QUALITY CONTROL BY SELF REGULATION

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

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

\(^1\) Herein after referred to as TQM.
benefit to the consumers. The extent of the benefit and the legal control over consumer warranties require a critical analysis.

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

**Need for Business Self-regulation**

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

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

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

However, most of the Indian managers remain as five-day sinners and two-day saints.5 They indulge in political activities to flatten their coffers, and restrict the entry of healthy competitive forces. They even exploit the ignorance of consumers through high-pressure advertising, which at times is false, deceptive and misleading. Often, they resort to unethical trade practices and show very little concern for quality, after sales service and maintenance. All these turned the public confidence on businessmen to public distrust and hatred. Self-discipline and business self-regulation are attempts by the business community to recapture the lost glory6.

Advantages of Self-regulation

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

4 Keith Davis, "Five Propositions for Social Responsibility", as quoted in supra n.2 at p.7.
5 Supra n. 2 at p.9.
6 It has been said that even though most of the corporations have become substantially more enlightened about their responsibilities to the consuming mass, the feeling abounds in many quarters that business performance in this respect is not always adequate particularly with regard to protecting consumers' health and safety. See Harper W.Boyd & Henry Claycamp, "Industrial Self-regulation and the Public Interest", 64 Mich.L.R. 1239 (1966).
remedies are\textsuperscript{7}. It can be more flexible and hence suitably applied in changing conditions without much difficulty. However, legislation cannot move in a similar pace. According to Cranston, voluntary standards are well in advance of legal provisions and hence more favourable to consumers\textsuperscript{8}. The standards so evolved for self-regulation can be applied in a practical and commonsense manner and not in a legalistic or rigid way of courts. Moreover, businesses comply with voluntary standards in its true spirit whereas they can push the law to its limit and find loopholes.\textsuperscript{9}

Self Regulation and Self Discipline

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

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

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


\textsuperscript{9} Ibid.

\textsuperscript{10} It has been said that in U.K. during the period when most of the codes of practice were prepared (i.e.1973-79), there was always a threat of regulation if a trade association did not sets its own house in order. See, David Oughton & John Lowry, TextBook on Consumer Law, Blackstone Press, London (1997), p.22. Also see, Russel.B.Stevenson, "Corporation and Social Responsibility", 42 Geo. Wash. L.Rev. 709 (1974).
more onerous government controls. They have also realised that self-regulation can lead to positive commercial advantage such as reduction of litigation costs, better profitability and consumer satisfaction. The money thus saved can be invested for better quality control methods, which would bring in more prosperity to the institution. It has also been said that self-regulatory measures projects the notion of the company as a "good corporate citizen".\textsuperscript{11}

**Business Codes**

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

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

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

\textsuperscript{11} See J.J. Boddewyn, *op.cit.* at p.32.
\textsuperscript{13} *Ibid.*
\textsuperscript{14} *Ibid.*
to have its own codes of ethics even though it is nothing more than the inarticulate body of conventions. The unwritten code of every business is simply its prevailing morality. A good business code is not from the viewpoint of the trader as a whole, entirely selfish. But it recognizes, in addition, the delegations of members of the trade to one another, their obligation to customers, suppliers and employees, and to the general public and the government. The Code of Ethics originated from the ethical principles developed by the learned professions of law and medicine can be cited as obvious examples of voluntary codes adopted in the service sector.

**Total Quality Management (TQM)**

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

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

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15 *Id. at p.472.*

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

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

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

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

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

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17 K.S.Rajagopal, “Quality is Everybody’s Business”, The Hindu, Cochin, June 27, 1998, p.27. Patrick L. Townsend is considered as a leading practitioner and theorist in quality management.
The only compulsion to adopt TQM is market pressure. A producer unconcerned about market pressure can avoid TQM. However, if the industries adopt TQM, it will certainly benefit the consumers. For this, legal recognition of TQM is needed. The requirement of compulsory filing of annual environment audit reports by companies can be cited as a good model of legislative attempt in improving the quality of environment. The audit reports, in addition to the methods adopted for quality control, shall contain measures adopted for handling consumer complaints in the establishment. Similarly, economic incentives can be given to industries that volunteer in adopting effective quality control measures.

