure free market economy. Our system of economic administration is fundamentally and largely based on a planned economy. We have not abandoned planning and the government and our state has the capacity to determine the nature and extent to which consumerism will be allowed, how the savings should be encouraged and how the investments should be directed towards the selective, important and desired channels of the economy.[1]

## III. Impact Of Free Market Economy

In economic terms literally speaking there is a hope over the fact that the annual rate of economic growth (GDP) is five per cent and is projected to achieve eight per cent which was only one per cent five years ago. But the inflation rate has touched the rate of double figures during this period. The result is that the real purchasing power of the common man is steadily eroding every day.

It is true that with the growth rate of five per cent the wealth of the nation is increasing but the real beneficiaries are a few private entrepreneurs who have taken advantage of the free market economy. In fact the problem in India is as to how to distribute the growing wealth equitably among the common masses who are the real victims of the free market economy. It has also been observed very recently that there has been a rapid decline of the rupee value in relation to the U.S. Dollar and other hard currencies. The government thinks that this situation will benefit the exports. In this context M.N. Buch has asserted :

> It is not as if India has an enormously favourable balance of trade, which can further improve by our export becoming cheaper on account of dollar appreciation. We have in fact, a chronic trade deficit and there are large scale imports of petroleum products, edible oil and other essential commodities.... The rupee is not under pressure because we have been trying to acquire the capital goods which contribute to the building of infrastructure. It is under pressure from the assorted soaps, scents, cosmetics, clothes and consumer durables which are flooding our markets. If this is free market competition. God help us.[2]

1. M.N. Buch, *Cock-eyed Economics,* The Hindustan Times (21 February 1996).
2. *Ibid.*

The danger in the modern world is that a new form of imperialism or colonialism is emerging. In this form of colonialism the countries like U.S.A., Japan and other developed countries are finding the selected countries among the developing countries to be used as captive or satellite production centres and to produce the goods needed by the developed world by exploiting the cheap labour and raw materials available at much less than the global prices.[3] Such role is being played by Taiwan and South Korea. The warning signal is that in the name of free market economy India may not be used as a captive colony by the developed countries. The point is further confirmed from the fact that most of the foreign investment is not for the capital building infrastructure but only for the consumer goods industries, like Pepsi Cola, Coca Cola, Uncle Chips, etc.

Added to all, the effects of free market economy is the moral crisis in Indian society. In India the problem is not merely of the type of economic or political system which ought to be followed. The problem is also of the character of the Indian people who have gradually lost the respect for law and the rule of law. Unless people really give a serious thought to this problem and do develop the habit of the respect of law and the rule of law no system will bring fruits for the common man. This point is well demonstrated from the various kinds of scandals, scams and corrupt practices followed by the people up to the top level in the country in the recent past.

## IV. Some Suggestions

The style in which the political economy of this country is being practised some apprehensions have been expressed in many quarters that the very basic institution of democracy is in danger and that it may not survive for a long time. Therefore, the impera-tive need of the present times is that we must support healthy democratic values. Democracy will not survive and develop on healthy lines without the people's habit of obeying the law, faith in the legal institutions, and the respect for the rule of law. It is only then we can hope for a viable economic system primarily based on the competitive market economy which can grow and flourish. The ideal value of equality should not be merely enshrined in Article 14 of the Indian Constitution but should be translated in economic terms. With the economic reforms and free market economy the problem may not be only for increasing wealth of the nation but the problem will also be now to distribute the wealth of the nation equitably. The economic growth and free market economy by itself will not be able to solve the problem of equitable distribution to the common masses. For this special efforts will have to be made in the economy by giving more wages for the working class, by providing welfare schemes for the poorer and vulnerable sections of the society. It has been aptly said by Ash Narain Roy "The increasing equal distribution of wealth not merely ensures equity, it is also an economic asset. One of the reasons for Japanese economic miracle is that it has a far less unequal distribution of income than any other country. The top

3. *Ibid.*



20 per cent of the income earners in Japan get four times the average of the bottom 20 per cent".[4]

In order to encourage foreign investments we have to make some changes in the labour laws of our country. Firstly, in case the workmen resort to strike during the process of collective bargaining then the principle of "No Work No Pay" should be strictly followed. In case of dismissal of a workman from the job the domestic enquiry need not be insisted by law. In case dispute is raised before the industrial tribunal, let the labour court or the tribunal decide on the merits of the case. The reinstatement of the workman should not be easily done on the job by the labour court only on mere technical illegalities. The reinstatement on the job should be on the merits of each case. Generally compensation instead of reinstatement should be the rule for an unfair dismissal.

For proper, balanced and equitable economic growth we also have to give attention to education of the masses at least up to the middle level. One of the main reasons for the lower role of economic growth in India has been total neglect for educating masses which has proved to be fatal for the democratic institutions and the economic growth. It has been observed that the reasons for more economic growth in Japan, South Korea, Taiwan, Hong Kong, etc. has been their concern for primary education of the people of their countries, whereas in Middle East, Latin American countries, Africa and India the seriousness of educating the masses has been lacking, resulting in economic backwardness of the common man in these countries. Spending on education of masses is a good investment and not a wastage from the point of view of economic growth.

The model of economic growth in India should not be based on the free market economy of competition without checks. Of course, socialism or socialistic economy does not hold good in the present world, where globlisation is the trend. In that sense socialism is a dead horse. But certainly social democracy or the welfare state as is practised in the Scandinavian countries is very relevant for the Indian society. Moreover, the emphasis should not be on the optimum utilisation of the natural capital resources which are not infinite and have to be preserved for future generations as well. Partially we need to have a shift in our attitude not to go on exploiting the natural resources for economic growth by controlling nature but need to reorient avoiding pollution of nature.

4. A.N. Roy, *Whither Neo-liberalism*, The Hindustan Times 13 (20 February, 1996).

# FREE MARKET ECONOMY AND HUMAN RIGHTS

*Subrham Rajkhowa**

After four decades of planned development the government has brought about fundamental changes in the Indian economy. The government has embarked upon a new policy since July 1991 providing for a free market economy as the model, by replacing system of controls, with globalisation and privatisation as the buzz words. This economic policy has been brought about by the urge to accelerate economic development in consonance with the international developments.

Even though the common man may not be aware of the New Economic Policy ushering in a free market, its impact would certainly influence his living standards. Therefore, the economic policy has to be judged in the light of the Constitutional philosophy of a socialistic pattern of society and the mandate of achieving socio-economic development in the welfare state, aimed at ensuring the dignity of man, freedom from want and protection against socio-economic oppression. It has to be seen to what extent the human rights being enjoyed by the citizens, would be promoted or curtailed in such a free market economy. For, if the people have to surrender their existing social and economic rights for the economic development of the nation, it would come in the way of the constitutional mandate as well as the country's international obligations in the field of human rights.

Without the human rights, which are considered to be the most precious possession of mankind, people face the risk of perpetual impoverishment. Since its presence makes life worthy of its purpose, the people are entitled to the effective enjoyment of the social and economic rights, which do not depend upon the gratitude of the state. In fact, going back to the Universal Declaration of Human Rights which was adopted at the time of framing of India's Constitution, one finds that besides providing Civil and Political rights, emphasis has been laid on the economic, social and cultural rights under Articles 22, 23 and 25 of the Universal Declaration of Human Rights. These rights are considered indispensable for the dignity and free development of ones personality and include the right to work, to free choice of employment, to just and favourable conditions of work and to the protection against unemployment.

It is, therefore, understandable that the framers of the Constitution have already incorporated many of the provisions of the Universal Declaration of Human Rights in the Constitution itself, some of them being considered to be justiciable in nature, while others are non-justiciable. The former are provided in part III of the Constitution, while the latter are contained in Part IV of the Constitution. In other words, many of the human rights universally recognised by the civilised nations have been given a constitutional status by incorporating them in the Constitution itself.

In a country where majority of the people live in the villages, with a large

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number below the poverty line, being dominated by the wealthy farmers, traders and money lenders, the government has to have a definite policy of economic development, otherwise the fruits of development will never percolate to the rural masses. The rural folk are concerned with having to look for two square meals a day, a roof over their heads and proper health care. Upliftment of the downtrodden and the economically oppressed being the constitutional mandate under Part IV, the state is directly concerned with the poor, destitute and the unemployed people. They find strength through the Directive Principles of State Policy, particularly Article 38, which provides for a charter of welfare measures for the upliftment of the needy, the deprived and the weaker sections of the society. It is particularly in this context that the economic rights are of immediate significance.

The former Chief Justice Chandrachud had observed that the economic rights have been pursued from time to time for poverty alleviation but the benefits have not percolated to the rural masses in the deserved degree, especially in the agricultural sector, because of the policy of pricing of inputs and agricultural products, taxation and marketing, as agricultural pricing policies are domina-ted by the big industrial houses, engaged in the manufacturing of inputs. The same holds good in respect of the urban poor as well.

As of now, the state has not been fully capable of implementing the economic rights, due to structural constraints of the major international bodies on the one hand and its own disability, weakness, incompetence, inefficiency and domestic constraints on the other.[1] Therefore, transfer of technology corresponding to the needs and conditions prevailing in the country is called for. To what extent the positive rights can be promoted under the new economic dispensation, for the decent and dignified survival of millions of souls in this country, is a matter of vital concern.

The broad features of the market-oriented economy, open to the exterior and dominated by the private sector, include integrating the economy with the global level, opening up of investments by the multinational corporations, privatisation of the public sector undertaking by offering of share so far held by the government, deregulation, delicensing, nonprotection and free competition, denationalisation and efficient enterprise, reduction in subsidies for food and fertilisers, liberalisation of foreign exchange regulations and liberalisation of fiscal and monetary policies.[2] Such policies would undoubtedly encourage experiment and innovation, while limiting the power of the bureaucracy. Yet, there are attendant risks of monopoly and lopsided development. Since private investments are promoted by profit motive, the economic benefits may not reach the intended masses.

In a democratic country with a market oriented economy there are, therefore, practical problems in safeguarding human rights.

1. S. Sanajaoba, HUMAN RIGHTS STANDARD-SETTING PREROGATIVES 11 (1994).
2. S. V. Joga Rao, *Economic Reforms, Pharmaceutical Industry And Rights to Health*, paper presented at Commonwealth Legal Education Association Conference 5 (1993), (mimeo), Bangalore.

At one extreme the major donors like the International Monetary Fund (IMF), the World Bank and other agencies may confront governments committed to improve their efficiency, at the other end the entrenched elites may hamper reforms. Moreover, with the emergence of the World Trade Organisation and corresponding developments in the field of intellectual property rights and patent laws, domestic industry may be unduly affected. The country has to be cautious of the IMF and World Bank conditionalities for sanctioning loans, for they are likely to have an adverse impact on the life of the common man. Before complying with these conditionalities, the government must convince itself of its effectiveness. The economic policies should not be influenced at the dictates of the international funding agencies. We should not inflict disaster on our economy by massive imports and allowing Multinational Corporations (MNCs) to dictate terms. The history of most of the agreements on transfer of technology has largely been the history of repeated attempts by the West to capture markets as areas of exclusive domain. This may affect the development of the importing countries, since foreign monopoly effectively blocks domestic production and skills as well as local incentives to invest in new technology.[3] Multinational corporations and non-resident Indians are induced to participate in a big way in the economic resurgence of India. However, foreign capital is unlikely to respond to the needs of the poor masses and may lead to lopsided development. This would result in a small powerful elite selling their produce to the market. While upper classes may benefit from foreign investment in terms of better jobs and quality product, vast majority of the poor people would remain outside the modern economy.[4]

Unless the government is alive to the quality of life of its people, there is also a possibility of these big corporations who are unable to sell the goods and technologies in the developed world, of attempting such investments in areas like food, medicine, services and allied area.

Pesticides and chemicals which cannot be profitably or legally used in countries where they are manufactured, are often dumped in Third World countries, who indulge in their use without being informed of the damages implicit in their use. Dumping and unrestricted disposal of accumulated stocks, that may ultimately interfere with industrial development of developing nations, needs to be checked.

India cannot afford to have such assistance and, therefore, antidumping laws should be effectively used. Further the govern-ment has to see that access to the market should not be at the cost of shutting down every conceivable industry, rendering unviable reduction in import duties and letting economic activities that fail to stand up to competition. Reforms must switch expenditure into investment and not compress it in the pursuit of demand management.

3. C. Singh, *International Environmental Law Agenda For Sustainable Development and Human Rights*, paper presented at Commonwealth Legal Education Association Conference 7-8 (1993), (mimeo), Bangalore .
4. *Ibid.*



The government should pursue a policy of promoting foreign investment to complement domestic production. An equitable distribution of resources between the production and social sectors should be considered, otherwise the poor would be the worst hit. The economic development should be aimed at sustaining the social upliftment of the vast majority of the Indians, otherwise it would not be of much purpose. A glance at the statistics of the last few years reveal some progress, but the rising internal debt needs to be contained, in order to sustain the progress. The GDP has gone up from 0.2% to 4.3%, industrial production from 0.6% to 5.6%, exports from - 1.5 to 19.6% and foreign exchange reserves from 1 billion to 15 billion. Simultaneously, inflation has gone down from 17% to 6.2% and fiscal deficit from 8.4% to 5.7%. However, the fiscal deficit financed by borrowings is a cause of concerns like current budget borrowings stand up at Rs. 49,183 crores, besides accumulated interest of Rs. 47,576 crores. Unless remedial measures are adopted, the country appears to be falling into an internal debt trap.[5] But it is doubtful to what extent the common man has been benefited by the rise in GDP and industrial production.[6]

The government would remain a silent spectator as the market and market forces would continue to dominate the scene, unless caution is appended to the new economic policy. Otherwise, the NEP would further accentuate the existing social and economic inequities. A wide cleavage would emerge between the privileged and underprivileged classes. This phenomenon would also affect the business classes, as the imperfection of the market would force the smaller enterprises into oblivion. In such an eventuality, it is doubt-ful whether the aim to reduce poverty, unemployment and inequity would ever be achieved.[7]

The large MNCs attracted by a favourable market and cheap labour are entering India, bringing with them new technologies. The Indian industry, in its bid to stand up to such competition has also been entering into agreements with foreign corporations or phasing out their existing technologies, leading to loss of employment of the workers, without specialised skills. This has also resulted in shutting down many unviable industries, leading to unemployment. In such a situation one has to consider the right to work and to fair wages, the right to form and join trade unions and the rights to organise. This is important as one notices abuse of worker's human rights through repression and intimidation of their leaders, at times leading to mass dismissals.

In its enthusiasm to attract foreign capital and thus boost economic growth, the state should not be insensitive towards the basic rights of workers, particularly the right to organise. The mandate of Article 43 of the Constitution ensuring a decent

5. M. K. Roy, *Beyond the IMF*, INDIAN EXPRESS (27 January, 1993).
6. D.A. Pendsa, *Polls and Reforms Don't Mix*, INDIAN EXPRESS (15 February, 1996 ).
7. J.K. Kaul, The Constitution, Social Justice and The New Economic Policies : An Appraisal, paper presented at Commonwealth Legal Education Association Conference 1-5 (1993), (mimeo), Bangalore.

standard of life and full enjoyment of leisure and social and cultural opportunities has to be enhanced, while at the same time realising the economic goals. India has a lucrative market for pharmaceutical products. The opening up of this industry to private and foreign investment is likely to result in escalation of prices of drugs beyond the reach of the common man.

The situation would be much worse with full blown liberalisation process which is likely to marginalise the health needs of millions of masses. In this sector too, the government should continue to play a vital role, specially in respect of the essential life saving drugs and formulations. Industrial progress might also lead to environmental degradation. There has to be a proper environmental agenda, otherwise industrialisation would lead to exploitation of natural resources which enhances the green house effect. Obnoxious chemicals and substances would otherwise be imported without proper safeguards, leading to health hazards. Finally, it may be observed that economic development is undoubtedly important, but not just any kind of economic development. Economic growth has to be accompanied by a wide measure of egalitarianism, the protection of the rights of the workers, and democratic practices at work place. Otherwise development would be perverse retrograde and would add to violation of human rights and human dignity.

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# ALTERNATIVE DISPUTE RESOLUTION: A MECHANISM FOR SETTLEMENT OF COMMERCIAL DISPUTES

*Ghanshyam Singh**

The method of settlement of disputes by reference to a third person was known and has been practised in India since ancient times.[1] The concept of arbitration thus, was not unknown to India before the advent of the British rule, though it may not have been practised in the form in which it is done now a days. The "Panchayat System", as it was then called, was very much akin to arbitration and was widely prevalent. The words "Panch" (arbitrator) and "Panchayat" (arbitration) are as old as Indian history. The composition of the Panchayat varied from one to eleven and could be even more. We in India have village Panchayats and Panchayats of different castes and creeds which play an important role and exercise considerable influence in many social and caste questions. The utility of the decision in a dispute by persons of party's own choice was recognised by the British administrators in the early stage of their rule in India, though the provisions had a limited application.[2] When the East India Company seized power in Bengal, Madras and Bombay presidency towns, they framed several reulgations, some of which for the first time provided for reference of disputes to arbitration. The regulations empowered the courts to submit the matter in dispute in a suit for the decision of an arbitrator mutually agreed to by the parties. If the could not agree as to the person to be appointed or if the person appointed by the parties refused to act and the parties could not agree uplon another arbitrator, then the court with the consent of the parties could appoint an arbitrator. However, when the parties did not consent to refer the dispute to an arbitrator, the case was to be tried by the court. The regulations recognised arbitration in suits only.

The Code of Civil Procedure, 1859 for the first time permitted reference to arbitration without the intervention of the court. Sections 312 to 327 of the Code dealt with the law of arbitration. The Code of Civil Procedure, 1859 was re-enacted as the Code of Civil Procedure, 1882 with certain modifications. Thereafter, the present Code of Civil Procedure, 1908 was enacted. In the meantime, theArbitration Act of 1899 was enacted, which extended only to the presidency towns.

Since a comprehensive legislation being an amending and consolidating law of arbitration was felt very much necessary, and the Civil Justice Committee, 1925, also recommended several changes in the arbitration law and as the Arbitration Act of 1899 was based largely on English law, which suffered substantial amendments by the Amending Act of British Parliament in 1934, the Government of India introduced a Bill in the Central Legislature which was passed as the Arbitration Act,

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1. S.D. Singh, LAW OF ARBITRATION 3 (10th Ed., 1989 ).
2. *Ibid.*

1940. The founding fathers of the Indian Constitution have also enshrined in the Constitution as one of its Directive Principles of State Policy, a plrovision encouraging settlement of international disputes by arbitration (Article 51 (*d*) of the Constitution). Keeping in line with the above principle of the Constitution, Arbitration in India was contained in three central enactments, *viz.* the Arbitration (Protocol and Convention) Act, 1937; the Arbitration Act, 1940 and the Foreign Awards (Regulation and Enforcement) Act, 1961.

The global trend towards liberalisation of economic policies and drastic economic reforms had led to a remarkable move towards "Free Market Economy" even in countries like the People's Republic of China. Not lagging behind in its pursuit for economic prosperity, India too has moved away from its socialistic pattern to a free market economy, which has led to a marked change in the role of the state in the emerging economic order. The new economic policy is based on the principle that the various government controls have to be either removed or liberalised to allow a free flow of foreign investment and transfer of technology and competive free market economy.

Trade agreements between nation states and corporations undergird the commerce of our transnational industrial and hightech civilization. In negotiating these agreements, lawyers alongwith politicians and economists help identify, clarify and formulate the issues on the table. But formulating mechanisms for dispute resolution in trade agreements is the exclusive domain of the legal professionals, as disputes are unavoidable even in the best circumstances of commercial transactions.

Our judicial system is adversarial, based on principles of natural justice and objectivity and ensures equal opportunities to the contesting parties. But by reason of several steps and stages that this process encompasses, it is both painfully slow and also capable of being abused and misused. The problem of cost and delay which is at present afflicting our legal system provides a salutary safeguard against unbridled litigiousness of a kind which is beneficial neither to the individual nor to the community. It is, however, obvious that to fulfil their constitutional and social purpose, the courts in which justice is administered must be reasonably accessible to the ordinary citizen, not only in the geographical sense but also in terms of cost. It is the cost which gives rise to the most acute anxiety.

In 1850 Abraham Lincoln said :

> Discourage litigation, persuade your neighbour to compromise whenever you can. Point out to them how the nominal winner is often a real loser ... in fees, expenses and waste of time.[5]

3. Sir T. Bingham , *Dispute Resolution : Where Should we go from Here* ? ARBITRATION 83 (May 1995).
4. *Ibid.*
5. Quoted in N. Kaplin, *Resolving Disputes in Asia Pacific Manner : An Asian Perspective*, paper presented at the American Bar Association — Interpacific Bar Association Conference, Hong Kong (20-22 February, 1995).



In 1984 two senior judges in England had similar observations to make:

Sir Thomas Bingham , the Master of Rolls said :

> That the resolution of civil disputes should be so costly is not merely a wart on the face of the administration of justice but a cancer eating at the heart of it.[6]

Lord Woolf, a Law Lord, also said :

> A system of justice which a very substantial section of its own citizens cannot afford is a system which contains a fundamental law and leaves them vulnerable to exploitation.[7]

In India the situation is highly appalling. It is all very well for the rich, be they individuals or corporations, who can afford to litigate. The poor can afford to litigate to some extent as we have Legal Aid Boards, which provide legal assistance to the poor class. Between the very poor and the rich class there is vast majority of the Indian population who cannot afford the luxury of our adversarial system. The approach of all progressive professionals should be towards dispute avoidance in a contract in the first place, which as already stated above, is unavoidable even in the best circumstances of commercial transactions, and better management of dispute, if it cannot be avoided.

The system of commercial dispute resolution develops hand in hand with the growth of economic interdependence of states and the increase of cross-cultural commercial transactions. Thus, the more advanced the legal prescription for commercial and economic exchanges are, the more mature the system for dispute resolution needs to be. The development of the system of dispute resolution undoubtedly enhances commercial transactions, as it gives certainty to the contracting parties.

In order to bring out structural adjustment of legal framework with economic reform, the professionals, several representative bodies of trade and industry and representatives of foreign investors recognised that our economic reforms may not become fully effective if the law dealing with settlement of both domestic and international commercial disputes remains out of tune with reforms. The government was under pressure to amend existing arbitration laws and bring them in line with international practices on the matter. The pressure has been intensified with the advent of liberalisation which has seen increasing interest in India from foreign investors. The pressure has not been without reason. The Indian law on arbitration sufferred from several deficiencies and loopholes. The law did not facilitate quick resolution of commercial disputes. This is one of the reasons why multinational companies like Enron preferred arbitration in London under international law than be bound by Indian laws.

