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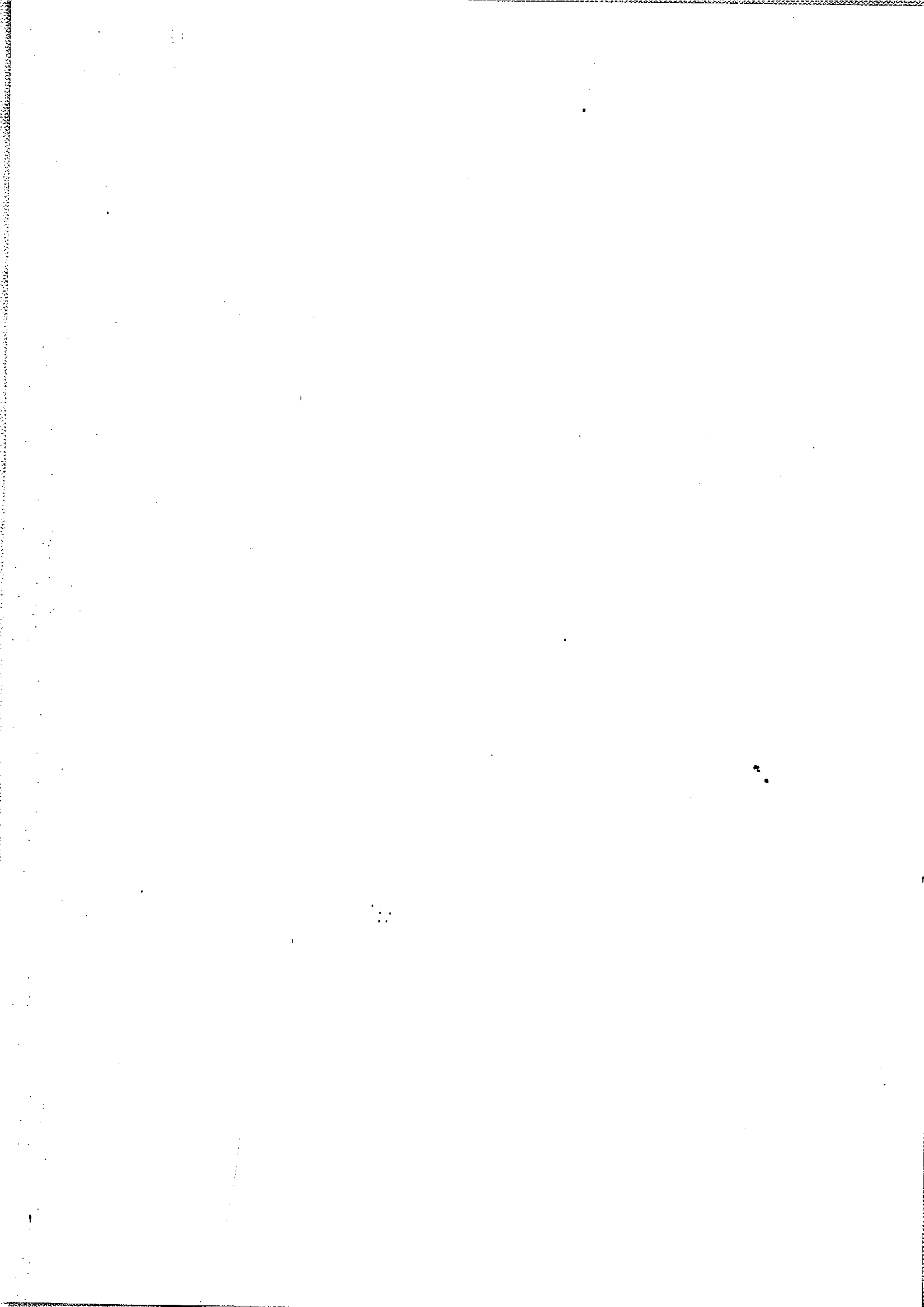

DELHI LAW REVIEW

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PREFACE

I have great pleasure and privilege in presenting this volume (Vol. XXI-1999) of the Delhi Law Review to our esteemed readers. I, offer, on behalf of the members of the Editorial Committee, our profound apologies for the delay involved in bringing out this issue. In the preparation of this issue, we have strived to keep up the tradition of maintaining high academic standards which the Delhi Law Review has been known for. This volume as earlier volumes contains thought provoking and scholarly papers on various contemporary and topical legal issues some of which have become subjects of public debate in the country.

I take this opportunity to express my grateful thanks not only to the contributors of this issue who have spared their valuable time in preparing their contributions but also to the members of the Editorial Committee, in particular, Prof B. Errabbi, who have taken all the pains in readying this volume.

I also extend our thanks to our readers with a request for their valuable responses which are a necessary feed-back for the members of the editorial committee for the improvement of the quality of the journal.

It is my privilege to place on record our appreciation of the services of Prof. S.S. Rathore to the Faculty of Law, Delhi University. who retired from the University on 3 October, 1999 after serving the same for a period of around 25 years.

In conclusion, I express my thanks and appreciation to the proprietor of the Shivam Offset Press for doing a thorough professional job in the publication of this volume.

Prof. A.K. Koul
Head and Dean
Faculty of Law
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PROFESSOR B. SIVARAMAYYA

1928-1999

IN MEMORIUM

It is with profound grief and sorrow that we, the members of the Faculty of Law, University of Delhi, would like to remember and recall the memories of our association with the late Professor B. Sivaramayya who died on 3-7-1999 under tragic circumstances. It was most unfortunate that a person of Sivaramayya's nature and compassion who could not even think of harming an insect was destined to suffer a violent death at the hands of two scooter-born desperados who robbed and fatally injured him almost infront of his own house on 1.7.1999. He breathed his last two days later in a hospital where he was admitted for medical treatment. Mysterious are the ways of god!

As a Professor of law in the Faculty of law, Prof. Sivaramayya served the cause of legal education and legal knowledge with distinction and dedication for a period of about 37 years (from 1.10.1956 to 18.2.1993) and left, on its academic spectrum the indelible imprints of his scholarly personality the hall-marks of which had been his remarkably disarming humility, simplicity and courage of conviction. During his long stay in the Faculty of Law, Prof. Sivaramayya had been a source of inspiration not only for generations of law students but also for generations of law teachers who considered him as their role-model and looked to him for guidance and academic leadership.

Prof. Sivaramayya was a scholar par excellence. His contribution to legal literature and knowledge had been both extensive and seminal. He was one of the very few legal scholars in the country whose writings not only influenced the course of legislative policies of the Government but also received the stamp of judicial aproval from the Apex Court of the country. Although Prof. Sivaramayya

had his specialisation in the field of Indian personal laws, his scholastic interests extended for beyond that discipline and embraced areas such as constitutional law, the problems of women and children, the problems of poverty and bonded labour and the issues of property and uniform civil code, etc. His legal writings were always marked by erudition, depth of learning, lucidity and simplicity of style.

As a person, Prof. Sivaramayya was an embodiment of virtue in all its comprehensiveness. During his life time, he staunchly believed as well as practiced the age old ideal of high thinking and simple living. It would be no exageration to say that Prof. Sivaramayya was wisdom and humility personified.

In the demise of Prof. B. Sivaramayya the Indian legal fraternity has not only lost a scholar of eminence but also a noble sole who stood steadfastly for the noble human values of honesty, integrity, sincerity, compassion and humility. It would be a fitting tribute to his memory if we strive to pursue these values which he cherished and held to his heart throughout his life.

We pray the God Almighty to bless his sole with Peace.

Prof. A.K. Koul and Prof. B. Errabbi

INAUGURAL ADDRESS*

*Justice Sujata V. Manohar***

I am very happy to preside over the inaugural session of this expert level seminar on WTO - Patents Law and National Economic Interest. In this high-level group of experts I am venturing to offer a few remarks with some timidity. Patent law, at its easiest, requires a certain degree of technical expertise. In the high technology modern world of digitalization, biotechnology and global telecommunications, privatisation of intellectual outputs, in whatever form, is bound to raise technical and legal problems. On the one hand, there is the obvious need to encourage scientific innovations and inventions with practical applications to raise the quality of life, as we know it. It is as a result of these scientific and technical advances accelerated by renowned inventors like Marconi. Edison and Benjamin Franklin, that daily living today is so much better than it used to be at the turn of this century. In the hottest weather, one can sit in the cool comfort of an air-conditioned room with the four walls of one's home and communicate with any part of the globe without moving from your armchair. I would like to remind you that in his day, Benjamin Franklin held the maximum number of patents in his name.

Patent protection and the resulting ability to earn financial rewards has spurred dramatic improvements in technology. It has made possible vast financial resources being deployed in research in basic and practical sciences, steadily extending our frontiers of knowledge. It has brought us vastly improved health care, a new range of medicines and the latest equipments for diagnosis and treatment of diseases. At the same time, the patent system requires that the users and beneficiaries of this knowledge and technology pay for the benefit they receive as a combined result of the intellectual outputs of scientists and technologists or even ordinary innovators, backed by financial sponsorship. In countries where this spurt of inventions, innovations and discoveries have taken place in this century, it was always realized that patent protection could lead to monopolist exploitation. A recent issue of time magazine carries an article

* Delivered at the seminar on "WTO" Patents Law and National Economic Interest" organised by the Faculty of Law, Delhi University on 10-4-99.

** Judge, Supreme Court of India.

on Craig Venter, the famous genomics expert in a hurry to decode the human DNA. His private lab with private funding has been criticized by fellow scientists who say that his genome may be locked up by his financial backers with patents, blocking the advancement of science. In an opinion poll conducted on the issue of private companies trying to get patents on genes so that they can make money, 71% disapproved it. Our concerns are, therefore, not dissimilar from the concerns of other more developed countries. The patent law sought to deal with this problem by providing for compulsory licensing, check on pricing through competition and prevention of monopolies, and providing exceptions to patentability in public interest - such as morality or health. Now, with international trade becoming relatively free within member States of the WTO, international minimum intellectual property norms are also required to be met by all member states of the WTO. To benefit from the membership of WTO, India has, therefore to comply with the TRIPS norms. To do so, the Patents Amendment Act has recently been passed amidst much controversy. It is important that we examine and understand the implications of being a part of the World Trade Organisation, the obligations that such membership imposes on us, its implications for our Patent Law and its impact on our national economy.

The United Nations General Agreement on Tariffs and Trade (GATT) was created in 1948 to liberalise trade in the post-war era. Its international agreements have been evolved in a series of trade negotiations, the most recent of which being the Uruguay Round which was finalised in 1994 after discussions lasting seven years. As a result, the World Trade Organisation, has come into being whose member countries are bound to implement the principles and provisions laid down in the agreement. One of the important changes in the WTO compared to the GATT is that all counties which wish to be members and to enjoy the market access it provides will have to accept all the main WTO agreements including the TRIPS Agreement dealing with trade related intellectual property rights. Another consequence of membership is that the dispute settlement procedures as revised in the Uruguay Round will also apply to the TRIPS Agreement. What is important, under the WTO, is that the failure of a country to meet its TRIPS obligations can put in jeopardy its market access rights and other benefits under the WTO.

The agreement on trade related aspects of intellectual property rights popularly called the TRIPS Agreement came into effect on 1st of January, 1995. It is the most comprehensive multilateral agreement on intellectual property. It deals with each of the main categories of intellectual property. It deals with each of the main categories of intellectual property rights and

not just patents. It establishes standards of protection as well as rules on enforcement and provides for the application of the WTO dispute settlement mechanism. Various kinds of intellectual property in the form of copyright and related rights, trademarks including service marks, geographical indications, industrial designs, patents, layout designs of integrated circuit and undisclosed information including trade secrets are all covered by TRIPS.

The fact that TRIPS has become an integral part of multilateral trading system of the World Trade Organisation is highly significant. Because, it shows that protection of intellectual property has moved to the centre stage of international economic relations. TRIPS require its members to conform to the minimum requirements as established by it. But, it is open to all members to have by law additional requirements. They are also left free to determine the appropriate method of securing minimum requirements within their own legal system and practice. While the objective of the TRIPS Agreement as laid down in Article 7 is very laudable, some of its provisions have caused a certain amount of consternation in the developing countries. Article 7 states:

> "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology to the mutual advantage of producers and users of technological knowledge, and in a manner conducive to social and economic welfare and to a balance of rights and obligations. Nobody can have any quarrel with these objectives. In fact, every country which hopes to promote creativity and ability to produce useful inventions amongst its people would require some kind of protection for this creativity in the form of patents which would bring returns to all those who have invented patentable products or processes".

Under our existing Patents Act, 1970, prior to its amendment, Section 3 enumerated inventions which were not patentable or which were not considered as inventions within the meaning of the Act. These included (1) an invention the primary or intended use of which would be contrary to law or morality or injurious to public health; (2) the mere discovery of a scientific principle or the formulation of an abstract theory; (3) the mere discovery of any new property or new use for known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant. It also included a method of agriculture or horticulture and any process for

the medicinal, surgical, curative, prophylactic or other treatment of human beings or any process for a similar treatment of animals or plants to render them free of disease or to increase their economic value or that of their products. Therefore, any invention the use of which would be countrary to morality or the use of which would be injurious to public health cannot be patented even now after the amendment. It may he noted that this kind of exemption is permissible under Article 27 of the TRIPS Agreement. Similarly, any process for the medicinal, surgical, curative, prophylactic or other treatment of human beings or animals or plants to render them free of disease is not patentable and it remains so even after the amendment. This also is a permissible exclusion under Article 27 of the TRIPS Agreement. Thus, some of the concerns expressed about the implementation of TRIPS in our country have already been taken care of under the existing Section 3. Section 4 provides that inventions relating to atomic energy area not patentable.

Under section 5, however, our existing patent law permits patenting only of methods or processes of manufacture in respect of substances capable of being used as food or as medicine or drug, or substances prepared or produced by chemical processes. These would include agricultural chemicals. Now, this law has been required to be changed within the time frame provided under TRIPS to enable patenting of medicines and drugs also along with the processes. There is a genuine fear that if patenting of pharmaceutical products or agricultural chemicals is allowed number of medicines and other such products developed outside the country and protected by TRIPS would now be available here only at very high prices which most people would not be able to afford. A fear has also been expressed that there is no obligation on a patentee to manufacture the patented product in this country. He can simply import the product and such imported product would also be protected by these patents. Through patent legislation, therefore, competition can be blocked and new medicines can be sold at very high prices without the consumer having any redress.

In this context one must remember that the international community, especially the developed countries which have spent large amounts in research and development of new drugs and medicines, would like that the inventors who have spent considerable time and effort and the financier who has invested money for inventing the medicines so vital for human welfare and well-being, should get an adequate return for their efforts and ingenuity. Otherwise they would not come forward to support research. If they are to be deprived of monetary benefits through patents, and anybody could make use of the discovery which they have made by spending vast amounts of money and labour, there would be no incentive for new discovery and new inventions in this vital area of health and welfare of mankind. In fact the whole purpose of having intellectual property protection is to ensure that those who are inventors and who have used their abilities and their intellect for producing inventions which are valuable for mankind should be adequately rewarded. At the same time, one cannot have a patent regime which gives such people a complete monopoly over their own inventions which they can exploit to the total detriment of users. While reasonable returns, especially in the field of medicines, drugs and other inventions which promote health and well-being of mankind, are obviously permissible, what has to be prevented is exploitation and exorbitant pricing. The only safeguard against such monopolistic practices which increase the price of drugs and medicines, is contained in Article 40 of the TRIPS Agreement which says that the agreement shall not prevent members from specifying in their legislations licensing practices or conditions that may, in particular cases, constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. A member may adopt consistently with the other provisions of the agreement, appropriate measures to prevent or control such practices.

The Patents Act, 1970 contains a system of compulsory licensing in cases where the patentee does not work the patent for a specified time. Abuse of the rights granted under a patent can be in various forms. For example, (1) activity such as meeting the demand for the patented articles solely by importation from abroad and not by manufacturing the patented articles locally, thereby discouraging and prejudicing the establishment of new trade or industry, (2) refusing to grant licenses to work patent locally, (3) imposing unreasonable terms on licensees thereby discouraging voluntary licensing , (4) imposing restrictive conditions on the use, sale or lease of the patented article, thereby prolonging the patent monopoly even after the patent has expired. The mechanism for avoiding this evil which India has adopted, like many other countries, is that of compulsory licensing by a statutory authority and revocation of a patent for non-working. The Patents Act provides for four types of compulsory licenses. A compulsory licence to work a patented invention may be granted 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 public at a reasonable price. Section 90 sets out the conditions when the reasonable requirement of the public shall be deemed to be not satisfied One of the conditions is where an existing trade or industry or its

development is prejudiced when the demand for the patented article is not met to an adequate extent, or on reasonable terms or where the patentee refuses to grant a license on reasonable terms for manufacturing the patented article in India; or a market for the export of the patented article manufactured in India is not supplied or developed, establishment of commercial activities in India is prejudiced and so on. One of the conditions also relates to the working of a patented invention in India on a commercial scale being prevented or hindered by importation from abroad of the patented article by the patentee. Some of these conditions are being challenged as contrary to TRIPS.

There is, however, no room, in my view, for any debate on whether India should or should not comply with TRIPS norms. We have to do so if we want to benefit from WTO. How this can be done without damaging national economic interest, is really what needs to be discussed. A part of the resentment against TRIPS is caused by the existing imbalance between the patentable innovations and inventions of developed countries as against our patentable innovations and inventions. Our technological and biotechnological advances have been slower, adequate financial support of the magnitude deployed by the developed countries for such research is also not available. Nevertheless, international funding is now becoming available for research and development. It is time we display some self-confidence in the abilities of our researchers, and attract the best talent to this work so that we can profit from TRIPS in the same way as others instead of concentrating on copying or reproducing the results of others.

This is not to say that we do not have any immediate cause for concern. In the context of fantastic scientific developments in the field of biotechnology, micro-biology and biological sciences in general, our areas of concern have been brought out in a number of articles and papers. I am happy that the three sessions of this seminar have focussed on these main areas of concern.

As I said earlier under Section 3 of the the Patents Act, 1970 there is a list of inventions which are not patentable. Among these are inventions that impinge on health and morality, But there is no express exclusion of life forms - plant, animal or human. Undoubtedly, what already exists in nature cannot be patented.

Only new and original inventions can be patented. Therefore, existing life forms cannot be patented. The problem in this area has now arisen because we have acquired the knowledge of how to cause changes in these life forms. What should be the extent of change before one creates a new life form which can be patented? In respect of seeds and plants and other life forms, the difficulty lies in deciding when something new is invented.

Often, because of the advances in genetic engineering, minor modifications in the gene structure of plants or life forms are passed off as new species invented by the patentee. How extensive should the modification be before the species produced can be considered as new? Some kind of an international agreement on the extent of such necessary modifications is required. India needs to prescribe by law the norms for judging a new life from patentability of plants and animals other than micro-organisms and essentially biological processes for the production of plants and animals other than non-biological or micro-biological processes. It should, therefore, be possible to exclude by specific legislation plants, animals including humans and all that require biological processes for production, from the ambit of patents. Article 27 makes this conditional on the member state providing for the protection of plant varieties either by patents or by an effective *sui generis* system or a combination of both. We could, therefore, have an appropriate legislation to protect plant breeders rights and new plant varieties. India has done extensive work in developing new plant varieties and in producing hybrid seeds. It is in India's interest that this knowledge is suitably protected and used for the benefit of farmers. India should also examine whether it can limit patentability of new life forms with reference to the processes deployed for their production. Anything involving a biological process could be excluded from patentability. The legislation could also protect existing bio-diversity, check destruction of rare varieties of plants, eco system and the like and prevent our existing life forms from being patented.