**Consumer Complaints Handling**

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

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18 Supra n. 2.
19 See the Environment Protection Rules, 1986. Rule 14 make it obligatory on every industry to file an environment audit report every year. This will help the authorities to assess the environment conservation plan adopted by industries and to consider areas where mandatory rules are required. For a brief discussion on environmental audit, see P. Leelakrishnan, Environmental Law in India, Butterworths, New Delhi (1999), p.101.
20 The Malcolm Balridge National Quality Award in America and the Deming Awards in Japan are examples of such economic incentives. See K.S.Rajagopal, “Quality is Everybody’s Business”, The Hindu, Cochin, June 27, 1998, p.27.
them to do, and to this extent, consumer protection goes beyond the parameters of law.

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

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

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

extensive scale with utmost sincerity, it may not have an optimal effect on a firm’s performance or quality control.\textsuperscript{23}

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

**Voluntary Codes Adopted Under Administrative Pressure**

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

\textsuperscript{24} Herein after referred to as OFT.
\textsuperscript{25} See the Fair Trading Act, 1973 (U.K.) s.124 (3).
representing both consumers and the trade itself in order to identify deficiencies in the operation of the trade. Once the problems have been identified, the primary responsibility for preparing the code of practice lies with the trade association itself. It will submit a draft code to the OFT for approval. Modifications to the code may follow suggestions for improvement given by the OFT in order to ensure effective protection of the consumer. Consequent to the dissemination of the code, the trade associations' responsibilities continue in that it is important that the code is kept up-to-date in the light of changing circumstances and the identification of new consumer problems.

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

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

²⁷ The famous economist Adam Smith has observed that where people of the same trade meet together, there is likely to be a conspiracy against the public or some agreement to raise prices. See R.H. Campbell and A.S. Skinner, *The Wealth of Nations*, Modern Library, New York (1937) Vol. 1, p.145.
manufacturer into the dispute. If the dispute is still not settled and the trader is a member of a trade association, the customer should ask the association to conciliate. Service of conciliation is rendered free of charge.

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

**Consumer Expectations from a Self-regulatory Code.**

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

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

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

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

The code should make available viable machinery for consumer complaint handling. The trade association must regularly monitor functioning of the code by publication of annual report of operation of the code. It must assess periodically consumer responses and ensure that copies of the code are made available to consumers and consumer associations free of charge. Compliance with the code and procedures for handling consumer complaints must be made mandatory on the members. The code should also contain provisions for penalties for non-compliance.

The Office of Fair Trading in England had recognised the above principles in early nineties.\(^\text{30}\)

**The Indian Scenario**

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


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

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

The Directorate of Advertising and Visual Publicity, Government of India has also formulated a code for commercial advertising. Enforcement of the code seems to be very mild in form. The Director General who receives any complaint about contravention of the code provisions, refers it for consideration by the advertisers’
association, if any, for suitable action. If it could not be resolved at that level, the Director General will consider a suitable action by himself.\textsuperscript{40}

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

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

\textsuperscript{40} Id., Procedure for Enforcement of the Code.
\textsuperscript{41} Director General of Fair Trading, Annual Report 1976, p.9.
\textsuperscript{42} Ibid.
\textsuperscript{43} Codes of practice drawn in consultation with the OFT may be an exception where consumer organizations and other parties interested are always consulted.
\textsuperscript{44} Even though codes are not generally enforceable due to its non-incorporation in to a statute, it is possible for courts to look at it as evidence of better trade practices and procedures followed by a section of industry in question. For a brief discussion on two cases in which the courts have made use of the voluntary codes as evidence of good business practices, see C.J.Miller, Brian W. Harvey and Deborah L. Parry, Consumer and Trading Law: Text Cases and Materials, Oxford University Press, Oxford (1998), p.511.
enforcement by recognising them by statutes\textsuperscript{45}. For example it is possible to include non-conformance with the code a 'deficiency'\textsuperscript{46} or an 'unfair trade practice'\textsuperscript{47} under the Consumer Protection Act, 1986. This will enable an aggrieved consumer to bring an action against a trader who is a member of the trade association for violation of the code provisions. Such an amendment would pave the way for application of the code to all members of a particular trade irrespective of the fact that he chooses not to join a trade association. It is one's choice to enter into a particular trade. Once he enters into the trade he is bound by the code and a formal membership in any trade association is immaterial. It is even possible to impose on the traders a statutory duty to trade fairly in express terms. As a part of discharge of this duty, a code can be interpreted and enforced\textsuperscript{48}.