6. *Ibid.*
7. *Ibid.*

Recognising the need, the government enacted the Arbitra-tion and Conciliation Ordinance, 1996 (now Act) which has repealed the three enactments, viz. the Arbitration (Protocol and Convention) Act, 1937; the Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961. The new Act is a step towards strengthening the economic reforms process and tries to meet the specific needs of International Commercial Arbitration so that the Indian law is made acceptable to parties from different states and legal systems. The Act seeks to minimise the supervisory roles of the courts. The provisions of the new Act are based on the harmonised concept of arbitration and conciliation for the settlement of domestic and international disputes through arbitration and conciliation. It caters to the provisions of concilia-tion of disputes arising out of legal relationship, contractual or otherwise, subject to mutual acceptance of the parties to dispute (sections 61-68 ).The Ordinance which became effective from January 25,1996 brings a dispensation where arbitration in India will be based on the United Nations Commission for International Trade Law (UNCITRAL).

While arbitration is known in the large majority of systems, in some of them it takes a different shape. Inevitably this sometimes reflects local problems and sometimes a different approach to the entire legal system. The traditional distinction of legal systems is between those of civil law and common law systems. However, in addition to these, there are other legal systems, such as those of the soicialist countries and Islamic law.

The claim is usually made that arbitration is quicker, cheaper, more expert and more private than litigation in court. But has this claim been justified? In *Guru Nanak Foundation* v. *Rattan Singh & Sons*[8], the Supreme court has said : –

> Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to enact Aribitration Act 1940 ('Act' for short). However, the way in which the proceedings under the Act are conduc-ted and without an exception challenged in courts, has made lawyers laugh and legal philosophers weep. Experience shows and law report bear ample testimony that the proceedings under the Act have become highly technical accom-panied by unending prolixity at every stage providing a legal trap to the unwary. Informal forum chosen by the parties to expeditious disposal of their disputes has by the decisions of the courts been clothed with "legalese" of unforeseeable complexity .

It is hoped that with the passing of the new Act more people will be turning to arbitration and to other forms of ADR. One might expect that the amount of arbitral activity will continue to increase. To avoid disappointment to the consumers of arbitral services, it is essential that all those involved in arbitration should ensure that the

8. (1981) SCC 634.



arbitral process is not a mere mirror image of litiga-tion system in particular jurisdiction.

A potential avenue of escape from the high cost and pain-fully slow pace of litigation is offered by arbitration and the various other forms of ADR.[9] In an increasingly competitive global economy, international business seeks a climate of political and industrial peace and stability. That translates into a need for the speedy and equitable resolution of disputes between diverse commercial parties so that business can be fully directed at improving bottom line, not expended on time and high cost litigation. Informal resolution of disputes is not new. It has been long in practice as a tradition for dispute resolution especially in the Asian culture. In numerous Asian countries there is a profound societal and philoso-phical preference for agreed solutions.[10] Asian cultures frequently seek a harmonious solution, one which will preserve the relation-ship, rather than one which, while arguably factually and legally correct, may severely damage the relationship of the parties involved.[11] Increased interaction between the West and Asia through tourism and trade has led to assimilate useful concepts of each others culture. The traditional Western view is that the conciliation process should be separate from the arbitraion process and that the same people who act as conciliators should not act as arbitrators in the same dispute. The traditional Western view is changing, however, largely due to the influence of Asian cultures. In Hong Kong, the outpost of Western civilization on the doorstep of Asia, by agreement of the parties, a conciliator may act as an arbitrator and an arbitrator as conciliator pursuant to sections. 2A and 2B of the Hong Kong Arbitration Ordinance (Cap.341).[12] In Canada, the British Columbia International Commercial Arbitration Act has been influenced by the experience of their Asian trading partners.[13] The Asia Pacific Centre for Resolution of International Business Disputes, with its headquarters in San Francisco, has adopted the Hong Kong model for combining arbitration and conciliation with the consent of the parties. The Peoples Republic of China which is the foremost proponent of combined role of the arbitrator and Conciliator, espouses the combination of mediation and conciliation. The Chinese combination of arbitration and conciliation occurs during the ongoing process of arbitration. In Korea and Indonesia, an arbitrator attempts to conciliate the parties' dispute at the outset prior to the commencement of the arbitration, or if the parties agree to conciliation during the course of arbitration proceedings, an arbitrator will suspend the arbitration during the period conciliation is attempted.[15]

9. See *supra* note 3 at 85.
10. M.S. Donahey, *Two cultures, One System,* Asian Law Journal 26 (April 1995).
11. *Ibid.*
12. J. Jakubowski, *Reflections On The Philosophy of International Commercial Arbitration and Concilation in the Art of Arbitration*, Essay On International Arbitration 186 (1982).
13. *Ibid.*
14. M.R. Sommartano, International Arbitration Law 5(1990) .
15. Ibid.

In keeping with the global trend in use of ADR for settlement of commercial disputes, India has also provided for use of mediation, conciliation and other procedures during arbitration with the consent of the parties to encourage settlement (section 30) in the newly enacted Arbitration and Conciliation Act, 1996.

Conciliation has now achieved the position of a separate institution in international trade. It has made an impact on settlement of international trade disputes, for two reasons (i) that for some businessmen even arbitration, although far less formalistic than litigation in state courts, has become too "technical" and too "legalistic" and (ii) the opening of the People's Republic of China which has brought with it the problem of creating mechanism for solving differences arising from the trade with China acceptable to people from that part of the world. This factor influenced, in particular, the Americans, especially the American Arbitration Association (AAA), who decided to support conciliation in interna-tional trade.

In view of its importance conciliation is being mentioned in the most recent arbitration conventions. It has now become an independent institution in international trade, which received its "conservation" by the adoption by the UN General Assembly in 1980 of the UNCITRAL Conciliation Rules. Conciliation facilities have been offered by various institutions, national and international, among which are the International Chamber of Commerce (ICC) and the World Bank's International Centre of the Settlement of Investment Disputes (ICSID). Conciliation is not expressly mentioned in the rules of London Court of International Arbitration, nor in the American Abitration Association. However, conciliation is welcomed by both institutions and is generally referred to as mediation. Reference to conciliation can be found in the rules of the Inter-American Commercial Arbitration Commission (IACAC), international arbitration rules of the Milan Court of Arbitration and a lot of room is given to it by the rules of Euro-Arab Chamber of Commerce. Other institutional facilities are organised within the framework of certain trade associations for the settlement of certain trade disputes. The UNCITRAL Rules are the first attempt at the establishment of uniform conciliation proceedings of general char-acter likely to be followed by the parties concerned "ad hoc", i.e. without the intervention of any institution or third person, if they so wish, the pattern laid down by UNCITRAL Rules being to speak "self sufficient".[16]

The economic success of the common law countries, has resulted in their taking initiatives in the legal field. Following this trend, in the area of ADR, the United States has developed various solutions, intended to meet their market needs and attractively presented, among them are various formulas for meetings and discussions between the parties, aiming to lead them to a better understanding of each other's position and thereby bringing about a settlement of the dispute.[17]

16. F. Eisemann, *Conciliation As Means of Settlement of International Business Disputes: The* UNCITRAL *Rules as compared with ICC System* in THE ART OF ARBITRATION 121 (1982).
17. *Id.* at 7.



The business world has long recognised the advantages of ADR over litigation in one form or another. Some of their advantages are :

1. Promptness of resolution ;
2. Creative, businessdriven solutions ;
3. Substantial cost savings ;
4. Access to trained neutral experts ;
5. Flexibility and ability of the parties to adopt the process to their needs rather than court rules ;
6. Nominal diversion of management, time and energy ;
7. Privacy and confidentiality; and
8. Preservation of business relationships[18]

ADR, of course, focuses on the resolution of the underlying problem which led to dispute, rather than nearly the defeat of one's opponent. This is particularly true when experts in the field are chosen to deal with the dispute.[19] As a result, ADR — which is fact driven and fact oriented — is better able to result in a decision which takes into account long term business and industry consideration that courts are simply not well equipped to handle.[20] While even one of these factors provided impetus to use ADR in resolving commercial disputes, taken together they demonstrate the superio-rity of ADR over litigation.[21]

For business disputes of an international character, ADR makes even more sense. In addition to the benefits mentioned above which is of great importance in a global setting, international commercial ADR has other advantage over litigation.[22] Rightly or not, parties to an international dispute frequently question the fairness of judicial proceedings in foreign courts.[23] If ADR is used, neither party is required to submit the dispute to the jurisdiction of a foreign court.[24] Moreover, ADR generally occurs in a neutral location, so the parties can feel more comfortable with the forum.[25] Another benefit of ADR is that a skilful arbitrator can acknowledge and reconcile different cultural legal and social norms in reaching a decision, whereas courts are generally bound by the procedural rules and substantive law of the country in which they sit.[26]

18. B.S. Murphy, ADR's *Impact on International Commerce*, DISPUTE RESOLUTION JOURNAL 1 (December 1993).
19. *Ibid.*
20. *Ibid.*
21. *Ibid.*
22. *Ibid.*
23. *Ibid.*
24. *Ibid.*
25. *Ibid.*
26. *Id.* at 2.

Related to this factor, ADR allows the parties to choose the substantive and procedural laws that will be applied to their dispute.

Business use of ADR has grown tremendously in recent years. The growth in ADR has been prompted by several factors including the tremendous expansion of international commerce and the recognition of the existence of a global economy.[27] This growth has spawned a demand for fair and efficient way of handling dispu-tes between diverse parties.[28] The demand for ADR has been supported by governments around the world. This has enabled businesses to act with the knowledge that their choice to use ADR is recognised, that ADR awards will be respected and that the awards are likely to be enforced by national governments.[29] Thus the availability of institutions experienced in conducting ADR has made the widespread utilisation of ADR a practical alternative to litigation.[30] ADR is increasingly supported by governments world-wide as an efficacious way of handling international commercial disputes without invoking the jurisdiction of national court systems. ADR enjoys varying levels of support from different governments worldwide. In some cases, it is less effective as a means of resolving international commercial disputes than others.

In Western Europe ADR has a long traditional support. As early as the 12th century, English Courts refused to intervene once parties had decided to arbitrate a dispute. More recently many European governments have enacted legislation recognising ADR and ADR awards. In addition to Europe's governmental support for ADR, many of the best known ADR institutions such as the London Court of International Arbitration, the ICC and the Arbitration Institution of the Stockholm Chamber of Commerce are based in Europe. The Central and Eastern Europe is also evolving a system which encourages the use of ADR and which will recognise and enforce ADR awards. In the past, governments in Latin America were unfriendly towards international commercial ADR which had the effect of limiting international investment in these countries since some investors are wary of being subjected to the jurisdiction of national courts without an alternative. As a consequence of this development Latin American States are increasingly supportive of international ADR.

Like Latin America the governments in the Middle East and Africa, were initially unreceptive to international ADR. However, they are now supporting ADR in the international setting and a number of institutions have come up which seek to increase the use of international ADR.

If one is to think of the area with the greatest potential for future growth of ADR, it would be none other than Asia and the Pacific region. A major reason for this growth is the shift of world trade towards this region and the corresponding

27. *Ibid.*
28. *Ibid.*
29. *Ibid.*
30. *Ibid.*



demand for accessible dispute resolution mechanisms.[31] In addition, cultural factors such as the Confucian and Buddhist traditions of peaceful dispute resolution and Asian preference for privacy in business dealing favour ADR over litigation.[32] The countries in Asia and the Pacific region which are opening up and have moved towards market economy have strong national arbitration institutions which remain independent from the national courts and whose awards are respected and enforced. The ADR institutions in the region are actively using ADR to resolve international commercial disputes and are generally well respected throughout the region. The support for ADR is not divided along ideological lines. The People's Republic of China and countries like Malaysia, South Korea, Hong Kong, Singapore, Sri Lanka, Japan all favour ADR to litigation. The widespread governmental support for ADR is both a recogni-tion of the usefulness of ADR in resolving international commercial disputes and impetus to the growth of ADR. With this support, the future of ADR seems to be one of continued and increased use throughout the world.[33] The increase in governmental support for ADR has been accompanied by the growth in the number of ADR institutions which focus on international commercial ADR, being established in different countries.

With the passage of time, new ADR processes have been evolved. ADR which is a broad term encompassing many different processes to resolve dispute outside traditional channels, can be broadly classified into two categorises, namely (a) "consensual" non binding procedure designed to achieve an agreement between the parties, i.e. mediation/conciliation, negotiation, ministrial and (b) binding adjudication, i.e. arbitration.

In practice parties frequently combine various elements of different processes, e.g., negotiation followed by mediation and then by binding arbitration.Thus the most commonly used forms of ADR processes are :

(a) Negotiation ;
(b) Conciliation ;
(c) Mediation ;
(d) Minitrial ;
(e) Arbitration and
(f) Settlement conference.

Besides the above commonly used ADR processes, in United States there are other ADR processes which are being practised, viz. court-annexed process — Early Neutral Evaluation, Special Masters, Hybrid Arbitration, etc.

The use of ADR in international commerce has great impact and it continues to expand. Many benefits are derived from the use of ADR processes, the classic

31. *Id.* at 5.
32. *Ibid.*
33. *Ibid.*

advantages being a savings in cost and time. Most ADR methods use fewer resources than trial. Preparation is much less extensive than it is for trial and none of the processes take as long as trial. Time required for resolution is shortened because use of ADR methods can be utilised prior to trials.

The use of neutrals with subject matter expertise is an important benefit which attracts parties to ADR. Moreover, most ADR processes are extremely flexible. Being consensual in nature, the processes generally allow the parties to create the rules which will govern their selected methods of resolution. ADR processes are or can be confidential, which often encourage participants to be more candid or offer more creative solutions. Most of the consensual ADR processes result in mutual benefits or "win-win" solutions, rather than "win-lose" or "lose-lose" outcomes. As the parties in ADR usually create their own agreements, they are more likely to honour their commitments. Most of the cases resolved through ADR do not require court enforcement of the agreement, because party satisfaction is very high. Parties greatly prefer the improvement of creating their own solution to being told what to get done by others or a judge. Another advantage of ADR over litigation is that it is designed to account for the tremendous differences between political, economic and social systems. Thus ADR creates a congenial atmosphere for parties from different cultures, countries, with diverse interests and backgrounds — to meet in a neutral forum to work out their differences peacefully. The global support for ADR involving international commerce is on the rise and in view of the increasing demand for ADR the number of ADR institutions equipped to handle international commercial disputes continues to grow.

We in India have, keeping in line with the ongoing process of economic reforms, enacted the Arbitration and conciliation Act, 1996, thus providing for the use of ADR for settlement of commercial disputes. A lot needs to be done for providing effective ADR processes and institutions which may specialise in ADR. The institutions which provide ADR facilities should have clear set of rules and panel of experts to provide ADR services of high standard for not only domestic but also international commercial disputes. A lot of homework has to be done for the same and professional approach has to be made by all those who are involved in this process and are connected in any form with resolution of disputes arising between the contracting parties.

In our view ADR systems should be relied on according to the parties' intention and need everywhere, irrespective of countries, and should be continually reformed to cope with the dynamism of the business world. Accordingly, if the parties intend to try some new or mixed form of dispute resolution, the persons or institu-tions which are entrusted to solve the dispute should devote themselves in creating any system that will satisfy the parties' preference as much as possible.

# CONCENTRATION CONUNDRUM AND DISTRIBUTIVE JUSTICE

*A. Raghunath Reddy**

## I. INTRODUCTION

The preamble of the Indian Constitution is to illumine what it gives to the people. It expresses a resolve to create a sovereign, socialist, secular, democratic republic. It has been held by the Supreme Court of India time and again that these concepts embodying the philosophy of the Constitution are part of the basic structure of the Constitution[1].The Supreme Court has clearly recognised the socialist ideology to which India is wedded to.[2] Justice Chinnappa Reddy in the *Sanjeev Coke* case,[3] Justice Desai in *Nakara*[4] and Justice Iyer in *Reddy*[5] have acknowledged this obvious fact. In a socialist economy the means of production should be socially owned and controlled for the benefit of the society as a whole. As a result, the state has to promote the prosperity and well being of the people. The goal of socialistic pattern of society envisaged by our Constitution can only be achieved if the states endeavour to implement the directive principles with a high sense of moral duty.

Articles 38 and 39 of our Constitution[6] embody the jurisprudential doctrine of "distributive justice".[7] The concept of distributive justice connotes inter-alia, the removal of economic inequalities rectifying the injustices resulting from dealings and

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1. See Kesavananda Bharathi v. State of Kerala , AIR 1973 SC 1461; Minerva Mills Ltd v. Union of India AIR 1980 SC 1789 ; S.R. Bommai v. Union of India (1994) 3 SCC.1.
2. 1 CONSTITUENT ASSEMBLY DEBATES, 62. Pandit Nehru told the makers of the Constitution in the debate on the famous Objectives Resolution, which was in the nature of a pledge, that "India will stand for socialism and that India will go towards the Constitution of a Socialist State". The Industrial Policy Resolutions 1948 and 1956 are the steps in the direction of imposing social control on private economic activity. See the Industrial Policy Resolutions of the Government of India, dated April 6, 1948 and April 30, 1956.
3. Sanjeev Coke Mfg. Co. v. Bharat Coking Co., Ltd., AIR 1983 SC 239 at 251.
4. D.S. Nakara v. Union of India, (1983) 2 SCR 165 at 187.
5. Karnataka v. R. Reddy, AIR 1978 SC 215.
6. Article 38 of the Indian Constitution speaks of welfare of the people, social, economic and political justice and removal of inequalities of income, status, facilities and opportunities. Article 39 is a sequel to Article 38. Article 39 (b) directs redistribution of ownership so as to subserve common good ; Article 39 (c) requires the state that the operation of economic system does not result in concentration of wealth and means of production to the common detriment. These principles were given more precise direction when Parliament accepted in December 1954 the socialist pattern of society as the objective of social and economic policy. The Congress Party in India passed a resolution at its Avadi Session in 1955 to this effect.
7. See E. Bodenheimer, JURISPRUDENCE 197, 209 (1974); Fitzgerald, SALMOND ON JURISPRUDENCE 9 (1966).

transactions between unequals in society. Articles, 38 and 39 therefore, reject the capitalist system, protest against the material and cultural poverty inflicted on the mass of the people, express a concern for the oppressed and admit that inequality of a class depends on inequality of income.[8] One can witness the activist Supreme Court's intended efforts to curb unregulated capitalism in its momentous decision in *T.M.A. Pai Foundation*.[9] The Court in the instant case engaged in the curious enterprise of ordering state subsidies and less interest study loans for the resident Indian stude-nts studying in private medical and dental educational institutions.[10]

The MRTP Act is designed to promote distributive justice. It is an important socio-economic legislation. The socialist ideal which is the main plank of our Constitution is deeply rooted in this legislation. The Act is to diffuse concentration of economic power and to control monopolies among other things. But because of the gaps, deficiencies and lacunae,[11] the Act proved to be a miserable failure in achieving the desired constitutional goals. In this paper, an attempt is made to trace in general, the problem of concentration of economic power among few industrial giants and big business houses in India. It is also proposed to analyse critically as to how far the New Economic Policy involving measures such as privatisation, public disinvestment and investment in India by the multinationals are in keeping with the constitutional goals. These objectives would naturally lead to the formulation of following hypotheses :

1. The growth of corporate private sector, big business houses and industrial giants is responsible for concentration of economic power.
2. The New Economic Policy and the consequent amendment to the MRTP legislation have virtually legitimised concentration, promoted the growth of monopoly and laid strong foundations for private capital.
3. The privatisation wave, multinationals and public disinvestment policy of the Government are not in keeping with the directive principles of state policy and on the other hand leading towards the direction of concentra-tion and monopoly.
4. Whether sovereignty of the Republic and socialistic pattern of our society which are basic features of the Constitution are emerging as challenges to the legal system under the new economic policies.

8. See *supra* note 3 for details. It is to be noted that Article 31 (C) considerably enhanced the significance of these directives and got over the difficulties placed in the way of giving effect to these directives. Article 31 (C) has been upheld in Keshavananda Bharati v. Kerala, AIR 1973 SC 1461; Minerva Mills v. Union of India, AIR 1980 SC 1789; see also M. Ghouse, *Role of the Constitution and the Supreme Court in Poverty Eradication* , 8 INDIAN BAR REVIEW 1 (1989).
9. T.M.A. Pai Foundation v. Karnataka, 1995 (4) SCALE 665.
10. *Id.* at 674-675. The litigations in Unnikrishnan v. State of AP (1993), 1 SCC 645 and Mohini Jain v. State of Karnataka, (1992) 3 SCC 666 had been concerned with eliminating capitation fee payments in such institutions.
11. See K. Basu, *Markets, Laws and Governments* in B. Jalan (ed.), THE INDIAN ECONOMY PROBLEMS AND PROSPECTS 338 (1993).



## II. CONCENTRATION OF ECONOMIC POWER : THE REGULATORY MECHANISM

Chapter III of MRTP Act 1969 is a unique feature in the anti-monopoly legislation of India as compared to similar legislation in other countries and represents a separate scope of control of monopolistic or oligopolistic economic power which was to the common detriment.[12] The main objective of the Act that operation of the economic system does not result in concentration of economic power to the common detriment is in keeping with the directive principles of state policy as enshrined in Article 39 (b) and (c) of the Indian Constitution.[13] The state policy is to assure economic and industrial growth consistently with reduction in concentration of wealth and economic power so that the benefits of economic growth would belong to the public at large not merely to a handful of industrial giants. It is feared that the New Economic Policy would run contrary to this assurance.

The points on which business power can normally concentrate has been given the name "undertakings". The object of preventing the concentration of economic power[14] is sought to be achieved by the Government of India through the examination and regulation, by way of approval or rejection, of proposals of large and dominant undertakings for substantial expansion of assets, establishment of new undertakings, merger, amalgamation and takeover of undertakings.[15] Such proposals are subjected to close scrutiny in the light of current industrial licensing policy and other socio-economic policies of the government and considerations like the demand and supply position, economies of scale, efficient production, efficiency in the use of new materials, capacities and other resources, effecting technical and technological improvements, encouraging new enterprises, balanced regional growth and develop-ment of backward areas.