Patenting of life forms whether it be micro-organisms or anything else can raise serious ethical questions. According to Andrew Kimbrell, the founder of the Washington based International Centre for Technology Assessment, the economic trigger for bio-prospecting was provided by a little known 1980 United States Supreme Court decision in *Diamond* vs. *Chakraborty*. According to him, the impact of this decision makes this unheralded court decision one of the most important judicial decisions of the twentieth century. Apparently, in 1971, Indian micro-biologist Anand Mohan Chakraborty, an employee of General Electric, developed bacteria that could digest oil. General Electric applied for the U.S. patent on oil eating bacteria. This application was rejected by the patent office under the traditional doctrine that life forms (products of nature) are not patentable. The case eventually went to the United States Supreme Court which held by a four to five margin that the patent could be granted. The Court stated that the relevant distinction for patenting material is not the distinction between living and inanimate things but whether living products could be seen as a human-made invention. On this basis, patents have

been extended to all altered or engineered animals micro-plants, human cells and genes. The Merck Pharmaceutical Company had patented microbial samples from nine countries. These include soil bacteria from a heather forest on Mount Kilimanjaro, a Mexican soil fungus useful in the manufacture of male hormones, a fungus found in Namibian soil for potential use in treating manic depression, a soil bacterium in India that serves as an anti-fungal agent and a Venezuelan soil bacterium patented for use in the production of anti-biotics. Each year the drug industry spends vast amounts of money searching the world's soils for valuable micro-organisms. This activity has its plus side and its minus side. On the plus side, if ultimately it results in production of valuable medicines and drugs which can fight diseases which are today incurable or prevents diseases, the effort would have been well spent. It is important to remember that native soil cannot be patented, nor what is naturally found there. If the element of inventiveness is forgotten in the process, ethical questions may arise as in the case of patenting human genes such as the cell line of a Guaymi Indian woman or cell lines from indigenous people in Papua New Guinea and the Solomon islands. On the minus side, in the name of new inventions traditional knowledge of local peoples and tribes can be pirated and patented; traditional plants and herbs with medicinal values like neem and indigenous varieties and food-grains like basmati rice can be patented, depriving the people of the benefit of their own plant species, crops or traditional knowledge. The exclusion clause under Article 27, therefore, must be carefully examined and suitable legislation should be framed to prevent unlawful exploitation of local and traditional wealth in the form of plant varieties and traditional knowledge. However, an Act could provide for use by others of this traditional knowledge for making further improvements; but by paying reasonable compensation to those whose knowledge is being so used.

Another area of concern for India is availability of medicines and drugs manufactured by multinationals at reasonable prices. It is in this area that the developing countries have to work together to set up a suitable set of criteria to decide what would be the reasonable price. Today the same drug is sold at vastly differing prices in different countries of the world. With the flurishing of international trade one should also expect international agreements on, at least prices of drugs and medicines throughout the world or special prices for poor countries. Such drugs and medicines should also be available throughout the world, at the same time ensuring that a fair return is available to the inventor. A mere resort to compulsory licensing may not be adequate or even entirely satisfactory. We have, therefore, to work for an international acceptance of certain basic prin-

ciples related to pricing and availability of medicines and drugs which affect the life and health of human beings.

There has also been a fear expressed that the patent regime under TRIPS will result in dumping of banned drugs in our country with international brand names for exploiting the local population. These are matters which ought to be taken care of by legislation in public interest which is permissible under TRIPS. Legislation can also control use of untested hybrid seeds, or those with terminator genes, preservation of local crop varieties and indigenous plants and eco-systems.

The other area of concern relates to exclusive marketing rights or EMRS for five years in respect of those products which do not have patent protection under our existing law and where we permit patent protection only to the process of manufacture. Therefore, in respect of pharmaceuticals and agricultural chemicals we have to comply with TRIPS by providing for EMRS for five years. Since we are a part of WTO, this is an obligation which we have undertaken and it is an obligation which we cannot shirk. However, in order to ensure that granting of EMRS will not be misused for hijacking prices, for stopping competition or preventing local industrial development, the provision of compulsory licensing have to be very carefully worked out within the frame-work of TRIPS. It is important to remember that countries which produce inventions and which support such research find the protection of patents beneficial and helpful for their people, generating more inventions and innovations and development of knowledge and techniques which can be beneficial to mankind. We should also hope to be a part of this information and technology explosion. If we have the requisite knowledge and the requisite skills, international funding will be forthcoming. This is happening in software. This is happening in molecular biology or at the frontiers of science. We have shown our technological skills in our space programmes and defense related projects. There is no reason why India cannot excel in research and invention of patentable products and processes. We should hope that in future we will be able to make better and more profitable use of our inventiveness through patents to promote better international trade and better agreements with other members countries of WTO, from a position of strength.

I would like to thank Dr. Ashwani Kumar Bansal and the Faculty of Law, University of Delhi, for inviting me to preside at this national Seminar on WTO Patents Law and National Economic Interest. I am sure the deliberations will produce valuable results.

REFORMING CRIMINAL LAW : A POLICE PERSPECTIVE*

*R.K. Raghavan***

Respected Justice Shri G.T. Nanavati, the Vice Chancellor, Dean, Law Faculty, teachers, students, ladies and gentlemen. I feel honoured to have been invited to deliver the twelfth Professor R.V. Kelkar Memorial Lecture. This is an honour for the entire Indian Police because it recognises the deep and intrinsic links between all wings of the criminal justice system, of which police officers and lawyers are two key pillars. At the same time, I feel humble in the presence of the chairman and eminent jurists because they have devoted a lifetime to the study of law in general and criminal law in particular, taking forward the traditions left behind by Prof. Kelkar.

Prof. Kelkar was as bold in deed as he was in his lectures and writings. Impelled by his passionate belief in the rectitude of law, whenever he found its practice differing from the precept, he spoke out against the dilation and even paid a heavy price for it. Generations of students have benefitted from his lectures. His works are lucid and transparent and classic in their approach to criminal procedure. If independent India were to count its sons who have made significant contributions in various walks of life, Prof. Kelkar would certainly be among the list in law and legal studies.

We are living in a world that is becoming increasingly violent. Violence envelopes even traditionally peaceful regions. Ordinary citizens in all walks of life who are normally law abiding and believe in the rule of law are greatly affected by it. The Indian scenario is in particular far from comforting. Violent crime during the decade (1986-96) went up by 33.7%. Homicides alone rose by 38.1% . The corresponding figure for rapes was 86.7% (Crime in India 1996). Alongside this is the cold fact that conviction rates have either been stagnant or have been falling under some heads of crime.

Against the above background of high crime and increasing fear of violent crime, consumers of police services, viz., the community in general, rightly turn to police leaders and ask us-we professionals - as to what is being done to preserve and protect public order and render justice to those victimized by persons who have no faith in civilized living. Here, as a senior serving police officer, I am aware of the oft-repeated accusation that the day-to-day functioning of the police is hampered, among other factors, by an archaic legal framework that is founded on distrust of the police. It is further said that the police could give a better account of themselves if the current criminal law of the country undergoes certain basic reforms.

The pro-reform position taken by police may not be wholly untenable, although it is difficult to subscribe to a demand sometimes by them that sweeping changes are warranted. At the outset itself, I would like to make my own stand quite clear. I am not for sweeping overnight changes. But I am for well conceived incremental changes which would facilitate better police control over crime and the underworld. In effect, I plead for a sense of balance and fairness within the framework of the rule of law that is fundamental to our Constitution.

I propose to begin with a few widely accepted propositions that serve to highlight the importance of criminal law in a democratic society, A firm but humane application of criminal law is essential for the proper functioning of constitutional democracy. Otherwise, the consequence would be one of lawlessness and anarchy. The administration may perhaps care to pay only minimal attention to social welfare schemes in certain difficult fiscal situations, but at no point of time can it afford to ignore criminal justice administration. It should be remembered that all economic development ultimately rests on a peaceful that believes in respect for law. It is possible that a person can eke out a living on his own without any assistance from government, if only he is given a sense of security. Herein lies the importance of criminal law and its role in establishing a sound criminal justice administration.

Lord Macaulay gave us a valuable gift in the form of the Indian Penal Code of 1860. It is a masterpiece of legislation which contains a description of almost all types of crime. Some of the criminal statutes enacted after Independence include the Prohibition of Dowry Act, 1961, the Prevention of Corruption Act, 1988, the Prevention of Food Adulteration Act, and the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act. All these laws specify various form of human conduct in the process of declaring them as offences and lay down different terms of punishment. We also have an outstanding Criminal Procedure Code which was totally revised in 1973 with a view to taking into account the needs of the times.

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* Prof. R.V. Kelkar Memorial Lecture 1999.

** Director, Central Bureau of Investigation, New Delhi.

It is this Code, more than any other, that has grabbed police attention for possible reforms.

The policeman in the field has to face many hurdles in the discharge of his investigative functions, To start with, he cannot really exercise his powers of search and arrest unless an FIR has been registered. Though the law provides for preliminary investigation, the fact remains that the accused or a witness is not duty bound to reply to the queries of the police officer unless there is some legal compulsion. Here the punishment for evading replies is simple imprisonment for one month or a fine of Rs. 500/-. Such a penalty is hardly deterrent.

Again, the registration of the FIR is a tricky matter because all sorts of complaints are tendered at the police station, some of which may be totally false and some only partially true. Indeed, the really watertight case is often not reported. *Suo motu* registration in indeed possible, but practical experience shows that the average police station is so over-worked, the SHO (and Writer) would be quite happy dealing with existing complaints rather then create more work for themselves. Hence, the first and foremost legal requirement is to make submission of false reports and false complaints to the police severely punishable. The law no doubt provides for perjury, but only in relation to a trial. Here the punishment is three years. The police officer, who is an agent of the court, is as much offended by perjury as the court itself. Hence, any false statement made to the police officer before or after registration of a case should be punishable by a term of imprisonment for not less than two years and the offence be made non-bailable. Section 182 of the IPC provides only for six month imprisonment or a fine of Rs. 1000/- or both. This illustrates the light view that was taken by Lord Macaulay. It is my prayer that this sentence should not be subject to the general leniency shown by learned courts in such matter.

A related point is the disowning of statements by witnesses. As we are aware a police officer records such statements during the course of investigation and submits them with other relevant evidence to the court along with the charge-sheet. Here, it has been noticed that due to various pressures - social, economic or political - witnesses retract their statements in court. One can well understand how weakened the prosecution case will become if key persons such as eye-witnesses or the complainant himself/herself changes the original version to the police while deposing in court.

Unfortunately, in our Criminal Procedure Code, as opposed to codes in a few other countries, there is no provision for witnesses to sign their statements. Hence, there is no sanctity for the statement recorded by the police officer in as much as it has no legal cover nor a witness, judicial or otherwise, to testify to the accuracy of the statement. It is indeed true that the police officer has to record a certificate that he has read out the contents to the witness and the latter has to certify that the contents are true and correct. But, since the witness does not commit himself/herself on paper, he or he she is quite capable of going back on his/her statement at a later stage. It is no doubt true that police officers, sometimes in ignorance and sometimes due to over-enthusiasm, put certain words in the mouth of the witness which the latter had not intended to speak. But this is only a human failing and the learned court can always question the witness and ascertain the central point of the statement. Thus, another possible amendment to our Criminal Procedure Code and the Evidence Act is to make statements to police officers binding on the witness by some mechanism such as a statement on oath, an affidavit or a judicial confession. We may recall the recommendation of the Law Commission in its reports, 14th & 41st Which need to be taken up by our legislators as early as possible.

One sore point with the police is the Constitutional requirement {Article 22 (2)} that a person arrested by them will have to be produced before the nearest Magistrate within 24 hours of the arrest. The human rights objective of this stipulation is laudable. Nevertheless, the police belief is that this limit is unreasonable if one reckons the need to question the individual and get all relevant information for quickly processing with further investigation, including effecting more arrests. I am aware that a longer time, sometimes 72 hours, is given to police investigators in a few countries. This needs to be beaded. It is my view that the existing legal position puts enormous pressure on the police and leads them to undesirable practices which bring a bad name to the whole force.

Another important point which I want to place before this distinguished gathering is : When, in many parts of the world, a confessional statement of the accused recorded by the police is admissible in evidence, why is the position different in India? A police officer, though he may be of the rank of Superintendent of Police or Director General of Police, is still not competent to record the confessional statement of any accused, even when it is voluntarily given. Why this distrust? The law that allows the officers of the Customs & Excise and Enforcement Directorate to record such a statement excludes the police officer. Police officers also come from the same society and broadly similar background as these government officials and the distinguished members of the Bar or the judiciary. On the face of it, this smacks of unintended discrimination.

This anomalous situation could be described as a hangover of our colonial legacy, but is one that deserves a hard look so that the distrust of the police yields place to healthy respect. This is particularly when the ultimate acceptability of such a confessional statement depends on it being

voluntary and truthful. Therefore, I strongly plead that the time has come, as the Law commission has said, to confer authority on senior police officers to record confessional statements. One thing which may be said is that our Constitution itself does not disfavor this. Our own Supreme Court has upheld the provisions of Terrorist & Disruptive Activities Prevention Act, 1987 empowering the Superintendent of Police to record a confessional statement.

All police investigation will come to nought if prosecution witnesses do not feel secure while deposing against the accused. It is widely known that fear of reprisal from the accused and his associates deters many a witness from coming out with the truth while testifying before the Court. Unfortunately in India, unlike in a few countries of the West, there is no exclusive legislation for witness protection. Here again it would be easy to say that a citizen should be able to discharge his/her duty by fearlessly stating the truth in court. But who is to protect the witness if the is threatened by the henchmen of the accused? Why is the law silent of this aspect of witness protection ?

While the existing criminal law, especially the Criminal Procedure Code, is protective of the rights of the accused, whose personal freedoms are sought to be enforced at any cost, the prosecution operates under tremendous odds. An example is the procedure with regard to grant of bail. Fristly, the police in the from of the SHO/IO has to state before the committal court the reasons for not agreeing to a request for bail by the accused. Such reasons can only be adduced if sufficient investigation has already been conducted. But, it would be difficult at the initial stages for the I.O. to state the grounds on which he opposes the bail. Further, he may require the arrested person for interrelation. Police Custody or police remand is no doubt granted more liberally than before by the courts. But there is an obligation to complete the interrogation within the stated period of one week, 10 days or maximum one fortnight. This places immense strain on the police machinery because once the accused or interrogated person leaves police custody, he is no longer available for questioning under normal circumstances. The police would have to apply through the Court to examine him in the jail and this has its own limitations. Bail is also granted very readily for the accused, sometimes even in law & order situations. When enlarged on bail, they return to the scene of crime and either commit further crimes or intimidate the witnesses.

Anticipatory bail in no doubt a measure which helps an innocent person or a person wrongly suspected of a crime to obtain the personal freedom of movement when being harassed by the investigative agencies.

However, the fact remains that this provision is being misused by the accused in various cirumstances to obtain anticipatory bail from courts which are not familiar with the facts of the case and which physically lie far away from the scene of occurrence. Hence, there is no logic in grant of anticipatory bail to persons without hearing the police side of the story. Further, Section 438 of Cr.P.C. was introduced by alter amendment and since TADA and SC/ST (Prevention of Atrocities) Act have made it non-applicable, there does notepaper to be any insurmountable problem in deleting it from the law books, The whole bail law therefor needs a fresh look, especially in the context of reported wide regional differences in their application.

Another police perception is that stays and restrictions on execution of warrants of arrest are sometimes granted quite freely by some appellate courts. While there is here an important element of protection of human right, we have to think to the danger to individual victims and to the society resulting from such restraints action against persons accused of crime.

Let us go back a few steps to a burning issue. It is common knowledge that the power of arrest given to Police Officers generates corruption as well as violation of human rights. There is a generally well founded criticism that law enforcement agencies resort to more arrests than are necessary. I also share this perception. The National Police Commission had recommended more than two decades ago that this power should be exercised with great caution and restraint. the Supreme Court had an occasion to consider the law of arrest in *Joginder Kumar's Case*[1] and laid down some guidelines regarding the power of arrest of police in a case involving grave offence like murder, dacoity, robbery, rape, etc. Where the accused was likely to abscond and evade the processes of law. The Law Commission in its 154th Repot has also recommended many amendments in the Cr.P.C. to ensure that the power of arrest is used only when it is genuinely required and is not misused by the police. The Supreme Court has prescribed certain procedural guidelines in *D.K. Basu's Case*[2] to ensure the dignity of human rights.

I fully support the view taken by the law Commission, Supreme Court and National Human Rights Commission. In the event of contravention of these guidelines and the spirit thereof, the erring policeman should be taken to task. Only then we can build a society that is based on order.

Another burning issue we have to address ourselves is offences against women. Crimes which are specifically directed against women, where

1. (1994) 4 SCC 260.
2. A.I.R. 1997 S.C. 610.

women alone are victims, fall under this category. Besides the constitutional guarantees, India is also committed to the protection of the rights of women in the international sphere ever since we rectified the CEDAW (Convention on the Elimination of all forms of Discriminations against Women).

Rape is one of the most serious offences in any civilized society. The Supreme Court has voiced the concern of all of us in the judgment in *Gurmit Singh* vs. *Punjab*[3] that rape is not merely a physical assault but is destructive to the entire personality of the victim. Rape degrades the very soul of the helpless female. Various judicial decisions have brought in far reaching amendments in the law and practice on the subject. This will have to be a continual exercise if law and the procedure in the area are to keep pace with trends of criminality. There is now a debate on whether or not rape merits the capital punishment. The debate is relevant although its implications need to be studied carefully.

Eve-teasing, known to the Western world as sexual harassment, should cause us immense concern because of its wide prevalence. In *Visakha* vs. *Rajasthan*[4] the Supreme Court issued guidelines to all government and private organisations directing them to take effective steps with regard to prevention, as well as initiate criminal and disciplinary action against offenders. Departmental committees have been formed to monitor sexual harassment at the work place but positive action, as obtaining in USA, where an affected person can apply for relief in courts is needed here too. Tamil Nadu has brought in exclusive legislation to tackle this menace. This deserves to be studied by other States.

Offences where children are victims and those which are specifically committed against children are slowly coming into national prominence. It is very unfortunate that the criminal predators are eating into the world of innocence, and consequently, crimes against children are showing a phenomenal increase. In 1992, 26% of the rape victims were children less than 16 years. In 1996 this percentage went up to 28% . Other crimes like infanticide, buying and selling of girls for prostitution and paedophilia have all increased over the years.

Child Sex Abuse is exhibited in many crude forms like child pornography and child trafficking too. Some of the recent judicial pronouncements throw light into certain interesting matters with respect to investigation and prosecution of crimes against children. The judgment by the Delhi

3. A.I.R. 1996 S.C. 1396.
4. A.I.R. 1997 S.C. 3011.

High Court in *K.C.J. and others*[5] has ushered in a high level of sensitization of all concerned in handling child victims of rape. The need of 'child-minder' has been appreciated by the High Court. The Court has drawn up the mechanisms to protect the child victim from the din and bustle of the court room, so as to pave way for free and fair deposition. However, the problems faced by the child victim in this particular case where she has been continuously sexually abused, has thrown up challenges to the legal definitions of rape and has brought to light the need for a comprehensive law dealing with Sexual Assault on Minors.