Manufacturer’s Warranties and Guarantees.

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

\textsuperscript{45} See for example, \textit{the Code of Practice for Traders in Price Indications} is given force of law in U.K. by the Consumer Protection Act, 1987, s. 25.
\textsuperscript{46} The Consumer Protection Act, 1986, s. 2 (1)(g).
\textsuperscript{47} \textit{Id.}, s. 2 (1) (t). This section gives a long list of practices that will be treated as 'unfair trade practice'.
\textsuperscript{48} This idea has been mooted by the office of Fair trading in 1982 and followed this up in 1986 with a discussion paper, \textit{A General Duty to Trade Fairly}. Such a bold step was not welcomed by industry in a period of free market economy. The Governmental policy at that time was evident from the titles of two white papers viz., \textit{Lifting the Burden} and \textit{Building Business not Barriers}. 
Generally, guarantees are given for a limited period. Guarantees often perform a promotional function for manufacturers and also act as a system of quality control. The trader thereby can get information about the performance of his product. A generous guarantee is advantageous to consumers since it affords them a remedy without resorting to the tedious formalities of establishing a legal claim. Repair by manufacturer himself confers better service because it is he who has enough expertise on the product. Guarantees seem to be one of the most effective means available to consumers to settle their disputes concerning defects in products.

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

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

“All too often, it seems that guarantees are used merely as a marketing ploy, a source of additional revenue for the supplier, or even as a means of divesting consumers’ attention from their legal rights.”

Warranty and Guarantee: Distinction

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

Legal Guarantee and Commercial Guarantee

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

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52 See Rani Advani, Warranties and Guarantees: Reading the Small Print, CERC, Ahmadabad (1992), Chapter 3.
54 Ibid.
he has no rights. Moreover, in many cases the consumer believes that his rights are
limited to the content of the commercial guarantee alone. The commercial warranty
offered by the producer may be either explicit or secret. The secret warranty, consequent to its secrecy, has only a very limited application.

Secret Warranties

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

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

55 See Jeff Sovem, ‘Toward the Regulation of Secret Warranties’, 7 Advancing Consumer Interest, 13
The consumer generally can get advantage of secret warranties only if he comes to know about its existence. So long as it remains secret, its availability is restricted to those limited ones who get information as to its existence. So as to ensure its availability to all consumers and to get rid of its secret nature, law is to be enacted to regulate them.  

Legal Basis of Commercial Guarantees

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

a) The Exploitation Theory

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

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

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

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

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

b) The Signal Theory

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

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

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

The signal theory has exerted substantial influence on consumer product warranty policy in many countries. For example in America, the objective of the Magnuson Moss Warranty Act, 197462 was to make warranties as more efficient signals. The Act required manufacturers to redraft warranties in simple and readily understood language63. All important provisions of warranties as per the Act are to be displayed prominently so that they are available for consumer inspection prior to purchase of the product.64

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

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

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

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65 See George L. Priest, supra n. 57.
66 Id., pp.1308 – 1313.
67 Id., pp.1314 – 1319.
consumers share. Consumers who face greater risks have to self-insure or obtain alternative insurance. Thus low risk consumers need not pay for more insurance.\textsuperscript{68} Whatever may be the theoretical foundation of warranties, its usefulness to consumers cannot be under-estimated. Depending upon the nature and scope of warranties, the producer’s faith in the performance of his products can be assessed. Therefore, warranties exert considerable influence on the consuming public. It is based on this reason that legal interference into the realm of formation and implementation of the terms of warranties has taken place.

**Legal Framework for Regulating Warranties**

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


\textsuperscript{69} Supra. n.50 at para.7.9.

\textsuperscript{70} Office of Fair Trading, Consumer Guarantees (1986), para.5.9.

\textsuperscript{71} National Consumer Council (U.K.), the Consumer Guarantees (1989).

\textsuperscript{72} Herein after referred to as DTI.

\textsuperscript{73} Directorate of Trade and Industry, Consumer Guarantees (1992).
should be made legally liable under his guarantee; (b) the retailers should also be liable on the terms of the guarantee; and (c) the manufacturers should be held responsible for the quality of goods manufactured by him but sold by someone else.