Other measures for the prevention of concentration include the division of large and dominant undertakings into two or more units, severance of interconnection of undertakings,[16] restraints on the appointment of directors and the transfer of shares of such undertakings.[17] The same guidelines as mentioned above are to be followed

12. Chatper-III of the MRTP Act, 1969 deals with regulation of concentration of economic power. For a critical study see K. K. Mitra, COMMENTARIES ON THE ACT, 1969, 1-5 (1980); D.P.S. Verma, THE MRTP ACT, 1969, 11 (1984); H.M. Jhala, THE LAW OF MRTP IN INDIA 20-25 (1981).
13. See Sitaram Jaipuria v. Banwarilal Jaipuria, AIR 1972 Cal. 105.
14. In the corporate field, concentration of economic power was in the form of management, ownership or operational control of several companies which can be secured through certain devices, i.e., inter-locking of directorships, holding of managerial offices in a large number of companies at high salaries, inter-corporate loans and investments, mergers and acquisitions, exercise of disproportionate voting rights by promoters, etc.
15. See Part A of Chapter III of the Act.
16. These measures are dealt with in Part B of Chapter III of the Act.
17. Chapter III A of the Act.

in these matters also.[18] Regulatory measures for preventing concentration and control of monopolies are not intended to prevent the growth of undertakings as such, but are designed to regulate their expansion only into specified fields for ensuring that such expansion does not adversely affect the small and medium scale undertakings and will not be harmful to the public interest. The Sachar Committee[19] had observed that MRTP Commission has ceased to play any effective role in consideration of the matters relating to concentration. This is because of the existence of a provision[20] in the Act giving discretion to the Central Government whether or not to refer the matter to the Commission. This would lead to a situation of almost total elimination of the role of the Commission. It is said that the overwhelming number of cases have been disposed off by the central Government itself without making a reference of the matter to the Commission.[21] The Government for reasons, political or other considerations is safeguarding the business interests of the owners of the undertakings in whom it is interested. Such powerful individuals may not only cripple freedom of trade and commerce but also challenge and even control political decisions to their advantage. They liberally give funds to the political party at the time of elections expecting quid pro quo in case of such party coming to power. This makes it necessary that economic power must not be allowed to be cornered beyond a certain extent by private individuals.

## III. Concentration Of Economic Power : The Impact Of The MRTP (Amendment) Act, 1991

The situation became worse with the MRTP (Amendment) Act, 1991 deleting Chapter III of the Act except regulatory meas-ures for division and severance of interconnection between undertakings in the backdrop of the New Economic Policy introduced by the Central Government.[22] The amended Act is directly giving scope for further concentration, unchecked growth of monopolies and private capital in the country. Apart from occasional rumblings from the leftist circles, nobody appears to be bothered today by the inherent dangers of increasing monopoly power that threatens our democratic socialistic ideals and the very fabric of our body politic. With the

18. For a detailed study see B. Marchant, Monopoly Laws : A Comparative Study - India And U.S.A. 5-15 (1976 ); see also C. Kuttikrishnan, *Anti-Monopoly Law in India — An Analytical Study*, 2 Academy Law Review 21 ( 1978 ).

19. Report Of The Sachar Committee Paras 50-52 (1978); see also Government of India, Deptt. of Company Affairs, The Tenth Annual Report On The Working Of The MRTP Act 4-5 (1980).

20. For example, see sections 21, 22 and 23 of the MRTP Act.

21. See supra note 12.

22. The New Economic Policy has been introduced by the Government of India in 1991. Its package mainly falls into Budgetary, Industrial, Trading and Financial Policies. For details see Dr. M. Singh, *Economic Policy Planning : The Task Ahead*, 39 The Indian Economic Journal 39 (1992); B. R. Datt *Public Sector and Privatisation, Id.*, at 1 ; P.V. George, *Liberalisation and NEP in India In Search of an Analytical Framework*, 40 India Economic Journal 9 (1992).



liberalisation of our economy and privatisation policy the sick public sector undertakings are either closed or being privatised.[23] Though it makes enterprises and economies productive, efficient and competitive, fears have been expressed about social and labour issues such as loss of present and future jobs, effect on trade unions and collective bargaining, etc.[24]

Even the profit earning and viable public sector undertakings are disinvested under the disinvestment policy. The nonresident Indians and multinationals are lured to invest in India paving the way for concentration. Some of the service oriented concerns like road transport, insurance, banking, post, etc., are threatened to be denationalised.[25] This amply demonstrates that the country is driven back towards the direction of preindependent colonial days where concentration and monopoly were the order of the day. The state is slowly absolving from its social obligations which is against the spirit of the Constitution. The free market economy in the process is restructured in favour of the privileged classes. Hence the ideological slogan of "retreat of the state" entails disastrous consequence in terms of social and economic justice.[26] The appeal that the benefits of economic reforms as proclaimed by the government are reaching the common man is no more than a myth. On the other hand, development theorists and criminologists expressed an apprehension that new economic policies foster criminogenic tendencies.[27]

Here it may be recalled that the bulk of the major and large scale industrial developments that had taken place in India before independence in the guise of institutions like managing agencies and multinationals had fostered foreign control and after independence became "a politico-economic eyesore". With the advent of independence though the managing agency system had been abolished the concentration of economic power among the large scale manufacturing industries owned by multinationals continued unabated. There was an unprecedented growth of

23. Privatisation is one of the major elements of structural adjustment process going on in most parts of the world for which India is no exception. See D. Bose, Privatisation — A Theoretical Treatment (1991).

24. See C.S.V. Ratnam, *Social And Labour Issues In Privatisation — An Overview*, 28 Indian Journal Of Industrial Relations 140 (1992); B.M. Misra, *Privatisation of Public Enterprises in India— Some Issues*, The Indian Economic Journal 71 (1993). On the evils of liberalisation, see R. Kothari, *Flawed Democracies : A Critique Of Indian and U.S. Models*, The Times Of India (30 May, 1994); M.N. Buch, *Economic Reforms : Myth & Reality*, The Hindustan Times (3 January, 1996).

25. Privatisation of public utility enterprises would be contrary to the Constitution. See T. Prosser, *Constitutions and Political Economy : The Privatisation of Public Enterprises in France and Britain*, 53 Modern Law Review 309 (1990).

26. For free markets to work better, the state must also work better. See S. S. Singh and S. Mishra, *Public Law Issues in Privatisation Process*, 1 Indian Journal Of Public Administration 396 (1994).

27. See M.B. Clinard and D.J. Abbot, Crime In Developing Countries — A Comparative Perspective (1973 ).

corporate organisations resulting in the steady growing process of monopolisation. As a result, industrial entrepreneurship tended to be confined in the hands of big business houses and industrial tycoons.

Hazari's study and the Mahalanobis Committee[28] established that there was a considerable degree of inequity in the distribution of assets and consequently an unjustified increase in the concentration of economic power in the private sector. As a result of the recommendations of the Monopolies Inquiry commission[29] the Monopolies and Restrictive Trade Practices Act, (MRTP Act) 1969 came into existence. It is in this background that the concept of public sector undertakings as a counterveiling force to private capital came to being.[30] The state came to be recognised as a catalytic agent in economic activities. The idea of nationalisation first emerged as a serious strategy aiming at a proliferation of statecontrol in the wake of the socialistic aspirations of the people. Nationalisation and state ownership of an industry must, therefore, be presumed to be reasonable and in the interest of the general public as far as Article 19 (1) (g) of the Constitution is concerned. Article 19 (6) (ii) clearly shows that there is no limit placed on the power of the state monopoly.[31] State ownership is thus held to be a reasonable restriction on the right to carry on trade or business.[32]

## IV. Conclusions And Suggestions

In the light of economic reforms which have legitimised the concentration and promoted the growth of monopolies in the country, strong suspicion shrouds on the credentials of the MRTP Act and its credibility is to be doubted. The Union Government is to be blamed for this unfortunate state of affairs. It is not bothered about balanced economic growth of the country nor about the participation of the masses in the process of economic development.

28. See R.K. Hazari, Corporate Private Sector (1966); P.C. Mahalanobis Committee Report On Distribution Of Income And Levels Of Living, Part-I, 1-10 (1964) which largely based its recommendation on Hazari's study.

29. Report Of The Monopolies Inquiry Commission (1965) Under the Chairmanship of Justice K.C. Das Gupta . See also M.P. Jain , *A Survey of Laws Preventing Concentration of Economic Power* in V. K. Agarwal (ed.), Some Problems Of Monopoly And Company Law 43-62 (1972 ) ; P.B. Mukharjee, *Legal Implications of MRTP Act, Id.* at 23-42; P. Chattopadhyay, *Preventing Concentration of Economic Power, Id.* at 73-83.

30. For details see M.D.Chaudary, *Liberalisation Without Reform* and S. L. Rao, *Muddling Along Modesty*, 437 Seminar 32 (January 1996 ).

31. See Akadasi v. State of Orissa, AIR 1963 SC 1047 at 1053. As per Gajendragadkar, J. a law creating a state monopoly indirectly or incidentally affects a citizens' right under any other clause of Article 19 (1) of the Constitution, *Id.* at 1055. For a discussion on the problem of socialism see Excelwear v. Union of India, AIR 1979 SC 36.

32. On nationalisation of motor transport see Nageswara Rao v. A.P.S.R.T.C., (1951) SCJ 967; Deep Chand v. State of UP, AIR 1959 SC 648. On nationalisation of banks see R.C.Cooper v. Union Of India, (1970) SCC 248.



Further, the MRTP Commission has been made impotent and reduced to a big zero in neutralising monopoly and concentration in India. The very objective is frustrated under this legislation. The problem of concentration is further aggravated by 1991 amendment to the Act. It is clear and apparent that statutory enactment by itself is not enough unless the government has willingness to control such problem and to demonstrate its willingness and capability to enforce the intention of the law.

The privatisation wave, multinationals and public disinvestment policy of the government are not in keeping with the directive principles of state policy and on the other hand they are leading towards the direction of undue concentration of wealth and economic power in a few hands. Consequently, it gives rise to the possibility that those having economic power may manipulate the political processes in the country to the detriment of the poor and weak. This goes against the roots of Indian democracy. Thus, big business houses and industrial tycoons are cornering the benefits of economic reforms. Multinationals and Non-Resident Indians are plundering our economy.

It is submitted that this type of social and economic transformation would run contrary to the ethos of the Constitution. Everyone who believes in the Constitution and sovereignty of the Republic will have to certainly oppose the recolonisation process that is going on in the country. It is feared that our sovereignty and the socialistic texture of our society which are the basic features of our Constitution are emerging as challenges under the new economic policies.[33] At this critical juncture, the judiciary has a greater creative role to play particularly the Supreme Court which is the custodian of the Constitution.

Unfortunately, the activist Supreme Court became most inactive when it sought to free economic policy from public interest litigation. The apex court while considering the legitimacy of telecommunications privatisation policy in *Delhi Science Forum case*[34] set limits of judicial domain which is against forensic dynamics. The question is when citizens are allowed to move the courts against the exercise or nonexercise of powers by unrepresentative governments (where true will of the people is not reflected) and corrupt politicians, why cannot they do so against policies framed by the same unrepresentative governments and corrupt politicians ? One fails to agree with the Chief Justice A.M. Ahmadi who flatly refused to tread on the policy in this case while he warned elsewhere that liberalisation was subject to the constitutional commitment to a just social order, a proposition which suggests that courts can strike down iniquitous policies.[35] In the instant case he maintains, however, that the policy of liberalisation is consistent with the directive principle of socialism.

33. V.R. Krishna Iyer, Human Rights—A Judges Miscellany Ch. II (1995) ; see V. R. Krishna Iyer, *It is affrmative Action*, Frontline 106-107 (3 May, 1996).

34. Delhi Science Forum v. Union of India, (1996) 2 SCC 405. In this case, the Supreme Court in a significant judgment delivered on Feb 10, 1996 has upheld the government's decision to grant licences to Indian and multinational companies to provide basic telephone services in the country.

35. There is no consistency of the views expressed by Ahmadi, C.J. While in a lecture delivered at Bangalore in August 1995 and also in the Zakir Hussain Memorial Lecture in Feb 1996 his stand

It is submitted that the Court, in fact, missed a historic opportunity of declaring the policy as anti-socialist and failed to live up to the expectations and pious trust reposed by the people in the role of the judiciary as protector of the Constitution and fundamental values in it. Kuldip Singh, J. in *Supreme Court Advocates-on-record Association case*[36] expressed his apprehension that "the Constitution and the democratic polity thereunder shall not survive, the day judiciary fails to justify the said trust. If the judiciary fails, the Constitution fails and the people might opt for some other alternative".[37] However, these expressions appear to have failed to caution N.P. Singh, J. in *Delhi Science Forum* who held that policies of Parliament could not be tested in the Court of Law. While *Delhi Science Forum* gave legitimacy to privatisation policy, which is part of liberalisation process, *Tata Press*[39] marked a new willingness to legitimise the thrust of post-liberalisation policy. Justice Kuldip Singh in *Tata Press* maintained that "advertising is considered to be cornerstone of our economic system even the lifeline of our free economy in a democratic country".[39] The order in this case constitutes a broad affirmation of *laissez-faire* and overturns the landmark Constitution Bench decision in *Hamdard Dawakhana*[40] which placed the right to advertise in a framework of public interest criteria. Both the decisions would go a long way in the proliferation of concentration of economic power.

was against the new economic policy, he appeared broadly supportive of the liberalisation policy suggesting that it was essentially consistent with the directive principle of socialism in his inaugural address at a conference in New Delhi on 8 March, 1996. The latter view is a reflection of his judgment in Delhi Science Forum. For details see FRONTLINE 98-105 (3 May, 1996 ).

36. S.C.Advocates-on-Record Association v. Union of India, (1993) 4 SCC at 646.
37. *Id.* at 648.
38. Tata Press Ltd v. Mahanagar Telephone Nigam Ltd., (1995) 4 SCALE 595.
39. *Id.* at 607.
40. Hamdard Dawakhana v. Union of India, (1960) 2 SCR 671.

# TRIBAL RIGHTS IN FREE MARKET ECONOMY

*Suprio Dasgupta**

"Globalisation" and "free market" are the two sides of the same coin of "New Economic Policy". "Globalisation" implies that we as a nation accept the position which may be assigned, or not assigned, to us in the global economic order. The market forces, with all associated processes of manipulation and monopoly in the universe of unequals, will be the main determinant of our position in that order. In particular, money will be the measuring yardstick of every thing. And our national economy will be restructured in response to the dictate of the new order.

The world we are entering is one of extreme tentativeness, ambivalence and market by adhocism.[1] In absence of reliable anchor, a new model of global corporate capitalism is emerging alongside the old imperial style of the dominant powers, making it difficult to a client state. India is caught between the ambition of becoming a major economic and political power amidst hostile and ambivalent treatment by others, between geopolitics and the globalising urge to integrate economically.[2]

This position is antipodal to our Constitution, where we resolved to build an egalitarian social order. The path of planned economic growth was to be so charted that the weaker sections of the community were not at a disadvantage. Particularisation in place of globalisation and gently guided process of advancement in place of ruthless operation of unbridled market forces were the key formulations of national development. It is a pity that the above policies and even the constitutional scheme were honoured more in their breach as years rolled on, notwithstanding increasingly sublime stately pronouncements. The objective of the Fifth and Sixth Schedules of the Constitution was that the process of fast change should not create strain for the tribal system. Instead the institutional structure should adapt itself to the demands of the smooth transition. The ordinary rules of game based on the socalled advanced communities and modern societies such as land being treated as property, operations of money in itself (lending) or in exchange (trade) were made inapplicable for the tribal areas. The matters concerning day to day life of the people were to be under the selfgoverning system of the community whose scope was specifically defined in the Sixth Schedule. The same structure or even a more exhaustive one could be created for the Fifth Schedule areas. The tribal areas were to function as a "sub-system" having their own rules of game as dictated by the social and economic situation in each case, the prime consideration being wellbeing of the tribal people.

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1. R. Kothari, *Desperate Times*, SEMINAR 24 (January 1996).
2. *Id.* at 25.

## I. The New Economic Policy —The New Era Of An Open Assault

Some of the salient features of the tribal scene at the beginning of the New Era market by "Free Market" and Globalisation can be the following :

(i) *Tribal Sub-System:* The Constitutional scheme of an autono-mous tribal sub-system within the nation committed to the establishment of an egalitarian society stands virtually rejected. As the national commitment itself has veered from egalitarian to unrestrained individualism, that egalitarian sub-system becomes incongruous and constitutional provisions redundant.

(ii) *Habitat and Community Concepts :* with the collapse of the sub-system frame, there is no place for the habitat as the lifesupport system of the tribal people, notwithstanding even international conventions in that regard. The Panchayati Raj Amendment of the Constitution, which has the clear provision of a special law for the tribal areas is bound to be frustrated as the matter stands. Creation for village councils (Gram Sabha) as a functioning "republic" with full command over the habitat and affairs of the community the quintessence of Panchayati Raj and the special Fifth and Sixth Schedule provisions of the Constitution will be anti-thesis of globalisationcreed adopted by the government. The fact that not even the first step was taken before the one year limit for the special law ran out is an indication of the inner contradiction.[3]

(iii) *Basis of Individual and Community Rights and Usage :* The superimposition of the concept of individual rights, in total disre-gard of the community and supersession of oral tradition by written word, has made the position of the tribal people about their rights over land, water, forest resources most tenuous. They are most vulnerable to insidious operation of laws, crafty manipulation and sheer use of force by the vested interests, particularly in the context of no education and their ignorance about the ruling modern system.

3. The Seventy - third Amendment of the Constitution came into effect on 20-4-1993. It was envisaged that all states will enact suitable laws within a year, that is, by 20-4-1993. Since this part was not extended to the Scheduled Areas and the Parliament was expected to extend the same with suitable exceptions and modifications through a legislation under article 243M, it was reasonable to assume that the Parliament will make such a law before the states created suitable structures: No action whatsoever was taken on a mistaken premise that the Governor could make suitable regulations under the Fifth Schedule of the Constitution. However, when the anomaly of the government on its own taking a decision about the powers vested in the Parliament by the Constitution was realised, a committee of members of Parliament and experts was constituted on June 10, 1994 to make recommendations on the salient features of the law for extending the provisions of Part IX of the Constitution to the Scheduled Areas. The committee has submitted its report on 17-1-1995. In the meantime the general state laws have not only been extended to the respective Scheduled Areas, even elections have been held in some states like M.P. The nature of adaptation which may be finally adopted will to a great extent depend on political commitment which is not a strong point of our current national scene.



## II. Formal And Informal Economies

The very first feature of the traditional tribal society was that it belonged to the informal sector. With the arrival of the British began the transition to the formal sector. Since the two economies are based on different foundations, this transition has resulted in the deterioration of the nature based communities like the tribals, because they were unable to cope with this encounter between the two systems. The consequent marginalisation had affected their whole community in general. The distinguishing feature of the traditional tribal informal society was that it was community-based as against the individual-based formal system. Secondly, it was oral tradition as against the written word of the present system. The oral undertaking of the individual was accepted in trust by the community. In this system, truth was unambiguous, not evidential as in the litigation-based formal system. Thirdly, the informal economy did not have the concept of property as it is understood today, i.e. something that can be used or destroyed by the individual owner or the corporate sector according to his will. What the informal economy had was a community meant to be used according to human and ecological imperatives, and preserved for posterity.[4]

As far as this paper is concerned, we need not go into the details of this process. Only two factors have to be taken into consideration. The first is that the present formal economy and the traditional tribal society are based on two contradictory founda-tions; the traditional tribal economy on community, the resource and the word of mouth; the formal economy or the written word, the individual and property. The written word and individual based legal and economic system is imposed on a society in which literacy is low. This should be understood in the context of their lack of exposure to the external economy because of the closed nature of their traditional society. Consequently, when the formal system entered their area with the support of the state machinery, the tribals were not prepared to meet it. The relationship between the two, therefore, became one of domination-dependency. The tribals were integrated into the mainstream formal economy as subordinates, viz. as suppliers of cheap labour and raw material, to the benefit of the small minority controlling the formal system. In other words, the first consequence of the intervention of the formal sector was transfer of resources like forests, land and water from the traditional communities to the corporate sector and the upper classes.[5]

Economic and industrial development of a country involves large scale deployment of resources. The greater the urge of development, the wider the lag to catch up with, the faster the pace of development, especially in the Third World.

These countries in a hurry know very well that the process of resource mobilisation and utilisation for the development of backward regions entails heavy sacrifices in the interest of the nation at large. The enthusiastic governments are prepared for these sacrifices. But, what is usually glossed over in this process in the

4. B.D. Sharma, Tribal Development : The Concept And The Frame 13-14 (1978).
5. *Id.* at 60-64.

involuntary displacement of huge populations for what is considered, national development.[6]

The moot question is : Can we afford to accept the logic of the free market and the power of money in such vital matters as command over an area and its resources, ownership of the means of production and labour relations? The die in that case, is heavily loaded against the ordinary people in general and the primary producer in particular. The production of goods has a physical limit. They have to be exchanged for money which serves as severe constraint on their entitlements. Persons commanding money suffer no such handicap particularly in the age of created and manipulated money.[7]

The avalanche of money power which will subsume comm-unity resources and enslave the worker, cannot be checked as long as the logic of money and market reign supreme. Community resources cannot be deemed to be money convertible. That is also a Constitutional Directive. When the state fails or ignores the vital conditions of the contract a "civil contract", solemnised through the declaration "We, the People of India, having solemnly resolved to constitute India...adopt, enact, and give to ourselves...", the community has a right and also the responsibility to defend its natural rights against any intrusion. With the acceptance of privatisation and globalisation as guiding principles the state has formally absolved itself of the grave responsibility and is not standing by the people.

## III Conclusion

We have noticed in this paper that the transition from the informal to the formal economy and from communitarian to the individualistic use of resources was crucial in the marginalisation of the tribal community as a whole. With this marginalisation begins the process of class formation among the tribals. Outsiders take control of their economy and the upper classes among the tribals accept Sanskritic custom as a mode of upward mobility. In other words, a new from of internal colonisation takes place. What is clear is that because of Sanskritic customs, the tribal who was till then an economic asset has today become a liability. Dowry, child marriage and illiteracy are only signs of this change.[8]

What the people may gain in terms of economic benefits and welfare is no doubt important. But, the real issues are those of national honour, dignity of the people and identity of the community. The people have resolved not to allow their primacy slip

6. L.K. Mahapatra, *Development for whom ? Depriving the Dispossessed Tribals* in W. Fernandes (ed.), National Development And Tribal Deprivation 131 (1992).
7. B.D. Sharma, *Community Control over Natural Resources and Industry : The Significance of the Mavalibhata Declaration* in W. Fernandes (ed.), The Indigenous Question : Search For An Identity 116-17 (1993).
8. S.T. Das, Tribal Life Of North-Eastern India : Habitat, Economy, Customs And Traditions 46-47 (1986).



