ECONOMIC AND LEGAL ASPECTS OF CONSUMER PROTECTION IN INDIA:
WITH A COMPARISON OF THE GERMAN EXPERIENCE

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November, 1997

Dedicated to
My Parents

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This is to certify that I Panta Murali Prasad have carried out the research embodied in the present thesis for the full period prescribed under Ph.D. Ordinances of the University.

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INTRODUCTION

There is a general recognition of the need for consumer protection in the context of widespread prevalence of market imperfections. The study of consumer protection requires analysis of both the legal as well as the economic dimensions of the problem. In recent years considerable interest has been evinced in the economic analysis of consumer protection by involving models of asymmetric information, nature of goods and misperception of product risks by the consumer. Similarly, there has been growing interest in the legal analysis of consumer protection by emphasising the weaker party protection and unequal bargaining power between the consumer and producer. The fact is that consumer protection is essentially interdisciplinary in nature calling for legal economics. Recent researches in the field are oriented towards economic analysis of the alternative legal system that is liability and regulation, in order to induce the tortfeasor to take precautionary measures that would reduce the risk of harm.

Statement of the Problem

Under perfect market conditions, consumers are protected by the equilibrium price and there will be hardly any need for state intervention. However, in the context of imperfect market condition and the inability of the market- induced correctives to reduce the market imperfections, state intervention is favoured to protect the interest of the consumers. The state intervention may be either by way of a liability system or a regulatory system or a combination of both. According to the theory of `liability versus regulation´ none of these systems is unique in providing the tortfeasor to take precautions in order to reduce risk of harm. Thus, the mixed use of these alternative legal systems is a necessary condition. In India, the consumers are protected by both the liability system (the Consumer Protection Act, 1986) and the regulatory system (the Bureau of Indian Standards Act, 1986). The present study attempts a critical evaluation of each of the systems in India. In addition, the functioning of the German consumer protection is compared with a view to draw some possible lessons for India.

Importance of the Study

India, being a developing country, has to face a lot of challenges in order to provide a good quality of life for her citizens. In the case of consumers, especially when the country is in transition from an agricultural economy to an industrial economy, the adaptation of liberalisation policies, looking forward to globalisation may certainly raise a doubt about the position of the consumers in the market place. In addition, rapid changes in science and technology may perhaps change the nature of goods from search goods to experience and credence goods. The presence of the experience goods in the market place may increase the asymmetric information about the attributes of the products between the consumer and the producer. Thus, there is a possibility of presence of not only *race to the bottom* situation in the market place but also there is the possibility that a consumer may have misperception about the product risks. The presence of limitations to correct the market imperfections by the market induced correctives as well the ignorant and the unorganised consumers are unaware of their rights and obligations in the market place stress the importance of consumer protection by the state intervention. Thus, for accelerating the pace of consumer protection in a developing country like India, there is a need to have sustained consumer research, information, education and advocacy. The economic analysis of the alternative legal systems and the review of the experiences of consumer protection in a civil law country like Germany, are intended to make the study not only interdisciplinary but also comparative in nature.

Growing Literature

Economic theory predicts that consumers are sovereign, and the prevalence of the perfect market conditions does not stress the need of much state intervention in order to protect the interests of the consumer. However, not only the divergence of perfect market conditions because of consumer exploitation, unequal bargaining power, externalities, nature of goods, and asymmetric information but also the market induced correctives such as signals, reputation, no asset specificity, and misperception of product risks by the consumers may not be able to correct the market imperfections and call for state intervention in order to protect the consumers. The works of Akerlof, P. Nelson, M. R. Darby and E. Karni, G. C. Priest,

Galbraith, O. E. Williamson, R. H. Coase, W. Emons J. Tirole, M. Spence, C. Shapiro, F. Allen, A. Eisenberg will be reviewed in order to build up the theory.

Once the need of state intervention is recognised to protect the consumer interests, then, the question arises as to what are the methods and means to protect the consumers by the state? There are several ways and means to protect the consumers such as mandatory disclosure of information, enacting anti-trust laws, alternative legal system etc. For one reason or the other the study will be limited to the alternative legal system. Before going on to examine the functioning of the alternative legal system in India, it is necessary to examine the justification of the legal economics analysis of the alternative legal systems in reducing the risk of harm. Here, one could ask what are the merits and demerits of the liability and regulatory systems? Why do we need an alternative legal system to protect the interests of the consumer? And what will be the optimal mix of alternative legal system? The theoretical arguments of '*liability versus regulation*' indicates that none of the approaches has a uniqueness in providing the incentives to the tortfeasor in order to take the precautions to reduce the risk of harm, and stress the need of the use of a mixed form of liability and regulatory systems.

Normally every one agrees that the use of mixed form of alternative legal system reduces the risk of harm, but no one knows about what is the optimal mix of the alternative legal systems? The optimal mix of ex- post and ex- ante approach varies not only from case to case but also from country to country. However, the optimal mix of alternative legal system is to be one in which the regulatory system sets the standards as minimum and the courts also take the minimum standards into the consideration and awards the compensation to the victims whenever the regulatory standards are unable to internalise the risk of harm. Similarly, the minimum regulatory standards may perhaps reduce the risk of harm up to some extent whenever the liability system is unable to provide compensation to the victim. The literature has been reviewed based on the works of S. Shavel, S. Rose- Ackerman, H. B. Schäfer & C. Ott, A. I. Ogus, C. D. Kolstand, T. S. Ulen & G. V. Johnson and R. A. Cooter.

Objectives

The main objectives of the study are:

i. To explore the theoretical foundations of the economic analysis of consumer protection;

ii. To examine the economic justification for alternative legal systems;

iii. To evaluate the functioning of the alternative legal systems of consumer protection in India;

iv. To review the experiences of consumer protection in Germany; and

v. To draw inferences from the comparative experience towards possible improvement in the consumer protection in India.

Limitations

One of the limitations of the thesis is that the survey will be restricted to two district level Fora viz. Nellore and the Ranga Reddy, districts, one state level commission viz. as the State Commission of the Andhra Pradesh and the National Commission. Generalisations on such limited observation may be too sweeping to be widespread relevance. However, the study will be either directly or indirectly helpful to the policy makers towards improving the alternative legal system in protecting the interests of the consumers. An attempt is also made to put together some guidelines for further research in the areas of legal economics as well as in consumer protection law.

Methodology

The applicability of the theoretical arguments of the economic theory of consumer protection and the prevalence of the alternative legal system in India make interesting study the functioning of the alternative legal systems such as the Consumer Protection Act, 1986 (as an ex- post approach) and the Bureau of Indian Standards Act, 1986 (as an ex- ante approach) in protecting the interests of the consumers.

In India, consumer protection raises a number of questions. In the case of an ex- post approach, why do we need separate courts (Consumer Dispute Redressal Agencies- CDRAs)?

What are the objectives of the Consumer Protection Act, 1986? Have these objectives been fulfilled by the CDRAs?

The civil courts are unable to provide adequate redressal to the consumers because of law's delay, higher litigation costs and a complex legal procedure. At the same time much of the rules and regulations enacted by Parliament were not only non- compensatory in nature but also not implemented effectively. Thus, the Consumer Protection Act, 1986, which is compensatory in nature, was enacted by Parliament in order to provide speedy, inexpensive and simple redressal to the consumers by establishing a separate three- tier court (CDRAs) at District, State and national levels.

In order to have a critical evaluation of the functioning of Consumer Fora as an ex-post approach, one would need data especially on the nature of cases filed, law's delay, decision on the cases. The Study will be based on both primary and secondary data. The empirical study tries to provide some insights about efficiencies and deficiencies on the effectiveness of the liability system in India in protecting the interests of the consumers.

The secondary data obtained from the Department of Civil Supplies, Andhra Pradesh and the Ministry of Civil Supplies, Consumer Affairs and the Public Distribution System, New Delhi are used for selecting *two District Forums in Andhra Pradesh*, one which has *the highest number of cases* filed by the consumers (the District Forum of Nellore) and the other which has *the least number of cases* filed by the consumers (the District Forum of Ranga Reddy). In addition, in order to cover all the three-tiers of the system of CDRAs, *one State Commission* that is State Commission of Andhra Pradesh and *the National Commission* are chosen for study.

Consumers' opinion about the functioning of the CDRAs has been collected by way of a sample survey of the aggrieved consumers. Out of 50 selected consumers from the District Forum of Ranga Reddy and the State Commission of Andhra Pradesh based on stratified random sampling, only 32 consumers responded. The data collected has been subjected to rigorous analysis including testing of certain hypotheses with the application of Multiple Regression Analysis. The factors such as education as well as engaging of a lawyer are analysed for their impact on the court success.

Empirical investigation was extended to the functionaries of the CDRAs, and the views of the members of the Fora and the consumers counsel have been collected by way of oral interview. In addition, personal observation on the functioning of the CDRAs has also been taken into the consideration.

The inferences drawn from the empirical work will be examined with the theoretical arguments of the alternative legal systems in order to find out whether the CDRAs, as an ex- post approach, are really protecting the interests of the consumers in India.

In the case of an ex- ante approach, the collected data from the Bureau of Indian Standards, will be used for critical evaluation of the functioning of the regulatory system. The empirical study tries to analyse not only the Bureau of Indian Standards' ability to protect the interests of the consumers through standard formulations and certification marks but also tries to throw some insights about efficiencies and deficiencies on the effectiveness of the regulatory system in India in protecting the interests of the consumers. The material will be analysed with the help of the theory of the alternative legal systems.

An attempt is made at a comparative analysis of the CDRAs and the BIS, which may provide some indications about the optimal mix of these two systems in order to protect the interests of the consumers effectively.

The experiences of the consumer protection in Germany is analysed in order to draw some possible lessons for India in improving consumer protection by suitable changes in the alternative legal system. One can ask why one needs to review the experiences of the consumer protection in Germany? The main reasons are:

- There are parallels and differences between developed and developing countries which justifies comparison with a view to improve the systems by drawing appropriate lessons;
- Germany is the most populated state in Western and central Europe with considerable experience in consumer protection;
- Germany is a non- common- law country with considerable experience in codified law and regulation; and

- There is absence of any comparative study between a civil law county like Germany and the common law country like India in the field of consumer protection, which excludes the possibility of deriving mutual lessons.

Thus, it is interesting to have such a study in order to draw some possible lessons from Germany for India.

In Germany, in the case of an ex- post approach, the study will be focused on a review of the importance of contract and torts of German Civil Code, the German Product Liability Act, 1990 and the EC Directives. From the drawn inferences some suggestions will be made for India to improve the consumer protection by modifying liability system. The works of N. Reich, H. Kötz, B. S. Markesins, J. M. Kellam, K. U. Link Esq, T. Sambuck, P. Kelly, R. Attree and A. Geddes have been used to review the German liability system.

In the case of an ex- ante approach, the study will focus on a review of the Appliances Act, 1968 (Amendment, 1992), the German Institute for the Standardisation- DIN, and the EC Product Safety Act, 1992. From the drawn inferences some suggestions will be made to India to improve consumer protection by modifying the regulatory system. The works of J. Folke, H. W. Micklitz, T. Askhan and A. Stoneham have been used for a review of the German Regulatory system.

Chapter Outline

The thesis contains five chapters. The first chapter provides an account of the economic theory of consumer protection with a view to set the analytical framework within which the study is to be located. The second chapter focuses on the issues of *the alternative legal system,* which are central to the analysis of the legal economics relating to consumer protection. The third chapter deals with the consumer protection in India. The fourth chapter is about the consumer protection experiences in Germany. The last chapter makes a certain suggestions on the working of the alternative legal systems in India relating to consumer protection, in the light of the comparative experience of Germany.

CHAPTER I

ECONOMIC THEORY OF CONSUMER PROTECTION

The Theory of this chapter has been developed based on the works of G. Akerlof, P. Nelson, M.R. Darby and E. Karni, G. C. Priest, J. Galbraith, O.E. Williamson, W. Emons, R. H. Coase, J. Tirole, M. Spence, C. Shapiro, F. Allen, and A. Eisenberg.

A. Introduction

I. Why Consumer Protection

The development of modern technology with large-scale enterprises is creating new types of consumer problems in the market place. Ironmonger (1972), "...by the fact that the emergence of new commodities and changes in the character of commodities have become important for consumer commodities only in recent decades. Prior to this, innovation and technological change were largely confined to the means of production rather than the means of consumption. Inventors and innovators were concerned with making existing commodities more efficiently rather than with making more efficient commodities"[1]. The consumers are unable to determine the characteristics of goods or services for example, it is difficult to know whether the prescription drug one takes really is effective. Consumers are unable to determine the quality of the services of doctors, lawyers, carpenters etc. Consequently there is a problem of asymmetric information between producers and consumers about the quality of the product.

In the case of production of hazardous products the state should interfere in order to reduce the severity of the damage because some times the consumer has to bear the costs of damage, especially in cases where the producer's assets are less than the liabilities. In some special cases it is profitable for manufacturers to harm the consumers. For example, Alpha Corporation produces an electric saw that has desirable characteristics but occasionally severs the hand of

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[1]Quoted in D. S. Ironmonger, *New Commodities and Consumer Behaviour*, Cambridge, Cambridge University Press, 1972.

the consumer using it. Let us assume that Alpha possesses the technology to make this product perfectly safe at some cost but incur the expenditure to save costs, such a situation calls for state intervention in order to produce safer electric saw. And also consumers some times misperceive the product risks. For example, even when given a correct perception of the risks of cigarette smoking, they would still choose to smoke believing that they are more immune to damaging effects than is objectively the case[2]. Thus, misperception merits the state intervention. Therefore, the prevalence of the asymmetric information and the consumer's misperception on product hazards in the market place favours consumer protection.

In addition, in a modern world, most of the products are in mass production. In spite of the advantages of the economies of scale, the mass production process magnifies the problems occurring in the case of defective products. In general there are three types of defects at the time of production of the goods: they are manufacturing defects, design defects, and warning defects. In the case of product defects, some of the products may escape from the standard controls during the production process and reach the market. In the case of design defects, all products are defective and reach the market. The producer of such products should recall the entire products and re-process the production. Design defect seems to be more complicated and costly compared to product defects because in the case of product defects the producer has to call back only the goods which are in defect but in the case of design defects he has to call back entire products. And in the case of warning failure, the manufacturer does not warn the consumer about the dangers involved the usage. At the same time, the production of the product is not the end of the producers` responsibilities, he has to observe the performance of his product in day- to- day use by the consumers, which is known as post- marketing surveillance. Whenever the producers are not practising their duties at the production stage, the state has to do something to force the producers in order to meet their responsibility to reduce product damages to the consumers.

The state has to do something regarding consumer protection, whenever marginal consumers are unable to influence the producer to provide quality products because producers discrimination between marginal and infra-marginal consumers. The producer can provide

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[2] Right now in the United States of America, there is a big debate on whether cigarettes should be under the category of drugs or not?

better terms and quality goods to marginal consumers and rip-off the infra-marginal consumers by providing low quality goods at higher prices.

The producers of adulterated products and deceptive advertisers may provide goods at lower prices to the consumers. The innocent, ignorant and illiterate consumer will purchase such goods and ultimately face the risks involved because they are unable to distinguish the product qualities based on the prices. The state has to interfere and curb these types of unscrupulous practices in order to improve consumer welfare. In principle, the state has two instruments i.e. liability and regulatory systems in order to protect the consumer interests. Here, the justification of economic analysis of the alternative legal systems will be reviewed extensively.

II. Traditional Neo-classical Economic Theory, the Role and Influence of the Consumer and the Implications for the Legal System

Economic theory assumes that the consumer is rational in the sense that he tries to maximise satisfaction from a given income. According to Adam Smith, "consumption is the sole end and purpose of all production" which emphasises the importance of the role of the consumer[3]. The classical economists envisaged an economic system of social efficiency in which all incentives encouraged, according to what people wanted most with great efficiency. One of the basic concepts in economics is the consumer sovereignty, "as shown by that the ways in which they spend their money, determine what merchandise is produced and which services supplied"[4]. The focus will be both on the old theories of consumer protection such as exploitation theory and the new theories of consumer protection such as asymmetric information.

1. *Consumer Sovereignty*

The notion of the consumer sovereignty is the very heart of the market economy. The term Consumers Sovereignty was coined by Prof. W. H. Hutt, in 1931. Market literature has phrases like "the consumer is always right" and a proverbial expression in high Dutch is "De

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[3]Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 625 (Modern Library, 1937).

[4]Quoted in Fullop Christina, *Consumers in the Markets*, The Institute of Economic Affairs, 1967, p.11.

Klant is Koning" (the customer is king). According to Hutt, "as a concept consumer sovereignty simply refers to the controlling power exercised by free individuals, in choosing between ends, over the custodians of the community's resources, when the resources by which these ends can be served are scarce"[5].

"In the good economic society, the consumer is cast in the role of a judge or arbitrator, though not necessarily one possessing absolute or infinite wisdom. As judge, the consumer assigns by his spending pattern the rewards or penalties for specific productive efforts"[6]. For example, when consumers want a good or service, they are willing to pay relatively more for it than when their wants are not as strong. Highly desirable goods and services become more profitable to produce, and resources will flow into their production. Therefore, consumer sovereignty directs the flow of resources into the goods or services that consumers want the most.

The full achievement of consumer's sovereignty has been known as "Ideal Output". And also it is very closely related to the idea of economic efficiency, i.e. efficiency in the use of resources for the greatest possible satisfaction of the needs and desires of consumers. In a perfect market economy, "the entrepreneurs and the resource owners must adapt themselves to the verdicts of the consumer. As a producer he is subject and as a consumer he is sovereign"[7].

2. *Perfect Markets*

Competitive market is the consumer's best friend. According to Peter Joy, "the consumers' only true protection is and should be through the extension and strength of markets"[8]. The orthodox neo-classical economists show that the market system will produce an efficient or

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[5]Quoted in W.H. Hutt, "The Concept of Consumers' Sovereignty", *The Economic Journal*, Vol.50. March 1940, p.66.

[6]Quoted in W. H. Hutt, *Economists and the Public: A study in Competition and Opinion*, London, Jonathan Cape, 1936, p.257.

[7]*Ibid.* .

[8]Quoted in Peter Joy, "The Bitter Bit: Or the Apotheosis of Corporation", *The Times*, 25 March 1976, p.23.

Pareto- Optimal outcome[9]. They assume either explicitly or implicitly that the consumers are fully informed not only about the quality and the safety of the goods or services but also that they were fully aware of the terms and the conditions of the warranty contracts and standard form of contracts. Perfect market assumes that the existence of large number of buyers and sellers; a homogeneous product; and a large amount of information, with the result that no individual producer or consumer would have sufficient economic power to control prices. Perfect market system enables the economic problem[10] to be solved in a way which combines efficiency and freedom. Efficiency because individual preferences determine what is produced, and freedom because individuals are free to choose what goods they want[11]. In perfect markets, the consumers can take decisions according to their needs by balancing the costs and benefits of the product risks, so that the consumers will be protected by the first-best solution.

3. *Legal Consequences: Freedom of Contract and Non- Intervention*

Production and consumption of goods or services are for the purpose of promoting consumer welfare, with no explanation of consumers by producers and *vice versa*. "In a free market economy, with the interplay of competition, the consumer has freedom to choose either by accepting or rejecting the price charged by the seller and also the selling is dependent upon assured good quality and full measure at prices equal to the cost of production"[12]. Adam Smith contented himself with distinguishing competition from monopoly by its consequence "the price of monopoly is upon every occasion, the highest which can be got..... the price of free competition on the contrary is the lowest which can be taken not upon every occasion indeed but for any considerable time together".

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[9]No one can be made better off without some one else being worse-off nor can the output or any good be increased without reducing that of another nor can the quality of any input be increased without reducing the quality of another under Pareto- Optimality.

[10]Like What shall be produced? How will it be produced? And who will get the product?

[11]In a perfect market conditions consumers are free to choose, there is no police man to take the money out of consumers pocket to pay for some thing they do not want or to make they do something consumer do not want to do.

[12]Quoted in J. Gordon Leland, and M. Lee Stewart, (ed), *Economics for Consumers*, New York, Von Wostrand Reinhold Company, 1972, p. 12.

Competition is a big stick that enforces order and fair- play. It is a self-policing world. The buyer and seller would possess equal bargaining power over transactions. Therefore, the government as well as the system of civil law or common law should also not be necessary to interfere into the freedom of contract. Thus, a contract written or oral should be kept at faith value by the legal order. It is a world of devisable laissez-faire[13] ruled by Adam Smith's invisible hand, which strongly favours the price mechanism with a little state intervention in order to fulfil the consumer satisfaction by encouraging the competition among the producers.

B. Traditional Theories of Consumer Protection

The neo- classical economists assume that in a perfect market, price is equal to marginal cost; that both the producers and the consumers were price takers and also that they are the best judges of their own welfare; prevalence of zero transaction costs; and, the allocation of resources are either perfect certainty or risk neutral. However, it was challenged both by the economics profession and the legal profession starting in the 1930s and the critique of the neo-classical tradition was the exploitation theory (F. Kessler).

I. Exploitation Theory

Modern capitalism is completely different from the traditional capitalism. In modern capitalism, there are large firms, industries and large corporations. Market failure, the problem of monopoly is not directly related with the problem of consumer protection. But at the same time it is one of the major institutions in modern capitalism, which has power to control the whole market either by possessing large share of the natural resources or by way of investing huge amounts in research and development. In fact, they can do whatever they want, for example, they can create the scarcity, raise the prices, create the unwanted desires among the consumers through advertisements and they can impose any type of terms or conditions in warranty and standard form of contracts. According to this theory modern capitalism is not competitive capitalism but monopoly capitalism, so that the producers can impose whatever they want on

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[13]Indeed, the expression of laissez-faire, which was intended as an admonition against deliberate restrictions on production and trade, has given rise to the idea that a working market mechanism will automatically arise and with particularly no governmental intervention. For details see Adam Smith

the consumers. Therefore, it is the producer sovereignty and not the consumer sovereignty. From 1930s to 1960s in Germany and in the United States of America, the exploitation theory has played major role regarding drastic changes in consumer laws and legislation.

The expansion of market economy facilitates the members of the community to have an infinite number of typical transactions. In such a situation, the legal system has a role to play to regulate the transactional consequences. But it cannot anticipate the continuously in each and every transaction into which the members of the community may need to enter. Ultimately, society has to give the parties freedom of contract.

"Freedom of contract means that the state has no monopoly in the creation of law. The consent of contracting parties also creates law. The law making process is decentralised. As a result, law is not an order imposed by the state from above upon its citizens; it is rather an order created from below. This is a realistic insight"[14].

"Since a contract is the result of the free bargaining of parties who are brought together by the play of the market and who meet each other on a footing of social and economic equity, there is no danger that freedom of contract will be a threat to the social order as a whole"[15]. But with the establishment of big industries and with the declining of the free enterprise system due to the innate trend of competitive capitalism towards monopoly, the meaning of contract has been radically changed up to standard form of contract. These type of contracts have "become an important means of excluding or controlling the `irrational factor´ in litigation"[16], for example, the use of warranty clauses in manufacturing industry limiting the common-law remedies of the consumer to breach of an implied warranty of quality and particularly excluding his right to claim damages i.e. exclude warranty recovery from consequential damages. Therefore, "standard form of contracts is the ones typically used by enterprises with strong bargaining power. The weaker party, indeed of the goods or services, is frequently not in a

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[14]Quoted in M. Cohen, "The Basis of Contract", *Harvard Law Review*, Vol. 46, 1933, pp.553, 585.

[15]Quoted in F. Kessler, "Contracts of adhesion, Some thoughts about Freedom of Contracts", *Columbia Law Review*, Vol. 43, 1943, p.630

[16]*Ibid.*, p. 632

position to shop around for better terms, either because of the author of the standard contract has monopoly (natural or artificial) or because all competitors use the same clauses"[17].

In general, consumers do not have any advantages from standard form of contract except some price reductions. These types of contracts in particular could thus become effective instruments in the hands of powerful industrialists and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals. To be specific, a world in which "producers have secured power" that they use "to rob the rest"[18]. The most convincing evidence to support the exploitation theory, however, arose from case histories of warranty practices. Courts were asked repeatedly to give effect to warranty provisions that they interpreted as exploitative. In the case of *Henningsen v. Bloomfield Motors, Inc.*,[19] involving serious personal injury from an allegedly defective automobile, the terms of the warranty at issue disclaimed the implied warranty of merchantability, excluding consequential damages, and limited warranty remedies to repair or replacement of the defective part as long as the victim has prepared transport charges for the part. The New Jersey Supreme Court remarked "It is difficult to imagine ... a less satisfactory remedy .... An instinctively felt sense of justice cries out against such a sharp bargain"[20]. The court embraced the exploitation theory and refused to enforce the terms of the standard warranty[21]. Thus, the exploitation theory stresses the need of not only a comprehensive quality and safety regulation but also an abridgement of the concept of freedom of contract in favour of a comprehensive system of binding civil law rules of liability in favour of the consumer.

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[17] *Ibid.*

[18] See Benn, Producer v. Consumer 25 (1928). The feeling of exploitation on the part of the consumer is sometimes justified by the seller's stated intentions. Walton Hamilton (1935, p. 1931) Quotes the head of a large department store as saying, "God created the masses of mankind to be exploited. I exploit them; I do his will".

[19] 32 N.J. 358, 161 A.2d 69 (1960).

[20] *Id.* at 375, 388, 161 A. 2d at 79, 85.

[21] Henningsen v. Bloomfeld Motors, Inc., 32 N.J. 358, 408, 161 A. 2d 69, 97 (1960). The adoption of the standard of strict liability for product is based upon the acceptance of the empirical presumption of the exploitation theory: consumers are powerless in relation to manufacturers. Quoted in George Priest, "A Theory of the Consumer Product Warranty", *The Yale Law Journal*, Vol. 90, May 1981, p. 1302.

II. Producers' Sovereignty

Adam Smith observed that, on the one hand, "consumption as the sole end and purpose of all production"; on the other hand, "the interest of the consumer is almost constantly sacrificed to that of the producer; and (the economic system) ... seems to consider production and not consumption, as the ultimate end and object of all industry and commerce"[22].

The market imperfections seem to put the consumer in a disadvantageous position in relation to the producer. J. K. Galbraith argues that the concept of consumers' sovereignty must be replaced by the notion of producers' sovereignty. "The Galbraithian position denies that competitive profit maximisation even is a rough approximation to economic reality. Protected by its oligopolistic position from the need to maximising profits, and largely outside the control of capitalists, a "technostructure" internal to the modern corporation organises its activities on the basis of criteria of scarcity, autonomy, market power, technical achievement, and public prestige. Since the technostructure need respond only incompletely to the structure of commodity demanded when it conflicts with these objectives, consumers' sovereignty theory fails to hold"[23].

"Consumers are rather vague about what they want. Therefore, someone has to step in to give them right direction. The real initiative lies with producers, who develop new products, decide which of these to put on the market and then persuade consumers to buy them through high-pressure advertising. It is this changed position which has been described by Prof. Galbraith as the principle of *revised sequence*"[24]. Instead the consumer telling the producer what should be produced, the position is reversed and it is the producer who tells the consumer what he wants or should want.

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[22]Smith, n. 3.

[23]Quoted in Herbert Gintis, "Consumer Behaviour and the Concept of Sovereignty: Explanations of Social Decay", *American Economic Review*, Vol. 62, May 1972, pp. 269,270.

[24]J. K. Galbraith, *The New Industrial State*, Penguin books, 1969, pp. 216, 217.

Imperfections in the market economy supporting the argument of state intervention to frame the consumer laws and regulations in order to protect the consumers. The unconscionability theory gives a brief idea of how these laws and regulations are really entering into the protection of the consumer.

III. Unconscionability Theory

The concept of unconscionability was first made explicit by the Uniform Commercial Code in order to reconcile it with the bargaining principle[25]. The terms of private agreements could not be set aside because the courts found them to be harsh, unconscionable, or unjust. Arthur Leff (1967) has drawn a distinction between `Procedural'[26] and `substantive'[27] unconscionability[28]. These two are often combined in actual cases because an unfair procedure frequently results in an unfair price.

A transaction is unconscionable because gross disparity between the price of the property or services.... (and their value) measured by the price at which similar property or services are readily obtainable in the credit transactions by consumers[29]. The norm of unconscionability is closely related to the manner in which the relevant market deviates from a perfectly competitive market. Prof. Eissenberg has proposed four arguments for unconscionability theory [30]. They are:

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[25]The bargaining principle- in the absence of a traditional defence relating to the quality of consent (duress, incapacity, misrepresentation, or mutual mistake), the courts will enforce a bargaining according to its terms, with the object of putting a bargain- promisee in as good a position as if the bargain had been performed.

[26]It is a fault or unfairness in the bargaining process.

[27]It is a fault or unfairness in the bargaining outcome.

[28]A. Leff, "Unconscionability and the Code- the Emperor's New Clause", *University of Pennsylvania Law Review*, 115, 1967, pp. 486,487.

[29]Uniform Commercial Code, Section 5, 108 (4) (c) 1974.

[30]Melvin A. Eissenberg, "The Bargain Principle and its Limits", *Harvard Law Review*, Vol. 95, No. 4,1982, pp.741-801.

1. *Distress*

It is for example, X makes a bargain with Y at a time when, though fault of Y, X is in a state of necessity that effectively compels him to enter into a bargain on any terms he can get. Let us consider the following hypothetical case:

> "T, a symphony musician, has been driving through the desert on a recreational trip, when he suddenly hits a rock jutting out from the sand. T's vehicle is disabled and his ankle is fractured. He has no radio and little water, and will die if he is not secured. The next day, G, a university geologist who is returning to Tucson from an inspection of desert rock formation, adventitiously passes within sight of the accident and drives over to investigate. T explains the situation and asks G to take him back to Tucson, which is sixty miles away. G replies that he will help only if T promises to pay him two- thirds of his wealth or $100000, whichever is more. T agrees, but after return to Tucson he refuses to keep his promise, and G brings an action to enforce it"[31].

The relationship between G and T is bilateral monopoly i.e., a market which effectively consists of a single seller and a single buyer. However, the existence of a bilateral monopoly is not inconsistent with extremely disproportionate bargaining power. In this hypothetical case T is bargaining for his life, while G is bargaining for windfall profit. A bilateral monopoly characterised by extreme inequality of bargaining power can lead to inefficiency, because the stronger party can induce a price far in excess of cost[32]. It is clear that a promise to pay an unfair price, extracted through the promisee`s exploitation of the promisor`s distress, should not be enforced to its full extent. The Common Law might have enforced T`s promise to its full extent, but the German Civil Code, Section 138 (2), Provides that a transaction is void `when a person (exploits) the distressed situation, inexperience, lack of judgmental ability, or grave weakness of will of another to obtain the grant or promise of pecuniary advantages... which are obviously disproportionate to the performance given in return[33]. Prof. Eissenberg suggested that instead of voiding the contract or enforcing it to its full extent, the court should enforce T`s promise to G but only for the value of the services G rendered i.e., the opportunity cost of his efforts plus a bonus, say 20 per cent. The reason for including the bonus is that the fact that a court will award more than opportunity costs in these instances should provide a mild inducement to future rescuers to seek out and help stranded travellers.

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[31]Quoted in *Ibid.* p.755.

[32]*Ibid.* p. 756.

[33] *Ibid.* p. 756,757.

2. Transactional Incapacity

"An individual may be of average intelligence and yet may lack the aptitude, experience, or judgmental ability to make a deliberative and well- informed judgement concerning the disability of entering into a given complex transaction"[34]. The doctrine of transactional incapacity is not only limited to -the promisor lack of capacity to understand the value of the performances to be exchanged but also- to whether the promisor can understand the value of the performance called for but lacks capacity to understand the meaning of contractual provisions governing the parties' rights in the event of non-performance. For example, in the well-known case of *Williams v. Walker-Thomas Furniture Co.*, (350 F. 2d 445, D.C. Cir. 1965). The buyer frequently purchased furniture and home appliances from the seller on instalment credit, in which a contractual term called an `add-on´ clause was held to be unconscionable. These clauses provided that:

> " the amount of each periodical instalment payment to be made by (purchaser) to the Company under this present lease shall be inclusive of and not in addition to the amount of each instalment payment to be made by (purchaser) under such prior leases, bills, or accounts; and all payments now and hereafter made by (purchaser) shall be credited pro rata on all outstanding leases, bills and accounts due to the Company by (Purchaser) at the time each such payment is made"[35].

A single default on a single payment could tigger the plaintiff's right to repossess all the goods subject to the comprehensive security arrangement.

3. *Unfair Persuasion*

It is that "the use of bargaining methods that seriously impair the free and competent exercise of judgement and produce a state of acquiescence that the promisee knows or should know is likely to be highly transitory"[36]. For example, the well-known case of Odorizzi *V. Bloomfield School District*, (246 Cal. App. 2d 123, 54 Cal. Rptr. 533, 1966). According to the plaintiff, Odorizzi, "an elementary school teacher, had been arrested of criminal charges of homosexual activity. After he had been questioned by the police, booked, released on bail, and gone forty hours without sleep, two school district officials came to his apartment. The officials advised

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[34] Quoted in *Ibid.* p. 763.
[35] Quoted in *Ibid.* p.772.

[36] Quoted in *Ibid.* p. 773,774.

Odorizzi that if he did not resign immediately he would be dismissed and his arrest would be publicised, jeopardising his chances of securing employment elsewhere, but that if he resigned at once the incident would not be publicised. Odorizzi then resigned, and the criminal charges were later dismissed. The court held that on these facts Odorizzi was entitled to reinstatement"[37].

"The doctrine of unfair persuasion can also be found in rules that a consumer who has made a contract in his home can rescind during a specified `cooling-off' period, typically three days"[38]. A major rational of these rules is that a consumer in his own home is subject to much more intense personal influence by the salesman than a consumer in the store: partly because it is often very difficult, in this marketplace, to break off the transaction; partly because the conventions of hospitality work against the consumer; and partly because door-to-door salesman often specialise in high-pressure selling techniques.

4. *Price Ignorance*

Price of goods and services are high in imperfect competitive market compared to perfect market because of non-availability of costless information about price. "A number of cases have concerned door-to-door sales at a price more than twice as high as that charged for comparable commodities in conventional retail marketplace"[39]. In the case of *Toker v. Westerman* (113 N.J. Super. 452, 274 A. 2d 78, Union County D. Ct. 1970), in which the "consumer had purchased a refrigerator-freezer for $899.98 plus a credit charges, whose sale value was apparently between $350 and $400"[40]. Consumer made payments of 655.85 and then stopped, and seller's assignee sued for the remaining balance. The court held that the seller and his assignee had already received a reasonable sum, and gave judgement to the consumer, is mainly because of exorbitant price... which makes this contract unconscionable and therefore unenforceable.

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[37] Quoted in *Ibid.* p. 775,776.
[38] Quoted in *Ibid.*

[39] Quoted in *Ibid.* p.779.

[40] *Ibid.*

The doctrine of unconscionability protects against fraud, duress and incompetence, without demanding specific proof of any of them[41].

C. Modern Theories of Consumer Protection

The ideology of modern theory towards to consumer protection is entirely different from the traditional theories of consumer protection such as the exploitation theory. It is not at taking into the account of the problem of consumer exploitation and the theory of unequal bargaining power regarding the arguments of the problem of consumer protection. Modern theory of consumer protection is basically arguing the case for consumer protection based on the problem of asymmetric information. Informational problems in between consumer and the producer for example, hidden action- the producer of a low quality product does not disclose the information to the consumer that his product is low quality and high probability risk.

I. Externalities

An externality, to quote Pigou's (1932, p.183) classic discussion, "arises where one person...., in the course of rendering some service, for which payment is made, to a second person..., incidentally also renders services or disservice to other persons..., of such a sort that payment cannot be exacted from the benefited parties or compensation enforced on behalf of the injured parties". Externalities arises from a lack of property rights, but at the same time, it is prohibitively costly to assign property rights for many goods and services, for example, common property resources. Jointness in production and consumption also leads to externalities. They may be negative e.g.: pollution, or positive e.g.: literacy; unilateral e.g.: the noise from a highway impinging on a residential neighbourhood, or reciprocal e.g.: pollination of an apple orchard by a honey producer's bees.

Externalities are sometimes referred to as a divergence between private costs and social costs. And at the same time with the presence of externalities (technological and pecuniary) free-market will produce too much of goods with external costs and too little of goods with

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[41]The doctrine of unconscionability can be applied as well as in cases in which there has been, as a matter of fact, no consent by a party to certain terms contained in standard form agreements.

external benefits. Externalities may occur among house-holds, producers and or between producers and house-holds for example, in the case of pecuniary externalities, when a consumer enters the market for apples and places a large order, his additional demand may raise the prices of apples to all the consumers. Therefore, it may adversely effect their welfare. Externalities some times viewed as a `mild' public good condition, market is unable to balance costs and benefits from a social point of view. For example, the exploding soda bottle may hit a passer by (consequential damages) and a failure by a doctor in treating a contagious disease may give rise to an epidemic. The costs of these product accident falls partially on third parties, the relevant markets are likely to ignore some of the costs that use of these product entails. Neither the levels of product output nor the `amounts' of safety built into the products themselves will be appropriately adjusted[42]. In fact, the existence of externalities may affect either production or consumption and may perhaps lead to affect the welfare of the consumer in general.

II. Nature of Goods: Search Goods, Experience Goods and Credence Goods

In general, consumers have poor information about the price and quality of goods. It seems to be very difficult and also expensive for consumers to get the information on the quality of goods compared to the price of goods.

Nelson categorised the consumer goods into two types. They are `search goods' and `experience goods'. According to him, search goods are those in which dimensions of quality and safety can be ascertained in the search process prior to purchase, for example, furniture, hardware, glassware etc. In the case of search good the argument of consumer protection is not worth while because they may be fully aware of the characteristics of the goods either before purchase or at the time of purchase of goods. For example, in developing countries like, India majority of the food products are sold loose, which gives an opportunity for checking the attributes of the goods on the spot by the consumers and therefore, the traditional argument of `consumer beware'. So, the classical theory of market perfection is perhaps very well suited or

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[42] Manufacturers and consumers might of course feel some remorse about the harm their behaviour creates, and thus act to reduce third-party risk. Few, however, would suggest that we relay on conscience to provide socially appropriate levels of safety. See Peter Asch, *Consumer Safety Regulation: Putting a Price on Life and Limb*, Oxford, Oxfod University Press, 1988.

applies to the search goods. Thus, there is no need to protect the consumer in the case of search goods.

Experience goods are those that can not be fully determined before it is purchased, where quality refers to any valued attribute such as taste, efficiency, or durability[43]. Most products are experience goods according to this description, for example, computer software, motion pictures, and most foods cannot be fully evaluated without consuming them. Durable products, such as automobiles are experience goods with respect to their post-purchase reliability and durability. The services of teachers, lawyers, are also experience goods. In the case of experience goods, consumers have lots of problems because they don't know the characteristics of the goods at the time of purchase, but only come to know the characteristics of the goods while using the goods. For example, in the case of cement the quality will be known only while using it. Therefore, there may be enough scope for cheating of the consumer by the producer. In fact, if producer cheats the consumer and if at the same time consumer come to know that he was cheated by the producer, no market will exist. Thus, that the effect of consumer protection laws is not only to protect the consumer from the hazards but also to establish the conditions for viable markets for complicated goods.

A third category of good was developed by Darby and Karni, which is termed as `credence goods'[44]. Credence goods are those that cannot be discovered even after purchase as the product is used. For example, it would be the claimed advantages of the removal of an appendix, which will be correct or not according to whether the organ is deceased. The buyer will have no different experience after the operation whether or not the organ was deceased[45]. A layman does not know what has doctor served him. The only way is he has to believe the services of the doctor. But the commercial attitude of the doctors really raises the questions about the reliability of the doctors` service. In an empirical survey in Switzerland, in all kinds of operations a lay man was advised by the medical surgeons to go for operation seven times

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[43]Phillip Nelson, "Information and Consumer Behaviour", 78 *Journal of Political Economy*, 1970, P.311. Quoted in Julia Liebeskind and Richard P. Rumelt, " Markets for Experience Goods with Performance Uncertainty", *Rand Journal of Economics*, Vol. 20, No.4, winter 1989, p. 602.

[44]Michael R. Darby and Edi Karni, "Free Competition and the Optimal amount of Fraud", *Journal of Political Economy*, 14 (1), April 1973, p. 68.

[45] *Ibid.* p.69

higher than the fellow doctors were advised by the medical surgeons for operation. The problems of unnecessary operations and tests might prevail not only in absence of social security but also in the presence of social security, the only difference is that the cost of medical treatment will be diversified in the case of social security system but it is not the case in the absence of social security system. It is very complicated to regulate the credence goods and the protection of the consumer by way of private law is also not merely enough. Therefore, consumers need lot of protection in the case of credence goods.

The basic issue for a search good is product selection, for an experience good is information, and for credence good is information with a vengeance. For obvious reasons, the evaluation of qualities of goods is costly. As a result, monitoring becomes valuable and perfect competition fails as a viable form of market organisation. Especially, in the case of credence goods information is never obtained or obtained slowly and too late, for example, in the case of any chemical substance that causes cancer. Therefore, neither in the case of credence goods nor in the case of search goods but in the case of experience goods the protection of the interests of the consumer is well taken by the forces of the markets.

III. Asymmetric Information and Race to the Bottom

Each firm obtains market power under the assumption that the information is costly. Therefore, "the relevant market structure with imperfect information is not perfect competition but rather monopolistic competition"[46]. The efficiency of competitive market wills generally is based upon whether the decentralised decision-makers possess full information about the attributes of the products. The market mechanism itself plays an informational role by conveying information in the form of relevant prices to decision-makers about the relative costs and benefits of their different actions. Consumers equate perceived marginal benefit with the price. If they lack information, and then the perceived marginal benefit may not be equal to actual marginal benefit, which results in misallocation of resources. Consumers are unable to distinguish the quality of good and bad products, mainly because of the problem of asymmetric information.

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[46]Steven Salop, "Information and Monopolistic Competition", *American Economic Review Proceedings*, Vol. 66, 1976, p. 20.

Asymmetric information in product quality may reduce economic efficiency from a hypothetical 'first-best' level, but some allocational efficiency may be restored through legal intervention. The problem of asymmetric information was initially analysed by Akerlof (1970), by 'lemons' principle[47]. According to this principle, the sellers have the better information about the quality of their products compared to buyers. And due to lack of information buyers will estimate the quality of the products on an average quality. It may result that the products of the above average quality simply go out of the market either because of they cannot receive the true value of the product or because of they can not even obtain the expected value of the new product. Therefore, the products which are less average quality will stay in the market and buyers will estimate new average quality which is less than the earlier one, and may perhaps leads to less and less quality products remaining in the market and so on. At one stage, no product will be traded at any price, accordingly, no market exists at all. This can be explained in the used car market, where good cars and bad cars (which is known as`lemons´) are traded. Normally, a used car may be a good car or a lemon. The buyers in this market purchase a new car without any idea of the quality of the car. But they do know that with probability of q it is a good car and with probability of (1-q) it is a bad car; by assumption, q is the proportion of good cars produced and (1-q) is the proportion of bad cars produced.

After experience with a specific car, the car owner can know the quality of his car i.e., he can easily assigns whether his car is good or lemon (let us assume his car is a lemon). So, if he is in the market- an asymmetry in available information has developed because the car owner has more knowledge about the quality of his car than the buyer has. And also good cars and bad cars must still sell at the same price because it is impossible for a buyer to tell the difference between a good car and a bad car. In such a situation, the sellers of the good cars will not have favourable market because they are unable to receive the exact value of the car (as well as unable to even obtain the expected value of a new car in order to buy a less probability of a `lemon´). Thus, the sellers of good cars will be out of the market because the bad cars tend to drive out the good. The traded cars in the market will be the `lemons´. At certain stage only

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[47] George A Akerlof, "The Market for "Lemons" Quality Uncertainty and the Mechanism", *Quarterly Journal of Economics*, Vol.84, 1970, pp. 488-500.

bad quality cars exist in the market, which is referred as 'race to the bottom' or 'adverse selection'[48]

One can assume that the demand for used cars depends upon two variables, that is the price of the cars and the average quality of used cars. Therefore, the supply and the average quality of used cars will depend upon the price. And in equilibrium the supply must be equal to the demand for the given average quality of used cars. There is proportional relationship between the price and the quality i.e., as price falls; normally quality will also falls. Thus, it is quite possible that no goods will be traded at any price level, resulting in no market at all.

The 'lemons' principle of Akerlof goes far beyond the market for used cars. For example, the market for insurance, financial credit and even employment are also characterised by asymmetric quality information. The presence of asymmetric information between producers and consumers may result in collapse of the entire market system. From this, one can conclude that in markets for experience goods and credence goods, the system of contractual freedom and the absence of government regulation may result in non- optimal outcome so that for these type of goods regulation is necessary either by way of governmental interference into the market such as quality control, safety standards etc., or by a comprehensive system of liability rules within the civil law system. However, it may not be necessarily true, because there are certain institutions without consumer laws and legislations, which may solve the lemon problem.

D. Market Induced Correctives of Asymmetric Information

Before dealing in detail with legal remedies to cure the imperfections in the market which may result from the existence of experience and credence goods, it seems to be necessary to point out that within the markets some of these imperfections might already been cured. Especially in highly developed markets the existing institutions may perhaps cure some of the imperfections even without the help of the legal order. For example, the sellers of high quality products have a big incentive to convince the consumers that their goods have high quality by market signals and reputation.

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[48]The principle of adverse selection is potentially present in all lines of insurance. When the term premiums are

I. Signal Theory

The concept of market signalling was first developed by Michael Spence, who showed that the sellers of high quality might send signals to consumers in such a way that it conveys information about a product quality.

1. *Warranties*

In general, "a warranty serves as both an insurance policy and a repair contract. In the case of insurance policy, a warranty provides that if, within a certain period, the product or some part of the product becomes defective, the manufacturer will compensate the consumer for the loss by repair, replacement, or refund of the purchase price. In the case of repair contract, a warranty fixes an obligation upon the manufacturer for some period of time to provide, without charge, services necessary to repair a defect in order to prolong the useful capacity of the product"[49]. Warranties, not only provides insurance against unsatisfactory product performance but also may be a way for firms to communicate information about product quality. Warranties include replacement or repair of defective products, price funds and sometimes reimbursement for consequential damages. In fact, "a warranty is a commitment of the firm to replace a broken item during a specific period of time"[50].

It is based on the assumption that without warranty, the low quality producer will offer his products at a price which is above his product costs but below the offer price of higher quality producer. Thus, at certain stage there is no market for higher quality products which leads to market for lemons. A solution to this problem is that the sellers of quality goods may induce the consumers through signals to think that their products are in high quality. The existence of warranties basically depends upon the three types of motives, the signalling motive is one among the three[51].

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too high, the pessimistic (which as to say the least healthy) insured to find attractive. *Ibid.* p. 489.

[49] Priest, n. 21, p. 1308.

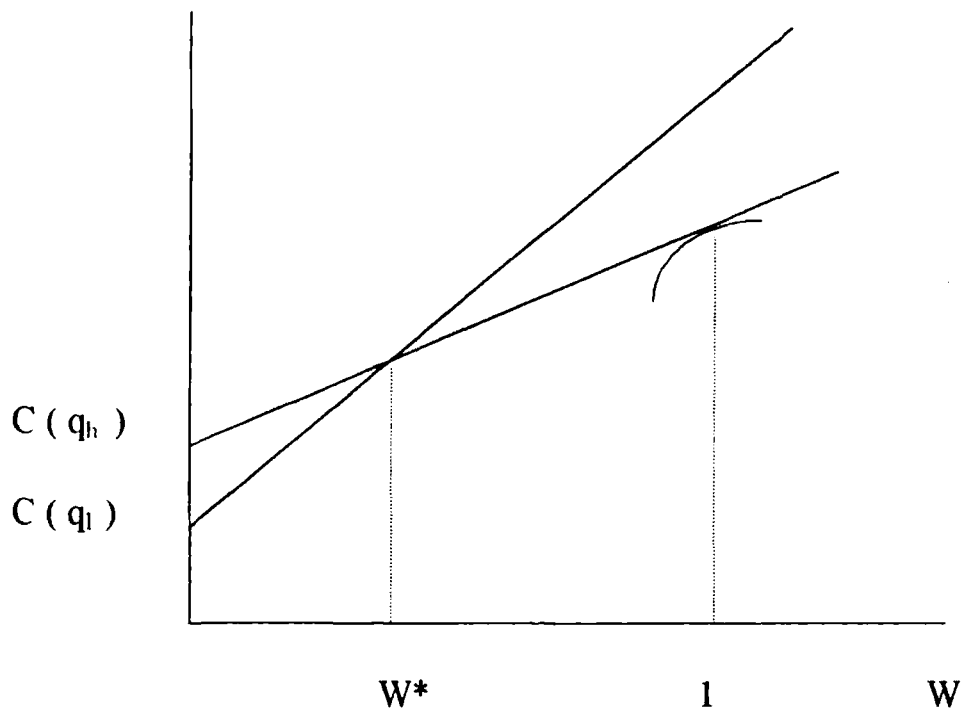
[50] Ester Gat-or, "Warranties as a Signal of Quality", *Canadian Journal of Economics*, Vol.22, No.1, 1989, p.51.

[51] The other two motives are: the insurance motive, which is based on the assumption that consumers are more risk averse than producers are. With different attitudes towards risk, producers provide consumers with insurance against the event of product failure in the form of warranty contracts; the incentive motive, which

A producer of a high quality product can provide additional unit of warranty at a lower cost than a producer of a low quality product. It is mainly because of the 'break- down' probability of good quality product is lower than the 'break-down' probability of a bad quality product. When a high quality producer offers extensive warranty coverage, a low quality producer is unable to mimic the signals because of huge losses. This can be explained with the help of a graph 1.1.

Graph No. 1.1

Warranties as a Device for Providing Information about Product Quality



W = Warranty

C (q_h) = Cost of high quality Products

C (q_l) = Cost of low quality Products

Source: Winand Emons (1989, p. 47)

The constant value of C at the vertical axis represents the production cost and price in a competitive market for a low quality and a high quality product so that the consumer has no possibility to know whether a product is of high or low quality. The slope of the curve

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views warranties as an incentive devices for firms not to cheat on quality. By lowering the quality level, the firms increase the probability of product failure by higher warranty cost. Therefore, warranties provide producers as an incentive to supply high quality products. Winand Emons, The Theory of Warranty Contracts", *Journal of Economic Surveys*, Vol. 3, No. 1, 1989, pp.44, 45.

represents the costs of increasing marginally the value of warranty contracts for the consumer. The warranty contracts are modelled in such a way that the value of one is the maximum warranty (money back) and that a value of lower than one is a warranty contract which gives the consumer less than the full money back guarantee. The non- linear curve touching the warranty contract line at W − 1 is an indifference curve of the consumer.

The figure shows that, "some firms produce a high quality level q_h and the other firms produce a low quality level q_l. Since $q_h > q_l$, a high quality producer can offer an additional unit of warranty at a lower cost than a low quality producer"[52]. If a high quality producer offer a warranty $\mathbf{w} > \mathbf{w}^*$ at the fair-adds rate $(1-q_h)$, a low quality producer mimicking his signal would incur losses, because the failure probability of his product is higher. And at the same time, whenever consumers observe a warranty $\mathbf{w} > \mathbf{w}^*$, they know that they may face a high quality product because producers have no incentive to cheat on quality.

Priest (1981), examines whether the exploitation, signalling, or investment theory best explains the content of 62 consumer product warranties. He finds that among the three theories under study the investment theory[53] is best suited to explain the actual design of warranties. Without warranties it is high quality products and with warranties it is low quality products, which get driven out of the market.

2. *Advertisement*

Advertisement is undoubtedly the provision of information concerning the prices and qualities of products available in the market. "Firms using advertising to inform potential consumers

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[52] Winand Emons, "The Theory of Warranty Contracts", *Journal of Economic Surveys*, Vol.3, No.1,1989, p.47.

[53] *Ibid.* p. 55. According to Priest, warranty serves a role of repair investments besides that of reducing transaction costs. By tying the warranty to the sale of the product, it also operates as performance bond of the manufacturer, see Barzel (1977). The decision to allocate repair investments between the manufacturer and the consumer, however, is identical to the decision of who should bear typical repair costs. As a more general preposition, however, two forms of investment by consumers will affect the likelihood of defects in any consumer product- (a) the consumer's selection on a product suitable for his expected needs; (b) the consumer's decision about the extent to which he will use the product. According to investment theory, a manufacturer makes incentives to prolong product life up to the point at which the marginal cost of such investment equals the marginal benefit. A manufacturer, then, offers market insurance for those losses or items of service for which market insurance is less costly than insurance or allocated investments by the consumer himself. See: Priest, n. 21, p. 1312, 1313.

about the existence, characteristics, and prices of the commodities they offer"[54]. Nelson (1970, 1974a, 1974b, 1978) has suggested that the primary message of advertisement is a positive message to prospective consumers"[55]. In such a case, the consumers are expected to infer an unobservable quality from an observable advertising i.e., advertising signal quality.

a Positive Relationship

In the case of an experience good, when a particular brand was advertised it could be a signal to consumers that the brand was high quality. It is clear that if high quality brands advertise more and advertising expenditures are observable[56], then rational, informed consumers would respond positively to the advertising, even if the advertisement cannot and do not have much direct information content. In India, one can easily observe the producers of cement spending enormous amount on advertising in order to establish their market though by way of reputation. The expenditure on advertisement is a kind specific investment or sunk cost, of firm if they wants recover all these costs they have to stay in the market and if they want to stay in the market they should not cheat the consumer in terms of product quality. However, the alternative for many producers with low firms specific fixed costs is to enter the market, sell cheap or hazardous quality and then leave the market at no cost, which is termed as hit- and - run strategy. The costs of advertisement for this type of producers may grossly reduce the profitability of a hit- and - run - strategy.

Therefore, consumers are expected to infer that higher quality firms invest relatively more on advertising than do lower quality firms and *vice versa*[57]. "Advertising may signal quality, but

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[54] Paul Milgrom and John Roberts, "Price and Advertising Signals of Product Quality", *Journal of Political Economy*, Vol. 94, No. 4, 1986, P.796.

[55] *Ibid.* p. 797.

[56]The advertising campaign for the 1984 Ford Ranger truck, which featured these trucks being thrown out of aeroplanes (followed by a half dozen sky drivers) or driven off high cliffs. It given the information that the product is existing in the market, and also the clearest message they carry is, `we are spending an astronomical amount of money on this ad- campaign. *Ibid.*

[57]Nelson's fundamental point concerning the role of advertisement is that, its inclusion of the pricing decision upsets the intuition that a high-quality producer will have a higher marginal benefit from attracting an initial sale and that this would provide the basis for the high quality firm's being willing to advertise more, up to which that low quality firm's will not mimic. *Ibid.* 797, 798.

price signalling will also typically occur, and the extent to which each is used depends in a rather complicated way, inter alia, on the difference in costs across qualities"[58].

b Experimenters

Advertisement works as a signal by way of attracting the attention of consumers who can be treated as a experimenters Johnsen (1976), some consumers are experimenters who will buy a product if a sufficient amount is spent on advertisement. If these experimenters find the advertised product to be of high quality, they recommend it to imitators, who substantially buy it. These types of advertisements by the producer of high quality product leads to repeat sales but advertisements by the low quality producer does not. For this reason only the producers of high quality products advertise and advertise signal quality.

"Advertisements increase consumer satisfaction because of the pleasure derived from advertisements and also by promoting the sale of branded goods, it makes for great convenience of shopping"[59]. In order for advertising to be an effective signal, "high quality firms must be able to recover advertising costs while low quality firms can not"[60].

3. *Price Signals: Product- Specific Information*

The role of prices in conveying information in the case of asymmetric information was first explained by Grossman- Stiglitz (1976) and Kihlstrom- Mirman (1975)[61]. In a market for a product that can be produced at different quality levels, but higher qualities are more costly to produce, the produced quality will be known only to the producer of that product. And all the consumers prefer higher quality product to lower quality product, but they may vary in their willingness to pay for quality products. Under these circumstances, prices may serve as signals which exactly differentiate the available product quality levels. Normally, for a certain product

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[58]Quoted in *Ibid.* P.819.

[59]N. Kaldor, "The economic Aspects of Advertising", *Review of Economic Studies*, Vol.18, No.1,1950-51, p. 8.

[60]Richerd E. Kilhlstrom and Michael H. Riordan, "Advertising as a Signal", *Journal of Political Economy*, Vol. 92, June 1984, pp. 427-450.

[61]These are the models of financial markets in which demands of informed agents influence asset price. Uninformed agents extract this signal from the price in formulating their own asset demands.

price consumers are "expected to find a certain product quality. A firm that charges that price may produce a lower quality product, but the product- specific information will enable some potential consumers to find out this, and provided that there are competing offers, they will not buy from that firm[62]. Therefore, in deciding whether to produce a lower quality than that signalled by its price is depending upon how a firm weighs the loss of sales against the cost saved of the sales to the remaining consumers? If the mark-up over the marginal cost of producing the quality signalled by the price is sufficiently high, the loss of sales will outweigh the cost saved. In that case, it is better for the firm to produce the quality signalled by price. At equilibrium, all price- signals are such that each firm's profit-maximising quality is that signalled by its price"[63].

II. Reputation: Consumer Learning

1. *Repeated Purchases*

Reputation is a word which denotes the persistence of quality and it commands a price (or exacts a penalty) because it economises on search[64].

In an asymmetric environment, "it is difficult to determine the quality of the product before purchase, and firms have an incentive to sell low quality products at high quality product prices. Klein and Leffler (1981) have suggested a competitive model where firms that produce low quality products and sell them at high quality prices acquire a bad reputation and are excluded from the market"[65]. By experimenting, consumers learn the attributes of a product. As long as their current experience is somehow related to the future quality, they obtain valuable information as to whether should repeat their purchases.

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[62]Some information about the quality of a firm's product will, however, reach its potential consumers, even if they do not make any special effort to acquire it.

[63]Asher Wolinsky, "Prices as Signals of Product Quality", *Review of Economic Studies*, 50, 1983, p.648.

[64]George J. Stigler, "The Economics of Information", *Journal of Political Economy*, Vol.69, No. 3, June 1961, p. 224.

[65] Quoted in Franklin Allen, "Reputation and Product Quality", *Rand Journal of Economics*, Vol. 15, No. 3, 1984, p. 311.

The producer of a high quality product try to induce consumers to buy his product by way of an introductory offers[66] At an introductory period producer of a high quality product may charge low price in order to attract the consumers But the consumers think that a low price may indicates a low quality However, based on the assumption that a high quality product generates repeat purchase So, that the producer of high quality product may more willing to sacrifice current profits to attract the consumers. The Producer of a low quality product may not will to duplicate this sacrifice because consumers are not worth as much to him. Hence, under certain circumstances, a low price may be signalling the quality, which is high. Once the consumers are informed, the producers of high quality products may charge high price and at the same time they have incentives to provide higher quality products because they are more afraid of loosing consumers.

2. *Communications among Consumers*

In order to induce the producers of high quality product; repeat purchases may need not necessarily made by the same consumer. Even in the case of one shot- good, the producers of the high quality product may have more customers because they have fewer dissatisfied consumers who leave, and word-of mouth advertising results in more arrivals. For example, one may deal with a real-estate agent or a contractor infrequently, but may learn about the quality of their recent services through family or friends. Intermediaries like, news papers, shopping guides, designers, doctors, attorneys, real estate brokers and consumer reports may provide more specific information tailored to the particular needs of the consumer and it can have significant effects on market outcome[67].

Quality deterioration because of asymmetric information depends upon how the consumers will learn the quality of a purchased product, sufficiently and quickly. Since the producer incentives to provide a high quality product will mainly depend upon the consumers learning, the process by which consumers gather information is crucial. One way to incorporate learning into consumer choice is to assume that the quality is positively related the probability of repeat

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[66]Farrel (1984), define an introductory offer as a first-period price that is strictly lower than the second-period (full information) price times the first-period probability of the customers` liking the good.

[67]Willam P. Regerson, "Regulation and Product Quality", *Bell Journal of Economics*, Vol. 14, 1983, p.508.

purchase. According to Shapiro, at any point in time each consumer will have some expectations regarding product quality. These expectations constitute the quality of goods' reputation. Consumer learning then involves adjusting expected quality towards true quality. In the case of unobservable product qualities even after consumption, will result in lagged adjustment of consumer expectations[68].

E. Reasons for Limitations of Market Induced Correctives of Asymmetric Information

1. Incomplete Warranties

Signals, however, only reduce information costs to consumers. But with some consumers misperception of product risks is inevitable[69]. The extent of misperception is determined by the costs and benefits to consumers of obtaining product information by means of warranty signals. Dean Prosser (1943) argued that, "without judicial intervention to imply warranties of quality in sales transactions, many manufacturers would provide consumers with *worthless junk*"[70].

Incomplete information from consumer's side may prevent warranties from serving the basic motives in a first-best way. The problems of moral hazard and adverse selection may prevent efficient risk sharing between the consumer and manufacturer.

1. *Moral Hazard*

In Arrow (1963) and Pauly (1968), the usual approach to the problem is to regard the existence of insurance itself as encouraging the purchaser to use too much of the good or

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[68]Carl Shapiro, Consumer Information, Product Quality, and Sellers Reputation, *Bell Journal of Economics*, Vol. 3, No. 1, Spring 1982, pp.21, 22.

[69]M. Spence, "Consumer Misperceptions, Product Failure and Producer Liability", *Review of Economic Studies*, Vol. 44, 1977, p. 561. (preserving those consumers will misperceive likelihood of losses from products). He recommends governmental fines to repair this form of market failure.

[70]Quoted in Priest, n. 21, p. 1301. See: D. Prosser, "The Implied Warranty of Merchantable Quality", *Minnesota Law Review*, Vol. 27, No. 117, 1943, PP. 158-165.

service that the insurance supplies"[71] The essence of this argument is that once an individual has taken out insurance against some particular contingency, the incentives to act in ways that decrease the risks involved will be reduced. For example, a home owner who is fully insured against burglary could be inclined to increase the size of the potential loss, by holding more valuables in the home, and probability of the loss, by spending less on locks and other burglary prevention devices

Milgrom and Roberts (1992 P. 456), says that moral hazard is the 'form of post contractual opportunism that arises because actions that have efficiency consequences are not freely observable and so the person taking them may choose to pursue his or her private interests at others' expense'. And also consumers may exert some influence on the probability of a product failure, by the way in which they handle the product. If the action chosen by the consumer cannot be monitored, producers providing warranties may face a moral hazard problem. For example, in the case of washing machine, it is impossible for the manufacturer to monitor intensity of use or maintenance. Usually, the more warranty that the buyers get, the less incentives they have to avoid the event of product break-down. It is because of moral hazard, that Shapiro (1983), ruled out warranty as a quality assuring mechanism.

2. *Adverse Selection*

Adverse selection may result in a rationed indemnity[72]. In general, producers of a product face two groups of risk-averse consumers. Due to exogenously given differences in the consumer's characteristics, the product's breakdown probability may be lower when it is used by low-risk consumers than the product's breakdown probability when it is used by high-risk consumers. If firms can perfectly discriminate between two groups of consumers, they will offer warranty coverage at the premium-benefit ratio for low-risk consumers and at the fair odds rate for high-risk consumers. In some cases either firms are unable to distinguish between these two groups of consumers or firms are unable to find out the cause of product failure, whether it is because

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[71] Arrow, "Uncertainty and the Welfare Economics of Medical Care", *American Economic Review*, Vol. 53, 1963, pp.941, 961 & 962; Also See: Pauly, "The Economics of Moral Hazard: Comment", *American Economic Review*, Vol. 58, 1968, pp. 531, 532-535.

[72] Rothshilld M and Stiglitz J E, "Equilibrium in Competitive Markets: An Essay on the Economics of Imperfect Information", *Quarterly Journal of Economics*, Vol. 90, 1976, pp. 659-679; Also See: Wilson C, "A Model of Insurance Markets with Incomplete Information", *Journal of Economic Theory*, Vol. 16, 1977, pp. 167-207.

of high usage or because of random failure. In such situation, firms may invariably end up with limited duration of warranties. Similarly, in the case of warranty coverage, also low-risk consumers prefer lower warranty coverage and the high-risk consumers will buy complete warranty coverage. In the case of small population of low -risk consumers, the possibility of arriving at an appropriate coverage trough separating equilibrium[73] becomes very difficult. Therefore, firms prefer a warranty which is based on pooling equilibrium[74], which is unfair to low-risk consumers, since they end up with cross-subsidising high-risk consumers. Thus, the problem of adverse selection results in an inefficient system of warranties.

II. Deceptive Advertisement

Advertisements often fail to inform consumers and in addition raise expectations beyond what can be fulfilled by a product or service. Advertising is `both the major medium of information for consumers and the major method of misinformation'[75]. In reality, the wants of consumers are being manipulated by advertising, so that instead of industry producing what the consumers want to buy, consumers are being duped and brain washed into buying what industry wants to sell[76]. A deceptive advertisement is one which makes a false statement about the product, for example, `our product will cure baldness', when in fact it will not [77].

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[73]Firms offer two distinct warranty contracts, High-risk consumers purchase will complete warranty at their fair odd rate and the low-risk consumers will purchase the warranty level at their fair odd rate.

[74]Firms offer the warranty at the average breakdown probability, low-risk consumers choose the warranty level which is less than the complete because the premium-benefit ratio is unfair to this group. High-risk consumers also buy this warranty level in order not to reveal their identity.

[75]Norris, *The Theory of Consumer Demand*, 1952, p.181.

[76]Abba P.Lerner, "The Economics and Politics of Consumers Sovereignty", *American Economic Review*, Vol.62, May 1972, P.259.

[77]an advertisement is deceptive:

> "i. If it makes a false claim about any material fact, that is an advertisement may be literally true, but still lead many consumers to draw false inferences about the product, with the same effect (as far as those consumers are concerned) as if the false inferences had been stated explicitly, for example, `no product is more effective in curing baldness' ( true, if all are equally ineffective ) or that the product `kills bacteria which cause baldness'(true, but incorrect in case of hereditary baldness);
> ii. If it produces an inaccurate belief in any material faction (some) consumers, that is falsity of the words of advertisement, which caused false belief, for example selling recycled oil without disclosing the fact that it has been recycled or imported products without disclosing that they were not made in India. Advertisements

Advertisement is simply a conspicuous expenditure incurred by firms[78] It is a fixed cost, which brings no direct benefit to the consumers Further, Advertisement could prove deceptive but it is difficult to prove the false advertisement of quality It is also increases the power of monopoly, with all its evils, creates a false sense of values and leads to a constant tendency for actual satisfaction to fall short of expectation; generally, that it leads to inefficient distribution by consumers of their expenditure. According to Retail Standards Association, 'it is quite possible to write an advertisement which is wholly truthful, yet totally misleading'.

III. 'Rip-Off' Uninformed Consumers

Consumers use prices as a signal of quality. In the Kihlstrom- Mirman and Grossman - Stiglitz models, suppliers of the asset cannot respond to the behaviour of the uninformed agents. Therefore, rational expectation equilibrium will reveal the information of the informed agents. So, prices convey information about the product quality from informed consumers to uninformed consumers. Once uninformed consumers use prices as signal of quality, profitable opportunities may attract for the entry of firms selling low quality products at high prices to the uninformed consumers. In such a way, dishonest firms may enter and 'rip-off' uninformed consumers. And also, it may distort the information conveyed by product prices i.e., price itself is a poor indicator of quality.

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have been treated deceptive, even when only 10 or 15 per cent (or possibly even less) of the consumers who saw the advertisement might have formed the incorrect belief;
iii. If it leaves (some) consumers with inaccurate beliefs about any material fact, that is if the advertisement fails to correct a pre-existing false belief. And also, if disclosing the additional information change the consumers behaviour, then his previous uninformed behaviour must have been based on a different (and hence incorrect) prior belief;
iv. If it fails to disclose any information which would change (some) consumer's behaviour, that is a consumer will be deceived as long as he does not have accurate information on every material point, or as long as there is still additional information the seller could disclose that would bear on the purchase decision;
v. If it fails to disclose the information that would be optimal under the circumstances, that is very much in need to understanding of consumer information markets than is reflected in current legal doctrine". See Hoard beeles, Richard Craswell and, Steven C.Salop, "The Efficient Regulation of Consumer Information", *Journal of Law & Economics*, Vol. 24, No. 3, December 1981, pp. 496-501.

[78]Kaldor, N. "The Economic Aspects of Advertising", *Review of Economic Studies*. Vol. 18, 1950-51, p. 8.

IV Non Repeated Purchases

Repeated purchases induce the producers of the high quality products not to cheat the consumers under the condition that the consumers repeat their purchase sufficiently. In that case producers have fear that consumers cut of their relations with them in the case of opportunistic behaviour. If the gains from opportunism are smaller than the loss from the exit option of the consumer opportunistic behaviour will not arise. However, in the case of durable products, the consumer's gross surplus is fixed as long as the product works. Quality is then measured by the amount of time between purchase and breakdown of the product. In such a situation, where the product durability is high, reputation seems to be less effective because of one-shot purchase. Therefore, durable products generate fewer repeat sales compared to less durable products. In the extreme case, a product that never breaks- down does not generate repeat sales. Hence, The producer may not have any incentives to produce durable products.

V. Little Communication Among Consumers

Information dissemination among consumers by way of intermediaries may not work effectively. By the very nature of the transaction, the consumer is often unable to judge the quality of the service received. Some times scale of economies in information generation and dissemination leads to natural monopoly problems; information intermediaries can achieve a high level of market power[79].

Information has public good properties. The production, purchase and use of information by consumers generate a market- perfecting external benefit to uninformed consumers. Additional information induce producers to compete for the patronage of informed consumers by offering better value, either by lower prices with higher qualities or by better contract terms. Although perfect market does not require all consumers to be perfectly informed, this externality implies

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[79]Even in the absence of natural monopoly, legislatures sometimes create this power in various regulations and statutes. For example, local building codes often require building materials to be certified by one or more specific standard setters rather than simply that materials achieve a performance level equal to those standards. In these cases, the standard setters can have the power to deter competition by arbitratively preventing new entity and setting inefficient standards. For instance, standard setters often formulate arbitrary design standards (i.e., pipe must be copper) rather than performance standards i.e., pipe must withstand xpsi of pressure. This may act to deter or delay innovation.

that too little product information will generally be produced, even in an otherwise competitive information market[80]. The shortage of third party information providers may also lead to under supply of information[81].

VI. Consumers Misperception: Low Probability Risks

Consumers have some expectations regarding product quality even in the presence of asymmetric information. Spence (1977) assumes that consumers systematically overestimate the probability that the product will not fail. The producer, who has rational expectations, then gains from offering a low warranty for a low price[82]. The consumers are willing to accept this contract because they wrongly perceive the probability of failure as low. In turn, this low warranty induces the producer to under supply reliability[83].

VII. No Asset Specificity

Neo-classical transactions take place within markets where "faceless buyer and seller ... meet...for an instant to exchange standard goods at equilibrium prices"[84]. Exchanges that are supported by transaction-specific investments are neither faceless nor instantaneous. Asset specificity arises only in an intertemporal context. Williamson categorised four types of asset specificities. They are (a) site specificity; (b) physical asset specificity; (c) human asset specificity; and (d) dedicated assets[85].

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[80]Steven Salop, "Information and Monopolistic Competition", *American Economic Review*, Vol. 66, 1976, p. 240.

[81]There are two factors- one is natural monopoly i.e., produced information can be disseminated at low marginal cost; and the other is free rider externalities i.e., buyers can resell purchased information to others.

[82]Spence also assumes that consumers are risk-averse. M. Spence, "Consumer Misperceptions, Product Failure and Product Liability", *Review of Economic Studies*, Vol. 44, 1977, pp. 561-572.

[83]In regard to consumers underestimating risks, Calabrisi (1970), remarked, `such things always happen to the other guy' is common. In particular instances, such proclaimed misperceptions may be due to cognitive dissonance; i.e., they may be ex- post attempts to justify the agent's behaviour (carelessness, signature of incomplete contracts etc.,); this should be investigated.

[84]Ban-Porath, Yorm, "The F-Connection: Families, Friends and Firms and the Organisation of Exchange", *Population and Development Review*, Vol. 6, March 1980, p.4.

[85]Site specificity, for instance, successive stations that are located in a check list-by-jowl relation to each other so as to economise on inventory and transportation expenses; physical asset specificity, for example, specialised

Assets are specific or non specific and what its implications are can be explained by way of an illustration. A firm which is investing in car production, due to some reasons the firm went bankrupt. The creditors of that firm can get some part of their investments by way of selling fixed assets of that firm or by way of next best use. It is not possible in the case of assets which are related to specific investments, for example, in the case of Euro-tunnel, the creditors will get nothing in case of closing the Euro-tunnel, because there is no possibility of next best use. In the view of consumers, they will benefit if and only if, the investments are related to asset specificity. The existence of high firms specific capital makes opportunistic behaviour non-profitable. If transactions are not related to asset specificity, there are *n* number of producers enter into the market, whose behaviour is just like 'hit and run'. These types of producers will stay in the market only for windfall gains. In such an environment, the market-induced correctives may be less effective.

F. Consequences of Consumer Protection in Well- Defined Solvents of the Market

Consumers are effectively protected if the markets work perfectly, even in the absence of any consumer protection laws. Theoretically, economists assume that the consumer is a rational maximiser of satisfaction and that the market operates as an influence on manufacturers. Competition among producers may curb misleading trade practices, if consumers are milled on one accession. Even in the case of standard form of contracts, if the seller offers unattractive terms to consumers, competitors will come forward with better terms. Therefore, the consumer who is offered a printed contract on the basis of take-it or leave-it does have a real choice, he can refuse to sign, knowing that if better terms are possible another seller will offer them to him[86].

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dies that are required to produce a component; human asset specificity that arises in a learning-by -doing fashion; and dedicated assets, which represents a discrete investment in generalised (as contrasted with special purpose) production capacity that would not be mode but for the prospect of selling a significant amount of product to a specific consumer. *See* Williamson, Olliver E, *The Economic Institutions of Capitalism*, New York, The Free Press, 1985, P.95.

[86]Richard A. Posner, *The Economic Analysis of Law*, Bosten, 1972.

Introducing the consumer protection in a well functioning price mechanism may lead to adverse effects. And also by diminishing an opportunity of voluntary exchange may result in reducing the economic welfare. In a highly regulated market, the cost of regulation as well as the increased cost of production will be ultimately paid by the consumers. The unorganised group of consumers may be unable to influence the legislatures compared to organised group of producers because of free rider problems. Price mechanism may reduce the information costs about what degree of product liability is economical because consumers are in a better position than any other regulatory agency to know the exact uses they plan for products and what degree of quality is appropriate[87]

G. Differences in the Market Conditions and Applicability of Conditions of Correctives

I. Developed Markets and Spontaneity of Corrective Institutions

Markets in developed countries, like Germany, may work effectively either because of competition among producers or because of awareness among consumers about their rights and obligations in the market place. For example, in the case of warranties, it seems to be easy to compare the available standard form of contracts and accordingly consumers may accept or reject the warranty. And even in the case of reputation, the consumers of developed countries may learn very quickly and sufficiently about the quality of the products signalled by the producers of the high quality products, which may perhaps give an incentive to the making of quality products by the manufacturers.

In developed markets, the consumers judge the quality of the product accurately with the available information and at the same time, the unfair trade practices may be found quickly and may send out of the market place at an earliest possible time.

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[87] Ronald N. Mckean, "Product Liability: Trends and Implications", *University of Chicago Law Review*, Vol. 38, p. 3, 44 & 52.

* The figures are for the year 1993-94, See: *Economic Survey of India*, 1994-95.

However, even in the case of well-developed markets, the protection of consumer interests may still be on high priority because of the nature of goods i e., credence goods and experience goods. For example, in mad cow decease in Europe, the market is unable to correct itself from the supplying of bad quality meat because of informational problems.

II. Less Developed Market Conditions and Problem of Persistence of Deficiencies

In markets in less developed countries, like India, competition may not be revealed among the producers because of monopolisation of resources. Consumers are unable to learn very quickly and sufficiently the quality of the product signalled by the producer of high quality product, may not be understood due to lack of awareness, which results that the reputation may not be effective. For that matter, the reputation via the market is a very sophisticated and complicated institution of a developed market system. If the market system is introduced in a developing country, reputation may takes a long time to develop for internal producers. Therefore, the scope for opportunistic behaviour on the side of the producers is very high and calls for the quality regulation and product safety by way of ex- post and ex- ante approach may be much higher in less developed markets rather than highly sophisticated markets. Since much of the goods and services are scarce, the consumers don't have any choice to select them according their tastes and preferences, under such market conditions the principle of take-it or leave-it may prevail pretty well. Therefore, the consumers are unable to get better warranty contracts. The consumers of less developed markets really lack information about the available goods or services and at the same time they are also unaware about their rights and obligations in the market place. There are possibilities that the market may not simply develop for experience goods. In general, purchase of foreign goods may be a prestige, but rational consumers may buy the foreign goods because of their reputation compared to the domestic products. For instance, German based Bahlsen company biscuits have reputation in Russian consumer product market in spite of three times higher price than the domestic biscuits.

II. Role of Consumer Protection under Different Socio-economic Contexts

India is basically an agrarian economy and more than 60 percent of people live in villages. In such an economy the needs of consumers are few, and these are met through exchange of goods and services with a self-reliance. With the transition from agricultural green- revolution (for instance, food production of 182 million tonnes*), to industrial revolution (growth rate of 5.1 per cent*), the state of affairs has changed drastically. In spite of all these developments, still she is under the category of developing nations with lower per capita income i.e., RS. 2282 at 1980 prices* (Human Social Index). Rapid growth of population (920 million in 1995) misutilisation of resources due to lack of know how and existence of distributional inequalities may have direct or indirect influence on unemployment, illiteracy (merely 50 per cent of the total population don't know how to read and understand, as per 1991 census) poverty (merely, 40 per cent of the people fall below poverty line) and scarcity of goods or services.

The new economic policies and the agreement of GATT, puts the Indian consumer in a much weaker position in terms of bargaining power with the producer. The entry of MNCs may increase consumer choice, but the incentive structure of MNCs regarding providing quality and safety products are doubtful. It may be either because of consumers incapacity of quick learning of MNCs product signals about their high quality products or because of being unaware of their rights and obligations in the market place. Consumers are exploited by the producers in almost all respects, simply not only because of their ignorance or illiteracy but also because of many consumers unable to afford the time which it involves and may have nagging uncertainties with regard to the merit of their grievances and may others, in spite of their frustration and dissatisfaction, do not wish to press their claims. Consumers may also have hardly and choice because of non-availability of sufficient goods or services and the available goods being either high price or manipulated, which may results to little scope for complaint by them of quality and measures.

The producers in India can easily distinguish the consumers, marginal and infra-marginal consumers. They may provide quality goods and better contracts terms to marginal consumers and rip-off the infra-marginal consumers by providing low quality products at high prices. With prevailing socio-economic conditions of consumers, it is necessary to have a strong consumer

movement in order to strengthen the socio economic and legal measures of consumer protection

In a mixed economy, like India, the public sector plays a major role in providing the goods or services to the consumers compared to the private sector. The public sector industries, like electricity, water, telephone, postal services, and air & road transportation etc., play predominant role in providing services to the consumers. And also through public distribution system, state is providing essential commodities viz., rice, wheat, sugar, edible oil and kerosene to rural and urban poor at subsidised rates.

In India, the market system is not as highly developed as in Europe and that therefore the scope for opportunistic behaviour is greater because the institution of reputation is less developed. The degree of asymmetric information is very high in a country like India rather than in a country like Germany because of 50 percent of illiteracy and a less financial means. In India, the degree of monopoly power of producers seems to be much higher than in Europe or in the United States. These countries are completely open economies. Therefore, monopoly power can arise only in certain pockets where the degree of regulation is high, such as banking and insurance. Therefore, the traditional exploitation theory of consumer protection even though not a valid theory to explain the necessity for consumer protection in Europe might have some relevance in a case like India.

The consumers have grievances about the goods or services, provided not only by private sector but also by public sector. According to the developed theoretical arguments of state intervention in order to protect the interests of the consumer, the state can protect the consumer either by way of liability system or by way of regulatory system or by both. In the case of defects and deficiencies of goods or services provided by the private sector, the state can use alternative systems or both the systems but in the case of state provided defective and deficiency goods or services, the regulatory agencies may have little grip compared to liability system, to protect the interests of the consumers[88].

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[88]The industrial policy 1991, envisaged disinvestment of a part of government holdings in the share capital of selected Public Sector Enterprises (PSEs) in order to provide market discipline and to improve the performance of Public enterprises, RS 4950 crores disinvested till March 1994. Transition from no-loss and no-profit condition (public sector) to profit maximisation condition (private sector) may suggest strong consumer protection trough state intervention either by way of liability system or by way of regulatory system and or by both the systems.

CHAPTER II

LEGAL THEORY OF CONSUMER PROTECTION: LIABILITY VERSUS REGULATION

It seems to be difficult to provide optimal product safety by price mechanism in the presence of asymmetric information between producer and consumer about the product risks. This necessitates the state intervention in order to protect the interests of the consumer. The state can protect the consumer interests either by way of liability system (ex-post approach) or by way of regulatory system (ex-ante approach) or by way of optimal mix of these two alternative legal approaches. The theory of this chapter has been developed based on the works of S. Shavell, S. Rose-Ackerman, H.B. Schäfer/ Claus Ott, A.I. Ogus, R.A. Cooter, T. S. Ulen, C.D. Kolstand, and G.V. Johnson.

A. Introduction

I. From Negligence to Strict Liability

In the legal theory of consumer protection, in those far-of days, when consumer and producer were equally competent to judge the quality of goods, the law took the approach that all parties to the transactions should watch out for their own interests. If a consumer was dissatisfied as to the quality of the goods purchased, the legal rules pronounce that the consumer should have inspected the product more carefully, which is known as *caveat emptor* i.e., let the buyer beware[1]. As the judge in a 15th century case said: `if a man sells me a horse and warrants that it has two eyes, and it has not, I shall not have an action, for I can know this for my self from the beginning. Until the 19th century, a consumer couldn't sue a manufacturer

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[1] In the case of food and drug consumption, the principle of caveat emptor has little or nothing to offer. See Swann Dennis. *Competition and Consumer Protection*, Harmondsworth, Penguin, 1979.

for injuries caused by a defective product unless he or she had bought the product directly from the manufacturer'

As products become more complicated and sellers evolved into large corporate entities selling not only domestic products but also foreign products widely through impersonal marketing organisations, consumers were unable to protect themselves in many instances. The old doctrines began to see as unjust and slowly started to change from freedom of contracts to standard form of contracts, where the manufacturers can avoid payment of compensation to the consumers either by way of express terms, implied terms or by way of exemption clauses and misrepresentation. The striking development of legal protection for consumers was based on the UK case *Donoghue v. Stevenson* [3], the appellant and his friend went to a cafe where the friend bought ice cream and ginger beer in a bottle made of dark opaque glass. After the appellant had consumed some of the ginger beer, the friend poured out the remain of the bottle revealing a decomposed snail. The appellant suffered, shocked and gastroenteritis as a result of the impure ginger beer[4]. Lord Atkin pointed out, "if some one is injured by consuming bottled beer or chocolates, poisoned because of the negligence of the manufacturer, or by using what should be harmless propriety medicines, soap or cleaning powders, surely the manufacturer should be under a legal liability to compensate for the harm done". Particularly, since the

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[2] Privity of contract shows that the relationship is between consumer and retailer, but not between consumer and manufacturer. For example, in a case, *Winterbottem v. Wright* 10 M. & W. 109,152 Eng. Rep 402 (Ex. 1842), a manufacturer of wagon wheels has, unknown to him, produced several wheels that are defective because the wood from which they were made was not properly seasoned. As a result of the defect, the wheels are likely to buckle while being used, creating the possibility of persons and property being thrown from the wagon and injured. The product was delivered from manufacturer to wholesaler, from wholesaler to retailer and from retailer to consumers. In the case of one consumer who is thrown from his wagon and severely injured, under the rule of privity of contract consumer can sue only retailer, who had probably not violated the implicit or explicit terms of contract with the consumer, because of which the consumer was unlikely to recover. Robert Cooter and Thomas Ulen, *Law and Economics*, The United States, Harper Collins Publishers, 1988, pp. 422, 423.

[3]AC 562 at 579 (1932). Brain W. Harvey, *The Laws of Consumer Protection and Faire Trading*, London, Butterworths, 1982, 2nd ed., p. 123.

[4] A circumstance in which actions may proceed between consumer and manufacturer is that of negligence giving rise to a tort action where the plaintiff must show that the defendant had a duty of care, that he did not do so and that the breach of duty resulted in foreseeable damage. The ability for an independent tort of negligence arises when there is a breach of duty to take care resulting in damage to another person. Thus, the liability for negligence presupposes the existence of the duty to take care - a duty situation. The existence of duty situation in particular circumstances has its basis on the principles of proximity and foreseeability. In *Donoghe v. Stevenson* case, the House of Lords formulated the general criterion for the existence of proximity, which could give rise to a duty of care.

growth of brand names and direct advertising by the manufacturer, it is to be to the manufacturer (and not retailer) that the consumer looks for reliability and quality.

Liability for consequential damages were brought based on the USA case of *Hemmingsen v. Bloomfield Motors, Inc*[5]. The courts have shown some willingness to apply the doctrine of *res ipsa loquitur* (the thing speaks for itself) but as long as the manufacturer's direct liability to the ultimate consumer is in a more uncertain position, it is less likely for consumers to risk pursuing a claim in the court than if the manufacturer were under strict liability[6]. One of the most important decisions proposing strict liability for all product related injuries was presented in the USA case of *Escola v. Coca- Cola Bottling Co.*[7]

II. General Justification of Economic Analysis

The justification of economic analysis of liability is that it could reduce the intensity of harm. Calabresi (1970), suggests that in the case of an accident, three types of costs i.e., primary

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[5] 32 N. J. 358, 161 A. 2d 69 (1960). Mr. Henningsen purchased a new Plymouth from the defendant retailer and then give it to his wife as a gift. The contract of sale with the retailer and manufacturer contained an express limitation of liability of the defendants to the original purchaser and only for the repair or replacement of defective parts within 90 days or 4000 miles. The seller expressly waived liability for consequential damages. Within the time limitation, the plaintiff (Mrs. Henningsen) was driving the car when the steering mechanism failed, causing the car to crash and injuring her. She sued the retailer and manufacturer, and the court held for her: "We are convinced that the cause of justice in this area of the law can be served only recognising that the plaintiff is ... a person who, reasonable contemplation of the parties to the warranty, might be expected to become a user of the automobile. Accordingly, her lack of privity does not stand in the way of prosecution of the injury suit against the defendant Chrysler". Cooter and Ulen, n. 2, pp.430, 431.

[6] Strict liability means that, liability without proof of an actual negligence. Damage, which must be compensated, includes not only death, personal injuries, or pain and suffering but also damage to property acquired for private use and consumption.

[7] 24 Cal. 2d 453, 150 P.2d 436 (1944), the plaintiff was a waitress in a restaurant. While she was placing bottles of Coca-Cola into the restaurant's refrigerator, one of them exploded in her hand, causing her to be severely injured. In this case plaintiff uses *res ipsa loquitur* because only a defective Coke bottle will explode. Traynor, J. I. concur in the judgement, but I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiffs right to recover in cases like the present one. In my opinion it should now be recognised that a manufacturer incurs an absolute ability when an article that he placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings..... Consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trademark..... Manufacturers have sought to justify that faith by increasingly high standards of inspection and a readiness to make good on defective products by way of replacements and refunds..... The manufacturer's obligation to the consumer must keep pace with the changing relationship between them..... The manufacturer's liability should be defined in terms of the safety of the product in normal and proper use, and should not extend to injuries that cannot be traced to the product as it reaches the market. Ooter and Ulen, n. 2, pp. 431-433.

costs[8], secondary costs[9], and tertiary costs[10] should be internalised in order to achieve economic efficiency. Primary cost can be reduced either by way of specific deterrence (collective method)[11] or by way of general deterrence (market method)[12]. Secondary costs can be reduced either by way of risk- spreading[13] or by way of deep- pocket[14]. And the tertiary costs should be reduced, to avoid the risk that these costs exceed the benefits of the reduction of the primary and secondary costs. The need to reduce the tertiary costs of the legal system, which tend to be very high, may conflict with the need to reduce primary costs of accidents. In a world of positive transaction costs, it seems to be better to assign the liability for the cheapest cost avoider[15].