Without a realistic procedural law, all other legislation cannot achieve the object of a low-crime society. Procedural laws outline the machinery for investigation of crime and trial by the courts and the functionaries manning such machinery. For instance, the new Cr.P.C. of 1973 did away with Honorary Magistrates and Justices of the Peace. Whatever the rationale behind such a move, the fact remains that one level of interface between the public and the judiciary was removed, placing a greater burden on the magistracy, which has to deal with a whole set of petty offences and is consequently unable to deal fairly with trial cases. No doubt, the creation of tribunals and consumer courts as well as the Lok Adalats have revived the system of a non-formal judicial system, but they have their limitations because police work is not greatly reduced. It is for consideration whether there is a case for the revival of the old system of Honorary Magistrates who will handle petty cases and also engage in the resolution of minor disputes, thereby saving precious police time.

A related point is the requirement to separate the less serious offences and provide for a sentencing procedure by which the committal courts award a caution, suspended sentences or even community service in lieu of the regular sentence which only adds to the burden of the present courts and on the general criminal justice delivery system. This principle of prioritisation is practiced in western countries which have well established legal systems but suffer from acute shortage of staff and would thus like to concentrate their resources on quality cases rather than small and petty cases. It is heartening that Delhi has Petty Offences (Summary Disposal) Rules which is worthy of being adopted in other States also.

The rationale of the Probation of Offenders Act is beyond question. Essentially this means that first time offenders are not subjected to the riggers of incarceration in jail. But the practical experience is that many first time offenders revert to a life of crime and commit second and third

5. (1999) 2 SCC 89.

crimes and do not regard the first offense as a necessary check or deterrent. "Spare the rod and spoil the child" is a well known proverb. Unless proper correctives are administered, a first time offender is likely to repeat his criminal behavior. In this regard, we may suggest the prescription by law of community service and other non-penal restriction of the accused in cases when they are convicted of offenses which do not constitute any grave violation of the law. Indeed, it would be in the fitness of things for the convicted person to help the family of victim to rehabilitate itself instead of serving out a dry sentence in jail. Examples from the West are available in plenty and the recent cases of Mike Tyson, the boxer and Eric Cantona the famous footballer come to mind.

It will not be inappropriate here to refer to the considerable opposition to bringing the hierarchy of Prosecutors under the Dirctor-General of Police. Hence one finds the phenomenon of an independent Directorate of Prosecution that operates outside the police. Investigation and prosecution are essentially police functions. It is universally accepted that, in order to get good results, the investigator should have the benefit of the knowledge and experience of a Law Officer at every stage of the investigation to assist him in the discharge of his duties. I do not dispute the wisdom behind the establishment of the Directorate of Prosecution with a cadre separate from the police but I am of the view that it should be under the overall charge of the Chief of Police. Experience has shown that in the States where a distinct Directorate of Prosecution outside of the DGP control has been established, the investigator does not receive the kind of assistance that is necessary for his success.

In conclusion, I would like to plead for a holistic approach to the problem. All of us sitting here come into play only when the informal control of the family, school, university and society break down. When I grew up, we had to ask the permission of our elders before speaking or coming up with a suggestion. We had opinions but they were our own, not given unless asked for. Fostering respect for our elders, for our women folk, our teachers and our saints - in general, our cultural tradition - will automatically act as a crime preventive. It is always better to prevent the outbreak of a fire rather than rush hither and thither dousing it.

As long as man exists, there will be two sides to his personality : the dark and the light, the bad and the good. The criminal justice system steps in to protect us from ourselves, to protect society from the depredations of a few misguided people, to protect our culture and heritage from wanton destruction. So we are all partners in this common objective and in strengthening one, we strengthen all.

I would like to end by recalling what Lord Denning said in the context of a refusal by the London Police to register a case as directed by the Home Secretary :

> The police shall be accountable to the law and the law alone. No Minister of the Crown shall tell the Commissioner of Police whom to arrest and whom not to arrest.

We are grateful to the Supreme Court of India for expressing similar sentiments. When such professional autonomy has almost become the prerogative of the police in India, the latter can possibly perform better even under existing constraints without merely pleading constantly for radical legal reforms. Such reforms are bound to come by themselves once police professional credentials are well and truly established. It is just possible that in such a situation, the community itself could rise in support of such reforms in order to strengthen the police hands in the common fight, against crime and graft.

LEGAL EDUCATION AND PROFESSIONAL TRAINING

*A. S. Bhat**

Globalisation has started to affect not only the market economy of the nation, but the whole system of education. The imperatives of economic and technological development has to pursue sustainable human development in which economic growth shall serve social development and ensure environmental sustainability. A highly skilled work force different from the earlier era will be required in the capital intensive technological development to change the existing industrial scene towards sophisticated and automated process. The service sector which is less capital and more labour intensive shall be no exception to the change in a highly competitive global economy under the conditions of liberalisation and privatisation. The educational system has, thus, to respond to the crisis of change and act as an instrument for a social change to develop not only an economically prosperous society but also to make adequate provisions for equity and social justice. The University Grants Commission in its IX Five Year Plan Proposals for the Development of Higher Education observed[1]:

> The University has a crucial role to play in promoting social change. It must make an impact on the community, if it is to retain its legitimacy and gain public support. Universities have to find solutions to the nation's problems . It is necessary for them to address themselves to the issues whether these be social such as women, health or welfare, or, scientific and technological, such as transfer of technology and appropriate technology for the community.

Higher education in general and legal education in particular is passing through a critical phase of globalisation and is beset with many challenges. Dunkle's proposal resulting in the establishment of World Trade Organisation (WTO) after the United Nations Commission on International Trade Laws (UNCITRAL) have become the compelling forces to promulgate the modified laws. In social and family disputes and advanced communication system impact of globalisation is being realised to change the existing laws in order to make them accord with the needs of the times. Globalisation, ensuring free movement of goods, unrestricted flow of trade and related investments, global protection of intellectual property rights, and prohibition of tariff and non-tariff barriers that restrict trade in goods, and services, shall necessarily require free movement of legal services[2]. 'The legal profession in the changing scenario has to equip and prepare itself to face the new challenges and give up the apprehension of fear of competition. In view of this changing scenario the existing system of legal education should receive a very serious consideration. The main focus of the present paper is on: (1) inadequacies and deficiencies in the existing legal system; (2) dichotomy of five year & three year professional courses; and (3) Pre-enrolment training

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1. University Grants Commission: Policy Frame and Programmes, June, (1996) at p.65.

A. Existing System of Legal Education

There has been a phenomenal growth in legal education since the fifties. It is estimated that at present there are over 500 law teaching institutions with an enrolment of over 300,000 students. Despite the diagnosis and prescriptions for improvement, the situation has only deteriorated further necessitating administration of remedial measures on an emergency basis. As early as 1954, The Law Commission (Setalvad Commission) of India in its fourteenth Report depicted a very dismal picture of legal education. It observed[3]:

> ...Legal education is imparted in part-time classes by teachers who are mainly legal practitioners who run many of these so called law colleges which are housed in buildings belonging to arts colleges and other institutions...Most of the students who crowd these institutions are young men who have not been able to secure employment; they take a course in law while awaiting

2. N L Mitra, *Trade in Legal Services: opportunities and constraints* 10 NLJ (1998) p.32 at p.65.
3. 14th Report of The Law Commission of India Vol 1 (1954) at p.522. See also UGC Report of the Curriculum Development Centre in Law (1990) at p.4 which provides, that the bulk and generality of students pursue part-time studies in law, that is either morning or evening classes for about three hours a day. Most of them are employed. Of these employed, some come to law school to improve their qualification of in-service promotion, others come towards the eve of superannuation hoping that a law degree will assist them later during retirement. A few part-time students, who are eligible to appear at competitive examinations under the UPSC or PSC, pursue law with the expectation of added advantage.

> for a job with no intention of practicing law as a profession. . .. some of these institutions are so overcrowded that classes are held in shifts and there are several hundred students on the rolls of each class... It is to these crowded classes that the part-time lecturer imparts his instruction, and the attendance he commands is only due to the anxiety of the pupil to have his attendance marked when the lecturer calls the roll. It is not surprising that in this chaotic state of affairs in a number of these institutions, there is hardly a pretence of teaching and that the holding of tutorials or seminars would be unthinkable. A senior lawyer characterised these law colleges as 'profit-making industry'.

It will not be out of place to mention here that The Law Commission of India has approvingly quoted the observations of a law teacher who had said that, "there are already a plethora of LL. Bs, half baked lawyers, who do not know even the elements of law and who are let loose upon society as drones and parasites in different parts of the country. Several of them did not even know what subjects were prescribed in the LL.B programme, did not know the names of the prescribed books and asserted cheerfully that all they had done was to cram the lecturer's notes[4]".

It has been reported that two-thirds of law graduates do not join the Bar. Their only object being attainment of some general knowledge about law or to improve their employment prospects generally. To improve the quality of professional training the Bar Council of India distinguished professional legal education from non-professional (liberal or general) legal education and confined its efforts towards the former for which it had a statutory responsibility and left the latter to the discretion of the Universities. The Council came forward with a new scheme of five year integrated LL.B Course after 10+2 as the way out to improve professional legal education. The two fold categorisation of Law teaching institutions received a severe jolt from the vested interest groups and the Council

4. See. *Supra note* 3 at pp. 522-23.
Madhava Menon in his article "*Legal aid and Legal Education: A challenge and an opportunity*" published in essays edited by him in June, 1974 on clinical education for the students in service setting has observed that the law students are perhaps the singular professional group who devote the minimum time for their studies despite "the fact that LL.B. is now three year programme after graduation. Leaving exceptions apart, normally compulsory percentage of attendence brings him to the classes for few hours in a week and he finds himself "out - of business" for the larger part of the day the year round. Law studies have become the professional course for the rejects, the mediocre and the educated unemployed and the law schools have become the breeding centres of student revolt and unrest.

diluted its stand by allowing both 3 year and 5 year LL.B courses to continue. The UGC Report of the Curriculum Development Centre in law, though felt the necessity of modernised legal education, avoided going into the controversy of dichotomy of 'liberal' and 'professional' legal education[5]. The report observed that the liberal/professional dichotomies disable us from addressing the hidden curricula underlying legal education enterprise[6].

It did, however, emphasise that 'modernisation' of legal education must.. ..draw commitment specifically from the Indian Constitution and especially the Fundamental Duties of citizens crystallized in Part IV of the Constitution[7]. "Adjudged by these constitutional obligations and standards" the report observed, that, "the present curricular, pedagogic and scientific effort are liable to be declared as violative of the constitutional letter and spirit[8]"

The authority of the Bar Council of India to regulate and maintain the standards of legal education was resisted, besides some vested interest groups, by The All India Law Teachers Congress[9]. The Congress in its outburst observed,[10] in its technical sessions, that:

1. Law teaching and the maintenance of law schools and law colleges and the standard of legal education should be the exclusive domain of law teachers;
2. The role of the Bar Councils in maintaining the legal educational standards in the country so far has been far from satisfactory and the curriculum devised by the Bar Council of India from time to time has not been in tune with the ground realities of the law schools;
3. The Bar Council of India has neither taken into account the needs of the legal education nor has it provided any support, financial or otherwise to make the legal education socially relevant and academically sound; and
4. The Congress, in the net result, suggested the establishment of an All India Legal Education Council to oversee, monitor and regulate law teaching and law schools in the country:

5. See, *Supra note* 3 at pp. 11-12.
6. *Ibid* at p.12.
7. *Ibid* at p.13.
8. *Ibid* at pp. 13-14.
9. See working paper on "Review of the Advocates Act, 1961" of The Law commission of India circulated to law secretaries of state governments vide letter no. F. No. 6(3)(62)/99-LC(LS) dated 13/8/99 at p. 17A.
10. *Ibid* pp.17A-17B.

The apprehensions of All India Law Teachers Congress are genuine and deserve a very serious consideration. The Congress did not challenge the authority of the Bar Council of India vested in it under the Advocates Act, 1961 to lay down standards of legal education. All it says is that the control of Bar Council over legal education has resulted in deterioration of standards of education and given rise to indiscipline. It is in sordid instances worth mentioning here in the history of the Bar Council of India that it came out of the deep slumber of Kumbhkarna to reform the legal education. The first one happened in late eighties when the Council insisted that institutions imparting legal education must adopt a five year law course by admitting the students after plus two. The hard posture taken by Bar council of India withered away after two years when it retraced its steps[11] and allowed the 3 year and 5 year LL.B courses to continue as professional courses thereby discouraging even those universities which took the Bar Council directives seriously and prepared themselves for the switch over to professional programmes. In the second instance, the Council hurriedly drafted outline of the revised syllabi for implementation by institutions imparting legal education with effect from the academic session, 1998.

The outline of the courses has drawn severe criticism from the academia and the apprehensions expressed are well founded . In a multi religious country like India which is further divided into winter and summer zones all the educational institutions go for atleast two and half months vacation with an addition of two more months enjoyment of national and other holidays in a year. The conduct of examination and declaration of results of two semesters also extends upto one month . A teacher thus gets less than four months in one semester to teach a particular course of the type devised by the Bar Council of India. Completion of such a course with a discussion of its practical utility in the Class is neither practicable nor justifiable resulting in the production of half baked law graduates , again, in the name of the reform of legal education . Further , courses which would normally be spread over two semesters have been combined in one course with an imperative from the Bar Council of India not to make any changes in the course. This has resulted in further deterioration of the standards of legal education . After all a student is not to be taught a bare Act but the whole of the legislative and judicial history of a provision and its relevance and utility in society. Mere completion of the course within the shortest academic calendar of the university shall

11. D.N. Jauhar, *legal education: A case for five year law programme* 41 J.I.L.I. (1999) p.66 at p 68.

perforce a student to resort to cheaper books/craming of lectures to pass the examination for obtaining a law degree and thus further deteriorate the legal education which is already in a state of crisis in the fast changing global scenario.

The authority for devising curriculum for professional legal education by the Bar Council can neither be doubted nor challenged. Listing the functions of the Bar Council Of India, s. 7(h) of the Advocates Act, 1961 provides as follows:

> "to promote legal education and to lay down standards of such education in consultation with the universities in India imparting such education and the state Bar councils"

The legislature has thus in clear and unambiguous terms conferred the power of laying down standards of legal education on the Bar Council of India with the only restriction to exercise it in consultation with the universities and the State Bar Councils. Additionally, under s.49(a) and (d) of the Advocates Act, 1961 the Bar Council of India has the power to make rules, interalia (a) to prescribe the minimum qualification required for admission to a course of degree in law in any recoganised university and (b) to prescribe the standards of legal education to be observed by such universities. It has been observed that the power to make rules prescribing the standards to be followed by universities imparting legal education and to enforce those rules through inspection of law colleges and recognition of degrees in law of such universities has never been in doubt and universities by and large followed Bar Council of India rules in structuring their law education programmes[12]. Thus, in pursuance of the Act and the rules ,all universities imparting legal education in the country changed over in 1962 to the three year law course from the then prevailing two year law programme, discontinued double courses and revised the curriculum to reflect the Council prescribed compulsory and optional subjects[13].

The expression "laying down standards of legal education" by the Bar council of India has invited comments from college managements and some section of law teachers. This function of the Bar Council of India is intended to include not only the prescription of subjects to be taught but also to determine, *interalia*, the duration of the course , the content and distribution of subjects in the curriculum, the hours of teaching ,the text books to be followed, the nature and the extent of physical and intellectual

12. N. R. Madhava Menon, *Legal education for professional responsibility-An appraisal of the five year LL.B. Course* Vol. 13 (1986) IBR (JBCI) p.436 at p.439.
13. *Id.*

facilities required , the qualifications of the teachers etc[14]. All these matters are incidental to the laying down of standards of the legal education .What can otherwise amount to the laying down of standards of legal education? Prof. Madhava Menon while reflecting on the scope of the expression " laying down standards of legal education" observed[15]:

> This is neither new nor extraordinary procedure for professional education. The Medical Council, The Dental Council, The Nursing Council, The Pharmacy Council and such other professional organizations do exercise these powers in varying degree according to the demand of circumstances in order to fulfil their statutory and professional obligation of maintaining standards on the part of their members. This power of professional bodies to lay down norms determining the qualification and training of its members exists in other countries as well . In England the academic requirements for barristers and solicitors are determined by the respective professional bodies and not by the universities which happen to teach the bar prescribed academic courses.

The requirement of consultation process as a statutory requirement under s. 7(h) of the Advocates Act,1961 with universities and state Bar Councils took seven years to complete. The seminar held in 1977 in Bombay and attended by the Vice-chancellors and deans of law faculties of various universities and other representatives of the state Bar Councils, suggested drastic changes in the preliminary proposals of legal education. It was due to this consultation process that the reduction in the number of teaching hours stipulated (from 6½ hours to 5½ hours each day), the revision of the permissible strength of part time teachers (from 25 per cent of total teachers to 50 per cent) in law colleges, the extension of time for continuing with the old three year law course to meet the just expectations of students and lateral entry for graduates and post graduates in the third year of the five year course have been incorporated in the rules at the instance of the State Council representatives or of the law teaching community[16].

A harmonious approach is required to be made while prescribing the legal professional curriculum without eroding the autonomy of the universities and without encroaching upon the functions of the Bar Council of

14. *Ibid* at 441
15. *Id.*
16. *Ibid* at 442-43.

India . Both UGC and Bar Council have standing bodies of law panel of teachers and Legal Education Committee, respectively, from around the country, which empowered to maintain standards in higher legal education. By consultation with UGC Law panel, the purpose of consultation with universities would be met substantially . Joint decisions among the BCI, UGC and Law Ministry would make the policy planning academically sound, professionally significant and the decisions easily implementable[17]. As the BCI consists of members from the State Bar Councils, there is no need to have State Bar Council representatives in legal Education Committee[18]. This shall require the enlargement of Legal Education Committee with equal participation of the Bar , the judiciary and the academics .The enlargement requirement shall avoid further scrutiny of the decisions by the Bar Council which is not only avoidable but shall accord an honourable status and autonomy to the LEC[19]. Thus, the UGC Act 1956 and rules of BCI are to be amended in such a manner that the procedure of placing the decision of the LEC before the Bar Council corresponding with the universities is dispensed with and the entire process must be shifted to the LEC so that on issues of professional legal education, the Bar Council speaks through the LEC only[20]. The decisions of LEC with representatives from various professions shall thus be unobjectionable and uniformly applicable throughout the country.

B. Dichotomy of Five Year and Three Year Professional Legal Education

The dichotomy of five year and three year professional legal education system is straining too much the nerves of the bar, the bench and academia. If a five years course in professional legal education is a success one cannot jump to the conclusion that a three year law course after a three-year's graduation programme is ipso-facto bad and ineffective. The debate between 'five years' or 'three years' professional courses should depend upon input stage of the students, contents of the legal professional course and the practical training required for development of expertise in the legal profession[21]. Elucidating the three components required in a professional legal education, Mitra observed[22]

17. *Supra note* 9 at p. 18.
18. *Id.*
19. *Ibid.* at 19.
20. *Id.* at 19.
21. N.L. Mitra, *A few questions in the beginning* vol. XXII 4 (1995) IBR p. 73 at p77.
22. *Id* at. 77.

> ...In legal education a multi-base level educational input is beneficial because law has its role in every branch of knowledge. For example, a corporate lawyer is required to have a fair understanding of the accounting and disclosure system; a criminal lawyer is to have command over the forensic science; an intellectual property attorney has to have good command over the physical and biological sciences. Often a lawyer does good job if he has good knowledge in mathematics and statistics. Besides psychology, philosophy and logic, Anthropology and literature are also required for success in legal profession. Medicine, engineering and technology are presently thought to be a good ground for flying taking off into legal profession. Law is needed everywhere. So, in almost all countries legal education takes into its fold students coming from each discipline.