The business world has long recognised the advantages of ADR over litigation in one form or another. Some of their advantages are :

1. Promptness of resolution ;
2. Creative, businessdriven solutions ;
3. Substantial cost savings ;
4. Access to trained neutral experts ;
5. Flexibility and ability of the parties to adopt the process to their needs rather than court rules ;
6. Nominal diversion of management, time and energy ;
7. Privacy and confidentiality; and
8. Preservation of business relationships[18]

ADR, of course, focuses on the resolution of the underlying problem which led to dispute, rather than nearly the defeat of one's opponent. This is particularly true when experts in the field are chosen to deal with the dispute.[19] As a result, ADR — which is fact driven and fact oriented — is better able to result in a decision which takes into account long term business and industry consideration that courts are simply not well equipped to handle.[20] While even one of these factors provided impetus to use ADR in resolving commercial disputes, taken together they demonstrate the superio-rity of ADR over litigation.[21]

For business disputes of an international character, ADR makes even more sense. In addition to the benefits mentioned above which is of great importance in a global setting, international commercial ADR has other advantage over litigation.[22] Rightly or not, parties to an international dispute frequently question the fairness of judicial proceedings in foreign courts.[23] If ADR is used, neither party is required to submit the dispute to the jurisdiction of a foreign court.[24] Moreover, ADR generally occurs in a neutral location, so the parties can feel more comfortable with the forum.[25] Another benefit of ADR is that a skilful arbitrator can acknowledge and reconcile different cultural legal and social norms in reaching a decision, whereas courts are generally bound by the procedural rules and substantive law of the country in which they sit.[26]

18. B.S. Murphy, ADR's *Impact on International Commerce*, Dispute Resolution Journal 1 (December 1993).
19. *Ibid.*
20. *Ibid.*
21. *Ibid.*
22. *Ibid.*
23. *Ibid.*
24. *Ibid.*
25. *Ibid.*
26. *Id.* at 2.

Related to this factor, ADR allows the parties to choose the substantive and procedural laws that will be applied to their dispute.

Business use of ADR has grown tremendously in recent years. The growth in ADR has been prompted by several factors including the tremendous expansion of international commerce and the recognition of the existence of a global economy.[27] This growth has spawned a demand for fair and efficient way of handling dispu-tes between diverse parties.[28] The demand for ADR has been supported by governments around the world. This has enabled businesses to act with the knowledge that their choice to use ADR is recognised, that ADR awards will be respected and that the awards are likely to be enforced by national governments.[29] Thus the availability of institutions experienced in conducting ADR has made the widespread utilisation of ADR a practical alternative to litigation.[30] ADR is increasingly supported by governments world-wide as an efficacious way of handling international commercial disputes without invoking the jurisdiction of national court systems. ADR enjoys varying levels of support from different governments worldwide. In some cases, it is less effective as a means of resolving international commercial disputes than others.

In Western Europe ADR has a long traditional support. As early as the 12th century, English Courts refused to intervene once parties had decided to arbitrate a dispute. More recently many European governments have enacted legislation recognising ADR and ADR awards. In addition to Europe's governmental support for ADR, many of the best known ADR institutions such as the London Court of International Arbitration, the ICC and the Arbitration Institution of the Stockholm Chamber of Commerce are based in Europe. The Central and Eastern Europe is also evolving a system which encourages the use of ADR and which will recognise and enforce ADR awards. In the past, governments in Latin America were unfriendly towards international commercial ADR which had the effect of limiting international investment in these countries since some investors are wary of being subjected to the jurisdiction of national courts without an alternative. As a consequence of this development Latin American States are increasingly supportive of international ADR.

Like Latin America the governments in the Middle East and Africa, were initially unreceptive to international ADR. However, they are now supporting ADR in the international setting and a number of institutions have come up which seek to increase the use of international ADR.

If one is to think of the area with the greatest potential for future growth of ADR, it would be none other than Asia and the Pacific region. A major reason for this growth is the shift of world trade towards this region and the corresponding

27. *Ibid.*
28. *Ibid.*
29. *Ibid.*
30. *Ibid.*



demand for accessible dispute resolution mechanisms.[31] In addition, cultural factors such as the Confucian and Buddhist traditions of peaceful dispute resolution and Asian preference for privacy in business dealing favour ADR over litigation.[32] The countries in Asia and the Pacific region which are opening up and have moved towards market economy have strong national arbitration institutions which remain independent from the national courts and whose awards are respected and enforced. The ADR institutions in the region are actively using ADR to resolve international commercial disputes and are generally well respected throughout the region. The support for ADR is not divided along ideological lines. The People's Republic of China and countries like Malaysia, South Korea, Hong Kong, Singapore, Sri Lanka, Japan all favour ADR to litigation. The widespread governmental support for ADR is both a recogni-tion of the usefulness of ADR in resolving international commercial disputes and impetus to the growth of ADR. With this support, the future of ADR seems to be one of continued and increased use throughout the world.[33] The increase in governmental support for ADR has been accompanied by the growth in the number of ADR institutions which focus on international commercial ADR, being established in different countries.

With the passage of time, new ADR processes have been evolved. ADR which is a broad term encompassing many different processes to resolve dispute outside traditional channels, can be broadly classified into two categorises, namely (a) "consensual" non binding procedure designed to achieve an agreement between the parties, i.e. mediation/conciliation, negotiation, ministrial and (b) binding adjudication, i.e. arbitration.

In practice parties frequently combine various elements of different processes, e.g., negotiation followed by mediation and then by binding arbitration.Thus the most commonly used forms of ADR processes are :

(a) Negotiation ;

(b) Conciliation ;

(c) Mediation ;

(d) Minitrial ;

(e) Arbitration and

(f) Settlement conference.

Besides the above commonly used ADR processes, in United States there are other ADR processes which are being practised, viz. court-annexed process — Early Neutral Evaluation, Special Masters, Hybrid Arbitration, etc.

The use of ADR in international commerce has great impact and it continues to expand. Many benefits are derived from the use of ADR processes, the classic

31. *Id.* at 5.
32. *Ibid.*
33. *Ibid.*

advantages being a savings in cost and time. Most ADR methods use fewer resources than trial. Preparation is much less extensive than it is for trial and none of the processes take as long as trial. Time required for resolution is shortened because use of ADR methods can be utilised prior to trials.

The use of neutrals with subject matter expertise is an important benefit which attracts parties to ADR. Moreover, most ADR processes are extremely flexible. Being consensual in nature, the processes generally allow the parties to create the rules which will govern their selected methods of resolution. ADR processes are or can be confidential, which often encourage participants to be more candid or offer more creative solutions. Most of the consensual ADR processes result in mutual benefits or "win-win" solutions, rather than "win-lose" or "lose-lose" outcomes. As the parties in ADR usually create their own agreements, they are more likely to honour their commitments. Most of the cases resolved through ADR do not require court enforcement of the agreement, because party satisfaction is very high. Parties greatly prefer the improvement of creating their own solution to being told what to get done by others or a judge. Another advantage of ADR over litigation is that it is designed to account for the tremendous differences between political, economic and social systems. Thus ADR creates a congenial atmosphere for parties from different cultures, countries, with diverse interests and backgrounds — to meet in a neutral forum to work out their differences peacefully. The global support for ADR involving international commerce is on the rise and in view of the increasing demand for ADR the number of ADR institutions equipped to handle international commercial disputes continues to grow.

We in India have, keeping in line with the ongoing process of economic reforms, enacted the Arbitration and conciliation Act, 1996, thus providing for the use of ADR for settlement of commercial disputes. A lot needs to be done for providing effective ADR processes and institutions which may specialise in ADR. The institutions which provide ADR facilities should have clear set of rules and panel of experts to provide ADR services of high standard for not only domestic but also international commercial disputes. A lot of homework has to be done for the same and professional approach has to be made by all those who are involved in this process and are connected in any form with resolution of disputes arising between the contracting parties.

In our view ADR systems should be relied on according to the parties' intention and need everywhere, irrespective of countries, and should be continually reformed to cope with the dynamism of the business world. Accordingly, if the parties intend to try some new or mixed form of dispute resolution, the persons or institu-tions which are entrusted to solve the dispute should devote themselves in creating any system that will satisfy the parties' preference as much as possible.

# CONCENTRATION CONUNDRUM AND DISTRIBUTIVE JUSTICE

*A. Raghunath Reddy**

## I. INTRODUCTION

The preamble of the Indian Constitution is to illumine what it gives to the people. It expresses a resolve to create a sovereign, socialist, secular, democratic republic. It has been held by the Supreme Court of India time and again that these concepts embodying the philosophy of the Constitution are part of the basic structure of the Constitution[1].The Supreme Court has clearly recognised the socialist ideology to which India is wedded to.[2] Justice Chinnappa Reddy in the *Sanjeev Coke* case,[3] Justice Desai in *Nakara*[4] and Justice Iyer in *Reddy*[5] have acknowledged this obvious fact. In a socialist economy the means of production should be socially owned and controlled for the benefit of the society as a whole. As a result, the state has to promote the prosperity and well being of the people. The goal of socialistic pattern of society envisaged by our Constitution can only be achieved if the states endeavour to implement the directive principles with a high sense of moral duty.

Articles 38 and 39 of our Constitution[6] embody the jurisprudential doctrine of "distributive justice".[7] The concept of distributive justice connotes inter-alia, the removal of economic inequalities rectifying the injustices resulting from dealings and

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1. See Kesavananda Bharathi v. State of Kerala , AIR 1973 SC 1461; Minerva Mills Ltd v. Union of India AIR 1980 SC 1789 ; S.R. Bommai v. Union of India (1994) 3 SCC.1.
2. 1 CONSTITUENT ASSEMBLY DEBATES, 62. Pandit Nehru told the makers of the Constitution in the debate on the famous Objectives Resolution, which was in the nature of a pledge, that "India will stand for socialism and that India will go towards the Constitution of a Socialist State". The Industrial Policy Resolutions 1948 and 1956 are the steps in the direction of imposing social control on private economic activity. See the Industrial Policy Resolutions of the Government of India, dated April 6, 1948 and April 30, 1956.
3. Sanjeev Coke Mfg. Co. v. Bharat Coking Co., Ltd., AIR 1983 SC 239 at 251.
4. D.S. Nakara v. Union of India, (1983) 2 SCR 165 at 187.
5. Karnataka v. R. Reddy, AIR 1978 SC 215.
6. Article 38 of the Indian Constitution speaks of welfare of the people, social, economic and political justice and removal of inequalities of income, status, facilities and opportunities. Article 39 is a sequel to Article 38. Article 39 (b) directs redistribution of ownership so as to subserve common good ; Article 39 (c) requires the state that the operation of economic system does not result in concentration of wealth and means of production to the common detriment. These principles were given more precise direction when Parliament accepted in December 1954 the socialist pattern of society as the objective of social and economic policy. The Congress Party in India passed a resolution at its Avadi Session in 1955 to this effect.
7. See E. Bodenheimer, JURISPRUDENCE 197, 209 (1974); Fitzgerald, SALMOND ON JURISPRUDENCE 9 (1966).

transactions between unequals in society. Articles, 38 and 39 therefore, reject the capitalist system, protest against the material and cultural poverty inflicted on the mass of the people, express a concern for the oppressed and admit that inequality of a class depends on inequality of income.[8] One can witness the activist Supreme Court's intended efforts to curb unregulated capitalism in its momentous decision in *T.M.A. Pai Foundation*.[9] The Court in the instant case engaged in the curious enterprise of ordering state subsidies and less interest study loans for the resident Indian stude-nts studying in private medical and dental educational institutions.[10]

The MRTP Act is designed to promote distributive justice. It is an important socio-economic legislation. The socialist ideal which is the main plank of our Constitution is deeply rooted in this legislation. The Act is to diffuse concentration of economic power and to control monopolies among other things. But because of the gaps, deficiencies and lacunae,[11] the Act proved to be a miserable failure in achieving the desired constitutional goals. In this paper, an attempt is made to trace in general, the problem of concentration of economic power among few industrial giants and big business houses in India. It is also proposed to analyse critically as to how far the New Economic Policy involving measures such as privatisation, public disinvestment and investment in India by the multinationals are in keeping with the constitutional goals. These objectives would naturally lead to the formulation of following hypotheses :

1. The growth of corporate private sector, big business houses and industrial giants is responsible for concentration of economic power.
2. The New Economic Policy and the consequent amendment to the MRTP legislation have virtually legitimised concentration, promoted the growth of monopoly and laid strong foundations for private capital.
3. The privatisation wave, multinationals and public disinvestment policy of the Government are not in keeping with the directive principles of state policy and on the other hand leading towards the direction of concentra-tion and monopoly.
4. Whether sovereignty of the Republic and socialistic pattern of our society which are basic features of the Constitution are emerging as challenges to the legal system under the new economic policies.

8. See *supra* note 3 for details. It is to be noted that Article 31 (C) considerably enhanced the significance of these directives and got over the difficulties placed in the way of giving effect to these directives. Article 31 (C) has been upheld in Keshavananda Bharati v. Kerala, AIR 1973 SC 1461; Minerva Mills v. Union of India, AIR 1980 SC 1789; see also M. Ghouse, *Role of the Constitution and the Supreme Court in Poverty Eradication* , 8 INDIAN BAR REVIEW 1 (1989).
9. T.M.A. Pai Foundation v. Karnataka, 1995 (4) SCALE 665.
10. *Id.* at 674-675. The litigations in Unnikrishnan v. State of AP (1993), 1 SCC 645 and Mohini Jain v. State of Karnataka, (1992) 3 SCC 666 had been concerned with eliminating capitation fee payments in such institutions.
11. See K. Basu, *Markets, Laws and Governments* in B. Jalan (ed.), THE INDIAN ECONOMY PROBLEMS AND PROSPECTS 338 (1993).



## II. CONCENTRATION OF ECONOMIC POWER : THE REGULATORY MECHANISM

Chapter III of MRTP Act 1969 is a unique feature in the anti-monopoly legislation of India as compared to similar legislation in other countries and represents a separate scope of control of monopolistic or oligopolistic economic power which was to the common detriment.[12] The main objective of the Act that operation of the economic system does not result in concentration of economic power to the common detriment is in keeping with the directive principles of state policy as enshrined in Article 39 (b) and (c) of the Indian Constitution.[13] The state policy is to assure economic and industrial growth consistently with reduction in concentration of wealth and economic power so that the benefits of economic growth would belong to the public at large not merely to a handful of industrial giants. It is feared that the New Economic Policy would run contrary to this assurance.

The points on which business power can normally concentrate has been given the name "undertakings". The object of preventing the concentration of economic power[14] is sought to be achieved by the Government of India through the examination and regulation, by way of approval or rejection, of proposals of large and dominant undertakings for substantial expansion of assets, establishment of new undertakings, merger, amalgamation and takeover of undertakings.[15] Such proposals are subjected to close scrutiny in the light of current industrial licensing policy and other socio-economic policies of the government and considerations like the demand and supply position, economies of scale, efficient production, efficiency in the use of new materials, capacities and other resources, effecting technical and technological improvements, encouraging new enterprises, balanced regional growth and development of backward areas.

Other measures for the prevention of concentration include the division of large and dominant undertakings into two or more units, severance of interconnection of undertakings,[16] restraints on the appointment of directors and the transfer of shares of such undertakings.[17] The same guidelines as mentioned above are to be followed

12. Chatper-III of the MRTP Act, 1969 deals with regulation of concentration of economic power. For a critical study see K. K. Mitra, COMMENTARIES ON THE ACT, 1969, 1-5 (1980); D.P.S. Verma, THE MRTP ACT, 1969, 11 (1984); H.M. Jhala, THE LAW OF MRTP IN INDIA 20-25 (1981).
13. See Sitaram Jaipuria v. Banwarilal Jaipuria, AIR 1972 Cal. 105.
14. In the corporate field, concentration of economic power was in the form of management, ownership or operational control of several companies which can be secured through certain devices, i.e., inter-locking of directorships, holding of managerial offices in a large number of companies at high salaries, inter-corporate loans and investments, mergers and acquisitions, exercise of disproportionate voting rights by promoters, etc.
15. See Part A of Chapter III of the Act.
16. These measures are dealt with in Part B of Chapter III of the Act.
17. Chapter III A of the Act.

in these matters also.[18] Regulatory measures for preventing concentration and control of monopolies are not intended to prevent the growth of undertakings as such, but are designed to regulate their expansion only into specified fields for ensuring that such expansion does not adversely affect the small and medium scale undertakings and will not be harmful to the public interest. The Sachar Committee[19] had observed that MRTP Commission has ceased to play any effective role in consideration of the matters relating to concentration. This is because of the existence of a provision[20] in the Act giving discretion to the Central Government whether or not to refer the matter to the Commission. This would lead to a situation of almost total elimination of the role of the Commission. It is said that the overwhelming number of cases have been disposed off by the central Government itself without making a reference of the matter to the Commission.[21] The Government for reasons, political or other considerations is safeguarding the business interests of the owners of the undertakings in whom it is interested. Such powerful individuals may not only cripple freedom of trade and commerce but also challenge and even control political decisions to their advantage. They liberally give funds to the political party at the time of elections expecting quid pro quo in case of such party coming to power. This makes it necessary that economic power must not be allowed to be cornered beyond a certain extent by private individuals.

## III. Concentration Of Economic Power : The Impact Of The MRTP (Amendment) Act, 1991

The situation became worse with the MRTP (Amendment) Act, 1991 deleting Chapter III of the Act except regulatory meas-ures for division and severance of interconnection between undertakings in the backdrop of the New Economic Policy introduced by the Central Government.[22] The amended Act is directly giving scope for further concentration, unchecked growth of monopolies and private capital in the country. Apart from occasional rumblings from the leftist circles, nobody appears to be bothered today by the inherent dangers of increasing monopoly power that threatens our democratic socialistic ideals and the very fabric of our body politic. With the

18. For a detailed study see B. Marchant, Monopoly Laws : A Comparative Study - India And U.S.A. 5-15 (1976 ); see also C. Kuttikrishnan, *Anti-Monopoly Law in India — An Analytical Study*, 2 Academy Law Review 21 ( 1978 ).

19. Report Of The Sachar Committee Paras 50-52 (1978); see also Government of India, Deptt. of Company Affairs, The Tenth Annual Report On The Working Of The MRTP Act 4-5 (1980).

20. For example, see sections 21, 22 and 23 of the MRTP Act.

21. See supra note 12.

22. The New Economic Policy has been introduced by the Government of India in 1991. Its package mainly falls into Budgetary, Industrial, Trading and Financial Policies. For details see Dr. M. Singh, *Economic Policy Planning : The Task Ahead*, 39 The Indian Economic Journal 39 (1992); B. R. Datt *Public Sector and Privatisation, Id.*, at 1 ; P.V. George, *Liberalisation and NEP in India In Search of an Analytical Framework*, 40 India Economic Journal 9 (1992).



liberalisation of our economy and privatisation policy the sick public sector undertakings are either closed or being privatised.[23] Though it makes enterprises and economies productive, efficient and competitive, fears have been expressed about social and labour issues such as loss of present and future jobs, effect on trade unions and collective bargaining, etc.[24]

Even the profit earning and viable public sector undertakings are disinvested under the disinvestment policy. The nonresident Indians and multinationals are lured to invest in India paving the way for concentration. Some of the service oriented concerns like road transport, insurance, banking, post, etc., are threatened to be denationalised.[25] This amply demonstrates that the country is driven back towards the direction of preindependent colonial days where concentration and monopoly were the order of the day. The state is slowly absolving from its social obligations which is against the spirit of the Constitution. The free market economy in the process is restructured in favour of the privileged classes. Hence the ideological slogan of "retreat of the state" entails disastrous consequence in terms of social and economic justice.[26] The appeal that the benefits of economic reforms as proclaimed by the government are reaching the common man is no more than a myth. On the other hand, development theorists and criminologists expressed an apprehension that new economic policies foster criminogenic tendencies.[27]

Here it may be recalled that the bulk of the major and large scale industrial developments that had taken place in India before independence in the guise of institutions like managing agencies and multinationals had fostered foreign control and after independence became "a politico-economic eyesore". With the advent of independence though the managing agency system had been abolished the concentration of economic power among the large scale manufacturing industries owned by multinationals continued unabated. There was an unprecedented growth of

23. Privatisation is one of the major elements of structural adjustment process going on in most parts of the world for which India is no exception. See D. Bose, Privatisation — A Theoretical Treatment (1991).

24. See C.S.V. Ratnam, *Social And Labour Issues In Privatisation — An Overview*, 28 Indian Journal Of Industrial Relations 140 (1992); B.M. Misra, *Privatisation of Public Enterprises in India— Some Issues*, The Indian Economic Journal 71 (1993). On the evils of liberalisation, see R. Kothari, *Flawed Democracies : A Critique Of Indian and U.S. Models*, The Times Of India (30 May, 1994); M.N. Buch, *Economic Reforms : Myth & Reality*, The Hindustan Times (3 January, 1996).

25. Privatisation of public utility enterprises would be contrary to the Constitution. See T. Prosser, *Constitutions and Political Economy : The Privatisation of Public Enterprises in France and Britain*, 53 Modern Law Review 309 (1990).

26. For free markets to work better, the state must also work better. See S. S. Singh and S. Mishra, *Public Law Issues in Privatisation Process*, 1 Indian Journal Of Public Administration 396 (1994).

27. See M.B. Clinard and D.J. Abbot, Crime In Developing Countries — A Comparative Perspective (1973 ).

corporate organisations resulting in the steady growing process of monopolisation. As a result, industrial entrepreneurship tended to be confined in the hands of big business houses and industrial tycoons.

Hazari's study and the Mahalanobis Committee[28] established that there was a considerable degree of inequity in the distribution of assets and consequently an unjustified increase in the concentration of economic power in the private sector. As a result of the recommendations of the Monopolies Inquiry commission[29] the Monopolies and Restrictive Trade Practices Act, (MRTP Act) 1969 came into existence. It is in this background that the concept of public sector undertakings as a counterveiling force to private capital came to being.[30] The state came to be recognised as a catalytic agent in economic activities. The idea of nationalisation first emerged as a serious strategy aiming at a proliferation of statecontrol in the wake of the socialistic aspirations of the people. Nationalisation and state ownership of an industry must, therefore, be presumed to be reasonable and in the interest of the general public as far as Article 19 (1) (g) of the Constitution is concerned. Article 19 (6) (ji) clearly shows that there is no limit placed on the power of the state monopoly.[31] State ownership is thus held to be a reasonable restriction on the right to carry on trade or business.[32]

## IV. Conclusions And Suggestions

In the light of economic reforms which have legitimised the concentration and promoted the growth of monopolies in the country, strong suspicion shrouds on the credentials of the MRTP Act and its credibility is to be doubted. The Union Government is to be blamed for this unfortunate state of affairs. It is not bothered about balanced economic growth of the country nor about the participation of the masses in the process of economic development.

28. See R.K. Hazari, Corporate Private Sector (1966); P.C. Mahalanobis Committee Report On Distribution Of Income And Levels Of Living, Part-I, 1-10 (1964) which largely based its recommendation on Hazari's study.