An incentive must be given to both the party's trortfeasors and victims to take the socially optimal level of precaution[16] in order to minimise the accident costs. In the case of unilateral accidents, strict liability[17] is to be preferred in comparison with negligence[18]. Where as in

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[8]They are the costs of accidents themselves- direct sorts of costs that depend upon the number of accidents taking place and their severity. See P. Burrows, and G. C. Veljanovski, (1981), p. 197.

[9]Secondary costs are also known as insurance costs - taking the volume of accidents as given there are different ways of organising the compensation that is paid to victims and these different ways entail different amount of costs. See *Ibid.*

[10]Territory costs are the term used by Calabresi (1971) for transaction costs including bargaining, litigation, and enforcement costs.

[11]Specific deterrence is basically the regulatory approach and compensation of accident.

[12]General deterrence is basically the liability approach and private insurance.

[13]The accomplishment of the broadest possible spreading of losses, both over people and over time, for example, transfer of risks to an insurance company.

[14]The placing of losses on those classes of people or activities that are best able to pay, usually the "wealthiest," regardless of whether this involves spreading.

[15]The cheapest cost avoiders is defined by Calabresi as `which of the parties to the accident as in the best position to make the cost benefit analysis between accident, accident avoidance and to act on that decision once it made'. G. Calabresi and J. Hirschoff, "Towards a test for strict liabilitz in tort", *Yale Law Jornal,* Vol. 80, 1972, p. 1060. Further See, Guido Calabresi, *The Costs of Accidents*, London, Yale University Press, 1970.

[16]It is the cost per unit of precaution equals the reduction in the probability of an accident from taking an additional unit of precaution times the accident costs. See, Steven Shavell, *Economic Analysis of Accident Law*, Massachusetts, Harvard University Press, 1987.

[17] Under this rule, tortfeasor has given the compensation to the victim irrespective of the victims behaviour i.e., victim will always receive compensation. Therefore tortfeasor has to take optimal level of care at all times in order to reduce the intensity of harm under the assumption that the awarded damages by the judges will be equal to the optimal level of harm.

[18] Under this rule, the tortfeasor will be liable only if his level of care is less than the due level of care. However, court should know the costs and effectiveness of harm in order to fix the due level of care, which

bilateral accidents, both the parties can influence the severity of harm, almost all liability rules[19] may give incentives to take optimal level of care, but there is no liability rule which gives an incentives to the parties to take optimal level of activity. Therefore strict liability will be preferred if it is of more importance to give an incentive to the tortfeasor to change the activity level than to the victim. The favouredness of strict liability over negligence, will be based on the arguments of unilateral precaution[20], risk-spreading[21] and lower administrative costs[22].

III. Liability

In general, there are several types of liabilites under contract and tort laws.

1. *Under contract laws*

(a) The sellers liability by forced warranties, for instance under the German Civil Code the buyer gets recovery from the seller if the productive is defective; and

(b) Liability in standard form of contracts for instance, a seller might provide that there is no warranty for the goods sold. This might be declared as void so that a buyer gets his money back.

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should be equal to optimal level of care. So, both the parties have to take precautionary measures to reduce the risk of harm.

[19] Strict liability may be inefficient because it would not give any incentives to the victims to take the optimal level of care and activity. But strict liability with defence of contributory negligence will induce the both parties to take optimal level of care. However, the optimal level of activity will be chosen only by tortfeasor and not the victim;

In negligence rule with or without the defence of contributory negligence both the parties will take optimal level of care, but the optimal level of activity will be chosen by victim and not tortfeasor. Comparative negligence rule results as same as negligence rule, but it will be preferred in the case of involvement of insurance mechanism.

[20] The producer will be always in a better position to take precautions against product related injuries.

[21] The producer can pass on the costs of providing insurance contract (third party insurance) with his product much more easily than the individual consumer.

[22] The burden of the plaintiff in a strict liability is only that he has to show legal causation by preponderance of the evidence.

) Under the tort law

The manufacturers would be held liable, if damages result from the use of their products. In general there are four types of defects, which result to the consumers. They are:

(a) Product failure: In the production process one or a few goods escape from the control of the manufacturer and reaches the market for example, if a bolt wes left out of a lawn mower during its assembly, causing a piece of the mower to fly off and injure a user;

(b) Construction failure: The total design of the product is wrong and reaches the market, for example, the Ford Motor Company's positioning of gas tanks in pinto automobiles.

(c) Warning failure: The manufacturer did not warn about the dangers involved in usage of the product. For example, in the case of medicine, warning against storage, dosage and also keeping the medicine away from the children to avoid unnecessary risk of harm. It is a little bit complex because even though the manufacturer warns about his product risks, if the consumer is unable to understand it properly, in such a case the avoidance of manufacturers liability is to be reviewed.

(d) Insufficient- Post market Surveillance: The manufacturer of a product must follow- up on the performance of his product in day to- day use by the consumers and also to observe the working behaviour of his products in the market place.

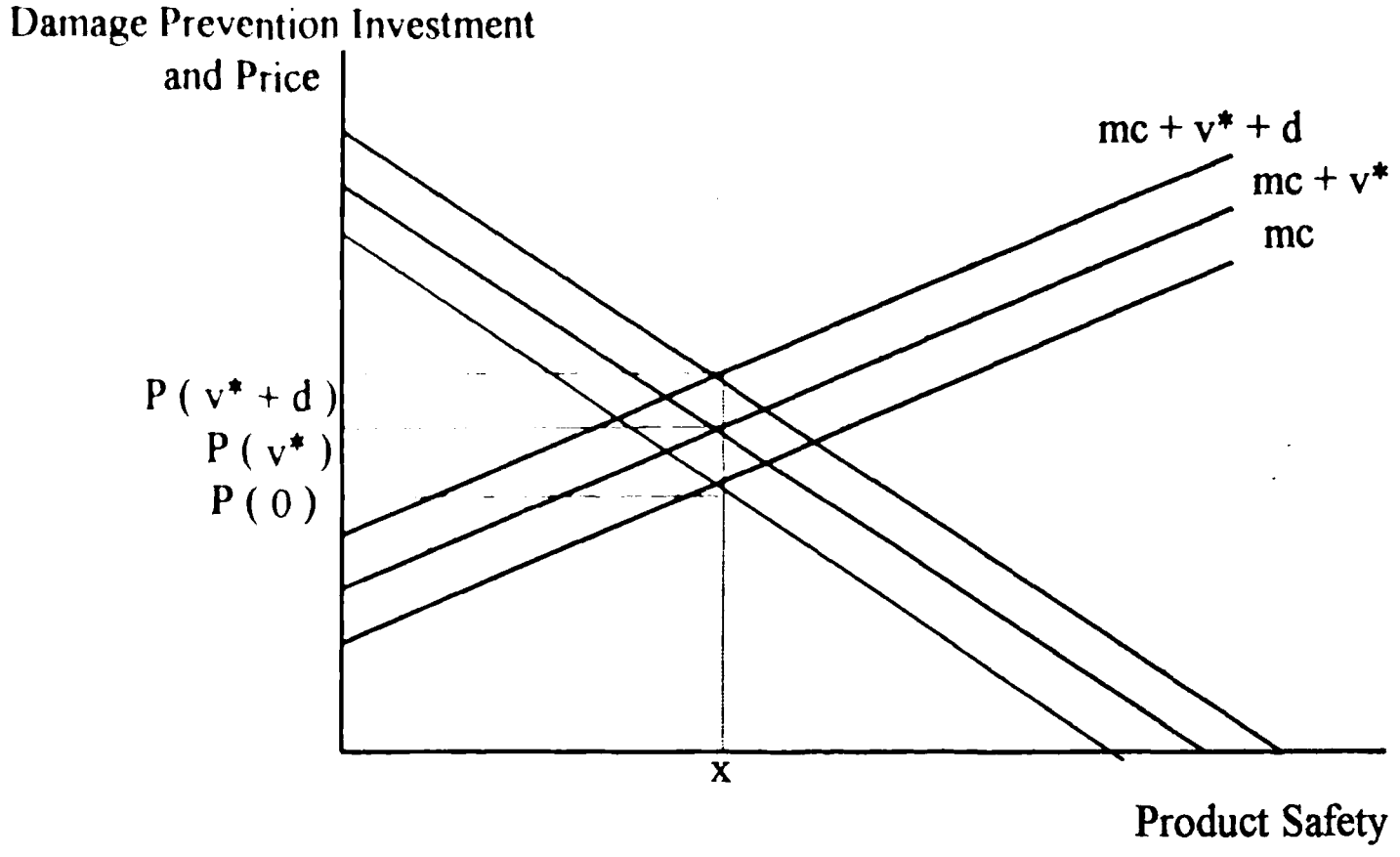
The basic theory behind the enterprise liability is that the manufacturer has the better information about the risks of his product than the consumer does. Therefore he has not only to take precautionary measure during the production process of the product but also he has to observe the working of the product in the market.

In general, any improvement in the legal rules and regulations about the quality and safety of the products leads to increase in the cost of production, which is ultimately reflected in the prices of the products, which will be paid by the consumer. Under the assumptions that:

- The consumer is fully informed about the product risks but he is risk averse, therefore he pays a premium on being insured; and
- The consumer is fully informed about the product risks but he is risk neutral, the system of liability will lead to exactly the same result irrespective of the tertiary cost of the legal system.

In the case of consumers who are willing to pay higher prices for the safer products and producers who may also have incentives to produce safer products to receive profits there is no need of legal rules in order to protect the consumer. Under the assumption of one group of consumers, one possible safety standard, the prevalence of product safety in the market place will be explained with the help of the Graph 2.1.

Graph No.: 2.1
Consumers willingness to pay for safer products

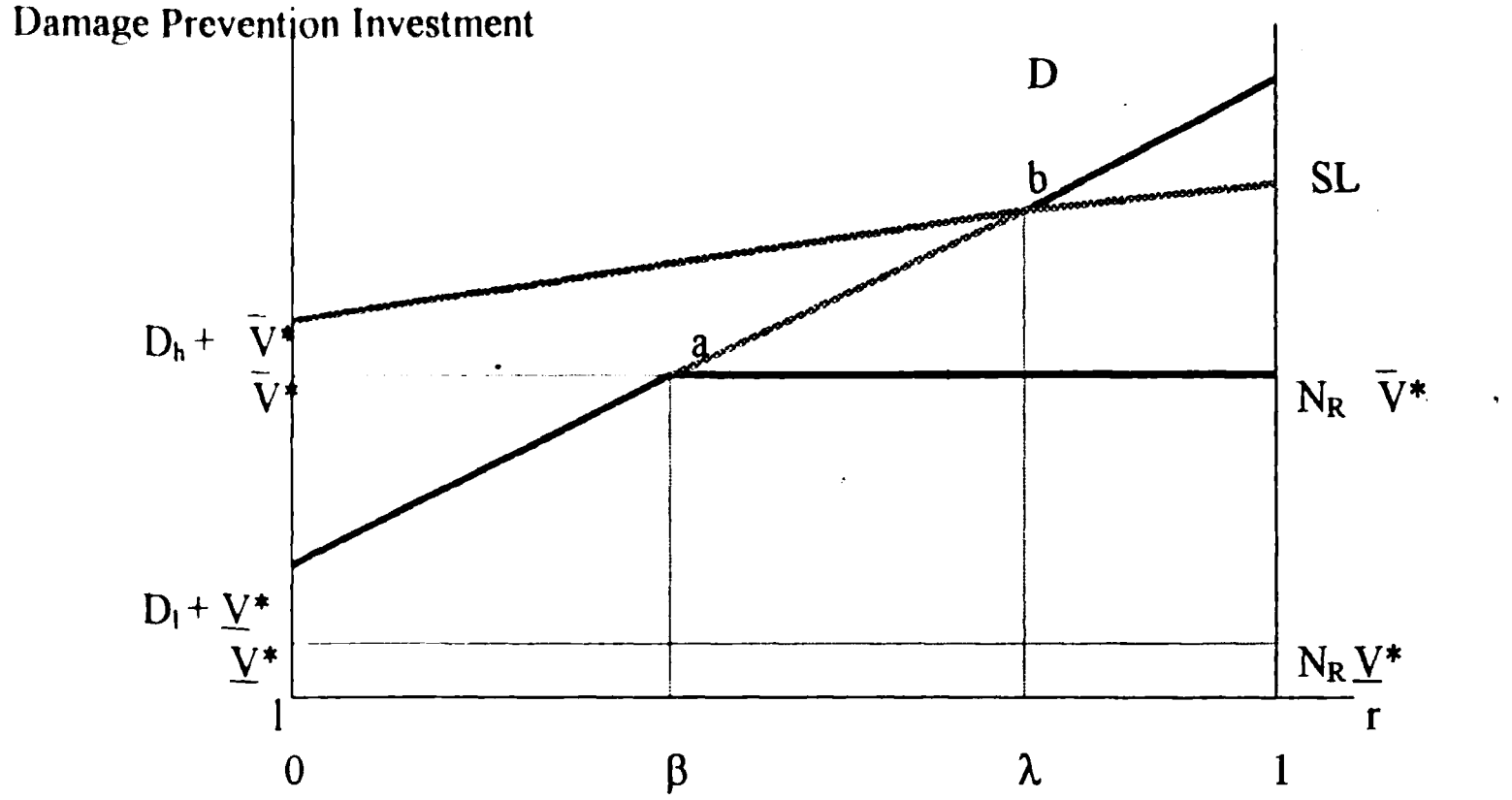


v* = optimal damage prevention investment
mc = offer curve without liability
mc + v* = offer curve with negligence
mc + v* + d = offer curve with strict liability

In the graph 2.1, the horizontal axis indicates the product safety and the vertical axis indicates the price and the damage prevention investment by the producer. In the case of the consumer who is fully informed and is risk neutral or he can buy private insurance results, the regime of liability does not change. The consumer is willing to pay for x even above mc+v* for safer products i.e., me+v*+d. Thus, with or without legal rules optimal product safety may prevail in the market. In the case of consumer who is fully informed and he is risk averse, then the regime of liability does change at least if the consumer is unable to buy the insurance privately.

If we assume two different groups of consumers, that is low risk consumers and high-risk consumers, the producers may produce two different goods for two different consumers at separate equilibrium. Thus, each group of consumer does get what he or she wants. The following graph 2.2 can explain it.

Graph No.: 2.2
Optimal Damage Prevention Investment for the Consumers



r = ratio of high risk consumers to all consumers r E [0,1]
$\underline{V}^*$ = optimal damage prevention investment per product for low risk consumers
$D_l + \underline{V}^*$ = optimal damage prevention investment per product at lower level of damage for low risk consumers
D_l = $D_l (r)$, $D_l^1 (r) > 0$, $D_l (0) > 0$
$\bar{V}^*$ = optimal damage prevention investment per product for high risk consumers
V^* = $\bar{V}^*$ = constant
$D_h + \bar{V}^*$ = optimal damage prevention investment per product at higher level of damage for high risk consumers
D_h = $D_h (r)$, $D_h^1 (r) > 0$,
= $D_h^1 (r) < D_h^1 (r)$; $D_h (0) > 0$
= $D_h (0) < D_l (0)$

$N_R \underline{v}^*$ = Negligence rule with optimal damage prevention investment for low risk consumers

$N_R v^*$ = Negligence rule with optimal damage prevention investment for high risk consumers

SL = Strict Liability

In absence of legal rules, an efficient equilibrium will prevail in the market place because of product differentiation, that is the producer will produce two products, one for low risk consumers and the other for high risk consumers. For instance, a group of consumers who use

their car only once in a week for attending church prayer are low risk consumers and the other group of consumers who uses car every day for their day to day business are high risk consumers. Thus the producer will produce two types of cars which lead to separating equilibrium

In the presence of the legal rules the producer will allocate his damage prevention investment based on the legal standards such as strict liability (SL), negligence rule with low standards (N_R $\underline{V}^*$) and the negligence rule with high standard (N_R $\bar{V}^*$).

Under strict liability rule (cost = D + V), the producer chooses $\underline{V}^*$ as long as $r < \lambda$.(the cost curve will be $D_l + \underline{V}^* - a - N_R$ $\bar{V}^*$).

Under negligence rule, the product quality depends upon the courts due level of care. For instance, if court chooses $\underline{V}^*$ as a legal standard, then the producer chooses $\underline{V}^*$ to minimise cost and low quality products prevails in the market (the cost curve will be $\underline{V}^*$). On the contrary, if the court chooses $\bar{V}^*$ as a legal standard, then the producer will choose $\bar{V}^*$ if $r \geq \beta$ and chooses $\underline{V}^*$ if $r \leq \beta$ (the cost curve will be $D_l + \underline{V}^* - b - SL$).

Thus, the product differentiation will depend upon r and the damage level depends upon r as well as V^*. Therefore, in reality there will be little scope for existence of separate equilibrium. Because the high risk consumers do not disclose the information to the producer that they belong to the high risk group and favour pooling equilibrium, where one standard good is produced by the manufacturer and purchased by both the groups of the consumers which is unfair to the low risk consumers because of `cross subsidisation'. So, the market will unable to produce optimal quality product.

IV. Insurance

In general, consumers are risk averse and they may perhaps insure against product risks. There are two types of insurances, which prevail in the market, namely first party insurance and third party insurance. Both types of insurance's have their own limitations, for example, in the case of first party insurance each and every individual consumer is unable to insure against the

product risks because of his limited resources, especially if insurers had increased their premiums drastically for an unusual set of products such as vaccines or services such as commercial trucking. In the case of third party insurance, it is unfair because the poor have to pay for the richer. And there is some case non-availability of the insurance coverage for certain products for example, wine testing, because of high damage awards to the victims by the courts. There is no need to have third party insurance against health related risks in Germany unlike in India, where social security system prevails.

B. Regulation

I. Introduction

Regulation is a "sustained and focused control exercised by a public agency over activities that are valued by a community"[23]. It is a centralised system because the state plays a major role in the formulation and the enforcement of the law. It contains the idea of control by a superior authority i.e. the state, in order to achieve the desired ends, parties are compelled by the state to behave in particular ways with the threat of sanctions if they do not comply. It is also a public law because it is for the regulatory authority to enforce the obligations, which cannot be overreached by private agreement between the parties concerned[24]. And at the same time, "in some areas regulation is formulated and enforced by self-regulatory agencies rather than by a public body"[25]. In some countries it "can take the form of `an economic instrument' which is not directive"[26]. For example, "individuals or firms are largely free to undertake certain activities, which are regarded as undesirable from a public interest perspective, but they have to pay if they want to do so"[27]. In general there are two types of regulations, namely social

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[23] P. Selznic, `Focusing Organisational Research on Regulation' in R. Noll (ed), *Regulation Policy and the Social Sciences* (1985), p. 363. Quoted in Anthony I. Ogus, *Regulation: Legal Forms and the Economic Theory*, Oxford, Clanrendon Press, 1994, p. 1

[24] *Ibid.* p. 2

[25] *Ibid.* p. 3

[26] *Ibid.*

[27] *Ibid.*

regulations[28] and economic regulations[29]. Social regulations are justified by prevalence of asymmetric information concerning the quality of goods or services and externalities[30]. Economic regulations are justified by the existence of natural monopolies because they may put over price on their products, fail to meet consumer preferences regarding quality, and lapse into inefficiency[31]. Policy makers can select from a range of regulatory instruments based on the degree of state intervention required such as regulation of information[32]; standards; licensing; and price controls.

II. Degrees of State Intervention

According to A. I. Ogus (1994, P.151), regulation of information is under the category of low degree of state intervention because it requires producers "to disclose certain facts about the goods or services, but do not otherwise impose behavioural controls", for example, a health warning must be printed on all cigarettes pockets because tobacco is injuries to health[33]. It comprises not only the required disclosure of product attributes but also a system of certification to indicate that the product complies with either a set of voluntary or a set of mandatory standards such as those promulgated by the Bureau of Indian Standards (ISI Mark)[34]. The more technologically complex the determinants of quality, the less policy -makers are likely to rely on information regulation. Thus in general, and other things being equal,

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[28] They may deal with the matters concerned health and safety, environmental protection, and consumer protection. *Ibid.* p. 4

[29] They generally deal with industries, particularly to monopolistic tendencies. *Ibid.* p. 5

[30] *Ibid.* p.4

[31] *Ibid.* p. 5

[32] It falls into two broad categories: mandatory disclosure, which obliges producers to provide information on characteristics of goods or services; and also the control of false or misleading information.

[33] Tobacco Products Labelling (Safety) Regulations, IS 1991/1531, Ergs. 3, 4, and Steed. I. *Ibid.* pp. 150, 151.

[34] Certification can overcome the information deficit as well as licensing and preserving freedom of choice, for example, consumers may choose lower quality products or services at a lower price. And also it is a kind of an information signal to the consumer that individuals (medical practitioner) with specific designations or titles have satisfied certain conditions, but without prohibiting others from practising. The market for uncertified practitioners may be so small that they cease to exist. Certification may nevertheless become licensing *de facto*.

mandatory standards will be favoured for consumer safety protection because the regulation of information controls the quality characteristics and is involved in risks of illness and injury[35].

Licensing or prior approval is a kind of high degree of state intervention because individuals or firms may be prevented from lawfully supplying a product or service without obtaining prior approval from the regulatory agency (BIS Mandatory Certification Marks), and for "such approval they will have to satisfy the agency that certain conditions of quality are or capable of being, met", for example, pharmaceutical products, where a manufacturer must obtain a licence before marketing a drug[36]. It may be used not only to preserve minimum standards of quality but also to limit competition i.e., creating barriers to entry[37]. These types of controls are justified in such a situation where prevention is better than cure. For example, in nuclear accidents where the consequences of performance failure may be so catastrophic, or the social aversion to them so high, that prior scrutiny and prevention is perceived to be preferable to deterrence from the threat of ex-post sanctions.

Standards is middle degree of state intervention because it allows "the activity to take place without any ex ante control, but the producer who fails to meet certain standards of quality commits an offence, for example, the requirement for toys be so designed that `they do not present health hazards or risks of physical injury by ingestion, inhalation or contact with the skin..."[38]. Standards can be subdivided into three categories (target, performance and specification) which themselves represent different degrees of intervention.[39]

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[35] In the case of food, both in terms of quality and safety for example, adulteration, additive, environmental constrains and irradiated foods, there will be mandatory standards. And at the same time, there are very few mandatory product standards concerned with quality *per se,* that is where a product does not, in ordinary use, generate a risk to health or safety. It may be justified by the argument that higher product safety standards generally involve higher production costs which ultimately have to be paid by the consumer. The benefits in each case have to weigh carefully against costs.

[36] Medicines Act 1968 s. 7. *Ibid.*

[37] In determining the eligibility for the product licence, the regulatory authorities must take into consideration the safety, efficacy and quality of the drug. Licences are used before the regulated activity has taken place, the ostensible purpose being to prevent the occurrence of what is regarded as socially undesirable; the potential quality of performance of all those engaged in the activity has to assessed to ascertain whether it achieves the required standards; the conditions for the licence involve only minimum and common standards and the sanction is particularly severe. The administrative costs of scrutinising all applications are very high and to these must be added to the opportunity costs arising from any delay before the licence is granted.

[38] Toys (Safety) Regulations, SI 1989/1275, Sched. 2, incorporating EC Directive 88/378, Annex II, point 3 (1). *Ibid.*

[39] G. Richardson, A. Ogus, P. Burrows, *Policing Pollution: A study of Regulation and Enforcement* (1982), pp. 35-40. *Ibid.*

"A target standard prescribes no specific standard for the supplier's process or output, but imposes criminal liability for certain harmful consequences arising from the output. A performance (or output) standard requires certain conditions of quality to met at the point of supply, but leaves the supplier free to choose how to meet those conditions, for example, health risks arising from pencils are governed by performance standards which, *inter alia*, prescribe that any coating of paint shall not contain soluble antimony or lead exceeding 250 ppm of that coating"[40]. "A specification (or input) standard can exist in either a positive or negative form: it compels the supplier to employ certain production methods or materials, or prohibits the use of certain production methods or materials", For example, the production of "motor vehicle incorporates several specification standards, one of which is the requirement that all tyres used on cars shall be a pneumatic tyre"[41].

It is well known that controlling of prices is not an effective economic solution. If the control prices less than the market price and if where is higher demand then it may resulting whether blockmarketing or in the reduction of the quality of goods or both.

The study growth of regulation can be linked with the changed perception of the importance of the state in relation to the economy and also that the state has to adopt policies which are in public interest, in particular to respond quickly to problems when they emerged in an acute form and were given extensive media coverage[42]. For example, recently, in New Delhi where nearly three hundred people died because of dengue disease (it is mainly because of mosquitoes), the state immediately had given wide publicity to take precautionary measures. Advancement of technology[43] and `rights revolution´[44]may also increased the scope of regulation.

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[40] Pencils and Graphic Instruments (Safety) Regulations, SI 1974/226, Reg. 2(I)(b). Quoted in *Ibid.* pp. 151, 152.

[41] Road Vehicles (Construction and Use) Regulations, SI 1986/1078, Reg. 24. *Ibid.*

[42] "Regulation often provides a convenient solution, not least because, as Dicey had observed, `the beneficial effect of state intervention, especially in the form of legislation, is direct, immediate, and so to speak, visible, whilst its evil effects are gradual and indirect, and lie out of sight". *See* A.V. Dicey, (ed), *Law and Public Opinion in England during the Nineteenth Century* (2nd ed.), E. C. S. Wade, 1962). p. 257. Quoted in *Ibid.* p. 9.

[43] It creates problems in health and safety as well as in consumer choice. *Ibid.*

"In the name of public interest, the increased acceptance of state's power to limit traditional property rights and freedom of contract, greater use was made of the most interventionist of regulatory forms that is the requirement of prior approval. Confidence in the knowledge and expertise of centralised agencies and in their ability to formulate appropriate regulatory solutions for a huge variety of industrial circumstances (in some areas) led to a proliferation of highly detailed and complex standards regimes, many of them requiring firms to use 'specification' standards"[45]. And at the same time "there was a general perception that industry had been subjected to an unnecessarily complex and inflexible body of detailed rules, some of which were difficult to reconcile with the goals" of public interest and also growing scepticism regarding the ability of centralised regulatory authorities, whether a regulatory agencies standards were appropriate for varying local circumstances. Regulatory agencies may be motivated to over regulate, which may work as barriers to entry as well as to increase the cost ultimately paid by consumers, taxpayers, shareholders and employees[46].

III. Costs of Regulatory Standards

There are three types of regulatory standard costs. They are administrative costs[47], compliance costs[48], and indirect costs[49]. "Target standards, which render unlawful the causing of certain harms, might appear to be an attractive option, at least from a cost effectiveness perspective", as, the harm will be thinly spread over a number of victims and the costs of bringing a private action by any one victim may exceed the compensation payable. In such a situation a regulatory target standard will be prefer compared to liability[50]. "Performance standards are more costly

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[44] "The groups representing, consumer protection, environmental protection, and perhaps some disadvantaged members of the community emerged as a significant political force and demanded 'rights' to increased protection, if only rhetorically". Quoted in *Ibid.*

[45] Quoted in *Ibid.*

[46] *Ibid.* p. 11.

[47] "They are largely born by the regulatory agency, which has the task of formulating, monitoring, and enforcing standards". Quoted in *Ibid.* p. 155.

[48] They "are the capital expenditure on equipment and adaptation to plant necessarily to meet the standard". *Ibid.*

[49] "They fall under the category of productive inefficiency, the inhibition of technology, and allocative inefficiency. The assessment of indirect costs is problematic because relevant effects which are widespread and data is difficult to obtain". *Ibid.*

[50] *Ibid.* p.166.

because the standard-setter has to relate different levels in the quality of performance to the regulatory goal It is much cheaper to the standard -setter compared to individual firms"[51]. Enforcement costs are lower because performance standards monitored at the firm's place and also there will be rare causational problems[52]. In the case of specification standards, it is easy for regulatory agency to predict the compliance costs because of the little difference between one firm to another and monitoring is also easy because the agency "has to simply verify that the prescribed input has been used by the firm (in terms of negative standards, that a prohibited subsistence or process has not been used)"[53].

C. Regulation versus Liability

The theoretical development of consumer protection entails examining the rationale of liability and regulatory systems, which are evaluated critically on the basis of providing incentives to the parties to reduce the risks of harm which may arise from engaging in their activities[54].

I. Alternative Approaches to Consumer Protection

1. *Regulation (ex-ante approach)*

It is an ex-ante approach, which provides that the parties have to pay the fine even before the harm occurs, after violation of the regulatory standards[55]. In the case of an ex-ante approach

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[51] *Ibid.*
[52] *Ibid.* p. 167.
[53] "The disadvantage of specification standard which is that the standard is imposed at an earlier stage in the production process implies that the regulatory agency has, perhaps inappropriately, a high level of confidence that the mandatory inputs will accomplish the regulatory goal in a cost-effective manner. The prohibition of these inputs induce technological rigidity, since it inhibits firms from innovating in general, and from developing other, cheaper means of meeting regulatory targets in particular". Quoted in *Ibid.*
[54] "Approaches to the control of risk of harm

	When applied	
How initiated	Ex-ante	Ex-post
Privately initiated	Injunction	Liability
State initiated	Corrective tax; Safety regulation	Fine for harm done

Source: Steven Shavel, *Economic Analysis of Accident Law*, Cambridge, Harvard Univeristz Press, 1987, p. 278.

standards must be defined[56] irrespective of whether harm occurs. "An ex-ante approach uses regulatory authority in order to decide individual cases; decides some common to whole group issues in rule makings, minimises the inconsistent and unequal coverage from individual adjudication; and also uses non-judicial procedures to evaluate technocratic information"[57]. In this approach, the engaged parties will pay the fine only if they are caught by the regulatory authorities, otherwise they do not pay for the violation of the regulatory standards. And also the participation of parties in their activities are very less, even though they have adequate skills to engage in their activities. For example, if a person having good skills to drive a car, is forbidden by rules and regulations to drive unless he gets the driving licence[58].

2. *Liability (ex-post approach)*

Liability is an ex-post approach, which makes the parties to pay the damages once harm has occurred. In this approach, courts will set the due level of care[59] based on the nature and the facts of the case[60], if harm occurs. In this system, the engaged parties will pay for the damages due to their negligent behaviour, only when they are brought to the court by the injured parties by way of filing a suit. In a great number of cases filing a suit itself does not mean that the tortfeasor has to pay the damages to the victim, for example, inability of the victim to prove the negligent conduct of the tortfeasor.

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[55] The criteria which are known to the parties.

[56] Which is difficult to modify the standards of safety, if it is not equal to the optimal level of standards, because it involves a long and a rigid process.

[57] S. Rose-Akerman, *Rethinking the progressive Agenda*, 1992, p.120.

[58] Sometimes it may be difficult for the poor man unable to pay a lump sum amount to get the driving licence. In some countries linking compulsory insurance with driving licence is also another burden to the poor man. Frequently, in developing countries like India, it takes a long time to get a driving licence.

[59] The criteria which are unknown to the parties except in the case of negligence rule, where the due level of care is specified by courts.

[60] Which is easy to modify the due level of care, if it is not equal to the optimal level of care.

II Regulation and the Information about Safety in a case of Public Goods

1 *State Provided Public Good*

In general, when compared with the courts, the regulatory authorities normally have better information to set the standards about the quality of the goods. They may have better informational advantage with regard to design of regulation based on more than common knowledge. Especially regarding health related and environmental risks, the regulatory authorities have better access and also superior skills to evaluate the relevant medical, epidemiological and ecological information.

In the case of special expertise to evaluate the risks involved in a particular product from engaging in risky activities, regulatory authorities might obtain information by diverting social funds to the purpose, "while private parties hardly have an incentive to do this because a party who generates information will be unable to capture its full value, if others can use the information without paying for it. For parties to undertake individually to acquire the information might result in wasteful, duplicated expenditures, and a co-operative venture by parties might be stymied by the usual problems of inducing all to lend their support"[61]. No individual will provide information, particularly if there are economies of scale in acquiring the information which it would benefit other parties. For example, "a small fumigating company might know little about necessary information, and have limited ability to understand the nature of the risks that the chemicals it uses create. The same might be true of a large producer of pesticides; it may be uneconomical for the producer to develop and maintain expert knowledge about the dangerous properties of pesticides"[62], indicating that there will be an advantage in regulation.

2. *Privately Provided Public Good*

Public good can be provided by private firms, for instance, an insurance company may give its expert advice to a larger corporation to reduce the risk of harm, in an activity in which the

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[61] K. J. Arrow , *Essay in the Theories of Risk Bearing*, 1971. Quoted in S. Shavell, " Liability for Harm Versus Regulation of Safety", *Journal of Legal Studies*, Vol. 13, No. 2, June 1984, p.360.

[62] Quoted in *Ibid.* p. 369.

corporation is participating. And at the same time, the insurance company may give incentives to take precautionary measures by large corporations to reduce the intensity of harm that may occur by providing premium reductions. Where private parties have superior knowledge of the benefits of the activities, the costs of reducing risks, or that of the probability of the risks, it would be better for them to decide about the control of risks, which favours liability rules, other things being equal.

In many situations private parties possess better information because they apparently do obtain it as an ordinary by-product of their activities. They can also take into account changes of the circumstances that influence the risks and the value of their activities. Therefore, under a liability system parties have enough opportunity to make reasonably satisfactory decisions, where it is lacking in the case of regulation[63]. Thus, Liability rule is favourable to control risks under the assumption that private parties have superior knowledge about risks which engaging their activities. Strict liability will give incentives to the parties to balance the costs and benefits of their risky activities. Under negligence rule, if their care falls below the due level of care, and even in case of due level of care not being equal to the efficient level of care, the liability system is still favoured based on information obtained ex-post at trial to formulate the appropriate level of due care. However, the self- interested parties may hide the factual information from the courts in order to escape from the liability. Similarly, the judges may not have adequate skills on technical aspects of a defective product so that they should depend upon the reports of technical experts in order to deliver unbiased judgements to provide incentives to the parties.

3. *Interest Groups and Capture Theory: Problems of Rent Seeking*

The capture or interest group theory emphasises the role of interest groups in the formation of standards of safety[64]. The advantage of better access and superior skills to evaluate on more

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[63] But the problems of moral hazard and adverse selection may prevent efficient risk sharing between the tortfeasor and the victim in the market relations. In such a case regulation perhaps prevent the risk of harm effectively.

[64] Starting from Marx's opinion that big business controls institutions. Stigler's work (1971) noting that the regulatory process can be captured by small business industries as well, and by using Olson's (1965) theory of collective action as a building block to explain how 'regulation is acquired by the industry and is designed and operated primarily for its benefit. Olsons's logic of collective action implies that for a given issue, the smaller the group, the higher the per-capita stake, and therefore the incentive of its members to affect the regulatory

than common knowledge information which may be obtained diverting public funds to get the information so as to set the standards by regulatory authorities will be upset in terms of capture theory Regulatory authorities can be easily captured by interest groups by way of:

(a) Monetary bribes are feasible although not common due to their illegality;

(b) More pervasive, are the hoped-for future employment for commissioners and agency staff with the regulated firms or their law firms or with public-interest law firms;

(c) Personal relationships provide incentives for governmental officials to treat their industry partners kindly;

(d) The industry may cater to the agency's concern for tranquillity by refraining from criticising publicly the agency's management;

(e) The industry can also operate indirect transfers through a few key elected officials who have influence over the agency, a method which include monetary contributions to political campaigns, as well as votes and lobbying of the `Grass Roots'[65], in order to set the standards according to their convenience; and

(f) The regulatory authorities some times use the experts of a firm, in such a case the experts may keep the necessary information away from the regulatory authorities.

In general, there are several ways to influence the policies of regulatory agencies, for example, the information required by the agency may be obtainable only from the regulated industries; lack of expertise in the subject-matter may mean that the agency has to recruit its officials from those industries; and industries may threaten the agency with costly, or even trivial, time-wasting appeals should it fail to be `co-operative' [66].

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outcomes. Stigler inferred those members to of an industry have more incentives than dispersed consumers with a low per capita stake to organise to exercise political influence. The emergence of some powerful consumer groups and the regulatory experience of the 1970s led Peltzman (1976) and the academic profession to take a broader view of Stigler's contribution that allows government officials to arbitrate among competing interests, and not always in favour of business.

[65] Employees, shareholders, suppliers and the citizens of communities where plants are located. See Jean-Jacques Laffont and Jean Tirole, *A Theory of Incentives in Procurement and Regulation*, Massachusetts, the MIT Press 1993, pp.476, 477.

[66] P. J. Quirk, *Industry Influence in Federal Regulatory Agencies* (1981), pp.16-19.

In the case of rent seeking[67], regulation can be used as an instrument for entry barriers "against competitors" It is easy for interest groups to capture the regulatory authorities because of its centralised power structure

Regulation as practised in Western economies was doomed to a high probability of failure because the effort to impose public interest outcomes was inherently incompatible with the preservation and fostering of private production and profit making[68].

In the case of liability system, it is very difficult for interest groups to capture the judges either by way of bribery or by way of political pressure because of the decentralised power structure. The scope of biased behaviour is less in the case of judges compared to regulatory authorities. However, liability system has its own limitations in delivering unbiased judgement, because of the following reasons:

a. Buying the Witnesses

The capture theory, however, has less influence on judges, but it can be very well argued that some of the scrupulous parties may buy the witnesses and submit them to the courts in order to prove the wrong things to be the right things. In such a situation the judges have no option but to deliver the order based upon the wrong witnesses.

b. Mis-utilisation of Laws Flexibility

The professional and experienced lawyers may save their clients frequently from the payment of compensation to the victims for wrong doing by using the flexibility of the law. Especially, whenever the victim attend party- in - person and the tortfeasor engages a lawyer may arise the problem because a non- legal skilled victim is unable to argue effectively with the skilled tortfeasor's lawyer. Therefore, it may not give any incentives to the tortfeasor to take precautions to reduce the risk of harm. They can twist the law according to their convenience.

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[67] A monopolist can charge a price higher than the market price. The extra earnings thereby obtained are known as `monopoly rents'. When the government allows monopolies to exist, a number of people may make great efforts to gain that monopoly. The winner gets the monopoly, the losers do not. The resources the losers expended to get the monopoly usually create no goods and services and are unproductive. As a result, rent-seeking behaviour is socially unproductive in a majority of the cases. See Krueger, A. O., The Political Economy of the Rent-Seeking Society, *American Economic Review* 64 (June 1974), 291-303; Buchanan, J. M. *et al.*, eds., *Toward a Theory of Rent-Seeking Society* (College Station: Texas A&M Press, 1980); Bhagwati, J. N. Directly Unproductive, Profit-Seeking (DUP) Activities, *Journal of Political Economy* 90 (October 1982), 988-1002; and Hillman A. L. and Katz, *E.* Risk-Averse Rent Seekers and the Social Cost of Monopoly Power, *Economic Journal* 94 (March 1984), 104-10.

[68] C. Offe, *Contradictions of the welfare State* (ed. J. Keane, 1984) Ch. I. See also G. Teubner, After Legal Instrumentalism? Strategic Models of Post- Regulatory Law (1984) 12 *Int. J. Soc. Law* 375.

c Corruption

In recent years the problem of corruption is a major issue in India. Starting at the legislatures, bureaucrats, and even some judges have been found corrupted. The liability system is based on an independent judiciary in a decentralised organisation, which makes regulatory capture unlikely at least if the system is large enough. On the other hand, regulatory authorities are normally centralised organisation and more likely to be influenced by vested interests, which run counter to reducing the risk of harm. And also corruption works in a different way. In the case of ex-ante approach the groups of possible victims is necessarily too disinterested and unorganised where as manufacturers interests might find their way into the decision centres of regulatory authorities or political organisations on which they are dependent. In contrast, in a decentralised liability system corruption becomes more difficult because the interest groups have to be influenced as many independent judges. Moreover corruption works in both ways, as in any private law case complainant and respondent have an equally large interest at stake. Even though bribery of judges might be common they are not easy to organise because either party can bribe and as this is common knowledge to both parties bribery might not evolve because it is too uncertain and too costly. In general it seems that the emergence of a decentralised liability system and the possibility of subsequently removing the comprehensiveness of regulation helps curbing corruption as well as regulatory capture.

d. Supersession of Judges

In 1973, Mr. Justice A.N.Ray was made Chief Justice of India over his three seniors Justice Shealat, Justice Hedge and Justice Grover. And in 1977 Justice Khanna was ignored in order to favour his junior brother on the high bench, Mr Justice Beg. According to Justice Jackson, Judges are more often bribed by their ambition and loyalty than by money. It seems that even the appointment of judges is influenced by political power[69].

e. The Influence of Judicial Background on Case Outcomes

Since the rise of legal realism, it has been axiomatic that the background and world view of judges influence the case outcomes. Ashenfelter& others[70], find little evidence that judges differ in their decisions with respect to the mass of case outcomes[71].

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[69]S. P. Sharma, *Indian Legal System*, New Delhi, Mittal Publications, 1991, pp. 48-50.

[70]O. Ashenfelter,. *et. al.*, "Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes" *Journal of Legal Studies*, Vol. 24, June 1995, pp. 257- 281.

f Tortfeasor Threat

In a liability system, the filed cases may some times be withdrawn by the complainants because they may face threats from the opposite party. Similarly, in the history of court system there are some incidents where the judgements delivered in favour of tortfeasor simply because the judges faced threat from the tortfeasors.

In over all, the regulatory agencies in principle are better suited to process information than courts. However, the courts have tendency to be less biased in favour of producers than regulatory agencies.

III. Liability If Compensation is not Equal to Damages

The liability system is unable to provide incentives to the tortfeasor, if the compensation is not equal to damages. This section will provide an over all view of the economic consequences of full, over and under compensation of victims.

1. *The Economic Consequence of Full Compensation of Victims*

Under strict liability regime, the tortfeasor has to compensate fully for his wrongdoing to the victim[72], which gives incentives to the tortfeasor to take the precautionary measures in order to reduce the intensity of harm. However, one of the disadvantages in this regime is that the victim has no incentive to take any precautionary measures to reduce the intensity of harm in situations where he is able to reduce the severity of harm by taking normal care.

Under the regime of strict liability with defence of contributory negligence, both the parties, tortfeasor as well as victim, have to take precautionary measures to reduce the intensity of harm. Because the tortfeasor will be liable only when the victim takes due level of care[73]

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[71] In the mass of cases that are filed, even civil rights and prisoner cases, the law dominates the case outcomes and not the judge.

[72] Under the assumption that the compensation awarded by the courts is equal to the actual damage.

[73] Which is set by the court, where due level of care should be equal to optimal level of care.

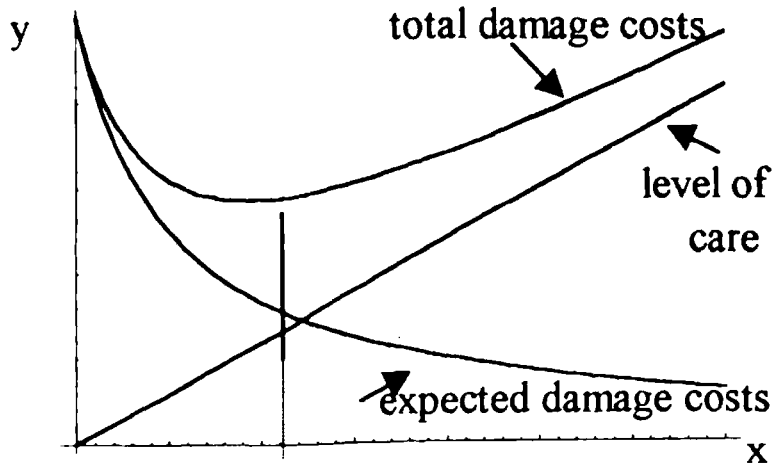
otherwise, the victim beats the costs of the harm due to contributory negligence, which gives an incentive to both the parties to take precautions to reduce the effectiveness of harm.

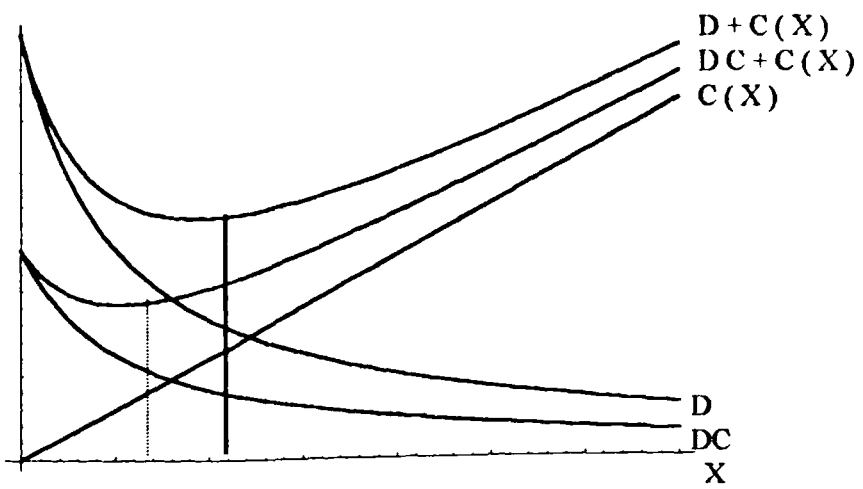
The economic consequences of liability system can be explained with the help of the following graph 2.3

Graph No.: 2.3

Economic Consequences of Liability

(a) The Case of Full- compensation





X_p X^*

(b) The Case of Under Compensation

X^* = optimal level of care
X_p = profit maximising level of care
X = level of care
Y =costs and damages
DC = damage compensation = 0.5 D
D = damages
C(x) = costs of care
D+C(x)= total damage compensation costs

Figure I shows the due level of care is equal to the social optimal level of care. Under the negligence rule, tortfeasor will be liable for damages they cause only if their level of care was less than the due

level of care X^*, specified by courts. Under strict liability rule without contributory or comparative negligence, victims will choose zero level of care, since they will be compensated for any losses they sustain, it may leads to social sub- optimal level of care

Figure II explains what the result will be, if due level of care is not equal to the optimal level of care, and if the awarded compensation is less than the total damage, under both the regimes of strict liability as well as negligence rule.

a. Strict liability

Under the rule of strict liability, whenever expected damages are higher than the expected compensation, it always leads to distortion because the profit maximising care and expected compensation, will always be lower than the optimal level of care and *vice versa*.

b. Negligence Rule

Under negligence rule, whenever expected damages are higher than the expected compensation, it leads to distortion, if the profit maximising care and expected compensation are lower than the optimal level of care. And it does not lead to distortion, if profit maximising care and expected compensation are higher than the optimal level of care.

2. *The Economic Consequences of Over-Compensation of Victims*

Courts, due to either lack of information about the facts of the case and or lack of analytical skills, award huge damage compensation, which has to be paid by the tortfeasor to the victim. In such a situation the tortfeasor simply will go out of the business, which perhaps leads to adverse effects for example, in the case of production of very important goods, such type of over-compensation results non-availability of those goods to the needy consumers.

3. *The Economic Consequences of Under-Compensation of Victims*

In the case of under- compensation, the tortfeasor will treat liability that exceeds his assets as imposing an effective financial penalty only equal to his assets, for example, a tortfeasor with assets of Rs. 500000 will treat an accident resulting in liability of Rs.1000000 identically to an accident resulting in liability of Rs. 500000 only. Therefore, tortfeasors' expected penalties

might be less than the expected losses for which they are liable to pay. It may give two adverse effects, one is that the tortfeasors may engage in risky activities to a socially excessive extent; and second is that the tortfeasors have little incentive to take care in order to reduce the intensity of harm due to their level of activity.

Under- Compensation of victims also lead to a decrease in the purchase of liability insurance by tortfeasors, because their assets are less than the harm they might cause; Part of the premium tortfeasors would pay for liability insurance would be to cover losses that they would not otherwise have to bear. In some cases, heavy damage awards to the victim by the court leads to non- availability of insurance in the market. And also it is helpless in the case of fatal accidents like nuclear fuel leakage. In a Country like India, not over compensation but under compensation is most important problem.

IV. Reasons for Under- Compensation under the Liability Regime

1. *Inadequate Wealth of Human beings*

When the wealth of the tortfeasor is less than the actual damage he caused to the victim the result is under-compensation. For example, if tortfeasors wealth is Rs. 10 and the damage caused by him is Rs. 100, in such a situation the liability system is inadequate to give any incentives to the tortfeasor to reduce the severity of the harm. The victim has to bear the large part of the costs of damage. But under the regime of regulation of safety, the issue of under-compensation is irrelevant because the parties would be made to take steps to reduce the risk of harm as a precondition for engaging in their activity. It might be preferable to use the regulation of safety, whenever the activity of the parties results in such a way that the costs of the accident are higher than the assets[74].

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[74] The parties could be made to do this through the exercise of the state's police powers; force could be used to prevent a business from operating those disobeyed safety regulations. Where, however, monetary penalties are relied upon by parties to satisfy regulations, the fact that their assets are limited might lead to problems. See Shavell, n. 51, p. 361.

2. *Inadequate Wealth of Corporations*

In the case of some of corporations, the victim is unable to get full compensation equal to the harm caused by such corporations because of its limited liability, though the share holders of that corporations have capability to compensate the victim fully. Not piercing the corporate veil is none other than deciding against imposing vicarious liability[75] on shareholders. Limited liability is justified because shareholders are unable to control the risk-creating behaviour of the corporation and also because the probability of losses exceeding corporate assets is small. The situation is totally different in the case of small and closely held corporations, where, the shareholder can easily monitor the risk-creating behaviour of such corporations if they want and the probability of bankruptcy because of tort liability might be higher in such corporations. Similarly, the justification of limited liability is lessened where the corporation in question is a subsidiary of a parent corporation. In case of assets, they are lesser than the losses of the subsidiary, the Parent Corporation will be always liable for the losses because of the parent's power over the subsidiary and the knowledge of the parent about its subsidiary. However, in the case of parent corporation and subsidiary corporation, if the subsidiary corporation did harm to the victim which exceeds its assets, the victim may or may not receive a compensation from the parent corporation because the payment of compensation will depend upon the relationship between the said corporations.

Liability system is more dependent on tortfeasors wealth than regulatory system. If damage compensation can easily lead to tortfeasors bankruptcy, which is especially probable in labour intensive firms, the liability system can lose its effectiveness as large damages go uncompensated and perhaps lead to under deterrence. On the other hand, in regulatory system, the fact that the fine can be substantially lower than the damage compensation may perhaps generate efficient deterrence. Especially, in countries like India, where the presence of low wealth tortfeasors suggest a stronger regulation of safety than in rich countries like Germany, for example, in India during the 19th century, breach of contract-unlike an any rich countries-

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[75] The imposition of liability on principal for some or all of the losses caused by his agent, is under the assumption that the agent's assets are less than the losses he might cause, but that the principal's assets are sufficient to pay for the losses (or) agent is engaged in such type of activities under the instructions of the principal thus what ever may be the consequences of that particular activity, the principal has to bear it and not the agent.

was a criminal offence for some contracts, as the sanction for breach led to bankruptcy and therefore did not deter sufficiently.

3. *Accessibility of Courts*

The effectiveness of liability system not only depends upon tortfeasors adequate wealth and victims incentives to sue the tortfeasor but also depends upon easy accessibility of courts. Poor people are unable to approach the courts compared to rich. For example, in India a common citizen, who resides at the end of the Southern part, appealing a case in Supreme Court (New Delhi) is merely a day dream because involvement of money, time and perhaps also legal knowledge. There is no wonder if majority of illiterate citizens don't know of the existence of the Supreme Court. It may be better to establish a Supreme Court bench in one of the south Indian states. In fact, if citizens of India turned to best utilisation of the courts, the existing courts are not enough in order to serve the citizens of India (it need not be just the criminal case but civil cases also). The low accessibility of courts also lead to a total amount of compensation which is lower than the total damages and therefore to the same problems of the liability system as in the case of inadequate wealth.

In the case of ex-ante approach, the regulatory authorities are able to enforce the safety standards not only on the basis of complaints of consumers but also by probabilistic methods of enforcement i.e., either by way of getting samples directly from the factory or by way of purchasing samples from the open market. Majority of consumers, however, do not know to whom to comply in case of defective goods. The existing regional (4) and branch offices (14) of Bureau of Indian Standards (BIS) may unable to enforce the standards effectively. It seems to be better not only increase the number of offices but also increase the enforcement officers in order to reduce the risk of harm by enforcing the standards effectively.

One of the advantages of regulatory system is that the regulatory action against one complaint may also serve the whole nation, which is lacking in the case of liability system. It is equally true that it is easy to regulate a few of monopolies before harm occurs rather than each individual consumer approaching to courts after harm occurs.

4. *Problems of Compensation in the case of Pain and Suffering and other Immaterial Damages*

The principle of determining fair compensation consists of the injurors obligation to make the injuree as well- off as if the injury had not occurred. Such a principle will provide incentives to the injurors not to impose risks on others by making the injurors bear the total costs of their activities. It is difficult to apply this principle in some injuries, for example, there may be no payment large enough to make a blinded man as well off as if the injury had not occurred. According to David Friedman " full compensation- a level of payment for damages which restore the victim to the level of welfare he had before the injury-is in a sense inefficient because of the level of compensation is inadequate as a deterrent to the injuror, since it understates the cost imposed by his actions". An efficient level of compensation will be found if the courts imposed ex-ante damages, provided the courts had adequate information. The correct level of compensation is the level that the potential victim, after selling as much insurance on himself as he wishes, will be neither better nor worse off than a situation where no risk had been imposed[76].

In fact, it is difficult to calculate the damages for sentimental values, for example, after the death of X's wife he lost all photographs in a fire accident. How can judges evaluate the damage occurred to X? The legal system says that there is no compensation for such accidents due to lack of information, which may lead to low compensation. On the other hand, if the legal system awards a damage compensation for sentimental values, it might lead to over-compensation because victims will try to exaggerate the damages, which are based upon subjective values. Courts generally award damages based upon objective calculation and might be reluctant to award damages based upon subjective calculation.

In the case of ex-ante approach, the regulatory authorities can easily fix a fine or compensation for immaterial damages with the help of expert committees based on average values.

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[76] D. D. Friedman, "What is 'Fair Compensation' for Death or Injury?", *International Review of Law and Economic* Vol.2, 1982, p. 84.

5. *The Enforcement Problem*

Becker and Stigler (1974) argue that competitive private enforcement can achieve optimal enforcement through incentives generated by fines. Landes and Posner (1975) argue that public enforcement may achieved at a lower cost by raising fines above the level of external damages and lowering the probability of apprehension. Given higher fines, however, the private sector would increase the resources devoted to enforcement thus leading to inefficient over investment. Polinsky (1980) notes that criminal violations may entail external damages. In this case, private enforcement generally leads to less enforcement than public enforcement. Therefore, even if public enforcement has a disadvantage it may be socially preferable. The public versus private enforcement issue depends upon whether public or private deterrence of violations is more efficient. By acting on the basis of complaints, an agency may be able to prevent damages from unsafe products before they occur. This system may be less costly than litigation of damages after a large number of violations have occurred. This observation accords with Landes and Posner (1975), who find advantages in public enforcement when the likelihood of detection is less.

6. *Rational Apathy and the Inability of Risk Redressal*

In spite of the total damages caused by the tortfeasor being very high, when it comes to individual damage it is not so high. In such a situation, a rational self- interested victim often does not wish to bear the problems of dealing with courts and lawyers. Since the efficiency of a liability system depends on the incentives to sue for damages by the victims, it is better to sue the tortfeasors in order to provide incentives to reduce the risk of harm by payment of compensation, which is equal to the damage done to the victim.

Rational apathy on the side of the victim is further enhanced if damages are fully insured. This incentive gap might not exist in countries with a less comprehensive social insurance system. Rational apathy can be offset to a certain degree if victims are allowed to litigate the tort case by way of class actions. Even then the problem of rational apathy of victims still prevails. It has been argued that in such a case no complainant has any incentive to monitor and control the efforts of lawyers. As a result, the award of damage compensation by courts might be too low to provide proper incentives to the tortfeasor to reduce the risk of harm.

a. Court fee

The Constitution of India provides justice for all without any discrimination. But justice is costly because in almost all-civil cases, justice seekers have to pay court fee. According to Professor Alan Gledhill the Indian judiciary is the most successful of nationalised industries[77]. Court fee is treated by the state as a source of revenue[78].

The Joint Committee on the code of civil procedure (Amendment Bill, 1974) recommended that the Central Government may ensure that there is a uniformity in the court fees all over the country. It felt that the rates of court fee should be very low, if not nominal, so that the less affluent sector of the community may not be deprived of equality before law. The amount received by the state government by way of court fee should not exceed the expenditure incurred on the administration of civil justice. Where such income exceeds, the amount should be spent for providing necessary amenities to the litigant public.

b. Law's Delay

Justice delayed is justice denied. The ever-increasing arrears of cases in the courts indicate the extent of this denial. The maximum pending period in the Supreme Court has reached the twenty- five years mark on civil cases, ten years in criminal appeals against life imprisonment and at least eight years in appeals against death sentence. The convicts have been languishing in jails and death cells and legal claims of citizens outlived their lifetime only because of deficiency in judicial manpower. This is the cause behind arrears of cases in courts, three million cases pending in the Supreme Court and the High Courts and a staggering 28 million cases in the lower Courts. The delay is because of the procedure, it has reached such a high dimension that some people have started adjudging the judicial system as an institution of oppression[79]. There are many factors contributing to delay viz., an inefficient and inexperienced judiciary, insufficient number of judicial officers (in the case of backlog of appointments-6 for 26 vacancies in Supreme Court, and 65 for 451 in High Courts), an incompetent and corrupt ministerial and process-serving agency. A survey states the position, the judiciary too is not free from graft, the Santhanam Committee reported that corruption exists in the lower judiciary

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[77] A. Gledhill, " Some Aspects of Indian Law To-day", *ICLQ Suppli.*, Vol.8, 1964.

[78] P. Jaganmohan Reddy, Quest of Justice, 1969, p. 102.

[79] *EMS Namboodripad v. TN Nambiar*, 1970 (2) S.C.C. 325-34.

all over India and in some places it has spread to the higher rank also[80]. The diverse delaying tactics adopted by the litigants and their lawyers[81] badly haunt the feeble expectations of the subjects in tort claims, for example, in the *State of Mysore v. Ramachandra (A.I.R. 1972 Bombay 93)*, the plaintiff's land and crops were heavily damaged due to the negligence of government servants. Therefore he filed a suit claiming Rs. 3,000 as damage. The suit was instituted on November 14, 1957 and the state contested it on technical grounds visualising fully the negligence on the part of the government employees. The case took thirteen years when it was decided by the Bombay High Court on second appeal awarding Rs. 2700 as damages against the state. In such a situation recourse to the courts appears to be a deterrent.

c. The environment of the court

In civil courts some of the parties are unable to express their views freely and frankly because of the fear of the courtroom. This is particularly the case in cross examinations, when the parties are asked to answer a question YES or NO in court room within a short span of time. This is difficult even for well- educated citizens.

d. Skilled Personnel

An efficient tort system requires a large number of highly trained judges, not only capable of working with the law and sometimes difficult legal procedures but also of developing expertise in different fields of law. In contrast regulatory system can be carried out in setting of regulatory standards established by a few highly specialised experts working beyond legal procedure. On the level of law enforcement, non-compliance with command and control regulation can be observed and sanctioned with less expertise. It is technically much easier to observe violation of a simple standard and to levy a fixed fine rather than to determine a level of due care in a court procedure and to assess damages properly. With respect to the qualification of personnel command and control regulation might get along with less trained civil servants than a system depending more on liability.

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[80] A. J. Heidenheimer, " The Dimensions of Corruption's in India", *Political Corruption*, 1970, p. 220.

[81] *Law Commission of India*: Fourteenth Report, 1958, p. 263..

7 *Difficulties in Establishing Causal Links*

A plaintiff can succeed in a tort action only if he can establish that the aspect of the defendant's conduct contributed to the injury[82]. It is highly complex to establish causal links, especially when there is a number of antecedent conditions that could have contributed to the injury. "In the case of environmental damages the causal links between the polluter and the victim are often so weak that the judicial routines to establish causation exclude compensation"[83]. According to the principle of ` all or nothing ´ a tortfeasor has to pay full damage compensation if the court affirms causation, otherwise no compensation at all has to be paid[84]. Legal doctrines have been developed to solve the informational problem of causation. This refers to the concept of *res ipsa loquitur*, which is based on the idea that in many cases damages can be linked to certain activities as a matter of general experience. An even more radical approach to the informational problem of causation is to shift the burden of proof entirely to the defendant. Such a rule will almost always lead to full damage compensation by the defendant, because the defendant is unable to disprove that the damage was not caused by his activity. This rule can be accepted only when it does not lead to wrong incentives for a plausible tortfeasor. The inefficiencies of reversing the burden of proof rule have been widely discussed in the legal economic literature[85]. The polluter may be driven out of a socially productive activity altogether if he has to bear the excess burden. It is likely to happen in a system of strict liability, whereas in a negligence system, when a due level of care is defined equal to the optimal level of care, this adverse effect does not arise[86].

The informational problem of causation can also be solved by replacing the `all or nothing principle by probability compensation which leads to pro rata compensation according to the

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[82]R.W. Wright, "Causation in Tort Law", *California Law Review*, Vol. 73, 1985, p1759.

[83]D. N. Dewees, " The Comparative Efficiency of Tort Law and Regulation for Environmental Protection", *The Geneva Papers on Risk and Insurance*, Vol. 17, 1992, , pp. 446 and 451. Quoted in H. B. Schäfer/ Claus Ott, *Widening the Scope of the Environmental Liability*, 1995, p. 10.

[84]S. Rose-Ackerman, "Market-Share Allocations in Tort Law. Strength and Weaknesses", *Journal of Legal Studies*, Vol. 19, 1990, pp.739 and 743;H. B. Schäfer./ C. Ott, "Unternehmenspublizität, Umweltschadensbilanz und Haftung für Umweltschäden", Schäfer / Ott (ed) in *Ökonomische Analyse des Unternehmensrechts*,, p. 232. *Ibid.* p.11.

[85]S. Shavell, "An Analysis of Causation and the Scope of Liability in the Law of Torts", *Journal of Legal Studies*, Vol. 9, 1980.p.502 ; W. M. Landas, & R. A., Posner, *The Economic Structure of Tort Law*, Cambridge/ Mass. and London 1987, p. 63. *Ibid.* p.12.

[86]A. Endres, Allokationswirkungen des Haftungsrechts, p. 124. *Ibid.* p. 12, 13.

probability of causation[87]. For example, in the case of *Sindell v. Abbott Labs (26 Cal. 3d588, 607 P.2d 924, 1980)*, which is known as the DES (*Diethylstilbestrol*) case DES was a drug given to women to prevent miscarriage. Some of the daughters born to mother whom took DES developed cancers, which were attributed to the drug. Since an identical drug was produced by several manufacturers and since most plaintiffs could not identify the manufacturers of the drug taken in their individual cases liability has been apportioned on the basis of firms' market shares. This doctrine would even bridge time lags between the emission and the damage such that compensation for expected damages that include future damages become possible. It has been shown that pro rata compensation provides correct incentives to the tortfeasor even in a system of strict liability [88]. This rule is based on the probability guesses and it should be confined to those cases, in which all available information on the causation is common knowledge of the courts, the complainant and the defendant. Otherwise it would be regarded as arbitrary if somebody who knows that he has not caused damage were held partly liable.

8. *Time-lags in recognising Harm*

In the case of food impurities, any of us may be exposed in one year to hundreds of intended and unintended constituents of food that are suspected of harmful effects on health. Some of these harmful effects may be immediate and the sources may be identified without any controversy; others may be insidious and long delayed, and the sources may be highly disputed. For example, the recent issue of mad-cow disease (Creutzfeld-Jakob disease and BSE) in which there is a passage of a long period of time before harm manifests itself. It also increases the possibility that by the time a suit is contemplated, the evidence necessary for a successful action will be stale or the responsible parties may be out of business.

The occurred problems of operationalisation of risk coverage under the liability regime can be overcome by the application of the regulation of safety because it is the duty of the regulatory authorities to enforce the regulatory standards in an efficient manner. It , however, seems to be that regulations are not only rigid in nature in order to modify the standards of safety but also that enforcing the old standards may perhaps unable to internalise the risk of harm. It may be

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[87]D. N. Dewees, " Instrument Choice in Environmental Policy", *Economic Inquiry* , Vol. 121, 1983, pp.53and 62.
Ibid. p. 13.

not the case in liability system because of flexibility in order to change the standards of care through case by case adjudication.

9. *Assessment of Damages*

In the case of litigation, the courts should measure the harm accurately either by the damage assessment process or by the use of damage tables, because it leads tortfeasors to behave in such a way that reflects the magnitude of the harm they might cause and to take precautions according to the harm they cause[89]. They will have no incentive to learn about the level of harm in advance if assessment of damages will be based of average harm, for then the particular level of harm will not effect their damage payments. And also exact assessment of damages will also provide incentives to the litigants to provide information about the harm to courts. Tortfeasors will want to establish the true level of harm if it is less than estimated harm, and victims will want to demonstrate the true harm if it exceeds the estimated harm[90]

V. Administrative Costs of an Alternative System

The costs of the tort system include time, effort, and legal expenses borne by private parties in the course of legal litigation or in coming to settlements as well as the public expenses of conducting trials, employing judges, empanelling juries etc. In the case of the tort system, most of its administrative costs are incurred only in the case of harm[91]. For two reasons the administrative costs of the tort system will not always be large, even when harm occurs. First, under the circumstances of a well-functioning negligence rule, defendants would generally have been induced to take due care; injured parties would generally recognise it and would not bring a suit against tortfeasors. Second, suits would usually be capable of being settled cheaply by comparison to the costs of a trial[92]. However, in the United States administrative costs of the

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[88]See S. Shavell, " An Analysis of Causation and the Scope of Liability in the Law of Torts", *Journal of Legal Studies*, Vol. 9, 1980 pp.502 and S. Shavel, *Economic Analysis of Accident Law*, 1987, pp.115.

[89]It is under the assumption that tortfeasors have the knowledge of level of harm they cause when they take their decisions. *Ibid.* pp. 13, 14.

[90]Louis Kapow and Steven Shavell, "Accuracy in the Assessment of Damages", *Journal of Law and Economics*, Vol.39, April 1996, p.192. (Note: some times it is difficult to establish the true level of damages especially by the victims, for example, excess billing in cross bar telephone service).

[91] The total administrative costs will equal to the number of claims settled multiplied by the administrative cost per settled claim, plus the number of litigated claims multiplied by the cost per litigated claim.

[92]Shavell, n. 61, p.364.

liability system are pretty high, for every dollar of the award of damage compensation involves 0.56 cents as costs of litigation.

The total number of claims are likely to be larger under strict liability than under the fault rule[93]. However, the average cost of resolving claims is likely to be higher under the fault rule than under the strict liability because of a higher propensity to go to trial and a higher cost per trial.

Administrative costs of the regulation of safety include the public expense of maintaining the regulatory establishment and the private costs of compliance. In the case of the regulatory system, administrative costs are incurred irrespective of whether harm occurs or not; even if the risk of harm is eliminated by regulations, administrative costs will have been borne during this process. On the other hand, administrative costs of regulations can be reduced through the use of probabilistic means of enforcement[94], for example, firms may be subjected to spot visits by regulatory authorities; when products and services are randomly selected and examined. But these have their own limitation because there is some minimum frequency of verification necessary to insure adherence to regulatory requirements. Generally regulations require the presence of particular safety devices. For example, fire extinguishers, guard rails, life boats etc., make enforcement less costly than regulations demanding particular modes of behaviour. Where regulation demands a type of behaviour, there may be features of a particular situation making a lack of compliance hard to conceal, for example, would it still be possible for a dairy to keep secret its failure to pasteurise milk when samples can be tested at low cost and when number of employees would be aware of the violation? A large number of violations of the regulatory standards, which necessitate many of regulatory authorities to regulate the standards and collect the fine from the standard violators, it automatically leads to heavy administrative costs.

In the case of the ex-post approach, the administrative costs do not only involve the costs of the legal process and the expenses of conducting trials but also the costs of the maintenance of

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[93] Under strict liability a victim will have an incentive to make a claim whenever his losses exceed the costs of making a claim. Under the fault rule a victim will not have an incentive to make a claim frequently because he will always concerned about the establishing tortfeasor's fault.

[94]See D. Wittman, "Prior Regulation versus Post Liability: The Choice between Input and Output Monitoring", *Journal of Legal Studies*, Vol. 6, 1977, p. 193.

jails in the case of criminal sanctions. For example, in the case of life imprisonment the state has to bear the total costs, which are quite heavy. Where as in the ex-ante approach, the major administrative costs involve in the maintaining of the regulatory establishment to enforce the regulatory standards. The authorities will collect the fine from standard violators or will cancel the licences. Criminal sanctions are very limited in the case of the regulatory system compared to the liability system.

In the case of administrative costs, the choice between ex-ante and ex-post approaches should depend upon the costs of ex-ante controls relative to the administrative costs of adjudicating each harm multiplied by the number of expected harms.

In India, courts are running out of resources compared to the regulatory institutions, for example, up to 1994 the Consumer Disputes Redressal Agencies (CDRAs) do not have proper financial assistance from the government. In 1994-95 the Planning Commission has agreed to provide one time assistance of Rs. 61 crore to the State Governments @ Rs. 50 lakh per State Commission and Rs. 10 lakh per District Forum to strengthen the infrastructure of the Consumer Courts set up under the Consumer Protection Act, 1986. In the year, 1994- 95 the BIS had a surplus account of Rs. 112.98 million.

VI. Standards Setting and Consumer Protection

1. *Expert Advice*

In the case of the liability system, courts always rely on the information given by the respective self-interested parties. It is difficult for courts to set the standards due to lack of expert skills. In some cases, for example, medical malpractice, the judges do not have adequate knowledge, in such cases the courts ask expert advice or set-up an enquiry commission to obtain relevant information in order to give an unbiased judgement. So in those cases other than the common knowledge disputes, courts should always seek the experts' advice. The due level of care, which is set by the courts, may not be equal to the efficient level of care[95]. Under such circumstances, there is no incentive provided to the tortfeasor to take the precautionary measures in order to reduce the risk of harm.

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[95]Reduction in probability of an accident from taking additional unit of care, times the accident costs.

In the case of the regulatory system, authorities have an informational advantage both by observation and by possessing the ability to evaluate the scientific information. Even in the case of award of damages for pain and suffering, the regulatory authorities have an advantage because they can set up an expert committee with those persons who possess adequate skills in different fields; based on their advice the regulatory authorities can easily fix a damage compensation on an average value.

2. *Appeals*

In the liability system, the aggrieved parties have an opportunity to appeal in the case of dissatisfaction with the order of lower courts. Because of the inexperience of some judges, the pressure of time etc., the lower courts may pronounce wrong judgements, which can be corrected by the upper court (Apex Court).

Within all legal systems in modern days, there exists a fairly general right of appeal for trial court decisions[96]. Shavell's article[97] discusses the appeal process in terms of the correction of errors, the extension of legal rules[98], and the harmonisation of the law[99], also in terms of error prevention, of lending legitimacy to the legal process, and of enhancing the power of the central state authority.

Appeals in terms of error prevention, may some times may have adverse affects, for example, a rich tortfeasor can delay the payment of compensation to the victim by going on appeal from lower court to higher courts. In higher courts judgement may be delivered after several years and perhaps even after death of either party. In the case of a poor common citizen, who does not have means to go for appeals, this indicates that the norm of error prevention by upper courts may be questionable. Thus, the norm of error prevention depends upon, quick disposal of the appeals and there should be easy accessibility of the courts to the common citizens.

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[96]In an authoritative monograph on appeal, it is stated that " (a) ll developed legal systems recognise various forms of attacks on judicial decisions."

[97]S. Shavel, " The Appeals Process as a Means of Error Correction, " *Journal of Legal Studies*, Vol. 24, June 1995, pp. 379- 426.

[98]Lawmaking is evidently a substantial function of the appeals process, not only in common-law countries but also in the amplification of the civil code in civil-law countries.

[99]Resolution of conflicts in the interpretation of the law among trial courts.

In general some of the Indian scholars supported the argument of curtailment of the right of appeal for remedies to Law's delay, but it may reduce the possibility of correcting wrong judgements. This kind of advantage is lacking in the case of regulation.

3. *Variation in the Standards of different Tortfeasors (in the case of private goods)*

The standards, which are set by the regulatory authorities, are commenly applicable to each and everybody. This type of standard enforcement has its own disadvantage in the case of private goods where standards vary for each individual. Recent developments in technologies provide better opportunities to maintain the different optimal standards for every single individual in order to reduce the risk of harm. For example, the standard set by the regulatory authorities are exactly suited for firm `A', but the same standards may be very high for firm `B' and very low for firm `C'. In such a situation, it is better not to set the standards and leave the whole thing to the choice of private parties, to have their own standards to reduce the risk of harm in order to avoid a compensation claim either by the negligence rule or by strict liability.

VII. Social Security Systems and Consumer Protection

1. *Liability versus Regulation under Comprehensive Social Security Systems*

Social security is a kind of compensatory mechanism that seeks to create wide diversification of losses occasioned by injury, sickness and disease common to every body, i.e. it is applicable to health risks only and not to damages on property. With the help of social security we can reduce the administrative costs of liability. But there is no incentive given to the victim to sue the tortfeasor in order to get a compensation for damage because the victim receives the compensation from social security. And also it leads to an adverse effect because there is no incentive given to the tortfeasor to reduce the risk of harm. In a social security system, the victim has to bear the total costs of the damage either by way of first party insurance or by way of third party insurance. At the same time the authorities of the insurance do not have any incentive to sue the tortfeasor because in any case they are getting back all the costs by way of collecting the premiums[100]. The problem of rational apathy is shifted to the insurance company

[100] This may not be applicable to private insurance companies.

whereby damages are not fully compensated. The advantage of the social security system is that the victims need not face the risks involved in suing the tortfesor in order to get a compensation. Social security will take care if liability and regulation systems fails.

2. *Liability versus Regulation in the absence of a Proper Social Security System*

There is no doubt that rational apathy still exists in the case of minor damages to the victim due to the desire order to avoid the risk of going to court to sue the tortfeasor to get a compensation. The major disadvantage is that the victim, bears the total costs of damage himself i.e., there is no scope for diversifying the costs of damages. In a liability system, the victim has only two options that are either to bear the total costs of damage or to sue the tortfeasor to receive compensation.

In the absence of a social security system, it is better to establish an efficient alternative legal system, where the tortfeasor will be allowed to engage in a particular activity by the regulatory authorities after fulfilment of certain standards. Especially in a developing country like India with little social security, a liability system might be more effective than in other countries with comprehensive social security.

It is very important to have a well functioning liability system or regulation or both in order to provide incentives to the tortfeasor to take precautionary measures to reduce the risk of harm when there is no proper social security.

VIII. The Relative Merits and Demerits of Liability and Regulation

1. *Appropriateness of Alternative Approaches under Different Conditions*

Based on the above analysis of the functioning of regulation and liability systems in order to control risks, one can easily see that none of the systems have any unique ability to control the risks. Regulation is unable to reduce the risks because regulatory authorities have inadequate information about the risky activities of private parties, high enforcement costs and regulatory capture. On the other hand, liability is unable to reduce the risks because of the possibility that

the parties may be incapable of payment of full damages or their escape from a suit of claim, weak causational links and complicatory legal procedure. The overlap between liability and regulation suggest the necessity of examining the optimal mix of these two alternative legal systems.

In the case of usage of a mixed form of liability and regulation, there are two questions, which have to be clarified in order to make the best use of an optimal mix of liability and regulation to control the risks of harm. They are:

(a) Should a party be liable for the damage even after satisfying the regulatory standards, in the event of harm? and

(b) Should a party be liable in the case of not satisfying the regulatory standards?

Protecting a party who fulfils the regulatory standards from liability will lead to adverse effects because no incentives are given to the party to take precautionary measures to reduce the risk of harm more than required by regulatory standards. It is inefficient in a situation where regulatory authorities set the standards, with a lack of information, especially on the private parties. On the contrary, protecting a party who fulfils the regulatory standards, might conflict with tort liability especially in the case of uninformed consumers and innocent victims, because denying compensation to those who were previously able to sue for damages is unjust and unwise.

Compulsory liability of the party in case of not satisfying the regulatory standards results in a finding of negligence. In such a case some parties would be led to comply with regulatory standards when they would not otherwise have done so. In particular, there will be some parties:

i. "Who ought not have to meet regulatory standards because they face higher than the usual costs of care or they pose lower risks than normal for example, the problem of pooling equilibrium and separating equilibrium related to high and low risk consumers; and

ii Who will not have been forced to comply with regulatory standards because of the probabilistic methods of regulatory enforcement"[101].

Protecting these categories of parties from the liability may be efficient because it provides incentives to them not to take any extra-ordinary precautions to reduce the risk of harm, otherwise it leads to wasteful precautions.

In an unusual circumstance, especially when additional precautions are necessary to avoid fatal accidents, it is always advisable to use the liability system despite satisfaction of regulation. Prosser (1971, P.204), "the statutory standards is no more than a minimum, and it does not necessarily preclude a finding that the actor was negligent in failing to take additional precautions. Thus, the requirement of a hand signal on a left turn does not mean that .... a driver....is absolved from all obligation to slow down, keep a proper lookout, and proceed with reasonable care. This is the case where the regulatory standards ought to be regarded as a minimum since there will be parties who ought to take greater care and would not do so they were to escape liability on account of simply complying with the statutory standard"[102].

However, the failure to comply with regulatory standards does not in fact automatically result in liability for example, "it has been held not to be negligence to violate... as where one drives on the left because a child dashes out on the street i.e., we do not want the driver to stay on the right-hand side of the road when the child dashes out; holding him liable for being on the left would give him a socially undesirable incentive to drive on right"[103].

2. *Possibilities of Appropriate Reconciliation of Liability and Regulation*

The compliance with regulation does not necessarily relieve the party from liability. On the other hand, failures to meet the safety standards do not in fact automatically lead to liability. The ex-ante approach is favoured especially in the areas viz., toxic torts, product defects, and medical malpractice. According to Peter Huber, courts' incompetence concerning technical

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[101]Quoted in Shavell, n. 61, pp.365- 366.

[102] *Ibid.* p.371.

[103] *Ibid.* p.373.

issues of health and safety incompetence arising from lack of expertise, inadequate staff, and ill-suited procedures may lead to negative effect to discovery of scientific truth[104].

Neither regulation nor liability provides incentives to exercise the socially desirable levels of care by the parties. Therefore, the policies of these two alternative legal approaches are considered as substitutes for correcting the externalities, for example, in the case of chopping down a tree in one's yard, it is less costly to use liability to force appropriate caution than to construct a myriad of permits and regulations covering tree felling. At the same time, in another example concerning air pollution it is less costly to promulgate well thought -out standard regulations than to let each victim to take the tortfeasor to court.

There is a large number of areas where both the approaches are used frequently as a complementarities for example, in the case of potential deficiencies of incompatible uses of neighbouring property, where a hospital is situated next to a noisy, dusty cement manufacturing industry, there may be possibilities of minimising externalities by zoning ordinances (which is a form of ex-ante approach) and at the same time exposing the externality generator to nuisance liability (which is a form of ex-post approach)[105]. Many view the tort liability as a way to counter the basis of state action despite the fact that some of the regulations, for example workers' compensation, were established to benefit ordinary people by substituting neutral administrative determinations for biased courts and costly lawyers [106].

In the case of joint use of liability and regulation, normally efficiency requires that the ex-ante regulatory standard be set on a level that, if regulation were used alone, would provide the socially sub-optimal level of precaution. In fact, a reduction of regulatory standards can be afforded because liability is present to take up some of the *slack* associated with the lower standards. In the absence of liability rules, regulatory standards need to be set at the socially

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[104]P. Huber, *Liability: The Legal Revolution and Its Consequences*, New York, Basic Books, 1988. Quoted in Ackerman, n. 57, p. 122.

[105] The classic comparison of the efficiency aspects of these alternate methods of minimising this type of externality is given by R. Ellikson, "Alternatives to Zoning: Covenants, Nuisance, and Fines as Land Use Controls", *University of Chicago Law Review*, Vol. 40, Summer 1973,, pp. 681-781.

[106]H. Weiss, "Employers' Liability and Workmen's Compensation", In Elizebeth Brandies, (ed), *History of Labour in the United States*, 1896-1932. New York, Macmillan, 1934, pp. 564-610.

optimum or equivalent, where there is a zero probability of a judgement against a rational injurer under liability system[107].

Court should see tort liability as a temporary substitute for regulation, when regulation seems to be inefficient. After the correction of regulatory standards, courts should resolve the conflicts between ex-ante and ex-post approaches. If the regulatory standard is the same as the court standard of due level of care and both are efficient, the tortfeasor has an incentive to comply with both the standards in order to avoid fine and compensation. If the regulatory standard is less than the court standard of due level of care (which is equal to efficient level of care), then the tortfeasor will choose the court standard in order to escape from the liability, at least in those cases in which he pays full damage compensation for all damages caused. However, in case of the mandatory regulatory standards, even though the regulatory standard is not equal to the court standard of due level of care, the tortfeosr has to comply with the regulatory standards, otherwise the regulatory authorities will not allow the tortfeasor to engage in his activity. Similar arguments are valid, even in the cases where tortfeasor pays less than full damages. But, in case of voluntary regulatory standards, if the tortfeasor pays less than full damages, he will always choose court standard of due level of care in order to avoid compensation.

Also, if the courts treat regulation as a low standard setting agency, there is no problem if the agency itself sets a low standard in view of case-by-case adjudication as the best way to respond to the regulatory problem. The problems will arise, when regulatory authorities set the standards equal to the optimal level of care, but the courts establish stricter negligence standards. In such a case a tortfeasor has to comply with double standards, which is unfair. On the contrast, a tortfeasor who just complies with regulations must pay damages to the victim. If he meets the courts' standard of care there is no need to pay any damages to the victim. This leads to the adverse effect because it will surpass the optimal regulatory standard, and marginal costs will exceed marginal benefits.

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[107]D. K. Charles, *et al.*," Ex-post Liability for Harm VS. Ex-ante Safety Regulation: Substitutes or Compliments?", *American Economic Review*, Vol.80 , no. 4, 1990, p.889.

It is also equally necessary to examine which liability rule is best based on efficiency grounds, under the favoured use of mixed ex-post and ex-ante approaches. Regulation can be found within the combination of fault rule and strict liability. Keeping in view the victims protection it justifies the introduction of strict liability in combination with regulation. Strict liability combined with compulsory insurance also serves the purpose of victims' protection. Under the assumption that the insurers can determine the injurers' levels of care, their liability insurance policies will support them with full coverage and provide incentives to take optimal level of care. And also injurers will choose the optimal level of activity because they will pay premiums equal to the expected losses they cause. In case of negligence, under the assumption that there is no uncertainty in determination of due level of care, injurers take due care that they bear no risk and victims will purchase full risk insurance coverage against damages. In the case of failure to set the due level of care, it will be better to take liability insurance by the injurers because they might be found negligent even if they try to take due care[108].

But there are some problems in first-party insurance and third-party insurance[109]; moral hazard[110]; adverse selection[111]; nonavailability of insurance at least for some activities[112] and

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[108]S. Shavell, " *Economic Analysis of Accident Law*, Cambridge, 1987 pp. 210 -213.

[109]First -party insurance simply states that the person who is engaging in risky activity, will himself take insurance in order to avoid the personal loses, for example he may take fire insurance for his house. In this case, every individual has a freedom of choice whether to go for insurance or not, according to his or her risk evaluations. The major differences with the liability system are that in the case of first party insurance the method of compensation normally depends on what has been lost. There is more opportunity for correcting the mistakes in the case of first party insurance than under the liability system, for example it is possible to provide by contract that disability payments payable only for permanent disability are repayable if the disability should turn out not to be permanent (see *Adler v. Moore [1961] 2 Q.B. 57*). First party insurance often does not offer 'full compensation' compared to tort liability. The contributory negligence is normally immaterial in the case of first party insurance, for instance many insurance policies exclude liability for losses arising from specified events which are similar to 'contributory negligence'. On the other hand, problems frequently arise in the case of first party insurance, which are similar to the causal problems which so arise in tort cases. In theory first party insurance as well as tort liability offers compensation for financial loss and also compensation for some kind of personal disability. Under both the tort liability and first party insurance the availability of compensation for loss of profit arising from the damage or destruction of profit- earning property is similar and also the assessment of compensation is similar in both the cases.

Third- party insurance means, instead of purchasing insurance individually, one can buy collectively; for example, a producer of a particular product will purchase insurance against the risks of that particular product in order to avoid the personal liability. The costs of the premium will be transferred to the consumers via prices. The main aim of this type of insurance is- as of all others- to protect the insured against some contingency against which it is impossible for him to guard adequately by other means. The policy is intended to benefit the insured and not the injured party, so the injured party has no direct claim against insurer. But in the case of insurance against liability to third parties is compulsory under the Road Traffic Act not for the protection of drivers, but for the protection of their victims.

also it is helpless in the case of fatal accidents for example, nuclear disasters. Under the

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The difference between third party insurance and first party insurance is that the former, to be truly effective, may have to be taken out for an unlimited sum. The third party insurance is affected by the law relating to contributory negligence compared to first party insurance. Third- party insurance is cheaper than the first-party insurance and the producer of products has capability of buying insurance compared to individual consumer who is unable to pay insurance premium. The only disadvantage with the third party insurance is that the cross-subsidisation i.e., poor pay for rich. And it is very difficult for insurance companies to determine the consumers' levels of care because of asymmetric information, especially in third- party insurance compared to first -party insurance, where it has some possibilities to determine the insurees levels of care. Third party insurance is a much more cumbersome form of insurance than personal insurance.

The risks which are covered under the third party insurance could also be covered by first party insurance to a certain extent; for example a person who has a comprehensive insurance policy on his vehicle is insuring not only against his legal liability should a claim be made against him, but also against the risk of any damage to his vehicle arising from any of the possibilities specified in the policy (See *Peter Cane*, 1990).

[110]Moral hazard has been recognised in the insurance literature i.e., medical insurance, automobile collision insurance, etc., by lowering the marginal cost of care to the individual, may increase usage; this characteristic has been termed moral *hazard*. The best known reason why insurance market may not function efficiently is normally referred to as moral hazard. The essence of this argument is that once an individual has taken out insurance against some particular contingency, the incentives to act in ways that decrease the risks involved will be reduced.

However, various devices are written into insurance, to partly reduce the problem of moral hazard, of which the most important are deductibles and coinsurance. The use of deductibles, under which parties have to meet the first Rs.X of any claim out of their own pocket, is another probably less effective means of countering moral hazard. While such a practice has no effect as marginal deterrent once the deductible ceiling is reached, it may nevertheless be of some help. The reason for this is that if damage costs may be small or large then the possibility of having to pay a moderate amount of damages will not be eliminated and thus some deterrent effect will be maintained.

The option of a system of coinsurance is a widely practised method of combating moral hazard. It entails the individual paying some portion of the costs of any claim, the insurance company paying the remaining amount. This has the same kind of effect in principle as imposing tax upon an activity creating an externality, since the insured individual has an interest in reducing the level of costs following from his own activity (see *David K.W., and Roger A. W.,* 1989). If the marginal gain from the coverage of additional fractions of cost always exceeds the marginal inefficiency loss, he will purchase full coverage insurance; if the marginal loss exceeds the marginal gain for all extents of coinsurance, the individual will purchase no insurance. If individual demands differ, the optimal extent of coinsurance will differ for different individuals (See *Mark V.P.*, 1968).

The third mechanism through which moral hazard may be controlled is the use of restrictions upon the activities of the insured i.e., the willingness of the insurance company to pay compensation may be made contingent upon the insured party conforming to various requirements, for example, the insurance company may require that firms buying theft insurance take reasonable precautions.

[111]Asymmetric information coupled with a reduction of average quality of goods or services traded in the market has received the name of `adverse selection'. Especially in the insurance market, the insurer is unable to determine whether the premium holder belongs to high risk or lower risk group. And also increase in the premium rate attracts the least healthy insured holders.

[112]"Insurers had increased premiums drastically for an unusual set of products, such as vaccines, general aircraft, and sports equipment, and for an equally diverse set of services, such as obstetrics, ski lifts, and commercial trucking. In still other cases- Intrauterine devices, wine testing, and day care, Insurers had refused to offer coverage at any premium, forcing these products and services to be withdrawn from the market" (See *Priest G.*, 1987, p. 289).

assumption that the compulsory insurance will solve the problem of under-deterrence, it is not necessary to argue in favour of the ex-ante approach. At the same time, the cumulative effect of direct regulation, strict liability and compulsory insurance may lead to higher costs.