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

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The manufacturer should be responsible under the Sale of Goods Act, 1979 for the merchantable quality.  
Id., Art.3(1).  
Ibid.
defect manifesting itself in the goods within six months of the sale, existed at the time of sale.\textsuperscript{78}

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

In the case of 'commercial guarantees', the Green Paper said that there is no legal framework within which they can operate. Similarly, there is no means of filling gaps in guarantee documents.\textsuperscript{81} Therefore, it has been suggested by the proposed Directive that commercial guarantees should be made legally enforceable.\textsuperscript{82}

Commercial guarantee should clearly be considered as a contract between the guarantor and the holder of the good\textsuperscript{83} even though there is no direct relationship between these two persons.\textsuperscript{84} It should confer additional benefits on the consumer over and above the rights already arising from the legal guarantee. It has been suggested that the guarantee documents should also mention the existence of legal guarantee and summarise its content.\textsuperscript{85} The provider of the guarantee should freely

\textsuperscript{78} Id., Art.3(3).
\textsuperscript{79} English law offers remedies of rejection or damages or both where appropriate. But if the buyer has accepted the goods, rejection will not be permitted. For a detailed discussion on this point, see A.G.Guest \textit{et.al} (Eds.), \textit{Benjamin's Sale of Goods}, Sweet and Maxwell, London (1992), pp.539-552.
\textsuperscript{80} Supra n. 75, Art. 3(4).
\textsuperscript{83} Under the Sale of Goods Act, 1979, the buyer alone is entitled for the benefit. The Green Paper seems to extend this to any person holding the goods as beneficiary.
\textsuperscript{84} Supra n.81, p.96
\textsuperscript{85} Ibid.
establish the content of the guarantee and its duration. When the document does not specify the scope of the guarantee, it should be considered as covering the goods in its entirety against any defect, which could arise after delivery. The guarantee would also be considered as entitling the beneficiary to have the item repaired or replaced free of charge. If no period is mentioned, the guarantee would be considered as valid for one year after the delivery to the purchaser. Unless the guarantee documents clearly state to the contrary, the guarantee would be automatically extended for the duration of the repairs. The spare parts should come with a new guarantee having the same duration as the initial guarantee. Guarantee conditions, if advertised shall not mislead. If this is the case, the guarantors should be obliged to honour the guarantee advertised. Consumers should normally be given freedom to refer to the guarantee prior to their purchase. Guarantees are to be displayed just like products are displayed.

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

86 Id. p.97. 87 Ibid. 88 Ibid. 89 Id. p.98. 90 The U.S. Department of Commerce has also made many recommendations for making the warranties fair and uniform. See, U.S.Department of Commerce, Office of Consumer Affairs, Product Warranties and Servicing (1980).
transport charges where a product is repaired under guarantee. A guarantee may not extend to all accessories and it may not apply at all if the consumer has attempted repairs. There are guarantees, which by virtue of its terms render them useless to the consumers.

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

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

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

91 For instance, the Automobile Manufacturers' Guarantees generally specify that the vehicle in question is to be presented to their authorized service station for repairs. In certain cases, such as electrical, what is guaranteed may be the replacement of new parts for the defective one where the consumer is often asked to pay for labour.
93 Id. at p.1224.
direct that the guarantee is made known to the consumers and also that it does not affect their rights under the Sale of Goods Act. The guarantee must be available to consumers prior to a transaction. It becomes legally binding on a business and cannot be disclaimed or modified.

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

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

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94 See the Fair Trading Act, 1973 (U.K.), s.17. Also see, Consumer Transactions (Restriction on Statements) Order, 1976, clause 5.
98 The respondents in this case, issued an advertising stating that their product, *viz*. The carbolic smoke ball, would surely cure influenza if anybody consume it as directed in the advertisement. To ensure their honesty to the claim, they offered a reward to any person suffering from influenza after consumption of the smoke ball. The petitioner, though consumed the smoke ball as directed, could not get cured from influenza. He filed the present suit to claim the reward notified in the advertisement.
possible to classify the cable and its descriptive material taken as a whole, as a defective product. In such circumstances, it may appear to be necessary to suggest the imposition of strict liability on the manufacturers. Any statement made by the manufacturer for the purpose of determination of liability can be treated as 'false' if it is a mis-statement of fact.