No one can deny the fact that in the professional legal education a multi-disciplinary base level input is required. In a three year professional legal education programme a student has a stronger base level education of science, social science, commerce, arts. etc. as compared to the one in a five year integrated LL.B course. The mental faculties of students in a three year legal education course are more matured as compared to those of five year integrated students. With a stronger base level education and matured faculty three year course students of professional legal education do not require more than three years to acquire the professional skill, viz; analytical skill , research skill, communication and drafting skill and the like[23]. The Bar Council of India in Rule 5 of the Rules on legal education has also permitted lateral entry to part II of the five year law course to a candidate who is a graduate of a university, or possesses such academic qualifications which are considered equivalent to a graduate degree of a university by the Bar Council of India. The professional training in the strict sense in a five year integrated course starts from the second part that is, third year whereas in the three year programme the professional training starts on the entry of a student who has a much stronger multi-disciplinary base input. Thus, excepting that a precious one year is saved in five year integrated programme there is not much difference between the three year and five year professional legal education training.

Instances are not far to seek where institutions imparting legal education in three year courses have made a rich and significant contribution towards the society. If the NLSIU claims to be a great success in view of its five year integrated course, the University of Kashmir, also, does not lag

23. *Id.* at 79-80.

behind in its three year professional course[24]. There are, also, multiple instances where imparting legal education has become a 'profit making industry' which produces 'half baked layers' who are rightly termed as 'drones and parasites' upon society. Such instances are large in number and has earned a bad name both for the academia and profession. Their indifferent attitude towards legal education cannot prove the three year professional programme a failure. The courses devised by the Bar Council of India both for five and three year programmes are welcome. However, mere devising of courses for implementation without looking into the ground realities, as pointed out somewhere in this paper, is to make the task more onerous. There is definitely a need and urgency to reform legal education to face the challenges of globalisiation in a successful manner but the change can be brought out slowly and steadily with the co-ordinated efforts of Bar Council of India ,UGC, State Bar Councils and the state Governments. The ambitious practical utility training programmes devised for implementation requires a huge financial support from UGC and state Governments to make the infrastructural facilities available even to those institutions who have a reputation of producing very competent professional lawyers.

The success of whatever programme depends among many other things upon its effective implementation. The Bar Council is vested with a power under s. 7(i) of the Advocates Act, 1961 to recognise Universities whose degree in law shall be a qualification for enrolment as an advocate and for that purpose to visit and inspect Universities or cause the State Bar Councils to visit and inspect Universities in accordance with such directions as it may give in this behalf. There is substantial truth in the criticism levelled against the Bar Council of India, that inspite of concrete evidence of the existence of spurious colleges with no full time teachers, no libraries and no regular classes, they continue to admit large number of students, the Council took no steps to disaffiliate such colleges or de-recognise the degrees of Universities which allow affiliation of such colleges.[25] If the Bar

24. The faculty of law, University of Kashmir, Srinagar, strictly admits students in LL.B & LL.M on the basis of merit through entrance test and adheres to the courses prescribed by the Bar Council of India. In addition to the prescribed courses the faculty has rigorous scheme of continuous assessment which has been paying rich dividends. Participation in moot courts, attending lok adalats and participation in legal awareness programmes is a regular and normal activity of the faculty. In the recent moot court competition organised by the Bar Council of India at Hyderabad our team of students secured the fifth position. The students work on socially relevant research projects during summer and winter vacations under the supervision of competent teachers. The faculty has earned the name of being a model deparhnent in the university.
25. See *Supra note* 12 at p.443.

Council of India falters in its own statutory obligation, the failure cannot be attributed to 3 year LL.B programme. Commenting on the dis-affiliation power of the Council, it has been observed[26] that:

> ....the Act has not given enough teeth to the Council's power to compel obedience on the part of the colleges. The Act empowers the council only to recognise or not to recognise the degrees of the universities for the purpose of enrolment. It has no power to disaffiliate individual colleges and all it can do is to ask the university concerned to disaffiliate the college, if necessary, under threat of de-recognition of its degree.

The Bar Council of India has now framed detailed rules under the Advocates Act, 1961 on legal education to deal effectively with the implementation of its directives. It is to be seen how_ far the Council succeeds in discharging its statutory responsibility to deal with the erring colleges/institutions and halts the mushroom growth of law colleges which are totally devoid of infrastructural facilities. It is heartening to note here that the Bar Council of India in its resolve to improve the standards of legal education has in the recent past disapproved the establishment of a number of law colleges and did not grant fresh approval to an equal number of new colleges which had applied for approval of affiliations[27]. To reform the professional legal education in order to make it socially relevant and purposeful the Bar Council of India should frequently inspect the institutions imparting legal education and ensure implementation of its directives. The institutions in turn should lend full support to the Council and make legal education an active instrument of social justice to face the global challenges. It is hoped that co-ordinated and joint efforts of Bar Council of India, University Grants Commission, Judiciary and the Universities to monitor constantly the functioning of legal institutions will restore the lost glory of legal education and make the democratic system of the country more vibrant and effective.

C. Pre-enrolment training

Pre-enrolment training before entry into the legal procession is another grey area bristling with controversy. The original advocates act, 1961 in s. 24(d) prior to its amendment dealt with the qualifications of a person to be admitted as an advocate on a state roll. The relevant portion of the section reads as follows:

26. *Ibid*. p.444.
27. See Arun Mishra keynote address at the seminar on post -enrolment Training V. XXVI 2 (1999) IBR p.1 1 at p.13 10

> "s.24(d) — he has undergone a course of training in law and passed an examination. After such training both of which shall be prescribed by the state bar council."

The aforesaid clause(d) of s. 24 was omitted by section 18 of the amending Act 60 of 1973 with effect from 31st January, 1974. The reasons given for deleting the pre-enrolment training and examination was given in the statement of objects and reasons' of the (Amendment) Bill of 1970 which is profitably reproduced below:

> The Bar Council of India has decided that in future a degree in law can be obtained only after undergoing a three-year course of study in law after graduation as a result of which the age of entry into the legal profession becomes much higher than the age of entry in other professions. It is, therefore, felt that after a three year course in law in a University, it is not necessary to retain the statutory provision in the Act requiring a further examination or practical training.

The Supreme Court in *V. Sudeer* v. *Bar Council of India*[28] relyng upon the above paragraph of "statement of objects and reasons," held that "It becomes clear from a mere look at the said paragraph that it was the Bar Council of India which had decided that a degree of law obtained by a person after undergoing three-year course of study after graduation would be enough for qualifying him to be enrolled as an advocate under the Act and, therefore, pre-enrolment training till then required of him before getting enrolment was not necessary"[29]

There is logic in the argument that after the introduction of the curriculum prescribed by the Bar Council of India, further practical training before enrolment is redundant. The new curriculum envisages the implementation of four comprehensive practical training programmes during the course of studies in the institutions imparting legal education. These training programmes are of great practical utility to a person who joins the practice after its successful completion. A look at these four practical oriented programmes devised by the Bar Council of India becomes necessary. Each practical training programme is to form a separate paper of 100 marks with the following course contents:

28. 1999 (2) Scale 32.
29. *Ibid* at p.40.

PAPER I : MOOT COURT, PRE-TRIAL PREPARATIONS AND PARTICIPATION IN TRIAL PROCEEDINGS

This paper will have three components of 30 marks each and a viva of 10 marks.

(a) Moot Court (30 Marks): Every student will do at least three moot courts in a year with 10 marks for each. The moot court work will be on assigned problem and it will be evaluated for 5 marks for written submission and 5 marks for oral advocacy.

(b) Observance of Trial in two cases, one Civil and One Criminal (30 marks): Students will attend two trials in the course of the last two or three years of LL.B. Studies. They will maintain a record and enter the various steps observed during the attendance on different days in the court assignment. This scheme will carry 30 marks.

(c) Interviewing techniques and Pre-trial preparation (30 marks): Each student will observe two interviewing sessions of clients at the Lawyers Office/Legal Aid Office and record the proceedings in a diary which will carry 15 marks. Each student will further observe the preparation of documents and court papers by the Advocate and the procedure for the filing of the suit/petition. This will be recorded in the diary which will carry 15 marks.

(d) The fourth component of this paper will be Viva Voce examination on all the above three aspects. This will carry 10 marks.

PAPER II: DRAFTING, PLEADING AND CONVEYANCING

This course will be taught through class instructions and simulation exercises, preferably with assistance of practicing lawyers/retired judges. Apart from teaching the relevant provisions of Law, the course will include 15 exercises in drafting carrying a total of 45 marks and 15 exercises in Conveyancing carrying another 45 marks (3 marks for each exercise).

NOTE:

(a) Drafting:

General principles of drafting and relevant substantive rules shall be taught.

(b) Pleadings:-

(1) Civil; (i) Plaint (ii) Written Statement (iii) Interlocutory Application (iv) Original Petition (v) Affidavit (vi) Execution Petition and (vii) Memorandum of Appeal and Revision (viii) Petition under Articles 226 and 32 of the Constitution of India. (2) Criminal: (i) Complaints (ii) Criminal Miscellaneous petition, (iii) Bail Application and (iv) Memorandum of Appeal and Revision.

(c) Conveyancing;

(i) Sale Deed (ii) Mortgage Deeds (iii) Lease Deed, (iv) Gift Deed (v) Promissory Note (vi) Power of Attorney (vii) Will

The remaining 10 marks will be given in a viva voce examination which will test the understanding of legal practice in relation to Drafting, Pleading and Conveyancing.

PAPER III : PROFESSIONAL ETHICS, ACCOUNTANCY FOR LAWYERS AND BAR-BENCH RELATIONS

This course will be taught in association with practicing lawyers on the basis of the following materials:

(*i*) Mr. Krishnamurthy Iyer's book on "Advocacy". (ii) The Contempt Law and Practice.

(*iii*) The Bar Council Code of Ethics.

(*iv*) 50 selected opinions of the Disciplinary Committees of Bar Council and 10 major judgments of the Supreme Court on the subject.

The written examination in this paper will have 80 marks and the viva voce will carry 20 marks.

In lieu of the written examination, colleges may be encouraged wherever appropriate to give the students, seminars and projects where they are expected to research and write persuasive memoranda on topics identified in the above subjects.

PAPER IV : PUBLIC INTEREST LAWYERING, LEGAL AID AND PARALEGAL SERVICES

This course carrying 100 marks will have to be designed and evaluated according to local conditions by the Colleges in consultation with the Universities and State Bar Councils. It can be taught partly through classroom instructions including simulation exercises and partly through extension programmes like Lok Adalat, Legal Aid Camp, Legal Literacy and Para Legal Training. The course should also contain lessons on negotiations and counselling, use of computer in legal work, legal research in support of Public Interest Litigation, writing of case comments, editing of Law Journals and Law Office Management. The marks may be appropriately divided to the different programmes that each university

might evolve for introduction in the colleges under its control.

After devising such an intensive scheme of practical training programme, there does not seem to be any necessity and justification of training, for a further period of one year or 18 months. The Bar Council of India is either doubtful of its successful implementation or considers these training programmes inadequate for entry into the profession. In the former case the Bar Council is or be vested with powers to visit the institutions imparting legal education to ensure successful implementation of the training programmes and take desired action as per its rules against the erring institutes/colleges, instead of burdening all the law graduates with the additional training period. In the latter case where the devised practical training programmes are considered inadequate, the impugned Bar Council of India Training Rules 1995 adopted vide Resolution No.128/95 can no longer be considered to make a significant addition to the practical training of a trainee advocate. If the pre-enrolment training was discarded as spelled out above in the statement of objects and reasons of the (Amendment) Bill of 1970, the same logic can be applied herein as well. A law graduate was admitted into the profession before 1974 on his mere attainment of a professional degree without undergoing any practical training. Now, that this entry into the profession is being extended further by a period of one year or 18 months programme, is it not making him a late beginner in the career than his counterparts in other professions? In *V. Suder* v. *Bar Council of India*[30] the Supreme Court dealing with the impugned pre enrolment training rules observed[31].

> ...The Bar Council of India by way of interim measure can... consider the feasibility of making rules providing for in practice training to be made available to enrolled advocates. Such an exercise may then not fall foul on the touchstone of section 49(1) (ah)... Such rules can also provide for appropriate stipend to be paid to them by their guides, if during that period such enrolled junior advocates are shown to have no independent source of income... Then in the light of section 17(2) of the Act such newly enrolled advocates who are required to undergo in-practice training for first one year of their entry in the profession can legitimately fall in the category of other advocates apart from senior advocates as contemplated by that provision.

The Supreme Court, in the aforesaid case has imposed a responsibility for payment of stipend to junior advocates which the parliament should

30. *Supra note* 28.
31. *Ibid* at p.62.

consider before making suitable statutory amendments in the Advocates Act, 1961, if at all, pre-enrolment training is considered to be necessary. Imposition of a condition of stipend upon senior advocates who are likely to act as guides shall be detrimental to the interests of trainee advocates. Advocates in general, with exceptions apart, would be unwilling to take a trainee advocate under his guidance. The Government, instead, must consider the making of a strong infrastructural base in the institutions imparting legal education and monitor the effective implementation of practical training programmes devised by the Bar Council of India, through its agencies.

It is argued that it would be fallacious to think that everything required to make a good lawyer could be capsuled into a law course, however, long and arduous[32]. It is pertinent to reprouduce here some observations of Dr. N. C. Sen Gupta: Proficiency in Law is obtained by a willing practitioner or student by practice and not from text books only. When the new entrant gets a case as a junior lawyer, he has to prepare it. In doing so, he has to find out the law from the books. It is this search for law that gets him into the touch of actual law which, in a really brilliant young man develops a real brilliancy of the practitioner in law[33].

Many top lawyers and judges clamouring for improvement in legal education were themselves products of only a two year course[34]. Their socio-economic background, right social connections, the fact that many of them were second or third generation lawyers, opportunities offered by big cities, exposure and, of course, hard work during actual practice made them what they are[35]. This does not mean that there is complacency and no more improvement in the existing structure is required[36]. Legal

32. Jamshed B. Pardiwala Vol XXV (2) 1998 IBR p.79 at p.93.
33. See *Supra note* 3 at p.1230 The products of the earliest legal education who have been regarded to be pleaders, as distinguished from Vakils-some of whom distinguished themselves at the Bar and some of them also on the Bench, were not law graduates at all.
34. *Ibid* at 1232 Justice Dwarka Nath Mitra, Justice Chandra Madhab Ghosh, Sreenath Das, Kali Mohan as in Calcutta, similarly judges at the High Court of Madras like Muthuswami Iyer were not law graduates at all.
35. Dhaiasheel Patil, "*Legal education - The journey so far*" Vol. XXVI (1) 1995 IBR p. 43 at p. 53. Mr. P. N. Bhagwati, former Chief Justice of India once said to the author with a twinkle in his eye: "Mr. Patel, as a law student I used to attend the college and do a job as well. But I hope I did not make too bad a judge".
36. While presiding in a seminar on 'Legal aid' organised by the Sringar District Legal Services Authority, the author of this paper suggested for suitable statutory amendment in the Jammu and Kashmir Legal Services Authorities Act, 1997 to enable the senior students of LL.B to represent the cases of persons entitled to such services under the supervision of teachers or senior lawyers. Involvement of students with such schemes shall make the clinical legal education programme more effective and meaningful.

education forms the bed rock in the effective system of administration of justice. Advanced knowledge, explosion in communication, technology and plummeting computerising course are shrinking distances and eroding border and time[37] very fast, unlike many stable decades of twentieth century. To keep pace with the changing times developing countries have to initiate policies that will enable them to narrow or bridge the gap that separates them from rich countries[38]. The alarming bells of gloablisation and its impact on India warrant the transformation of the texture of legal education[39]. To face the challenges of globalisation, ineffective laws are to be weeded out and substantial changes are to be made in the exisiting bar devised curriculum in order to make it socially relevant and purposeful. The bar and judiciary has to work in co-operation with academia to overcome the difficulties faced by the latter, to achieve excellence in the field of legal education. The urgency of improvement expressed by various committees[40] from time to time for failure of existing legal education should not be attributed only to academic institutions but shared by all, concerned with the administration of justice.

Conclusion

A democratic state wedded to rule of law requires a properly equipped crusader of justice who has undergone requisite requirements of legal education whether functioning as an advocate before law courts or as a judge deciding *lis* between contesting parties or as a research scholar in law or as a professor imparting legal education[41]. However, unceremonial death is bound to occur to a system which fails to keep pace with the changing times in the present day global scenario. Mere complacency and ostrich like approach shall be viewed very seriously by generation in posterity. The diagnosis of the ailment of the existing legal education having been identified, there is an urgent need of proper treatment to put it in the global market. Serious concern of various agencies to remedy the ailment requires joint and co-oridnated efforts to monitor the progress of the system, constantly. Strong instructional base involving financial inputs

37. "Legal Education in India in 21 Century: Problems and Prospects", published by All India Law Teachers Congress, Faculty of Law, University of Delhi, 1999 at p. 485.
38. *Ibid.*
39. *Ibid.* at pp. 487-488.
40. Justice A. M. Ahmadi Committee Report on "*Reforms in legal education and entry into legal profession*", see also Bhubaneshwar Statement of Law Ministers working group on legal education vol. XXII (4) 1995 IBR pp. 7-42.
41. Justice S. B. Majmudar, inaugural address at the All India Law Teachers Congress (AILTC) on "*legal education in India in 21st century: Problems and prospects*", *supra note* 37 at p. IX.

and capable human resource in the institutions imparting legal education though an arduous task shall yield rich dividends and lead the country to face the challenges of 21st century. Without any disregard of the autonomy of institutions, socially relevant courses are to be devised to keep pace with the changing times. Hard decisions to ensure effective implementation of curriculum shall strengthen the system of legal education. Compromise on academic failure on account of pressure from Government shall prove dangerous and disastrous to the health of legal education in general and legal profession in particular. The judiciary has to rise to the occasion and circumvent the activities of the vested interest forces and agencies which stand in the middle of the mission of persons who are in pursuit of salvaging the legal education.

THE LEGAL REGIME OF SUBSIDIES AND COUNTERVAILING MEASURES IN WORLD TRADE ORGANIZATION (WTO)

*A. K. Koul**

The problem of subsidies and countervailing measures became the intense subject of negotiations in the World Trade Organization (WTO) on account of its rampant use in international trade since the birth of General Agreement on Tariffs and Trade (GATT) in 1947. The use of subsidies in industry and agriculture in 1980s was resorted to by the governments under the influence of political and social pressures embarking on massive financial commitments. In order to support ailing industries, to stimulate infant industries and to promote exports, subsidies have become an important element in world trade to the extent that, in some sectors, financial ability to subsidize exports have overridden competitive reality[1]. Subsidies for the LDCs are important for the sustenance and maintenance of their economies at whatever stage of development the economies of LDCs are.

Accordingly, the scope of this paper is to unfold the problem of subsidization in international trade and the earlier attempts to deal with it, taking into account the historical background leading to the negotiations of final subsidies in the Uruguay Round and its incorporation in the WTO and finally the position of the LDCs interests in the WTO.