Under the rule of strict liability, there is no conflict between the two alternative legal approaches under the assumption that damages are awarded equal to the harm caused by the tortfeasor. It is applicable even in the case of dangerous activities, where the calculation of damages and the establishment of causation are relatively straight- forward.

"The combination of regulation with fault rule seems to be based on the following reasons:

(a) The risk of underdeterrence is less under a fault rule because the injurer will take precautions to reduce the risk of harm as long as his total costs of precaution are not higher than his assets;
(b) Regulation of safety has a functional role under a fault rule. Regulation sets the standards which can contribute to the avoidance of making mistakes in the determination of the due level of care; and
(c) The enforcement problem created through safety regulation, which also justifies the argument of mixed use of ex-ante and ex-post approaches[113], might be less serious under a fault rule"[114].

Under a fault rule, the victim is the enforcer of safety standards because he has to prove that the tortfeasor has violated the regulatory standards. At the same time it gives incentives to the tortfeasor to comply with the regulatory standards. This type of advantage is lacking under the rule of strict liability, where the victim has to prove only that he was injured by the conduct of the tortfeasor, irrespective of any violation of the regulatory standards.

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[113]See M. Wheeler, " The use of Criminal Status to Regulate Product Safety", *The Journal of Legal Studies*, Vol. 13, 1981, p. 600.

[114] Quoted in Michael Faure and Roger Van den Bergh, "Negligence, Strict liability and Regulaion of SafetyUnder Belgium Law: An Introductory Economic Analysis", *The Geneva Papers on Risk and Insurance*, Vol. 12, No. 3, pp. 110, 111.

In addition to holding violators of the regulatory standards to be negligent per se, the courts would also recognise *a per se* defence for injurers who meet the regulatory standards[115]. Any penalty that exceeds or equals social costs provides the correct deterrent by making tortfeasors comply with the regulatory standards, under the assumption that regulatory authorities set the optimal standards and courts also accept these standards in awarding damages and apply them competently to individual cases[116].

A recent decision on doctors by the Supreme Court makes us ask, whether doctors can be brought under the scope of the Consumer Protection Act, 1986? A far reaching verdict by the Apex Court of India given on 13th November, 1995, holds that services offered by nursing homes, hospitals and doctors for consideration fall within the ambit of the Consumer Protection Act, except when it is rendered free of charge or under a `contract of personal service'. This is the result of the inadequacy of the existing regulatory system under the Indian Medical Act. The medical councils are supposed to register medical practitioners and medical colleges and to look into complaints made by patients. So far, there has not been any intervention by the medical council in a medical malpractice case. Although patients go through the routine of first appealing to the medical council they inevitably have to turn to the courts. Before this verdict, the most determined of aggrieved patients had to suffer interminable delays and costs in civil litigation, which was a major deterrent. Therefore, the Consumer Protection Act, 1986 came as a tremendous relief to such potential complainants.

On the other hand, there is the case of securities scam, in which the well known stock broker, Harshad Mehta, manipulated the stocks by using the bank money based on the flexibility in the Indian Banking Rules, for instance fortnight adjustments of the funds from surplus banks to deficit banks in order to balance the assets and liabilities, which ultimately resulted in the direct regulation of stocks under the authorities of Securities Exchange Board of India (SEBI). The argument of Abel, preventing an injury is more important than compensating for its occurrence

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[115]The injurer's compliance with that standard, however, would not preclude liability if some other negligent action caused the injury. (*Bradley v. Boston & Maine Railroad*, 56 Mass. 539, 543 [1948]) If a manufacturer obtained governmental approval for a new vaccine, for example, the firm would not be absolved of liability for injuries due to lax quality control in production.

[116]See J. Calfee, and R. Craswell, " Some Effects of Uncertainty on Compliance with Legal Standards", *Virginia Law Review* , Vol. 70, 1984, pp. 965-1003.

because there is no guarantee that the status quo ante is restorable after physical or emotional injury may be well suited here (Abel,1986,p.161).

The above two cases may provide a sufficient ground for the importance of the mixed use of ex-ante and ex-post approaches in India in order to control the risk of harm.

In India liability system is itself alone unable to control the risk of harm because of court delay's rate; lack of trained personnel; complicatory legal procedure; higher litigation costs; existence of labour intensive firms; and no easy accessibility of courts. Similarly regulatory system is itself unable to control the risk of harm because of easy regulatory capture; inadequate regulatory institutions in order to cope with the problems of ever growing population; difficulties involved in getting the information from regulatory authorities; inadequate enforcement of standards and perhaps higher administrative costs. The helplessness of the ex-post as well as ex-ante approach suggests to examine the optimal mix of liability and regulation in order to control the risk of harm. Every body accepts the necessity of two alternative legal systems, but there is no clear- cut answer for what will be the optimal mix of liability and regulation? In general, the optimal mix of alternative legal systems differ across countries for example, in developing countries like India, where large number of firms are labour intensive compared to developed countries like Germany, if the damage compensation lead to tortfeasors bankruptcy liability cannot do anything and may be regulation can do something. Similarly involvement of top most politicians and civil servants in a series of scams, either directly or indirectly showing that the interest groups may influence regulatory authorities. It suggests that the decentralised liability system is better than the centralised regulatory system to control the risk of harm.

Liability system should be strengthened by changing the ideology of Indian law to that one innocent can face damage compensation in order to bring 100 tortfeasors under the liability in stead of not bringing the 100 tortfeasors to court in order to save one innocent from damage compensation.

The alternative legal systems may have to work as a complementarities as well as substitutes. In the case of complementarities viz., as in tea and sugar, in order to have a best combination of these two, we have to know how much sugar we need in order to get the quantity of tea we

need? This, however, varies from person to person. Similarly the optimal mix of the alternative legal systems also vary from case to case and country to country.

The optimal mix of alternative legal system is to be the one in which the regulatory authorities set the standards as minimum and at the same time the courts also take into consideration these standards as minimum and award the damage compensation in case of harm occurring because of the regulatory standards being sufficient to internalise the risk of harm. Similarly the minimum standards of regulation may perhaps reduce the risk of harm to least a reasonable extent, if the liability system is unable to do so because of several reasons, for example, no case being filed by the victim against the tortfeasor. Thus, the optimal mix of liability and regulation should provide incentives to the parties to take precautionary measures in order to reduce the risk of harm with efficient utilisation of resources.

CHAPTER III

CONSUMER PROTECTION IN INDIA

This Chapter is devoted to a detailed analysis of the different consumer protection systems in India. Because of the exhaustive nature of the issues covered, the chapter is divided into three parts for the sake of convenience. The first part deals with the liability system in India. The Second part deals with the regulatory system and the third part is a brief comparison of the two.

Part I: Liability system in India

A. Introduction

The theoretical arguments for the state intervention in the protection of consumer interests, based on the economic theory of consumer protection, are more or less applicable to the Indian consumers. For instance, the arguments of traditional exploitation theory are still valid in the case of India because of the prevalence of opportunistic behaviour in the market place. The informational asymmetry about the quality of products and the consumer misperception on product hazards are very high during the transition of products from search goods to experience and credence goods. In the mean time, the market-induced correctives such as signals and reputation are unable to correct the prevailing market imperfections because of less developed institutions. In these circumstances, as the consumers are unable to protect themselves[1] the state has to protect the consumers against fraudulence, unfair trade practices, defamation etc., through alternative legal systems.

This chapter deals with the evaluation of the working of the two legal systems viz. Liability System and Regulatory System for consumer protection in India. The liability system is

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[1]Initially the impact of consumer education may not have much impact especially on Indian consumers because 50 percent of the total population do not know how to read and write.

evaluated by examining the working of the Consumer Protection Act, 1986 and the regulatory system through the functioning of the Bureau of Indian Standards.

I. A Brief Review of the Indian Legal System

Indian legal system can be said to have its roots in Vedic age, where the matters relating to civil and criminal offences are elaborately noted in the vedas[2]. The main texts of the time such as Manusmrti, Naradasmrti, Kautilya's *Arthasastra* etc. show that adulteration in different consumer goods was prevalent in ancient India and was mainly practised by the trading class. In the medival period, the compilation of the code of civil procedure is known as *Fiqha-e-Feroze Shahi* in Tughlaq period and was replaced by *Fatawa-i-Alamgiri* written in 1670. The village courts were the tribunals to which the people would ordinarily resort for settlement of their disputes. The difference between royal and village courts was that the royal tribunals were bound to follow some sort of definite procedure, where as the village courts adopted their own procedure based on *Dharma*. During 1834-1947 Four Law Commissions and other Committees were appointed in order to shape the judicial system in India. In general India is a common law country because much of the judicial techniques are of common law origin[3]. The public law's main concern is to protect the individual from the arbitrary action of the state including the legislature[4] which may only be a means of assuring the fundamental rights provided by the Constitution of India in part III. And at the same time the state an equivocally important role in implementing the directive principles provided by the Constitution of India in part IV. Therefore, it seems to be difficult to draw a line between the rule of law and the legislation. The state has adopted the principle of separation of powers among the judicial, executive and legislative branches. Judiciary can independently uphold the liberty of the

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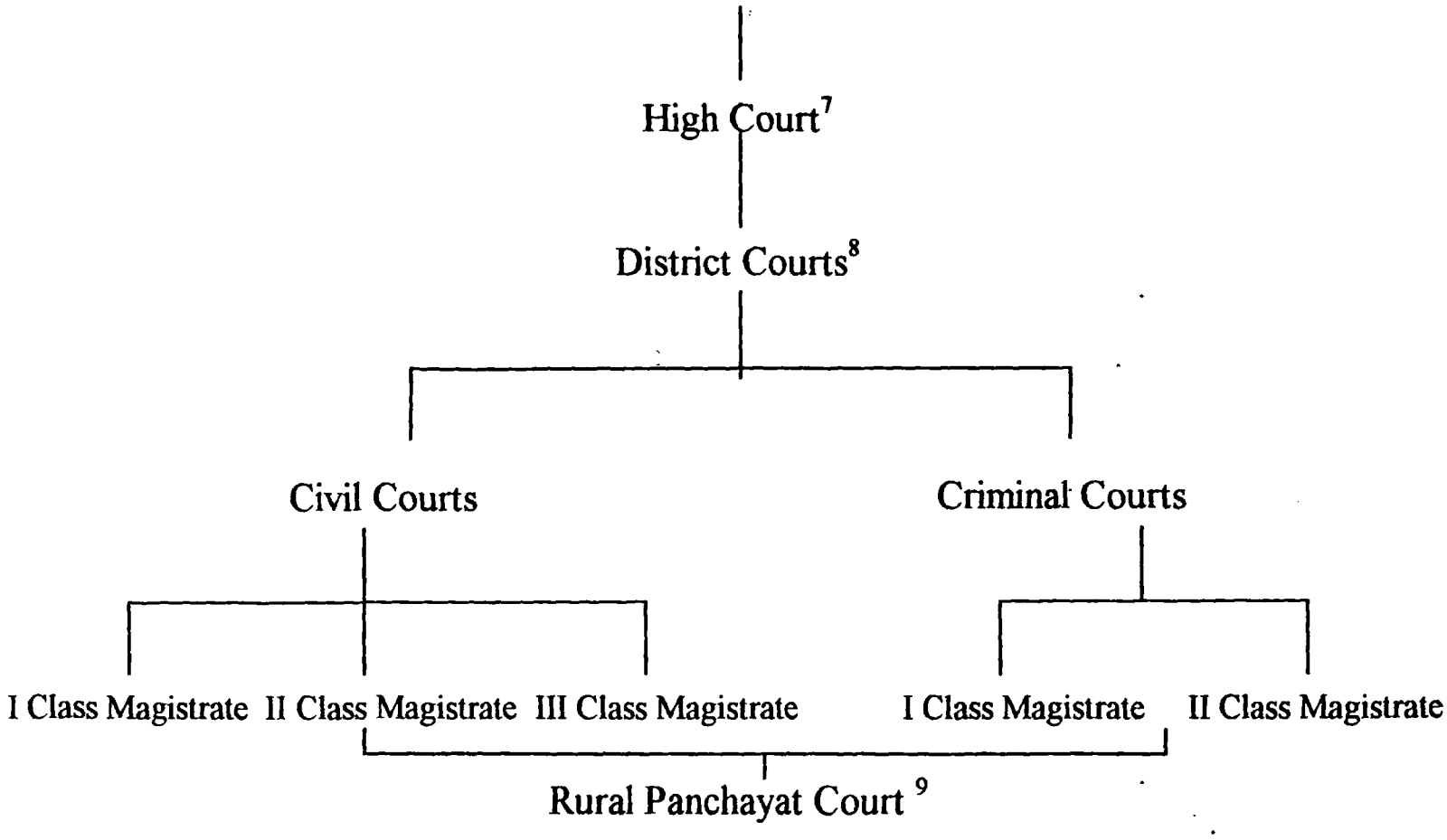
[2]Chakradhar Jha , *History and Source of Law in Ancient India*. New Delhi, Ashish Publishing House, 1987, p. 210.

[3]In the light of the presence and prevalence of French and Portuguese civil laws, customary laws of various ethnic groups and laws based on religion of the several communities, the introduction of indigenous judicial procedures in village tribunals and several other factors, one can easily claim that the Indian legal system is a kind of mixed system.

[4]In modern India the role of state instead of being merely negative (for example, abstaining from interfering with the liberties of the people) became positive (for example, to protect the weaker i.e., consumer against the stronger i.e., producer).

citizens of India[5]. The hierarchy of courts in Indian legal system can be represented with the help of a chart as follows:

Chart No.: 3.1
Civil Court System in India



[5]There are some differences between judiciary and legislature in the case of constitutional amendment. For example *Kasavananda Bharati v. State of karala* (1973 9 4 S.C.C. 225 .

[6]Supreme Court of India was established in 1937 under the Government of India Act, 1935. It has a wide appellate jurisdiction in constitutional, civil, criminal and other matters. In original cases, as an apex court, it decides disputes between the centre and the states or among the states. It provides advice on important issues to president of India. Law declared by the apex court is constitutionally binding on all the courts in the country. And also the Supreme Court is free to change its views by overruling its earlier decision.

[7]The High Court as the highest state forum for appeal and revision of both civil and criminal matters. They are 18 in number, of which 3 (Bombay, Guwahati and Punjab-Haryana) have jurisdiction over more than one state. In the case of Union territories, Delhi alone has a High Court of its own and the other 6 union territories come under jurisdiction of different state High Courts. It is also invested with writ jurisdiction. In general, the decision of the High Court is only appellable when the High Court certifies that the cases satisfies the conditions prescribed for appeal in the constitution.

[8]The structure of District Courts varies from state to state. They are established by the Code of Civil Procedure, 1908 and the Code of Criminal Procedure, 1973. It is a court of appeal and has powers of supervision over the courts below, for example, in the case of civil courts there are I, II and III class magistrate and in the case of criminal courts I and II class judicial magistrates. The Head of the court of the district and sessions judge is responsible for the efficient judicial administration. [note: by the request of state or central, state High Court may appoint special judicial magistrate (II class). Metropolitan areas (1 million populations) consist of chief, additional, and other metropolitan magistrates. There are separate Family Courts under the Family Courts Act, 1984. So far they are in total 52. Under the Article 323-A of the Constitution of India, *the administrative tribunals* were established in order to solve the disputes and complaints relating to recruitment and conditions of services of persons appointed in government offices of the state as well as the centre.

Generally the law in India is unable to provide enough protection to the common citizens because of several reasons. According to the Krishna Iyer Committee, 'legal profession in India .... enjoys a near monopolistic power', which permits no equalisation of the bargaining power between the consumers of legal services and the closed group of the legal profession. And also the market of the legal service is essentially a seller's market because the demand for services is backed by purchasing power. In India the greatness of a lawyer is measured by the fee he charges[10] and not the quantum of social service, which he or she renders as a lawyer. Therefore, Article 39A of the Constitution of India, pronounces that the state shall ensure that the operation of the legal system promotes justice on the basis of equal opportunity and that the state shall in particular provide free legal aid[11] by suitable legislation or schemes or in any other way ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Everything seems to be fine on paper in regard to the Indian legal system but major problems occur in the case of its strict implementation. For example, the Constitution of India provides most of what the common citizen needs and the adaptation of separation of power among the judicial, executive, and legislative branch in itself shows that the three wings of governance require a regular and greater co-ordination and support based on mutual respect and better understanding in order to serve the citizens of India. In reality, however, there is a few somewhere. For example, accessibility of courts remains a dream to the common citizens, because of several reasons like fear of courts, law's delay[12], complicated litigation, higher court fee[13] and winning of the cases by tortfeasors and not by the victims either by buying witnesses or by engaging of a skilled lawyer. Thus, the

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[9]Lowest court in the Indian judicial system is the rural panchayat court. It is an elected body limited to civil and criminal jurisdiction and free from procedural technicalities.

[10]Here we can easily apply the principle of 'price works as a signal of quality', which has its own advantages and disadvantages.

[11]To ensure social justice the Committee for Implementing Legal Aid Schemes was been established in 1980. According to it, a person whose annual income is less than the Rs. 6000 and Rs. 12000 is eligible for free legal aid in cases filed in High Courts and Subordinate Courts and the Supreme Court respectively. There is no such limit in the case of a person belonging to the scheduled castes, scheduled tribes, women and children.

[12]Three million cases are pending in the Supreme Court and the High Courts and a staggering 28 million cases in the lower courts.

[13]The annual fees borne by the litigants is about Rs. 10,000 crores. See *The Hindu on-line*, January 28, 1997 opinion.

common citizens simply cannot afford to go to courts in spite of free legal aid services[14]. In the case of appointment of judges, in spite of the fact that India is the only country where judges select themselves, there are evidences that shows the influence of politicians. For instance soon after the retirement of Chief Justice Sikri in 1973, after the pronouncement of judgement in Kasavanada Bharati case, the supersession of judges showed the influence of politicians. In order to make the judiciary committed to their views, the party in power upset the principle of separation of powers.

In principle, the independent judiciary must be unaffected by affection or ill will and which should remain balanced even in any legal combat between the strong and the weak. But it is simply not possible because of the fact that an increase in rights of some individuals will generally entail some restrictions on the rights of others[15]. And also errors committed by the trial judge who is not of the right calibre can sometimes be so crucial that they can change the entire course of the trial leading to irreparable miscarriage of justice. In India the legal system is unable to provide enough incentives to tortfeasors to take precautionary measures to reduce the risk of harm especially in tort liability cases. For example, the courts are unable to provide compensation to the victims equal to the harm done by the tortfeasor. This may be because of informational asymmetry about the facts of the harm and the problems involved in assessment of the compensation. Thus the Indian legal system, particularly courts are unable to provide adequate legal remedies as quickly as possible because of aforesaid reasons. This may perhaps have led the Government of India to adapt a separate court system in order to protect the interests of the consumer.

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[14]Some remarks have to be made in regard to CILAS, especially about the coverage of the population. For example in the case of annual income limit of a legal aid seeker, it may be better if the limit is based upon the per capita income of a citizen, for the cases belonging to High Court and Subordinate Courts.

[15]Which is simply based on the principle of pareto- optimality, a situation in which it is impossible to make anyone better off without making someone worse-off.

II. Liability and the Indian Consumer

1. *The Place of Strict Liability and Negligence in the Indian Legal System*

The Indian liability system more or less depends upon the British liability system. As per as consumer law is concerned it starts from *caveat emptor* (let the buyer beware) to *caveat venditor* (let the seller beware). It may be contractual or tort or statutory liabilities. Each and every system has its own merits and demerits in providing the incentives to the parties to take precautionary measures in order to reduce the risk of harm[16]. In India, especially in the case of product liability or strict liability a major evidence of this, is the case of UCC *v. Union of India and Others*, (1989 AIR 1990 SC 273)[17] which resulted in the enactment of the Public Policy Insurance Act, 1991[18]. It is true that one can hardly find out a single case of product liability against the less hazardous products because of difficulties involving in proving the defendants negligence[19], little knowledge of consumers about the process of finding the cause of action, corruption, higher litigation costs, lengthy litigation trials and law's delay. In India the loss of human life because of contaminated liquor is a usual phenomenon almost every year. In all such cases no compensation suits have been filed because of the influence of the tortfeasors and public servants and also because it is not possible to reach the assets of the tortfeasors[20]. In many cases there are 'N' number of inquiry commissions to find out the facts of the case. For example, in 1986 in J. J. Hospital, Bombay contamination of glycerine administered to patients led to 14 deaths. An inquiry commission under the chairmanship of

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[16]For example, contractual liability may be unable to provide compensation to the victims because of express or implied warranty.

[17] 3000 people died and thousands became disabled because of the leakage of Methyl Iso Cyanate (MIC) gas from the Union Carbide (India) Ltd. This is also known as the Bhopal Gas Tragedy.

[18]It provides immediate minimum relief to victims, if they want to claim large sums again they have to approach the courts.

[19]In cases like Bhopal gas tragedy, casualties caused by overloading of a bus, falling down of a clock tower on the busy market would be instances in which *res ipsa loquitur* is applied by the courts to relieve victims of the burden of proof. See *Municipal Corporation of Delhi v. Subhagwanti, AIR (1966) SC 1750.*

[20]Some times it is difficult to find out who are the real bootleggers. It is true that the servants of bootleggers may be arrested . Even imprisoning or fining the bootlegger may not provide any adequate incentives either to him or to fellow tortfeasors to reduce the risk of harm.

Mr. Justice B. Lentin, charged the manufacturer and the distributor of Ganesh Chemicals, for gross violations of the Drugs and Cosmetics Act, 1940[21].

In India consumers are largely dependent upon the state and public sector undertakings in the case of service viz., road and airways, postal and telegraph, electricity and water. They exclude the liability on the basis of standard terms and these are backed by legislative provisions contained in the relevant laws like the Railway Act, 1989; the Carriage by Air Act, 1972 etc. In modern society, especially in developing countries the interaction of the state with its citizens becoming more close day by day in almost all respects in spite of introduction of liberalisation policies. Each and every citizen of India seeks help from the state, in his or her day to day life. The Constitution of India, Articles 38, 39, 42, 43, 46, and 47 provide that the state shall strive to serve a social order for protection of welfare of the people. Article 38, provides that "the state shall effectively work to achieve a social order in which economic and political justice shall inform all institutional and national life". Article 46 pronounces that "the state shall endeavour to protect the economic interest of the weaker section of its population and also to protect them from social justice and all forms of exploitation"[22]. And Article 47 provides that "people shall be entitled to unadulterated supply of goods and other consumable articles and also claims responsibility to effectively check in the market place the flow of adulterated stuff which injures the public health and safety"[23]. And at the same time cases like *State of Rajasthan v. Ms. Vidyawati* AIR 1969 SC 933[24] suggests the state liability in case of its negligent behaviour. Thus, the Constitution of India provides for the individual rights under fundamental rights[25] in part III, and these rights are protected through the independent judiciary.

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[21]The report exposes the lapses of Health Ministers who, it was alleged "had encouraged corruption, favouritism and deliberate violation of the Act and the Rules".

[22] Rajendra Kumar Nazak, *Consumer Protection in India: An Eco-legal Treatise on Consumer Justice*, Bombay, N.M. Tripathi, pvt.ltd., 1991, p. 20.

[23] *Ibid.*

[24]While on a public duty a driver of a Government jeep negligently knocked down Mr. Jagdish Lal and the victim subsequently died. The complainant Vidhyawati, the widow of Jagdish Lal and his minor daughter sued Lokumal (driver) and the state of Rajasthan being the employer of the said Lokumal, for damages. The case went up to the Supreme Court and was decided in favour of Vidyawati based on *vicarious liability of the State*.

[25]Article 19 to 31(note: Article 31 has been omitted from Part III and put in Part XII by the Constitution 44th Amendment, 1978 as 300 A " No person shall be deprived of his property save by authority of law.").

The service provided by the private sector also is not free from deficiencies. For example, replacement of other parts entailing considerable expenditure deters the consumer from entering into argument regarding the quality of the service. It is a fact that a very few consumers take the provider of such services to task, by filing a case in the courts. In the case of professional liabilities such as those of doctors, architects and advocates, the law treats them with the assumption that they will exercise reasonable level of care and skill in performance of their professional activities. And also they have to satisfy some standards which are set by the regulatory agencies. If they are unable to do so the results of the case of negligence entailing liability will stress the importance of the mixed use of ex-post and ex-ante approaches in order to provide incentives to the tortfeasors to take precautionary measures to reduce the risk of harm.

III. Legal System for Consumers Before the Consumer Protection Act, 1986

It is not a recent phenomenon that legal mechanisms have been advised to protect consumers from unscrupulous traders. India, has a long history of consumer consideration, dating back to the vedic age (500 BC. to 2500 BC.). In the ancient period, one can come across four broad types of relevant criminal offences- adulteration of food stuff; charging excessive prices; fabrication of weights and measures; and selling of forbidden articles, for which statutory measures and punishment have been recommended from time to time, books like *Manusmrti,* Kautilya`s *Arthasastra, Yajnavalkyasmrti etc.* We also find further evidences of consumer protection, during the Moghal times and during the time of Alaud-Din Khalji (1296-1316), for example, price control policies. Starting from the colonial era (1765- 1947) and until the enactment of the Consumer Protection Act, 1986 there was some consideration for protection of the interests of the consumer by the Government of India, which is shown with the help of a table 3.1.

Table No.: 3.1

Major consumer laws in India before the enactment of the Consumer Protection Act, 1986 (Amendment, 1993)

Year	Law	Main Provisions
1860	Indian Penal Code	Some sections of Indian Penal Code viz., 264 - 267; and 269 - 278 relates to fraudulent use of weights and measures, spreading of infections, adulteration of food or drinks or drugs, and voluntary corrupting or flouring of water public spring or reservoir.
1872	Indian Contract Act	Provides to see that a man or woman fulfils what he or she promises to his or her fellow being.
1930	Sale of Goods Act	Contains contract of sale, conditions and warranties in the sale, transfer of property between seller and buyer, duties of seller and buyer, rights of unpaid sellers against the goods suits for the breach of the contract.
1940	Drugs and Cosmetics Act (Amendment 1982)	Prohibits the import, manufacture, distribution and sale of substandard drugs.
1950	Drugs (Control) Act	Related to the control of the supply, sale and distribution of drugs.
1951	Industries (Development and Regulation) Act	Provides for the development and regulations of certain industries.
1952	Indian Standard Institution (Certification Marks) Act (Amendment 1961; 1976)[26]	Provides for the standardisation and marking of goods which is a prerequisite to the establishment of a healthy trade and to compare favourably with the established marks of foreign products.
1954	Drugs and Magic (Objectionable Advertisements) Act	Prohibition of advertisement of certain drugs for treatment of certain diseases and disorders.
1954	Prevention of Food Adulteration Act (Amendment 1964)	Provides to curb the increasing tendencies in adulteration of food stuffs.
1955	Essential Commodities Act (Amendment 1966; 1967; 1971; 1974; 1976; 1981; and 1984)	Provides for the control of production, supply and distribution of certain commodities in the trade and commerce.
1958	Trade and Merchandise Marks Act[27]	Provides for the registration, better protection of trade marks and for the prevention of the use of fraudulent marks on merchandise.
1963	Specific Relief Act	Some sections of the Act provides for reliefs obtainable in civil courts[28].
1969	Monopolies and Restrictive Practices Act (Amendment 1984 and 1991)	Trade Provides that the operation of economic system does not result in the concentration of economic power to the common determinant.
1972	Hire-Purchase Act	Provides special protection to a hirer wherever such protection is legitimately and inevitably needed.
1973	Code of Criminal Procedure	Section 153 of the Code pronounces that the police is empowered to check the weights and measures without any warrant.
1975	Cigarettes (Regulation of Production, Supply and Distribution) Act	Provides to regulate trade and commerce, production, supply and distribution of cigarettes.
1976	Standards of Weights and Measures Act[29]	Provides for establishment of standards of weight and measures on metric system, regulation of interstate trade or commerce in weights, measures and other goods which are sold or distributed.
1980	Prevention of Black-Marketing and Maintenance of Supplies of Essential Commodities Act	It prevent malpractices such as black-marketing, hoarding, profiteering and unjustified price rises of essential commodities.
1985	Narcotic Drugs and Psychotropic Substances Act	Relates to control and regulation of narcotic and psychotropic substances and other related matters.

[26]It was replaced by the Bureau of Indian Standards Act, 1986.

[27]It was consolidated from the TradeMarks Act, 1940 and the Indian Merchandise Marks Act, 1889.

[28]Section 8, 13, 21 and 22 of the Act relates to the interests of the consumers.

[29]It is the result of an earlier enactment of the Act of 1956 and replacement of the Standards of Weights Act, 1939 and the Measures of Length Act, 1889.

From the table 3.1. one can observe that there are numerous laws in order to protect the interests of the consumer. However, due to lack of proper implementation of laws and also as majority of laws are non- compensatory in nature[30], one needs to stress the need for enactment of the Consumer Protection Act, 1986, which is compensatory in nature, in order to protect the interests of the consumers.

B. The Consumer Protection Act, 1986 (Amendment, 1993)

The General Assembly of the United Nations unanimously adopted a set of general guidelines[31] for consumer protection on 9th April 1985. The adoption of these guidelines was the culmination of much earlier work and negotiation, by the International Organisation of Consumer Union (ICOU). In India, the established voluntary organisations[32] along with the pressure groups were unanimous and unequivocal in their demand for a separate full-fledged

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[30]It is also merely true that the majority of consumers are unable to utilise the prevailing laws because of inadequate demand for receiving the bill at the time of purchasing of the products. This may be because of receiving the benefit of tax evasion. The traders are encouraging this type of culture because they benefit much more than what the consumers benefit from the tax evasion. It is very important for the consumers to get the bill at the time of purchasing of products as it may perhaps not only help the consumer to get the compensation from the producer for defective products but also gives incentives to the traders to keep proper records. This also it benefits the Government by raising the revenues, which can be utilised for the measures to protect the interests of the consumers.

[31]It includes adoption of measures for physical safety, promotion and protection of consumer economic rights, distribution facilities for essential consumer goods and services, effective redressal machinery, development of education and the formulation of programmes for consumer interests. The objectives of the guidelines are as follows:

- to assist countries in achieving or maintaining adequate protection for their population as consumers;
- to encourage high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers;
- to facilitate production and distribution patterns responsive to the needs and desires of consumers;
- to assist countries in curbing abusive business practices by all enterprises at the national and international levels which adversely affect consumers;
- to facilitate the development of independent consumer groups;
- to encourage the development of market conditions which provide consumers with greater choice at lower prices.

[32]They are many at least in number in some parts of the country, but their movements are strong only in the metropolitan cities. However, the majority of the organisations are not fully involved in the activities like representation, advice, creating awareness in order to promote consumer welfare. A few organisations like Common Cause, Consumer Action Group (CAG), Consumer Education and Research Centre (.CERC), Consumer Guidance Society of India (CGSI), Consumer Unity and Trust Society (CUTS), Mumbai Grahak Panchayat (MGP), Voluntary Organisation in the Interests of Consumer Education (VOICE), Consumer Care Centre, and Consumer Awareness and Research Centre (CARC) have good reputation.

piece of legislation concerning consumer protection. The emerging concern for consumer protection and for a better quality of life thus culminated in the enactment of the Consumer Protection Act, 1986 by the Parliament.

I. Objectives and Functions of the CP Act

The main object of the Consumer Protection Act, 1986 is:

a) To promote and protect the consumer rights[33] by establishment of the Consumer Protection Councils[34]; and

b) To provide speedy, simple and inexpensive redressal to consumer grievances by establishment of quasi-judicial machinery at District, State and Central Levels known as Consumer Disputes Redressal Agencies (CDRAs). The provisions of the Act are compensatory in nature. It was amended in 1993 to extend its coverage and scope and also to enhance the powers of the redressal machinery.

II. Structure and Functioning of the Consumer Disputes Redressal Agencies

The Consumer Protection Act, 1986 provides for the setting up of three-tier Consumer Disputes Redressal Agencies (CDRAs), which can be shown with the help of a chart 3.2.

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[33]"(i) right to be protected against the marketing of goods which are hazardous to life and property;
(ii) right to be informed about the quality, quantity, potency, purity, standard and price of goods so as to protect the Against Consumer unfair trade practices;
(iii) right to be assured, wherever possible, of access to a variety of goods at competitive prices;
(iv) right to be heard and to be assured that consumer interests will receive due consideration at appropriate forums;
(v) right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers; and
(vi) right to consumer education". Act No. 68 of 1986

[34]The councils were set up at the state and the central level which consists of consumer activists, officials and policy makers in order to strengthen the consumer movement in the country. For example, in the case of Consumer Protection Council of Andhra Pradesh State, the members of the council consist of not more than 100 nominated by the state Government. The term of the Council is three years from the date of its constitution and they have to meet at least four times in a year. According to the Act (Amendment 1993), the State Council has to meet at least two times in a year. See Consumer Protection Act, 1986 (amendment 1993) Section 7 (3). Act No. 68 of 1986.

Chart No.: 3.2
Activities of CDRAs

Consumer Disputes Redressal Agencies (CDRAs)[35]

	District Forums (DF)[36]	State Commission(SC)[37]	National Commission(NC)[38]
Jurisdiction			
(a) pecuniary:	Up to Rs. 5 lakh	Up to Rs. 20 lakh	More than Rs. 20 lakh
(b) non-pecuniary (area)	: District	State	National
Members (in Number)	: 3	3	5

Limitation Period[39] : within two years from the date when the cause of action arises.

Disposal/Dismissal of the case[40]: 90days, without and 150days,with testing of goods or services

Decision of the CDRAs

(a) In Favour of Consumer : to remove the defects or replace the goods or return the price ; and compensate for loss or injury, if any[41].

(b) Consumer withdrawn: consumer can withdraw his case and have an out of court settlement.

(c) Against Consumer : not only dismiss the case but also consumer has to pay the cost not < Rs. 10000 in the case of frivolous or vexatious filing[42].

(d) Dismissed on Technical Grounds : the cases which did not come under the purview of the CP Act, 1986.

Enforcement of the Order : same as normal court procedure.

Penalties[43] : imprisonment for > one month and not < 3 years or fine > Rs. 2000 and not < Rs. 10000 or both. CDRAs can put penalties according to their wish also.

Appeals[44] : DF → SC → NC → AC

(within 30 days from the date of order or at the discretion of CDRAs.)

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[35] See Chapter III of the Consumer Protection Act, 1986 (Amendment,1993).
[36]See Section 10 to 15 of the Act, 1986 (Amendment,1993).
[37] See Section 16 to 19 of the Act, 1986 (Amendment,1993).
[38]See Section 20 to 23 of the Act, 1986 (Amendment,1993).
[39]See Section 24A of the Act, 1986 (Amendment,1993).
[40]See Section 13 of the Act, 1986 (Amendment,1993).
[41]See Section 14 of the Act, 1986 (Amendment,1993).
[42]See Section 26 of the Act, 1986 (Amendment,1993).
[43]See Section 27 of the Act, 1986 (Amendment,1993).
[44]See Section 15 of the Act, 1986 (Amendment,1993).

1 *District Forum*

Consumer Disputes Redressal Forums are also known as District Forums. The State Government may establish more than one DF in a District, if it thinks it is necessary. It consists of three members, namely, a President, whose qualification equals to that of a District Judge and two other members, one of whom shall be a woman, who have adequate knowledge in the area of economics, law, commerce, accountancy, industry, public affairs or administration. Selection may be based on the recommendation of a selection committee[45]. The term of the members of the DF is five years or up to the age of 65 whichever is earlier and the members are not eligible for re-appointment. It has jurisdiction to entertain complaints where the value of the goods or services and the compensation, claimed if any, does not exceed rupees five lakhs and also within the local limits of jurisdiction[46]. A complaint may be filed by consumer or recognised consumer organisation or the central or state governments or a group of consumers based on the same interest with the permission of DF.

According to the CP Act, 1986 (Amendment, 1993), the consumer is a person who bought goods and services for personal consumption as well as for self- employment purposes.

The consumer can file a case against the unscrupulous trader[47] or manufacturer[48] or both by simply addressing the facts of the case to the concerned CDRAs by registered post[49]. On

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[45]which consists of:
"(i) the president of the State Commission as Chairman;
(ii) Secretary, Law Department of the State as a member; and
(iii) Secretary in-charge of the Department dealing with consumer affair in the State as a member". Act No. 68 of 1986, Section 10, 1a

[46]In cases where the opposite party actually or voluntarily resides/ business/ work for gain, at the time of the filing the case. And even not, with the permission of DF or based of the cause of action arises, the case can be filed by the consumer.

[47]According to section 2 (1)(q) of the CP Act, 1986, a person who sells or distributes any goods for sale and includes manufacturer thereof, and where such goods are sold or distributed in package, includes the packer thereof.

[48]According to section 2 (1)(j) of the CP Act, 1986, a person who makes or manufactures any goods or parts thereof; or does not make or manufacture any goods but assembles parts thereof made or manufactured by others and claims the end- product to be goods manufactured by himself; or puts or causes to be put his own mark on any goods made or manufactured by any other manufacturer and claims such goods to be goods made or manufactured by himself. Act No. 68 of 1986.

receipt of a complaint, Agencies refer a copy of the complaint to the opposite party to give their version of the case within a period of thirty days or extend this period to fifteen days. If the opposite party fails to reply within the prescribed time period, the Agencies proceed to settle the consumer dispute. The Agencies settle the consumer dispute within ninety days, if it is not necessary to send the goods to laboratory for analysis and within one-hundred and fifty days, if it is necessary to send the goods to laboratory for analysis in order to find the alleged defect in the goods[50]. The DF has the same powers as are vested in a civil court under the Code of Civil Procedure, 1908[51]. It is also deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code.

After the proceedings, if the Agencies are convinced that the goods or services suffer from any of the defects specified or contained in the complaint, they will issue an order to the opposite party directing:

- To remove the defect pointed out by the appropriate laboratory;
- To replace the goods with new goods of similar description;
- To return the price to the complainant;
- To pay awarded compensation to the consumer for the loss or injury suffered by the consumer due to negligence of the opposite party;
- To remove the defects or deficiencies involved in the service;
- To stop the unfair or restrictive trade practices;
- Not to offer the hazardous goods for sale;

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[49]In recent times consumers are asked by the CDRAs to submit as many copies as the number of opposite parties plus three copies for the members of the District Forums (DF) or of the State Commission (SC); plus five copies and perhaps in bound form in the case of the National Commission (NC). According to the Act, Sections 12, 13 and 14 are applicable to the DF and the SC; Section 22 is applicable to the National Commission. It seems to be better if the procedure followed by the CDRAs is same at all levels because it helps the average consumer to understand and follow easily.

[50]There is no time limit regarding the disposal/ dismissal of the case, specified by the Act in the case of appeals and revisional jurisdiction .

[51]"(a) the summoning and enforcing of the attendance of any defendant or witness and examining the witness on oath;
(b) the discovery and production of any document or other material object producible as evidence;
(c) the reception of evidence on affidavits;
(d) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;
(e) issuing of any commission for the examination of any witness; and
(f) any other matters which may be prescribed". Act No. 68 of 1986, Section 4.

- To withdraw the hazardous goods that have been offered for sale; and
- To provide for adequate costs to parties.

The person dissatisfied about an order made by:

- The District Forum may prefer an appeal against such order to the State Commission;
- The State Commission may prefer an appeal against such order to the National Commission;
- The National Commission may prefer an appeal against such order to the Supreme Court may go for an appeal within a period of thirty days from the date of the order; provided that the State Commission or National Commission or Supreme Court may entertain an appeal after the expiry of thirty days, if it is satisfied that there was sufficient cause for not filing it within the prescribed time limit.

2. *State Commission*

Consumer Disputes Redressal Commission is also known as State Commission. It also consists of three members, namely, a president[52], whose qualification equals that of Judge of a High Court and the other two members, one of whom shall be a woman, who have knowledge in the area of problems of economics, law, commerce, accountancy, industry, public affairs or administration. Selection may be based on the recommendation of a selection committee[53]. The term of the members of the SC is five years or up to the age of sixty-seven years whichever is earlier and the members is not eligible for re-appointment. It has jurisdiction to entertain complaints where the value of the goods or services and the compensation claimed exceeds rupees five lakhs but does not exceed rupees twenty lakhs and there is no provision regarding the non-pecuniary jurisdiction of the SC. It has appellate, revisional and administrative jurisdiction over the District Forum within the State. The other provisions of SC regarding the disposal of disputes are the same as the DF provisions.

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[52]Appointment may be made after consultation with the Chief Justice of the High Court.

[53]The selection committee of the State Commission is same as the selection committee of the District Forum.

3 *National Commission*

National Consumer Disputes Redressal Commission is also known as National Commission. It consists of five members, namely, a president[54], whose qualification equals that of a Judge of the Supreme Court and other members, one of whom shall be a women, who have knowledge in the area of problems of economics, law, commerce, accountancy, industry, public affairs or administration. Selection may be based on the recommendations of a selection committee[55]. The term of the members of the NC is five years or up to the age of seventy years and the members is not eligible for re-appointment. It has jurisdiction to entertain complaints where the value of the goods or services and the compensation claimed exceeds rupees twenty lakhs and there is no provision regarding the non-pecuniary jurisdiction. It has an appellate, revisional and administrative jurisdiction over any State Commission. The other provisions of the NC regarding disposal of complaints may be the same as the provisions of the DF, unless and until specified by the Central Government.

4. *Enforcement of CDRAs Orders*

Every order made by the Agencies may be enforced in the same manner as if it were a decree or order made by a court in a suit pending therein and it shall be lawful for Agencies to send, in the event of its inability to execute it, such order to the court within the local limits of the jurisdiction, and thereupon, the court to which the order is so sent, shall execute the order as if it were a decree or order it for execution.

Where a trader against whom a complaint is made or the complainant fails to comply any order made by the Agencies, such trader or complainant shall be punishable with imprisonment for a term which shall not be less than one month but which may be extended to three years, or with fine which shall not be less than two thousand rupees or with both.

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[54]Appointment may be made after consultation with the Chief Justice of India.

[55]Which consists of:

> "(i) a Judge of the Supreme Court, nominated by the Chief Justice of India as a Chairman;
> (ii) the Secretary in the Department of Legal Affairs in the Government of India as a member; and
> (iii) Secretary of the Department dealing with consumer affairs in the Government of India as a member". Act No. 68 of 1986, Section 20, 1b.

Where a complaint instituted before the Agencies is found to be frivolous or vexatious, the complaint is dismissed and an order made that the complainant shall pay to the opposite party, not exceeding ten thousand rupees.

5. *Limitations of the CP Act, 1986 (Amendment, 1993)*

a. Limitation Period

The Agencies shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen; provided that the Agencies may entertain a complaint, if the complainant has sufficient cause for not filing the complaint within the specified time limit.

b. Act is not in Derogation

Consumer Protection Act, 1986 (Amendment, 1993) is not in derogation of any other law i.e., the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

c. The CDRAs have no power to declare any provisions of the CP Act as unconstitutional or infringing on any fundamental rights of any person.

6. *Miscellaneous*

i. No suit, prosecution or other legal proceedings shall lie against the members of the Consumer Disputes Redressal Agencies.
ii. Every rule made by the Central Government under this Act shall be laid, as soon as it is made, before each House of Parliament.
iii. Every rule made by the State Government under this Act shall be laid as soon as it is made, before the State Legislature.
iv. The environment of the CDRAs should be such that the justice seeking parties are able to express their views freely and frankly.
v. There is no need to pay any court fee and
vi. There is no need to engage a lawyer.

C. Evaluation of the functioning of the CDRAs

The working of the Indian liability system in respect of protecting the interests of the consumers may be examined by evaluating the functioning of the CDRAs, which was established under the provisions of Consumer Protection Act, 1986. There are some major procedural differences in the functioning of the civil and the consumer forums, which can be explained with the help of a table 3.2.

Table No. 3.2

Difference between CDRAs and Civil Courts

CDRAs	Civil Courts
1. Complainants need not pay any court fees or stamps duty.	1. It is necessary to pay court fee or stamp duty.
2. Parties do not need to engage a lawyer.	2. Parties must engage a lawyer.
3. There is time bound in disposal/ dismissal of complaints.	3. There is no such time limit.
4. It should be free from legal technicalities during filing as well as procedure of the case.	4. There is no such provision.
5. The court environment is friendly in nature.	5. There is no such principle.
6. During the hearing of the case the presence of the consumer is not necessary in each and every time.	6.Both the parties are required to be present in each and every time during the court hearings
7. Under the purview of the executive.	7. Under the purview of the judiciary.
8. The order should be the majority of the members.	8. It is not the same in majority of the cases.
9. Person with no legal knowledge persons can also become members of the Fora.	9. only with legal knowledge persons can become the judges of the courts.

I.Empirical Analysis of the Functioning of CDRAs

In order to have a critical evaluation of the functioning of CDRAs, it may be necessary to find out whether these Fora are fulfilling the objectives[56] of the CP Act, 1986 (Amendment, 1993). In this context one would need to have a look at the data especially on the nature of case filed, decision on the cases, law's delay, environment of the Fora, appearances before Fora by the consumers etc. As a matter of fact there is no ready-made data available for studies of this type. In the present study, the analysis is based on both the primary as well as secondary data. The requisite data has to be compiled on the basis of:

[56]Such as speedy, inexpensive and simple redressal to the consumers.

The data which has been collected from the selected CDRAs;

- The opinion of consumers who approached the CDRAs;
- The views of the members of CDRAs;
- The views of the consumer counsel; and
- Personal observations.

1. *Sources of Data*

Primary data are collected by sample survey as well as state agencies like the Department of Civil Supplies, Andhra Pradesh and the Ministry of Civil Supplies, Consumer Affairs and Public Distribution System, New Delhi. In addition, Annual Reports, Acts, brochures, case statements and the minutes and agendas of Consumer Councils of Andhra Pradesh have been utilised. The data thus obtained[57] from the Department of Civil Supplies, Andhra Pradesh (AP), were used for selecting two District Forums in AP- one which has the highest number of cases filed by the consumers[58](District Forum of Nellore- DF of N) and the other which has the least number of cases filed by the consumers[59] (District Forum of Ranga Reddy- DF of RR). Further, one State Commission, the State Commission of Andhra Pradesh (SC of AP) and the National Commission (NC) were chosen in order to cover the three-tire system.

2. *Sample Survey*

The collection of data is limited to original cases only and to the provisions of the CP Act, 1986. However, the Provisions of the CP Act, 1986 (Amendment, 1993) is used for analysis. The collected data from `the Consumer Dispute Cases Registers´ are classified Category-wise[60] FILED[61] and DISPOSED/ DISMISSED[62]Consumer Dispute Cases, which give

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[57]The Quarterly Statements of Cases

[58]Since its inception up to the end of December, 1992, there were 4407 cases filed by the consumers. Note: according to the Quarterly Statement, there were 4467 cases.

[59]Since its inception up to the end of December 1992, there were 302 cases filed by the consumers.

[60]Like insurance, Banking and Financial Institutions, industries, communications etc.,

information on how many cases were filed; on which categories consumers had many grievances, on pending rate of the cases; and on per cent of cases are disposed/ dismissed within the time limit prescribed by the CP Act, 1986.

In order to ascertain awareness among the consumers about the CP Act, 1986, the behaviour of unscrupulous traders towards consumers and the attitude of the members of the CDRAs towards protecting the interests of the consumers, one has to investigate the DECISION-WISE DISPOSED/ DISMISSED CASES[63].

By the method of Stratified Random Sampling, 320 cases[64] were chosen from the Decision-wise Disposed/ Dismissed Cases. The selected complaints were administered a structured questionnaires[65]. Based on a review of the cases questionnaires were prepared for the consumers[66] in order to obtain their opinion on the functioning of CDRAs. Out of 50 selected consumers from the DF of RR and the SC of AP based on the Stratified Random Sampling, for reasons such as poor response from the respondents and change of address of the respondents only 32 consumers could be interviewed.

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[61]302 cases in the DF of Ranga Reddy; 4407 cases in the DF of Nellore; 733 cases in the SC and 513 cases in the NC (the data collected since its inception up to 31.12.1992). For further information please see the table numbers, 3.3, 3.6, 3.9, 3.12.

[62]280 cases in the DF of Ranga Reddy; 3454 cases in the DF of Nellore; 168 cases in the SC and 433 cases in the NC (the data collected since its inception up to 31.12.1993). For further information please see the table numbers, 3.3, 3.6, 3.9, 3.12.

[63] which are classified into: (a) in Favour of Consumer (CF); (b) Consumer Withdrawn (CW); (c) Against Consumer (CA); and (d) Dismissed on Technical Grounds (D on TG)

[64]The population of Consumer Disputes Redressal Agencies has divided into strata or groups such as different types of cases such as Insurance, Industries, Banks and Financial Institutions etc, different of decisions such as in Favour of Consumer, consumers withdrawn, Against Consumer and dismissed on technical grounds and for different years, thus, in order to give equal representation from all strata the method of Stratified Random Sampling used. 75 cases from the DF of Ranga Reddy; 100 cases from the DF of Nellore both DFs from the State of Andhra Pradesh; 100 cases from the SC and 45 cases from the NC.

[65] In order to gain the necessary information on: (i) case number; (ii) the date of filed and disposed/ dismissed; (iii) addresses of both the parties; (iv) whether the case was disposed/ dismissed; (v) councils for both the parties; (vi) nature of claim; and (vii) judgement. Note: Disposed applicable to the cases which are either In Favour of Consumer or consumer withdrawn and dismissed used for the cases which are either Against Consumer or dismissed based on technical grounds.

[66]See appendix- I.(Questionnaires for Complainant).

The variables of explanation[67] are identified and the data collected are quantified[68]. The questions were also prepared for the members of CDRAs and the counsels for consumers separately in order to get their opinion about the functioning of the CDRAs by oral interview. The collected views of the members of CDRAs[69] and the consumer counsel[70] were tabulated.

3. *Fora- wise Analysis*

In a three tier CDRAs, the National Commission started functioning w.e.f. 27.12.1988. In addition, there are 32 State Commissions and 459 District Forums[71]. In Andhra Pradesh, the working of the CDRAs started as a Saturday Court on 1.10.1988 at the office of the District and Sessions Judges in respective 22 districts and the Hyderabad District Forum at the Office of the Chief judge, City Civil Court, Hyderabad. The District and Sessions Judge acted as a President of the DF in respective Districts. The other two members were appointed by the Government of Andhra Pradesh[72]. The DF of Hyderabad, Karimnagar, Nellore and Krishna started functioning on full time basis from 15. 11.1991[73] and other 16 DFs viz., Vizianagaram, Visakhapatnam, East Godhavari, West Godhavari, Guntur, Prakasam, Chittor, Kurnool, Ananthapur, Mahabubnagar, Medak, Nalgonda, Nizamabad, Adilabad, Kammam and Warangal started working on full time basis from 16.07.1993[74]. The State Commission of

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[67]See the Appendix –IV. (Names of the selected variables)

[68]See the Appendix- V (quantification of data)

[69]The members of the DF of Ranga Reddy and the SC of Andhra Pradesh. Out of 6 members from both the Fora I interviewed 5 members only. See the Appendix- III (the questionnaire to the members of the consumer Fora).

[70]Selected half a dozen lawyers randomly and interviewed. For further details see the appendix-II the questionnaire for the counsel for the consumers .

[71] Annual Report,1995- 96, Ministry of Civil Supplies, Consumer Affairs and Public Distribution, Government of India, New Delhi, p. 51.

[72]Vide G.O.Ms.No. 767, Food and Agril. (CS. III) Department, dated: 1 October 1988.

[73]Vide G.O.Ms.No.985, Food and Agril. (CS.III) Department, dated: 1 October 1991.

[74]The three DFs namely Cuddapah, Ranaga Reddy and Srikakulam do not fall under this category. See Supreme Court Judgement, dated 7 January 1993 in W.P.No. 1141 of 1988 with W.P. No. 742 of 1990.

Andhra Pradesh started functioning on full-time basis from 20.1.1993[75]. For the purpose of the present study the Ranga Reddy and Nellore District Forums are taken as case studies.

(a) District Forum of Ranga Reddy

i. Category-wise Filed and Disposed/ Dismissed Consumer Dispute Cases

Table 3.3 presents the category - wise number of consumer dispute cases filed and disposed/ dismissed in the District Forum of Ranga Reddy since its inception up to the end of December, 1992 and 1993 respectively.

Table No.: 3.3

The Category- wise Cases Filed by the Consumers and Disposed/ Dismissed by the DF of RR

			FILED					DISPOSED/ DISMISSED				
Name of the Category/ Year	1989	1990	1991	1992	Total	Percentages	1989	1990	1991	1992	Total	Percentages
Public Utilities	1	20	19	27	67	22,19	1	20	19	24	64	22,86
Housing/Construction/Real Estate	1	6	17	42	66	21,85	1	6	14	38	59	21,07
Banks & Financial Institutions	0	13	23	19	55	18,21	0	13	23	16	52	18,57
Consumer Products	0	9	14	14	37	12,25	0	9	14	12	35	12,50
Communications	0	12	6	12	30	9,93	0	12	6	10	28	10,00
Government Departments	0	1	2	10	13	4,30	0	1	2	7	10	3,57
Health & Medicine	0	1	4	4	9	2,98	0	1	4	4	9	3,21
Miscellaneous	3	2	11	9	25	8,28	3	2	11	7	23	8,21
Total	5	64	96	137	302	100,00	5	64	93	118	280	100,00
Percentages	1,66	21,19	31,79	45,36	100,00		1,79	22,86	33,21	42,14	100,00	
Sources: Compiled from the District Forum of Ranga Reddy.												

Table 3.3 reveals that the different categories of cases filed by the consumers in the DF of RR. From the table it is evident that since its inception up to 31.12.1992, the DF of RR had received maximum number of cases against the public utilities accounting for 22.19 per cent (67) of the total cases, followed by Housing, Construction and Real Estates accounting for 21.85 per cent (66). The Banks and Financial Institutions occupied next place accounting for 18.21 per cent. Consumer products and Communications accounted for 12.25 per cent (37) and 9.93 per cent (30) respectively. These five categories together accounted for 84. 43 percent of the total cases filed up to the end of December, 1992.

The total number of cases received by the DF of RR had increased from 5 cases to 137 in 1992. However, the DF of RR had received the least number of cases from the consumers

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[75]Vide G.O.Ms.No. 1131, Food and Agril. (CS. III) Department, dated: 25 August 1992 (Note: On 20 December 1989 the first Original Case was filed in the State Commission of Andhra Pradesh).

even up to the end of 31.12.1992 compared to other 23 DF in the state of Andhra Pradesh. The reason may be either a lack of awareness among the consumers in that particular district or poor functioning of the DF of RR.

In the case of the category - wise disposed/ dismissed number of consumer dispute cases by the DF of Ranga Reddy, Public Utilities had the maximum disposed/ dismissed cases accounting for 22.19 per cent (64), followed by Housing, Construction and Real Estates accounting for 21.07 per cent (59). The Banks and Financial Institutions occupied the next place accounting for 18. 57 per cent (52). Consumer Products and Communication accounted for 12.50 per cent (35) and 10 per cent (28) respectively. The five categories together accounted for 85 percent of the total.

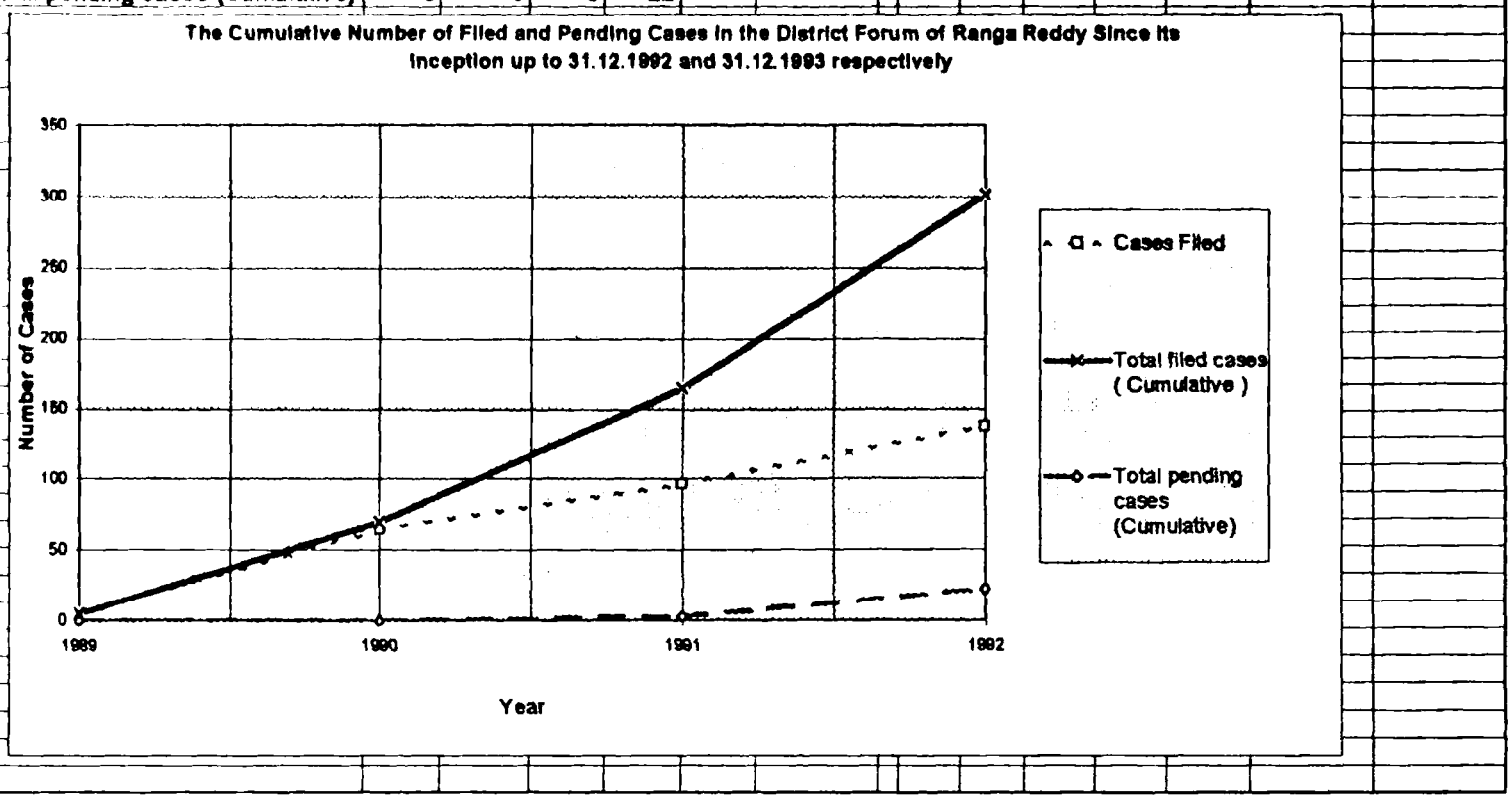
In terms of filed and disposed/ dismissed cases health and Medicine had the least accounting for 2.98 per cent (9) and 3.21 per cent (9) respectively.

The total number of consumer dispute cases deposed/ dismissed by the DF of RR had increased from 5 cases in 1989 to 118 in 1992. In spite of the irregularities in the functioning of the DF of RR the disposal/ dismissal rate was satisfactory. This may be because of low rate of filing cases or because the DF had only an original jurisdiction and did not have appellate jurisdiction compared to the higher Fora within the CDRAs. The low rate of filing cases does not necessarily mean that there were no consumer problems within that particular district. This shows that the government and non-governmental organisations should step in and create awareness among the consumers about their rights in order to get their redressal through the CDRAs.

Graph No.: 3.1

The Cumulative Number of Filed and Pending Cases in the DF of RR

	1989	1990	1991	1992
Cases Filed	5	64	96	137
Total filed cases (Cumulative)	5	69	165	302
Total pending cases (Cumulative)	0	0	3	22



Graph 3.1 shows the number of pending consumer dispute cases in the DF of RR since its inception up to end of December 1992. The number of disposed/ dismissed cases accounting for 92.72 per cent (280). Thus, the number of cumulative total pending cases accounted for 7.28 per cent (22) only. It is evident that the functioning of the DF of RR especially in the case disposal/ dismissal rate was very satisfactory.

ii. Decision-wise Disposed/ Dismissed Consumer Dispute Cases

Table No.: 3.4

The Decision- wise Disposed/ Dismissed Cases by the DF of RR

	In Favour of Consumer					Consumers Withdrawn					Against Consumer					Dismissed on T G						
Category/ Year	1989	1990	1991	1992	Total	1989	1990	1991	1992	Total	1989	1990	1991	1992	Total	1989	1990	1991	1992	Total	G.total	G.Percentage
Public Utilities	1	13	12	10	36	0	2	1	1	4	0	1	2	0	3	0	4	4	12	20	63	22,50
Housing/Con/RE	0	2	13	4	19	1	0	0	26	27	0	2	0	2	4	0	2	1	6	9	59	21,07
Banks & Fis	0	9	14	6	29	0	0	0	4	4	0	1	2	1	4	0	3	7	5	15	52	18,57
Consumer Prodcts	0	3	4	5	12	0	1	1	2	4	0	2	1	0	3	0	3	8	5	16	35	12,50
Comminications	0	8	4	5	17	0	1	0	1	2	0	3	0	0	3	0	0	2	4	6	28	10,00
Govt. Deprts	0	0	0	2	2	0	0	0	0	0	0	1	1	2	4	0	0	1	3	4	10	3,57
Health&Medicine	0	0	2	0	2	0	0	0	2	2	0	0	2	0	2	0	1	0	1	2	8	2,86
Miscellaneous	0	1	8	3	12	3	0	1	2	6	0	0	2	0	2	0	1	0	4	5	25	8,93
Total	1	36	57	36	130	4	4	3	37	48	0	10	10	5	25	0	14	23	40	77	280	100,00
Percentages	0,36	12,86	20,36	12,86	46,43	1,43	1,43	1,07	13,21	17,14	0,00	3,57	3,57	1,79	8,93	0,00	5,00	8,21	14,29	27,50	100,00	

Source: Compiled from the Registers of District Forum of Ranga Reddy.

The decision on the consumer disputes may be classified into four types: i) In Favour of Consumer (CF), ii) Consumer Withdrawn (CW); iii) Against Consumer (CA); and iv) dismissed on technical grounds (D on TG).

The table 3.4 reveals that the cases disposed in favour of consumer (CF) account for 46.43 per cent (130) out of the total cases disposed/ dismissed in the DF of RR. It is followed by the cases dismissed on technical grounds (D on TG) accounting for 27.50 per cent (77). The cases where the consumer has withdrawn (CW) occupied next place accounting for 17.14 per cent (48). The cases decided as against the consumer (CA) stood at 8.93 per cent (25). The cases decided in favour of the consumer and those withdrawn by the consumer together account for 63.57 per cent (178). This has a positive implication that the consumers get majority of their grievances redressed through the CDRAs.

iii. Time Taken to Dispose/ Dismiss the Consumer Dispute Cases

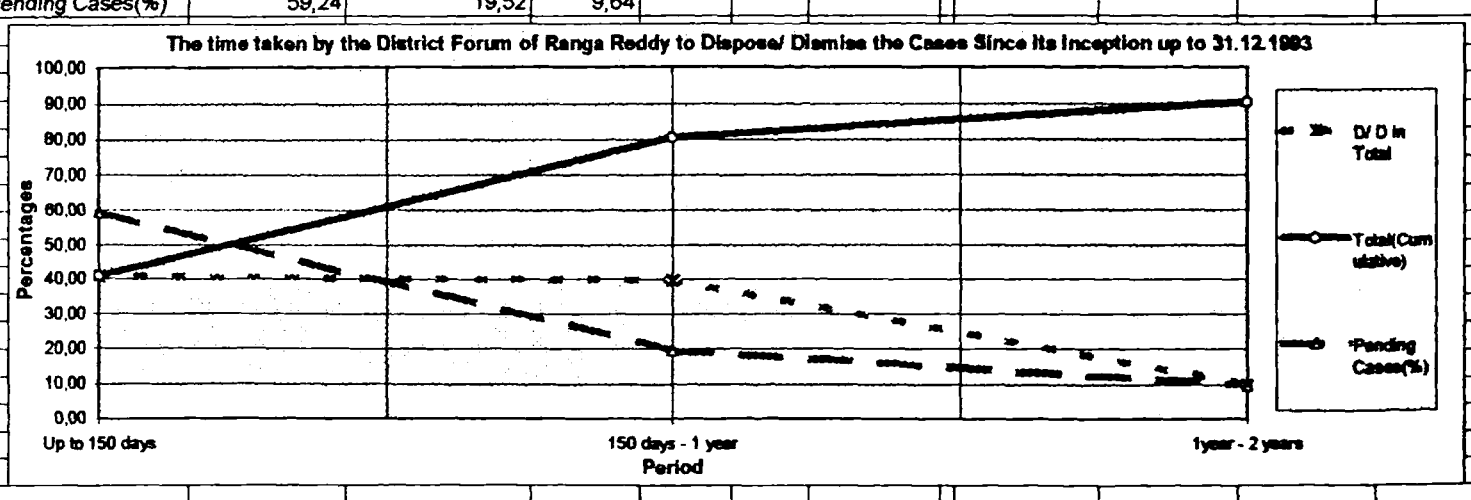
Table No.: 3.5 (Graph No.: 3.2)

Time Taken by the DF of RR in order to Dispose/ Dismiss the Cases

	CF	CW	CA	D on TG	Total	Percentages
Upto 150 days	22	8	2	1	33	45,21
150 days- 1year	21	5	3	3	32	43,84
1 year- 2 years	1	2	4	1	8	10,96
Total	44	15	9	5	73	100,00

Sources: Compiled from the Original Files of Consumer Dispute Cases of District Forum of Ranga Reddy

*****	Up to 150 days	150 days - 1 year	1year - 2 years
D/ D in Total	40,76	39,72	9,88
Total(Cumulative)	40,76	80,48	90,36
Pending Cases(%)	59,24	19,52	9,64



***** It represents the time taken by the Distict Forum of Ranga Reddy in order to Dispose/ Dismiss the cases for for the Total Number of Cases filed by the Consumers Since its Inception up to 31.12.1992.

(Similar calculations were made for the DF of Nellore; the SC of AP, and the NC).

The Table 3.5 shows the time taken by the DF of RR in order to dispose/ dismiss the consumer dispute cases since its inception up to 31.12.1993. This is based on a sample of 75 cases out of 280 in total. The cases which were disposed/ dismissed by the DF of RR within the prescribed time limit of 150 days[76] accounted for 40.76 per cent. However, within two years the DF of RR managed to dispose/ dismiss 90. 36 per cent of the total cases filed by the consumers. However, it is evident that the DF of RR was unable to dispose/ dismiss 59.24 per cent of the total received cases within the time limit. These facts and figures are also presented with the help of Graph.

The law delay's by the CDRAs not only proves that justice delayed is justice denied but also it may provide the opportunity to hide the actual information by the self interested parties which automatically raises the questions about the favourable argument of the liability system in the case of private information compared to the ex- ante approach. There is no doubt the time bound approach of the CDRAs is definitely an advantage to the consumers in order to get speedy redressal. At the same time like on the other side of the coin, it has an adverse effect also. There are several consumer dispute cases dismissed by the CDRAs not because the filed case is out of the purview of the Act but simply because the filed case may be in complex in its nature or it needs a lot of investigation or enquiry, which makes it impossible to provide redressal within the time limit prescribed by the CP Act, 1986.

There are several causes why the CDRAs are unable to dispose/ dismiss the consumer dispute cases within the prescribed time limit. They are:

a) functioning of the CDRAs known as Saturday courts, once in a week during the initial stages;
b) delay in the case of appointment of the members of the CDRAs;
c) inadequate number of staff in the CDRAs;
d) no proper rules and regulations regarding the adjournments
e) the CDRAs liberally granting of the adjournment, if the Government is an opposite party, because of the involvement of several officials;

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[76] According to the Act, the CDRAs should dispose/ dismiss the consumer dispute case within 90 days and 150 days if there is no necessity or necessity of sending the good for testing respectively. For simplification, we have taken the maximum time period i.e. 150 days as a slab to evaluate the CDRAs performance in regard to the time bound or speedy redressal of the aggrieved consumers.

f) delays in serving the notices to the parties because of postal delay; and

g) absence of not only the parties but also members of the CDRAs.

Thus, it is necessary to take some steps in order to reduce the delay and improve the functioning of the CDRAs not only in order to protect the interests of the consumers but also to provide some incentives to the opposite parties to take precautionary measures to reduce the risk of harm.

(b) The District Forum of Nellore

i. Category-wise Filed and Disposed/ Dismissed Consumer Dispute Cases

Table No. 3.6

The Category- wise Cases Filed by the Consumers and Disposed/ Dismissed by the DF of N

				FILED							DISPOSED/ DISMISSED				
Name of the Category/ Year	1988	1989	1990	1991	1992	Total	Percentage	1988	1989	1990	1991	1992	Total	Percentages
Government Departments	4	34	259	448	356	1101	24,98	4	34	227	391	214	870	25,19
Public Utilities	2	22	259	359	208	850	19,29	2	22	217	300	142	683	19,77
Banks & Financial Institutions	0	21	116	243	204	584	13,25	0	21	95	213	124	453	13,12
Consumer Products	1	44	159	183	117	504	11,44	1	44	112	157	101	415	12,02
Communications	0	7	47	183	156	393	8,92	0	7	44	137	77	265	7,67
Transportation	1	6	76	81	36	200	4,54	1	6	64	71	24	166	4,81
Micellaneous	0	11	174	309	281	775	17,59	0	11	125	256	210	602	17,43
Total	8	145	1090	1806	1358	4407	100,00	8	145	884	1525	892	3454	100,00
Sources: Compiled from the Registers of District Forum of Nellore.														

Table 3.6 presents the category - wise number of consumer cases filed and disposed/ dismissed in the DF of Nellore (N) since its inception up to the end of December 1992 and 1993 respectively. The DF of Nellore received a number of cases against Government Departments which accounted for 24.96 percent (1101) of the total cases, followed by Public Utilities accounting for 19.29 per cent (850). The Banks and Financial Institutions occupied next place accounting for 13.25 per cent (584). Consumer Products and Communications accounted for 11.44 per cent (504) and 8.92 per cent (393) respectively. These five categories together accounted for 77.88 per cent of the total cases filed up to the end of December, 1992.

The number of cases received by the DF of N has increased from 8 cases in 1988 to 1358 in 1992. It received the highest number of cases compared to other DFs in the state. The

fieldwork makes it evident that the highest number of cases filed by the consumers in the DF of N was due to the liberal attitude of the members of the Forum regarding awarding the monetary or non- monetary compensation to the aggrieved consumers. Even in cases, which strictly did not come under the purview of Consumer Protection Act, the Fora simply directed the opposite party to consider the case of complainant sympathetically and give some relief[77]. And the respondents did give some relief to the complainant based on humanitarian grounds. It seems that these types of reliefs encouraged the consumers to file cases liberally resulting in the highest number of cases received in the state. There can be no doubt that the liberal view of the members of the Fora helped some consumers to get some compensation from the respondents but at the same time the consumer had to pay the costs for the wrong filling up to Rs. 10,000. Therefore this seems to suggest that the members of the Fora should award the costs only to the cases which come under the scope of the Act in order to avoid adverse effects like payment of the costs for wrong filing, increasing pending rate etc.

In the case of the category - wise disposed/ dismissed the number of consumer dispute cases by the DF of Nellore, Government Departments accounted for the maximum number (870) with 25. 19 per cent, followed by Public Utilities accounting for 19.77 per cent (683). Banks and Financial Institutions occupied next place accounting for 13.12 (453). Consumer Products and Communications accounted for 12.02 per cent (415) and 7.67 per cent (265) respectively. These five categories together accounted for 77.77 per cent of the total cases.

In terms of filed and dispose/ dismiss the consumer dispute cases Transportation occupied the last place accounting for 4.54 per cent (200) and 4.81 per cent (166) respectively.

The total number of case disposed/ dismissed by the DF of N had increased from 8 cases in 1988 and 892 in 1992. This may be not only because of permanent sitting of the members of the Forum but also because it did not have the appellate jurisdiction.

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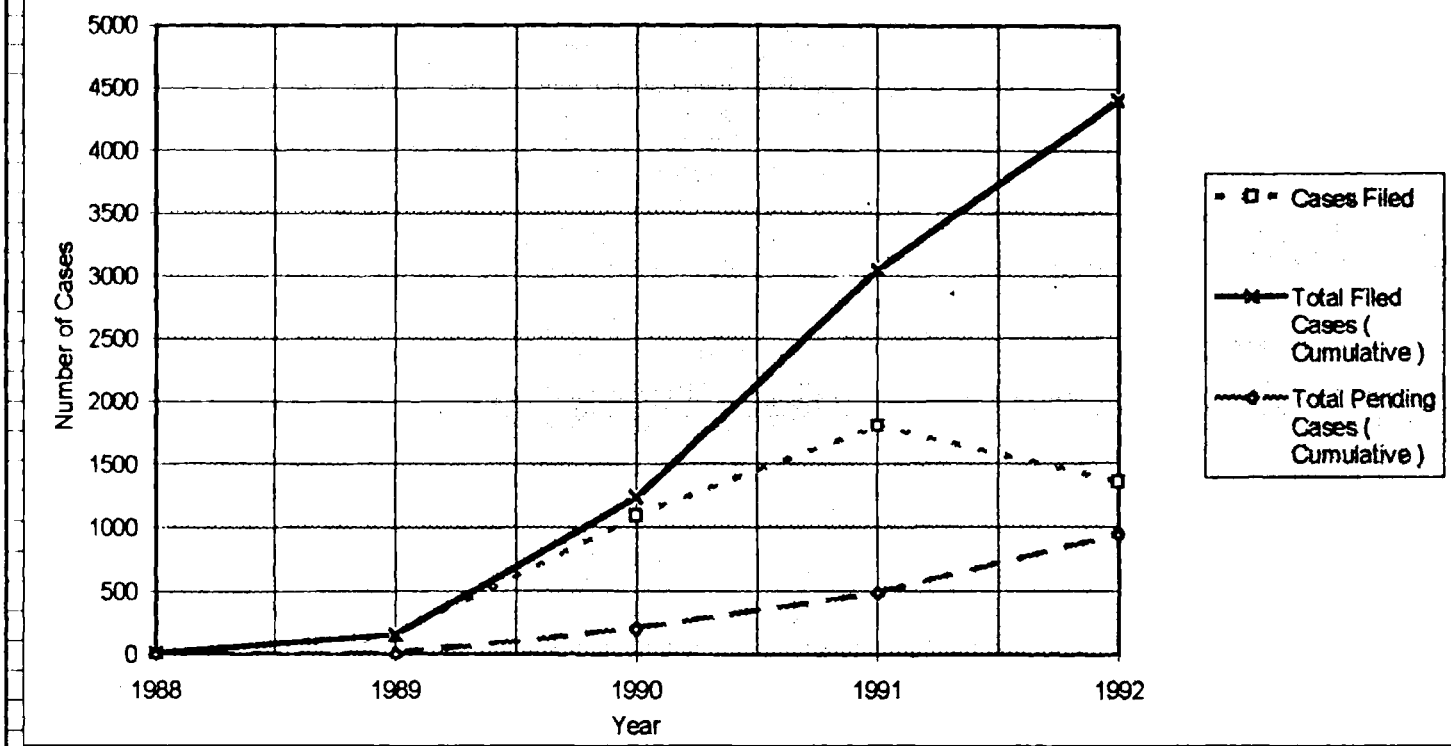
[77]CD case number 114/ 1990.

Graph No.: 3.3

The Cumulative Number of Filed and Pending Cases in the DF of N

	1988	1989	1990	1991	1992
Cases Filed	8	145	1090	1806	1358
Total Filed Cases (Cumulativ	8	153	1243	3049	4407
Total Pending Cases (Cumula	0	0	206	487	953



Graph 3.3 shows the number of pending consumer cases in the DF of N since its inception up to the end of December, 1992. The number of disposed/ dismissed cases accounted for 78.37 per cent (3454) of cases out of the total filed. Thus, the number of cumulative total of pending cases accounted for 21.63 per cent (953) only. Therefore it is clearly evident that the functioning of the DF of N is very much satisfactory especially in the cases of disposal/ dismissal rate.

ii Decision-wise Disposed/ Dismissed Consumer Dispute Cases

Table No.: 3.7

The Decision- wise Disposed/ Dismissed Cases by the DF of N

	In Favour of Consumer						Consumer Withdrawn						Against Consumer						Dismissed on TG						
Category/ Year	1988	1989	1990	1991	1992	Total	1988	1989	1990	1991	1992	Total	1988	1989	1990	1991	1992	Total	1988	1989	1990	1991	1992	Total	G.Total
Govt Depts	2	12	90	168	94	366	0	16	76	67	23	181	2	3	23	69	32	129	0	3	39	67	66	194	870
Public Utilities	1	14	94	190	82	321	0	4	64	83	17	138	0	0	24	30	22	76	1	4	35	67	41	148	683
Banks & FIs	0	10	38	70	29	147	0	3	19	34	27	83	0	2	23	51	26	102	0	6	15	58	42	121	453
ConsumerProd	0	21	44	69	34	168	1	20	31	50	17	119	0	2	5	5	9	21	0	1	32	33	41	107	415
Communication	0	2	16	28	18	64	0	4	12	11	8	35	0	0	6	31	17	53	0	1	11	67	34	113	265
Transportation	0	4	30	22	7	63	0	0	22	13	8	43	1	0	6	15	3	25	0	2	6	21	6	35	166
Miscellaneous	0	4	52	84	69	209	0	4	36	48	32	120	0	0	14	62	33	99	0	3	23	72	76	174	602
Total	3	67	364	691	313	1338	1	51	259	276	132	719	3	7	100	253	142	505	1	20	161	405	306	892	3454
Percentages	0,09	1,94	10,54	17,11	9,06	38,74	0,03	1,48	7,50	7,99	3,82	20,82	0,09	0,20	2,90	7,32	4,11	14,62	0,03	0,58	4,66	11,73	8,83	25,83	100,00
Sources: Compiled from the Registers of District Forum of Nellore.																									

Table 3.7 shows the decision - wise disposed/ dismissed consumer cases in the DF of N since its inception up to 31.12.1993. The cases disposed as in favour of consumer account for 38.74 per cent (1338), followed by the cases which went against consumers accounting for 25.83 per cent (892). Consumers have withdrawn 20.82 per cent (719) of cases. The cases dismissed on technical grounds accounted 14.62 per cent (505).

The cases disposed as in favour of consumer and the cases withdrawn together accounted for 59.56 per cent of the total cases disposed/ dismissed. This is an indication that majority of cases were settled to the satisfaction of consumers.

iii. Time Taken to Dispose/ Dismiss the Consumer Dispute Cases

Table No.: 3.8 (Graph No. 3.4)

Time Taken by the DF of N in order to Dispose/ Dismiss the Cases

	CF	CW	CA	D on TG	Total	Percentages
Up to 150 days	24	4	15	7	50	50,51
150 days - 1 year	10	9	5	10	34	34,34
1 year - 2 years	5	7	0	2	14	14,14
2 years - 3 years	0	0	0	1	1	1,01
Total	39	20	20	20	99	100,00
Percentages	39,39	20,20	20,20	20,20	100	

Sources: Compiled from the Original Files of Consumer Dispute Cases of District Forum of Nellore.

	Up to 150 days	150 days - 1 year	1year - 2 years	2 years - 3 years
D/ D in Total	39,19	26,65	10,97	0,78
Total(Cumulative)	39,19	65,84	76,81	77,59
Pending Cases(%)	60,81	34,16	23,19	22,41

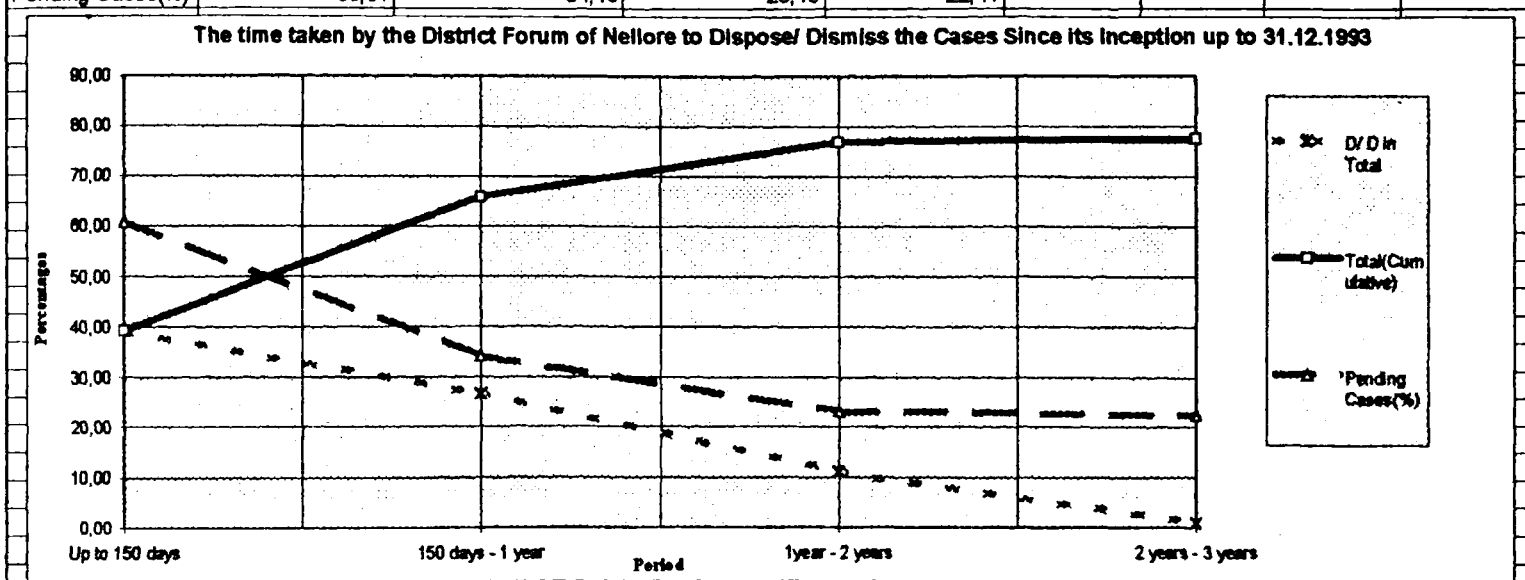


Table 3.8 shows the time taken by the DF of N in order to dispose/ dismiss the consumer cases. The results are based on a sample of 100 cases out of 3454 in total disposed/ dismissed cases. The cases, which were disposed/, dismissed within the stipulated time limit of 150 days accounted for 39.19 per cent of the total cases received. The pending cases have come down proportionately and after three years stood at 22.41 per cent of the total filed cases. These figures and facts are also presented with the help of the Graph.

It is evident that the DF of N is unable to dispose/ dismiss 60.81 per cent of the cases within the prescribed time limit, in spite of the permanent sitting of the members of the Forum and lack of appellate jurisdiction. Therefore, it is necessary to take some measures not only to curb the increasing pending rate but also to reduce the opportunity of hiding the actual facts by the self interested opposite parties.

(c) The State Commission of Andhra Pradesh

i. Category-wise Filed and Disposed/ Dismissed Consumer Dispute Cases

Table No.: 3.9

The Category- wise Cases Filed by the consumers and Disposed/ Dismissed by the SC of AP

			FILED					DISPOSED/ DISMISSED				
Name of the Category \ Year	1989	1990	1991	1992	total	Percentages	1989	1990	1991	1992	total	Percentages
Insurance	3	44	102	74	223	30,42	3	17	15	3	38	22,62
Hosing/construction/Real Estate	0	34	67	25	126	17,19	0	8	9	2	19	11,31
Banks & Financial Institutions	0	26	28	33	87	11,87	0	16	9	4	29	17,26
Industries	1	23	31	17	72	9,82	1	12	12	1	26	15,48
Health & Medicine	2	8	11	23	44	6,00	1	2	0	1	4	2,38
Public Utilities	3	12	19	9	43	5,87	3	8	5	1	17	10,12
Transportation	0	8	14	8	30	4,09	0	5	5	1	11	6,55
Government Departments	0	6	8	10	24	3,27	0	1	3	1	5	2,98
Communications	0	6	6	5	17	2,32	0	5	3	0	8	4,76
Miscellaneous	0	12	36	19	67	9,14	0	5	4	2	11	6,55
Total	9	179	322	223	733	100,00	8	79	65	16	168	100,00
Sources: Compiled from the Registers of State Commission of Andhra Pradesh.												

Table 3.9 presents the category - wise number of consumer disputes filed and disposed/ dismissed in the SC of AP since its inception up to end of December, 1992 and 1993 respectively. From the table it is evident that maximum number of cases received are regarding Insurance accounting for 30.42 per cent (223), followed by Housing, Construction and Real Estates accounting for 17.19 per cent (126). Banks and Financial Institutions occupied next place accounting for 11.87 per cent (87). Industries and Health and Medicine accounted for 9.82 per cent (72) and 6 per cent (44) respectively. These five categories together accounted for 75.30 per cent of the total cases filed.

The total number of cases received by the SC had increased from 9 in 1989 to 322 in 1991, but in 1992 the number of cases were 223 only. There are some reasons why the number of cases received or filed went down. The performance of the SC of AP itself is one of the reasons. The consumer may develop up rational apathy towards approaching the SC to get their redressal, resulting in the reduction in the filing of the cases in the SC.

In the cases of the category - wise disposed/ dismissed number of consumer dispute cases by the Commission, Insurance had the maximum accounting for 22.62 per cent (38) followed by Banks and Financial Institutions accounting for 17.26 (29). The industries occupied next place accounting for 15.48 per cent (26). Housing, Construction and Real Estates and Public

Utilities accounted for 11.31 per cent (19) and 10.12 (17) respectively. The five categories together accounted for 76. 79 per cent of the disposed/ dismissed cases.

In terms of cases filed, Communications had the least accounting for 2.32 per cent (5) and in terms of disposed/ dismissed cases Health and Medicine accounted for 2.38 (4). At best guess, the reasons in the case of poor filing of the cases against the Communications seems to be that the majority of the consumers are not getting proper redressal from the Commission. The majority of cases against the Communications were based on the excess bills. The consumers did not have enough evidence to prove that the opposite party was wrong in issuing the excess bills except for the bills, which were sent by the opposite party. Especially it was very difficult in the case `X' bar telephone services. And at the same time the service would be disconnected if the consumers do not pay the bill within the due date. The consumer had to struggle a lot in order to get reconnection of the telephone service. The CDRAs did not have power to grant the interim order which was to be issued to the opposite parties in order to prevent the opposite party from taking action against the consumer because of non-payment of the due amount while cases were pending in the Commission. In spite of the poor redressal, the pecuniary jurisdiction could also have been another cause for fewer cases being filed by the consumers in the SC of AP against the communications category.

Even though the cases filed against Health and Medicine accounted for 6 per cent (44) of the total cases filed, it had the least percentage in terms of disposal/ dismissal accounting for only 2. 38 per cent of the total disposed/ dismissed cases. It may be either because the CDRAs themselves are in a dilemma about whether the services of personal contract come under the purview of the Consumer Protection Act or not? Because the members of the Commission need expert advice regarding the services of the doctors as there is a lot of asymmetric information regarding the services of the doctors termed as credence goods, it is not possible to evaluate the quality of services, not only before but also after the hiring of such services.