29. Report Of The Monopolies Inquiry Commission (1965) Under the Chairmanship of Justice K.C. Das Gupta . See also M.P. Jain , *A Survey of Laws Preventing Concentration of Economic Power* in V. K. Agarwal (ed.), Some Problems Of Monopoly And Company Law 43-62 (1972 ) ; P.B. Mukharjee, *Legal Implications of MRTP Act, Id.* at 23-42; P. Chattopadhyay, *Preventing Concentration of Economic Power, Id.* at 73-83.

30. For details see M.D.Chaudary, *Liberalisation Without Reform* and S. L. Rao, *Muddling Along Modesty*, 437 Seminar 32 (January 1996 ).

31. See Akadasi v. State of Orissa, AIR 1963 SC 1047 at 1053. As per Gajendragadkar, J. a law creating a state monopoly indirectly or incidentally affects a citizens' right under any other clause of Article 19 (1) of the Constitution, *Id.* at 1055. For a discussion on the problem of socialism see Excelwear v. Union of India, AIR 1979 SC 36.

32. On nationalisation of motor transport see Nageswara Rao v. A.P.S.R.T.C., (1951) SCJ 967; Deep Chand v. State of UP, AIR 1959 SC 648. On nationalisation of banks see R.C.Cooper v. Union Of India, (1970) SCC 248.



Further, the MRTP Commission has been made impotent and reduced to a big zero in neutralising monopoly and concentration in India. The very objective is frustrated under this legislation. The problem of concentration is further aggravated by 1991 amendment to the Act. It is clear and apparent that statutory enactment by itself is not enough unless the government has willingness to control such problem and to demonstrate its willingness and capability to enforce the intention of the law.

The privatisation wave, multinationals and public disinvestment policy of the government are not in keeping with the directive principles of state policy and on the other hand they are leading towards the direction of undue concentration of wealth and economic power in a few hands. Consequently, it gives rise to the possibility that those having economic power may manipulate the political processes in the country to the detriment of the poor and weak. This goes against the roots of Indian democracy. Thus, big business houses and industrial tycoons are cornering the benefits of economic reforms. Multinationals and Non-Resident Indians are plundering our economy.

It is submitted that this type of social and economic transformation would run contrary to the ethos of the Constitution. Everyone who believes in the Constitution and sovereignty of the Republic will have to certainly oppose the recolonisation process that is going on in the country. It is feared that our sovereignty and the socialistic texture of our society which are the basic features of our Constitution are emerging as challenges under the new economic policies.[33] At this critical juncture, the judiciary has a greater creative role to play particularly the Supreme Court which is the custodian of the Constitution.

Unfortunately, the activist Supreme Court became most inactive when it sought to free economic policy from public interest litigation. The apex court while considering the legitimacy of telecommunications privatisation policy in *Delhi Science Forum case*[34] set limits of judicial domain which is against forensic dynamics. The question is when citizens are allowed to move the courts against the exercise or nonexercise of powers by unrepresentative governments (where true will of the people is not reflected) and corrupt politicians, why cannot they do so against policies framed by the same unrepresentative governments and corrupt politicians ? One fails to agree with the Chief Justice A.M. Ahmadi who flatly refused to tread on the policy in this case while he warned elsewhere that liberalisation was subject to the constitutional commitment to a just social order, a proposition which suggests that courts can strike down iniquitous policies.[35] In the instant case he maintains, however, that the policy of liberalisation is consistent with the directive principle of socialism.

33. V.R. Krishna Iyer, Human Rights—A Judges Miscellany Ch. II (1995) ; see V. R. Krishna Iyer, *It is affrmative Action*, Frontline 106-107 (3 May, 1996).

34. Delhi Science Forum v. Union of India, (1996) 2 SCC 405. In this case, the Supreme Court in a significant judgment delivered on Feb 10, 1996 has upheld the government's decision to grant licences to Indian and multinational companies to provide basic telephone services in the country.

35. There is no consistency of the views expressed by Ahmadi, C.J. While in a lecture delivered at Bangalore in August 1995 and also in the Zakir Hussain Memorial Lecture in Feb 1996 his stand

It is submitted that the Court, in fact, missed a historic opportunity of declaring the policy as anti-socialist and failed to live up to the expectations and pious trust reposed by the people in the role of the judiciary as protector of the Constitution and fundamental values in it. Kuldip Singh, J. in *Supreme Court Advocates-on-record Association case*[36] expressed his apprehension that "the Constitution and the democratic polity thereunder shall not survive, the day judiciary fails to justify the said trust. If the judiciary fails, the Constitution fails and the people might opt for some other alternative".[37] However, these expressions appear to have failed to caution N.P. Singh, J. in *Delhi Science Forum* who held that policies of Parliament could not be tested in the Court of Law. While *Delhi Science Forum* gave legitimacy to privatisation policy, which is part of liberalisation process, *Tata Press*[39] marked a new willingness to legitimise the thrust of post-liberalisation policy. Justice Kuldip Singh in *Tata Press* maintained that "advertising is considered to be cornerstone of our economic system even the lifeline of our free economy in a democratic country".[39] The order in this case constitutes a broad affirmation of *laissez-faire* and overturns the landmark Constitution Bench decision in *Hamdard Dawakhana*[40] which placed the right to advertise in a framework of public interest criteria. Both the decisions would go a long way in the proliferation of concentration of economic power.

was against the new economic policy, he appeared broadly supportive of the liberalisation policy suggesting that it was essentially consistent with the directive principle of socialism in his inaugural address at a conference in New Delhi on 8 March, 1996. The latter view is a reflection of his judgment in Delhi Science Forum. For details see FRONTLINE 98-105 (3 May, 1996 ).

36. S.C.Advocates-on-Record Association v. Union of India, (1993) 4 SCC at 646.
37. *Id.* at 648.
38. Tata Press Ltd v. Mahanagar Telephone Nigam Ltd., (1995) 4 SCALE 595.
39. *Id.* at 607.
40. Hamdard Dawakhana v. Union of India, (1960) 2 SCR 671.

# TRIBAL RIGHTS IN FREE MARKET ECONOMY

*Suprio Dasgupta**

"Globalisation" and "free market" are the two sides of the same coin of "New Economic Policy". "Globalisation" implies that we as a nation accept the position which may be assigned, or not assigned, to us in the global economic order. The market forces, with all associated processes of manipulation and monopoly in the universe of unequals, will be the main determinant of our position in that order. In particular, money will be the measuring yardstick of every thing. And our national economy will be restructured in response to the dictate of the new order.

The world we are entering is one of extreme tentativeness, ambivalence and market by adhocism.[1] In absence of reliable anchor, a new model of global corporate capitalism is emerging alongside the old imperial style of the dominant powers, making it difficult to a client state. India is caught between the ambition of becoming a major economic and political power amidst hostile and ambivalent treatment by others, between geopolitics and the globalising urge to integrate economically.[2]

This position is antipodal to our Constitution, where we resolved to build an egalitarian social order. The path of planned economic growth was to be so charted that the weaker sections of the community were not at a disadvantage. Particularisation in place of globalisation and gently guided process of advancement in place of ruthless operation of unbridled market forces were the key formulations of national development. It is a pity that the above policies and even the constitutional scheme were honoured more in their breach as years rolled on, notwithstanding increasingly sublime stately pronouncements. The objective of the Fifth and Sixth Schedules of the Constitution was that the process of fast change should not create strain for the tribal system. Instead the institutional structure should adapt itself to the demands of the smooth transition. The ordinary rules of game based on the socalled advanced communities and modern societies such as land being treated as property, operations of money in itself (lending) or in exchange (trade) were made inapplicable for the tribal areas. The matters concerning day to day life of the people were to be under the selfgoverning system of the community whose scope was specifically defined in the Sixth Schedule. The same structure or even a more exhaustive one could be created for the Fifth Schedule areas. The tribal areas were to function as a "sub-system" having their own rules of game as dictated by the social and economic situation in each case, the prime consideration being wellbeing of the tribal people.

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1. R. Kothari, *Desperate Times*, SEMINAR 24 (January 1996).
2. *Id.* at 25.

## I. The New Economic Policy —The New Era Of An Open Assault

Some of the salient features of the tribal scene at the beginning of the New Era market by "Free Market" and Globalisation can be the following :

(i) *Tribal Sub-System:* The Constitutional scheme of an autono-mous tribal sub-system within the nation committed to the establishment of an egalitarian society stands virtually rejected. As the national commitment itself has veered from egalitarian to unrestrained individualism, that egalitarian sub-system becomes incongruous and constitutional provisions redundant.

(ii) *Habitat and Community Concepts :* with the collapse of the sub-system frame, there is no place for the habitat as the lifesupport system of the tribal people, notwithstanding even international conventions in that regard. The Panchayati Raj Amendment of the Constitution, which has the clear provision of a special law for the tribal areas is bound to be frustrated as the matter stands. Creation for village councils (Gram Sabha) as a functioning "republic" with full command over the habitat and affairs of the community the quintessence of Panchayati Raj and the special Fifth and Sixth Schedule provisions of the Constitution will be anti-thesis of globalisationcreed adopted by the government. The fact that not even the first step was taken before the one year limit for the special law ran out is an indication of the inner contradiction.[3]

(iii) *Basis of Individual and Community Rights and Usage :* The superimposition of the concept of individual rights, in total disre-gard of the community and supersession of oral tradition by written word, has made the position of the tribal people about their rights over land, water, forest resources most tenuous. They are most vulnerable to insidious operation of laws, crafty manipulation and sheer use of force by the vested interests, particularly in the context of no education and their ignorance about the ruling modern system.

3. The Seventy - third Amendment of the Constitution came into effect on 20-4-1993. It was envisaged that all states will enact suitable laws within a year, that is, by 20-4-1993. Since this part was not extended to the Scheduled Areas and the Parliament was expected to extend the same with suitable exceptions and modifications through a legislation under article 243M, it was reasonable to assume that the Parliament will make such a law before the states created suitable structures: No action whatsoever was taken on a mistaken premise that the Governor could make suitable regulations under the Fifth Schedule of the Constitution. However, when the anomaly of the government on its own taking a decision about the powers vested in the Parliament by the Constitution was realised, a committee of members of Parliament and experts was constituted on June 10, 1994 to make recommendations on the salient features of the law for extending the provisions of Part IX of the Constitution to the Scheduled Areas. The committee has submitted its report on 17-1-1995. In the meantime the general state laws have not only been extended to the respective Scheduled Areas, even elections have been held in some states like M.P. The nature of adaptation which may be finally adopted will to a great extent depend on political commitment which is not a strong point of our current national scene.



## II. Formal And Informal Economies

The very first feature of the traditional tribal society was that it belonged to the informal sector. With the arrival of the British began the transition to the formal sector. Since the two economies are based on different foundations, this transition has resulted in the deterioration of the nature based communities like the tribals, because they were unable to cope with this encounter between the two systems. The consequent marginalisation had affected their whole community in general. The distinguishing feature of the traditional tribal informal society was that it was community-based as against the individual-based formal system. Secondly, it was oral tradition as against the written word of the present system. The oral undertaking of the individual was accepted in trust by the community. In this system, truth was unambiguous, not evidential as in the litigation-based formal system. Thirdly, the informal economy did not have the concept of property as it is understood today, i.e. something that can be used or destroyed by the individual owner or the corporate sector according to his will. What the informal economy had was a community meant to be used according to human and ecological imperatives, and preserved for posterity.[4]

As far as this paper is concerned, we need not go into the details of this process. Only two factors have to be taken into consideration. The first is that the present formal economy and the traditional tribal society are based on two contradictory founda-tions; the traditional tribal economy on community, the resource and the word of mouth; the formal economy or the written word, the individual and property. The written word and individual based legal and economic system is imposed on a society in which literacy is low. This should be understood in the context of their lack of exposure to the external economy because of the closed nature of their traditional society. Consequently, when the formal system entered their area with the support of the state machinery, the tribals were not prepared to meet it. The relationship between the two, therefore, became one of domination-dependency. The tribals were integrated into the mainstream formal economy as subordinates, viz. as suppliers of cheap labour and raw material, to the benefit of the small minority controlling the formal system. In other words, the first consequence of the intervention of the formal sector was transfer of resources like forests, land and water from the traditional communities to the corporate sector and the upper classes.[5]

Economic and industrial development of a country involves large scale deployment of resources. The greater the urge of development, the wider the lag to catch up with, the faster the pace of development, especially in the Third World.

These countries in a hurry know very well that the process of resource mobilisation and utilisation for the development of backward regions entails heavy sacrifices in the interest of the nation at large. The enthusiastic governments are prepared for these sacrifices. But, what is usually glossed over in this process in the

4. B.D. Sharma, Tribal Development : The Concept And The Frame 13-14 (1978).
5. *Id.* at 60-64.

involuntary displacement of huge populations for what is considered, national development.[6]

The moot question is : Can we afford to accept the logic of the free market and the power of money in such vital matters as command over an area and its resources, ownership of the means of production and labour relations? The die in that case, is heavily loaded against the ordinary people in general and the primary producer in particular. The production of goods has a physical limit. They have to be exchanged for money which serves as severe constraint on their entitlements. Persons commanding money suffer no such handicap particularly in the age of created and manipulated money.[7]

The avalanche of money power which will subsume comm-unity resources and enslave the worker, cannot be checked as long as the logic of money and market reign supreme. Community resources cannot be deemed to be money convertible. That is also a Constitutional Directive. When the state fails or ignores the vital conditions of the contract a "civil contract", solemnised through the declaration "We, the People of India, having solemnly resolved to constitute India...adopt, enact, and give to ourselves...", the community has a right and also the responsibility to defend its natural rights against any intrusion. With the acceptance of privatisation and globalisation as guiding principles the state has formally absolved itself of the grave responsibility and is not standing by the people.

## III Conclusion

We have noticed in this paper that the transition from the informal to the formal economy and from communitarian to the individualistic use of resources was crucial in the marginalisation of the tribal community as a whole. With this marginalisation begins the process of class formation among the tribals. Outsiders take control of their economy and the upper classes among the tribals accept Sanskritic custom as a mode of upward mobility. In other words, a new from of internal colonisation takes place. What is clear is that because of Sanskritic customs, the tribal who was till then an economic asset has today become a liability. Dowry, child marriage and illiteracy are only signs of this change.[8]

What the people may gain in terms of economic benefits and welfare is no doubt important. But, the real issues are those of national honour, dignity of the people and identity of the community. The people have resolved not to allow their primacy slip

6. L.K. Mahapatra, *Development for whom ? Depriving the Dispossessed Tribals* in W. Fernandes (ed.), National Development And Tribal Deprivation 131 (1992).
7. B.D. Sharma, *Community Control over Natural Resources and Industry : The Significance of the Mavalibhata Declaration* in W. Fernandes (ed.), The Indigenous Question : Search For An Identity 116-17 (1993).
8. S.T. Das, Tribal Life Of North-Eastern India : Habitat, Economy, Customs And Tradition 46-47 (1986).



by and make their honour negotiable in the new scheme of structural transformation and retrieve the same where damage has already been done. The rules shall not be allowed to proceed further with bartering away the suzerainty which have been mischievously planned under deceptive title, deeds and forms. These paper titles will have no force on the ground firmly held by the people. The alliance of farmers, workers, artisans, tribals, that is, the community comprising working classes, is destined to create a new world order based on equality, justice and fraternity.

# THE ROLE OF INTELLECTUAL PROPERTY RIGHTS IN FREE MARKET ECONOMY: POST-GATT SCENARIO

*Virendra Kumar Ahuja**

## I. INTRODUCTION

One of the major developments in international law in this decade is the conclusion of Uruguay Round of Multilateral Trade Negotiations (URMTN) which started at Punta Del Este in 1986 and came to an end in December 1993. This was the most contro-versial of the eight rounds of multilateral trade negotiations undertaken by GATT since its inception in 1948. Protectionism, Quota and other types of trade barriers as well as the preferential treatments to developing countries have now become incidents of the past. This is now time of free market economy and competition where the developed and developing countries are trading at par.

Free market economy is no doubt a healthy trend for economic development of nations provided all the nations have equal standard of economic and technological development. Since there is a lot of disparity in terms of economic and technological development between developed and developing countries, therefore the latter are more likely to face new challenges. This paper analyses the role of intellectual property rights in free market economy in the post GATT period.

The prosperity achieved by developed nations is the result of the exploitation of their intellectual property. Intellectual property has a direct bearing and symbiosis with invention and technology.

The technological development and economic growth may come to a halt if adequate protection is not given to intellectual property rights. This situation arises when new types of technological developments are not covered by the laws of a country. The frequent infringement of intellectual property and inadequate laws to protect them have resulted in severe economic loss to the owner of intellectual property rights. Due to this reason, trade related aspects of intellectual property (TRIPs) were negotiated under the auspices of General Agreement on Tariff and Trade (GATT), which was a forum for international trade and not under World Intellectual Property Organisation (WIPO), which is a suitable body for negotiation on intellectual property.

Before going further into the intellectual property regime it is worth mentioning here the World Investment Report, 1995 on Transnational Corporations and Competitiveness which talks of 40,000 transnational corporations (TNCs), who have approximately 2,50,000 foreign affiliates. The sales of these TNCs and their affiliates is in excess of $ 5.2 trillion, a greater volume than all of world trade.[1] This is because of the protection provided to their intellectual property rights throughout the world.

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1. UNCTAD BULLETIN NO. 34: WORLD INVESTMENT REPORT 1995: TRANSNATIONAL CORPORATION AND COMPETITVENESS 4 (NOV-DEC.1995).



In addition to this, the Report states that TNCs made direct investments in foreign countries amounting to $ 226 billion in 1994. The 1995 total is likely to amount to $ 235 billion. In 1994, 37% of the investment went into developing countries.[2] This trend shows that developing countries are also adopting liberal policies to achieve development because the benefits that this investment can yield for a liberal economy are increasingly being recognised throughout the world. TNCs bring with them a package of tangible and intangible assets including capital, management, intellectual property rights, know how, skills and access to international markets.

The successful conclusion of URMTN made it obligatory for member states to open up their economies for TNCs, which will bring with them their intellectual property. Member states will be under an obligation to protect their intellectual property. The protest of India and other developing countries on the inclusion of intellectual property in the URMTN could not be proved fruitful and trade related aspects of intellectual property rights were negotiated under GATT forum which has now been replaced by World Trade Organisation (WTO).

The TRIPs Agreement of Final Act embodying the Result of the Uruguay Round of Multilateral Trade Negotiations (hereinafter referred as final act) deals with copyright, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits, undisclosed information and control of anticompetitive practices in contractual licences.

## II. COPYRIGHT

Copyright deals with the rights of intellectual creators in their creation. The reasons to protect such rights of creators are the need to stimulate and foster the individual creativity of persons and make the results of that creativity available on the widest possible scale. Copyright subsists in original literary, artistic, musical and dramatical works. Under TRIPs Agreement members are made obliged to comply with Articles 1-21 and the Appendix of the Berne Convention. According to Article 2 of the Berne Convention, members are obliged to protect all "literary and artistic works".[3] Apart from this, TRIPs Agreement requires member states to protect computer programmes and other compilation of data.[4] The author of original work gets following exclusive rights in relation to his work: the right of translation and reproduction of literary and artistic works;[5] rights of public performance of dramatic, dramatic-musical

2. *Ibid.*
3. It include books and other writings ; dramatic or dramaticamusical works; choreographic works; musical compositions with or without words; cinematographic works; works of drawing, painting, architecture, sculpture, engraving and lithography, photographic works and derivative works such as transactions, adaptations, arrangements of music, etc. This list is, however, not exhaustive.
4. TRIPs Agreement, Article 10.
5. Berne Convention, Articles 8 and 9.
6. *Id.*, Article 11.

and musical works;[6] the broadcasting and related rights with regard to their literary and artistic work;[7] right of public recitation;[8] right of authorising adaptations, arrangements and other alterations of the work;[9] right of recording of musical works;[10] rights related to cinematographic adaptation and reproduction, distribution, public performance and publication communication[11] and droit do suite in works of art and manuscripts.[12]

In addition to this, the TRIPs Agreement obliges Members to provide authors the right to authorise or to prohibit the commercial rental of their computer programmes and cinematographic works to the public.[13] Members are made obliged not to put arbitrary limitations or exceptions to exclusive rights of the right holder.[14] The TRIPs Agreement, therefore prohibits Members to incorporate more provisions regarding public interest in their copyright laws.

The TRIPs Agreement also provides for civil, administrative and criminal remedies for the infringement of copyright. The author of a copyright may therefore, get good returns for his work. The practice of audio piracy and video piracy will be curbed which is prevalent in many countries. This will result in substantial monetary benefit to the author.

## III. Industrial Designs

In order to catch the attention of buyers, an article must be visually attractive. Visual attraction of an article enhances the marketability of that article. Today, manufacturers are paying full attention to the design of the articles they produce. For this purpose they invest substantial capital and carryout research activities.

The TRIPS Agreement provides strong legal protection to the owner of design. It provides the owner of protected design the right to prevent third parties not having his consent from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design.[15]

Article 26(2) of the TRIPs Agreement provides limited exceptions to the protection of industrial designs provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs.

7. *Id.*, Article 11 bis.
8. *Id.*, Article 11 ter.
9. *Id.*, Article 12.
10. *Id.*, Article 13.
11. *Id.*, Article 14.
12. *Id.*, Article 14 *ter*.
13. See *supra* note 4, Article 11.
14. *Id.*, Article 13.
15. *Id.*, Article 26. In India also under the Designs Act, 1911 the same rights are available to the owner of protected design. Sec. 53 (2) provides remedies against the infringement of the copyright in a registered design.



Recently, U.S.A. raised strong protest against Chinese practice of infringing their copyright in the dresses. This matter was later resolved amicably without invoking dispute settlement machinery of TRIPs agreement.

## IV. Trade marks And Geographical Indications

A trademark is a symbol or name or device or any combination of these used by one enterprise to distinguish its product from the products of other enterprises. By virtue of this application the enterprise which sells its goods under a particular trademark acquires a sort of limited exclusive right to use its trademark in relation to those products. In India, registration of a trademark is essential to claim protection under the existing Trade and Merchandise Marks Act, 1958. Proprietors of unregistered trademark may sue the infringer for passing off.

The TRIPs Agreement contains provisions different from those contained in Trade and Merchandise Marks Act, 1958. It provides for registration of trademarks as well as of service marks.[16] It provides further that the registration may be cancelled only after an uninterrupted period of at least three years of non-use, unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner.[17]

Article 17 of TRIPs Agreement provides for limited excep-tions such as fair use of descriptive terms to the rights conferred by a trademark. Such exceptions shall take account of the legitimate interests of the owner of the trademark and of third parties. TRIPs Agreement prohibits the compulsory licensing of trademarks.[18]

Article 20 of TRIPs Agreement prohibits the practice of requiring linkage with domestic marks in order for a foreign trade-mark to get registered. It is noteworthy that this practice prevalent in some developing countries including India where in case of foreign trademarks only "hybrid marks" such as Maruti-Suzuki, DCM-Toyata, etc. used to get registered. The reason for doing so is that when a foreign company works in collaboration with a domestic company, the domestic company adds its trademark to the foreign trademark and makes the foreign trademark a "hybrid mark". When the collaboration comes to an end, the domestic company becomes entitled to use its domestic mark which gets popularity with the use of foreign trademark. But now the foreign companies will be free to use their trademarks which will not be linked with a domestic mark. As a consequence of which the domestic companies will not be able to use the foreign trademark once the collaboration comes to an end.