I. Subsidies in International Trade

Subsidies continue to be one of the most frequently used, though controversial, instruments of domestic and commercial policy of the governments which provide subsidies for a great variety of purposes, including assistance to facilitate the foundation or expansion of new industries, to encourage exports, to create new jobs, or to enhance national security by ensuring that a country can provide itself with certain products. Subsidies can also be an instrument to serve as a means to support or ensure an internationally competitive position for certain high tech industries. The subsidies code of GATT 1980 in fact, recognizes the reality that subsidies

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1. GATT, GATT Activities 1988, at 47 (1989)

are an important tool of government policy, and are used to promote social and economic policy objectives[2].

The subsidies code further notes some of the governmental objectives, which are promoted by the use of subsidies:

(*a*) The elimination of industrial, economic and social disadvantages of specific regions;

(*b*) To facilitate the restructuring, under socially acceptable conditions, of certain sectors, especially where this has become necessary by reasons of changes in trade and economic policies, including international agreements resulting in lower barriers to trade;

(*c*) Generally to sustain employment and to encourage re-training and change in employment;

(*d*) To encourage research and development programmes, especially in the field of high technology industries;

(*e*) The implementation of economic programmes and policies to promote the economic and social welfare of developing countries; and

(*f*) Redeployment of industry in order to avoid congestion and environmental problems[3].

The use of subsidies by various governments depends on the varying needs of the governments. United States for instance provided industrial subsidies at the rate of 0.5% while Sweden subsidized at the rate of 7.4% in 1986 and other OECD countries industrial subsidies varied from 2 to 3.5% of their GDP[4]. According to G.C. Hufbauer,[5] in the 1970's and early 1980's government subsidies proliferated in response to hard times in agriculture and declining industries. This trend has been reversed. In most industrial countries subsidies are stable or declining, and in certain developing countries they are being slashed. The subsidy climate changed dramatically in the late 1980's for several reasons such as budgetary stringency, as the claims of health, education, and the environment pressed upon resources in nearly all the industrial countries; growing public skepticism that industrial policy can revive sunset industries; and

2. Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT.GATT BISD (26th supp.) 56(1980) herein after referred as Subsidies Code
3. *Id.*, at Art. 11(1).
4. Ford and Suyker, Industrial subsidies in the OECD Economics, OECD Working Paper No.74 at 1.47 (Table I) (1990).
5. G.C. Hufbauer, *Subsidies in Completing the Uruguay Round*: in J. Schott (ed) A Results-Oriented Approach to the GATT Trade Negotiations 93-94 (1990).

fiscal bankruptcy in many Latin American countries, which brought a halt to the long standing practice of allowing their industrialists to feast on rich menu of public subsidies. Yet, despite the present adverse climate for public subsidies, many delegations in the GATT Negotiating Groups on Subsidies and Countervailing Measures were less than anxious to see their future freedom to subsidize curbed by an international code.

On the other hand J. Schott[6] believes that decline of subsidies in the OECD countries in 1980's and the economic downturn of 1990's may have the effect of providing subsidies to industries suffering difficulties.

However, subsidies continue to be of great concern in international trade negotiations as subsidies have assumed a greater importance as a tool of government's economic policy as against tariffs, which have been reduced to an insignificant level. Also, once tariffs have lost significance as a governmental economic policy, there is more incentive to use subsidy as a ready instrument for solving economic, social and political problems besetting the governments, howsoever small it may be as it can change the production patterns from one country to another[7].

II. Historical Background

A. Efforts to deal with subsidies prior to the Uruguay Round.

Countervailing duty laws are one means of addressing the adverse effect of subsidies to offset the amount of subsidization, which certain imported goods, might have received. Countervailing duty laws, in fact, have been employed as a remedial measure for more than one hundred years; for example, the United States enacted a countervailing duty laws in 1890[8] and 1897[9].

GATT, 1947 in its Articles VI and XVI addressed the problem of subsidies and countervailing measures. Art. VI deals with the imposition of antidumping and countervailing duties and defines 'countervailing duty' as a 'special duty' levied for the purpose of offsetting any bounty or subsidy bestowed, either directly or indirectly, upon the manufacture, production or export of any merchandise, and limits the amount of any countervailing duty imposed by a contracting party to an amount equal to

6. *Ibid.* J.Schott. *The Uruguay Round: What can be achieved in Completing the Uruguay Round.*
7. G. Hufbauer, A View of the Forest in Subsidies and Countervailing Measures: Critical Issues for the Uruguay Round. World Bank Discussion Paper No. 53 at 13(B.Balassa ed. 1989).
8. Tariff Act of 1890 to deal with the bounties paid on the exportation of certain grades of sugar. Tariff Act of 1897 U.S enacted a general Countervailing Duty Law.
9. The General Agreements on Tariff and Trade, 1947:55 U.N.T.S. 187.

the estimated bounty or subsidy determined to have been granted. Paragraph 6(a) of Article VI establishes that a contracting party may not impose anti-dumping or countervailing duty on another contracting party unless it determines that the subsidization is such as to cause or threaten material injury to an established domestic industry, or is such as to materially retard the establishment of a domestic industry.

Article XVI deals with subsidies in general and export subsidies in particular, and sets out the basic obligations of a GATT member country. Paragraph 1 of Article XVI states that if any contracting party 'grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into its territory' it has the obligation to notify the other contracting parties of the 'extent and nature of the subsidization' and 'of the circumstances making the subsidization necessary'[10].

Paragraph 1 of Article XVI further states that if it is determined that any such subsidization causes or threatens 'serious prejudice'[11] to the interests of any other contracting party, then the party granting the subsidy shall discuss with other contracting parties, if requested, the possibility of limiting the subsidization.

Paragraph 2 of Article XVI recognizes that a 'subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may either, hinder the achievements of the objectives' of GATT. Paragraph 3 of Article XVI at the same time advises that 'contracting parties should seek to avoid the use of subsidies on the

10. *Id.*, Art XVI:1
11. 'Serious Prejudice' has not been defined in GATT. However, as to what constitutes 'Serious Prejudice' has been defined in one of the Panel Reports of GATT in European Communities- Refunds on Exports of Sugar, Complaint by Brazil, Report Adopted, 10 November 1980, GATT, BISD 27th supp. at 69,97(1981). The reports included the following passages:
The Panel found that the Community system of exports refunds for sugar did not comprise any pre-established effective limitations in respect of either production, price or the amounts of exports refunds and constituted a permanent source of uncertainty in world sugar markets. It therefore concluded that the community system and its application constitutes a threat of prejudice in terms of Article XVI:1 BISD 26th supp. at 319
The Panel concluded that in view of the quantity of Community sugar made available for export with maximum refunds and the non-limited funds available to finance exports refunds, the Community system of granting export refunds on sugar had been applied in a manner which in the particular market situation prevailing in 1978 and 1979 contributed to depressed sugar prices in the world markets and this constituted a serious prejudice to Brazilian interests in terms of Article XVI:1 BISD 27th supp. at 97

export of primary products[12].

If, however, export subsidies on primary products are granted by a contracting party, its obligation is set out in paragraph 3, which states that export subsidies on primary products, shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product[13]. With respect to subsidies on non-primary products, paragraph 4 requires that, 'contracting parties shall cease to grant either directly or indirectly any form of subsidy which results in the sale of such products for export at a price lower than the comparable price charged for the like product to buyers in the domestic market[14].

B. Subsidies Code: The Tokyo Round

The Director-General of GATT summarized the economic backdrop to the Tokyo Round Subsidies Negotiations as under:

> Subsidies have become one of the most frequently used and controversial instruments of commercial policy. In the industrial sector the use of subsidies has greatly increased. Particularly under the impact in recent years of recessionary world economic conditions, slackening demand and high employment under the influence of political and social necessity, governments have embarked on massive financial commitments in order, among other things, to prop up ailing industries, to support depressed areas, to stimulate consumer demand or to promote exports. Subsidies have become an important instrument of protection. In some sectors – shipbuilding is good example – more trade is being conducted less in response to normal market forces than on the basis of competitive subsidization.
>
> A principal difficulty is to draw a distinction between subsidies granted by governments in pursuit of valid economic and social policies and those, which, directly or indirectly, intentionally or unintentionally, have the effect of distorting world trade, and depriving other countries of legitimate trade opportunities[15].

The Tokyo Round Subsidies code was essentially a compromise between the United States and EEC countries for the reason that EEC

12. A 'primary product' is defined as 'any product of farm, forest, or fishery, or any mineral, in its natural form or which has gone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.' Interpretative Note to Article XVI of the GATT, Section B, paragraph 2.
13. GATT, Supra note 9, Art.XVI: 3
14. *Id.*, Art. XVI: 4
15. GATT. The Tokyo Round of Multilateral Trade Negotiations: Report by the Director General of GATT 53(1979)

granted subsidies to industry and agriculture whereas the United States domestic law lacked 'injury test' and the United States was interested in strengthening the international rules governing subsidies[16].

Accordingly, the subsidies code as stated in the preamble emphasized 'the effects of subsidies' and its purpose is to ensure that the use of subsidies does not adversely affect the interests of other signatories to the code[17]. 'The text of the code seeks to implement this purpose by directing that signatories shall not grant export subsidies on products other than certain primary products.'[18] The code also requires, in accordance with the provisions of Article XVI: 3 of the GATT, that signatories not grant, directly or indirectly, any export subsidy for 'certain primary products' (primary agriculture) to the extent that such subsidy results in the displacement of the exports of others (by having more than an equitable share) of the world market, or in the undercutting of the prices of other suppliers in particular markets[19]. The code further requires signatories to ensure that the use of countervailing duty measures comply with the requirements of Articles VI of GATT, which requires an injury determination[20].

The subsidies code further provides a mechanism for the resolution of complaints brought by signatories concerning the subsidies of other signatories, which are believed to be in contravention of GATT or the code. The code resolves such complaints through means of conciliation, dispute settlement, and authorized counter measures[21]. The code also establishes a two-track approach to disciplining subsidies. Track I deals entirely with countervailing duties, establishing international rules on what national governments can do in implementing their countervailing duty rules (including constraints on the procedures of those cases) and rather elaborate definitions of material injury.... Track II of the code is devoted to the substantive obligations under international law regarding how governments should refrain from granting subsidies that affect goods in international trade[22].

In practice, the "code has been characterized by numerous disputes and lack of agreement between signatories on various issues."[23] Track II

16. J. Jackson, THE WORLD TRADING SYSTEM 258(1989)
17. Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT. Reprinted in GATT. BISD 26th supp. at 56(1980)
18. *Id.*, Art.9
19. *Id.*, Art.10
20. *Id.*, Art.1 & 6
21. *Id.*, Art 13
22. J. Jackson, *Supra* note 16.

of the code, i.e., government-to-government consultation and conciliation, is the normative option for most of the GATT signatories. The United States, on the other hand, has been the primary user of Track I, the imposition countervailing duties via national law[24].

The code does not prohibit all subsidies, or provide for direct enforcement of subsidy violations, Track II established a process designed to promote a "mutually satisfactory solution." If consultation does not resolve the problem within a short time, either party may refer the matter to the code committee for conciliation, whose purpose is to review again the facts and encourage the parties to reach a mutually acceptable solution[25]. The panel may submit findings as to facts and the application of the GATT and the code to the entire code committee, which may in turn make recommendations to the parties aimed at resolving the dispute, and, in the event that the committee's recommendations are not followed, the committee may authorize appropriate countermeasures[26].

Subsidies code in Track I, recognizes a country's right to impose countervailing duties on subsidized imports that cause injury to its domestic producers. The code outlines in detail the procedures for conducting subsidy-injury determinations. The code specifies that countries may only impose countervailing duties after having followed the procedures outlined and after having determined that the subsidized imports have caused injury to the domestic industry.

In addition to the code being concerned with export subsidies and countervailing duties, Art 11 of the code recognizes that signatories may use non-export or domestic subsidies for the promotion of social and economic policy objectives[27]. These subsidies, which are described as being granted normally by region or by sector[28], include subsidies aimed at the elimination of economic disadvantage of certain regions, the maintenance of employment, the encouragement of research, and the promotion of the economic and social developments of developing

23. R.Stern & B. Hoekman, *The Codes Approach, in the Uruguay Round*: in J.M. Finger and A. Olechowks, (ed). A Handbook for the Multilateral Trade Negotiations 59,61(1987)
24. Between 1980 & 1986, over ninety percent of the countervailing duty cases initiated were brought by the United States and Chile. During this time, only one case was initiated against the United States and one case initiated against Chile. In general, countervailing duties are brought against a different group of countries more than they are initiated by the same group.
25. See Subsidies Code, Supra note 2, Art. 17
26. *Id.*, Arts. 18(8) and 18(9)
27. *Id.*, Art.11
28. *Id.*, Art.11 (3)

countries[29]. The code also requires greater transparency regarding subsidy practices and in the administration of countervailing duty laws[30].

The subsidies code does not provide an explicit definition of 'subsidy' except an illustrative list of export subsidies, which should not be granted[31]. The interpretative notes to the subsidies code also does not provide any further assistance, so that other than the examples provided, the definition of 'subsidy' remained unclear. In 1975, United States, proposed that code should delineate all types of subsidy practices and set out the conditions on which offsetting measures could be taken against such practices. The United States proposed three types of subsidies such as:

(*a*) Prohibited (practices designed to increase the competitiveness of national producers, thereby distorting international trade);

(*b*) Conditional (practices directed towards domestic, economic, political or social objectives, but which may distort international trade);

(*c*) Permitted (practices with little or no impact on international trade against which offsetting measures could not be taken).[32]

Another issue prominently discussed during the Tokyo Round was the use of subsidies by the developing countries, and to what extent they should be afforded special and differential treatment while still maintaining some meaningful disciplines on the use of subsidies by developing countries. This same issue was a major concern of the Uruguay Round negotiations.

At the end of the Tokyo Round, the subsidies code represented compromise of 'fundamental policy differences among the participating governments'. Article VI and XVI of the GATT have been abbreviated, yet the subsidies code ultimately proved lacking in the clarity and effectiveness to resolve the problems posed by subsidies in international trade.[33]

C. Subsidies after the Tokyo Round

After the Tokyo Round the problems of subsidies in international trade were not resolved. The United States stressed the need to reduce the use

29. *Id.*, Art.1 (1)
30. *Id.*.
31. See GATT, GATT Activities in 1979 and conclusion of the Tokyo Round Multilateral Trade Negotiations (1973-1979) 21 (1980)
32. GATT, The Tokyo Round of Multilateral Trade Negotiations. Report by the Director-General of GATT 53(1979)
33. See J.Jackson Supra note 16 at 259

of trade-distorting subsidies and suggested;

(*a*) Persuading developing countries to make commitments that specify their obligations under the Agreement to reduce or eliminate export subsidies that are inconsistent with their development needs;

(*b*) Persuading Agreement signatories to report the extent, nature, and effect of subsidies, and

(*c*) Using the Agreement's conflict resolution procedures to help eliminate the effects of specific subsidy practices.[34]

The United States and European Union following the Tokyo Round were involved in a number of disputes involving EEC subsidizing of its agricultural products. GATT rules permit a number of non-tariff barriers in agricultural trade, particularly import quotas and export subsidies. In the 1980s, in response to EEC export and production subsidies, the United States initiated a number of section 301[35] cases involving the EEC agricultural policies. These disputes involved products such as sugar, poultry, meat, pasta, oilseed, and canned fruit. Similarly there were disputes between United States and Canada regarding the use of the subsidies. Also 1980s saw a great number of disputes between United States and Mexico concerning subsidization of imported Mexican products, although the disputes arose in the countervailing duty context.[36]

III. Subsidies Debate Before the Conclusion of the Uruguay Round

Before the conclusion of the Uruguay Round, 1994, the subsidies debates took serious twists and turns. The Ministerial Declaration of 1982 took note of the potentially detrimental trade effects of subsidies especially export subsidies, and has the commitment of the contracting parties to avoid their use[37]. The Leutwiler Report[38] which detailed the shortcomings of GATT also underlined the adverse affect of subsidies in international trade for the reasons that firms receiving subsidies from the governments

34. See U.S. General Accounting Office. Benefits of International Agreement on Trade-Distorting Subsidies not yet realized. GAO Doc. No. GAO/NSIAD-83-10 (August 15, 1983)
35. For an overview of these cases see Patrick J. McDonough in T.P. Steward (ed.) The GATT, URUGUAY ROUND-A Negotiating History (1986-1992) V.I. Kulwer Publications 809 at 824-833(1993)
36. *Ibid*
37. See Ministerial Declaration. Adopted on 29 Nov. 1982. GATT Doc No. L/5424 reprinted in GATT. BISD 29th supp. at 9(1983).
38. See Trade Policies for a Better Future. The 'Leutwiler Report' 1987

gain an advantage which unsubsidized competitors regard them as powerful instruments for overcoming domestic and economic and social problems. Further, the Report maintained that GATT rules on subsidies are not as explicit or as fully accepted as its rules on tariffs, but the damage to trade from subsidies are tremendous. A major challenge facing the trading system is to define what a subsidy is, and when it is legitimate to use it. Industrial policy, natural resource policy, tax policy and many other kinds of subsidies can bestow unfair trade advantages. The Report suggested that the export subsidies on primary products should be allowed on the condition that they do not lead to acquisition of more than an equitable share of the world export trade. The Report argued that a more meaningful explanation for legitimacy of export subsidies on primary products would be necessary, and indeed that exemption from discipline of such subsidies may not be legitimate at all.[39]

Subsidies debate was further taken up in early 1987 in the subsidies negotiating group in the Uruguay Round.[40] The subsidies negotiating group in the backdrop of Uruguay Round declarations of September 1986 at *Punta del Este*, wherein subsidies and countervailing measures were kept as a separate subject for negotiations underlined the need that subsidies and countervailing measures shall be based on a review of Articles VI and XVI and the MTN Agreement on subsidies and countervailing measures with the objective of improving GATT disciplines relating to all subsidies and countervailing measures that affect international trade.

In the Uruguay Round, the United States advocated for stronger and more effective subsidy disciplines (i.e. broadening the category of prohibited subsidies and strengthening GATT remedies) and a supporter of integration of the less developing countries into GATT discipline. It has been commented that U.S. policy has been guided by an economic and political philosophy, which presumes that subsidies distort resource allocation, and international trade flows, undercut economic efficiency, and distorts the law of comparative advantage by enabling the survival of otherwise uncompetitive industries.[41] The United States also cautioned that subsidies have not increased trade or opened new markets, but instead have precipitated matching subsidies and countermeasures under the

39. *Ibid.*
40. See Generally, Problems in the Area of Subsidies and Countervailing Measures. Note by the Secretariat. GATT Doc No. MTN.GNG/NGIO/W/3 (March 17, 1987)
41. See R.K. Lorentzen. Antidumping and Countervailing Duty Issues in the Uruguay Round of Multilateral Trade Negotiations in The Commerce Department speaks: 1990. The Legal Aspects of International Trade, 459(1990)

GATT Article VI by other governments.[42] As against the United States, the other negotiating participants viewed countervailing measures in need of reform. Their basic premise was subsidies are legitimate instruments of social and economic policy. 'A Necessary Safety Net' to ease industries and geographic regions through periods of economic transition, more specifically EEC advocated a definition of subsidy which would permit regional and structural adjustment assistance.[43] Some participants while acknowledging the necessity for subsidy discipline in general, seek to protect certain types of subsidies from discipline (e.g., Canada has an interest in seeing that regional subsidies are non-actionable, and Canada and Mexico have an interest in seeing that the price of natural resource products is not considered to constitute a subsidy).[44]

The developing countries had expressed an interest in using subsidies as tools for economic development and demanded increased special and differential treatment. The developed countries who viewed subsidies as a necessary safety net and developing countries who viewed as a major governmental instrument for furthering their economic development sought to focus on strengthening the countervailing measures.[45]

IV. WTO And the Agreement on Subsidies and Countervailing Measures

The WTO Agreement on Subsidies and Countervailing Measures is intended to build on the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII, which were negotiated in the Tokyo Round. Unlike its predecessor, WTO Agreement on Subsidies and Countervailing Measures defines subsidy and introduces the concept of 'specific' subsidy for the most part, a subsidy available only to an enterprise or industry, or group of industries or industries within the jurisdiction of the authority granting the subsidy. Only specific subsidies would be subject to the disciplines set out in the Agreement.