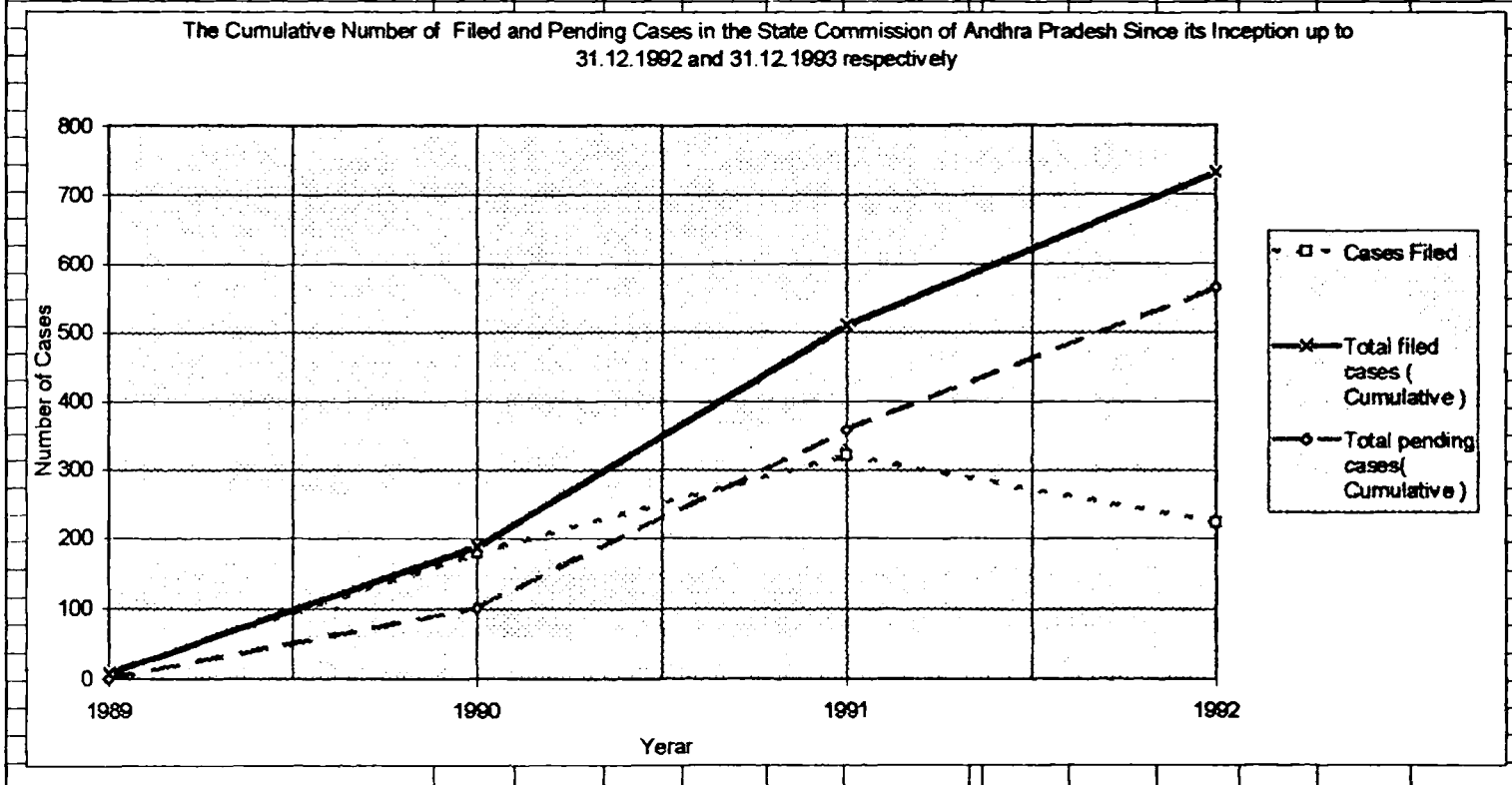
The total number of cases disposed/ dismissed by the SC of AP increased from 8 in 1989 to 65 in 1991, but decreased to 16 in 1992. The reasons may be either irregular functioning as in the case of non- appointment of the members of the Commission or the Commission may be

concentrating much time on the disposal/ dismissal of appeals rather than on original cases because it had the appellate jurisdiction in addition to the original jurisdiction.

Graph No.:3.5

The Cumulative Number of Filed and Pending Cases in the SC of AP

	1989	1990	1991	1992
Cases Filed	9	179	322	223
Total filed cases (Cumulative)	9	188	510	733
Total pending cases(Cumulative)	1	101	358	565



Graph 3.5 shows the number of pending consumer cases in the SC of AP since its inception up to the end of December, 1992. The number of disposed/ dismissed accounted for 22.92 per cent (168) out of the cumulative total cases filed. Thus, the number of cumulative total pending cases accounted for 77.08 per cent (565). This clearly indicates that the functioning of the SC especially in the case of original jurisdiction is not at all effective in protecting the interests of the aggrieved consumers. The reasons may be either the irregular functioning of the Commission as mentioned above. There is a need to take measures to impose the working of the Commission and reduce the pending cases

ii. Decision-wise Disposed/ Dismissed Consumer Dispute Cases

Table No.:3.10

The Decision- wise Disposed/ Dismissed Cases by the SC of AP

	In Favour of Consumer					Consumer Withdrawn					Aainst Consumer					Dismissed on TG						
Category/ Year	1989	1990	1991	1992	total	1989	1990	1991	1992	Total	1989	1990	1991	1992	Total	1989	1990	1991	1992	Total	G.total	G.Percentage
Insurance	1	12	9	0	22	1	2	5	2	10	0	2	0	0	2	1	1	1	1	4	38	22,62
Housing/Con/RE	0	4	3	1	8	0	0	4	1	5	0	2	1	0	3	0	2	1	0	3	19	11,31
Banks & Fis	0	9	2	1	12	0	1	3	2	6	0	4	3	1	8	0	2	1	0	3	29	17,26
Industries	1	1	3	1	6	0	3	5	0	8	0	1	2	0	3	0	7	2	0	9	26	15,48
Health&Medcine	1	0	0	0	1	0	0	0	0	0	0	2	0	0	2	0	0	0	1	1	4	2,38
Public Utilities	1	2	1	0	4	0	0	1	0	1	0	3	1	1	5	2	3	2	0	7	17	10,12
Transportation	0	3	4	0	7	0	0	0	0	0	0	1	1	0	2	0	1	0	1	2	11	6,55
Govt. Depts	0	0	0	0	0	0	0	0	0	0	0	1	1	1	3	0	0	2	0	2	5	2,98
Communications	0	2	2	0	4	0	0	0	0	0	0	2	0	0	2	0	1	1	0	2	8	4,76
Miscellaneous	0	1	1	1	3	0	1	1	0	2	0	3	1	1	5	0	1	1	0	2	12	7,14
Total	4	33	25	4	66	1	7	19	5	32	0	21	10	4	35	3	18	11	3	35	168	100,00
Percentages	2,38	19,64	14,88	2,38	39,29	0,60	4,17	11,31	2,98	19,05	0,00	12,50	5,95	2,38	20,83	1,79	10,71	6,55	1,79	20,83	100,00	
Sources: Compiled from the Registers of State Commission of Andhra Pradesh.																						

Table 3.10 shows the decision - wise disposed/ dismissed consumer cases in the SC of AP since its inception up to 31.12.1993. The cases disposed in favour of consumers accounted for 39.29 per cent (66), and it is followed by the cases decided against consumers and cases dismissed on technical grounds, accounting for 20.83 per cent (35) each. The cases of consumers withdrawing accounted for 19.05 per cent (32). In general we can club the cases disposed in favour of consumer and consumers` withdrawal and see it as a kind of positive sign that the consumers are getting their grievances redressed through the liability system. However, in the case of consumers` withdrawal there are at least two possible reasons. One is the out of court settlement where the opposite party may agree with the claims of consumer. This is a positive sign. But another reason is that the cases are withdrawn by the consumers because of some threat from the opposite party. There are some evidences where the consumers withdrew the case simply because of the threat from the opposite party[78].

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[78] in the State Commission of Gujrat, C.D. number 5/ 1990, *CERS v. Canara Bank* order dated 31.5.1990 and 7.1.1991. One of the complainants in this case, M/s. Janata Textiles, was threatened by the opposite party, Canara Bank, that unless it withdrew its complaint before 31. 5. 1990, its credit arrangement with the Bank would come to an end. This was no empty threat. After a few months this complainant asked CERS to withdraw the complaint. It also filed an application before the Commission of Gujrat for withdrawal of the complaint, which was opposed by CERS. The Commission of Gujrat pronounced that the CERS was merely an agent of janata Textiles. Since the real complainant had filed an application for withdrawal of the complaint, it had no option but to allow it. The threat-based injustice through the liability system may not affect only consumers but also judges were several times threatened by opposite parties. (Quoted from Saraf, D. N., Law of Consumer Protection in India, Bombay, N. M. Tripathi Private Limited, 1995, 2nd ed., P. 237)

iii. Time Taken to Dispose/ Dismiss the Consumer Dispute Cases

Table No.:3.11 (Graph No.:3.6)

Time Taken by the SC of AP in order to Dispose/ Dismiss the Cases

	CF	CW	CA	D on TG	Total	Percentages
Up to 150 days	7	11	5	14	37	38,14
150days - 1 year	14	3	5	2	24	24,74
1 year - 2 years	3	2	6	1	12	12,37
2 years - 3 years	6	2	3	2	13	13,40
3 years - 4 years	7	0	2	1	10	10,31
above 4 years	1	0	0	0	1	1,03
Total	38	18	21	20	97	100,00
Percentages	39,18	18,56	21,65	20,62	100,00	

Source: Compiled from the Original Files of Consumer Dispute Cases of State Commission of Andhra Pradesh.

	Up to 150 days	150days-1year	1year-2years	2years-3years	3years-4years	above 4 years
D/D in Total	8,73	5,66	2,83	3,07	2,36	0,24
Total(Cumulative)	8,73	14,39	17,22	20,29	22,65	22,89
Pending Cases(%)	91,27	85,61	82,78	79,71	77,35	77,11

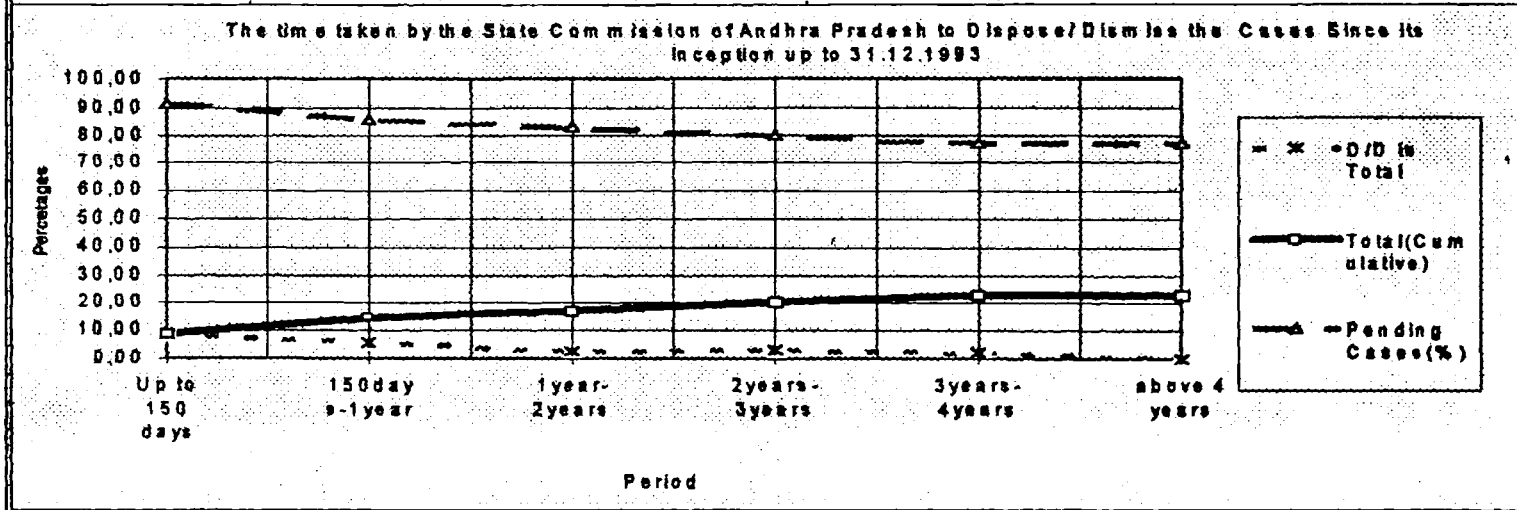


Table 3.11 shows the time taken by the SC of AP in order to dispose/ dismiss the consumer disputed. The results are based on a sample size of 100 cases out of 168 cases. The cases, which were disposed/ dismissed by the SC of AP within the statutory time limit of 150 days, accounted 8.73 per cent of the total cases received. Even after four years, the SC of AP is unable to dispose/ dismiss 77.11 per cent of the total cases filed. These facts and figures are also presented with the help of the Graph .

(d) The National Commission

i. Category-wise Filed and Disposed/ Dismissed Consumer Dispute Cases

Table No.:3.12

The Category- wise Cases Filed by the Consumers and Disposed/ Dismissed by the NC

Name of the Category/ Year	1988	1989	1990	1991	1992	Total	Percentages	1988	1989	1990	1991	1992	Total	Percentages
Banks& Financial Institutions	1	12	20	60	134	227	44,25	1	12	20	60	112	205	47,34
Industries	1	6	11	18	28	64	12,48	1	6	11	15	27	60	13,86
Public Utilities	3	15	4	6	32	60	11,70	3	15	4	5	19	46	10,62
Housing/ Construction/ Real Estate	0	2	4	6	22	34	6,63	0	2	3	6	14	25	5,77
Health & Medicine	2	1	2	5	20	30	5,85	2	1	2	4	7	16	3,70
Transportation	1	2	5	6	13	27	5,26	1	2	5	6	11	25	5,77
Government Departments	0	4	1	7	11	23	4,48	0	4	0	7	11	22	5,08
Micellaneous	0	3	2	12	31	48	9,36	0	3	2	11	18	34	7,85
Total	8	45	49	120	291	513	100,00	8	45	47	114	219	433	100,00
Source: Compiled from the Registers of the National Commission														

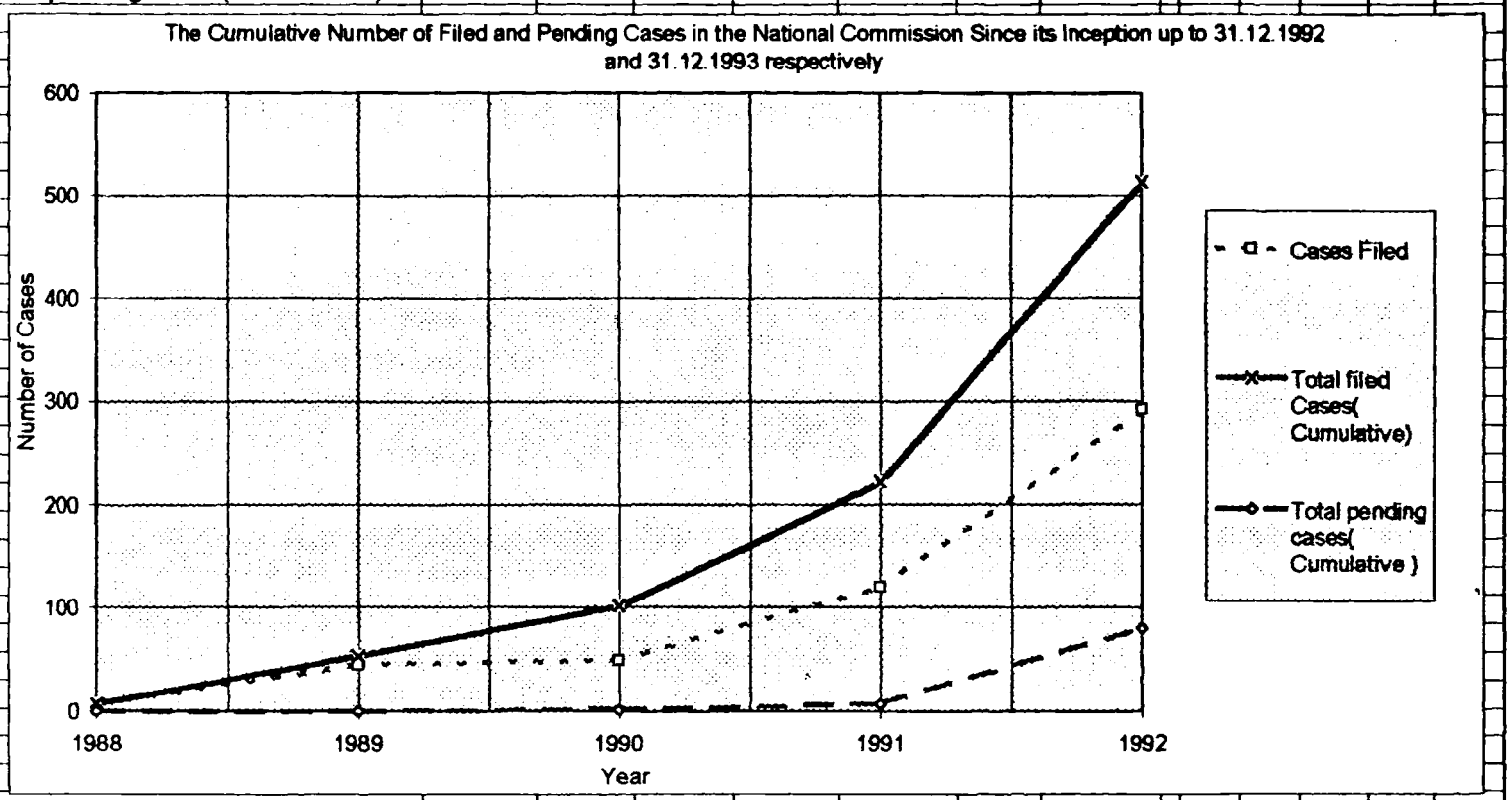
The total 3.12 reveals that the number of cases received by the NC had increased from 8 cases in 1988 to 291 cases in 1992. Table 3.12 presents the category - wise number of consumer cases filed in the NC since its inception up to the end of December, 1992. From the table it is evident that the NC had received maximum number of cases against Banks and Financial institutions accounting for 44.25 per cent (134), followed by industries accounting for 12.48 per cent (64). Public Utilities occupied next place accounting for 11.70 per cent (60). Housing, construction and Real Estate and Health and Medicine accounted for 6.63 per cent (34) and 5.85 per cent (30) respectively. These five categories together accounted for 80.91 per cent of the total cases filed.

The total number of case disposed/ dismissed by the NC had increased from 8 cases in 1988 to 219 cases in 1992. In the case of category - wise disposed/ dismissed number of consumer dispute, Banks and Financial Institutions had the maximum accounting for 47.34 per cent (205) of the total, followed by industries accounting for 13.86 per cent (60). Public Utilities occupied the next place accounting for 10.62 per cent (46). Housing, Construction and Real Estate and the Transportation accounted for 5.77 per cent (25) each. These five categories together accounted for 83.36 per cent of the total case disposed/ dismissed since the inception of the Commission.

Graph No.:3.7

The Cumulative Number of Filed and Pending Cases in the NC

	1988	1989	1990	1991	1992
Cases Filed	8	45	49	120	291
Total filed Cases(Cumulative)	8	53	102	222	513
Total pending cases(Cumulative)	0	0	2	8	80



The graph 3.7 shows the number of pending consumer disputes in the NC since its inception. The number of disposed/ dismissed cases accounted for 84. 41 per cent (433) of the total cases filed. Thus, the number of cumulative pending cases accounted only for 15.59 per cent. In spite of appellate jurisdiction, the higher disposed/ dismissed rate may have been because of the fact that the NC possessed not only adequate staff but also had permanent sitting of the members of the NC. The NC especially had an advantage because it consist of 5 members, which made the NC function regularly in spite of the absence of some members or occasionally even the president, which is not possible in the case of other CDRAs.

ii. Decision-wise Disposed/ Dismissed Consumer Dispute Cases

Table No.:3.13

The Decision- wise Disposed/ Dismissed Cases by the NC

	In Favour of Consumer						Consumer Withdrawn						Against Consumer						Dismissed on TG							
Category/ Year	1988	1989	1990	1991	1992	Total	1988	1989	1990	1991	1992	Total	1988	1989	1990	1991	1992	Total	1988	1989	1990	1991	1992	Total	G.Total	G.per
Banks & Fls	1	1	2	14	17	35	0	1	6	7	12	26	0	1	3	11	19	33	0	8	9	28	65	111	205	47,34
Industry	0	1	6	1	0	8	0	1	0	5	5	11	0	2	1	4	5	12	1	2	4	5	17	29	60	13,86
Public Utilities	0	9	0	1	1	11	0	2	0	0	4	6	3	2	2	3	5	15	0	2	2	1	9	14	46	10,62
Housing/Con/RE	0	1	0	1	1	4	0	0	2	2	2	6	0	0	1	0	0	1	0	1	0	3	11	15	26	6,00
Health&medicin	0	0	0	1	1	2	0	0	0	1	0	1	1	0	0	2	3	6	0	1	2	0	3	6	15	3,46
Transportation	1	1	1	2	2	8	0	0	1	1	1	3	0	0	0	2	2	4	0	1	3	1	6	11	26	6,00
Govt.Depts	0	2	0	0	0	2	0	0	0	1	0	1	0	0	0	0	2	2	0	2	0	6	9	17	22	5,08
Miscellaneous	0	0	0	0	1	1	0	1	1	0	1	3	1	0	0	0	2	3	0	2	1	11	14	28	35	8,08
Total	2	15	9	20	23	69	0	5	10	17	25	57	5	5	7	22	37	76	1	19	22	55	134	231	433	100,00
Percentages	0,46	3,46	2,08	4,62	5,31	15,94	0,00	1,15	2,31	3,93	5,77	13,16	1,15	1,15	1,62	5,08	8,55	17,55	0,23	4,39	5,08	12,70	30,95	53,35	100,00	

Sources: Compiled from the Registers of National Commission.

Table 3.13 shows the decision - wise disposed/ dismissed consumer disputes in the NC. The cases which were dismissed on technical grounds accounted for 53.35 per cent (231) of the total cases disposed/ dismissed, and was followed by the cases which went against consumers accounted for 17.55 per cent (76). The cases disposed as consumers favour occupied the third place accounting for 15.94 per cent (69). The cases of withdrawal by the consumers stood at last place accounting for 13.16 per cent (57). It is evident that the clubbing of the cases as in favour of consumers and cases withdrawn accounted for 29. 10 per cent only. Thus, the cases, which went against consumers and those, dismissed on technical grounds accounted for 70.90 per cent. This explains the reason behind the inclusion of a clause under Section 26 in the CP Amendment Act, 1993 by the Government of India:

> where a complaint instituted before the District Forum, the State Commission or the National Commission, as the cases may be, is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, dismiss the complaint and make an order that the complainant shall pay to the opposite party such cost, not exceeding ten thousand rupees, as may be specified in the order.

The empirical work clearly indicates that this is not the case with other CDRAs. Imposing of the costs on consumers because of wrong filing is not justified because of the following reasons:

i. the CDRAs themselves are unable to draw a clear cut line between the goods and services which come under the definition of the term `consumer´ ;

ii. all over India the full functioning of the CDRAs are not seen earlier than 1993 for several reasons;

iii. the majority of the Indian consumers are still not aware of the existence of such a Fora in the country.

In such a situation, there does not seem to be justification to enforce such hard measures against the consumers in order to reduce the number of cases of wrong filing, and may be to help in the reduction of not only case filing but also reduction of pending rates in the CDRAs. It seems the Government of India is acting by the advice of NC, which suggested amendment of the Act regarding wrong filing of the cases by the consumer. The influence of the NC is much more than the influence of a District Forum on the Government, even though the District Fora are on a reasonable footing, it takes a lot of effort to convince the Government of India. Before taking any hard measure against the consumers, the Government has to do many things. The major task is to create awareness about the Fora and make the Fora easily accessible to the consumers, instead of creating deterrents at this stage. There are several problems like lack of funds, staff, no separate court buildings, non-appointment of the members in time etc., faced by the CDRAs in the implementation of the Consumer Protection Act. The selection committee for the selection of members of the CDRAs was constituted only from the Amendment Act, 1993. Prior to that the appointment of the majority members of the CDRAs was simply without any norms, and their services to the consumers also left much to be desired.

iii. Time Taken to Dispose/ Dismiss the Consumer Dispute Cases

Table No.:3.14 (Graph No.:3.8)

Time Taken by the NC in order to Dispose/ Dismiss the Cases

	CF	CW	CA	D on TG	Total	Percentages
Up to 150 days	2	3	2	7	14	33,33
150days - 1 year	5	2	4	5	16	38,10
1 year - 2 years	4	1	3	4	12	28,57
Total	11	6	9	16	42	100,00
Percentages	26,19	14,29	21,43	38,10	100,00	

Sources: Compiled from the Original Files of Consumer Dispute Cases of National Commission.

	Up to 150 days	150 days - 1 year	1year - 2 years
D/D in Total	27,48	29,50	25,52
Total(Cumulative %)	27,48	56,92	82,44
Pending Cases(%)	72,52	43,08	17,56

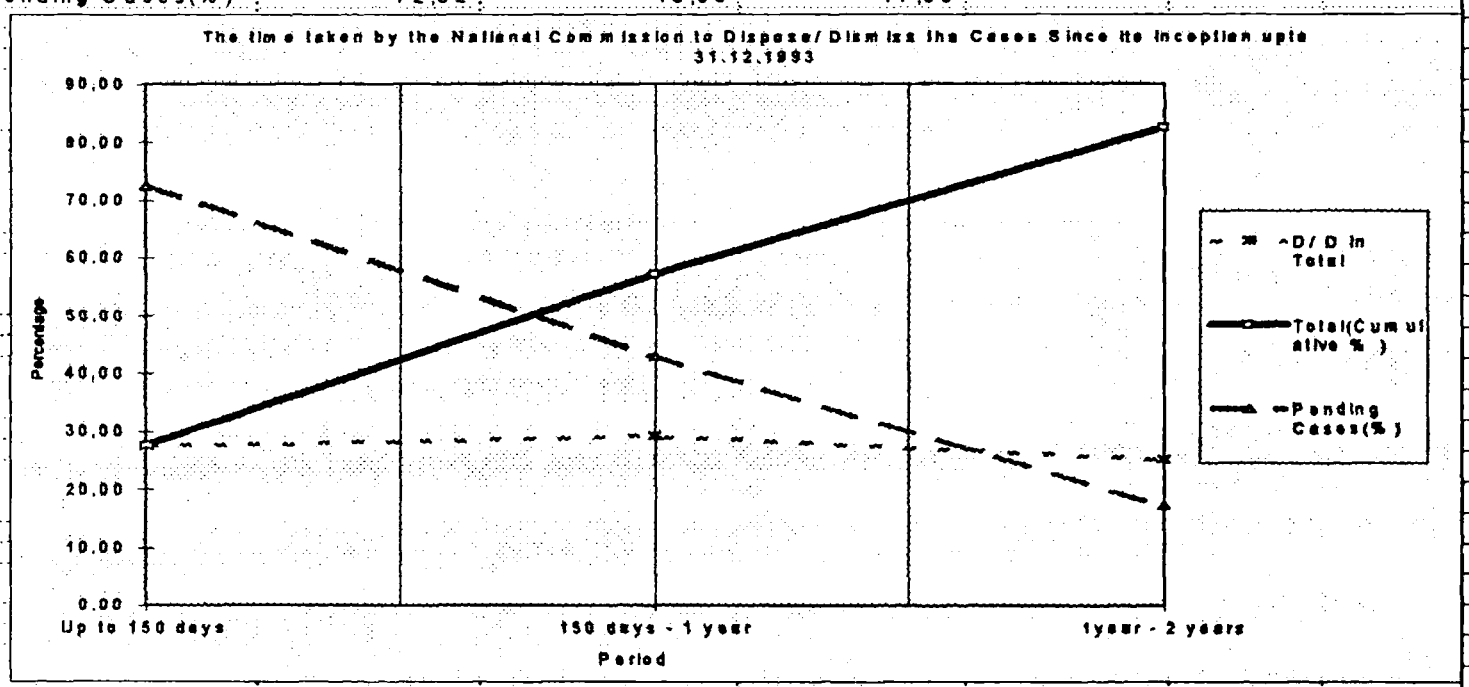


Table 3. 14 shows the time taken by the NC in order to dispose/ dismiss the consumer dispute cases since its inception up to the end of December, 1993. The results are based on a sample of 43 cases out of 433 cases. The cases which were disposed/ dismissed by the NC within the prescribed time limit of 150 days accounted for only 27.48 per cent (14) of the total cases (513) received by the NC. However, within two years time period the NC has managed to disposed/ dismissed 82.44 per cent of the total cases received. These facts and figures are also presented with the help of the Graph.

It is evident that in spite of its advantages in having permanent sitting, adequate staff, perhaps adequate funds and possessing an unique opportunity of continuous functioning of the NC with the five members, is unable to dispose/ dismiss more than 72.52 per cent of the total

cases within the prescribed time limit. Therefore, it is obvious that the Government should take necessary steps in order to reduce the pending rates in not only the NC but also in other CDRAs.

D. The CDRAs: Complainant or Appellant Based Assessment

This section is devoted to an assessment of the CDRAs on the basis of the information collected from the three groups of participants in the process of functioning of the system. The first group is the sample consumers. The second consists of members of the grievance redressal machinery at the district and state levels and the third group consists of consumer counsel.

1. Consumers' Views

Consumers' views on the functioning of the Fora have been gathered by administering a questionnaire. The respondents are drawn from one district forum (DF of RR)and the SC of AP. Of the 50 selected appellants from these Fora, for one or the other reasons such as poor response or the change of address, only 32 appellants were interviewed. The views of the consumers are analysed to evaluate the effectiveness of the liability system in redressing consumer grievances.

The effectiveness or the success, referred to here after as the *Court Success*, is of central concern to the consumers. The success of the machinery may be gauged from the extent of compensation settled in favour of the consumer and the speed and least inconvenience with which it is settled. Given the possibility that quicker and least expensive settlements go with high proportion of compensation settlements, the *Court Success* may be defined as indicated by the proportion of compensation settled to the compensation claimed.

Based on the information collected from the consumers, an attempt is made here to explain the determinants of the *Court Success (CSUCC)* with the help of multiple regression analysis. From the responses of the consumers one can discern the following factors as determinants of *Court Success*: the number of appearances before Fora, the bribes paid to the Fora, the

duration of cases disposal/ dismissal, the difficulties if filing petitions, the level of education of the consumer and the engagement of lawyer. The *a priori* relationship between *Court Success* and each of these determining variables is specified below.

The *appearances of the consumer before the Fora (AFORA)* more number of times indicate relatively weak case and reduced the chances of winning. Further, it may also go against the spirit of speedy and inexpensive redressal. Therefore, we may specify an inverse relationship between *Court Success* and AFORA. The latter is measured in terms of number of appearances.

Consumers seem to perceive that there is a certain amount of corruption and *bribes (BRIBE)* do play a role in deciding the cases in favour of consumers as well as the proportion of compensation awarded. The consumers who bribe the members of the Fora are supposed to have better chances of winning their cases than those who do not win. Bribes as measured as a dummy variable, where bribe gets the values of one and no bribe a value of zero.

Similarly, the *time taken for the disposal/ dismissal of the case (DDDUR)* can also impact the *Court Success*. According to the Consumer Protection Act 1986, any Fora dealing with the consumer case should dispose it of within a stipulated period of 90 days in the case of goods which need no testing and 150 days in the case of those which require testing. The longer the duration of the case, the lesser the fulfilment of the objective of speedy redressal to the consumer. The duration is measured in terms of number of days between the date of filing the complaint and the date of disposal/ dismissal by the Forum.

Besides, the *difficulties experienced in filing (DIFIL)* the complainant by the consumer also influences the *Court Success*. Complicated filing procedures adversely affect the consumer success. This is measured as a dummy variable by assigning a value of one in the case of responses expressing difficulties in filing the complainants and a value of zero where there is no difficulty.

Educational level (EDUCA) of the consumer is an other factor that influences the *Court Success*. A better-educated consumer has much more chances of winning the case than an ill-

educated person. Higher education is assigned a value of one and low or no education is assigned zero.

The *engagement of a lawyer (ENLAW)* by the consumer is likely to provide a better chance of winning, though it may violate the spirit of consumer Fora which should ideally be free from the engagement of lawyers. Engagement of lawyer is assigned a value of one and non-engagement zero.

Based on the above *a priori* relationship between the *Court Success* and the various determining variables the following specification is made[79]:

$$\text{CSUCC} = \beta_0 + \beta_1 \text{AFORA} + \beta_2 \text{BRIBE} + \beta_3 \text{DDDUR} + \beta_4 \text{DIFIL} + \beta_5 \text{EDUCA} + \beta_6 \text{ENLAW} + U$$

Where the variables are as defined above, βs are parameters and U is the error term.

The result of the regression analysis are presented below:

Table No.: 3.15
Results of the Regression Analysis

Dependant Variable : CSUCC

Variables	Estimated Coefficients
AFORA	-0.7500 (t = - 0.601
BRIBE	**71. 3971** **(t = 2.5387*)**
DDDUR	-0.0534 (t = - 1.1463)
DIFIL	-36.2709 (t = -1.7060)
EDUCA	-6.0005 (t = -0.2741)
ENLAW	7.0468 (t = 0.3327)
CONSTANT	**60.1712** **(t = 2.5251)**
R SQUARE	0.3806
RBAR SQUARE	0. 1947
F VALUE	(F = 2.0452)

* significant at 5% level

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[79] see Appendix- VI for results of Ordinary Least Squares and Two Stage Least Squares for *Court Success, Appearance Before Fora and Disposed/ Dismissed Duration of time taken.*

F is mere significant so that the hypothesis that '*Court Success* is not influenced by other determinants' can be clearly rejected. From the table, it is clear that BRIBE is significant. The other determinants however, do not show any significant influence on court success. It reveals that the consumer who bribes the CDRAs may have higher chances of winning the case compared to the average consumer. Therefore, bribery not only makes the illegal claims into legal claims but also encourages frivolous or vexatious complaints.

In general one can say that education (EDUCA) may either directly or indirectly help court success because of the ways in which the educated consumers make claims. However through the analysis we are unable to ascertain whether education had any significant impact on court success, which does not mean that EDUCA does not have any impact on court success. However, this may be a result of the simplicity of the procedures and legalities of the CDRAs. In addition, consumers who have higher education or lower education may be equal in the environment of asymmetric information about the quality of goods or services. Thus the findings shows that the CDRAs judge the claims of award irrespective of the educational background of the consumers.

Similarly in the matter of engaging of a lawyer (ENLAW), we are also unable to find any significant impact on court success, which does not mean that ENLAW do not have any impact on court success. It may be because, if both the parties are not engaging of a lawyer or if both parties are engaging of a lawyer then should be the same outcome, but if the opposite party (producer) engages a lawyer and the complainant (consumer) does not engages a lawyer, the result might have some relevance. However, in principle, the consumers need not engage a lawyer in order to get compensation from the CDRAs. One can also say that the engaging of a lawyer may increase the chances of getting the award of a claim but on the basis of analysis we are unable to prove it, especially in the case of CDRAs. The consumers may engage a lawyer for several reasons such as the complexity of the case, lack of time, etc., other than winning the case as prime motive. At the same time, in a liability system, the parties have much more information about their activities than any other agency, and the involvement of lawyers may be just as mediators between CDRAs and the consumers. So, consumers do not need to engage a lawyer in order to present the facts about their grievances in CDRAs.

Therefore, the CDRAs should take the necessary steps to speed up the disposing/ dismissing of cases within the time limit prescribed by the Act in order to avoid adverse effects. At the same time it has to take some precautionary steps regarding the prevention of frivolous or vexatious complaints, not simply by imposing costs on the consumers but by reducing the prevailing drawbacks in CDRAs. Since the influence of lawyers is not clear on CSUCC, it may suggest that consumers do not need to engage a lawyer. Similarly, the influence of education is not clear on CSUCC, and there is evidence of CDRAs giving its judgement based purely on the facts of the case rather than on the educational background of consumers.

There are certain aspects of the consumers` opinion which can not be captured through regression. The majority of the consumers stressed the importance of the consumer education, awareness programmes by both governmental and non-governmental organisations and establishment of the local level Fora. However, regarding the establishment of Fora at local level - not only the consumers but also the members of the Fora and the counsels for consumers expressed their opinion about the involvement of the costs. The government should take steps to provide financial assistance, infrastructure facilities, adequate staff and timely appointment of the members to the CDRAs, also strictly implement the act regarding timely disposal of cases, create friendly environment, strictly implement order, and widen the scope of the Act to include self employed consumers, immovable properties, services of personal contracts, educational institutions, municipal corporations etc.

The majority of the consumers are not favourable towards permanent appointment of the members of CDRAs because of corruption, shirking, involvement of difficulties in the case of removal of bad members in spite of advantages of accountability, speedy disposal and commitment. They also opinied three members are enough in order to run the day to day activities of CDRAs. One of the consumers commented on the role of the other two members of CDRAs, claiming that *they are just like spectators*. There appears to be considerable truth in this going by the present investigator's own observation during the time of data collection from different Fora.

The above analysis on the functioning of CDRAs by using both primary and secondary sources, clearly indicates that there are several good objectives like separate courts, speedy disposal, friendly environment, no court fee and inexpensive redressal, and the principle of protecting the interests of consumers. However, there are several reasons like law's delay, engagement of lawyers, imposition of costs on consumers for wrong filing, calling consumers more than the required times etc., which hinder adequate redressal to the consumers who approach the Fora.

2. *Views of the Members*

The members of the State Commission of Andhra Pradesh and District Forum of Ranga Reddy were interviewed with the help of a questionnaire[80] in order to get their opinion on the functioning of the CDRAs. The majority members expressed similar opinion regarding certain issues. They agreed the *cases* relating to goods as well as services could be brought to the Fora. Their view was that there is no problem in *filing* cases with the Fora. They felt *lawyer's involvement* is *not necessary* unless in complicated cases. The *award of costs* are based on no criteria but on the discretion of the members and felt the need for some objective criteria. They insisted on the need for better *infrastructure*. They see no *bribery* in the Fora. There is *no bias* even when the government is the respondent but they may be more flexible in the case of adjournments. The *environment* of the Fora, they felt, is helpful to the consumer. And there are no problems in the *implementation* of the orders.

At the same time they differ on some issues. First, the issue of *presence of the consumer*, the members of the State Commission felt that it is required only one time, but members of the DF of RR felt that it is required at least 5 times to as many times as needed, based on the admitted facts.

Second, on *law's delay*, the members of SC had different views on delay in notices served, postal delay, adjournments because of either of the party is absent and delay in appointment of the members. The lady member of the SC commented that the time given for arguments is completely at the discretion of the president, for example some times 3 days and some times

[80]See the Appendix- III (the questionnaire to the members of the consumers Fora).

one hour. One of the members of DF of RR stated that it would be better to reduce the judiciary involvement so that the cases may be decided based on common sense.

Third, on *appointment, legal knowledge, and the number* of the members of the CDRAs- both the members of the SC and DF of RR agreed that there should not be any permanent appointment except for the lady member of the SC, who favoured permanent appointment of the members. In the case of legal knowledge of the members, both the members of the Fora opinied that there was no need for legal knowledge but it is an advantage. In the case of required number of the members in the Fora in order to continue its day to day functions, the president and the other member preferred only two members but the lady member of the SC prefers three members. The lady member of the DF of RR even preferred five members excluding the president.

Fourth, on *Consumer Education, Fora at local levels, and the activities of the Government and NGOs* -both members of the Fora, except one member of the SC, suggested consumer education should be introduced in the educational institutions. They also favoured the suggestion of Fora at local levels besides DFs and at the same time they expressed their doubts regarding establishment of such local level Fora due to lack of funds. Members at both levels of the Fora also opinied that the government should create awareness among the consumers and strengthen the CDRAs through establishment of permanent courts. In the case of NGOs majority of the members of the Fora opinied that the NGOs should work without misutilisation of its provisions.

3. *Views of the Consumer Counsel*

Six lawyers who dealt with the consumer cases were interviewed in order to get their opinion on the functioning of the CDRAs[81]. The majority of the lawyers expressed similar opinion regarding certain issues. On the *type of cases* they agreed these should be related to goods and services transacted. They felt the *environment of the Fora* is cooperative and helpful towards the consumer. There is no general problem in the *implementation of orders*. They

[81] See the Appendix- II (the questionnaire for the counsel for the consumers).

denied any knowledge of *bribery*. The *awards of costs, however, were* not based on any criteria but on the discretion of members.

But there are areas on which the opinions of the counsel differ. On *lawyers fee*, majority of the lawyers opinied it differs from case to case and person to person in spite of the existence of Advocate Fee Act[82], but one of the counsel felt it should at be Rs. 500. On the issue of *involvement of lawyers*, majority of lawyers viewed that the involvement of lawyer in the CDRAs is advantageous to the consumer and whenever there is involvement of complication, due to lack of knowledge and also monitory aspects, the engagement of lawyer is essential for the consumers. Lawyers are not at all cause for the delay of the law, the delay may be mainly because of the members not following the rules regarding the adjournments. However, a couple of lawyers felt that the involvement of lawyer is not necessary because there is no procedural difficulties. The opposite parties may engage a lawyer which perhaps may not only cause the law's delay but the consumers also may face difficulties while arguing the case. An other counsel suggested that the involvement of the lawyers should be from the non-governmental organisations.

On the issue of *presence of the consumers* at the Fora, majority of the lawyers except one opinied the presence of the consumer in the CDRAs is not required more than five times. The exceptional opinion was that the presence of the consumer should be five to ten times. On the *Appointment, legal knowledge and the number* of the members of the CDRAs, all the lawyers opinied that the appointment of the members of the CDRAs should be temporary. Fifty per cent of the interviewed lawyers opinied that the members of CDRAs should possess basic legal knowledge. In the cases of the number of the members of the CDRAs two to three members are sufficient to run the day to day activities of the CDRAs. On *consumer education, Fora at local levels, and the activities of the government and the NGOs*, majority of the lawyers opinied that the consumer education should be introduced at the educational institutions. They also favoured the suggestion of local level Fora[83]. The lawyers viewed that the government should create awareness among the consumers, and provide financial assistance in order to strengthen the CDRAs. Majority of the lawyers was not satisfied with

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[82]According to it 10 per cent for Rs. 5000 and 1 per cent for Rs. 100000.

[83]One lawyer opinied that local level Fora are not necessary.

the activities of the NGOs because they not only under-utilised but also misutilised provisions for the sake of popularity.

E. Critical Evaluation of the CDRAs in the Light of the Theory of Liability

In spite of considerable progress in the area of consumer protection under the liability system in India especially since the enactment of the Consumer Protection Act 1986, there are a number of inadequacies which have crept in. This section is devoted to analysing these aspects of the present liability system in India.

I. The Problems of Defining Consumer

Section 2 (d) of the Consumer Protection Act, 1986 pronounces the definition of the consumer. According to the CP Act, consumer means, not only one who is buying goods and services for private consumption but also one who is buying goods and services for self-employment for the purpose of earning one's livelihood. In the case of doctors' services, till recently (13th November, 1995), there was a dilemma whether the services of doctors should come under the purview of the CP Act, 1986 or not? Since the inception of CDRAs, several cases against doctors were filed by the consumers, some were dismissed on technical grounds and some were disposed in favour of consumers because CDRAs were unable to decide that these services were really under the purview of the CP Act.

The frequent change in definitions may lead to a situation where some tortfeasors may be brought to the court and at the same time some tortfeasors may not be brought to the court. This creates a lot of confusion among the consumers is filing a suit against the producer. It is always better to clearly define consumer, in order to avoid unnecessary cost paid by the consumers in the case of wrong filing. The remaining question is whether the goods and services bought for commercial purposes should be brought under the scope of the Consumer Protection Act or not?

II. Accessibility of the CDRAs

In general the accessibility of CDRAs to the aggrieved consumers is easy because there is no fee, and the state governments can establish more than one District Forum in a district if it thinks necessary[84]. The State Governments have shown less priority to the establishments of DFs. A case was filed by the Common Cause, which is a consumer association, before the Supreme Court for proper implementation of the Consumer as a Co-petitioner Protection Act by the State Governments[85]. Consumer Education and Research Society also intervened [86]. In spite of several interim orders directed to State Governments by an Apex Court, little progress was made regarding setting up of the Consumer Fora. The Supreme Court made its order on 5.8.1991 to the concerned State Governments with the following observation:

> We directed that within two months from today every District should have a District Forum which would be presided over by an exclusively appointed judicial officer in terms of the prescription of the statute. In such district only, where the minimum monthly load is not above 150 consistently for a six month period, it would be open to the State Government with the concurrence of High Court to continue a sitting District Judge to do this work but the District Judge should devote attention to complaints under the statute on three alternative days of every week.
>
> If there were any failure in future to comply with its directions contempt action would be initiated for violation of these directions [87].

The final Judgement of the Court was delivered by J. Ahmedi on 7.1.1993[88]. It is essential to avoid such inordinate delays in establishing the consumer protection machinery and providing access to consumers to redress their grievances.

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[84]See Section 9 (a) of the Consumer Protection Act, 1986 (Amendment,1993). Act No. 68 of 1986.

[85]*Common Cause v. Union of India*, Writ Petition No. 1142/ 1988.

[86]*Consumer Education and Research Society v. Union of India.* Writ Petition no. 742/ 1990, Orders dated 5 August 1991.

[87]This order was reaffirmed on 20 December 1991.

[88]The Supreme Court directed that whether a sitting Judge is functioning as the President of a DF, if the work load exceeds consistently for a six months period, the High Court will convey the same to the State Government which will within a period of SIX months from the date of the receipt of communication appoint a regular independent DF. The Supreme Court also directed that in respect of districts where the workload does not exceed the minimum of 150 cases, the adhoc arrangements might continue for one year from 12.1.

III. The Environment of the CDRAs

Ideally the environment of the CDRAs should be friendly in nature. The consumers must be in such a situation that they can put the facts of the case in front of the members of the CDRAs freely, frankly and without any fear. The appointment of the non-legal knowledgeable members of CDRAs is mainly because of the environment of the CDRAs which is very different from the environment of the civil court. For example, there is no presence of holy book on which the parties are supposed to take a kind of oath in order to tell the truth before jury, there is no witness box, and there is no cross examinations, where the witnesses have to answer either YES or NO. As far as my observation about the court environment is concerned it is better than the civil court, but it is still necessary to modify it. Especially some of Presidents of the CDRAs wanted to practice the civil court traditions, for example parties were in one group, lawyers were in one group and member were in one group. The consumer should be treated as equal as lawyers especially during the hearing time. While presenting the facts of the case by the consumer there are some incidents where jokes were made by the members on the ways in which the parties were presenting the case. Such incidents should be stopped immediately. In some cases the parties were unable to sit in a relaxed manner. Though these issues were minor, they certainly had an impact on the environment of the CDRAs. However, the members of the SC of AP, DF of RR and the lawyers for consumer council expressed their opinion that the environment of the CDRAs is favourable to the consumers[89].

IV. Lawyers' Involvement in Consumer Cases

The CDRAs should be free from the legal jargon as this is also one of the motivations of the Act for setting up of separate courts for consumers. The Act says that there is no need to engage a lawyer for getting redressal from the CDRAs for consumer disputes, which was also

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1993, and before expiry of one year, the State Government might take action to constitute full time DFs. *Common Cause v. union of India; CERS v. Union of India*, 742/ 1990.

[89]For further details please see the opinions of the members of the SC of AP, DF of RR and the lawyers for consumer councils for the question 16 and 3 in the Appendix-II .

accepted by both the members of the State Commission, the District Forum, and the lawyers for the consumers` counsel. And at the same time they opinied that the lawyers` involvement is unavoidable if the cases are complicated in nature[90]. The possibilities of involvement of lawyers in CDRAs is due to either the complicated nature of the cases or the opposite party is Government or the opposite party is a business firm which engages a lawyer or when consumers don't know about the legal procedure due to lack of time or information.

Problems do arise when the consumer is party-in person and the opposite party engages a lawyer. It is difficult for the consumers, especially those who do not know any thing about the legal language as they are incomparable, to arguing with the skilled lawyers. In such a situation some times it seems to be difficult to get the compensation from the opposite parties. The members of State Commission and the District Forum stated that they support the consumers in the event of opposite party engaging a lawyer. The usefulness of such support is not measurable and it simply depends upon the way in which the consumers receive the support. The involvement of the lawyers may not only be a cause for law's delay but also a cause for the application of legal technicalities in consumer disputes. However, majority of the lawyers for consumer counsels rejects this opinion. They stated that the law's delay is not because of lawyers` involvement but is mainly because of those members of the CDRAs who do not follow the rules and regulations in the case of adjournments. They also opinied that the involvement of lawyers in the CDRAs is advantageous to the consumers[91].

V. The Presence of the Consumer during the Hearings of the Case

In general the consumer can file the case in CDRAs by registered post. Based on that complaint the CDRAs issue a notice to the opposite party to give his or her version about the facts of the case. If there is difference between the parties, then the CDRAs call the parties and after listening to both parties' arguments, if it is necessary to send the goods to the laboratory for testing the CDRAs wait for the results and if it is not necessary to send the goods to the laboratory for testing the CDRAs deliver the judgement immediately. At the

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[90]For further details see the Appendix- III, question number 3.

[91]For further details see the Appendix-II, question number 16.

time of delivering the judgement though the presence of the consumer seems to be not necessary because the CDRAs sends the copy of the order by registered post. Yet the CDRAs call the consumer more often than his or her presence is required for providing the redressal.

VI. Need for Expert advise on Scientific and Technical Issues

The CDRAs depend on the advice of the experts especially on scientific and technical knowledge like medicine, the services of doctors' etc., in order to provide incentives to the parties to take precautions to reduce the risk of harm[92].

In one case, the complainant purchased an industrial shed from the opposite party in order to manufacture P.V.C. battery separators and abrasive paper and cloth. The shed collapsed due to defective construction or cyclone resulting in a loss of Rs. 6,15,000. The packing of the *mortar* was sent to the Department of Engineering Chemistry, Andhra University for analysis. In its cement mortar report, the cement and sand ratio was 1:15. The complainant made a plea to the Commission to order the opposite party to pay Rs. 6,86,695 and 18 per cent p.a. rate of interest.

The opposite party analysed the mortar with the help of a retired Chief Engineer. In his report the cement and sand ratio was 1:8, which satisfied the norm. The opposite party had paid Rs. 15, 687.50 and was also willing to pay Rs. 40,000 which was assessed as a damage loss by the GM, DIC, Visaka. Accordingly the Commission ordered the opposite party to pay Rs. 40,000 within two months failing which the interest @ 18 per cent was to be charged to the sum till the payment.

VII. Question of Informational Disadvantage

The theoretical arguments for the alternative legal system, i.e. the courts having less informational advantage especially on scientific and the technological knowledge, may also prevail in the case of CDRAs because of the following reasons viz., the appointment of non-legal members which may further intensify the informational disadvantage on scientific and technological knowledge over the standards and it may also be true that the CDRAs' speedy, inexpensive and simple redressal some times lead to inadequate information.

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[92] *K. Narayan Kumar v. M.D. APIIC Ltd. and Others*, For instance, in the SC, C.D. number 128/ 1990.

VIII. The Establishment of the Causational Links to decide Compensation

It is one of the disadvantages of the ex-post approach that the members of the CDRAs are unable to find the causational links in order to provide incentives to the parties to reduce the risk of harm[93].

In a case, the complainant consulted a doctor for an ailment of his *prostategland*. After pre-surgical tests, he advised the complainant to get admitted to the respondent's nursing home for surgery. The respondent collected Rs. 200 from the complainant towards the cost of blood to be obtained for transfusion. While paying the amount, the complainant insisted that the blood was obtained only from the Institute of Preventive Medicine, but the respondent obtained the blood from the Nagarjuna Blood Bank, which is a private organisation. One Dr. B.V. Ramaraju did the surgery in the presence of the respondent. Towards the end of the surgery, as the influence of anaesthesia almost waned, the complainant heard the Anaesthetist Dr. Murthy remark that the tongue of the complainant turned black, and Dr. Ramaraju hurried, to instruct the concerned person to stop the transfusion forthwith in view of an adverse reaction. Four months after the surgery, the complainant started becoming progressively weak, with other accompanying Symptoms. The complainant consulted a specialist in Gastro-enterology, Dr. Sethu Babu. On examination the doctor diagnosed the disease as *Post-Transfusion Hepatitis* (also known as HEPATITIS-B or SERUM HEPATITIS); which results from infected and contaminated blood transfused at the time of the surgery. The incubation period of the virus was one to six months. The complainant was advised by the doctor to take two blood tests namely, *LFT* (Liver Function Test) and *HBs Ag.*, (also known as `Australia Antigen).

The *LFT* revealed that the bilirubin content in the blood was 22.9mgs % as against the normal 0.4 to 1.0mgs%. This bilirubin content went up to an alarmingly high of 41.0mgs%. In the case of the complainant, the bilirubin was 40 times higher than normal, indicating that the *Hepatitis B* was alarmingly acute. There was a frightening inflammation of the liver. There was yellow discoloration of the skin. No appetite, no digestion, and a crippling weakness were other symptoms. The plaintiff was sustained only by fruit juice with a lot of dextrose. The result of the *HBs Ag.*, test came `positive', this was also due to transfusion of infected and contaminated blood. The complainant appealed to the State Commission of Andhra Pradesh to direct the respondent to pay a compensation of rupees one lakh for the immense damage, the physical and mental torture by their act of negligence.

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[93]*A. Narain Rao v. Dr. G. Ramakrishna Reddy and Others,* In the SC, C. D. number 6/ 90.

The case was dismissed by the State Commission of Andhra Pradesh for the following reasons:

> The complainant produced a routine urine examination report before Dr. Ramaraju, and as the urine report was normal, he excluded the routine urine examination from the pathological tests. The complainant got a urine examination report earlier to surgery, without the doctor's recommendation. In that report the complainant had `bile salts' and `bile pigments' in his urine indicating that he had *Hepatitis* even five days before surgery. This information was not disclosed by the complainant.

The respondent was not there at the time of surgery. The nursing home was in good condition. The blood was brought in from Nagarjuna Blood Bank by the complainant's wife. The blood bank delivered the blood after conducting all tests, so there was no evidence to prove that infected and contaminated blood was transfused to the complainant.

The respondent testified that the complainant had never requested the nursing home to use disposable syringes and as a matter of fact, the nursing home had been using the disposable syringes in respect of the patients who were prepared to bear the cost. He said that the syringes used on the complainant were properly and adequately sterilised and there was no defect in the sterilisation of operation equipment. They held that, the *Hepatitis-B* infection suffered by the complainant was not caused due to the transfusion of blood.

There can be no doubt that *Hepatitis-B* is a dreadful disease. Therefore, before pertaining to the judgement, we like to emphasise that whenever a patient has to be administered blood transfusion, he shall first be asked about a voluntary donor of blood. If the patient is not in a position to procure a voluntary

> donor, the doctor or the hospital concerned shall arrange to procure the blood from the Institute of Preventive Medicine. Procuring blood from a private blood bank should be the last alternative. Where the blood has been procured from a private blood bank, the doctor administering the blood transfusion shall ensure himself that the blood had been screened by the following tests for *HBs* and *AIDS*.

The State Commission of Andhra Pradesh dismissed the case on the ground that the complainant had not disclosed the information about the urine test, which showed there were bile salts and bile pigments and that the transfusion of blood was not the cause for post-surgical problems. According to Dr. Sethu Babu's diagnoses, the disease of *Post-Transfusion Hepatitis* occurred to the complainant because of transfusion of infected and contaminated blood, which was contradictory to the respondents argument. In such a situation the

Commission can usually appoint a fact-finding committee to get adequate information, but in this case the commission did not take that kind of a decision.

With regard to the argument of disclosing the urine test result by the complainant, we may say that this might not be the main criterion to dismiss the case because the complainant may not know that he had *bile salts* and *bile pigments* in his urine, which created major problems for his post-surgical time. Even though he did not disclose the information about his urine test, the doctor can insist that the complainant needs to go for compulsory urine test, if it is of major concern to surgery. It may not involve much time and expenditure. The patients generally follow the advise of the doctors because it concerns their life. Here we can apply the principle of cheapest cost avoider. Since the doctors have better information about the necessary conditions for the Complainant's surgery i.e., *TURP*, the respondents can cheaply avoid the costs by advising the complainant to go for all compulsory pre-surgical tests as well as post-surgical care.

Based on the facts of the case and the judgement, the State Commission of Andhra Pradesh was unable to establish, whether the *Post- Transfusion Hepatitis* occurred to the plaintiff because of the infected and contaminated blood or because of *bile salts* and *bile pigments* in the urine or lack of post-surgical treatment. One can easily recognise the lack of information and knowledge of the members of the State commission especially in the case of credence goods or services, for example doctors service. Thus, it seems to be that the State Commission was proved to have failed in fulfilling the following conditions of liability for negligence:

i. that it provides for compensation to the victim as result of the negligence of tortfeasor; and
ii. that it acts as a deterrent to future negligent behaviour by way of imposing sanctions on persons found negligent; and calls for regulation of safety to reduce the intensity of harm.

IX. Inadequate Wealth of Tortfeasors

Often, the CDRAs are unable to provide any redrassal for the consumers because of inadequate wealth of the tortfeasor. In such a situation regulatory system works effectively because, the ex- ante fine is much lower than the ex- post compensation. The ex- ante price can be calculated on the basis of expected damages whereas the ex- post compensation is based on the actual damage. In addition, the other possibility is providing criminal punishment to the tortfeasor i.e. imprisonment[94].

X.The Ability of Providing Compensation for Pain and Suffering and Other Immaterial Damages

The CDRAs are also unable to provide adequate compensation, if the defective goods or deficiency of service causes damages to the consumer, if the claim is based on sentimental value or mental agony. For instance[95], in a case,

> the complaint Mr. N. D. Patnaik booked four flight tickets from Hyderabad to Goa and the return journey with Vayudoot Ltd. While coming back from Goa, at Goa airport, two names were not in the chart. The complainant wife and son faced several difficulties like health problems because they had to travel by flight, rail and bus in order to reach Hyderabad including one day at Bombay, which involved total expenditure of Rs. 1,500.
>
> The complainant appealed to the Commission to order the opposite party to pay Rs. 2, 01,500 (Rs .50000) each for his wife and son as a compensation for mental agony and hardship; RS. 1,00,000 as a compensation for the complainant for the mental agony suffered by him because of non-availability of tickets for his wife and son; expenditure of Rs. 1,500 and Rs. 10,000 for cost of application.

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[94]For example, in one case the CDRAs asked the consumer to find the wealth of the tortfeasor. The tortfeasor was actually doing the business but the entire assets were on his wife name. If the tortfeasor caused any harm to the consumer, the consumer not has any chance to get the compensation except imprisonment of the tortfeasor because he did not have wealth.

[95]*N.D. Patnaik and Family v. Vayudoot Ltd., and others,* In the SC, C.D. number, 86/ 1991.

The Commission directed the opposite parties to pay Rs.10, 000 as compensation and of Rs. 1500 as expenditure incurred to the complainants' wife and son, Rs. 5, 750 as a compensation and Rs. 500 as cost of application to the complainant.

It is evident that the liability system is unable to calculate and award the cost of compensation equal to the subjective value based claim of the complainant and his family. This is mainly because the CDRAs want to calculate and award the costs of compensation based on subjective value.

XI. Provision of Compensation to the Consumer because the Tortfeasor is out of the Business

In one case before the State Commission (C.D. 5/1990), the complainant appealed to the Commission to order the Andhra Pradesh Housing Board, which is the opposite party, to supply water. The Commission dismissed the case because the opposite party went out of business. The case was filed by the consumer at time that the Andhra Pradesh Housing Bord (APHB) was the opposite party, but subsequently the responsibility of water supply was handed over to the Water Works Department (WWD), which was informed to the complainant by a letter dated 13.08. 1991. Even though the consumer was unable to include the WWD as an opposite party because of his ignorance, there were enough chances to get the same information by the Commission from APHB and based on that the Commission issued the notice against the WWD in order to protect the interests of the consumer.

XII. Compensation for Complicated Cases

CDRAs are simply dismissing the case even though the case is under the purview of the CP Act, because the case is complicated in nature, needs lot of investigations and also needs lot of time to dispose of the case. For example, in a case[96], the petition was filed by on behalf of 82 farmers. The petitioner hired the cold storage services of the respondent (Jasara Sahkari Cold Storage) for storing potatoes. But, it was found that the potatoes stored were completely spoiled. When the petitioner demanded compensation the responded refused to

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[96] *Kalloo Ram Singh v. Manager, Jasara Sahkari Cold Storage*, In the NC, C. D. Number 282/ 92.

pay. In these circumstances, the petitioner appealed to the NC to direct the respondent to pay compensation.

The case was dismissed by the members of the National Commission based on the following reason:

- regarding to the nature of the contentions raised by the parties in this case which necessitates investigation of complicated questions of fact after taking elaborate oral as well as documentary evidence, a satisfactory adjudication of the said dispute cannot be had in the time bound proceedings before the Consumer Forums. The compensation, therefore, declined to go into the merits of the case and dismissed the petition on the limited ground aforementioned reserving liberty to the complainant to pursue his remedy before an ordinary civil court and no costs.

In general the Consumer Disputes Redressal Agencies are not strictly following the time bound disposal of the consumer disputes, which is provided under Section 13 of the Consumer Protection Act, 1986 due to several reasons viz., frequent adjournments, non-appointment of the CDRAs members, absence of parties and the members of CDRAs etc. In the above example, the case was filed by the plaintiff on 10th December 1992 and the National Commission pronounced its order on 14th December 1993. Based on this evidence, the commission's dismissal of the case is questionable. Whenever complicated questions arise and also wherever deep investigations are required in order to pronounce the order the CDRAs are unable to give the redressal of consumer disputes. In this regard we can very well apply the theoretical argument that tortfeasors escape from the payment of damages for the harm done to the victim not only because of rational apathy, limited wealth of tortfeasor, problems in establishment of causational links but also because of time bound approach of CDRAs. And at the same time it also hints either directly or indirectly on the theoretical argument of the ex-post approaches' inability to award the damages to the victim in the case where innovative judgements are called for especially if they need to seek help from the experts by setting up committees in order to get information on complicated issues due to asymmetric information on the scientific and technological issues. Even though the CDRAs do not following the time bound proceedings stated under the Act, they dismiss the cases

whenever the case involved is complicated in nature. This is also one of the reasons for the consumer`s reluctance to approach the CDRAs in consumer disputes[97].

The law's delay by the CDRAs not only proves that the justice delayed is justice denied but it also provides the opportunity to hide the actual information by the self interested parties which automatically raises the questions about the favourable argument of the liability system in the case of private information compared to the ex- ante approach. There is no doubt that the time bound approach of the CDRAs is definitely an advantage to the consumers in order to get the speedy redrassal. But at the same time like the other side of the coin, it has an adverse effect also. There are several consumer dispute cases dismissed by the CDRAs not because the filed case is out of the purview of the Act but because the filed case is complex in nature or it needs lot of investigation or enquiry which ultimately makes it impossible to provide redressal with in the time limit prescribed by the Act, even though the SC of AP do not strictly implementing the time bound disposal/ dismissal.

There are several reasons for the CDRAs inability to dispose/ dismisses the consumer cases with in the prescribed time limit. The main reasons are that in the initial stages the CDRAs functioned once in a week known as Saturday courts; that there are delays in the appointment of the members of the CDRAs; that the staff of the CDRAs is inadequate; that there are no proper rules and regulations regarding the adjournments; that the CDRAs liberally grant adjournment if the government is the respondent because of the involvement of several officials; that there are delays in serving notices to the parties because of postal delay; and that there are instances of absence of not only the parties but also members of the CDRAs. Thus, it is necessary to take some steps in order to reduce the delay rates and improve the functioning of the CDRAs not only in order to protect the interests of the consumers but also provide some incentives to the opposite parties to take precautionary measures to reduce the risk of harm.

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[97]C.D. numbers 38/ 1989 and 282/ 1992 are similar in nature. Even in the SC we can found similar type of cases, for example C.D. number 102/ 1990.

XIII.CDRAs and Civil Courts

There are several incidents showing that the consumers are unable to get the redressal from CDRAs because the filed cases are pending in civil courts. These type of clauses may reduce the accessibility of getting compensation by the consumer for his or her redressal from the CDRAs because there may be enough chances that the tortfeasors may intentionally approach the civil court in order to delay the compensation by utilising the complicated civil court procedure in his favour where an average consumer may be unable to do so. At the same time, majority of the public service utilities has its own tribunals which may perhaps prevent the consumer from approaching the CDRAs.

In a case at State Commission[98], the complainant approached the Commission against electricity supply and appealed to order the opposite party to pay Rs. 1,50,000 as compensation. The Commission dismissed the case and it is pending in civil court[99]. The decision of division bench of the High Court, Andhra Pradesh[100], decided that the creation of additional forums under the Act was conceived of in the interest of general public for expeditious and effective adjudication of complaints instead of driving the affected parties to the time consuming process of civil courts. In addition as the Forum is not a parallel Forum, the complainant must choose one of the two forums and not both. Section 3 of the Act provides that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law in force at the time.

XIV.Narrow Interpretation of Cases by the CDRAs

The consumers are unable to get proper remedy form the producers because of poor interpretation of the cases by the CDRAs, which may also lead to the liability system's

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[98] The SC, C. D. number 21/1990.

[99]C.D. number 12/ 1990 of SC, 92/ 1991 and 240/1992 and in DF, 43/ 1990 of Nellore and 21/ 1992 of Ranga Reddy are similar in nature.

[100] In *Dr. A. S. Chandra v. Union of India* (W. A. No. 1402/1991).

inability to provide any incentive to the tortfeasor in order to take the precautions to reduce the risk of harm. In a case before Ranga Reddy District Forum[101]:

> the petitioner is a member of the respondent Housing Society. He got a flat at Rs. 92,000, which has several defects worth of Rs. 30,000. Thus the complainant appealed to the Forum to order the opposite party to pay Rs. 46, 300. The original order of the Forum observes that the Section 3 of the Act lays down that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law in force at the time. So, the petitioner has an option either to proceed under Andhra Pradesh Co-operative Societies Act[102] or under the provisions of the Consumer Protection Act for redressal of his grievances. The Forum dismissed the case by holding that the petitioner would have been entitled to Rs. 15000 as a compensation, but since he is not a consumer of the respondents as the flat constructor was a contractor of the Society therefore the petitioner is not entitled to any relief from the respondents.

It seems to be merely a poor interpretation of the case by the Forum because even though the Society did not construct the flat, it hired the services of the contractor, who is a third party to the petitioner. By using the principles of vicarious liability the contractor was liable to pay the compensation or since the contractor worked for the Society by using master-servant relationship the Society itself was liable to pay the compensation for selling the defective flat[103].

The economic rationale for contract law is the creation of incentives for value maximising conduct in the future, encouraging process by which resources are smoothly moved through a series of exchanges into successively more valuable use. It is a standard form of contract, where the buyer simply accepts the terms and conditions of the seller. In such a situation especially in sale agreement, the goods and services must be performed according to the terms and conditions, which may also be known as specific performance. Therefore the opposite party is liable to pay the compensation subject to the breach of sale agreement.

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[101] C.D. number 21/ 1992 (*S. Janardhan v. BHEL- MIG Employees Co- operative Housing Society*).

[102] Any dispute between a member and the Society has to be referred too arbitration.

[103] The potential liability of the manufacturer to the ultimate consumer off defective goods was extended by the decision of the House of Lords in the case of *Junior Books v. Veitchi co., Ltd.*, (1982) 3 All ER 201. In this case, the producer was liable for the cost of remedying defects in the work or article or for replacing it and for any consequential economic or financial loss, even though there was no contractual relationship between the producer and the user.

XV Power to Grant Interim Orders

It is common practice that getting things, especially from public utility services viz., electricity, telephone etc., is not that very easy because of lot of demand and less of supply. And also in the case of Unfair Trade Practices, where the products which are hazardous to health and property one can only guess how severe it would be such type of practices are not stopped immediately[104]. The cases filed by the consumers in CDRAs against these services are more or less based on the excess billing. As per rules and regulations if the consumer is not paying the bill (even though it is excess and the case is in pending in CDRAs) means that the concerned authorities may simply disconnect the service. And it is not that very easy to get the reconnection of the service by the consumers. Consequently, consumers have to face lot of problems. In order to avoid these types of difficulties, at initial stages even CDRAs are issuing the *interim orders* to the opposite party not to take any action up to the disposal/dismissal of the case. The NC has held that the DF may not issue an interim order or restrain the opposite party doing a thing or examining the legality of rules and regulations properly enacted by a subordinate authority[105].

XVI The Problems Involved in Implementing the Orders

The Consumer Disputes Redressal Agencies are unable to implement their orders, especially in the case where the tortfeasor does not belong to the jurisdiction of a particular District Forum[106]. There are no specific rules and regulations under the Consumer Protection Act to

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[104]It is necessary that the CDRAs should have power to stop UTP immediately after receiving the complainant from the consumer by granting interim order otherwise there is no meaning in the inclusion of clauses and sub-clauses under sections of the Consumer Protection Act, 1986 (Amendment,1993).see Section 2(c)(i) of the Act.

[105]In Kangara Anantha Rao v. Telecom District Engineer it was observed that instead of considering the question of compensation to be given, the Forum chose to direct the opposite party to take steps for providing free telephone service, which is not within its power. See R. P. No. 62/ 1990, ordered dated 6 November 1990.

[106] Section 11 (2) (a) (b) (c) of the Consumer Protection Act, 1986.
"(2) A complaint shall be instituted in a District Forum within the local limits of whose jurisdiction,-
(a) the opposite party or each of the opposite parties where there are more than one, at the time of institution of the complaint, actually and voluntarily resides or carries on business, or personally works for gain, or
(b) any of the opposite parties, where there are more than one, at the time of the institution of the complaint actually and voluntarily resides, or carries on business, or personally works for gain provided that in such case

enforce CDRAs orders, whenever an order is issued against the respondent who is out of the territorial limits of a particular District Forum[107].

XVII. The Discretionary Powers of the Members of the CDRAs

The Consumer Protection Act, 1986 (Amendment,1993) has given wide discretionary powers, for example *they can allow the original cases and appeals even after expiry of limitation period* [108], to the members of the CDRAs in order to strengthen the CDRAs to protect the interests of the consumers. And at the same time there is no proper guidelines regarding awards of the compensation in general and in particular to the award *of application costs*[109], *rate of interests*[110]and some times there is no proper calculation made by the CDRAs

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either the permission of the District Forum is given, or the opposite parties who do not reside, or carry business, or personally work for gain, as the case may be, acquiesce in such institution,; or
(c) the cause of action, wholly or in part arises". Act No. 68 of 1986.

[107]For instance, a consumer, who is a resident of Nellore District bought an article in Bombay and that article had been defective in nature, and the consumer filed a case in the District Forum of Nellore. In its judgement the Forum ordered the respondent to replace the defective good or to pay back the price of the article along with the rate of interest, but he never implemented the Forum order. The complainant filed an execution petition stating that the respondent had not implemented the order. In that a situation, the Forum issued a showcause notice to the respondent asking that `why the Forum must not imprison him?. Even if the respondent had not given proper reply, the Forum might have issued an arrest warrant against him. In general the arrest warrant is sent to the Superintendent of Police (SP) of Nellore District. He will inform Bombay Police to arrest the respondent, because the SP of Nellore District does not have powers to arrest the respondent directly. If Bombay Police do not take any proper action on one respondent, the District Forum of Nellore does not have any power to enforce its order, except by informing State Commission about that matter. The State Commission forwards the matter to the National Commission and *vice versa*; it is just like running around the bush without getting proper results.

[108]Which leads to some cases get through the CDRAs and some cases not may probably depends upon the mood of the members of the CDRAs. It is exactly true in the case of District Forum of Ranga Reddy, Andhra Pradesh. In Consumer Dispute (C. D.) number 87/1991 , filed in 13.5.1991 against the allotment of plot , though the cause of action arises in 10.7.1978, which disposed on 20.6.1992 in favour of consumer stating that the respondent should refund RS. 1225 to the petitioner with rate of interest @ 12 per cent per annum from 10.7.1978 up to the date of payment within one month from 20.6.1992. And at the same time In C.D. number 69/ 1992, filed in 25.7.1992 against lucky scheme, though the cause of action arises from 10.3.1987, the case was dismissed based on the limitation period. The same is true in the case of National Commission, for example C. D. number 46/ 1990.

[109]Under the Section 14 (1)(i) of the Act, 1986 (Amendment,1993), the CDRAs are empowered to provide adequate costs of the application of the parties. In reality there is no evidence that the CDRAs are following any criteria in awarding the costs of application. The collected data shows that in majority of the cases, in the DF of Ranga Reddy and Nellore, and the State Commission of Andhra Pradesh, the award of the costs of application is between Rs. 50 and Rs. 500, which is inadequate. For example, for a person coming from far away the award of Rs. 500 is inadequate even when the consumer presence is required only a single time during the hearing of the case.

in the case of awards which may perhaps leads to the adverse effects. For example, in a case before the DF of Ranga Reddy[111], the petitioner appeals to the forum to award a sum of RS. 95, 400 with rate of interest, but the Forum awarded Rs. 10,000 only. Section 14(1) of the Act pronounces the power of CDRAs to award the compensation to the complainant at their discretion, though there is no criteria to be followed by CDRAs while pronouncing the awards to the petitioner. In an oral interview, both the members of the SC of AP, DF of RR and the lawyers for consumer council agreed that there are no criteria except that based on the facts of the case in awarding the costs to the complainant[112]. Even in NC the award of compensation seems to be arbitrary[113].

XVIII. Law's Delay

Speedy disposal of the cases is one of the major objectives for establishment of separate courts for consumer disputes. It seems that the CDRAs are also not free from the law's delay in spite of its time bound redressal. Section 13(1) of the Act pronounces the CDRAs should

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[110]There is also enough evidence based on the collected data that the CDRAs does not have any criteria regarding award of the rate of interests. In majority of the cases it is not neither based upon the complainant plea nor based upon the open market rate of interest or bank rate of interest. It merely depends upon the discretion of the members of the CDRAs. For example, in the DF of Nellore, in C.D. number 742/1990, the Forum awarded the rate of interest @ 12 per cent p.a. on due amount even though the consumer did not make a plea for it. In C.D. 740/1991, the Forum awarded the rate of interest @ 15 per cent p.a. on due amount in spite of the complainant plea for @ 18 per cent p.a.. And in C.D. number 1589/ 1991, the Forum awarded the rate of interest exactly as asked by the complainant i.e., 12 per cent p.a. on due amount. In DF of Ranga Reddy, in C.D. number 98/1992 the Forum awarded the rate of interest @ 15 per cent p.a. on due amount in spite of the complainant plea @ 18 per cent p.a.. In C.D. number 135/1992, the petitioner made a plea to the DF to order the opposite party to pay Rs. 44, 900 with rate of interest. But the Forum did not aware any rate of interest.

[111] In C.D. 42/1991.

[112]For further details please see the opinions of the members and the lawyers for councils for question number 4 and 5 in the Appendix-II.

[113]In C.D. 107/ 1991, the complainant Balaraman purchased one tube of „ SENSODET- +" tooth paste based on dentist advise, and found that half of the tube was empty. Based on the advise of the shop keeper the complainant wrote a letter to the respondent Warren Laboratories Pvt. Ltd. the respondent admitted the short-filling and sent a parcel of two tubes which was rejected by the complainant. The sales executive of the respondent requested the complainant not to initiate any legal proceedings for a period of 15 days and promised an amicable settlement of this issue out of the court. But no such solution took place. The complainant made a plea to the NC to award Rs. 12 Lakhs as compensation and punish the respondent for selling short-filled product to the consumers through out the country. The case was settled at the payment of Rs. 5000 to the complainant.

dispose/ dismiss the case within stipulated time limit[114]. According to the empirical evidence, since the inception of CDRAs up to the end of December, 1993. 81.27 per cent in the SC of AP, 72.52 per cent in the NC, 60.18 per cent in the DF of N, and 59.24 per cent in the DF of RR of the total cases filed were not to disposed/ dismissed within the time limit prescribed by the CP Act.

XIX. Threat based Withdrawals by the Consumer

Of the cases filed, the cases withdrawn by the consumers accounted for 19.05 per cent in the SC of AP, 13.16 per cent in the NC, 20.82 and 17.14 per cent in the DF of N and RR respectively[115]. It may be either because the complainant was satisfied with the offerings of the opposite parties which is a kind of positive sign or because the consumer may have faced a severe threat from the opposite party which seems to have negative impact on fulfilment of the consumer rights because they are unable to get the redressal from the CDRAs. For example, in the State Commission of Gujrat[116] one of the complainants was threatened by the opposite party, Canara Bank, that unless it withdrew its complaint, its credit arrangement with Bank would come to an end. This was no empty threat. After a few months this complainant asked Consumer Education Research Society (CERS) to withdraw the complaint. It also sent an application before the Commission of Gujrat for withdrawal of the complaint which was opposed by CERS[117]. The threat-based injustice through the liability system may not only affect consumers but also judges as they were several times threatened by the opposite parties.

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[114]The time bound redressal is not applicable in the case of appeals and at the same time the appeals should be filed within 30 days of the lower CDRAs order or the appellant should show the reasons why he has not filed the appeal within the specified time limit. For example, there are some incidences, which I have observed personally in the SC of Andhra Pradesh, where the sending of the orders to the concerned parties were delayed due to lack of postage stamps. It may be better to extend the time limit from 3 months to 6 months, which may help the parties to think and act and also the appellant parties need not give any reasons to CDRAs for late filing of the appeals and they need not wait for the discretionary decision of the CDRAs regarding considering the appeal whether as valid or invalid.

[115]See the tables of respective CDRAs

[116]C.D. number 5/ 1990, *CERS v. Canara Bank* order dated 31 May 1990 and 7 January 1991. (Quoted from Saraf D.N., *Law of Consumer Protection in India*, Bombay, N.M. Tripathi pvt. Ltd., 1995, 2nd ed., p. 273).

[117]The Commission of Gujrat pronounced that the CERS was merely an agent of Janata Textiles. Since the real complainant had filed an application for withdrawal of the complaint, it had no option but to allow it.

XX. Imposing Costs on the Consumer for Frivolous or Vexatious Claims

In general, even till date the CDRAs are in such a position that they are unable to make clear distinction about which cases genuinely come under the purview of the Consumer Protection Act, 1986. In practice this type of problem may be overcome by case by case method which is one of the advantages that the liability system provides to the society in order to reduce the risk of harm. In fact though the Act was enacted in the year 1986, few of the CDRAs started functioning only from the 4th quarter of the year 1988 and even up to 1993 the CDRAs were not fully established all over the country. Especially in Andhra Pradesh the working of the CDRAs started as a Saturday courts and did not have adequate staff and separate building even up to the year 1993. The appointment of the members was based on political influence even up to the Amendment Act, 1993. In such circumstances it is not possible to draw a clear distinction about the cases which come under the purview of the Consumer Protection Act, 1986 and those which do not. For example the consumers who purchase goods or services for self-employment purposes are included under the definition of the consumer by the Amendment Act, 1993. Also there was lot of confusion even among the CDRAs on the issue of the contract of personal services (Doctor-Patient relations). Finally, the Supreme Court in its order on 13th November, 1995 stated that the services of doctors also come under the purview of the Act. But suddenly the Amendment Act, 1993 Section 26 pronounced that the consumer had to pay to the opposite party up to Rs. 10,000 or as may be specified in the order by the CDRAs for filing frivolous or vexatious claims. This had an adverse effect on the protection of the interests of the consumer as acted as deterrent effect on the aggrieved consumers, who are merely incompetent to decide whether the cause of action is come under the purview of the Act or not freely filing cases. It is too early to introduce such type of measures to control the filing of consumer cases in CDRAs. The DF of Nellore, in C.D. numbers 114/1990, 633/1991, 577/1991, and 1044/1991, ordered the opposite parties to "consider the case of complaint *sympathetically* and give some relief; or may give some relief to the complainant based on *humanitarian grounds*". These types of order puzzle the consumers with regard to when to approach the Forum. The NC, in C.D. number 40/ 1990

ordered the complainant to Rs. 2500 for wrong filing to the opposite parties[118]. Inclusion of these types of clause does many harms to the consumers rather than protecting the interests of consumers[119].

XXI. The Problems Involved in the Case Appeals

It seems that the CDRAs are some how unable to award the costs of compensation based on the actual figures. For instance, in a case before the DF of Ranga Reddy[120]:

> the complainant filed a case on 16.11.1990 against the opposite party because his TV picture tube was damaged due to high voltage of power supply. The DF awarded the costs of compensation according to the plea of the complainant i.e. Rs. 4325. But the opposite party filed an appeal in the SC, and it really took two and half years to order the appellant to pay Rs. 4325 to the respondent. But in the mean time the price of the TV picture tube which was RS. 4000 in the year 1991 increased to Rs. 7500 in the year 1994.

Does the consumer get the exact compensation through liability system?. It is clearly evident that the liability system needs to take some favourable steps like award the costs based on the inflated price in order to provide incentives to the tortfeasor to take precautions to reduce the risk of harm. This case is also a best example of how the tortfeasor can delay the payment of the compensation to the victim by approaching the higher courts by way of an appeal in the liability system.

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[118]The NC also delivered the judgement stating that, the complainants motive was `only to indulge in speculative litigation taking undue advantage of the fact that no court fee is payable for institution, for a case under the Consumer Protection Act. The members directed the petitioner Mr. Kher to pay Rs. 10,000 each to the two respondent physicians as costs with a view that the petitioner filed a case in order to `harass, intimidate and blackmail' the doctors by falsely claiming Rs. 55.90 lakhs from M/s Sion Hospetal of Bombay, saying that the doctors treated him for gall blader, whereas he was actually suffering from myocardial infection for which he should have been immediately shifted to the intensive care unit.

[119]It is very similar to the Mr. Gowda Government thoughts on introduction of a Bill to check Public Interest Litigation (PIL). According to BJP spokesman Yashwant Sinha `the bill will encourage corrupt politicians and bureaucrats, smug in the belief that their actions are no longer subject to judicial scrutiny, to violate the law of the land for self and commit gross human rights violations .' see *Times of India*, 15 February, 1997: Bill to check Public Interest Litigation will be opposed: BJP.

[120] C.D. number 51/ 1990, *V. Muralidhar Rao v. APSEB.*

F. Suggestions Based on the Findings

One basic lacuna that emerges from the analysis of the working of the CDRAs is the lack of criteria for awarding the costs, rate of interests etc which often results in unintended discrimination of the parties. Since the members are non- experts, it would be useful to provide some criteria for commonly recurring components of consumer complaints.

Secondly, the calculation and award of compensation by the CDRAs must be in such a way that it should not only have some deterrent effect on the tortfeasor but also provide some incentives to him in order to take precautionary measures to reduce the risk of harm. Such compensation should not only reduce the negligence of tortfeasor but also protects the consumers who do not approach the Fora because of rational apathy, or threat of opposite parties.

Third, whenever delays become unavoidable, the CDRAs should have power to grant `interim order' in order to prevent the respondents to take action against the consumers during the trial. Further, the imposition of time limit on the disposal of the cases, instead of ensuring speedy justice is leading some times to adverse effects on the consumers. Though the CDRAs are not strictly following the timely disposal/ dismissal in majority of the cases, some times they simply dismiss the cases because of its complexity, as it needs more time and it is not possible to solve the problem within the prescribed time limit. It is necessary to review the existing time bound redressal in order to eliminate its adverse effects. Thus, it is advisable to adopt a workable time bound programme.

Fourth, imposing costs on the consumers for wrong filing may do much of harm to the consumers. As a matter of fact it is premature. It also has a kind of deterrent effect on the consumer so that they do not approach the CDRAs for their grievances. It may be better to establish a scrutinising department in CDRAs in order to reduce the consequences of wrong filing rather than imposing costs on consumers this may be of help both ways. The consumers need not pay for the costs for wrong filing and there may be a chance of reduction of law's delay. Similarly, the consumers should be well informed about the consequences of the applicability of derogatory principle, and also they should be advised to withdraw the case

from civil court and then seek the redressal from the CDRAs rather than simply dismiss cases wherever the derogatory principle is applicable;

Fifth, the governments should take steps to reduce the law's delay by continuity in the function of CDRAs, if necessary by increasing the number of the members of DFs and SCs even up to five in the NC, provide adequate resources and establish a separate independent body in order to monitor the functioning of the CDRAs all over the country.

Sixth, it is better to minimise the appearance of consumers before Fora as much as possible in order to reduce the adverse effects like rational apathy i.e. not only because of small individual claims but also because of unnecessary presence before the Fora. It also increases the costs of the trial, which is against the objectives of providing inexpensive redressal to the consumer disputes through the CDRAs.

Seventh, it may be true that the involvement of lawyers in CDRAs is perhaps advantageous to the consumers, however they create some problems like unnecessarily dragging the case, asking for frequent adjournments, making the trial more technical by quoting earlier cases, and by, using technical legal language, which makes the trial more complicated. Hence lawyer's involvement is against the objectives of the Act which provides for simple redressal to the consumer disputes.

Further, since the harm is often from the negligent tortfeasor the administrative costs of the CDRAs may be covered under the court fee from the tortfeasor. However, the court fee should be based on the award of the compensation. Such measures may provide incentives to the tortfeasor to take precautions to reduce the risk of harm.

Finally, it should be said that in general, the environment of the CDRAs is far better than the Civil Court. However, the purpose of appointment of the non-legal members to make the environment of the CDRAs informal, is not achieved fully, because during the trial their role often is no more than spectators. There is a need for reform by assigning some concrete responsibilities to the non- legal members in order to improve the working atmosphere of the CDRAs.

Part II: Regulatory System in India

A. Introduction

The unorganised consumers are unable to use their sovereignty on goods and services which are available to them in an inefficient market and also the liability system is not able to adequately protect the consumers due to several reasons which were mentioned earlier. In these types of circumstances government must intervene to rectify the possibility of defective goods and services passing on to the consumers. In order to evaluate such an intervening regulatory system the Bureau of Indian Standards is selected. The role of Bureau of Indian Standards is not only to set reasonable standards[121] but also to provide voluntary and mandatory certification marks for goods and services.

The study will focus on the functioning of the Bureau of Indian Standards, as an ex- ante approach to consumer protection. The study will be based on information collected from the Bureau of the Indian Standards, New Delhi. The analysis is made within the framework provided by the theoretical arguments of the alternative legal system. An effort is made to draw from the analysis certain suggestions for to based on the findings some suggestions will be posed to the policy makers to improve the effectiveness of the BIS in protecting the interests of the consumers. At the end a comparative analysis of the CDRAs and the BIS is made with a view to evolve a proper combination of these two systems in order to improve the consumer protection system in the country.

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[121]They are instruments for facilitating production and distribution of goods or services, mostly in the form of documents in order to verify if a particular good confirms to the mentioned requirements or not. There are both national and international standards.

B. Functioning and Working of Bureau of Indian Standards (BIS)

In India, the activity of standardisation of goods and services began with the creation of the Indian Standards Institution (ISI)[122] in 1947. In the wake of industrialisation, rapid technological changes and increasing expectations of the consumers for quality goods, effective promotion of Indian standards , to promote the standards according to the national priorities, to introduce the mandatory certification, to extend the functional activities outside India and take stringent measures against the misuse of Standard Mark, the ISI was found to be inadequate. Hence the Government of India enacted the Bureau of Indian Standards Act, 1986 in the place of ISI and the BIS was established with effect from 1 April 1987. It took over the functions, assets and liabilities of the Indian Standards Institution. The BIS is a statutory body and it functions according to the provisions of the BIS Act, 1986. The Minister for Civil Supplies, Consumer Affairs and Public Distribution, the Government of India is the president of the BIS and the members consist of representatives of governments, members of parliament, industry, science and research institutions, consumer organisations and professional bodies.

I.Functions of the BIS

The main functions of the BIS include establishing, publishing and promoting the Indian standards any goods or processes, recognising the standards which were formulated by the other institutions, establishing the Bureau of Indian Standards Certification Mark, granting renewing, withdrawing and cancelling the use of Standard Mark, controlling the improper use of the Standard mark with or without a licence, promoting of Indian Standards outside India, establishing, maintaining and recognising laboratories for standardisation and quality controls, and promoting research activities for the formulation of Standards in the interests of consumers and manufacturers.

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[122]It was registered as Society under the Societies Regulation Act, 1860 in January 1947 to prepare and promote standards. The operation of Certification Mark Scheme began under the provisions of the Indian Standard Institution Certification Marks Act, 1952 which is known as ISI Mark.

The BIS can appoint as many as Inspecting Officers as required for the purpose of proper use of Standard Mark. They have also power to search or seizure[123]. The BIS has power to obtain information from every licensee and the obtained information may be under confidential, if necessary[124]. The BIS Act sets out an elaborate set of powers of inspection, regulation and punishment relating to the standards of quality set by the Bureau.

The Bureau consists of 115 members[125]. They have to meet at least twice a year in order to deal with the requirements of the BIS. Besides the central Headquarters it has five regional offices, 14 branch offices, nine inspecting offices and eight laboratories which are shown in the map.