The TRIPs Agreement provides for the protection of geographical indications whereas India does not have a law to protect geographical indications.[19] To bring Indian trademark law in conformity with TRIPs Agreements the trademarks Bill, 1993 was introduced in the Parliament which intended to provide protection for the

16. See *supra* note 4, Article 15(1).
17. *Id.*, Article 19(1).
18. *Id.*, Article 21.
19. *Id.*, Articles 22 - 24.

geographical indications. Under the Bill, indication of geographical origin could be registered as collective mark only if such use was bonafide use in trade. Clause 62 of the Bill provided that a collective mark which consists of any mark or indication which might serve in trade to designate the geographical origin of goods or services could be registered.

Apart from this, the Bill provided that the Central Government might require that goods of any class which were made outside India and imported into India or goods made and produced in India shall have applied to them an indication of the country or place in which they were made or produced. In this way the Bill made a beginning regarding protection of geographical indication which eventhough was not comprehensive but significant.

The Bill also provided for the registration of service marks in India. The Bill was intended to repeal the existing Act and reenact new one by making drastic changes in the provisions of the existing Act and adding some new provisions regarding service marks, collective marks, Appellate Board, etc. In this way, the Bill proposed to bring trademark laws in conformity with the TRIPs Agreement but it could not be passed and finally lapsed. The multinational companies are still to wait in order to enjoy the protection available under TRIPs agreement in India.

## V. Patent

Patent is the area which has generated much heat in the URMTN. Provisions regarding patents in Dunkel Draft were totally unacceptable to developing countries since they tend to create a lot of hardship on them. The developing countries were not prepared to accept the system of free market economy which lacks state's control since it could have detrimental impact on their economies. But later Final Act of Uruguay Round was accepted by developing countries which incorporated the same provisions regarding patents since there was no way out for them.

"Patent" means statutory grant of the exclusive right to a person to exploit his invention for a limited period of time. This monopoly right can be enjoyed by a person other than the patentee with the later's previous authorisation.

The basic philosophy of the Indian Patents Act, 1970 is enunciated in Section 83 which reads as under:

(a) that patents are granted to encourage inventions and to secure that the inventions are worked in India on a commercial scale and to the fullest extent that is reasonably practicable without undue delay; and

(b) that they are not granted merely to enable patentees to enjoy a monopoly for the importation of the patented article.

However, the Government can import the patented product for the purpose of its own use. In the case of medicine or drug the Government shall have the right to import such patented medicine or drug for its own use or distribution in dispensary,



hospital or other medical institution.[20] Patentee is not allowed to import the patented product in order to meet the demand of the market.

The reasons for this philosophy are manifold : firstly, the working of the patent in the country leads to saving of scarce foreign exchange which no doubt is very important for the economic development of the country. Secondly, working of patents in country helps in lowering the prices of products. Thirdly, working of patent is responsible for transfer of technology and the promo-tion of industrial activity in the host country. Fourthly, more employment opportunities are generated by working of the patents in the country. Last but not the least, without working, patent protection would merely mean the monopoly for the importation of the patented article into the country and a device for the reservation of the Indian market by the patent owner.

Therefore, in order to ensure working of patents in India, the Patents Act made the provisions of licences of right, compulsory licences and revocation of licences.

*(a) Licences of Right* : Under Section 86 of the Patents Act, the Central Government may make an application to the Controller, at any time after the expiration of three years from the date of sealing of a patent, for an order that the patent may be endorsed with the words "licences of right" on the ground that the reasonable requirements of the public with respect to the patented invention have not been satisfied or that the patented invention is not available to the public at a reasonable price. Section 87 provides that patents' grant for methods or processes for the manufacture or production of substances used or capable of being used as food, medicine, drugs and chemicals shall be deemed to be endorsed with the words "licences of right" from the date of expiration of three years from the date of sealing of the process patent. The effect of such endorsement will be that any person who is interested in working the patented invention in India may require the patentee to grant him a licence for the purpose on such terms as may be mutually agreed upon or in the case of disagreement as settled by the controller.

*(b) Compulsory Licences:* Compulsory licence is another device to ensure working of patents in India. Section 84 of the Act provides that after the expiration of three years from the date of sealing of a patent, compulsory licence would be granted by controller to any person on his application to work the patented invention if the controller is satisfied that the reasonable requirements of the public with respect to the patented invention have not been satisfied or that the patented invention is not available to the public at a reasonable price.

*(c) Revocation of Licences* : In addition to this, Patents Act contains provisions regarding the revocation of patents in public interest. Section 89 provides that where, in respect of a patent, a compulsory licence has been granted or, the endorsement "licences of right" has been made, the Central Government or any person interested may after the expiration of two years from the date of the order granting the first

20. Patents Act, 1970, section 47.

compulsory licence, apply to the controller for an order revoking the patent on the ground that the reasonable requirements of the public with respect to the patented invention have not been satisfied or that the patented invention is not available to the public at a reasonable price. The controller on his satisfaction may make an order for the revocation of patent.[21]

Under TRIPS Agreement, importation of patented products will be considered as working of patent. Article 27 (1) of TRIPs Agreement states that patent rights shall be enjoyable "without discrimination as to... whether products are imported or locally produced".

Thus, this provision goes against the spirit of Patents Act, 1970. In addition to this, it would not be possible to maintain any more the provision of licences of right in the Indian Patents Act.

As far as compulsr, such use shall be non-exclusive and non-assignable. It provides further that such use shall be authorised predominantly for the supply of the domestic market of the member authorising such use. It is noteworthy here that the Indian Patents Act allows the issue of a compulsory licence for not meeting the reasonable requirements of the public if a market for the export of the patented article manufactured in India is not being supplied or developed.[24] Therefore, the provision mentioned in TRIPs Agreement contra-venes the provision of Patents Act, 1970.

Article 31(h) of the TRIPs Agreement provides that in case of non-voluntary use, the right holder shall be paid adequate remun-eration in the circumstances of each case taking into account the economic value of the authorisation. This crucial provision may create a number of questions, e.g., what is the economic value of the authorisation?. What are the measures to determine it? Should R&D costs to be recovered from a single market?, etc.

The use without authorisation of the right holder as well as the remuneration in this regard shall be subject to judicial review or other independent review by a distinct higher authority in that member state. The authorisation for such use by member state[25] shall be liable subject to adequate protection of the legitimate interests of the persons so authorised, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur.[26]

To sum up, TRIPs Agreement provides for non-exclusive compulsory licences, but in very limited circumstances. Further, compulsory licences are also limited in scope and duration.

21. *Id.*, section 90.
22. D. Abod, *Trade Related Intellectual Property Rights*, WORLD FOCUS 19 (1992).
23. See *supra* note 4, Article 31(f).
24. See *supra* note 20, Section 90 (a) (iii).
25. See *supra* note 4, Article 31(i)and (j).
26. *Id.*, Article 31(g).



*(d) Patentable Subject Matter :* Keeping the social and public interest in view, the Patents Act provides under section 3 a list of matters which are not inventions with in the meaning of the Act and, therefore, not patentable. Section 5 of the Act provides that in the field of food, medicine, drug or chemical substances only methods or processes of manufacture shall be patentable and not the products themselves.

Indian Patents Act does not provide a patent for microorganisms per se. In the context of bio-technology, only inventions relating to processes for the production of drugs, medicines and food, including the processes employing the use of micro-organisms, are patentable.

As far as TRIPS Agreement is concerned, Article 27 provides that patents shall be available for any inventions, whether products or processes, in all fields of technology. However, members may exclude from patentability inventions, which are necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment. It is also stated that diagnostic, therapeutic and surgical methods for the treatment of humans or animals; plants and animals other than micro-organisms and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes may also be excluded by members from patentability.

However, Member shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof.

By having a simple look on TRIPs provisions it can easily be concluded that patents shall be granted almost in all fields of technology. As far as product patents in the field of bio-technology is concerned, it require some detailed discussion, because it is the area which will effect economy of our country in a drastic manner.

*(e) Bio-Technological Inventions*: Bio-technological inventions are the processes for the creation or modification of living organisms and biological material. The term "micro-organisms" has not been defined either under TRIPs Agreement or any other international convention. Micro-organisms include all the bacteria, viruses, fungi, cell lines, etc. As stated earlier, in the context of bio-technology, only inventions relating to processes for the production of drugs, medicines and food, including the processes employing the use of micro-organisms, are patentable. The Indian Patents Act, does not provide a patent for micro-organisms per se. Apart from this Indian Patents Act does not protect plant varieties. If the patenting of plant varieties and plant genes are allowed, the ownership of our invaluable genetic resources will pass into the hands of patent holder, who will be the multinational companies of the industriali-sed world, because our genetic resources which are concentrated in tropical and sub-tropical areas would be treated as common heritage of mankind and therefore everyone will be free to make use of our genes without paying anything to us.

The genetic resources, which would be appropriated and patented by TNCs of the North, have been created by generations of Third World farmers. It was they who created almost all known races of food and cash crops from wild plants in the forest,

through careful observation, breeding and selection. Now the TNCs of the North will create new varieties of crops by using modern methods of genetic engineering by transferring genes from one variety to another. Thus they will take the crops for their starting material which in fact are the creation of the Third World farmers.

The industrialised world demands for protection of its plant varieties while it declares the genetic resources of the Third World as common heritage of mankind. This is completely unfair because if genetic resources are common heritage of mankind, they cannot be privatised by TNCs of the North and if they are to be privatised, they must be acknowledged as the property of the Third World and paid for that. It is noteworthy here that the Biodiversity Convention which was signed by most of the nations in 1992, recognised the sovereign rights of the nations on their own biological resources.

*(f) UPOV Convention* : In regard to the protection of plant varieties there is an international convention known as UPOV Convention which was established in 1961 and revised in 1972, 1978 and 1991. Prior to the 1991 revision, the breeder had monopoly over his varieties via the seed trade but the convention allowed two exceptions. One was breeder exemption, which allowed other plant breeders to use the protected variety for breeding purposes. The other was farmers exemption, which gave farmers the right to use seed from their harvests to plant the next crop. But after the 1991 revision the breeders cannot use the protected variety for breeding purposes without paying royalty to the PBR holder where as the farmers exemption is made optional on the permission of the PBR holder. The TRIPs Agreement does not make it obligatory for members to adopt the standard of UPOV convention. Therefore, it is better for us to adopt a *sui generis* system which will concentrate on the following points.

The patenting of micro-organisms, genes, gene sequences, etc., howsoever, derived or trivially modified, should not be patented. These should be considered "discovery"' and not "invention". Only those processes or product patents should be given protection which incorporate genetically modified micro-organisms involving substantial human intervention. No genetically modified micro-organisms *per se* should be made patentable, so that the same could be used for other purposes.

As far as plant varieties are concerned, we should establish a plant breeders' rights (PBR) system instead of patenting the plant varieties. Under this PBR system, exclusive marketing rights should be conferred on the plant breeder for breeding a new variety but there shall be exception for farmers, researchers and scientists.

It is noteworthy here that India is a signatory to the Final Act which includes the TRIPS Agreement. With a view to meet its obligations under the said agreement, it became necessary for India to amend the Patents Act, 1970 in conformity with the obligations under the TRIPs Agreement. With this purpose the Patents (Amendment) Ordinance, 1994 was promulgated which inserted clause (2) in section 5 of the Patents Act. The clause reads: "Not withstanding anything contained in sub-section(1), a claim for patent of an invention for a substance itself intended for use or capable of being used, as medicine or drug may be made and shall be dealt, without prejudice to the other provisions of this Act, in the manner provided in chapter IV A (of the Ordinance)".



With the insertion of this clause the effect of section 5 is now done away with. Before amendment by claims for the methods or processes of manufacture in which such substances were used could be patented and not the substances themselves.

*(g) Product and Process Patents* : Article 27 paragraph 1 of the TRIPs Agreement states that patents shall be available for any inventions, whether products or processes in all fields of technology. It simply means that members have to grant product patents in critical sectors also in which they were earlier giving process patents only.

Indian Patents Act allows only process patents in the field of food, drugs and medicine. As a result of this, the drug prices in India are currently the lowest in the entire world. It is noteworthy here that in 1961, the US Senate Committee, headed by senator Kefauver said that in drugs, generally, India ranks amongst the highest priced nations of the world.[27] This unfortunate situation was reversed after the enactment of Patents Act, 1970.

Therefore, if India grants product patents in these crucial areas then the prices of drugs will, no doubt, go very high. Nilima Chandiramani writes that inspite of the fact that drug prices in India are currently the lowest in the world, only 30% of the country's population can afford modern drugs. But after accepting TRIPs Agreement another 20% of the population will lose health cover, allowing only 10% of India's population access to modern drugs. This fact was admitted by the former Union Minister of state for commerce Mr. P. Chidambaram.[28] Thus, food and pharmaceutical sectors will definately be effected by this provision.

It is very important to note that in case of infringement of patented process the burden of proof has been shifted to the defendant. It is the defendant who has to prove that the process to obtain an identical product is different from the patented process.[29]

*(h) Term of Protection* : Under section 53 of Patents Act, the term of protection of patented process is five years from the date of sealing of the patent, or seven years from the date of the patent whichever period is shorter. In respect of product patents the term of protection is fourteen years from the date of the patent.

The reason for giving less term protection to process patents (particularly in the field of drugs and medicine) is to control the prices of food and drugs.

Article 33 of TRIPs Agreement provides that the term of protection available shall not end before the expiration of a period of twenty years counted from the filing date. The impact of this provision will be that in the sector of food and drugs, India

27. N. Chandiramani, *GATT and India*, MAINSTREAM 9 (16 April, 1994).
28. *Ibid.*
29. See *supra* note 4, Article 34.

will have to grant product patents for a minimum period of twenty years. In other words, grant of a monopoly right of twenty years to the patentee. This will definitely increase the prices of food and drugs substantially.

## VI. Layout Designs Of Integrated Circuits

Layout designs determine the physical location, within the integrated circuit, of each element having an electronic function. They are usually the result of an enormous investment both in terms of the time of highly qualified experts and finances. The TRIPs Agreement laid down some provisions regarding the protection of layout designs of integrated circuits which are in addition to some of the provisions already laid down by the Treaty of Intellectual Property in respect of Integrated Circuits.[30]

Article 36 of TRIPs Agreement makes it unlawful to import, sell or otherwise distribute the protected layout design which has not been authorised by the right holder. But such an act will not be unlawful if the person performing or ordering such act did not know and had no reasonable ground to know when acquiring the integrated circuit or article incorporating such an integrated circuit, that it incorporated an unlawfully reproduced layout design. But such person shall pay the right holder a sum equivalent to a reasonable royalty. The provisions of Article 31 (a) to (k) will also be applicable *mutatis mutandis* to non-voluntary licensing of a layout design.[31]

The term of protection of layout designs will be ten years from the date of filing an application for registration or from the first commercial exploitation wherever in the world it occurs.[32]

India is neither a member of the Treaty on Intellectual Property in respect of Integrated Circuits nor does it have any *sui generis* law for the protection of layout designs of integrated circuits. Therefore, India has to protect the layout designs by enacting a law.

## VII. Undisclosed Information

Under a system of free private enterprise where competition is more, every trader wants to obtain trade secret of his rivals not only to capture more market but also to wipe out his rivals from the market, if necessary. Therefore, traders are very careful and impart their trade related confidential information to only some responsible employees for the purposes of trade.

Under TRIPs Agreement members shall protect undisclosed information in order to ensure effective protection against unfair competition as provided in Article 10 of the Paris Convention 1967.[33]

30. *Id.*, Article 35.
31. *Id.*, Article 37.
32. *Id.*, Article 38.
33. *Id.*, Article 39 (1).



Article 39 para 2 of the TRIPs Agreement enables the natural and legal persons to prevent the information within their control from being disclosed, acquired or used by others without their consent in the manner contrary to honest commercial practices on the fulfilment of following three conditions:

1. Such information should be secret;
2. Such information must have got commercial value; and
3. Such information should be subject to reasonable steps under the circumstances by the person lawfully in control of the information, to keep it secret.

Undisclosed test or other data submitted by an organisation for the approval of marketing of pharmaceutical or of agricultural chemical products which utilise new chemical entities are also protectable under Article 39(3) of the TRIPs Agreement. There are two exceptions to this provision. Members are not obligated to protect such data against disclosure where it is necessary to protect the public or where steps are taken to ensure that the data are protected against unfair commercial use.

In India there is no specific statute to protect undisclosed information but a rule may always find recognition in the Indian legal system, even though it is not specifically enacted in an Act of the legislature. Since, we generally follow common law in India, therefore, we also provide protection to undisclosed information. Apart from this, our laws already provide protection against unfair competition .

The TRIPs Agreement lays down comprehensive provisions regarding enforcement of intellectual property rights. It lays down civil, administrative and criminal procedures and remedies for the enforcement of intellectual property rights. In addition to this, the agreement provides for detailed provisions requiring border meas-ures to stop the importation of the counterfeit trademark and pira-ted copyright goods.[34]

The URMTN provides for prompt and effective dispute settlement mechanism to settle down disputes regarding intellectual property rights among members. The TRIPs Agreement requires the transparency of laws and regulations, final judicial decisions and administrative rulings pertaining to the subject matter. Members are required to notify their laws and regulations regarding TRIPs to the Council for Trade Related Aspects of Intellectual Property Rights.[35]

## VIII. Conclusion

The most controversial and hectic round of multilateral trade negotiations finally came to an end in 1993. After conclusion of this eigth round, it became obligatory for member states to remove state barriers and open up their economies. India too, is a signatory of the Final Act and therefore, under an obligation to globalise its economy.

34. *Id.*, Articles 51 - 60.
35. *Id.*, Article 63 (1) and (2).

As stated earlier, patent is the only area which will affect Indian economy in a drastic way. Grant of product patents in the field of drugs and pharmaceuticals as well as in the field of bio-technology will result in price rise of medicines as well as of crops and seeds. Some of the provisions of TRIPs Agreement regarding patents are contrary to the philosophy of Indian Patents Act, 1970. Therefore, India will have to enact a new patent law in order to bring it in conformity with the TRIPs Agreement. Apart from this, India will have to protect plant varieties either by a sui generis law or by patent law. In the field of trademarks, Trade Marks Bill, 1993 was introduced in the Parliament which was intended to repeal the existing Trade and Merchandise Marks Act, 1958 and to re-enact a new one. The Bill also carried some provisions for the protection of geographical indication which were though not comprehensive but significant. The Bill could not be passed by Rajya Sabha and lapsed. Now it has become mandatory for India to amend its trademark law in conformity with TRIPs Agreement. At present, India does not have a specific law to protect layout designs of integrated circuits. Therefore, a law is to be made to protect layout designs of integra-ted circuits. For other types of intellectual property, no amendment is required in the existing laws.

It is is noteworthy here that the TRIPs Agreement exempts developing countries from implementing this agreement for a period of five years while the least developed countries are exempted for a term of ten year from its implementation. India can also enjoy five years transitional period. It can also delay the product patent protection by ten years to the areas of technology not so protectable in India. Meanwhile, India shall have to provide exclusive marketing rights to the patentee. The council for TRIPs shall monitor the operation of this agreement and, in particular, the members' compliance with their obligations under TRIPs Agreement.

The TNCs of industrialised countries will be the major beneficiaries of the system of free market economy as they are financially very sound and have got with them the sophisticated technology. With the removal of trade barriers, it has become easier for the TNCs to have access to the market of almost every country in almost every field. Therefore, it shall be very difficult for national industries in the developing countries to compete with the giant TNCs. No state protection shall be given to national industries and the provisions regarding public interest in existing laws shall either by omitted or amended in the light of TRIPs Agreement.

In India, a lot of agitation has already taken place against our signing of Final Act. Moreover, it seems very difficult for the present United Front Government to pass the Patents Amendment Bill in the Parliament. The forum of parliamentarians on intellectual property in India described the TRIPS Agreement as "draccnian" and expressed its view to oppose the current version of the Patents Amendment Bill in order to protect national interests.

Whatever will be the fate of Patent Amendment Bill or Trademarks Bill, a few questions are yet to be answered. These are, e.g., how long can India delay the implementation of TRIPs Agreement when it has already signed the Treaty ? Should India again take the lead and mobilise the opinion of various countries to review the TRIPs Agreement after the expiration of transitional period of five years in accordance with Article 71 of the Agreement? Or should India accept the challenge posed by the TRIPs Agreement and prove its potentiality before the world?

# PATENT REGIME IN THE TWENTY-FIRST CENTURY

*V.K.Gupta**

A Bill for replacing the Indian Patents Act, 1970 was introduced in Parliament in 1995. The Bill was passed by the Lok Sabha. However, Rajya sabha had blocked the proposed legislation, and the Bill was sent to the Select Committee. The Bill was introduced to amend the Indian Patent Law following the ordinance issued by the President of India on 31.12.1994 to fulfill its obligation, as contemplated in the Final Act of Uruguay Round in Marrakash (signed on 15th April 1994) by which signatory countries had taken upon themselves to amend their Patent Law by December 31, 1994 . However, the aforesaid Bill lapsed due to dissolution of 9th Lok Sabha in 1996.[1]

This paper tries to examine the present patent law and discuss the implications of TRIPS agreement.

## I. Indian Patent Law: What Changes Are Desired By TRIPs Agreement ?

*1. Duration:* In India, period of protection of patent is 14 years except in case of food and pharmaceuticals. For food and pharmaceuticals the period is five years from the date of sealing of the patent, or seven years from the date of granting of the patent, whichever period is shorter.[2] As per TRIPs Agreement for all products the period of patent protection must be 20 years from the date patent protection is sought, TRIPs agreement wants to change section 5 of the Act.[3]

2. *Relaxation of Compulsory Licensing :* Indian law provides for granting of compulsory licensing.[4] It requires that a registered patent must be worked in the country within three years and it may be revoked on the ground of its non-working.[5] Failure to work may end the patent monopoly right. Patent can be revoked on the ground (a) that reasonable requirements of the public with respect to invention have not been met; or (b) that the patent is not available to public at reasonable price.[6] The law requires government authorities to enquire whether or not sufficient time had elapsed since the sealing of the patent or whether governmental policies or rules have intervened which prevented working; or patentee had taken insufficient steps to start working.[7] The law has worked more as a a psychological pressure, and in very few cases it has actually been enforced.