For the purpose of the Agreement, a subsidy shall be deemed to exist if, there is:-

(*i*) Financial contribution by a government or any public body within the territory of a member;

(*ii*) Government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion).

42. *Ibid*
43. *Ibid* at 476
44. *Ibid*
45. *Ibid*

(*iii*) Potential direct transfers of funds or liabilities (e.g. loans, guarantees); government revenue that is otherwise due, is foregone or not collected (e.g. fiscal incentives such as tax credits); a government provides goods or services other than general infrastructure, or purchase goods;

(*iv*) A government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (I) and (II) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; or there is any form of income or price support in the sense of Art. XVI of the GATT, 1994; and a benefit is thereby conferred. However, a subsidy defined above shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V of the Agreement only if such subsidy is specific in accordance with the provisions of Art. 2 of the Agreement.[46]

In order to determine whether a subsidy is defined above is specific to an enterprise or industry or group of enterprises or industries or certain enterprises within the jurisdiction of the granting authority, the specificity has to be determined by applying the following principles:

(*a*) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises;

(*b*) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions (objective criteria or conditions, as used herein, mean criteria or condition which are neutral, which do no favour certain enterprises over others, and which are economic in nature and horizontal in application such as number of employees or size enterprise) governing the eligibility for, and the amount of, a subsidy, specifically shall not exist, provided that the eligibility is automatic and such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, or other official document, so as to be capable of verification.[47]

Notwithstanding any appearance of non-specificity resulting from the application of the principles as laid down in (a) and (b) above of Art.2, if there are reasons to believe that the subsidy may in fact be specific, other

46. Art. 1 and 2 of the Agreement on Subsidies and Countervailing Measures: see, Arun Goyal (ed.) WTO in The New Millennium, 4th ED. 342 (2000).
47. Art. 2. *Ibid*

factors may be considered. Such factors are the use of a subsidy programme by a limited member of certain enterprises, predominant use by certain enterprise and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. Further, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.[48]

A. Export Subsidies

Annex I of the WTO Agreement on Subsidies and Countervailing Measures provides an illustrative list of export subsidies which are prohibited such as: governmental direct subsidies to a firm or an industry contingent upon export performance; currency retention schemes or any similar practices which involve a bonus on exports; internal transport and freight charges on export shipments, provided or mandated by the governments on terms more favourable than for domestic shipments; the provision for governments or their agencies either directly or indirectly through government mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms and conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.

The full or partial exemption, remission, or deferral specifically related to exports, or direct taxes or social welfare charges paid or payable by industrial or commercial enterprises.

The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base of which direct taxes are charged.

The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

The exemption, remission or deferral of prior-stage cumulative in direct taxes on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior-stage cumulative indirect taxes on goods or services used in the production

48. *Ibid.* Art 2.1 (c) of the Code.

of like products when sold for domestic consumption; provided, however, that prior-stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).

The remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years.

The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Any other charge on the public account constituting an export subsidy in the sense of Article XVI of GATT 1994.[49]

All the above subsidies whether contingent in law or in fact solely or as one of the several other conditions and subsidies, contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods are covered under prohibited subsidies.

The Agreement denominates certain specific types of programmes as prohibited subsidies. Parties to the Agreement pledge not to grant or

49. Supra note 16 at PP 358-359.

maintain these types of subsidies at all. If a signatory country fails to abide by this requirement, then the country may face formal retaliation, as other countries could bring a (non-product specific) case in the GATT based on the use of a prohibited subsidy. The prohibited subsidies constitute the 'red light category' within the 'traffic light' framework and contracting parties are required to cease using them. This approach reflects the broad consensus of the contracting parties that certain types of subsidies by their very nature distort trade flows and impede the efficient allocation of resources.[50]

B. *Trade Related Subsidies*

During the Uruguay Round Negotiations participants suggested that certain trade related subsidies should be prohibited and the general consensus as reflected in the Agreement is that subsidies which are contingent 'upon export performance' as well as subsidies contingent upon the use of domestic over[51] imported goods are prohibited.

C. *Domestic subsidies*

The question of domestic subsidies whether by providing grants to cover operating losses, direct forgiveness of debt, loans at interest rates which are less than the government's cost of obtaining the funds plus any cost in administering the loans, provision of equity capital where the expected return is less than the government's cost of obtaining the funds plus any costs incurred in administering the equity investment, loan guarantee programmes where the premium rates are inadequate to cover the long-term operating costs and losses of the programme, and subsidies contingent upon production performance were discussed in the Uruguay Round Negotiations,[52] however, the Agreement does not reflect directly prohibiting any domestic subsidies other than prohibiting subsidies contingent on the use of domestic goods over imports.[53]

D. *Remedies*

The Agreement in Art.4 provides for remedies against prohibited subsidies that if a signatory to the Agreement has reason to believe that a prohibited subsidy is being granted by another signatory, consultation may be requested, the purpose of which shall be to clarify the facts of the

50. See also subsidies code, Supra note 3 Art. 9.
51. Art. 3(1) (a) and (b) of the Agreement, Supra note 46.
52. Proposals submitted by U.S see: Elements of the Negotiating Framework : Submission by the United States, GATT Doc. No. MTN. GNG/NG.10/W/39 (Sept 27, 1990).
53. See Supra not 46, Art. 3.

situation and to arrive at a mutually acceptable solution.[54] If the consultation does not result in a solution, within a period of 30 days, any member party may refer the matter to the Dispute Settlement Body (DSB) for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel. Once the panel is established, the panel may request the assistance of the Permanent Groups of Experts (PGE) to see whether the measure in question is a prohibited subsidy. The PGE shall have all the powers of reviewing the evidence of the existence or otherwise of the measure in question and PGE has to afford an opportunity to the opposite party to justify that the measure is not a prohibited subsidy. The PGE report is time bound and its conclusions whether or not a measure is a prohibited subsidy is final. If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing member withdraw the subsidy without delay. The report of the panel is adopted by the DSB unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.[55]

If the panel report is appealed, the Appellate Body shall issue its decision within 30 days from the date when the party to the dispute formally notifies its intention to appeal. In case the Appellate Body fails to provide its report with 30 days the Appellate Body has to inform the DSB in writing of the reasons for the delay together with an estimate of the period within which the Appellate Body shall submit its report and the submission of the report cannot exceed 60 days.[56]

Once the appellate report is submitted to the DSB, the DSB has to adopt the same and is binding on the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.[57]

In the event the recommendations of the DSB is not followed within the time-period specified by the panel, which commences from the date of adoption of the, panel's report or the Appellate Body's report, the DSB is competent to grant authorization to the complaining Member to take appropriate counter measures, unless the DSB decides by consensus to reject the request.[58]

54. *Ibid.*
55. *Ibid* Art. 4.3 to 4.8.
56. Art. 4.4 *Ibid*
57. Art. 4.5 *Ibid*
58. Art. 4.9 *Ibid*

E. Actionable Subsidies

The Code does not strictly define actionable subsidies, although Art. I of the Code defines 'subsidy' as a financial contribution by, or at the direction of, a government or public body, or as a form of income or price support which conferred a benefit on the recipient, the determination of whether a subsidy is actionable focusses on the trade effects, including injury, nullification or impairment of benefits, and serious prejudice, resulting from the subsidy in particular the benefits of concessions bound under Article II of the GATT, 1994.

F. Serious Prejudice

The Code addresses 'serious prejudice' in two ways. One, by setting criteria for a presumption of serious prejudice and second, by identifying conditions or trade effects under which serious prejudice may arise. The presumption of serious prejudice as provided in Art. 6(1) of the Code are:

(*a*) Where the total ad-valorem subsidization of a product exceeds 5 per cent;

(*b*) Where subsidies are used to cover operating losses sustained by an industry;

(*c*) Where subsidies are used to cover operating losses sustained by an enterprise (other than one time measures which are non-recurrent, cannot be repeated for that enterprise, and which are given to provide time to develop long-term solutions and to avoid acute social problems); and where there is 'direct forgiveness of debt', i.e. (government held debt), and, 'grants to cover debt repayments' [59].

The subsidies as contemplated in the category of serious prejudice are considered to be the dark amber category of subsidies. They are presumed to give rise to serious prejudice. However, the presumption of serious prejudice established by Art. 6(1) may be rebutted if the subsidizing country can demonstrate that the subsidy has not resulted in any of the conditions or trade effects that are enumerated in Art. 6(3) [60].

Art. 6(3) of the Code enumerates four cases in which serious prejudice may arise:

(*a*) Where the "effect of the subsidy is to displace or impede the imports of like products into the market of the subsidizing signatory."

59. *Ibid*. Art. 6.
60. *Ibid*.

(*b*) Where the "effect of the subsidy is to displace or impede the exports of like product of another signatory from a third country-market".

(*c*) Where the "effect of subsidy is a significant price under cutting by the subsidized products as compared with the price of a like product of another signatory in the same market or significant price suppression, price depression or lost sales in the same market," and

(*d*) Where the effect of subsidy is an increase in the world market share of the subsidizing signatory in a particular subsidized primary product or commodity as compared to the average share it had during the previous period of 3 years and this increase must follow a consistent trend over a period of when subsidies have been granted.

Succeeding provisions of Art. 6 of the Code especially Arts. 6(4) and 6(5) further explain the meaning and scope of 'displacing or impeding' imports and exports and price undercutting, while Art. 6(7) lists six circumstances where 'displacement or impedance' shall not give rise to serious prejudice. These circumstances, which must not be isolated, sporadic or otherwise insignificant, are:

(*a*) Where there is a prohibition or restriction on exports of the like product from the complaining signatory or on imports from the complaining signatory, into the third market concerned;

(*b*) Where there is a 'decision by an importing government operating a monopoly of trade or state trading in the, product concerned to shift, for non-commercial reasons, imports from the complaining signatory to another country or countries;

(*c*) Where, there are 'natural disasters', 'strike', transport disruption or other *force majeure*, substantially affecting production, qualities, quantities or prices of the product available for exports from the complaining signatory;

(*d*) Where there exist arrangements limiting exports from the complaining signatory;

(*e*) Where there is a voluntary decrease in the availability for export of the product concerned from the complaining signatory (including, *inter-alia*, a situation where firms in the complaining signatory have been automatically reallocating exports of this product to new markets); and

(*f*) Where there is a failure to conform to standards and other regulatory requirements in the importing country[61].

G. Injury

The Code establishes a '*de-minimus*' threshold standard regarding subsidy amount and import volume. Art.11 (9) of the Code states that there shall be immediate termination of in cases where the amount of a subsidy is *de-minimus* or where the volume of subsidized imports, actual or potential, or the injury is negligible. The amount of subsidy shall be considered negligible if the subsidy is less than one per-cent *ad-valorem*. In contrast to the one per cent *de-minimus* standards Art. 27(10) of the Code requires that any countervailing duty investigation of a product originating in a developing country signatory shall be terminated where the level of subsidies is less than two per cent *ad-valorem*, and the volume of the subsidized imports represents less than four per cent of the import total, "unless imports from developing country signatories whose individual share of the total import represent less than four per cent collectively account for more than nine per cent of the total imports for the like product in the developing country".[62]

H. Cumulation

The Code adopts the view that a subsidy must exceed a *de-minimus* threshold before its effect may be cumulatively assessed with the subsidized imports from the other countries. Art. 15(3) of the Code provides that cumulation may be applied only if the investigating authorities determine that (a) the amount of subsidization established in relation to the imports from each country is more than *de-minimus* as defined in Article 11.9 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition, between imported products and the conditions of competition between the imported products and the like domestic product.[63]

I. Subsidies by Developing Countries

Article 27 of the Code and its Annexes VII and VIII deal with the special and differential treatment of developing countries were highly controversial when they were released. Both developed and developing

61. *Ibid.*
62. *Ibid.* Arts. 11 and 27
63. *Ibid.* Art. 15.

countries were dissatisfied with the substance of these provisions.[64]

Art. 27 of the Code begins with a recognition that subsidies may play an important role in economic development programmes of developing countries and then specifies which developing countries shall be exempt from the prohibition of Art. 3 (1)(a) against the use of export subsidies and subsidies contingent on export performance:

(*a*) developing country signatories referred to in Annex VIII and;

(*b*) Other developing country signatories for 8 years from the date of entry with force of this Agreement subject to compliance with the provision in paragraph 4.

Paragraph 4 states that any developing country referred to above shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. In that period, the developing country may not increase the current level of its export subsidies, and actually shall eliminate them within a period shorter than that provided for in this provision when the use of such export subsidies is inconsistent with its development needs.[65]

The Code further provides that if any developing country believes it is necessary to maintain its export subsidies beyond the eight-year period that country must so inform, and consult with, the committee at least one year before the end of eight-year period.[66]

For those developing countries which have 'reached export competitiveness in any given products', the Code requires that the export subsidies for such products be phased out over a period of two years.[67]

However, for those countries listed in Annex VII, if they reached export competitiveness in one or more products, the phase-out period for export subsidies on such products shall be eight-years.[68]

Art. 27(6) of the Code establishes the criteria for determining whether export competitiveness in a particular product exists. It specifies that export competitiveness in a product exists if 'a country's exports of that product have reached a share of at least 3.25 per cent in world trade of that product for two consecutive calender years. Further, the Code defines a

64. See Minutes of the Meeting of 6 Nov. 1990. Note by the Secretariat. GATT Doc. No. MTN.GNG/NG 10/24 (Nov. 29. 1990.
65. See *supra* note 46.
66. *Ibid.*
67. *Ibid* Art. 27(4).
68. *Ibid* Art. 27(4).

product as a section heading of the Harmonized System Nomenclatures. This section also establishes that export competitiveness shall be shown to exist either:

(*a*) on the basis of notification; or

(*b*) on the basis of a computation undertaken by the GATT Secretariat at the request of any signatory.

Art. 27(7) of the Code provides that the remedies specified in Art.4 (remedies for prohibited subsides) shall not apply to a developing country's export subsidies as long as they are in conformity with Arts. 27(2)-27(4), and the applicable remedy provision shall be Art. 7 (remedies for actionable subsidies). There shall be no presumption that a developing country subsidy results in serious prejudice, as that term is defined in Art. 6(1) of the Code and if serious prejudice exists, it must be demonstrated by positive evidence.

Art. 27(9) of the Code goes further and states that no action may be taken against a developing country's actionable subsidies (other than those referred to in Art.6 (1) unless nullification or impairment exists so as to 'displace or impede' imports of like products, or unless injury to the domestic industry occurs.[69]

The Code in Arts. 27(10) and (11) add specific *de minimus* percentage and provides:

> Any countervailing duty investigation of a product originating in a developing country signatory shall be terminated as soon as authorities concerned determine that :
>
> (*a*) the overall level of subsidies granted upon the product in question does not exceed two per cent of its value/calculated on a per unit basis; or
>
> (*b*) the volume of the subsidized imports represents less than four per cent of the total imports for the like product in the importing signatory, unless imports from developing country signatories whose individual shares of the total imports represent less than four per cent collectively account for more than nine per cent of the total imports for the like product in importing country.

Art. 27(13) of the Code provides that direct forgiveness of debts, subsidies to cover social costs, in whatever form, including relinquishment

69. See *supra* note 46. Legal Text. Agreement on Subsidies And Countervailing Measures. 343-365.

of government revenue and other transfer of liabilities between such subsidies are granted within and directly linked to a privatisation programme of a developing country signatory provided that both such programme and the subsidies involved are granted for a limitated period and notified to the Committee and that the programme results in eventual privatisation of the enterprise concerned.

Finally, the Code empowers the Committee which upon request and depending upon the nature of the request, undertake a review of either (a) a specific export subsidy of a developing country to determine whether it conforms to that country's development needs, or (b) a specific countervailing measure against a developing country's subsidy in order to determine whether the measure is consistent with the provisions of Arts. 27 (10) and 27(11).

J. Calculation of the amount of a subsidy

Art. 14 of the Code provides that any method used to calculate the benefit conferred by a subsidy must be provided in each signatory's national legislation and be adequately transparent. In addition, it provides the following guide lines for calculating the amount of a subsidy :

(*a*) government-provided equity does not confer a benefit unless the investment is inconsistent with the usual investment practice of private investors;

(*b*) a government loan does not provide a benefit unless there is a difference between what the firm receiving the loan pays and what it would pay for a comparable commercial loan which the firm could obtain on the market; if different, the benefit conferred is the difference between the two amounts;

(*c*) a government loan guarantee does not confer a benefit unless there is a difference between the amount the receiving firm pays on the guaranteed loan and the amount the firm would pay for a comparable commercial loan without the government guarantee; if different, the benefit conferred is the difference between the two amounts, adjusted for any difference in fees;

(*d*) the provision of goods or services or the purchase of goods by a government do not confer a benefit unless provided for less than adequate remuneration or purchased for more than adequate remuneration, determined in relation to prevailing market conditions (including price, quality, availability, marketability, transportation, etc.).

V. COUNTERVAILING MEASURES

Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.[70]

The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of Art VI of GATT, 1994, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another:–

(*a*) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(*b*) in the absence of such domestic price, is less than either

(*i*) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(*ii*) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of Art. VI, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.[71]

No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting

70. For the Legal Text. See *supra* note 46 at 375.
71. *Ibid.*

party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bountry or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.[72]

No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.[73]

No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.[74]

No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

The Contracting Parties may waive the above requirement so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping of subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The Contracting Parties shall waive the above requirements so as to permit the levying of a countervailing duty, in cases in which they find that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party.

72. Ibid. Art. VI (3).
73. Ibid. Art VI (4).
74. *Ibid.* Art VI (5).

In exceptional circumstances, however, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty for the purpose referred to in sub-paragraph (b) of this paragraph without the prior approval of the Contracting Parties: Provided that such action shall be reported immediately to the Contracting Parties and that the countervailing duty shall be withdrawn promptly if the Contracting Parties disapprove.[75]

A system for the stabilization of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the commodity concerned that :

(*a*) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and

(*b*) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties.[76]

Determination of Dumping

For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.[77]

When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country of when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by

75. *Ibid*. Art VI (6).
76. *Ibid* Art. VI (7).
77. For the Legal Text of the Agreement on Implementation of Article VI of GATT, 1999 see *supra* note 46 at 377.

comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.[78]

Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices, which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.[79]

Costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations, costs shall be adjusted appropriately for those non-recurring items of cost, which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operation.[80]

The amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of :

(*i*) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the

78. *Ibid* Art 2(1) and (2) of Art. VI.
79. *Ibid*. Art 2.2.1 of Art. VI.
80. *Ibid*. Art. 2.2.1.1 of Art. VI.

domestic market of the country of origin of the same general category of products;

(*ii*) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

(*iii*) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.[81]

In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as importer, on such reasonable basis as the authorities may determine.[82]

A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect prices comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to above allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.[83]

When the comparison requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale,

81. *Ibid.* Art 2.2.2 of Art. VI.
82. *Ibid.* Art. 2.3 of Art. VI.
83. *Ibid.* Art. 2.4 of Art. VI.

provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.[84]

Subject to the provisions governing fair comparison the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.[85]

In the case where products are not imported from the country of origin but are exported to the importing Member from an intermediate country, the price at which the products are sold from the country of export to the importing Member shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely transshipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.[86]

Throughout this Agreement the term "like product" ("product similaire") shall be interpreted to mean a product, which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.[87]

This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994.[88]

84. *Ibid.* Art. 2.4.1 of Art. VI.
85. *Ibid.* Art. 2.4.2 of Art. VI.
86. *Ibid.* Art. 2.5 of Art. VI.
87. *Ibid.* Art. 2.6. of Art. VI.
88. *Ibid.* Art. 2.7. of Art. VI.