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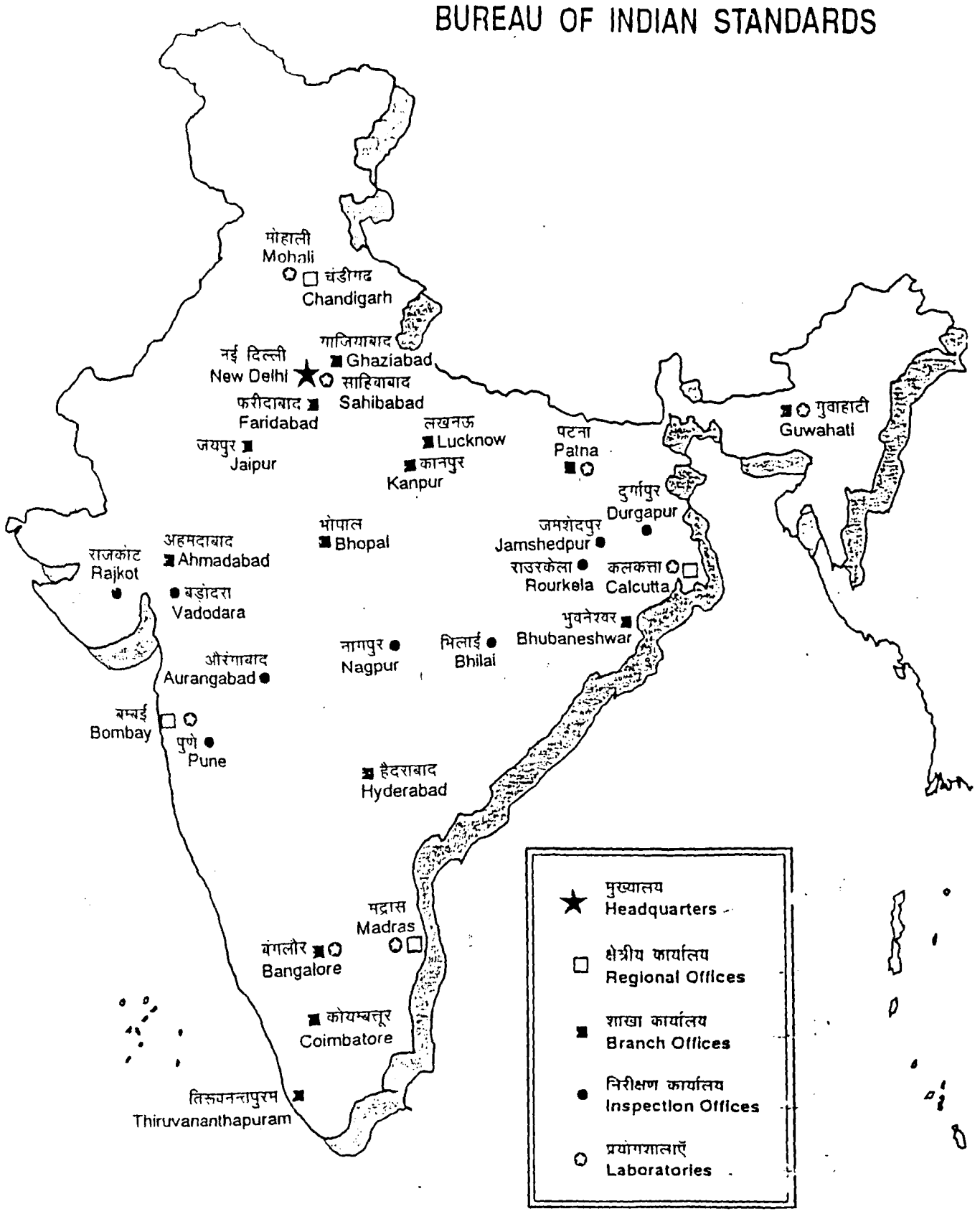
[123]Section 25 and 26 of the BIS Act, 1986.

[124]Section 28 and 30 of the BIS Act, 1986.

[125] The cabinet and the state Ministers, the Secretary and the Joint- Secretary from the Ministry for Civil Supplies, Consumer Affairs and the Public Distribution; the Director General; 5 Members of Parliament; 26 persons representing the Ministries and Department of Central Government; 32 representatives one each from the State Government and the Union Territories; one representative each from 5 recognised Consumer Organisations; 5 and 2 persons, who, in the opinion of Central Government, are capable of representing interests of the consumers and farmers; 32 persons representing the industry and trade; 10 persons from the scientific and research institutions; and 10 persons representing the technical, educational and professional organisations.

Map No. 3.1

Offices of the Bureau of Indian Standards



Source: Annual Report, BIS.

II. The BIS activities

1. *Standard Formulation*

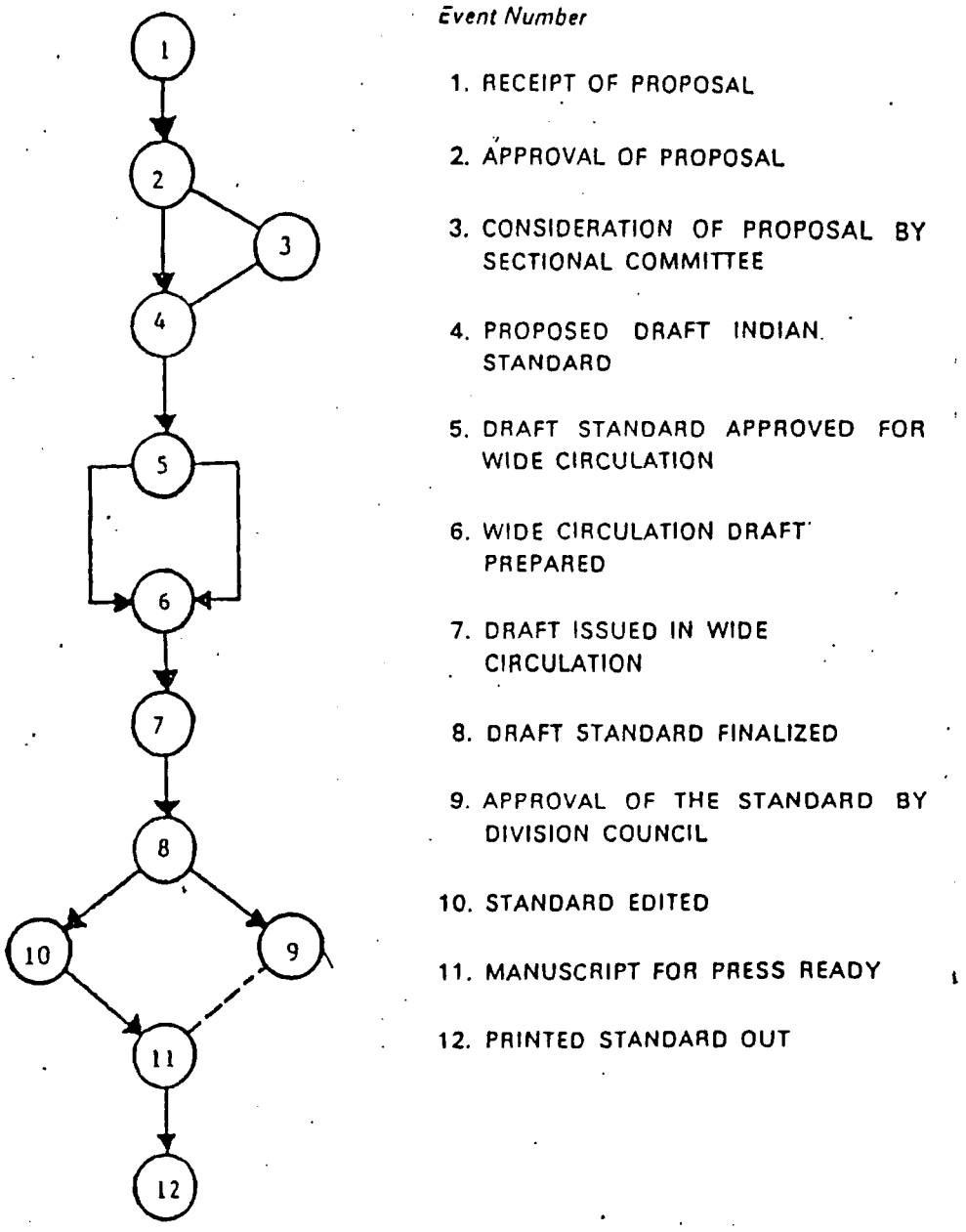
The Standard Advisory Committee guides the activities of standard formulation. The technical work of standard formulation is planned and organised by 19 Division Councils[126].

[126]They are: Basic Standards and Services; Chemical; Civil Engineering; Electronics and Telecommunication; Electronic; Food and Agriculture; Heavy Mechanical Engineering; Light Mechanical Engineering; Medical Equipment and Hospital Planning; Metallurgical Engineering; Petroleum, Coal and Related Products;

These Councils discharge its functions under a system of technical committees[127], sub-committees and panels. A proposal[128] for formulation of Indian Standard is first of all approved by the divisional council and then sent to an appropriate technical committee for formulation of standard. The procedural aspects of standard formulation can be explained with the help of a chart.

Chart No.: 3.3

Standard Formulation Procedure: The BIS



Source: *Bureau of Indian Standards: An Overview*, New Delhi, BIS, May 1989, p. 14

Production Engineering; River Valley Projects; Management and systems ; Textiles ; and Transport Engineering etc.

[127]Consists of representatives from industry, Government, research and development organisations, consumers and individual experts.

[128]It may be submitted by any Ministry of the state and central Governments, Union Territory Administration, consumers organisation, industrial associations and units, professional body, members of the Bureau and its technical committees.

The published standards may be reviewed by technical committees once in five years for updating or reaffirmation. BIS is trying to speed up the process[129] in particular to high-tech areas and if necessary, the standards of other institutions in India as well as in abroad will be adopted as Indian Standards. However, a tentative standard, though adopted as an Indian Standard, cannot be used for Certification Marking. The promotion of Indian Standards by BIS over the years is being represented in the table 3.16

Table No.: 3.16

Field- wise New and Revised Standards Formulation by the BIS

Field	Standard Formulation						
	1988-89	1989-90	1990-91	1991-92	1992-93	1993-94	1994-95
Chemical	70	71	69	73	122	72	25
Civil Engineering	91	75	77	76	106	78	21
Electronics & Telecommunications	75	64	68	74	80	72	22
Electotechnical	64	65	68	71	71	72	32
Food & Agriculture	75	60	69	71	71	72	29
Heavy mechanical Engineering	150	49	48	51	156	55	16
Light Mechanical Engineering		50	48	51		46	23
Management & Systems		10	6	2	10	10	19
Medical Equipment & Hospital planning	54	40	37	39	39	40	16
Metallurgical Engineering	92	75	68	72	70	67	24
Petrochemicals	50	50	45	47		56	19
Production Engineering		38	37	46		43	25
River Vally	41	16	19	26		31	13
Statistics Publication	3						
Textiles	66	60	58	45	52	48	20
Transport Engineering		40	38	42	42	45	34
Total	831	763	755	786	819	807	338
Since inception upto 31, March	14438	14788	15186	15972	16142	16542	16631

Source: Compiled from Annual Reports of Bureau of Indian Standards

The table 3. 16 reveals that the majority of the Indian Standards formulated by the BIS are related to the industry and electronics. Since its inception[130] up to 31st March 1995, the BIS formulated 16631 Indian Standards (new and revised) in different fields. The Standards were also formulated by the BIS based on multi-disciplinary co-ordination like energy conservation, environmental protection by establishment of ECO Mark, consumer protection, etc.

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[129]Initially the average time taken for the development of standards was around 37 months. BIS is trying to formulate the standards within 24 months in the case of general standards and 12 months in the case of highly technological standards.

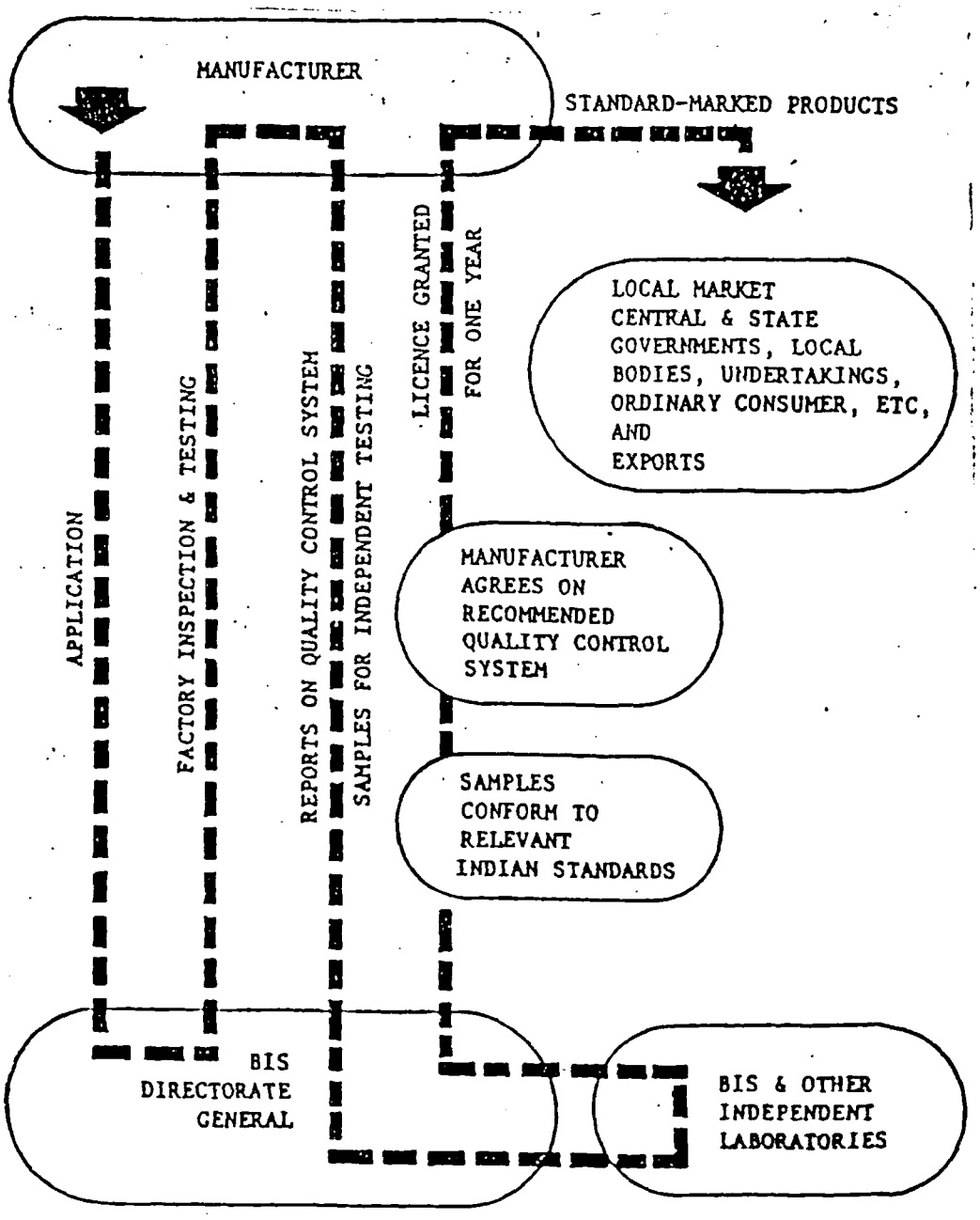
[130] It should be read as that which includes the standards set by the ISI as well.

2. *Certification Marks*

It is operated under the provisions of the Indian Standard Institution Certification Mark Act, 1952 which was replaced by the Bureau of Indian Standards Act, 1986. It is basically voluntary in character and the producer of any product may or may not apply for Standard Mark. The BIS may grant the licence to the producers who seek to use the Standard Mark on their products after satisfaction of the Indian Standard norms[131]. The applicant has to pay Rs. 500 and an additional fee for application, and testing charges. The marking fee depends upon the annual production. The procedure for grant of licence by the BIS is explained by chart 3.4

Chart No.: 3.4

Procedure for Grant of Licence by the BIS



Source: *Bureau of Indian Standards: An Overview*, New Delhi, BIS, May 1989, p. 17.

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[131]The procedure for grant of licence was modified with a maximum time frame of six months for taking decision on the applications within the BIS. This resulted the number of pending applications reduced from 2995 to 1450 with only 546 applications pending more than six months as on 31.March 1995 against 1931 as on 31 March 1994.

The Standard Mark on products certifies not only that the products comply with the requirements of a particular Indian Standards but also that it guarantees that the producers are operating a quality control system in their production. The firm also has to implement a Scheme of Testing and Inspection (STI) during operation, duly approved by BIS. During the operation of the licence, inspecting officers of the Bureau carry out surprise inspections and checks of the manufacturing process and on the products drawn based on samples from the firm as well as the market for testing in the BIS laboratories or recognised laboratories in order to make sure that the Standard Mark is being properly adhered to. If any producer misuses the ISI Mark (without obtaining a licence from the BIS), in such a case he has to either pay a fine of Rs. 50000 or go to prison for one year or do both. If the licensee is not complies with the BIS standards and uses the ISI Mark, then the BIS may cancel the licence or seize the factory or take him to the court based on the gravity of the offence. The BIS, New Delhi may also forgive the offences of the producer at first time, if he made that request. The producer dissatisfied about the order of the BIS may also approach the Court. If the licensee was not procured by the court, he can apply for the licence. In 1993 a separate Enforcement Department was established by the BIS in order to check the misuse of ISI Mark.

BIS also closely interacted with the State level Committees for Standardisation and Quality systems in order to implement quality control orders.

Licences are granted initially for a period of one year and renewed[132] from time to time based on the licensee`s performance as examined by the periodic inspections and test reports.

The supervisory control exercised by the BIS may be presented with the help of a chart 3.5.

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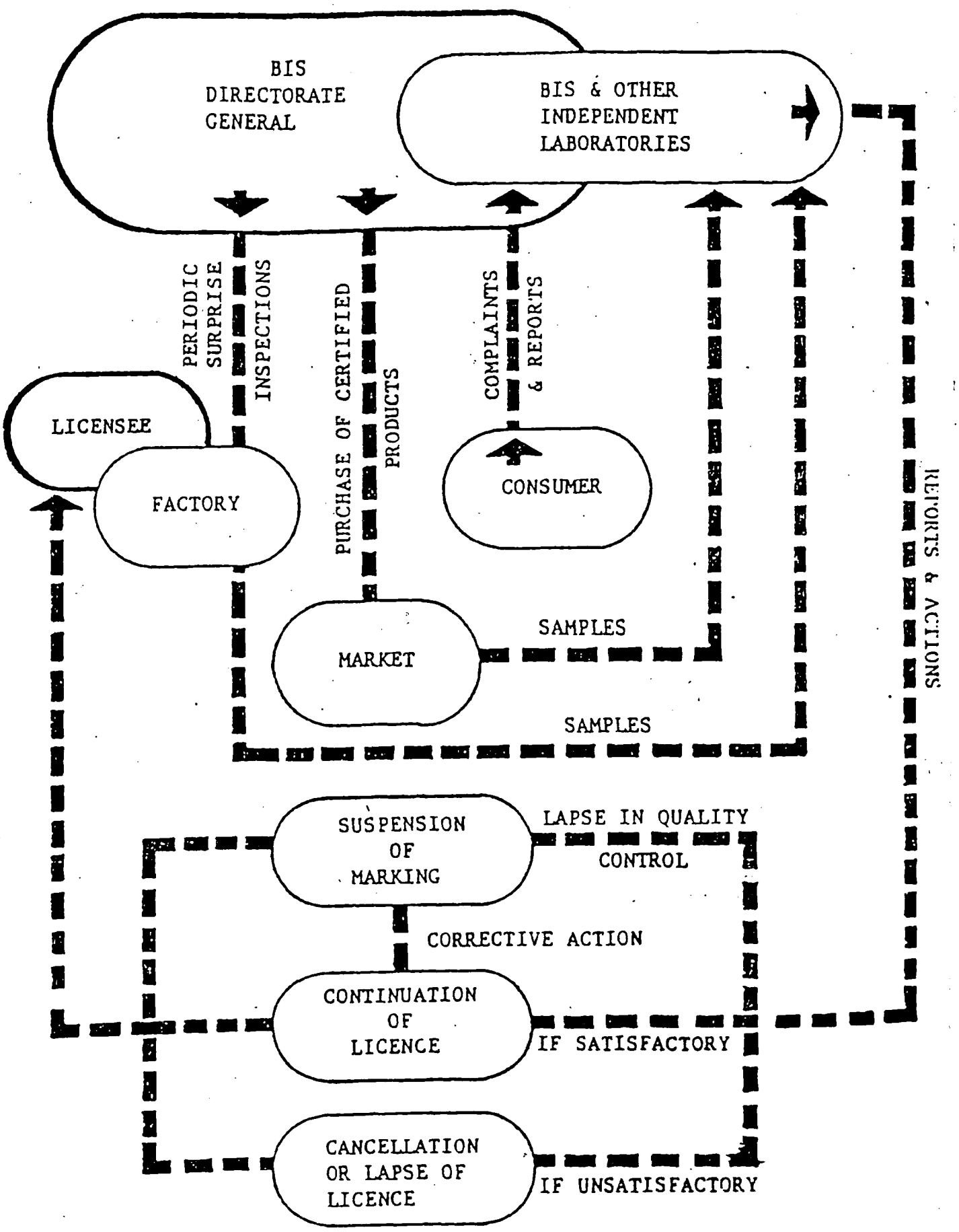
[132] Renewal of licences was decentralised, by giving power to the Heads of the Branch offices. The validity of the licences is two years at a time.

Chart No.: 3.5

Supervisory Controls Exercised by the BIS



Source: *Bureau of Indian Standards: An Overview*, New Delhi, BIS, May 1989, p. 18.

(a). Quality System Certification

It has been operating since 1991, and involves assessment and subsequent surveillance of the quality systems instituted by the firm for verification of the conformity of its systems to the prescribed requirements of the ISO 9000 series of standards which has been adopted as IS 14000 series of standards by BIS. Initially the demand for certification of quality systems was anticipated by potential Indian exporters to Europe. Since its inception up to 31st March 1995 BIS has granted 132 licences under this scheme.

(b). Mandatory Certification of Standard Mark

The Central Government, in the interests of consumers, after consulting the Bureau, made BIS Certification of Standard Mark as Mandatory regarding quality of products meant for mass consumption, health, safety and energy conservation[133]. According to this certification, the producer has to fulfil the requirements of the mandatory regulatory standards in order to produce a product and also to circulate the product into the market. If a producer does not meet the requirements of the mandatory regulatory standards and sells the product, the BIS will take action according to the Code of Criminal Procedure, 1973, relating to searches and seizures[134]. The first mandatory Certification Marks licence was granted by the BIS in 1987. So far, about 135 products have been brought under the mandatory certification of the Bureau by various Acts, for example Essential Commodities Act, Prevention of Food Adulteration Act, Explosives Act, and Mines Act. The producers of notified products have to obtain a licence from the BIS and also the production of these products should conform to the relevant Standard specification.

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[133]Section 14 of the BIS Act, 1986.

[134]Section 26 (3) of the BIS Act, 1986.

(c) The BIS: Industry- wise Certification Marks

The industry-wise Certification Marks licences issued by the BIS are presented in table 3. 17.

Table No.: 3.17

Industry- wise Certification Marks issued by the BIS

in Operation*										
					Since its inception upto 31, March					
Industry				1989	1990	1991	1992	1993	1994	1995
Agriculture and Food Products				1791	2010	1957	2007	1885		
Chemicals				777	789	794	813	1344*		
Civil Engineering				2100	2265	2224	2319	2511		
Consumer Products & Medical Instruments				488	68	72	78			
Electronical, Electronics & Telecommunications				1958	2176	2420	2610	2596		
Marine, Cargo Movement and Packaging				555						
Mechanical Engineering				1097	1388	1365	1395	1464		
Petroleum, Coal and Related Products				485	620	622	642			
Production Engineering					43	43	41			
Structural and Metals				1017	1449	1416	1473	1374		
Transport Engineering					48	63	72	66		
Textile and Allied Products				527	643	596	526	486		
Total				10795	11499	11572	11976	11726	11705	11848
*including Deffered										
				1989	1990	1991	1992	1993	1994	1995
				10795	11499	11572	11976	11726	11705	11848
Source: Compiled from Annual Reports of Bureau of Indian Standards										

The table 3.17 shows that the industries like civil engineering; electronical, electronics and telecommunications; agriculture and food products; and structural and metals obtained large number of Certification Marks compared to other industries. Since its inception up to the end of March 1995, the Certification Marks in operation were 11848.

The licences which were cancelled by the BIS or expired due to several reasons[135], went up to 15587 since its inception up to 31 st March 1995.

[135]Like unsatisfactory performance by the licensees, closure of the licensee's factory, lack of interest on the part of the licensees to continue manufacture of the product covered by the licence, etc.

(d) BIS Inspections

The number of inspections carried out by the BIS for grant, supervision, operation, etc., of licences is in table 3.18.

Table No.: 3.18

Inspection Carried out by the BIS

Region	1988-89	1989-90	1990-91	1991-92	1992-93	1993-94	1994-95	Percentages
Central	10925	11431	9639	9103	10006		8364	20,67
Estern	6983	6691	5336	5778	5897		4634	11,09
Northern	5075	9180	10889	10641	10127		12569	30,06
Southern	7160	7908	8461	7537	7754		7514	17,99
Western	8486	9689	9612	10167	11200		8687	20,79
Total	38629	44899	43937	43226	44984	43944	41777	
Source: Compiled from Annual Reports of Bureau of Indian Standards								

The table reveals the region -wise inspections carried out by the BIS from 1988-89 to 1994-95. During 1994-95, the inspections carried out by the Northern region stood at 12569 accounting for 30.06 per cent of the total inspections. It was followed by the Western region which stood at 8687 accounting for 20.79 per cent of the total inspections. The central region which stood at 8364 occupied next place accounting for 20.67 of the total inspections. Eastern region all the time carried out fewer inspections.

(e) BIS and Its Manpower

BIS manpower stood at 2216 at the end of March 1995. The deployment of manpower is shown in table 3.19.

Table No.: 3.19

BIS and Its Human Capital

			Since its inception upto 31st March						
Activity			1989	1990	1991	1992	1993	1994	1995
Corporate									39
Standardisation			571	585	557	557	534	535	321
Certification & Quality Systems			810	828	834	835	835	803	1119
Laboratories			354	361	385	382	396	367	174
Promotional Activities			148	150	98	93	84	100	242
Support Services			499	506	523	531	483	533	321
Total			2382	2430	2397	2380	2332	2338	2216
Source: Compiled from Annual Reports of Bureau of Indian Standards									

The table 3.19 reveals that the certification and quality control got the maximum number of employed personal, followed by standardisation compared to other activities. It also proves that the effectiveness of regulation not only depends upon the standard formulation but also equally depends upon its implementation.

3. *Laboratory Testing*

The BIS is itself maintaining a few laboratories in order to meet the day to day testing of quality of goods for Certification of Standard Mark. Laboratory equipment's are added through Government Grants as Plan Project under the five-year plans. At the same time there are 280 laboratories like Scientific Research laboratories, academic institutions, R and D wings of different manufacturing units and public and private test houses have been recognised by the BIS use for product testing in order to meet the increasing work load. The BIS labs not only provide services to industries for quality improvement but also carry out research and development in order to promote the Indian Standards and quality assessment studies. At the Central and Regional laboratories training in testing is organised for the personnel from BIS; recognised laboratories and industry.

4. *Promotional and Informational Activities*

At the initial stage itself for the widespread acceptability of Indian Standards the BIS chose its members in such a way that they are all from different fields for example, representatives from Governments, manufacturers, consumers, researchers etc. The Government of India had also

decided that the Government departments have to purchase goods which has Standard Mark and in the case of Standard Mark goods being not available, the goods strictly conforming to Indian standards will be purchased in order to meet its day to day requirements. Through the activities like company standardisation, educational utilisation of standards[136], inter-plant standardisation in steel industry, Institute of Standard Engineers (SEI)[137] , state level programmes for standardisation and quality systems[138] and Public Sector Undertakings (PSUs), the BIS is promoting its Standards. Apart from these activities, BIS is conducting industry-wise conferences, seminars and workshops on specific subjects in order to discuss the problems of standardisation and quality control. It also promotes standards by using mass media like Newspapers, Radio, TV and pamphlets.

BIS has a well- equipped library with computerised data bank on Standards , reference books, technical regulations, monographs etc. from all over the world. It also offers bibliographical services at a nominal charge and the BIS publications are sold at Bureau offices. The BIS also organises international activities in order to promote the standardisation[139].

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[136]In order to promote greater use of Standards BIS is trying to include suitably selected Indian Standards in the curriculum of education pertaining to civil, mechanical, electrical and electronics and also BIS is organising orientation programmes for faculty members of engineering, technological and agricultural institutions in order to apprise them of the standardisation activity being carried out in the various fields.

[137]Which is a professional body of practising standards engineers to act as an extended arm of the Bureau in the promotional activities.

[138]In order to monitor and improve the implementation of Standards by various agencies in the respective states.

[139]BIS is a representative in the international organisations like International Organisation for Standardisation (ISO 9000/ IS14000 series of Standards), International Electrotechnical Commission (IEC), GATT agreement of Technical Barriers to Trade (TBT), NAM based working group on Standardisation, Metrology and Quality Control (SMQC), technical co-operation with GOST of USSR, China State Bureau of Standards (CSBS), Bilateral agreement with the Underwriter's Laboratories (UL) of USA, Canadian Standard Association (CSA)Memorandum of Understanding (MOU), British Standards Institution Quality Assurance (UK), and Deutsche Gesellschaft Zur Zertifizierung Von Qualitatsmanagement systemen mbH (Germany). It also organises the International Training Programmes like Indian Technical Economic Co-operation Programme (ITEC), African Assistance Programme (SCAPP) and it is also participates with the other International bodies dealing with Standardisation like FAO, Codex Alimentarius Commission, International Organisation of Legal Metrology (OIML) in order to gaining mutual advantages regarding formulation and promotion of Standards.

III. Income and Expenditure of the BIS

1. *Income of the BIS*

Table No.: 3.20

Income: The BIS

Sl.No.		1988-89	1989-90	1990-91	1991-92	(Rs.in Million) 1992-93	1993-94	1994-95
1	Certification Fee	112,39	149,81	158,30	180,10	218,79	297,05	323,10
2	Sale of Standards	13,64	14,18	13,59	15,47	16,59	24,43	28,15
3	Other Income	2,71	3,03	2,82	3,59	6,82	11,88	30,58
4	Government Grant	10,50	0	0	0	0	0	0
	Total	139,25	167,02	174,72	199,17	242,2	333,36	381,86
Source: Compiled from Annual Reports of Bureau of Indian Standards								

Table 3.20 reveals the income of BIS from 1988-89 to 1994-95. During 1988-89, a major source for income to BIS was from certification fee to the tune of Rs. 323.10 million, followed by other incomes to the extent of Rs. 30.58 million. The sale of standards occupied the next place with Rs. 28.15 million. The BIS could raise income from its various sources from Rs. 139. 25 million in 1988-89 to Rs. 381.86 million in 1994-95.

2. *Expenditure of BIS*

Table No.: 3.21

Expenditure: The BIS

					(Rs. in Million)		
	1988-89	1989-90	1990-91	1991-92	1992-93	1993-94	1994-95
Pay and Allowannces	78,13	88,44	98,96	105,28	121,10	132,14	141,48
Retirement Benifits	6,62	0,69	0,57	0,76	0,74	9,89	10,15
Other Staff Benifits	3,51	3,95	5,01	5,96	5,75	8,76	10,83
Travelling Expencess	5,22	6,44	6,76	6,70	6,93	9,60	11,08
Subscription to International Organisations	4,61	5,41	5,92	10,74	10,89	10,14	12,99
Production	4,57	3,98	5,16	5,67	6,13	6,03	4,90
Testing	9,69	8,26	10,07	12,47	15,53	15,98	19,78
Publicity	1,00	1,53	1,30	1,62	2,05	1,37	2,49
Office Expencess	13,19	13,18	15,03	18,79	19,28	22,21	23,61
Repairs & Maintenance	2,75	3,72	3,92	4,84	5,56	6,16	9,01
Other Expences	4,39	5,31	5,26	5,86	5,36	5,85	5,89
World Bank Project Revenue Expences				0,71	5,07	2,15	3,85
Depreciation	7,71	18,6	18,81	13,62	11,94	11,83	12,83
Total	141,39	159,51	176,77	193,02	216,33	242,11	268,89
Surplus/(Deficit)	-2,13	7,53	-7,02	6,16	25,88	91,25	112,98
Appropriations							
Transfer to:							
World Bank Loan Redemption Fund			5,00	5,00	5,00	5,00	3,47
Capital Fund				1,16	20,88	86,25	109,50
Total				6,16	25,88	91,25	112,97
Source: Compiled from Annual Reports of Bureau of Indian Standards							

Table 3.21shows the expenditure of BIS from 1988-89 to 1994-95. During, 1994-94, Pay and allowances were the major outlet of funds amounting to Rs. 141.48 million, followed by office expenses amounting to Rs. 23.61 million. Testing occupied the next place with Rs. 19.78 million. The BIS had a surplus of Rs. 112.98 million.

IV. The Role of BIS in the Interests of the Indian Consumers

BIS serves not only as a third party assurance to the consumers on the quality of the certified goods but it also protect and promotes the rights of the consumers through its functions of standard formulations and certification of standard mark. The consumer dissatisfied about the quality of the ISI Marked product may approach the nearest branch office in order to lodge a complaint in Consumer Affairs (and Public Grievances) Department for redressal. In the case of genuine complaint BIS arranges for his/her redressal by way of replacement/ repair of the

product. At the same time BIS also takes necessary action against the producer in order to prevent the risk of harm. If it is proved that the manufacturer was intentionally producing a sub-standard goods, depending upon the gravity of the offence BIS can cancel or allow the licence to lapse and undertake legal action against the manufacturer. In the case of BIS providing Certification Mark license to a particular part of a product, the BIS gives assurance to that particular part only.

It not only claims that the regulation of standards does not cost the consumers[140] but it also justifies its random sampling probability tests claiming that cent-percent inspection is neither necessary nor always possible. Cent-percent inspection does not eliminate complete defects, though it consumes lot of time and costs.

C. Critical Evaluation of the BIS in the Light of Theory of Regulation

The evaluation of the functioning of the BIS is based upon the data collected from the BIS Annual Reports and records.

I. Certification Mark and the BIS

The BIS Certification of Standard Mark is a voluntary scheme in nature for most of the goods, therefore it is completely dependant upon the interests of the producers. If they feel that the Standard Mark products has a good reputation among the consumers then the producers will go for the Certification Mark otherwise they do not go for it. Thus, BIS does not have any power to force the producers to obtain Certification of Standard Mark on each and every product. In such a situation the role of the BIS as a regulatory agency seems to be inadequate in reducing the risk of harm. However, in the case of Mandatory Certification of Standard Mark the BIS plays a major role regarding standard formulations because the goods which are under this scheme should possesses the Standard Mark, but the goods which were bought under these schemes is not more than 150 so far. Thus, the Government of India

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[140]It charges 60 piece per electrical iron costing in the range of RS. 300; 5 piece per 50-kg bag of cements costing in the range of RS. 100.

should take necessary steps to bring more of the goods under Mandatory Certification Scheme for to effective functioning of BIS, as an ex-ante approach.

II.Compensation to the Consumer

BIS is unable to provide an adequate compensation to the individual consumers even when the ISI Marked product in defective. It is difficult to find out defectiveness of the ISI Mark product from the used product because of asymmetric information over the root cause of the defect. It is not always clear whether the defect is either because of non- compliance of the provisions of the Indian Standards by the producer or misuse or mishandling of the ISI Marked product by the consumer. In the case of redressal, there is a separate Consumers Affairs Department in the BIS, but its role is very simple especially in the case of compensation to the concerned consumers, BIS is unable to do more than just replace the substandard good[141] . It can take some measures in the case of the commercial transactions involving bulk buying because BIS can take a sample from the non-used product and go for testing in order to find out the defect. But whether it be individual consumer or commercial consumer - if only the used product is defective and other non-used products are not defective in such a case BIS is unable to do any thing. In these types of circumstances the functioning of BIS is ineffective to control the risk of harm and it is unable to provide any incentives to the manufacturer to take precautions in order to reduce the harm. Even when the defect is on the part of the manufacturer, BIS gives an opportunity to the manufacturer to rectify the defect. The manufacturer also is allowed to pardon the regulatory agency for a first time mistake. In the case of severe violation of Indian Standards the BIS may withdraw or cancel the licences and also if necessary, BIS may file a case in a court against the manufacturer. However, if the manufacturer was not prosecuted by the court he can apply for a new licence. The measures which can be taken by the BIS against the manufacturer in the case of violation of Indian standards seems to be not only inadequate to provide incentives to the manufacturer in order to take the precautions to reduce the risk of harm but also it fails to keep the manufacturer within the market because of the stringent measures like cancellation of the licence which has adverse effects. For example, the products which are produced by a

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[141] In these type circumstances the advantage of ex-anti approach over the ex-post approach - awarding the damages to the consumers for pain and suffering by setting up of an expert committee in order to fix the compensation may not be applicable to the BIS.

manufacturer are most important and essential products then these types of measures stops the production permanently. Thus it is better to take some positive reasonable measures like fine or imprisonment or both, which will provide adequate incentives to the manufacturer to take the precautions in order to reduce the harm. The BIS applies the measures like fine or impression or both only in the case of misuse of the ISI Mark and not in the case of violation of the Indian standards. The consumer dissatisfied about the redressal given by the BIS can approach the court.

III. Enforcement or Third Party Assurance

The BIS established a separate Enforcement Department in 1993. Though the BIS is empowered to raid the licensee's premises and collect samples not only from the factory but also from the open market based on probabilistic methods in order to test the products to find out whether they are produced according to the Indian Standards or not, it does not do so. In majority of the cases they take action against the manufacturer based on the complaint received from the consumer only.

Certification Marks manual pronounces that the BIS has to take various steps in order to ensure that the goods bearing ISI Mark have been produced in accordance with the provisions of relevant standards. According to the Manual, a minimum of 4 samples per year are to be drawn from the factory and 1 to 8 samples from the open market for testing as indicated in the following table:

Table No.: 3.22

Sample Testing: Certification Marks Manual

	Minimum Samples per Year
Food and Consumer Products	8
For Products Costing RS. 250	4
For Products Costing RS. 251 to RS. 1000	2
For Products Costing RS. 1001 and above	1

Source: Annual Reports of Bureau of Indian Standards- 1989-90/ 1990- 91.

The number of samples drawn from the factory as well as open market during 1988-89 and 1989-90 was lower than the Certification Marks Manual prescription, which can be explained with the help of the following table:

Table No.: 3.23
Sample Testing during 1988- 1990

Year	No. of Operative Licences for the Purpose of Draw of Samples	No. Of Samples Requir to be Drawn from the Factory as well as Open Market	No. of Sample Actually Drawn from the Factory as well as Open Market	% of Shortfall
1988-89	9735	77880	33434	57.05
1989-90	10956	87648	32431	63.00

Source: Annual Reports of Bureau of Indian Standards, 1989-90/ 1990-91.

In the brochure "Are You A Victim of Any of These Myths?" issued by the BIS, it was stated that the Certification Marks act as third party assurance, " therefore, a third-party certification of the kind which the ISI Mark provides is valuable because then you do not have to worry about the quality of the product and can buy such a product with confidence". It is clear from the above table that the BIS is unable to draw the required samples and that this may reduce the effectiveness of the BIS Certification Marking as well as its claim of third party assurance. BIS itself has stated that it was not possible to obtain requisite number of samples as per norms due to lack of orders and demands, seasonal nature of product, items being expensive and bulky, and difficulty in obtaining certain samples because they were not available in the market. Further there are also manpower constraints, and the non-availability of ISI Marked material during the periodic inspections[142].

IV. BIS and Its Resource Mobilisation

The BIS is always very conscious about the raising of its income through the certification fee which are paid by the Certificate Mark license seekers. If we see the recent annual reports of

[142] Annual Report 1989-90, Bureau of Indian Standards, pp. 57,58.

BIS, in an overview, "the prosperity is reflected in the balance sheet as well as with the operating revenue registering a quantum jump of nearly 38 per cent reaching Rs. 333.40 million for the year 1993-94"[143]. In this connection the statement of the Krishna Iyer Committee, that the 'legal profession in India... enjoys a near monopolistic power' and in India the greatness of lawyer is measured by the fee he charges and not the quantum of social service he or she renders as a lawyer is very relevant. The BIS also enjoys a near monopolistic power and the statement of the BIS in its overview indicates that its prosperity is measured by the revenue received rather than its effective functioning as a regulating agency in order to promote and protect the rights of the consumer through its standard formulation and Certification Marks. In this type of environment there is a possibility that the BIS may formulate the standards according to the preference of the manufacturers rather than fulfilment of the interests of the consumers. It seems to be acting as a commercial testing agency rather than a regulatory agency.

V. Standards in BIS Activity

The standard formulation institute itself lacks standards in its functioning. From a layman's perspective, starting with observation of working place environment and ending with the preparation of annual reports, there is no specific structure or standard followed while presenting the data e.g., Industry-wise Certification Marks licenses. Therefore the question arises as to who formulates the standards for the standards formulating institutes like BIS?

VI. Informational Difficulty

It is very difficult to get information from a regulatory agency. In the case of BIS even the information which they have to disseminate to the general public is not made available. In the name of *Confidentiality* or *Secret* some government departments are not willing to give any information to the public because such type of activity according to them will disturb the routine work. Information is power and the consequence of the asymmetric information hurts consumer interests. The BIS does not share any information from the Consumer Affairs Department. This is not the case with the liability system where in at least one is well

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[143] Annual Report 1993-94, Bureau of Indian Standards, p.1.

informed about the nature of the case and the judgement which were published in different journals and magazines and news papers and it is possible that one can get a copy of judgement based on payment.

VII. Variation in Standards

The disadvantage of commonly applicable regulatory standards in the case of private good may not exactly be applicable in the case of BIS because much of the formulated standards i.e. 16000 standards in force are voluntary in nature. Therefore the manufacture can choose the standards which are suitable to his/ her product attributes. At the same time the BIS not only grant the Certificate Mark license for one year and which is renewable but the manufacturer can also discontinue the license whenever he wants to do so. However, this is not true in the case of Mandatory Certification of products[144], which will be favoured for consumer safety protection. Especially in the case of private goods, the BIS`s commonly imposed Mandatory Certification may have the adverse effects.

VIII. No Distinction between Consumers and the Commercial People in the Case of Redressal

In the case of ex-ante approach like BIS there is no distinction made between the consumers and the commercial people. In fact, one can say that the regulatory agency, BIS is much more useful to the commercial people rather than to individual consumers. In the case of ex-post approach like Consumer Protection Act there is a clear-cut distinction between consumers and commercial people. The liability system is only helpful to the individual consumers rather than to commercial people. At the same time in the case of one consumer going to the CDRAs, the redressal or the decision of the CDRAs may benefit only that particular consumer but in the case of one consumer going to the BIS, the redressal may not only benefit that particulate consumer but it also has positive externalities to other consumers because the decision of the BIS may effect the particular product all over the country.

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[144]Producer may be prevented from lawfully supplying a product without obtaining prior approval from BIS.

IX. BIS and Its Costs or Expenditure

The administrative costs of BIS are incurred irrespective of whether harm occurs or not and also these costs are forever even the risk of harm is eliminated by the BIS. For example, since its inception 15587 licences were cancelled due to several reasons however even then the BIS bore the administrative expenditure. Though the BIS is repeatedly stating that it provides third party assurance to the consumers, and enforces the standards strictly by probabilistic methods there is no separate column about the expenditure involved in the case of its enforcement activity. Much of the expenditure of BIS is on pay and allowances, retirement benefits rather than on production, testing, and promotional activities of standards.

X. Involvement of Rigidity in BIS in the case of Standards Review

BIS is reviews its standards once in five years only and a lengthy process, which reveals the theoretical arguments of rigidity of regulatory agency in order to modify the standards of safety and at the same time, rapid changes in technology- enforcing of old standards may perhaps unable to internalise the risk of harm.

XI. Influence of Interest groups on BIS activity

The theory of regulation predicts that there is always the problem of interest groups on regulatory activities because of its easy capture compared to ex-post approach. As such where BIS activities are concerned there are no direct evidence about the validity of the prediction of regulatory theory. However, there are indirect clues about the validity of the theoretical arguments about capture theory.

For instance, since BIS looks forward to self- reliance in mobilisation of its resources, the standards formulated and certification marks licences granted to the manufacturers seems to be favourable to the interest groups. Otherwise it is not possible to collect certification marking fee Rs. 323.10 million in 1994-95 alone.

Further, the Bureau consists of 115 members, out of whom only 5 representatives are from the consumer organisations and 32 representatives are from the industry and trade and the remaining majority representatives are politicians and bureaucrats who are influenced by the interest groups one way or the other. Monetary bribes are feasible although not common due to their illegality. Personal relationships provide incentives for government officials to treat their industry partners kindly; and the industry also operates indirect transfers through key elected officials who have influence over the agency, using methods which include monetary contributions to political campaigns, as well as lobbying for votes at the `grass root ´ levels in order to set the standards according to their preferences.

XII.Expert Advise

BIS as an ex-ante approach has certain advantage over CDRAs especially in the case of scientific information. BIS through its activity channel like advisory committee, divisional councils, technical committees and penal committee capable is of getting information by diverting the social funds to get the information on scientific and technological information's in order to formulate the standards.

XIII.Does the Compliance of BIS Standards Exempt the Tortfeasor from the Liability?

The compliance of BIS standards does not protect the manufacturer from the liability in the event of harm. At the same time, non -compliance of BIS standards by the manufacturer does not automatically lead to liability. However, in the case of Mandatory Certification of ISI Mark, the producer is prevented from the production of mandatory products by the BIS based on a simple clue i.e., if the consumer is dissatisfied about the decision of the BIS, he can go to civil court or CDRAs in order to get the compensation. One can argue that the tortfeasor who complies with the standards may not be exempt from the liability in the event of harm.

In India the courts treat the BIS standards as a minimum standard and irrespective of compliance of the standards the tortfeasor is liable for the harm occurred. For example, in the case of household appliances like electric iron, TV picture tube etc., even though the

producer of those products complies with the BIS standards, based on the consumer complaint the CDRAs award the compensation to the consumers. In such an environment the only advantage to those producers who comply with the BIS standards is the increase of demand of their products because of reputation among the consumers in the market and the possibility of reduction of the severity of damage in the event of harm.

The examples of doctors' liability in spite of their compliance with Medical Council regulations and the establishment of SEBI because of loopholes in the Banking laws gives evidence that in India not only the courts treat the BIS standards as a minimum standard and ask the producer to pay compensation in the event of harm but also that there is a mixed system of ex-ante and ex-post approaches in order to reduce the risk of harm.

However, especially in the CDRAs where lay men or women can also become the members, it is possible to complain about the lack of expertise on the subject of technical standards in order to provide incentives to the tortfeasor to reduce the risk of harm. On the other hand, especially in the case of BIS the experts have much information and capabilities on the technical information but they may give biased information because of several reasons. In such type of environment the unbiased less knowledgeable decision of the CDRAs may be better than the biased more knowledgeable decision of the BIS in order to protect and promote the interests of the consumers by providing incentives to the tortfeasor to take precautions in order to reduce the risk of harm.

D. Suggestions Based on the Findings

The foregoing analysis of the BIS leads to the following suggestions for the improved functioning of the institution.

It is necessary to bring almost all products which are hazardous to health and safety under the mandatory certification mark. The activities of BIS which are mainly concerned with the consumer protection like mandatory certification, consumer grievances, enforcement and the promotional activities etc., should be brought under a separate branch. It may be advisable to give equal representation to the consumers on the one hand and the Industry and trade on the

other. It may perhaps be helpful if BIS and its basic activities are introduced in the academic curriculum in non-scientific disciplines like law and economics. In the formulation of standards it is better if the BIS can give equal importance to the preparation of standards both for domestic purpose based on the Indian requirements and export purpose based on international standards. It is advisable to upgrade the standards according to necessity that is based on the scientific and technological changes rather than the periodic review like once in five years in order to reduce the risk of harm. It is necessary to establish as many branch offices as possible in order to control and promote the Indian standards. It is better to at least to fulfil the probabilistic method of enforcement by strictly following the Certification Mark Manual regarding collecting the samples from the factory and open market in order to test the ISI mark standards to see if they are according to the requirement provisions of the Indian Standards or not.

E. Comparative Analysis of Liability (CDRAs) and Regulatory (BIS) Systems in India

The Consumer Dispute Redressal Agencies (CDRAs) which are viewed as an ex-post approach in regard to protection and promotion of the welfare of the interests of the consumers. Since these tribunals or courts are meant only for dealing with the consumer disputes and have much more ability to improve the consumer welfare compared to the Bureau of Indian Standards, which is viewed as an ex-ante approach, where its functions[145] are not only related to consumer protection but also related to environmental protection, and energy conservation. The activities of BIS are related to the consumers, self-employed consumers and also producers. A comparison between the CDRAs and the BIS is presented in the table 3.24.

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[145]Standard formulation must not only keeping in view of national priorities but also meet the export orientation, Certificate Mark license, Quality assurance system and international co-operation and promotional activities.

Table No.: 3.24

The Comparison between the CDRAs and the BIS

Sl. No	CDRAs	BIS
1	Compensation It is compensating the consumer in the event of harm. CDRAs' under or over compensation may lead to adverse effects.	It is just replacing the good in the case of ISI Mark is defective product. However, the BIS will take measures such as cancel the licence or seize the factory or take the legal action against the licensee based on the gravity of the offence. If a person misuses the ISI Mark, he has to pay a fine Rs.50000 or be imprisoned or both. There is no such problems in the case of BIS. However, the cancellation of license or seize the factory in the case of standard violation may perhaps lead to adverse effects.
2	Impact The decision of CDRAs in a case may have positive or negative impact restricted to that particular case unless until a case is related to Public Interest Litigation (PIL).	The decision of BIS in one complaint may positive or negative externalities in all over the country.
3	Correction There is possibility of error correction by appealing to the higher courts.	There is no such advantage in the case of BIS. However, the dissatisfied manufacturer and the consumer about the decision of the BIS may approach the court . In some cases the manufacturer can go for appeal to the central Government.
4	Procedure The procedure for claiming the award is a little bit complicatory and expensive for example, appearance before the forum, engagement of a lawyer.	The procedure for claiming against the ISI Mark defective product is easier and in-expensive for example, just writing a letter.
5	Costs The administrative costs are very low.	The administrative costs are very high because of controlling the misuse of ISI Mark and testing the samples which were drawn from the factory as well as open market in order to see that the ISI marked product met the Indian Standards.
6	Expertise In the case of scientific and technological information CDRAs has to seek expert advise or set-up a committee. However, it has no problem about the private information.	BIS has no such problem because the standard formulation were set by the technical committee. However, it has problems regarding private information.
7	Enforcement CDRAs has problems regarding enforcing its order.	BIS has also enforcement problem in spite of its own enforcement personal.
8	Interest Groups The influence of interest groups on the decision of CDRAs may be difficult but possible based on presenting wrong witness, threatening, by engaging skilful lawyer etc.,	In the case of BIS there is no direct evidence of the interest groups influence on the decision of BIS. However, it is easy to influence the BIS, by politicians, bribes, may be Eagerness of raising the sources of BIS.
9	Subjective Suffering CDRAs are unable to award the compensation for pain and suffering.	In practice BIS is also not doing any thing In such case. However BIS can prevent such

			Type of harm by setting the standards based on Advise of technical committee.
10	Delays The problem of laws delay's presented in the case of CDRAs		It is also present in the case of BIS also but Not as severe as CDRAs[146].
11	Apex Court Sometimes the decision of the Apex Court or the NC may have adverse effects because all lower courts should follow the order of the Apex Court or the NC. For example, this may mean cancellation of interim order provisions. However, in some cases it will have positive effect. For example, Apex Court decision on doctors' services.		The formulation of mandatory standards by BIS have adverse effects in the case of private Good.
12	Rational Apathy CDRAs unable to compensate the consumer in the case of rational apathy, causational problems, inadequate wealth of human beings as well as corporations, complicatory cases etc.,		There is no such problems in the case of BIS Because it has powers to enforce its standards Based on probabilistic methods. However, BIS Is just replacing the substandard products.
13	Deterrent on Complaints CDRAs imposing the costs on the consumer for frivolous or vexatious claims		Even though BIS is receiving some false Complaints, it is not imposing any costs On the complainant.
14	Discretion The members of the CDRAs have discretionary powers in the case of costs of award, granting adjournment, rate of interest, exempting the complainant from the time limit for both original filing as well as appeal.		In the case of BIS the discretion of the officers Is very limited, because it just replaces the Substandard product.
15	Information To obtain information form CDRAs is not that much difficult		In general it is very difficult to obtain the Information from the BIS
16	Appointment The members of the CDRAs are appointed by the committee which consists of both judiciary and executive personnel		The BIS staff is appointed by the executive.
17	Environment The environment of the CDRAs does matter in the case of claim of award		There is no such problem in the case of BIS

The above analysis clearly suggests that either CDRAs or BIS has any unique ability in order to promote the interests of the consumers. CDRAs are unable to promote the welfare of the consumers because of the law's delay, presence of the problems of under compensation, inability to award the compensation for complicated cases, problems of enforcement of its order, and lack of funds to run the day to day activities of the CDRAs. On the other hand, BIS is unable to protect and promote the interests of the consumers because of its simple redressal i.e., just replacing the substandard product, adverse effects of the cancellation of the

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[146] At the end of March 31st 59 complaints were pending see Annual Report 1994-95, BIS, p. 42.

licence in the case of violation of the standards by the licensee, standards variation in the case of private goods, high enforcement costs because of drawing samples and testing, voluntary nature of majority of the standard formulations and of the easy influence of the interest groups. The overlap between the CDRAs and BIS may perhaps stress the importance of the optimal mix of both the systems in order to protect and promote the rights of the consumers in an effective manner.

In India the courts or CDRAs treat the standards of BIS as minimum standards and make the tortfeasor as liable in the event of harm. In the case of BIS, standards are unable to set the standards optimally due to informational asymmetry or unable to control its standards by probabilistic methods and in such a case the CDRAs make the tortfeasor liable for the harm done to the victim. Similarly, the CDRAs are unable to make the tortfeasor liable due to bankruptcy, causational problem, and rational apathy in such a case the BIS at least can reduce the severity of the harm by formulating the standards. Therefore, the CDRAs and the BIS works as complimentarities and substitutes[147] in order to protect and promote the interests of the consumers.

In India, generally speaking, the liability system is trying to give some incentives to the tortfeasors to take precautions in order to reduce the risks in the event of harm. For example, in the year 1996 there was tremendous influence and popularity or reputation in the society and among the citizens of India because a large number of cases were brought against leading politicians, bureaucrats and even against some judges based on Public Interest litigation. At the same time the leaders of political parties at the national level were talking of reasserting the supremacy of Parliament vis-a vis the Judiciary and tried to amend the provisions of the Constitution to bring the judiciary under the undisputed hold of the executive in the matter of appointment and transfer of judges of the higher judiciary. Similarly there was also another move to curtail the scope of Public Interest Litigation by making it obligatory for the applicant to pay a deposit of Rs. 1 lakh and to confine the eligibility of the applicants to those who are not below the poverty line and so on[148].

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[147] Which supports the arguments of W. L. Prosser, Peter Huber and Abel.

[148] The Hindu on line: 5 March 05, 1997 opinion on `Disregard for the Judiciary´.

In the case of regulations there are sincere officers who want to implement the regulations or standards strictly in order to prevent the harm. However, there are a number of incidents proving that the sincere officers were unable to do any thing against the tortfeasors because the duty officer was transferred or threatened by the interests groups with the help of politicians and gangsters. For example, there are several cases filed by the consumer in the CDRAs against the excess billing for telephone services. In majority of the case CDRAs are unable to protect the consumers because they don't have the power to grant the interim order and the consumer are unable to prove the deficiencies of the opposite party services. Based on reliable sources, the transfer of one officer in one of the Department of Telecommunications had occurred because he found the people who were responsible for excess billing and wanted to take action against them. In general majority of the officers know who the tortfeasors are but they can not take any action against them in spite of their obligation to take action against the *tortfeasors*.

From the above facts one can derive that especially India, the alternative legal systems are inadequate to provide incentives to the tortfeasors, in spite of theoretical merits of a combined ex- ante and ex- post systems because of the attitude of the executive towards the Judiciary, whenever efforts are made to enforce order that hurts the powerful. Thus, in order to make the tortfeasor not only liable for wrong doing but also to provide incentives to the tortfeasor, one needs independent judiciary as well as regulatory agency.

In India, as discussed above, in spite of the establishment of the CDRAs for providing redressal to the consumer disputes, the ex-post approach is not very effective because of law's delay, complex legal procedure, and costly litigation. It may be helpful to review the civil liability system in Germany in order to draw some lessons for India. Similar kind of attempt will be made even in the case of ex- ante approach, to examine how the decentralised German regulatory system can provide some lessons to the centralised Indian regulatory system.

Chapter IV

Experiences in the Field of The Consumer Protection in Germany

German liability system has been reviewed based on the works of N. Reich, H. Kötz, B.S. Merkensis, J.M. Kellam, K.U. Link, T. Sambuc, P. Kelly, R. Attree, and A. Geddes. Similarly, the regulatory system of Germany has been reviewed based on the works of J. Falke, H. W. Micklitz, Tony Askham, and Anne Stoneham.

A. Introduction

It may be interesting and also seems to be necessary to take into consideration of the experiences of Developed Countries like the United States of America, the United Kingdom, Australia, Japan, Germany etc, in the field of consumer protection in order to draw some possible lessons to improve the protection of consumer interests in India. There is hardly any study done for drawing lessons from the experiences of the civil law countries like Germany in order to improve the protection of Indian consumers. This is the first comparative study in the field of consumer protection between a civil law country like Germany and a common law country like India, where major difference is between the codified law and the judge made law. Since there are no separate courts to protect the interests of the consumer in Germany, the review will be based on German civil courts only.

I. Socio-economic and legal conditions of the consumers in Germany

In a developed country like Germany, one can hardly find any official figures on illiteracy and poverty. The consumers in Germany not only have lot of choices to select the goods or services according to their tastes but also have better possibility to get information about the attributes of the products even though it is costly. Since most of the available goods may either experience goods or credence goods, the problems of asymmetric information is still valid even in the case of Germany. The misperception about risks is another side of reason for state intervention in order to protect the interests of the

consumer. The market induced correctives like warranties and signals some how fail to protect the consumer interests. Since consumer is unorganised, the unscrupulous trader may easily exploit the consumer, based on unfair contract terms and usurious credit brokerage. Though the consumers of developed countries may boycott goods, which are not environment friendly, and the goods, which are produced by children, they are still unable to protect themselves from the unscrupulous traders. Therefore, there is a necessity to protect the consumers by the intervention of the state.

II. The Development of the German Civil Code (GCC- BGB)

Anton F.J Thibaut urged, "German people needed one general code, written in German tongue; and the slight inconveniences involved would be outweighed by the countless advantages of unity"[1]. His proposals were opposed by the Friedrich Carl v. Savigny and the *Historical School of Law* saw law as a historically determined product of civilisation, having its roots deep in the spirit of the people and maturing there in long process viz., language, property, and religion, law is the product not of the formative reason of a particular legislator, but an organic growth, rather like a plant, of the `inner secret powers' of the `spirit of the people'working through history. "Saviny`s basic view was that legislation, being inorganic and unscientific, was not the right way to create a common German law and would do violence to the traditions it opposed; what was needed in his view was a thorough absorption and cultivation of the legal material which was to hand, as it had grown through time, a task he would entrust to an *organically progressive legal science which would be common to the whole nation*"[2].

The codification of the private law into a Civil Code took place in 1874. A preliminary commission of five superior judges was first appointed to make suggestions as to the method to be pursued in framing a draft Code. The commission recommended that the preparation of Code should not be left to the regular staff officials of the Government,

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[1] Quoted in A. Taylor Von Mehren, *The Civil Law System: Cases and Materials for the Comparative Study of Law*, Englewood Cliffs, Prentice-Hall, INC, 1957, p. 23.

[2] Quoted in Zweigert/ Kötz, Introduction to comparative law, 1987 (translated by Tony Weir), p. 145.

but an *ad hoc* Commission should be created with judges, officials of the Department of Justice and law teachers in the universities. In July 1874 the Federal Council appointed a commission of eleven members consisting of nine judges and two university professors. The first draft of the Code was submitted to the imperial chancellor in 1887. The first draft called forth a flood of papers, pamphlets, and books, practically every legal writer in Germany contributing to the work of criticism. In 1890, another commission was appointed consisting of twenty-two members, partly jurists, partly economists, and partly experts in different branches of trade and industry. The second draft's superiority over the first draft was generally acknowledged, and the improvement was generally credited in the main to the work of Professor Planck of Göttingen. In 1895 the second draft went to the Federal Council for discussion. On 17th January 1896 the Code was submitted to Reichstag and it referred to a committee of twenty-one members. The committee submitted its report on 12th June for the discussion of the House. The German Civil Code was enacted by the parliament on 1st July 1896 and was promulgated by the German Emperor on 18th August 1896. It came into force on 1st January 1900.

The Scope of Codification is indicated by its main divisions:

The general part treating of natural and juristic persons, different kinds of property and appurtenances, acting capacity, void and voidable acts, offer and acceptance, conditions, agency and ratification, time and limitation and prescription. There is a part devoted to the Law of obligation and other to Law of property, followed by the Family law, and Law of inheritance.

"The law of contract in the GCC is unequivocally dominated by the bourgeois idea that contracting parties are formally free and equal. This idea expresses itself in the legal principles of freedom of contract and the duty to respect contracts. On the one hand, everyone servant as well as master, consumer as well as producer is entitled to decide, freely and on his own responsibility, what contracts to enter and on what terms; on the other hand, contracts so formed must be adhered to in all cases, precisely because they arose from the free decision of reasonable contraction parties of sound judgement. Only a few marginal rules seek to protect those for whom the freedom of contract is

nugatory, as being economically inferior to the other contracting party or dependent on him in some other way. Thus contracts are void under §138 GCC if they are *contra bonos mores* or if one party has exploited the plight, inexperience, or lack of judgement of the other. In addition; contractual penalties may be modified by the court if they are unduly high (§343 GCC)"[3].

The moralisation of contractual relations was made possible by the famous `general clause' of §242 BGB, that every one must perform his contract in the manner required by good faith (Treu und Glauben)[4].

"The tort law of BGB still rests on the principle of liability for fault. So far as compensation for accidents is concerned, this principle has been greatly weakened both by statute and by judicial decision. There are special statutes for important types of accidents which grant the victim compensation for his loss without his having to prove any fault in the defendant. However, the general principle of liability for fault has also been altered in response to the growing need to protect large sections of the community from the distress and impoverishment which an accident may cause: here the courts have greatly improved the victim`s position in many ways- by vastly extending the duty of care, by treating the mere facts as evidence of fault, or even by openly reversing the burden of proof and sabotaging §831 GCC- to such a degree indeed that it is not easy in practice to distinguish between liability for fault and strict liability"[5].

The judges in Germany make judgements not only based on mere interpretation of the German Civil Code but also they use the case law. For example in the Chicken pest case the Federal Supreme Court reverse the burden of proof based on this land mark case the producer he himself prove that his product is free from defective.

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[3] *Ibid.* p. 155.

[4] *Ibid.* p. 156.

[5] Quoted in *Ibid.*

B. The Consumer and the German Liability system

Germany is basically a Civil Law country. Especially in the case of protecting the interests of the consumer it is evident that the case law plays a major role because the German legislatures hardly passed any bill in the field of consumer law apart from the transposition of EC Directives. Product liability is developed by the courts by using case law as well as on the basis of the tort law paragraphs of the German Civil Code, for example, the Federal Supreme Court shifted the burden of proof concerning negligence to the manufacturer in the Chicken pest case, 1968. Similarly the basic rule of consumer protection in the field of consumer credit is judge-made and based on one of the two general clauses of the German Civil Code, according to § 138 GCC, Under which an immoral contract is void. According to the Federal Supreme Court a credit contract is void in the sense of § 138 GCC if the interest rate agreed in the contract is double or more that of the average market interest rate at the time of the conclusion of the contract. Even the most important paragraphs of the Act against Unfair Competition and the Standard Contract Terms Act are general clauses, which must be put into concrete terms by case law. According to §1[6], § 3[7] of the Act against Unfair Competition and the §10, 11[8] of the Standard Contract Terms Act, however the general clause § 9 is most important because the Federal Supreme Court often declared clauses unlawful which were not designated as such in the grey or black list concerned. For example, §11 (1) of the Standard Contract Terms Act pronounces that a price-increase clause is unlawful if the contract is to be fulfilled not later than four months after conclusion of the contract. However according to the Federal Supreme Court price-increase clauses in long term contracts are not automatically lawful. They are under the control of the general clause of §9 with the effect that the customer must have the right to cancel the contract if the price increase is higher than the increase of general living costs. Therefore, though the general legal system is based on the Civil

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[6]Which is against unfair competition

[7]Which is against misleading advertisement

[8] „GREY", „BLACK" lists. Black lists contains more than two dozens detailed invalid contract terms. It is applicable only to the consumer transactions.

Law, the role of the case law is not ruled out especially in the field of the Consumer law. The following are the major consumer laws in Germany, which is shown with the help of a table 4.1.

Table No.: 4.1

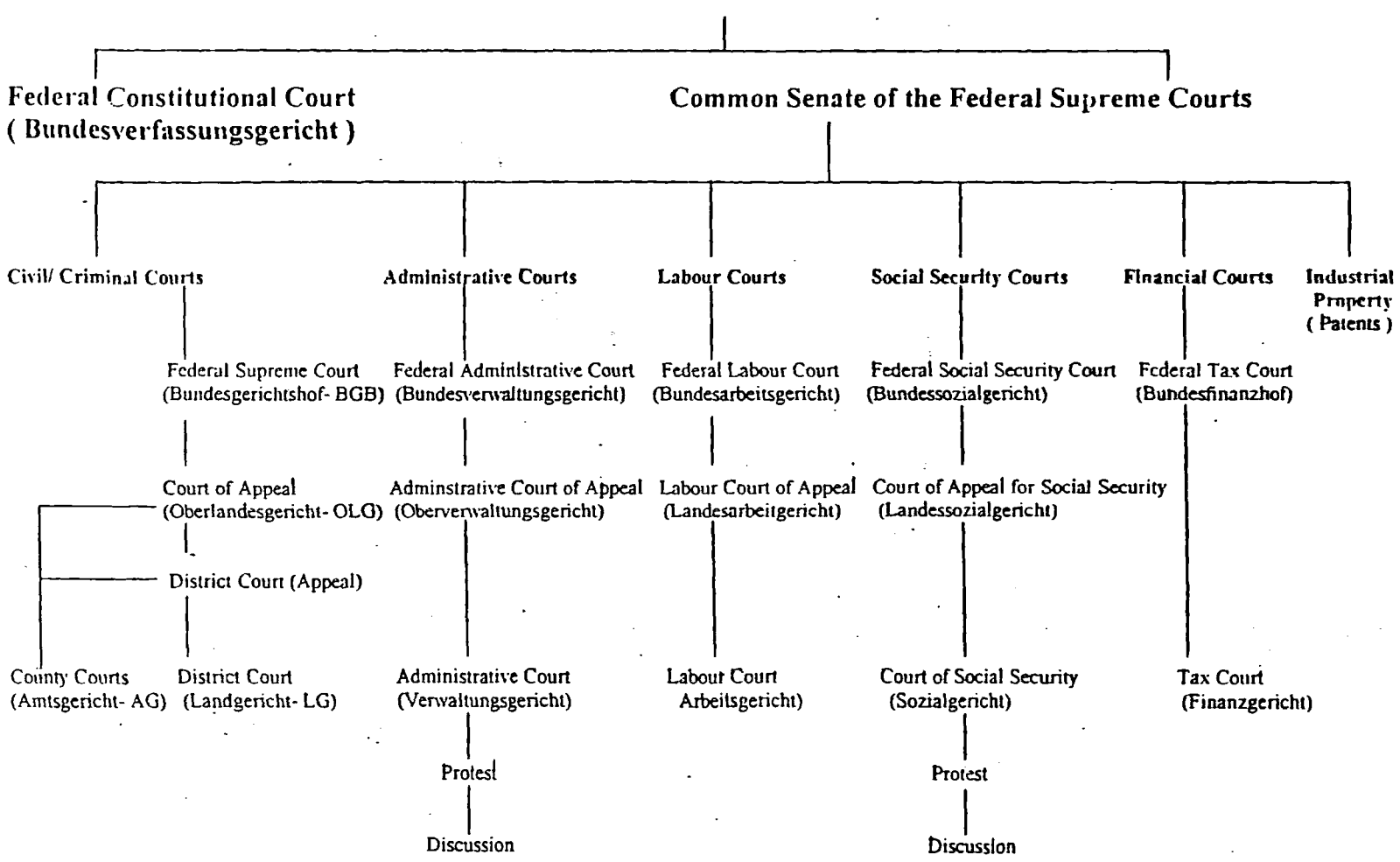
The Major Consumer Laws in Germany

Year Law	Main Provisions
1894 Hire Purchase Act (Abzahlungs gesetz)	The seller has obligation to pay back the instalments already paid by the buyer, if the seller with draws from the contract when the buyer has ceased to pay the instalments. In 1970's some remedies in favour of the consumer were added, e.g., the right of cancellation within one week.
1900 German Civil Code	It is a statute law some of the paragraphs of the Code, e.g. Contracts, Torts etc. related to the consumer law.
1909 The Act against Unfair Competition (Gesetz gegen unlauteren Wettbewerb, UWG)	Until 1965 it is only to protect the competitors. In its amendment it included that the rights of consumer organisations take action against business.
1976 The Standard Contract Terms Act (Gesetz zur Regelung des Rechts der Allgemeinen Geshäftsbedingungen, AGBG).	It relates to the Provisions of the standard contracts which are imposed on the buyer by the seller.
1986 The Doorstep Sales Cancellation Act (Haustürwiderrufsgesetz)	It pronounces the right of cancellation in door-to door sales and similar transactions.
1989 Product Liability Act (Produkthaftungsgesetz)	It protects the consumer from the product defects.
1992 The Equipment Act (Gerätesicherheitgesetz)	It is a kind of regulation, the producer must fulfil the standards of GS Mark in manufacturing a product.

1. German Court System

Chart No.: 4.1

Civil Court System in Germany



1. *Federal Supreme Court*

It is an Apex Court for both civil and criminal cases only[9]. It is divided into 10 Civil Senates and 5 Criminal Senates[10]. Each Senate consists of one presiding judge and four other Supreme Court judges. It reviews the cases of the Court of Appeal and the District Courts. Thus the Federal Supreme Court is not the finder of the fact and its review is confined to issues of law. The decision about permitting the review will not only depend

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[9]Germany has four other Supreme Courts such as Administrative, Financial, Labour and Social Security.

[10]The Grate Senate, which consists of President of the entire court and eight judges, will resolve the dispute:
a. whenever one of the Civil Senates wishes to depart from the case law of another Civil Senate or the case law of Grate Civil Senate itself; and
b. Whenever one of the Civil Senate is anxious that the Grate Civil Senate pronounces its opinion on a matter of particular significance.

upon the pecuniary and the non-pecuniary cases which do not exceed DM 60,000 and has to seek permission from the Court of appeal but also depends upon the work load of the Federal Supreme Court. However, the right of appeal exists only if the case was for technical reasons, deemed inadmissible by the Court of Appeal[11]. The Federal Supreme Court itself may refuse to review the case by a two-third majority if the case is not of fundamental importance of law[12]. Theoretically, the decision of the Federal Supreme Court is not binding to the lower courts [13].

2. *Court of Appeal*

It has appellate jurisdiction only. It reviews the cases from the District Courts and some times cases form the County Courts. The parties can utilise the leap- frogging procedure[14], if the both parties are keen to resolve their dispute in an early manner and they agree on the facts of the case but disagree only on the law. Thus, the Court of Appeal can be by passed and an appeal against District Court can be filed directly in the Federal Supreme Court.

3. *District Courts*

The District Court has both original as well as appellate jurisdictions on the decisions of the County Courts. However the appeals which exceed DM 1500 can approach the District Court otherwise the decision of the county court is itself final. The District Court receives the original cases, which not only exceed DM 10,000, but also cases of non-monitory matters other than family matters. The parties must engage a lawyer. The

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The conflicts of Civil Senates and the Criminal Senates regarding development of the law of its uniform applicability is resolved by the Combined Grate senates which includes from both Senates of the Court.

[11]This type of provision is mainly because of all parties have at least two chances of having their case heard by a court of law.

[12]§ 554b of the of Civil Procedure Code (ZPO).

[13]In practice, the lower Courts jury may follow the Federal Supreme Court decisions because of several reasons for example, in order to avoid the risks or in order to get higher positions. However, they can also some times prove that Higher Court judgements were wrong.

[14]§ 566a of Code of Civil Procedure

District Court is divided in to two chambers, each of which includes a presiding judge and two associates[15].

4. *County Courts*

The Local or County Courts will take the litigations up to the value of DM 10,000 and they also give verdicts on special matters such as land lord/ tenant, executors and trustees in bankruptcy, matrimonial and custody cases, and claims for maintenance, irrespective of the value of the litigation. Original cases related to rent would be filed in County Courts. Especially in County Courts, the parties are not necessarily engaging of a lawyer.

5. Federal Constitutional Court

The parties can approach the Federal Constitutional Court once their constitutional rights are not protected by the lower courts.

II. The Accessibility of Courts

Consumer law in Germany is enforced by government authorities, by individual consumers and by self-control. The application of criminal law only related to fraudulent trade practices. The legal advice to the consumer is regulated by the general provisions of the RBG (Rechts beratungmuß brauchsgesetz) of 1935.

1.*Litigation costs*

According to German procedural law the losing party has to bear not only legal costs of his own but also the costs of the opposite party. In the case of expert's advice or witness hearings, the loser has to bear the costs of the service of the experts. On the other hand, even if he wins the case there is a risk of not only collection of the compensation but also the legal costs which includes attorney fee, court fee etc. Generally the litigation costs

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[15]All are professional and academically trained judges except those sitting in the Commercial division (the Kammer für Handelssachen) which includes a professional judge as president and two laymen experienced in commercial matters.

will be based on the value claimed in the dispute. For example, a case involving DM 5000, litigation costs would be as much as DM 2182[16].

Thus the losing party has to bear DM 2182, if the case is necessary to go for expert or witness hearings, it costs even more. This policy of the loser having to pay the litigation costs to the winner may have its own merits and demerits. From the side of merit, it is a kind of deterrence to the parties approaching the court unless until there is genuine cause for claiming compensation from the tortfeasor i.e. it reduces the frivolous or vexatious claims. From the side of de-merit, the consumer as weaker party is unable to bare the costs of litigation and technical legal procedure when compared to the producer who is stronger party and has capacity to hire the skilful attorney and able to spend money in order to prove white cat as a black cat. Thus, it bars consumers from access to the courts, which is against the idea of social justice.

2. *Legal Aid (Armenrecht)*

In Germany as in India, there is legal aid[17] given to the poor plaintiffs in order to claim their compensation in the courts against the tortfeasor. However, this legal aid will be granted only after the satisfaction of two conditions, namely, that there is a fairly rigorous means test; and that the court must satisfy itself at a preliminary stage of the proceedings that the petitioner's allegations disclose prima facie case. The grant of legal aid does not affect the liability to reimburse the costs, therefore if a poor man loses the

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[16] Attorney fee:

1. Case filing	= DM	320
2. Argument	=	320
Telephone	=	40
Xerox & Stationary	=	20
Tax @ 15 per cent	=	111
Total	=	851
Court fee	=	480
Opposite lawyers fee	=	851
Grand total	=	2182

case; anyhow he has to bear the costs incurred by the opposing party[18]. Generally, skilful lawyers do not deal the cases, which are approaching the court based on Legal Aid.

The Act on Aid concerning Cost of Litigation (Prozeß- kostenhilfe) of 1979 provides financial assistance even to the higher income people, if they are unable to pay the litigation costs. However, they have to pay back this aid by reasonable instalments at most within 48 months.

3. *Case Disposal/ Dismissal by the German Civil Courts*

In Germany, the County Court has original jurisdiction, the District Courts has both original and appellate jurisdictions, and the Court of Appeal, the Federal Supreme Court only has revisional jurisdictions.

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[17]Legal aid means that the assisted is exempted from his costs and that a lawyer is assigned to him for provisional gratuitous safeguarding of his rights.

[18]§ 117 of the Civil Procedure Code.

Table No.: 4.2

The Cases Filed and Disposed by the German Civil Court

The Cases Filed and Dispossal by the German Courts												
					(% of cases disposed in Months)							
Courts		Year	Filed	Disposed*	3	3to 6	6 to 12	12 to 24	24			
		1991	1196881	1198999	54,90	25,80	14,50	4,20	0,70			
		1992	1261405	1200665	53,70	26,40	15,10	4,10	0,60			
County Courts		1993	1455094	1366092	53,10	27,10	15,10	4,00	0,60			
		1994	1456459	1465813	51,50	27,40	16,20	4,30	0,60			
		1995	1434600	1422781	50,80	27,10	16,50	4,80	0,70			
		1991	360462	358546	42,30	25,60	20,10	8,90	3,00			
		1992	386887	366655	42,60	25,30	20,00	9,00	3,20			
	Original	1993	357020	378247	42,20	25,30	20,50	8,90	3,10			
		1994	339283	342145	41,30	25,00	20,30	9,90	3,50			
		1995	335353	330594	40,20	25,60	20,90	9,50	3,80			
District Court										12~	24~	
		1991	84540	92553						49,00	91,00	
		1992	81425	83417						53,00	91,00	
	Appeal	1993	82455	81368						53,00	92,00	
		1994	91317	86625						51,00	92,00	
		1995	88920	87958						46,00	90,00	
		1991	58918	60032						24,00	69,00	
		1992	60313	59635						24,00	69,00	
Court of Appeal		1993	61077	60946						25,00	70,00	
		1994	57569	59024						22,00	69,00	
		1995	55361	56612						23,00	68,00	
		1991	4204	4534						6,00	28,00	
		1992	4161	4208						6,00	27,00	
Federal Supreme Court		1993	4761	4682						7,00	31,00	
		1994	5198	4972						8,00	30,00	
Sources: Compiled from Statistical Year Book 1996 & 1997 and Rechtspflege: Fachserie 10 From 1991 to 1995. Stuttgart, Metzler-Poeschel.												
* it includes pending cases of previous years.												
~ from the date of original filing.												

Table 4.2 reveals the cases disposed by the judgement of the Civil Courts at different levels from 31st December 1991 to 31st December 1995. The County Courts and also the District Courts (original jurisdiction) have disposed 95 per cent of the cases within a year.

In the case of appeals, the District Court accounted 90 per cent, judgement of the Court of Appeal accounted between 68 to 70 per cent, and the Federal Supreme Court accounted in between 27 to 30 per cent of the cases were disposed within two years (from the date of original filing in lower courts).

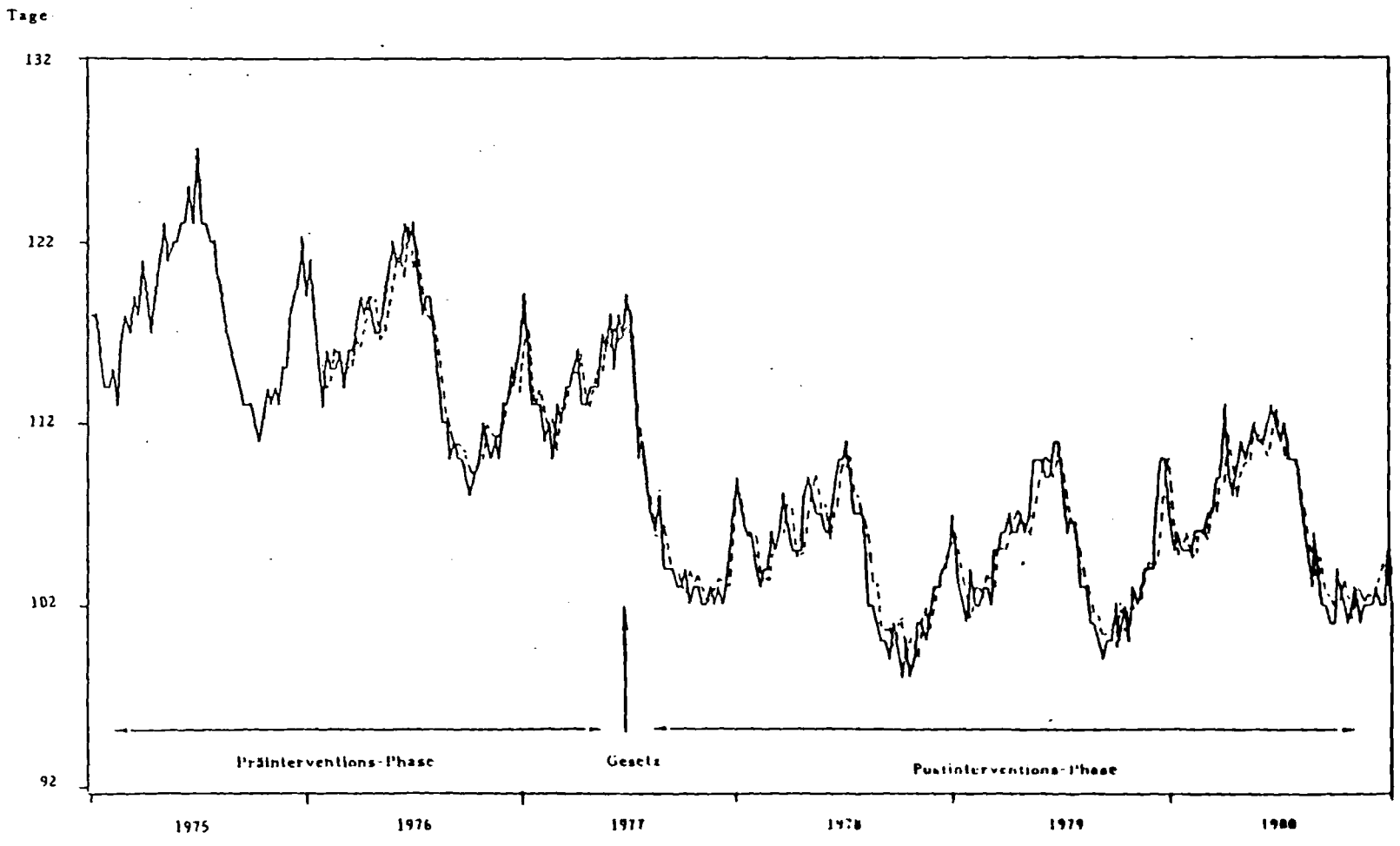
It shows that the liability system in Germany is more effective in the case of disposal of original cases than the disposal of appeals. The reasons for low pending rate at civil

courts may be because of separate court for appeals i.e. Court of Appeal, or because in the smaller (involving less than DM 1500) cases the decision of the County Court itself is final, or in cases up to DM 60000 the decision of the Court of Appeal is final.

4. *The Act, 1977*

Graph No.: 4.1

Changes in Cases Disposal: Before and After the Act of 1976



Source: H. Rottleuthner and M. Rottleuthner- Lutter, Die Daur von Gerichtsverfahren, Baden-Baden, Nomos Verlagsgesellschaft, 1990, p. 248.

There is a tremendous change in the disposal of cases very quickly by the German courts after enactment of "Gesetz zur Vereinfachung und Beschleunigung gerichtlicher Verfahren" in 1st July 1977 by the parliament. The main policies are flowing from the Act that the case should be disposed within one sitting of the court, that the judgement should be within three weeks and that compensation is possible before final verdict of the

case (Erleichterungen in Fällen vorläufiger Vollstreckbarkeit). The courts give interim orders for either partial or full compensation.

C. Consumer Protection: The Role of Insurance

The social security insurance prevails from the Bismarck period. Generally, in Germany there are two groups of insurance systems. They are Public insurance; and Private insurance with and without compulsory provision.

I. Public Insurance

Public insurance is a kind of social insurance. The compulsory work accident insurance for employees is part of the social insurance system (gesetzliche unfallversicherung).

Health insurance is a complex mixture of social insurance and private insurance. For example, self- employed professionals are not subject to social insurance but may obtain coverage voluntarily from a private insurer. At the same time the employed persons included in the social insurance system may choose to obtain the required coverage and supplementary coverage from a private carrier rather than the general sickness funds set up by the Government.

II. Private Insurance

Private insurance with compulsory insurance means that the citizens of Germany must purchase an insurance on their own for example, Motor Vehicle insurance. On the other hand, private insurance with non- compulsory insurance, for example Lawyers insurance (Rechts Schutz Versicherung). The insurance system especially social security insurance seems to be playing a major role in protecting the interests of the consumers. For example, in the case of health insurance, the doctor services will be paid by the insurance that means that the cost of the health damages of a patient will be paid by the insurance. At the same time if the consumer wants to get the compensation for pain and suffering

and other immaterial damages, it is not covered by the health insurance, and he must approach the court based on negligence rule under the German Civil Code. Thus, whenever a consumer has health problems due consumption of adulterated food, immediately he or she will approach the doctor because the Social Security System will cover the costs and also he or she does not wants to face risks by approaching the court, for example litigation costs and technical legal procedure. However, in the case of claims against pain and suffering the victim has to approach the court because it will not be covered by the social security system. The insurance companies may also fall under the rational apathy principle[19] because they will recover the costs through premiums unless until there is a heavy claim.

In general, in Germany, the insurance company settles most of the cases out of court or health costs are covered by the social security (Krankenkasse). There are a very few test cases like Honda, Milupa I, II & III which went up to the Federal Supreme Court.
On the one side, the social security insurance system either directly or indirectly protecting the interests of the consumer by paying the costs of the health damages and the consumer those who are unable to offer the services of the courts are mostly benefited from the insurance. In contrast, there is a possibility of influence of the legislature in framing rules and regulations according to the interests of the insurance companies. For example, the rule of fixing a fee for legal advice as DM 350[20]. Last but not the least, there is one question regarding the whole insurance that is WHOSE MONEY GOES TO WHOM?

D. The Role of Consumer Organisations in Germany

The consumer institutions in Germany are subsidised or sponsored by the government. The consumer organisations, which are based on representation, are as follows:

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[19]The victim does not have any incentive to approach the court because individual claims are lesser than the aggregate claims and he or she may not want to face the complexity in legal procedure.

[20]In order to get the attorney fee, in some cases attorneys have to do a lot of correspondence with the insurance company. The attorney's who are not co-operated with insurance company some times face a tough time. In the long run there is possibility of insurance company act as an agent for the attorney's in the case of legal advice.

Association of Consumers (the Arbeitsgemeinschaft der Verbraucher- AgV), which is an umbrella organisation. The main function of this is articulating the consumer's interests in a political way and advising the government as well as other organisations on these matters at a national as well as European level.

Consumer Centres of the German States (Verbraucherzentralen der länder)- its main function is related to consumer counselling, education, legal advise and to bringing collective actions under the Act Prohibiting Unfair Competition (the Gesetz gegen den unlauteren wettbewerb- UWG) and the Standard Form of Contract Act (the Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen- AGBG).

Consumer Institute (Verbraucherinstitut), which is designed to develop advanced training programmes for personnel engaged in consumer counselling.

Stiftung Warentest which is in- charge of the product testing system.

The Consumer Protection Association (Verbraucherschutzverein) which is relatively independent and central consumer protection institution.

There are other representatives of the consumer's interests, for example the Associations of Motorists (Allgemeiner Deutscher Automobilclub- ADAC), which influence the manufacturers of the automobile regarding production, testing, safety regulations etc., and co-operate in the drafting of contracts for the sale or repair of motor cars.

In Recent years the Federal Government has withdrawn from providing financial assistance to the Consumer Centres of the German States, affected the activities of the consumer organisations in order to protect the interests of the consumers by the consumer organisations. The Federal Government policies regarding the protection of the interests of the consumer was summarised in the Consumer Reports of 1971 and

1975[21]. Generally, the Ministry of Economics at the Federal and State Government level are responsible for consumer policy.