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1. Article 70, Paragraph 8, Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs). Annex 1c — GATT Agreement Final Act of Uruguay Round.
2. The Patent Act, 1970, section 53.
3. *Id.*, section 5.
4. *Id.*, section 84.
5. *Id.*, section 89.
6. *Id.*, section 86.
7. *Id.*, section 91.



TRIPs Agreement requires these sections to be abrogated. The agreement provides that the inventor has the sole right to appropriate the product or to permit someone in this regard. Those who oppose changing these provisions allege that relaxation would mean that even while a patent is registered in India, the actual goods will continue to be imported. It will drain out foreign currency resources. It is further alleged that in the garb of private property concept developed countries want control of the markets of the developing world for their economic exploitation and for the comforts of their own citizens. These changes have the potential of making new drugs and chemicals virtually out of the reach of a majority of Indian patients suffering from cancer, AIDS, etc. The patients cannot hope to get any treatment unless they are very rich.

3. *Process Patent v. Product Patent :* The target is section 5 of the Patent Act which says that for food, pharmaceuticals and chemicals only process patent would be granted. Product patent in these areas was considered tanathemav by Ayyangar Committee Report which formed the basis of the Patent Act, 1970.[8] The product patent precludes attempts to arrive at the same product by other alternative processes, whereas process patent stimulates research in regard to alternative methods for patenting the same product.[9] The TRIPs Agreement wants the Indian legislature to change the esisting provisions contained in section 5.

4. *Patentibility* : Patent is granted for all except biotechnological process in the agriculture and horticulture areas. Atomic and nuclear energy inventions are not patented in India.[10] If any patent is relevant for defence purposes, then Controller of Patents may give directions to prohibit the publication of any such information.[11] TRIPs agreement provides patent for all except biotechnological processes for the production of plants and animals. That means much of what we have under sections 3 and 4 of the Patent Act would go. Atomic and nuclear energy inventions are also not spared. The same applies to inventions in agriculture and horticulture areas.

5. *Reversal of Burden of Proof* : The burden of proving a point lies with one who wants to establish it. This principle has universal application including in the penal laws. It is proposed to shift this burden of proof from the plaintiff to the defendant.

6. *International Obligations under TRIPs Patentable Subject Matter*: Subject to certain exceptions patents must be granted for any inventions, whether products or processes, in all fields of technology, provided they are new, involve an inventive step and are capable of industrial applications. Patents protection will be made available and patents rights will be enjoyable without any discrimination with regard to the place

8. Ayyanger Committee : Revision Of The Patent Law (1959).
9. *Id.*, at 23.
10. The Patent Act, 1970 section 4 read with section 65.
11. *Id.*, section 35(1).

of invention, the field of technology and whether products are imported or indigenously produced.[12]

## II. Exceptions To Patentable Subject Matter

1. A country may refuse from patenting inventions, and may also prevent commercial exploitation within its territory, if it is necessary to protect morality or public order. Protection may be denied to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided such exclusion is not made merely because the exploitation is prohibited by domestic law.[13]

2. Any country may also exclude from patentability the diagnostic, therapeutic and surgical methods for the treatment of human or animals.[14] Patent is also not to be given for plants and animals other than microorganisms and essentially biological processes for the production of plants or animals, other then nonbiological and microbiological processes. However, the member country must provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. This provision is to be reviewed after 1 January, 1999.[15]

Developed countries were asked to amend their laws in conformity with the provisions of this agreement by 1 January, 1996.[16] Developing countries or any other country which is in the process of transformation from a centrally-planned to a market, free enterprise economy and which is undertaking structural reforms of its intellectual property system may delay for a further period of four years,[17] i.e. upto 31.12.1999. Developing countries were permitted to delay granting of product patent upto 31.12.2004, provided such rights were not already protected in that country on the date of application of this agreement.[18] However, in the transitory period these countries cannot change their legislation, regulations or practices so that they become inconsistent with the agreement.[19] Least developed countries have been granted total exemption for applying the agreement upto 31.12.2004.[20]

In the field of pharmaceuticals and agricultural chemicals the member countries, during the transitional period,[21] shall facilitate for filing of applications and shall grant exclusive marketing right immediately upon filing of such applications.[22]

12. Article 27 (1), Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), including Trade in Counterfeit Goods.
13. *Id.*, Article 27 (2).
14. *Id.*, Article 27 (3) (a).
15. *Id.*, Article 27 (3) (b).
16. *Id.*, Article 65 (1).
17. *Id.*, Article 65 (2) (3).
18. *Id.*, Article 65 (4).
19. *Id.*, Article 65 (5).
20. *Id.*, Article 66 (1).
21. *Id.*, Article 70 (8) (1).
22. *Id.*, Article 70 (9).



## III. Implications Of TRIPs

Let us now examine the implications of TRIPs for developing countries and endeavour to provide a balanced solution in view of the obligations of the countries which are signatories to the TRIPs agreement.

1. *Patent over Human Species* : Today biotechnology companies are seeking patents over the basics that make life, like DNA, genes, genes sequences or complex human biological material like hair, blood, heart, kidney, urine, semen, perspiration, etc. It is estimated that by the year 2010, the human body organs/genes trade industry will grow to US $ 60 billion.[23] Although US Constitution forbids patent rights in human beings,[24] the American biotechnology companies are trying to seek patents, where the dividing line between tnaturalv and invented/innovated biological material blurs. Genes are patentable when they are isolated from DNA in organisms cells or by placing foreign genes into organisms. Such genes are called transgenic. University of Pennsylvania scientists filed an application for a patent involving Transgenic human sperm which will provide them an opportunity to select or deselect specific human genes.[25]

Baylor College of Medicine and the Greneda Biosciences of Texas in the US had recently filed a patent application before the European Patent Office seeking patent protection for genetic engineering research that enables female mammals, including women, to secrete certain biochemicals from their mammary glands. With European Parliament imposing a clamp down on patenting of life forms, the patent for a genetically engineered women was refused, but if the proper care is not taken, it will be a matter of time, when entire female species may be brought under the monopolistic control of biotechnological companies.[26]

California Supreme Court in John Moore case gave a ruling which protected Genetics Inc. (Boston) and Sandoz Ltd. Switzerland, the two biotechnology companies from sharing the profits from commercial marketing of a human cell line with those to whom it belongs. The facts of the case are that a surgeon, David Golde had surreptitiously removed from the body of John Moore, a rare cell line and patented it in 1984 (Mo Cell - US Patent No. 4438032). The above named two companies purchased the patent from the surgeon for US $ 3 Million and are doing business worth US $ 3 billion. Although the surgeon had taken out the biological material without the consent of John Moore, the court declined his claim on the ground of bonafide purchase.[27] The author is of the strong view that the court should have declared it as a stolen property.

23. D. Sharma, *Patenting The Female Species*, The Hindustan Times 14 (6 December, 1994).
24. US Constitution, 13th Amendment.
25. *Id.*, *supra* note 23.
26. *Id.*
27. *Id.*

The US Department. of commerce had filed a patent on a particular cell line from the blood samples of a Guyami tribe women in Panama. Public outcry forced the US to withdraw the patent claim. Still, under the agreement US was allowed to preserve this cell line for 30 years.[28]

Such claims are being patented for commercial purposes and not for the benefit of society at large. After all heart transplant, drugs for malaria, TB; penicillin or insulin were never patented in the past. If genes are allowed to be patented, they will be exorbitantly priced making it difficult to take advantage of the genetic research for the benefit of masses. If proper patent law is not enacted in this regard, Indian tribes which contain novel human tissues or cell lines are likely to loose heavily, as identifying their tissues may be claimed as tinventionv.

2. *Research in Universities* : Most of the scientific research in Indian Universities is being funded by developed countries, their organisations or UN institutions. The agreement clauses make exchange of scientific material and information compulsory. Vast scientific material has already passed into the hands of western universities, research institutes and scientists. Germplasm of most varieties of wheat, rice, maize and other crops is already with many advanced countries. The US has already evolved a new variety of tBasmativ rice. The only snag is that the aroma could not be created. It is now trying to grow it in an arid India — like climate elsewhere.

India is yet to introduce Biological Diversity Bill in the Parliament, which would include provisions to adequately reward the local communities for their indigenous knowledge on the pattern of IPRs. Domestic law should be enacted protecting germplasm sharing. The chances of misuse and exploitation is great in view of our limited knowledge.

Research in the field of agriculture, horticulture and allied sciences needs to be protected by getting them patented. Our scientists understand the need for patenting, but they do not know thow to go about it. It is so new and complicated. Practicising attorneys help should be taken by the universities in this regard. Funds for research, should include tpatenting costsv. Recently Technology Information Forecasting and Assessment Council, under the chairmanship of Dr. A.P.J. Abdul Kalam, Scientific Adviser to the Defence Ministry has provided nearly one crore rupees to pay for the registration of patent by scientists working at laboratories or other R & D centres in the country.[29]

3. *Bio-Diversity Convention and Patent Regime* : Rio-de-Janeiro convention on environment 1992, had made the preservations of bio-diversity legally binding on all countries. The neem, which is indigenous to India, presents the classic example of what the lack of patent awareness can do to the scientific and industrial interests of

28. *Id.*
29. M.K.Tikku, *Patent To Boost R&d* ,Hindustan Times 14 (14 December 1995).



the countries. 66 patents on neem have already been registered. India's share is of 3 patents, as it got awakened late.[30]

4. *Transfer of Technology* : Article 16 of the Convention of Bio-Diversity deals with transfer of technology, keeping in view the environment and sustainable development. Article 7 of the TRIPs agreement provides protection of patents to promote tTransfer of Technologiesv to third world. It is suggested that tRoyaltyv payment is safest method for such transfers.[31]

5. *Exclusive Marketing Right* : India should raise the issue in World Trade Organisation (WTO) Committee on Trade and Environment, that if exclusive marketing rights during the 10 years transient period are to be given, it should be confined to only to country of origin and only in the field of bulk drugs or agro-chemicals. It should not be available for combinations, alternative process, etc.

6. *Product Patent*: Product Patenting must be coupled with transfer of technology/ compulsory licensing.

7. *Price Control*: If product patent is to be granted for medicines, etc. it should be coupled with price control.

8. *Service Sector*: India, Brazil, Mexico etc. had always opposed the inclusion of services/ TRIPs in Final Act. However, their voices were silenced by USA in 1989 under threat of US Law Special 301. India should raise the matter in WTO, that US should repel Special 301 Law, Unilateral action by a WTO member inconsistent with multilateral GATT Treaty should be declared as illegal. WTO lost the opportunity to consider the issue, when US withdrew its threat against Japan in the case of automobiles.

9. *Small Scale Industry*: The common man had understood the implications of the proposed patent law. Prices of medicines were already up. Opening up of fisheries, deprived the fishermen of their rights to earn livelihood. A right step has been taken by cancelling all foreign fisheries contracts of foreign vessels. Economy is being opened up to ensure competition and quality. They should not be allowed to control local industry in wholesale, as has happened in Thailand and many other countries, which opened up their economy since 1970s.

10. *Tariff Reduction*: Tariff reduction under GATT coupled with Patent Regime is resulting in heavy imports. Foreign collaborations may cause monopoly conditions. This will be against the spirit of competitiveness, for which opening of economy has all along been advocated. Globalisation/opening of economies as part of WTO agreement; amendment of patents laws, trademarks, etc. should not result in neo-colonisation.

30. *Id.*
31. D. Razdan, *Alternative Patent System Proposed,* Hindustan Times 19 (26 January, 1996).

# CONSTITUTIONALITY OF MARKET ECONOMY

*Mahendra P. Singh**

## I. INTRODUCTION

From the earliest times in the recorded history of mankind man has been constantly in search of an ideal society and in devising ways and means of establishing such a society on the earth. The conceptions of an ideal society may have widely differed in their details from man to man and from age to age but all through their core has been the same, namely, happiness of all and every one. This is what our *Upanishads* declared in ancient past: सर्वे भवन्तु सुखिन: (let entire world be happy) and this is what a few hundred years ago saint poet Tulsidas declared to be the speciality of Rama Rajya which was Mahatma Gandhi's dream and goal for this country after its independence from the foreign rule fifty years back: दैहिक दैविक भौतिक तापा। राम राज काहुहि नहीं व्यापा।। (in Rama Rajya nobody suffered physical, divine or material hardship).

On the ways and means of establishing such a society it is, however, difficult, if not impossible, to find an agreed core. The suggestions range from selfdiscipline, to the fear of supernatural to benevolent monarcy to autocracy to selfrule and democracy. In this regard the modern State has acquired a place of predominance, almost unchallenged, since the beginning of the sixteenth century. The State has emerged as a sovereign institution having unlimited and unrestricted powers to regulate the lives of its subjects. Simultaneously it has owned the responsibility of ensuring good life to them. Until the middle of the nineteenth century such life was conceived in the model of a *laissez faire* State. From the middle of the nineteenth century, however, it was realised that the *laissez faire* State had failed to create an ideal society in which everyone was happy. Therefore, a more activist role in ensuring the welfare of each and every member of the society was envisaged for the State. This led to the emergence of collectivism or social welfare State from the latter half of the last century. It saw its extreme version in Marxism and establishment of socialist regimes in various countries starting with the former USSR in 1917. This led to the emergence of two conflicting ideologies — one based on the capitalist model of welfare State and the other on the socialist model of the absolute State. While until the end of the third quarter of this century the world was almost clearly divided into these two models, cracks started appearing in the latter in the eighties and finally by the end of that decade it started falling apart with the fall of USSR in 1989. Since then the former model, also known as free market economy or the liberal State model, has become the predominant, if not the sole, hope of an ideal society.

In India, without going into long past, when the demand for constitutional reforms started coming from the Indian leaders towards the end of the last century,

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collectivism was already in full swing in England and most of the other countries in Europe. As the demand grew and got strengthened in the early part of this century many of these leaders had got their education in England and had come into contact with people and the political ideologies in that and other European countries including the former USSR. Some sort of socialism in one form or the other was always reflected in the preindependence constitutional reform proposals of these leaders. The same leaders finally formed the Constitutent Assembly which produced the present Constitution. Drawing a profile of the members of the Assembly the well known authority on the Indian Constitution, Glanville Austin, says that they had a socialist commitment. "Although", he says "they ranged from Marxists through Gandhian socialists to conservative capitalists, each with his own definition of 'socialism', nearly everyone in the Assembly was Fabian and Laski-ite enough to believe that 'socialism is everyday politics for social regeneration...', and that 'democratic constitutions are, inseparably associated with the drive towards economic equality."[1]

One of the foremost leaders and the main architect of modern India and the mover of the Objective Resolution in the Constituent Assembly, Pandit Jawaharlal Nehru — the first Prime minister of India, summed up the collective vision of the Indian society in the following words:

> The first task of this Assembly is to free India through a new constitution, to feed the starving people, and to clothe the naked masses and to give every Indian the fullest opportunity to develop himself according to his capacity.[2]

It is with this background and vision of the Indian society that the Constitution makers set on the task of making a constitution for India. At the very outset they had to make the fundamental decision about the kind of political institutions they should establish which would help to create the conditions in which their vision of the Indian society would be realised. Among others, they had to make a choice between the European and Indian political tradition.

The Constitution makers could either look back to the indigenous Indian tradition of some sort of Panchayat system envisaged by Mahatma Gandhi or they could draw a constitution based on the Euro-American model. While the Indian tradition was not all that rosy as was presented by some Gandhians, the Euro-American tradition had also produced absolute State in the former USSR and some other countries. The Constitution makers, therefore made themselves clear: "In either case the constitution must be democratic, there was to be no return to the Indian precedent of a despot with his durbar, nor would the Assembly have Europe's totalitarianisms or the Soviet system."[3] Accordingly, the Gandhian model presented to the Assembly was based on bottom up democratic institutions taking village as the first unit creating

1. G. Austin, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION, 41 (1966).
2. J.L. Nehru, UNITY OF INDIA, 11 (1938) cited in Austin *id.* at, 26
3. G. Austin, *supra* note 1 at 28.

a Panchayat for itself which Panchyat will create regional Panchayats and the latter will finally constitute a national Panchayat. It also pleaded for minimal government. The Gandhians clearly believed and preached that the State that governs best, governs least and that the government must be kept to the minimum and decentralised. So also the Euro-American model considered and finally adopted by the Constitution makers was the one which was the product of *laissez faire*. But in this model, as we have noted above, much before the constitution making process started the State had come to assume more and more responsibility for the citizen's welfare with its steadily widening role. Unlike the Gandhian model, however, this model had a centralising tendency. But it was *not* made with the aim of creating a single economy country.

## II. The Constituion

Out of these two models, the first one was never given a serious consideration perhaps because most of the honourable members of the Assembly were not Gandhians in that sense. They believed in social tranformation through the instrumentality of state following the liberal democratic tradition which they had imbibed through their education and travel to western countries. Therefore, the first draft of the Constitution prepared by Sir B.N. Rau, which became the basis for further constitutional deliberations in the Assembly, appeared in the Euro-American model. There were some protests against this draft. But they were more against the absence of recognising village as an important unit where large masses lived which required upliftment and immediate attention rather than for providing a philosophical support to Gandhian model. The Constitution, as it finally emerged, however, produced the Euro-American model in its design and provisions. It declared India a soverign democratic republic constituted with the purpose of securing justice, equality and liberty to its citizens as well as promoting fraternity among them all, assuring the dignity of the individual. It provided for the fundamental rights of the individual on the lines of the liberal constitutions though, of course, some of these fundamental rights were finally expressed separately as directive principles of state policy to be enforced by the state. It provided for parliamentary form of government at the centre as well as in the States based on adult franchise. It also provided for the rule of law in every respect and created an independent judiciary to ensure its observance. The Constitution was made the highest law of the land and could be changed only in accordance with the special procedure provided for that purpose. Of course in line with the belief of most of the members of the Assembly in some sort of socialism which had got reflected in the constitutions and laws of the countries of the Euro-American traditions also the Constitution was given that slant with the possibility of taking its economy in that direction to the required extent. But it did not reflect any particular brand of socialism. Nor did the word socialist or socialism find place in it anywhere and the move to include it was expressly rejected by the Assembly.[4]

4. *Constituent Assembly Debates*, vol. X, pp. 435-437.



The Constitution as originally enacted attracted criticism not from the liberals for its socialist bias but from the socialists and communists because it did not provide for the dictatorship of the proletariat and for the acquisition of property without compensation[5]. Such criticism has continued even after the adoption and commencement of the Constitution. To meet some of these criticisms as well as to undo too liberal an interpretation given by the courts to the property and business rights of the individual the Constitution has been amended from time to time. Such criticism confirms that the true socialists never thought that the Constitution in any way reflected their concept of socialism. It is only through successive amendments of the Constitution that larger powers of socialisation and nationalisation of property and regulation of business were conferred upon the government, some directive principles of state policy were given superiorty over the fundamental rights and finally the word "Socialist" was introduced in the preamble in 1976 through a controversial amendment.

## III. The New Economic Policy (NEP)

As we have already noted almost everyone of our leaders before and at the time of commencement of the Constitution believed in Fabian or Laski-ite socialism and therefore thought of social regeneration and economic equality through the instrumentality of the State. It was this kind of belief which was reflected in the Karachi Resolution of Congress in 1925 and also in its declaration of mixed economy in 1948 just after the independence. Until the end of Mrs. Indira Gandhi's first spell of rule in 1977 the concept of mixed economy and greater State control and regulation was pursued with increasing vigour both at the ideological plane as well as in practice. With the coming of Janata Party government at the centre in 1977 a rethinking was started. In a blueprint of the economic philosophy for the Janata Party the then Deputy Prime Minister, later Prime Minster for a shortwhile, Chaudhary Charan Singh, who was always critical of too much State ownership and public sector, produced an alternative based on the Gandhian ideas of social and indigenous industry. That may have not brought any immediate change in India's economic policy, it opened the door for an alternative official thinking. Even though Mrs. Gandhi was back in power in 1980 she never pursued her former policies of nationalisation and State control with the same vigour as she did before. After her assassination in 1984, her son Mr. Rajiv Gandhi pursued a visible liberal economic policy which was followed without any let up by two short term Janta Dal governments of Mr. V.P. Singh and Mr. Chandra Shekhar. But until then the governments were ambivalent and could not muster enough courage to openly announce a departure from the policies of our great leaders pursued before and after the commencement of the Constitution. Such courage was finally shown by Prime Minster Narasimha Rao and his finance minister Dr. Manmohan Singh in 1991 by declaring what is known as New Economic Policy (NEP).

5. B. Shiva Rao (ed). The Framing of India's Constitution, vol.IV, p. 939 (1968).

The NEP, in short, through its budgetary, industrial, trading and financial provisions relaxes many restrictions on private investment, inflow and investment of foreign capital, international trade and foreign exchange. It opens up, though not yet fully, the Indian market for free competetion in the international market as part of the global economy. It reduces the so-called state or public sector and widens and encourages the sphere of private enterprise. In a way it is an attempt to bring Indian economy in line with the economy of the Euro-American countries which in Marxist language is called capitalist economy. The economic policy which India was pursuing was not fully Marxist economy but definitely it was being highly influenced by those countries who were pursuing it such as the former USSR. Many economists in the West always predicted doom of the Marxist economy and in fact it came towards the end of the last decade exposing all its weaknesses. This international development must have definitely played an important role in the adoption of NEP.

While until the end of the last decade there existed two competetive ideologies of political economy the fall and rejection of the Marxist ideology in the former USSR and other East European countries has converted the World into one ideology that is of liberalism. The prevalent dominant paradigm of the liberalism is composed of four-fold political economy: (a) maximum play of market forces by privatisation; (b) representative democracy; (c) free trade and (d) welfare state. This paradigm must have been forced or produced by many national and international considerations but at the moment it is extending from the nation-state to the global economy. In common man's language it represents free market against the State planning. The NEP is also a movement in the direction of that paradigm.

## IV. The Constitution and the NEP

There may be and are sharp differences among the economists and political thinkers about the wisdom of NEP in respect of its adequacy as well as desirability. They are definitely important and cannot be ignored. But the short question to which I want to address myself is: whether the NEP conflicts with the Constitution and is therefore unconstitutional ? Some people have strongly argued that the NEP is inconsistent with several provisions of the Constitution such as the preamble and Articles 19, 38, 39, 43-A, 305, etc. and is not legally sustainable unless India goes through similar exercise of constitutional revision as some of the former socialsit countries in Europe have done after the fall of socialism.[6] In my view these arguments are not consistent with the background and the nature of the Indian Constitution.