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

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

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

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

(a) for injury or damages so caused; and

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

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

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

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

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

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

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

106 Id., clause 5.
many cases may not even have packed the product, should be the only person to whom the purchaser can look upon. Extension of the liability to the manufacturer will increase the chance of the consumer being compensated better, since the manufacturer's financial resources are often greater than that of the retailer. Accordingly, legal systems have started making the manufacturer directly liable for the legal guarantees.

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

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

The Indian Law on Manufacturers' Guarantees.

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

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

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

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

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110 The Consumer Protection Act, 1986, s. 2(i)(i).
111 A contractual term that is express or implied, can be treated as a legal guarantee.
112 Claims other wise than in a contract can be treated as a commercial guarantee.
113 The Consumer Protection Act, 1986, s. 2 (i) (r).
114 Id., s. 2(1) (r) (vii).
115 Id., s. 2(1) (r) (viii).
116 A 'complaint' under the Consumer Protection Act, 1986, includes a complaint for 'unfair trade practices' also. See id., s. 2(1)(e).
117 See the Monopolies and Restrictive Trade Practices Act, 1969, ss.36 B, 36 C, 36 D and 36 E. These sections are sought to be replaced by the proposed Competition Act, 2001. See the Competition Bill, 2001.
trade Practices Commission may end up in an order directing the party to discontinue or not to repeat the practice any more. The Commission can also award compensation in deserving cases.\textsuperscript{118}

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

Quality Regulation by Consumer Self-help.

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

\textsuperscript{118} See the Monopolies and Restrictive Trade Practices Act, 1969, s.12 B.


\textsuperscript{120} U.T.P. Enquiry No.153/90, Order dated 15-2-1996.

\textsuperscript{121} The Monopolies and Restrictive Trade Practices Act, 1969, s. 36-A(viii).
inspect or examine the goods\textsuperscript{122} and to reject goods\textsuperscript{123} of unsatisfactory quality is the potential weapon in the hands of the consumer.

**Right of Inspection**

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

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

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

\textsuperscript{122} The Sale of Goods Act, 1930, s. 41.
\textsuperscript{123} Id., ss. 42 and 43.
\textsuperscript{124} See, The Sale of Goods Act, 1930, s. 41; also see for corresponding English law, s. 34 of the Sale of Goods Act, 1979.
\textsuperscript{125} A.I.R. 1960 Mad. 520.
\textsuperscript{126} Id. at p. 523.
\textsuperscript{127} The Sale of Goods Act 1930, s. 41(2) reads:
"Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract".
In *Heilbutt v. Hickson*, military boots for the use of French army were delivered at a wharf in London. The buyers re-directed it to Lillie, for delivery to French authorities. The French authorities on examination discovered paper in the soles of the shoes, which rendered them unfit for military use. In an action for refund of the purchase price, the respondents contended that the plaintiff had examined the cargo at London and then accepted it by re-directing it to the French port. It was held that the buyers had not had reasonable opportunity for examining the goods at London wharf. Therefore, they had not accepted them and hence entitled to refund. Similarly, when the seller refused to allow the buyer to open the cases that contained the goods, the buyer was held not bound to accept them. Correspondence of the goods with the requirements of the contract, upon test or inspection, is a condition precedent. If the article does not correspond in kind, quality or condition to that which he has contracted for, the buyer may reject it. The contract itself may contain provisions for the buyer’s right of inspection, the place and manner of inspection. This right exists even though the contract does not expressly provide for it.

**Place of Inspection**

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

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


132 The Uniform Commercial Code (U.C.C.) of the U.S.A. also contains a similar provision with respect to inspection of the goods delivered, in order to determine whether they are the one that has been ordered by the consumer. See the U.C.C. s. 2-513(1) and s. 2-606 (i) (b).
on inspection at the place specified, inspection at another place is permissible. On the other hand, if it was possible for the buyer to inspect the goods in the place mentioned in the contract, buyer's failure to inspect at such place may be deemed as a waiver of his right.133

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

**Time of Inspection**

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

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133 *Id.*, s.2-513, Comment 6.
134 In cases of C.I.F. contracts, before accepting the goods, the buyer has a right to inspect them. See, *Mysore State Co-operative Marketing Society v. KoMoung Gyi & Sons*, A.I.R. 1974 Mys. 20.
135 *Supra* n. 131 at p.526.
This is to be determined by the court based on the circumstances, custom or usage or the prior course of dealing between the parties.\(^{137}\)

**Manner of Inspection**

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

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

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

\(^{138}\) See U.C.C. s. 2-513 (1).