E. Product Liability and the German Civil Code

Product liability claims in Germany may be based on contracts and torts. Contract law applies only between parties who have entered into some sort of privity of contract. Tort law applies to anyone who has suffered injury or loss from a defective product.

I. Contractual Liability

The German Civil Code- GCC (Bürgerliches Gesetzbuch -GCC) pronounce that the contractual claims in law of sales (Kaufvertragsrecht) are based on guarantee (Gewährleistungsansprüchte) for breach of which the seller is strictly liable (not necessarily for damages). However, in the case of positive breach of contract (positive vertragsverletzung) and pre-contractual breach (culpa in contrahendo) the seller is liable based on negligence rule.

Under GCC, the buyer of a defective product can get remedies like rescission (Wandelung)[22] damages for the diminution in the price of the product (Minderung) and

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[21]The 1975 report demands that the consumer should be active and that freedom of consumption and contract is protected. The objectives of consumer policy are as follows:
- Strengthening of the consumer's position on the market through the maintenance and promotion of workable competition in all sectors of the economy;
- Information and advice to the consumer on basic economic connections, current market tendencies, proper market behaviour and economical house keeping;
- Improvement of the consumer's legal position and protection of the consumer against deception, unfair sales practices and contract terms which are unreasonably prejudicial to him;
- Safeguarding the supply of foodstuffs which are optimal in terms of quality and quantity, at the best possible prices;
- Comprehensive protection of the consumer against risks to his health and an environmentally acceptable design of production and products;
- Best possible supply of the customer with public services;
- Safeguarding the supply of low-cost housing with optimum town planning conditions being taken into account;
- Strengthening and streamlining of the bodies protecting interests in terms of consumer policy and safeguarding the consumer's interest in the case of quality labelling and standardisation.

[22]Under a Werkvertrag in Germany, however, the buyer of a goods made to specifications does have a right to demand the removal of defects (§ 633 GCC).

replacement delivery (Ersatzlieferung) for breach of § 459 (1) GCC. The purchaser can claim damages if he has been wilfully deceived by the seller, or if the product is lacking specific characteristics which have been the subject of an express or implied representation by the seller (§ 463 of GCC).

It is difficult to draw the distinction between the claims for damages of a contract for work and services and a product liability claim based on the same defects. However, courts have made the distinction: damages that can be claimed based on GCC § 635 have been limited to damage directly connected with the result of the work where as damage done to other objects as a consequence of the defective work can only be compensated if product liability applies.

If breach of contract is relied upon within a contract for work and services, claims based on breach of contract become statute -barred only after 30 years.

1. *Remedies for Non-conformity of Goods* (Gewährleistungsansprüche): §459 GCC

If the quality of a product supplied under a contract of sale is deficient, liability is regulated primarily by the agreement of the parties. It is only when the parties fail to make provision for the occurrence of an event in the contract or if what they have agreed is for some reason invalid, that the provisions of the GCC become relevant.

A product may be deficient because it may be either defective[23] or a warranted attribute may not be present [24].

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[23] § 459 (1) GCC (Liability for defect):
The seller of a thing warrants the purchaser that, at the time when the risk passes to the purchaser, it is free from defects which diminish or destroy its value or fitness for its

[24] § 459 (2) GCC:
The seller also warrants that, at the time the risk passes, the product has the attributes promised.

2. *Independent Guarantee*

The producer or seller will give independent guarantee to the buyer on the attributes of the products, for instance, a producer of a car will give guarantee to the buyer that his car will be free from rust for 10 years. In such a case if the product is not according to the guarantee then the buyer can get the remedies through the court.

3. *Defect* (Fehler)

A product can be defective either because of a physical defect within itself (objective defect) or because it is not appropriate for intended purpose under the contract (subjective defect)[25].

If goods are delivered other than those agreed upon (*aliud)*, there is no claim under § 459 (1) GCC[26]. The right cause of action is rather specific performance under §433(1) GCC.

Under § 459 (1) GCC second sentence, an insignificant reduction in value or an irrelevant effect on use is not a defect[27].

The warranty is that the product sold is free of defects generally impose strict liability upon the seller. Under § 462 GCC, the purchaser may either rescind the contract or

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[25]Palandt, O. Bürgerliches Gesetzbuch CH Beck Munich 49th ed. 1990 - putzo § 459 (3) Fehler (a) Begriff; BGHZ 16, 55; RGZ 161, 333ff; Medicus, D. Bürgerliches Recht Carl Heymanns Verlag KG Berlin 1987 at 185.

[26]Jauernig, O Kommentar zum BGB CH Beck Munich 1987 - Vollkommer § 459, 2. Arten, (b) Artabweichung; 3. Abgrenzung, (a) Falschlieferung. There is one exception, however, and that is when it is a commercial transaction (see § 378 HGB). Quoted in Jocelyn M. Kellam, *The Contract-Tort Dichotomy and a Theoretical Frame work for Product Liability Law: A Comparison of the elements of liability in Product Liability Law in Australia, France and Germany*, unpublished Ph. D. Thesis, Sydney, University of Sydney, 1996, p. 234.

[27]Use of trade is the relevant test. If it is a temporary defect disappearing by itself or can be removed without effort it is not significant; Palandt, Bürgerliches Gesetzbuch.

reduce the purchase price in correspondence with the diminution in value of the defective product, which is calculated under §472 GCC[28].

Generally with rescission, the purchaser returns the goods in exchange for the refund of the purchase price with interest, less any value the purchaser has obtained under the contract. Recession is not prevented however, by the fact that the subject matter of the sale has been destroyed or that its condition has deteriorated, unless the destruction was due to the fault of the purchaser.

Under § 480 GCC, the purchaser can also demand the subsequent delivery of substitute goods (Nachlieferung)[29]. It is applicable only if the good was one of a generic type. The seller's obligation under § 243 GCC and §360 HGB is then to deliver a substitute good of that type of average kind and quality[30]

4. *Remedies for misrepresentation* (Haftung zugesicherte Eigenschaften)

Warranty claims are based on the fact that the purchaser should receive a product which is free from defects and which can be used fully for purchaser's purpose. Under GCC, the sellers representations concerning the specific qualities of the product only in connection with warranty claim and do not cover the consequential damages.

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[28] Kellam, (1996), pp. 235, 236.

[29][§ 480 GCC (purchaser of generic goods):
(1) The purchaser of an object described only by its class may demand, instead of rescission or reduction that in substitution for the defective good, one free from defects be delivered to him. The provisions of §§ 464 to 466, of § 467 sentence 1, and of 33 469, 470, 474 to 479, apply *mutatis mutandis*].

[30]§ 243 GCC (Generic Obligation):
(1) If a person is obliged to supply an object described only by class, he shall deliver an object of average kind and value.
(2) If the person has done whatever is necessary on his part for the delivery of such an object, his obligation is limited to that object.
§ 360 HGB (Generic obligation):
When merchandise received is described only by class, then merchandise of average description and quality shall be delivered. Kellam, (1996), pp. 236, 237.

Under §459 (2) GCC when read conjunction with §463 GCC or §480 (2)[31] GCC the seller is liable for damages for non-performance (Schadensersatz wegen Nichterfüllung) if attributes warranted by it to be present in the goods are absent. Such terms constitute a contractual warranty (vertragliche Grantie) as to the quality of the goods. Remedies under §462 GCC (rescission, diminution in value) are alternatively available, as is substitute delivery in the case of a generic sale. Under §463 GCC seller may also be liable for consequential damages.

Warranties need to be a term of the contract to be actionable. A warranty need not be stated expressly. It can be implied from the circumstances. A purchaser may return the goods and seek damages for non-performance under §463 GCC based on the absence of a warranted attribute. The purchaser who sues for compensation to cover loss occasioned by the absence of the warranted attribute is then entitled to be placed in the same position they would have been, had the contract been properly performed. The basic principle of compensation under §249 GCC is restitution[32]. A purchase making a claim based on guarantee, must prove the existence of the warranty (or fraudulent concealment of the defect by the seller) and the sub-standard nature of the good[33].

Klaus-Ulrich Link Esq and Thomas Sambuc (1997) have categorised three Groups of typical cases, which are of great practical importance:

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[31] §463 GCC (Spezie: specific goods) damages for non-performance:
If a specific express representation attribute was absent from the good sold at the time of the purchase, the purchaser may demand damages for non-performance, instead of rescission or reduction. The same applies if the seller has fraudulently concealed a defect.
§480 (2) GCC (Gattungskauf: generic goods):
If, at the time at which the risk passes to the purchaser, a warranted attribute was absent, or if the seller has fraudulently concealed a defect, the purchaser may demand damages for non-performance instead of non-performance instead of rescission, reduction or replacement deliver of a good free from defects. *Ibid.* p.238.

[32] The plaintiff should be placed in the same position had the breach of contract not occurred. *Ibid.* pp. 239, 240.

[33] BGH BB- 1967, 903- "Trevira". *Ibid.* p.240.

i. "The seller's statements are considered a valid representation, if he realises that the quality in question is of particular importance for the buyer in regard to a particular purpose or use of the product[34].

ii. It is not sufficient, if the sales contract refer to specific industrial standards (like DIN standards)[35].

iii. There is a tacit representation that the seller of a processed article has carried out the processing in accordance with the general customs of his trade[36b,37].

In the case of liability for representations of quality, the buyer has to prove that the product did not comply with the seller's representation once he accepted the sales. Object otherwise the seller must show and prove that the product complied with his representations until the product is handed over to the buyer.

The limitation period for the claims based on the absence of represented qualities or breach of contract are subject to a period of six months after delivery, provided that they are raised within a sales relationship.

5. *Commercial Transactions* (Handelsgeschäfte: HGB)

Provisions contained in the Commercial Code modify the foregoing provisions of the GCC for commercial transactions. The HGB imposes an obligation on a merchant to immediately examine the goods on receipt and notify the seller of defects (§ 377 HGB). It applies when both parties to a transaction are merchants and the sale is a commercial transaction for both parties[38]. Commercial transactions are those of a merchant

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[34][BGH in WM 1971, 1121/1123- `Zucker'].

[35][BGH in NJW 1981, 1501- `Gleichstrom-Nebenschlußmotoren'].

[36][BGH in NJW 1988, 1018 - Garne'].

[37] Klaus-Ulrich Link Esq and Thomas Sambuc, "Federal Republic of Germany", in Patrick Kelly and Rebecca Attree (ed.,), *European Product Liability*, London, Butterworths, 1997, 2nd ed., pp. 166, 167.

[38]§HGB (Merchant by vertue of type of business):
(1) A merchant within the meaning of this Code is a person who carries on a commercial enterprise.
(2) Every business enterprise which has as its objective one of the kinds of business indicated below, is deemed to be a commercial enterprise:

connected with the operation of his business[39] including secondary transactions relating to personnel, equipment, supplies and financing. By virtue of §377 HGB[40], a merchant who purchases goods as a part of a commercial transaction is obliged to examine them without delay after receipt to establish if any defects are present. The seller must then be notified without delay of any defects, it depends on the facts, but case law indicates two weeks seems to be the maximum period within which notice must be given. It will vary according to whether the defect is latent or obvious. The burden of proof rests on the purchaser to establish the elements of § 377 HGB, being the defective nature of the good and compliance with the examination and notice requirements. Alternatively, the merchant's fraudulent concealment of the defect must be proved.

6. *Positive Breach of Contract* (Positive Vertragsverletzung)

The German Civil Code deals only with the inability to perform (Unmöglichkeit) and delayed performance (Verzug). The misperformance is not regulated in the GCC but was developed by the case law (Rechtsprechung)[41] to fill these gaps in the provisions of the GCC (Gesetzeslücke). Positive breach of contract which also known as infringement of an obligation [Forderungsverletzung (pFV)], covers all culpable failures to fulfil contractual obligations, the reason for which is not delayed or impossibility, and which

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1. The acquisition and resale of chattels (merchandise) or of securities, without distraction as to whether the merchandise is resold unchanged, or after treatment or processing;
2. The acceptance for treatment or processing of merchandise for others, provided that the enterprise is not carried on as artisan one'. Kellam, (1996), pp. 240, 241.

[39]§343 (1) HGB (Concept of commercial transaction):
" Commercial transaction" encompasses all transactions of a trader, which belong to the operation of his business enterprise... *Ibid. p. 241.*

[40]§377 HGB (Duty of examination and notice of defect):
(1) If the sale is a commercial transaction for both parties, the buyer should examine the goods immediately after their delivery by the seller, to the extent that this is a practical in the ordinary course of business, and if a defect is found, he should notify the seller without delay.
(2) If the buyer fails to give notice, the goods are accepted, unless the defect is one, which was not apparent on examination.
(3) If such a defect appears later, the notice must be given immediately after the discovery; otherwise the goods are deemed to be accepted also in regard to this defect.
(4) The sending of the notice within the time specified is sufficient to preserve the rights of the buyer
(5) If the seller has fraudulently concealed the defect, he may not invoke these provisions in his favour. *Ibid.* p. 242.

[41]Eine Gesetzeslüke: RGZ 54, 98; BGHZ 11, 83: DB 1972, 1355. *Ibid.* p. 243.

are not covered by specialised provisions in the GCC (such as §§ 459 ff. GCC). Positive breach of contract are breaches of general legal obligations like duty of preparation; custody; instruct; co-operate and other duties of care. Sellers, however, are not in general under a duty to inspect goods before supply[42].

The duty of care is owed to people who are directly and intentionally affected by the performance of the contract. Therefore, its protective ambit extends to family members and employees.

An example of the operation of positive breach of contract in product liability law is:

- Failure to inspect- the „ Propangas- Flaschen" decision (BGH DB 1972, 1335); and
- Failure to advise- the „ Verzinkungsanlage" decision (BGH NJW 1983, 392).

If positive breach of contract is established, the injured party has a claim for compensation for the damage suffered as a consequence of the breach.

The general provisions regarding impossibility and delay are not applicable if specific goods are defective on delivery, but the rules of `positive breach of contract´ may be. If generic goods prove to be defective when delivered, the purchaser has a choice: he may exercise the claim arising from guarantee if he chooses, but instead he may assert that the delivery of the defective goods was not a performance of the contract, call for delivery of sound goods, and, in proper circumstances, exercise his rights under §326 GCC[43].

7. *Pre-contractual duties* (Culpa *in Contrahendo*)

It has only a limited role in product liability because losses and injuries are caused by defective products generally only after the product has been sold and not during the pre-contractual stages. However, it may apply during the test phase of a product or when duties concerning proper instructions have been violated. It has been described as liability

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[42]BGH 6.11.56; VersR 1956, 359. *Ibid.* p. 245.

[43] Zweigert/ Kötz, Introduction to Comparative Law, 1987 (translated by Tony Weir), p. 532.

for disappointed trust [44]and it does not encompass negligent representation or silence by the seller about characteristics of the product which are governed by § 459 GCC or § 463 GCC[45]. Even though a seller is not obliged to make full disclosure to a purchaser of all matters which may impact on his decision to buy a product, such an obligation may exist when silence offends the principle of good faith (Treu und Glauben)[46].

The limitation period for claims based on pre-contractual duties is subjected to a period of 30 years.

The plaintiff, relying on pre-contractual duties or breach of contract, bears the burden of proof. He must also prove the amount of damages he claims.

8. *Calculation of Damages*

Klaus-Ulrich Link Esq and Thomas Sambuc (1997) explain in detail the methods abd provisions relating to the calculation of damages. Under § 249 GCC, "the claimant must be put into the position he would be in, if the circumstances giving rise to his claim for damages had not occurred".

In the case of pre-contractual duties, "damages will not comprise the claimant's interest in the performance, but only his interest in the integrity of his vested rights".
In the case of unwarranted representations with respect to the product's quality, "the seller will have to put the buyer into a position he would have been in, if the product had in fact had the represented qualities".

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[44] "Eine Haftung für enttäuschtes Vertrauen" - BGH NJW 1981, 1035 cited Westphalen, v. F. Produkthaftungshandbuch CH Beck Munich 1991 at 75. Kellam, (1996), p. 247.

[45]BGH NJW 1973, 1234. *Ibid.*

[46]It applies only when the seller is also the manufacturer and distributor of the products. See Westphalen, v. F. Produkthaftungshandbuch CH Beck Verlag Munich 1991 at 75.

The pure financial loss can be recovered only under breach of contract but not under the tort[47].

9. *Limitation of Liability*

Klaus-Ulrich Link Esq and Thomas Sambuc (1997) explain the limitations in the following terms:

There are two types of contracts such as general terms and conditions of sale, and specific contract. Under §1 AGBG (Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen) defines the concept of general conditions. Under §1 II AGBG, conditions are not considered general if they have been negotiated individually between the parties. The authorities of the judiciary to hold certain clauses invalid is greater when these clauses have been used in contracts with consumers than in contracts with business people[48].

10. *Vicarious Liability*

"The seller or contractor is liable for negligent acts of the person he employs to the same extent that he himself would be liable, if he were at fault himself"[49].

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[47]"The Federal Supreme Court decision on 'Hebebühne' (BGH in NJW 1983, 810) represents these types of damages recoverable under the breach of contract. Lifting gear, which had been sold, to an auto repair shop had broken down, because it had been defective. As a consequence of this breakdown, a car belonging to the shop owner was destroyed, and the repair shop could not be used for a lengthy period of time. There are two types of damages:
- The destruction of the owner's car is a typical property damage, which can be recoverable both under breach of contracts as well as tort.
- The impossibility of using the repair shop leads to pure financial loss, which is recoverable only under breach of contract. It is applicable if the destroyed car had not belonged to the owner but to another customer". Quoted in Link Esq and Sambuc, (1997), pp. 170, 171.

[48] *Ibid.* pp. 172, 173.

[49] § 278 GCC
The seller or contractor held liable for product liability is responsible for any fault of a person employed by him in the performance of his obligation. *Ibid.* p. 174.

"A person who is not a party to the contract may nevertheless claim damages from the seller or contractor based on contractual product liability, if the contract has been concluded for his benefit". However, "contracts for the supply of goods are generally not considered to benefit third parties. Thus, the ultimate consumer does not benefit from the contractual duties the producer owes to the dealer"[50]. At the same time, the purchaser's employees and the family of the purchaser "in a contract for works and services have been considered protected as third parties". It seems to be "the contractual protection granted to third parties, which is more effective than the protection arising in tort upon which third parties would normally have to rely"[51].

II. Tortious Liability

Most of the consumers those who suffer damage from defective products are not contractually tied to the manufacturer. Thus, they have to rely on tortious liability. § 823 (1) and (2), and §826 GCC are the most relevant provision for tortious product liability in Germany.

1. *§823 (1) GCC* (unerlaubte handlung/ proscribed act)

In order to claim the compensation based on § 823 (1) GCC[52], the following requirement must be fulfilled:

1. There must be a violation of a legal interest (Rechtsgut) as the result of breach of a publicly recognised obligation to take due care (Verkehrssicherungspflicht);

2. Damage (Schaden);

3. A causal link (Ursächlichkeit) between the breach of obligation and the damage; and

4. Intentional (Vorsatz) or negligent (Fahrlässigkeit) culpability[53].

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[50]BGH in BB 1989, 20.Quoted in *Ibid.* p. 174

[51] *Ibid.* pp. 174, 175.

[52]§ 823 GCC (Duty to compensate for damage):
(1) A person who intentionally or negligently, unlawfully injures the life, body, health, freedom, property or other right of another is bound to compensate him for any damage arising therefrom.

[53] Kellam, (1996), p. 284.

Under the GCC the protected interests are:

a) "Life (Leben) has been violated if a human being has been killed. Life, according to the GCC, starts with birth.

b) Violations of body (Körper) and health (Gesundheit) will mostly be the same, except in cases where mental health is impaired[54].

c) Property violations considered every damage, deformation, destruction or deprivation, every functional disturbance or interruption, pollution or contamination, even changes of the physical condition or physical danger which prevents use[55]. The land- mark decision by the Federal Supreme Court on violation of property is Floating Switch[56] in 1976. A property violation has also been found where only the removal of a defective part has led to destruction of the quality part[57]. These rules are of particular importance in the construction industry. Whenever a defective part becomes indistinguishable within the entire product as consequence of its being united, welded, glued, riveted, etc., into the new product, its function cannot be distinguished any more from that of the entire product, and consequently there is no room for the defective part inflicting property damage on the entire product.

d) Other rights (sonstiges Recht) are the rights of possession and of business operation, but not financial assets per se"[58].

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[54]If the health of an unborn child is damaged, for example- by pharmaceuticals when the mother has taken during her pregnancy, the child may claim damages after birth. See BGH in NJW 1972, 1126.

[55]Kullmann/Pfister KZA 1520, pp. 9,10.

[56]BGH in NJW 1977, 379- `Schwimmschalter'. "The seller had supplied a cleaning installation. The entire installation caught fire and was destroyed because a small floating switch was defective. This switch had been part of the sales object, and if the sales object had been taken as a whole, there would have been no room for a product liability claim, since the sales object (taken as an entity) had been defective to begin with. However, since the function of the floating switch had been clearly defined within the entire installation, the court saw fit to distinguish between this small element and the remaining installation and held that the property in the latter had been damaged by the defective switch". Link Esq and Sambuc (1997), p. 176.

[57]BGH in NJW 1992, 1225.

[58] Link Esq and Sambuc (1997), pp. 175-176.

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[58] Link Esq and Sambuc (1997), pp. 175-176.

2. *Unlawfulness*

In general, the manufacturer is under obligation to distribute only safe products. It is based on generally stated care i.e., one who creates a source of danger must also take preventative measures to protect third parties from it[59]. The distribution of unsafe or defective products is unlawful[60].

3. *The Duties of Care on the part of the Manufacturer*

Under § 823 (1) GCC, liability is a fault- based liability. The breach of duty of care must be either intentional or negligent. Intention involves a conscious and desired action or a sanctioned inaction. Negligence is defined in § 276 GCC as a disregard of a Standard of care. The manufacturer has various duties of care. They are.

- Manufacturing Defects
- Design Defects
- Warning Defect
- Insufficient Post- marketing Surveillance

a. "Manufacturing Defects- it occurs during the manufacturing process. It must be organised in such a way that it allows products to be made to a consistent, flawless quality. Raw materials and partially finished products have to be selected carefully and must be checked for defects before using them in one's own manufacturing process. Since manufacturing defects can often not be completely avoided, there must be a verifiable quality control. Depending on the risk involved in the event of a possible undetected flaw, quality control may be limited to random samples, or may include every single product"[61].

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[59]Schmidt-Salzer, J. Produkthaftung J Schweitzer Verlag Berlin 1976 at 50.

[60]Unlawful conduct is one of several presuppositions of a tortious product liability claim.

[61] Link Esq and Sambuc (1997), p. 178.

"A manufacturing defect was at issue in the land mark chicken pest decision of 1968 where the Federal Court developed the principle of the reversal of the burden of proof. Chicken pest serum was said to be contaminated, thereby causing the death of several thousand chickens of the plaintiff (chicken farmer). In this case, the plaintiff only had to prove that the defect arose in the process of manufacture of the vaccine, not because the manufacturer or his employees acted negligently"[62].

b. Design Defects- Designers of a machine must safeguard against blunders or mistakes by the future machine operator. „In this case all products manufactured by the producer are considered to be defective because he used for all his products a design or composition which does not provide the safety one might reasonably expect. The consequences of a design defect can be crippling massive recalls, costly modification, and loss of reputation and sales, even going out of business. Once one victim has successfully sued, there can be a bandwagon effect. This is exactly what happened when claims were brought in the United States of America against the German vehicle manufacturer of the Audi on the ground that a design defect was responsible for the risk of an unintended acceleration of the car out of the driver's control" [63].

In the case of product designs the manufacturers must comply the regulatory standards. However, the Federal Court frequently has insisted that the mere fact that a product confirms to regulatory standards or product licences is no defence. Usually, the court will try to avoid setting its own standards of safety design but insist on adequate instructions and warnings.

c. Warning Defects- the manufacturer and the seller of a product must give proper warnings to the user in order to avoid risks. The duty to warn covers three related issues:

- To warn the user against the hazards associated with the product;

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[62]Prof. Norbert Reich, German Product Liability Law: Before and After the Enactment of the EC Product Liability Directive, Bremen, ZERP. (Unpublished Work), p. 4.

[63]Kötz, H. Recent European Legislation on Product Liability Law, Max- Plank- Institute, Hamburg (Unpublished Works), p. 6.

- To instruct the user about the safe usage, operation and maintenance of the product; and
- To inform the user about the consequences of failure to heed those warnings and instructions.

An example is the Honda decision[64]by the Federal Supreme Court where the manufacturer was held liable because the warning duty applies also to accessories which have not been attached to the product by the manufacturer but which might foreseeably be attached by the user[65].

Since 1990, there have been numerous law- suits against the producers of sweetened children's tea, in which the proper warning of possible damages was at stake. The cases are Known as the `Baby-Bottle- Syndrome´ or `Nursing-Bottle- Syndrome´ or `Milupa´ cases[66]. On the first decision, the court made it clear that health warnings must not be mixed with directions concerning the dispensation. Since sweetened children's tea had been known to cause cavities for many years, the sellers of this tea were held liable for damages[67].

In another decision, the Federal Supreme Court has required that the extent of the warning must take into consideration the most endangered user group. Consequently, the

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[64]BGH in WM 1987, 176.

[65]"The decision deals with a motorcycle windshield spoiler, which had not been a standard feature of the motorcycle. Instead, it had been made by a company which was not related to Honda and which sold its products independently. At a certain speed, this windshield spoiler led to an instability of the motorcycle, which caused a serious accident. The defendant in this lawsuit was not the producer of the spoiler, but Honda. The court held Honda liable, because they had not appropriately warned the buyer of the motorcycle of the consequences that an additional windshield spoiler might have for the stability of motorcycle riding. The court stated that the producer of a motorcycle must not only safeguard the proper functioning of parts and accessories that are necessary to operate the motorcycle to begin with. The same apples to accessories the use and the attaching of which the motorcycle producer has made possible by providing drill holes, lugs, fixing devices, mountings or the like". Link Esq and Sambuc (1997), p. 179.

[66]"Sweetened children's tea had been sold in plastic bottles that could be sucked with a mouth- piece, which fitted the child's jaw. Thus, the teeth were totally rinsed with sweetened tea, the naturally protective saliva was washed away and cavities were caused quickly. It has been discussed among dentists since 1981". *Ibid.*

[67]BGH in NJW 1992, 560- `kindertee I´. *Ibid.*

attention of consumers who do not read product instructions any more due to continuing use of the product has to be caught as well[68].

"Another decision dealt with a variation of the `Baby- Bottle- Syndrome', where carrot juice had been sold in bottles with a mouthpiece which again directed the juice behind the teeth, where the fruit sugar converted to acid and destroyed the protective layer of the dental enamel. Even though the court was not completely satisfied with the warning the manufacturer was not held liable where he had applied a conspicuous warning (Important) on the container"[69].

Warnings relating to product risks or side effects[70]should identify the nature of the danger. Whenever risks arise against body or health due to product misuse this also must be clearly specified[71]. Further, manufacturer should not only warn of dangers originating from their product but also about risks which are associated with its use[72].

In general not all dangers must be the subject to warning. If the average consumer is aware of risks associated with a special type of equipment only additional or those, which are not apparent need to be warned against[73]. In the case that the equipment is to be used only by qualified personnel the duty to warn is lower[74].

A producer is under a duty of care to select materials, machines, processes and employees carefully. He is also obliged to institute quality procedures to identify defective goods before they are placed on the market. Under the assumption that the

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[68]BGH in NJW 1994, 932- `Kindertee II'. *Ibid.*

[69]BGH in NJW 1995, 1286- Kindertee III.*Ibid.* p.180.

[70]In "*Haartonicum*" decision the Federal Supreme Court pronounced that the manufacturer held liable due to failure to warn of possible allergic reactions. BGH in 1975, NJW 1975, 824.

[71]In "*Estil*" decision, which held a pharmaceutical manufacturer, held liable for failure to warn, as it had not detailed the serious consequences of an intra-arterial injection, even though to inject the anaesthetic intra- arterially was warned against the consequences. BGH in NJW 1972, 2217.

[72]In "*Zinkotom-Spray*" decision, which held a chemical manufacturer liable for failing to warn of the risks associated with treating a surface, treated with the chemical. BGH in NJW 1987, 372.

[73]BGH in NJW 1975, 1827- "Spannkupplungs" decision.
[74]BGH in NJW 1992, 2016- "*Silokipper*".

manufacturer has taken all reasonable precautions, the manufacturer is not liable for inevitable, unavoidable defects. What is reasonable depends upon the facts and the circumstances of each industry.

d. Insufficient Post- marketing Surveillance- The manufacturer of a product must follow up on the performance of his product in day to-day use by the consumers and he also has to observe its working behaviour. It plays important role where a design defect cannot be established particularly in the case of development risks[75].

The duty to monitor after they have been placed in circulation has been extensively developed (and is a distinguishing feature) of German tort law[76]. The product monitoring obligations depends upon the state of knowledge of the product at the time the risk occurred or could reasonably be expected to occur. The manufacturer is under an obligation to follow R&D as far as safety risks are concerned. He has also an extensive surveillance obligation, however, it depends upon the size and importance of the under taking. For example, in the Honda decision the Federal Supreme Court has extended the monitoring obligation to the component parts also.

4. *Burden of Proof*

Under normal circumstances, the plaintiff must prove that the manufacturer whose defective product had caused the damage because of violation of a duty of care. However, a reversal of the burden of proof (Beweislastumkehr) was established by the „Chicken pest" decision of the BGH in 1968[77]. The reasoning which was used to justify the reversal of the burden of proof in the „Chicken pest" decision was based on the imbalance in respective sphere of knowledge of manufacturers and consumers.

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[75] Liability for development risks does exist in one area, namely in the manufacturer of medicaments, under §§84 ff. of the Medicaments Law 1978. Under this law the manufacturer is liable if injury or death is caused by the use of a medicament 'if, by reason of the manner of its development or manufacturer the medicament, being used as prescribed, has adverse effects beyond what medical science regards as acceptable'. Such liability is limited in amount and does not extend to damages for pain and suffering.

[76] In "Gewindeschneider-Mittel" decision - a business under an obligation to investigate complaints about its products and act if necessary (passive Produktbeobachtung) that is, to set up a system to collect information and evaluate it.

[77] BGH November 26, 1968- VI ZR 212/66- BGHZ 5, 9.

„ (Manufacturers) survey the spheres of production lay down and organise the manufacturing process and quality control of the finished product. Often the size of an enterprise, its complicated organisation and biological progresses and the like make it practically impossible for the injured party to explain the case of the defect causing the damage. If the cause of the unexplainable lies in the areas of the manufacturer, however, it belongs to his sphere of risk“[78].

In later cases, the Federal Supreme Court has made it clear that the reversal of the burden of proof also concerns the objective elements of the duty of care. For example in the Limonadenflaschen (recyclable lemonade bottles) decision of the BGH in 1988, established that in limited circumstances when a plaintiff establishes the presence of a defect and damage, the manufacturer may have to prove that the product was not defective when it was placed into circulation[79]. Similarly, a presumption of fault results from a failure to warn[80]or if a product is defective it carries considerable potential risks[81]. The manufacturer must exonerate himself from fault or prove that the plaintiff was contributory negligent[82].

5. *Causation*

In general tort law in Germany provides that the plaintiff must prove that the violation of the duty of the care of the producer caused the injury to his life, health or property. There is no reversal of the burden of proof as far as causation is concerned, unless the rules on *prima facie* evidence apply: if a certain product related accident happens, it may be presumed that it was caused by the defective product.

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[78]BGHZ 51, 91. Kellam, (1996), p. 289.

[79]`Mehrwegflashe II´ - BGH in NJW 1988, 2611. *Ibid.*

[80]Kindertec I BGH BB 1992, 93. *Ibid.*

[81]`Mehrwegflashe III` - BGH in NJW 1995, 2162. *Ibid.*

[82]§ 254 GCC (Contributory Negligent):
(1) If any fault of the injured party has contributed to causing the damage, the obligation to compensate the injured party and the extent of the compensation to be made depends upon the circumstances, especially upon how far has been caused predominantly by the one or the other party. *Ibid.* p. 290.

Diffuse causal relations have yet to be decided by the German liability system. Thus, „ market share liability" could probably not be established under the existing case law. If there have been several tortfeasors, at least one must clearly be identified as such to come under the rules of joint and several liabilities according to § §830, 840 of GCC. If none of them has reached the threshold necessary to cause the injury, they will not be liable.

6. *Limitation Period*

Under § 852 GCC, the plaintiff has to claim the damages against the manufacturer before three years, from the date of the plaintiff and the defendant become aware of the damage. The negotiation period between the parties does not include, however, it includes if one of the parties refusal to continue the negotiations in order to solve the dispute. Irrespective of the plaintiff's awareness of the damage and of the liable person, the period of limitation is 30 years[83].

7. *Vicarious liability*

Under § 831 GCC[84] the producer is also liable for the conduct of the persons he employs in the pursuit of the production activities. However, the manufacturer was usually able to escape liability under § 831 GCC by proving that it had exercised due care in selection, equipping and supervision of its employees[85].

8. *Quantum of Damage*

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[83] Link Esq and Sambuc, n. 36, p. 185.

[84]§ 831 GCC (Liability for employees):
(1) A person who employs another to do any work is bound to compensate for any damage, which the other unlawfully causes to a third party in the performance of his work. The duty to compensate does not arise if the employer has exercised necessary care in the selection of the employee; and, where he has to supply apparatus or equipment or to supervise the work, has also exercised ordinary care as regards such supply or supervision, or if the damage would have arisen notwithstanding the exercise of such care.

[85]The exculpatory proof required under § 831 GCC is nevertheless onerous when the process is not fully automated as the producer must name all employees involved in the manufacture and prove his innocence; see: Markesinis, B. A Comparative Introduction to the German Law of Torts, Oxford, Clarendon Press, 1994, p. 90.

The general rule of compensation is that the claimant must be put into a situation that would have existed even if the damaging had not taken place. The victim is entitled to receive compensation for pain and suffering, but the amount was determined by courts and varies widely. In the case of no permanent disability the amount normally will be below DM 10,000. Suppose the victim has lost an eye or a limb, the compensation will be awarded up to DM 100,000. "The maximum amount so far has been DM 350, 000 in a case of paraplegia"[86].

9. *§ 823 (2) GCC* (Schutzgesetz/ Protective Law)

In German Civil Law the breach of a particular statute will always give rise to a civil remedy. However, in order to get the remedy under § 823 (2) GCC[87] the plaintiff must not only show that the occurred mischief was the one that the statute wanted to avoid but also he must show that he belongs to that category of persons that the violated statute wished to protect. It is a kind of an additional cause of remedy and not a reason for excluding remedy that may arise from another legal source.

Protective laws include laws related to pharmaceuticals (ArenimittelG), food (LebensmittelG), technical equipment (GerätsicherheitsG), and the criminal code (Strafgesetzbuch)[88]. The German Industrial Standards (DIN Norm) are not protective laws[89]. Protected interests under § 823 (2) GCC are those protected by the law in question[90]. Under §3 of the Safety of Technical Equipment Statute (GerätesicherheitsG), for example, only life and health and not property are protected[91]. Culpability (intention

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[86] Link Esq and Sambuc, n. 36, p. 183.

[87] § 823 (2) [Protective Law]:
(2) The same obligation is placed upon a person who infringes a statute intended for the protection of others. According to the provisions of the statute, if an infringement of this is possible even without fault, the duty to make compensation arises only in the event of fault. Kellam, (1996), p. 290.

[88] Palandt, O. Bürgerliches Gesetzbuch CH Beck Verlag Munich 49th ed. 1990 - Thomas § 823, 15 Db. *Ibid.* p. 291.

[89] Kullman, H.J. „Produzentenhaftung in der Rechtsprechung des BGHs" BB 1976, 1085, 1091. *Ibid*

[90] RGZ 163, 21, 33; Kullmann, H.J. "Produzentenhaftung in der Rechtsprechung des BGHs" BB 1976, 1085, at 1089. *Ibid.*

[91] § 3 Safety of Technical Equipment Statute:

or negligence) must be established regarding the breach of the protective law even when the protective law provides for strict liability.

§ 826 GCC (Sittenwidrige vorsatzliche Schadigung/ Wilful Damage contrary to Public Policy)

The § 826 GCC[92] will be used for criminal remedies for example the Lederspray[93], Glykol[94] and Holzschutzmittel[95] cases under the assumption that the manufacturer makes a positive decision for continuation of marketing his products by knowing that exposure to them involves serious risks to health. It exists only if intentional infliction of damages (dolus directus[96] or dolus eventualis[97]) by a positive act and a breach of public policy (contra bonus mores).

10. *§ 847 GCC* (Pain and Suffering)

Personal injury may also lead to non-pecuniary losses like pain and mental suffering. The remedy for pain and suffering is possible under § 847 GCC[98] only under the condition that the tort action is based on the breach of one of the tort provisions of the Civil Code.

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(1) The producer or importer of technical tools of trade may only place them on the market or on display, when they are made in accordance with generally recognised rules of technology, work safety and accident prevention regulations, so that the user or a third party is protected against dangers of all types to life and health, when used as intended, insofar as the intended use allows. Departures from the generally recognised rules of technology, work safety and accident prevention are allowed, provided the same safety is guaranteed. *Ibid.*

[92]§ 826 GCC (Wilful damage contrary to public policy):
A person who wilfully causes damage to another in a manner contrary to public policy is bound to compensate the other for the damage. *Ibid.* p. 293.
[93]BGH 6.7.90; NJW 1990, 2560. *Ibid.*
[94]BGH 19.7.95; NJW 1995, 2933. *Ibid.*
[95]LG Frankfurt 5/26 KIS 65 JS 8793184; BGH 2.8.95; NJW 1995, 2930. *Ibid.*
[96]In those cases where the defendant knows the consequences of his conduct and wishes to bring them about.
[97]In those cases where the defendant is aware of the consequences of his conduct which he accepts as inevitable even though he may not specifically desire them.
[98]§ 847 GCC (Schmerzengeld) Money for Pain:
(1) In the case of injury to body or health, or in the case of deprivation of liberty, the injured party may also demand an equitable compensation in money for damage, which is not a pecuniary loss. The claim is not transferable and does not pass to heirs, unless it has been acknowledged by contract, or an action of it has been commenced.
(2) A like claim belongs to a woman against whom a crime or offence against morality is committed, or who is induced by fraud, or by threats, or by an abuse of a relation of dependence to permit illicit cohabitation.

The German Courts seems to be tending to attach much importance to the pain suffered by the victim. Thus, great intensity and duration will lead to larger awards[99]. In determining the level of award the German courts not only taken into the account of the relative economic strength of the parties but also whether the tortfeasor is insured or not irrespective of whether the insurance is obligatory of simply widespread[100].

In some instances the BGH has felt that some money should be awarded as a `symbolic atonement´ `for the interference with rights and interests unconditionally protected by the legal order´ even if the victim is unconscious[101]. In German law mental suffering caused by loss of marriage occasioned by disfigurement will also be compensated[102].

The victims who wants to get compensation for pain and suffering from the tortfeasor has to approach civil court under negligence rule (§ 823) based on § 847 only and not under the Product liability Act, 1989.

F. European Council (EC) Directives

I. Introduction

The EC law plays a major role in its member countries such as Germany, especially in the field of consumer law, where much of the legislation has been transformed based on EC Directives and regulations. However the severity of the EC law is more in the case of regulation than the directives in its member states. Broadly there are two types of legislation viz. the secondary and the primary. Article 189 of the EC Treaty sets out the various kinds of legal instruments, which are to be adopted and provide a general description of their different characteristics.

There are two types of EC legislative measures. They are regulatory measures and Directive measures. Regulatory measures become a part of member state law without the need for national legislation. Directive measures require member state legislation to incorporate them into national law.

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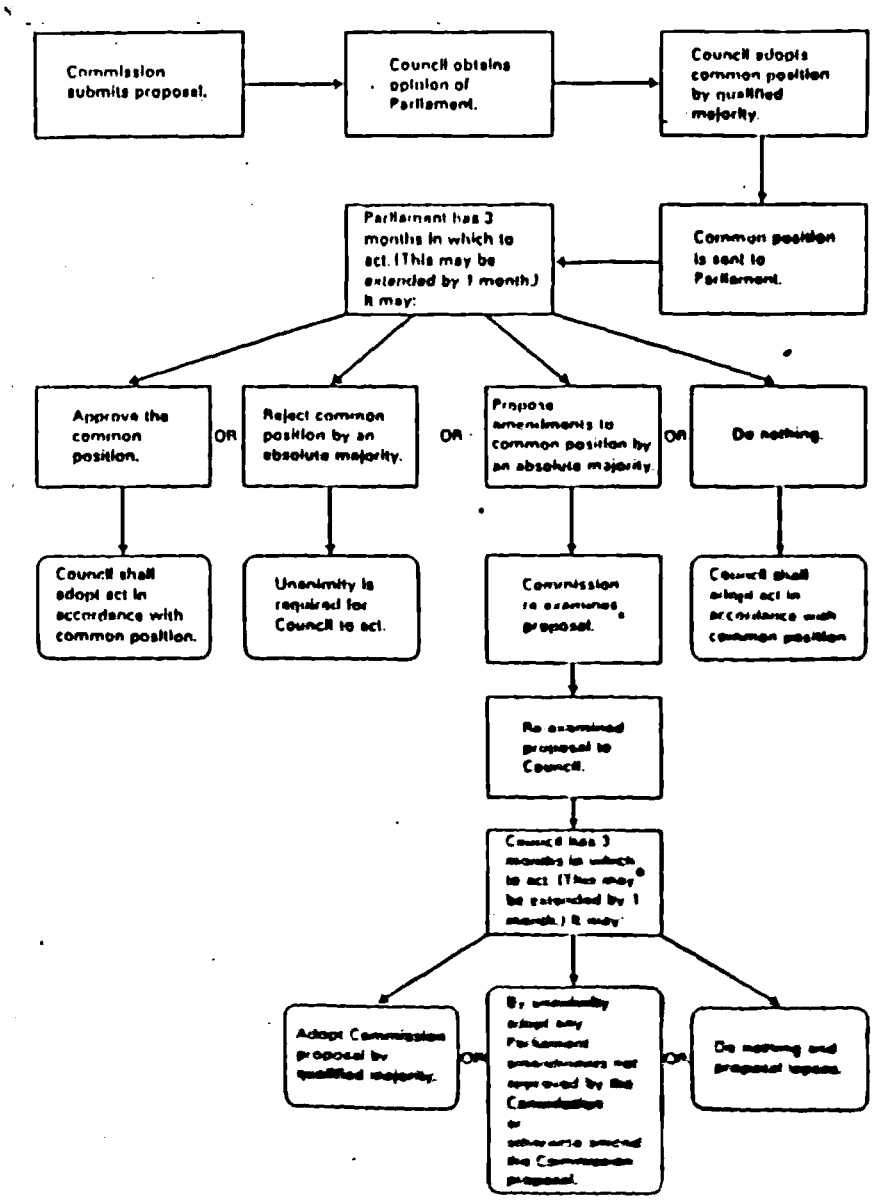
[99]BGH VersR 1960, 401.
[100]BGHZ 18, 149, 165.
[101]BGH NJW 1982, 2123.
[102]BGH NJW 1959, 1031.

The institutions such as the Commission and the Council of Ministers are the key institutions in the law making process in the EC. The Commission is given the right to initiate legislative proposals while the Council took the final decision. In some cases, such as social security, the Council must take unanimous decision and the other cases different voting as well as involvement of the other institutions will take place. Initially, the European parliament has only advisory powers where by the Council has to obtain its opinion before adopting legislation. Whenever the proposal before the Council Change in substance, a fresh consultation of the European Parliament is required. The Conciliation Procedure aims to seek an agreement between the European Parliament and the Council, while the Council is still free to reject the views of the Parliament[103]. The Single European Act increased the involvement of the Parliament in certain cases by introducing the Co- operation procedure (Article 189c of the EC Treaty). The various stages of procedure are explained with the help of a chart a chart 4.2.

Chart No.: 4.2

The Co- operation Procedure under Article 189c

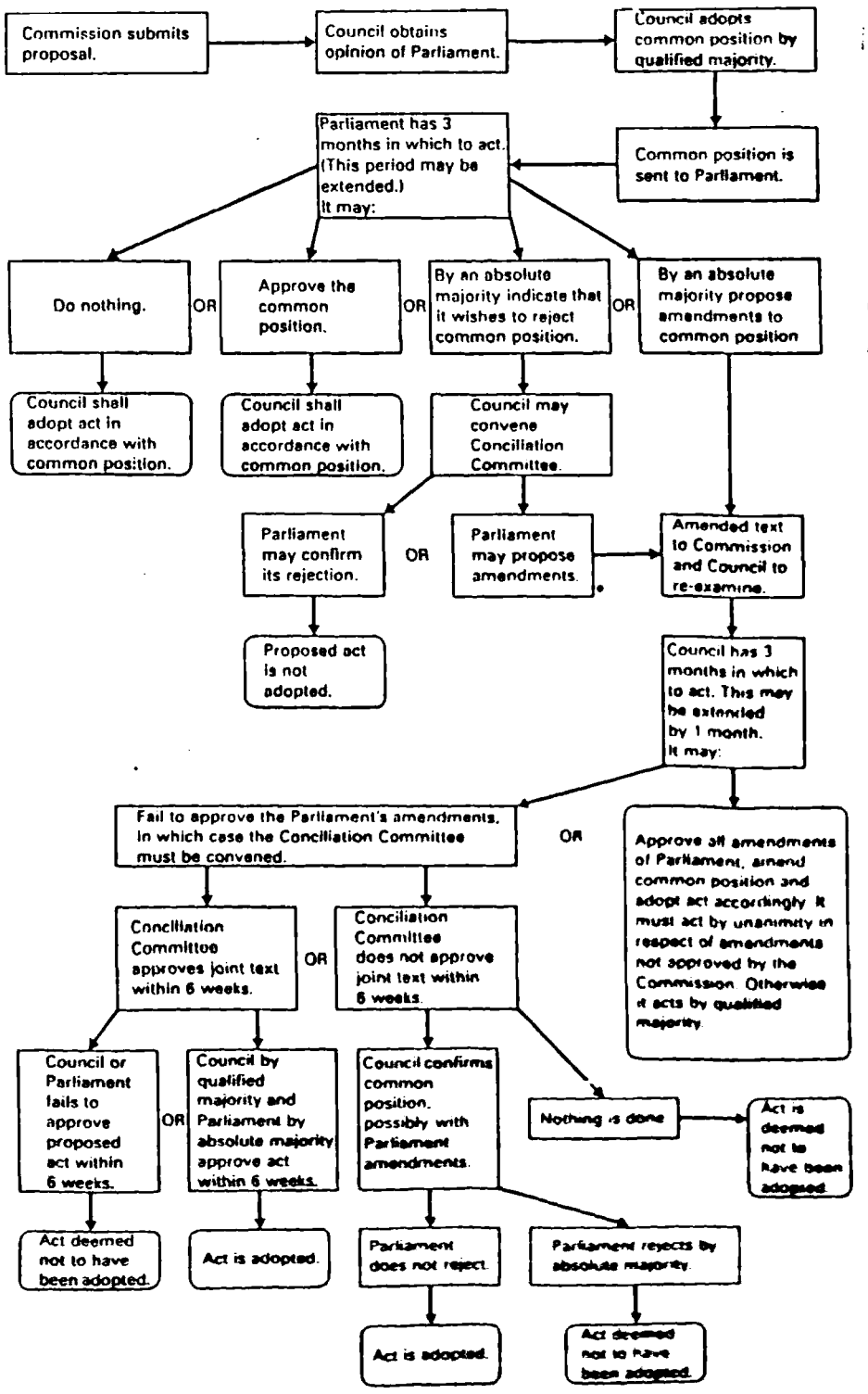


[103] Joint Declaration of the European Parliament, the Council and the Commission on the Conciliation Procedure of 1975, Oj 1975 C89.

As per Co- operation procedure, the Parliament's opinion cannot be totally ignored since it requires unanimity in the Council to adopt a measure in relation to which the parliament has rejected the common position. Earlier to the Co- operation procedure, there was a Co- decision procedure (Article 189b of the EC Treaty). According to it, if the European Parliament rejects the measure it is not possible for the Council to adopt it even by unanimity. The various stages of procedure are explained with the help of the chart as follows:

Chart No.: 4.3

Co- decision Procedure under Article 189b



The Co- decision procedure gives the Parliament a veto and there are a number of other provisions where the Parliament's assent is required in order for a measure to be adopted. For example, Article 8a of the EC Treaty allows for provisions facilitating the

free movement of citizens of the Union throughout the member states. This is to be adopted by the Council acting unanimously on a proposal from the Commission and after obtaining the assent of the European Parliament. In certain cases, the Commission alone is given power to adopt a legislation.

The EC Treaty provides that the member states must take all positive acts necessary to ensure the effectiveness of Community law and refrain from any actions which would undermine it. In a case of Conflict between Community and national law the status of the provision within the national system is irrelevant[104].

European Union, which consists of 13 countries, has formulated the common consumer protection policy by introducing the product liability law on 25th July, 1985 with the promulgation of the Council Directive on the Approximation of the Laws, Regulations and Administrative provisions of the Member States concerning liability for defective products known as `EC Directives'. "It was notified to Member States on 30 July 1985 and was to be implemented in all the Member States by 25 July 1988"[105].

The main purpose of the EC Directives is to reduce the differences in legal system among the Member States in order "to compensate consumers for death, personal injury or damage to personal property due to defects, industrial produce and movable products" [106]by establishing `no-fault liability' or `strict liability'.

II. Producers

The term "producer" means not only the manufacturer of a finished product but also the producer of any raw material or the manufacturer of a component part[107]. It also extends

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[104] Article 5 of the Directives.

[105] Patrick Kelly Esq, "Overview of EC Product Liabilities Law", in Patrick Kelly and Rebecca Attree (ed.,), *European Product Liabilities*, London, Butterworths, 1997,2nd ed., p. 11.

[106] *Ibid.*

[107] Article 3 (1) of the Directives
`Producer' means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer.

to importers of products[108]. Further, it also extends to the "anonymous" goods[109]. In the case of harm occurring due to defect of an "anonymous" product, the supplier of the product shall be treated as its producer. If the supplier is unable to identify the actual producer or supplier he should inform the same to the consumer within a certain time limit[110].

III. Provisions of the Liability

The Directive provides that the producer shall be liable for damage caused by a defect in his product. It introduces the concept of strict liability so there is no need to prove fault[111]. The Directives provide clear definition of the *product, defect* and *defences.*

1.*Product*

Article 2 of the Directive [112]pronounces that the *product* means all movables with the exception of primary agricultural products or game, which do not require initial processing and movables incorporated into immovebles, including electricity.

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[108] Article 3 (2) of the Directives
With- out prejudice to the liability of the producer, any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as producer.

[109]Goods, which do not carry any indications as to the identity of the producer or, in the case of an imported product, as to the identity of the importer, are likely to be found in sectors, which supply natural products and building materials and fabrics. (Prof. Hein Kötz)

[110]Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the importer referred to in paragraph 2, even if the name of the producer is identified.

[111] Article 1 of the Directives.

[112]Article 2 of the Directive
For the purpose of this Directive 'product' means all movable, with the exception of primary agricultural products and game, even though incorporated into another movable or into an immovable. 'Primary

2. *Defect*

According to article 6 (1) of the Directive[113], the product is defective if it does not provide the safety which a reasonable person is entitled to expect, taking all circumstances into account including, presentation, the product's reasonably expected use and the time when it was placed into circulation.

The Directive expectation test is what „ a person is entitled to expect". While utilising this, the judge must weigh a number of factors[114]. Further, Article 6 (2) of the Directive[115] provides that a product will not be defective because a better product is subsequently put into circulation.

3. *Defences*

Article 7 of the Directive pronounces six defences to the producer; the burden of proving the defences lies with the producer.

a. The state of the art defence provides that it is defence for the producer if he establishes "the scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered". The main purpose of introducing this defence may be to protect the interests of the manufacturers "at the forefront of technology, such as drug and aircraft producers"

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agricultural products' means the products of the soil, of stock- framing and of fisheries, excluding products which have undergone initial processing. 'Products' include electricity.

[113]Article 6 (1) of the Directive

1. A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:
   a. The presentation of the product;
   b. The use to which it could reasonably be expected that the product would be put;
   c. The time when the product was put into circulation.

[114] i. The usefulness and desirability of the product, ii. The likelihood that the product will cause an injury, and the probable seriousness of the injury, iii. The availability of substitute product, which would be safer and meet the same, needs, iv. The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility, v. The user's awareness of the dangers inherent in the product, and vi. The user's ability to avoid danger by the exercise of care in the use of the product.

[115]Article 6(2) of the Directive

A product shall not be considered defective for the sale reason that a better product is subsequently put into circulation.

b. Subsequent defect defence provides a producer may be establish that "having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into effect afterwards". The cases on lemon bottles explosion provide a good illustration for how a product may be rendered defective after it leaves the manufacturer's control[116].

c. Regulatory Defence provides a defence to the producer under the circumstances where „the defect is caused by compliance of the product with mandatory regulations issued by public authorities". However, compliance with voluntary standards, for example DIN norms, may not provide any defence to the producer[117].

d. Defence of Non-commercial Manufacture and Distribution pronounces that "the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of this business". It is really intended to take account of goods made as prototypes or supplied as gifts or `good works ´ for charity.

e. If the product is put in market place then the producer is not liable for product damage. These types of defences presumably encompass situations like stolen and counterfeited goods. An issue arises, with prototype or trial products being tested, for example, medical trials[118].

f. Component- part defence provides a defence to the manufacturer "in case of a *manufacturer of a component*, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product". Thus, it is not applicable in the case of a defect attributable to a fault in the manufacture of the final product in which it is included.

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[116] Kellam, J. „ Explodierende Glasflaschen" VersR 1991,970.
[117] Article 7 (d) of the Directive.

4. Compensation

Compensation may be recovered by the victim or by the kith and kin of the victim based on the Article 9 of the Directive[119], which defines the „damage" as caused by personal injury or by death respectively. However, it does not apply for pain and suffering including other immaterial damages, which should be recovered based on the National Law.

In the case of property damages, the Directives will provide recovery for `personal-property` only. It also excludes compensation for damage or the distraction of the defective product itself. However, it is possible for a claim to be made in relation to property damage caused by a defective component in a "complex chattel"[120].

5. Exclusion of Liability

There are provisions which prohibit any limitation or modification of liability provided under the Directives. However, there *are limits set on compensation* in cases with identical defect. The Directives also set a *time limit* of three years. The *burden of proof* is on the injured person.

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[118]Schmidt-Salzer, J. / Hollmann, H.H. Kommentar EG Richtlinie 2nd ed. Verlag Recht und Wirtschaft Heidelberg 1989 at 670.

[119]Article 9 of the Directive

For the purpose of Article 1, *damages* means:

a. Damages caused by death or by personal injuries;

b. Damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of 500 ECU provided that the item of property:

i. Is of a type ordinarily intended for private use or consumption, and

ii. Was used by the injured person mainly for his own private use or consumption.

This Article shall be without prejudice to national provisions relating to non-material damage.

G. German Product Liability Act, 1989 (GPL Act)

The implementation of the EC Directives was fulfilled with the establishment of the Product Liability Act, 1989 (Produkthaftungsgesetz - ProdHaftG) by the German Parliament, which came into force on 1st January 1990. It will not be applicable to the products, which have been distributed before 1st January 1990 and it does not applicable to pharmaceutical products. Thus, the Arzneimittlelgesetz remains un-effected by the ProdhaftG. It is based on the principle of protected rights and at the same time, it did not replace § 823 GCC in relation to all remedies for the losses caused by defective products. It is based on the liability without fault. Recovery for product- related injuries does not require privity of contract between the plaintiff and the defendant. The GPL ACT requires that an objective rather than the defective productive itself must be damaged[121].

I. Provisions of the GPL ACT

1. *Remedy* (Haftung)

Under § 1 of the GPL ACT[122], the liability arises only if the product is used for private consumption and a cause of action exists when a defective product causes death, personal injury, damage to health or property.

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[120]Stapleton, J. „ A Personal Evaluation of the Implementation of the EEC Directive (85/374/EEC) on Products Liability" (1993) Torts L J 90.

[121]That is pure economic losses are not recoverable, however, this does not affect the cases where a supplier has provided a defective part and damages the whole product.

[122] § 1 of the GPL ACT, 1989 (Remedy):
If by virtue of a defect in a product a person is killed or their body or health injured, or a thing is damaged, the producer is obliged to pay to the victim compensation for the resultant loss. In the case of damage to an object, this only applies when an object rather than the defective product is damaged, and this other things by its nature is usually intended for private use and consumption and was predominantly used for to his by the injured person.

2. *Product* (Produkt)

According to § 2 of the GPL ACT[123], the product which includes all movable things including components of other movables or immovables and electricity but not primary agricultural products. It is not concerned about what product is produced for example, individually, by hand or mass production[124].

3. *Defect* (Fehler)

A product is defective if it does not fulfil the consumer's expectation test. According to § 3 of the GPL ACT[125]a product will be deemed to be defective if it does not provide safety taking all circumstances into account. Under §3 of the GPL ACT, 1989 the producer is liable for the violation of the duties of care like manufacturing, design and warning but not for product observation. Especially § 3 (1)(b) focused on the presentation of the product, its foreseeable use and the time it was placed into the market.

§ 3 (2) of the GPL ACT, 1989 pronounces that a product shall not be considered as defective for the sole reason that subsequently an improved product was distributed. `For the sole reason' means that improvements do not necessarily serve to eliminate defects of the product.

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[123]§ 2 of the GPL ACT, 1989 (Product):
Product under this GPL ACT means all movables, also when they are a part of another movable or immovable, including electricity. Exceptions are agricultural products of the ground, livestock breeding, bee farming and fishery (primary agricultural products), excluding products, which have undergone initial processing; the same applies for game.

[124]Lem, C. Die Haftung für fehlerhafte Produkte nach deutschen und franzoischem Recht Verlag Recht und Wirtschft Heidelberg 1993 at 52.

[125]§ 3 of the GPL ACT, 1989 (Defect):
(1) A product is defective if it does not provide safety, taking all circumstances into account, including
(a) Its presentation;
(b) The use to which it could reasonably be expected it would be put; and
© The time when it was put into circulation
Could be justifiably expected.
(2) A product is not for the sole reason to defective, that a better product is subsequently placed into circulation.

4. *Exemption Clauses*

§ 1 (2) of the GPL ACT[126], 1989 pronounces the exculpatory provisions. They are:

a. The producer is not liable if he did not put the product on the market i.e. he is not liable for the damages when it occurs from the stolen product;

b. The producer is not liable if the product is free from defects when it was placed on the market;

c. The producer is not liable if the product was neither produced for sale or any form of distribution for a trading purpose nor produced or distributed by him in the course of his business;

d. The producer is also exempted from liability, if the defect is due to compliance of

the product with mandatory regulations issued by the regulatory authorities[127]; and

e. In such a case where the defect could not be discovered based on the scientific and technical knowledge at the time when product was distributed[128].

Further, § 1(3) of the GPL ACT[129], 1989 pronounces that the producer of a component part is also not liable on the ground that the defect is attributable either to the design of the end product or to the instructions provided by the producer of that end product.

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[126]§ 1(2) of the GPL ACT, 1989 (Ausschluß der Ersatzplict):
The producer's obligation to compensate is excluded, if
1. He did not place the product into circulation;
2. With regard to the circumstances it is probable that the defect which caused the damage did not exist at the time the producer placed the product into circulation;
3. That the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured by him in the course of business;
4. The defect was due to compliance of the product with mandatory legal requirements at the time it was placed into circulation by the producer; and
5. The existence of the defect could not be discovered at the time it was placed in circulation by the producer by the state of scientific and technical knowledge at that time.

[127]However, he is not exempted from liability if he has merely complied with certain standards prescribed by law, for example, DIN norms, accident prevention regulations, etc.,

[128]Two German decisions have held that the defence is not available in the case of manufacturing defects: see *Johnnisbeerschmandkuchen OLG Frankfurt*; NNW 1995, 2498; *Mineralwasser-Mahrwegflaschen* BGH NJW 1995, 2126; VersR 1995, 924.

[129]§ 1 (3) of the GPL ACT, 1989
The obligation to compensate the victim by the producer of a component part is excluded when the defect is attributable to the design to the product in which the component has been fitted, or to the

5. *Producers* (Hersteller)

The scope of potential producers under § 4 of the GPL ACT, 1989[130] is not limited to those who actually produce the defective product. In addition to the producer of the component parts, basic raw materials, and finished products, liability is also extended to quasi- producer[131]. Liability also attaches to importers and sellers of a product when the actual producer cannot be identified. A purchaser may be liable as producer if he buys products in a non-EU country and leases them within the EU.

The designers, licensers or franchisers, workers and employees are not subject to product liability under the GPL ACT.

6. *Types of Damages which may be recoverable*

Generally damages are awarded for death and personal injury, especially in the case of property, the damages will be awarded if the product was intended and predominantly used by the consumer for his personal consumption. Damages for pain and suffering are excluded and must be recoverable in accordance with the conventional rules as developed by the courts under § 847 GCC, negligence rule. In the case of death and personal injury, §10 of the GPL ACT put a ceiling on liability amounting to DM 160 million. Periodic compensation payments may be awarded for impairment of earning capacity and future losses.

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instructions given by the manufacturer of the product. Sentence 1 is similarly applicable to producers of raw materials.

[130]§ 4 of the GPL ACT, 1989 Producer (Hersteller):
(1) Producer under this GPL ACT is whoever manufacturers a finished product, any raw materials or a component part. Producer is also any person, who by putting his name, trademark or other distinguishing feature on the product presents himself as the seller;
(2) A producer is further, who imports into the European Community a product for the purposes of sale, hire or lease any form of distribution in the course of his business; and
(3) Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within one month after receipt of a request, of the name of the producer or such person which supplied the product to it. This also applies for imported products, even if the name of the manufacturer is known, if the person named in sub- paragraph (2) cannot be determined.
[131]A quasi producer is some body who presents himself as a producer by affixing his name, trademark, or other distinguishing feature to the product.

There is no ceiling on liability for property, however, § 11 of the GPL ACT, 1989 pronounces that in the case of property damage the victim is eligible to claim only if the damages exceeds DM 1125, otherwise not.

The § 6 (1) of the GPL ACT, 1989 pronounces the importance of the contributory negligence while awarding damages to the plaintiff. Accordingly, irrespective of the fault of the producer, if the plaintiff is contributory negligent, then the calculations of the damages will be based on the degree that the plaintiff has caused the damage.

II. Procedural Matters (Verfahrensfragen)

1. *Burden of Proof* (Beweislast)

Under § 1(4) of the GPL ACT, 1989[132] the plaintiff requires a showing of damage, defect and causation. It may be assisted by *prima facia* evidence (Ansheinsbeweis)[133]. On the other hand, the producer must show and, if necessary, prove the presuppositions for exclusion or a restriction of his liability. However, he can exculpate himself from the liability by establishing on the balance of probabilities that the defect did not exist when the product was placed in circulation[134].

The burden of proof placed upon the plaintiff under the GPL ACT, 1989 has been described as less than full (Vollbeweis) that is usual in German law. The plaintiff need not prove that the product was defective when it was placed in circulation, which has been described as probability proof (Wahrscheinlichkeitsbeweis). However, the principle of burden of proof will frequently pose insurmountable problems for plaintiffs[135].

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[132]§ 1 (4) of the GPL ACT, 1989
The injured person has the onus of proving the existence of the defect, the loss and the causal connection between the defect and the loss. If it is in dispute whether the obligation to compensate is excluded by Sub-Sections (2) or (3), the producer bears the burden of proof.
[133]Reich, N. „The Onus of Proof in Litigation" (1991) 2 APLR 49. Kellam, (1996), p. 343.
[134] *Ibid.*

[135]It is important to note that, unlike in most American civil suits, a mere preponderance of the evidence ordinarily does not suffice in German private litigation. The party carrying the burden of proof must

2. *Statute of Limitations* (Verjahrungsfrist)

According to § 12 of the GPL ACT, 1989 the limitation period for remedy is three years. It begins from the date of the victim became aware of the defect or damage and the identity of the liable party.

§ 13 of the GPL ACT, 1989 provides that the product liability remedy expires ten years after the producer has put the product into circulation.

3. *Contribution and Indemnity* (Mehrere Ersatzplichtige)

Consumer protection is further enhanced by the GPL ACT, 1989 by inclusion of § 5 which allows the plaintiff to hold several injurers liable jointly and severally. The GPL ACT expressly provides for contribution between defendants by reference to provisions in the GCC, which regulate joint and several liabilities. In case of no other agreement exists, contribution between defendants depends upon the circumstances. Especially, the contribution depends upon the degree to which the damage was caused by one or another of the defendants[136].

H. Comparison between the German Product Liability Act, 1989 (GPL Act) and the German Civil Code (GCC)

1. The GPL Act does not have any scope for compensating pure financial losses (such as interruption of a business due to power failure) so that it can be recovered under the contractual product liability only.
2. The remedy for breach of seller representation will be based upon the contractual product liability and not under the GPL Act.

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establish all necessary facts by what might be roughly compared with „clear and convincing evidence" see, e.g., decision of the German Federal Supreme Court, BGHZ 53, 245, 256 (1970).

[136] Kellam, (1996), pp. 344, 345.

3. In case, where the producer has contractually agreed with the buyer to furnish a product of a special quality and not met, then the buyer has to claim his damages based on the tort law only but not under the GPL Act.
4. The compensation of property damages for commercial usage will be recovered under tort law but not under the GPL Act.
5. Primary agricultural products, which have not undergone any processing and also the game will be recovered based on the tort law.
6. The claims based on missing or insufficient product observation will be recovered based on the tort law and not by the GPL Act.
7. The compensation of damages, which have been caused by other factors, can be recovered based on the tort law because the Act excluded such type of damages.
8. The compensation for pain and suffering and other immaterial damages can be recovered only under the tort law.
9. The GPL Act excludes the liability of the tortfeasor based on the scientific and technical knowledge at the time of circulation.
10. The statute time limit under the Act is ten-year time limit but the usual statute repose in torts is 30 years.
11. Whenever the liability exceeds DM 160 million, the excess amount can be recovered under the tort law.
12. The claims, which are less than DM 1125, will be recovered only under the tort law but not under the GPL Act.
13. The GPL Act (or § 84 of the Medicines Act, 1976) does not apply to defective pharmaceutical products so that the victim has to claim those damages under the tort law only.
14. Persons like designers, dealers, workers or employers who are not liable for the production or distribution under the GPL Act, will be liable only under the tort law.

I. Comparison between the EC Directive and the German Product Liability Act, 1989.

1. The Directives pronounce that the supplier of a product is liable if he is unable to identify the manufacturer or actual supplier of a product with in "reasonable time". The German product liability specified a time limit of "one month".

2. There is substantive disuniformity on three provisions among the Member States. They are:

a) To impose liability for unprocessed agricultural products and game (Article 15 of the EC Directive);
b) To allow the development of risk defence (or state of the art); and
c) To impose maximum amount of damages of 70 million ECU (Article 16 of the EC Directive).

3. EU Directive does not regulate the provisions of recovery for pain and suffering and other immaterial damages, which have been left to the discretion of the implementing Member States (Article 9 (a) of the EC Directive).

4. National courts may interpret elements of liability such as „ defective" (such as expectation test) differently.

5. Article 8 (2) of the EC Directive does not defined the „fault" in the case of contributory negligent, which has been left to the national law of the implementing Member States.

J. German Liability System: General Remarks

Theoretical arguments of ex-post approach may as well be applicable to the German liability system. The general remarks on this system are as follows:

1. The German Courts have to rely on expert hearings in scientific and technical related cases;

2. Though the victim can approach the civil court in order to claim damages for pain and suffering and other immaterial damages based on negligence rule. It is difficult to award the damages by way of providing incentives to the tortfeasor to take precaution to reduce the risk of harm and it fails to satisfy the victim in real terms;
3. The social security system in the case of health damages plays a major role in acting as a substitute to the alternative legal systems in order to protect the interests of the consumer. However, the rational apathy is shifted from the victim to the insurance company, where insurance company really is not interested in suing the tortfeasor in order to collect the damages because they get its money through collecting premiums;
4. The judges have to dispose the cases within the scope of the codified law otherwise the parties may go for appeal in order to challenge the legality of the decision of the lower courts. In German liability system, the applicability of the case law is not clear; however, there are some incidences where the Federal Supreme Court decided cases based on case law. For example in the Chicken paste case of 1968; the misperformance was not regulated in the GCC but was developed by the case law (Rechtsprechung)[137] to fill these gaps in the provisions of the GCC (Gesetzeslüke).
5. The German civil courts seem to be not giving as much importance in disposing the appeals. In the case of original cases the civil courts (lower) are trying to dispose 88 to 95 per cent of cases within a year. In the case of appeals the civil courts take two years time in order to dispose 68 per cent by Court of Appeal; and 27 per cent by the Federal Supreme Court (it is from the date of original case filing in lower courts);
6. In the case of tortfeasors` bankruptcy the German civil liability system is also helpless to compensate the victim. However, if the tortfeasor provides wrong information regarding his wealth to the courts and if it is proven by the courts, then the German civil court can give criminal punishment;
7. It seems to litigation costs were very high in the German liability system. In 1994, the court fee has been raised two folds. The procedure of the loser having to pay the litigation costs of the winner also leads to the reduction of the accessibility of courts to the citizens of Germany. Apart from this, there are several restrictions regarding approach to courts. For example, below DM 1500 chances to go for appeal are nil, in

the case of below DM 60,000 cases the parties have to seek permission from the Court of Appeal in order to go for appeal to the Federal Supreme Court. These types of policy measures may reduce the pending rate of cases in the civil courts but it has a kind of deterrence effect on the parties in fulfilling their rights through liability system. However, the policy of the loser having to pay the litigation costs of the winner, may perhaps provide some incentives to the parties not to approach the court unless until there is genuine negligence.

8. The introduction of lawyers` insurance may be much more useful to the organised traders than to any other unorganised individuals like consumers. The mighty traders may have chances to transfer the burden of premium on the consumers in one way or the other. In some cases it is true that some individuals are forced to buy these types of insurance;
9. The state of art or the development risk defence[138] seems to be the advantageous to the manufacturer. It is really intended to protect the manufacturers at the front of technology such as drug and aircraft. Though the Federal Government of Germany included these defences in the German Product Liability Act of 1989, there is a special legislation especially on the liability of drug manufacturers[139]. According to the Drug Act of 1976, the drug manufacturers may be liable despite the fact that the defect was unable to be discovered at the time when the drug was put into circulation. It is really a complicated defence.
10. In general, in Germany the parties have to convince the judges fully. Thus it seems to be difficult to tortfeasor to escape from the civil liability.
11. In Germany there are no separate courts (like CDRAs) in order to protect the interests of the consumers as in India. It may be because of the German civil court system, which is more effective than the Indian civil court system. For instance, in Germany there is a separate Court of Appeal for lower courts, laws` delay were negligible (original cases in lower courts), the prevalence of lawyers insurance, social security system against health risks. Therefore, it may not be necessary to establish CDRAs in Germany.

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[137]Eine Gesetzeslüke: RGZ 54, 98; BGHZ 11, 83: DB 1972, 1355.
[138]The producer has to prove that the state of scientific and technological knowledge at the time when the product put into circulation was not such as to enable the existence of the defect to be discovered.
[139]Arzneimittegesetz of 24 August 1976 (Bundesgesetzblatt 1976 I 2445), §§ 84 et seq.

K. Comparison between Indian and German Liability and Social Security System

Based on the above review of the German liability system, the following lessons were drawn which may be help in improving the Indian liability system.

I. Separate Court of Appeal for the lower level courts

Under the German law either the consumer or the tortfeasor can go for an appeal against the decision of the County Court to a District Court if the worth of the case is more than DM 1500. Otherwise the decision of the County Court is considered final. In case either party or both are dissatisfied with the decision of the District Court, then they may approach the Court of Appeal, where only the legality of the case is revised and not the facts of the case. At the same time the decision of the Court of Appeal is final. The decision of the Court of Appeal can be challenged in the Federal Supreme Court, when the amount of the claim exceeds DM 60000 or by getting permission from the Court of Appeal. Thus, the case filed in County Court in most case end with the decision of the Court of Appeal and it never reaches the Federal Supreme Court.

In India, there is enormous increase in pending cases. Three million cases are pending in the Supreme Court and the High Courts and a staggering 28 million cases are pending in the lower courts. The German model of separate Court of Appeal and putting monitory limit to go for appeal by the parties may perhaps not only help to reduce the pending rate but also would prevent the delay of the tortfeasor in paying compensation to the victim by filing appeals at different levels of courts up to Apex level. Generally civil court cases may take 5 to 20 years for disposal and dismiss the case and even in the case of Consumer Dispute Redressal Agencies the pending rate is increasing each and every year rather than decreasing. The empirical data shows that on an average of 68 per cent of the cases are not disposed/ or dismissed by the CDRAs within the prescribed maximum time limit. At the same time there are incidences, which shows that the CDRAs are not providing any incentives to the tortfeasor in the case of appeal. Often there is no incentive for the tortfeasor not to go for appeal unnecessarily. All these things are mainly because of law's delay. Justice delayed is justice denied. Thus, it is advisable to set up a

separate Court of Appeal in the German model in order to facilitate effective functioning of the liability system by reducing the pending cases not only in the civil courts but also in the CDRAs.

II. Social Security Insurance System

The German social security system plays a major role in protecting the interests of the consumer by providing insurance especially against health risks. Under this environment, the victim need not go to courts in order to cover his or her health damages because it will be covered by the insurance. Thus, the tortfeasor does not face litigation, which lead to the reduction of the incentives to take precautions in order to reduce risk of harm. This would ultimately favour an ex- ante approach in order to provide incentive to the tortfeasor. However, one can say that there are certain advantages and disadvantages in this social security system.

The advantages are:

a) It reduces the administrative costs of both liability and regulatory systems in the protecting the interests of the consumer;
b) Whenever, due to some reasons either liability system or regulatory system or both fail to protect the interests of the consumer, the social security system works as a substitute;
c) In some cases, if it is necessary, the insurance company may go to the courts in order to receive the costs of the damages. Thus, the insurance company, which is a stronger party when compared to the consumer, find it easy to file a case against the mighty tortfeasor;
d) Very few cases reach the courts because the insurance company may settle the dispute out of court;
e) The consumer need not face any risks like, litigation costs, law's delay, proving causation and the implementation of the court order, which are involved in suing the tortfeasor.

The main disadvantages are:

a) The problem of rational apathy shifts from consumer to insurance company because insurance company anyhow covers its costs by way of collecting premiums. Thus, damages are not fully covered;
b) It is not ruled out that at a certain stage, insurance companies may act as interest groups and pressurise the legislature to frame the rule and regulation according to its advantage;
c) In some cases judges may award compensation to the victim more generously by thinking that the insurance is paying the compensation to the victim and not the tortfeasor. This may lead to adverse effects that insurance industry may rise the premium or at extreme case it may with draw for some products and services;
d) It does not covers - i. the damages against wealth and property; ii. The damages for pain and suffering. Thus, the victim has to approach the civil court.

On balance it is wise to go for social security system in order to protect the interests of the consumer in aspects like health. Generally, introducing the system of a social security has a positive impact rather than a negative impact especially on protecting consumer interests. In the case of a developing country like India, where due to several reasons an alternative legal system is unable to protect the interests of the consumer effectively not only against the activities of the unscrupulous traders but also against the malpractice of the doctors, the importance of the introduction of the social security system needs to be stressed. Thus, it is advisable to introduce the social security system to provide basic protection to the consumers especially in terms of health risks.

III. Pecuniary Limitation on Filing of the Case in Civil Courts against Property Damages

The German model of pecuniary limitation on filing the case in civil courts based on GPL Act may as well be introduced to the Consumer Dispute Redressal Agencies by amending the CP Act, 1986 (Amendment, 1993). These types of policy measures may not only reduce the rat of cases pending but also avoid unnecessary wastage of resources.

IV. The Principle of Reversal of Burden of Proof

According to the principle of reversal of burden of proof, the tortfeasor has to disprove that he or she was negligent towards the victim. Under this principle the tortfeasor is unable to escape from the payment of compensation to the victim. The main reason to adopt this principle is based on the imbalance in respective sphere of knowledge of manufacturers and consumers. The German Civil Courts based on German Civil Code and also based on GPL Act practising the principle of reversal of burden of proof since 1968. The reversal of burden of proof is not a general principle of consumer protection but is related to the Product Liability in the Civil Code.

The principle of reversal of burden of proof may as well introduce to the Indian liability system, in order to protect the interests of the consumer from the mighty and organised producer who try to use all types of means in order to escape from the payment of compensation to the consumer, if it is not so far introduced.

V. Duties of care

The German liability system pronounces its judgement based on the duties of care of the manufacturer. They are, manufacturing Defects; Design Defects; Warning Defects; and Insufficient Post-marketing Surveillance. It is better to follow the duties of care of the manufacturer by the Indian liability system especially to the CDRAs in pronouncing its judgement against the manufacturer in order to provide incentives to the tortfeasor to take the precaution to reduce the risks of harm.

VI. Time Limitation

The GPL Act, 1989 provides 3 year time limitation, to file a case in civil courts against the manufacturer by the consumer in order to get claim compensation. The Indian liability system especially the CP Act, 1986 (Amendment, 1993) provides only a two years limitation. Since a developed country like Germany, where dissemination of information is more effective than a developing country like India it is advisable to give a

time limit of three years in order to approach the CDRAs by the consumer to claim compensation against the manufacturer. Implementing this type of policies may give more opportunities to the parties to have a correspondence to settle the matter out of court. Similarly, the awareness of the consumers about their rights and obligations in India is not as better as much in Germany.

VII. Protection of Tortfeasor

In Germany a tortfeasor is provided certain protective measures from the liability system. This type of policies will provide incentives to the tortfeasor to comply with the standards of regulatory authorities in order to reduce the risk of harm. However, if the regulatory authorities are influenced by the interest groups in the formation of standards then the protection of tortfeasor from the liability may have a negative impact on the protection of the interests of the consumers, is likely.

In the case of India, merely 150 products are brought under the mandatory standards by the regulatory agency (the Bureau of Indian Standards) i.e., unless until complies with the standards the producer of a product not allowed to put his or her product into the market. At the same time the Indian legal system is not protecting the tortfeasor from the complying with the mandatory Standards formulated by the BIS. Thus, Indian manufacturer has to pay the compensation irrespective of the compliance with the mandatory standards, which is unjustified from the view of manufacturer because he has to comply both with the standards of regulatory agencies and the court. For example, if he does not comply with the regulatory standards and comply with the court standards, which are lower than the regulatory standards, then the regulatory agencies may not allow him to produce the product. On the other hand, if he complies with the regulatory standards and does not comply with the stricter negligence standards which are higher than the regulatory standards, then the manufacturer has to pay the compensation to the consumer, which leads to adverse effects because it surpasses the optimal regulatory standard, and marginal costs exceed marginal benefit.

Under the assumption that the regulatory authorities are not influenced by the interest groups in the formation of mandatory regulatory standards and also the regulatory authorities have better scientific and technological skills and resources in order to

formulate the efficient standards over the courts are may introduce the policy of tortfeasor protection in Indian liability system based on the German liability system.

VIII. Financial Assistance for meeting the litigation costs

German Government is providing financial assistance to the plaintiff based on the Act on Aid concerning to Cost of Litigation, 1979. Under this provision, even higher income people can get financial assistance from the government in order to meet the costs of litigation, but the plaintiff has to pay back to the government by reasonable instalments within 48 months.

Under the assumption that, India can be free from corruption and also the benefit of the legal aid should go to the needy, the German financial aid model may as well be introduced to the Indian liability system. This would serve to provide financial assistance to the plaintiff to hire the skilful lawyer and also spend the resources to get concrete evidences. It may very well be needed by the general Indian liability system compared to the CDRAs where consumer need not engage a lawyer in order to claims the compensation against the manufacturer. Since based on the empirical analysis, most of the consumers are engaging a lawyer due to several reasons, it may be better to provide financial assistance to the plaintiffs who are approaching the CDRAs. It may either directly or indirectly increases the accessibility of the courts to the citizens of India.

IX. Lawyers Insurance

In Germany, there is an insurance coverage on the costs of litigation. Whenever, the insured party approaches the court, the insurance company will pay the costs of attorney and the court fee. It may be good to introduce this system in India also, where some sections of people may be offered such type of insurance. However, there are some reservations in introduction of the insurance system. The introduction of insurance may raise the participation of the people in risky activities. Some times some sections of people may be forced to take the insurance. The utilisation of the lawyers insurance is much more in the case of manufacturers compared to the individual consumers. Thus, the

lower level users of the insurance have to pay the higher level users of the insurance. The insurance may acts as an agent for lawyers. There is a possibility of the insurance dictating terms and conditions and fix the lawyers fee by influencing the legislature, for example, the legal advice fee fixed DM 350 irrespective of the amount of value of the case.

It is advisable to introduce the policies which are being practised by the German liability system into the Indian liability system not only to provide incentives to the tortfeasor to take precautionary measures and reduce the risk of harm but also to protect the interests of the consumers.

L. Regulation and the German Experience

I. Introduction

The purpose of reviewing the ex- ante approach in Germany is mainly to draw some possible lessons for India. In Germany there is de- centralised regulatory system in order to formulate the standards and for issuing certification marks, therefore the study will be limited to some of the important regulatory institutions. The most important rules and regulations in Germany are the Medical Drug Act (Arzneimmittelgesetz- AMG) the Food Act (Lebensmittel und Bedarfsgegenständegesetz- LMBG), the Appliances Act (Gerätesicherheitsgesetz- GSG), Medicine Products Act (Medizinproduktegesetz- MPG) and the Genetic Engineering Act (Genetechnikgesetz- Gen TG). Some of these laws provide for criminal sanctions in case of offences. At the same time, interestingly in Germany, the decentralised standardisation and certification system prevails. The most important labels or marks or certifications are; the GS Mark, The DIN mark for testing and supervision, the VDE Mark for electrical equipment, and the DVGW Mark for gas appliances and water supplies. In the are of safety certification the TÜV also plays a major role. It often certifies product conformity with specific legal safety requirements,

for example cars. One or the other reason, the study will be limited to the Appliances Act, DIN norms and the EC law.

The interaction of public legal standards and private technical standards set by specialist technical associations in a complex system of standards is characteristic for the German product safety law as well as for the whole of the law of technical safety.

"The object of technical safety law is on the one hand, to protect life, health, property and the environment against damage from technical products and installations, and on the other hand, to provide legal guarantees in connection with economic activities bound up with certain technical risks"[140].

Since the legislature or regulator in general cannot refer to sufficient expertise of their own in order to make the required detailed scientific or technical regulations themselves, the rules and regulations often paraphrase the requirements of the composition of technical appliances, plants or materials in general clauses and undefined principles such as 'generally recognised rules of the art'[141] or `state of the art'[142] or `state of science and technology'[143]. By adopting the `deviation clause'[144], the development dynamic of modern technology is to be thereby taken into account and loss of topicality and hindrance of progress avoided. Whether a technical regulation referred to in fact meet the statutory safety standard is subject to judicial verification. However, the regulatory authorities are free to take action against a product manufactured or installation operated in accordance with the standards in cases of a concrete risk.

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[140] Quoted in Josef Falke, "Product Safety Legislation in the Federal Republic of Germany", in Christian Joerges (ed.,), *European Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards*, Badia Fiesolana, European University Institute, 1991, p. 6.

[141] "Focuses on the prevailing view among technical practitioners, on what is generally regarded as tried and tested in professional practice". *Ibid.* p. 7.

[142] "It shifts the legal criterion from what is permitted or commanded to the front line of technical development, the decisive point is not what is generally recognised or established in practice, but what is technically necessary, appropriate and possible, even if commercial practice is not yet in line with it" *Ibid.*

[143] "Those precautionary measures regarded as necessary according to the latest scientific findings must be used; the limit to the requirement is not set by what is currently technically available" *Ibid.*

II. The Appliances Safety Act (Gerätesicherheitsgesetz- GSG)

The roots of the GSG even starts from the Industrial Safety Bill, 1929 in order to guarantee safety for workers. In the similar line, the Machine Safety Act, 1968 (Maschinenschutzgesetz) introduced with the aim of protecting workers and the citizens from risks arising from technical appliances and machines. The Appliances Safety Act[145]was enacted in 1968 (amended 1980[146]and 1992). With the broadened scope, it assumed inspection of installations and provided legal guarantees for the safety mark `GS = geprüfte Sicherheit´ (safety tested)[147]. The GSG is based on the `generally accepted rules of the art ´ (or state- of- the - art) as a general standard of safety.

1.*The scope of the Appliances Safety Act*

According to § 1(1) of GSG, the manufacturers and importers market or display technical work materials by way of trade, or independently in the context of a business undertaking. The dealers were also bought under the preview of the GSG only in exceptional cases because they were not in a position to make technical safety assessments of products and that there were sufficient possibilities of fighting the danger at source. Similarly, the GSG applies to all technical work materials for which there are no specific regulations. For example, it does not apply to Foodstuffs (Consumer Goods Act), and to vehicles, which are subjected to road traffic regulations.

§ 3(1) of the GSG

The core of the GSG is the general safety duty under § 3(1) of the GSG:

> "A manufacturer or importer of technical work materials may market or display these only if they are, according to the generally recognised rules of the art and the industrial safety

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[144]The manufacturers, users as well as operators of potentially dangerous technical goods are not legally bound by the standards, rather they may choose deviating solutions if at least the same safety standard is achieved thereby.

[145]In order to cope with the rapid development of technology and the range of goods offered.

[146] The Machine Safety Act was replaced by the Appliances Safety Act.

accident prevention provisions, of such a nature that users or third parties are when properly using them, protected against dangers of all kinds of life or health as far as the nature of that proper use permits. Generally accepted rules of the art and the industrial safety and accident prevention provisions may be departed from where equal safety is guaranteed in another manner"[148].

It was changed fundamentally in August 1992[149]. It was mainly because of the new approach of EC Directives to technical harmonisation and standards, into national law. The GSG protects the user only in so far as he uses appliances `properly'[150]. In the case of conflict between the manufacturer's indications and the normal use, according to the Münster Administrative Appeals Tribunal[151]- always the normal use will apply. The appliances must take into consideration the habits of the user. Thus, the manufacturer simply cannot escape from his responsibility through instructions for use that goes against the uses predictable from the appliance's design.

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[147]Introduced by the Federal Ministry of Labour in 1977 and its scope are some what extended to dealers. Falke (1991), pp.14, 15.

[148] Quoted in *Ibid.* p. 17.

[149]Zweites Gesetz zur Änderung des Gerätesicherneitsgesetzes v. 26.8. 1992, BGBl. I, p. 1564. According to § 3 (1) Section 1-3 of the GSG:

"Technical work tools may be brought into circulation, only if they fulfil the technical safety demands and the other marketing provisions, laid down in the legal ordinances according to this law, and if they do not endanger life or health or other legally protected goods, as are quoted in the legal ordinances, when they are used in accordance with directions. Technical work tools, for which legal ordinances according to this law do not include any requirements, may be brought into circulation, only if they are supplied in accordance with the generally recognised state of the art as well as the regulations on industrial safety and prevention of accidents, so that users or third parties when using the products in accordance with directions are protected against all types of dangers to life and health insofar as permitted by use according to specification. Deviation for the generally accepted state of the art as well as the regulations on industrial safety and prevention of accidents may be permitted only insofar as equivalent safety is ensured by other means". Quoted in Josef Falke, "Foodstuffs Control and the Regulation of Business Practices in Emergency Situations in the Federal Republic of Germany", in Hans W. Micklitz (ed.), *Post Market Control of Consumer Goods*, Baden-Baden, Nomos Verlagsgesellschaft, 1990, p. 267.

[150]According to § 2(5) of the GSG:

"1. A subjective characteristic, namely the manufacturer's or importer's indications (practically those contained in publicity) on ways of using the technical work materials; and

2. An objective characteristic, namely the standard uses deducible from the design and construction of the technical work materials". Falke (1991), p. 18.

[151]Judgement of 26 October 1978 by OVG Münster- XIII AN 881/ 76, reprinted in Meyer. 257 et seq.

Ibid.

2. *Incorporation of Standards in the Annexes A, B, and C*

"In the Annexes A, B and C to the General Administrative Regulations (Allgemeine Verwaltungsvorschrift- AVV) on the GSG, the Federal ministry for labour and Social Affairs indicates rules of the art, compliance with which leads to a presumption that appliances are in line with the legally accepted level of safety"[152]. These Annexes are subjective to continuous review. Annexe C was opened in 1984 on the basis of agreement between France and the Federal Republic of Germany.