Determination of Injury

A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.[89]

With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.[90]

Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than *de minimus* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.[91]

The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not

89. *Ibid.* Art. VI.
90. *Ibid.*
91. *Ibid.* Art. 3.3. of Art. VI.

exhaustive, nor can one or several of these factors necessarily give decisive guidance.[92]

It must be demonstrated that the dumped imports are, through the effects of dumping, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.[93]

The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available date permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.[94]

A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as :

(*i*) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;

(*ii*) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially

92. *Ibid.* Art. 3.4. of Art. VI.
93 *Ibid.* Art. 3.5. of Art. VI.
94. *Ibid.* Art. 3.6. of Art. VI.

increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

(*iii*) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

(*iv*) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with the special care.[95]

Conclusion

Form the above discussion, it is clear that the WTO Agreements on Subsidies and Countervailing Measures represents the culmination of five years hard work of negotiators and their negotiating skills. The Ministerial Declaration which launched the Uruguay Round stated the objectives of the subsidies negotiations as follows:

Negotiations on subsidies and countervailing measures shall be based on a review of Articles VI and XVI and the MTN agreement on subsidies and countervailing measures with the objective of improving GATT disciplines relating to all subsidies and countervailing measures that affect international trade. A negotiating group will be established to deal with these issues.

Thus the primary goal of the subsidies and countervailing measures negotiations was to improve GATT disciplines that relate to all subsidies and countervailing measures.

The perusal of the view points put forward by various countries in the negotiations were characterised by a conflict between two points of view – one, being the view that saw subsidy discipline as the primary goal of negotiations, while the other view emphasised the objective of greater discipline over the use of countervailing measures. The Uruguay Round of Negotiations dwelt on both subsidies and countervailing measures

95. *Ibid.* Art. 3.7. of Art. VI.
96. *Ibid.* Art. 3.8. of Art. VI.

aiming in discipline both, it is obvious that the WTO success in negotiating the Multilateral Agreements on subsidies and countervailing measures is susceptible to the competing view points as outlined above.

The essence of the Multilateral Agreements on Subsidies and Countervailing Measures is the increase in disciplining the both subsidies and countervailing measures. The WTO Agreement on subsidies as explained in the beginning of this Article categorises subsidies as either prohibited, actionable or non-actionable; establishes a rebuttable presumption of serious prejudice based on, *inter alia*, a quantitive standard; articulates a benefit to the recipient standard for calculating particular types of benefits and requires public notice of other types of calculation methodologies; establishes measures to prevent circumvention of countervailing duty orders; and institutes a programme of phase-out of the use of export subsidies by developing countries.

The WTO Agreement on Countervailing Duties provides, *inter alia*, a quantitative definition of *de-minimus* subsidies below which a countervailing duty investigation would be terminated. It also establishes that imports may be cumulatively assessed only if subsidies are not *de-minimus* and volumes not negligible; provides that a petitioner in a countervailing duty case must show positive evidence of industry support before an investigation is initiated; recommends that the public interest (including the interest of consumers) be considered in determining whether the imposition of countervailing duties is appropriate; and establishes a mandatory review provision under which a countervailing duty order would lapse "(sunset)" after five years unless good cause were shown for its continuance.

In conclusion, it can be said that the WTO Agreement on Subsidies and Countervailing Measures meets the stated goals of *Punta-de-Este* Declaration for the negotiation on subsidies and increase disciplines on both subsidies and countervailing measures. However, as with anything new in the law (be it domestic or international), it is ripe for fresh interpretations as its limits are explored by those with a vested interest in doing so.

JUDICIAL RESPONSE TO THE RIGHT TO INFORMATION IN INDIA

*A. David Ambrose**

Generally speaking right to information or right to freedom of information refers to an individual's right or freedom to seek public information where information means any material relating to the affairs, administration or decision of a public authority. To build up a society of free people, information must flow freely without any hindrance. It is indisputable that in a democratic polity to ensure and facilitate the continued participation of people in the effective functioning of the democratic process, the people mus be kept informed of the vital decisions taken by the government and the basis thereof. Therefore, right to seek and receive public information becomes a pillar of democratic setup. Many countries such as Sweden, Australia, Canada and U.S.A. have expressly reocgnised this right.

At international level right to information has been recognised as a human right. Universal Declaration of Human Rights in Article 19 included free flow of information as human right essential for peace and development. Article 19 runs as follows:

"Every one has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

The International Covenant on Civil and Political Rights reinforced this provision: Article 19 (2) of the Covenant states: — Everyone shall have the right to freedom of expression, this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other, of his choice".

Further the UNESCO Declaration 1978 provided for "the exercise of freedom of opinion, expression and information, recognised as an integral part of human rights and fundamental freedoms".

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If that is so, whether right to information has been recognsied in India? As the culture of the Indian governance has so far been one of secrecy, apart from the Official Secrets Act 1923, taken from Britain no other central statute touching on this field exists.[1] The Official Secrets Act, 1923 without defining what constitutes an 'official secret' created a climate of confidentiality around all governmental activity thereby making it difficult for an individual to obtain any information regarding the functioning of the government.

However, the Indian judiciary acknowledging that the participatory role of the public can be fulfilled in any democracy only if it is an open government, where there is full access to information in regard to the functioning of the government, has to some extent, recognised the right to information. A host of decisions of Indian judiciary clearly acknowledge the existence of the right of freedom of information in India. It is proposed to discuss in this short paper the positive role-played by the Indian judiciary in developing and recognising the right to information in India.

THE CONCEPT OF PRIVILEGED DOCUMENT

The post independence period in India witnessed the emergence of many new constitutional rights including the right to clean environment, right to education, right to privacy etc. the right to information is one such right that has been accorded Constitutional recognition in this period by the Indian judiciary.

However, right to information did not get itself graduated directly to a constitutional (fundamental) right. The Indian courts had to first break open the privilege shield that clothed all the governmental actions.

The privilege shield owes its origin to the "crown privilege" which can be traced to 'crown prerogative right' to prevent the disclosure of state secrets. It has been established well that 'crown privilege" refers to the rule that certain evidence is inadmissible on the ground that it's adduction would be contrary to the public interests and the important aspect of this crown privilege, is that it cannot be waived. With the growth of democratic government, the prerogative right developed into and became

1. Though a bill to provide Freedom to every citizen to secure access to information under the control of public authorities called Freedom of Informations Bill, 1997 was introduced in the Lok Sabha, it is yet to see the Light of the day. However, there are two State Acts; the State of Goa passed the Right to Information Act in 1997 followed by the State of Tamil Nadu, Right to Information Act 1997 passed by the Tamil Nadu Government in May 1997 (Act 24 of 1997).

identified with public interest and therefore we find the 'privilege Documents' recognised on the public interest.[2]

State privilege shield in India is embodied in the "state privileges' found in the Indian Evidence Act. Section 123 and 124 of the Evidence Act protect from disclosure, documents and communication which are considered to be privileged.

Under section 123, no one is permitted to give evidence derived from:

(1) Unpublished official records

(2) Relating to "Affaris of state"

(3) Except with the permission of the departmental head,

(4) Who may either give or withhold the permission.

Under section 124, no public officer can be compelled to disclose communications:

(1) Made to him in Official confidence,

(2) If he considers that public interest would suffer by such disclosure.

Section 162 of the Evidence Act deals with the powers of the court regarding admissibility of documents. It states that the court, if it thinks fit, may:

(1) Inspect any document, unless it refers to matters of the state, or

(2) Take other evidence to enable it to determine its admissibility.

The first response of the Indian judiciary in upholding the right to freedom of information is to dilute the state privilege concept to the possible extent.

Ruling on the relevant provision of India Evidence Act, the Supreme Court way back in 1961 in *State of Punjab* v. *Sukhdev Singh*[3] laid down the following propositions of law:

(1) Disclosure of information to privileged documents was a private interest whereas the protection of such interest was a public interest.

(2) The courts could decide whether the documents related to "Affairs of State".

2. Generally see "*Documents Privileged in public interest*", Law Quarterly Review, Vol. 39 p. 476. Cf. *State of U.P.* v *Raj Narain* AIR 1975 SC 865 at 879-880.
3. AIR 1961 SC 493.

(3) Such documents relating to "Affairs of State" could either be noxious (causing public injury) or not noxious (not causing public injury).

(4) The courts could not decide whether documents relating to "Affairs of State" were noxious or not noxious. This could be decided only by the departmental head.

In *State of U.P.* v *Raj Narain*[4] the main issue was whether or not privilege under secion 123 of Indian Evidence Act can be claimed in respect of the unpublished blue book *viz.*, the circulars regarding the security arrangements of the tour program of Shrimati Indira Nehru Gandhi and the instructions received from the government of India and the Prime Minister's secretariat on the basis of which police arrangements for construction of rostrum, fixation of loud speakers, and other arrangements were made and the correspondence between the state government and the government of India regarding the police arrangements for the meeting of the minister.

The majority judgment of the Supreme Court delivered by the Chief Justice Ray, while elaborating the scope of sec 123 and sec 164 of Indian Evidence Act, held that the foundation of law behind sections 123 and 164 of Indian Evidence Act is the same as in English law. The court further held that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if disclosed would injure public and national interest. Public interest which demands that evidence be withheld is to be weighed against the public interest in the administration of justice that courts should have the fullest possible access to all relevant materials. When public interest outweighs the latter, the evidence cannot be admitted. The court will proprio motu exclude evidence the production of which is contrary to public interest. It is in public interest that confidentiality shall be safeguarded. The reason is that such documents become subject to privilege by reason of their contents. Confidentiality is not a head of privilege. It is a consideration to bear in mind. It is not that the contents contain material, which would be damaging to the national interest to divulge but rather that the documents would be of class, which demands protection.[5]

However Justice Mathew who delivered separate judgment to some extent, watered down the "privileged documents" concept by saying that

4. *Supra* note 2.
5. See Chief Justice Ray's judgment delivered on behalf of himself and three other Judges.. *Ibid.* at p. 871-876.

"I am not satisfied that a mere label given to a document by the executive is conclusive in respect of the question whether it relates to affairs of state or not. If the disclosure of contents of the documents would not damage public interest, the executive cannot label it in such a manner as to bring it within class of documents, which are normally entitled to protection".[6]

Justice Mathew further held that 'If on inspection, the court holds that any part of the blue book or other document does not relate to affairs of state and that the disclosure would not injure public interest, the court will be free to disclose that part and uphold the objection as regards the rest provided that this will not give a misleading impression. The principle of the rule of non-disclosure of records relating to affairs of state is the concern for public interest and the rule will be applied no further that the attainment of that objective requires.[7]

The *Raj Narain's Case* in effect diluted the rigid privilege document concept and the non disclosure rule by stating that the privilege status should be accorded to any documents of the government not merely because they are labeled as government documents but according to the contents of the documents. If the contents of the documents do not relate to any affairs of the state then the documents are not entitled to protection and the rule of non disclosure will not be applicable to those documents.

Right to Know

Apart from diluting the privileged concept, Justice Mathew in *Raj Narain's Case* recognised the existence of right to know as derived from the concept of freedom of speech and expression. The Supreme Court held that in a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. *They are entitled to know the particulars of every public transaction in all it's bearing.*[8] Thus the Supreme court not only acknowledged the citizen's right to know but also found that it emerges from freedom of speech and expression.

Right to Information

The right to know was further elaborated by Justice Bhagwati (as he then was) in the *S.P. Gupta and other* v. *Union of India and others*

6. *Ibid.* at p. 866.
7. *Ibid.* para 87 at p. 886-887.
8. *Ibid.* para 74 at p. 884 (emphasis supplied).

famously known as *Judges Transfer Case,*[9] which involved the question of whether the correspondence between Chief Justice of India and the Union Law Minister ought to be disclosed. In this case, a fundamental change in the conception of the right of disclosure of information took place. The Court while adding a afresh liberal dimension to the need for increased discloser in matters relating to public affairs, held that the concept of an open government is the direct emanation the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19 (1) (a). Therefore, disclosure of information in regard to the functioning of government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as mush as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest.[10]

In the *Judges Transfer Case* overruling the earlier *Sukhdev Singh's Case* it was decided firstly that the right to disclosure is not a private interest but public interest. Secondly, whether or not the disclosure of documents relating to "affairs of the state" would injure public interest could be decided by the courts. Thirdly, the court also decided that the documents relating to the "affairs of the state" could be ordered to be disclosed even though they would cause injury to public interest, if the court came to the conclusion that the competing public interest of disclosure was superior in the facts and circumstances of the case.

The propositions of law that have been laid down by the *Judges Transfer Case* can be summed up in the following manner:

(1) Disclosure of documents relating at to "Affairs of State" involves two competing public interest viz., the right to disclosure of information competing with the right to protect information relating to "Affairs of the State".

(2) The court can decide not only whether the document relates to "Affairs of State' but also whether or not the disclosure of document relating to "Affairs of State" would be injurious to public interest.

(3) Certain types of documents would be protected, those for example which:

9. AIR 1982 SC 149.
10. *Ibid.* para 66 p. 234.

(*a*) Endanger national safety, or

(*b*) Endanger diplomatic relations with other countries, or

(*c*) Result in disclosure of State secrets.

(4) Whether or not other documents relating to "Affairs of State" and which may result in injury of public interest ought to be disclosed would depend on the balance of the two competing public interests, the right to protect disclosure of documents relating to "Affairs of State" and the right to freedom of information.

The right to know or information was jsutified by the court by saying no democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. It is only if people know how government is functioning that they can fulfill the role which democracy assigns to them, and make democracy a really effective participatory democarcy.[11]

The Court further said that today it is common ground that democracy has a more positive content and the orchestration has to be continuous and pervasive. This means *inter alia* that people should not only cast intelligent and rational votes but also should exercise sound judgment on the conduct of the government and the merits of the public policies, so that democracy does not remain merely a sporadic exercise in voting but becomes continuous process of government-an attitude and habit of mind. But this important role people can fulfill in a democracy only if it is an open government *where there is full access to information in regard to the functioning of the government.*[12]

The apex court thus made it clear that in a democratic country like India, right to information is a must for the smooth functioning of the democratic process and the right to information flows from the right to freedom of speech and expression.

In 1986, the Bombay High Court applied this ruling in *Bombay Environmental Action Group* v. *Pune Cantonment Board*, and observed that the right of inspection of documents as claimed by the petitioners must flow freely from the said fundamental right, i.e., the right to free speech and expression under Article 19 (1) (a).[13]

11. *Ibid* para 63 at p. 232.
12. *Ibid.* para 64 at p. 232-233 (emphasis supplied).
13. *Lawyers Collective*, vol. 5 No. 2, pp. 24-25.

The Supreme Court in *Indian Express (Bombay) Pvt. Ltd* v. *Union of India*[14] held that fundamental principle invested in freedom of speech and expression is peoples right to know. While emphasizing the importance of freedom of press as included in Art. 19 (1) (a) which guarantees freedom of speech and expression and non-interference in the freedom of press, the Supreme Court observed that over the years government in different parts of the world have used diversified methods to keep press under the control. The court equated the interference of the government with the freedom of press with that of interference with free flow of information and said that it is with a view to checking such malpractices which interfere with *free flow of information*, democratic constitutions all over the world have made provisions guaranteeing the freedom of speech and expression laying down the limits of interference with the freedom of press.[15] Thus, the apex court through its three Judges bench made a connection between free flow (freedom) of information and freedom of speech and expression by saying that interference with the freedom of press (which is included in the freedom of speech and expression) means interference with free flow of information.

Similarly, in *L.K. Koolwal* v. *State of Rajasthan*[16] the Rajasthan High Court while considering the public interest petition by a citizen seeking protection against the neglect of sanitation by the state which led to pollution hazards held that the citizen has right to know about the activities of the state, the instrumentalities, the departments and the agencies of the state. The privilege of secrecy, which existed in the earlier times that the state is not bound to disclose the facts to the citizens or the state cannot be compelled by he citizens to disclose the facts, does not survive now to a great extent guaranteed under Article 19 (1) (a) of the Indian constitution the right of freedom of speech is based on the foundation of the freedom of right to know.[17]

Recently, the Supreme Court, when it was asked to give directions the details of the reports and events mentioned in the Vohra Committee Report be fully and completely disclosed, held in *Dinesh Trivedi* v. *Union of India* that to ensure the continued participation of the people in the democratic process, they must be kept informed of the vital decisions taken by the government and the basis thereof. Democracy therefore, expects openness and openness is a concomitant of free society. Sunlight is the best disinfectant.[18]

14. AIR 1986 SC 515 para 31 at p. 527.
15. *Ibid.* para 31 at 527 (emphasis supplied).
16. AIR 1988 Raj 2.
17. *Ibid.* at p. 4.
18. (1997) 4 SCC p 306 at p 314.

Some New Developments

Having been established that right to information is very much included in the freedom of speech and expression guaranteed in Art. 19 (1) (a) of our Constitution, the Indian Judiciary has started giving new dimensions to the right to freedom of information. In *Secretary, Ministry of I & B Government of India* v. *Cricket Association of Bengal and others*[19] which involved the cricket association's right to telecast cricket match, the Supreme Court has taken the view that the freedom of speech and expression includes right to acquire information and disseminate it, and broadcasting is a means of communication, and sport is an expression of self.

The Supreme Court held that right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed, entertained. The former is the right of the telecast and latter that of the viewers. The Court further held that the freedom guaranteed by Art 19 (1) (a) does include the right to receive and impart information.[20]

While deciding on a prayer for direction to the electricity board not to apply power cut during the telecast hour of the Wills World Cup Cricket 1996, the Karnataka High Court in *K. M. Nataraj* v. *State of Karnataka* followed the *Secretary, Ministry of Information and Broadcasting Case* and held that so far as the contention of the right to information and right to acquire knowledge about the game of cricket through electronic media is a right guaranteed to the petitioners under Art. 19 (1) (a) of the Constitution of India is concerned, there cannot be any dispute on this proposition.[21]

It should be noted that the right to information developed to ensure public access to the so called privileged documents has been slowly extended to other informations, pertaining to the enrichment of one's knowledge.

Limitations on Right to Information

No right including a fundamental right is absolute and without any limitations. This general principle of jurisprudence even applies to right to information. While recognising the right to information, the Indian courts have indeed taken pains to strike a balance between individual right to information and the public security and thereby identifying certain limitations on this right.