\(^{139}\) Id., s. 2-513 (4).


\(^{141}\) Id. at p. 525.

\(^{142}\) See *In Re, Beharilal Baldeo prasad Firm of Merchants*, A.I.R. 1955 Mad. 271.

\(^{143}\) A.I.R. 1955 Mad. 435.
reputed firm dealing in second hand crushing machines. The respondent company agreed to purchase one such machine, which was examined by an employee of the respondent. The employee tested the machine by using manpower. The court held that the defect in the machine could only be ascertained by demonstration with electric power. Hence examination by the employee of the respondent was of no defense.

Right of Rejection

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

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

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144 The Sale of Goods Act, 1930, s. 43.
145 Ibid. However, according to s.42 of the Act, if the buyer retains the goods beyond a reasonable time without rejecting them, he is deemed to have accepted them. Therefore, if the buyer wants to reject, he must intimate to the seller his intention to reject.
147 See the U.C.C. (U.S.A.), s. 2-326 (i)(a).
the seller even though they conform to the contract. The buyer has a better opportunity of rejection here than in case of ordinary sale. In ordinary sale rejection is permitted only if the goods fail to conform to the contract.

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

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

\textsuperscript{148} 'Insight', a consume magazine, published by the Consumer Education and Research Society, Ahmedabad, probably is an exception. It contains a portion for product guidance for consumers. Considering the width and depth of consumer ignorance about product performance and quality, efforts and initiatives on a larger scale is a desideratum.
plenty. What are being disseminated through the media are predominantly the views of manufacturers and sellers who quite often try to mislead the consumers.

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

Conclusion

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

\(^{149}\) For instance, the Consumer Education and Research Society, Ahemedabad publishes regular columns on unsafe products along with test reports on quality standards of various goods in their magazine *Insight*.

\(^{150}\) For example in India, the Consumer Protection Act, 1986, the Prevention of Food Adulteration Act, 1954, the Drugs and Cosmetics Act, 1940 etc. recognise the representation of consumer organisations in these processes.
regulation and global marketing, strengthening of these methods of quality control will benefit both the manufacturers and consumers.

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

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

‘Manufacturers warranty’ in consumer transactions is a neglected area in India. In many jurisdictions, substantial legislative controls are made to ensure that guarantees are properly made and performed. The Magnusson Moss Warranty Act, 1974 of the United States is a good example. The Act stipulates that detailed
Information relating to warranty coverage and the procedures for claiming them are to be clearly stated. In addition to the disclosure provisions, the Act requires that guarantees be clearly labeled as either 'full' or 'limited'. A 'full' guarantee must meet certain minimum standards. It must provide that defects will be rectified without charge and within a reasonable period. If this proves to be impossible, consumers must be offered a full refund or replacement.

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

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

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

"No additional written warranty shall:
(a) purport to make the warrantor or his agent the sole judge in deciding whether or not there is a valid claim under the warranty;
(b) purport to exclude or limit any express or statutory warranty or any of the rights or remedies contained in this Act;
(c) purport to make a claim under the warranty dependant upon the consumer products' being returned to the warrantor, when it would be unreasonable to so return the product;
(d) purport to limit the benefit of the warranty to the consumer or purport to exclude persons mentioned in sub-section 4(1) from receiving the benefit of the warranty; or
(e) be deceptively worded."

153 Ibid., s.17(1).
154 Ibid.
weight or method of attachment or installation cannot be removed or transported without significant cost to such person. When the warrantor fails to honour a valid claim for repair or replacement made by a consumer within a reasonable period of time, the consumer can have the defect remedied elsewhere and recover from the warrantor the repair costs, losses and damages suffered by him. It has been made an offence for every manufacturer, retailer or warrantor to provide an additional written warranty that does not comply with the guidelines given under the Act.

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

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