3. *Principles of Safety Standardisation*

Under the provisions of the law, reference is made to technical safety standards formulated by the various private standard agencies, for example DIN, in order to determine the `generally accepted rules of the art' or `state of the art'. In formulating "the technical norms for inclusion in Annexes A, the Appliances Safety Division of the Federal Institute for Industrial Safety and the DIN Committee on Safety technology work closely together"[153].

The test criteria are laid down in detailed for all standardisation work in DIN 3100/ VDE 1000 (`general guidelines for safety design of technical products'[154]) and DIN 820, part 12 (`standardisation work, standards with technical safety provisions, design'[155]).

DIN 820, part 12 published in May 1977 which brings together experience to date in the DIN safety Committee, the Federal Institute for Industrial Safety, and the Federal

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[152] Quoted in Falke (1990), p. 269.
[153] Quoted in Falke (1991), p. 30.

[154] According to DIN 31000/ VDE 1000 (3.3), "`Proper use within the meaning of this standard is the use for which the technical product is suitable according to the manufacturer's indications including those in publicity. In cases of doubt, it is a use that would be taken as usual from the design, construction and function of the technical product. Proper use also includes compliance with operating and maintenance conditions stated and the taking of foreseeable misuse into account". *Ibid.* p. 19.

[155] According to DIN 820, part 12, (3.9.1); "`Technical safety requirements should be specified in such a way that (when the product is properly used) it is likely that people, animals or things will be endangered. Ergonomic considerations should apply. Foreseeable mistakes should be taken into account". *Ibid.*

Ministry of labour provides the structural criteria that safety standards must meet for inclusion in Annexes A of the General Administrative Regulations under the GSG[156]. The DIN 31000/ VDE 1000 introduced in March 1979 for the safety design of technical products. It was to act as the basis for the specification of safety standards or VDE definitions.

In safety design the preferred solution should meet the safety objective in technically rational fashion as well as being economical the best, and in case of doubt, safety requirements take priority over economic considerations[157]. For safety design, the three-stage method may apply. They are:

i) Direct safety technology- technical products should be so designed that no hazards are present;

ii) Indirect safety technology- in the case of direct safety technology not fully possible, special safety devices that come into play automatically should be used; and

iii) Safety through instructions- indications of the conditions under which hazardous use is possible[158].

"The technique of safety through instructions is to be used in combination with both the direct and indirect safety technology even where hazards with products can be prevented only by particular actions on the part of the user[159]. Thus, it can be lead to excluding foreseeable misuse from design safety technology and allocating it to the technique of safety through instructions"[160].

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[156]Safety requirements must be laid down concretely and unambiguously, and compliance must be fully and unambiguously testable. Requirements must be specified so exactly that test results are reproducible.

[157][DIN 31000/ DE 1000, (4.1)].

[158] Falke (1991), p. 33.

[159] Notes on DIN 31000/ DE 1000.

4. *Deviation Clause*

It is intended to make progress in the safety technology and as well allow the manufacturer to adopt his or her own methods to meet the safety standards. It is useful to foreign manufacturers, where the foreign rule of art is not identical with the domestic one but nevertheless provides the same level of safety, the product may not be objected to the German market for safety reasons. It avoids obstacles to trade between member countries. In principle, products can be placed into the market freely without prior permission, however, in the case of the regulatory intervention for specific hazard, the manufacturer who departs from regulation position is under obligation to provide proof of equal safety standards being met.

The obligation to comply safety standards "does not apply to manufacturers where the technical work materials have, according to written statement by proposed user, been manufactured to order (§ 3(2) of the GSG)"[161].

5. *The GS (geprüfte Sicherheit) Mark*

The Appliances Safety Act does not have an obligation to test the technical work materials but it offers manufacturers as well as importers the possibility of securing confirmation by a design test from recognised test centres that their appliances meet the required safety standards[162]. If their appliances are according to the provisions of the safety standards, then they have the right to use the GS Mark, along with an identification of the test centre (§ 3(4) of the GSG). The GS Mark was introduced by the Federal Ministry for labour in 1977. It serves not only the consumer to choose safe products in a simple and easy manner but it also serves the marketing interests of manufacturers and also a way of lessening the burden on supervisory authorities who

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[160] Falke (1991), p. 33.
[161] *Ibid.* p.27.
[162] § 3(1) of the GSG or of a legal ordinance adopted pursuant to § 4 (the Federal Government may hear the Commission before enacting a law) or § 8a (the Commission comes into force by law).

should refrain from testing appliances bearing the mark, unless there are grounds to suspect its illegal use[163].

The GS Mark has become common in almost all-technical consumer appliances. The applicants for the GS Mark have the opportunity to make a request for the equipment-related criteria. Thus, the relevant safety requirements may already be referred to in the design phase of technical work appliances.

6. *Test Centres and their Practice*

The test centres competence for the design test will be determined by the legal ordinance by the Federal Ministry for Labour and Social Affairs, after consultation with the Committee on Technical Work Materials and with the agreement from the Bundesrat (the Upper House of the German Parliament). The test centres must be suitable in staff and equipment for the task, economically independent and be able to offer the guarantee of reliable test results. In the Register of Testing Centres, the area of responsibility is set out, for which a testing centre is recognised[164]. In Germany at present there are 64 GSG test centres, EU- test centres are 28, and in addition there are 6 test centres in France. However, all GSG test centres must reach European test centre standards by the end of 1997 for a certain period of time, which may be extendable.

Time limitation varies in the case of testing certificates among the test centres:

i. The Federation of Mutual Indemnity Associations (BG) limits validity of test certificates to a maximum of five years;
ii. In the case of where the workplace- related sound pressure gauge exceeds 85 dB (A), the certificate will be valid for a maximum of three years; and
iii. In the case of TÜV and VDE test centres there is no such time limitations.

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[163] Falke (1991), p. 34.

[164] In the context of the bilateral agreement between France and the Federal Republic of Germany, the Labaratoire Nationale D'Essais was also recognised as a test centre in 1985. *Ibid.* p. 35.

A test certificate will become invalid if appliances deviate from the state of the art on which it is based, unless a further examination indicates that the appliance corresponds to the altered requirements of safety standards.

The test centres inform the competent Trade Supervisory Office because defects found were not removed or unsafe equipment was put into further circulation, otherwise not. The test centre is also entitled to remove appliances in the process of manufacture and examine them in a control inspection at any time and without any prior appointment, in order to determine whether the finished products corresponds to the tested design model or not. They have to note accidents arising in using appliances tested by them and see to the removal of faulty goods and also they have to transfer their experiences from testing work into standardisation and regulatory work.

In a decentralised testing system, where different test criteria may be applied by different test centres, so that the manufacturers might choose test centres according to their preferences. In such a situation the only solution is to extend the information network among test centres, and have control on the test centres by the Federal Institute for Industrial Safety, which is active since 1984[165].

7. Trade Supervisory Offices and Its Activities

The Trade Supervisory Officers are the competent authority to monitor the GS Mark. They have a very wide range of tasks like environmental protection, social industrial safety and, in the area of technical industrial safety, work places, monitored installations, dangerous work substances, explosive materials, radiation protection, the organisation of occupational safety in plants and for technical work materials. Thus, the trade supervisory officers are not obliged to make systematic control on all technical work materials of manufacturers and importers. However, they have to check technical work materials where a competent authority for industrial safety or a legal accident insurance agency, officer of police or other authorities, user of technical work materials or a centre

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[165] *Ibid.* pp. 36, 37.

concerned with protection against hazards within the context of the GSG (i.e. Stiftung Warentest- which is a testing agency, works councils, and testing/ inspection centres) have submitted a report on a defective technical work material or an accident arising from the use of a technical work tool[166].

The basic objective of the GSG is to prevent the risk of harm, which may arise form the hazard appliances. Accordingly, the Trades Supervisory Officers may supervise on the technical work materials, which are exhibited at, trade fairs and important trans- regional exhibitions. The advantage of these kinds of activities may be:

i. With a limited personal, not only the latest but also the largest technical work materials will be checked;
ii. There is no need to trace industries and importers scattered all over the nation; and;
iii. Testing can be carried out prior to mass production of technical work materials.

At the same time, majority control on technical work material at trade fairs and exhibitions may also lead to disadvantages. For example, inspections may be limited to visual inspection, so that the defects which can caught at first sight may be noted. Therefore, more detailed inspection is not possible, for which (in a certain circumstances) a dismantling or destruction of the technical equipment is necessary[167]. The Trade Supervisory Offices in the individual states in 1995 is is presented in table 4.3.

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[166] § 5(2) of the GSG and § 1 AVV- GSG. *Ibid.* pp. 38, 39.
[167] *Ibid.* pp. 39, 40.

Table No.: 4.3

Trade Supervisory Officials: Local, Middle and Central Level

Trade Supervisory officials in the individual States in 1995 at the Local, Middle, and Central level (Without persons in training, trade doctors,remuneration auditors, other experts and adminstrative personal)					
	Local	Middle	Central	Total	
Baden- Württemberg	634	55	56	745	
Bayern (Bavaria)	499		28	527	
Berlin	183		11	194	
Brandenburg	183		14	197	
Bremen	50			50	
Hamburg	111			111	
Hessen	174	17	20	211	
Mecklenburg-Vorpommen	145		7	152	
Niedersachsen	419	32	7	458	
Nordrhein-Westfalen	765	32	16	813	
Rheinland-Pfalz	147	14	12	173	
Saarland	52		8	60	
Sachsen(Saxony)	219		10	229	
Sachsen-Anhalt	279	12	2	293	
Schleswig-Holstein	69		5	74	
Thüringen	138	16	11	165	
Total	4067	178	207	4452	
Source: Bundesministerium für Arbeit und Sozialordnung(Hrsg.), Arbeitssicherheit(1996),. Reihe: Berichte und Dokumentationen, Bonn. (The Federal Ministry for Labour and Social Affairs (ed.,), Report on Accident Prevention, 1996, Bonn).					

The table 4.3 shows that in the states of Baden- Württemberg, Hessen, Niedersachsen, Nordrhein- Westfalen, Rheinland- Pfalz. Sachsen- Anhalt and Thuringen, the administration of trade supervision is three-tier in structure. A mid-level agency has been created between the Trade Supervisory Offices at the lowest state level and the highest state authorities. One exception is in Rheinland- Pfalz, where the competent mid-level agency, the State Office for Environmental Protection and Trade Supervision, is responsible for the entire state. Trade Supervision in the States of Bavaria, Berlin, Brandenburg, Mecklenburg- Vorprommen, Saarland, Saxony and Schleswig- Holstein is set up on a two-tier administrative system. The city-states of Bremen and Hamburg, the administration of Trade Supervisory offices are one-tier system. In the year 1995, at the local level there were 4067 trade supervisory officials employed in supervisory tasks. In addition there were 178 officials in the mid-level agency and 207 at the central agency

As a matter of fact, in Germany, the Federal laws are not enforced by the Federal Agencies but the State and Local government officials enforce them. For instance, the Federal law on Nuclear Safety Regulation is not enforced by the Federal Agency but by the State and Local Governments. However, there is a Federal Department for Radiation Protection.

The Central Agency for Safety Technology, Radiation Protection and Nuclear Technology of the Trade Supervisory Office of Nordrhein- Westfalen (ZfS) does some selective market controls for certain kinds of technical work materials suggested by accident reports or safety tests as being particularly accident prone. It mainly concentrates on the kinds of devices, which are used in the home, do-it-yourself business, and for games and sports. The findings are used in standardisation works, if not yet incorporated in technical safety standards[168].

8. *Prohibition Orders*

If the Trades Supervisory officers discover a defect which constitutes a danger to life or health of the user or third parties, given proper use, as a last resort, where other measure proven inadequate, is the prohibition order, preventing the technical work material from being brought into circulation or exhibited. Similarly, if an accident has occurred because of the defect ascertained and further accidents are feared, immediate execution of the prohibition order should be directed[169].

"The prohibitionary order, to be issued to the manufacturer or importer and only under very restrictive conditions to an exhibitor or trader, must be accompanied by reasons, and the defects must be specified in detail. To ensure that the prohibitionary orders are issued only in justified cases, the Trade Supervisory office, must consult one of the agencies of legal accident insurance whose members use technical work materials of the

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[168] *Ibid.* p. 40.
[169] Falke (1990), p. 373.

similar type, before deciding, unless the danger of delay or the defect in the nature of the work materials is obvious"[170].

In general the Trades Supervisory officers may use less intensive measures, cautioning about defects ascertained and advice about eliminating the defects or give an order to remove defects ascertained within a certain period of time, before issue of prohibitionary orders.

The prohibitionary orders are valid throughout Germany, even if they are issued by state authorities, because they are concerned to Federal Laws. The numerical development of control inspections and the prohibition of technical work tools from 1985- 1995 can be explained with the help of a table 4.4.

Table No.: 4.4
Trade Supervisory Officials: Testing Activities

Testing Activities of the Trade Supervisory Offices according to the Appliances Safety Act (GSG). in the Period from 1985-1995.		
Year	Inspections	Forbidden Technical Work Tools
1985	12655	94
1986	13005	45
1987	Unknown	29
1988	13726	19
1989	13871	31
1990	11256	15
1991	14957	35
1992	17607	66
1993	15262	61
1994	15631	44
1995	15130	60
1996	Unknown	24
1997	Unknown	13 (up to June)
Source: Bundesministerium für Arbeit und Sozialordnung, (The Fedral Ministry for Labour and Social Affaiars), Unfallverhütungsbericht (Report on Accident Prevention), 1995, Bonn. (On telephone request Ms. Otto and Mr. Kröger).		

[170] Quoted in Falke (1991), p. 41.

Table 4.4 reveals that the number of inspections marginally raised up to 1992 is from 12655 to 17607 and then from 1993 there is not much variation in the number of inspections, which were below 16000.

In the case of forbidden technical work tools the data collected ranges from 1985 to June'1997. There was a lot variations during the period in the case of a number of prohibited technical work tools. The decreasing trend may pose a question of whether the Trade Supervisory officers can still effectively threaten to employ the prohibition order as an instrument of control.

The tests done by the Trade supervisory offices of Hamburg according to the GSG in 1995 are presented in Table 4.5.

Table No.: 4.5

Inspection: Trade Supervisory Offices of Hamburg

Inspection of the Trade Supervisory offices of Hamburg according to the Appliances Safety Act (GSG) in 1995.		
Number of Inspections	n	%
total	929	100,00
at trade fairs and exhibitions	597	64,26
Tested Technical Work Tools		
total	1402	100,00
business, agriculture, administration	396	28,25
household, leisure,school,preschool	1006	71,75
produced domestically	779	55,56
produce abroad	623	44,44
Technical Work Tools with Technical Safety Deficiencies		
total	529	100,00
domestic products	245	46,31
foreign products	284	53,69
Number of Defects		
total	601	
removable through refiting	358	59,57
removable through construction changes	80	13,31
unusable-new design necessary	19	3,16
deficiencies in the users´manual	144	23,96
Inspection Protocols	2	
Prohibition Orders	4	
Source: Bundesanstalt für Arbeitsschutz- BAU, (The Federal Minsitry for Occupational Health and Safety) Dortmund, 1995 (On telephone request: Ms. Otto).		

The table 4.5 shows that 64. 26 per cent of the inspection took place at trade fairs and exhibitions. 1402 technical work tools were examined in the course of 929 inspections Of these 28. 25 were used in business, agriculture and administration, and 71 75 per cent in the home, for leisure, school and pre-school. 44.44 per cent of the technical tools were produced abroad. 59. 97 per cent of the deficiencies could be eliminated through add-ons, and 13.31 per cent through constructive measures, 23.96 per cent can be attributed to erroneous instruction manuals. Only 3.16 per cent of the deficiencies were so serious that the device was rendered unusable and has to be newly constructed. Prohibition order

was issued in only four cases, which can be attributed to both the strict applications of the principle of proportional response and the self-understanding of the trade supervisory officials, who see themselves more as advisors than supervisory officials.

9. *Information Dissemination about the Prohibitionary Orders*

The prohibitionary orders are published in the monthly newsletter on the GSG, by the Federal Institute for Occupational Health and Safety (BAU) only for internal use. It is mainly intended to warn the owners of defective appliances, where technical work materials are still in trade, and to bring attention to the traders and potential purchasers about the hazards[171].

Prohibitionary orders, which are effective, are reported to the EC Rapid Information Exchange System by the BAU, after an appropriate preliminary investigation.

III. German Institute for Standardisation- (Deutsches Institut für Normung e. V. - DIN)

1. *Origin and the Development of DIN*

In Germany DIN plays a major role in the formulation and dissemination of technical rules when compared to other organisations. It has established its position in the field of standardisation at national level by a multiplicity of co-operative relationships, embodied in agreements with the Federal as well as state authorities, associations, and technical and scientific bodies[172].

In 1975 the name was changed from NADI (1917), DNA (1926) to Deutsches Institut für Normung e. V- DIN, the object being specified as being, „through joint work by interested circles and for the benefit of the public", to formulate,, publish and promote

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[171] *Ibid.* p. 46.

[172] *Ibid.*p.51.

the application of „German Standards or other working results that aid rationalisation, quality guarantees, safety and communication in the fields of economy, technology, science, administration among the public", and to „represent German Standardisation at home and abroad"[173]. DIN is not a Government agency but a private self-regulatory organisation. The organisation structure of DIN can be explained with the help of the Chart 4.4.

Chart No.: 4.4

DIN- Organisation

Members Assembly

Presidia Board

Conformity
President
1. Vice- President
2. Vice- President

Director

Standardisation.Examination Office
Consumers Counsel
German Counsel for the Estimation of

Committee for Financial Matters
Election Committee

Management

Director the DIN		Standardisation Department	DKE 5. Electro Techniques	Department of International	Department for Administration and Publishing
Leadership	Examination Department	Technical Department		Co-operation International	- Legal Dept
Consumer Certification:	Staff Department Principles of Standardisation	1 Basic Standards 2 Safety, Environment		Secretariat Foreign	- HRD - Finance Dept
German Counsel for Estimation of the conformity	Quality Management Application Techniques Educational System	3. Material s testing Light, Pictures, Precision-mechanics, Optics 6. Construction,		Committees Office Contact Committee for MCTF Committee for	- Organisations - DGTR - Activities of the Publisher
German Society for Product Information	CIM and Quality Health- System Laser Techniques Metrology	Water matters, technical progress 7 Purity of Air		European Standardisation	Beuth Verlag
DQS	Techniques for Safety Chain of Transport	8. Machines and Sports and leisure time Air travel, Materials			
DE- PRO Ltd.,	Society for Information Commissions	10 Ship and marine techniques for vessels and the Sea			

99 Standardisation Committees with 4107 working- committees

„Interested Circles" (Approximately, 35000 Volunteers)

Source: Business Report 1995/ 96 of DIN

[173] § 1(2) and (3) of the DIN statutes of 20 April 1975, printed in DIN- Norenheft 10 Grundlagen der normungsarbeit des DIN, 4. Aful., Berlin/ Köln 1982, 219 et seq Quoted in *Ibid* p 52

The composition of DIN Executive Board reflects the prevailing influences on the formulation of standards. 45 members are drawn from Government, Industry, Public Utilities, Health, Insurance, Consumers, States etc[174].

In October 1979, with the help of the Federal Government, the German Information Centre for Technical Rules (DITR) was set up within DIN. It collects all German Technical rules, including rules on non- DIN standards, accident prevention regulations and the technical legal and administrative provisions of the states, of the Federal Republic, of the European Community and international standards. Its stored information is available in user- oriented fashion and can considerably facilitate and accelerate the administration and updating of voluminous standards, database and manuals[175].

2. *DIN and Its Agreements (Agreement between the DIN and the Federal Government)*

DIN has several agreements with several organisations or governing bodies, among those, the agreement with the Federal Government and the Association of German Electrical Engineers (Verband Deutscher Elekrotechniker- VDE) are considered as most important. It also has an agreement with the Federation of Mutual Indemnity Associations (BG). Thus, the firm is a link among the regulatory work of legal accident insurance agencies (gesetzliche Unfallversicherungsträger), the accident prevention regulations, and DIN standards can secure.

In the agreement on 5 June 1975, the Federal Government recognises DIN as the "Competent Standards Organisation for Federal Territory and Berlin (West) and as the national standards organisation in non- governmental international standards organisations" [§ 1(1)]. The DIN undertook to take the public interest such as safety technology, health protection, environmental protection, consumer protection, and energy conservation into account in its standardisation work It also ensured that the

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[174] Industry (16), Federal Government (6), Public Utilities (4), Standardisation Organisations (4),States (4), Technical Supervision, material Testing(3),Trade union (1),Health(1), Handicrafts (1), Science (1), Mutual Indemnity Associations –BG (1),Consumers(1),Insurance (1), Trade (1) Source: DIN Geschäftsbericht 1995/96, pp. 51 and 52.

[175] Falke, n. 136, pp. 53, 54.

standards can be adduced of technical requirements i.e., DIN standards can be referred to as the recognised *state of the art* [§ 1 (2)][176], which has great importance in practice for the liability system because very often courts use the DIN norm as the due level of care when they grant compensation. Courts are not bound to do this because the DIN norm does not posses any formal legal characteristics but in fact and in reality DIN norms comes very close to it.

Further, the DIN provide a place to the Federal Government on its directing body in order to involve in standardisation work, to give Government applications for standard preferential treatment, and also to advice in standard related matters. In return, the Federal Government provides financial assistance to DIN, observes strict subsidarity in national standardisation [§ 4(2)], uses DIN standards in the national administration and publishes a list of DIN standards, draft standards and projected standards in the Federal Gazette.The DIN, then, declares its willingness „to contribute to international understanding in the area of standardisation" and to do every thing in its power to ensure that „ obligations entered into by the Federal Government through bilateral agreements on liberalisation of trade and removal of technical barriers are not interfered with by DIN standards [§ 6(1) "anti- protectionism clause"]. Last but not least, DIN explicitly undertakes to comply with DIN 820, which sets out the principles for standardisation work, and with the directives for the specialised standardised committees (§ 3)[177].

In 1984, DIN was entrusted with the carrying out of tasks arising from conversion of the Community Directive on an information procedure in the area standards and technical regulations. However, the standards agreement does not transfer any

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[176] *Ibid.* p. 59.

[177] *Ibid.* p. 60.

sovereign powers and from the legal point of view there is an unwritten relationship between the DIN and the Federal Government[178].

3. *Principles and Procedures for standard formulations*

The decisive factor for legitimating standard formulation would be based on neither substantive evaluation of the findings nor actual involvement of interested parties, but only the procedure specified in DIN 820 part 1 and 4 of 1974/1975.DIN 820, part 1, lays down the principles for standard formulation. Standardisation is seen as „planned harmonisation carried out jointly by interested parties" for the general good, which ought not to not lead to special economic advantages for individuals[179]. The technical work should be done by honorary workers, in particular experts from the interested circles. In the composition of the working groups, the principle is that, there should be suitable proportional representation from the interested groups[180]. On the selection of workers, the directives for the working committees go on to specify that account has to be taken of the special features of the field of work and the objective of bringing the latest findings of science and the state of art into standard formulation[181]. It also provides that the results of regional or international standard formulations be taken over where possible without change[182].

"The standards should both, promote the development and humanisation of technology and take into account the current state of science and technology and economic circumstance requirements that in some cases are entirely contradictory"[183]. DIN 820, part 4 lays down the course of standard formulations in detail and also specifies the openness principle laid down in DIN 820, part 1. Generally the procedure for standard

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[178] *Ibid.*

[179][Din 820, part 1(2)].

[180][DIN 820, part 1 (3.4)].

[181][Guidelines for standards committees, point 10(5)].

[182]DIN 820, part 1 (5.2).*Ibid.* pp. 61, 62.

[183][DIN 820, part 1 (5.7)].

formulation leading up to publication of a standard will take 3 years, if no special delays arise[184].

Applications for standardisation largely come from the business community or from the committees despite the general principle that any one can file an application in DIN or competent committee, for standard formulation. If the application is accepted for standardisation, the public is informed about the standards formulation and the committee goes for a preliminary standard. Following technical standardisation checks by DIN's internal standards verification centre, the draft standard is made available to the public for opinions varying from 4 to 24 months. Proposals for amendment can be put forward by anyone and they are invited for the competent committee discussions. In some cases a mediation as well as arbitration procedure will be available within DIN. Before final publication, the standard is once again subjected to check in order to guarantee that the standard formulation is uniform and non- contradictory. The decision on standards will be based on consensus principle i.e., "the content of a standard should be arrived at by mutual agreement in the endeavour to reach a common view- where possible avoiding formal voting"[185].

[184] *Ibid.* p. 62.

[185] DIN 820, part 4(6). *Ibid.* p. 63.

The standard formulation procedure can be explained with the help of a chart 4.5.

Chart No.: 4.5

Standard Formulation Procedure: DIN 820- 4

Introduction of a motion for Standardisation by Interested Circles or Individuals		
Rejection of the motion by the Responsible Standardisation Committee within 3 months	Acceptance of the motion by the responsible Standardisation Committee within 3 months	Decision on the foundation of a new Standardisation Committee within 3 months
Publication of the working title of the Planned standardisation matter in the DIN- Bulletin for technical rules		
Elaboration of a working draft through the Secretary of DIN editor with the help of a small working group and the proposer, if necessary		
Elaboration of a new working draft on the basis of the results in the committee, if necessary		
Passing of the working draft for printing as a Standard draft by the working committee		
Edition's out of a manuscript by the Secretary of the DIN, if necessary with the help of an editorial group		
Examination of the Standard- draft on the basis of the principles for Standardisation by the interior examination office within 4 weeks and release for printing		
Printing of the Standard- draft by the publisher „Beuth Verlag" within 6 weeks		
Opportunity for every body to give comments on the Standards- draft within 4 months as a general rule	Comments by the Standardisation Examination office with regard to a possible comment by the DIN- Presidia Board	
Committee deals with the comments in a hearing with the commentators within 3 months after the deadline for objections		
In case of fundamental changes publishing of a second Standard- draft a public hearing	Passing of the Standard- draft by the committee and if necessary by a supervising committee	Withdrawal of the Standard- draft without substitute and publication in the DIN- Bulliton including the reasons for the decision
Examination of the manuscript by the standardisation examination office on the basis of the principles and rules for the publication of DIN- Standards		
Printing of a control copy and examination by the secretary		
Acceptance of the control copy by the Standardisation examination office as a DIN- Standard in the name of the DIN- Presidia Board		
Printing of the DIN- Standard by the Publisher „ Beuth- Verlag " and publication for sale		

Source: Business Report 1995/ 96 of DIN

The standards are reviewed once in five years. In the case of a standard not according to the state of art, it must be reformulated if it is to maintain[186]. The DIN has no enforcement powers, but it is dependent on voluntary compliance by the manufacturers concerned. According to 820 part 1, "DIN standards in Germany standardisation system are open to use by anyone. They should be introduced as recognised rules of the art"[187].

The principle for applying DIN standards state that "while the rules for establishing DIN standards call for the state of the art to be taken into account, this demand is extremely hard to achieve in reality because of the dynamic advance of technology", and that "the outcome of team work cannot be expected to meet the highest aspirations"[188].

The Marburger's five minimal constitutional requirements[189] and Gusy's one- sided representation of interest groups[190] for standard formulation procedure may be relevant to review here.

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[186][DIN 820, part 4 (4)].

[187]DIN 820, part 1(6.1). *Ibid.* pp. 63, 64.

[188] Quoted in *Ibid.* p. 64.

[189]Marburger, 1979, pp. 138-146
"i) Relevant expertise must be comprehensively represented on the standardisation committees,
ii) All interests involved should have balanced representation in the procedure for arriving at standards;
iii) The public must have an opportunity to influence the content of the standard produced;
iv) Technical standards must be subjected to regular revision; and
v) The procedure must be laid down in binding fashion". *Ibid.*

[190]Gusy, 1986; see also Brinkmann, 1976, 94-96 and Backherms, 1978, 53-56
"i) Private interest may take precedence over public interests which are not concretely enough defined and often not personally represented on the committees;
ii) Standardisation against clear market leaders is not possible- the factor of honorary standardisation work one-sidedly favours industrial suppliers;
iii) Consumers are under-represented and able to articulate their interests only with great difficulties, and ;
iv) There is an overlapping of interests between industry and standardisation that is hard to break down- the expertise of the applicants from industry cannot be outweighed". *Ibid.* p. 65.

4. *DIN: the Consumer Council*

The consumer council is the result of the agreement between the DIN and the Federal Ministry for Economics[191]. It was established under the DIN in order to improve the representation of consumer interests in standards formulations and is fully financed by the Ministry. "The formal status of the Council as a standing committee of the DIN Executive and the disciplinary attachment of its full-time workers to DIN, which guarantees the professional ties to DIN and its working committees. This type of representation has appositely been called a „partnership- type in- house solution"(partnerschaftliche Im-Hause-Lösung')"[192].

"The Council has the task of advising and supporting DIN steering and working Committees in matters of interest to the non- commercial final consumer, and of incorporating consumer interests into international, regional and national standardisation. The consumer interest representation must take place exclusively within the procedural framework laid down by DIN 820 for standard formulation. The council should take the following steps in order to fulfil its task:

- Keep standardisation projects and work programmes of the standards committees under observation;
- Present applications for standardisation projects of relevance to consumers on the standards committees;
- Ensure personal representation of consumers on the standards committees;
- Keep standardisation work under observation, even in standard committees on which consumer representatives do not regularly sit;
- Present opinions on preliminary and draft standards and where necessary, formulate objections to draft standards;
- Ensure the incorporation of DIN standards into the work of consumer institutions, and feedback of experience acquired there into standardisation work, and

[191] [The DIN Executive Resolution of 8 October 1974].
[192] *Ibid.* pp. 68, 69.

- Ensure the instruction and training of consumer representatives working on DIN working committees"[193].

The President of DIN in consultation with the Consumers Working Group (Arbeitsgemeinschaft der Verbraucher- AGV) and the Ministry for Economic Affairs, appoints five members to the Consumer Council. To facilitate co-ordination and train consumer representatives, the Executive Office has produced an exhaustive „ guide to standardisation for consumer representatives"[194].

The DIN may take into the consideration of the following the criteria in standardisation:

"- Safety or health;

- Environmental protection; energy conservation and other general economic interests;

- Interchangeability, compatibility, allocation possibilities;

- Accessibility of fitness for use; and

- Staffing and financial capacities.

In general, standardisation projects are followed from their inception. In addition, the Council reserves the right to „break in" in the course of preparation of standards in order to assert consumer interests. Still more importantly, a fixed group of selected people, augmented in each case by experts in particular areas, receives all draft norms of consumer relevance produced for forming final opinion, so as to assert consumer interests in the course of the normal opposition procedure[195].

5. *DIN: the Role of German Market for Product Marketing- DGWK*

The German Society for Product Marketing has been established by the DIN under the executive resolution of 24 September 1971 in order to administer, monitor, give quality assurance and protect the DIN certification marks. DGWK handles co-operation in

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[193]Rule of procedure of the DIN Executive of October 1975, point 4.2.2.4. *Ibid.* p. 69

[194]Stiftung Verbbraucherinnstitut/ DIN- Verbraucherrat (ed.). Leitfaden für Verbrauchervertreter bei der Normung, Berlin 1981. An extract concerning structural problems of honorary consumer work in standards committees is contained in: Bosserhoff, 1984, 7 et seq. The point is considered in detail in Chapter V, 6.1.3. *Ibid.* p. 70.

[195]On these principles cf. Bosserhoff, 1980, 671-72. *Ibid.* p. 71.

international and regional certification. The activities of the DGWK are reflected in the form of the DIN testing and monitoring mark[196].

Furthermore, neither the DIN nor the DGWK are generally involved in the actual testing and inspection of products licensed under the scheme. The product tests and inspections are carried out by independent laboratories, except the categories like Optical appliances, Heating, Cooking Appliances and Air Condition Techniques. The DGWK is responsible for the approval and appointment of test laboratories to work on behalf of the DIN/ DGWK. If the test centre confirms that a product meets all the requirements of DIN standards, then the DGWK confer the DIN testing and monitoring mark for a fee, for a maximum period of 5 years. Based of the content of the standards observed, the DIN test mark acts as a commodity mark, safety mark or otherwise confirms a product's fitness for use. Marking with the "DIN- tested" (DIN- geprüft) must be clearly distinguished form the marking of a product with a DIN number[197] and the association's mark DIN[198], which anyone may use[199].

In principle there are no specific rules for the assessment of quality- control and its acceptance. The guidelines provide only that the DGWK has the right to order re- testing of the product if it is necessary to do so and to carry out audit testing of products under licence, at its own discretion. In the case of misuse of the DIN mark the DGWK can withdraw the licence, prohibit the use of the mark and claim damages.

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[196] *Ibid.* p. 72.

[197] It is sufficient for the product to meet only the requirements of the DIN standards indicated.

[198] The rules for this mark observed

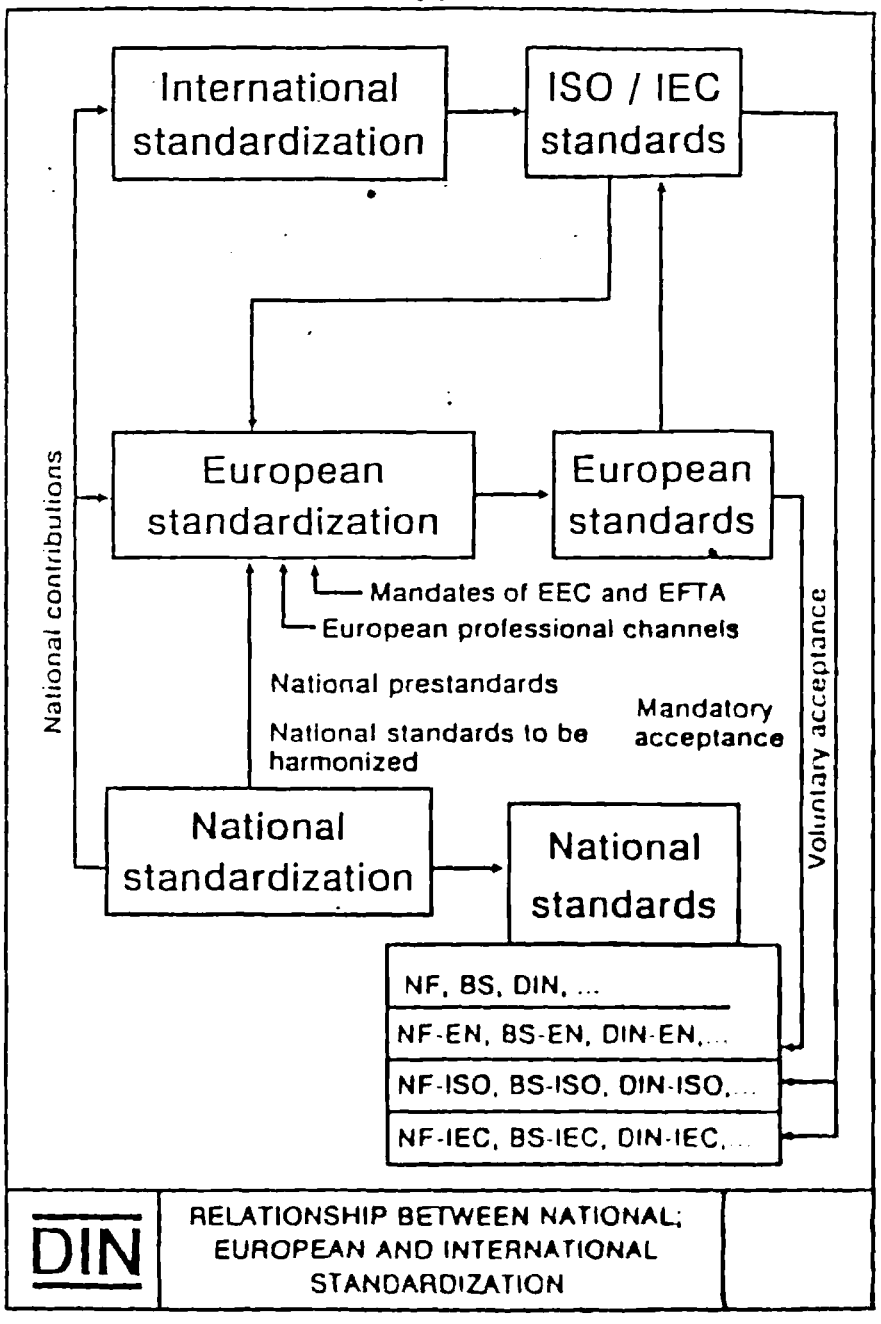
[199] DIN 820, part 1 (6.5). Falke (1991), p. 73.

6. *DIN: European and International Standard Activities*

In general a large proportion of the DIN standards are based on European and international harmonisation work. The relationship between national; European and international standardisation can be explained with the help of a chart 4.6.

Chart No.: 4.6

DIN: Relation between National, European and International Standardisation



Source: Material prepared for the Subgroup on "Standardisation, Certification and Quality" (DIN, Berlin, dated: 28-4-1987), Unpublished.

Since the German state of the art is higher than international standards, the adaptation of an international standard is not possible. In the case of international standards adopted by the German standards system, the usual obligation for verification after 5 years is still in

force. It is mainly because of progress in technical requirements that an international standard taken over as a DIN standard is tightened up in the national framework, if international decision is delayed. There are several resolutions adopted by the DIN Executive Board, which are of relevance to international, and regional standardisation work[200].

"The orientation of the Community policy on the standards has led to a fundamental and very rapid transfer of priorities from the national to the European level with respect to technical standards, which can be explained with the help of the table 4.6.

Table No.: 4.6

DIN: Share of Standardisation

Share of Standardisation activity of the DIN at different levels, 1984 - 1994 (in Percentages)						
Levels	1984	1986	1988	1990	1992	1994
National	60	50	40	30	27	18
Bilateral	5	5	5	5	5	5
European	10	15	25	35	38	45
Worldwide	25	30	30	30	30	32
Source: DIN Annual Report 1992/93, P.21						

The table reveals that the increase in standardisation activity of the DIN at the European level from 10 per cent in 1984 to 45 per cent in 1994. At the same time there is a great decline in the share of activities covered by national projects from 60 per cent to 18 per cent between 1984 and 1994. During that period, the proportion of work in this area, which went to international standardisation projects increased from 25 to 32 per cent"[201].

In the case of international bodies like ISO and IEC, the national member organisation is not obliged to take a standard over into its national standard system, even if it has assented to the international standard[202]. However, with the European bodies like CEN and CENELEC there is a binding obligation on a national member standards

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[200] *Ibid.* p. 66.

[201] Josef Falke, "The Role of Non-governmental Standardisation Organisations in the Regulation of Risks to Health and Environment", *Working Paper RSC No. 96/9*, Badia Fiesolana, European University Institute (Robert Schuman Cetre), 1996, p. 11.

[202] The rules on take-over are stated in the basic norm DIN 820, part 15-standardisation work, DIN/ ISO standards, DIN/ IEC standards, and structure. According to these provisions, in the German „package" a national preamble and a national appendix are possible, but they must not contain any changes from the international standards. Falke (1991), pp. 66, 67.

organisation, even if outvoted, to take standards over unchanged into the national standard system[203].

"The president of the DIN declared that from 1991 onward all standardisation committees had to have new standardisation initiatives approved by its advisory councils, unless the project was identical to an actual or planned project of the CEN, CENLEC, ISO or the IEC. The advisory council has in any case to determine whether an equivalent application to the ISO or CEN might not be more appropriate"[204].

The standardisation activities of national, European and international can be explained with the help of the table 4.7.

Table No.: 4.7

Standardisation: National, European, and International Levels

Ntional, European, and International Standardisation Activities 1980- 1995.								
			1980	1985	1989	1991	1993	1995
DIN Standards Total			18739	20566	20510	21257	22002	23476
of these newly published			1655	1473	1272	1150	1337	1842
DIN draft standards			4576		4694	5148	6636	8097
Members of the DIN Society			5982	5531	5320	6351	6230	5933
Professional Employees			786	743	782	988	837	825
of these DIN employees			633	595	632	789	837	825
Volunteers			41000	41000	39849	44565	39000	34938
Standardisation Committees			121	114	109	107	105	99
DIN Working Committees			3865	3764	3768	3973	4300	4107
Meetings of Standardisation Committees			4922	4848	4846	5162	5700	5121
Places of Publication for DIN Standards			124	150	140	159	168	160
DIN standards in English			2700	5891	6186	7300	8100	9200
International Standards (ISO/ IEC)			5978	8275	10461	11471	12330	13818
of these newly publishhed			591	788	742	904	1114	1274
Working Committees (ISO/ IEC)					3400	3470	3652	4449
European Standards			98	744	1376	1870	3255	4810
of these newly published			14	37	306	400	939	1367
European draft standards			205	299	1300	2940	2691	3388
Working Committees(CEN/ CENELEC/ ETSI)					1500	1700	2010	2133
Source: DIN- Geschäftsberichte (DIN- Business Reports).								

[203]These common rules for CEN and CENLEC have applied only since 1986, after the 1985 CEN General Assembly adopted the principle of binding majority resolutions for CEN too. See Mohr, CEN-Generalversammlung 1985, DIN- Mitt. 65 (1986), 47-48. The rules on take-over are laid down in basic standard DIN 820, part 13- standardisation work, DIN- EN standards, Structure. *Ibid.*

[204] Falke (1996) pp. 11, 12.

The table 4.7 shows that the total of European standards increased from 98 to 4810 between 1980 and 1995. An annual increase of 1000 European standards is expected up to the year 2000[205]. The number of national standards has almost stagnated, although one must take into consideration that the European standards are to be included unalterably in the total of national standards. There is an increasing trend even in the case of international standards i.e. it rose from 5978 to 13818 between 1980 and 1995. Reflecting the precedence of international standards for reasons arising from the opening of the market, 40 per cent of the European standards of the CEN are identical to international standards of the ISO, with the CENELEC showing a 95 per cent degree of conformity. In the case of working committees of the DIN has decreased from 4300 in 1993 to 4107 in 1995 compared to European and International standard organisational working committees, where there is a an increasing trend.

7. DIN: Sources and Expenditure

The mobilisation of sources of DIN and its expenditure can be explained with the help of the table as follows:

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[205]DIN Annual Reports 1992/ 93. p. 8.

Table No.: 4.8

DIN: Income and Expenditure

Income and Expenditure of DIN, 1980- 1996 (in DM millon)									
		INCOME					EXPENDITURE		
Year	Publishing & Miscellaneous	Contributions from Industries	Contributions From Government	Total	Employement	Production	Business	Miscellaneous	Total
1980	36,5	10,7	11,9	59,1	35,2	8,00	14,5	0,7	58,4
in %	61,8	18,1	20,1	100	60,3	13,7	24,8	1,2	100
1981	38,7	11,4	12,4	62,5	38,2	8,00	15,1	0,7	62,5
1982	40,00	12,3	12,5	64,7	38,8	9,4	16,1	1,8	65,00
1983	41,6	12,3	12,3	66,1	38,8	9,4	16,1	0,7	65,8
1984	43,2	12,7	12,5	68,4	40,6	9,3	17,7	0,7	68,2
1985	45,9	13,2	13,1	72,2	43,4	10,6	18,7	0,8	73,6
1986	48,8	13,6	13,00	75,4	45,4	8,9	20,2	1,00	75,4
1987	52,00	15,3	13,3	80,6	48,3	7,5	22,00	2,1	80,00
1988	57,3	16,1	15,8	89,2	52,3	8,7	25,1	2,3	88,4
1989	65,2	17,7	17,7	100,6	56,6	9,8	29,9	4,3	100,6
1990	94,2	25,3	20,7	140,1	79,3	12,6	40,2	8,00	140,1
in %	67,2	18,1	14,8	100	56,6	8,9	28,7	5,7	100
1991	111,5	25,9	25,00	162,4	66,3	15,00	62,8	18,4	162,4
1992	112,9	27,9	23,9	164,7	68,2	16,6	62,9	17,00	164,7
1993	105,9	28,5	25,4	159,7	71,2	18,7	57,3	12,5	159,7
1994	105,8	27,9	25,6	159,3	72,2	16,5	60,4	10,00	159,3
1995	105,4	28,5	24,7	158,6	77,1	16,5	50,00	14,9	158,6
1996	106,00	28,1	25,1	159,2	77,4	17,5	54,3	10,00	159,2
in %	66,6	17,7	15,8	100	48,6	11,00	34,1	6,3	100
Source: DIN- Geschäftsberichte (DIN- Business Reports)									

The table 4. 8 reveals that the sources of the DIN and its expenditure in between 1980 and 1996. For the year 1996, the large percentage of the DIN finance comes from sales proceeds for standards sold by its own publishing house account for 66.6 per cent, followed by the contributions from member firms account for 17.7 per cent. The sources from the Government account for 15.8 per cent. The Government pays the costs in full for the Safety Technology Committee and the Consumer Council, the work of which is in large part for the public interest.

On the other side of the coin, in the case of the DIN expenditure during the year 1991, The costs on employment occupies the first place account for 48.6 per cent, followed by the costs on business accounting for 34.1 per cent. Only 11 per cent of the total

expenditure went to the formulation of the standards. The remaining per cent fall under the category of miscellaneous expenditure.

IV. EC: The Standardisation and The Product Safety Act, 1992

1. *The EC Standardisation*

The main purpose is to harmonise the laws of Member States relating to product safety and thereby remove barriers to trade and distortion of competition within the Community. Once in force a product to which the directive applies and which satisfies its required standard of safety cannot be refused entry by a Member State on safety grounds. At the same time it proposes to achieve this aim by imposing `general safety requirements' on all applicable products which enter into the European market. The duty observe to the `general safety requirement' is supplemented in the directive by an obligation on economic operators to supply consumers with relevant information and adopt measures enabling consumers to be informed of the risks present in products.

The European Community's new approach to technical harmonisation and standards is a kind of decisive step towards the effective dismantling of technical barriers to trade within the policy on the completion of the internal market. Tied in with this new approach is the strengthening of European standardisation and the development of a complementary global approach to certification and testing[206].

Products are bringing into circulation according to regulations in the harmonised sector as a rule, that the conformity of a product with the essential safety requirements is certified in a certain procedure and documented by the CE mark. The CE mark is a kind of conformity mark and not the safety mark that the CE marked products can enter into the markets of EC Member States. The CE mark is obligatory in contrast to the GS mark.

In granting harmonised standards greater relevance in its internal market policy, the community has brought about an unforeseen revival of European standardisation. It

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[206] Falke (1996), p. 1.

raises so to speak the `ruling capacity' of European Standard organisations, the CEN (Comite europeen de normalisation), the CENELEC (Comite europeen de normalisation electotechnique), and since 1988 the ETSI (European Telecommunications Institute) for the field of telecommunications, are assigned the task of marking and technical specifications[207]. The reference is simply made to the `essential safety requirements and not to the `generally accepted rules of the art' or to the `state of the art' or to the `state of science and technology'- the most advanced reference formula in the form of a general clause[208]. In a technical safety law, the Community and the European standardisation organisations are symbolically dependent on each other along the lines of `relief of the state through associations' and `relief of associations through the State`.

The importance of the central national standardisation institutes grew parallel to the revaluation of European Standards. They have only one vote to negotiate in the preparation and adoption of European Standards. The interested parties like manufacturers, suppliers, consumers, certification bodies, scientists, authorities, and environmental associations are not directly involved in European standardisation, rather they can only participate via `mirror Committees'or `fractional representation'or territorial representation'.

The main objective of the new approach is `to make it possible to settle at a stroke, with adoption of a single Directive, all problems concerning regulation for a very large number of products, without the need for frequent amendments or adaptations to that Directive. Consequently, in the selected areas there should be a wide range of products sufficiently homogeneous to allow common`essential safety requirements' to be defined.

The Directives adopted for implementation of the new approach to technical harmonisation and standards contain so called safe- guard clauses. In the case where a Member State or the Commission is of the opinion that a harmonised standard which is cited in the official journal does not conform to the essential safety requirements, the

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[207] *Ibid.* p. 3.
[208] *Ibid.* pp. 5, 6.

Commission has power to struck it out of the official journal after consulting the Standing Committee of Standards and Technical Rules.

2. *The EC Product Safety Act, 1992*

a. Scope

According to article 1, the purpose of the provisions of this directive is to ensure that products placed on the market are safe[209].

b. Definitions

Article 2 provides, the meaning of the words `product'[210], `safe product'[211], `producer'[212] and `distributor'[213] within the context of the directive.

c. General Safety Requirement

According to Article 3 of the Directive, the general safety requirement is that all producers must place only safe products on the market. The producers within their limitations must provide consumers with relevant information so that risks inherent in the product throughout its normal or foreseeable use can be assessed and precautions taken in circumstances where such risks are not obvious without warning. However, the

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[209]"It also makes clear that the directive shall apply in the circumstances where there is no other specific Community provisions applicable". Quoted in Tony Askham and Anne Stoneham, *EC Consumer Safety*, London, Butterworths, 1994, p. 48.

[210]"Product is any product which, although intended for consumers, may be supplied in the course of a commercial activity. Thus, it can be a product used by professionals as well". *Ibid.* p. 48, 49.

[211]"It is one, which under normal or reasonably foreseeable conditions of use does not present any risk or only minimum risks compatible with the product's use". *Ibid.* p. 49.

[212]"He is a manufacturer of the products, when he is established in the community, and any other person presenting himself as the manufacturer by affixing to the product, his name, trademark or other distinctive mark as the person who reconditions a product. A producer may also be the manufacturer's representative if the manufacturer is not established in the community or even for that matter, the importer". *Ibid.*

[213]"Any professional in the supply chains whose activity does not affect the safety properties of a product". *Ibid.*

provision of warning will not exempt a manufacturer from meeting the requirements laid down in the Directives[214].

"There is an obligation on the part of the distributor to act with due care in order to ensure compliance with the general safety requirement. They must not supply products, of which they know or believe that on the basis of information available to them do not meet the general safety requirement[215]".

d. Conformity to standards

Article 4 of the Directive provides that if there are no specific Community rules and if a product confirms to specific legislation in the member States where it is in circulation, it will, be deemed to satisfy the general safety requirement. At the same time, if there is no specific legislation, the safety of a product is to be assessed against standards or codes. However, it is to be noted that compliance with these standards or codes, unlike compliance with legislation, does not imply that the products meet the general safety requirement. In either case the competent authorities in Member States are empowered to take appropriate action against the manufacturer, if there is enough evidence that a product may be dangerous to health and safety[216].

e. Powers and enforcement

According to article 5, there is a general obligation on member States to adopt necessary rules and regulations to make manufacturers and distributors comply with the directive. And also Member States have to appoint competent authorities to monitor the compliance with the general safety requirements, including the powers to impose of suitable penalties[217].

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[214] *Ibid.*

[215] *Ibid.*

[216] *Ibid.* p. 50.

[217] *Ibid.*

"Article 6 gives the powers of enforcement to Member States. The powers should be used and acted upon in accordance with the degree of risk involved. The measures are as follows:

i. Organising appropriate checks on safety properties of products;
ii. Requiring information from parties involved;
iii. Taking samples and subjecting them to safety checks;
iv. Subjecting product marketing to prior conditions and requiring suitable warnings;
v. Making arrangements for special warnings to persons whom may be exposed to a risk;
vi. Temporary prohibition on supplying product whole checks is carried out if there are indications that it may be unsafe;
vii. Prohibiting the placing on the market of a product which has proved dangerous and establishing measures to ensure the ban is complied with; and
viii. Organising a product recall and if necessary the distraction of a product"[218].

f. Information Exchange

According to article 7 of the Directive, a Member State has to inform[219] the Commission about the actions taken against the marketing of a product or its withdrawal, "except where the measures relate to an event whose effect is limited to that of the Member State". The Commission will advise other Sates, after consultation with the parties concerned, if the commission views the measures are justified. Otherwise, it will tell the relevant Member State. "It is assumed that the concerned Member State will then revoke whatever measures taken"[220].

g. Emergency Situation and Action at Community Level

According to article 8, if a Member State adopts emergency measures to deal with products presenting a `serious and immediate risk', the Commission is to be advised, unless it is limited to the territory of that particular Member State. The Commission will

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[218] *Ibid.*

[219] Rapid Exchange of information.

[220] Replaces Council Decision 89/45, OJ L17, 21.1.89, p. 51. *Ibid.*

check before forwarding to other Member States. If other Member States adopt measures on the basis of this information, they are to advise the Commission[221].

Article 9 of the Directive provides that the Commission is itself empowered to take emergency measures on the basis of information received[222].

h. Procedures

According to article 10 of the Directive, a Committee on Product Safety Emergencies shall assist the Commission. And also the Committee has to assist the Commission on the health and safety aspects of products concerned[223].

Article 11 provides the procedure[224] for dealing with any measure to be adopted by the Commission.

According to article 12, confidentiality is preserved, "unless information on safety properties must be made public if circumstances require, in order protecting the health and safety of persons"[225].

Article 15 of the Directive provides that the Commission is required "to submit a report to the European Parliament and Council on the implementation of this directive every two years after its adoption"[226].

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[221] *Ibid.* p.51.

[222] *Ibid.*

[223] *Ibid.*

[224] "The measures are to be submitted to the committee for its opinion, which must be delivered within a time limit laid down according to the urgency of the matter but not exceeding one month. Decisions are to be made by a qualified majority. Any measures adopted under this procedure are effective in the first instance for three months, although it may be extended. Member States have to put the commission's decision within less than 10 days and the competent authorities charged with carrying out the order must, within one month give the parties concerned an opportunity to submit their views to forward to the Commission". *Ibid.*

[225] *Ibid.*

[226] *Ibid.*

According to article 16, the Commission has "to prepare a report for the Council on the basis of experience acquired with appropriate proposals for the Council to decide whether adjustment to the directive is necessary"[227].

i. Implementation

Article 17 provides that "the Member States were required to implement this directive by adopting suitable rules and regulations by 29 June 1994"[228].

j. The limitations of the Directives

1. Second- hand goods, by virtue of their nature, may be excluded in certain circumstances;
2. Production equipment, capital goods and other products used exclusively in the context of a trade or business are stated as not intended to be covered by this directive; and
3. It does not apply to services in general.

M. German Regulatory System: General Remarks

The theoretical arguments of alternative legal system may as well apply to the German ex- ante approach. The general remarks on the German ex- ante approach as follows:

1. The majority of the German regulatory standards as well as certification marks are voluntary in nature. At the same time, a decentralised regulatory system prevails in Germany.
2. The categorisation of standards based on the general clauses such as `generally recognised rules of the art` or `state of the art´ or `state of scientific technology´ may help not only the regulatory authorities but also the manufacturers and even for that matter consumers too in order to recognise the state of the safety of product.
3. According to the deviation clause, the manufacturers are free to adopt several methods in order to comply with the regulatory standards. Thus, theoretical

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[227] *Ibid.*

[228] *Ibid.*

arguments of alternative legal system `variation in the standards for different tortfeasors, especially in the case of private good ´, seems to be not having any impact on the German regulatory system.

4. In Germany, the tortfeasor who complies with the regulatory standards may not be protected from the liability, in case the event of harm occurs. However, the tortfeasor will be protected from liability in the case of mandatory regulatory standards, if he complies with the mandatory standards[229]. Thus, the conflict with the alternative legal system on due level of care may be ruled out. On the one hand the German system is providing incentives to the tortfeasor to meet the mandatory regulatory standards in order to reduce the risk of harm. On the other hand, there is a problem for the tortfeasors in complying with the double standards i.e., to regulatory standards as well as to court standards, in the case of compliance with to voluntary regulatory standards by the tortfeasor.
5. The regulatory authorities in Germany, that is Trade Supervisory Officers have a wide range of tasks. Thus, much of the supervision of the technical work is done at trade fairs and important trans- regional exhibitions which may help to reduce the administrative costs of the regulation. However, these kind of eye based probabilistic methods of enforcement may be unable to provide any incentive to the tortfeasors who escape from the regulatory authorities to take precautionary measures to reduce the risk of harm.
6. The European Commissions` new approach to technical harmonisation and standards, and the global approach to certification and testing´ may raise doubts about the continuing importance of the national standards institutions and the certification marks like DIN and GS mark in formulating standards and providing safety products to the consumers. For example, the test centres need to comply with the European standards of test centres standard by the end of 1997.
7. The German regulatory authorities may have the power to prevent import of goods, the goods, which do not comply with the German safety standards, into the German market. At the same time, the German State of art is a little bit higher than the International and the European standards, which may result in the adaptation of

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[229] § 1(2) of the German Product Liability Act, 1989.

international standards into the DIN standards being impossible and also may lead to hidden protection of German Industry.

8. The prevalence of the decentralised regulatory system in Germany may reduce the influence of interest groups on regulatory agencies by illegal means in order to fulfil their interests. For example, the competition among the test centres and the de-linking of the test centres, and standardisation institutions makes it difficult for the manufacturers to influence the test centres and get favourable test results for their products. In the case of differences between the test centres and the standards formulation institutions on any related issues, the Ministry's decision will be the final.
9. The rapid exchange information system about banning products may help the consumers to get quick information on hazardous products, which prevents the risk of harm.
10. In Germany, the manufacturers themselves are responsible for complying with the regulatory standards, which may provide strong incentives to take precautionary measures to reduce the risk of harm.

N. Comparative Analysis of the German and Indian Regulatory System for Consumer Protection

Based on the above review on the German regulatory system, the following are some of the lessons drawn for the Indian regulatory system for improvement in order to provide effective protection to the consumer.

I. Consumer Council

It may be advisable to introduce the German model of DIN `Consumer Council´ in the BIS in order to represent the interests of the consumers in the formulation of regulatory standards. The ad hoc representation of consumers in the formulation of standards in BIS and the Consumer Affairs (& Public Grievances) Department is unable to provide adequate protection to the consumers. Thus, it is advisable to establish a separate `Consumer Council´ similar to the DIN- Consumer Council.

II. Tortfeasors Protection from the Liability

In the case of tortfeasors protection from the liability, if he complies with the mandatory (regulatory) standards- in Germany- the tortfeasor will be protected from the liability. On the contrary, the tortfeasor will not be protected from the liability in spite of compliance with the voluntary (regulatory) standards. Thus, Germany has a mixed system. Therefore, protecting the tortfeasor from the liability, if he complies with the mandatory (regulatory) standards may not only provide incentives to the tortfeasor (because he does not need to take double standards i. e. both the regulatory and court) to take precautionary measures to reduce the risk of harm but also it resolves the conflict between the ex- ante and ex- post approach on the due level of care.

Thus, it is advisable to introduce the tortfeasors protection from the liability in India, in the case of mandatory regulatory standards in order to provide incentives to the Indian tortfeasor to comply with the mandatory regulatory standards to avoid court liability.

However, from the tortfeasors point of view it is not fair that he has to comply with the double standards and in that case, he may prefer to comply with the court standards rather than the regulatory standards in order to avoid the liability.

III. The Concept of Proper Use

The GSG provides protection to the consumer only under the condition that he uses the appliances `properly'. Otherwise even though it is not possible to merely evaluate the cases based on the `properly used' concept by the courts, at least these type of concepts may provide some incentives to the consumers to follow the instruction of the manufacturers before usage of a particular product in order to meet the necessary requirements to approach a court to get the compensation from the tortfeasors, if harm occurs. Thus, it is advisable to introduce the concept of `proper use' in India under the provisions of BIS Act, 1986 in addition to the provision that BIS will take action against the tortfeasors only in the case of ISI marked product being defective.

IV. Supervisory Activities of Trade Supervisory Officers

In Germany, the Trade Supervisory officers are the competent authorities to enforce the regulatory standards. Since they have several tasks, most of the supervisory activities were done at trade fairs and important trans- regional exhibitions which not only consume the less personnel to control latest and large technical work materials but also makes it not necessary to trace the widespread manufacturers and the importers. In spite of the disadvantage of these kind of approach, for example inspections are limited to visual inspections, it is advisable to introduce the supervisory activities at fairs and exhibitions especially in developing countries like India, where resources are limited. At the same time these type of measures at least provide some incentives to the manufacturers to take precautionary measures to reduce the risk of harm because of regulatory authorities inspection.

V. Decentralised Regulatory System

The German decentralised ex- ante approach may not only provide competitive environment among the test centres but also it reduces the scope of interest group influence on the regulatory agencies in the formulation of standards. Thus, it is better to adopt the German based decentralised regulatory approach in India in order to reduce the influence of interest groups in the standard standardisation in BIS. It is necessary to not only de-link the test centres and the BIS in the standards formulation but also need to establish as many test centres as required in order to provide a competitive environment.

VI. Deviation Clause

In India, the tortfeasor who complies with the regulatory standards is not protected from the liability, if harm occurs. Thus, it is advisable to introduce German based `deviation clause´ in order to reduce the adverse effects which arise from the theoretical arguments of alternative system in the form of `variation in the standards of different tortfeasors (in the case of private goods)´.

VII. Rapid Exchange Information

The information dissemination activity of the Federal Institute for Occupational Health and Safety about hazardous products may not only create awareness among the consumers but also it can prevent the adverse effects of such products in the earliest possible manner. Thus, it could be better to introduce the similar type of information dissemination about hazardous products in India to prevent the adverse effects.

VIII. Manufacturer's Obligation

In Germany, it seems to be that much of the obligation to comply with the regulatory standards is on the shoulders of the manufacturer. This type of approach may provide better consumer protection by providing safe products to the consumers, when compared to the regulatory agency enforcing the standards. One wonders whether the corporate culture in India has evolved to a level where one could think of an environment in which the manufacturers would shoulder the responsibility of evolving standards to protect the consumer interests!

CHAPTER V

SUMMARY AND CONCLUSIONS

The market system that has evolved over the centuries instead of tending towards being perfect has actually been highly distorted. The resulting asymmetry of informative has often put the consumer at a disadvantage requiring extra-market intervention. Though the need for consumer protection is more in countries like India where the markets tend to be more predatory, the consumer protection systems are much better evolved in developed countries like Germany. The study is set in a comparative perspective with a view to draw lessons from the more evolved systems.

The purpose of the Study

The thesis tries to show why state intervention is needed in order to protect the interests of the consumers. What instruments can be used by the state to protect the consumers? What are the justifications of the economic analysis of the liability and the regulation in providing incentives to the parties to take precautions to reduce the risk of harm? Why do we need to use the optimal mix of the alternative legal system? How effectively are the established instruments of ex-ante and ex-post systems are functioning India?. The study has also made an attempt to review the experience of the consumer protection in developed countries like Germany in order to draw some possible lessons for India.

Need for State Intervention

According to the traditional liberalist view, the market is the best instrument to protect the interests of the consumer. However, the divergence from the perfect market conditions leads to the causes and consequences of market failure.

The traditional theory of market failures such as exploitative theory suggests that the state should frame the rules to protect the weaker party (consumer) against the stronger party (producer) especially, in standard form of contracts where there is unequal bargaining power prevails between the consumer and producer. Modern capitalism is not market capitalism but

monopoly capitalism, where the monopolies can not only dictate the terms and conditions but also manipulate the consumers.

The modern theory of market failure such as Nelson and Darby & Karni's nature of goods suggests that neither in the case of search goods nor in the case of credence goods but in the case of experience goods, the protection of the consumer needs to be reviewed because of informational asymmetry about the attributes of the products.

The theoretical model of asymmetric information which was developed by Akerlof as a *lemons principle,* indicates that the producer has much more information about the attributes of his product than the consumer does. Thus, consumer will estimate the quality of a product on an average which results that the product of above average quality do not have the market. At certain stage no product will be traded, accordingly no market will exist because only bad quality products exist in the market, which is known as *race to the bottom* or *adverse selection.*

The study, first of all, put emphasis on the theories of market induced correctives, such as the theory of signal and the theory of reputation, of market failure. The theory of signal is broadly based on warranties, advertisements and prices. In the case of warranties, the higher quality producer can provide an additional unit of warranty at a lower cost than the lower quality producer can, which signals the consumer that the higher quality producer can stay longer in the market compared to the lower quality producer. Consumers can get the information on an unobservable quality from an absolvable advertisement. The theory of positive relationship of advertisement and the theory of experimenters on advertisement shows that the highly advertised products experienced repeat sales compared to the less advertised products.

The theory of price signals reveals that the firm which cheats the consumer by providing low quality product at higher prices may go out of market because some of the potential consumers may not purchase a product from that firm based on the product specific information. According to the theory of reputation, the consumer will repeat their purchase based on the current experience, if the quality of a product is good. Thus, the producers have incentives to provide high quality products to the consumers. Similarly, consumer's quick learning about the attributes of the products may also provide incentives to the producer to provide high quality

products to the consumers. However, in reality the theories of signal and the reputation are unable to correct the problems of informational asymmetry because of prevalence of moral hazard and adverse selection which may lead to inefficient risk sharing between the consumer and the producer.

The treatment of marginal and infra-marginal consumers by the producer, the underestimation of product risks by the consumer and the non- prevalence of asset specificity may be unable to correct the market imperfections by market induced correctives. In a perfect market economy, the introduction of consumer protection may reduce the welfare of consumers because non-existence of free exchange of goods and services. Markets in developed countries like Germany may work effectively because of highly developed reputation in the market place compared to markets in developing countries like India.

The introduction of consumer protection is very much needed in India because of the prevalence of illiteracy, ignorance, poverty and asymmetric information which may keep the consumer in a weaker position. Consumers are unable to gain from the producers signals. And the high degree of monopoly power which prohibited the development of reputation in the Indian markets. In theory, state can protect the consumer by way of liability system or by way of regulatory system or by both.

The theory of the alternative legal systems: Liability System

The liability system came into play an effective role in consumer protection since change of its doctrines from caveat emptor to caveat venditor. Further, the asymmetric information between the consumer and the producer favours the introduction of product liability or strict liability. In the case of weaker party protection, based on several reasons, strict liability is preferred to negligence rule.

The liability system is an ex- post approach where the parties are liable to damages, after the harm occurs. The perfect liability system will provide incentives to the parties to take precautionary measures to reduce the risk of harm, just like as the way in which the perfect market protects the interests of the consumers. On the other hand, the liability system is unable to provide incentives to the tortfeasor to reduce the risk of harm because of law's delay,

rational apathy, weak causation links, informational disadvantage particularly in the case of scientific and technological knowledge, inadequate tortfeasor's wealth, problems involved in the calculation of the damages in the case of pain and sufferings etc. Thus, the effectiveness of the liability system on the parties is as similar as the effectiveness of the market induced correctives on the market imperfections. Therefore, the liability system in which the consumer is not perfectly sheltered either in terms of product safety or in terms of insurance, favours the regulatory system.

Regulatory System

In the case of regulatory system the state plays a major role both in the formulation as well as enforcement of laws. According to Prof. Ogus, there are three different degrees of state intervention such as regulation of information; standards, licensing and price controls. Licence is the highest degree of state intervention because the firm has to take prior approval from regulatory agency in order put the product into circulation. Each and every degree of state intervention involves costs, especially, in the case of regulatory standards there are three types of costs such as administrative costs, compliance costs and indirect costs. Normally, under certain circumstances, regulatory agencies may work not only as barriers to trade but also they impose certain cost on consumers. The regulatory system is an ex- ante approach where the parties have to pay the fine even before harm occurs and after violation of the regulatory standards. The standards have been formulated irrespective of whether harm occurs. However, the advantages of the regulatory system are such as informational advantage over scientific and technological knowledge, fining the tortfeasor for the violation of the standards based on the expected damage, and the applicability of the regulatory agency decision to the whole nation may overlap because of the regulatory capture, high administrative costs, the rigidity in the case of reformulating the standards, imposition of common regulatory standards on private goods- where standards varies from individual to individual, informational disadvantage over private parties etc.

Mixed use of the alternative legal systems

The above analysis clearly indicates that none of the alternative legal systems has uniqueness in reducing the risk of harm by providing incentives to the parties. Therefore, there is a need for

usage of mixed from of regulation and liability. If this is the case, one has to be clear about the following questions:

Is it necessary to protect the tortfeasor from the liability, if he complies with the regulatory standards? and

Is it necessary to make the tortfeasor liable, if he does not comply to the regulatory standards?

The arguments show that the compliance of regulatory standards by the tortfeasor does not necessarily relieve him from the liability and also the non- compliance of regulatory standards by the tortfeasor does not automatically make him liable.

Neither regulation nor liability provides incentives to the parties to exercise the socially desirable level of care stress the importance of working of this alternative legal system as substitutes as well as complementarities. Every one favours the alternative legal system but there is no answer yet on what is the optimal mix of alternative legal system? It is mainly because the optimal mix of alternative legal system varies from country to country and case to case. Thus, it is really difficult to set the optimal mix of legal system. However, within my point of view the optimal legal system is to be the one in which the regulatory system set the standards as minimum and the courts also taken it into the consideration and award the compensation to the victims whenever the regulatory standards are unable to internalise the risk of harm. Similarly the minimum regulatory standards perhaps reduce the risks of harm up to some extent whenever the liability system is unable to provide the compensation to the victims.

Bringing doctors services under the purview of Consumer protection Act, 1986 in spite of the regulatory provisions of Medicines Act and the establishment of the SEBI in order to regulate the stock exchange market in spite of the Companies Act clearly not only indicates the prevalence of ex- ante and ex- post approaches in India but also indicates the working of alternative legal system as a substitute as well as complementary in order to reduce the risk of harm.

Consumer Protection in India

The economic theory of consumer protection which argues for state intervention to protect the interests of the consumers is more or less applicable to the Indian situation. Based on the theoretical analysis of liability versus regulation, the study on Indian consumer protection has been focused on the functioning of the alternative legal system in India such as the Consumer Protection Act, 1986 (amendment, 1993) as an ex- post approach and the Bureau of India Standards Act, 1986 as an ex- ante approach in order to protect the interests of the consumer.

In general, the alternative legal system in India plays an important role in protecting the rights of citizens. Before enactment of the Consumer Protection Act, 1986 there were several rules and regulations either directly or indirectly to protect the interests of the consumer. However, not only were most of these rules and regulations are non- compensatory in nature but also the civil courts are unable to provide adequate legal remedies to the consumers because of law's delay, higher litigation costs and complex legal procedure. Thus, the Consumer Protection Act (CP Act) has been enacted by the parliament in 1986, which is not only compensatory in nature but also under the provisions of CP Act a separate three-tier courts (Consumer Disputes Redressal Agencies- CDRAs or Consumer Forums- Fora) at the District, the State and the national level were established with the objectives of providing *speedy*, *inexpensive* and *simple redressal* to the consumers.

The Consumer Protection Act, 1986 (Amendment, 1993): The CDRAs (as an Ex- Post approach)

The three- tier CDRAs differs in terms of its members, pecuniary, revisional, and administrative jurisdictions. The members (both legal and non- legal) of CDRAs are not eligible to re-appointment. The consumers has to file a case within two years from the date when cause of action arises, however even after two years the Fora may entertain a case based on sufficient reasons. The consumers have to pay fine up to Rs. 10000 for frivolous or vexatious complaints. After the proceedings the Fora issue an order to the concerned party. The dissatisfied party(s) may go for an appeal even up to the Supreme Court. The parties need not engage a lawyer; no court fee and the environment of the Fora should be informal. The CP Act is not in derogation of any other law.

Research Design

The functioning of the CDRAs has been analysed based on primary as well as secondary data. The collected data from the selected Fora such as District Forum of Ranga Reddy (least number of cases filed by the consumer) and the Nellore (largest number of cases filed by the consumer), State Commission of Andhra Pradesh, and the National commission; the collection of the Consumers (those who approached the Fora) opinied based on the questionnaire schedules; and the collection of the views of the members of the Fora (District Forum of Ranga Reddy and the State Commission of Andhra Pradesh) as well as the Consumer Counsel based on the oral interviews, will be taken into the consideration in the analysis of the functioning of the CDRAs. It gives an information on how many cases were filed; on which categories consumers have very many grievances; on what the cases pending rate is; and on what per cent of cases are disposed/ dismissed within the time limit prescribed by the CP Act, 1986. In other words, whether the Fora is fulfilling the objectives (speedy, simple and inexpensive redressal to the consumers) of the CP Act, 1986?

Findings Based on the Empirical Work

The data analysis shows that the majority of cases were filed by the consumers against the category of Public Utilities, Government Departments, Insurance firms and Banks & Financial Institutions. It also indicates that the rate of pending cases is low except in the State Commission of the Andhra Pradesh and the majority of total filed cases were not given judgement by the Fora within the prescribed time limit. The percentage of disposed cases such as cases disposed in favour of consumers and the cases disposed as withdrawn by the consumers were high except in the National Commission.

The Multiple Regression Analysis shows that the court success can be influenced by bribe. It also indicates that the court success will be purely based on the facts of the case but not on the engaging of a lawyer by the consumer or the educational background of the consumer.

In an oral interview the members of the State Commission of Andhara Pradesh and the District Forum of Ranga Reddy, expressed their view that there is no biased judgement or bribes in the functioning of the Fora. However, they viewed the consumer should appear before the fora between 1 to 5 times. They also felt that the law's delay mainly because of delay in notices served to the parties and the granting of adjournments liberally wherever the Government is opposite party. They are against the permanent appointment of members, the possession of legal knowledge by the non- legal members may be an advantage and two to three members are enough to run the day to day activities of the Fora.

They also viewed that the consumer education should be introduced in educational institutions and the establishment of local level Fora is advisable, however one has to consider the cost effectiveness on the exchequer. The interviewed members opined that the governments and the voluntary organisations should create awareness among the consumers and especially the non-governmental organisations should work for consumer protection without misutilisation of its provisions.

In an oral interview the consumer counsel opinied that the involvement of lawyers is an advantage to the consumers and the fee for lawyers will differ from case to case and person to person in spite of prevalence of Lawyers Fee Act. They viewed that consumers' appearance before Fora for more than five times is not necessary. The reason for frequent appearance before Fora by the consumers is not the involvement of lawyers but because the members of the Fora are not following any criteria regarding granting of adjournments. They favour the temporary appointment of the members of the Fora, the legal knowledge of non- legal members may be an advantage and two to three members are enough to run day to day activities of the Fora.

They also favoured the introduction of consumer education in educational institutions and the establishment of local level Fora. In their opinion the Government should not only need to create awareness among the consumers but also to provide adequate financial assistance to the Fora. The majority of the consumer counsel was dissatisfied with the working of voluntary organisations.The drawn consensus on the functioning of the CDRAs based on the empirical work has been critically examined with the theory of alternative legal system.

CDRAs: The theory of the alternative legal systems

The CDRAs are easily accessible to the consumers not only because there is no court fee but also, because the Fora should provide simple and speedy redressal to the consumers. The State Governments can establish more than one Forum, if necessary. However, the CDRAs has also proved that they are not competent to provide incentives to the tortfeasor in the case of law's delay, tortfeasor being out of business, weak causational links, inadequate tortfeasors wealth and compensation for pain and sufferings. There is no doubt the environment of the Fora is far better than the civil court, however we need to take some steps in order to keep informal environment, especially the non- legal members should to play a major role in encouraging the consumer to present his case freely and frankly without any fear.

Suggestions to policy makers

The objective of speedy disposal is not fulfilled by the Fora because of on an average 68 per cent of cases were not cleared within prescribed time limit. At the same time the Fora is not providing redressal to the consumers not because the case is out of the purview of the CP Act but because the case need a lot of investigation which is not possible to dispose within prescribed time limit. Thus, one should need to think of pros and cons of speedy disposal and may perhaps need to establish `workable time bound programme ´.

The calling of the consumers by the Fora more than the required times may lead to adverse effects on consumers such as rational apathy. The data also indicates that the appearance before Fora by the consumers varies from 1 to 32 times. Thus the Fora is unable to fulfil the objective of providing inexpensive redressal to the consumers. Therefore, the Fora need to take some necessary steps in order to minimise the appearance before the Fora by the consumers.

The involvement of the lawyers in the Fora may be advantageous to the consumers. However, it may lead to establishment of more legal jargons in day to day activities of the Fora, law's delay because of frequent adjournments; especially, whenever consumer attends part-in-person and the opposite party engaging of a lawyer may raise the difficulties to win the case by the consumer. It may also further lead to the Fora failing to not only fulfil the objectives of providing simple redressal to the consumer but also failing to achieve the purpose of

appointment of non- legal members. Thus, it is necessary to take some measures such as establishment of some criteria in granting adjournments to lawyers as well as keep the informal environment.

The imposition of fine of up to Rs. 10,000 on consumers for frivolous and vexatious complaints is a premature policy because of not only the CDRAs themselves are unable to draw a clear cut border line between the goods and services which have come under the definition of the consumer and all over the country the full functioning of the CDRAs being not earlier than 1993 but also majority of the Indian consumers still not being aware of the existence of such Fora in the country. These type of policies may deter the consumer to approach the Fora in order to get redressal and also it is unable to provide any incentives to the tortfeasor to take precautions in order to reduce the risk of harm. The study also shows that some of the Fora are too liberal to award compensation to the consumers and even if the case is not under the purview of the CP Act, may impose costs on the consumers. Thus, it is necessary to take some steps such as that the Fora should need to follow the scope of the CP Act in the case of award of compensation to the consumers and the establishment of scrutiny department in the Fora may reduce the adverse effects on consumers wrong filing.

That the Fora is not empowered to grant interim order may perhaps lead to adverse effects on consumer protection especially in the case of public utilities. Keeping in view of law's delay in CDRAs, which suggests the think of providing power to the Fora to grant the interim order, for the required cases.

The study also reveals the adverse effects of appreciation of the members of the Fora in the case of award of costs of application, rate of interests, allowing the cases filing both originals as well as appeals even after expire of time limitation, and the granting of adjournments suggests the reduction of the appreciation of the members of the Fora in order to reduce the adverse effects on consumers.

The largest filing by the consumers against the category of Public Sector Units such as Public Utilities, Government Departments, Insurance, and the Banks & Financial Institutions, clearly indicates that there is need of policy measures to create consumer friendly transactions.

The ineffective market system and the liability system in protecting the interests of the consumer stress the need of usage of regulatory system. Thus, the study will also focus on the functioning of the Bureau of Indian Standards (BIS) as an ex- ante approach, how effectively it protects the consumer? The study will be based on secondary sources only.

The Bureau of Indian Standards Act, 1986: BIS (as an Ex- ante approach)

The Bureau of India Standards (BIS) was established in the place of Indian Standard Institute (ISI) by the enactment of the BIS Act, 1986 in order to meet the day to day requirements in the field of standards and certifications. In its structure the BIS consists of 115 members, 5 regional offices including Head quarters at New Delhi, 14 branch offices, 9 inspection offices and 8 laboratories. In its functions the BIS, mainly formulate the standards and grant the licences to the producers once after meeting the requirements of the Standards to use the ISI Mark, which is either voluntary or mandatory in nature. The licensee has to pay nominal fee. In the case of a person who use the ISI Mark without getting licence from the BIS may have to pay fine or imprisonment or both. Licences are granted initially for one year and renewed based on criteria. In the case of misuse of ISI Mark by the licensee, after investigation the Bureau may cancel the licence or take necessary legal action against the licensee.

The standards formulated by the BIS were based on multi- disciplinary co- ordination such as consumer protection, environmental protection and energy conservation.

The BIS laboratories will do the quality testing of a product for certification mark. In addition to BIS labs, there are other laboratories recognised by the BIS for product testing, in case of demand.

The BIS is promoting its standard formulation activities by choosing its members from different fields and the Government of India's policy of buying products which has ISI Mark indicates the important role of the BIS as a regulatory agency in India. The BIS also promoting its informational activities by conducting industry wise conferences, seminars and workshops. The Bureau also has its own well- equipped library. It is increasing its international activities in order to gain mutual advantages in the field of formulation and promotion of standards.

The BIS is controlling its activities by its inspecting officers by drawing samples both from the factory as well as from the open market.

The BIS: the theory of the alternative legal systems

The functioning of the BIS shows that the majority of the BIS standards are voluntary in nature which may unable the BIS to provide any incentive to the tortfeasor to take precautions to reduce the risk of harm. It is also unable to provide adequate compensation to the consumers, if the ISI Marked product is in defect, because the Bureau is unable to investigate the product defect especially from the used product, whether product is defective due to misuse by the consumers or non- compliance of standards by the licensee. This might be because the regulatory agency does not have an adequate information about the usage of the ISI marked product by the private parties that is consumers. The study also shows that the BIS is not providing adequate incentive to the tortfeasor except to withdraw or cancel the licence. The dissatisfied parties about the decision of the BIS may approach the civil court. The study is also shows that the BIS is unable to keep its credibility in the case of third party assurance because it is not following the provision of Certification Marks Manual (CMM) for sample testing.

It seems that the BIS is enjoying monopoly power in formulation of standards and certification marks. As a matter of fact the BIS major finance is from certification fee, which may indicate that the BIS is acting as a commercial test agency. It is very difficult to get the information from the BIS because it keeps almost all information under the category of *confidential* or *secret*, which may lead to closing the doors for resource persons and academicians in order to evaluate the functioning of the BIS in protecting the interests of the consumers. The adverse effects of commonly imposed standards by the BIS in the case private goods does not apply to voluntary standards. However, this is true in the case of mandatory standards.

There is no distinction between the consumer and the commercial concerns in the case of compensation from the BIS. As a matter of fact, in the case of redressal of grievances, commercial complaints will be benefited from the BIS compared to consumers. The administrative costs of the BIS will occur irrespective of the harm which may occurs, however it can reduce its administrative costs by adopting probabilistic methods of enforcement.

The BIS policy on review of standards once in five years clearly indicates the regulatory agencies are rigid in modifying the standards. As a centralised regulatory agency, the BIS is not free from the regulatory capture because its attitude towards mobilisation of resources; unequal representation between the consumer and industry & trade; the centralised formulation of standards and testing.

The compliance with BIS standards by the tortfeasor does not protect him from the liability, in the event of harm. At the same time non- compliance of the BIS standards does not automatically lead to tortfeasors liability. However, in the case of mandatory standards of the BIS, the producer will not allowed to circulate his products unless until it meets the requirements of mandatory standards.

Suggestions to Policy Makers

The BIS needs to formulate the standards for its day to day activities in order to improve its quality of work. The BIS needs to take some measures in order to improve the representation of the consumers in its formation of standards and certification marks. The BIS also need to review its policy measures in the case of cancellation of the licence, whenever the licensee is unable to meet the BIS standards may lead to adverse effects especially in the case of important products. The BIS need to follow strictly the provisions of Certification Marks Manual in sample collection both from the market as well as factory in order to provide third party assurance to the consumers. The activities of the BIS which are related to the consumer interests such as mandatory certification, consumer redressal etc. may be better to brought under a separate department in order to provide better protection to the consumers.

The BIS also needs to change its policy on reviewing standards once in five years because of rapid change in science and technology. It may be advisable for the BIS to increase its branch offices with at least one in every state in order to function effectively in its formulation of standards, certification and enforcement of standards. The BIS needs to adopt a policy in information dissemination to the consumers in the case of product hazards in order to avoid adverse effects. The analysis clearly indicates that either CDRAs or the BIS has uniqueness in providing the incentive to the tortfeasors in order to take precautions to reduce the risk of

harm. At the same time the overlap between the CDRAs and the BIS may perhaps propose the optimal mix of both the systems in order to protect the interests of the consumer by providing incentives to the tortfeasor. The alternative legal system needs so be effective in India because of the absence of social security system in health related risks.

The compliance with the BIS standards may not protect the tortfeasor from the liability and also the non- compliance of the BIS standards may not automatically lead to tortfeasors liability. Thus, the BIS as well as the CDRAs need to work as substitutes as much as complementarities in protecting the interests of the consumers. The BIS mandatory standards will provide some incentives to the tortfeasor in the case of ineffective liability system. Similarly, liability system will provide some incentives to the tortfeasor in the case of ineffective BIS standards.

The review of the experiences of developed countries like, Germany on consumer protection may be helpful for drawing some possible lessons to improve the consumer protection in India. It is interesting to do a comparative study between the civil law country, Germany and the common law country, India in the field of consumer protection.

Consumer Protection Experience in Germany: German Liability System

The prevalence of asymmetric information and the misperception of product risks by the consumers favour the argument of state intervention in Germany in order to protect the interests of the consumers. The state may protect the consumer by way of alternative legal system. The study will focus on the review the functioning of the German ex- post approach such as contract law, tort law, Product liability Act, 1990 & the European Product liability Act, 1985 (EC Directives) and the German ex- ante approach such as the Appliances Act, 1992, the DIN norm and the EC Product Safety Law.

The German Civil Code: Contracts and the Torts

The German liability system is based on the German Civil Code (GCC). However, in the case of consumer law, it appears to be the case that it plays major role because the German

legislatures hardly passed any bill in the field of consumer law apart from the transposition of EC Directives.

In Germany, the aggrieved consumer has to approach civil courts in order to get compensation either based on Product Liability Act or based on Tort Law. In civil court system there is a separate court for appeal i.e. the Court of Appeal for lower courts. The decision of the county court is final, if the monetary value of the case is less than DM 1500. In the case of litigation costs the looser has to pay the winner. The lawyers insurance system prevails in Germany. In the case of legal aid, even the higher income people can also get the financial assistance based on repayment within 48 months. The pending rate is lower except in the Federal Supreme Court. The lower pending rate may be the result of the Act, 1977, which not only reduce the number of presence before the court by the parties but also puts a time limit on the stages of the trial. The social security system may settle the cases out of court especially in the case health related risks. There are a few cases such as Honda, Milupa I, II, & III were gone up to the Federal Supreme Court. Thus, the social security system works as a substitute to the alternative legal system in protecting the interest of the consumers. It also reduces the administrative costs of the liability system. The argument of the insurance lobby is on the other side of the coin, which is out of the purview of the study.

The product liability claims in Germany will be based on contracts and torts. According to the GCC, the seller is strictly liable for breach and also he is liable based on negligence rule for positive and pre- contractual breach.

A product may be deficient because it may be either defective or a warranted attribute may not be present. The warranty claims are based on the misrepresentation. The seller is strictly liable for warranty claims; however, victim is unable to get compensation for consequential damages.

In the case of commercial transactions the merchant has to examine the goods on receipt immediately and notify the seller in the case of defects. The burden of proof rests on the purchaser. The calculation of damages varies based on breach such as unwarranted representation, breach of pre-contractual duties etc., however the claimant must be put into the position he would be in, if the circumstances giving rise to his claim for damages had not occurred. Especially, the pure financial loss can be covered under the breach of contract only.

The seller is also liable for grossly negligent act of the person he employed. The consumers those who suffer damages due to product defects may get compensation.

A person who intentionally or negligently, unlawfully injures the life, body, health, freedom of property or other right of another is bound to compensate him for any damage arising from that.In general, the distribution of unsafe or defective products by the manufacturer is unlawful and he is liable for the breach of duty of care such as manufacturing defects, design defects, warning defects and insufficient post- market defects.

Normally, the burden of proof rests on the plaintiff, however, a reversal of the burden of proof established by the Federal Supreme Court in the *Chicken pest* case, 1968. In the case of causation, the burden of proof rest on the plaintiff unless the reliance on *prima facia* evidence applies. The market share liability is yet to be practiced in Germany.

The plaintiff has to claim compensation within 3 years from the date of cause of action arises, however irrespective of the plaintiffs awareness of the damage, the period of limitation is 30 years.

The producer is liable for the conduct of the persons he employs, however there are some exception. In the case of compensation the claimant must be put into a situation that would have existed if the damaging even has not taken place. The plaintiff is also entitled to receive damages for pain and sufferings, however the amounts are determined by the courts which varies widely. A civil remedy is possible from the breach of statute protective laws such as pharmaceuticals, food, technical equipment and the criminal code.

The EC Product Liability Law

The emergence of European union has formulated the common consumer protection policy by introducing Product Liability Act, 1985 in order to reduce differences in legal system among the Member States to compensate consumers based on strict liability.The manufacturer of a finished product as well as raw materials will be treated as producer . The supplier of anonymous product may also be treated as producer, if he is unable to identify the actual

producer. The manufacturer is liable for damage caused by his defective product. The product will be defective if it does not meet the *user expectation test*, however, a product is not defective because a better product can be put into circulation. The manufacturer can avoid liability in the case of the state of the art defence, subsequent defect defence, regulatory defence, defence of non- commercial manufacturing and distribution, products not put into circulation and component part defence.

Compensation may be received by the victim or by the kith and kin of the victim. The EC Directive does not apply for damages for pain and suffering, which is left to the national law.

There is a cap on compensation, in the case of death or injury the upper ceiling of 70 million ECU. In the case of property damage the lower optional threshold of 500 ECU.
There is a 3-year time limitation for compensation claim. The maximum time limit is 10 years from the date of product put into circulation. The burden of proof rests on the injured party.