19. AIR 1995 SC 1236 at para 17 p 1250.
20. *Ibid*. at p 1307.
21. AIR 1997 Kant 36 at 43 para 14.

In *Raj Narain's case* the Supreme Court held that the right to know which is derived from the concept of freedom of speech, though not absolute is a factor which should make one worry, when secrecy is claimed for transaction which can at rate have no repercussions on public securty.[22]

In *S.P. Gupta* v. *Union of India* the court held that the disclosure of documents relating to the affairs of the state involves two competing dimensions of public interest, namely, the right of the citizen to obtain discloser of information, which competes with the right of the state to protect the information relating to it's crucial affairs. It was frutgher held that, in deciding whether or not to disclose the contents of a particular document, a judge must balance the competing intrest and make his final decision depending upon the particular facts involved in teach individual case. It is important to note that it was conceded that there are certain classes of documents, which are necessarily required top the protected, e.g., cabinet minutes, documents concerning the national safety, document which affect diplomatic relations or relate to some state secrets of the highest importance, and the like in respect of which the court would ordinarily uphold Governments claim of privilege. However, even these documents have to be tested against the basic guiding principle which is that wherever it is clearly contrary to the public interest for a document to be disclosed, then it is in law immune from disclosure.[23]

The Rajasthan High Court in *Koolwal* v. *State of Rajasthan*[24] held that under Art.19 (1) (a) of the Constitution there exists the right of freedom of speech. Freedom of speech is based of the foundation of the freedom of right to know. The state can impose and should impose the reasonable restrictions in this matter like other fundamental rights where it affects the national security and any other allied matter affecting the nation's integrity.

Very recently, the Supreme Court in a case involving disclosure of medical information, envisaged a clash between person's "right to be alone" and another person's "right to be informed, in *Dr. Tokugha Yepthomi* v. *Apollo Hospoital Enterprises Ltd.*[25] while holding that the disclosures by hospital concerned (Respondents) that a patient (Appellant) was HIV Positive would not be violative of either the rule of "confidentiality" or the appellant's "right to privacy" observed. "Doctors are morally

22. *Supra* note 2 at p 884.
23. Cf (1997) 4 SCC 306 at 314.
24. *Supra* note 16 at p 4.
25. 1998 (6) *Scale* p 230 para 26 at p 238.

and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true facts may amount to an invasion of the right to privacy which may sometimes lead to the clash of a persons right to be let alone with another persons right to be informed".

Thus, it becomes clear that the freedom of information is subject to certain limitations. If the public interest warrants the non-disclosure of information, then freedom of information cannot be exercised. Further, freedom cannot be exercised if it affects nation's integrity and security. Apart from these limitations, since right to information is included in the right to freedom of speech and expression the restrictions that are applicable to right to freedom of speech and expression enumerated in Art. 19 (2) will also be naturally applicable.

Evaluation and Conclusion

From the above dissuasion it is evident that though the right to freedom of information or the right to know is not a specified fundamental right under our Constitution, the Indian Judiciary, by holding that it flows from freedom of speech and expression under Art. 19 (1) (a) of the Constitution, has accorded to the freedom of information, the constitutional that too fundamental rights status.

In the olden day when information technology was not so well developed and the welfare state concept was not followed, it was thought it is better to have secret government. It was thought that all the Government documents are privileged irrespective of their contents. Then the culture of governance was one of secrecy and a climate of "confidentiality" was around all governmental activity. However, the development of democratic process, the fundamental right to freedom of press and the development of information technology jointly have highlighted the need for an open Government, the need for having full access to information in regard to the functioning of the government. Inadequacy of legal framework facilitating flow of information was badly felt. Under the old Official Secrets Act 1923, and the sections 123, 124 and 162 of Indian Evidence Act it was not possible to compel the government to become one of openness.

First, as a general response the Indian Judiciary diluted the "privilege concept" and held that the privilege status should be given only according to the matter of substance of the documents and not to all government documents irrespective of their contents.

Secondly, the Indian judiciary well established the citizen's right to know or right to freedom of information. The right to freedom of

information once considered as a private right was recognised as a public right.

Thirdly, the right to information was found to flow from the citizen's fundamental right to freedom of speech and expression guaranteed under Art. 19 (1) (a) of our constitution. The Indian judiciary was quick to point out that only information whose disclosure would affect public interest and integrity and security of India can be with held. This, the Judiciary termed as restrictions on freedom of information.

It is pertinent to note that the judiciary developed and established the right to freedom of information referring only to Governmental Information i.e. information about the functioning of the government, its decision making and about other like activities. By information it meant only governmental information clothed by the secrecy veil. It stressed the need for openness in governmental functioning and developed the concept of right to information as embodied in Art 19 (1) (a) of our Constitution. Since the Judiciary thought that freedom of information is very much essential for the smooth and successful functioning of democratic governments, it included right to information in the fundamental right to freedom of speech and expression. Thus the Indian Judiciary successfully made right to information as a fundamental right.

The State and Central Bills on right to information, to supplement the Judicial response to information refer only to governmental information. Freedom of Information Bill, 1997 introduced in the Lok Sabha in Section 2 (d) defines information as follows "information means any material relating to the affairs of the public authority". Similarly, the Tamil Nadu Right to Information Act 1997 as introduced in the State Assembly in Sec. 2 (3) says that "Information" includes copy of any document relating to the affairs of the state or any local or other authorities constituted under any act for the time being in force for a statutory authority or a company, corporation or a co-operative society or any organization owned or controlled by the government.

Thus the right to information is guaranteed against governmental action withholding informations relating to the functioning of the government in the guise of privilege or official secrecy. Any judiciary in a democratic country can be proud of this great achievement.

However, of late the Judiciary knowingly or unknowingly, by information, also tends to mean information relating to enrichment of knowledge or dissemination of knowledge. The recent two decisions, *the Secretary Ministry of Information and Broadcasting case* decided by the Supreme

Court and the *K.M. Nataraj's Case* decided by the Karnataka High Court discussed above, prove this point very much.

Further more, even though the right to information has been recognised by the Indian Judiciary, it's scope and extent has yet to be fully explained by the Indian Courts.

It must be remembered that using the right to information to have access to government documents is more important than using it for acquiring knowledge etc. As the Bible says - *"And ye shall know the truth and truth shall make you free"* the right to information must be largely used to remove the cloud of secrecy over the governmental actions and thus enabling the citizens to lead a free and unfettered life.

THE CONSTITUTIONAL RIGHT TO EQUALITY IN GOVERNMENT CONTRACTS: JUDICIAL EXPOSITION

*J.K. Chauhan**

I. Introduction

The modern State is a dispenser of social welfare measures. This has resulted in proliferation of government largess in the form of jobs, contracts, licences, quotas, etc. New sources of wealth are being created in the nature of privileges of rights.[1] The government is the custodian of the finances of the state and has to protect its financial interests.

Contracts have been indispensable tools for carrying on business amongst private parties. They have now become almost equally important in conducting the affairs of the state. Construction of public works, procurement of defence material, the giving of largess, and vital research and development take place to a substantial extent under the terms of contracts entered into between the government and private persons or organisations. As the requirements of the state are extensive and wide ranging, the government has to purchase from small items like brooms to big items like aeroplanes. There is no doubt that some of the goods and services are also provided by the government owned factories, corporations, dockyards, workshops and research establishments. But most of the state requirement are met through contracts whereby rights and duties are created, not by the exercise of power that is peculiarly governmental, but by voluntary acts of the parties.[2]

The state can carry on its executive functions through or without legislation. The exercise of such functions is subject to the fundamental rights guaranteed in Part III of the Constitution of India. Article 14 in this Part guarantees equality before the law or the equal protection of the laws to all persons. The doctrine of equality does not, however, mean universal application of the same law to all persons in all circumstances. Some kind of classification is, therefore, permissible. What is forbidden is class

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1. Charles A Reich, "The New Property", 73 Yale L.J. 733 (1983-64).
2. Turnip Collins, "Government Contracts", 28 (1972).

legislation, not classification which must be founded on an intelligible differentia distinguishing certain persons or things, that are grouped together from others, who are left out of the group and that the differentia must have a rational relation to the object of the law. In order to be unconstitutional, the law must not only create inequality but also such inequality should be unreasonable and arbitrary.[3] This is a matter for the courts to decide. There is no set formula of classification. Its extent, range and kind depends on the subject matter of the legislation. The prevailing conditions, including the social, economic and political factors at work at a particular time are all taken into consideration.

Thus every state action of the executive government must be informed with reason and be free from arbitrariness. That is the very essence of the rule of law and its bare minimum requirement. When the government is trading with the public, the doctrine of equality demands absence of arbitrariness and of discrimination in contractual transactions. Its activities have a public element and, therefore, there should be fairness and equality. It need not enter into a contract with anyone. Whenever it enters, it must act without discrimination and by adopting a fair procedure. This proposition would hold good in all cases, where the interest sought to be protected is a privilege.[4] Where the government is dealing with the public, whether by way of giving jobs, entering into contracts issuing quotas or licences, or granting other forms of largess, it cannot act arbitrarily at its sweet will and cannot, like a private individual, deal with any one it pleases. Its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant.

The purpose of this paper is to examine judicial pronouncements on the allegations of the violation of the doctrine of equality in the matters of government contracts.

II. Judicial Approach to Government Contracts

(a) Earlier view

The contractors have often invoked the provisions of article 14. Their grievances have been numerous. They have alleged that their lowest tenders have been wrongfully and arbitrarily rejected and that this has not only resulted in discrimination but also in loss of revenue or public money. Their grievance is that a contract, already awarded to a particular contractor, has been arbitrarily cancelled to prefer another contractor. This has led

3. See J.K. Mittal, "*Right to equality and the Indian Supreme Court*", 14 Am. J. Comp. L 422 at 431 (1965).
4. *R.D. Shetty* v. *International Airport Authority of India*, (1979) 3 S.C.C. 489 at 507-8.

to unequal treatment. Moreover, in some cases it has been alleged that a particular contractor has been wilfully and arbitrarily black-listed, so as to deprive him from entering into contracts with the government causing discrimination. When such cases came before the courts, the view taken by the government is that there is no discrimination involved in such actions. It has been argued that, like an individual, the government is free to decide with whom it would like to have contractual relationship. Further, when it makes a contract, it does not act in exercise of its sovereign functions but is performs mere commercial functions. The making of a contract is a commercial function and not a government function.

The view taken by the courts is that like a trader the government has to act in its best interest. No person has a fundamental right to insist that the government must enter into a contract with him in doing its business or work. Like a private person, it has a right to choose or to enter into a contract with any particular person, It has also a right to decide on the terms of the contract like the amount of earnest money and income tax clearance certificate, alongwith the submission of tender.[5] The government also enjoys unrestricted right to determine the persons with whom it will deal. It can reject the lowest tender of the person who has been blacklisted.[6] The constitulional right under Article 14 does not extend to compelling any third party including the government to enter into a contract with any particular individual. The duty to act fairly may include duty to act judiciously. There would be cases where vested rights exist. In the matter of contracts, there is no vested right in any person. In *C.K. Achutan* v. *State of Kerala*,[7] the petitioner entered into contracts for the supply of milk to the government hospital at Cannanore since 1946. Previous to this, his brother was in the same business and had similar contracts from 1936. In 1957, he and a cooperative milk suply society submitted their respective tenders for supply of milk. After scrutiny his tender was accepted. Later, however, the district medical officer cancelled his contract and gave it to the society. In a petition under Article 32, the Supreme Court upheld the action of the district medical officer as non-discriminatory. The Court was of the view that it was perfectly open to the government to choose a person of its liking. The Court said that where one person was preferred to another, the aggrieved party could not claim the protection of Article 14, because the choice of a person to fulfil a particular contract must be left to the government. The government contract stood on no different footing from

5. *Vedachala Mudalier* v. *Divisional Engineer*, Highway, A.I.R. 1959 S.C. 490.
6. *K. Bhaskaran* v. *State of Kerala*, A.I.R. 1958 Ker 333 at 334.
7. A.I.R. 1959 S.C. 1081.

a contract of a private party.[8] This case was followed by a Kerala High Court in *V. Punnen Thomas* v. *State of Kerala*,[9] wherein the petitioner was blacklisted as he commited irregularities in connection with the tender. On this account, the government had to suffer considerable loss. The grievance of the petitioner was that he was not heard before the passing of impunged order. The High Court observed that although every citizen has the right to carry on trade or business, he has no fundamental or other right to insist upon the government to enter into business with him. When a person is excluded from entering in to business with the government in accordance with the law, there is no question of invasion of civil rights and rules of natural justice. Article 14 cannot, therfore, be invoked.[10]

But as would be seen presently, the government cannot enter into a contract which may benefit any individual at the cost of the public finance. Such contract would be both unreasonable and against public interest. For the first time the Supreme Court in *Rasbihari Panda* v. *State of Orissa*[11] decided that Article 14 had been violated in case of government contracts. In this case, the validity of Section 10 of Orissa Kendu Leaves (Control of Trade) Act 1961 was questioned. This section vested power in government to dispose off Kendu leaves as it likes. In pursuance of this power, firstly, the government invited the tenders from those licensees who had done work satisfactorily during the previous year. This act of the government was challenged on the ground of violation of Articles 14 and 19 (1)(*g*). The court observed that original scheme of entering into contracts with the old licensees and to renew their terms was open to grave objection. It sought arbitrarily to exclude many persons interested in the trade. The new scheme under which the government restricted the invitation to make offers to those traders who had carried out the contracts in the previous year without default and to the satisfaction of it was also objectionable. The right to make tenders for the purchase of Kendu leaves being restricted to a limited class of persons, it effectively shut out all other persons from carrying on trade in Kendu leaves. The new entrants into that business were barred and it was ex-facie discriminatory. It enabled the existing contractors to carry on the business. Both the schemes evolved by the government were violative of Articles 14 and 19 (1)(g) because they gave rise to a monoply in the trade in the hands of certain traders and singled out other traders for discriminatory treatment.[12]

8. *Id.* at 1492.
9. A.I.R. 199 ker. 81.
10. *Id.* at 84.
11. A.I.R. 1969 S.C. 1081.
12. *Id.* at 1088.

The government has a right to reject a higher tender and accept a lower tender. It can do so where it is satisfied that an offer of a lower tender is, on an overall consideration, preferable to the higher tender, The Supreme Court applied this principle in *Trilochan Mishra* v. *State of Orissa*.[13] In this case, the government invited tenders. On the receipt of the tenders, the highest tender was not accepted. The lowest tenderer was asked to raise the amount to the highest offered before the same were accepted The court observed that there was no loss to the government and merely because the government preferred one tender to another, no complaint can be entertained. Government certainly has a right to enter into a contract with a person well known to it and specially who has faithfully performed his contracts in the past in preference to an undesirable or unsuitable or untried person. Moreover, government is not bound to accept the highest tender but may accept the lower one in case it thinks that the person offering the lower tender is, on an overall consideration, to be prefered. Similarily in *State of Orissa* v. *Harinarayan Jaiswal*[14] the discretionary power of the government to accept or reject the tenders without assigning any reason under Section 29 (2) of the Bihar and Orissa Excise Act, 1915 was challenged as violative of Articles 14 and 19 (1) (g). The respondents were the highest bidders but their bid was rejected. *Hegde, J.* speaking on behalf of the Court observed that the government is the guardian of the finances of the state. It is expected to protect the financial interest of the state. Hence quite naturally, the legislature has empowered the government to see that there is no leakage in its revenue. It is for the government to decide whether the price offered in an auction sale is adequate. While accepting or rejecting a bid, it is merely performing an executive function. The correctness of its conclusion is not open to judicial review. The Court observed that the plea of contravention of Articles 14 or 19 (1) (g) does not arise in these cases.[15]

The Supreme Court reaffirmed the above porinciple in *P.R. Quenim* v. *M.K. Tandel* [16] saying that the government shall be at liberty to accept or reject any bid without assigning any reason. Therefore, it is not violative of Article 14. In matters relating to contracts with the government, the latter is not bound to accept the tender of the person who offers the hightest amount.

13. (1971) 3 S.C.C. 153.
14. (1972) 2 S.C.C. 36.
15. *Id.* at 44.
16. (1974) 2 S.C.C. 169.

(b) *Contemporary View*

Where state is dealing with individuals in transactions of sale and purchase of goods, the two factors are important for consideration, *Firstly*, an individual is entitled to deal with the government. *Secondly*, individual is entitle to fair and equal treatmment. A duty to act fairly means a duty to observe certain aspects of rules of natural justice. The blacklisting of contractors without hearing is not valid. This view was taken by the Supreme Court in *Erusian Equipment and Chemicals Ltd.* v. *State of West Bengal*[17]. In this case, the petitioners had been bidding at the sale of cinchona by the state government. After a certain date, all the offers of theirs were rejected even when they were highest. The government in the meanwhile, learnt from a secret letter from the Collector of Customs of the firm's practices which were under investigation. Therefore, the government had blacklisted the firm without giving it any notice. The petitioner challenged the action of the government. The court allowed the appeal and held that equality of opportunity applies to matters of public contracts. The government cannot choose to exclude anyone by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matters of public contracts.[18] The court further explained that blacklisting has effect of prevening a person from the privilege and advantage of entering into lawful relationship with the government for purpose of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist.[19]

Once again, the Supreme Court in *R.D. Shetty* v. *International Air Port Authority of India*[20] got an opportunity to examine the question of availability of the right ot equality guaranteed by Article 14 to the contractors. In this case, the terms and conditions of tender were changed after opening the tenders. The petitioner had not submitted the tender, since he did not fulfil the required qualifications. The change effected relaxed the terms and conditions, qualifications, experience, etc. The petitioner filed the petition challenging the action of the Airport Authority on the ground that he did not know that the terms and conditions would be changed, otherwise, he too would have submitted the tender earlier. By relaxing the terms and conditions contract was given to Mr. Kumaria (respondent No.

17. (1975) 1 S.C.C. 70.
18. *Id.* at 74.
19. *Id.* at 77.
20. *Supra* note 4.

4). The court, holding the act of the authority *ultra-vires*, observed that though it is inappropriate to speak of a person as a 2nd class hotelier, the expression when used in the tender was not meaningless or purposeless. It was inapt but it meant to denote a person conducting or running a 2nd class hotel or restaurent and having 5 years such experience. It was a requirement meant to be objectively satisfied and respondent number 4 did not satistfy this requirement.[21] In this case the court explained the discretionary powers of statutory authorities in accepting or rejecting the tender and observed that there was no statutory requirement of awarding the contract by inviting tenders. The International Airport Authority of India did not reject all the tenders and then negotiate with respondent 4. The contract was given in response to the tenders of respondent 4. Action of respondent No. 1, therefore, cannot be justified on ground that the same could have been achieved by rejecting all the tenders and entering into direct negotiation with the respondent no. 4[22]. While expressing the need to follow the standard of norm by the state, the court observed that it is a well settled rule of Administrative law that an executive authority must be rigorously held to the standards by which it professes its action to be judged and it must scrupulously observe those standards.[23]

The Supreme Court laid down two limitations in *Kasturi Lal Reddy* v. *State of Jammu and Kashmir*[24] which structure and control the discretion of the government in regard to the grant of largess. The first is in regard to the terms on which largess may be granted and the other in regard to the persons who may be recipients of such largess. As regards the first limitation, it is imperative that if the government awards the contract, or leases out or otherwise deals with its property or grant any other largess, it would be liable to be tested for its validity on the touchstone of reasonableness which has to be applied in order to determine the validity of government action. In this case, the court observed that the government is not bound to advertise and invite offers to enter into a contract. The government is entitled to negotiate with any one it likes.[25] But it is submitted that this position may hold good as offers are not invited by advertisements. If offers are invited through advertisements, then it cannot deal with anyone it likes. The government has to justify its action in not accepting the highest tender.

21. *Id.* at 500.
22. *Id.* at 502.
23. *Id.* at 503.
24. (1980) S.C.C. 1 at 11.
25. The court reiterated the same view in *State of M.P.* v. *Nand Pal* A.I.R. 1987 S.C. 251.