The Constitution of India, as we have noted, is based on the Euro-American model of liberal constitutions. Apart from incorporating the liberal values the constitution in this model is considered to be the law and not mere declaration of certain aspirations for the guidance of the rulers as was and is the case with the

6. See, for example, U. Baxi, *Constitutional Perspectives on Privatization*, Mainstream, (6 July 1991) and S.S. Singh and S. Mishra, *Public Law Issues in Privatisation Process*, 40 Indian Journal of Public Administration, 396 (1994); also *supra* p. 46.



constitutions of the socialist countries. The constitution in this model lays down a very broad framework of the structure, powers and functions of the government to which the government of the day must adhere. Powers to interfere in the matters pertaining to an individual have to be specifically traced in the constitution or the laws validily made under it. In almost all the constitutions in that model State powers to interfere in the matters of the individual are specifically restricted by the guarantee of fundamental rights. These fundamental rights are judicially enforceable and are not left to the conveneince of the rulers or the government of the day, including the elected representatives of the people. This broad framework provides for people's participation in the forming of the government at regular intervals, through free and fair elections normally based on universal franchise. The constitution does not lay down the economic or other policies which the government of the day would like to pursue. It may, however, lay down very broad goals of the constitution in the preamble which is generally not considered part of the constitution as binding law. The constitution may also exceptionally lay down, as the Irish and the Indian constitutions have done, some judicially unenforceable directive principles for the guidance of the government. But invariably the constitutions in the Euro-American model leave the day to day as well as long term policies to be determined by the government of the day. The people may reject the government if they do not like its policies but the constitution does not come in the way of determination of such policies. These propositions are fully supported by the experience of working of the constitutions in this model.

The kind of constitutional argument which is being taken by some Indian scholars against NEP was taken by the scholars, lawyers and judges in the United States against the welfare legislations at the beginning of this century. That argument continued to work in some form or the other until 1940 against the regulatory measures of the government based on the social welfare policies. The argument was that the US Constitution was based on the freedom of contract and any regulation of that freedom was contrary to the Constitution. It is this argument which was forcefully refuted by Justice Holmes in his memorable dissent in *Lochner v. New York*.[7] He said:

> The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. ...[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statues embodying them conflict with the Constitution of the United States.[8]

His dissent later became the law of the land and all misconceptions about the nature and interpretation of the Constitution on this account were removed without

7. 198 US 45 (1905).

8. *id* at 75-76.

any constitutional amendment. Though, of course, it took sometime before Justice Holmes' dissent became the law but it has created an unforgetable precedent on the nature and interpretation of the constitution. Drawing lesson from that precedent we can say that our Constitution also does not propound any particular economic theory. It does not incorporate any of the Marxist maxims of political economy that could be noticed in the former socialist constitutions. The Constitution talks of social, economic and political justice and of the welfare of the people. It also talks of distribution and control of material resources in such a way that they subserve common good and of the economic system that does not result in he concentration of wealth and means of production to the comon detriment. But it does not tell very precisely as to how these goals will be served except by leaving it to the determination of the elected representatives of the people. The elected representatives of the people pursued a particular kind of economic policy for over forty years to achieve these goals. Having failed in achieving them through that policy they have decided to pursue a different policy. If they still fail they may try a third alternative and so on. This is what is expected from a durable constitution and this is what the Indian Constitution does. There is no question of its coming into conflict with any economic policy liberal, socialist or any other.

These propositions equally apply to the provisions mentioned above and relied upon by some scholars to establish conflict between the Constitution and the NEP. Provisions relating to nationalisation in Articles 19 and 305 were introduced by the first and fourth amendments respectively to protect the nationalisation laws from challenge under those articles. These provisions did not lay down any mandatory policy to be followed by the state. They simply protect the state action from challenge on grounds mentioned in those provisions. Similarly the provisions in Articles 38, 39 and 43A set certain standards or goals which have to be achieved by the State through its policies and laws. But they do not lay down how exactly those standards and goals have to be achieved except by leaving it to the wisdom of the elected representatives of the people in Parliament or State legislatures. The NEP nowhere says that these goals will not be pursued any more. On the contrary we have noted above that one of the four paradigms of modern liberalism is welfare state. Therefore, there is no question of ignoring or undermining social justice or welfare of the people under the NEP. They have to be as much, if not more, on the agenda as they have been so far.

As regards the inclusion of the word "Socialist" in the preamble by the forty second amendment in 1976, serious doubts have been expressed about the legitimacy of the whole of that amendment and several provisions of that amendment have either been repealed by subsequent amendments or invalidated by the courts. In view of the fact that the word "Socialist" sought to be introduced in the preamble was rejected by the Constitutent Assembly, it is doubtful whether its reintroduction by the forty-second amendment can survive challenge on the ground of violation of basic structure of the Constitution. Moreover, the word "Socialist" does not have a definite meaning



or content. It has been invoked in a few judicial decisions but in none of them it has been given an interpretation that conflicts with anything in the NEP.[9]

On the technical plane there cannot be a constitutional challenge to a policy decision unless that decision is implemented either by the legislature or by the executive in a manner that gives a cause of action or *locus standi* to an individual to challenge it. Constitutionally, subject to the distribution of powers between the centre and the states, the executive and the legislatures can take any policy decision. They can also implement and enforce it consistent with the distribution of powers, fundamental rights or any other limitation on the powers so distributed. Subject to the provisions of the Constitution, the legislative powers and to the provisions of the Constitution and laws made under it, the executive powers are unlimited and unrestricted. Strictly speaking any limitations or restrictions on these powers must be express and not merely implied. Except perhaps the provisions in the directive principles of state policy none of the provisions of the Constitution cited above imposes any limitation on the powers of the legislature or the executive to take a policy decision or to enforce them through law. As regards the directive principles I do not want to take the argument that they are not enforceable in the courts but definitely none of them says that the objectives or goals mentioned in them can be achieved only through any particular type of economic policies and that the NEP is opposed to such policies. Therefore we may have our genuine doubts about the soundness of the NEP in our context but it cannot be assailed on the constitutional grounds. This position has also been recognised and reasserted specifically with respect to the NEP by the Supreme Court in *Delhi Science Forum v. Union of India*[10]. Rejecting the challenge to privatisation by the Central Government of telecommunications system in the country the Court made the following statement:

> The national policies in respect of economy, finance, communications, trade, telecommunications and others have to be decided by the Parliament and the representatives of the people on the floor of the Parliament can challenge and question any such policy adopted by the ruling Government. ...
>
> They cannot be tested in Court of Law. The courts cannot express their opinion as to whether at a particular juncture or under a particular situation prevailing in the country any such national policy should have been adopted or not. There may be views and views, opinions and opinions which may be shared and believed by citizens of the country including the representatives of the people in the Parliament. But that has to be sorted out in the Parliament which has to approve such policies.

9. See, for example, Excel Wear v. Union of India, AIR 1979 SC 25; National Textiles Worker's Union v. P.R. Ramakrishnan, AIR 1983 SC 75; D.S. Nakara v. Union of India, AIR 1983 SC 130; Kerala Hotel and Restaurant Assn. v. State of Kerala, AIR 1990 SC 913.

10. AIR 1996 SC 1356.

> Privatisation is a fundamental concept underlying the questions about the power to make economic decisions. What should be the role of the State in the economic development of the nation? How the resources of the country shall be used? How the goals fixed shall be attained? What are to be the safeguards to prevent the abuse of the economic power? What is the mechanism of accountability to ensure that the decision regarding privatisation is in public interest? All these questions have to be answered by a vigilant Parliament. Courts have their limitations because these issues rest with the policymakers for the nation. No direction can be given or is expected from the Courts unless while implementing such policies, there is violation or infringement of any of the constitutional or statutotry provision.[11]

Thus the constitutional position in this regard is vey well established. The NEP as such cannot be challenged on the plea that it is against the Constitution. Its specific implementation may, however, be questioned on case to case basis on the ground that such implementation conflicts with any express provision of the Constitution which limits the powers of the legislature or the executive.

## V. Conclusion

This short note may be concluded with the reassertion of the principle stated in the foregoing discussion that the Constitution of India represents the Euro-American tradition of liberalism with its faith in democracy based on adult franchise. In this tradition subject to certain ground rules of governance ensuring individual rights and the rule of law the laying down of day to day policies and their implementation is left to the wisdom of the government of the day. The people may reject the government if they disagree with its policies. But they cannot stall its functioning on the spacious plea that its policies are against the Constitution unless the specific implementation of such policies conflicts with any specific provision of the Constitution. The pleas that can be raised in the courts are also subject to the conditions and requirements of the judicial review and judicial process such as justiciability and *locus standi*.

However, merely because an issue cannot be raised in the courts does not mean that a constitutional argument cannot be put forth otherwise with respect to it in political or legislative debate. As has been noted in the very beginning, the Consitution envisages a society based on justice, liberty, equality, fraternity and dignity of the individual. Any policies or actions of the government that ignore these goals may and must be brought to light, criticised and condemned. But when there are sharp and honest differences of opinion about the way these goals may be achieved, the matter should be left to the determination of the electorate, particularly when they concern the determination of economic policies. The courts and the constitutionalists are now almost unanimous everywhere that in economic matters the government must have

11. *Id.* at 1359.



much greater flexibility and much bigger space for play than in respect of some other matters such as rights to life, religion and speech.

There is no doubt that serious differnces have always existed between political and economic thinkers about the ways in which the kind of goals set out in the Constitution can be achieved. At one point of time the free market and regulated market economies were strongly competing with each other in this regard. Now the balance has almost completely tilted towards the free market economy. Even the staunch socialist countries like the People's Republic of China have now adopted what they call as socialist market economy.[12] At the moment the entire world seems to be competing ony for the market economy in which alone it sees the future of the mankind. Although I do not find myself competent to enter into that argument, the argument about India is that it is not opting for market economy as much and as fast as it must. In a recent statement one of the foremost economists of India, Professor Kaushik Basu, says:

> For decades we fooled the world that we were establishing socialism. We must now beware against fooling the world that we are reforming our economy. ...
>
> There used to be a view that growth and equity are inimical to each other. There is now evidence to suggest that this is not true. Between 1984 and 1994, India's per capita income growth rate of 2.8 per cent per annum was faster than almost ever before. Was this the period when poor got impoverished? No, on the contrary, the quintile growth rate during the same period was a remarkabel 5.1 per cent per annum. The advantage of focusing on quintile growth is that it does not matter how the debate between growth and equity is resolved because quintile looks directly at how well the poorest people are progressing.
>
> This focus on the poorest 20 per cent is the reason why economic liberalisation is important for India. It has the greatest potential for the working classes.[13]

We may disagree with Professor Basu and all those who agree with him but that is no reason to exclude his views from the debate on the constitutional ground because he is precisely arguing for what the Constitution aims at, namely, justice, liberty, equality, fraternity and human dignity.

12. See, for example, Wang Guiguo and Wei Zhenying (eds), Legal Developments in China: Market Economy and Law (1996).

13. K. Basu, *Right Marx for the Poor*, India Today, 57 (June 16, 1997). See also Arun Kotenkar, *supra* p. 15 and J. Bhagwati, *Self-Respect on Hold*, India Today, 47 (June 30, 1997).

## BOOK REVIEWS

LAW OF MEDICAL NEGLIGENCE AND COMPENSATION. By R.K.Bag. New Delhi : Eastern Law House. Pp.275, Rs.300/-.

The question of medical negligence has emerged as the most controversial issue after various consumer forums have started awarding compensation to the patients affected by the negligence of the doctors. In *Indian Medical Association* v. *V.P. Shantha*[1], the Supreme Court has clarified that the service rendered by a medical practitioner attached to a government hospital or nursing home or dispensary or health centre or non-governmental hospital where such services are rendered free of charge to every body would not be a service under the Consumer Protection Act 1986. However, if services are rendered on payment of charges such services would fall within the ambit of the consumer law. It has also been clarified that the determination about the deficiency in medical services is to be made by applying the same test as is applied in an action for damages for medical negligence under the law of torts.

The book under review[2] is a welcome addition to the existing literature on law of medical negligence. The author very ably analyses the concepts of negligence, duty of care, nature of professional negligence, by referring to leading decisions of the English and Indian courts. The analysis of the principles to deter-mine negligence is of great importance in dealing with the question of medical negligence because the Consumer Protection Act has not changed the law of medical negligence but has created an inexpensive and speedy remedy against medical malpractice. The author has attempted to discuss both general and consumer law with regard to the right to claim for an individual as well as vicarious liability to pay compensation. The issues such as proof of negligence in consumer courts as well as in Civil Courts,mode of assessment of compe-nsation and text of important statutes connected with medical ethics, termination of pregnancy prenatal sex diagnosis and transplantation of human organs are discussed in great detail.

The author has devoted one chapter to the common errors of surgeons, physicians, gynaecologists and obstetricians, paediatricians, anaesthetists and dental surgeons which will be of immense use to lawyers and laymen, patients and professions.

In dealing with principles of medical negligence and measure of damages, the law has generally been developed through the judicial pronouncements in the United Kingdom. The common law principles have been further refined and enlarged by the courts in Canada, Australia, New Zealand, U.S.A. and other common law countries. The author has devoted a major portion of the book under review in analysing these judgments. The author has thus covered a wide range of decisional law on medical

1. A.I.R. 1996 S.C. 550.
2. R.K. Bag, LAW OF MEDICAL NEGLIGENCE AND COMPENSATION. (1996).



negligence. The most valuable discussion in the book under review relates to the various decisions of the consumer courts in India.

The book is divided into three parts. Part A deals with negligence, Part B deals with compensation and Part C contains appendices. The text has been covered in 178 pages.

The book is very informative and will be of great use to the lawyers and laymen alike.

Parmanand Singh*

SYED KHALID RASHID'S MUSLIM LAW. By V.P. Bharatiya. Lucknow : Eastern Book Company (3rd Edn.), 1996. Rs. 80/-.

In a secular country like India the people can cherish the religious freedom. Out of one-sixth of the total world Muslim population, 15 crore Muslims in India alone follow Muslim Law. This fact itself speaks volume of the significance and relevance of any study of Muslim Law. The present work by Dr. Bharatiya (here-in after referred as the author) in revising and editing Syed Khalid Rashid's Muslim Law has to be evaluated and commented upon only in this context.

The latest edition of the present book (under review) has been introduced almost after a quarter century. In the meanwhile, as the author rightly emphasises, much water has flowed through the judicial and legislative channels. For a longtime past, a controversy has been going on for introducing reforms in traditional Muslim Law and its replacement by an uniform civil code as provided under Art. 44 of the Constitution. The concepts of law have also undergone transformations preferring more humanitarian approaches. In this connection a knowledge of how and to what extent Islamic personal law has been reformed is extremely necessary. The present work certainly fulfils the need for a compact volume giving up-to-date account of the reform and codification of Islamic Law. However, some of the portions of the book needs special mention.

Chapter II of the book, which deals with Muslim law as applied and interpreted in India, provides some interesting and thought provoking insight of the debate on Uniform Civil Code. It also incorporates the deliberations from the conference on Uniform Civil Code (1985) held under the auspices of Bar Council of India Trust. The author quotes Vasudha Dhagamwar, a social worker :

> ....The academic debate on the uniform civil code is more a debate on the Muslim Personal Law. It is hardly a debate from the secular point of view and therefore, not a debate on Uniform Civil Code. Changes in the family law are accepted or rejected in terms of what is posited or seen to be posited in the Muslim Personal Law (at p. 41).

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He also quotes extensively from the contributions made by jurists like Tahir Mahmood, and Justice Beget. However, it would have been more fruitful from the point of view of researchers and students, had there been some contributions from those who vehemently support the introduction of Uniform Civil Code.

Similarly, Chapter III dealing with *Nikah* or Marriage also provides a critical analysis of one of the contentious issues of Islamic Law i.e. Polygamy (at. page 74).

In the concluding para of the analysis, the author has reported a social survey (which may be presumed to be the views of author also), where majority of the Muslims in India on their views on polygamy, either avoided answering or answered in favour of retaining its legality on the ground that polygamy is not much in vogue.

Chapter V also provides the readers with some latest material on Divorce, particulary with reference to a case pending before the Supreme Court, pertaining to the constitutional validity of Triple Talaq. It is significant to mention that at a time, when far reaching reforms relating to unilateral divorce have been introduced in large number of Muslim countries, that something is done in India too. In this regard, the author has given some useful informa-tion that Khojas in India have their own marriage tribunals and neither a second marriage nor a divorce is possible without recourse to these tribunals. (at p. 115)

The author has to be commended for incorporating latest case law on the Muslim Woman (Protection of Rights on Divorce) Act, 1986. He has rightly pointed out that a close analysis of the provisions of the Act shows that the Act does nothing like throwing out of window the *Shah Bano* verdict or the legislative progress enshrined in the provisions of the Cr. P.C. *Shah Bano* laid down that divorced Muslim woman was entitled to maintenance from her husband not merely under Sec. 125 Cr. P.C. but also under the traditional Muslim Law. The Act of 1986 was passed apparently to undo the ratio of *Shah Bano*. But our High courts thought otherwise. Most of the post Act litigations pertain to Muslim divorced woman's right of maintenance. Mention may be made of *A.A. Abdulla* v. *A.B. Mehmuna Saiyjadbhai*[1]; *Usman Khan* v. *Fathimunisa*[2] and *M. Slavi* v. *T. V. Safia*.[3]

The purpose of the work continues to be the same as earlier edition of providing to the students and the practioners of law — a short, yet complete and up-to-date account of the entire gamut of Muslim Personal Law in a lucid,simple,descriptive, intelligible language and style. However, the author has refrained himself from suggesting any particular modalities regarding the controversial issues of the reforms of Islamic personal law in India.

The publishers of the book have to be commended for their efforts bringing out the book in attractive format and that too at reasonably affordable price.

Sunil Gupta*

1. A.I.R. 1988 Guj. 141.
2. A.I.R. 1990 A.P. 225.
3. A.I.R. 1993 Ker 21 .

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PROBATION - PHILOSOPHY, LAW AND PRACTICE, By S.C. Raina. Regency Publications, 1996. Pp XVI + 187. Price Rs. 275

Crime is as old as human civilisation. The society has responded to crime/ violence differently as it developed. In primitive society the response of the community to crime was to curb deviant behaviour. The earliest forms of punishment were based on the principle — 'a tooth for tooth' and 'an eye for an eye'. As crime has undergone refinement in long course of its evolution with develop-ment of society and industralization, so has the nature of sentencing undergone a tremendous change. In the nineteenth century alongwith the change from crime to criminal, certain programmes meant for rehabilitation of the offenders were also introduced within the prison. The advent of rationalism led to the recognition of rights of prisoners and the need for devising correctional method of dealing with offenders was felt. As a consequence of this positive approach, concept of community based treatment was evolved, which included non-prison programmes like work release, furloughs, half way houses, parole and probation.

Part I of the book under review[1] comprises Chapters -1 and 2. Chapter -1 deals briefly with the various nonprison progra-mmes. In this chapter the author has explained the concept and the procedure that has to be gone through before an offender is granted parole. The significance of probation and the advantages that probation has over other community based treatment programmes, has been summarised by F. Tennorbaum thus :

> Probation avoids the shattering effects upon individual personality which frequently follows imprisonment. Probation keeps the man's personality in its old moorings; it makes no violent and sudden wrench in his daily habits ; it does not destroy his family relations, his contacts with his friends and his economic independence. All that is good in his old habits is retained ; every contact, interest, emotion and habit which can be utilised to keep his relations with community within the expected norm come automatically into play and become powerful factor in straightening the individual's habit patterns back to normal. The crime for which man was arrested is not dramatized and used as a reason for disrupting the system of his life.[2]

In Chapter 2 titled — Judicial Exposition and Correctional Jurisprudence, the author has elaborately discussed the various provisions and judicial decisions relating to probation. It has been emphasised that the purpose of the Probation of Offenders Act, 1958, is reformation and rehabilitation[3], and the Act is a social legislation which is meant to reform juveniles and first offenders so as to prevent them from becoming

1. S.C. Raina, PROBATION PHILOSOPHY, LAW AND PRACTICE (1996).
2. F. Tennorbaum ; CRIME AND THE COMMUNITY, 28 (1938).
3. Babu Raghunath Naik v. Mrs T.P. Faria, AIR 1967 Goa 95.

hardened criminals by providing an educative and reformative treatment to them.[4] has been stressed that sentencing functions best when the judge demonstrates a understanding of individualised treatment, which means that the sentence must tak into account the offender's need.

This chapter discusses in detail the various factors and circum-stances whic have to be kept in mind by a judge/magistrate while dealing with each case on i individual merits for grant of probation under the Probation of Offenders Act. 195 It has also been stated that the analysis of the numerous decisions leads to the con lusion that the courts including the Supreme Court are evolving a correction jurisprudential approach in the field of probation.

Part II of the book contains chapters 3 to 6. In Chapters 3 and 4 the author ha explained the research design that he has adopted for his study and analysed the socio economic profile of the probationers who are the subject of his study, on the basis o the data collected for the period 1975-81. The author has also discussed the factor which bear relationship with various concepts like age, sex, marital status, residenc level of literacy, locality, family atmosphere, nature of occupation, income, religio etc of the offender and how far they contribute to their deviancy have been carefull and minutely classified and analysed. On the basis of the data, the author has draw an inference that bad company is the main cause of involvement in crime, thoug there are other factors which are contributing to their deviant behaviour in differen forms and degree.

Chapter 5 of the book gives a critical evaluation of the probation services an for this purpose the author has divided them into four units, namely (a) Courts Magistrates; (b) Probation Officers; (c) Community and (d) Probationers. The role o each of these four units has been critically evaluated, thereby focusing on success o the system and the difficulties being faced in the process of managing and operating the probation services.

The last chapter of the book contains the findings of the study conducted by the author and the chapter ends with suggestions by him. The suggestions made by the author especially relating to Sections 3, 4(2), 6(2), 11 and 12 of the Probation o offenders Act, 1958 need immediate attention of the legislature.

However the suggestion of the author regarding method of recruitment of Probation Officers needs detailed examination and a fool proof system needs to be evolved for the same. The author suggests that Section 12 needs a complete overhaul in view the correctional jurisprudential approach adopted by the courts. The suggestions made by the author regarding laying down the time limit for submissions of pre-sentence report, separate investigating agency (not police) and the applicability of the Act to all offenders irrespective of age would go a long way in improving the existing probation system and moving closer to the correctional jurisprudential

4. Musa Khan v. State of Maharastra, AIR 1976 SC 2566.



approach adopted by the courts, keeping in view the nature of the Act being a social legislation. Through this book the author has provided an exhaustive and comprehensive literature on the subject of probation. The subject matter of the book is well designed and the various aspects covered in each Chapter reflects the author's indepth knowledge and deep understanding of the subject.

Except a few printing errors in the book, it is undoubtedly a welcome addition to the existing literature on probation. The suggestions made by the author may be viewed as forming an agenda for reforms in the existing law.

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