The implementation of EC Directives is fulfilled with the enactment of Product Liability Act, 1989 by the German Parliament. The German Product Liability Act, 1989 (GPL Act) is based on liability without fault.

The German Product Liability Act, 1989

The GPL Act provides remedy only if the product is used for personal consumption. The manufacturer is liable for the violation of the duties of care such as manufacturing, design and warning but not for product observation. The product is defective, if it does not fulfil the *consumers expectation test*, however it is not defective simply because of better product can put into the market. The manufacturer can avoid liability in the case of the state of the art defence, subsequent defect defence, regulatory defence, defence of non- commercial manufacturing and distribution of products not put into circulation and component part defence. Liability is extended to producer of a product, component parts, raw materials, quasi-producer, importer, and supplier if he is unable to identify the actual producer within certain time limit.

Normally, damages are awarded for death or injury. In the case of property damages, compensation will be awarded if the product is used only for personal consumption. There is a cap on the liability, in the case of death or injury a ceiling of DM 160 million. There is no limit for property damages, however, victim is eligible to get compensation if the damages exceeds DM 1125. Damages for pain and suffering recoverably is only under § 847 of the GCC based on negligence rule. Contributory negligence also prevails in the damage compensation. The plaintiff is required to show the damage, defect and causation, however, it may be assisted by *prima facie* evidence.

The consumer has to claim his damages within 3 years from the date of cause of action arise. The maximum time is 10 year from the date of product put into circulation.

The GPL Act does not provide remedy in the case of pure financial losses, breach of seller representation, property damages for commercial purposes, damages for primary agricultural and games, damages arises for insufficient product observation, damages for pain and suffering, statute limit above 10 years, damages exceeds DM 160 million and damages less than DM 1125 compared to the GCC.

The supplier of a product is liable if he is unable to identify the actual producer within a month, under the CPL Act, which is not the case in EC Directives. There is substantive disuniformity among Member States on primary agricultural and games, development of risk defence and cap on amount of damages.

In Germany, the presence of social security system substitutes the alternative legal systems in the case of health related risks. In addition, the lawyers insurance system is much more useful to the commercial people than to individual consumer, which indicates that the weaker has to pay the stronger. At the same time, there is no separate court for consumer grievances. There is prevalence of hidden case law in the filed of consumer protection. Higher litigation costs and ceilings on appeals may deter the consumer to approach the civil courts in order to get compensation. Moreover, the state of art defence seems to be the advantage of the manufacturer to escape from the liability.

The lessons drawn from the German liability system to the Indian liability system

The presence of law's delay in the Indian liability system suggests the need for introduction of the German model of a separate court of appeal. In the case of health related risks, the German social security system is working as a substitute to the alternative legal system to protect the interests of the consumers. In the case of India, not only the liability system is unable to provide adequate compensation in health related risks but also that majority of patients are unable to hire the services of the doctor, suggests adaptation of German model of social security system in India.

The German model of pecuniary limitation on filing of a case in civil court against property damages may as well be introduced in the Indian liability system in order to reduce the law's delay as well as reduce the resource wastage. The German liability system is practising the principle of reversal of burden of proof for negligence and is based on the imbalance in respective sphere of knowledge of manufacturer and the consumer. Thus, it may be advisable to introduce such principle in Indian liability system in order to improve the consumer protection.

The German liability system pronounce its judgements based on the duties of care neglected by the manufacturers such as manufacturing defects, design defects, warning defects and insufficient post- market surveillance which provides incentives for the tortfeasor. Thus, it is advisable to practice such type of procedure in the consumer grievances to protect the interest of the consumers.

In Germany the liability system is providing an opportunity to the consumer to file a case within 3 year from the date of cause of action arises. Thus, it is advisable to introduce such time limitation in filing the case, which may perhaps give more opportunity to go for out of court settlement.

In Germany the tortfeasor will be protected from the liability, if he complies mandatory standards and they may give incentives to the tortfeasor to take precautions to reduce the risk of harm. Thus, under the assumption that regulatory authorities are not easily influenced by the interest groups and also that they have better capabilities to get the information on science and

technology in order to set the standards may suggest the protection of tortfeasor from the liability, if he complies with the mandatory standards even in India, which may provide incentives to the tortfeasor.

The German model of providing financial assistance to higher income people in order to meet the litigation costs, based on pay back criteria may increase the accessibility of the liability system to the consumers. Thus, it is advisable to introduce such a policy in Indian liability system in order to increase the accessibility to civil courts compared to the CDRAs to the consumers, if India is free from corruption.

The German Regulatory System

The German standards were set by both public as well as private technical associations, which indicates the decentralised and complex system which prevails in product safety and technical safety laws. The technical safety law not only provides protection to life, health, property and the environment but also provides the legal guarantees in connection with economic activities bound up with certain technical issues. The assumption that the legislatures are not having sufficient expertise of their own in science and technological regulations stresses the need of adaptation of undefined general clauses such as *generally recognised rules of art* or *state of the art* or *state of science and technology*. Keeping in view of rapid changes in science and technology, the *deviation clause* was adopted in the case of conformity of regulatory standards by the tortfeasor, may perhaps reduce the hindrance of progress.

There are several rules and regulations were enacted by the German parliament in order to protect the interests of the consumers. However, the study will focus on the Appliances Act, the DIN norm, and the EC Product Safety Law in order to draw some possible lessons for Indian regulatory system to improve the protection of consumers.

The Appliances Act, 1968 (Amendment, 1992)

It provides some legal guarantee for the safety mark GS= geprüfte Sicherheit (Safety test). Its safety standards are generally based on the principles of *generally recognised rules of the art*

or *state of the art*. The manufacturers, importers and occasionally the dealers were brought under the purviews of the Appliances Act (GSG). It will applicable to all technical work materials for which there are no statutory regulations. . Consumers will be protected by the GSG, if they *use* the appliances *properly*.

The technical safety standards are formulated by the various private standard agencies such as DIN. The test criteria are laid down in detail for all standardisation work in DIN 3000/ VDE 1000 and DIN 820 part 12. The rational of technical as well as economic factors will be taken into the consideration in safety design, however in case of doubt safety requirements take priority over economic considerations.The manufacturers are free to adopt their own methods to meet the safety standards based on the *deviation clause*. In principle, products can be placed into the market without prior permission, in case of regulatory control the manufacturers who depart from regulatory position are under obligation to provide proof of equal safety standards being met. The manufacturer is not under obligation, if he provides technical work material according to the instruction of the user.

The GSG does not have any obligation to test the technical work materials, however it offers the manufacturers and importers to use GS Mark, once after getting conformity by recognised test centres that the appliances meet the required safety standards. The GS Mark serves, to the consumers to chose safe products in an easy manner; to the manufacturers it serves the marketing interests; and to the Trades Supervisory Officers (TSOs) it reduce the burden of control to the some extent.

The competence of the test centres for the design test will be determined by the legal ordinance. The time limit of test certificates issued by the test centres varies widely. The test centres will inform the TSOs only when the defects found were not removed or unsafe appliances were put into the circulation by the manufacturers. The test centres were not only empowering spot visits but also is entitled to remove defective appliances in the process of production. They also have to transfer the experience from test work into standardisation and regulatory work. In an decentralised testing system, the manufacturer may chose the test centre according to his convenience, however, these adverse effects may be reduced by increasing the competition among the test centres, extended information net work among test centres and have control on the test centres by the Federal Institute for Industrial Safety.

In Germany, the GS mark will be monitored by the TSOs, however they have wide range of tasks, which makes them unable to make systematic control but they have to check technical work material whenever they receive complaints. Much of the supervisory activity done by the TSO at the fairs and important trans- exhibitions, may reduce the administrative cost of the regulatory agency but these type of control is limited to visual inspection which is unable to provide adequate incentives to the manufacturers.

The TSOs were empowered to issue prohibitionary orders, if a defective product causes damages. They also are empowered to bring immediate execution of prohibitionary orders in the case of further intensification of hazards by a defective appliance. The prohibitionary order is to be used against manufacturers, importers and only under exceptional case against traders. The prohibitionary orders are valid throughout Germany even if they are issued by a state authority. The prohibitionary orders were published under the GSG in order to warn the owners of defective appliances and to bring attention to the traders as well as potential users about the hazards of the appliances. The prohibited products were also reported to the EC rapid information exchange in order to disseminate the information to the Member States once after investigation.

The DIN Norm

It plays a major role on the formulation and dissemination of German standards both at home as well as abroad. It established its position in the field of standardisation by multiplicity of co-operative relationships embodied in agreements with both the Federal and State Governments, associations, and technical & scientific bodies.

The formulation of standards in DIN would be based on neither substantive evaluation of the findings nor actual involvement of interest groups but only the procedure specified in DIN 820 part 1 and 4 of 1974/ 75. Normally, the procedure for standard formulation leading up to publication of a standard will take 3 years, if no specific delays arise. The decision on standards will be based on consensus principle and the standards are subjected review once in 5 years. The DIN has no enforcement power, so the compliance of standards will be left to the manufacturers concern.

The Consumer Council (CC) has been set up under the DIN in order to improve the representation of consumer interests in formulation of standards and the CC will be fully financed by the Federal Ministry for Economics. The representation of the consumer interests will be within the procedural framework laid down by the DIN 820 for standard formulation. The CC reserves the right to *break- in* the course of preparation of standards in order to asserts the interests of the consumers.

A large portion of DIN standards is based on the European and international harmonisation work. However, the German state of the art is a little bit higher than the European as well as international standards, thus the adaptation of international standards in to the DIN standards is not that much easy?

The EC Product Safety Law

It is mainly to harmonise the laws of Member States and thereby remove barriers to trade and distortion of competition within the community, may perhaps improve the consumer protection. EC proposes to achieve this aim by imposing *general safety requirements* on all applicable products which enter into European market. As a general rule, the conformity of a product with the *general safety requirements* is certified by a certain procedure and documented by the CE Mark. However, the CE mark is a conformity mark and not the safety mark.

The European standard organisations such as the CEN, the CENELEC and the ESTI are assisted the task of marking the technical specifications. The Member States can be representing by one vote based on territorial representation in the European standards formulations. The EC Product Safety Act, 1992 ensure that the products placed on the market are safe. The manufacturers should comply with the *general safety requirements*. The Member States are obliged to adopt necessary rules and regulations to ensure that the manufacturers and the distributors comply with the EC Directives and also Member States need to appoint competent authorities to control the compliance of *general safety requirements*.

The Member States have to inform the EC in the case of withdrawal of a product from the market, except if it is limited to the national concern. The EC will then advise to the Member States, after investigation. The same procedure applies even in the case of emergency situation. The EC will maintain the confidentiality unless until it needs to make it public for safety reasons. The EC Product Safety Law does not cover the second- hand goods, commercial purpose and it does not apply to services.

The formulation of standards and certification marks, in Germany is not only voluntary in nature but also decentralised system.The formulation of standards based on the general clauses such as *generally recognised rule of the art* or *state of the art* or *state of science and technology* may have its own advantage for easy recognition of the standards of the product by the consumer.

The presence of *deviation clause* in the conformity of standards by the manufacturer rules out the ex- ante approach adverse effects on imposition of common standards in the case of private goods.In Germany tortfeasor will be protected from the liability, if he complies with the mandatory standards. This not only provide incentives to the tortfeasor but also it eliminates the conflicts between the alternative legal system on due level of care.

The supervision of the standards of appliances by the TSOs at fairs and exhibitions may reduce the administrative costs of the regulation, however, it limits itself to the visual inspections only.

The expansion of European standards raises doubts about the continuing importance of the German national standard Institutions and the certification marks such as the DIN and the GS Mark.The higher German state of the art compared to the European and international standards not only reduce the possibilities of adaptation of international standards as DIN standards but also it leads to hidden protection of German Industry.

The decentralised formulation of standards and certification may reduce the influence of interests groups.The dissemination of information about the prohibited products by rapid exchange information may protect he consumer from the product risks.

The lessons drawn from the German Regulatory System for the Indian Regulatory system

The German model of Consumer Council in DIN is to represent the interests of the consumers in the formulation of standards. It may be advisable to introduce in the BIS a similar council in order to improve the consumer interests in standard formulations. The German system of tortfeasors' protection from the liability, if he complies the mandatory standards, may be adopted in Indian legal system in order to provide incentives to the tortfeasors and eliminate the conflicts between the alternative legal system.

The concept *proper use* in the GSG may as well needs to be introduced in the BIS in order to provide incentive to the consumers to take possible care in the usage of appliances.

The German procedure of inspection of the appliances by the TSOs at fairs and exhibitions also favour introduction in order to reduce the administrative costs of regulation, especially in a developing country like India, where resources are scarce.

The German model of decentralised formulation of standards and certification marks may as well be introduced in Indian system in order to reduce the interest groups influencing regulatory agencies. It is also necessary to de-link the laboratories and the BIS in order to create competitive environment in standardisation and certification.

The German model of *deviation clause* in the case of compliance of standards by the tortfeasor may also need to be adopted in Indian system in order to reduce the adverse effects of regulatory system in imposition of common standards in the case of private goods.

The German policy of informational dissemination about the prohibited goods may also need to be adopted in the Indian system in order to protect the consumers from the product risks.It is also advisable to keep the obligation on the manufacturers in the compliance to the regulatory standards in India.

Last but not least, the establishment of the Consumer Disputes Redressal Agencies under the provision of the CP Act, 1986 has its own importance in protecting the interest of the consumer by providing speedy, simple and inexpensive redressal. The study shows that there

are deficiencies in the functioning of the Consumer Dispute Redressal Agencies that's why it is unable achieve the objectives of the CP Act, 1986. In my opinied, the Government needs to take policies on time bound programme of the Fora, the consumer appearances before Fora, environment of the Fora, the appreciation of the members of the Fora, the appointment of members of the Fora, the involvement of the lawyer especially when consumer attend party- in person, and the infrastructure of the Fora, not only in order to fulfil the objective of the CP Act but also to bring effective liability system to develop a market for the complex goods. It is true even in the case of regulatory system such as the Bureau of Indian Standards Act, 1986. The establishment of the Bureau of Indian Standards is of great importance in protecting the interests of the consumer, and in providing markets for the producers of complex goods by formulating the standards and issuing certification marks. However, the reviewed study shows that the BIS is unable to do much for the consumers in a case where ISI product is defective because simply replaces the product and any action against the producer of a defective product cannot be taken. In addition, the stringent measures like cancellation of licences may have adverse effects on the market especially in the case of necessary goods. The BIS is unable to enforce its standards even based on the probabilistic methods raises the doubts about its role as a third party assurances to the consumers. In my opinied, the BIS is enjoying monopoly power, the interests of the consumers is not well protected, and it should formulate standards in its work place in order to improve the quality of BIS work. Thus, the Government of India needs to adopt policies on decentralisation of regulatory system in order to not only establish competitive environment but also reduce the regulatory capture and there is also need of a policy on improving the consumer protection activities by the regulatory system by establishment of the Consumer Council to represent the consumer interests in the standard formulations. Especially, in the wake of liberalisation and privatisation it might be better if there is a separate Ministry for Consumer Affairs or an Independent Statutory Body in order to the oversee policies based on incentive structure to protect the interest of the consumers.

Appendix- I

Evaluation of Functioning of The Consumer Disputes Redressal Agencies for Protecting the Consumer Interests

Questionnaire to Complainants - I

PART - I Personal Information

1. Name & Address :
2. Sex : Male Female :
3. Age :
4. Religion :
5. Caste :
6. Educational Qualifications :
7. Occupation
   (i) Main
   (ii) Substitution :
8. Nature of the complaint :
9. Compensation claim :
10. Date of filing the case :
11. Date of Disposal / Dismissal of the case :

PART - II Opinion Data

1.Do you know Consumer Protection Act?
Yes / No
If Yes, How?
i) News paper ii) Radio iii) T.V. iv) Friends v) Relatives
vi)Voluntary Organizations vii)Pamphlets viii) any other(specify)

2. Did you face any difficulties in filing the case?
Yes / No
If yes, specify the difficulties

3. Did you seek any help to file the complaint?
Yes / No
If yes, from whom?

4. Did you engage a lawyer?
Yes / No
If yes, give reasons

5. Do you know the jurisdiction of the Consumer Forum?
Yes / No
If yes, specify

6.What is the basis for claiming the compensation?

7. Did you appear before the Consumer Forum?
Yes / No
If yes, what is your experience?

How many times?
Was it necessary? your opinion
8. What is the environment you find at the Consumer Forum?
Formal -Informal - Helpful - No different from any other court or Government office

9.Do you agree that the Consumer Forum should make efforts to get the evidences from the opposite party whenever it is not possible to get through the consumer?
Agree /Disagree
If disagree, why?

10. Are you satisfied by the compensation awarded to you by the Consumer Forum?
Yes /No
If no, reasons

11. Did you face any problems in implementation of the order in toto?
Yes /No
If yes, what are the reasons for not implementing the order?
What is your suggestion for proper implementation of the order?

12. If you are dissatisfied about the order, what would you do?

13.Do you know the causes for not giving the judgment within the time limit prescribed in the Consumer Protection Act?
Yes / No
If yes, specify

14. Do you think that the goods and services purchased for commercial purpose should also be brought under the umbrella of Consumer
Yes / No
If yes, reasons
If no, reasons

15. a) If any goods/services lead to health hazards, do you wish that the goods / services should be ceased or desisted by the Consumer Forum?
Yes / No
If yes, reasons
If no, reasons
b)Do you think that the powers should be vested in the hand of Consumer Forum?
Yes / No

16. Did you pay any bribes at any stage of the case?
Yes /No
If Yes, give details.

17. Do you think that the monitoring machinery is necessary to supervise the functioning of the Consumer Forum.
Yes /No
If yes, reasons
If no, reasons

18. How many members must be there in the Consumer Forum for its continuous and effective functioning?

19. What are the advantages/dis-advantages if all the members of the Consumer Forum are appointed on permanent basis?
i) advantages
ii) disadvantages

20.a)Do you wish that the Non-Governmental organizations should be involved to protect the consumer interests?
Yes / No
b)In what type of activities they should be involved?
c)Did you seek the help of Non-governmental organizations so far?
Yes / No
If Yes specify

21. Do you think that the establishment of Consumer Forum at Mandal / Taluq level is necessary?
Yes / No
If yes, reasons

22. What steps government should take for effective implementation of the Consumer Protection Act?

23.Do you suggest that the Consumer Education should taught in the educational institutions?

24. What do you think are the serious problems you faced in your case with the Consumer Forum?

25. Are you satisfied with the working of the Consumer Forum?
Yes / No
If No, Why?

26. Would you like to offer any suggestions for further improvement of the Consumer Forum for effective functioning?

Appendix- II
Questionnaire to the council for Consumers

1. Type of cases come under purview of Consumer Protection Act

2. Problems involved in filing procedure

3. Environment of the consumer fora

4. Members of the consumer fora
   (number- permanent appointment- legal knowledge)

5. Views on the award of the costs by the fora

6. Presence of consumers before the fora

7. Getting evidence by the consumer fora from the opposite party

8. Problems in implementation of the award

9. Bribes

10. Controlling authority

11. Change of Administration of the consumer fora

12. Views on commercial purpose
    (goods/ services bought for resale)

13. Causes for dismissal of cases

14. Opinion about- NGOs
    - Consumer Fora at local level
    - Government activities
    - Consumer Education

15. Lawyers fee

16. involvement of lawyers into the fora

17. Suggestions

Sri. V. Gouri Sankar Door.No. 9/ 136 Besides Sai Baba Temple Dilsuknagar Hyderabad- 500660 Andhra Pradesh	Sri. Rajan Ganesan Consumer Care Centre Door.No. 3-5-273 Vittal wadi, Narayanaguda Hyderabad- 500 029 Andhra Pradesh	Sri. K. Sathyanarayana Rao Door.No. 3-6-498 Himayathnagar Hyderabad- 500 029 Andhra Pradesh	Sri. M. Lakshma Reddy Door.No. 3-5-170A Narayanaguda Hyderabad-500 029 Andhra Pradesh	Sri. Harsha Door.No. 3-6-221 Street Number 15 Himayanagar Hyderabad- 500 029 Andhra Pradesh	Smt. C. Lalitha Sathri Pragathi Consumer Association Door.No. 3-6-539/A Himayatnagar Hyderabad- 500 029 Andhra Pradesh
Goods and services purchased for consideration. Service rendered free of charge, contract of personal services, does not come under the Act.	goods and services purchased for consideration. payment of tax to the government is not for the particular purpose, so it is not covered under the Act.	all goods purchased for consideration. services except, contract of personal service and services at free of cost.	goods purchased for consideration.	goods which are defective in character/standard/value/quality. CDRAs have different opinion of the services of doctors, lawyers, home services.	any good purchased for personal consumption. the Act is ambiguous. the goods commercial purpose is nc included except self-employment. services for personal contract. No free services.
complicated filing of cases goes for lawyers because of question of law.	no procedural problem. to avoid tax consumers are not demanding bill may cause inconvenience to file a case.	no complication.	consumers facing some difficulties and some confusion. prescribed format, prayer, verification, notice, affidavit	there is no problem. simply on white paper. not technically strict. cases are filling in HC/SC on post card, why not in the CDRAs	no problem
full co-operation. problem may arise during the case presentation when party in person and OP engages lawyer.	freedom is there. judge should also be helpful to the consumer.	no civil court atmosphere.	good environment	favoured to the consumer. no court formalities. Act is being misused because there is no court fee. law of limitation not in CDRAs.	they are very helpful.
President and one member are enough to give orders. Honorarium members. basic legal knowledge is necessary. Language problem. political appointments. select committee is good.	two members (P+M). not on permanent basis. no need to go far technicality, it is based on common sense. the more rules you observe the more complications you get.	three members. Permanent appointment is not advisable. Common sense is more important than the legal knowledge.	three members, frankly speaking President dictates the orders. 3yrs period is enough. members need not possess legal knowledge because president has that.	no permanent appointment they may corrupt and misconduct. it is better if the members have basic legal knowledge.	3memberssufficient.experienced an educated people are good. no permanent appointment. Statutory provision of the Act, lawyers shoulc involve. legal knowledge is necessary for the members.
costs award based upon the facts of the case. there are no guidelines for awarding rate of interest and costs of application. it depends upon the appreciation of the judge.	consumer should prove that there is expenditure. in adjournment the costs should be collected from the person who asks for it. there are no rules for awarding the rate of interest and the costs of application.	award of costs is unreasonable. it should be made reasonable.	based on the merits of the case. president can pronounce any costs.	it depends upon the facts of the case. interest rates bank rate 9 to 10 per cent. Civil courts for commercial purposes 18 per cent. application costs should be included.	based on statutory procedure. lawyers involvement is necessary.
filling-appearance-hearing (3 times).	2 to 4 times presence of consumer is enough.	5 to 10 times.	4 or 5 times.	minimum 3 times.maximum 4or 5 times.filling-appearance-hearing-cross-examination-examining theOP.	not more than 5 times. filling-appearance-taking counter-reply counter/rejoinder-arguments-order.
the CDRAs can get the records from OP.(evidence-oral-petition-affidavit-counter affidavit OP-judgement).	the CDRAs can ask the records from OP.	the CDRAs can get it from OP.	The CDRAs can direct the OP to produce the necessary records.	the court can get the evidence from the OP.	the CDRAs can ask the OP for the records .
generally no problem. executive petition-fine & imprisonment Section 27 no procedure & clarification.	Quasi-judicial powers equally as civil courts regarding the implementing the order.	regular procedural defects.	Order should be civil court order. Judgement is easy it is difficult to execute it.	no problem in implementing the award.	implementation of the order lot of problem. punishment provisions must be improved. compensation should be available on punitive basis, including mental agony.
NC, SC- no bribes. DF- there is some chances- may be staff.	————	no bribes	no bribes. Other DFs may be yes.	———	no bribes. you don't know.
no question of arising controlling authority. civil court judgements right or wrong no controlling	SC is on DF; NC is on SC having supervisory powers: and the Ministry of civil supplies also supervises.	higher courts supervision on lower ones.	PIL- appeal- a kind of controlling authority.	Supervisory powers of higher courts enough.	no controlling authority.amendment should be based on agitation and awareness. They should be interim

					order.
It is better to have separate independent body. or it is better to strengthen the consumer councils .	Government is not showing any interest in implementing the Act e.g. filling the vacancies.	it is better to take expert advice.	———	statutory body. CP Act should change in India. In the USA it is very strong.	———
what is commercial and self-employment. it is simply interpretation. in case of goods there is restriction but in case of services there is no such restriction. no need for ordinary consumer to go to the NC because of Rs. 20 lakhs it is useful to business people.	commercial purpose should not come under the Act. If it cover under the Act means the consumers may out of the Fora.	concept of consumer will go out.	commercial purposes should not come under the Act.	commercial purpose it is in the Act.	the plastic industry's zipsum processing machine not worked. the CDRAs said it is commercial purpose.
it is based on the merits of the case.	limitation- evidence not comes under Jurisdiction.	———	no hard and fast rule. but based on the facts of the case.	law of the country is based on the documentary evidence. SC/NC judgements law governing the party.	———
-NGOs given power to filling, representation, committees. -establishment of Fora at divisional levels (revenue). - government should create awareness among consumer -consumer education should be introduced at educational institutions.	- NGOs are trying for popularity. they misused their provisions. -mobile courts. - providing adequate funds by the government. planning commission accepted Rs.61 crore assistance to the CDRAs. -consumer education should introduce in institutions.	-NGOs - local level Fora should be there. -Government - Consumer education at graduate level should be introduced.	-NGOs there are merits and de-merits. - Foras may have camps at mandal level. - Government should strengthen the Act. _no need for consumer education.	-no answer on NGOS -local level Fora are not necessary. -Government activities are very good. - there should be consumer education	-NGOs are not taking very active role because lack of publicity and co-operation. -local level Fora are necessary. - Consumer guidance consumer economics.
lawyers fee depends upon case to case and person to person. normally 2%. legal advisory to consumer federation (advocates Act) some slab Rs. 4200 for Rs. 2 lakh . no separate lawyers.	———	———	No lawyer will go for CF. Advocate Fee Act. 10% for Rs.5000. 1% for Rs.100000.	it depends upon the richness of the party. there is no yardstick.	Rs. 500 lawyers fee.
participation of lawyers is necessary. it benefited 100% consumers. advocates are not the causes for delay. Fora are not following the rules against adjournment. involvement of number of Acts, fundamental principles of law, due to lack of knowledge and for complicated and monitory aspects involvement of lawyers in necessary.	Adjournments and technicalities result in delay. the CDRAs are not following the rules provided by the Act in the case of adjournment. how can an ordinary consumer represent his case while Op engaging a lawyer.	involvement of lawyer is an advantage not disadvantages to the consumers.	it is an advantage and depends upon the complication of the case. consumers do not need to engage a lawyer because there are no procedural difficulties.	involvement of lawyers not at all necessary. Op may engage a lawyer. case delays. DFs awareness is so much.	lawyers should be from NGOs.
-the provision of interim order should be there. -limitation period at 3yr. -Fora at divisional level -municipal and government services should brought under the Act. (based on taxes or fee).	-loopholes in the Act should be eliminated by Amendment. - provide infrastructure facilities. -commission should fix the price. - at least 2 forums in a district. in Delhi 3 forums are working.	Case scrutiny should be there. adequate staff should be appointed. laws should be strictly implemented (not only Consumer Protection Act but also all other laws).	-pending rate is increasing. - reasons should be given in the case of dismissal of the case. -permanent sitting is good.	accumulation of pending cases should be reduced.	-Act should amend. -claims not regarding commercial purpose. -strict implementation of the award. - compensation should be high in such a way people should not repeat the same mistake.

Appendix- III
Questionnaire to Members of Consumer Fora

1. Type of cases come under purview of Consumer Protection Act

2. Problems involved in filing procedure

3. involvement of lawyers into the fora

4. Basis for awards of costs

5. Delay in cases disposal

6. Causes for dismissal of cases

7. Views on commercial purpose
   (goods/ services bought for resale)

8. Health hazards goods/ Services
   (desisted powers to consumer fora)

9. Opinion about- NGOs
   - Consumer Fora at local level
   - Government activities
   - Consumer Education

10. Necessary infrastructure facilities

11. Change of Administration of the consumer fora

12. Presence of consumers before the fora

13. Getting evidence by the consumer fora from the opposite party

14. Problems in implementation of the award

15. Members of the consumer fora
    (number- permanent appointment- legal knowledge)
16. Environment of the consumer fora

17. Controlling authority

18. Bribes

19. Biased judgment
(if the opposite party is Government)
20. Suggestions

Justice A. Venkatarami Reddy President State Commission Andhra Pradesh	MS. J. Anandha Lakshmi Member State Commission Andhra Pradesh	Mr. K. Ranga Rao Member State Commission Andhra Pradesh	Mr. G. Krishna Rao President District Forum, Ranga Reddy Andhra Pradesh	MS. K. Jhansi Lakshmi Member District Forum, Ranga Reddy Andhra Pradesh
goods which are purchased only for personal consumption; and ***services which are purchased not only for personal consumption but also for commercial purposes*** will come under preview of the Consumer Protection Act.	deficiency in services and defects in goods. (*There is awareness among rural consumers. mass media should help. ht NC judgement is binding e.g.: shares. backlog cases. period of limitation 2yr.)*	defective and deficiency of goods and services brought for consideration.	the goods and services brought for personal consumption.	consumption purpose.
there is no problem in filing the cases.	no problem, they can send even by post.	preliminary scrutiny at the stage of admission, if necessary the commission may call the consumer before serve the notice to the Opposite Party.	a letter can be sent by post without any format (Act pronounced a format). there is no hard and fast rule regarding filing a case.	no problem in filing.
the involvement of the lawyer depends upon the difficulties raised in the law, otherwise there is no need to engage a lawyer. The CDRAs are in favour of consumers when the Opposite Party engages a lawyer.	it is not necessary. involvement of technicalities of the law. justice delayed.	the involvement of the lawyer is time taking, but their involvement is necessary regarding procedural activities e.g. affidavit (Section (6) of the Indian Post Offices Act, and Section (9) of the Indian Telegram Act, needs reasonable enquiry.	the involvement of lawyers may help the parties & the Forum because of its legality. However, they may cause delay of the case by dragging the matter. advantages are more than disadvantages.	not creating environment of the civil court. But the appointment of retired judge as a President of the DF results to implement civil procedure.
there are no criteria as such. It depends upon the nature and facts of the case.	no yardstick for awarding costs. based on the facts of the case. research should be done in this regard.	no criteria are followed for award costs. based on merits of the case and logical thinking.	depends upon the facts of the case. the application costs e.g. typing, advocate fee etc.,	based on the facts of the case.
notices are not served in time due to postal delay. 1 or 2 times adjournments because either complainant or opposite party does not appear.	because full involvement of lawyers. the SC is regularly working only from 1993, there are some backlogs. delay in members appointment. time given for arguments completely at the discretion of the President, e.g. some time 3 days, some time one-hour.	large number of cases filing. delay regarding serving the notices to OP, not because of the Commission but because of postal delay. cases delay leads to facts going of. (see at Q.No.16)	90 or 150 days (not testing and testing respectively) from the date of serving the notice to the OP. ***(members, President , parties absence and lack of infrastructure facilities results the delay of the cases)***	reduce the judiciary involvement. the case may dispose based on common sense.
based on the merits of the case and in the absence of the complainant default the case.	if the cases do not come under the preview of the Consumer Protection Act.	the case should be within the preview of the Act, otherwise simply dismissed.	facts of the case are not under the preview of the Act.	goods or services under the preview of the Act.
Large-scale profits, it based upon the claimed value.	large amounts. why should we help to the traders? it is only to the consumers. Speedy disposal.	If trader enters into the CDRAs means protection consumer objectives go out. Personally I am against for bringing the self employed consumer under the Act	trader is not a consumer.	transactions involved whether it is for consumption or resale.
the CDRAs possess the cease and desist of hazard goods/ services by the Amendment, 1993.	now the CDRAs have the power to cease the medical factories and pronounce heavy compensation	the CDRAs have powers to inspect. ***It can recommend and not have cease and desist power.***	based on the complaint, after investigation if products are hazardous in nature then the CDRAs have power to do that.	CDRAs should have such power.
-NGOs are threatening the traders, they can filter the cases. -establishment of Fora at local level in principle it is good but it involves more costs than benefits. Mobile courts are not really helpful. -establishment of permanent courts. -consumer education is necessary to teach the rights and obligations of the consumers at higher levels of education.	-NGOs is not working at satisfactory level. - establishment of local Fora is not merely possible due to lack of funds. - government should create the awareness among the consumers. - consumer education should be introduced in the educational institutions.	-NGOs is good if they are not misutilising their provisions. -establishment of Fora at local levels involves costs. -Government should create awareness through media. the President of the DFs may send the necessary information to the Panchayat Presidents. -consumer education is not necessary. may perhaps at school level. CP is not working in	-NGOs may file the case on behalf of the consumer, which may help the ordinary consumer. - establishment of divisional level Fora may be good to reduce the work load of DFs and near to the place of the consumers. -Government should strengthen the CDRAs and creating awareness among consumers. - consumer education at secondary level about their rights against traders.	-consumers are not utilising the services of the NGOs. -Fora at divisional level. Mobile courts. - Government should create awareness programme. - consumer education at graduation level.

		important/ on major issues.		
it is necessary to have enough infrastructure facilities in CDRAs.	there should be enough infrastructure facilities. Most SCs does not have such facilities. In the case of the SC of AP it is better.	no problem in the SC, but there are problems in the DFs regardinginfrastructure. speedy justice if rich pays extra money. every body should be equal before law.	Central Government one time grants Rs. 10 lakh for the DF and Rs. 50 lakh for the SC.	infrastructure facilities are necessary
Establishment of independent body may mainly depend upon the state finance.	there should some independent body in order to fulfil the day to day needs of the CDRAs.	the chairman has the power of internal infrastructure adjustment, which serves the purpose.	the SC and the Dept. of Civil Supply have the control on DFs. it may be better under one independent body headed by the SC.	separate body should be there.
The presence of consumer is necessary at once after notice of the OP.	the presence of consumer is enough for one time.	the presence of consumer is enough for one time. 2 or 3 times in unavoidable circumstances.	it depends on the adjournments. file a case; notice to OP; counter file; examine witness; affidavits.	many times based on admitted facts.
----------	the CDRAs can ask the necessary information from the OP.	the CDRAs can get the necessary information from the OP.	the CDRAs get necessary evidence from OP.	the CDRAs should get the evidence if it is not possible by the consumer. Simply based on that we cannot simply give the judgements.
Arrest of the OP based on the executive petition. SC to SC relevant courts for implementation.	there is no problem regarding the implementation of the order.	there is no problem (Section 27 of the Act).	usually no problem. the award sends to the munisif court for implementation. the action should be taken by the police.	Execution petition.
two members are sufficient. the appointment is not necessary based on permanent approach. legal knowledge is not necessary in the case of members but it may be better if it is an additional qualification.	three members are sufficient. appointment based on permanency is good. legal knowledge is not necessary because they have to learn A to Z.	two members are enough. appointment based on temporary. the members should also belong to the judicial experience.	Members are intended to the president in conclusion; skilled persons must be chosen; use/misuse of the CF for their own purposes; if both members absent Fora does not function on that day. appointing the retired judges as a President is good because they have an experience. But it should not related to the age limit like the USA. Members minimum qualification should be degree. it is necessary because language problem. lower public they don't know English. Procedure is not necessarily in English.	Increase the number up to 5 without President. no permanent appointment. Legal knowledge and training is necessary. Members should have liberty.
there is no problem regarding the environment of the Forum.	we are giving opportunity to the consumer to express his views freely and frankly.	consumers have some fears in court system. limited time. they are unable to decide/say, relevant/ irrelevant issues in arguments.	no question of environment of the consumer & the OP. it depends upon the members, how to receive them, lack of education and social activity.	Full co-operation to the consumers.
supervisory powers on the DFs by the SC and on the SCs by the NC.	controlling authority is not necessary.	it is irrational. the SC- the NC no supervisory powers.	appellant authority. DF unable to question the SCs and the NC order	Controlling authority is necessary.
No such (bribes) incidences	so far we never come across.	there no corruption. but there may be wrong judgement because of difference in understanding the facts of the case.	so far no corruption.	Possibility is there because the appointment of the members is based on political influence.
absolutely there is no biased judgement if the Opposite Party is Government. There may be delays because of adjournments.	no relaxation in the case where the Government is OP.	no biased judgement, but there may be delay because of several officials involvement.	no biased judgement in the case of Government is OP	no biased judgement.
It is necessary to file genuine cases NGOs may perhaps help. Issue on pension, patta, ration cards, rice mill permit not come under the Act. There are some statutory obligations which the CDRAs should fulfil	consumers should know their rights and responsibilities. they should keep the bills and they should not influenced by others. they should get awareness.	the consumer can file a case against charging over prices. But in the case of price fixing e.g. price inclusive of all taxes, who will question the real cost of the product.	the Act is amended three to four times.	the CDRAs should not impose the orders on each other. presidents are whole authority. Documents are not sending to the members. Preference should be given to the members also. language problem is also there.

Appendix - IV

Names of the Selected Variables

AFORA - Consumer's Appearance before Fora (in number of times)

AWARD - Awards given by the CDRAs to the consumers (in Rupees)

BRIBE - bribes in the CDRAs (if bribe 1; if no bribe 0)

CLAIM - claims made by the consumers (in Rupees)

CSUCC - claims of award (differences of claims and award in Percentage)

COAGE - consumer's age (in years)

CONAW - consumer's awareness about the CP Act (if consumers are aware of the CP Act 1; not aware of the CP Act 0)

DDDUR - disposal/ dismissal duration

DIFIL - difficulties in filing the case (if filing a case by the consumers in CDRAs is difficult 1, not difficult 0)

EDUCA - educational qualifications of the consumers (lower education 0; higher education 1)

EFORA - environment of the Fora (formal 0; informal 1);

ENLAW - engaging a lawyer (if consumers engaging a lawyer 1; not engaging lawyer 0)

SHELP - seeking help by the consumers (seeking help for getting compensation 1; not seeking help 0)

SORDE - satisfaction of the award (if consumers are satisfied with award 1, not satisfied 0; and not availability of data 2)

Appendix- V
Quantification of the data

AFORA = the number of appearances before CDRAs by the consumers in order to get compensation. I took the data as it is, however in the case of non- available data I assumed it as a 0.

AWARD = the awarded compensation by CDRAs in the case of disposed cases such as consumer favored I have taken the data as it is and consumer withdrawn I incorporated the data at my best guess; in the case of dismissed cases I assumed the data as 0.

BRIBE = Yes is 1; No is 0.

CLAIM = the claims made by the consumers, I have taken the data as it is in the case of pecuniary claims and, in the case of non-pecuniary claims, I have incorporated the data at my best guess.

CSUCC = I calculated the awards in terms of the percentage over its claim in order to give some real meaning to the data. For example If a consumer claimed Rs. 100 and got only Rs. 50, I calculated the claim of award as 50 percent and so on. These types of calculations eliminate the problems such as that if a consumer `X´ claimed RS. 1 million and was awarded only Rs. 2000 and at the same time another consumer Y claimed RS. 100 and awarded Rs. 100, we cannot simply take the data as it is because it has no meaning.

COAGE = the age of the consumers I have taken as it is.

CONAW = Yes is 1; No is 0.

DDDUR = the duration of time taken by CDRAs in order to dispose/ dismiss the consumer dispute cases, I have calculated the difference between date of filing and the date of disposal/ dismissal by CDRAs.

DIFIL = Yes is 1; No is 0.

EDUCA = higher education is 1; lower education is 0.

EFORA = formal is 0 (I have included the consumers those who are responded as `no different from any other court or Government office´ in the category of `formal´); informal is 1; helpful is 2; and not available is 3.

ENLAW = Yes is 1; No is 0.

SHELP = Yes is 1; No is 0.

SORDE = Yes is 1; No is 0

Appendix No. VI

Resutls of OLS & 2SLS for CSUCC, AFORA & DDDUR

i. Data

ENTRY	CLAIM 1	AWARD 2	DDDUR 3	COAGE 4
1: 1	136086.	85321.0	89.0000	31.0000
2: 1	101724.	40000.0	165.000	39.0000
3: 1	4625.00	4325.00	161.000	48.0000
4: 1	3500.00	1970.00	201.000	70.0000
5: 1	15200.0	2600.00	173.000	47.0000
6: 1	10000.0	2775.00	281.000	40.0000
7: 1	21600.0	36000.0	253.000	62.0000
8: 1	13250.0	650.000	164.000	32.0000
9: 1	36000.0	36000.0	62.0000	67.0000
10: 1	736.000	886.000	178.000	52.0000
11: 1	6225.00	6250.00	133.000	70.0000
12: 1	31687.0	34060.0	151.000	30.0000
13: 1	16892.0	11992.0	297.000	52.0000
14: 1	5000.00	600.000	189.000	57.0000
15: 1	4000.00	4100.00	273.000	62.0000
16: 1	275000.	129250.	383.000	38.0000
17: 1	45000.0	21150.0	76.0000	27.0000
18: 1	20600.0	9682.00	64.0000	24.0000
19: 1	924024.	.000000	375.000	65.0000
20: 1	174000.	.000000	432.000	63.0000
21: 1	500000.	.000000	1242.00	41.0000
22: 1	56200.0	.000000	377.000	37.0000
23: 1	46000.0	.000000	543.000	46.0000
24: 1	15000.0	.000000	375.000	57.0000
25: 1	257175.	.000000	11.0000	36.0000
26: 1	15000.0	.000000	89.0000	59.0000
27: 1	10000.0	.000000	175.000	66.0000

ENTRY	EDUCA 5	DIFIL 6	SHELP 7	ENLAW 8
1: 1	1.00000	.000000	1.00000	1.00000
2: 1	1.00000	.000000	1.00000	1.00000
3: 1	1.00000	.000000	.000000	1.00000
4: 1	1.00000	.000000	1.00000	.000000
5: 1	.000000	1.00000	1.00000	1.00000
6: 1	1.00000	.000000	.000000	.000000
7: 1	1.00000	.000000	.000000	.000000
8: 1	1.00000	.000000	.000000	.000000
9: 1	1.00000	.000000	.000000	.000000
10: 1	.000000	.000000	.000000	.000000
11: 1	1.00000	.000000	.000000	.000000
12: 1	.000000	.000000	1.00000	.000000
13: 1	.000000	.000000	1.00000	1.00000
14: 1	.000000	.000000	1.00000	.000000
15: 1	.000000	.000000	.000000	.000000
16: 1	1.00000	.000000	1.00000	1.00000
17: 1	1.00000	.000000	1.00000	.000000
18: 1	1.00000	.000000	1.00000	1.00000
19: 1	1.00000	.000000	.000000	.000000
20: 1	.000000	.000000	.000000	.000000
21: 1	.000000	.000000	1.00000	1.00000
22: 1	1.00000	.000000	1.00000	1.00000
23: 1	1.00000	.000000	1.00000	1.00000
24: 1	.000000	.000000	1.00000	.000000
25: 1	1.00000	.000000	.000000	.000000
26: 1	1.00000	.000000	.000000	.000000
27: 1	1.00000	.000000		

ENTRY	AFORA 9	EFORA 10	EFORA2 11	SORDE 12
1: 1	12.0000	.000000	1.00000	1.00000
2: 1	20.0000	1.00000	.000000	1.00000
3: 1	1.00000	1.00000	.000000	1.00000
4: 1	4.00000	1.00000	.000000	1.00000
5: 1	6.00000	.000000	.000000	1.00000
6: 1	3.00000	1.00000	.000000	1.00000
7: 1	3.00000	.000000	.000000	.000000
8: 1	4.00000	.000000	.000000	.000000
9: 1	3.00000	.000000	.000000	1.00000
10: 1	5.00000	1.00000	.000000	.000000
11: 1	5.00000	1.00000	.000000	1.00000
12: 1	4.00000	1.00000	.000000	1.00000
13: 1	10.0000	1.00000	.000000	1.00000
14: 1	.000000	.000000	.000000	1.00000
15: 1	12.0000	1.00000	.000000	.000000
16: 1	3.00000	.000000	.000000	1.00000
17: 1	15.0000	1.00000	.000000	.000000
18: 1	.000000	.000000	.000000	1.00000
19: 1	10.0000	1.00000	.000000	1.00000
20: 1	8.00000	.000000	.000000	1.00000
21: 1	20.0000	.000000	.000000	.000000
22: 1	30.0000	.000000	.000000	.000000
23: 1	30.0000	.000000	.000000	.000000
24: 1	15.0000	.000000	.000000	.000000
25: 1	2.00000	1.00000	.000000	.000000
26: 1	.000000	.000000	.000000	.000000
27: 1	.000000	1.00000	.000000	.000000

ENTRY	BRIBE 13	CSUCC 14
1: 1	.000000	62.6964
2: 1	.000000	39.3221
3: 1	.000000	93.5135
4: 1	.000000	56.2857
5: 1	.000000	17.1053
6: 1	.000000	27.7500
7: 1	1.00000	166.667
8: 1	.000000	4.90566
9: 1	.000000	100.000
10: 1	.000000	120.380
11: 1	.000000	100.402
12: 1	1.00000	107.489
13: 1	1.00000	70.9922
14: 1	.000000	12.0000
15: 1	.000000	102.500
16: 1	.000000	47.0000
17: 1	.000000	47.0000
18: 1	.000000	47.0000
19: 1	.000000	.000000
20: 1	.000000	.000000
21: 1	.000000	.000000
22: 1	.000000	.000000
23: 1	.000000	.000000
24: 1	.000000	.000000
25: 1	.000000	.000000
26: 1	.000000	.000000
27: 1	.000000	.000000

ii. Results of Ordinary Least Squares:

ii. The Appearance Before Fora: What determines the Appearance Before Fora (AFORA) ?

By taking appearance before Fora (AFORA) as a dependent variable and keeping the other variables as independent variables such as COAGE, CSUCC, DDDUR, EDUCA, EFORA1, ENLAW, SHELP. We can test the hypotheses of the independent variables. The relevant model is specified as follows:

$$AFORA = \beta_0 + \beta_1 COAGE + \beta_2 CSUCC + \beta_3 DDDUR + \beta_4 EDUCA + \beta_5 EFORA1 + \beta_6 ENLAW + \beta_7 SHELP + U$$

Dependent Variable: AFORA

Variables	Estimated Coefficients (t-values)
COAGE	0.0067 (T = 0.5087)
CSUCC	-0.1174 (T = -0.3302)
DDDUR	**0.0172 (T = 2.2002 *)**
EDUCA	2.5526 (T = 0.7149)
EFORA	1.3646 (T = 0.4295)
ENLAW	2.8945 (T = 0.7025)
SHELP	4.5547 (T = 1.1232)
CONSTANT	-1.8265 (T = -0.1964)
R SQUARE	0.4272
RBAR SQURE	0.2162
F VALUE	2.0266

* significant at 5% level

F is mere significant and hence the hypothesis that ` appearance before Fora is not affected by the other determinants ´ can be clearly rejected. However, by looking at the t values for the individual independent variables , we find that only DDDUR turned out to be significant.

The variables which were in the equation indicate that except for DDDUR, all other determinants are unable to show any significant influence on dependent variable AFORA, which does not necessarily mean that they do not have any influence on AFORA.

It indicates that the more the time taken by the Fora leads to the more number of appearances before Fora by the consumers. It is becuase of involvement of lawyers, absent of the parties and members of the Fora. In the case of lawyers it true that the lawyers unnecessarily widen the arguments, ask for frequent adjournments and also take a lot of time in the matter of counter filings. However, the lawyers interviewed for the consumer counsel rejected this argument and stated that members of CDRAs are not following the rules in granting adjournments.

In general the appearance of the consumer before CDRAs may not be necessary. If the members of CDRAs consider it necessary in order to take the arguments of both parties, then at that stage the presence of the consumer is necessary. Under the assumption that the arguments are straightforward, the appearance of the consumer more than once is not necessary, irrespective of whether the goods go for laboratory testing or not. In practice the consumers were called by CDRAs more often than the required times, which may be because of the engagement of a lawyer by both the parties, frequent adjournments , absence of the parties, absence of the members etc.,. The majority of the lawyers come to the Fora not for one case but for many cases. They may plan it this way, that they may ask for adjournments accordingly. But, it is

not true in the case of individual consumers. They have to come all the way and all the time for a single case. The involvement of lawyers in CDRAs for 320 reviewed cases can be presented with the help of a table as follows:

Involvement of Lawyers in CDRAs

Parties	NC	SC of AP	DF of Nellore	DF of Ranga Reddy	Total
Consumers alone	3	12	17	6	38
Opposite Parties alone	16	17	26	13	72
Both the parties	20	56	31	23	130
Not available	3	15	4	33	55
Total	42*	100	78**	75	295

* data was not collected for 3 cases

** in 22 cases both the parties attended the DF of Nellore party in person

Within 32 interviewed consumers, the number of other appearances before Fora varies from 1 to 30 times. The interviewed members of the CDRAs, stated that they liberally give adjournments if the opposite party is Government because it involves many officials and certainly requires time to file a counter appeal.

Thus the CDRAs have to develop a culture of not calling the consumers more often than the required times and also of not granting adjournments liberally in order to reduce the adverse effects, such as rational apathy. Lawyers should also co-operate with the CDRAs.

iii. The Disposed/ Dismissed Duration: What determines the Disposed/ Dismissed Duration (DDDUR) ?

By taking Disposed/ Dismissed duration of cases (DDDUR) as a dependent variable and keeping the other variables such as AFORA, BRIBE, CSUCC, EFORA, ENLAW, SORDE. We can test the hypotheses of the independent variables. The formulated model as follows:

$$DDDUR = \beta_0 + \beta_1 AFORA + \beta_2 BRIBE + \beta_3 CSUCC + \beta_4 EFORA + \beta_5 ENLAW + \beta_6 SORDE + U$$

Dependent Variable: DDDUR

Variables	Estimated Coefficient (t-values)
AFORA	10.7267 (T = 1.6412)
BRIBE	104.9240 (T = 0.6659)
CSUCC	-0.9921 (T = -0.8826)
EFORA	-64.8623 (T = -0.7029)
ENLAW	45.1916 (T = 0.4001)
SORDE	-36.9506 (T = -0.3659)
CONSTANT	**(234.9128) (T= 2.2235)**
R SQUARE	0.3413
RBAR SQUARE	0.1437
F VALUE	1.7295

The resutls are not significant.

iii. Results of Two Stage Least Squares:

In order to check the simaltanity between the variable, we have run the Two Stage least squares. The results are as follows:

$$DDDUR = \beta_0 + \beta_1 AFORA + \beta_2 BRIBE + \beta_3 CSUCC + \beta_4 EFORA + \beta_5 ENLAW + \beta_6 SORDE + U$$

Dependent Variable: CSUCC

Variables	Estimated Coefficient (t-values)
IAFORA	-3.3941 (T = -1.2262)
BRIBE	**73.1929 (T = 2. 3781)***
IDDDURA	0.0516 (T = 0.3950)
DIFIL	-23.1957 (T = -0.3643)
ENLAW	9.6270 (T = 0.3377)
EDUCA	11.1220 (T = 0.3324)
CONSTANT	(42. 0998) (T= .9859)
R SQUARE	0.3556
RBAR SQUARE	0.1623
F VALUE	2.0452

Dependent Variable: DDDUR

Variables	Estimated Coefficient (t-values)
IAFORA	**44.8015 (T = 2.1981)***
BRIBE	-303.0198 (T = -1.0489)
ICSUCC	5.4522 (T = 1.4358)
EFORA	**-208.1330 (T = -1.7600)****
ENLAW	-231.4051 (T = -1.1415)
SORDE	145.3933 (T = 0.9221)
CONSTANT	(-225.5003) (T= -.8640)
R SQUARE	0.3586
RBAR SQUARE	0.1662
F VALUE	2.0452

* signifcant at 5% level **significant at 10% level

Dependent Variable: AFORA

Variables	Estimated Coefficient (t-values)
IDDDUR	**-0.0371 (T = 2.4175)***
COAGE	-0.0461 (T = -.3455)
ICSUCC	-0.0263 (T = -0.4374)
EFORA	-3.3519 (T = -0.9897)
ENLAW	-0.5108 (T = -0.1065)
SHELP	4.5015 (T = 1.0639)
CONSTANT	(-5.4582) (T= -0.5412)
R SQUARE	0.4554
RBAR SQUARE	0.2548
F VALUE	2.0266

BIBLIOGRAPHY

Ashkham, T. & Stoncham, A. — *EC Consumer Safety*, London, Butterworths, 1994.

Akerlof, A. George. — "The Market for *Lemons* Quality Uncertainty and the Mechanism", *Quarterly Journal of Economics*, Vol. 84, No. 3, 1970, pp. 488- 500.

Allen, Franklin — "Reputation and Product Quality", *Rand Journal of Economics*, Vol. 15, No. 3, 1984, pp. 311- 327.

Arbeitsgemeinschaft der Verkehrsrechtsanwälte — *Probleme der Produzentenhaftung*, Berlin, Deutscher Anwaltsverlag, 1988.

Arrow, K. J. — "Uncertainty and the Welfare Economics of Medical Care", *American Economic Review*, Vol. 53, No. 5, 1963, pp. 941- 973.

Asch, Peter — *Consumer Safety Regulation: Putting a Price on Life and Limb*, Oxford, Oxford University Press, 1988.

Ashenfelter, O, *et al* — "Political and the Judiciary: The Influence of Judicial Background on Case Outcomes", *Journal of Legal Studies*, Vol. 24, No. 2, June 1995, pp. 257- 281.

Atiyah, P. S. — *The Rise and Fall of Freedom of Contract*, Oxford, Clarendon Press, 1979.

Backer, S. Gary — "Crime and Punishment: An American Approach", *Journal of Political Economy*, Vol. 76, No. 2, 1968, pp. 169- 217.

Beales, Howard, *et al* — "The Efficient Regulation of Consumer Information", *Journal of Law and Economics*, Vol. 24, No. 3, December 1981, pp. 491- 973.

---------- — "Information Remedies for Consumer Protection", *American Economic Review (p)*, Vol. 71, No. 2, 1981, pp. 410- 413.

Behörde für Arbeit, Gesundheit und Sozialordnung — *Jahresbericht 1988- 1995*, Hamburg, Freie und Hansestadt Hamburg, 1995.

Besanko, David, *et al* — "Monopoly and Quality distortion effects and remedies", *Quarterly Journal of Economics*, Vol. 102, No. 4, 1987, pp. 743- 767.

Beyleveld, D. & Brownsword, R. — "Impossibility, Irrationality and Strict Liability", *Anglo-American Law Review*, Vol. 20, 1991, pp. 257- 284.

Bhagwati, J. N. "Directly Unproductive, Profit-Seeking (DUP) Activities", *Journal of Political Economy*, Vol. 90, No. 5, October 1982, pp. 988- 1002.

Breyr, Stephen "Analysing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform", *Harvard Law Review*, Vol. 92, No. 3, 1979, pp. 549- 609.

---------- *Regulation and its Reform*, Massachusetts, Harvard University Press, 1982.

Bowman, Jean Mary "The Consumer in the History of Economic Doctrine", *American Economic Review (p)*, Vol. 41, No.2, May 1951, pp. 1- 40.

Boulding, E. Kenneth "The Role of Government in a Free Economy", *Review of Social Economy*, Vol. 40, No. 3, December, 1982, pp. 417- 426.

Bronfernbrenner, M. *et al* "Consumer Sovereignty Yet Again", *Western Economic Journal*, Vol. 16, No. 3, July/ September, 1990, pp. 265- 270.

Brown, Prather John "Toward an Economic Theory of Liability", *Journal of Legal Studies*, Vol. 2, No. 2, 1973, pp. 323- 349.

Bureau of Indian Standards *Annual Report, 1988- 89*, New Delhi, BIS, 1989.

---------- *Annual Report, 1989- 90*, New Delhi, BIS, 1990.

---------- *Annual Report, 1990- 91*, New Delhi, BIS, 1991.

---------- *Annual Report, 1991- 92*, New Delhi, BIS, 1992.

---------- *Annual Report, 1992- 93*, New Delhi, BIS, 1993.

---------- *Annual Report, 1993- 94*, New Delhi, BIS, 1994.

---------- *Annual Report, 1994- 95*, New Delhi, BIS, 1995.

---------- *BIS Act, 1986, Rules, 1987, Certification Regulations, 1988 and Procedure for Grant of Licence*, New Delhi, BIS, 1992.

---------- *Bureau of Indian Standards: An Overview of Activities*, New Delhi, BIS, Kay Kay Printers, May 1989.

Burrows, Paul & Veljanovski, G. Cento *The Economic Approach to Law*, London, Butterworths, 1981.

Brüggemeier, Gert *et al* "Product Safety Legislation in the Federal Republic of Germany and in the United States", in Joerges, Christian ed., *European Product Safety Internal Market Policy and the New Approach to Technical*

Harmonisation and Standards, EUI Working Paper Law No. 91/ 12, Florence, European University Institute, 1991.

---------- "Produkthaftung und Produktsicherheit" *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, Vol. 152, 1988, p. 511.

Buchanan, J. M. *et al* *Toward a Theory of Rent-Seeking Society*, Texas, A & M Press, 1980.

Calabresi, G. & Klevorick, K. Alvin "Four Tests for Liability in Torts", *Journal of Legal Studies*, Vol . 14, No. 3, December 1985, pp. 585- 627.

Calabresi, Guido *The Costs of Accidents*, London, Yale University Press, 1970.

Calfee, E. John & Craswell, R. "Some Effects of Uncertainty on Compliance with Legal Standards", *Virginia Law Review*, Vol. 70, No. 5, 1984, pp. 965- 1003.

Campbell, Persia "State Protection for Consumers", *American Association University Women Journal*, Vol. 55, March, 1962, pp. 144- 148.

Centre for the Study of the Economy and the State "Consumer Protection Regulation", *Journal of Law and Economics*, Vol. 24, No.3, December, 1981, pp. 365- 686.

Christina, Fullop. *Consumers in the Markets*, London, The Institute of Economic Affairs, 1967.

Ciscel, H. David "Galbraith's Planning System as a Substitute For Market Theory", *Journal of Economic Issues*, Vol. 18, No. 2, June 1984, pp. 411- 418.

Clovis, L Albert *et al* *Consumer Protection: A Symposium*, New York, Da Capo Press, 1972.

Coase, Ronald H. "The Problems of Social Cost", *The Journal of Law & Economics*, Vol. 3, No. 1, October 1960, pp. 1- 44.

Cohen, Morris R. "The Basis of Contract", *Harvard Law Review*, Vol. 46, No. 4, February 1933, pp. 553- 592.

Cohen, Morris R. & Stigler, G. J. *Can Regulatory Agencies protect the Consumers?*, Washington, D.C., American Enterprise Institute, 1971.

Cooper, Russel & Ross. W. Thomas "Prices, Product Qualities and Asymmetric Information: The Competitive Case", *Review of Economic Studies*, Vol. 51, 1984, pp. 197- 207.

Cooter, Robert & Ulen, Thomas *Law and Economics*, The United States, Harper Collins Publishers, 1988.

Cooter, Robert & Rubinfeld, Daniel "Economic Analysis of Legal Disputes and Their Resolution", *Journal of Economic Literature*, Vol. 27, 1989, pp. 1067- 1097.

Cranston, Ross — *Consumers and the Law*, London, Weidenfeld & Nicolson, 1978.

Craven, John — *Introduction to Economics*, Oxford, Basil Blackwell, 1990.

Cullis, G. John & Jones, R. Phillip — *Micro Economics and the Public Economy: A Defence of Leviathan*, Oxford, Basil Blackwell, 1987.

Darby, R. Michael & Karni, Edi — "Free Competition and the Optimal Amount of Fraud", *Journal of Law and Economics*, Vol. 16, No. 1, April1973, pp. 67- 88.

Dehn, D. — "A Consumer Perspective on the UK's Product Liability Regime" in Mildred, M. (ed), *Product Liability Law and Insurance*, London, LLP, 1994.

Demsetz, H. — "When Does the Rule of Liability Matter?", *Journal of Legal Studies*, Vol. 1, No. 1, 1972, pp. 13- 28.

Dennis, Swann. — *Competition and Consumer Protection*, Harmondsworth, Penguin, 1979.

----------. — "Instrument Choice in Environmental Policy", *Economic Inquiry*, Vol.21, 1983, pp. 53- 71.

Dicey, A. V. — *Law and Public Opinion in England during the Nineteenth Century*, 2nd ed., Wade, E.C.S., 1962.

DIN — *Geschäftsbericht 1995/ 96*, Berlin, DIN, 1996

Easterbrook, H. Frank & Fischel, R. Daniel — "Limited Liability and the Corporation", *University of Chicago Law Review*, Vol. 52, No.1, 1985, pp. 89- 117.

Eissenberg, A.Melvin — "The Bargain Principle and Its Limits", *Harvard Law Review*, Vol. 95, No. 4, 1982, pp. 741- 801.

Ellikson, C. Robert — "Alternatives to Zoning: Covenants, Nuisance and Fines as Land Use Controls", *University of Chicago Law Review*, Vol. 40, No. 4, Summer 1973, pp. 681- 781.

Emons, Winand. — "The theory of Warranty Contracts", *Journal of Economic Survey*, Vol. 3, No. 1, 1989, pp. 43- 56.

---------- — "Warranties, Moral Hazard, and the Lemons Problem", *Journal of Economic Theory*, Vol. 46, 1988, pp. 16- 33.

---------- — "On the limitation of Warranty Duration", *Journal of Industrial Economics*, Vol. 37, No. 3, 1989, pp. 287- 301.

Epple, Dennis & Raviv, Artur — "Product Safety: Liability Rules, Market Structure, and Imperfect Information", *American Economic Review*, Vol. 68, No. 1, 1978, pp 80- 95

Epstein, A. Richard — "Unconscionability: A Critical Reappraisal", *Journal of Political Economy*, Vol. 18, 1975, pp. 293- 315.

European Commisson — Council Directive EC/ 85/ 374 on Liability for Defective Products, 25 July 1985.

---------- — Council Directive EEC/ 92/ 59 on General Product Safety, 29 June 1992.

Falke, Josef — "Integrating Scientific Expertise into Regulatory Decision- Making. The Role Non- governmental Standardisation Organisations in the Regulation of Risks to Health and the Environment", *EUI Working Paper (RSC No. 96/ 9)*, Florence, European University Institute, Robert Schuman Centre, (Badia Fiesolana, San Domenico (FI), 1996.

---------- — "Product Safety Legislation in the Federal Republic of Germany" in Christian Joerges (ed.), *European Product Safety, internal Market Poicy and the New Approach to Technical Harmonisation and Standards*, Florance, European University Institute, Department of Law, (Badia Fiesolana, San Domenico (FI), 1991.

---------- — "Post market Control of Technical Consumer goods in the Federal Republic of Germany" in Micklitz, Hans- W. (ed.), *Post Market Control of Consumer Goods*, Baden- Baden, Nomos Verlagsgesellschaft, 1990.

Faure, Michael & Van den Bergh, Roger — "Compulsory Insurance for Professional Liability", *The Geneva Papers on Risk and Insurance*, Vol. 14, No. 53, 1989, pp. 308- 330.

Finsinger, Jörg & Simon, Jürgen — "An Economic Assessment of the Product Liability Directive and the Product Liability Law of the Federal Republic of Germany", in Faure, Michael *et al*, *Essays in Law and Economics, Corporations, Accident Prevention and Compensation for Losses*, Antwerpen, MAKLU, 1989.

---------- — *The Harmonisation of Product Liability laws in Britain and Germany : An Applied Legal- Economic Analysis*, London, Anglo- German Foundation for the Study of Industrial Society, 1992.

Folkes, S. Valarie & Kotsos, Barbara — "Buyer's and Sellers, Explanation for Product Failure: Who Done It?" *Journal of Marketing*, Vol. 50, April, 1986, pp. 74- 80.

Fornall, Claes & Westbrook,A. Robert — "The Vicious Circle of Consumer Complaints", *Journal of Marketing*, Vol. 48, Summer, 1984, pp. 68- 78.

Friedman, D. — "What is 'Fair Compensation' for Death or Injury?", *International Review of Law and Economics*, Vol. 2, No. 1, June 1982, pp. 81- 93.

Gaedeke, R. M. & Etcheson, W. W. — *Consumerism: View Points from Business, Government and the Public Interest*, San Francisco, Canfiel Press, 1972.

Galbraith, Kenneth J. *New Industrial State*, Bosten, Houghton Mifflier company, 1985.

---------- *Affluent Society*, London, Hamilton, 1959.

---------- *Economics and the Public Purpose*, Delhi, Vikas Publications, 1974.

---------- *Contemporary Guide to Economics, Peace and laughter*, New York, New American Library, 1972.

Galatin, Malcolm ed. *Economics of Information*, Boston, Martinus Nijhoff Publishing, 1981.

Gal- Or, Esther. "Warranties as a Signal of Quality", *Canadian Journal of Economics*, Vol. 22, No. 1, 1989, 50- 61.

Geddes, A. *Product and Service Liability in the EEC: The New Strict Liability Regime* , London, Sweet & Maxwell,1992.

Gerner, L. Jennifer & Bryant, W. Keith " Applience Warranties as a market Signal?", *Journal of Consumer Affairs*, Vol. 15, No. 1, 1981, pp. 75- 86.

Geroski, P. A. *et al* *Oligopoly, Competition and Welfare*, London, Basil Blackwell Ltd., 1985.

Gintis, Herbert. "Consumer Behaviour and the Concept of Sovereignty: Explanations of Social Decay", *American Economic Review (p)*, Vol. 62, May 1972, pp. 267- 278.

Goldberg, P. Victor "The Economics of Product Safety and Imperfect Information",*Bell Journal of Economics and Management Science*, Vol. 5, No. 2, 1974, pp. 683- 695.

Government of India *Annual Report, 1995- 96*, New Delhi, Ministry of Civil Supplies, Consumer Affairs & Public Distribution, 1996.

---------- *Annual Report, 1996- 97*, New Delhi, Ministry of Justice, 1997.

---------- The Consumer Protection Act, 1986 (Amendment, 1993), No. 68 of 1986.

Gowland, D. H. *Modern Economic Analysis II*, London, Butter- Worths, 1983.

Grabowski, G. Henry & Vernon, M. John "Consumer Product Safety Regulation", *American Economic Review (p)*, Vol. 68, No. 2, 1978, pp. 284- 289.

Griffiths, Roy "Does the Public Service serve? the Consumer Dimension", *Public Administration*, Vol. 66, Summer 1988, pp. 195- 204.

Grossman, S.& Stiglitz, J. E. "On the Impossibility of Informationally Efficient Markets", *American Economic Review*, Vol. 70, No. 3, 1980, pp. 393- 408.

Grossman, Sanford "The Informational Role of Warranties and Private Disclosure about Product Quality", *Journal of Law and Economics*, Vol. 24, 1981, pp. 461- 483.

Hamilton, H. Walton "The Ancient Maxim Caveat Emptor", *Yale Law Journal*, Vol. 40, No. 8, 1931, pp. 1133- 1187.

Hausman, A. Jerry "Exact Consumer's Surplus and Dead-weight Loss", *American Economic Review*, Vol. 71, No. 4, 1981, pp. 662- 676.

Havemann, H. Robert & Knof, K. Kenyon *The Market System: An Introduction to Micro Economics*, 3rd ed, Santa Barbara, John Wiley & Sons, 1978.

Heilbroner, L. Robert & Thurow, Laster C. *Economics Explained*, New Jersey, Prentice-Hall Inc., 1982.

Hey, D. John & "Consumer Search with Uncertain Product Quality", *Journal of Political Economy*, Vol. 89, No. 1, May 1980, pp. 193- 196.

Higgins, S. Richard "Producers' Liability and Product - Related Accidents", *Journal of Legal Studies*, Vol. 7, No. 2, 1978, pp. 299- 321.

Hillman A. L. & Katz, E "Risk-Averse Rent Seekers and the Social Cost of Monopoly Power", *Economic Journal*, Vol. 94, March 1984, pp. 104- 110.

Howells, Geraint & Wilhelmsson, Thomas *EC Consumer Law*, Aldershot, Ashgate, 1997.

Huber, P. *The Legal Revolution and Its Consequences*, New York, Basic Books, 1988.

---------- *Economists and the Publics: A Study in Competition and Opinion*, London, Jonathan Cape, 1936.

Ironmonger, D.S. New Commodities and Consumer Behaviour, Cambridge, Cambridge University Press, 1972.

Jaskow, Paul & Roger, Noll "Regulation in Theory and Practice: An Overview", in G. Forman, (ed), *Studies in Public Regulation*, Cambridge, Mass., MIT Press, 1981, pp. 1- 65.

Jacoby, Jocab *et al* " Corrective Advertising and Affirmative Disclosure Statements: Their Potential for Confusing and Misleading the Consumer", *Journal Marketing*, Vol. 46, Winter, 1982, pp. 61- 72.

Jensen, Walter Jr. "The Consumer Product Safety Act: A Special Case in Consumerism," *Journal of Marketing*, Vol. 37, No. 4, October 1973, pp. 68- 71.

Justice, S.Craig. *Economics*, Maureen Burton, Harper & Row Publishers, 1988.

Kaldor, N. "The Economic Aspects of Advertising", *Review of Economic Studies*, Vol. 18, 1950- 51, pp- 1- 27.

Kaplow, Louis "Rules Versus Standards: An Economic Analysis", *Duke Law Journal*, Vol. 42, 1992, pp. 557- 629.

---------- "An Economic Analysis of Legal Transitions", *Harvard Law Review*, Vol. 99, No. 3, 1986, pp. 511- 617.

Kaplow, Louis& Shavell, Steven "Accuracy in the Assessment of Damages", *Journal of Law and Economics*, Vol. 39, No. 1, April 1996, 191- 210.

Kellam, M. Jocelyn *The Contract- Tort Dichotomy and a Theoretical Framework for Product Liability Law: A Comparison of the Elements of Liability in Product liability law in Australia, France and Germany*, Unpublished, Ph. D. Thesis (Law),.Sydney, University of Sydney, 1996.

Kelly, Patrick Esq., "Overview of EC Product Liabilities Law", in Kelly, P. & Attree, R., *European Product Liability*, 2nd ed, London, Butterworths, 1997.

Kessler, Daniel "Institutional Causes of Delay in the Settlement of Legal Disputes", *Journal of Law, Economics, & Organisation*, Vol. 12, No. 2, 1996, pp. 432- 460.

Kessler, Friedrich "Contracts of Adhesion, Some Thoughts about Freedom of Contracts", *Columbia Law Review*, Vol. 43, No. 5, July 1943, pp. 629- 643.

Kilhlstrom, E. Richerd & Riordan, H. Michael "Advertising as a Signal", *Journal of Political Economy*, Vol. 92, No. 3, June 1984, pp. 427- 450.

Klaus, Tonner "The European Influence on German Consumer Law", *Journal of Consumer Policy*, Vol. 17, No. 3, 1994, pp. 427- 450.

Knox, F. "The Doctrine of Consumers' Sovereignty", *Review of Social Economy*, Vol. 18, Summer, 1960, pp. 138- 149.

Kolstad, Charles *et al* "Ex Post Liability for Harm vs. Ex Ante Safety Regulation: Substitutes or Complements", *American Economic Review*, Vol. 80, No. 4, 1990, pp. 888- 911.

Kötz, H "Rechtsvergleichung und Rechtsdogmatik" (Rabels) *Zeitschrift für ausländisches und interntionales Privatrecht*, Vol. 54, p. 203.

Kronman, T. Anthony "Mistake, Disclosure, Information, and the Law of Contracts", *Journal of Legal Studies*, Vol. 7, No. 1, 1978, pp. 1- 34.

Krueger, A. O. "The Political Economy of the Rent-Seeking Society" *American Economic Review*, Vol. 64, No. 3, June 1974, pp. 291- 303.

Laffont , Jean-Jacques & Tirole Jean. *A Theory of Incentives in Procurement and Regulation*, Massachusetts, the MIT Press, 1993.

Landas, M. William & Posner, R. A. "The Independent Judiciary in an Interest Group Perspective", *Journal of Law and Economics*. Vol.18, 1975, p. 875 .

Lansert, R. D. "Price as a Quality Signal: The Tip of the Iceberg", *Economic Inquiry*, Vol. 18, January 1980. pp. 144- 150.

Leff, A. Allen "Unconscionability and the Code- the Emporer's New Clause", *University of Pennsylvania Law Review*, Vol. 115, No. 4, 1967, pp. 485- 559.

Leland, J. Gordon . Stewart, Lee M. (ed) *Economics for Consumers*, New York, Von Wostrand Reinhold Company, 1972.

Leela Krishna, P. *Consumer Protection and Legal Control*, Bangalore, MPP House, 1984.

Lem, C. *Die Haftung für fehlerhafte Produkte nach Deutschem und Französischem Recht*, Heidelberg, Verlag Recht und Wirtschft, 1993.

Lerner, P. Abba "The Economics and politics of Consumer Sovereignty", *American Economic Review (p)*, Vol. 62, No. 2, May 1972, pp. 258- 278.

Lewis, A. Kornhauser "Unconscionability in Standard Forms", *California Law Review*, Vol. 64, No. 5, 1976, pp. 1151- 1183.

Liebeskind, Julia & Rumelt, P. Richerd "Markets for Experience Goods with Performance Uncertainty", *Rand Journal of Economics*, Vol. 20, No. 4, Winter 1989, pp. 601- 621.

Link, Klaus- Ulrich Sambuc, Thomas "The Federal Republic of Germany", in Kelly, Patrick & Attree, Rebecca, *European Product Liability*, 2nd ed, London, Butterworths, 1997.

Lutz, A. Nancy "Warranties as Signals under Consumer Moral Hazard", *Rand Journal of Economics*, Vol. 20, No. 2, Summer 1989, pp. 239- 255.

Mann, D. P. & Wissink, J. P. *Hidden Actions and Hidden Characteristics in Warranty markets*, Mimeo, Cornell University, 1987.

Marburger, P. *Die Regalan der Technik im Recht*, Köln/Berlin/Bonn/München, 1979.

Markesinis, B. S. *A Comparative Introduction to the German Law of Tort*, 3rd ed, Oxford, Clarendon Press, 1994.

Massel, S. Mark *Competition and Monopoly: Legal and Economic Issues*, New York, Douldeday & Company, Inc., 1964.

Mckean, N. Ronald "Product Liability: Trends and Implications", *University of Chicago Law Review*, Vol. 38, 1970, pp. 3- 63.

---------- "Government and the Consumer", *The Southern Economic Journal*, Vol. 39, No. 4, April 1973, pp. 481- 489.

Michael, R. Behr & Nelson, Dennis *Economics: A personal Consumer Approach*, L. Virginia, Reston Publishing Company, Inc., 1975.

--------- *et al* (ed.,) *Federalism and Responsibility: A Study on Product Safety Law and Practice in the European Community*, London, Grahm & Trotman, 1994.

Milgrom, Paul & Robberts, John "Price and Advertising Signal of product Quality", *Journal of Political Economy*, Vol. 94, No. 4, 1986, pp. 796- 821.

Mitchell Jeremy "The Consumer Movement and Technological Change", *International Social Science journal*, Vol. 25, No. 3, 1973, pp. 358- 369.

Morris , David (ed). *Economic of Consumer Protection*, London, Heinemann Educational Books, 1980.

Murray, Barbara (ed), *Consumerism: The Eternal Triangle: Business, Government and Consumers*, California, Good Year, Pacific Palisades, 1973.

Nayak, K. Rajendra *Consumer Protection Law in India: An Eco- Legal Treatise on Consumer Justice*, Bombay, NM Tripati Pvt. Ltd., 1991.

Nelson, Phillip. "Information and the Consumer Behaviour", *Journal of Political Economy*, Vol. 78, No. 2, March1970, pp. 311- 329.

---------- "Advertising as Information", *Journal of Political Economy*, Vol. 82, 1974a, pp. 729- 754.

Ogus, I. Anthony *Regulation: Legal Form and the Economic Theory*, Oxford, Clanrendon Press, 1994.

Oi, Y. Walter "The Economic Analysis of Product Safety", *The Bell Journal of Economics and Management Science*, Vol. 4, No. 1, Spring 1973, pp. 3- 28.

Olliver, E. Williamson *The Economic Institutions of Capitalism*, New York, The Free Press, 1985.

Pauly, "The Economics of Moral hazard: Comment", *American Economic Review*, Vol. 58, No. 3, 1968, pp. 531- 537.

Peltzman, Samuel "Towards a More General Theory of Regulation", *The Journal of Law and Economics*, Vol. 19, No. 2, 1976, pp. 217- 240.

Persky, Joseph "Restorspectives Consumer Sovereignty", *Journal of Economic Perspectives*, Vol. 7, No. 1, Winter, 1993, pp. 183- 191.

Polinsky, A. M. "Strict Liability vs. Negligence in a Market Setting", *American Economic Review (p)*, Vol. 70, No. 2, 1980, pp. 363- 367.

Roger, Bowles *Law and the Economy*, Oxford, Martin Robertson & Company, Ltd., 1982.

Posner, A. Richerd *The Economic Analysis of Law*, Bosten, LB, 1972.

---------- "Theories of Economic Regulation", *The Bell Journal of Economics and Management Science*. Vol. 5, No. 2, Autumn 1974, pp. 355- 358.

---------- "A Theory of Negligence", *Journal of Legal* Studies, Vol. 1, No. 1, 1972, pp. 29- 96.

Pratt, W. John *et al.* "Price Differences in Almost Competitive Markets", *Quarterly Journal of Economics*, Vol. 93, No. 2, 1979, pp. 189- 211.

Priest, L. George "A Theory of the Consumer Product Warranty", *The Yale Law Journal*, Vol. 90, No. 6, May 1981, pp. 1297- 1352.

Prosser, L. William "The Implied Warranty of Merchantable Quality", *Minnesota Law Review*, Vol. 27, No.2, January 1943, pp. 117- 168.

Regerson, P. William "Reputation and Product Quality", *Bell Journal of Economics and Management Science*, Vol. 14, No. 2, Autumn 1983, pp. 508- 516.

Reich B. Robert "Toward A New Consumer Protection", *University of Pennsylvania Law Review*, Vol. 128, No. 1, November 1979, pp. 1- 40.

Reich, Norbert "Product Safety and Product Liability - An Analysis of the EEC Council Directive of 25 July 1985 on the Approximation of the Laws, Regulations and the Administrative Provisions of the Member States concerning Liability for Defective Products", *Journal of Consumer Policy*, Vol. 9, 1986, p. 133.

Richard, J. Barber "Government and the Consumer", *Michigan Law Review*, Vol. 64, No. 7, May 1966, pp. 1197- 1348.

Rose-Akerman, S. *Rethinking the Progressive Agenda*, New York, The Free Press, 1992.

----------. "Market-Share Allocations in Tort Law: Strength and Weaknesses", *Journal of Legal Studies*, Vol. 19, No. 2, 1990, pp. 739- 746.

Rosen, S. "Hedonic Prices and Implicit Markets: Product Differentiation in Pure Competition", *Journal of Political Economy*, Vol. 82, 1974, pp. 34- 55.

Rosemthel, S. B. "Producer Versus Consumer: The Unequal Battle", *Economic Business Bulletin*, Vol. 22, No. 2, Winter 1970, pp. 37- 40.

Rothshilld, M. & Stiglitz, E. J. — "Symposium: The Economics of Information: Equilibrium in Competitive Markets: An Essay on the Economics of Imperfect Information", *Quarterly Journal of Economics,* Vol.90, No. 4, 1976, pp. 629- 649.

Rottleuthner, Hubert& Rottleuthner-Lutter,M. — *Die Dauer von Gerichtsverfahren*, Baden-Baden, Nomos Verlagsgeselschft, 1990.

Salop, Steven — "Information and Monopolistic Competition", *American Economic Review*, Vol. 66, No. 2, 1976, pp. 240- 245.

---------- — "The Noisy Monopolist: Imperfect Information, price Dispersion, and Price Discrimination", *Review of Economic Studies*, Vol. 44, 1977, pp. 393- 406.

Salop, Steven & Stiglitz, J. — "Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion", *Review of Economic Studies*, Vol. 44, 1977, pp. 493- 510.

Schäfer, Hans-Bernd & Ott, Claus — *Lehrbuch der ökonomischen Analyse des Zivilrechts*, 2. Auflage, Berlin, Springer, 1995.

---------- — "EG-Richtlinie Produkthaftung - Der Entwurf für das deutsche Transformationagesetz (ProdhaftG)", *Der Betriebs- Berater*,1987, p.1404.

---------- — "Das Mehrwegflaschen-Urteil des BGHs und die allgemeine Produkt- Verschuldenshaftung", *Produkthaftpflicht*,1988, p.146.

---------- — "Die EG-Richtlinie Produkthaftung", *Der Betriebs- Berater*,1986, p.1103.

---------- — "Der Fehlerbegriff der EG-Richtlinie Produkthaftung", *Der Betriebs-Berater*,1988, p. 349.

---------- — "Strafrechtliche Produktverantwortung: Das Lederspray - Urteil des BGH", *Neue Juristische Wochenschrift*,1990, p. 2966.

---------- — "Die Bedeutung der Entsorgung - und der Schwimmerschalter-Entscheidung des Bundesgerichtshof für das Produkthaftungsrecht" *Der Betriebs- Berater*, 1979, p. 1.

Saraf, N. Dwarika — *Law of Consumer Protection in India*, Bombay, Tripathy, 1995.

Schmalensee, R. — "Advertising and Product Quality", *Journal of Political Economy*, Vol. 86, 1978, pp. 485- 503.

Schwartz, Alan & Wilde, L. Louis — "Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis", *University of Pennsylvania Law Review*, Vol. 127, 1979, pp. 630- 682.

Schweizer, Urs — "Litigation and Settlement Under Two- Sided Incomplete Information", *Review of Economic Studies*, Vol. 56, 1989, pp. 163- 178.

Scitovsky, Tibor. — "Ignorance as a Source of Oligopoly Power", *The American Economic Review (p)* , Vol. 40, No. 3, 1950, pp. 48- 53.

Semkow, W. Brian — "Social Insurance and Tort Liability", *International Review of Law and Economics*, Vol. 5, No. 2, December 1985, pp. 153- 171.

Shapiro, Carl — "Consumer Information, Product Quality, and Sellers Reputation", *Bell Journal of Economics*, Vol. 13, No. 1, Spring 1982, pp. 20- 35.

---------- — "Premiums for high Quality Products as Returns to Reputations", *Quarterly Journal of Economics*, Vol. 98, No. 4, 1983, pp. 659- 679.

Sharma, S. P. — *Indian Legal System*, New Delhi, Mittal Publications, 1991.

Shavel, Steven — "A Model of the Optimal Use of Liability and Safety Regulation", *Rand Journal of Economics*, Vol. 15, No. 2, Summer 1984, pp. 271- 280.

---------- — "The Judgement Proof Problem", *International Review of Law and Economics*, Vol. 6, No. 1, 1986, pp. 45- 58.

---------- — "Strict Liability versus Negligence", *Journal of Legal Studies*, Vol. 9, No. 1, January 1980, pp. 1- 25.

---------- — "Alternative Dispute Resolution: An Economic Analysis", *Journal of Legal Studies*, Vol 24, No.1, January 1995, pp. 1- 28.

---------- — "The Social versus the Private Incentive to Bring Suit in a Costly Legal System", *Journal of Legal Studies*, Vol. 11, No. 2, June 1982b, pp. 333- 339.

---------- — "Liability for Harm Versus Regulation of Safety", *Journal of Legal Studies*, Vol. 13, No. 2, June 1984, pp. 357- 374.

---------- — "An Analysis of Causation and the Scope of Liability in the Law of Torts", *Journal of Legal Studies*, Vol. 9, No. 3, June 1980, pp. 463- 516.

---------- — *Economic Analysis of Accident Law*, Massachusetts, Harvard University Press, 1987.

---------- — "The Appeals Process as a Means of Error Correction", *Journal of Legal Studies*, Vol. 24, No. 2, June 1995, pp. 380- 426.

Smallwood, D. & Conlisk, J. — "Product Quality in Markets Where Consumers Are Imperfectly Informed", *Quarterly Journal of Economics*, Vol. 93, No. 1, 1979, pp. 1- 23.

Smith, Adam. — *An Inquiry into the Nature and Causes of the Wealth of Nations,* New York, Modern Library, 1976.

Smith, Peter & Swann, Dennis — *Protecting the Consumer: An Economic and Legal Analysis,* Oxford, Martin Robertson & Company, Ltd., 1979.

Smithson, W. Charles & Thomas, R. C. — "Measuring the Cost to Consumers of Product Defects: The Value of *Lemon Insurance*", *The Journal of Law and Economics*, Vol. 31, No. 2, October 1988, pp. 485- 502.

Spence, A. Michel — "Consumer Misperceptions, product failure and Product Liability", *Review of Economic Studies*, Vol. 44, 1977, pp. 561- 572.

---------- — "Job Marketing Signalling", *Quarterly Journal of Economics*, Vol. 87, August 1973, pp. 355- 374.

---------- — "Monopoly, Quality and Regulation", *The Bell Journal of Economics and management Science*, Vol. 6, Autumn 1975. pp. 417- 429.

Spulber, F. Daniel — *Regulation and Markets*, Massachsetts, The MIT Press,1989.

Statisches Bundesamt — *Statistical Yearbook* 1996, Wiesbaden, for the Federal Republic of Germany, 1996.

Staurt, C. — "Quality of Products/ Consumer Protection in Markets with Informationally week Buyers", *The Bell Journal of Economics and Management Science*, Vol. 12, Autumn 1981, pp. 562- 573.

Stigler, J. George — "The Economics of Information", *Journal of Political Economy*, Vol. 69, No. 3, June 1961, pp. 213- 225.

---------- — "Free Riders and Collective Action: An Appendix to Theories of Economic Regulation", *The Bell Journal of Economics and Management Science*. Vol. 5, No. 2, 1976. pp. 359- 365.

Stiftung Verbraucher Institute & DIN-Verbraucherrat — Leitfaden für Verbrauchervertreter bei der Normung, Berlin, DIN, 1981.

Taylor von Mehren, A — *The Civil Law System: Cases and Materials for the Comparative Study of Law*, Englewood Cliffs, N.J., Prentice-Hall, INC, 1957.

Terence, Daintith — *Law as an Instrument of Economic Policy: Comparative and Critical Approaches*, New York, Walter de Gruyter, 1988.

Tirole, Jean — *The Theory of Industrial Organisation*, Cambridge, MIT Press, 1988.

U. N. General Assembly — "Guidelines for Consumer Protection", *UN Chronicle*, Vol. 22, No. 5, April, 1985. pp. 33- 35 & 76- 78.

Veljanovski, C.G. — *New-Law and Economics: A Research Review*, Oxford, Centre for Social Legal Studies, 1982.

Viscusi, W. Kip — "Product Liability and Regulation: Establishing the Appropriate Institutional Division of Labour", *American Economic Review (P)*, Vol. 78, No. 2, 1988, pp. 300- 304.

"Regulating the Regulators", *The University of Chicago Law Review*, Vol. 63, No. 4, Fall 1996, pp. 1423- 1461.

Weiss, H. — "Employers' Liability and Workmen's Compensation". in Elizebeth Brandies, (ed),*Labour Legislation: History of Labour in the United States, 1896-1932*, Vol. 3, New York, Macmillan, 1943.

Westphalen, v.F. — *Produkthaftungshandbuch*, Munich, CH Beck ,1991.

Wheeler, E. Malcolm — "The Use of Criminal Status to Regulate Product Safety", *The Journal of Legal Studies*, Vol. 13, No. 3, 1981, pp. 593- 618.

Wilson, C. — "A Model of insurance markets with incomplete Information", *Journal of Economic Theory*, Vol. 16, 1977, pp. 167- 207.

Wittman, Donald — "Should Compensation be based on Costs or Benefits?", *International Review of Law and Economics*, Vol. 5, No. 2, December 1985, pp. 173- 185.

---------- — "Prior Regulation Versus Post Liability: The Choice Between Input and Output Monitoring", *Journal of Legal Studies*, Vol. 6, No. 1, pp. 193- 211.

Wolinsky, Asher — "Prices as Signals of Product Quality", *Review of Economic Studies*, Vol. 50, 1983, pp. 647- 658.

Wright, W. Richard — "Causation in Tort Law", *California Law Review*, Vol. 73, No 6, 1985, pp. 1735- 1828.